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Obligation and the political authority of international law

CHRISTIAN REUS-SMIT

INTRODUCTION
Despite all of the talk about anarchy and the lawlessness of international relations, states have invested considerable time and effort over the past two centuries in constructing a complex array of international legal rules, governing everything from postage and fisheries to arms control and world trade. Despite realist scepticism, compliance with these rules is high, with most states observing most of the rules most of the time. This is partly because observing the rules is often in the narrow self-interest of states, and partly because non-observance can undermine a state’s reputation and in turn its capacity to pursue its interests in other issue-areas. On their own, however, these factors cannot explain high levels of compliance. The fact is that most states also feel an obligation to observe the rules of international law; the very authority of international law has a compliance pull independent of self-interest and the fear of sanctions. As James Brierly wrote in his classic study of international legal obligation, ‘[t]hose who act in international affairs (in contrast to those who speculate about them), statesmen, diplomats, judges, advocates, regularly and unhesitatingly assume the existence of a juridical obligation in international law’. This sense of obligation is a crucial factor in explaining both the attraction of international law as a regulatory institution, as well as the lengths some states will go to avoid legal entanglements—if international law incurred no obligations, it would have little attraction in a world where narrow self-interest and fear of sanctions are insufficient on their own to sustain extensive cooperation.

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International relations theorists have paid little attention so far to the question of legal obligation, stressing instead the role of coercion or narrow self-interest in observance of international rules. The importance of obligation has been brought to the fore, however, by a recent special issue of the discipline’s premier journal, *International Organization.* ³ With a view to understanding ‘the use and consequences of law in international politics’, the editors and contributors to ‘Legalization and world politics’ focus on processes of ‘legalization’, understood as a ‘particular form of institutionalization’. ⁴ As is commonly observed, international institutions have greatly proliferated, with regimes emerging across the full spectrum of issue areas. Yet the editors and contributors correctly observe that not all regimes are equally legalized. To conceptualise and study this variation in institutional legalisation, they point to three aspects of regimes that vary. Most importantly for our purposes, they differ in ‘the degree to which rules are obligatory’, but also in the relative precision of their rules and the degree to which they involve the delegation of authority to a third party, such as an arbitral tribunal. A regime that incurs strong obligations, has precise rules, and delegates authority is said to be highly legalized, and one that involves weak obligations, has vague rules, and confines decision making to the contracting parties is legal only in the most general sense of the word. Although it is but one axis of variation, the degree of obligation is of central importance to this schema, as ‘legal obligations bring into play the established norms, procedures, and forms of discourse of the international legal system’, ⁵ thus altering the structure of incentives and constraints shaping actor behaviour in a given issue area. Furthermore, the issue of obligation is inextricably entwined with those of rule precision and third party delegation—one of the principal reasons for making a regime’s rules more precise is to clarify and strengthen its attendant obligations, and in the absence of enforceable sanctions, a core


rationale for delegating authority to a third party is to establish, in an
objective fashion, the legal obligations incumbent upon contracting
parties.

This article contends that the rationalist conception of politics and
institutional rationality employed in ‘Legalization and world politics’
generates an inadequate account of the nature and basis of legal obligation
in international society. As explained below, the editors and contributors
unsuccessfully graft the assumption that politics consists of strategic
action, and that institutional rationality involves utility-maximisers con-
structing functional institutions to solve cooperation problems under
anarchy, to the proposition that the basis of legal obligation lies partly in
the contractual terms of particular legalised regimes, but primarily in the
background institution of the international legal system. Rationalist
assumptions about politics and institutional rationality may well help us
understand why states choose to incur legal obligations in one context and
not another, but they provide little insight into why states feel obliged
to observe legal rules once contracted. Strategic rationality, for example,
may well explain why states chose to further legalise the General
Agreement on Trade and Tariffs/World Trade Organization (GATT/WTO)
regime, but such rationality cannot explain the authoritative force of
international law in general, a force that states brought to bear on the trade
regime but which is autonomous of that regime. It is this problem that
encouraged the editors and contributors to ground obligation primarily in
the background institution of international law, yet this move offers no
solution: rationalist theories of politics and institutional rationality
struggle to provide a convincing account of this institution, and the editors
and contributors note its importance but studiously avoid explaining it.

These problems are indicative of a wider problem in the literature on
the obligatory force of international law—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 theories in question
lack the theoretical resources to account for the existence or legitimacy of
the system as a whole. This is problematic because whichever aspect is
emphasised it inevitably turns out to be insufficient, and theorists of
obligation are then forced back onto arguments about the legitimacy of the
wider normative system, for which they cannot account. As we shall see, the literature on the obligatory force of international law can be divided into three broad approaches: realist, rationalist, and rule-constitutive. The first attributes obligation to the existence of sanctionable commands (which the international legal system is said to lack); the second ties it to consent and the constraints of contract; and the third grounds it in communicative processes or procedural legitimacy and fairness. On close inspection each of these loci of obligation turn out to be inadequate and only make sense if we assume the existence and legitimacy of the broader international legal system. None of the three approaches, however, provides a satisfactory account of that system or its validity. The theory of obligation advanced by the editors and contributors of ‘Legalization and world politics’ is a case in point, providing as it does a textbook example of the problem of interiority as manifest in rationalist theories of international relations.

This article contends that a fundamental reconception of the nature of politics, institutional rationality, and the ‘demand for institutions’ is necessary if we are to avoid the problem of interiority and arrive at a more satisfactory account of international legal obligation. After detailing the problem of interiority in realist, rationalist, and rule-constitutive approaches, and explaining its expression in the ‘Legalization and world politics’ volume, I set out an ‘interstitial’ theory of politics, one that integrates idiographic, purposive, moral, and instrumental forms of reason and action. Once politics is reconceived in this way, institutional rationality appears multi-faceted, involving more than the pursuit of functional solutions to cooperation problems under anarchy. Institutional rationality also involves the negotiation and licensing of legitimate preferences and stratagems, the articulation and encoding of principles of moral action and justice, and the constitution, stabilisation, and performance of socially-sanctioned identities. Only by acknowledging this multi-faceted character of institutional rationality can we explain the totality of historical institutional formations—their content, practice, and form. Most importantly, only by acknowledging this can we provide a plausible account of the legitimacy of normative systems, including the modern system of international law. The interstitial conception of politics advanced here, along with its attendant holistic conception of institutional
rationality, thus enables us to escape the problem of interiority and to articulate a more robust conception of international legal obligation. In particular, it allows us to develop an ‘antior’ theory of obligation, consisting of six interrelated propositions. This integrated argument about the nature of politics, institutional rationality, institutional formations, and international legal obligation is illustrated in the final section through an analysis of the structure of obligation that prevailed in European international society in the Age of Absolutism, a structure of obligation fundamentally different from that which prevails in contemporary international relations.

THE PROBLEM OF INTERIORITY: BEGGING THE QUESTION OF SYSTEMIC LEGITIMACY

Why do actors feel obliged to obey the law? This question is particularly vexing in the case of international law, as the answers most often given in the domestic context—the existence of a central authority with sanctioning powers, or the imagining of a foundational social contract—are said to be weak or non-existent in the international. If states showed little interest in creating new legal rules, exhibited a blasé attitude toward signing and ratifying those they did create, and paid little heed to the rules governing their choices in particular situations, then that would be the end of the matter. The debate about international legal obligation is fueled, however, by the multiplication of international legal rules, the seriousness with which states treat ascension, and the prominence of ‘the law’ in states’ deliberations over how to act. The simple, confusing fact is that states and other actors in international relations attribute obligatory force to international law, which is one among a number of reasons for the consistently high levels of rule compliance in international society.6

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6 This article draws a distinction between obligation and compliance, the former being but one factor contributing to the latter: a sense of obligation is a reason for rule observance; compliance is a measure of such observance. When we say that an actor has an obligation to observe the law we are saying that they have a duty or responsibility to act accordingly. When actors feel a strong sense of obligation we can expect high levels of compliance, even in the absence of enforceable sanctions or strong self-interested reasons to obey. In any given legal system, however, obligation will mix with the fear of sanctions and the imperatives of self-interest to determine levels of compliance. It seems, though, that the greater the weight of obligation in this mix, the greater a system’s stability and
Attempts to explain the obligatory force of international law are legion, but three broad approaches stand out: realist, rationalist, and rule-constitutive. Each of these, however, suffers from the aforementioned problem of interiority.

Realist theory

Realist international theory, properly construed, does not contain a theory of legal obligation, it contains instead a theory of legal compulsion. Realists define law as a system of command-like rules backed by effective sanctions. This view found celebrated expression in Hobbes’s *Leviathan*, which imagined a democratically unfettered sovereign promulgating laws upheld by coercion. In legal philosophy it was elaborated by John Austin, who argued that ‘law is true within a particular political society if it correctly reports the past command of some person or group occupying the position of sovereign in that society’. Such views have come to form the foundation stone of the realist account of international law. In Stanley Hoffmann’s words, ‘[l]aw is a body of rules for human conduct established for the ordering of a social group and enforceable by external power’. Once such a conception of law is assumed a particular theory of legal compulsion follows—individuals are compelled to obey the law because they fear the sanctions unleashed by non-observance. It is because international law cannot rightly be construed as a system of command-like rules promulgated by a sovereign power, and because

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whatever the origins of international rules they are not backed by effective sanctions, that realists deny that it carries any compelling force, or even that it constitutes real law. Hans Morgenthau thus drew a distinction between political and non-political international law: the former having little affect on relations between states because it was incompatible with the power political realities of international relations, with Wilsonian internationalism being a case in point; and the latter contributing to international order simply because it codified the preexisting common interests of sovereign states.\textsuperscript{10}

The enforced commands view of law, both within domestic and international legal theory, rests on a fundamental fallacy. It holds that law is binding because it is enforced, but precisely the opposite is true—law is enforced because it is binding. As Sir Gerald Fitzmaurice famously explained, '[e]nforcement presupposes the existence of a legal obligation incumbent on those concerned. The prospect of enforcement is in fact little more than a factor or motive inclining people to obey rules that they are in any case under an obligation to obey: but it is not itself the source of the obligation'.\textsuperscript{11} If this were not the case, I would be obliged to obey the law that one must stop driving at a red light only when I was at certain risk of being caught for violating that law. Likewise, signatories to the Chemical Weapons Convention would be obliged to observe its precepts only when their illicit weapons production was likely to be discovered and punished. Both of these scenarios are nonsensical, as common sense tells us that we are obliged to obey the law, domestic or international, even when there is little chance of us being caught and punished for violations. If realists conceded this point, then two things would follow: they would be forced to admit that legal obligation is important and needs explaining, and they would have to seek such an explanation in the nature and legitimacy of the international legal system itself, not in the existence, or lack thereof, of sanctions. It is at this point that they would come up

\textsuperscript{10} Hans J. Morgenthau, ‘Positivism, functionalism, and international law’, American Journal of International Law 34(2) 1940, pp. 260–84.

against the problem of interiority. Realist international theory has few resources to explain the nature and legitimacy of the international legal system. Its standard explanatory tool—the preferences of hegemonic states—turns out to be seriously under-determined, with dominant institutional practices, including the modern system of international law, varying considerably from one hegemonic system to another.\textsuperscript{12}

**Rationalist theory**

The rationalist understanding of international legal obligation has its roots in the foundational assumptions of liberal political philosophy, particularly liberal conceptions of individual freedom, consent, and the origins of civil law. The principal innovation of classical liberal thinkers was the reimagining of ‘men’ as ‘by Nature, all free, equal and independent’, possessed of their own conceptions of the good and holding a protective basket of natural rights.\textsuperscript{13} In the state of nature such individuals were empowered by natural law to defend their ‘property’ rights—their ‘Lives, Liberties, and Estates’—and to judge and punish infractions. The insecurities and uncertainties of such a state encouraged the foundation of ‘political society’, involving the creation of a common government empowered by collective will to institute and uphold ‘civil laws’. In doing so, individuals exchanged their natural rights for civil rights, for rights encoded and enforced by the united legislative and executive power of society. The mechanism by which such a transition could occur was individual consent, for as Locke argued ‘[t]he only way whereby any one divests himself of his Natural Liberty, and puts on the bonds of Civil Society is by agreeing with other Men to joyn and unite into a Community …’.\textsuperscript{14} It follows that for liberal political philosophers


\textsuperscript{14} Locke, *Two treatises*, pp. 330–1.
consent provided the only legitimate basis of legal obligation, either to observe public authority in general or the laws authored by such authorities in particular. In Locke’s words, ‘every Man, by consenting with others to make one Body Politik under one Government, puts himself under an Obligation to every one of that Society, to submit to the determination of the majority ...’  

15 No sooner had these ideas been first articulated than three cracks appeared in the liberal theory of legal obligation: namely, that most people are born into political societies and never expressly consent to membership; that the consent of all individuals in the legislation of civil laws is impractical; and that legislative majorities can be just as tyrannical as dictatorial monarchs. Much of the history of liberal political philosophy has since been devoted to plastering over these cracks with notions of tacit consent, representative democracy, and inalienable individual and minority rights.

Rationalists have taken on these foundational liberal ideas as core theoretical commitments, in what constitutes one of the clearest examples of domestic analogising in international theory.  

16 States have been imagined as individuals writ large, as autonomous, free, and equal actors, each rationally pursuing their own exogenously determined interests. This is captured in the pervasive characterisation of states as rational egoists, as concerned first and foremost with their own self-interest, as seeking to maximise their preferences within prevailing environmental constraints and incentives.  

17 It also finds expression in the legal principal of sovereign equality, so prominently encoded in Article 2.1 of the United Nations Charter. Despite this emphasis on states as rational egoists, however, rationalists are relatively sanguine about the prospects of international cooperation, particularly through the medium of formal, legalised regimes. Although they are difficult to construct, and often require the catalytic impetus of hegemonic leadership, international

15 Locke, Two treatises, p. 332.
regimes can facilitate ongoing cooperation by increasing information, lowering transaction costs, and impeding cheating. Because the motive to construct regimes is self-interest, and because they take form in an anarchic system without a central authority, their constituent rules are binding only on those states that are parties and only because they have expressly consented. Since international relations scholars have dwelt little on the question of obligation, it has fallen to rationalist international lawyers to highlight the importance of consent and its connection to legal obligation. In Louis Henkin’s words, ‘[s]tate consent is the foundation of international law. The principle that law is binding on a state only by its consent remains an axiom of the [international] political system, an implication of state autonomy’. Of course, this translation of classical liberal ideas into the international realm has not prevented the same old cracks from appearing. In particular, the notion of state consent to international law is complicated by the unquestioned subordination of new states to the existing rules of international society and by the obligatory force of customary law as well as treaty law. Not surprisingly, the idea of tacit consent features prominently in explanations of such phenomena. As Rosalyn Higgins casually observes, ‘we have in international law a system in which norms emerge either through express consent or because there is no opposition ... to obligations being imposed in the absence of such specific consent’.

The rationalist theory of legal obligation informs two contemporary perspectives on the politics of international law. First, it is expressed in the writings of neoliberal institutionalists, both in international relations and international law. In Kenneth Abbott’s early introduction of legal theorists to ‘modern’ international relations theory, he argued that by using

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rationalist assumptions ‘one can explain deductively—without any reference to idealism or altruism—why rational self-interested states might find it in their interest to create norms and institutions … and to comply with their dictates, even in an issue area ripe with discord and competition’.\(^{21}\) Robert Keohane, in his call for stronger bridges between international relations and international law, assumed that political elites ‘are rational in the limited sense that they seek to relate means to ends in such a way as to achieve their ends most reliably’, and when comparing scholarship in international relations and international law, he argued that the ‘instrumentalist optic [of the former] has interests more sharply in focus than the normative optic [of the latter]’.\(^{22}\) It is crucial to note, however, that Keohane is sensitive to the limitations of the rationalist approach. The ‘fact that institutions can structure interests means that interests are not the instrumentalist trump cards after all’,\(^{23}\) and Keohane has admitted in his previous work that a strength of ‘reflectivist’ approaches (such as the one adopted in this article) is their capacity to explain the nature and legitimacy of basic institutional practices.\(^{24}\) Second, rationalist assumptions also provide the ontological and normative bedrock of the ‘new liberalism’ in international relations and international law, despite the fact that the locus of agency shifts from states to individuals and private groups. New liberals, Andrew Moravcsik states so clearly, assume that actors ‘are on the average rational and risk-averse and … organize exchange and collective action to promote differentiated interests under constraints imposed by material scarcity, conflicting values, and variations in societal influence’.\(^{25}\) Because these actors are primarily individuals and private groups not states, and because


\(^{23}\) Keohane, ‘International relations’, p. 496.


consent is considered central to obligation and in turn compliance, new liberals, such as Anne-Marie Slaughter, stress the importance of transnational and transgovernmental laws over traditional public international law, as ‘[l]aw that has a direct impact on individuals and groups will thus have the greatest impact on international order’.  

Liberalism’s naturalisation in the West makes rationalist assumptions about individual agency, consent, and legal obligation appear unproblematically persuasive. Yet the consent theory of international legal obligation, like the enforced sanctions theory before it, suffers from the problem of interiority. The flaws in consent theory were articulated long ago by H.L.A. Hart. He denied, in the first instance, that its advocates had adequately explained why sovereignty means that states are only bound by rules they have consented to. They ‘fail completely to explain how it is known that states “can” only be bound by self-imposed obligations, or why their sovereignty should be accepted, in advance of any examination of the actual character of international law’.  

More importantly, Hart argued that consent can only be obligating if there exists a prior rule that specifies that promises to observe legal rules are binding, and because this rule gives consent its normative standing, consent cannot itself be the source of that prior rule’s obligatory force.

For, in order that words, spoken or written, should in certain circumstances function as a promise, agreement, or treaty, and so give rise to obligations and confer rights which others may claim, rules must already exist providing that a state is bound to do whatever it undertakes by appropriate words to do. Such rules presupposed in the very notion of a self-imposed obligation obviously cannot derive their obligatory status from a self-imposed obligation to obey them.  

Finally, Hart claimed that the facts simply do not sustain the consent theory of legal obligation. As alluded above, there is the uncomfortable fact that new states are bound by the general rules of international law

28 Hart, The concept of law, p. 225.
irrespective of their consent, and this is especially the case with regard to *pacta sunt servanda*. It is also the case that states whose changed circumstances bring them under the purview of international rules that they had previously had little reason to consider are nevertheless bound by those rules. Hart uses the example here of a formerly landlocked state that gains, through territorial adjustments, access to the sea. Such a state is immediately obliged to observe the laws of the sea, irrespective of whether or not it has consented.29 The upshot of all of this, as Michael Byers observes, is that ‘the basis of obligation is located anterior, not only to individual rules of international law, but even to the processes that give rise to those rules’.30 Ultimately, consent theorists are forced to confront the existence and legitimacy of the constitutive rules of the international legal system in general, and they are no better equipped to account for this than realists. Choice-theoretic assumptions struggle to explain why the modern institution of contractual international law gained normative stature only in the seventeenth and eighteenth centuries, and rationalists have themselves acknowledged the multiple equilibria problems encountered when trying to explain the rise of multilateralism, the twin-sister institution of contractual international law.31

**Rule-constitutive theory**

Rule-constitutive theories of international legal obligation take two forms: communicative and just-institutionalist. The former—most clearly manifest in constructivist writings—attributes the obligatory force of international law to the communicative processes that attend norm formulation, reproduction, and change. The social ‘logic’ of communication, it is argued, provides the basic framework for individual and collective action. In Jürgen Habermas’s words, I ‘speak of the general presuppositions of communicative action because I take the type of action

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aimed at reaching understanding to be fundamental ... [and that] other forms of social action—for example, conflict, competition, strategic action in general—are derivatives of action oriented to reaching understanding'.

To communicate effectively—to explain, justify, persuade, and negotiate successfully—actors must provide valid reasons for their actions, and validity is determined in part by the internal structure of their arguments and in part by the ‘truth’ of their claims. When it comes to the normative veracity of those claims—to their status as legitimate appeals to right conduct or belief—the validity of reasons is judged, within the processes of intersubjective communication, according to the established norms, rules, and principles of the ‘lifeworld’. Legal rules constitute a distinct normative strata of this world, a strata consisting of rules that “provide relative firm guidance not only with respect to ends but also to the means to be adopted,” to the contexts or settings of application, and to admissible and inadmissible exceptions.

For advocates of this conception of law, legal obligation derives from the communicatively-determined validity of the rules in question. ‘Deliberation, rather than following another’s command, is the prototype for deciding moral questions. Deliberation and persuasion are similarly characteristic of legal decision-making, as the metaphor for “finding the law” and the need for reasons offered in judicial pronouncement indicate’. Furthermore, participation in such deliberation, Habermas contends, fulfills ‘the idea of self-legislation (or the supposition of the political autonomy of the united citizens), which first vindicates the legitimacy claim of the rules themselves, that is, makes this claim rationally acceptable’.

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33 'The lifeworld', Habermas writes, 'forms both the horizon for speech situations and the source of interpretations while it in turn reproduces itself only through ongoing communicative actions'. Jürgen Habermas, *Between facts and norms* (Cambridge: Polity Press, 1996), p. 22.


The just-institutionalist form of rule-constitutive theories stresses not the communicative bases of legal reasoning and obligation but the distributive justness and procedural legitimacy of the international legal system itself. Thomas Franck argues that because the system lacks a central authority to enforce command-like laws, the obligations that states feel to observe its precepts must stem from the system's perceived fairness. Fairness, he contends, has 'distributive' and 'procedural' dimensions, and 'the fairness of international law, as of any other legal system, will be judged, first by the degree to which the rules satisfy the participants' expectations of justifiable distribution of costs and benefits, and secondly by the extent to which the rules are made and applied in accordance with what the participants perceive as right process'. The rules of all legal systems have distributional consequences, with some members of society gaining more in the form of power, status, and wealth than others. When those distributional consequences are considered fair, high levels of voluntary compliance are likely to prevail. Notwithstanding this, though, whether or not a rule is considered fair is also 'affected by certain intrinsic properties both of that rule and the process by which it was made ...'. If rules have great determinacy (or clarity), if they have elevated symbolic authority, if they treat like cases alike and are uniform in application, and if 'they are demonstrably supported by the procedural and institutional framework within which the community organizes itself ...', then Franck holds that they will inspire a stronger sense of legal obligation. These rule specific measures of legitimacy are clearly tied to the general procedural legitimacy of the legal system itself, but here Franck curiously takes refuge in the consent-based arguments mobilized by rationalists, problematic as they are. The 'operating principles' that legitimate the international legal system and its processes of rule making, he concludes, are '(1) that states are sovereign and equal; (2) that their


38 Franck, Fairness in international law, p. 7.

sovereignty can only be restricted by consent; (3) that consent binds; and (4) that states, in joining the international community, are bound by the rules of that community.40

There is much that is valuable in the rule-constitutive approach to international legal obligation—much that informs the argument advanced below—but as currently configured both the communicative and just-institutionalist variants suffer from the problem of interiority. There is a tendency for constructivists to speak of communicative action in highly abstract, universalist terms, to treat the logic of communication, the relationship between reasons, norms and role-identities, and the rhetorical and structuring power of legal rules as historically-transcendent. The communicatively grounded form of legal obligation that they emphasise is thus considered intrinsic to all legal discourse and it is abstract actors who feel such obligation, not historically or culturally grounded human subjects. This social-communicative world may well be less than universal, however, and the pointers are to be found within constructivist writings themselves. Friedrich Kratochwil’s characterisation of legal rules as providing guidance as to appropriate means and ends, applicable contexts and settings, and admissible and inadmissible exceptions describes not a universal form of law, but a liberal one. Likewise, Habermas’s notion that participation in legal deliberation fulfills the idea of ‘self-legislation’, and thus legitimises the legal system, only makes sense in a world in which liberalism has been naturalised. Once we admit this, however, we are compelled to explore the nature and legitimacy of this type of legal system and its communicative dynamics, and this is true also of our present, distinctly liberal international legal order. Habermas tip toes toward such a project, noting that ‘modern law lives off a solidarity concentrated in the value orientations of citizens and ultimately issuing from communicative action and deliberation’, and constructivist international relations scholars gesture toward the modernity of the international legal system, but this is largely for the purpose of scene-setting, which cannot substitute for systematic theoretical and historical

40 Franck, Fairness in international law, p. 29.
politico-legal analysis. Without such analysis, the phenomenon of international legal obligation remains an enigma, as the constructivist viewpoint rests implicitly upon the legitimacy of the international legal system and its communicative processes, for which it provides no compelling account.

The just-institutionalist perspective is interesting because it begins and finishes where the other approaches to international legal obligation end—at the legitimacy of the international legal system. As we have seen, Franck tackles this legitimacy head on, arguing correctly that it is the most likely source of obligation. Yet his account is less than satisfactory. Curiously, he starts with an observation of great import: that it “is only by reference to a community’s evolving standards of what constitutes right process that it is possible to assert meaningfully that a law, or an executive order, or a court’s judgement, or a citizen’s claim on a compatriot, or a government’s claim on a citizen, is legitimate.” In other words, law and its legitimacy are milieu-contingent. Insightful as this is, though, Franck does not take it seriously in his own analysis of the international legal system. This is most clearly apparent in the way in which he attributes two indicators of procedural legitimacy to the system, indicators that he simply asserts as though they were natural. First, as we have seen, he identifies four operating principles that apparently legitimate the international legal system, all of which are drawn straight from consent-based social contract theory. Second, one of his key indicators of a particular rule’s legitimacy is ‘coherence’, the idea that rules apply equally to all like cases to all legal subjects. It will be clear to even the most casual reader that these markers of legitimacy are distinctly liberal, making sense and capable of inspiring obligation only in a milieu in which liberal political and legal ideas have been naturalised. Unfortunately, like realist, rationalists, and constructivists before him, Franck provides no systematic theoretical and historical politico-legal analysis to explain why these

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42 Franck, Fairness in international law, p. 26.
principles should carry normative force at this historical juncture. Furthermore, his theoretical framework is incapable of providing such an analysis because it assumes the very thing it needs to explain—the normativity of the procedural processes that undergird and sustain the modern international legal system.

The limits of ‘legalisation’

As noted above, the question of legal obligation has been given renewed prominence in the discipline of international relations by the special issue of *International Organization*, ‘Legalization and world politics’. The principal measure of a regime’s legalisation is said to be the nature and extent of the obligations it imposes, with stronger obligations being a mark of a more legalised institution. The other two measures—rule precision, and the delegation of authority to third parties—are of a second order, in the sense that making rules more precise clarifies the obligations incumbent upon legal subjects, and granting decision making power to third parties provides for the authoritative determination of legal obligations and also for their enforcement. After elaborating this descriptive typology, the contributors sketch a rationalist theory of legal obligation that follows the broad contours of the consent-based arguments detailed above, while falling into precisely the same problem of interiority.

Their argument is predicated on a set of assumptions about the institutional architecture of modern international society. The volume focuses on a particular form and level of international institutions—international regimes—which may be more or less legalised. It is clear, though, that we are meant to see these institutions as nested within a broader institutional framework. Drawing on Hedley Bull’s oft-quoted depiction, the sovereign states of the international system are said to form an ‘anarchical society’, characterised by institutions like sovereignty and international law as well as diplomacy and the balance of power.43 Leaving aside the problems of lumping this diverse group of institutions in the same undifferentiated basket, it is a recurrent assumption of the volume that they provide the background array of institutions that

43 Abbott et al., ‘The concept of legalization’, p. 408.
structure international society. The existence of these two tiers of institutions is clearly apparent in the intellectual debt acknowledged to Hart’s famous conceptual schema, which

defined a legal system as the conjunction of primary and second rules. Primary rules are the rules of obligation bearing directly on individuals or entities requiring them ‘to do or abstain from certain actions.’ Secondary rules, by contrast, are ‘rules about rules’—that is, rules that do not ‘impose obligations,’ but instead ‘confer powers’ to create, extinguish, modify, and apply primary rules.  

In seeking to conceptualise the relationship between international regimes and background institutions, principally international law, Kenneth Abbott et al. cast the former as the primary rules of the international legal system and the latter as its secondary rules.

This characterisation of the institutional architecture of modern international society is crucial to the volume’s theory of legal obligation. While it is never clearly articulated as such, the contributors strongly imply that there are two sources of international legal obligation: the first is consent, deriving from the commitments states make when they accede to specific international agreements; and the second is the legitimacy of the background institution of international law. As rationalists, the first of these constitutes the default argument, but it soon becomes clear that ultimately their theory of legal obligation rests on the latter. It is common parlance to say that a state is obliged to behave in a particular way, or refrain from doing so, because it is a signatory of a legally binding treaty or convention. As noted earlier, there may be many reasons for a state to comply with the rules of such a treaty, including self-interest and fear of sanctions. But it is only formally obliged to obey those rules because of the legal status of the accord, and that accord enjoys such status because it is an issue-specific instantiation of the norms, rules, and decision making procedures of the background institution of international law, which states have a general obligation to observe as members of international society. Affirming this view of international legal obligation, Abbott et al. argue

44 Abbott et al., ‘The concept of legalization’, p. 403.
that '[...] legal rules and commitments impose a particular type of binding obligation on states and other subjects (such as international organizations). Legal obligations are different in kind from obligations resulting from coercion, comity, or morality alone. ... legal obligations bring into play the established norms, procedures, and forms of discourse of the international legal system'.

Having shifted the locus of legal obligation from consent to the legitimacy of the international legal system, the contributors to 'Legalization and world politics' find themselves in the same dilemma as other rationalists—they have no theoretical resources with which to account for the nature or authority of that system. From an empirical perspective, there are two questions that can be asked about legalised regimes: why do states choose to incur legal obligations in particular contexts and not in others? And why do states feel obliged to observe legal rules once incurred? The first of these questions is strategic—it concerns the reasons why states prefer legalised over non-legalised solutions to particular cooperation problems. The second is authoritative, relating to the obligatory force of the legal rules themselves. 'Legalization and world politics' suggests that it is at least possible to construct respectable, if not incontestable, rationalist answers to the strategic question, answers that emphasise the functional strengths and weaknesses of 'hard' versus 'soft' legal regimes. It is clear, though, that answering this question is not the same as answering the authoritative question. States might well decide, on the basis of individual self-interest, to solve a particular cooperation problem by agreeing to a raft of new legally binding rules, but one of the principal reasons they have chosen a legal solution is because of the preexisting authority of international law. Appealing to the interests states have in solving this particular cooperation problem cannot explain the authoritative force of international law in general, a force that states can bring to bear on a particular regime but which stands autonomous of that regime.

45 Abbott et al., 'The concept of legalization', pp. 408–09.

46 Of particular merit here is Kenneth Abbott and Duncan Snidal, 'Hard and soft law in international governance', *International Organization* 54(3) 2000, pp. 421–56.
No attempt is made in 'Legalization and world politics' to account for the nature and legitimacy of the international legal system, but the contributors could have invoked a 'Nardinesque' thesis about international law that would have been compatible with their rationalist presuppositions. For Terry Nardin, international society is a 'practical association', 'a relationship among those engaged in the pursuit of different and possibly incongruent purposes, who are associated with one another, if at all, only in respecting certain restrictions on how each may pursue his own purposes'. 47 Busily pursuing their own ends, states are bound only by 'authoritative practices' that permit coexistence, foremost among which is the institution of international law. 48 From this perspective, the international legal system carries obligatory force because it serves the ordering needs of a practical association, and is thus both rational and functional. The problem with this solution, however, and why it would not have solved the problem of interiority for the rationalists, is that it rests on a naturalisation of the connection between the international legal system and international society—the former is assumed to be functional to the latter because in the foreshortened historical perspective of most international relations scholars the two have always been conjoined. In reality, though, the international legal system is a distinctly modern, post-Napoleonic ordering institution, and in other historical settings actors have evolved markedly different institutional forms. 49 This means that we cannot explain the obligatory force of the international legal system by simply appealing to systemic rationality—the obligations states attach to institutional practices certainly relate to the reasons why they construct them, but these reasons are more variegated and historically contingent than simple notions of functional rationality can accommodate.

48 Nardin, Law, morality, and relations of states, p. 19.
49 Reus-Smit, 'The constitutional structure'; and Reus-Smit, The moral purpose of the state.
POLITICS, INSTITUTIONAL RATIONALITY, AND OBLIGATION

The failure of realist, rationalist, and rule-constitutive theories to adequately account for international legal obligation is ultimately rooted in their flawed conceptions of the political. Assumptions about the nature of politics are what animate theories of international relations, providing the conceptual focal points around which notions of human agency and action converge. They represent the micro-foundations of our theories, the irreducible root explanations for why individuals and states behave the way they do. Whether it is the realist view of politics as the struggle for material power, the rationalist idea of politics as utility-maximising strategic action, or the constructivist notion of politics as a rule-governed form of practical action, assumptions about the political inform how theorists view all subsequent issues in international relations, including the present question of international legal obligation. It is the problematic nature of these assumptions, however, that leads inexorably to the problem of interiority. If politics consists of nothing more than a struggle for power, then international legal obligation is either nonsensical or inexplicable. If it is reduced to strategic action among rational egoists, then consent can be the only source of legal obligation. This presupposes, however, an international social order in which consent has normative standing—in which promises and contracts are considered binding—and accounting for the existence, nature, and legitimacy of such a system stretches the rationalist conception of politics beyond its limits. Finally, if politics is considered a rule governed activity, then attention invariably turns to the governing rule environment and its attendant communicative and procedural characteristics, and as we have seen this is usually associated with a naturalisation, rather than an explanation, of that environment. It is a central contention of this article that we must move beyond these heuristically limited notions of the political and embrace, instead, an elaborated ‘classical’ conception of politics, one that enables us to avoid the problem of interiority and better account for the phenomenon of international legal obligation.
Politics as interstitial

In political theory it is commonplace to distinguish between ‘strategic’, ‘communicative’, and ‘republican’ conceptions of politics. As ‘Legalization and world politics’ illustrates, the first is based on the concept of the calculating monological actor with fixed preferences. To such an actor people are just external, objective facts of reality, on line with material things, only with the distinctive quality that they carry out strategic actions too. Contrasting this, the communicative conception holds that politics involves ‘dialogical actors who coordinate their plans through argumentation aimed at reaching mutual agreements’. The republican conception pushes this idea one step further, depicting politics as a ‘constitutive’ form of human reason and action. When actors engage in politics—which is understood as a form of communal deliberation, the melding of speech and action—they realise themselves as individuals and as a self-directing collectivity. The problem with each of these conceptions, and with the typology that carves the debate in this way, is not that they fail to capture aspects of the political, but that their advocates present them as mutually exclusive. This is especially the case with regard to the strategic and republican conceptions, though also to a lesser degree with the communicative. In concentrating on instrumental forms of action, rationalists do not claim to be focusing on an aspect of politics, but on its defining essence. Similarly, republicans, such as Hannah Arendt, explicitly quarantine the political realm of the polis from the private realm of

50 ‘Legalization and world politics’ provides a good example of the first, Habermas’s theory of communicative action typifies the second, and Hannah Arendt’s arguments in The human condition (Chicago: University of Chicago Press, 1958) the third.

51 Erik Oddvar Eriksen and Jarle Wergard, ‘Conceptualizing politics: Strategic or communicative action’, Scandinavian Political Studies 20(3) 1997, pp. 219–41, at p. 221.

52 Eriksen and Wergard, ‘Conceptualizing politics’, p. 221.

necessitous material self-interest. This tendency is encouraged by the constant movement between empirical propositions and normative prescriptions that characterises much of the literature. Writings on the nature of politics often evince a tension between the author’s desire to capture the core quality of the political while simultaneously promoting a politics of this quality. The imperatives of theoretical parsimony and advocacy thus conspire to unnecessarily circumscribe our understanding of politics.

The argument advanced here starts from the assumption—common-sensical to international relations scholars of the classical period—that politics is a variegated, multi-dimensional form of human deliberation and action, the lifeblood and challenge of which lies at the intersection and interaction of these dimensions. To fully comprehend this domain of social life it is necessary to begin with the nature of political reason or deliberation, as all but the most brute forms of action rest on some type of individual or collective reasoning and decision, however crude or disagreeable we might judge it to be. Political deliberation can be said to integrate four types of reason: idiographic, purposive, moral, and instrumental. Idiographic deliberation occurs when actors confront the question ‘who am I?’ or ‘who are we?’, and is thus identity-constitutive. Purposive deliberation takes place when they ask ‘what do I want?’ or ‘what do we want?’, engaging them in a process of interest or preference formation. Moral deliberation occurs when they address the question ‘how should I act?’ or ‘how should we act?’, situating their purposive and instrumental decisions within the realm of socially sanctioned norms of rightful conduct. And, finally, instrumental deliberation—the favoured terrain of rationalists—involves actors in confronting two subsets of questions: one strategic-instrumental, the other resource-instrumental. The former asks ‘how do I get what I want?’ or ‘how do we get what we want?’.

54 Arendt writes that Greek philosophers assumed ‘that freedom is exclusively located in the political realm, that necessity is primarily a prepolitical phenomenon ...’. Arendt, The human condition, p. 31.

55 The argument advanced here compliments those recently offered by other scholars who advocate a return to a more classical conception of politics. See, in particular, Robert Jackson, The global covenant (Oxford: Oxford University Press, 2000).
latter asks 'what do I need to get what I want?' or 'what do we need to get what we want?'. These four types of reason constitute the key reference points that frame political deliberation, but the crucial point is that political reflection and choice lies at the difficult intersections between the idiographic, purposive, moral, and instrumental—its distinctiveness lies in its interstitial quality. This is captured in E.H. Carr's critical but neglected observation that 'Politics cannot be divorced from power. But the homo politicus who pursues nothing but power is as unreal a myth as the homo economicus who pursues nothing but gain. Political action must be based on a coordination of morality and power'.

From the way that these questions have been posed, it is clear that idiographic, purposive, moral, and instrumental forms of political deliberation can take individual and collective forms: groups contemplate their identities just as do individuals, and groups and individuals both reflect on their purposes, morality, and strategies. Whether individual or collective, however, such deliberation is unavoidably and inherently social. Individual identity may have deep psychological roots, but individuals also negotiate their identities within the concrete social environments of family and community, the norms and communicative practices of which license certain identity constructs and role playing over others. This is true also with regard to purposes, ethics, and strategies. Because the goals we set ourselves, the decisions we make about right behaviour, and the strategies we choose invariably impact on others, and because we seldom have the power to realise them with impunity, we are compelled to justify our ends and means with reference to existing frames of legitimate action. All of this is true for groups as well. Groups too must negotiate their identities within social environments, though in this case idiographic deliberation has intra-group and inter-group dimensions. Since all groups exist within broader social environments, as state-bounded communities exist within international society, groups construct their identities by negotiating their own histories within the frame of broader,

56 This is an elaboration of a schema advanced in Ronald Beiner, Political judgement (London: Methuen, 1983), pp. 129–52.

‘external’ norms of legitimate collective identity. The same dual-faced social environment conditions the formulation of group interests, assessments of ethical conduct, and the determination of strategies, as genuine collective preferences and stratagems can only emerge through processes of intra-group and extra-group argument, communication, and learning.

If political deliberation is multidimensional, so too is political action. Because political action is the behavioural expression of political reason, each aspect of deliberation generates its own form of political action. Idiographic reason leads to a type of behaviour in which actors seek to articulate, justify, demonstrate, perform, and contest self-identities through verbal and ritual processes of communication. The Washington Summit Communiqué that NATO member states issued on the 50th anniversary of the alliance is a prime example of this form of political action. NATO states declared that ‘The North Atlantic Alliance, founded on the principles of democracy, individual liberty and the rule of law, remains the basis of our collective defence; it embodies the transatlantic link that binds North America and Europe in a unique defence and security partnership’. Purposive deliberation generates a form of political action in which actors learn, articulate, justify, negotiate, and revise their individual and collective preferences in the context of other actors’ interests, expectations of legitimate conduct, and established societal norms. This type of action was clearly apparent in the agonisingly slow rise to humanitarian consciousness and commitment of European states and the United States, in which their initial denial that they had any fundamental interests in the Balkans was eventually displaced by a stated humanitarian interest of such import that it demanded military intervention. Moral deliberation produces a form of political action in which actors seek to license their interests and actions in terms of prevailing norms of legitimate agency and rightful conduct. NATO’s statement at the outset of the bombing campaign against the Federal Republic of Yugoslavia is an example of such ethico-communicative

political action. ‘The crisis in Kosovo’, it reads, ‘represents a fundamental challenge to the values of democracy, human rights and the rule of law, for which NATO has stood since its foundation. We are united in our determination to overcome this challenge’. 59 Finally, instrumental deliberation informs a strategic type of political action, the essence of which is the application of available means to achieve individual and collective interests within environmental constraints. When NATO declared that its ‘military action against FRY supports the political aims of the international community: a peaceful, multi-ethnic and democratic Kosovo in which all its people can live in security and enjoy universal human rights and freedoms on an equal basis’, 60 it was engaging in instrumental political deliberation, and on launching its air campaign it was engaging in strategic political action.

As NATO’s pronouncements clearly illustrate, forms of political deliberation and their associated forms of political action stand in a distinctive constitutive relationship. To borrow a phrase from Alexander Wendt, idiographic deliberation and idio-communicative action ‘supervene’ upon the other modes of deliberation and action. ‘Supervenience’, Wendt argues, ‘is a nonreductive relationship of dependence, in which properties at one level are fixed or constituted by those at another’. 61 Here this means that deliberation and communicative action around questions of identity pre-structure purposive and moral deliberation and action, which in turn condition instrumental and strategic reasoning and behaviour. In rationalising and justifying their actions, NATO member states explicitly tied their identity as a group ‘founded on the principles of democracy, individual liberty and the rule of law’ to their ‘interest’ in meeting ‘the challenge’ of the ‘Kosovo crisis’, and their military campaign was presented as an appropriate means to serve such an ‘interest’.


60 NATO Press Release M-NAC-1(99)51, ‘The situation in and around Kosovo’.

Thinking about politics in the manner outlined above helps us to understand the ‘political charge’ that attends central issues in contemporary international relations, a charge that is occluded by the rationalist perspective on politics employed in ‘Legalization and world politics’ and elsewhere. Returning to the Kosovo case, the strategic-instrumental question—‘how do I (we) get what I (we) want?’—and the resource-instrumental question—‘what resources do I (we) need to get what I(we) want?’—beg a series of deeper identity and purposive questions which constitute the political heart of the conflict. For NATO, the Serbs, and the Kosovars, the salient issues concerned ‘who we are?’, ‘what do we want?’, and ‘how should we act?’. The debates surrounding these questions, and the resulting answers constituted Serb and Kosovar nationalisms, split NATO from the UN, and provided the discursive structure in which secondary instrumental questions were answered. If these deeper identity, purposive, and moral questions had been settled, and if the answers that relevant groups arrived at had been mutually compatible, the political essence of the Balkans issue would have dissolved. The same can be said of issues ranging from the intervention in East Timor and debates about the treatment of refugees to the expansion of the European Union and the development of the World Trade Organization—in all of these cases the political resides at the juncture of the normative and the instrumental, where identities, purposes and principles, goals and strategies, and techniques and resources are int-mingled and contested.

**Institutional rationality as holistic**

Institutional rationality is the term commonly employed to describe the reasoning that informs actors’ decisions about whether or not to construct, reproduce, renovate, or abandon social institutions, conventionally understood as complexes of rules, norms and principles which define the meaning and identity of the individual [and actors in general] and the patterns of appropriate economic, political and cultural activity engaged in
by those individuals'. Conceptions of institutional rationality are invariably epiphenomenal—they are built upon, and derivative of, deeper conceptions of the political. For realists, states are institutionally averse because politics is considered a struggle for relative power; for rationalists they are institutionally instrumental because politics is understood as utility-maximising strategic action; and for constructivists they are institutionally constituted and guided because politics is a rule-governed form of practical action. As we have seen, it is underlying conceptions of the political that ultimately lead theories of legal obligation into the problem of interiority, and the move from a conception of politics to an idea of institutional rationality is the first step along this path. The view of politics as interstitial, however, leads to a different, more variegated conception of institutional rationality that enables us to avoid the problem of interiority.

If we consider the four dimensions of political deliberation and action elaborated above, each can be seen to have its own distinctive institutional imperatives. Rationalists are correct that instrumental deliberation and action lead actors to pursue institutional arrangements that enable the resolution of specific conflicts and the solution of cooperation and collaboration problems—instiutions do indeed lower transaction costs, increase information, and deter cheating, thus facilitating ordered interstate relations. Yet this is not the only type of ‘demand for institutions’. Idiographic deliberation and action prompt the construction of institutions that permit the constitution, stabilisation, and demonstration of legitimate social identities. This is clearly apparent in the institutional orders created after major systemic conflagrations, where the community of states has sought to enshrine notions of legitimate statehood that will ensure international peace and stability, with the institutional projects of the Congress of Vienna, the Versailles Peace Conference, and the San Francisco Conference being cases in point. It is also apparent in issue-specific regimes, where the norms and rules of security, economic,
environmental, and human rights institutions coalesce around particular, historically contingent, notions of legitimate statehood that prescribe certain relations between state, society, economy, and nature. Purposive deliberation and action call forth institutions that enable the negotiation and stabilisation of legitimate collective purposes and strategies. In this respect, the norms, rules and principles that comprise international institutions serve as encoding devices, locations in which the collectively negotiated, socially sanctioned legitimate interests of states—either in particular issues areas or for the governance of international society in general—are publicly enshrined to serve as orientation points for acceptable political conduct, internationally and, increasingly, domestically. Finally, moral deliberation and action demand institutions that enable the expression, stabilisation, and pursuit of collectively negotiated, historically contingent moral principles, ideas of justice, and conceptions of fairness. Questions of the right, the good, and the fair constitute a crucial, yet curiously overlooked, dimension of institutional rationality, affecting not only the substantive content of international institutions—from the lofty principles of the United Nations Charter to the existence of foreign aid and human rights regimes—but also the procedural practices of such institutions.63

Just as politics ought to be understood as interstitial, institutional rationality should be seen in holistic terms. This is for two reasons. First, the politics that generates institutional imperatives cannot be segmented into discrete idiographic, purposive, moral, and instrumental components. When actors move to create institutions, they are almost always engaged in the simultaneous construction of social identities, definition of individual and collective interests, deliberation on the good and the just, and the strategic pursuit of instrumental objectives. The precise mixture of these political practices will vary from issue to issue and from one level of institutions to another, but the pristine pursuit of strategic interests, devoid

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of all considerations of legitimate statehood and rightful state action, is as rare as disinterested codifications of state identity. Second, there has been an overwhelming tendency in the study of international institutions to focus solely on regime rules, on their relationship to state interests, on the constraints they place on states, and on their contribution to order within a particular issue area. A comprehensive perspective on international institutions must, however, move beyond consideration of the rule content of issue-specific institutions to comprehend the varying form and practice of different institutional arrangements. Only by considering the full spectrum of institutional impulses—from identity construction to instrumental action—can we grasp the totality of institutional formations, their distinctive form, practice, and content. For instance, John Ruggie has shown how the form of the contemporary institutions of multilateralism and positive international law is deeply wedded to the social identity of the modern liberal sovereign state, based as they are on underlying principles that rules should be equally and reciprocally binding on all legal subjects in all like circumstances.\(^{64}\) Similarly, the purposive politics that surrounds the codification and institutional pursuit of legitimate state interests affects not only the rule content of institutions but also their procedural practices. Institutional rules and norms instantiate and stabilise the collective interests of states, yet often institutions, such as the Framework Convention on Global Climate Change, are designed procedurally to permit the regime’s gradual evolution as ongoing, institutionally structured negotiations lead states to redefine their interests. With regard to ethico-communicative politics, Cecilia Albin and Thomas Franck have explained how considerations of justice and fairness have conditioned the practices and content of issue-specific institutions.\(^{65}\) Albin’s exhaustive study of the role such considerations play in international negotiations demonstrates their central importance in shaping the negotiations that create new institutions, the procedural rules of those institutions, and the content of their rules. Finally, rationalists have shown how instrumental

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\(^{64}\) Ruggie, ed., *Multilateralism matters*. Also see Reus-Smit, ‘The constitutional structure’; and Reus-Smit, *The moral purpose of the state.*

\(^{65}\) Albin, *Justice and fairness*; and Franck, *Fairness in international law.*
politics plays an important role in conditioning the content of institutions, the specific rules, norms and principles they enshrine.

Rationalist approaches to politics and institutional rationality encourage—inadvertently or not—an ahistorical understanding of institutional development. States are ascribed with an atemporal means-ends strategic rationality that they employ to overcome the standard cooperation problems that accompany international anarchy, principally those of coordination and collaboration. Because strategic rationality is assumed of all states, not particular states at particular times, and because anarchy is said to generate the same spectrum of cooperation problems whenever it structures an international system, there is little room for the idea that politics, institutional rationality, and institutional formations might vary historically. In contrast, the interstitial conception of politics and the holistic understanding of institutional rationality outlined above encourage precisely such an idea. The ideals of legitimate statehood that states conceive and seek to enshrine, the purposes they uphold and negotiate, the conceptions of justice and fairness they mobilise, and the interests they strategically pursue are all historically contingent, and if the preceding argument is correct, then so too are institutional formations. As idiographic, purposive, moral, and instrumental politics changes, we can expect the form, practice, and content of institutions to change as well. Only by recognising this can we begin to comprehend the rich diversity of institutional forms that have evolved between independent political units in the course of human history, from the practices of Iroquois Indians to those of the Chinese empire.66

An anterior theory of obligation

Because the interstitial conception of politics elaborated above encourages an holistic perspective on institutional rationality—one that comprehends not only the rule content of institutions but also their form and practice—it also enables the development of an ‘anterior’ theory of institutional

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obligation. As we have seen, existing theories of international legal obligation all suffer from the problem of interiority, from their tendency to attribute obligation to an internal feature of a legal system—such as sanctions, consent, or discourse—but when this feature turns out to be insufficient, they fall back on the general legitimacy of the system, for which they cannot account. An anterior theory of institutional obligation overcomes this problem of interiority by drawing on the interstitial conception of politics and holistic understanding of institutional rationality to account for the legitimacy of institutional systems, including the contemporary international legal system. It concurs, therefore, with Franck’s previously stated observation that it ‘is only by reference to a community’s evolving standards of what constitutes right process that it is possible to assert meaningfully that a law, or an executive order, or a court’s judgement, or a citizen’s claim on a compatriot, or a government’s claim on a citizen, is legitimate’. The principal difference, however, is that anterior theory of obligation has the resources to explain that legitimacy, which Franck’s just-institutionalist perspective lacks. This augmented theory of obligation consists of six key propositions, elaborated below with reference to states as the principal legal subjects and the international legal system as the institutional order.

First, manifestations of politics and institutional rationality are milieu-specific. While the desire to realise interests in the most efficient manner possible within prevailing circumstantial constraints may well be universal, how political actors define the terms of legitimate agency, construct their individual and collective interests, imagine the terrain of rightful action, and understand efficiency all varies from one historical context to another. This means, in turn, that although the full spectrum of demands for institutions will be evident in all historical contexts—with the need to stabilise identities, codify interests, enshrine moral principles, and resolve cooperation problems being recurrent imperatives—the expression of these imperatives will differ from one epoch system to another.

Second, *milieu-specific politics and institutional rationalities produce different institutional formations in different historical periods and contexts*. Because different expressions of the idiographic, purposive, moral, and instrumental dimensions of politics give distinctive contents to demands for institutions, and because these demands condition the form, practice, and substantive content of institutions, institutional formations vary from one historical system to another, and this is true of the formations that characterise sovereign, suzerain, imperial, and international political systems. Iroquois politics generated distinctive institutional forms within and between tribes, as did the politics of the Greek city-states, the politics of heteronomously organised elites in medieval Europe, and, as we shall see, the politics of Absolutist monarchs before the Age of Revolutions. Only in the modern world of ascendant political liberalism has the international institutional order been characterised by the centrality of a system of contractual international law.

Third, *of the four constitutive aspects of politics, idiographic deliberation and action are primary in determining the form of predominant institutional practices*. As we saw in the discussion of the limitations of the ‘Legalization and world politics’ volume, reference to the cooperation problems that states face in particular issue-areas at particular points in time may well help explain the content of the specific norms and rules that are created in those areas, but it cannot explain the overarching form of the institution in which that process of norm construction takes place. As Keohane admits, rationalist approaches to institutions are not good at explaining institutional practices, even if they do contribute to our understanding of the content of institutional rules and norms. To account more successfully for the ascendancy of particular institutional forms we should focus instead on the politics surrounding the constitution of legitimate agency in international systems, as decisions as to what constitutes a legitimate political unit, entitled to the entire spectrum of agential rights, exert a profound influence on which institutional practices gain normative and, in turn, practical ascendancy. States are institutional arrangements of power and authority, but historically not all such arrangements have been

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considered equal. International societies have always sought to grant legal sovereignty only to those states that organise power and authority in ways that concur with dominant conceptions of legitimate statehood. More importantly for our purposes, these models of legitimate statehood, with their integral notions of how power and authority ought to be organised in a polity, have been applied to the organisation of power and authority between states, to the institutional architectures of international societies. It was the rise of a new liberal-constitutionalist conception of legitimate statehood in the second half of the nineteenth century that provided the critical catalyst for the normative ascendancy of positive international law and its twin institution of multilateralism.

Fourth, predominant institutional practices are considered legitimate because they are assumed to be consistent expressions of prevailing conceptions of legitimate statehood. As noted earlier, Nardin attributes the legitimacy of contemporary international institutions—including international law—to the functional role they perform in maintaining an international order that allows sovereign states to coexist. There are two problems with this argument, though. To begin with, history shows us that states have adopted a variety of institutional practices to deal with the problems of coexistence under anarchy, and while the experience of relative order under such institutions may have earned each of them a certain legitimacy over time, the legitimacy they held at the time of institutional innovation and construction cannot be attributed to such functionality, as other equally efficient institutional solutions were possible, if not imaginable. Second, history is replete with examples of dysfunctional institutional arrangements that nevertheless attract high levels of legitimacy. Domestic state institutions that continually fail to deliver social order and well-being are frequently the locus of national veneration and rectitude. And at the international level, despite having been condemned for their failure to prevent the Second World War, the institutions of contractual international law, multilateralism, and universal conferences of states were confidently reendorsed as the guarantors of peace and stability in the post-1945 world, undermining arguments about crisis induced change and punctuated equilibria. What appears more important for sustaining the legitimacy of institutional arrangements—domestic and international—is the extent to which they are seen as
consistent with prevailing ideals of legitimate statehood. As Rodney Hall observes, ‘[s]ocietal self-understandings have helped to determine the norms, rules, and principles of interaction between societies, privileging some modes of interaction and constraining others’.69

Fifth, primary obligations derive from the degree of legitimacy that institutional subjects attribute to an institutional form. ‘Legitimacy’, Ian Hurd observes, ‘contributes to compliance by providing an internal reason for an actor to follow a rule. When an actor believes a rule is legitimate, compliance is no longer motivated by the simple fear of retribution, or by a calculation of self-interest, but instead by an internal sense of moral obligation …’.70 This fifth proposition echoes Franck’s argument that states obey international rules ‘[b]ecause they perceive the rule and its institutional penumbra to have a high degree of legitimacy’.71 The crucial difference is that the anterior theory of obligation—of which this fifth proposition is a part—can account for the legitimacy of institutional orders (including that of the modern system of international law) by connecting milieu-specific expressions of idiographic politics and institutional rationality to historically contingent institutional practices. The key insight, therefore, is not that modern states feel primary obligations to obey the rules of international law because they consider that system legitimate—which, although true, departs little from Franck’s thesis—but rather that this sense of legitimacy, and the concomitant feelings of obligation, are grounded in a distinctive type of politics.

Sixth, all institutional orders contain signifiers of obligation which are internal aspects of those orders, but these signifiers gain their meaning and locutionary force only because of the broader, anterior structure of obligation in which they are embedded. Within the modern international legal system, consent constitutes just such a signifier. The fact that a state


71 Franck, The power of legitimacy, p. 25. Original was italicised.
has explicitly consented to a set of treaty rules clearly indicates the sense of obligation that it feels to abide by those rules. But as we have already seen, consent can only meaningfully be considered a signifier of obligation because the state in question already feels obliged to observe the systemic socially recognised rule of *pacta sunt servanda*, which in turn stems from the legitimacy ascribed to the international legal system as a whole. In short, the locutionary force of the signifier—in this case consent—is dependent upon the duty-inducing force of the primary source of obligation, the institutional order’s legitimacy. Properly construed, therefore, signifiers of obligation are not sources of obligation, but are rather practice-specific cues to deeper, truer sources. Institutional practices, such as consent, discourse, or procedure, often constitute the lived experience of an institutional form, and their ritual demands often serve as the immediate prompts to an actor’s sense of duty or responsibility. Ultimately, however, these practices only exist and carry normative weight because of the existence and normative standing of the institutional order itself, and it is its legitimacy that gives rise to primary institutional obligations.

**OBLIGATION WITHOUT CONSENT**

The preceding argument about politics, institutional rationality, and institutional obligation provides important insights into the phenomenon of modern international legal obligation. In the period spanning 1776 to 1848 the idiographic politics of legitimate statehood was transformed by the rise of liberal-constitutionalist ideals of national governance, ideals that moved from being counter-hegemonic revolutionary principles to providing the accepted template for political reform in Europe, even if actual reform proceeded at different paces in the different places. The emergent ideal of legitimate statehood was increasingly that of the democratic, rule of law polity, a vision that rested on two interlocking institutional principles: that law was only legitimate if it was authored by those who were subject to it (or their representatives); and that law must apply equally to all legal subjects in all like cases. These principles licensed the gradual development of national legislatures, constitutions, and, eventually, the expansion of electoral franchises. It was in the context of this progressive legitimation of the democratic, rule of law polity that
consent, as the signifier of legal obligation, achieved normative ascendency. No sooner had these ideals and principles begun to take root within European states, than they began to appear in diplomatic negotiations as the preferred guidelines for the development of international institutions. Most significantly for our purposes, they prompted the accelerated development of a system of positive international public law, a development that had been stunted for the preceding three centuries. The key characteristic of this system was its contractarian essence, the idea that international law was obligating only if it was based on the consent of affected states. In the words of G.F. von Martens, one of the early proponents of such a conception of international law, the law of nations is binding only because it represents ‘the mutual will of the nations concerned’.72

If this is a reasonable depiction of the political bases of modern international law and legal obligation, then what of international law in the preceding four or more centuries of European international relations? According to F.H. Hinsley, the Treaties of Westphalia ‘came to be looked upon as the public law of Europe’.73 At the Congress of Vienna, almost two centuries later, Prince Talleyrand, the French representative, insisted repeatedly that the principles of ‘public law’ had to guide the conference’s procedures and settlements.74 What sort of public international law were they referring to, and why could someone like Talleyrand speak as though its rules and norms were obligating? This was the crucial period in European international history when the sovereignty of states moved from being grounded solely in the empirical capacities of rulers to defend their exclusive control and jurisdiction over particular territories to its institutionalisation, to the gradual, if haphazard, stabilisation of territorial property rights through the codification of reciprocally binding rules of

international law. International law was thus of central importance to the emerging sovereign order, and its ordering capacity derived, at least in some measure, from its obligatory force. We must recognise, however, that this system of international law and its power to oblige existed prior to the development of the modern, contractarian international legal system—international legal obligations thus bound states before consent was considered a necessary signifier. In this final section of the article, I explain how a distinctive type of pre-modern—or at least pre-liberal—form of idiographic politics and institutional rationality encouraged the development of an international legal order in which the legitimacy of a divinely ordained social order provided the primary source of legal obligation and expressed fealty to the command of God the signifier.

The idiographic politics that produced the modern international legal system was liberal, but the politics that conditioned its Absolutist predecessor was sacral. During the fifteenth and sixteenth centuries plague-induced demographic changes (which reduced the value of land and increased the cost of labour), a burgeoning commercial revolution (which accelerated the growth of towns and empowered the merchant classes), and the spread of anti-papist Protestantism conspired to destroy the heteronomous institutional order of medieval Europe. This produced a political vacuum that emergent political elites sought to exploit by carving out new centres of political authority, the most successful of which proved to be nascent sovereign states created by regional monarchies. This process of state construction involved not only the violence of internal pacification and external warfare, as well as complex ‘taxation for security’ bargains between domestic populations, merchant


classes, and monarchs, but also the ideological legitimation of the new state-based European order. For as Hart observed, political authority is more than the capacity to rule, it is the right to rule.\textsuperscript{78} The ideological legitimation of the new order entailed the crafting of a social identity for the sovereign state, an identity that resonated with the existing cultural understandings of legitimate authority. These understandings were exclusively sacral, in the sense that all worldly authority was thought to derive ultimately from God. This was what had sustained the political authority of the Papacy and the Holy Roman Empire for centuries, and with the decline of these institutions the principles of sacral authority were redeploled to ordain Europe’s new sovereigns with legitimacy. Nowhere was this redeployment more clearly articulated than in the writings of Jean Bodin, who famously stated that there ‘are none on earth, after God, greater than sovereign princes, whom God establishes as His lieutenants to command the rest of mankind’.\textsuperscript{79}

Sacral politics engendered a unique type of institutional rationality, producing a distinctive understanding of law and legal obligation. If all legitimate political authority derived from God, then it followed that all law had to stem, in some fashion, from God’s will. In general, law was not understood as something negotiated between legal subjects or their representatives, instead it was defined as the command of a superior. As Bodin argued, ‘[t]he word law signifies the right of command of that person, or those persons, who have absolute authority over all the rest without exception, saving only the law-giver himself, whether the command touches all subjects in general or only some in particular’.\textsuperscript{80} Foremost among all laws were God’s law and natural law, both of which emanated from the will and purposes of the All-Mighty. Lowly subjects and monarchs alike were bound by these eminences, and although the principles they embodied were supposed to be accessible to all imbued with reason, monarchs, as God’s lieutenants on Earth, were endowed with particularly acute interpretive insight. This insight was said to inform the promulgation of civil or municipal laws, the worldly laws of the state that

\textsuperscript{78} Hart, The concept of law, pp. 80–8.


\textsuperscript{80} Bodin, Six books of the Commonwealth, p. 43.
directly governed the lives of all subjects, although not of course the sovereign, ‘for the word law in Latin implies the command of him who is invested with sovereign power’.\textsuperscript{81} All of this implied a distinctive conception of legal obligation, one in which consent was neither a source nor signifier. In Bodin’s words, ‘[t]he principal mark of sovereign majesty and absolute power is the right to impose laws generally on all subjects regardless of their consent’.\textsuperscript{82} The primary source of legal obligation lay in the general legitimacy of the divinely ordained social and political order. Jean Domat, a leading French jurist in the reign of Louis XIV, wrote that ‘[s]ince government is necessary for the common good and God himself established it, it follows that those who are its subjects must be submissive and obedient’.\textsuperscript{83} Not surprisingly, in a legal universe defined by Christian cosmology, the signifier of obligation was express fealty to the command of God and, by his delegation, the sovereign. Where in the modern world the words ‘I promise’ signify the assumption of legal obligations, in the early modern world of European absolutism words such as ‘I defer’ or ‘I obey’ had greater meaning.

This conception of law and legal obligation found expression not only in the writings of early modern political theorists and jurists but also in the treatises of international legal theorists. Like Bodin, Hugo Grotius defined law as the command of a superior. He distinguished between ‘rectorial law’, that prevailed among unequals (such as monarchs and their subjects), and ‘equatorial law’, that exists between equals (such as brothers or friends), and he contrasted the public rights of the state with the private rights of individuals. Precedence, he argued, must always go to the rectorial law of the superior and the public rights of the state.\textsuperscript{84} Putting the point more bluntly, Samuel Pufendorf simply asserted that ‘law is a decree by which a superior obliges one who is subject to him to conform

\textsuperscript{81} Bodin, \textit{Six books of the Commonwealth}, p. 28.
\textsuperscript{82} Bodin, \textit{Six books of the Commonwealth}, p. 32.
\textsuperscript{84} Hugo Grotius, \textit{The law of war and peace}: De Jure Belli ac Pacis Libri Trea (New York: Bobbs-Merrill, 1925), pp. 34–6.
his actions to the superior’s prescript.\footnote{Samuel Pufendorf, On the duty of man and citizen according to natural law (Cambridge: Cambridge University Press, 1991), p. 27.} As far as civil and municipal law were concerned, the relevant superior was the sovereign who had been invested with authority from God, much as ‘guardianship was instituted for the sake of the ward’.\footnote{Grotius, The law of war and peace, p. 110.} At the level of international law, however, God’s authority was unmediated. Grotius drew a distinction between the law of nature and the law of nations, the first laying down a general moral code, the second comprising the customary and conventional practices of sovereign states. The law of nature, he claimed, ‘ought to be more dear to us than those things through whose instrumentality we have brought to it’, whereas the law of nations had ‘its origins in the free will of man’.\footnote{Grotius, The law of war and peace, p. 24.} International law was thus acknowledged to be a human artifact, the product of ‘mutual consent’ between sovereign states. The obligation to obey this law, however, stemmed not from consent but from fealty to God. ‘Observance of the law of nature and of divine law, or of the law of nations…’, Grotius insisted, ‘is binding upon all kings, even though they have made no promise’.\footnote{Grotius, The law of war and peace, p. 121.} In Pufendorf’s words, ‘[t]hough these precepts [of the law of nations] have clear utility, they get the force of law only upon the presuppositions that God exists and rules all things by his providence…’\footnote{Pufendorf, On the duty of man and citizen, p. 36.}

It was in this context of idiographic politics, institutional rationality, and legal obligation that the early modern system of sovereign states was painful constructed. As Ruggie observes, the codification of territorial property rights was central to this process.\footnote{Ruggie, ‘Territoriality and beyond’.} If states were to move from a condition of perpetual war and instability, some means had to be found to establish territorial sovereignty as a mutually recognised right. Two moments were particularly important in this transition: the 1648 Peace of Westphalia that ended the Wars of Religion, and the 1713 Peace of Utrecht that concluded the Wars of Spanish Succession. The former was...
instrumental in defining the substantive scope of sovereign rights, the
domain of social life over which a monarch could exercise legitimate
authority. Under the Treaties of Westphalia, the ‘Electors, Princes and
States of the Roman Empire’ were granted ‘free exercise of Territorial
Right as well as Ecclesiastik’.91 ‘Territorial Right’ included the rights to
make and interpret laws, declare wars, impose taxes, hire soldiers, erect
fortifications, and form alliances, while ‘Ecclesiastik Right’ permitted the
Lutheran states of the empire to ‘enjoy their religious belief, liturgy and
ceremonies …’.92 Important as these rights were, the Treaties of
Westphalia left unresolved the geographical extension of sovereign rights.
Nothing existed to prevent self-aggrandising monarchs from claiming
sovereign rights wherever they could trace genealogical connections—at
the end of the sixteenth century, it was still the family tree that defined the
limits of rule, not geographical frontiers. The destabilising consequences
of this came to a head when Louis XIV sought to extend his authority by
claiming inheritance rights to provinces, estates, and fiefs across Europe,
most notably his right to the Spanish throne. Fearing an amalgam of
French and Spanish power, a Grand Alliance, comprising Great Britain,
the Holy Roman emperor, and the United Provinces, fought an eleven-
year war to contain Louis’s dynastic ambitions. In settling this conflict,
the Treaties of Utrecht played a pivotal role in defining the geographical
extension of sovereign rights, establishing the principle that dynastic
entitlements could be curtailed to preserve the European balance of power.
The Treaties forced the Bourbon monarchs of France and Spain to issue a
series of dynastic renunciations that permanently separated the two
crowns, thus enshrining a new principle that sovereign rights were to be
territorially bounded. As the Duke of Berry stated in his renunciation, ‘[i]t
has been agreed in the Conferences and Treaties of Peace … to establish
an Equilibrium, and political Boundaries between the Kingdoms’.93

93 ‘Treaty of Utrecht between Great Britain and France’, Article 6, in Fred L. Israel, ed., Major peace
Both the Peace of Westphalia and that of Utrecht were formally negotiated agreements, the terms of which were codified in legally binding treaties. Each of these agreements had to meet the interests of the respective parties, conform to the realities of power, and attain the consent of the monarchs concerned. It is clear, however, that what made these treaties legally obligating was not the fact of the consent—even as a signifier—for as Grotius argued at the time, such instruments were 'binding upon all kings, even though they have made no promise'. The primary source of legal obligation was the perceived legitimacy of an international legal system that upheld a divinely ordained social and political order, and the crucial signifier of such legitimacy was express fealty to God. Not surprisingly, such expressions feature prominently in the texts of both the Treaties of Westphalia and Utrecht. The preamble to the Treaty of Osnabrück stated that '[a]t last it fell out by an Effect of Divine Bounty, that both sides turn'd their Thoughts towards the means of making peace .... After having invok'd the Assistance of God ... they transacted and agreed among themselves, to the Glory of God, and the Safety of the Christian World'. Similarly, in the preamble to the Treaty of Utrecht between Great Britain and France, the ambassadors prayed 'that God would be pleased to preserve their Work intire and unviolated, and to prolong it to the latest Posterity'. And in concluding his renunciation, Philip of Spain declared that 'I give again the pledge of my Faith and Royal Word, and I swear solemnly by the Gospels contained in this Missal, upon which I lay my Right Hand, that I will observe, maintain, and accomplish this Act and Instrument of Renunciation'. It is clear from all of this that the crucial legal instruments that stabilised the territorial property rights of European states—that defined the scope and then geographical extension of sovereign rights—were founded on a pre- contractualist philosophy of legal obligation, one in which faith not consent was salient.

94 Grotius, The law of war and peace, p. 121.
95 'Treaty of Osnabrück', Preamble.
96 'Treaty of Utrecht between Great Britain and France', Preamble.
CONCLUSION

In an instructive article, Anne-Marie Slaughter, Andrew Tumelillo, and Stepan Wood survey approaches to interdisciplinary research between international relations and international legal scholars, identifying three areas of convergence and six elements of a collaborative research agenda. As they readily admit, the three areas of convergence, which focus on international governance, social construction through shared norms, and liberal agency, map closely, if not neatly, on to established paradigms of international relations theory; namely, institutionalism, constructivism, and liberalism. Their purpose, however, is to move away from paradigm driven research to focus on substantive research questions, thus creating a new, genuinely interdisciplinary terrain of scholarship. The six questions they nominate address the issues of regime design, process design, the mutual constitution of agents and structures through social practices, the transformation of the constitutive structures of international affairs, the impact of governmental networks on the nature of regimes, and the embedding of international institutions in domestic society. The connection between the three paradigm-based areas of convergence and the six substantive research questions is close, with the institutionalist paradigm informing the first two questions, the constructivist paradigm the second two, and the liberal paradigm the final two. An underlying assumption is, therefore, that the conceptual and theoretical apparatuses of these paradigms are sufficient, either in isolation or through some admixture, to address the proposed research questions, even though Slaughter et al. are at pains to deny that they want a 'straightforward projection of IR paradigms onto IL'.

The argument presented in this paper suggests that the conceptual and theoretical resources of established international relations theory may be insufficient to address adequately the important research agenda sketched.


by Slaughter and her co-authors. The question of why states feel obliged
to observe the rules of international law cuts across this agenda, having a
particular bearing on issues of regime design, process design, agency,
structure and shared norms, and the constitutive power of international
structures. Yet, as we have seen, the major paradigms are hamstrung in
answering the question of international legal obligation by their under-
lying conceptions of the political. Viewing politics as strategic action
among rational egoists leads to a consent-based theory of obligation,
seeing it as a rule-governed form of practical action leads to a
communicative or just-institutionalist account of obligation, and both
ultimately lead to the problem of interiority. The solution, I have argued,
is to reconceive the nature of politics, to see it as existing at the interstices
of idiographic, purposive, moral, and instrumental reason and action. Such
a reconception enables us to rethink the demand for institutions, to see the
need to construct and stabilise social identities, negotiate and encode
collective purposes, pursue questions of the good and the fair, and solve
cooperation problems as together determining the form, practice, and
content of institutions. This understanding of politics and institutional
rationality enables us to view international institutions as milieu-specific
constructs, with their form and legitimacy determined by historically
contingent expressions of politics, particularly idiographic politics. The
development of an anterior theory of international legal obligation thus
becomes possible, as understanding how distinctive forms of idiographic
politics affect the social identity of the state and privilege certain
institutional forms over others enables us to account for the legitimacy of
international institutional orders, including the modern international legal
system. Furthermore, it allows us to distinguish between institutional
legitimacy, as the primary source of obligation, and signifiers of
obligation, such as consent and fealty. Finally, the interstitial conception
of politics, holistic view of institutional rationality, and anterior theory of
obligation encourage us to denaturalise the component features of the
modern international legal system and to comprehend international
institutional orders with different structures of obligation, the absolutist
system of naturalist international law being but one.