

# THE CRISIS OF WORLD ORDER AND THE CONSTITUTIVE REGIME OF THE INTERNATIONAL SYSTEM

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## ABSTRACT

*Statespersons, scholars, and commentators of every political persuasion agree that we are currently witnessing a crisis of world order. It is widely assumed that the so-called “Liberal World Order” that the United States constructed in the post-World War II years is collapsing. This Article interrogates and challenges this claim. This Article examines what it means to speak of “world order.” It argues that to understand the notion of “world order,” it is necessary to investigate the normative foundations of the international system. Therefore, this Article develops a theoretical construct that I call the Constitutive Regime of the International System to conceptualize the notion of world order. It argues that the international system is predicated on and governed by a Constitutive Regime that embodies a grand worldview—i.e., a theory of world order—that prescribes policies, practices, and rules of international law that are considered necessary for maintaining global order and stability. This regime, which is designed by the Great Powers of each historical epoch, shapes international and domestic politics. It determines the criteria and preconditions of statehood, thereby affecting how societies are organized and governed. It promotes certain methods for the conduct of world politics, and it establishes mechanisms for international lawmaking, thus providing the constitutive foundation of international law. A crisis of world order occurs when these basic normative assumptions about the nature of the international system and the processes of global governance are challenged.*

*Having provided a conceptual framework for understanding the notion of “world order,” this Article then challenges the claim that the post-World War II “Liberal World Order” is currently in a period of crisis. It argues that, beginning in the 1970s, the Liberal World Order of the post-World War II era was replaced by a neoliberal world order—in other words, a neoliberal Constitutive Regime. This Article shows how this neoliberal Constitutive Regime shaped virtually every aspect of world politics and provided the normative foundation of globalization during the closing decades of the twentieth century. This Article concludes with a discussion of the origins of the current crisis of world order and a reflection on the future of world order in an era of increased Great Power competition.*

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*Some say the world will end in fire,  
 Some say in ice.  
 From what I've tasted of desire  
 I hold with those who favor fire.  
 But if it had to perish twice,  
 I think I know enough of hate  
 To say that for destruction ice  
 Is also great  
 And would suffice.*  
 - Robert Frost<sup>1</sup>

#### REQUIEM FOR PAX AMERICANA

We live in anxious times. Uncertainty and unease, perhaps even fear and foreboding, are pervasive. Expressions of apprehension about the state of our world, at least in Western media and academe, are ubiquitous. The global political climate, we are told, “resembles a gathering storm.”<sup>2</sup> We are cautioned that “[c]haos is spreading,”<sup>3</sup> and warned that our world is “[u]n unraveling”<sup>4</sup> and becoming “[u]nrul ed.”<sup>5</sup> A similar sense of pessimism and distress is also felt about the state and fate of many societies. Individuals are feeling increasingly insecure, vulnerable, and exposed to multiple threats, some real and others imagined, and entire communities fear that their fortunes and futures

1. COLLECTED POEMS OF ROBERT FROST 268 (Garden City Publ'g Co. ed., 1942).

2. Hal Brands & Charles Edel, *The Gathering Storm vs. the Crisis of Confidence*, FOREIGN POL'Y (July 14, 2017), <https://foreignpolicy.com/2017/07/14/the-gathering-storm-vs-the-crisis-of-confidence-trump-1930s-1970s/> [<https://perma.cc/GS5C-FV9Z>].

3. Stephen M. Walt, *The World Is Even Less Stable than It Looks*, FOREIGN POL'Y (June 26, 2017, 11:07 AM), <https://foreignpolicy.com/2017/06/26/the-world-is-even-less-stable-than-it-looks/> [<https://perma.cc/CL2K-TE5B>].

4. Richard N. Haass, *The Unraveling: How to Respond to a Disordered World*, FOREIGN AFF., Nov./Dec. 2014, at 70.

5. Stewart Patrick, *The Unruled World: The Case for Good Enough Global Governance*, FOREIGN AFF., Jan./Feb. 2014, at 58.

are being “tossed hither and thither by forces beyond their control.”<sup>6</sup> At least in the Western world, the optimism of the final decade of the twentieth century has given way to despondence: “This [c]entury is [b]roken,” writes David Brooks.<sup>7</sup> “The twenty-first century is looking much nastier and bumpier: rising ethnic nationalism, falling faith in democracy, a dissolving world order.”<sup>8</sup>

The “pervasive sense of anxiety” and “deep-seated pessimism about the future” is the subject of a growing body of commentary by statespersons, scholars of international relations, and pundits.<sup>9</sup> Whatever their ideological orientation or political persuasion, virtually all commentators agree that our world is in crisis.<sup>10</sup> This crisis, a legion of writers is now arguing, is caused by “[t]he [c]ollapse of the Liberal World Order.”<sup>11</sup> This order was the *Pax Americana*. It was designed by America, protected by American might, and underwritten by American wealth. It was an order created from the ashes of World War II by an America determined not to repeat the folly of isolationism, which contributed to the rise of fascism in Europe.<sup>12</sup> The hallmarks of this liberal order were that it was open, multilateral, and rules-based. Instead of the secret alliances and balance-of-power politics of nineteenth century Europe, the United States built a series of open, multilateral institutions that all states were invited to join, and which facilitated cooperation among states on the basis of general ordering principles (i.e.,

6. Roger Cohen, *The Age of Distrust*, N.Y. TIMES (Sept. 19, 2016), <https://www.nytimes.com/2016/09/20/opinion/the-age-of-distrust.html> [<https://perma.cc/MNK5-U3W9>].

7. David Brooks, *This Century is Broken*, N.Y. TIMES (Feb. 21, 2017), <https://www.nytimes.com/2017/02/21/opinion/this-century-is-broken.html> [<https://perma.cc/Q3TV-L7PG>].

8. *Id.*

9. Pankaj Mishra, *The Globalization of Rage: Why Today's Extremism Looks Familiar*, FOREIGN AFF., Nov./Dec. 2016, at 48-49. *See also* RICHARD HAASS, A WORLD IN DISARRAY (2017); PHILLIP Y. LIPSCY, RENEGOTIATING THE WORLD ORDER (2017); EDWARD LUCE, THE RETREAT OF WESTERN LIBERALISM (2017); REIN MÜLLERSON, DAWN OF A NEW ORDER (2017); JENNIFER WELSH, THE RETURN OF HISTORY (2016); OLIVER STUENKEL, POST-WESTERN WORLD (2016).

10. HENRY KISSINGER, WORLD ORDER 375 (2014) (“[T]he crisis in the concept of world order [is] the ultimate international problem of our day.”).

11. Stephen M. Walt, *The Collapse of the Liberal World Order*, FOREIGN POL’Y (Jun. 26, 2016, 4:43 PM), <https://foreignpolicy.com/2016/06/26/the-collapse-of-the-liberal-world-order-european-union-brexit-donald-trump/> [<https://perma.cc/VW7Y-26X9>]. *See also* AMITAV ACHARYA, THE END OF AMERICAN WORLD ORDER (2014); GEORG SØRENSEN, A LIBERAL WORLD ORDER IN CRISIS (2011); Richard Haass, *World Order 2.0: The Case for Sovereign Obligation*, FOREIGN AFF., Jan./Feb. 2017, at 2; Kori Schake, *Will Washington Abandon the Order?: The False Logic of Retreat*, FOREIGN AFF., Jan./Feb. 2017, at 41.

12. DANIEL J. SARGENT, A SUPERPOWER TRANSFORMED 14-16 (2015).

rules of international law).<sup>13</sup> This order, it is argued, was hugely successful.<sup>14</sup> It heralded an extended period of peace between the Great Powers during the Cold War, and, after the demise of the Soviet Union, it fostered greater freedom of trade that led to unprecedented prosperity, promoted human dignity, and encouraged the spread of democracy throughout the world.<sup>15</sup>

According to an increasingly popular storyline, however, we are now witnessing “[t]he [e]nd of *Pax Americana*.”<sup>16</sup> The causes of this crisis of the post-World War II liberal world order have been diagnosed and dissected. The increasing influence and affluence of non-western powers, especially China, has raised concern, if not alarmism, among American and western writers and commentators.<sup>17</sup> The global financial crisis also generated doubts about the sustainability of the liberal economic system that America built.<sup>18</sup> Ultimately, however, it was the unforeseen political cataclysm of the rise of populism in America, embodied in Donald Trump, and in Western Europe, exemplified in Brexit, that led to the dejection and despair that animates the “tomes and eulogies” portending and lamenting “the death-of-liberalism.”<sup>19</sup>

This Article questions the claim that the “liberal world order” is in crisis by deconstructing the phrase “liberal world order” and examining its two components—the *noun* “world order” and the *adjective* “liberal.” Specifically, in Part I, this Article introduces and discusses a theoretical construct that I call the Constitutive Regime of the International System, which helps make sense of the phrase “world order” that is often used colloquially in scholarship and commentary. The Constitutive Regime is a set of foundational norms that provide the

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13. G. JOHN IKENBERRY, *LIBERAL LEVIATHAN: THE ORIGINS, CRISIS, AND THE TRANSFORMATION OF THE AMERICAN WORLD ORDER* 159 (2011) [hereinafter IKENBERRY, *LIBERAL LEVIATHAN*].

14. True, the liberal world order contributed to avoiding World War III. Nonetheless, to argue that this was a peaceful, prosperous order overlooks the violence and inequalities it inflicted. See generally PANKAJ MISHRA, *THE AGE OF ANGER: A HISTORY OF THE PRESENT* (First Am. ed., 2017).

15. Robert Kagan, *Allure of Normalcy*, in *READINGS IN AMERICAN FOREIGN POLICY* 9, 18-19 (Glenn P. Hastedt ed., 2d ed. 2018).

16. Christopher Layne, *The End of Pax Americana: How Western Decline Became Inevitable*, *ATLANTIC* (Apr. 26, 2012), <https://www.theatlantic.com/international/archive/2012/04/the-end-of-pax-americana-how-western-decline-became-inevitable/256388/> [<https://perma.cc/3W9S-H7H3>] (emphasis added).

17. See MARTIN JACQUES, *WHEN CHINA RULES THE WORLD* (2012).

18. See NIALL FERGUSON, *THE GREAT DEGENERATION: HOW INSTITUTIONS CHANGE AND ECONOMIES DIE* (2013).

19. Adam Gopnik, *Are Liberals on the Wrong Side of History?*, *NEW YORKER* (Mar. 20, 2017), <https://www.newyorker.com/magazine/2017/03/20/are-liberals-on-the-wrong-side-of-history> [<https://perma.cc/B3W8-LPDT>].

ground rules of international politics.<sup>20</sup> An integral element of this normative regime is a theory of “world order,” which articulates a particular approach to managing the international system; it embodies a grand worldview that prescribes rules, policies, and practices to govern international relations.<sup>21</sup> A crisis of world order, in essence, occurs when this normative regime—the Constitutive Regime—is in decline. Then in Part II, I challenge the claim that the so-called post-World War II liberal world order is currently in crisis. Rather, I argue that, beginning in the 1970s, the post-World War liberal order was gradually dismantled and, by the end of the Cold War, it had been replaced by a *neoliberal* world order. It is this *neoliberal* world order that is currently experiencing a period of crisis. Finally, this Article discusses the origins of this crisis of world order and suggests that the liberal norms of the post-World War II order that governed world affairs until the 1970s provide a normative framework that is capable of maintaining at least a modicum of order in a turbulent twenty-first century.

Scholars of international relations understand the concept of “world order” as referring to a set of actors interacting at the international level according to a set of norms. These norms establish and distribute authority in the international system and govern the use of power among the actors that inhabit the international system.<sup>22</sup> I call these governing norms the Constitutive Regime of the International System. This normative regime governs the international system because it performs three constitutive functions: first, it identifies the principal participants in the system; second, it prescribes policies that are necessary for maintaining order in the system; and third, it establishes the lawmaking, law-enforcement, and dispute-resolution mechanisms of the international system.

To clarify and simplify this claim, consider the following news items:

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20. Stanley Hoffmann, *International Systems and International Law*, 14 *WORLD POL.* 205, 212 (1961) (discussing “[t]he law of the political framework—i.e., the network of agreements which define the conditions, and certain of the rules, of the political game among the states.”).

21. A world order is “the system of authoritative rules, norms, institutions, and practices by means of which any collectivity manages its common affairs.” John G. Ruggie, *Forward*, in *GLOBAL GOVERNANCE AND THE UN* xv (Thomas Weiss & Ramesh Thakur ed., 2010).

22. Richard Falk, *World Orders, Old and New*, 98 *CURRENT HIST.* 29, 29 (1999) (discussing that world order is “the distribution of power and authority among the political actors on the global stage”); Gabriela Marin Thornton, *Democracies and World Order*, *OXFORD BIBLIOGRAPHIES* (2017) (“[R]ealists, international political economists, and Marxist scholars see the world order as an arrangement of actors such as great powers or economic classes. On the other hand, liberals, constructivists, and globalists view the world order as a process in which states or dominant classes are not the only actors. Various transnational institutions, norms, and values transcend borders and continuously shape world politics.”).

- South Sudan declared independence from Sudan and became the 193rd member of the United Nations on July 14, 2011.<sup>23</sup>
- The International Air Transport Association announced that during 2013 there were over 100,000 flights per day, transporting over three billion passengers and approximately “48 million tonnes [sic] of cargo.”<sup>24</sup>
- On July 14, 2014, over one billion people watched the 2014 FIFA World Cup final.<sup>25</sup>
- On November 4, 2016, the Paris Agreement entered into force. As of this Article’s publication, 184 state parties have ratified this treaty.<sup>26</sup>
- On December 6, 2017, the United States recognized Jerusalem as the capital of Israel.<sup>27</sup>
- As part of Brexit, the United Kingdom will phase-out its current EU-mandated burgundy passports and return to its original blue passports as of October 2019.<sup>28</sup>

These are examples of the daily routine of international affairs. Occasionally, states are born while other states die, and more frequently, states make and break treaties, they wage war and make peace, they engage in trade, default on their debts, and borrow from financial markets. Other activities go unnoticed. Passports are issued to enable international travel, bills of lading are used to facilitate shipping, and sporting events are broadcast around the world. Whether it is the newsworthy or the quotidian, transnational relations occur ceaselessly and seamlessly without a global governing authority.<sup>29</sup> How is this all possible?

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23. *UN Welcomes South Sudan as 193rd Member State*, UN NEWS (July 14, 2011), <https://news.un.org/en/story/2011/07/381552> [<https://perma.cc/SU5T-65FC>].

24. Press Release, IATA, News Brief: Tracking Airline Industry Performance in 2013 – World Air Transport Statistics Released (Aug. 12, 2014), <https://www.iata.org/pressroom/pr/Pages/2014-08-12-01.aspx> [<https://perma.cc/XWW4-S3ZB>].

25. Dion Dassanayake, *One Billion People Set to Tune in to Watch Germany and Argentina Battle for the World Cup*, SUNDAY EXPRESS (July 13, 2014, 11:40 AM), <https://www.express.co.uk/news/world/488521/World-Cup-2014-Fans-gear-up-for-Germany-v-Argentina-final> [<https://perma.cc/9ELW-ZRJR>].

26. *Paris Agreement – Status of Ratification*, UNITED NATIONS CLIMATE CHANGE, [http://unfccc.int/paris\\_agreement/items/9444.php](http://unfccc.int/paris_agreement/items/9444.php) [<https://perma.cc/BS36-QHVD>].

27. Mark Landler, *For Trump, an Embassy in Jerusalem Is a Political Decision, Not a Diplomatic One*, N.Y. TIMES (Dec. 6, 2017), <https://www.nytimes.com/2017/12/06/us/politics/trump-embassy-jerusalem-israel.html> [<https://perma.cc/EBE4-DMJA>].

28. Kara Fox, *UK Passports Will Change from Burgundy to Blue after Brexit*, CNN (Dec. 22, 2017, 6:55 AM), <https://www.cnn.com/2017/12/22/europe/uk-passports-brexit-intl/index.html> [<https://perma.cc/6XGB-GHJA>].

29. This absence of a central governing authority is why the international system is called anarchic. See Brian C. Schmidt, *On the History and Historiography of International*

The obvious answer is that these activities are facilitated by international law. There are rules for the establishment of embassies,<sup>30</sup> there are regulations for sharing the telecommunications spectrum,<sup>31</sup> there are specifications for the shape and size of passports,<sup>32</sup> and there are rules relating to the creation and dissolution of states.<sup>33</sup> There are also numerous international institutions that oversee the implementation of these rules. The matter becomes more complicated, however, if we take a logical step back by asking questions such as: What are states, and who defines what a state is? Why did the people of South Sudan have to organize themselves into a state to gain admission to the international system? Why can states, but not individuals, non-governmental organizations (NGOs), or the Dinka and Nuer tribes of South Sudan, contract treaties, such as the Paris Agreement? Why are states, but not corporations, entitled to dispatch emissaries and establish embassies? Why must aircraft fly the flag of a state? Why are states, but not the State of Ohio or New York City, entitled to issue passports? Finally, and fundamentally, from where does international law itself come?

International law cannot answer these questions. It is true that the Vienna Convention on the Law of Treaties recognizes the capacity of states to contract treaties,<sup>34</sup> but the Vienna Convention could not have *created* that capacity of states to contract treaties, because the Vienna Convention is itself a treaty, which means that the capacity of states to contract treaties must have predated the Vienna Convention. Alternatively, one might claim that the capacity of states to contract treaties is a preexisting rule of customary international law that was codified in the Vienna Convention. That answer is correct,<sup>35</sup> but ultimately unsatisfactory. This is because in order to claim that there exists a rule of customary international law that allows states to contract treaties, one must necessarily presume that there exists an antecedent rule that empowers states to create rules of customary international

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*Relations*, in HANDBOOK OF INTERNATIONAL RELATIONS 3, 9 (Walter Carlsnaes et al. eds., 2002).

30. See EILEEN DENZA, *DIPLOMATIC LAW* 20 (2d ed. 2016).

31. See INT'L TELECOMMS. UNION, *RADIO REGULATIONS* 3 (2016), <http://search.itu.int/history/HistoryDigitalCollectionDocLibrary/1.43.48.en.101.pdf>.

32. See INT'L CIVIL AVIATION ORG., *MACHINE READABLE TRAVEL DOCUMENTS* (7th ed. 2015), [https://www.icao.int/publications/Documents/9303\\_p3\\_cons\\_en.pdf](https://www.icao.int/publications/Documents/9303_p3_cons_en.pdf) [<https://perma.cc/H6S2-4HMP>].

33. Principles such as self-determination, territorial sovereignty, the rules of recognition of states and government, and the rules of state succession all relate to the creation and disappearance of states. See VAUGHAN LOWE, *INTERNATIONAL LAW* 136-69 (2007).

34. Vienna Convention on the Law of Treaties, art. 6, May 23, 1969, 1155 U.N.T.S. 331.

35. The authoritative treatise on the customary law of treaties is: LORD MCNAIR, *LAW OF TREATIES* (1986).

law, such as the rule that empowers states to contract treaties. Therefore, the next logical question becomes: What rule of international law endowed states with the capacity to create rules of customary international law? International law has no definite answer to this question.<sup>36</sup> The answer must lie elsewhere—*beyond* international law.<sup>37</sup>

Nor can international law definitively answer questions such as: What is a state, what is the definition of statehood, and how was this definition formulated? A tentative answer is that international law outlines criteria for statehood in a treaty.<sup>38</sup> This is true, but again, unsatisfactory. This treaty that enumerated criteria for statehood could not have been the original source of the definition of statehood; it could not have *created* the concept of states. This is because this treaty was contracted by states, which means that states existed as competent legal persons before this treaty was contracted. It is also unsatisfactory to claim that the criteria for statehood are rules of customary international law, because that necessarily presumes the preexistence of states and presumes that these preexisting states already enjoyed the capacity to create rules of customary international law, including criteria for statehood. Again, international law cannot solve these logical quandaries. The criteria for statehood—indeed, the very definition of statehood—and the competence of states to make international law must emanate from elsewhere, *outside* international law.<sup>39</sup>

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36. This is a “validity regress.” It is a “standard ploy in legal philosophy and is often cast as a series of questions along the lines of: ‘Why is a norm valid, what is its basis of validity?’ ” Jörg Kammerhofer, *Hans Kelsen in Today’s International Legal Scholarship*, in INT’L LEGAL POSITIVISM IN A POST-MODERN WORLD 81, 95 (Jörg Kammerhofer & Jean D’Aspermont eds., 2014).

37. International law cannot create itself. The ability to create international law cannot, as a matter of logic, emanate from international law itself. Attempting to locate the origin of international law *within* international law is to engage in an “infinite regress,” which is “linked to the paradox of self creation. ‘Self creation’ is paradoxical because it would seem a self that is going to create anything must already exist.” Eric Christian Barnes, *Historical Moral Responsibility: Is the Infinite Regress Problem Fatal?* 98 PAC. PHIL. Q. 533, 540 (2017).

38. This treaty, which I discuss below, is the 1933 Montevideo Convention on the Rights and Duties of States. See IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 71-74 (7th ed. 2008).

39. To solve this quandary, Hans Kelsen invented the *Grundnorm*, which is a hypothetical concept that constitutes the origin of all international law. See HANS KELSEN, PURE THEORY OF LAW 8 (1967). Obviously, it is not possible to engage with Kelsen’s complex jurisprudence here. It will have to suffice to say that my concept of the Constitutive Regime is unlike Kelsen’s *Grundnorm* in two respects. First, while the *Grundnorm* is a hypothetical concept, the Constitutive Regime is real; it is a set of intersubjective assumptions about the nature of the international system that are articulated by the Great Powers of a particular historical era. Second, the *Grundnorm* provides a foundation for the international *legal* system, while the Constitutive Regime provides a foundation for the entire international *political* system, including international law. For a brief synopsis of Kelsen’s philosophy, see François Rigaux, *Hans Kelsen on International Law*, 9 EUR. J. INT’L L. 325 (1998).



Unless international law is imagined as a “brooding omnipresence in the sky,”<sup>40</sup> it cannot answer fundamental questions about its own origin or about the definition of statehood or about the competences of states, such as their capacity to make international law. It is a futile exercise in tautology to attempt to locate the origins of international law and the normative foundations of the international system *within* international law.<sup>41</sup>

The answer, this Article argues, lies in a set of background norms that are constitutive of the entire international system, including international law. These background norms are the Constitutive Regime of the International System.<sup>42</sup> This is not a regime of *legal rules*; rather, it is a set of political assumptions—a collection of postulates about the composition and nature of the international system. These political assumptions are articulated by the most powerful actors in the international system and accepted as authoritative by the other members of the system. These norms, in other words, are authoritative because they are accepted as a matter of *political fact*.<sup>43</sup>

This regime performs three constitutive functions. First, it identifies the primary members of the international system and determines the prerequisites for membership in the system. In other words, it was the Constitutive Regime that, in the early twentieth century, identified the territorial state—and not some other method of organizing human societies, such as clans, tribes, city-states, civilizations, or empires—as the constituent unit of the international system. This is why the tribes of South Sudan, the Albanians of Kosovo, and all other societies are organized into states. The Constitutive Regime also determines the basic rights, obligations, and competences of these constituent units. Again, it was the Constitutive Regime of the early twentieth century that afforded states the right to be independent and sovereign within their territory, and it was that Constitutive Regime that accorded states the

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40. *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

41. This is “the problem of ‘interiority’.” This problem arises when the source of obligation is located within an aspect of a particular normative system, but where the theory in question lack the theoretical resources to account for the existence or legitimacy of the system as a whole.” Christian Reus-Smit, *Politics and International Legal Obligation*, 9 EUR. J. INT’L RELS. 591, 593 (2003).

42. The Constitutive Regime of the International System is analogous to what Mark Tushnet calls a “constitutional order” or “regime.” Mark Tushnet, *Forward: The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 HARV. L. REV. 29, 31 (1999).

43. The Constitutive Regime, therefore, is like the U.S. Constitution, which is considered legitimate and authoritative “not because it was lawfully ratified, as it may not have been, but because it is accepted as authoritative.” Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1805 (2005).

competence to make international law by contracting treaties and generating customary rules.

Second, this regime is constitutive because it articulates a theory of world order. Theories of world order are worldviews; they are ideological frameworks that provide normative roadmaps for governing the international system. They prescribe policies that are assumed to be the most effective approach to maintaining order in the system.<sup>44</sup> It is the theory of world order that enables us to use adjectives like *liberal*, *neoliberal*, *illiberal*, *imperialist*, *communist*, *fascist*, *Islamist*, or *Sino-centric* to describe world orders. In many instances, the distinguishing feature of an order is not the identity of its constituent unit, but the policies that are implemented to govern relations between the constituent units. Hence, while Napoleon, Metternich, and Hitler, sought to establish European or even world-wide orders, the distinguishing feature of each these orders was the particular worldview (whether tyrannical or benevolent) that animated these orders—i.e., their theories of world order.<sup>45</sup> Similarly, as discussed at length in Part II of this Article, while the territorial state was the constituent unit of both the post-World War II and post-Cold War world orders, the distinguishing feature of these orders was that the former was *liberal* while the latter implemented a *neoliberal* theory of world order.

Third, this regime is constitutive of international law. It generates the secondary rules of international law, which identify the lawmaking, law-enforcement, and dispute resolution mechanisms in the international system. In short, underlying the flags, anthems, honor guards, passports, and the pomp and pageantry of statehood, and preceding NATO, NAFTA, the United Nations, and the treaties and customs that regulate international life, is a Constitutive Regime that defines what it is to be a state, determines the powers and prerogatives of statehood, outlines how order will be maintained and establishes the international lawmaking and law-enforcement procedures.

Constitutive Regimes are creations of Great Powers. Each historical epoch is led by Great Powers that amass sufficient material capability and ideational influence to enable them to configure the content and normative orientation of the Constitutive Regime in a manner that serves their values and interests. Once the Constitutive Regime

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44. Hedley Bull, *Order vs. Justice in International Society*, 19 POL. STUD. 269, 270 (1971) (noting that the system is structured according to “primary or elementary goals” that are necessary for its existence).

45. ROBERT GILPIN, WAR AND CHANGE IN WORLD POLITICS 35-37 (1981) (“Rome and Great Britain each created a world order, but the often oppressive rule of *Pax Romana* was in most respects different from the generally liberal rule of *Pax Britannia*. Napoleonic France and Hitlerite Germany gave very different governances to the Europe they each united.”).

is articulated by the Great Powers and accepted, either by acquiescence or coercion, by the other actors in the international system, it becomes the dominant approach to governing the system. History, however, is endless and its path is uneven. World orders rise and fall as the balance of power shifts or when the worldviews of the Great Powers evolve.<sup>46</sup> Indeed, that is the story that Part II of this Article tells; it is a story of the making, remaking, and unmaking of world order.

In the aftermath of World War II, the United States led the process of articulating the normative foundations of the post-war order. It designed the Constitutive Regime of the International System according to a theory of world order that I call the *Code of Coexistence*.<sup>47</sup> This Constitutive Regime constructed a Westphalian world.<sup>48</sup> It established territorial states—not, as widely assumed, *nation-states*<sup>49</sup>—as the constituent units of the international system. This Constitutive Regime was profoundly liberal. This liberalism was manifested in that this Constitutive Regime did not promote any particular form of statehood. Instead, it granted states the liberty to design their political and economic systems and their foreign policies in accordance with their own values and interests. As its name suggests, the theory of world order at the foundation of this Constitutive Regime assumed that preserving international security and stability required maintaining the peaceful coexistence of states by minimizing conflict between states and maximizing cooperation between states.<sup>50</sup> As a result, the “central *problématique*” of international law became the facilitation of “interaction

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46. G. JOHN IKENBERRY, *LIBERAL ORDER & IMPERIAL AMBITION* 3 (2006) (“International orders rise and fall and come and go.”).

47. The “Code of Coexistence” is inspired by, but not identical to, what Wolfgang Friedmann called “[t]he International Law of Coexistence.” See WOLFGANG FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* 60 (1964). Friedmann used that label to describe a rudimentary type of international law that performed the relatively simple function of facilitating inter-state communication. The policy purpose of this body of law was to encourage the peaceful coexistence of states, which is a feature that The Code of Coexistence shares with the “International Law of Coexistence.” Unlike the latter, however, the Code of Coexistence is *not* a set of legal rules. It is a holistic worldview or a theory of world order that accepts states as the principal or constituent units of the international system and prescribes a whole range of policies, practices, and rules of international law that are intended to maintain the peaceful coexistence of states.

48. Westphalia is one of the most used and misused labels in international law and international relations literature. It is employed here, not because the 1648 Peace of Westphalia marked the birth of a distinctive state-based system, but because the term ‘Westphalia’ is universally recognized as referring to a world composed of independent, sovereign, and juridical equal states. See Randall Lesaffer, *The Classical Law of Nations (1500-1800)*, in *RESEARCH HANDBOOK ON THE THEORY AND HISTORY OF INTERNATIONAL LAW* 408, 414 (Alexander Orakhelashvili ed., 2011).

49. See *infra* notes 187-191 and accompanying text.

50. Georges Abi-Saab, *Whither the International Community?*, 9 *EUR. J. INT’L L.* 248,

between autonomous sovereigns.”<sup>51</sup> The Code of Coexistence also empowered states. It prescribed Keynesian policies that required active government involvement in economic management.<sup>52</sup> Ultimately, the liberalism of the Code of Coexistence reflected an acknowledgement of the fundamental reality of humanity’s pluralism.<sup>53</sup> It accepted the moral and normative diversity that marks the human condition and recognized that states pursue diverging interests, have different strategic outlooks, and espouse varying visions of world order, and sought to maintain world order by preserving the pluralism of the international system.<sup>54</sup>

Starting in the 1970s, however, the United States adopted a revisionist attitude.<sup>55</sup> It remade the international system by reconstructing the Constitutive Regime according to an alternative theory of world order that I call the *Code of Civilization*.<sup>56</sup> The Code of Civilization was *neoliberal* and *anti-pluralistic*.<sup>57</sup> Instead of preserving the autonomy of states to design their internal polities as they saw fit, the Code of Civilization sought to universalize a particular form of state; namely, liberal democracies that protect human rights and that implement neoliberal economic policies. States that did not fulfill this single standard of statehood were delegitimized and risked losing the prerogatives of statehood and the privileges of membership in the international system.<sup>58</sup> This desire to remold states into a single model of statehood was an expression of the liberal peace theory. This theory,

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251-52 (1998).

51. Arnulf Becker Lorca, *Eurocentrism in the History of International Law*, in THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW 1034, 1035 (Bardo Fassbender & Anne Peters eds., 2012).

52. ODD ARNE WESTAD, *THE COLD WAR: A WORLD HISTORY* 397 (2017) (noting that the post-World War II economic order was “state-centered, tariff-oriented, [and] capital-controls-dominated”).

53. Friedrich Kratochwil, *Of Systems, Boundaries, and Territoriality: An Inquiry into the Formation of the State System*, 39 WORLD POL. 27, 33 (1986) (noting that the normative pluralism of this Westphalian order meant that it imagined the world as a “negative community”).

54. Gerry Simpson, *Two Liberalisms*, 12 EUR. J. INT’L L. 537, 553 (2001).

55. Randall L. Schweller, *A Third-Image Explanation for Why Trump Now: A Response to Robert Jervis’s “President Trump and IR Theory”*, ISSF POLY SERIES (Feb. 8, 2017), <https://issforum.org/roundtables/policy/1-5m-third-image> [<https://perma.cc/FHY4-FGMB>] (describing America’s “revisionism in the guise of liberal hegemony”).

56. For a similar argument, see Andrew Linklater, *The ‘Standard of Civilisation’ in World Politics*, 5 SOC. CHARACTER, HIST. PROCESSES (2016), <https://quod.lib.umich.edu/h/humfig/11217607.0005.205?view=text;rgn=main> [<https://perma.cc/Z6YN-QBKW>].

57. Simpson, *supra* note 54, at 556.

58. Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT’L L. 503, 504 (1995) (discussing that a liberal international system “permits, indeed mandates, a distinction among different types of [s]tates based on their domestic political structure and ideology”).

which was the cornerstone of U.S. foreign policy, assumed that the surest guarantee of world order is democratizing states and liberalizing, deregulating, and integrating their economies.<sup>59</sup>

The Code of Civilization shaped the Constitutive Regime of the post-Cold War world. This Code of Civilization was driven by the belief that “human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterized by strong private property rights, free markets, and free trade.”<sup>60</sup> This led to dismantling the Keynesianism of the Code of Co-existence and the promotion of policies that disempowered the state and empowered an endless variety of non-state actors, including corporations, NGOs, activists, experts and networks of experts, bankers, financiers, investors, international markets, and international organizations. Gradually, these actors amassed enough power and exercised enough authority in global governance to justify claims of the rise of a post-modern, post-state world.<sup>61</sup> The Code of Civilization legitimized this systematic privatization of authority. It provided a permissive normative environment that enabled many of the developments associated with globalization.<sup>62</sup> Globalization, therefore, was not inevitable; it was orchestrated. It was supported and sponsored by the neoliberal order constructed by the United States. This is the order that is currently in crisis. It is the neoliberal post-Cold War order, and not, as many prominent writers claim,<sup>63</sup> the post-World War liberal world order, that is being unmade.

The Constitutive Regime of the International System is not a theory of everything. It does not explain the content of every rule of international law, or the structure of every international institution, or every event in international politics. The Constitutive Regime is an instrument of systematization. It uncovers the “master narrative” that justifies the rules, institutions, and practices of international politics.<sup>64</sup> It shows that underlying the myriad, and often unrelated, rules, institu-

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59. Michael W. Doyle, *Three Pillars of the Liberal Peace*, 99 AM. POL. SCI. REV. 463 (2005).

60. DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM 2 (2005).

61. See MIKE FEATHERSTONE, UNDOING CULTURE: GLOBALIZATION, POSTMODERNISM AND IDENTITY 78 (1995).

62. Saskia Sassen, *The State and Globalization*, in THE EMERGENCE OF PRIVATE AUTHORITY IN GLOBAL GOVERNANCE 91, 97 (Rodney B. Hall & Thomas J. Biersteker eds., 2002) (noting that neoliberalism was “at the heart of the structural changes constitutive of globalization”).

63. See IS THIS THE END OF THE LIBERAL INTERNATIONAL ORDER? (Rudyard Griffiths ed., 2017).

64. G. John Ikenberry, *The Plot Against American Foreign Policy*, 96 FOREIGN AFF. 2, 8 (2017), <https://www.foreignaffairs.com/articles/usa/2017-04-17/plot-against-american-foreign-policy> [<https://perma.cc/MDJ9-L6BS>].

tions, and practices of the international system is a coherent normative structure. During the past seventy years, two worldviews, two master narratives—the Code of Coexistence and the Code of Civilization—shaped the content of the Constitutive Regime. These paradigms functioned like DNA. They provided the genetic code of the international system, which is why I call them the *Codes* of Coexistence and Civilization. They justified the structuring of the international system into sovereign states, as opposed to other possible alternative modes of organizing human societies; facilitated the establishment of certain institutions to manage the international system; and legitimated the implementation of policies that were prescribed as necessary for maintaining world order.

This Article is an interdisciplinary project that draws on multiple fields of study. Therefore, it is important before proceeding to identify the main scholarly debates with which this Article engages and to highlight its intellectual ambitions. First, this Article seeks to make a theoretical contribution to scholarship conducted at the intersection of international law and international relations (IL/IR),<sup>65</sup> but that should also be of value to scholarship on general jurisprudence.<sup>66</sup> This Article highlights the distinction between *regulatory* and *constitutive* norms<sup>67</sup> and problematizes the *constitutive function* that norms perform in international affairs. IL/IR scholarship is disproportionately focused on the *regulatory function* of international law. It uses empirical techniques to ascertain the impact specific rules or regimes, such as Human Rights Law, Humanitarian Law, or Trade Law, have on state behavior.<sup>68</sup> This scholarship has, however, largely overlooked that some

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65. For an overview of IL/IR, see Anne-Marie Slaughter, *International Law and International Relations Theory: 20 Years Later*, in INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS 613, 613-25 (Jeffrey L. Dunoff & Mark A. Pollack eds., 2012).

66. The distinction between constitutive and regulatory rules, which is central to this Article, has been examined by scholars of jurisprudence. See 1 ENRICO PATTARO, A TREATISE OF LEGAL PHILOSOPHY AND GENERAL JURISPRUDENCE 18 (2005); Riccardo Guastini, *On the Theory of Legal Sources: A Continental Point of View*, 20 RATIO JURIS. 302, 305 (2007).

67. John Rawls, John Searle, and others have argued that rules are either regulatory or constitutive. The former, such as a rule that sets a speed limit, that establishes a twelve-nautical-mile limit of a state's territorial sea, or that prescribes or proscribes specific behavior. These rules are regulatory because they instruct actors in a particular social setting to behave in a particular manner. Constitutive rules, however, are antecedent to regulatory rules. They establish social settings, grant standing to particular actors, and enable the making of regulatory rules. See John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3 (1955); George P. Fletcher, *Law*, in JOHN SEARLE 85 (Barry Smith ed., 2003).

68. Kal Raustiala & Anne-Marie Slaughter, *International Law, International Relations and Compliance*, in HANDBOOK OF INTERNATIONAL RELATIONS 538 (Walter Carlsnaes et al. eds., 2003) ("The core issue is the impact of law and legalization on state behavior, often understood in terms of compliance."); William Bradford, *International Legal Compliance: Surveying the Field*, 36 GEO. J. INT'L L. 495, 495 (2005) ("[T]he questions of whether, and if

norms are not designed either to regulate state behavior or to cause states to act in a particular way.<sup>69</sup> Rather, these norms have a *constitutive*, not *causal*, effect on states and the other actors engaged in international affairs.<sup>70</sup>

In addition to the theoretical pay-off of shedding light on the constitutive function of norms in international politics, the notion that the international system is predicated on a set of constitutive norms that are essential to its existence and functioning challenges the views of scholars of both international law and international relations who depict norms as epiphenomenal to international politics.<sup>71</sup> This Article neither discounts nor diminishes the role of power in international politics, but it does highlight the constitutive power of norms by developing a theoretical construct—the Constitutive Regime of the International System—that encapsulates the normative bedrock of global governance, which structures, constrains, and justifies the practices of international politics and provides the generative grammar of the regulatory rules of international law.

Second, this Article engages some of the most perplexing theoretical debates in international law; namely, questions that explore the origins of international law, the bases of international legal obligation, and the foundation of the authority of international law.<sup>72</sup> This Article does not pretend to proffer comprehensive or conclusive answers to these questions. After all, these jurisprudential debates implicate what Oscar Schachter called “imponderables” that constitute the “assumptions undetected” of international law.<sup>73</sup> Rather, this Article draws on and contributes to views that the origin of international law,

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so, why and under what circumstances, states elect to comply with international law have emerged as the most central and pressing issues within the international legal academy.”).

69. Notable exceptions to the lack of attention to the concept of constitutive rules include: ANTHONY CLARK AREND, *LEGAL RULES AND INTERNATIONAL SOCIETY* 42 (1999). The New Haven School, led by Myres McDougal, also made important contributions to the understanding of the constitutive processes in the international system. See Myres S. McDougal et al., *The World Constitutive Process of Authoritative Decision*, 19 J. LEGAL EDUC. 253 (1967).

70. See Kenneth W. Abbott, *Toward a Richer Institutionalism for International Law and Policy*, 1 J. INT'L L. & INT'L REL. 9, 21 (2004) (differentiating between “causal and constitutive governance mechanisms”).

71. JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005); BAŞAK ÇALI, *INTERNATIONAL LAW FOR INTERNATIONAL RELATIONS* 75 (2010) (“Realist theorists of international relations have also long claimed that international law is epiphenomenal to understanding international relations and state behavior.”).

72. Sir Gerald Fitzmaurice, *The Foundations of the Authority of International Law and the Problem of Enforcement*, 19 MOD. L. REV. 1, 1 (1956) (contending that questions of the origins and foundations of the authority of international law are “one of the most difficult in the whole field of international law and relations”).

73. Oscar Schachter, *Towards a Theory of International Obligation*, 8 VA. J. INT'L L. 300, 300 (1968).

and indeed all law, is social necessity,<sup>74</sup> and that the authoritativeness and legitimacy of international law emanate from the socio-political fact of its acceptance,<sup>75</sup> principally by the Great Powers in the international system, as indispensable for facilitating international politics and preserving world order. This challenges scholarly views that locate the authoritative power of international law in a sense of shared moral purpose among a so-called “international community”<sup>76</sup> or perceptions of natural law or natural reason.<sup>77</sup>

In addition to the importance of these jurisprudential inquiries to understanding the nature of international law, the Article hopes to contribute to a growing body of literature that examines the relationship between international law and Empire.<sup>78</sup> A central claim of this Article is that world order is constructed. The Great Powers of every epoch articulate a set of constitutive norms, which are embodied in a Constitutive Regime, to govern international politics and generate the lawmaking mechanisms of the international system. This process is an act of elite-engineering. Like domestic political elites, Great Powers shape the content of the Constitutive Regime in a manner that advances their interests, reflects their values, and promotes their worldview.<sup>79</sup> By developing the notion of the Constitutive Regime, this Article provides a theoretical construct that conceptualizes this process of constructing world order.

Third, this Article engages in a search for the “overarching constructs linking the various subdisciplines within international law.”<sup>80</sup> It argues that the entire international system, including international law, operates on the basis of a Constitutive Regime that provides systemic structure and coherence. This claim, it is hoped, contributes to

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74. The notion of international law as a social necessity has been associated with Georges Scelle. See Hubert Thierry, *The European Tradition in International Law: Georges Scelle*, 1 EUR. J. INT'L L. 193, 198 (1990).

75. In adopting the position that the legitimacy and authority of international law are based on social acceptance, I am inspired by H.L.A. Hart, who argued that legal systems are founded on social acceptance of the rule of recognition. See H.L.A. HART, *THE CONCEPT OF LAW* 100 (2d ed. 1994).

76. C. WILFRED JENKS, *THE COMMON LAW OF MANKIND* 17 (1958).

77. See Fernando R. Tesón, *International Obligation and the Theory of Hypothetical Consent*, 15 YALE J. INT'L L. 84 (1990).

78. See LAUREN BENTON & LISA FORD, *RAGE FOR ORDER* (2016); *INTERNATIONAL LAW AND EMPIRE* (Martti Koskeniemi et al. eds., 2017); *SYSTEM, ORDER, AND INTERNATIONAL LAW* (Stefan Kadelbach et al. eds., 2017).

79. This builds on the work of critical international relations theorists. See 1 ROBERT W. COX, *PRODUCTION, POWER, AND WORLD ORDER* (1987).

80. Steven R. Ratner & Anne-Marie Slaughter, *Appraising the Methods of International Law: A Prospectus for Readers*, 93 AM. J. INT'L L. 291, 291 (1999).



the debate on the fragmentation of international law, which has attracted considerable scholarly attention in recent years.<sup>81</sup> This Article does not deny that the sub-fields of international law have become increasingly specialized and institutionalized, which leads to occasional conflicts and contradictions between these legal regimes. Nonetheless, this Article argues that underneath the doctrinal fragmentation of international law is a considerable degree of ideological coherence. The theory of world order at the core of the Constitutive Regime of the International System dictates the overall normative orientation and grand policy purposes of international law. Indeed, in Part II, this Article describes how the doctrinal content of international law and the institutional infrastructure of the international system were molded by two distinct theories of world order—the Codes of Coexistence and Civilization. It reveals how underlying and animating a diverse range of rules, institutions, and practices are coherent ideological outlooks and worldviews.

Fourth, and finally, the current moment in world history makes this Article particularly pertinent. “[T]he ultimate international problem of our day,” according to Henry Kissinger, is “the crisis in the concept of world order.”<sup>82</sup> This Article engages with this claim. It argues that a crisis of world order ensues when the Constitutive Regime of the International System—those basic political assumptions that constitute the normative foundation of international politics—are contested. This Article contends that the neoliberal order of the post-Cold War years is being challenged from above (due to the reconfiguration of the global balance of power), from below (due to the rise of populism globally), and from within (due to failures and distortions of neoliberalism within Western societies). This means that in the coming years, and possibly for decades, global political contestation will not be limited to specific crises, such as North Korea or Syria, or to specific issue-areas, such as climate change, but will extend to the content of the Constitutive Regime of the International System, at the core of which is the dominant theory of world order.

This Article consists of two parts. Part I introduces the concept of the Constitutive Regime of the International System. It discusses its three constitutive functions of identifying the constituent units of the international system, articulating a theory of world order, and generating the secondary rules of international law. Part I concludes with a discussion on how changes in the Constitutive Regime signal the rise and fall of world orders. Part II explains how the United States made

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81. See JOOST PAUWELYN, *CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW* (2003); *REGIME INTERACTION IN INTERNATIONAL LAW: FACING FRAGMENTATION* (Margaret A. Young ed., 2012); MARIO PROST, *THE CONCEPT OF UNITY IN PUBLIC INTERNATIONAL LAW* (2012).

82. KISSINGER, *supra* note 10, at 375.

and remade world order during the twentieth century, by constructing a post-World War II order predicated on the Code of Coexistence and then redesigning world order in accordance with the Code of Civilization. This Article concludes with a *Prologue for the Future*. It discusses the current crisis of world order and proposes a return to the logic of coexistence in a twenty-first century that will be marked by Great Power competition for global dominance.

## I. THE CONSTITUTIVE REGIME OF THE INTERNATIONAL SYSTEM

This Part discusses what I call the Constitutive Regime of the International System. It draws on constitutional theory<sup>83</sup> and builds on the work of international relations scholars, especially constructivists,<sup>84</sup> and English School theorists,<sup>85</sup> to argue that underlying and enabling all international affairs are norms that are constitutive of the international system. Before discussing the contents of the Constitutive Regime of the International System, and to avoid terminological confusion, this Part begins by defining the following terms: “constitutive,” “regime,” and “international system.” Next, this Part unpacks the components of the Constitutive Regime of the International System. These are: the Principle of Differentiation, the Terms of Association, and the Secondary Rules of International Law.

### A. Of “Constitutions” and “Regimes”

Domestic political systems are governed by what Mark Tushnet calls constitutional “regimes” or “orders.”<sup>86</sup> These are “a reasonably stable set of institutions through which a nation’s fundamental decisions are made over a sustained period, and the principles that guide those decisions.”<sup>87</sup> Constitutional regimes generate rules and institutions that govern the body politic. These rules and institutions embody the dominant values of a society, they express the prevailing perceptions of justice, and they reflect the predominant beliefs about how society ought to be governed.<sup>88</sup> The Constitutive Regime of the International System is analogous to a constitutional regime. It expresses political assumptions about the composition of the international system,

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83. On the similarities between constitutional law and international law, see Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1792, 1795 (2009).

84. See Alexander Wendt, *On Constitution and Causation in International Relations*, 24 REV. INT’L STUD. 101 (1998).

85. See ANDREW LINKLATER & HIDEKI SUGANAMI, *THE ENGLISH SCHOOL OF INTERNATIONAL RELATIONS: A CONTEMPORARY REASSESSMENT* (2006).

86. MARK TUSHNET, *THE NEW CONSTITUTIONAL ORDER* 1 (2003).

87. *Id.*

88. See generally Tushnet, *supra* note 42.

articulates a worldview or theory for how to maintain order in the system, and establishes the lawmaking, law-enforcement, and dispute-settlement processes in the international system.

Employing constitutional concepts in international law scholarship has a long pedigree and has enjoyed a revival in recent years.<sup>89</sup> Indeed, a growing body of literature known as global constitutionalism argues that our world is evolving into a community that shares certain values that are embodied in a global constitutional order.<sup>90</sup> This Article is not, however, intended as a contribution to global constitutionalism. Global constitutionalism is a normative project; it promotes a particular vision of global governance and world politics. It seeks to engineer a normative framework for the international system that enables and advances globalization while protecting individual autonomy, human rights, and political liberty.<sup>91</sup> The Constitutive Regime of the International System makes no such normative prescriptions. The Constitutive Regime is a normatively neutral theoretical construct. Its content is determined by the great powers of each historical epoch, which means that its normative orientation is not static. As the identity of the great powers of the international system changes, so will the content of the system's constitutive regime. That is why I use the term "*constitutive*" to describe this regime. This term does not evoke the normative "thickness" of terms like *constitution*, *constitutional*, or *constitutionalism*. Rather, the term *constitutive* reflects the *functional* nature of this regime.<sup>92</sup> It constitutes the international system, whatever its normative or moral orientation.

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89. Laurence R. Helfer, *Constitutional Analogies in the International Legal System*, 37 LOY. L.A. L. REV. 193, 193 (2003) ("It's recently become fashionable to study the intersection of international and constitutional law.").

90. See generally JAN KLABBERS ET AL., *THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW* (2009).

91. See CHRISTINE E.J. SCHWÖBEL, *GLOBAL CONSTITUTIONALISM IN INTERNATIONAL LEGAL PERSPECTIVE* 1 (2011).

92. The notion of "functional" constitutionalism was developed by Jeffrey Dunoff and Joel Trachtman. See Jeffrey L. Dunoff & Joel P. Trachtman, *A Functional Approach to International Constitutionalization*, in *RULING THE WORLD: CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE* 3 (Jeffrey L. Dunoff & Joel P. Trachtman eds., 2009). While this Article is influenced by Dunoff and Trachtman's functional constitutionalism, the constitutive regime proposed here differs from their concept of functional constitutionalism. The latter, according to Dunoff and Trachtman, is intimately connected to international law. Functional constitutionalism is the process of *enabling* the making of international law, *constraining* lawmaking to ensure that international law does not infringe on basic human rights, and *supplementing* lawmaking by filling in gaps that emerge in domestic constitutionalism due to globalization. The functions of the Constitutive Regime are broader than this legalistic understanding of functional constitutionalism. The Constitutive Regime of the International System embodies a series of fundamental pre-legal political decisions. It determines the members of the international system and articulates a theory for maintaining order in the international system, in addition to enabling and constraining lawmaking in the international system.

The term “regime” used in this Article is borrowed from international relations regime theory. Regimes are sets of norms. They are broadly accepted rules, principles, and decision-making procedures that together perform a governing function.<sup>93</sup> These rules either apply to specific areas of global governance, such as the global environmental regime or trade regimes,<sup>94</sup> or they can apply to the entire international system. The Constitutive Regime of the International System operates like a regime. It is a coherent set of rules, norms, and principles that are broadly accepted and perform a governing function—in this case, a *constitutive* function.

### B. Of “Systems” and “Anarchy”

Although there is no generally accepted definition of the term “international system,”<sup>95</sup> the various understandings of this concept share the assumption that a “system” is the totality that is generated once formerly separate units are combined.<sup>96</sup> Based on this understanding of the term “system,” it is maintained that an international system emerges once “two or more states have sufficient contact between them, and have sufficient impact on one another’s decisions, to cause them to behave—at least in some measure—as parts of a whole.”<sup>97</sup> Realizing that in today’s world states are hardly the sole participants in the international system, scholars have proposed an expanded definition of “international system”: “[t]aken collectively, states and non-state actors co-existing and interacting at any point in history form an international system.”<sup>98</sup>

The defining feature of the international system is that it is anarchic. Anarchy does not mean that states are locked in ceaseless conflict or that the system is interminably chaotic. Anarchy merely expresses

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93. INTERNATIONAL REGIMES 2 (Stephen Krasner ed., 1983).

94. See Karen J. Alter & Sophie Meunier, *The Politics of International Regime Complexity*, 7 PERSP. ON POL. 13 (2009).

95. BARRY BUZAN & RICHARD LITTLE, INTERNATIONAL SYSTEMS IN WORLD HISTORY: REMAKING THE STUDY OF INTERNATIONAL RELATIONS 35 (2000) (“IR theorists have failed to generate any consensus about what is meant by a system.”).

96. BARRY BUZAN ET AL., THE LOGIC OF ANARCHY 156 (1993) (“[A] system is usually defined simply as a ‘set of interacting parts.’” (citation omitted)); RAYMOND ARON, PEACE AND WAR 94 (2003) (discussing how the international system is “the ensemble constituted by political units that maintain regular relations with each other and that are capable of being implicated in a generalized war”). According to Martin Wight, Samuel von Pufendorf was the first to develop the concept of an “international system,” which he called “*de systematibus civitatum*,” as a discrete domain of political activity. Pufendorf suggested that a system is composed of: “several states that are so connected as to seem to constitute one body but whose members retain sovereignty.” MARTIN WIGHT, SYSTEMS OF STATES 21 (1977) (internal quotation marks omitted).

97. HEDLEY BULL, THE ANARCHICAL SOCIETY 9-10 (1977).

98. JOSEPH GRIECO ET AL., INTRODUCTION TO INTERNATIONAL RELATIONS 15 (2015).

the reality that the international system operates without a supreme governing authority that acts as the system's central lawmaker, law-enforcer, and arbiter of disputes.<sup>99</sup> Anarchic systems are, therefore, decentralized social plains, the members of which recognize no authority superior to themselves. This is not to say that power, including military, economic, and ideational power, is irrelevant. Power is the currency of international affairs and the determinant of outcomes in the international system.<sup>100</sup> Nonetheless, unequal power and wealth do not generate formal or legal hierarchies in the system. No one has a *right to rule* and no entity is authorized to govern the international system merely by virtue of its power or wealth. As Kenneth Waltz artfully put it, in an anarchic world “none is entitled to command; none is required to obey.”<sup>101</sup>

This definition of the international system and its depiction as an anarchic realm is the conceptual point of departure for all theorizing about international relations and international law.<sup>102</sup> It provides a parsimonious model that is used to explain a wide range of phenomena in international affairs. Anarchy is the “most important structural condition in accounting for the behavior of states in the international system.”<sup>103</sup> Nonetheless, even as a highly stylized or abstract model, this understanding of the international system is insufficient. This is because the international system appears normatively barren.<sup>104</sup> It is portrayed as a “quasi-physical realm”—once regular contacts are established between a set of previously separate units, an international system emerges.<sup>105</sup> The existence of these units is simply assumed, and the first contact and early interaction among these units, which gives rise to the system, appears to occur in a normative vacuum. This physicalist conception of the international system omits a normative component that is essential for the creation and continued operation of the

99. Ian Hurd, *Anarchy*, in *ENCYCLOPEDIA OF INTERNATIONAL RELATIONS AND GLOBAL POLITICS* 20 (Martin Griffiths ed., 2005).

100. David Lake, *Authority, Coercion, and Power in International Relations*, in *BACK TO BASICS: STATE POWER IN A CONTEMPORARY WORLD* 55 (Martha Finnemore & Judith Goldstein eds., 2013) (“Power is the primary medium of international politics.”).

101. KENNETH N. WALTZ, *THEORY OF INTERNATIONAL POLITICS* 88 (1979).

102. Hedley Bull, *Society and Anarchy in International Relations*, in *DIPLOMATIC INVESTIGATIONS* 35 (Herbert Butterfield & Martin Wight eds., 1966).

103. BRIAN C. SCHMIDT, *THE POLITICAL DISCOURSE OF ANARCHY* 39 (1998).

104. Chris Brown, *International Theory and International Society: The Viability of the Middle Way?*, 21 *REV. INT'L STUD.* 183, 184-85 (1995) (noting that a “highly influential” conception of order “suggests that whatever rules and regularities exist in the world are the product solely of an interplay of forces and devoid of any kind of normative content”).

105. Christian Reus-Smit, *Struggles for Individual Rights and the Expansion of the International System*, 65 *INT'L ORG.* 207, 209 (2011) (“[I]nternational systems are quasi-physical realms: their constituent states are sufficiently proximate and encounter one another sufficiently often, that they have to take one another into account.”).

international system.<sup>106</sup> This normative component consists of intersubjective assumptions that are articulated by the leading powers of the international system. These principles identify the units whose combination generates an international system and articulate the terms that govern interactions between those units. These intersubjective assumptions are the Constitutive Regime of the International System.

### C. *The Constitutive Regime of the International System*

Having defined the terms “constitutive,” “regime,” and “international system,” it is now appropriate to put these terms together and define what I call the Constitutive Regime of the International System. *The Constitutive Regime of the International System is the combination of the principle of differentiation and terms of association of the international system, and the secondary rules of international law.* The constitutive regime consists of three components. The first two are the principle of differentiation and the terms of association, while the third is the secondary rules of international law.

The Constitutive Regime is logically antecedent to the international system.<sup>107</sup> Without background assumptions that identify the members of the system; set prerequisites for admission to the system; determine their basic rights, obligations, and competences; and establish a lawmaking mechanism to govern relations between the members of the system, any examination of the international system or discussion of the activities of its constituent units would be incomplete and unintelligible. Before states, international organizations and the many institutions and practices of statecraft; preceding wars, peace treaties, and balances of power; and underlying trade, tariffs, and travel is the Constitutive Regime of the International System.

#### 1. *The Principle of Differentiation of the International System*

The first component of the Constitutive Regime of the International System is the principle of differentiation. Country clubs, professional associations, sororities, fraternities, and obviously, law schools have admissions criteria. The international system is no different; it also

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106. Jack Donnelly, *The Constitutional Structure of International Societies* 5 (July 13, 2006) (unpublished manuscript) (on file with author) (highlighting that the constitutional foundation of the international system is an “analytical complement to the much more intensively studied ‘material structure’” of the system).

107. Dunoff & Trachtman, *supra* note 92, at 18 (“[T]he basic decisions about the fundamental structure of society precede and determine the structuring of legal constitutions.”).

has prerequisites for membership.<sup>108</sup> That is the function of the principle of differentiation. It designates the “constitutive unit of the new collective political order.”<sup>109</sup> The principle of differentiation also determines the basic rights, obligations, and competences of these constituent units. The principle of differentiation is essential for the creation of the international system. Before an international system can be created, a consensus needs to emerge regarding *who* the constituent units of the system are, *how* these units qualify for membership of the system, and *what* rights and obligations are entailed by virtue of membership in the system.

Differentiation is a theory of systems’ structure.<sup>110</sup> It was developed by sociologists, most prominently Emile Durkheim,<sup>111</sup> as a theoretical tool to identify and classify different forms of social organization and to analyze how the structure of authority in human societies evolves.<sup>112</sup> Differentiation theory does this by examining “how and on the basis of which structuring principle, are the main units within a social system (or subsystem) defined and distinguished from one another.”<sup>113</sup> Because international relations theory is dedicated to the study of a system—the *international system*—international relations scholars use differentiation theory as a heuristic instrument to describe the composition and structure of the international system, and to analyze how its composition and structure change over time and space.<sup>114</sup>

Throughout history, various actors, entities, and social collectivities of different types and sizes have engaged in contacts with their counterparts from neighboring lands or distant places. Not all contacts, however, generate an international system. Only contacts between specific actors count towards the creation of a system. The principle of

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108. INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED IN CANADA 271 (Hugh Kinderd et al. ed., 4th ed. 1987) (suggesting that international systems need “a mechanism of admission to that society of states”).

109. JOHN GERARD RUGGIE, CONSTRUCTING THE WORLD POLITY 188 (2002).

110. See Niklas Luhmann, *Differentiation of Society*, 2 CANADIAN J. SOC. 29 (1977).

111. See Jonathan H. Turner, *Emile Durkheim’s Theory of Integration in Differentiated Social Systems*, 24 PAC. SOC. REV. 379, 382-87 (1981).

112. DIFFERENTIATION THEORY AND SOCIAL CHANGE (Jeffrey C. Alexander & Paul Colomy ed., 1990); Niklas Luhmann, *Globalization or World Society? How to Conceive of Modern Society?*, 7 INT’L REV. SOC. 67, 68 (1997) (“[T]hroughout the tradition and in modern times as well, the concept of society proclaims a specific combination of difference and identity, of differentiation and reconstructed unity, or, in traditional language, of the parts and the whole.”).

113. Mathias Albert et al., *Introduction: Differentiation Theory and International Relations*, in BRINGING SOCIOLOGY TO INTERNATIONAL RELATIONS: WORLD POLITICS AS DIFFERENTIATION THEORY 1 (Mathias Albert et al. eds., 2013) [hereinafter BRINGING SOCIOLOGY].

114. Barry Buzan & Mathias Albert, *Differentiation: A Sociological Approach to International Relations Theory*, 16 EUR. J. INT’L REL. 315, 318 (2010).

differentiation designates the actors that constitute the international system through their interaction. The actors designated as the constituent unit of the international system will almost invariably be the dominant “conflict group” of that particular historical period.<sup>115</sup> Conflict groups are human collectivities, such as tribes, clans, racial groups, religions, states, kingdoms, or empires. These collectivities are dubbed “conflict” groups because human beings are loyal to these groups, organize their lives around membership in these groups, and are prepared to fight and die for these groups.<sup>116</sup>

[T]he foundation of political life is . . . ‘conflict groups.’ . . . *Homo sapiens* is a tribal species, and loyalty to the tribe for most of us ranks above all loyalties other than that of the family. . . . True, the name, size, and organization of the competing groups into which our species subdivides itself do alter over time . . . . [but] the essential nature of intergroup conflict does not.<sup>117</sup>

Conflict groups are modes of organizing human society. They establish public authority, assign lawmaking and law-enforcement powers, engage in or manage economic activity, and shape the identities of individuals within the group. The emergence of a conflict group and its ascendance as the dominant mode of organizing human society is rarely peaceable. In this process, which often occurs over an extended period, preexisting modes of organizing human society are challenged and dismantled, often by force. Indeed, the history of statehood is a testament to the physical coercion and ideational compulsion that accompanies the creation of a conflict group and its consolidation of power.<sup>118</sup> As a particular type of conflict group amasses greater power over other types of conflict groups, a consensus among the most powerful of these ascendant conflict groups will crystalize regarding the principle of differentiation that will govern the international system. These leading powers will design the principle of differentiation in

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115. Ralf Dahrendorf coined the term “conflict group[s]” to refer to a process of social differentiation that divided humans into interest groups that engaged in constant conflict to protect and advance their group interests. See Ralf Dahrendorf, *Toward a Theory of Social Conflict*, 2 J. CONFLICT RESOL. 170 (1958); see also Jacek Tittenbrun, *Ralf Dahrendorf’s Conflict Theory of Social Differentiation and Elite Theory*, 6 INNOVATIVE ISSUES & APPROACHES IN SOC. SCI. 117 (2013); Alan Zuckerman, *Political Cleavage: A Conceptual and Theoretical Analysis*, 5 BRIT. J. POL. SCI. 231 (1975).

116. Eric Levitz, *America is Not a Center-Right Nation*, N.Y. TIMES (Nov. 1, 2017), <https://www.nytimes.com/2017/11/01/opinion/democrats-economic-policy.html> [https://perma.cc/555T-ZH8W] (“The impulse to define oneself in relation to an in-group—and opposition to an out-group—is a survival strategy that’s been with us since the dawn of our species.”).

117. Robert G. Gilpin, *The Richness of the Tradition of Political Realism*, 38 INT’L ORG. 287, 290 (1984).

118. See KENNETH H.F. DYSON, *THE STATE TRADITION IN WESTERN EUROPE* 29-30 (ECPR Press 2009).



their own image, thereby legitimizing their newfound power and securing their status as the principal participants in international affairs.<sup>119</sup> The principle of differentiation, in other words, ratifies the realities of power. It consecrates the victory of a particular *type* of conflict group and legitimizes its position as the dominant mode of organizing human society.<sup>120</sup>

The identity of the conflict group chosen as the primary actor in international affairs could be codified in a legal instrument or it could be manifested in political practices that are accepted as legitimate. Whether enshrined in a legal instrument or displayed in political practice, the principle of differentiation determines which actors or entities are endowed with international legal personality.<sup>121</sup> Accordingly, it identifies who has the right to have rights, the obligation to bear duties, and the power to exercise competences in the international system.<sup>122</sup>

The 1933 Montevideo Convention on the Rights and Duties of States is a prime example of the legal expression of the principle of differentiation.<sup>123</sup> It reiterated that states are the principal actor in international affairs, outlined the criteria of statehood, and enunciated their basic rights, obligations, and competences.<sup>124</sup> The Montevideo Convention, however, was neither constitutive of states nor did it establish states as the main actor in international affairs. Sovereign states existed as independent and fully competent legal persons long before the convention was concluded. The convention merely codified a preexisting political reality. It expressed in legal terms the principle

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119. See Jack Donnelly, *Differentiation: Type and Dimension*, in BRINGING SOCIOLOGY, *supra* note 113, at 97-99.

120. As James Brierly recognized,

the fundamental rights of states were born of the needs of a cause, rather than of reflection on the nature of the juridical relations of states. They were invented because the post-Renaissance prince, himself a successful rebel against the claims of pope and emperor, sought in a new juridical order a system to consecrate his hardly won independence.

JAMES LESLIE BRIERLY, *THE BASIS OF OBLIGATION IN INTERNATIONAL LAW* 4 (Sir Hersch Lauterpacht & C.H.M. Waldock ed., 1977) (1958).

121. ROLAND PORTMANN, *LEGAL PERSONALITY IN INTERNATIONAL LAW* 1 (2010) ("Legal personality is a concept . . . employed to distinguish between those social entities relevant to the international legal system and those excluded from it.").

122. See JEAN-MARC COICAUD, *LEGITIMACY AND POLITICS* 234 (David Ames Curtis trans., 2002).

123. See Montevideo Convention on the Rights and Duties of States, Dec. 26, 1933, 165 L.N.T.S. 19.

124. *Id.*

of differentiation that had become dominant by the early twentieth century.<sup>125</sup>

Although not explicated in legal terms, a similar process of articulating a principle of differentiation occurred in the early nineteenth century. In the aftermath of the Napoleonic Wars, the great powers that vanquished Napoleon adopted and enforced a principle of differentiation that identified European monarchies as the principal participants and legitimate members of the system.<sup>126</sup> For a century after the Congress of Vienna, this principle of differentiation led to the formulation of a “set of principles about the proper conduct of relations between states, in order to sustain a working international society.”<sup>127</sup>

The principle of differentiation also articulates the basic rights, obligations, and competences of the members of the international system. By virtue of their membership, states, or whichever actors are recognized as the constituent units of the system, enjoy certain rights, privileges, and protections, and are required to undertake certain duties. In the state-centric system of the twentieth century, many of these rights and obligations of states were codified in legal instruments such as the U.N. Charter and in political statements such as the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States.<sup>128</sup> These rights and obligations included the independence of states, the exclusive competence of states in matters falling within their domestic jurisdiction, and the juridical equality of states.<sup>129</sup> These principles, which are cardinal rules of general international law, do not owe their existence to the legal instruments and political statements in which they are recorded. Rather, these rules are part of the principle of differentiation. They are an expression of a political consensus on the basic rights and obligations of states. This consensus predates the legal instruments in which these rules are enunciated. Indeed, these basic rights and obligations are corollaries of statehood. They are an intrinsic part of what

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125. Several years before the Montevideo Convention, an arbitral award articulated a definition of statehood that anticipated the criteria of statehood codified in the convention: “[A] [s]tate ‘does not exist unless it fulfills the conditions of possessing a territory, a people inhabiting that territory, and a public power that is exercised over the people and the territory.’” Tom Sparks, *State*, in CONCEPTS FOR INTERNATIONAL LAW 838, 843 (Jean d’Aspermont & Sahib Singh eds., 2019) (quoting *Deutsche Continental Gas Gesellschaft v. Polish State*, 5 Ann Dig ILC 11 (Ger.-Pol. Mixed Arb. Trib. 1929)).

126. See MARK MAZOWER, GOVERNING THE WORLD: THE HISTORY OF AN IDEA 5 (2012) (noting that the Concert of Europe “had a deeply conservative sense of mission. Based on respect for kings and hierarchy, it prioritized order over equality, stability over justice.”).

127. IAN CLARK, LEGITIMACY IN INTERNATIONAL SOCIETY 90 (2005) [hereinafter CLARK, LEGITIMACY].

128. G.A. Res. 2625 (XXV) (Oct. 24, 1970).

129. MALCOLM N. SHAW, INTERNATIONAL LAW 153-157 (3d ed. 1991).

it means to be a state and constitute an integral element of the concept of statehood, which is itself a concept that is defined by the principle of differentiation.

Similarly, the statement in the Vienna Convention on the Law of Treaties (VCLT) that “[e]very State possesses capacity to conclude treaties” reflects the principle of differentiation.<sup>130</sup> This capacity to conclude treaties—which is part of what James Crawford calls the “plenary competence [of States] to perform acts, make treaties, and so on, in the international sphere”<sup>131</sup>—is *codified* in international legal instruments but is not *derived* from these instruments. These competences, like the basic rights and obligations of states, are *a priori* to international law. This is because it would be logically implausible to assert that the capacity to conclude treaties is based on the VCLT, seeing as the VCLT is itself a treaty, which means that the capacity of states to conclude treaties necessarily predated the negotiation and conclusion of the VCLT. A claim that the capacity of states to conclude treaties is based on customary international law is similarly logically implausible. This is because such a claim is necessarily based on an *a priori* assumption that the international system is composed of sovereign states and that these states enjoy the capacity to create customary international law through their practice and *opinio juris*. In other words, the “plenary competences” of states are simply widely accepted political assumptions. They are integral features of statehood that are predicated on a political consensus on the meaning and content of statehood, which is embodied in the principle of differentiation. By articulating the rights, obligations and competences of the constituent units of the international system, the principle of differentiation generates the legal grammar of international affairs, thereby enabling these units to communicate and engage in transnational relations.

Recognizing the role of the principle of differentiation in determining the composition of the international system and establishing the basic rights, duties, and competences of the members of the system leads to challenging the widely held assumption that sovereignty is “the basic constitutional doctrine of the law of nations.”<sup>132</sup> The principle of differentiation is a normative reflection of the political reality that a particular conflict group has become the predominant mode of organizing human society. By recognizing the ascendancy of a particular conflict group, the principle of differentiation identifies the bearer of sovereignty. In short, it tells us *who* is sovereign. The principle of

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130. Vienna Convention on the Law of Treaties, art. 5, May 23, 1969, 1155 U.N.T.S. 331.

131. JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 40 (2d ed. 2006).

132. IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 289 (7th ed. 2008).

differentiation also generates the *content* of sovereignty. By articulating the rights, obligations, and competences of the bearers of sovereignty, the principle of differentiation tells us *what* the sovereign can do with sovereignty. As Nehal Bhuta put it, “[e]very concept of sovereignty, it would seem, presupposes a concept of the state.”<sup>133</sup> Without the principle of differentiation sovereignty and statehood remain inchoate concepts.

The impact of the principle of differentiation is rarely recognized during extended periods of political stability when the structure of the international system is accepted as legitimate.<sup>134</sup> During these periods, the composition of the international system is taken for granted. This was the situation for most of the twentieth century. The international system was predicated on a state-centric principle of differentiation, and sovereign states were accepted as the principle units of the system. Indeed, entire continents of states emerged and joined the international system during the era of decolonization, and for most of humanity acquiring statehood became—and for many, such as in Kurdistan and Catalonia, it remains—an expression of emancipation and a vehicle of self-determination.<sup>135</sup> This statist composition of the system is, however, historically contingent and socially constructed; it is neither inevitable nor preordained. Various forms of political authority have existed before sovereign states became the preeminent method of organizing human society,<sup>136</sup> and it would be ahistorical to assume that the international system will be exclusively, or even principally, composed of sovereign states indefinitely.

Because the principle of differentiation determines the constituent units of the international system, it has productive power; it creates insiders and outsiders.<sup>137</sup> The former become the primary participants

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133. Nehal Bhuta, *State Theory, State Order, State System – Jus Gentium and the Constitution of Public Power*, in SYSTEM, ORDER, AND INTERNATIONAL LAW 399 (2017).

134. Ian Clark, whose use of the term legitimacy overlaps with the concept of the principle of differentiation, notes that:

principles of legitimacy are not static; instead, fashions in legitimization change from time to time, and it means different things at different times. Accordingly, legitimacy should not be approached as a set of absolute principles, standing apart from time and place, but should be understood simply as the norms of a specific cultural system at any given time.

CLARK, LEGITIMACY, *supra* note 127, at 13 (2005) (internal citations and quotation marks omitted).

135. See STATEHOOD AND SELF-DETERMINATION (Duncan French ed., 2013).

136. JOSEPH R. STRAYER, ON THE MEDIEVAL ORIGINS OF THE MODERN STATE (Princeton Univ. Press 1998).

137. Tanja E. Aalberts, *Rethinking the Principle of (Sovereign) Equality as a Standard of Civilisation*, 42 MILLENNIUM: J. INT'L STUD. 767, 769 (2014) (noting that “the politics of

of the political process, while the latter are shunned as illegitimate forms of political authority—"barbarians" to be conquered,<sup>138</sup> objects to be governed, or "entities" existing beyond "the pale" of the international system.<sup>139</sup> The configuration of membership in the international system generated by the principle of differentiation, with its insiders and outsiders, is rarely static. Indeed, history has witnessed international systems of varying sizes and composition which were predicated on different principles of differentiation.

International systems may be global or regional. The current international system is global. Through the processes of European conquest and colonialism the state-system that originated in fifteenth century Europe was exported to every corner of Earth.<sup>140</sup> This global international system, however, is a historical exception. International systems in previous eras were geographically bounded and rarely came into contact due to the limitations of technology and transportation. Indeed, for centuries, separate international systems co-existed in different regions of the globe. At certain historical moments, however, these separate systems and distinct conflict groups came into contact. Examples include the contacts and conflicts between the ancient Greek city-states and the Persian Empire, or the manifold relations between Europe and Islamic powers, such as the Abbasid state and the Ottoman Empire. The contacts between these separate systems did not generate an international system. If anything, these contacts were decidedly *anti-systemic*. These were relations based on the mutual rejection of the legitimacy and existence of the opposing system or power. Even when they maintained uneasy truces or engaged in trade, to medieval Christendom, the Islamic systems and empires of the Southern Mediterranean and Western Asia were heretical powers to be either converted or opposed, contained, and destroyed.<sup>141</sup> Similarly, for the Muslim world, Europe was an infidel realm to be converted to Islam by persuasion or conquest.<sup>142</sup> Contacts between Europe and China were similarly anti-systemic. For centuries, these powers engaged in

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legal subjecthood" have a productive power through inclusion and exclusion into the international system).

138. WILHELM G. GREWE, *THE EPOCHS OF INTERNATIONAL LAW* 548 (Michael Byers trans. 2000) (discussing that in the nineteenth century, "the application of the law of occupation to territories located outside Europe and inhabited by 'savages' was founded on the assumption that 'barbarians have no rights as a nation' as John Stuart Mill wrote").

139. B. O. Okere, *The Western Sahara Case*, 28 INT'L & COMP. L. QUART. 296, 306 (1979).

140. RICHARD TUCK, *PHILOSOPHY AND GOVERNMENT 1572-1651*, at xiv (1993) (highlighting that the state "had begun to occupy Europe and lay siege to the entire world").

141. See generally JOHN VICTOR TOLAN, *SARACENS: ISLAM IN THE MEDIEVAL EUROPEAN IMAGINATION* (2002).

142. See Gamal M. Badr, *A Survey of Islamic International Law*, 76 AM. SOC. INT'L L. 56, 56-57 (1982).

contacts and traded without recognizing a common normative framework to govern their relations. Indeed, Europe and China considered each other to be barbarians that, at best, were to be tolerated, but that remained outsiders to their systems.<sup>143</sup> Until China was forcibly integrated into the Euro-centric international system—after the devastation inflicted upon it in the Opium Wars and after it was coerced into signing the 1842 Treaty of Nanjing—China led a distinct system that was governed according to a separate Constitutive Regime and a unique principle of differentiation.<sup>144</sup>

Relations of this nature, which are based on the absolute rejection of the legitimacy of the opposing system or power, are not generative of a system. International systems are not created simply as a result of contacts between separate units. A system is predicated on a common normative framework—a Constitutive Regime—designed by the most powerful players in the system and accepted, often forcibly, by its constituent units.

## 2. *The Terms of Association of the International System*

The second component of the Constitutive Regime of the International System is its terms of association. Achieving order in an anarchic system is the perennial problem of world politics. The terms of association are the solution to this problem.<sup>145</sup> They are a set of principles, policies, and practices that are designed to maintain order in the

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143. One of the many interactions between China and western powers that exemplifies this relationship of continued contacts and trade without recognizing or accepting a common normative framework was narrated by the late Onuma Yasuaki. In 1793, Britain dispatched Lord Macartney to convince China to engage in trade with Britain on the bases of European international law. Macartney's proposals were rejected because:

[F]rom the Chinese perspective, it was nothing more than a joke of the "barbarians" who were ignorant of the long established 'universal' rules and rituals through which all nations must behave themselves. According to the Chinese view, since the Celestial Empire [of China] produces abundant goods and products, it is not necessary for it to engage in trade with others. It is the barbarians that are in need of trade with China. This being so, then it is the barbarians who ought to abide by the rules which China regarded as applicable between China and other countries. This was a perfectly logical argument on the part of China.

Onuma Yasuaki, *When Was the Law of the International Society Born? – An Inquiry of the History of International Law from an Intercivilizational Perspective*, 2 J. HIST. INT'L L. 1, 29 (2000).

144. This process was not unique to China. Other powers, such as the Ottoman Empire also experienced a similar process as they joined the Euro-centric international system. Kevin Harrick, *The Merger of Two Systems: Chinese Adoption and Western Adaptation in the Formation of Modern International Law*, 33 GA. J. INT'L & COMP. L. 685, 696-97 (2005).

145. For more in-depth analysis on the concept of "terms of association," see Michael Oakshott, *The Vocabulary of a Modern European State*, 23 POL. STUD. 319, 338 (1975).

international system. The terms of association, in other words, express a theory of world order.

An analogy drawn from constitutional theory might help clarify the nature and function of the terms of association of the international system and dispel the obscurity of the phrase “world order,” which is frequently used by scholars and pundits without definition. The terms of association of the international system are analogous to what Laurence Tribe calls the “dark matter” of the U.S. Constitution.<sup>146</sup> These are unwritten political axioms, fundamental postulates, and foundational propositions about the nature of the American republic that underlie the written Constitution and shape the practice of politics and law in America.<sup>147</sup> Although they are echoed in the text and structure of the Constitution, in political parlance, and in court decisions, the ultimate source of these principles is a social consensus on the basic values of America’s body politic.<sup>148</sup> The international system operates on the bases of a set of principles that perform a similar function. These principles—which I call the terms of association—are a set of values that are considered necessary to maintain world order. These values are articulated by the leading powers of the international system and are assumed to be the prerequisites of preserving a modicum of stability in a system that lacks a central governing authority. These principles and values are, in essence, a worldview; a paradigm for seeing, understanding, and interpreting the world; a normative roadmap for how international life ought to be managed and governed.<sup>149</sup>

Scholars and statespersons have recognized and analyzed this normative element of the architecture of the international system. In his magisterial *magna opus* titled *A World Restored*, Henry Kissinger posited that international systems operate on the basis of a concept of “legitimacy,” which is “an international agreement about the nature of workable arrangements and about the permissible aims and methods

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146. LAURENCE H. TRIBE, *THE INVISIBLE CONSTITUTION* 37-38 (2008).

147. These include precepts such as that the U.S. government is a “government of the people, by the people, for the people,” that it is “a government of laws, not men,” that the U.S. society is “committed to the rule of law,” and that “no state may secede from the Union.” *Id.* at 28 (internal quotations omitted).

148. These are “legal norms and principles that form fundamental underlying precepts for our polity—background norms that contribute to and result from the moral development of our community. Public values appeal to conceptions of justice and common good, not to the desires of one person or group.” William N. Eskridge Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1008 (1989).

149. Martin Griffiths, *Worldviews and IR Theory: Conquest or Coexistence?*, in *INTERNATIONAL RELATIONS THEORY FOR THE TWENTY-FIRST CENTURY* 1 (Martin Griffiths ed., 2007) (“A worldview is a broad interpretation of the world and an application of this view to the way in which we judge and evaluate activities and structures that shape the world. . . . Worldviews contain fundamental assumptions and presuppositions about the constitutive nature of IR.”).

of foreign policy.”<sup>150</sup> Later writers developed Kissinger’s concept of legitimacy and postulated that international systems are predicated on principles that determine the limits of rightful conduct among the members of the system.<sup>151</sup> The terms of association are similar, but not identical, to this notion of legitimacy. The terms of association do not merely establish the permissible aims of foreign policy or the limits of rightful conduct. The terms of association are normatively thicker. They are, as aforementioned, a holistic worldview that articulates substantive values that are considered essential to maintaining order in an anarchic system. An international system, therefore, is not a random congregation of states. Rather, as Hedley Bull put it, the international system is “an arrangement of social life such that it promotes certain goals or values.”<sup>152</sup>

Liberal peace theory, which is the intellectual core of the Code of Civilization that I discuss in Part II of this Article, is an example of such a worldview. It articulates a set of substantive values that ought to be pursued by the participants of the international system and posits that the realization of those values is the guarantee to maintaining world order.<sup>153</sup> Similarly, the Code of Coexistence, which is also discussed below, is based on a recognition of the moral and value pluralism of humanity, and assumes that world order is best maintained by protecting and preserving this pluralism. Both of these worldviews prescribe diverging policies, practices, and rules to implement their theories of world order.

Other values have been identified by scholars of both international relations and international law as the fundamental values of the international system. For example, Hedley Bull argued that the “elementary, primary or universal” goals of the international system are: to ensure the integrity of the system of states; to maintain the independence of the individual states that constitute the system; and to minimize conflict among states.<sup>154</sup> Similarly, Christian Tomuschat suggests that the purposes of international legal regulation are to realize international peace, security, and justice in inter-state relations and ensure the protection of human rights and the rule of law within states.<sup>155</sup> Myres McDougal and scholars of the New Haven School, on

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150. HENRY KISSINGER, *A WORLD RESTORED* 1 (1957).

151. For a review of the literature on legitimacy in international relations, see CLARK, *LEGITIMACY*, *supra* note 127, at 1-30.

152. BULL, *supra* note 97, at 4.

153. See John R. O’Neal et al., *The Liberal Peace: Interdependence, Democracy, and International Conflict, 1950-1985*, 33 *J. PEACE RES.* 11 (1996).

154. BULL, *supra* note 97, at 16-18.

155. Christian Tomuschat, *General Course on Public International Law*, 281 *RECUEIL DES COURS* 1, 23 (1999).



the other hand, identified the promotion of human dignity as the overall objective of the international system, and outlined a catalogue of values that ought to guide international legal regulation in its pursuit of human dignity.<sup>156</sup> Whatever the content of these values, the claim I make here is that, in addition to the principle of differentiation, the international system operates on the basis of terms of association that articulate the overarching normative commitments of the system. The terms of association are, to borrow a phrase coined by Adam Watson, the “*raison de système*.”<sup>157</sup>

Like the principle of differentiation, the terms of association of the international system are determined by the dominant conflict groups of each historical period. These powerful conflict groups will articulate the terms of association that reflect their normative commitments and their perceptions regarding the prerequisites of maintaining systemic order and stability.<sup>158</sup> One factor that influences the system’s terms of association is the domestic governance structure of these leading conflict groups.<sup>159</sup> The values that underlie social relations within those conflict groups—in other words, the “dark matter,” ideology, philosophy, or religion animating their domestic polities—supply the “generative grammar of international authority.”<sup>160</sup> These leading conflict groups may also articulate terms of association that reflect their formative national experiences, their geographic realities, their strategic interests, or the history of their engagement with the international system. In short, hegemonic powers of each historical period will design the international system to reflect their history and their domestic values and strategic interests.

### 3. *The Secondary Rules of International Law*

The third component of the Constitutive Regime of the International System is the secondary rules of international law. Legal systems, as H.L.A. Hart wrote, are composed of primary rules of obligation and secondary rules.<sup>161</sup> The former are do’s and don’ts; prescrip-

156. These values are: power, wealth, respect, wellbeing, affection, skill, rectitude, and enlightenment. See W. Michael Reisman et al., *The New Haven School: A Brief Introduction*, 32 YALE J. INT’L L. 575, 576 (2007).

157. ADAM WATSON, *THE EVOLUTION OF INTERNATIONAL SOCIETY* 14 (2002) (1992).

158. ROBERT KAGAN, *THE WORLD AMERICA MADE* 5 (2012) (“Every international order in history has reflected the beliefs and interests of its strongest powers . . .”).

159. See G. JOHN IKENBERRY, *AFTER VICTORY: INSTITUTIONS, STRATEGIC RESTRAINT, AND THE REBUILDING OF ORDER AFTER MAJOR WARS 21-22* (2001) [hereinafter IKENBERRY, *AFTER VICTORY*]; PHILIP BOBBITT, *THE SHIELD OF ACHILLES* (2002).

160. RUGGIE, *supra* note 21, at 64, 66-67 (internal quotation marks omitted).

161. HART, *supra* note 75, at 94.

tions and proscriptions addressed to individuals in a society. Secondary rules, on the other hand, are rules about rules. They “specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively ascertained.”<sup>162</sup> Secondary rules, therefore, confer lawmaking authority, establish law-enforcement powers, and institute dispute resolution mechanisms.

Law is a social necessity. The coexistence and interaction of individuals in society, even the most primitive societies, generates a need to devise rules to govern relations among these individuals.<sup>163</sup> International systems are no different.<sup>164</sup> As independent conflict groups, whether in ancient international systems or in the modern system of states, engage in regular contact, it becomes necessary for these conflict groups to articulate rules to manage their manifold relations.<sup>165</sup> As Arthur Nussbaum remarked in his seminal tome on the history of international law, the “phenomena of [international] law have been conspicuous since the dawn of documentary history, that is, from the fourth millennium B.C.”<sup>166</sup>

Obviously, the term “international law” was not known in ancient international systems; that term is a European innovation of eighteenth century vintage.<sup>167</sup> Nonetheless, even if not called “international law,” all international systems operated on the basis of rules that regulated relations between the constituent units of these systems.<sup>168</sup> Historians of international law have established that ancient civilizations,

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162. *Id.*

163. ANDREW CLAPHAM, *BRIERLY'S LAW OF NATIONS* 1 (7th ed. 2012).

164. As Oppenheim observed: “The necessity for the Law of Nations did not arise until a multitude of States absolutely independent of one another had successfully established themselves.” L. OPPENHEIM, *INTERNATIONAL LAW* 54 (1905).

165. Carlo Focarelli, *In Quest of Order and Capturing the Complexity of International Law: The Historical Foundations of World Order*, 11 *J. HIST. INT'L L.* 187, 191 (2009) (“[C]onfronted with the much debated question of whether international law may be traced back to ‘pre-classical’ antiquity. He answers in the affirmative . . . . The underlying assumption is that the need for some degree of order must inevitably have been felt in antiquity.”).

166. ARTHUR NUSSBAUM, *A CONCISE HISTORY OF THE LAW OF NATIONS* 7 (1947).

167. Jeremy Bentham coined the term “international law” to describe what was called the “[L]aw of [N]ations.” See M. W. Janis, *Jeremy Bentham and the Fashioning of “International Law”*, 78 *AM. J. INT'L L.* 405, 409 (1984).

168. Heinhard Steiger, *From the International Law of Christianity to the International Law of the World Citizen – Reflections on the Formation of the Epochs of the History of International Law*, 3 *J. HIST. INT'L L.* 180, 181 (2001) (“There were, without doubt, normative rules governing the relationship between political powers at all times throughout history and in all regions of the planet.”). Indeed, there is no reason to be constrained by the definitional straitjacket that is the Euro-centric understanding of what international law is and what it looks like. Rather, a broader definition of what counts as international law, and which I find persuasive, has been formulated by Heinhard Steiger: “Each normative order of

including in Egypt, Mesopotamia, Greece, the Indian subcontinent, and China, engaged in organized relations with allies and rival powers on the basis of a system of legal rules.<sup>169</sup> In short, all international systems, whatever the nature of their constituent units, function on the basis of some set of rules however substantively simple, rudimentary in nature, or religious in origin.

Secondary rules are essential for the existence and operation of these rules that regulate relations between the members of the international system. Any set of primary regulatory rules require a set of secondary rules to enable the creation of the primary rules. The secondary rules determine how (and by whom) the primary rules of the system are made, how disputes are settled, and how the rules are enforced and by whom.<sup>170</sup> Like the principle of differentiation and the terms of association, the secondary rules of international law emerge from a consensus among the most powerful units of the international system. These powers recognize a particular process as law-creating, agree to some method of dispute resolution, and accept some method of law enforcement. In other words, like the H.L.A. Hart's rule of recognition, the secondary rules of international law are a matter of social fact. They are articulated by the leading powers of the historical period and accepted as authoritative by the constituent units of the international system. The foundation of international law, in other words, is the broad acceptance by the constituent units of the international system of the secondary rules of international law.<sup>171</sup>

Secondary rules can take an infinite variety of forms.<sup>172</sup> They can be nothing more than the belief that the edicts of a Pharaoh, Emperor, or Czar shall count as law, or that a breach of a treaty shall be punished by the wrath of a thousand gods.<sup>173</sup> However simple or superstitious, the signal feature of the secondary rules of international law is

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relationships between a number of political powers, independent of each other, in whichever time or region, are covered by the term 'international law.' *Id.* at 180.

169. Wolfgang Preiser, *History of International Law, Ancient Times to 1648*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 722 (Rudolph Bernhardt ed., 1995).

170. See BOBBITT, *supra* note 159, at 484 (discussing that the functions of the constitution of the society of states include setting up a "structure for rule following," specifying "procedures for coping with disputes arising from its implementation," and providing "modalities of interpretation"). These are the functions of the secondary rules.

171. HART, *supra* note 75, at 100 ("[W]here a secondary rule of recognition is accepted and used for the identification of primary rules of obligation. It is this situation which deserves, if anything does, to be called the foundations of a legal system.").

172. *Id.* at 94 ("The existence of such a rule of recognition may take any of a huge variety of forms, simple or complex. It may, as in the early law of many societies, be no more than that an authoritative list or text of the rules is to be found in a written document or carved on some public monument.").

173. NUSSBAUM, *supra* note 166, at 3 (noting that a treaty between the Egyptians and

that they provide a mechanism for the “conclusive identification of the primary rules” in the international system.<sup>174</sup> Today’s international law operates on the basis of a sophisticated system of secondary rules.<sup>175</sup> These rules are embodied in the doctrine of sources of international law, which are codified in Article 38 of the Statute of the International Court of Justice.<sup>176</sup>

The secondary rules of international law are ontologically subsequent to the principle of differentiation and the terms of association. The identity, authority, and prerogatives of the lawmakers, law-enforcers, and arbiters of disputes of the international system are dependent on the principle of differentiation and the terms of association of the system.<sup>177</sup> The international system of the early-twentieth century illustrates this determinative relationship between the principle of differentiation and the terms of association on one side and the secondary sources of international law on the other. Because sovereign states are the primary participants and beneficiaries of the international political process, the secondary rules of international law were designed with a heavy state-centric emphasis.<sup>178</sup> States were the primary authors of treaties, and it was up to states to grant other actors, such as international organizations, the power to contract treaties.<sup>179</sup> The acts of states and the statements of state representatives carried more weight in generating customary international law than the positions and policies of other actors, even those wielding greater material power than states. The state-centric nature of the principle of differentiation also explains the crucial role of state consent in generating the primary rules of international law. A system composed of co-equal sovereign states that recognize no supreme authority generated the rule that the validity of legal rules is dependent on the consent of those sovereign states.<sup>180</sup> Thus, the President of Palau, a tiny pacific island

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Hittites enunciated that violations of the treaty would invite the wrath of a thousand Egyptian and Hittite gods).

174. HART, *supra* note 75, at 95.

175. Mehrdad Payandeh, *The Concept of International Law in the Jurisprudence of H.L.A. Hart*, 21 EUR. J. INT’L L. 967, 994 (2010).

176. These are: treaties, customary law, general principles of law, judicial decisions, and the opinions of publicists. See Statute of the International Court of Justice, Article 38.

177. See Denis J. Galligan & Mila Versteeg, *Theoretical Perspectives on the Social and Political Foundations of Constitutions*, in SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS 3, 11 (Denis J. Galligan & Mila Versteeg eds., 2013).

178. Samantha Besson, *Theorizing the Sources of International Law*, in THE PHILOSOPHY OF INTERNATIONAL LAW 163, 164 (Samantha Besson & John Tasioulas eds., 2010).

179. JAN KLABBERS, AN INTRODUCTION TO INTERNATIONAL ORGANIZATIONS LAW 267 (2015).

180. Randall Lesaffer, *Peace Treaties and the Formation of International Law*, in THE OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW 71, 93 (Bardo Fassbender & Anne Peters eds., 2012) (“[T]he collapse of supra-state authorities gave consent through treaty a central role in the articulation of general as well as particular law of nations.”).

state of some 20,000 citizens, enjoyed, at least formally, greater law-making authority, than the CEO of the vastly richer Wal-Mart with its over two million employees. This capacity to engage in lawmaking—which is enjoyed by all states, regardless of power, size, or wealth—is a reflection of a statist principle of differentiation that accords plenary competences to states, and states alone.

*D. Never Ending History: The Rise and Demise of Constitutive Regimes*

The Constitutive Regime of the International System is a living concept. At certain historical junctures, pressure mounts to revisit the normative foundations of the international system. This pressure may originate from the emergence of a new form of conflict group that seeks to establish itself as the dominant mode of organizing human society. The pressure to redesign the normative foundations of the international system may also emanate from a shift in the balance of power among existing conflict groups. Like an ascendant elite within a domestic polity, new powers that attain hegemony within an international system will adapt the principles governing the system to reflect their interests and values. These moments, which are likened to constitutional moments,<sup>181</sup> often coincide with the conclusion of major conflicts in the international system. The victorious powers in these conflicts refashion the constitutive foundation of the system to reflect their interests and normative commitments.<sup>182</sup> In history, this process of reconstitution was associated with specific events, places, or documents where the fundamental rules of the international system were promulgated, such as the Peace of Augsburg, the Peace of Utrecht, the Peace of Westphalia, the Congress of Vienna, the allied conferences held in Washington, Moscow, Cairo, Malta, Yalta, and San Francisco during the final months of World War II, and the Fall of the Berlin Wall in 1989.<sup>183</sup>

During these moments of creation, the ascendant powers seek to universalize their values and to establish their worldviews as the dominant approach for managing world affairs. This process is, in other words, an attempt to transform the historically contingent and normatively subjective preferences of the new hegemon into universal, self-evident, necessary conditions for the effective functioning of the international system.<sup>184</sup> The articulation of the Constitutive Regime of the

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181. IKENBERRY, *LIBERAL LEVIATHAN*, *supra* note 13, at 148.

182. See IKENBERRY, *AFTER VICTORY*, *supra* note 159, at 3.

183. See BOBBITT, *supra* note 159, at 481-608.

184. Richard K. Ashley, *Imposing International Purpose: Notes on a Problematic of Governance*, in *GLOBAL CHANGES AND THEORETICAL CHALLENGES* 251, 259 (Ernst-Otto

International System is, in other words, an act of elite engineering; a bid to shape the “political common sense of a new era.”<sup>185</sup> The hegemonic powers engage in this process to secure their position of preeminence. To ensure that the system established under their leadership is stable and sustainable, great powers seek to garner the widespread acceptance of the normative and institutional foundations of the international system.<sup>186</sup> Despite their preponderant power and influence, the great powers have an incentive to garner support for their worldview to ensure that their leadership of the international system is perceived as legitimate.<sup>187</sup>

The success of a particular conflict group or specific power in dictating the content of the Constitutive Regime of the International System never spells the end of history. The principle of differentiation, the terms of association, and the secondary rules of international law are rarely unchallenged or uncontested. Every international system includes the disenfranchised, the disenchanting, and the dissatisfied, and as the topography of power shifts and as normative winds change, challenges to the established constitutive regime will gain traction. These are moments of constitutive crisis.

Our contemporary world is in such a period of constitutive crisis. To understand the origins of the current crisis of world order, it is necessary to trace the genesis of the current Constitutive Regime of the International System, to examine how it evolved, and to identify how and by whom it is being challenged. While most commentators speak of a post-World War II liberal international order,<sup>188</sup> I argue that the world order currently in crisis is not the post-World War II order. Rather, starting in the 1970s the United States dismantled what I call the *Code of Coexistence*, which was the normative logic underlying the Constitutive Regime of the post-World War II era. Instead, the United States established what I call the *Code of Civilization* as the governing logic of the Constitutive Regime of the International System. This move from Coexistence to Civilization gained momentum after the end

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Czempiel & James N. Rosenau eds., 1989) [hereinafter GLOBAL CHANGES].

185. Karen Orren & Stephen Skowronek, *Regimes and Regime Building in American Government: A Review of Literature on the 1940s*, 113 POL. SCI. QUART. 689, 694 (1998-1999).

186. G. John Ikenberry, *Constitutional Politics in International Relations*, 4 EURO. J. INT'L REL. 147, 152 (1998) (“To achieve a legitimate order means to secure agreement among the relevant states on the basic rules and principles of political order. A legitimate political order is one where its members willingly participate and agree with the overall orientation of the system.”).

187. A perception of legitimacy facilitates the leadership of the great powers of the system by ensuring that other stakeholders continue to operate within the bounds of the system instead of seeking to challenge it. See Ian Hurd, *Legitimacy and Authority*, 53 INT'L ORG. 379, 388 (1999).

188. See Robert Kagan, *The Twilight of the Liberal World Order*, BROOKINGS (Jan. 24, 2017), <https://www.brookings.edu/research/the-twilight-of-the-liberal-world-order/> [https://perma.cc/T7NQ-MYM8].

of the Cold War. At the core of the Code of Civilization is the belief that maintaining peace and stability internationally is dependent on domestic good governance achieved by democratization and economic liberalization. This challenged the central precepts of the Code of Coexistence, which assumed that a stable and peaceful world order depended on maintaining a balance of power between the leading powers in the international system.

By the first decade of the twenty-first century, however, it became apparent that the attempt to reengineer the Constitutive Regime of the International System on the basis of the Code of Civilization had failed. Multiple factors including the shifting global balance of power combined with the global financial crisis, the dysfunction of democracy in many western powers, and the rise of populism spelled the failure of the attempt to turn the Code of Civilization into the governing logic of the Constitutive Regime of the International System. These are the claims to which I now turn in Part II of this Article.

## II. FROM COEXISTENCE TO CIVILIZATION: THE MAKING & REMAKING OF THE CONSTITUTIVE REGIME OF THE INTERNATIONAL SYSTEM

Before describing the contents of the Code of Coexistence and the Code of Civilization, three introductory remarks are in order:

*First*, the Code of Coexistence and the Code of Civilization are two contrasting worldviews; two different models for governing the international system. They are paradigms that are predicated on two diverging theories of world order that prescribe different policies for maintaining international peace and stability. These paradigms, therefore, generate wholly different Constitutive Regimes for the international system. In this Article, I have constructed these two paradigms as ideal types. They are not perfect descriptions of the political or legal reality of the international system. Neither of these paradigms has entirely determined the content of the Constitutive Regime of our contemporary world. Rather, the current international system exhibits elements of both these paradigms.<sup>189</sup> The utility of these paradigms is that they serve as instruments of systematization. They help identify the systematic pattern underlying the mass—or perhaps, mess—of rules, regimes, practices, policies, and institutions in the international system. They uncover the worldview that drives, animates, and shapes the doctrinal architecture and institutional infrastructure of the international system.

*Second*, as aforementioned, international systems occasionally experience constitutional crises and constitutional moments, which are

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189. Alexander Wendt & Raymond Duvall, *Institutions and International Order*, in GLOBAL CHANGES, *supra* note 184, at 51, 60 (noting that the system is both “‘socially integrated’ and ‘systematically integrated’—both *Gemeinschaft* and *Gesellschaft*.”).

periods of profound political change when a new form of conflict group emerges and seeks to establish itself as the predominant mode of organizing human society or when new hegemons recalibrate the normative orientation of the international system to accord with their values and interests. It is, therefore, common in international law and international relations to identify moments or events when the international system was fundamentally altered. This is the case with both the Code of Coexistence and the Code of Civilization. The origins of the former are traditionally traced to the 1648 Peace of Westphalia that ended the Thirty Years War,<sup>190</sup> while the latter has been associated with the adoption of the 1990 Paris Charter that marked the end of the Cold War.<sup>191</sup> These dates and events should not, however, be treated like political big bangs that created wholly novel international systems. 1648 and 1990, like the many milestones of conventional accounts of world history, are heuristic tools that simplify historical inquiry, research, and teaching.<sup>192</sup> The Peace of Westphalia and The Peace of Paris are not revolutionary moments or sharp breaks in the path of history. Rather, they are symbolic labels that denote what is in reality a gradual process during which ideas ferment and power is accumulated until a particular moment or crisis provides the occasion for the emergence of a distinct normative framework for regulating the international system.

*Third*, I am not the first to construct a dichotomy of paradigms to categorize a wide range of phenomena and patterns of relations at the international level. Many scholars have used similar tools of intellectual systematization, and it is important to recognize the parallels between those earlier works and the claims made in this Article. One of the distinguishing hallmarks of the Code of Coexistence and the Code of Civilization is that while the former envisages the system as a society of sovereign states, the latter envisions it as a community of humankind. This distinction, between a society of sovereigns and a community of humankind, echoes typologies developed by sociologists, political scientists, and international relations theorists seeking to describe different forms of social organization. Ferdinand Tönnies' *Gesellschaft* and *Gemeinschaft*,<sup>193</sup> Max

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190. See Derek Croxton, *The Peace of Westphalia of 1648 and the Origins of Sovereignty*, 21 INT'L HISTORY REV. 569 (1999).

191. IAN CLARK, INTERNATIONAL LEGITIMACY AND WORLD SOCIETY 153 (2007) [hereinafter CLARK, WORLD SOCIETY].

192. Barry Buzan & George Lawson, *Rethinking Benchmark Dates in International Relations*, 20 EURO. J. INT'L REL. 437, 439 (2014).

193. See FERDINAND TÖNNIES, COMMUNITY AND CIVIL SOCIETY 9, 17-18 (Jose Harris ed., Jose Harris & Margaret Hollis trans., 2001).



Weber's communal and associative relationships,<sup>194</sup> Michael Oakeshott's civil and enterprise associations,<sup>195</sup> and Terry Nardin's practical and purposive associations,<sup>196</sup> all share, to varying degrees, features of the dichotomy proposed here. The English School of international relations theory also devised typologies of the international system that bear similarities to the Code of Coexistence and the Code of Civilization.<sup>197</sup> Some international lawyers have also reflected on the nature of the international system as part of their inquiries into the role of international law in world politics, with some positing that the world is ultimately composed of a global community of humankind while others rejecting that claim and preferring to see the world as being "irreducibly divided into separate nations."<sup>198</sup>

### A. *The Code of Coexistence*

#### 1. *Genesis*

The Code of Coexistence should be readily recognizable to readers. The Constitutive Regime that it generated reflected the international system as it existed for most of the twentieth century. The Code of Coexistence assumed that states were the constituent units of the international system. Actors such as international organizations and corporations were recognized as performing important roles in international politics. Nonetheless, the Constitutive Regime designed by the Code of Coexistence recognized states as *the* principal player in international affairs. The terms of association of this Constitutive Regime assumed that guaranteeing world order required maintaining the peaceful coexistence of states and facilitating inter-state cooperation, hence the name—the Code of *Coexistence*.

According to a ubiquitous scholarly myth, the content of the Code of Coexistence originates in the peace agreements collectively known as the Peace of Westphalia.<sup>199</sup> The traditional storyline is that the

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194. MAX WEBER, *ECONOMY AND SOCIETY* 40-43 (Guenther Roth & Claus Wittich eds., 1978).

195. MICHAEL OAKESHOTT, *ON HUMAN CONDUCT* 112-122 (1975).

196. TERRY NARDIN, *LAW, MORALITY, AND THE RELATIONS OF STATES* 14 (1983).

197. Barry Buzan, *The English School: An Underexploited Resource in IR*, 27 *REV. INT'L STUD.* 471 (2001). See also MARTIN WIGHT, *INTERNATIONAL THEORY: THE THREE TRADITIONS* 5-24 (1996).

198. MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960*, at 32-33 (2001).

199. Hedley Bull, *The Importance of Grotius in the Study of International Relations*, in *HUGO GROTIUS AND INTERNATIONAL RELATIONS* 65, 76 (Hedley Bull et al. eds., 1992) [hereinafter HUGO GROTIUS].

Thirty Years War destroyed what was a politically integrated and religiously united Europe. “The arch constituted by the *res[ ]publica Christiana* was broken and its stones lay scattered across Europe,”<sup>200</sup> and the question for the delegates gathered at Osnabrück and Münster to negotiate a settlement for the Thirty Years War was how to reconstruct the European political order. The answer was “*cujus regio, ejus religio*” (whose region, their religion).<sup>201</sup> This principle provided the intellectual foundation of the modern international system. It recognized the supremacy of rulers within their realms and granted them the right to freely determine the governmental structure of their dominions. This effectively ended the medieval European political order in which the Pope and the Holy Roman Emperor had claimed supreme authority in divine and worldly matters.<sup>202</sup> The Peace of Westphalia, therefore, marked the emergence of a Europe divided into mutually exclusive, territorially parceled domains of political authority called states that recognized no supreme authority. States had become the dominant conflict group in Europe, and Westphalia ratified that political reality.<sup>203</sup>

The Constitutive Regime of the International System of the post-World War II era was predicated on these Westphalian assumptions. This Constitutive Regime, which was primarily designed by the United States, had two defining features. The first, obviously, was that it was resolutely state-centric; it adopted a principle of differentiation that identified the territorial state as the dominant conflict group in the system. The second feature of this Constitutive Regime was that it was liberal. Liberty under this Constitutive Regime was not, however, the liberty of individuals; it was the liberty of states.<sup>204</sup> All states were at liberty to organize their domestic political and economic systems as they saw fit, and all states were invited to join an open international system in which they could cooperate to achieve their common interests.<sup>205</sup> This liberal Code of Coexistence generated a Constitutive Regime that led to the creation of a series of international legal regimes

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200. ROBERT JACKSON, SOVEREIGNTY 53 (2007).

201. Although *cujus regio, ejus religio* is more renowned, “[r]ex in regno suo est [i]mperator regni sui” (within his realm, the King is Emperor) better expresses the logic of Westphalia. See Georg Sørensen, *Sovereignty: Change and Continuity in a Fundamental Institution*, 47 POL. STUD. 590, 591 (1999).

202. Jason Farr, *Point: The Westphalian Legacy and the Modern Nation-State*, 80 INT’L SOC. SCI. REV. 156, 156 (2005).

203. This is a highly stylized account of the Peace of Westphalia. See Benjamin de Carvalho et al., *The Big Bangs of IR: The Myths that Your Teachers Still Tell You About 1648 and 1919*, 39 MILLENIUM: J. INT’L STUD. 735, 740 (2011).

204. JOHN RUGGIE, CONSTRUCTING THE WORLD POLITY 148 (2002) (noting that Westphalia promoted political liberty—“the political liberty, that is, of states”).

205. STEWART PATRICK, THE BEST LAID PLANS: THE ORIGINS OF AMERICAN

and international institutions, the purpose of which was to promote and protect the liberty of states and to facilitate inter-state cooperation.

## 2. *The Principle of Differentiation of the International System*

The principle of differentiation of this Constitutive Regime is most evident in the area of self-determination. As the institution of colonialism became universally condemned, it was accepted that the peoples of Europe's colonies would be granted the right to determine their political future. In exercising this right to self-determination, these colonies were given three options all of which accorded with the state-centric principle of differentiation: "(a) [e]mergence as a sovereign independent State; (b) [f]ree association with an independent State; or (c) [i]ntegration with an independent State."<sup>206</sup> Organizing human societies into anything other than states was inconceivable.<sup>207</sup> The Constitutive Regime designed by the Code of Coexistence essentially universalized the European mode of dividing human society into sovereign states.

This principle of differentiation also determined the criteria that must be met by an entity to qualify as a state. These criteria, which, as discussed above, were codified in the Montevideo Convention on the Rights and Duties of States, required a putative state to possess a permanent population; territory; government; and the "capacity to enter into relations with the other states."<sup>208</sup> Nowhere in the Convention, however, was there any preference for any particular form of government. Those in power were not required to demonstrate that they were democratically elected or that they were accepted as the legitimate rulers of the state. All that was required was that a government exercise effective control over a population on a defined territory.<sup>209</sup> This reflected the liberalism of the Code of Coexistence. The post-World War II Constitutive Regime entitled states to organize their governments in a manner that reflected their own self-evident truths, their own worldviews, and their unique conceptions of morality and justice.<sup>210</sup>

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MULTILATERALISM AND THE DAWN OF THE COLD WAR xi (2009) ("The goal of this effort was to create an *open world*—a rule-based global order in which peace-loving countries could cooperate to advance their common purposes within international institutions.")

206. G.A. Res. 1541 (XV), at 29 (1960).

207. See KAREN KNOP, *DIVERSITY AND SELF-DETERMINATION IN INTERNATIONAL LAW* (2002).

208. Montevideo Convention, *supra* note 123.

209. JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 45 (1979).

210. Robert Rosenstock, *The Declaration of Principles of International Law Concerning Friendly Relations: A Survey*, 65 AM. J. INT'L L. 713, 734 (1971).

It is universally assumed that the post-World War II international system was composed of *nation-states*.<sup>211</sup> This is a misconception. Nations are “imagined communities.”<sup>212</sup> They are socially-constructed identities based on sentiments of loyalty and attachment that are felt by individuals who share certain characteristics. As the Permanent Court of International Justice explained, a community is “a group of persons living in a given country or locality, having a race, religion, language and traditions of their own and *united by this identity of race, religion, language and traditions in a sentiment of solidarity*.”<sup>213</sup> However, nowhere in international law was it required for such a “sentiment of solidarity” to exist among a population for an entity to qualify as a state. International law did not establish any *sociological* or *anthropological* prerequisites for statehood. Nowhere was it required to demonstrate any symmetry between *nationhood* and *statehood* or to show that a state is the juridical/political representative of a nation.<sup>214</sup> States may be racially, ethnically, or religiously monolithic—although I doubt any such state exists—and thus represent a specific nation; but more often states contain a diverse citizenry that belong to various “nations.” These are the legal manifestations of a substantively minimalist principle of differentiation. It created a substantively low threshold for entities to qualify for statehood: all that was required was the formation of a government that controlled a territory and a population (even if by sheer coercion),<sup>215</sup> regardless of the social composition of that population.

This principle of differentiation generated the cornerstone principle of post-war international law: the sovereign equality of states. Sovereignty, here, was the sovereignty of states. It was an entitlement to liberty; a right for states to reign supreme within their territory. As Max Huber explained in his *Island of Palmas* decision, “[s]overeignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State.”<sup>216</sup> Once admitted into the system, all states enjoyed equal rights. Monarchies,

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211. CONNIE L. MCNEELY, *CONSTRUCTING THE NATION-STATE: INTERNATIONAL ORGANIZATION AND PRESCRIPTIVE ACTION 1* (1995).

212. BENEDICT ANDERSON, *IMAGINED COMMUNITIES* (rev. ed. 2006).

213. Interpretation of the Convention between Greece and Bulgaria Respecting Reciprocal Emigration, Advisory Opinion, 1930 I.C.J. 1930 (Jul. 31) (emphasis added).

214. On statehood and nationhood in international law, see Nathaniel Berman, “*But the Alternative Is Despair*”: *European Nationalism and the Modernist Renewal of International Law*, 106 HARV. L. REV. 1792 (1993).

215. Most states emerged out of armed conflicts. After all, as Charles Tilly noted: “War made the state, and the state made war!” THE FORMATION OF NATIONAL STATES IN WESTERN EUROPE 42 (Charles Tilly ed., 1975).

216. *Island of Palmas* (Neth. v. U.S.), Hague Ct. Rep. 2d (Scott) 83, 92 (Perm. Ct. Arb. 1928).

communist republics, liberal democracies, Islamic republics, and The Holy See were treated as equals. All were granted the full rights, obligations, and competences appertaining to statehood.<sup>217</sup>

### 3. *The Terms of Association of the International System*

The terms of association of the Constitutive Regime of the post-World War II international system also reflected the state-centrism and liberalism of the Code of Coexistence. As discussed in Part I, the terms of association are a theory of world order. They are principles, policies, and practices that are assumed to be the most effective approach to maintaining order in an anarchic system. The terms of association of the post-war Constitutive Regime reflected the historical background of the Peace of Westphalia.

Because it emerged out of a revolt against centralized political and religious authority, the Peace of Westphalia sought to resist the resurrection of hierarchical authority and to preserve political and ideological pluralism in the international system. The post-war Constitutive Regime was based on similar assumptions. It accepted the reality that the system was inhabited by states that espouse divergent ideological outlooks and pursue diverse interests. This Constitutive Regime did not seek to eliminate these ideological differences. Rather, it was intended to provide a normative environment that, on the one hand, afforded states the liberty to organize their societies according to their ideological preferences and to freely pursue their political and economic interests, both individually and collectively, while on the other hand, protecting the sovereignty, safety, and autonomy of states.

In other words, this Constitutive Regime not only preserved the *internal* liberty of states (by allowing them to freely determine the nature of their government), but it also preserved the *external* liberty of states by recognizing the freedom of states to pursue their interests, either individually or in cooperation with other states. This freedom of states was only limited by the general obligation to respect the freedom and liberty of other states.<sup>218</sup> Maintaining peace and stability in this liberal order required creating mechanisms that would enable these co-equal states to coexist and cooperate peacefully. That was the overarching objective of international law and international institutions in the post-war years.

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217. Georg Schwarzenberger, *The Grotius Factor in International Law and Relations: A Functional Approach*, in HUGO GROTIUS, *supra* note 199, at 301, 311.

218. SHAW, *supra* note 129, at 154. (“The starting point for the consideration of the rights and obligations of states within the international legal system remains that international law permits freedom of action for states.”).

#### 4. *The Secondary Rules of International Law*

The third element of the Constitutive Regime of the International System is the secondary rules of international law, which determine the lawmaking, law-enforcement, and dispute resolution mechanisms in the international system. Like the principle of differentiation and terms of association, the Constitutive Regime of the post-World War II era generated a state-centric set of secondary rules. The oft-quoted *Lotus Case* embodies this state-centrism: “International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law . . . . Restrictions upon the independence of States cannot therefore be presumed.”<sup>219</sup> Securing state consent, in other words, was the prerequisite that every rule must satisfy to qualify as valid international law.<sup>220</sup> Even grand multilateral treaties such as the Vienna Convention on the Law of Treaties or the Convention on the Law of the Sea are binding only on those states that consent to them.<sup>221</sup> Similarly, custom is the product of a continuous inter-state conversation; the claims of one state are met with either the consent or counter-claims of other states, and as opinion converges on certain practices, that practice evolves into binding law for all states, except those that persistently object to an emerging practice.<sup>222</sup> Taken to its logical extremity, this means that under these state-centric secondary rules, there is no single body of universal international law. What counts as law for one state is not necessarily valid law for another.<sup>223</sup> International law, therefore, appears less like an integrated legal order that equally governs all of its subjects and more like a cobweb of bilateral legal relations between states.<sup>224</sup>

The statist nature of the secondary rules is most palpable in the mechanisms for enforcing international law. For scholars and laypersons alike, the gravest failure of international law, perhaps even the

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219. S.S. *Lotus* (France v. Turkey), Judgment, 1927 P.C.I.J. (Ser. A) No. 10, at 18 (Sept. 7).

220. Tom Farer, *Toward an Effective International Legal Order: From Coexistence to Concert?*, 17 CAMBRIDGE REV. INT'L AFF. 219, 221 (2004).

221. G. M. DANILENKO, LAW-MAKING IN THE INTERNATIONAL COMMUNITY 53 (1993).

222. Jonathan I. Charney, *The Persistent Objector Rule and the Development of Customary International Law*, 56 BRITISH Y.B. INT'L L. 1 (1985).

223. Christian J. Tams, *Individual States as Guardian of Community Interests*, in FROM BILATERALISM TO COMMUNITY INTERESTS: ESSAYS IN HONOR OF JUDGE BRUNO SIMMA 379, 382 (Ulrich Fastenrath et al. eds. 2011) (discussing the “essentially relative character of international obligations”) (internal quotation marks omitted).

224. ANTONIO CASSESE, INTERNATIONAL LAW 14 (2d ed. 2005) (“International rules, even though they address themselves to all [s]tates (in case of customs) or groups of [s]tates (in the case of multilateral treaties), confer rights or impose obligations on *pairs of [s]tates only*.”).

greatest indictment against its status as a legal system, is its unenforceability due to the absence of a central law-enforcer.<sup>225</sup> This, however, is a fallacy. The secondary rules of international law provide multiple means of enforcing legal rights; only these are mechanisms that reflect its state-centric Constitutive Regime. As aforementioned, this Constitutive Regime was inspired by the Code of Coexistence which protects states against attempts to establish a central political authority in the system. Therefore, all judicial settlement of disputes was made dependent on the consent of the litigant states.<sup>226</sup> In addition, non-judicial dispute settlement and law-enforcement mechanisms were created that also reflected the state-centrism of this Constitutive Regime.<sup>227</sup> These included diplomatic protection<sup>228</sup> and countermeasures,<sup>229</sup> which are decentralized mechanisms that are available for states to use at their discretion to respond to violations of international law and to vindicate their rights. These mechanisms were obviously ineffective, but they served a deeper purpose. They reflected the state-centrism of a Code of Coexistence that sought to preserve the liberty of states, even at the cost of the effectiveness of international law.

##### 5. *Managing the International System Under the Code of Coexistence*

This Constitutive Regime provided the ideational DNA of the post-World War II international order. It shaped the structure of the international institutions that were established in the post-war years, determined the policies that these institutions promoted, and molded the content of post-war international law. A distinguishing structural feature of post-war international institutions, which were shaped principally by the United States, was their “openness.”<sup>230</sup> U.N. membership,

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225. Oona Hathaway & Scott J. Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 YALE L.J. 252, 256 (2011) (“Since international law lacks mechanisms of physically coercive enforcement, it cannot affect behavior in the right way and hence cannot be a real legal system.”).

226. Alain Pellet, *Judicial Settlement of International Disputes*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Rudolph Bernhardt ed., 2013).

227. D.W. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW 3 (1958) (“[T]he enforcement of the law and the protection of rights recognized by the law is, traditionally, a task delegated to or retained by the . . . the sovereign states.”).

228. International Rep. of the Int’l Law Comm’n on the Work of its Fifty-Eighth Session, U.N. Doc. A/61/10, at 26-27 (2006).

229. Mary Ellen O’Connell, *Controlling Countermeasures*, in INTERNATIONAL RESPONSIBILITY TODAY: ESSAYS IN MEMORY OF OSCAR SCHACHTER 49 (Maurizio Ragazzi ed., 2005).

230. See generally John Gerard Ruggie, *Multilateralism: The Anatomy of an Institution*, 46 INT’L ORG. 561 (1992).

for instance, was open to all “peace-loving states”<sup>231</sup>—a non-discriminatory criterion that permitted states of every political persuasion to join the organization.<sup>232</sup> This allowed a United States-led western bloc, its rival Communist bloc, and a non-aligned Third World to coexist, albeit uneasily, and to occasionally cooperate. The post-war Constitutive Regime did not seek to end ideological contestation. Rather, it constructed an open system in which multilateral institutions provided forums that were open to states with opposing ideologies and interests to coexist, cooperate, and even compete, but to do so peacefully.

The rules and institutions created after World War II in the area of international security also reflected these assumptions. For centuries, war was accepted as a sovereign right of states—the *ultima ratio regum*. War was a legitimate instrument of national policy and states were permitted to resort to war to settle disputes and vindicate their rights.<sup>233</sup> By the end of World War II, however, war was outlawed and states were prohibited from the use of force against other states.<sup>234</sup> This rule, which is presumably a cardinal principle of international law,<sup>235</sup> was combined with an obligation not to intervene in the internal or external affairs of states and the requirement to settle disputes peacefully.<sup>236</sup> These rules reflected the liberalism of the post-war Constitutive Regime. It sought to maximize the liberty of states by protecting their sovereignty and territorial integrity and to maintain order by minimizing the prospect of inter-state war.

The structure and powers of the U.N. Security Council also echoed the assumptions underlying the post-war Constitutive Regime. World order, according to this Constitutive Regime, depended on maintaining peace between states. Accordingly, the Security Council was granted virtually limitless powers to take measures, including waging war, to protect states against threats to the peace, breaches of the peace, or acts of aggression.<sup>237</sup> However, because some states enjoyed superior military capabilities, which made them a potentially greater threat to

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231. U.N. Charter art. 4, ¶ 1.

232. THOMAS D. GRANT, *ADMISSION TO THE UNITED NATIONS: CHARTER ARTICLE 4 AND THE RISE OF UNIVERSAL ORGANIZATION* (2009).

233. Josef L. Kunz, *Bellum Justum and Bellum Legale*, 45 AM. J. INT'L L. 528, 528 (1951).

234. See OONA A. HATHAWAY & SCOTT J. SHAPIRO, *THE INTERNATIONALISTS* (2017).

235. *Cases Concerning Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 189 (1986).

236. U.N. Charter art. 2, ¶ 3, 7.

237. Niels Blokker, *The Security Council and the Use of Force: On Recent Practice*, in *THE SECURITY COUNCIL AND THE USE OF FORCE* 1, 8 (Niels Blokker & Nico Schrijver eds., 2005).



world order, the principal objective of the Security Council was to prevent war between these great powers.<sup>238</sup> Therefore, the founding fathers of the United Nations, who were also the leaders of the most powerful states in the system, granted their countries permanent membership on the Security Council, and bestowed upon themselves an unfettered right to block Security Council action that they deemed could threaten their vital interests.<sup>239</sup> These features of the Security Council were expressions of the basic assumptions underlying the international system. This was a multilateral forum that was open to all states, and that extended to all states a pledge to consider intervening to protect their sovereignty and independence if they were threatened, while simultaneously providing an institutional mechanism for ideologically divergent great powers to coexist and cooperate in the management of the international system.<sup>240</sup>

The structure and policies promoted by the institutions that were established in the area of international economic governance in the post-war years were also shaped by the Constitutive Regime based on the Code of Coexistence. These institutions, especially the IMF, World Bank, and the GATT Agreement—collectively known as the Bretton Woods institutions—operated on the basis of a single logic that John Ruggie called “embedded liberalism.”<sup>241</sup> The Bretton Woods institutions—which implemented Keynesian economic policies—were liberal because they created and managed a multilateral regime for economic management and trade that was open to all states to join on the basis of non-discriminatory rules such as the Most Favored Nation principle.<sup>242</sup> In addition, these international institutions were state-centric; they promoted policies that sought to preserve the liberty and policy-autonomy of states. Governments were afforded considerable latitude by these institutions to manage domestic economies in accordance with their “different national traditions and con-

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238. Bart M.J. Szewczyk, *Variable Multipolarity and U.N. Security Council Reform*, 53 HARV. INT'L L.J. 449, 472 (2012).

239. James S. Sutterlin, *The Past as Prologue*, in THE ONCE AND FUTURE SECURITY COUNCIL 1, 3 (Bruce Russett et al. eds., 1997).

240. Mohamed S. Helal, *Am I My Brother's Keeper? The Reality, Tragedy, and Future of Collective Security*, 6 HARV. NAT'L SEC. J. 383, 435 (2015); Mohamed S. Helal, *The Myth of U.N. Collective Security*, 32 EMORY INT'L L. REV. 1063 (2018).

241. John Gerard Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, 36 INT'L ORG. 379, 393-98 (1982).

242. See G. John Ikenberry, *The Political Origins of Bretton Woods*, in A RETROSPECTIVE ON THE BRETTON WOODS SYSTEM: LESSONS FOR INTERNATIONAL MONETARY REFORM 155, 161-164 (Michael D. Bordo & Barry Eichengreen eds., 1993) [hereinafter RETROSPECTIVE ON BRETTON WOODS].

figurations of interests among leading social sectors. Indeed, securing such a degree of domestic policy autonomy was among [embedded liberalism's] central objectives."<sup>243</sup>

The post-war international economic order was also protective of the state. It encouraged states to exercise their powers of monetary and fiscal management to protect against the economic and social dislocations caused by the free flow of capital that contributed to the Great Depression. These policies, which were especially dominant in the United States, reflected a Keynesian post-war consensus on the need to empower states to implement measures that would promote growth and secure full employment and offer largescale welfare programs to their populations.<sup>244</sup> The combination of these elements meant that the post-war economic order provided institutions through which states could pursue their common interest in engaging in international trade, while being protective of state autonomy by according states considerable latitude in designing and implementing domestic socio-economic policies.

The rules and institutions created in other areas of global governance reflected a similar pattern of state-centrism and liberalism. These rules and institutions were open to all states and sought to promote inter-state cooperation while protecting the sovereignty and autonomy of states. Indeed, not only were post-war international law and institutions protective of the state, they were also, in many respects, state-empowering. As Anne-Marie Slaughter observed, many of the rules and institutions of the post-World War II years were designed on the basis of a belief—espoused principally by the United States, but also shared by the great powers of that era—that effectively managing the international system required states to exercise significant regulatory powers and to enjoy policy autonomy in determining and implementing domestic political, economic, and social policy.<sup>245</sup> This, in short, was the era of big government. States were encouraged to exercise greater authority in domestic and global governance. The Constitutive Regime of the post-war years protected the ability of state bureaucracies to exercise policy autonomy domestically and promoted greater involvement of state bureaucracies internationally.

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243. John Gerard Ruggie, *Global Markets and Global Governance*, in GLOBAL LIBERALISM AND POLITICAL ORDER 23, 26 (Steven Bernstein & Louis W. Pauly eds., 2007).

244. Christopher Pierson, *Origins and Development of the Welfare State 1880-1975*, in 2 WELFARE AND THE STATE: CRITICAL CONCEPTS IN POLITICAL SCIENCE 47, 69 (Nicholas Deakin et al. eds., 2004).

245. Anne-Marie Burley, *Regulating the World: Multilateralism, International Law, and the Projection of the New Deal Regulatory State*, in MULTILATERALISM MATTERS 125, 126, 141-48 (John Gerard Ruggie ed., 1993) ("In virtually every issue area, ranging from the Food and Agricultural Organization to the projected International Trade Organization to the International Civil Aviation Organization, U.S. policymakers sought to establish autonomous, centralized, and relatively depoliticized regulatory organizations.").

Concluding this Section presents an opportunity to recapitulate one of the central claims of this Article. The international system is not a haphazard collection of actors, rules, and institutions. Rather, the international system is arranged according to a specific logic; its structure and content are patterned. The Constitutive Regime is a theoretical construct that helps uncover the logic underlying the international system. In this Section, I argue that the victors of World War II, led by the United States, articulated a Constitutive Regime inspired by the Code of Coexistence. This was a liberal state-centric paradigm that adopted the Westphalian assumption that states are the predominant conflict group of the international system. This paradigm created an open system that all states could join on equal terms and assumed that maintaining world order required protecting states against threats to their survival, empowering states to exercise greater authority in domestic and international governance, and providing the legal and institutional tools to facilitate inter-state cooperation.

## B. *The Code of Civilization*

### 1. *Genesis*

Beginning in the 1970s, the United States and its allies began to articulate an alternative vision of world order. This vision did not, initially, reflect a purposive program to revise the normative foundations of the international system. Rather, this vision crystallized over several years as a result of the confluence of various factors including domestic political realignments and shifting economic interests in the United States and Western Europe. By the end of the Cold War, however, this vision had evolved into a holistic normative agenda—which I call the Code of Civilization—that sought to remold the Constitutive Regime of the International System.

The Code of Civilization is anti-pluralistic.<sup>246</sup> Instead of a liberal system that is open to all states, it sought to construct a system based on single model of statehood. According to this paradigm, democratic states that adopt a neoliberal model of economic governance ought to be the sole legitimate form of states. The Code of Civilization influenced every aspect of global governance in the post-Cold War years. It promoted the democratization of states, the deregulation, liberalization, and integration of their economies, and the protection of human rights. It also reconfigured international lawmaking by granting a wide range of actors, such as civil society organizations, corporate actors, and international organizations, greater lawmaking and norm-creation authority. The Code of Civilization provided the normative DNA of the globalized world of the post-Cold War era. Globalization,

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246. Simpson, *supra* note 54, at 537.

in other words, did not just happen; it was state-sponsored and orchestrated, especially by the United States. Globalization depended on and operated through rules, institutions, policies, and practices that were enabled, facilitated, and justified by a Constitutive Regime inspired by the Code of Civilization, which was designed and implemented by the United States.<sup>247</sup>

This means that during the final decades of the twentieth century, the United States behaved like a revisionist power.<sup>248</sup> It is a widely held assumption that “the American vision as to what constitutes a desirable world order has been clear and consistent, and it embodies certain key multilateral principles: movement toward greater openness, greater nondiscrimination of treatment, and more extensive opportunities to realize joint gains.”<sup>249</sup> This Section challenges this assumption. It demonstrates that starting in the 1970s, the United States remade the Constitutive Regime of the International System in its own image by universalizing a liberal democratic and economically neoliberal model of statehood.<sup>250</sup> This generated an order that was less open, less multilateral, and more discriminatory, which constitutes a significant departure from the post-World War II order that the United States sponsored.

I call this paradigm the Code of Civilization because it erects a standard of civilization for the international system. During the nineteenth century, Europe required non-European societies to satisfy a “Standard of Civilization” to gain admittance to the “Family of Nations.”<sup>251</sup> The Code of Civilization performs a similar function. It articulates a vision of how states and societies ought to operate and makes full membership of the international system contingent on implementing that vision. This required states to democratize their political systems and deregulate and their economies. As various scholars recognized, this constitutes a standard of civilization<sup>252</sup>—hence the label: Code of *Civilization*.

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247. Gary Teeple & Stephen McBride, *Introduction*, in *RELATIONS OF GLOBAL POWER*, at ix, x (Gary Teeple & Stephen McBride eds., 2011) (“[N]eoliberal globalization has always been underpinned by a set of institutions, formal and informal, public and private, global and national . . .”).

248. See Randall L. Schweller, *Neorealism's Status-Quo Bias: What Security Dilemma?*, in *REALISM: RESTATEMENTS AND RENEWAL* 90, 98 (Benjamin Frankel ed., 1996).

249. John Gerard Ruggie, *Third Try at World Order? America and Multilateralism After the Cold War*, 109 *POL. SCI. QUAR.* 553, 560 (1994).

250. See generally Randall Schweller, *Emerging Powers in an Age of Disorder*, 17 *GLOBAL GOVERNANCE* 285 (2011) (discussing how the United States engaged in “remaking the world in its own image”).

251. See GERRIT W. GONG, *THE STANDARD OF 'CIVILIZATION' IN INTERNATIONAL SOCIETY* 1-6 (1984) (internal quotation marks omitted).

252. Benedict Kingsbury, *Sovereignty and Inequality*, in *INEQUALITY, GLOBALIZATION, AND WORLD POLITICS* 66, 90-91 (Andrew Hurrell & Ngaire Woods eds., 1999); Edward Keene,

States that satisfied this standard of civilization became “responsible stakeholder[s],”<sup>253</sup> while those who failed to live up to this standard were ostracized as “outcasts”<sup>254</sup> and “pariahs.”<sup>255</sup>

## 2. *The Terms of Association of the International System*

The terms of association of the post-Cold War Constitutive Regime are its most distinctive feature. Therefore, I will first outline these terms of association before discussing the principle of differentiation of this Constitutive Regime. But first, a recap: the terms of association of the international system articulate a theory of world order. They express a worldview—a narrative or reading of history—that generates normative prescriptions about how to govern the world. The theory of world order espoused by the Code of Civilization is predicated on the Liberal peace theory. This theory argues that liberal democracies, in which individual rights are guaranteed, where governments are elected in free and fair elections, and that are economically interdependent are less likely to wage war against each other.<sup>256</sup>

This theory is based on an observation that,<sup>257</sup> at least since the nineteenth century, liberal democracies have fought few, if any, wars against each other.<sup>258</sup> Liberal peace theory makes a profound causal claim on the basis of this historical observation. It suggests that it is the very nature of democracy that *causes* democratic states not to wage war. Instead of the traditional explanations for the outbreak of war or the prevalence of peace, such as geopolitical realities or strategic considerations, this theory argues that it is the restraints of democratic government, especially the requirements of transparency and political accountability, and the constraints of economic interdependence that

*The Standard of ‘Civilisation’, the Expansion Thesis and the 19th-Century International Social Space*, 42 MILLENNIUM: J. INT’L STUD. 651, 652 (2014); David P. Fidler, *The Return of the Standard of Civilization*, 2 CHI. J. INT’L L. 137, 150 (2001).

253. Robert B. Zoellick, *Whither China: From Membership to Responsibility?*, U.S. DEP’T STATE (Sept. 21, 2005), <https://2001-2009.state.gov/s/d/former/zoellick/rem/53682.htm> [<https://perma.cc/B2WN-Y3YX>] (remarks to the National Committee on U.S.-China Relations).

254. Annita Lazar & Michelle M. Lazar, *The Discourse of the New World Order: ‘Out-casting’ the Double Face of Threat*, 15 DISCOURSE & SOC’Y 223, 227 (2004).

255. Rebecca Adler-Nissen, *Stigma Management in International Relations: Transgressive Identities, Norms, and Order in International Society*, 68 INT’L ORG. 143, 144 (2014) (internal quotation marks omitted).

256. Michael W. Doyle, *Three Pillars of the Liberal Peace*, 99 AM. POL. SCI. ASSOC. 463, 463 (2005).

257. This observation is not unchallenged. See David Spiro, *The Insignificance of the Liberal Peace*, 19 INT’L SECURITY 50, 51 (1994).

258. David A. Lake, *Powerful Pacifists: Democratic States and War*, 86 AM. POL. SCI. REV. 24, 33 (1992).

prevent war.<sup>259</sup> On the other hand, repressive regimes that deny the fundamental freedoms of their citizens and maintain their rule by coercion and intimidation are assumed to be “in a permanent state of aggression against their own people,”<sup>260</sup> which makes these states prone to behave aggressively in international relations.

Despite criticisms of the empirical methods employed by liberal peace theorists and doubts regarding the veracity of the purported causal link between democratic government and peace,<sup>261</sup> many international relations theorists adhere to liberal peace theory as an article of faith.<sup>262</sup> One scholar even declared that “[t]his absence of war between democracies comes as close as anything we have to an *empirical law* in international relations.”<sup>263</sup> Faith in the liberal peace theory extends far beyond the academy. Indeed, it is not an exaggeration to contend that belief in the superiority of liberal democracy and the assumption that democratic states are less prone to wage war were among the governing ideals of post-Cold War American foreign policy.<sup>264</sup>

It is not hard to imagine the policy prescriptions that flow from liberal peace theory. Preventing war and maintaining order, according to liberal peace theory, require promoting and spreading democratic government. Obviously, opinions differ over the methods of proselytizing for democracy. Ultimately, however, proponents of liberal peace theory, whether liberal internationalists or neoconservatives, concur that

259. BRUCE RUSSETT, GRASPING THE DEMOCRATIC PEACE 11 (1993).

260. Michael W. Doyle, *Kant, Liberal Legacies, and Foreign Affairs, Part 2*, 12 PHIL. & PUB. AFF. 323, 325 (1983).

261. Spiro, *supra* note 257, at 51 (“[T]he absence of wars between liberal democracies is not, in fact, a significant pattern for most of the past two centuries . . . [T]he results rest on methods and operationalization of variables that undergo contortions before they yield apparently significant results.”).

262. JOHN MACMILLAN, ON LIBERAL PEACE: DEMOCRACY, WAR AND THE INTERNATIONAL ORDER 1 (1998) (“[T]he contention that liberal states, or democracies, do not go to war against each other has become a central theme of recent debate in [i]nternational [r]elations.” (footnotes omitted)).

263. Jack S. Levy, *Domestic Politics and War*, 18 J. INTERDISC. HIST. 653, 662 (1988) (emphasis added).

264. JOHN M. OWEN IV, LIBERAL PEACE, LIBERAL WAR 7 (1997) (“Outside the academy, liberal peace has rekindled flickering hopes that perpetual peace is within humankind’s grasp . . . . In Washington, both Democrats and Republicans profess to believe in liberal peace. . . . Liberal peace has provided a ready-made principle for foreign policy makers . . . .”); ROBERT JERVIS, AMERICAN FOREIGN POLICY IN A NEW ERA (2013), [https://books.google.com/books/about/American\\_Foreign\\_Policy\\_in\\_a\\_New\\_Era.html?id=\\_bf42wD8hMoC&printsec=frontcover&source=kp\\_read\\_button#v=onepage&q=taps&f=false](https://books.google.com/books/about/American_Foreign_Policy_in_a_New_Era.html?id=_bf42wD8hMoC&printsec=frontcover&source=kp_read_button#v=onepage&q=taps&f=false) (discussing how the claim made in the 2002 U.S. National Security Strategy that there is “‘a single sustainable model for national success: freedom, democracy, and free enterprise’ . . . . [T]aps deep American beliefs and traditions enunciated by Woodrow Wilson and echoed by Jimmy Carter and Bill Clinton, and is linked to the conceit, common among powerful states, that America’s values are universal and their spread will benefit the entire world.”).

converting more countries into liberal democracies is the surest guarantee of world order.<sup>265</sup> The prescriptions of liberal peace theory also extend to economic governance. The argument, in short, is that trade has a tempering effect on politics. As the volume of inter-state trade increases and as domestic economic actors become integrated in transnational chains of production, governments will face resistance to engaging in conflict that threatens or severs profitable economic contacts.<sup>266</sup> Liberal peace theory, therefore, prescribes deregulating markets, limiting state intervention in economic activities, removing restraints on trade, and encouraging private enterprise to enmesh the state in a global economic system. As Michael Doyle, a leading liberal peace theorist, writes: “[t]he ‘spirit of commerce’ spreads widely[,] creat[ing] incentives for states to promote peace and to try to avert war.”<sup>267</sup>

The Code of Civilization is, therefore, not only a bid to revisit the normative foundations of the international system, but also an attempt to reengineer the state. It promoted a two-pronged liberalization of the state: (1) political liberalization to protect individual rights and increase popular participation in politics (i.e., *democratization*); and (2) economic liberalization and deregulation through “policies that reduce government constraints on economic behavior and thereby promote economic exchange: ‘*marketization*.’”<sup>268</sup>

### 3. *The Principle of Differentiation of the International System*

This bid to ‘democratize’ and ‘marketize’ the state shaped the principle of differentiation of the post-Cold War Constitutive Regime. The post-World War II Constitutive Regime had not expressed any preferences regarding the domestic political or economic structure of states. The Code of Civilization, on the other hand, introduced a requirement that states adopt a democratic and economically liberal form of gov-

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265. C. BRADLEY THOMPSON & YARON BROOK, *NEOCONSERVATISM* 54 (2010) (“Throughout the 1990s, the neoconservatives advocated a strong and aggressive U.S. foreign policy that would seek to proactively overthrow threatening (and nonthreatening) regimes and to replace them with peaceful ‘democracies.’”); Roland Paris, *Peacebuilding and the Limits of Liberal Internationalism*, 22 *INT’L SECURITY* 54, 56 (1997) (“The central tenet of [liberal internationalism] is the assumption that the surest foundation of peace, both within and between states, is market democracy, that is, a liberal democratic polity and a market-oriented economy.”).

266. John Oneal & Bruce Russett, *Assessing the Liberal Peace with Alternative Specifications: Trade Still Reduces Conflict*, 36 *J. PEACE RES.* 423, 423-24 (1999).

267. Doyle, *supra* note 256, at 464.

268. Beth Simmons et al., *Introduction: The Diffusion of Liberalization*, in *THE GLOBAL DIFFUSION OF MARKETS AND DEMOCRACY* 1-2 (Beth A. Simmons et al. eds., 2007).

ernment that protects basic human rights and promotes private enterprise to be eligible for full membership in the international system.<sup>269</sup> Moreover, to retain membership in the system and to continue to enjoy the full rights and privileges of statehood, existing states were encouraged to transition towards democratic government and to implement neoliberal economic reforms. In other words, the Code of Civilization made illiberal states less legitimate and less worthy of full membership in the international system.<sup>270</sup>

The Code of Civilization, therefore, reconfigured the cornerstone of post-World War II international law: the principle of the sovereign equality of states. Not all states, according to the Code of Civilization, are born equal, and not all states deserve to be treated equally. Rather, only liberal democratic states merit the full rights, privileges, and competences of statehood.<sup>271</sup> Dictatorships, undemocratic or illiberal states, or states that systematically violate human rights are condemned as rouges and outlaws to be sanctioned, reformed, and disciplined.<sup>272</sup> In addition to discarding the juridical equality of states, the Code of Civilization rejected the assumption that sovereignty is the birthright of states. Rather, sovereignty under the Code of Civilization ultimately belonged to the individual citizens of states. The Code of Civilization was, therefore, predicated on a concept of *popular* sovereignty, not *state* sovereignty.<sup>273</sup> Accordingly, states that egregiously violate the human rights may be stripped of sovereignty. Those states simply do not merit the protections of their safety, security, and territorial integrity that flow from sovereignty. As Rosa Brooks argued:

[S]overeignty is less a right inherent in all states than a privilege that must be earned through good behavior. A state is required to execute certain responsibilities. If it fails to do so, external actors have a right—perhaps an obligation—to step in themselves to ensure proper execution of its responsibilities.<sup>274</sup>

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269. See JURE VIDMAR, *DEMOCRATIC STATEHOOD IN INTERNATIONAL LAW* (2013).

270. Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?*, 93 AM. J. INT'L L. 596, 599 (1999) (arguing that “democracy has become the touchstone of legitimacy” of states).

271. STEVEN R. RATNER, *THE THIN JUSTICE OF INTERNATIONAL LAW* 188 (2015) (asserting that states that are “unwilling to commit to certain basic norms of human rights law do not automatically receive the privileges of statehood”).

272. GERRY SIMPSON, *GREAT POWERS AND OUTLAW STATES* 280-81 (2004).

273. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866, 866-67 (1990).

274. Rosa Brooks, *Lessons for International Law from the Arab Spring*, 28 AM. U. INT'L L. REV. 713, 718 (2013) (footnotes omitted).



#### 4. *The Secondary Rules of International Law*

The principle of differentiation and terms of association of the Code of Civilization had a notable effect on the secondary rules of international law in the post-Cold War international system. This did not entail a wholesale dismantling of international law as it existed since World War II. States continued to contract treaties, customary norms continued to crystalize, and institutions such as the International Court of Justice continued to operate on the bases of their traditional statist rules. The Code of Civilization did, however, generate lawmaking, law-enforcement, and dispute-resolution mechanisms that reflected its normative agenda of promoting popular sovereignty, protecting human rights, deregulating economies, maximizing private initiative, and supporting private enterprise. It empowered institutions and forums, such as governance networks and quasi-judicial bodies, to engage in rule-making, and it granted certain actors, especially non-state actors such as NGOs, corporations, and experts, greater norm-creation authority.<sup>275</sup> This led to the “pluralization of global power and authority,”<sup>276</sup> which challenged the formerly unrivaled supremacy of states in global lawmaking, law-enforcement, and dispute-resolution.<sup>277</sup>

The Code of Civilization achieved this by deformalizing and disaggregating lawmaking and norm-creation in the international system. This phenomenon has attracted considerable scholarly attention among international lawyers who have described and critiqued these developments in bodies of literature, including global administrative law,<sup>278</sup> legal pluralism,<sup>279</sup> and global constitutionalism.<sup>280</sup> Despite the differences between these scholarly approaches, they share an interest in chronicling the diminishing role of states in global governance and in studying the impact of the growing influence and authority of non-traditional, non-state-based processes of norm-creation and regulation in the international system.<sup>281</sup>

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275. See Janet Koven Levit, *Bottom-Up International Lawmaking: Reflections on the New Haven School of International Law*, 32 YALE J. INT'L L. 393, 409-11 (2007).

276. Paul D'Anieri, *Autocratic Diffusion and the Pluralization of Democracy*, in POWER IN A COMPLEX GLOBAL SYSTEM 80, 81 (Louis Pauly & Bruce Jentleson eds., 2014).

277. Duncan B. Hollis, *Private Actors in Public International Law: Amicus Curiae and the Case for the Retention of State Sovereignty*, 25 B.C. INT'L & COMP. L. REV. 235, 235-36 (2002).

278. RESEARCH HANDBOOK ON GLOBAL ADMINISTRATIVE LAW (Sabino Cassese ed., 2016).

279. Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155 (2007).

280. SURENDRA BHANDARI, GLOBAL CONSTITUTIONALISM AND THE PATH OF INTERNATIONAL LAW (2016).

281. See ANDREA BIANCHI, INTERNATIONAL LAW THEORIES 61-71 (2016).

The deformalization of lawmaking and norm-creation is most pronounced in the assault on state consent as the foundation of international legal obligation.<sup>282</sup> A most prominent example of this is the emergence of *jus cogens*. Not only do these peremptory rules protect individuals against the most egregious violations of human rights,<sup>283</sup> but they are also assumed to be binding on states regardless of their consent.<sup>284</sup> This claim—that *jus cogens* are non-derogable and valid independent of state consent<sup>285</sup>—“sent shock waves across international legal theory, transforming the venerable doctrine of sources.”<sup>286</sup>

Perhaps even more importantly than the emergence of *jus cogens*, many of the rules and norms that govern various aspects of domestic and global governance are being formulated with minimal state participation. Norm-creation and regulation in vital sectors such as trade, investment, finance, banking, internet governance, cyber-security, climate change, and intellectual property are increasingly being exercised by non-state actors, supra-state entities, networks of non-state/supra-state actors, and hybrid combinations of state and non-state actors.<sup>287</sup> The result is that, “willingly or unwillingly, sovereigns surrender their monopoly on regulatory power—what formerly defined the notion of sovereignty—to actors whose reach defies political boundaries.”<sup>288</sup>

As a result of this deformalization of norm-creation, the dividing line between law and non-legal forms of normativity has blurred. The rule of recognition of international law under the Code of Coexistence was simple: states generated law through their co-action and state consent was the test of whether a rule qualified as valid international law. Under the Code of Civilization, with its drive to democratize the state and marketize and deregulate its economy, norms in the form of industry standards, codes of conduct, auditing and certification by private entities, and operating procedures developed by non-state actors are performing the traditional governance functions of international

282. Andrew T. Guzman, *Against Consent*, 52 VA. J. INT'L L. 747, 775 (2012) (discussing “a suite of doctrines and practices that can constrain the actions of states while circumventing the norm of consent”).

283. UNITED NATIONS, II YEARBOOK OF THE INT'L L. COMM'N 248 (1966).

284. John A. Perkins, *The Changing Foundations of International Law: From State Consent to State Responsibility*, 15 B.U. INT'L L.J. 433, 445 (1997).

285. Michael Byers, *Conceptualising the Relationship Between Jus Cogens and Erga Omnes Rules*, 66 NORDIC J. INT'L L. 211, 223 (1997).

286. Evan J. Criddle & Evan Fox-Decent, *A Fiduciary Theory of Jus Cogens*, 34 YALE J. INT'L L. 331, 332 (2009).

287. Anthea Roberts & Sandesh Sivakumaran, *Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law*, 37 YALE J. INT'L L. 107, 111-25 (2012).

288. EYAL BENVENISTI, THE LAW OF GLOBAL GOVERNANCE 25 (2014).

law.<sup>289</sup> Whether these norms constitute international law is an open jurisprudential question (indeed, my use of both “lawmaking” and “norm-creation” throughout this Section reflects my uncertainty regarding the classification of new types of norms in global governance). The important point is that a turn to informality and a shifting of authority (and power) has occurred in the norm-making mechanisms of the international system.<sup>290</sup>

Norm-creation in the international system has also been disaggregated. For decades after World War II, international law was mostly generated at grand diplomatic conferences that gave us instruments such as the Vienna Conventions on: the Law of Treaties, Diplomatic Relations, Consular Relations, the Geneva Conventions, the Refugee Convention, and the Convention on the Law of the Sea. Since the end of the Cold War, on the other hand, norms are being created by a wide range of actors in an endless variety of forums and institutions. The processes of articulating anti-trust and securities regulations and accounting and financial reporting standards, for instance, “shifted increasingly toward a set of emerging or newly invigorated crossborder regulatory networks . . . . Specialized, often semi-autonomous regulatory agencies, and the specialized crossborder networks they are forming, are taking over functions once enclosed in national legal frameworks, and standards are replacing rules in international law.”<sup>291</sup> Food safety provides another example.

[P]rivate actors, especially multinational food companies, supermarket chains and non-governmental organizations (NGOs), are increasingly filling the gaps by employing private standards, certification protocols, third-party auditing, and transnational contracting practices. The emergence of private governance in the food safety arena has been alongside the gradual decline of states’ traditional command-and-control regulation, which is increasingly being replaced by more flexible, market-oriented mechanisms.<sup>292</sup>

Evidence of the deformalization and disaggregation of lawmaking and norm-creation abounds throughout the international system of the post-Cold War years. Although it may appear that this was a random, unorchestrated occurrence that resulted from what many assume are

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289. See Walter Mattli & Tim Büthe, *Global Private Governance: Lessons from a National Model of Setting Standards in Accounting*, 68 *LAW & CONTEMP. PROBS.* 225 (2005).

290. Jean d’Aspremont, *From A Pluralization of International Norm-making Process to a Pluralization of the Concept of International Law*, in *INFORMAL INTERNATIONAL LAWMAKING* 185, 190 (Joost Pauwelyn et al. eds., 1st ed. 2012) (“[D]e-formalization of law-ascertainment, more particularly, materializes in an abandonment of formal (source-based) indicators to identify international legal rules.”).

291. Sassen, *supra* note 62, at 97.

292. Ching-Fu Lin, *Public-Private Interactions in Global Food Safety Governance*, 69 *FOOD & DRUG L.J.* 143, 144 (2014) (footnotes omitted).

the uncontrollable forces of globalization, I argue that these phenomena were neither accidental nor inevitable. The changing processes of lawmaking and norm-creation were enabled by the Code of Civilization. By emphasizing the protection of human rights, encouraging deregulation, and promoting private enterprise, this paradigm which the United States championed, disempowered the state and devalued state consent, thereby opening the global regulatory space to an infinite variety of non-state actors.

##### 5. *Governing the Globe Under the Code of Civilization*

It is important to begin this final Section of this Article by reiterating a point I made earlier. The Constitutive Regime of the International System is not a theory of everything. It does not explain every rule, every institution, or every policy in the international system. Rather, the Constitutive Regime provides the grand normative architecture of the system that justifies specific rules, enables specific institutions, and facilitates specific practices. This was how the post-Cold War Constitutive Regime functioned. It does not explain the content of the GATT Escape Clause<sup>293</sup> or Article 10 of the TRIPS Agreement,<sup>294</sup> nor does it account for why democratic transitions succeeded in Latin America but not in the Middle East. The Constitutive Regime does, however, explain the post-Cold War wave of political and economic liberalization.<sup>295</sup> It shows how the WTO, TRIPS, democratization, structural adjustment programs, market liberalization, and many other rules, institutions, practices, and policies fit within a general pattern. This pattern was not a natural occurrence; it was orchestrated. Through a broad range of political, military, legal, economic, and institutional tools, the United States spearheaded a global drive to implement the twin objectives of liberal peace theory, which constitute the core of the Code of Civilization: the democratization and marketization of states.

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293. This clause allows states to “temporarily suspend a concession agreed upon in a previous negotiation if its import-competing industry is injured as a consequence of a temporary surge in import volume.” KYLE BAGWELL & ROBERT STAIGER, *THE ECONOMICS OF THE WORLD TRADING SYSTEM* 104 (2002).

294. This provision extends copyright protections to “databases and other compilations of data.” Huala Adolf, *Trade-Related Aspects of Intellectual Property Rights and Developing Countries*, 39 *DEVELOPING ECO.* 49, 63 (2001).

295. Frank Dobbin et al., *The Global Diffusion of Public Policies: Social Construction, Coercion, Competition, or Learning?*, 33 *ANN. REV. SOC.* 449, 450 (2007) (“What is distinctive about the late twentieth century wave of liberalization is its rapidity, its wide geographic reach, and its conjoining of political and economic reform.”).

The “Charter of Paris for a New Europe,”<sup>296</sup> like the Peace of Westphalia, is considered an inflection point between two fundamentally different historical eras<sup>297</sup> and bears the marks of the Code of Civilization. Here was a Europe newly liberated from the stranglehold of Cold War politics pledging to “consolidate and strengthen democracy as the *only* system of government of our nations.”<sup>298</sup> This exemplifies the principle of differentiation of the Code of Civilization that makes liberal democracies the sole legitimate form of state. Shortly thereafter, these principles were put into practice. The European Communities adopted the “Guidelines on the Recognition of New States.” This policy-directive, which was devised in response to the break-up of Yugoslavia, made recognition of new states conditional on their transitioning to democracy, respecting human rights, and upholding the rule of law.<sup>299</sup>

The Code of Civilization also made its mark on U.N. practices. Starting in the early 1990s, democratization enjoyed greater prominence on the organization’s agenda.<sup>300</sup> Peacekeeping operations became increasingly tasked with “implanting the seeds of liberal democratic statehood,”<sup>301</sup> and peacebuilding became geared towards reengineering war-torn societies into a “liberal state, which respects human rights; protects the rule of law; is constrained by representative institutions, a vigilant media, and periodic elections; and protects markets.”<sup>302</sup> Other international organizations in non-western regions also exhibited a greater attentiveness to promoting democratic governance. For instance, the African Union (AU), which practiced an almost religious observance of the principle in the non-intervention of the affairs of states during its four decades of existence as the Organization of African Unity, now stipulates that governments that reach power through unconstitutional means shall be suspended from the organization.<sup>303</sup>

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296. CHARTER OF PARIS FOR A NEW EUROPE (Nov. 21, 1990), <https://www.csce.gov/sites/helsinkicommission.house.gov/files/Charter%20of%20Paris%20for%20New%20Europe.pdf>.

297. CLARK, LEGITIMACY, *supra* note 127, at 153.

298. CHARTER OF PARIS FOR A NEW EUROPE, *supra* note 296, at 3 (emphasis added).

299. *European Community: Declaration on Yugoslavia and on the Guidelines on the Recognition of New States*, 31 I.L.M. 1485, 1487 (1992).

300. GUY S. GOODWIN-GILL, FREE AND FAIR ELECTIONS 10-34 (2006) (1994).

301. ALEX J. BELLAMY ET AL., UNDERSTANDING PEACEKEEPING 4 (2d ed. 2010).

302. Michael Barnett et al., *Peacebuilding: What Is in a Name?*, 13 GLOBAL GOVERNANCE 35, 50-51 (2007).

303. Constitutive Act of the African Union, Article 30. This rule was applied in a number of situations. See Eki Yemisi Omorogbe, *A Club of Incumbents? The African Union and Coups d’Etat*, 44 VAND. J. TRANSNAT’L L. 123, 128, 134 (2011). This practice has also been implemented in certain situations in the Americas. See Dexter S. Boniface, *Is There a Democratic Norm in the Americas? An Analysis of the Organization of American States*, 8 GLOBAL GOVERNANCE 365, 365, 372, 374-75 (2002).

The Code of Civilization also sought to humanize states. Starting in the 1970s, promoting human rights became a prominent element of U.S. foreign policy and gradually became recognized as a central concern for the international community.<sup>304</sup> Indeed, human rights were the *cause célèbre* of the 1990s, which many hailed for having “revolutionized the international system and international law.”<sup>305</sup> The legitimacy of states and their right to retain their sovereignty and enjoy the privileges of statehood was becoming contingent on their human rights record.<sup>306</sup> And as the debate over humanitarian intervention demonstrated, waging war to prevent atrocities against civilians became increasingly accepted in the international system.<sup>307</sup> This, Adam Roberts observed, represented a “sea-change in international attitudes.”<sup>308</sup>

Not all human rights, however, received equal attention. The post-Cold War Constitutive Regime promoted a particular form of state that was politically democratic (which required maximizing individual freedoms) and economically neoliberal (which meant minimizing state intervention in economic activity). As a result, civil and political rights were emphasized at the expense of socio-economic rights.<sup>309</sup> Violations of civil and political rights were often met with condemnations from Western governments, NGOs, the international media, and international organizations, while the failure of states to fulfill socio-economic rights—a failure that was the inevitable result of the rolling-back of social welfare programs prescribed by neoliberalism—was virtually ignored.<sup>310</sup>

The dual agenda of democratization and marketization also shaped the policies of the donor community. Development assistance became conditional on democratic reform and economic liberalization, promoting good governance and transparency, and combatting corruption gained greater policy prominence.<sup>311</sup> This reflected

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304. See SAMUEL MOYN, *THE LAST UTOPIA* 1 (2010).

305. Louis Henkin, *Human Rights and State “Sovereignty”*, 25 GA. J. INT’L & COMP. L. 31, 43-44 (1995).

306. HENRY SHUE, *BASIC RIGHTS* 174 (2d ed. 1996) (discussing a “global consensus that state sovereignty is conditional upon the protection of at least basic rights”).

307. See Robert O. Keohane, *Introduction*, in *HUMANITARIAN INTERVENTION* (J.L. Holzgrefe & Robert O. Keohane eds., 2003).

308. Adam Roberts, *Humanitarian War: Military Intervention and Human Rights*, 69 INT’L AFF. 429, 433 (1993).

309. Kelly-Kate Pease, *Economic Globalization and American Society*, in *THE UNITED STATES AND HUMAN RIGHTS* 31, 32 (David P. Forsythe ed., 2000).

310. Mary Robinson, *Advancing Economic, Social, and Cultural Rights: The Way Forward*, 26 HUM. RTS. QUART. 866, 866-67 (2004) (admitting that “too little attention has been paid in the past to this important area of human rights work”).

311. Morris Szeftel, *Misunderstanding African Politics: Corruption & the Governance*

the view of a positive interrelationship between democracy and economic liberalisation [becoming] more widespread. Essentially, democracy was valued as providing the political context most likely to sustain economic reform efforts. . . . [D]emocratization was desirable not only as an end in itself but also as a means to the end of economic liberalisation.<sup>312</sup>

The result was that “democracy had a remarkable global run, as the number of democracies essentially held steady or expanded every year from 1975 until 2007.”<sup>313</sup> Even authoritarian states, feeling the pressure of inhabiting an international system in which liberal democracy was recognized as the sole legitimate form of government, engaged in the trappings of democracy in an effort to secure at least a patina of legitimacy in the international system.<sup>314</sup>

The impact of the post-Cold War Constitutive Regime was most pronounced in economic governance. Beginning in the 1970s and accelerating in the 1980s, then culminating in the 1990s, the United States led the charge to deregulate domestic economies and integrate the global economy. The story of how the United States restructured the global economic system need not be retold in full here as it has been described in detail elsewhere, perhaps most ably by Susan Strange in *Casino Capitalism*.<sup>315</sup> This process commended with the appearance in the 1960s of “Euromarkets,” which are ‘off-shore’ markets created in London for trading in Dollars.<sup>316</sup> These markets were very much ‘on-shore’ in the sense that they are located within a state. They were *off-shore*, however, in that they were deregulated.<sup>317</sup> Deregulation meant that City of London banks engaged in dollar-based transactions without complying with United States or British capital controls, which were an important feature of the Keynesian policies of the Bretton Woods institutions, thus allowing these banks to facilitate transactions at cheaper rates.<sup>318</sup>

*Agenda*, 76 REV. AFR. POL. ECON. 221, 221 (1998).

312. GORDON CRAWFORD, FOREIGN AID AND POLITICAL REFORM 13 (2001).

313. Larry Diamond, *Facing Up to the Democratic Recession*, 26 J. DEMOCRACY 141, 141 (2015).

314. D’Anieri, *supra* note 276, at 80.

315. See generally SUSAN STRANGE, CASINO CAPITALISM (2d ed. 1997) (arguing different interpretations of solutions for the rise of financial uncertainty and disorder throughout the world in the late twentieth century).

316. GARY BURN, THE RE-EMERGENCE OF GLOBAL FINANCE 11-12 (2006).

317. SASKIA SASSEN, CITIES IN A WORLD ECONOMY 40 (4th ed. 2012) (“[*Offshore* does not always mean overseas or foreign; basically the term means that less regulation takes place than onshore . . .”).

318. LEONARD SEABROOKE, US POWER IN INTERNATIONAL FINANCE 61 (2001) (“The Euromarkets were also free of domestic regulations such as ceilings on interest rates, stipulations on reserve requirements, and the need for deposit insurance.”).

Euromarkets are significant because they marked the first move to overturn the Keynesian policies of the post-World War II system of economic management and to deregulate financial markets, which eventually opened the way for private actors to exercise greater authority in this policy space. Euromarkets did not just happen; they were enabled by states. Although private actors, especially British and American bankers and investors, designed and managed the Euromarkets, ultimately, this financial innovation was encouraged by the British government and tolerated by the United States.<sup>319</sup> This pattern of state-sponsored, state-enabled, state-tolerated private ordering of global finance through deregulation, which began with the Euromarkets, gradually became the dominant mode of governing the global financial system.

The deregulation of financial markets and the enabling of private governance of global finance accelerated in the 1970s. Several factors generated the pressures that led to this shift, which entailed the dismantling of the Bretton Woods system and discarding its Keynesian policies. These factors included a deteriorating U.S. balance-of-trade, rising U.S. budget deficits, heightened inflation in Western Europe, and the infusion of billions of OPEC oil revenues into the international financial system.<sup>320</sup> This led to the abandonment of the Bretton Woods system of fixed exchange rates on August 15, 1971, which was unable to accommodate these developments.<sup>321</sup> As the 1970s proceeded, the United States, Western Europe, and Japan increasingly depended on borrowing from international financial markets, such as the Euromarkets which were now plush with Arab petrodollars, to finance domestic deficits.<sup>322</sup>

Another decisive moment that further empowered global financial markets and marked a further departure from the Keynesian policies of the post-World War II era was the implementation of the Volcker Stabilization Program in 1979. Named after Federal Reserve Chairman Paul Volker, this program, which has been called “the most . . . visible macroeconomic event of the past 50 years,”<sup>323</sup> was ini-

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319. ERIC HELLEINER, STATES AND THE REEMERGENCE OF GLOBAL FINANCE: FROM BRETTON WOODS TO THE 1900S, at 99-100 (1994).

320. David Hammes & Douglas Willis, *Black Gold: The End of Bretton Woods and the Oil-Price Shocks of the 1970s*, 9 INDEPENDENT REV. 501, 504 (2005).

321. See Barry Eichengreen, *Epilogue: Three Perspectives on the Bretton Woods System*, in RETROSPECTIVE ON BRETTON WOODS, *supra* note 242, at 644-50.

322. See Michael Bordo, *Bretton Woods International Monetary System: A Historical Overview*, in RETROSPECTIVE ON BRETTON WOODS, *supra* note 242, at 74-80.

323. See Marvin Goodfriend & Robert G. King, *The Incredible Volcker Disinflation*, 52 J. MONETARY ECON. 981, 981 (2005).



tiated in response to the U.S. inflation crisis of the late-1970s. It prescribed limiting public spending (i.e. “austerity”—a term that would become illustrious and ignominious in future years) and interest-rate hikes to control inflation. Opting for austerity measures instead of capital controls to control budget deficits and runaway inflation marked the end of Keynesianism and the triumph of neoliberalism. This, however, was not inevitable; it was a deliberate choice. A domestic political realignment in America in the form of the increased strength of Wall Street and its political allies in Congress and the increasing popularity of neoliberal thought among economists enabled, supported, and justified the adoption of neoliberal policies.<sup>324</sup> These choices, as Eric Helleiner concludes, were “crucial for the globalization process.”<sup>325</sup> By rejecting policy options that would have empowered the state, such as imposing capital controls, policymakers in the 1970s adopted neoliberal reforms that deregulated markets, thereby arrogating further power to global financial markets and the private actors, such as banks and investors, who manage these markets.<sup>326</sup>

The 1980s were the era of neoliberal ascendancy. The “Reagan-Thatcher Revolution” instituted policies of deregulation, privatization, austerity, trickle-down economics, social welfare cut-backs, disempowering labor unions, and corporate tax relief in the United States and Britain.<sup>327</sup> By the 1990s, these neoliberal policies had become the dominant mode of economic management, and shaped every aspect of socio-economic life in America, Europe, and gradually around the world. The so-called “Washington Consensus” was articulated as a holistic policy program to implement this neoliberal orthodoxy. It promoted a “market fundamentalism” which assumes that market pressures and processes ought to govern economic decision-making and that the state ought to have a minimal role in economic governance.<sup>328</sup> As the state retreated, private market actors—including corporations and their CEOs, banks, hedge-funds managers, stock-brokers, and the international financial

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324. See PAUL LANGLEY, *WORLD FINANCIAL ORDERS* 100 (2002).

325. HELLEINER, *supra* note 319, at 133-34.

326. *Id.* at 131-35.

327. David Lake, *Crises of Authority*, in *POWER IN A COMPLEX GLOBAL SYSTEM* 115, 124 (Louis Pauly & Bruce Jentleson eds., 2014); Terry O’Shaughnessy, *Economic Policy*, in *A CONSERVATIVE REVOLUTION? THE THATCHER-REAGAN DECADE IN PERSPECTIVE* 89 (Andrew Adonis & Tim Hames eds., 1994).

328. Joseph Stiglitz, *Is There a Post-Washington Consensus Consensus?*, in *THE WASHINGTON CONSENSUS RECONSIDERED* 41, 46 (Narcis Serra & Joseph E. Stiglitz eds., 2008) (noting that the Washington Consensus and neoliberalism “entailed a much more circumscribed role for the state”).

institutions—advanced and amassed greater authority in the international system.<sup>329</sup>

This neoliberal logic also shaped other fields of global economic governance. Although it was built on the foundation of the post-World War II GATT agreement, the WTO took a decidedly neoliberal turn. The former, in keeping with the logic of the Code of Coexistence, included exemptions that allowed states to regulate and restrict international trade to enable the implementation of social programs that protected against the dislocations of unregulated capital movements. The WTO, however, “sought to restrict these exemptions,” which was a policy choice based on the neoliberal assumption that “instituting a competitive or self-regulating market” was the most effective mode of economic governance.<sup>330</sup> Similarly, the conclusion of thousands of Bilateral Investment Treaties, the increased resort to state-to-investor arbitration, the conclusion of the TRIPS Agreement, and the imposition of structural adjustment programs that prescribe privatization, deregulation, and market liberalization all reflect the dominance of neoliberalism in economic governance.<sup>331</sup>

By the late 1990s and the early twenty-first century even left-wing parties in the developed world had subscribed to the neoliberal orthodoxy. Britain’s Labour Party rebranded itself as “[N]ew Labour,”<sup>332</sup> President Clinton declared that the “era of big government is over,”<sup>333</sup> and Germany’s Chancellor Schroder moved towards a *Neue Mitte* (New Middle).<sup>334</sup> This was the political capitulation of the left that abandoned its traditional policy commitments in favor of the neoliberal dogma of the era.<sup>335</sup>

A pattern should now be apparent. Virtually every field of global governance was constituted by the post-Cold War Constitutive Regime. This neoliberal Code of Civilization that sought to democratize and marketize states became “hegemonic as a mode of discourse and

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329. Teeple & McBride, *supra* note 247, at xiii (contending that this “shift[ed] sovereignty from the state to supranational organization or agreements or to private actors such as corporations or investors.”).

330. Jane Ford, *A Social Theory of Trade Regime Change: GATT to WTO*, 4 INT’L STUD. REV. 115, 116-17 (2002).

331. Stephen McBride, *The New Constitutionalism*, in RELATIONS OF GLOBAL POWER 19, 21-22 (Gary Teeple & Stephen McBride eds., 2011).

332. Amiee Oakley, *New Labour and the Continuation of Thatcherite Policy*, 6 POLIS (2011), <http://www.polis.leeds.ac.uk/assets/files/students/student-journal/ug-winter-11/aimee-oakley.pdf>.

333. WESLEY W. WIDMAIER, ECONOMIC IDEAS IN POLITICAL TIME: THE RISE AND FALL OF ECONOMIC ORDERS FROM THE PROGRESSIVE ERA TO THE GLOBAL FINANCIAL CRISIS 157 (2016).

334. Cas Mudde, *Europe’s Populist Surge*, 95 FOREIGN AFF. 25, 27 (2016).

335. Teeple & McBride, *supra* note 247, at 12.

has pervasive effects on ways of thought and political-economic practices to the point where it has become incorporated into the commonsense way we interpret, live in, and understand the world.”<sup>336</sup> Often in academic and popular literature the enmeshment of states in the “borderless order of advanced capitalism” is described in a “language of inevitability.”<sup>337</sup> That is a fallacy. There was nothing inevitable about the post-Cold War political and economic order. This order, which provided the normative foundation for our globalized world, was purposefully engineered. It was the result of the ascendancy and dominance, principally in the United States, of a new theory of world order; namely, liberal peace theory, and the success of the United States in reconfiguring the Constitutive Regime of the International System according to its worldview.

PROLOGUE FOR THE FUTURE: THE CRISIS OF WORLD ORDER AND THE MORALITY OF COEXISTENCE<sup>338</sup>

No volume encapsulates in its title the sense of foreboding about the state of the world as much as Robert Kagan’s *The Return of History and the End of Dreams*.<sup>339</sup> History did not end, as Francis Fukuyama had hoped and predicted.<sup>340</sup> The demise of communism and the ascendancy of a US-led world driven by the neoliberal logic of the Code of Civilization did not end ideological contestation. By the end of the first decade of the twenty-first century, the dream of a democratic, prosperous, peaceful, and globalized world remained unfulfilled. Instead, authoritarianism is on the rise, populism is waging a revolt, and liberalism is on the defensive.

Much has been written, especially in the wake of Brexit and the election of Donald Trump, about the triggers of the current crisis of world order. The origins of this crisis, however, are deeper, broader, and older than the rise of nativist, pseudo-nationalist populists in the west. For several years, the post-Cold War order has been subjected to sustained pressure from above, from below, and from within.

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336. David Harvey, *Neoliberalism as Creative Destruction*, 610 ANNALS AM. ACAD. POL. & SOC. SCI. 22, 23 (2007).

337. Louis W. Pauly, *Global Finance, Political Authority, and the Problem of Legitimation*, in THE EMERGENCE OF PRIVATE AUTHORITY IN GLOBAL GOVERNANCE 76, 80 (Rodney B. Hall & Thomas J. Biersteker eds., 2002).

338. Some ideas in this conclusion are drawn from: Mohamed Helal, *Teaching Public International Law: Reflections on the State of the Art in an Era of Uncertainty* (Ohio State Pub. Law & Legal Theory, Working Paper No. 416, 2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3046633](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3046633) [<https://perma.cc/GT2L-2BMV>].

339. ROBERT KAGAN, THE RETURN OF HISTORY AND THE END OF DREAMS (2008).

340. FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN (1992).

From above, the post-Cold War order is being challenged by a tectonic shift in the global balance of power. For centuries, the North Atlantic was the center of global power. Europe and North America were the locomotives of world history. The ideas that shaped human societies and determined the political and economic fate of entire continents (and the navies and armies that imposed those ideas) have for centuries emanated from the North Atlantic region. That is changing. Non-western regions and peoples have amassed sufficient military and economic power to enable them to realign the rules and norms that govern the world to reflect their interests and values.

This power shift is usually associated with China's reemergence, Russia's resurgence, India's growing prosperity, and the economic success of pivotal states like Brazil, South Africa, South Korea, and Turkey.<sup>341</sup> These powers are not monolithic. They include authoritarian regimes, communist states, and the world's largest democracy. At times, these countries have even treated each other as adversaries. Nonetheless, these powers share an ambivalence, or even an outright rejection, of the foundational precepts of the Code of Civilization, which shaped the post-Cold War world order. These non-western powers do not adhere to liberal peace theory. Despite—or perhaps because of—their diverse ideological, cultural, religious, and political orientations, these states espouse a traditional state-centric Westphalian image of the world and prefer a system of global governance that operates on the basis of the Code of Coexistence.<sup>342</sup>

The post-Cold War order is also being challenged from below. For years, leftists, anarchists, environmentalists, and human rights activists have expressed, at times violently,<sup>343</sup> discontent at the dislocations and distortions caused by globalization.<sup>344</sup> However, it was the populist tsunami that ejected Britain from the European Union, elevated Donald Trump to the White House, and empowered far-right parties throughout the world that revealed the extent and depth of the crisis facing the globalized post-Cold War order. These populist parties and politicians reject the ideas and institutions that underpin the Code of Civilization, especially free trade, environmental protection, pro-immigration policies, multiculturalism, and multilateralism. The importance of this ongoing populist revolt is that it has afflicted the very heart of the western world. The societies that articulated the Code of

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341. Michael Cox, *Power Shifts, Economic Change and the Decline of the West?*, 26 INT'L REL. 369, 371 (2012).

342. See William W. Burke-White, *Power Shifts in International Law: Structural Realignment and Substantive Pluralism*, 56 HARV. INT'L L.J. 1 (2015).

343. See JANET THOMAS, THE BATTLE IN SEATTLE: THE STORY BEHIND AND BEYOND THE WTO DEMONSTRATIONS (2000).

344. Richard N. Haass & Robert E. Litan, *Globalization and Its Discontents: Navigating the Dangers of a Tangled World*, FOREIGN AFF., May/June 1998, at 2.

Civilization and led the post-Cold War order are now rejecting the normative foundation of that order they built.

Although often overlooked, the post-Cold War order was also challenged from within. Despite initial successes in the 1980s and 1990s, by the early twenty-first century it appeared that the Code of Civilization was failing to achieve its objectives of constructing a world composed of liberal democracies that protect human rights and that adopt a neoliberal model of economic governance. Two developments reflect the failure of the democratization agenda. First, as Larry Diamond has observed, the world is now witnessing a “democratic recession.”<sup>345</sup> Indeed, illiberal regimes are now on the offensive, working to “tilt the global order in an illiberal direction.”<sup>346</sup> Second, and more importantly, liberal democracy, especially in the United States, is increasingly dysfunctional. Political gridlock and extreme partisanship in Washington, coupled with economic stagnation and income inequality, have undermined faith that liberal democracies are better at delivering effective and accountable governance.<sup>347</sup>

The economic agenda of the Code of Civilization is also failing. The 2008 financial crisis, known as the Great Recession, shattered faith in the neoliberal orthodoxy of the Code of Civilization. It revealed the income inequality generated by decades of implementing variations of Reaganomics in America and throughout the world. It also demonstrated the flaws of rampant deregulation and undermined support for free trade and open capital markets.<sup>348</sup> Moreover, that virtually no one was held accountable for the corrupt practices and corporate mismanagement that wrecked the lives of millions further inflamed popular rejection of these policies.<sup>349</sup> The Great Recession, of course, was not the first financial crisis to be caused by the structural weaknesses of a deregulated neoliberal world economy. The 1994 Peso Crisis, the 1997 Asian Crisis, the 1998 Russian Crisis, the crises in Turkey and Brazil in 1999, and the 2001 Argentine Crisis were all precursors to the 2008 financial meltdown.<sup>350</sup> Unlike these crises, however, the Great Recession struck the very heart of neoliberalism: Wall Street. The challenge

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345. Larry Diamond, *Democracy in Decline*, FOREIGN AFF., July/Aug. 2016, at 159.

346. Thorsten Benner, *An Era of Authoritarian Influence?*, FOREIGN AFF., Sept. 2017.

347. Francis Fukuyama, *America in Decay*, FOREIGN AFF. Sept./Oct. 2014, at 10.

348. James Crotty, *Structural Causes of the Global Financial Crisis: A Critical Assessment of the 'New Financial Architecture'*, 33 CAMBRIDGE J. ECON. 563, 575 (2009) (discussing that the financial crisis “demonstrate[s] the utter bankruptcy of the deregulated global neoliberal financial system and the market fundamentalism it reflects”).

349. Robin Niblett, *Liberalism in Retreat: The Demise of a Dream*, FOREIGN AFF., Jan./Feb. 2017, at 19.

350. Elmar Altvater, *Postneoliberalism or Postcapitalism? The Failure of Neoliberalism in the Financial Market Crisis*, 51 DEV. DIALOGUE 73, 77 (2009).

was now coming from within the globalized world order; the very sponsors of this order who had orchestrated its rise were now losing faith in their secular religion of neoliberalism.

American exceptionalism also challenged the post-Cold War order from within.<sup>351</sup> The United States presented itself as the leader of a rules-based international order that promoted peace, security, and human dignity. American exceptionalism, however, undermined that narrative. America's propensity to wage war unilaterally, especially its invasion of Iraq which wreaked untold suffering and disorder, undermined the multilateral foundations of the international order, weakened the authority of international law, and set a precedent of forceful unilateralism for other powers. U.S. counter-terrorism policies since 9/11 also eroded the credibility of the claim that human rights protection represents a principal value of the post-Cold War order. America's violations of international human rights and humanitarian law in its war on terror combined with America's non-cooperative, if not outright dismissive, attitude towards the International Criminal Court eroded America's moral authority and undermined the integrity of the post-Cold War Code of Civilization.<sup>352</sup> Stephen Hopgood even went so far as declaring that we are witnessing *The Endtimes of Human Rights*.<sup>353</sup>

So what of the future? No one, I believe, can say for certain. Indeed, (unwelcome) surprises such as Donald Trump's election counsel caution when engaging in political prediction. However, if history is to be our guide, it would be reasonable to predict that the world will experience an extended constitutive crisis. One of the principal arguments of this Article is that the normative foundation of world order—embodied in the Constitutive Regime of the International System—is an act of elite engineering. It is articulated and imposed on the system by the hegemons of each historical era. In today's world, however, power is too dispersed and too diversified to the extent that there is no clear center of political gravity. We are, in short, living in *No One's World*.<sup>354</sup> In this politically weightless world it is unlikely that any single state or coalition of states will wield sufficient power to wholly determine the content of the Constitutive Regime of the International System. Instead, for the

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351. See Harold H. Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479 (2003).

352. Amitav Acharya, *The War on Terror: One Result: The Retreat of Liberal Democracy*, N.Y. TIMES (Sept. 17, 2002), <https://www.nytimes.com/2002/09/17/opinion/IHT-the-war-on-terror-one-result-the-retreat-of-liberal-democracy.html> [<https://perma.cc/8EFQ-F86D>].

353. STEPHEN HOPGOOD, *THE ENDTIMES OF HUMAN RIGHTS* (2013).

354. CHARLES A. KUPCHAN, *NO ONE'S WORLD* (2012).

foreseeable future, our world will be governed by a decaying Constitutive Regime that no is longer accepted by either its creators or consumers, but to which no clear alternative has emerged.

During this constitutive interregnum, which might last several decades, I believe the Code of Coexistence provides the normative tools to maintain a semblance of order in the international system. To many scholars, the Code of Coexistence with its Westphalian roots is unsatisfactory. It is dismissed as “incapable of serving as the normative framework” of our world,<sup>355</sup> and it is decried as “morally and value-impooverished.”<sup>356</sup> Declaring the Code of Coexistence unsatisfactory from a policy perspective is a claim that should be debated in full. But to argue that it is morally or value-impooverished misunderstands the nature of the Code of Coexistence.

The Code of Coexistence is predicated on a normative foundation that is ethically attractive, yet often underappreciated. The Code of Coexistence is not, as Henry Kissinger depicts it, merely “a practical accommodation to reality, not a unique moral insight.”<sup>357</sup> Rather, the Code of Coexistence recognizes the moral and value pluralism of humanity. It acknowledges that, as Isaiah Berlin observed, “[i]n the house of human history there are many mansions . . . . There are many objective ends, ultimate values, some incompatible with others, pursued by different societies at various times.”<sup>358</sup> It realizes that self-evident truths vary among communities and that perceptions of moral rectitude differ between societies. It understands that great powers inhabiting an international system will often espouse conflicting worldviews. It is operated like the U.S. Constitution, which, as Justice Holmes described it, is “made for people of fundamentally differing views.”<sup>359</sup>

Therefore, like a democracy that “must deal with people who very much disagree on the right as well as the good,”<sup>360</sup> the Code of Coexistence enables great powers that disagree on how the world ought to be governed to coexist. Because it recognizes and preserves the pluralistic nature of the system, the Code of Coexistence enables great powers to cooperate in addressing intractable global problems, such

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355. Fernando R. Teson, *The Kantian Theory of International Law*, 92 COLUM. L. REV. 53, 53 (1992).

356. Mark Toufayan, *A Return to Communitarianism – Reacting to Serious Breaches of Obligations Arising Under Peremptory Norms of General International Law Under the Law of State Responsibility and United Nations Law*, 42 CAN. Y.B. INT'L L. 197, 202 (2004).

357. KISSINGER, *supra* note 10, at 3.

358. ISAIAH BERLIN, *THE CROOKED TIMBER OF HUMANITY* 83 (Henry Hardy ed., 2d ed. 2013).

359. *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

360. Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1735 (1995).

as civil wars, protracted conflicts, arms control, climate change, natural disasters, and communicable diseases. Unfortunately, the outcome of great power cooperation will almost always be an imperfect solution, a temporary fix, or an uneasy compromise. Nonetheless, politics is the art of the possible. While one may dream of a world in perpetual peace, the reality is that we live in a world where power is diffuse and disaggregated, where territorial states remain the principal repositories of human loyalty, and where humanity is not united by a single moral compass. In this world, the Code of Coexistence provides an imperfect but prudent and effective normative foundation for the international system.