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Comprehending global governance: International regime complexity vs. global constitutionalism

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Abstract: The *After Fragmentation* special issue unites political science conversations about regime complexity with legal/normative conversations about global constitutionalism through a focus on the generation and resolution of interface conflicts, defined as moments when overlapping elements or rule incompatibilities generate actual conflicts. Yet scholars choosing among these two perspectives actually have different objectives. After reviewing the two literatures, I argue that this special issue is closer to the global constitutionalism perspective, which generally seeks legitimated order. By contrast, the regime complexity literature asks how does the fact that global governance is spread across multiple institutions in itself shape cooperation politics. Investigating what it means to get 'beyond fragmentation', I suggest that the potential or actuality of rule conflicts is not necessarily a problem because conflicts are a normal and even salutary aspect of politics. If conflict is not the concern, then what should we be worrying about? Both perspectives, I argue, are amoral because they normalise and help justify an international order where responsibility is spread across institutions, promoting order while failing to address fundamental problems affecting people and the world. In this respect, resolving rule conflicts does not get us beyond fragmentation.

Keywords: fragmentation; global constitutionalism; global governance; international law; regime complexity

THE contributions to this *After Fragmentation* special issue reminded me of the parable of the Blind Man and the Elephant. The parable is a message about tolerance. A group of blind men are invited to explore an elephant that is visiting the village. Each blind man touches a different part of the elephant,

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insisting that their description – based on touching an ear, the tail, the trunk, a leg, and a tusk – is the more accurate description of what an elephant is. A wise sage then enters and says that each is right, since each is describing a different piece of the elephant. The different men leave satisfied that they are all correct in their personal truths. Having never actually heard the parable, I thought the message was different. I thought the lesson was that one cannot comprehend the elephant by exploring only a leg. In my less charitable version, the blind man who studies the leg and concludes that an elephant is like a tree is actually wrong, and the moral of the story is that our limited ability to see the entire elephant impedes our comprehension of what an elephant is.

Both versions – the real and confused parables – have lessons for the conversation about global governance. Given that global governance includes many different policy elements (science, communications, texts, norms, institutions, laws, practices, domestic politics, international politics etc.), the study of global governance involves nearly every scholarly discipline. The substantive issues addressed within the realm of global governance also range from small (a river that crosses borders) to huge (climate change and mass refugee migrations). The challenge for students of global governance is how can you comprehend the whole when you can only see or deeply explore small pieces, and when the mode of divining truth is so different. Meanwhile, global governance is actually quite different than an elephant. It is not a single organism, with one heart, one brain, and one circulatory system. It is an abstract man-made creation, developed piecemeal over time by a disparate set of actors who are pursuing disparate goals and agendas.

What, therefore, is global governance? Is the mapping of a regime complex the way to envision the elephant? Is the metaphor of a work-in-progress global constitutional system a good way to conceptualise the whole? The regime complexity and global constitutionalism conversations have mostly occurred in the separate realms of political science and legal/normative theory. *After Fragmentation* unites these two conversations through a focus on a single entity: the generation and resolution of what the collaborators call interface conflicts, defined as moments when overlapping elements or rule incompatibilities generate actual conflicts (Kreuder-Sonnen and Zürn, this issue). Yet a fundamental point to recognise is that these two metaphors not only provide different strategies to wrap one's mind around a whole, they actually have different objectives.

As a collection, the contributors explore what the resolution of interface conflicts reveals about the whole, which is the elephant that is global governance. The special issue's micro-investigation of variation helps us understand why interface conflicts do and do not erupt, and why there is never a final resolution that once and for all forecloses the possibility of a future interface conflict. What is revealed, the authors argue, is that interface

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conflicts work themselves out, and in doing so they contribute to the construction of global order. This finding, in conjunction with the framing of the project as exploring the forces for conflict and fragmentation, calls upon readers to consider the following: Why would we worry that at any moment the elephant might fragment into its component parts? Indeed the overall finding makes a lot of sense. At some level, global governance is about a search for solutions. If this is true, then even intentionally created rule conflicts and activated interface conflicts are likely to be resolved.

I want to make sense of this conversation by returning to the differing goals of the regime complexity and global constitutionalism literatures. Undoubtedly the special issue contributors identify cogent reasons why many potential interface conflicts never emerge, and why those that do emerge generate neither problematic fragmentation nor festering political conflicts. Yet in their goal of exploring actual interface conflicts, each author reflects the sensibility of global constitutionalists, which is a desire to find order. The search for order was never the objective of the regime complexity conversation. Instead, the literature on international regime complexity asks how does the fact that global governance is spread across multiple institution in itself shape cooperation politics?

Part I considers the concerns of the political science perspective–international regime complexity. Part II reviews the concerns the legal-normative perspective–global constitutionalism. Part III addresses what is missing in a search for order or legal virtue, and in doing so ask whether any of these approaches actually move us *After Fragmentation.*

I. Why think about global governance through the lens of international regime complexity?

The fragmentation, global constitutionalism, and regime complexity literatures are all grappling with the challenging reality that there is no agreed upon means to resolve questions of hierarchy at the international level. Hierarchy allows conflicts to be decisively resolved by reference to higher order authorities and principles. An absence of hierarchy means that there is no supreme authority, that states and policy-makers face an array of overlapping international commitments, that the diverse commitments can be incompatible, that as a formal matter each commitment can carry equal weight, which therefore allows political leaders – if they desire – to pick and choose which rule to follow.[2] Of course, political leaders can also decide to

[2] Of course, *jus cogens* and the UN Security Council both claim to be higher-order institutions and norms. There are, however, challenges to these claims including arguments that national and regional constitutions can trump international law. For more, see Alter (2018).

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make the system work, and thus to seek solutions so that potential conflicts do not erupt. That said, a lack of hierarchy, and the concomitant inability to decisively resolve disputes through appeals to higher-order authorities and rules remains a structural feature of international law and governance. The trend towards proliferating international institutions and rules exacerbates the problem of overlapping and potentially incompatible institutions, authorities and rules.

Scholarship on international regime complexity emerged to address the reality of proliferating global governance, but also in response to common practice in cooperation studies wherein international relations (IR) scholars would shine a spotlight on a particular cooperation challenge, often within a single institution, after which they would analyse the 'structure' of the cooperation challenge, the cooperation decision-making and politics, and the effects of a specific regime. This research strategy suggested that politics occurred within the analyst's spotlight. For example, a scholar might study Organization for Economic Cooperate and Development's (OECD) efforts to address corruption. Yet if the issue of transnational corruption is actually addressed through a broad range of national and international institutions and mechanisms, investigating the effectiveness of the OECD's Convention on Combating Bribery of Foreign Public Officials in International Business might be akin to divining the elephant by investigating its tail. Meanwhile, for some international issues, the lack of any focal institution means that the issue is only addressed through lower-level cross-institutional collaboration, thus via internal processes that may be neither tangibly nor easily visible.

Also problematic is that a spotlight strategy approaches cooperation issues as if actors are operating from a blank slate, rather than working within and around pre-existing institutions. A spotlight focus on cooperation efforts ignores or discounts the endowed predispositions and constraints of pre-existing institutions, and it tends to overlook that the same set of actors are meeting across disparate venues, and for this reason diplomats and policy-makers may be working in chessboard-like cross-institutional ways. And the spotlight approach generally ignores how, at times, actors and institutions are working at cross-purposes, and shocks from one institutional realm may reverberate across another (Alter and Meunier 2009). Finally, the spotlight approach to cooperation studies does not recognise that global governance via a regime complex, despite its limitations and challenges, can be an intentional and productive governance strategy (Keohane and Victor 2011).

It is somewhat ironic that the simplyfing spotlight approach became prevalent alongside the unprecedented proliferation of international institutions and rules after 1980. Mapping a regime complex provided an antidote, offering a means to see and theorise about the larger whole. Raustiala and Victor, who

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coined the term 'regime complex', argued that the legalisation of international cooperation politics caused regime complexes, which they defined as 'an array of partially overlapping and nonhierarchical institutions governing a particular issue-area. Regime complexes [they argued] are marked by the existence of several legal agreements that are created and maintained in distinct fora with participation of different sets of actors. The rules in these elemental regimes functionally overlap, yet there is no agreed upon hierarchy for resolving conflicts between rules' (Raustiala and Victor 2004: 279).

The notion of international regime complexity was also an attempt to harness studies of complex systems to gain additional insights. Because of regime complexity, the simplifying assumptions about rationality and interests fail to recognise how complexity in itself generates bounded rationality and empowers those experts who can navigate through the complexity (Alter and Meunier 2009: 17–18). Of course, some aspects of global governance are helpfully addressed by focusing on a spotlight. When there is a nuclear accident, a major war, or a global financial crisis, the focal nature of the moment organises actors. And some global issues (although actually surprisingly few) are addressed via a single encompassing regime. But for many if not most global governance challenges, international regime complexity arguably provides a more accurate lens.

The debate about international regime complexity mostly occurred within the political science subfield of international relations. Political scientists then asked the set of questions that interested them most, focusing on strategising across the complex, about the possibility of conflicts, about the production of suboptimal outcomes. Yet scholars also studied how diverse actors worked within the regime complex to achieve their goals, and how the fact of regime complexity empowered certain states and actors (for a review of the literature, see Alter and Raustiala 2018: especially 12–14).

To the extent that regime complexity literature suggested that conflict predominates within the regime complex in problematic ways (e.g. Hale et al. 2013), then *After Fragmentation* offers an important corrective in that it observes that potential conflicts erupt far less often than some IR analysts imagined. To be sure, some IR scholars worry that conflict can spiral out of control. For conflict worrywarts, the idea that incoherent overlaps might generate abounding conflict is perhaps – to invoke a different parable – a Henny Penny concern.[3] But for most political scientists, conflict is simply an inherent part of politics. If conflict is normal, then talking about conflict does not suggest that the sky is falling. In this respect, to say that the outcome of

[3] In the Henny Penny parable, a chicken that generally looks only ahead becomes aware of the existence of the sky when an acorn falls on its head. Henny Penny (aka Chicken Little) turns this insignificant occurence into a catastrophe, telling everyone he meets that the sky is falling.

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interface conflicts is a new form of order does not really get at the concerns and questions the international regime complexity literature has sought to engage.

More fundamentally, to presume that conflict and power are always part of politics is to reject the editors' binary that working to resolve conflicts through specified procedures generates a 'coordinated institutional order' that is more or less constitutional in nature, whereas refusing to use the designated conflict resolution procedures necessarily leads to a 'purely power based outcome' that 'vindicates' the concerns of people who worry about fragmentation of the international order (Kreuder-Sonnen and Zürn, this issue). This presumption suggests that following procedural requirements for dispute settlement does not generate power-based outcomes, and that power-based outcomes necessarily generate institutional fragmentation. Neither of these is given, nor is it the case that fragmentation occurs primarily because of power politics.

Indeed as Alter and Raustiala explain, there are many practical reasons why global governance occurs via regime complexes, reasons that are not necessarily power based, and that do not necessarily suggest fragmentation (2018: 9–10). These reasons remain germane, as does the reality that contemporary cooperation politics occurs in a context of pre-existing rules and institutions. Because the forces generating regime complexity endure, not even the declining US commitment to multilateralism nor the rising influence of China will change the reality that '[t]he signature feature of twenty-first-century international cooperation … is arguably not the regime but the regime complex' (ibid: 17).

Yet it is fair to say that the regime complexity literature had not addressed the issue of when overlaps become problematic, or whether and how variation across regime complexes is consequential.[4] Also, this literature is still grappling with the challenge of thinking about global governance in holistic terms. It is extremely hard to wrap one's head around what is happening across a number of institutions, and across time. We may need teams of researchers and new methodologies to harness complexity and therefore generate profound insights from the idea that global governance occurs through a series of regime complexes.

II. Why think of global governance through the lens of global constitutionalism?

Global constitutionalism is a preferred lens of legal scholars and normative theorists. This lens is also motivated by the observation that 'international

[4] There is new work on this topic. See Pratt (2018).

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law is made in a highly decentralised manner, often in specialized regimes, such as trade, human rights, investments, environment and so on. Each of these differentiated areas … has its own treaties, principles and institutions … [and] the values and interests advanced by any particular regime are not necessarily consistent with those advanced by a different specialized regime' (Dunoff 2017: 187). This reality generates a concern about legal fragmentation; global constitutionalism is the suggested antidote. If conflict-threat is the Henny Penny cry of the IR world, then fragmentation is the Henny Penny cry of the legal world, which is to say that both are hysterical responses to what are, more often than not, ordinary/everyday occurrences.

The search for a global constitution is a natural outgrowth of the discipline of law. To avoid the bad of inconsistent legal outcomes, lawyers employ standard legal techniques, collecting evidence of what is done in similar cases, fashioning lists of 'conflict of law' resolution techniques, and identifying doctrines that suggest and help produce coherence. Global constitutionalism goes further. There is no global constitution, and for many this is a defect of the global governance system. A genuine rule of law arguably requires a constitution, written or otherwise fashioned, that defines the primary rules of global governance, that contains a system of checks and balances to limit governments and that protects fundamental rights. The global constitutionalism project is an effort to fashion a constitution in order to enhance the legitimacy of global governance.

The normative objective of the global constitutionalist project is a big difference between the IR and law approaches. Whereas the regime complexity literature suggests neither legitimacy nor illegitimacy, the promise of global constitutionalism is that it can fashion a more coherent, normatively defensible and more legitimate global legal order.[5] Fashioning constitutions through adjudication, and thus through the resolution of interface conflicts, is neither a new nor a crazy project. The European Court of Justice is famous for constitutionalising the European Treaties (Stein 1981), and for creating a system of administrative legal accountability (Bignami 2005). The European Union is not alone; a recent handbook identifies intellectual and historical antecedents to the current popular focus on global constitutionalism (Lang and Wiener 2017: Ch 1).

The *After Fragmentation* editors suggest an interest in what lies between the antipodes of fragmentation and constitutionalisation. Yet *After Fragmentation* is closer to the global constitutionalism perspective.

[5] As Kreuder-Sonnen and Zürn note, constitutional pluralists see some benefits emerging from a lack of a more centralised global system (this issue). Similar benefits are touted by promotors of global experimental governance (de Búrca et al. 2013; de Búrca et al., 2014).

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Already mentioned is that the editors associate fragmentation with a disregard for procedural rules and with power-based outcomes, which need not lead to fragmentation yet it is arguably the opposite of what constitutionalism requires. The editors' interest in the 'constitutional quality of the global order' also suggests that their preference for constitutionalism in some form. Their finding that interface conflicts are mostly resolved, and that their resolution generates forms of global order, may – they argue – 'cause for some optimism from a global constitutionalism perspective'. Even the title *After Fragmentation* and the publication venue in a journal on global constitutionalism indicate a preference for the order and assurance that constitutional elements arguably provide.

The most fundamental requirement of international law is that conflict be peacefully resolved. If the alternative to peaceful resolution is the use of force, then the fact of peaceful resolution surely is order-sustaining. It is also true that when actors follow treaty-specified procedures for conflict resolution, their rule-following behaviour helps instantiate the institutions and procedures of the larger regime (Alter et al., 2017: 13–14). So there is something to the notion that following procedures produces order and peace, and that dispute resolution that generates checks and balances pushes in a constitutional direction.

At the same time, especially given that international law also allows mediation, side deals, and acquiescence, all of which legally circumvent specified dispute settlement mechanisms, isn't the deck stacked in favour of a finding of conflict resolution? If conflict resolution, procedural or otherwise, is the norm, should we believe that the fact of resolution, and even resolution that helps to generate constitutional checks and balances, lead us beyond fragmentation?

III. What is missing in a search for order and legal virtue?

The regime complexity and much (although not all) of the global constitutionalism scholarship follow the positivist enterprise of science, which is understanding the world we live in. The genuinely excellent contributions to the *After Fragmentation* special issue also follow this tradition, using variation in the existence and resolution of interface conflicts to understand what happens when different types of rule conflicts arise. While defensible as a positivist enterprise, all of these perspectives are basically amoral.

To be sure, the *After Fragmentation* editors and their contributors acknowledge normative factors. For example, the editors note that the contributions of Moe and Geis (this issue) and Flonk *et al.* (this issue) find contestation that may be resolved in illiberal ways, and they acknowledge that 'from a constitutionalist perspective … we have to bear in mind that the

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normative substance of the global legal order can be liberal but also illiberal' (Kreuder-Sonnen and Zürn, this issue). Yet they do not consider the ethical basis of our current approach to global governance writ large.

It would be, of course, unfair to say that elephants are unethical when they act as elephants, tromping through a village's crops and eating trees to the point of unsustainability. But this is where the metaphor of the blind man and the elephant falls short. The global governance system that we fashion is a man-made elephant. It is a system where states refuse to fill important policy and legal lacunae, and scholars normalise and validate the functional, ordered, incrementally progressive parts of a system that falls short for most, if not all, of the Earth's inhabitants. It is a system where the resolution of an interface conflict can produce outcomes like an arrangement wherein Greece, Turkey, Lebanon and Jordan keep hundreds of thousands of Syrian refugees in camps, perhaps for five, ten or more years. This resolution contributes to order, but to what end?

In this respect, we are in no way beyond fragmentation. We are in a system that muddles through in a self-sustaining fashion, and we scholars are then normalising and providing a justificatory narrative for a world in which no set of institutions, governments or actors becomes responsible or accountable for solving the problems humans are generating. Precisely because of existing global governance shortcomings, conflict is not necessarily a problem to be solved. People should be contesting about the problems this system of global governance generates.

Yet even if the current system were more morally defensible, we might still want to embrace and encourage conflict to the extent that conflicts generate or reflect ongoing contestation about norms, practices, goals and objectives. There are varied reasons to embrace conflict. On a policy level, incoherence in the form of latent conflicts of law may serve as a peace pact that allows divergent ideas to coexist within a larger space. When actual conflicts then erupt, according to Monika Hakimi conflict 'plays a particularly important integrative role. [Highly diverse or diffuse] groups need conflict to bind themselves because their members otherwise have little in common or limited opportunities to interact' (Hakimi 2017: 320). The latent possibility and eruption of conflict can also play a checking role. For example elsewhere I suggest resistance to domestic actions that violate international law, and to international actions that interrupt democratic choice generates a helpful tension that keeps national and international bodies 'attuned to the priorities and preferences of state and societal actors' (Alter 2014: 344 and generally 351–9). And elsewhere Zürn suggests that contestation is a signal of a legitimation gap, and a constructive mode of institutional adaptation and change for times where public sentiment and global power shifts generate new legitimation challenges for existing global governance systems (Zürn 2018: 141–4).

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I don't mean to suggest that global constitutionalism, or the contributors to this symposium, reject the idea that conflict can be productive. On the contrary, their contributions demonstrate that interface conflicts can be constitutive of global governance. The larger issue is that the status quo and justificatory orientation of these debates will never actually get us beyond fragmentation. Even if scholars can fashion constitutional rules, institutions and sensibilities, the reality that politicians choose to govern the globe through often incoherent and intentionally incomplete regime complexes, more than the fact of conflict, is something we all should worry and complain more about.

References

Alter, Karen J. 2014. *The New Terrain of International Law: Courts, Politics, Rights*. Princeton, NJ: Princeton University Press.

Alter, Karen J. 2018. "National Perspectives on International Constitutional Review: Diverging Optics." In *Comparative Judicial Review*, edited by Erin Delaney and Rosalind Dixon, 244–71. Cheltenham: Edward Elgar Publishing.

Alter, Karen J., Laurence Helfer and Mikael Rask Madsen. 2017. *International Court Authority*. Oxford: Oxford University Press.

Alter, Karen J. and Sophie Meunier. 2009. "The Politics of International Regime Complexity." *Perspective on Politics* 7(1):13–24.

Alter, Karen J. and Kal Raustiala. 2018. "The Rise of International Regime Complexity." *The Annual Review of Law and Social Science* 14:(2018) 329–49.

Bignami, Francesca. 2005. "Creating European Rights: National Values and Supranational Interests." *Columbia Journal of European Law* 11:241–352.

De Búrca, Gráinne, Robert O. Keohane and Charles Sabel. 2013. "New Modes of Pluralist Global Governance." *New York University Journal of International Law and Politics* 45(3):723–86.

De Búrca, Gráinne, Robert O. Keohane and Charles Sabel. 2014. "Global Experimentalist Governance." *British Journal of Political Science* 44(3):477–86. <https://doi.org/10.1017/S0007123414000076>.

Dunoff, Jeffrey. 2017. "The Multifacited Relationship between Functionalism and Global Constitutionalism." In *Handbook on Global Constitutionalism*, edited by Anthony F. Lang and Antje Wiener, 183–94. Cheltenham: Edward Elgar Publishing.

Flonk, Daniëlle, Markus Jachtenfuchs and Anke Obendiek. 2020. "Authority Conflicts in Internet Governance: Liberals vs. Sovereigntists?" *Global Constitutionalism* 9(2):364–86.

Moe, Luise Wiuff and Anna Geis. 2020. "From Liberal Interventionism to Stabilisation: A New Consensus on Norm-Downsizing in Interventions in Africa." *Global Constitutionalism* 9(2):387–412.

Hakimi, Monica. 2017. "Constructing an International Community." *American Journal of International Law* 111(2):317–56. <https://doi.org/10.1017/ajil.2017.22>.

Hale, Thomas, David Held and Kevin Young. 2013. *Gridlock: Why Global Cooperation Is Failing When We Need It Most*. Cambridge: Polity.

Keohane, Robert O. and David G. Victor. 2011. "The Regime Complex for Climate Change." *Perspectives on Politics* 9(1):7–23.

Kreuder-Sonnen, Christian and Michael Zürn. 2020. "After Fragmentation. Norm Collisions, Interface Conflicts, and Conflict Management." *Global Constitutionalism* 9(2):241–67.

https://doi.org/10.1017/S2045381719000418 Published online by Cambridge University Press

Lang, Anthony F, and Antje Wiener. 2017. Handbook on Global Constitutionalism, Research Handbooks on Globalisation and the Law. Cheltenham: Edward Elgar Publishing.
Pratt, Tyler. 2018. "Deference and Hierarchy in International Regime Complexes." *International Organization* 72 (3):561–90 <https://doi.org/10.1017/S0020818318000164>.
Raustiala, Kal and David Victor. 2004. "The Regime Complex for Plant Genetic Resources." *International Organization 58*(2):277–309.
Stein, Eric. 1981. "Lawyers, Judges and the Making of a Transnational Constitution." *American Journal of International Law 75*(1):1–27.
Zürn, Michael. 2018. *A Theory of Global Governance*. Oxford: Oxford University Press.

https://doi.org/10.1017/S2045381719000418 Published online by Cambridge University Press