

The Metaphysics of Statehood

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In one of the classic texts on States in international law, James Crawford notes that

[a] State is not a fact in the sense that a chair is a fact, it is a fact in which a treaty is a fact: that is, a legal status attaching to a certain state of affairs.¹

This seems like a proposition about metaphysics, i.e., about the nature of reality. How can we distinguish between facts about institutions (such as States) and facts about things like chairs? If we do discover the nature of institutional facts, then what does this tell us about Statehood? What is the certain state of affairs to which Crawford alludes? Despite the similar questions that both metaphysicians and international lawyers are asking, little research has been done to place debates about State recognition within the framework of analytic metaphysics.²

This paper attempts to remedy this gap and show that metaphysical enquiry can shine light on debates about Statehood formation. In particular, there is a subdomain of metaphysics called ‘social ontology’ which explains the nature of social and institutional facts. The main goal of this paper is to show that social ontological theories classified as Groupjective Internalism can be used to defend Constitutive Theories of Statehood formation. Constitutive Theories are theories that require that entities be recognised by other States in order for those entities to be States. This is a significant conclusion as Constitutive Theories are not well regarded by many international lawyers.³ One caveat is that this paper aims to show that Constitutive Theories are true if Groupjective Internalism is true. This paper will not defend Groupjective Internalism itself but I argue in Section 2.1 that assuming its truth is neither problematic nor uninteresting.

The author owes a special debt of gratitude to Patrick Emerton and Jayani Nadajaralingam who have both read through numerous versions of this paper. Additionally, comments from Jason Grant Allen, Thomas Harre, Peter Lawrence, Jan Mihal, Dale Smith and the attendees of the 2014 Melbourne Doctoral Forum on Legal Theory and 2015 Australian Society of Legal Philosophy Conference have been very helpful. Thanks also to the CJLJ anonymous reviewer.

1. James Crawford, *The Creation of States in International Law*, 2nd ed (Oxford University Press, 2007) at 5.
2. I have only found two published articles analysing international states from a metaphysical perspective. Edward Robinson, “An Ontological Analysis of States: Organisations vs Legal Persons” (2010) 5:2 *Applied Ontology* (2010) 109; Sebastian Jodoïn, “International Law and Alterity: The State and the Other” (2008) 21 *Leiden J Int'l L* 1. There is an unpublished paper by Jason Grant Allen, “Of Cabbages and Kings: ISIS and the Nation State” which deals with Searle and Statehood although in a slightly different way from this paper. He also briefly touches on the topic in an editorial note: Jason Grant Allen, “What is Transitional Constitutionalism and How do we Study it?” (2014) 3:4 *Cambridge J Int'l & Comp L* 1098. None of these papers however have addressed the Constitutive-Declaratory divide in statehood formation which is the focus of this paper.
3. The oft-repeated line in most international law commentaries is that Constitutivism is dead. See Crawford, *supra* note 1 at 21; Malcolm N Shaw, *International Law*, 6th ed (Cambridge University Press, 2008) at 447; Martin Dixon, *Textbook on International Law*, 7th ed (Oxford University Press, 2013) at 134-35; Stephen Hall, *Principles of International Law*, 3rd ed (Lexis Nexis, 2011) at 199-200.

This paper's argument is roughly as follows: Internalist theories of social ontology posit that the existence of institutions (including States) depend on certain groups of people having beliefs about those institutions (e.g., believing that States exist). Hence, States exist only by virtue of some group believing that they exist. Who are these groups of people who must believe that some entity is a State in order for it to be recognised? I will introduce the notion of Groupjectivity, a term coined by Tuomela, to show that these groups must be other States. Since both Internalism and Groupjectivity stipulate that some entity is a State only when other States believe that it is. This is tantamount to the Constitutive Theory. Lastly, I show that social ontology can also deal with the problem of relativism which is frequently raised against Constitutive Theories.

Section 1 will introduce social ontology and will explain why it is important for debates about Statehood. Section 2 will then introduce Groupjective Internalism. Lastly, Sections 3 and 4 provide a defence of Constitutive Theories of Statehood.

1.0 Social Ontology and International Law

Before teasing out the consequences of social ontology for international law, it must first be explained why social ontology is relevant to international legal doctrine. Social ontology is a field that investigates social and institutional reality. Its major goal is to find systematic ways to explain why social and institutional facts exist (e.g., like money, churches and States) and to distinguish between them and brute facts like the existence of rocks and trees.⁴ It is this aspect of social ontology which is directly relevant to the Statehood formation debate since States are institutions rather than brute objects like rocks and mountains. It seems like the debate over Statehood formation just is a question of social ontology: once the social ontologist has a theory of institutions, this theory would also apply to States.

I put forward three arguments to show that social ontology is important for international law: firstly, some international lawyers already think (although not explicitly) of States as coming within the purview of metaphysics. The second argument is that *prescriptive* theories of Statehood cannot tell us about what the world *is* like. The third argument is that we cannot fully assess the attractiveness of a *descriptive* theory of Statehood without taking into account social ontology.

My first argument is that international lawyers already think that the legal

4. This at least is the project as laid out by John Searle, *The Construction of Social Reality* (The Free Press, 1995) at 1-4. Epstein is more abstract about the point of social ontology. For him social ontology defines social facts and explains what their building blocks are. He does not commit to the building blocks being brute facts. Brian Epstein, "A Framework for Social Ontology" (2016) 46: 2 POS 147 at 147, 149.

As a terminological point, there is some debate whether facts "exist" or "obtain", but I will use the term exist here given that it is a term that Searle uses as well. I also am not entirely precise whether I am referring to facts or objects/particulars, but this distinction does not affect the substance of my arguments.

concept of a State is linked to metaphysics and ontology.⁵ As discussed in the introduction, James Crawford, the pre-eminent legal authority on Statehood, posits that States come into existence when international law assigns a legal status to some fact (or state of affairs).⁶ This state of affairs that Crawford discusses already exists before the status of Statehood is assigned. Hall similarly describes the concept of Statehood as deciding which “entities” should be given legal personality.⁷ Kingsbury states that many Grotian pluralists treat ‘[S]tates as pre-legal political facts’.⁸ These authors see the theorising of Statehood as giving some legal status to an already existing entity independent of the law. Given that these entities are not unique to law, their analysis cannot be one that is purely within the legal domain. What field of study outside of law deals with the existence and nature of reality? The answer is quite clearly metaphysics, and more specifically in this context social ontology.

Moving on to descriptive and prescriptive theories of Statehood, let me first define these terms. A prescriptive theory tells us how States *should* be like.⁹ A descriptive theory tells us what States *are*. The debate around Statehood formation is largely a descriptive one: it asks what States are so that we know what entities in the world count as States. Any theorist who wants to use prescriptive theories to tell us what States *are* will face some problems. It is popularly stated that one cannot derive an *ought* from an *is*; in other words one cannot derive a prescriptive conclusion from purely descriptive premises.¹⁰ If the reader wants to know what States *are*, based on purely what a State *should be* then the reader is doing the reverse: they are trying to derive an *is* from an *ought*. They are trying to get to “States are entities with property *p*” from “States *ought* to be entities with property *p*”. The problem with this is that it allows the inference from “It ought to be that *p*” to “*p* is the case”. This is tantamount to licensing the moving from “There should be no poverty in this world” to “There is no poverty in this world”. This seems implausible.

I am hesitant to say that the aforementioned problem eliminates the relevance of prescriptive theories for Statehood debates once and for all. There is a large

5. This is not a radically new idea in law in general. The recent project by Scott Shapiro to reduce legal facts to social facts would also support this approach: Scott Shapiro, *Legality* (Harvard University Press, 2011). More practically, in Australian constitutional law it has been suggested that the power to legislate on marriage, copyrights and bankruptcy, do attempt to hook on in some way to social institutions that exist external to the constitution. Michael Stokes, “Meaning, Theory and Interpretation of Constitutional Grants of Power” (2013) 39:2 Monash U L Rev 319 at 322.

6. Crawford, *supra* note 1.

7. Stephen Hall, *supra* note 3 at 194-95.

8. Benedict Kingsbury, “The International Legal Order” in M Tushnet & P Cane, eds, *The Oxford Handbook of Legal Studies* (Oxford University Press, 2005) 283.

9. See, for example, Allen Buchanan, *Justice, Legitimacy and Self-Determination* (Oxford University Press, 2004) at 102; John Rawls, *The Law of Peoples: With “The Idea of Public Reason Revisited”* (Harvard University Press, 2001).

10. Originally elaborated by Hume, there is a literature that develops this: Julian Dodd & Suzanna Stern-Gillet, “The Is/Ought Gap, the Fact/Value Distinction and the Naturalistic Fallacy” (1995) 34: 4 *Dialogue: Canadian Philosophical Rev* 727; RM Hare, *The Language of Morals* (Oxford University Press, 1952); GE Moore, *Principia Ethica* (Cambridge University Press, 1922); John Searle, “How to Derive an ‘Ought’ from an ‘Is’” (1964) 73:1 *Philosophical Rev* 43.

literature on *is-ought* statements which cannot be exhaustively covered here.¹¹ However, even if the reader can show that some prescriptive theories can bridge the *is-ought* gap, these prescriptive theories still have competitor theories that are purely descriptive. For international lawyers to defend a prescriptive theory of Statehood, they would have to show that it is better than the descriptive ones. And this requires a lawyer to be able to assess the desirability of these theories.

Let us now turn to descriptive theories of Statehood. A descriptive theory of Statehood attempts to explain the existence of States by telling us what facts constitute a State, such as a State is constituted by some government that controls a certain territory. Let us contrast a descriptive theory of Statehood with a social ontological theory by defining social ontological theories as those that explain the existence of all kinds of institutions, not just States. My argument here is that any comparison of descriptive theories, in terms of which one is better, that does not include social ontological theories will be incomplete. To show this, let us stipulate that to compare two theories we need some criteria by which to compare them. I propose here to borrow from metaphysics to do this (although my point below will work no matter what criteria we use).¹² One way to distinguish between metaphysical theories is to treat them just like scientific theories and decide between them based on *theoretical desiderata*—such as simplicity and explanatory power.¹³ Let us assume these theoretical desiderata also apply to different descriptive theories of Statehood (e.g., the simpler and more explanatory descriptive theories are the correct ones).

Suppose that we have two descriptive theories of international law, T_1 and T_2 , both of which explain what counts as States and what does not. Let it be the case that T_1 is simpler than T_2 when it comes to explaining the existence of States. If we stop our comparison at this point without considering social ontology more broadly (i.e., consider institutions other than States) it seems like T_1 is the better theory of explaining Statehood formation. However, there is always the possibility that this will be a mistake if we don't consider other institutions. To show this, further suppose that T_1 has a simple explanation of what States are but T_1 cannot explain the existence of money, courts, and banks. T_2 , while being slightly more convoluted can explain all other institutions. It seems then that T_2 is a better theory since it has far greater explanatory power which justifies its lack of simplicity: it can explain a host of other institutions and not just States. This same argument can be repeated with any criteria the reader wishes, T_1 might outperform T_2 on a certain criterion, A , but there is no guarantee that T_2 will outperform T_1 on some other criteria or perhaps even the same criteria A when we broaden the scope to all institutions.

Some might respond that there is no reason to take into account criteria that apply to institutions other than States. States are such a special type of institution

11. *Ibid.*

12. To be precise these criteria fall under meta-metaphysics.

13. Ted Sider, "Ontological Realism" in David Chalmers, David Manley & Ryan Wasserman, eds, *Metametaphysics: New Essays on the Foundations of Ontology* (Oxford University Press, 2009) at 385; John Searle, "The Limits of Emergence: Reply to Tony Lawson" (2016) 46:4 *J* for the Theory of Social Behaviour 400 at 404.

that the descriptive theory of States is going to be very different from other institutions. For example, States are things that involve control over a territory whereas institutions like money do not. We would not expect a theory of Statehood to cover other institutions. Let us call this a *particularist* theory of institutions: the structure and/or functions of each institution must be studied in its own right and cannot be universalised.

In response, I note that the social ontological theories laid out in Section 2 are general enough to explain both States and other institutions. Hence there is no reason to multiply the number of theories beyond what is necessary (i.e., one theory of States and another for other institutions).¹⁴ Even if the particularist is correct, I will note that particularism itself is a position about social ontology or at least meta-social ontology. The particularist theory tells us something about the metaphysics of institutions (i.e., that the nature and reality of different institutions are very different from each other). The particularist international lawyer would still need to consider the consequences and contents of different theories of social ontology in order to arrive at a particularist conclusion. They would need to think about the nature and existence of different types of institutions and conclude that no one theory can handle all of them. Social ontology is still relevant.¹⁵

2.0 Groupjective Internalism

I propose that we can divide up social ontology into the two rough camps: *Internalism* and *Externalism*. For the *Internalist*, the existence (and maybe nature) of social and institutional facts depends on the mental states of individuals or groups.¹⁶ Hence the existence of States are dependent upon the beliefs of certain people. *Externalists* argue that the existence and nature of social and institutional facts are independent of mental states. Rather it is more important to look at actual behavioural patterns of societal practices, regardless of whether they conform to what we *think* the societal practice is.¹⁷ The term “dependence”

14. This argument assumes that simplicity applies not just to theories of social ontology but theories of theories of social ontology (i.e., meta-social ontology).

15. My claim is *not* that theorising social ontology is logically necessary to theorising about meta-social ontology. My claim is much weaker and lies at a pragmatic level (rather than logical necessity): if one wants to do metatheoretical reasoning, one practically needs to have some basic knowledge about the theories that they are reasoning about. For an analogous debate in moral philosophy, there is disagreement whether metaethical theorising requires theorising about ethics. See Tristram McPherson, “Metaethics and the Autonomy of Morality” (2008) 8:6 *Philosophers Imprint* 1.

16. Margaret Gilbert, *On Social Facts* (Routledge, 1989) at 58; FA Hayek, “The Fact of the Social Sciences” (1943) 54: 1 *Ethics* 1 at 2-3; John Searle, *supra* note 4 at 23-26; Amie Thomasson, “Artifacts and Human Concepts” in Eric Margolis & Stephen Laurence, eds, *Creations of the Mind: Theories of Artifacts and their Representation* (Oxford University Press, 2007); Raimo Tuomela, *Social Ontology: Collective Intentionality and Group Agents* (Oxford University Press, 2013) at 220.

17. Crawford Elder, “On the Place of Artifacts in Ontology” in Eric Margolis & Stephen Laurence, eds, *Creations of the Mind: Theories of Artifacts and their Representation* (Oxford University Press, 2007); Patrick Emerton, “Political Freedoms and Entitlements in the Australian Constitution—An Example of Referential Intentions Yielding Unintended Legal Consequences” (2010) 38:2 *Federal Law Rev* 169; Rebecca Mason, “Social Ontology Naturalised” [unpublished]

will not be precisely defined, e.g., in terms of constitution or necessity or other metaphysical concepts, but some comments on the properties of dependence will be made below.

I use the following example, from Haslanger, to show how the two theories can come apart.¹⁸ Consider what counts as a “parent” for parent-teacher evenings at schools. Most people think of parents as the biological progenitors of a child. However for school purposes, the school often accepts any guardian of the child as a “parent”. Suppose that the teachers don’t *think* of the guardians as the parents of the children, but simply as substitutes for the parent. Nevertheless, the way the teachers *interact* with the guardians is identical to what they would have done if a parent had come. Someone with Internalist leanings might say that “parent” here refers to biological progenitors since that is what everyone associates with the term “parent”. What is happening is that the school is making an exception for guardians. Someone with Externalist leanings might say that in practice the “parent” of a child for parent-teacher night is either the biological progenitor or their guardian since that is in practice what happens. It is not that they are making exceptions for guardians; guardians actually count as parents for parent-teacher nights.

In this section I shall firstly give some brief motivations for taking Internalism as a premise rather than arguing for it (Section 2.1). I shall then provide more details on how “dependence” between institutions and mental states work in that Internalism (Section 2.2.). Lastly, I will discuss the variant of Internalism called Groupjective Internalists (Section 2.3), which I shall be using later in this paper to establish Constitutive Theories of Statehood.

2.1 Some Reasons for Considering Internalism

While this paper does not aim to thoroughly defend Internalist theories, I shall present three brief reasons why a version of Internalism is used. The *first* is that Internalism is popular in the social ontology literature.¹⁹ I show in 2.3, that some

manuscript] online: personal website, http://www.remason.org/uploads/8/1/2/6/8126749/social_ontology_naturalized_march_2015_draft.pdf. I would also add Durkheim as belonging to this group since he thinks of social facts as lying outside the consciousness of individuals. However, note that Gilbert has given an internalist reading of Durkheim as being committed to group beliefs (so perhaps social facts are not within the consciousness of individuals but in the consciousness of the group). Emile Durkheim, *The Rules of Sociological Method*, translated by WD Hall (The Free Press, 1982) at 51-52. Gilbert, *ibid* at ch 5.

I would add that this is not the same debate as the holist and individualist debate (i.e., the debate whether we explain social facts based on groups or the actions of individuals in the group). One can be an individualist and an externalist: the proper explanation of social facts is at the individual level, but it is only about their external actions and not their mental states. One can also be a holist and an internalist: the proper explanation of social facts is at the group level, but a complete explanation is in regards to collective mental states.

18. Sally Haslanger & Jennifer Saul, “Philosophical Analysis and Social Kinds” (2006) 80 Proceedings of the Aristotelian Society Supplementary at 99-100. Haslanger’s original example is used to illustrate a different distinction from the one I discuss here.
19. Mason, *supra* note 17, calls this the Standard View in social ontology. This assertion is backed up by the fact that major figures in the field subscribe to some form of internalism, *supra* note 16.

major figures in the field subscribe to Internalism. Since there is not much written on social ontology in the context of Statehood formation, it would make sense to start with the more orthodox versions of social ontology.²⁰

The *second reason* is that intuitively mental states and institutional facts do seem to be tightly linked. It is hard to imagine institutional facts without any mental states regarding those facts or institutions. For example, it seems inconceivable for there to be a world where money exists and yet no one thinks there is such a thing as money. The *third reason* is that Internalism provides a simple explanation as to how to separate social facts from brute facts: the former is mind-dependent whereas the latter is not.²¹ Further it is a simple one, that only focuses on one factor—that of the mind. Hence in terms of *theoretical desiderata* (see 1.0), Internalism is already doing well in terms of two of the criteria.

2.2 Dependence in Internalism

I defined an Internalist as someone who believe that there is a dependence relation between the mental states of people and institutions. I want to illustrate two different types of dependence relations in social ontology based on Searle's distinction between *ontological subjectivity* and *epistemic objectivity*.²²

Ontologically subjectivity means that the *existence* of institutional facts *depend*²³ on human intentions (i.e., their mental states).²⁴ This is the first kind of dependence relation, it holds between the existence of an institutional fact and the beliefs of people. It is not conceivable that there is a world with money without humans having beliefs or desires about commodities and wanting something to be a medium of exchange. By contrast, the existence of brute facts (e.g., there are rocks in the distance, grass exists) is not dependent on human intentionality. There are possible worlds with no humans but with rocks and grass. The reader might wonder if it makes difference whether we are analysing the existence of institutions in general (i.e., the existence of States depend on mental states) or the existence of a particular institution (i.e., The existence of France depends on mental states). I will address this issue in 3.3.

For many social ontologists it is not just individual human intentions that are

20. *Supra* note 2.

21. For a more detailed defence of this see John Searle, *supra* note 13.

22. Searle, *supra* note 4 at 8-9.

23. Searle does not clearly state what he means by “depends”. As stated before I too do not try to define the relation.

24. The question is what then do we do with mental states? We want to say they are brute objects, but they seem to be dependent on human intentionality. Searle's answer to this (as I interpret him) is to introduce the distinction between *observer-relative features* and *intrinsic features of reality*. He defines intrinsic features of reality as ‘[features] that exist independently of all mental states except for mental states themselves, which are also intrinsic features of reality’ (*supra* note 4 at 12). Observer-relative features are properties of an object that is only describable in terms of relations with an observer. A mental state is not observer relative as in a world with only one thinking person, he would still have a mental state even if that person was not aware of it himself. Social facts are observer-relative but not intrinsic. Some might think that the definition of intrinsic features of reality is rather *ad hoc*, but I shall leave it to others to defend. Searle, *supra* note 4 at 9-13.

relevant for the existence of institutions but rather the collective intentions of groups.²⁵ The basic idea of collective intentions is that there is such a thing as group intentions that are not the same as individual intentions. There is a difference between an individual football player's intention to score a *goal* and the collective intention of the whole team to win a *match*. A single player cannot win a group game; only thinking as a team allows one to do that. A realist about collective intentions will say that groups of people such as corporations and parliaments can have intentions as a group.²⁶

The second type of dependency (or rather lack thereof) is *epistemic objectivity*. While social facts are ontologically subjective, they are epistemically objective. This means that when making judgements about social facts, there is a truth and falsity to those judgements *independent* of our *individual* attitudes, perceptions and feelings.²⁷ As an example, I can say that it is true that "This burrito costs \$5" without referring to my own personal attitudes, perceptions, or feelings. There is no dependence relation between the truth of this proposition about money and individual mental states. Regardless, money is still ontologically subjective because it only exists because people accept that it does.

I don't think it is necessary for an Internalist to accept epistemic objectivity, but it is necessary to accept ontological subjectivity: this is the core of what it means to be an Internalist. Internalists who subscribe to both ontological subjectivity and epistemic objectivity claim that social facts are still "real" because of their epistemic nature. While it is people who socially construct things like money and property, our ability to make true statements of these things entails that they are real in some social sense.

2.3 Groupjectivity

A Groupjective Internalist is an Internalist (i.e., subscribes to ontological subjectivity) who is also committed to what Tuomela calls *Groupjectivity*.²⁸ I divide groupjectivity into two types: truth and normative groupjectivity.

Truth Groupjectivity, and the original version of Groupjectivity that Tuomela proposes, is the thesis that propositions about social and institutional facts are true relative to the groups that accept them. For example, "The Prime Minister is Malcolm Turnbull" is false relative to Americans but is true relative to Australians. We can frame this as follows:

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- 25. Searle, *supra* note 4 at 23-26; John Searle, *Making of the Social World* (Oxford University Press, 2010) at ch 2; Christian List & Phillip Pettit, *Group Agency: The Possibility, Design and Status of Corporate Agents* (Oxford University Press, 2011); Margaret Gilbert, *supra* note 16; Michael Bratman, *Faces of Intention: Selected Essays on Intention and Agency* (Cambridge University Press, 1999); Raimo Tuomela, *supra* note 16.
 - 26. Admittedly this is a rather short and oversimplified elaboration of a complex topic. For further reference see *ibid*.
 - 27. Searle, *supra* note 4 at 8-9. I have added the term "individual", which is not found in Searle, to avoid the charge that "This burrito costs \$5" cannot be epistemically objective since it is dependent on the attitudes of society in general towards money.
 - 28. Tuomela, *supra* note 16 at 220.

Truth Groupjectivity

Propositions about the existence and nature of a group's (or groups') institutions are only true for that group (or groups).²⁹

E.g., Existential Propositions: "There exists the position of Presidency" is only true in the US but not Australia.

Propositions about the nature of institutions: "The Prime Minister is Malcolm Turnbull" is only true for Australia but not the US.

There is no conflict between Truth Groupjectivity and epistemic objectivity. As defined, the former states that *truth is relativised to groups* and the latter states that truth is *not relativised to individuals*. These are two sides of the same coin.³⁰

Normative Groupjectivity is the thesis that the norms of an institution are relative to the people who participate in the institution.

Normative Groupjectivity

The norms of an institution only apply to the group who has accepted the institution.

E.g., The President of the United States can only declare war on behalf of Americans.

A Groupjectivist holds to either one (or both) of these theses. I shall show examples of three well-known social ontologists whose theories commit them to one of the Groupjectivity theses above: Raimo Tuomela, John Searle, and Margaret Gilbert.

A. Truth Groupjectivity

Both Tuomela and Searle are committed to Truth Groupjectivity but get to that position using different routes.

Although Searle doesn't use the term Groupjectivity, we can still derive Truth Groupjectivity from his theory. On my interpretation of Searle, propositions

29. This is my own slight modification to Tuomela's groupjective thesis. Firstly, Tuomela claims that all group-social facts (i.e., group constructed social facts) are groupjective, not just those having to do with the existence and nature of institutions (*ibid* at 219). I don't think this is true. Consider "Burritos are 5 Australian dollars". This proposition describes a fact that involves the institution of Australian money, but it can be correctly asserted about burritos in Malaysia (i.e., by converting the Malaysian ringgit to Australian dollars). By limiting groupjectivity to propositions about the existence and nature of institutions, I get rid of these kinds of counterexamples.

Secondly, there is an issue of how to deal with propositions that contain the group that accepts the social institution, e.g., "The Prime Minister of Australia is Malcolm Turnbull". This proposition seems true in any group—e.g., it would be true even for a Frenchman or American. Nevertheless, this proposition already has the group context built into the proposition via the phrase "of Australia". Hence these kinds of propositions are already groupjective despite being true for people outside of Australia.

30. In fact, Tuomela claims that Truth Groupjectivity entails epistemic objectivity for a group. See *ibid* at 220.

about societal facts (or *social propositions*), *s*, always describe the beliefs of specific groups. Hence, it is trivially true that a societal proposition *s* is truthfully asserted about particular groups, since all *s*' describe particular groups. The reason for this is that Searle proposes that institutional facts arise from the collective acceptance of constitutive rules.³¹ Constitutive rules are rules that come in the form "object X counts as having status Y with function F in context C".³² Take again the case of money; we take certain brute objects such as pieces of paper (the X's) and then assign them the status of money Y which carries the function (F) of being a medium of exchange in the context of some country (C). In the case of Statehood, States arise where some objects X (presumably ministers of government) count as a State Y with the Statehood function F in the international context C.³³

Searle asserts that institutional objects (e.g., governments, States, money) are just 'placeholders for patterns of *activities*' involving beliefs about these constitutive rules.³⁴ Hence, the social proposition "Australia exists" just describes the fact that there exists a group of people who accept that certain X's count as Australia (Y) with the statehood function in some context. Hence, "Australia exists" is true when some *particular* group of people actually accept a constitutive rule. Propositions about the existence or nature of institutions just describe some group of people accepting certain constitutive rules. The facts that would make these propositions true are facts about some *group(s)* collectively accepting some constitutive rule. People outside the group do not matter.

Tuomela on the other hand argues that it is the epistemic objectivity of institutions that lead to Truth Groupjectivity.³⁵ Recall that the truth of a proposition like "Malcolm Turnbull is Prime Minister" is independent of people's individual feelings and beliefs (this is epistemic objectivity). However, on the flip side Tuomela says that the truth of "Malcolm Turnbull is Prime Minister" can only be validated based on the collective acceptance of the group that he is Prime Minister.³⁶ It is the fact that people *collectively* believe that Malcolm Turnbull is Prime Minister that makes it the case that "Malcolm Turnbull is Prime Minister" is true.³⁷ It is because of this that Tuomela says '[n]o input from the group-external world is relevant to the truth of the belief.'³⁸ Instead the relevant collective mental states are those in the group.

We can conceptualise this as a *truthmaker* conception of Truth Groupjectivity. According to truthmaker theories, propositions are true when they correspond to

31. Searle, *supra* note 4 at 27-28.

32. The original formulation was just "X counts as Y in C", see *ibid* at 27-28 and 38-40. However, in Searle (*supra* note 25 at 99) we get this more elaborate version separating the Y and the F.

33. Some might say that for States, we should follow Smith and Searle's freestanding view instead, where there are no underlying X's, just the collective acceptance that "entity Y has the function F in C". See Barry Smith, "John Searle: From Speech Acts to Social Reality" in Barry Smith, ed, *John Searle* (Cambridge University Press, 2003) at 19-25; Searle, *supra* note 25 at 100.

34. Searle, *supra* note 4 at 57.

35. Tuomela, *supra* note 16 at 225.

36. *Ibid*.

37. *Ibid* at 226.

38. *Ibid*.

facts in reality. These facts are *truthmakers* for these propositions, they make the propositions true.³⁹ For Tuomela, the truthmakers of social propositions are the fact that group members collectively believe that these social propositions are true. Hence the facts that makes a proposition like “Australia exists” true are the beliefs of a *specific* group. It might be objected that this view allows institutions to be created out of thin air; nevertheless, that is very much consistent with the ontological subjectivity of Internalists:

Assuming ... that people have a grasp of what money in general is ... we are here dealing with full *content construction* entailing that the group has the full power by its collective construction to create an institution or other artifact by its “arbitrary” choice.⁴⁰

Additionally, while this might seem like an easy a way to create institutions, trying to get a belief or goal to be accepted across a society is not an easy task.

B. Normative Groupjectivity

In addition to Truth Groupjectivity, I propose that there is also a normative variant of Groupjectivity. Normative Groupjectivity asserts that the norms of a group’s institutions only apply to that group.

Tuomela’s theory is Normatively Groupjective because in his view, the main function of institutions is to solve coordination problems (e.g., the law resolves which side of the road we drive on).⁴¹ Since institutions solve coordination problems in the group, this provides reasons for individuals in the group to obey the institution and those in power (e.g., if we have resolved to drive on the left side of the road then everyone has a reason to do so).⁴² These reasons for action produce a norm for people to follow (i.e., these individuals have a reason to drive on the left hand side of the road and so they *ought* to do so). The reasons do not, however, apply to out-group members. Americans have no reason to follow the left-side driving rule of other countries, because in America everyone drives on the right. Thus, the norms of road driving laws in other areas of the world doesn’t apply to Americans.

Searle’s theory is similarly Groupjective in a normative sense. For Searle, if X counts as Y with F, then norms surrounding F are created.⁴³ For example, if Malcolm Turnbull counts as the Prime Minister of Australia with the function of leading the executive branch, then Turnbull has the right to exercise executive powers. This holds because everyone has accepted that Turnbull has the function of leading the executive branch.⁴⁴ Nonetheless, the rights and duties of X do not

39. See generally, David Armstrong, *Truth and Truthmakers* (Cambridge University Press, 2004).

40. Tuomela, *supra* note 16 at 219.

41. *Ibid* at 224.

42. *Ibid.*

43. “... we are not just creating Y status functions for their own sake but to assign powers—positive, negative, conditional, and so on—to actual people by relating them to the Y status functions created”, Searle, *supra* note 26 at 102.

44. *Ibid.*

extend beyond the group that accepts X as having some F.⁴⁵ Since the Chinese have not accepted Turnbull as their leader; Turnbull does not have the rights and duties of their executive leader.

In *On Social Facts*, Margaret Gilbert's notion of social facts focuses on social groups, e.g., States, nations, and army corps.⁴⁶ Her theory does not extend to money or property since those institutions are not made up of people. Nonetheless, her theory is still relevant since States are arguably a type of social group. For Gilbert, one of the key defining features of a social group is that the group of people have a collective belief.⁴⁷ This is what distinguishes a social group from a random collection of individuals. If we saw a lot of people walking on a main road in the city, we would not call that a social group since they are probably just independently walking to different locations. It would be different however if they held a demonstration or a protest because then there is some kind of collective belief that holds them together.⁴⁸

Gilbert argues that these collective beliefs can be coercive.⁴⁹ She defines collective beliefs as the beliefs that members of a social group are commonly known to accept.⁵⁰ For example, it is commonly known that to be a conservative Christian one must accept that Jesus died for their sins. To become a member of these groups 'entails taking on or accepting a set of responsibilities and rights: it involves recognizing a new set of constraints on one's behaviour'.⁵¹ If one wants to join the Christian church then one accepts, or will be pressured to accept, that one should go to church and engage in the sacraments, for example. In this sense, Gilbert's theory is Normatively Groupjective: to enter a certain group, one ought to act in certain ways and believe in certain things. However, this does not apply to people who have no interest in entering the group. An adherent to Hinduism or Islam would have no reason to conform to the group beliefs of Christians.

3.0 Reviving the Constitutive Theory of Statehood

Assuming that Groupjective Internalism is correct, the rest of the paper is dedicated to showing that a certain type of Constitutive Theory—*Substantive Constitutivism*—is not as unattractive as most international lawyers think.⁵²

In International Law, the two traditional competing views of Statehood are the *Declaratory* and *Constitutive Theories* of Statehood.⁵³ *Declaratory Theorists* argue for recognition-independent criteria for statehood while *Constitutive Theorists* claim that recognition is a necessary criterion for statehood. In other

45. 'The system, once accepted by the participants, commits *them* to the acceptance of facts within the system.' *Ibid* at 103.

46. Gilbert, *supra* note 16 at 8.

47. *Ibid* at 237.

48. I should note that Gilbert's view of a collective belief does not reduce to individual beliefs. See *ibid* at 290.

49. *Ibid* at 308.

50. *Ibid* at 306.

51. *Ibid* at 411.

52. *Supra* note 3.

53. Crawford, *supra* note 1 at 4-5; Malcolm Shaw, *supra* note 3 at 445-46.

words, a Constitutive Theorist requires that some entity *A* be recognised by other States in order for *A* to be a State. Recognition is a *constitutive* element of Statehood. The Declaratory Theorist however, believes that the creation of a State is not reliant on recognition by other States. When States recognise another State they are just *declaring* their acknowledgement that the other State has met the requisite recognition-independent criteria. Crawford has proposed that neither theory explains modern international relations.⁵⁴ Nonetheless, Crawford cannot be correct because my definition is exhaustive: either States need to be recognised by other States or they don't. Whatever the correct theory of Statehood is, the theory will logically have to fall within one of these two categories.

I will first discuss what recognition is and divide Constitutive Theorists into *Treatment* and *Substantive Constitutivists*. I will argue that Groupjective Internalism leads to Substantive Constitutivism but will not comment on Treatment Constitutivism. Since my main concern is to eliminate Declaratory Theories, I take it to be sufficient for me to establish the connection with Substantive Constitutivism. The road to Substantive Constitutivism will be based on two arguments against the Declaratory Theorist. The first is that Groupjectivity requires external recognition for a State to come into existence. The second argument is that this cannot be escaped via what I call the *Indirect Method* of Statehood creation. I end this section by dealing with objections.

3.1 What is Recognition?

To theorise 'recognition', we need to explain two things: firstly, how is it that a State as a group can *do* anything and secondly, what exactly counts as recognition?

All the authors I have cited in 2.3 accept the reality of collective intentionality—i.e., that groups can in fact form intentions and desires. They would say that for France to recognise the existence of Australia there will be collective intentions among some of the French to recognise Australia. The issue is which French persons need these collective intentions? It cannot be all of them. Tuomela's distinction between egalitarian and hierarchical groups is useful here.⁵⁵ Egalitarian groups are ones where the beliefs and intentions of *all members* are relevant to setting up institutions. Nonetheless in many cases we do not need the collective intentions of everyone in a group. Instead, groups sometimes specialise, and only the intentions of the members of some sub-groups are relevant to the creation of some institutions. These are *hierarchical groups*. For example, only the intentions of parliamentarians, as opposed to members of the executive, are relevant to making laws. So in the case of France recognising the existence of Australia, this probably only requires the collective intentions of certain ministers and diplomats.

The second issue to be theorised concerns what kinds of collective actions or intentions count as an act of recognition? I propose three possible ways to categorise

54. Crawford, *supra* note 1 at 5.

55. Tuomela, *supra* note 16 at 26.

these collective actions: *formal*, *substantive*, and *treatment recognition*.

Formal recognition is a written or oral pronouncement that some State exists. It does not matter if the relevant people in the pronouncing State actually form the intention to accept the other entity as a State. What matters is that they have given an authoritative and formal statement that it is so. Alternatively, we can view recognition *substantively* as the actual acceptance that some entity is a State. The substantive view is that States cannot just formally pronounce a group to be a State, they need to form the intention to recognize that some group counts as a State. Lastly, we can think of recognition in terms of *treatment*. This is where *A* treats another entity *B* as if it were a State but *A* doesn't form the intention to accept *B* as a State. For example, the leader of *A* might informally trade with *B*, i.e., no formal treaty, which seems as if *B* is being treated as a State but the leader of *A* still refuses to declare that *B* is a State in formal documents.

Some might wonder how there can be formal recognition without substantive recognition. One example is a case of *deceit*, State *A* formally pronounces that there exists a State *B*, but in reality the leadership of *A* doesn't really form the requisite intention. Another example is a case of *ignorance*, where *A* makes the formal pronouncement but does not realise that this indicates their intention to accept *B* as a State (e.g., maybe the leader of *A* signed the proclamation without reading it).

Let us first eliminate formal recognition (on its own) as a possible type of recognition for Constitutive Theories (let us refer to these as *Constitutivism*). It is unlikely any Constitutivist would defend formal recognition alone as being required for statehood. Firstly, it would lead to the incredulous conclusion that newer States have not recognised old established States like France or England as these newer States have not written a formal pronouncement to that effect. Secondly, the purely formal definition of recognition would mean that even if State *A* frequently and consistently treats Group *B* like a State, e.g., enters into treaties with it, *A* is still not recognising *B* as a State. This seems counterintuitive. Hence, I shall ignore formal recognition in this paper.

We are thus left with substantive and treatment recognition which allows us to differentiate between different types of Constitutivism:

Treatment Constitutivism: The existence of a State is dependent on treatment recognition.

Substantive Constitutivism: The existence of a State is dependent on substantive recognition.

It is plausible that one cannot separate formal and treatment recognition from substantive recognition (i.e., if one treats another entity as a State, then one has to have the requisite mental state). Whether or not they are separate will not affect the substantive arguments in the rest of the paper.

We can then define Declaratory Theories as follows:

Declaratory Theory: The existence of a State is not dependent on either substantive or treatment recognition.

The rest of this section will argue that subscribing to Groupjective Internalism eliminates the Declaratory Theory. It is unclear whether it also eliminates Treatment Constitutivism as this version of constitutivism might be consistent with what Searle calls the Background (I will discuss this in Section 4.2). However as indicated above, I shall not deal with Treatment Constitutivism as the main concern of this paper is to deal with Declaratory Theories.

3.2 Argument 1: External recognition is necessary

Internalism claims that an institution exists only where some group of people accept or believe in its existence. The question is *whose* mental states are necessary. If it is the intentions of *other States*, then this amounts to substantive recognition and the Declaratory Theory is inconsistent with Internalism.

Could the Declaratory Theorist argue that we only need to focus on *internal* recognition by the governed population? As long as the governed population of entity *E* accepts *E* as a State then that suffices to establish a State. The existence of a State is dependent on recognition but it is not the recognition of other States.

Internal recognition cannot be enough to generate States, at least the type of States that international law is concerned with. Here is where Groupjectivity comes into play. Recall that Truth Groupjectivity says that propositions about a group's institutions can only be truthfully asserted about that group. Applying this, the proposition "*E* is a State" are only true for the governed population but not for other States. For example, if the population of Palestine recognised it as a State but no one else did, then "Palestine is a State" is only true for Palestinians but is not true for the international community. Normative Groupjectivity says that the norms of an institution only apply to the group whose mental states establish that institution. Hence, norms (rights and duties) surrounding Statehood would only apply to the governed population of *E* and not to other States.

States created by internal recognition are not the kind of institutions that international law is concerned with. For international law, we want "*E* is a State" to be true for other States as well. Further, international legal rights and duties are those that apply between *E* and other States and not *E* and its own governed population. Hence internal recognition is not sufficient to get the types of States that international law is concerned with. We need external recognition (i.e., recognition from other States).

3.3 Argument 2: The Indirect Method cannot be used for Statehood Creation

There might still be a way out for the Declaratory Theorist. Up to this point we have been assuming that the existence of *specific institutional entities* (e.g., Australia) is dependent on mental states. However, ontological subjectivity as defined is ambiguous between whether the proposition "States exist" or the proposition "Entity *A* is a State" must be accepted by other States. For example, it

is plausible that for States as a general category to exist, people need to believe that such institutions exist. Nevertheless, it doesn't follow that these people also need to believe that specific States such as France or Germany exist. Instead, as Crawford hypothesises, perhaps existing States only need to recognise 'general rules or principles' as to what counts as a State rather than on 'an ad hoc, discretionary basis'.⁵⁶ Let us call the recognition of general rules or principles the *Indirect Method* of creating States whereas the recognition of the existence of specific States the *Direct Method*.⁵⁷

To clarify these two methods further, it will be useful here to introduce the *type-token* distinction.⁵⁸ An institution *type* is a general category of institutions. Whereas institution *tokens* are particular instances of institution types. For example, a State is an institution type, but Australia is an institution token. Money is an institution type but the specific money bill in my wallet is an institution token. The Direct Method requires the existence of institution tokens to be dependent on mental states whereas the Indirect Method only requires the existence of institution types to be dependent on mental states.

I assume that both methods are legitimate ways of creating States. Some institutions are created through the Direct Method such as electing the Prime Minister or President. People vote for the particular person. On the other hand, the institution of money is created using the Indirect Method. People generally agree that certain coins and pieces of paper count as money because of the properties they possess (i.e., metals and paper of a certain kind backed by the Reserve Bank). They do not look at individual pieces of coins and paper and say that each piece counts as money.

With the Indirect Method, the agreement is going to be about the *properties* of institution types (agreement is still necessary as we are still within the Internalist framework). For States here is how the Direct and Indirect Methods would work:

Direct Method: *Palestine* is a State.

Indirect Method: States exist and they have the properties $P_1 - P_n$.

A Declaratory Theorist can still be a Groupjective Internalist if she uses the Indirect Method. This is still "non-recognitional" in nature hence still being consistent with Declaratory Theories. To explain what I mean by "non-recognitional", let us call the properties $P_1 - P_n$ that States need to possess *D-criteria* (as in Declaratory Criteria). With the Indirect Method, States do not recognise new State tokens but instead recognise the D-criteria that produces new States. For example, let us say that existing States recognise the D-criteria that States are things that have a properly running government. Then it does not matter whether existing States recognise that there exists a State of Palestine. So long as there is

56. Crawford, *supra* note 1 at 5.

57. In the Searlean context, Searle explicitly mentions the indirect method (*supra* note 25 at 99) but not the direct method. He was also possibly making something of this distinction when talking about codification (*supra* note 4 at 53).

58. See, generally, Linda Wetzel, *Types and Tokens: On Abstract Objects* (MIT Press, 2009).

a Palestinian government that “runs properly”, it meets the D-criteria and is thus a State under the Indirect Method. Conversely, the Declaratory Theorist *cannot* use the Direct Method. With the Direct Method, other States do need to recognise specific State tokens (e.g., there is a State of Palestine). This amounts to the same thing as Substantive Constitutivism.

Nonetheless, it is implausible for the Indirect Method to be applied to States as there is no clear set of D-criteria that the international community has accepted. As Grant mentions, “statehood remains a concept inadequately fleshed out in authoritative international legal sources”.⁵⁹ Crawford similarly states that “[d]espite its importance, statehood ‘in the sense of international law’ has not always been a clearly defined concept”.⁶⁰

To show this let us now list some suggestions for D-Criteria in the literature. Most Declaratory Theorists accept the *Montevideo Convention*⁶¹ as being necessary conditions for Statehood. According to the Montevideo Convention a group is considered a State where it has (a) a permanent population, (b) a defined territory, (c) a government and (d) the capacity to enter relations with other States. Technically (d) might not be recognition-independent since the capacity of some group to enter relations with other States in many cases will be dependent on the group’s recognition as a State.⁶² Thus to avoid falling into Constitutivism, declaratory theorists generally interpret Art 1(d) without reference to recognition. There are two ways to do this. Firstly, it is possible to interpret Art 1(d) formally as simply requiring the constitutional competence to enter into legal relations.⁶³ As long as the local domestic laws of some government allows for it to enter into relation with other governments, then this is enough to satisfy art (1)(d). Another method of avoiding recognition is to interpret (1)(d) as referring to how independent the group is from the rule of another State.⁶⁴

However, many have suggested other conditions that go beyond the Montevideo Convention:

Independence: Crawford drops capacity to enter relations from the Montevideo Convention and argues that independence is an additional property that groups must have to become a State.⁶⁵

Secession Requirements: There are several possible requirements for a new state to legitimately break away from an old one. These include

59. Thomas Grant, “Defining Statehood: The Montevideo Convention and its Discontents” (1999) 37 Colum J of Transnat L 403 at 408.

60. Crawford, *supra* note 1 at 31.

61. Art 1, Montevideo Convention on the Rights and Duties of States, 26 December 1933, 165 LNTS 19.

62. Shaw, *supra* note 3 at 202.

63. Amy Eckert, “Constructing States: The Role of the International Community in the Creation of New States” (2002) 13 Journal of Public and International Affairs 19 at 23.

64. Donald Rothwell, Stuart Kaye, Afshin Akhtakavari & Ruth Davis, *International Law: Cases and Materials with Australian Perspectives*, 1st ed (Cambridge University Press, 2010) at 278-79.

65. James Crawford lists the capacity to enter into legal relations and independence as two different criteria, *supra* note 1 at 61-63.

self-determination requirements,⁶⁶ *non-usurpation requirements*,⁶⁷ and potentially *constitutionally legitimacy constraints*.⁶⁸

Government Claims to be a State: Potentially if some Group does not claim to be a state then we cannot claim that it is one.⁶⁹

Protection of Minority Rights: There is evidence of state practice where governments are refused recognition until they can guarantee the protection of rights of the minorities in their governed territories.⁷⁰

Given that there is no universally recognised set of D-criteria, this raises the problem of how to reconcile all these different criteria.

To simplify things, let us suppose that it is generally agreed upon that we can group existing suggestions for D-criteria into the following sets: D_1 with criteria c_1 and c_2 and D_2 with criteria c_2 and c_3 . There are four possibilities for dealing with these sets. The first is to merge D_1 and D_2 into a third set, D_3 , which has criteria c_1 , c_2 and c_3 (even if the criteria contradict each other). The second is to merge D_1 and D_2 into a third set D_3 but remove any criteria that is inconsistent. For example, if c_2 and c_3 are inconsistent, then we might remove both so that D_3 might just be c_1 or remove only one of them to form $\{c_1, c_2\}$ or $\{c_2, c_3\}$. The third option is to abandon the Indirect Method and resort to the Direct Method. The fourth option is to say that we do not know what States are.

The fourth option is the most easily dismissed since the third option is available. Why give up on analysing Statehood, when we still have the Direct Method? Additionally, the conclusion that no one knows what States are is a rather radical conclusion to make.

The first and second options have issues with having to posit *hypothetical intentions*. Both options 1 and 2 require a merged set which is not actually accepted by anyone (some people have accepted D_1 and others D_2 , but none have accepted D_3). This option hence requires some hypothetical acceptance of the merged set, D_3 . The theories I have discussed require *actual collective acceptance* of the existence of some institution or of some D-criteria. Hence options 1 and 2 are antithetical to the core of Internalism thesis that institutional facts are grounded on the *real* mental states of people.

The first option also has issues with inconsistent predictions about States since it does not remove inconsistent criteria. For example, the secession requirements

66. In *Reference re Secession of Quebec* [1998] 2 SCR 217, 227. It is unclear if the right to secession through self-determination is available in contexts other than decolonialisation (see Hall, *supra* note 3 at 213-14).

67. This is the notion that 'an entity is not legitimate if it comes into being by displacing or destroying a legitimate state by a serious act of injustice'. Allen Buchanan, *supra* note 9 at 264.

68. Thomas Grant states that since the demise of the Soviet Union and Yugoslavia, some theorists propose that have argued that a condition for statehood was that a successor state seceded in a way as allowed by the constitution of parent state (although Grant does disagree with this). Thomas Grant, *The Recognition of States: Law and Practice in Debate and Evolution* (Praeger Publishers, 1999) at 99-106. For more on internal constitutions as a requirement see Alan James, "System or Society" (1993) 19 Rev of Int'l Studies 269 at 269.

69. Grant, *supra* note 59 at 431.

70. Grant, *supra* note 59 at 96-98; Eckert, *supra* note 63 at 26; Dixon, *supra* note 3 at 135.

make it the case that a new State needs to have legitimately seceded from the old State. If these are conditions for Statehood then Manchuko (which was a territory taken from China by Japan through the use of force) would have not been a State. Suppose that D_1 says that legitimacy is a necessary criteria while D_2 states that it is not. We end up with the prediction that Manchuko was both a State and not a State. The second option gets rid of inconsistencies, but without much motivation. Why are we allowed to remove inconsistent criteria? As stated above, we cannot motivate this by referring to some hypothetical rational person since we need actual agreement.

The only option left is option three, the Direct method, which as discussed above is equivalent to Substantive Constitutivism.

Objection 1: It is unlikely that there is collective acceptance between every State to recognise that some other State exists; even for older established States.

This is a forceful objection and is similar to the problem of relativism that many international lawyers attribute to Constitutivism. I dedicate Section 4 to addressing this issue.

Objection 2: Even if we concede that Substantive Constitutivism is true, how is metaphysics necessary? Is this not just Hart's Legal Positivism?

The overall project of this paper was to show that taking a metaphysical position can lead to specific legal outcomes. This objection attacks the paper by claiming that the arguments above are just legal positivism in disguise. Thus, the payoffs of metaphysics are yet to have actualised. Here is one way that a legal positivist might frame his argument for Substantive Constitutivism:

If L is a legal norm then there is societal acceptance of L.⁷¹ [Hartian Assumption]

(1) If "States ought to be created through D-criteria" is a legal norm then there is collective acceptance of the norm. [Instantiation of 1]

(2) There is no collective acceptance of the norm. [from discussion above]

Therefore, "States ought to be created through D-criteria" is not a legal norm. [Modus Tollens 2,3]

My first response is that none of the theorists surveyed in 2.3 are wedded to Hart's theory of law.⁷² While they all believe that social institutions arise out of societal acceptance, that doesn't follow that the norms of these institutions are legal ones. None of these theorists identify legal norms as social ones. Secondly, if we rely solely on Internalism and Truth Groupjectivity then we do not need to rely on any of the premises above. This is because neither Internalism nor Truth Groupjectivity requires a theory of normativity. So we can get to Substantive

71. HLA Hart, *The Concept of Law* (Clarendon Press, 1961) at 868-69. Hart describes it as societal pressure/demands/customs, but I shall assume the concepts are roughly interchangeable.

72. For example, Crowe argues that using Searle's theory of social ontology leads to natural law. Jonathan Crowe, "Law as Artifact Kind" (2014) 40:3 Monash U L Rev 737 at 752.

Constitutivism independent of any normative premises like the ones above.

Objection 3: Could you not make the same arguments purely from an international law perspective? Custom requires agreement, there is no agreement about D-criteria and therefore there is no custom.

It is not clear if social ontological issues (e.g., what counts as a State) can be decided by purely legal arguments. Custom as a source of international law comes from Art 36(2) of the ICJ Statute. What relevance, if any, does the ICJ Statute have on whether institutional facts exist? A lot more must be said about the relationship between the two in order for this objection to even be relevant. Even if Art 36(2) can tell us about the existence of States, Substantive Constitutivism is just as problematic as Declaratory Theories. There is no state practice and *opinio juris* that Substantive Constitutivism is correct either. Groupjective Internalism on the other hand leads to Substantive Constitutivism as it does not require collective acceptance of the Direct Method.

4.0 The Relativism Problem

Declaratory Theorists often dismiss any form of Constitutivism because of its alleged descent into relativism.⁷³ If Statehood is dependent on recognition, then the existence of a State is relative to whoever recognises it and who does not. The idea that States exist for some people while not for others seems counterintuitive. This is related to Objection 1 in Section 3.3. What happens if not all States agree that some entity *A* is a State? Either that means that *A* is not a State or *A* is a State relative to whatever group of States do substantively recognise *A*. Here I will spend some time outlining how one can deal with relativism given the social ontological theory already developed.

4.1 Solution 1: Relativism is not fatal

The first option is to accept relativism but claim that it is not a bullet to bite. States are institutional facts just as prime ministers are. It is not counterintuitive to assert that Malcolm Turnbull counts as the Prime Minister of Australia but not of the US. Similarly, why should we find it unusual that there are States for some people but not others? This does not mean that States do not exist in some way. Just because Americans do not count Malcolm Turnbull as their head of state, does not mean that the role of Prime Minister of Australia does not exist. It is just a highly group contextualised feature of the world (e.g., it is groupjective). The same thing applies to Statehood.⁷⁴

73. Dixon, *supra* note 3 at 134 states that relativism is an ‘insoluble theoretical and practical problem’. Crawford, *supra* note 1 at 5, mentions that some people will find the notion of relativistic states as ‘a violation of common sense’.

74. I would think that Hans Kelsen would agree with this approach as he once stated: ‘[T]he legal existence of state ... has a relative character. A state exists legally only in its relations to other states. There is no such thing as absolute existence’. Hans Kelsen, “Recognition in International Law: Theoretical Observations” (1941) 35 Am J Int’l L 605 at 609.

4.2 Solution 2: The Background and Pattern-Governed Behaviour

Both Searle and Tuomela do not require that all group members be conscious about the collective acceptance of institutions. Searle escapes this through what he calls the *Background* and Tuomela through what he calls *Pattern-Governed Behaviour* (PGB). One way out of relativism might be to use these concepts.

Searle argues that in some cases, those who accept constitutive rules do not necessarily need to be aware that they are doing so. Instead it might happen through what he calls the *Background*.⁷⁵ The Background is a set of abilities, capacities, and dispositions that are the prerequisites for intentions.⁷⁶ These dispositions and tendencies among group members exercise social pressure on the members of the community to act in certain ways. When I buy a burrito, I do not think that “this piece of paper counts as money”. Nevertheless, in order to even form the intention to pay money, a prerequisite is that I am already acting within the confines of the rule that certain pieces of paper count as money.⁷⁷ I am automatically forced to comply with this rule because everyone else is doing so.

As for Tuomela, while institutions depend on *collective acceptance* of some group goal, these group goals lead to institutional norms.⁷⁸ Institutions help to ‘economize reasoning’ by making activities ‘routine’.⁷⁹ This is aided by the norms that are engrained into group members to tell them how to act and perform. Importantly once these norms are in place, it does not matter that an individual’s actions are intended to comply with the overall goal or purpose of the group. All that matters is that the individual’s actions conform to the correct behaviour (as per the norm) as this is considered as part of the institution.⁸⁰ These are what Tuomela calls *Pattern Governed Behaviour* (PGBs).

A solution to relativism along these lines might be as follows: when there is near consensus that *A* is a State in the UN, this creates a background rule or institutional norm that *A* is a State. For example, suppose that one day Palestine is largely accepted as a State and is part of the UN Convention. Further suppose that another State *B* that does not want to accept Palestine as a State but has signed up to the UN and WTO. The fact that *B* engages in UN-related activities indicates that it has conformed to the Background or the institutional norm or the PGB which establishes Palestine as a State.

4.3 Solution 3: Adding Spontaneous Order

I am not convinced that the Background or PGBs sufficiently deal with relativism. Both the Background and PGBs require a strong rule or norm that *A* is a

75. For further reference see John Searle, *Intentionality: An Essay in the Philosophy of Mind* (Cambridge University Press, 1983) at ch 5 and John Searle, *Rediscovery of the Mind* (MIT Press, 1992) at ch 8.

76. Searle, *supra* note 4 at 129; Searle, *supra* note 25 at 31.

77. *Ibid* at 147.

78. Tuomela, *supra* note 16 at 218.

79. *Ibid* at 215.

80. *Ibid* at 217.

State to be set up initially. Once that happens, successive States will be forced to recognise *A* as a State. However, this does not explain how the Background or original norm is created without collective acceptance in the first place.

I posit another way of getting institutional facts through *spontaneous order*. Spontaneous order is the idea that institutional facts are not always created because of the *collective* mental states of the group. Instead independent *individual* beliefs can sometimes lead to these institutional facts. Originally developed by Menger and Hayek, and also utilised in contemporary social ontology by Tieffenbach and Lawson, spontaneous order is another method of obtaining institutional facts.⁸¹ I discuss Tieffenbach's version as hers is an Internalist version of spontaneous order. For Tieffenbach, paper-based money can arise in a group as long as *individuals* consistently believe that certain pieces of paper are money.⁸² This does not require any collective intentionality. All those individuals are acting in self-interested ways and do not care about the mental states of the other members of the group. We do not need the group to collectively recognise pieces of paper as money, but we do need many individuals in the group to recognise it.⁸³ The institutional fact is an 'unintended consequence' of the individual's belief the paper is money.⁸⁴ Once the number of people possess the requisite mental states reaches a certain mass, we can say that the institution emerges. In the context of international law, once a very large number of States recognises some entity *E* as a State, then spontaneous order occurs and *E* is in fact a State.

There is an issue whether spontaneous order is consistent with the requirement that people collectively accept a societal proposition in order for an institution to arise. Tuomela thinks that the answer is in the affirmative.⁸⁵ He states that sometimes 'rudimentary (normative) institutions can arise spontaneously or through cultural evolution without the collective or collectively authorised design'.⁸⁶ On the other hand, both Tieffenbach and Lawson frame spontaneous order as an opposing theory to Searle's requirement for collective intentions.⁸⁷

I side with Tuomela in this debate, there is nothing inherently inconsistent with requiring collective agreement in some cases and allowing for spontaneous order in other cases. They are just different ways that institutions can be created (just like how some are created through the Direct Method and some through the Indirect Method). Further, Internalist theories need a concept like spontaneous order as they have problems dealing with *dissenters*. Imagine a cult in some country, whose members either barter or pay for everything in gold because the

81. Karl Menger, "On the Origin of Money" (1892) 2:6 *The Economic Journal* 239 at 250; FA Hayek, *Law, Legislation and Liberty* (University of Chicago Press, 1973) ch 2; Emma Tieffenbach, "Searle and Menger on Money" (2010) 40 *POS* 191; Tony Lawson, "Comparing Conceptions of Social Ontology: Emergent Social Entities and/or Institutional Facts?" (2016) 46:4 *Journal for the Theory of Social Behaviour* 359 at 367.

82. Tieffenbach, *ibid* at 203.

83. *Ibid* at 202.

84. *Ibid* at 191-92.

85. Tuomela, *supra* note 16 at 220.

86. *Ibid* at 230.

87. Tieffenbach, *supra* note 81 at 192; Lawson, *supra* note 81 at 360.

members of the cult do not believe in money. However, members of this cult still vote and participate in other civic activities. These members seem to be citizens of the country and so there is no collective agreement among the country's citizens about the existence of money. Yet, it seems implausible to say that money does not exist in this country. Spontaneous order solves this problem.

Some might think that spontaneous order is rather mysterious and I think there are two worries that contribute to this thought. The first is a *vagueness issue*: how many members of the group needs to recognise the State in order for an institution to arise? The second is an *explanatory issue*: what are the principles underlying spontaneous order?

With vagueness I am willing to accept that there are borderline cases where we just do not know if a State exists.⁸⁸ In some cases, it is clear that a State exists (e.g., where almost everyone recognises the State). In others, it is clear that there is no State (e.g., where no one recognises the State). Lastly, there will be borderline cases, where we just will not know if there is a State or not. This is not a strange occurrence. We get similar problems in other areas of philosophy with whether things are red or things are heaps so why should we be surprised that it applies to States as well?

I shall provide two reasons why this is not a problem. Firstly, it does genuinely seem like there are entities with some State-like properties and non-State-like properties. Take for example what Crawford calls *internationalised territories*.⁸⁹ These are semi-autonomous ruling governments which are created under the supervision of existing States. The one I want to draw attention to is the Memel Territory. The Memel Territory was created as an entity that enjoyed legislative, judicial, administrative, and financial autonomy.⁹⁰ It was however still subject to Lithuania's sovereignty as Lithuania had the power to control its foreign affairs.⁹¹ Was the Memel Territory a State or not? This seems like a case where the answer is unclear. Importantly, it is not the lack of substantive recognition that is causing the vagueness. Rather it is due to the way the government is constitutionally set up (i.e., how much control Memel has over certain areas). This shows that even when recognition is not an issue, vagueness can be a feature of institutional reality. Hence, we should not be surprised when it also arises in cases of substantive recognition.

Secondly, this problem arises even for the Externalist.⁹² Externalists would require reliance on some historical or sociological mind-independent fact to explain why States exist. I have already done a cursory analysis of the contemporary international law literature to show there is no one correct sociological or historical description of the State in 3.3. Further evidence of this can be seen in Skinner's survey on the how historically there was no uniform use of the term

88. For a survey of the vagueness literature see Timothy Williamson, *Vagueness* (Routledge, 1994).

89. Crawford, *supra* note 1 at 234.

90. *Ibid* at 237.

91. *Ibid* at 238.

92. *Supra* note 17.

“State”.⁹³ Since there is no clear fixed set of historical and sociological descriptions of the State, it is unlikely that an Externalist could give us a theory of Statehood without also generating borderline cases.

The second worry about spontaneous order, after vagueness, is that its explanation for institutions seems mysterious. We start with individuals accepting some proposition about the world (e.g., I will use paper as money) and then we end up with an institutional fact (in this country certain types of paper are money). Robert Sugden has provided a possible explanation using evolutionary game theory.⁹⁴ I present a simplified version of his model here.

Sugden asks us to suppose that in some society, its members repeatedly face each other in some kind of *game*. In game theory, a game is any situation where two or more people, called *players*, must choose from a set of actions. Each action will have positive pay-offs or bad consequences based on what action the other player chooses as well. Players will have a strategy of how to play the game; i.e., what kind of actions will the player make based on the other player's actions. An important type of strategy that Sugden relies on is an *evolutionary stable strategy* (ESS), which is:

a pattern of behaviour such that, if it is generally followed in the population, any small number of people who deviate from it will do less well than the others.⁹⁵

According to Sugden spontaneous order arises once it is conventional to play a certain ESS and most of the players in the game start playing that ESS.⁹⁶

This is quite abstract so let me present a simple example, which I call the *Statehood Game*. Let it be that there are a group of existing States who will be the players of this game. Their goal is to decide whether to recognise some entity *A* as a State. Hence, the possible actions that the existing States can take in this game is to either recognise or not recognise *A*. For each round of the game we pair off two random States to play the game and we repeated the game for an indefinite amount of time. Suppose that States only get a pay-off where they both choose to recognise or both choose not to recognise *A*. If one chooses to recognise and the other doesn't, no pay-off is given. We can motivate this by saying something like not co-ordinating with the other State leads to bad diplomatic ties and all its consequences. We also suppose that group *A* itself does not affect the players whether the players choose to recognise or not—e.g., the players are not threatened by *A* and are only concerned with what other players are doing. It does not matter if the reader does not think this reflects reality, I am only using this as *an example* of how Sugden's model works.

To explain the concept of an ESS let us first identify the four combinations of strategies available to each player:

93. Quentin Skinner, “A Genealogy of Modern State” (2009) 162 Proceedings of the British Academy 325.

94. Robert Sugden, “Spontaneous Order” (1989) 3:4 J Economic Perspectives 85.

95. *Ibid* at 91.

96. *Ibid* at 97.

Cooperative Strategies

(1) Both recognise the State

(2) Both do not recognise the State

Non-Cooperative Strategies

(3) Player 1 recognises and Player 2 doesn't

(4) Player 2 recognises and Player 1 doesn't

As stated above, States that choose cooperative strategies get a pay-off whereas those who do not will not. Since an ESS is some strategy such that people who deviate from it will lose out, there are two ESS' here: the cooperative strategies.⁹⁷ Players who do not learn how to cooperate will lose out since they will keep getting lower pay-offs compared to those who do. It is important to note that we are analysing these strategies *evolutionarily*. There is no assumption that the players are trying to be altruistic when they cooperate. It just happens that over long periods of time, States that do not cooperate will keep losing out. Thus, the States that tend to be more successful are the ones that do cooperate since they are the ones getting pay-offs.

Now that we have a clearer picture of ESS, let us now return to the question of when an institution fact comes into existence via spontaneous order. On Sugden's account: 'Order in human affairs ... can arise spontaneously, in the form of conventions'.⁹⁸ In other words, once it has become conventional to play a certain ESS then spontaneous order occurs. In the case of Statehood, if it becomes a convention to recognise the State, then the State comes into existence. The issue then is to define conventions. Sugden argues that *conventions* occur where (1) a game has two ESS' and (2) anyone of which when established would be 'self-enforcing'.⁹⁹ I shall discuss these conditions in turn.

Traditionally conventions require two ESS' (or equilibria points).¹⁰⁰ I want to drop Sugden's requirement that spontaneous order needs at least two ESS'—i.e., there need not be a convention in this technical sense for spontaneous order to occur. For example, take a scientist in a small town. Town leaders have the option of consulting her or not, and she has the option of advising or not for scientific matters. Here are the possible outcomes:

- (1) Scientist advises, and leaders consult.
- (2) Scientist advises, and leaders ignore.
- (3) Scientist does not advise, and leaders consult.
- (4) Scientist does not advise and leaders do not consult.

97. A strategy *J* is an ESS if for all strategy's *I*, playing *J* against *J* is better than *I* against *J*. For simplicity let us label the strategy of recognising a State as R and not recognising as NR. Playing, R against R and NR against NR meets this requirement as they are better than playing R against NR and NR against R respectively. See John Maynard Smith & George Price, "The Logic of Animal Conflict" (1973) 246 *Nature* 15 at 17.

98. Sugden, *supra* note 94 at 97.

99. *Ibid* at 91. Cf David Lewis, *Convention: A Philosophical Study* (Harvard University Press, 1969).

100. In the literature on conventions, the reasons for having more than one ESS is due to the arbitrariness of conventions. Consider a convention of what side of the road to drive on. The convention might arise that we all drive on the right side or left side of the road. There is however nothing intrinsically better about the right or left side of the road, which is why conventions are considered arbitrary. Andrei Marmor, "On Convention" (1996) 107(3) *Synthese* 349 at 349.

Let us say that we only get pay-offs when (1) occurs. All other combinations are equally bad losing strategies because the town does not benefit from the scientific advice. So there is only one ESS here: both giving and getting advice. Over time many of the town leaders go to see the scientist and assign to her the status of being an “advisor” to them personally. They never intend for her to be an official advisor. However, it just so happens that so many people assign to her the status of “advisor” that it starts becoming practice that no one would make scientific decisions without her advice. It seems like her role has becoming institutionalised without anyone intending for that to happen. Nonetheless, if spontaneous order necessarily needed two ESS’, we would have to say there is no spontaneous order here.

What is more important, in my view, is the fact that the ESS becomes self-enforcing: the leaders always consult her and she always gives advice. Sugden comments that conventions become self-enforcing when there is an expectation that people will follow the convention.¹⁰¹ Dropping the convention terminology, we can say that an institutional fact comes into existence where an ESS is established: whereby *established* means that most people are playing that ESS and there is an expectation to play that ESS. For example, in our Statehood game, suppose that most people decide to recognise a new State. This is the established ESS. Imagine that you are one of the players in this game. There are two ESS’ to get maximum pay-off: either recognise alongside another player who recognises or do not recognise with another player who does not. Now given that most people are recognising the new State, what would be the best action for me to maximise my pay-offs? The answer is to also recognise since that will increase the likelihood that we will both cooperate and get pay-offs. Thus, once most people have settled on a certain ESS, it becomes self-enforcing because those who do not follow that same ESS will lose out. There is an expectation that all players will recognise the new State.

This explains the causal mechanism by which spontaneous order comes about. There does not need to be collective agreement because once sufficient people recognise that *A* is a State, this creates a momentum where more and more people start recognising it as well. Once this happens we can say that the new State exists. The test then is whether the existence of some *A* as a State is so broadly agreed upon, that refusal of some State *B* to recognise *A* would lead to negative effects (i.e., not recognising would lead to not choosing the ESS since other States are recognising). These negative effects need not be something as drastic as a trade embargo, but could be something as simple as gaining a bad reputation or losing soft power. It also needs to be clear that these negative effects would occur and so it would be in the best interest of existing States to recognise *A*. This would explain why long term existing entities such as France and Australia are States since anyone who does not recognise them as such would lose out on treaties, trade deals, and diplomatic opportunities.

101. Sugden, *supra* note 94 at 96.

5.0 Conclusion

I have now shown that Groupjective Internalism leads to Substantive Constitutivism by showing that it is inconsistent with the Declaratory Theory. Further, I have argued that by using spontaneous order we can defend against criticisms of relativism. Potentially, I have also achieved two other side objectives. First, to have shown that Constitutive Theories are respectable if not persuasive positions. Given that major social ontologists are Groupjective Internalist, Substantive Constitutivism is rooted in strong and rigorous theoretical foundations. Second, that studying social ontology and social theory is crucial for resolving debates surrounding Statehood. In that regard, this paper aims to help regiment the methodology for dealing with the Statehood debate. The ultimate hope is that more light can be shone on issues surrounding States in international law by looking at its metaphysical foundations.