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Institutional Proliferation and the International Legal Order

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Since the cataclysm of World War II, the international order has grown increasingly institutionalized. Hundreds of international organizations (IOs) and tens of thousands of treaties now exist, many with widespread – and in some cases nearly universal – membership. International institutions existed before 1945, of course, and even before the outbreak of World War I. But compared to these earlier eras, the international system today is far more densely populated by rules and institutions.

At one level, this is a sign of the robustness of international cooperation. Great wars yield great reorderings, and the reordering that took place after 1945 was unusual in its focus on the construction of a rule-based and multilateral system (Ikenberry 2000; Patrick 2009). Yet, the significance of the postwar growth of rules and institutions is contested. For some, it is a sign of healthy maturation toward a more cooperative world, increasingly “lapt in universal law” (Tennyson 1881: 54). For others, international institutions are simply big government writ global: irrelevant at best and, at worst, a menace to national sovereignty (e.g., Rabkin 2004). Even those inclined toward a positive view of international institutions, however, sometimes see a dark side to the robust growth that has taken place in recent decades. Too many rules, and too many institutions to administer and adjudicate them, can fragment and complicate the international order.

This concern can be seen in fields as varied as trade, environment, human rights, and investment. International institutions have multiplied in recent decades and, increasingly, they overlap and even clash. Rising institutional density is particularly apparent with regard to courts (Shany 2004). In the realm of criminal law sits the International Criminal Court, the tribunals for the former Yugoslavia and Rwanda, and the many special and hybrid courts of Sierra Leone, Cambodia, and elsewhere. In the realm of human rights law are regional courts for the Americas, Europe, and Africa. There is a special tribunal for the Law of the Sea, and others for Central America and Eastern and Southern Africa. The World Trade Organization's (WTO) Appellate Body has a healthy docket of cases. And the International Court of Justice (ICJ) continues to hear disputes, as it and its predecessor, the Permanent Court of International Justice, have done since the 1920s.

No one international court sits above another, however, and judgments on related topics can exhibit considerable tension in reasoning as well as results. As the president of the ICJ – not coincidentally, the institution with most to lose from this judicial flourishing – declared in a speech before the United Nations (UN) General Assembly, tribunals have proliferated “in an anarchic manner.” “Unfortunate consequences” have ensued, he suggested, chief among them forum shopping, conflicting decisions, and ultimately, a fragmented system of international law (Guillaume 2000). Rising fragmentation, a UN report declared, poses a serious threat to the “credibility, reliability, and consequently, authority of international law” (Hafner 2000). In short, some fear this “kaleidoscopic reality” may be a recipe for a

disjointed and dysfunctional legal order (Koskenniemi and Leino 2002: 559). Not all observers share this sense of foreboding, however. Some offer qualified praise – and even encomiums – for institutional proliferation and legal diversity (e.g., Charney 1998).

Institutional proliferation is not limited to courts, nor has it only been noticed by lawyers. Political scientists, who have long studied institutionalization (Krasner 1983; Keohane 1984), have also begun to consider density's implications. Early scholarship on international institutions focused primarily on their impact. Did institutions (or “regimes”) alter outcomes in meaningful ways? Or did they simply ratify existing policies and preferences – and, as such, serve largely as an irrelevant sideshow to the real game of power politics? More recently, research has turned to the microdesign of institutional features. But alongside this focus is new attention to proliferation. Does a densely institutionalized order yield distinctive politics? What happens when institutions overlap and even contradict one another? Is rising density the result of a deliberate strategy by powerful states, or simply an unintended outcome of a more cooperative world politics? Either way, how do states use such a complicated international order to advance their interests?¹

This chapter explores institutional density, and the conflict and competition such density inevitably creates in an anarchical system of states. This topic is explored somewhat differently in law and political science. For legal scholars, who look predominately at international courts, the primary focus is normative: is fragmentation – the key animating concept for lawyers – a threat, or simply a

welcome indicator of a maturing legal system? For political scientists, the primary focus is positive, and concepts such as “regime complexity” and “institutional overlap” are deployed to analyze strategic behavior within a crowded and intersecting institutional matrix. These divergent analytic modes are not surprising. But they should not be overdrawn, as there is increasingly sophisticated interaction between the two fields on these (and many other) issues.² Still, there remains substantial room for fruitful debate, as these literatures have not fully engaged the many possible connections. Perhaps the best example of an emergent common agenda is the question of who benefits from rising density.

In short, rising density has interesting implications for world politics. (I will generally use *density* as shorthand for the related but sometimes distinct issues of proliferation, overlap, and fragmentation.) Once we think in terms of interaction among a multiplicity of institutions, we can see that institutionalization is not per se constraining. States can more readily pick and choose which rules to follow – and, most interestingly, which rule interpreters. They can create competing institutions as well as compete within institutions. Politics becomes less a 2×2 matrix than a three-dimensional game of chess.

Existing research provides some preliminary insights into these issues, but, to date, these insights are less empirical than conceptual. The main contribution has been to recognize the phenomenon of institutional density and to begin to theorize about its nature. That issues in world politics overlap and connect, and that linkages may alter outcomes, is of course no mystery to policy makers. Nixon and Kissinger

famously pursued linkage diplomacy in the 1970s, and no doubt Kissinger's hero Metternich did so far earlier. But linkage politics is different from institutional density, even if there is substantial overlap in practice. Nixonian linkage was an almost purely political strategy pursued outside of (and with contempt for) the role of international institutions. It was about substantive connections. A dense institutional order, by contrast, certainly makes some policy linkages easier – and yields new forms of leverage – but it also creates linked and fragmented procedures and structures. These, in turn, may produce distinct and even novel behaviors, such as forum shopping and “strategic inconsistency” (Raustiala and Victor 2004). These phenomena are newer, since they fundamentally rest on the dramatic increase in institutionalization that has taken place in recent decades.

Is a dense international order a significant problem, a welcome development, or a largely superficial phenomenon? Is density an inadvertent outgrowth of intensifying interdependence, or a deliberate strategy? How does density vary – by issue area, over time, and across regions? These questions represent important lines of thinking that are either under way or incipient in the growing literature on institutional density. The first part of this chapter (“The Rise of Institutional Density”) looks at the empirics of institutional density. Part II (“Density: Two Optics”) surveys the emerging scholarship in law and political science. Part III (“The Debate Over Density”) explores some fundamental questions. Part IV concludes the chapter

I. The Rise of Institutional Density

For most of its history, the states system was lightly institutionalized, if at all. Proto-institutions, such as the Concert of Europe, allowed the great powers of the day to manage their interactions, but these arrangements had no real organizational basis and only barely resembled contemporary international institutions.³ Treaties of the nineteenth century were likewise limited in number and, because only a small number of entities were considered members of international society, were largely bilateral or plurilateral. Some specialized, functional IOs were created late in the nineteenth century, such as the International Telecommunications Union. But the number remained quite small. The creation of the League of Nations in 1919 ushered in the modern age of international organizations (Claude 1988), and the early twentieth century also saw many more multilateral treaties and a general proliferation of rule making, led in part by the move to codify what had long been the core of international law: custom.

But the real break point came with the creation of the UN and the explosion of institution building that followed – or, in some cases, such as the Bretton Woods institutions, accompanied – the San Francisco conference of 1945. Institutions with sweeping scope and meaningful capacity multiplied in the wake of World War II, as did a wide range of agreements, some in areas that had hitherto simply not existed as subjects of international law. Arms control, human rights, foreign investment, environmental protection – these and many other topics were the focus of extensive rule making in the postwar order. The number of treaties deposited with the UN grew

from fewer than 4,500 in 1959 to more than 45,000 fifty years later. By one estimate, there were 37 IOs in the system in 1909; a century later, 1,839.⁴

Slowly – or not so slowly – the “space” of the international system began filling up. Many areas of state behavior were now governed by some regime or another, and increasingly, by more than one. Trade is illustrative. From 1947 onward, the General Agreement on Tariffs and Trade (GATT) – the surviving pillar of the stillborn International Trade Organization – governed a wide swath of world trade. But, in later decades, free-trade accords multiplied dramatically. This new institutional density had repercussions for compliance and dispute settlement. Since now the parties to a dispute could be members of more than one such accord, there were multiple ways to seek reconciliation (or delay). To be sure, in the 1950s and 1960s, when the mode of settlement was more firmly diplomatic, there was not much in the way of difference among differing regimes – and fewer differing regimes to begin with. But as trade regimes increasingly legalized and developed more refined settlement procedures, the differences became more pointed.

The negotiation of the North American Free-Trade Agreement (NAFTA), for instance, took note of the contemporaneous negotiations of the WTO, the effective successor of the GATT system. NAFTA declares that “disputes regarding any matter arising under both this Agreement and [GATT], any agreement negotiated thereunder, or any successor agreement, may be settled in either forum at the discretion of the complaining Party.”⁵ Nonetheless, respondents can require that certain disputes be settled under NAFTA and not the WTO, including challenges to

measures adopted pursuant to certain environmental agreements, as well as disputes arising under “the NAFTA Chapters 7 (sanitary and phytosanitary measures) and 9 (standards related measures) relating to human, animal, or plant life, or health, or protection of the environment, or raising factual issues concerning the environment, health, safety, or conservation, including directly related scientific matters” (Gantz 1999: 1044).⁶ In 2009, the United States invoked this provision in requesting NAFTA dispute settlement over Mexico’s failure to move the long-running tuna-dolphin dispute from the WTO to NAFTA.⁷

This complicated relationship between overlapping treaty regimes plainly creates much scope for strategic behavior. Consider the softwood lumber dispute between the United States and Canada. Begun prior to NAFTA’s entry in force, it was heard by eleven NAFTA Chapter 19 panels, four NAFTA Chapter 11 panels, and was featured in six WTO disputes, as well as in several U.S. Court of International Trade and federal court decisions (Dunoff 2007). The multiplicity of rulings was no accident. The players, all sophisticated and well-lawyered, jockeyed for advantage by employing (and reemploying) varied forums.

Today, there are over 500 plurilateral trade agreements, in addition to the many WTO accords (and nearly 3,000 bilateral investment treaties). A prevailing metaphor among trade analysts is “the spaghetti bowl,” a reference to the arresting image that results from drawing lines around the various trade zones.⁸

None of this is unique to trade, even if it may be most pronounced in trade. NAFTA and the WTO were both treaties of the 1990s, an era that witnessed an

explosion of international conferences (or circuses, depending on your viewpoint) and produced many new treaties, resolutions, and “outcome documents.” These texts contained rules and norms that often touched on or overlapped with rules and norms already in existence. As early as 1992, legal scholars warned of the growing problem of “treaty congestion” (cf. Palmer 1992; Weiss 1993: 675).

And it was not a coincidence that concern with treaty congestion was first raised in the context of the global environment. Environmental cooperation was a major growth area in this period, and the focus was largely on negotiating new agreements rather than implementing existing ones. Many environmental issues are also intrinsically linked in ways (perhaps no different than in other arenas of international cooperation, but seemingly more apparent to scholars and practitioners) that led to concern over the ramifications of treaty overlap. If a treaty on transboundary air pollution, for example, also had implications for climate change – and the two issues are plainly connected as economic and ecological matters – ought they not be connected as well in terms of negotiation and implementation? At least that is how many scholars and participants began to think.

There were, as a result, increasing calls for a common institutional home that would rationalize environmental cooperation and reduce “congestion,” and soon after a debate over creating a World Environment Organization to provide coherence to the multiplying and sometimes fractious array of institutions (Runge, Ortalo-Magné, and Van de Kamp, 1994; Calderin 2002; Charnovitz 2002). Negotiators began to include clauses purporting to govern the relationships among the growing number of

accords. Consider the 1998 Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade.⁹ The convention's preamble amply illustrates both the rising density of agreements and the difficulty inherent in addressing this density frontally:

The Parties to this Convention

Aware of the harmful impact on human health and the environment from certain hazardous chemicals and pesticides in international trade,

Recalling the pertinent provisions of the *Rio Declaration on Environment and Development* and *Chapter 19 of Agenda 21* on 'Environmentally sound management of toxic chemicals, including prevention of illegal international traffic in toxic and dangerous products',

Mindful of the work undertaken by the United Nations Environment Programme (UNEP) and the Food and Agriculture Organization of the United Nations (FAO) in the operation of the voluntary Prior Informed Consent procedure, as set out in the *UNEP Amended London Guidelines for the Exchange of Information on Chemicals in International Trade* (hereinafter referred to as the 'Amended London Guidelines') and the *FAO International Code of Conduct on the Distribution and Use of Pesticides* (hereinafter referred to as the 'International Code of Conduct'),

...

Recognizing that good management practices for chemicals should be promoted in all countries, taking into account, inter alia, the voluntary standards laid down in the *International Code of Conduct* and the *UNEP Code of Ethics on the International Trade in Chemicals*,

Desiring to ensure that hazardous chemicals that are exported from their territory are packaged and labelled in a manner that is adequately protective of human health and the environment, consistent with the principles of the *Amended London Guidelines and the International Code of Conduct*,

Recognizing that trade and environmental policies should be mutually supportive with a view to achieving sustainable development,

Emphasizing that nothing in this Convention shall be interpreted as implying in any way a change in the rights and obligations of a Party under any existing international agreement applying to chemicals in international trade or to environmental protection,

Understanding that the above recital is not intended to create a hierarchy between this Convention and other international agreements...

Italicized (my emphasis) in this short preamble are five other international agreements explicitly mentioned; implicitly recognized in the final two clauses are scores more related to environment, trade, and hazardous chemicals.

Indeed, the final two clauses constitute what diplomats refer to as a “savings clause”: language meant to ensure that one accord does not alter commitments

undertaken in another. Savings clauses are not specific to the environment, although the myriad trade and environment linkages provide ample cause for their negotiation. Savings clauses both reflect and accentuate the fundamental problem of rising density in the international system. Since there is generally no hierarchy among international institutions, and since by their terms agreements such as the Rotterdam Convention do not alter other agreements, conflicts are left to be sorted out – or to fester – in some political fashion. This is the basic intuition behind the concept of a “regime complex”: rather than a single, coherent regime, there is, in practice, often an array of partially overlapping institutions governing a particular issue area (Raustiala and Victor 2004).

Just as agreements increasingly began to (metaphorically) bump into one another, so too did IOs and other bodies. Consider international courts. For most of the twentieth century, international courts were almost nonexistent: aside from the usually sleepy ICJ there were few examples, and those dispute settlement procedures that did exist, such as the GATT panels, were avowedly uncourtlike (Hudec 1987). As recently as 1986, for example, a leading British international lawyer could write (correctly) that, “it is a rarity in the international field for there to be any possibility of more than one forum” for a given dispute (Fitzmaurice 1986: 437).

Several momentous changes altered this story. One was the rise and rise of international criminal law, which spawned several new tribunals and an array of complex judgments that sometimes addressed common doctrinal issues, even if the underlying facts and crimes differed. Another was the creation of the WTO Appellate

Body, which increasingly took the trade order away from the diplomatic-consultative approach of the past toward a world of careful legal briefs and rulings in the hundreds of pages. Other courts also popped up, such as the International Tribunal for the Law of the Sea (Romano 1999). A third change was the revival of regional integration efforts, many of which featured courts as dispute settlers. (What deeper factors drove some of these changes is a topic I turn to below.)

Courts, by nature, issue rulings, follow precedent, and interpret texts.¹⁰ But the lack of hierarchy among international courts creates scope for inconsistent decisions and divergent reasoning. In turn, this encourages forum shopping as litigants use these differences to seek advantage. For some international lawyers, the phenomenon (or problem) of fragmentation in the international system begins and ends here: the proliferation of courts, and therefore of rulings, they believe, fundamentally challenges the coherence and integrity of the international legal system.

But institutional density is by no means limited to overlapping treaty rules or contradictory legal decisions. Negotiating forums can also overlap. The existence of multiple institutions with plausible jurisdiction over a shared set of issues, often exercised in different ways, among different parties, and with different procedures, provides ample opportunity for maneuvering – or “regime-shifting” (Helfer 2004) – by actors interested in a particular bargaining outcome (or no outcome). Should questions of essential medicines and patents be negotiated at the World Health Organization (WHO), the WTO, the World Intellectual Property Organization

(WIPO), or the many bilateral “TRIPs-plus” accords? Should agreements on food grow out of the Food and Agricultural Organization (FAO), the WTO, the CGIAR system, or the UN General Assembly? And which agreement, norm, or process prevails in the event of a conflict?

The problem is not limited to existing institutions. States can create new institutions (and exit existing ones) if they prefer new rules and structures. The UN replaced the League; the WTO, the GATT (Steinberg 2002). Because different institutions often have different procedures and different members, there may be strong incentives to pursue one or another venue for rule making. Nothing stops parallel rule making efforts, nor prevents the resulting rules from conflicting. In short, *a denser international order yields more institutional choice*. Relatedly, *the desire for more (or better) choices may yield more density*. This, as I will discuss later in this chapter, has potentially significant implications for how we understand the constraining role of international institutions.

To be sure, not all institutions that overlap – or coexist in the same juridical space – do so in an uncoordinated or nonhierarchical fashion. Some are explicitly “nested” in others. Work dating from the 1980s, for example, described how various textile agreements, as well as regional institutions such as Asia-Pacific Economic Cooperation (APEC), were nested within the larger GATT system (Aggarwal 1985). Others have looked at nestedness in other contexts (Alter and Meunier 2009). Nested regimes remain an important part of the institutional fabric of the global order. But

what is more striking is the plethora of institutions that are decidedly not nested, yet by inadvertence – or intent – address many of the same subjects.

Some of these nonnested institutions are multilateral and even universal in ambition; others are regional in nature. There is, as a result, a sort of geography of density. Some regions are clearly more densely institutionalized than others; one need only to compare Europe to East Asia. Why this is so is an outstanding question in both senses of the word. Geography may matter in another way. Although the simple accretion of treaties, institutions, and tribunals is likely to correlate at least roughly with more fragmentation, overlap (and conflict) is most likely when more relevant institutions operate in the same geographic zone. If, conversely, much of the growth in institutions is via regional regimes, the resulting fragmentation may have a different character: segmented by area and more parallel than overlapping. One might even describe it as more akin to a federal system of rule, whereas an array of partially overlapping regimes with broadly global ambits is more reminiscent of the complexity of rule and authority in feudal Europe (Ruggie 1993). This distinction should not be overdrawn, however, since even parallel regimes with different regional focuses may still engage common legal or policy questions – and do so differently.

II. Density: Two Optics¹¹

Institutional density is growing, but this is not new. International lawyers, who are typically closer to the practice of institution-building than their counterparts in the social sciences, have been contemplating the specter of a denser and more

fragmented system for decades.¹² In 1958, for example, Baxter (1958: 178–79) examined the law governing armed forces stationed abroad, in particular the North Atlantic Treaty Organization (NATO) Status of Forces Agreement, and asked “is the law progressing in the direction of greater uniformity or, on the contrary, has there been a disintegration and fragmentation of the law since the period of the Second World War?” A few years earlier, Jenks (1953: 405) observed that “the conflict of lawmaking treaties ... must be accepted as being in certain circumstances an inevitable incident of growth” of international law. Likewise, Szasz wrote in 1966 that

what is lacking is a generally accepted codification of international law, or even a definitive and complete encyclopedia wherein the established international legal norms can conveniently be found. As a matter of fact, it is unduly difficult to determine, without extensive and often involved research, the various rules of international law that may bear upon a given point. (Szasz 1966: 852)

Szasz did not invoke fragmentation *per se* in this passage – or at least did not use that exact term – but he did have his finger on a basic attribute of it, as did many other prominent international lawyers of the time. Even in 1966, there were lots of legal rules, too many for even an able lawyer in the UN legal counsel’s office (such as Szasz) to keep track of. As a result, there was no easy way to make sense of what was and what was not required in a given situation. Again, there is no necessary connection between a multiplicity of rules and overlapping or contradictory rules.

But practice – and common sense, if not the basic laws of entropy – suggests that two phenomena are related: a rising tide of disconnected rules, of which no one person or office can keep track, will surely yield conflict if not contradiction.¹³

And lawyers were perhaps primed to see this. Litigation provides ample incentive to seek out conflicting rules and differing forums. Domestic law had long addressed the problem (or issue) of conflicts, which arise even in well-functioning national systems. This is a point worth underscoring: while the international system may be particularly prone to conflict because it lacks a clear and accepted legal hierarchy, conflict is inherent in many legal systems – particularly federal ones like that of the United States or Germany. The study of “conflicts of laws” has been a mainstay of Anglo-American legal study for centuries and dates back, in one form or another, to Roman law. The typical conflicts problem involves multiple legal rules grounded in multiple sovereigns, such as a contract signed in one state but breached in another. But the basic concept – how to choose when seemingly parallel rules or systems diverge in result – is neither novel nor inapplicable to the international legal plane.

Indeed, international law has long contained doctrines, simple to be sure, that are meant to alleviate such conflicts. The doctrine of *lex specialis*, for example, declares that particular rules prevail over general rules. Similarly, later treaties generally trump earlier ones.¹⁴ These sorts of basic rules of the road can be helpful, but are plainly limited in a world of tens of thousands of treaties, many highly specialized and often updated (leading to confusion about which is prior, let alone

more specialized.) The Vienna Convention on the Law of Treaties codifies some of these rules, but hardly solves the fundamental problem. A direct consequence of this weak arsenal of conflict-dampening tools has been the angst demonstrated by some over the rising number – or specter, depending on one’s view – of legal conflicts.

This angst – although concentrated in The Hague – stems from real events. Remarkably, international courts have issued over 25,000 decisions (Alter 2012). Nearly all are innocuous with regard to conflicts, but a few high-profile judgments illustrate the consequences of a nonhierarchical system. In 1995, for example, the International Criminal Tribunal for Yugoslavia (ICTY) rejected a prior interpretation of the law of state responsibility announced by the ICJ. In justifying this move, the ICTY wrote that international law “lacks a centralized structure [and] does not provide for an orderly division of labor” among tribunals. As a result, “every tribunal is a self-contained system.”¹⁵

This decision sparked attention. Judges such as ICJ President Guillaume spoke out on the need for an organizing structure, and some scholars bemoaned the implications of this new juridical landscape. Others pushed back, however, arguing that these concerns were overwrought and “the more [courts] the merrier” (Charney et al. 2002: 369). New courts, they urged, “strengthen the system of international law, notwithstanding some loss of uniformity.” Moreover, in the end, “multiple courts are better than no courts at all” (Charney 1998; Pauwelyn and Salles 2009: 80). In 2006, however, the International Law Commission (ILC) produced a nearly 500-page report, revealingly subtitled “difficulties arising from the diversification and

expansion of international law” (International Law Commission 2006: para. 251). This report, unsurprisingly, took a less positive view of judicial proliferation. Among the many points made, the ILC noted that there is “astonishingly little” judicial practice on conflicts; that is to say, international courts have tended to avoid resolving such conflicts. Instead, they are far more often resolved, in the ILC’s phrasing, by negotiation – otherwise known as politics.

Across campus in political science departments, however, there was little worry over the specter of inconsistent legal decisions, nor much consideration of whether (in Judge Guillaume’s words) the “privileged position” and “special authority” of the ICJ made it *primus inter pares*, and therefore the appropriate apex of a restructured international legal order. But political scientists did have a long-standing interest in one aspect of international law – treaties – and the cooperation they represented. Regimes in world politics had been a central concern since the early 1980s. Regimes were generally thought of, if only implicitly, as self-contained institutions that operated in a specified issue area. At the core was usually a legal document (although, as the late Abram Chayes liked to say, political scientists rarely used the “L Word”).¹⁶

The regimes literature that emerged from this era was rich and varied. But, until recently, it rarely acknowledged a growing reality: regimes were not self-contained, but instead frequently overlapped and even competed with one another.¹⁷ That regimes were multiplying was well understood. The larger implications of institutional density, however, were not given much attention. Yet, as Drezner has

recently argued, density has begun to transform the fundamental challenge of cooperation in ways that have major implications for theories of world politics. “In a world thick with institutions, the central problem for institutionalists is no longer surmounting the transaction costs of policy coordination, but selecting among a welter of possible governance arrangements” (Drezner 2009: 66).

By the turn of the new millennium, international relations (IR) scholars were more actively exploring the issue of rising density. Although the particular spin and nomenclature varied – some spoke of “overlap” or “interplay,” while others analyzed regime “complexes” and “complexity” – the basic orientation was the same (Young 2002; 1996; Raustiala and Victor 2004; Stokke 2004; Alter and Meunier 2009).

International institutions were not free-standing, nor did state choices in one institution fail to affect those in others. Rising density moves more of the action of cooperation to implementation, and leads to a more complex “chessboard politics” in which different pieces move in different ways (Alter and Meunier 2009: 16). As noted above, earlier scholarship had introduced the idea of nested regimes (Aggarwal 1998). Although this provided an analytic point of entry, it had a different orientation than most of the work on institutional density that followed. And, conceptually, nested regimes were distinct if not diametrically opposed to the concerns about fragmentation raised by some lawyers: indeed, it was precisely a nested and organized relationship that Cassandras like Judge Guillaume sought.¹⁸

Adding to this new wave of scholarship was the remarkable growth of trade law, which spurred a burst of attention to the overlap inherent in what were dubbed

“trade and” problems. “The ‘trade and...’ industry is booming,” noted one knowledgeable observer in 2002 (Leebron 2002: 15). Trade’s connection to human rights, environment, labor, intellectual property, cultural practices – these and other combinations led to a more focused examination of how regimes interacted, clustered, or undermined one another. (Moreover, it was nearly always the “and” part of the “trade and” equation that was being undermined by the trade part – leading partisans of various “ands” to dig deeper into the underlying structural features that favored trade institutions.)

Indeed, the concept of a “regime complex” was introduced in the pages of the leading journal of international relations with regard to an obscure issue – plant genetic resources – that nonetheless bridged the very heated arenas of trade, environment, intellectual property, and agriculture (Raustiala and Victor 2004). The role of regime complexes in a wide array of areas of international cooperation, from human rights, security in Europe, election monitoring, trade, intellectual property, refugees, to climate change, have all been explored since (Helfer 2004; Raustiala and Victor 2004; Busch 2007; Alter and Meunier 2009; Biermann, Pattberg, and van Asselt 2009; Gehring and Oberthur 2009; Keohane and Victor 2011).

Meanwhile, international lawyers continue to debate the merits, or peril, of a fragmented legal order, in a torrent that far outmatches, in size at least, the work done by political scientists (see, e.g., Kingsbury and Romano 1999; Pauwelyn 2004; Orakhelashvili 2008; Benvenisti and Downs 2009; Teitel and Howse 2009). A search of “fragmentation w/5 ‘international law’” on the Westlaw database in early 2012

produced nearly 600 articles, many published in the last few months alone (although, to be sure, not all fully focused on fragmentation). To paraphrase an earlier scribe on the subject, for lawyers, the fragmentation industry is booming.

III. The Debate Over Density

Why are international institutions proliferating and, increasingly, overlapping and conflicting? How does this phenomenon affect the behavior of states and other actors? Is institutional density good or bad – and for whom? These questions are central, but their answers are still emerging. The sheer fact of rising density appears almost undisputed.¹⁹ But, beyond this, there is substantial room for debate and only a small (but growing) body of scholarship. Perhaps the most basic question raised by institutional density is why it is increasing. The limited research that directly engages this issue tends to focus on the dynamics of specific examples of density, rather than on why density *across the system* appears to be increasing.

Existing explanations for rising density also vary depending on what facet is emphasized. An early study by Romano of international courts argued that their rapid proliferation could be attributed “largely to the expansion of international law into domains that were either solely within states’ domestic jurisdiction (e.g., criminal justice) or not the object of multilateral discipline...when conceived in this manner, the multiplication of [courts] becomes the precipitate of the accrued normative density of the international legal system” (Romano 1999: 728–29). Although it is uncontroverted that international law increasingly addresses subjects traditionally thought of as domestic, this is somewhat question-begging: why has this happened?

(I will return to this in a moment.) And, in any event, as Romano (1999: 728–29) points out, this argument “fails to explain why the 1990s have given birth to more international judicial bodies than any other decade.” Nor does it explain why this expansion comes replete with new courts. Romano instead looks to the end of the Cold War as a key trigger. By revitalizing the Security Council and weakening Russia, the Cold War’s demise directly aided the establishment of several international criminal tribunals and may have indirectly assisted the development of others, such as the Law of the Sea Tribunal.

Other legal scholars have suggested, not necessarily inconsistently, that the dramatic proliferation of courts is a consequence of new politics and preferences on a grand scale – a shift from a state-centered conception of international law to a more universalistic, human-centered, and individually accessible system. This shift is perhaps best exemplified by the tremendous postwar expansion of the human rights regime (Koskeniemi and Leino 2002: 574–79; see also Teitel 2011). Whereas ordinary state disputes can be dealt with diplomatically, or in fora that add a veneer of legal process to diplomatic negotiation, individual rights issues require, or are thought to require, institutions of adjudication that more closely resemble Western-style domestic courts. Still, determining what is driving the move toward a more person-centered conception of international law is no easier a question to answer than what is driving the move to internationalize once-domestic policy concerns. But both seem to reflect a kind of meta-ideational change in how international law is conceived and in the broad understandings of the acceptable purposes of international

cooperation. In other words, this is likely a topic that transcends the narrow and rationalist analysis that tends to dominate contemporary scholarship on institutions in political science.

Rising density is, of course, not limited to international courts; there are many more treaties and IOs as well. But the rate of recent change in agreements and organizations is somewhat less dramatic and, moreover, does not appear keyed to the demise of Cold War politics. One prominent study argues that, for IOs, “the birthrate peaked in the mid 1970s, remained high in the early 1980s, and has steadily declined since.”²⁰ Other data suggest that intergovernmental organizations grew from fewer than 100 at the end of World War II to close to 350 fifty years later, in a fairly steady rise – and the number has generally plateaued since. These numbers are sensitive to conceptual choices about what counts as an organization, but the basic picture appears reasonably clear and consistent: the growth of IOs has continued since the end of the Cold War, but is slowing down from its early postwar peak.

International agreements are similar. The number of treaties registered with the UN exhibits the following pattern:

UN Treaty Registrations by Decade

1950–59: 4,318

1960–69: 5,106

1970–79: 8,098

1980–89: 8,146

1990–99: 9,461

2000–09: 9,809

Total as of May 2011: 48,566

As this shows, treaty proliferation was most marked in the 1970s, when the rate of increase jumped substantially. As with IOs, the end of the Cold War did not seem to bring about a major disjuncture; in fact, the rate of change in the 1990s was slower than in some earlier decades. It may well be that the type of agreement we see in recent decades is different – and certainly that is the perception held by many observers – but the data do not speak to that issue. Still, when one takes the long view, there is no denying the great rise in the number of treaties: more than a tenfold increase since 1945. In sum, the different forms of institutionalization have exhibited different patterns of growth. Yet, overall, international institutions are clearly far more numerous today than a half century ago.

A very basic claim about this growth, alluded to earlier in this chapter, is that overall rising levels of density and fragmentation may simply be a product of time: perhaps higher levels of density reflect a natural and organic process, unfolding over time as the wheels of diplomacy grind along and produce new agreements and organizations.²¹ This process may have been further bolstered by an even more basic change: the increasing numbers of states in the international system. As postwar decolonization took root, the number of states in the system doubled, and then doubled again. As a result there are many more dyads in the system now than in 1945.

These basic changes may explain a substantial part of the rise in density. Yet increased density appears to be more than the mere accumulation of decades of negotiations and summitry among a rapidly growing cast of sovereigns. Even if it were, one would still need to explain why there are so many negotiations and so many summits producing so many rules and so many institutions. Perhaps rising institutional density reflects not just the proliferation of sovereigns but also a greater dispersal of power in the international order. As new or newly resurgent players – such as China, Brazil, India, Turkey – grow more powerful, and older powers, such as the United States and Europe, diminish in at least relative terms, these new, or at least more powerful, actors may seek to create new institutions that better serve their interests (Steinberg 2012). But much of the growth of international institutions is connected to traditional great powers, and so this factor, although of an as-yet unknown quantum, is probably not sufficient to account for much of the expansion in density we observe.

The early regimes literature offered some ideas about institutionalization that may be helpful in pondering these questions. Keohane invoked the concept of density when he asked, three decades ago, the very basic question of why we observe regimes rather than simply ad hoc arrangements among states. He argued that “the denser the policy space, the more highly interdependent are different issues.” And where issue density is high,

one substantive object may well impinge on another and regimes will achieve economies of scale, for instance in establishing negotiating procedures that

are applicable to a variety of potential agreements within similar substantive areas of activity. Furthermore, in dense policy spaces, complex linkages will develop among substantive issues.... As linkages such as these develop, the organizational costs involved in reconciling distinct objectives will rise and demands for overall frameworks of rules, norms, principles, and procedures to cover certain clusters of issues – that is, for international regimes – will increase. (Keohane 1982: 339–40)

More succinctly, he wrote, there is “a link between interdependence and international regimes: increases in the former can be expected to lead to increases in demand for the latter” (Keohane 1982: 341).

Two things stand out. First, Keohane hypothesized that, as issues overlapped and the costs of reconciliation increased, states would rationalize their cooperation via the creation of regimes. Pushed further, that logic suggests that as regimes themselves overlap and conflict, meta-regimes of some kind should arise to rationalize the (now larger and more complicated) issue area. Although this may sometimes occur – and perhaps that is the story of the WTO’s “single undertaking” – clearly many issue areas follow a different and messier path toward not regimes, but regime complexes. Second, at a deeper level it does seem intuitive that rising interdependence may be a sort of master variable that yields more demand for agreements, which in turn spur the creation of more institutions to organize cooperation, adjudicate disputes, and interpret provisions. Coupled to a far larger

number of putative bargaining parties, growing interdependence may drive a substantial portion of rising institutional density.

The qualitative changes in the nature of international institutions discussed above – more “behind the border” issues, more focus on individual rights and access – are less easily connected to changes in interdependence – and not obviously connected to the numerical growth of sovereigns – but they too can be seen as its product. As states grow more interdependent economically, for example, they have a greater interest in the seemingly neutral domestic regulations that may alter conditions of international competition, such as food safety inspections. That requires a new set of rules to govern what was formerly a purely domestic matter (such as the Sanitary and Phytosanitary [SPS] and Technical Barriers to Trade [TBT] Agreements in the WTO). And, as liberal values spread via commerce, and knowledge of other political and cultural systems grows, we might expect to see a spread of rights-consciousness and of individualistic approaches to the law as well. Add in an increasing number of states, eager to demonstrate their sovereignty via participation in the full fabric of international life, and you may have a recipe for substantial institutional proliferation.

These speculations are consistent with a world in which international institutions are plentiful and increasingly intersect with domestic law and life. But do they explain the rise not just in the number of institutions, but in overlap and conflict among these institutions? In a simple sense, perhaps: more regimes likely yield a higher probability of overlap and conflict. Yet, an increase in rules and institutions

does not *necessarily* lead to substantial fragmentation or conflict; the fact that national legal systems also accumulate many new rules over time as well (just consider the Federal Register) suggests that the problem of density – to the degree that there is a problem – transcends mere numerical growth. National rules emerge, even in federal systems, within a constitutional structure that provides for a process of rule-reconciliation over time. Conflicts may well occur, but there is an established method for resolving them. In the international arena, there is no such constitutional structure, and thus the impact of sheer numerical growth may be far more meaningful.

So, at one level, rising density may simply be the wages of success in a more cooperative, peaceful, and truly global world. But the existing patterns of institutional overlap and conflict suggest that overlap and fragmentation in this process is not randomly distributed. In recent work, Keohane and Victor theorize about the conditions under which some issues become more complexly institutionalized than others. They describe a continuum, with integrated regimes at one end, “highly fragmented collections of institutions” at the other, and regime complexes somewhere in the middle (Keohane and Victor 2011). They theorize that three forces explain where a given issue, and its associated agreements, is situated on this spectrum. First, when the interests of key powers vary, regime complexes are more likely. Second, when states face high uncertainty about cooperative risks and rewards, they will favor smaller clublike structures that often will overlap. Third, the harder it is to link relevant issues, the more fragmentation is likely to increase.

Some studies even suggest that rising levels of complexity and overlap may reflect a deliberate strategy to create new institutional options and rules and undermine existing ones (Leebron 2002; Helfer 2004; Raustiala and Victor 2004; Benvenisti and Downs 2009). (I will return to this point later.) If true, this raises very interesting puzzles. The guiding assumption in the pioneering work on regimes was that states created regimes to reduce the transaction costs of cooperation and to create focal points that promote agreement. Institutionalization, as a result, channels decisions and over time restricts freedom of action, thus promoting stable cooperation.

By contrast, a multiplicity of institutions in a given issue area can enlarge choice and latitude, allowing states to pursue multiple and even contradictory tracks. This is likely to be especially true for those states with the resources and bureaucratic capacity to operate effectively across multiple forums. Consequently, the existence of overlap and inconsistency may be broadly beneficial for the most powerful states, and may even reflect an intention to *raise* transaction costs, not lower them. As transaction costs grow in a given area, cooperation may shift to regimes more favorable to powerful actors (Helfer 2004).²² And, in general, the greater difficulty of maneuvering in a more complex, high-transaction-costs world can be much more readily borne by powerful states. This, in turn, gives them a relative advantage over other actors. (It also bears at least a family resemblance to the argument that dominant firms in an industry may counterintuitively favor complex regulation,

because they are relatively better able to navigate such a system and therefore are advantaged vis-à-vis smaller rivals or newcomers.)

In short, rising levels of density may undermine some of the power-restraining effects of institutionalization. In a denser system, states and other actors can more readily choose among rules and procedures. Which then become dominant – if any – is ultimately more a matter of politics and power than of law and rules. This logic suggests that institutionalization relates to power in a sort of U-curve. Powerful states are advantaged by either low levels of institutionalization – which more closely approximate a state of nature – or by very high levels, in which a dense and overlapping thicket of institutions both saps the resources of smaller states and provides greater scope for choice and strategy for major players. How these varied motivations and strategies interact, and whether and when states seek to increase transaction costs so as to slow down cooperation or divert it into other forums, is a central area in need of more study.

As this suggests, while the causes of rising density remain murky, so too are the consequences. In addition to advantaging some states over others, possible consequences adverted to in the emerging scholarship on density include a greater role for implementation in determining outcomes, a greater reliance on bounded rationality in actor decision making, more social interaction among key actors, more forum shopping, more institutional competition, and more feedback among institutions (Alter and Meunier 2009). The normative attractiveness of this more complex cooperative climate is also unclear. Lawyers in particular have debated

whether legal fragmentation is broadly beneficial or a peril to be avoided. The aforementioned *Tadic* ruling, in which the upstart ICTY appeared to reject the authority of the World Court, became “a flashpoint for the anxiety of fragmentation” (Teitel and Howse 2009: 963). If different courts could announce different rules for similar problems, then international law – often derided as weak at best, meaningless at worst – now also seemed more malleable and even arbitrary than many had feared.

Nonetheless, whether fragmentation bears greater virtue than vice is often viewed differently depending on the context. Regional fragmentation rarely raises concerns, perhaps because it corresponds to a basic geographic presumption about law: legal rules (appropriately) vary depending on location. Location, in turn, is often thought to be a powerful proxy for preferences. This Tieboutian view appears to have widespread adherence, even if it is rarely expressed directly (Tiebout 1956). Yet, it is not obvious why regional fragmentation should be more acceptable. All treaty regimes are consent-based, and hence each reflects the considered deliberation of a set of parties that have chosen to join together to form, for at least a given set of issues, a community of commitment. Whether that community of commitment rests on a geographic basis or some other ground seems normatively immaterial. Indeed, a fair case can be made that regional groupings, which rest on accidents of geography, should be accorded less deference than other forms.

Still, the primary concern of many legal scholars is that fragmentation will yield divergence in similarly oriented legal rules. In other words, it is not fragmentation per se that is the concern, but that, as in *Tadic*, doctrines or reasoning

on common issues will vary across juridical domains. This variation, in turn, may yield two sorts of problems, one direct and one indirect. First, it creates direct uncertainty and perhaps even conflict over rules and their meanings. Whether a given human rights treaty applies extraterritorially, for instance, is not always plain from the treaty text, and different adjudicators may opine differently on it. Some agreements may even contain “counterregime norms,” norms that directly undermine rules in other, perhaps older, forums (Helfer 2009). Such rule uncertainty may mean that foreign ministries and other actors will lack clear guidance, or will selectively choose which guidance to adhere to, and hence law will not serve to channel behavior effectively. This may, in turn, lead to higher levels of noncompliance as states violate one rule while complying with another. Second, and more indirectly, divergence creates incentives to forum shop. Lawyers have long looked askance at forum shopping, which seems to undermine fundamental principles of evenhandedness by making outcomes turn on the vagaries of the forum chosen.

How grave are these problems? For the first, rule uncertainty, there is good reason to be skeptical that it is a serious concern. International law is sufficiently malleable already that there is often substantial wiggle room for good lawyers to make a range of reasonable claims about the meaning of an international legal rule. It is hard to see how divergent results or doctrines from different treaties or international forums will substantially alter this preexisting latitude. To be sure, rising levels of rule uncertainty will make it easier for states, as well as other actors,

to make self-serving legal claims. But they seem perfectly capable of doing so already.

Moreover, actors seem able to work within a rule-uncertain environment in domestic legal systems. Within the United States, for example, appellate circuits often split on major issues, and while, in theory, the Supreme Court stands ready to resolve splits, in practice, many persist for decades. Because the circuits are geographically defined, actors know that legal rules vary based on what region of the nation the relevant behavior occurs in. For international courts, jurisdiction is not always geographic in nature, and so it may be more likely that a given dispute will fall within the purview of multiple rule interpretations or interpreters. But international courts have their jurisdiction delimited in other ways. The ICTY, for instance, has limited time and place jurisdiction – over acts committed in the former Yugoslavia from 1991 onward. Likewise, the ICC's jurisdiction is limited to certain crimes and inapplicable to events that occurred before July 1, 2002. There is no obvious reason why such differentiated jurisdiction cannot be sustained in the international plane in much the same way it is (sometimes) sustained in domestic law. In short, higher institutional density may well lead to more rule uncertainty. Yet, uncertainty is already pervasive for many areas of international law, and hence any added uncertainty from divergence is likely to be small. And experience in the domestic realm suggests that legal systems can survive a fair bit of divergence with little ill effect.

What about the risks of forum shopping? The answer depends in part on whether the likely result is a race to the bottom or to the top – however defined – or simply a distribution of options that allows actors more latitude to pick their own rules and rule makers. Some analyses of the proliferation of international tribunals implicitly assume a race to the bottom—that is, a dynamic in which forum shopping leads to weaker or worse rules. (Worse, of course, being very much in the eye of the beholder.) But others see a race to the top. A more densely populated international system can lead to fruitful competition among international institutions, including courts. This “competitive multilateralism,” may “ultimately be as beneficial for the international regulatory regime as the competition among political interests is for democracy” (Wedgewood 2005; Benvenisti and Downs 2009: 596–97). The existence of multiple forums is certainly good news for complainants, who have more options as a result. Proponents of this view go further, however, and argue that competition “may also improve the quality of rulings and the expediency of proceedings” (Pauwelyn and Salles 2009: 80). “Competitive adjudication” may serve to keep the power and reach of often-insufficiently unaccountable international courts in check (Cogan 2008).

Even if these views are seen as a bit Panglossian, concerns raised by forum shopping in the domestic context do not necessarily transpose to the international plane. Pauwelyn and Salles, for example, argue that some of these concerns, such as the cost to the parties of multiple proceedings, have little bite in the international context where litigation costs are very small relative to the stakes at play and the

resources of the players. In a context in which the primary actors are very sophisticated and – most importantly – may have the ability to create or change rules and institutions, forum shopping seems far less of a concern than it would be in a domestic context. The most significant issue, they argue, is likely to be inconsistent rulings, which may both “leave the dispute unresolved” and threaten the legal system’s stability and legitimacy (Pauwelyn and Salles 2009: 82–83). In any event, a persuasive accounting of the costs and benefits has yet to be done, and further study of international forum shopping is essential.

In short, the legal literature raises concerns about proliferation but also highlights advantages. Some political scientists agree. Although a well-designed single regime is usually preferable in terms of regulatory effectiveness, “regime complexes have some distinctive advantages over integrated, comprehensive regimes” (Keohane and Victor 2011: 19).²³ In particular, regime complexes are often more flexible and adaptable; the variegated architecture of agreement within a regime complex may allow for multiple paths forward in an uncertain cooperative climate. This argument is not so different from the notion of “competitive multilateralism.” Like Justice Brandeis’ famous depiction of the states in a federal system as laboratories for policy experimentation,²⁴ a less uniform approach to cooperation permits both experimentalism and competition. As multilateral cooperation embraces ever more complicated and technical issues, these features may prove attractive.

Whatever the merits and demerits of rising institutional density, density is unlikely to decrease. For the near term, at least, it seems to be a durable feature of the

international system. And so perhaps the most interesting question is: who benefits? The most common answer is that powerful states benefit.²⁵ Fragmentation, write Benvenisti and Downs, favors the great powers, for it “operates to sabotage the evolution of a more democratic and egalitarian international regulatory system and to undermine the normative integrity of international law” (Benvenisti and Downs 2009: 597). Just as corporations use the threat of exit to extract favorable tax or regulatory concessions from local governments, so too can powerful states more credibly threaten to exit a given international institution in a world in which there are other, similar institutions with plausible jurisdiction over issues they care about.

Perhaps the most dramatic example of this phenomenon is the WTO. The major trading states strategically exited one regime (the old GATT) and entered a new one more to their liking (the WTO). A dense and fragmented international order increases the opportunity for great powers to choose particular forums that favor them or use the threat of exit to enact rules more consistent with their preferences. This ability to choose and to exit and to generally seek advantage in the briar patch of institutions that characterizes many complex issues today is not uniquely the province of the powerful, but it appears far more easily deployed by them. In a related fashion, the powerful can more easily deploy “strategic inconsistency” – the deliberate creation of inconsistent rules and norms in other forums – simply because they have a greater bureaucratic capacity to participate in and strategize about a wide range of negotiations and institutions (Raustiala and Victor 2004). It is no surprise that many scholars point to the most powerful state in the system – the United States

– as the most “adroit” at shifting between (and creating new) regimes (Helfer 2004: 17).

There are at least two additional reasons to believe that rising levels of density and fragmentation will favor the powerful. First, the proliferation of institutions can dilute the power of the constructed focal points that institutions so often create and contain, making institutions less effective as organizers of cooperation. That freedom of movement is likely to be more beneficial to the powerful. Paradoxically, a very dense and overlapping institutional order may provide as much freedom of movement to a great power as a thinly-institutionalized “state of nature.” As hypothesized above, institutional density and freedom of action may exhibit a U-shaped relationship, especially for the strong. Second, and equally important, the transaction costs of cooperation will likely rise as density rises. This again is likely to favor the powerful, who can more readily bear these costs. Together, these factors “create dynamics that favor the great powers more than would be expected under the institutionalist paradigm” (Drezner (2009: 66)

In a similar fashion, by undermining the coherence and therefore the normative force of the international legal order fragmentation is likely to further disadvantage the weak. In other words, fragmentation may limit the fundamental ability of the international order to remain – or become – a rule-based system that constrains the strong as well as the weak. As Teitel and Howse (2009: 966) perceptively put it, “the more so called international law there is, and the more lawyers and judges there are, the less clear and certain this purported law becomes.”

A more ambiguous or variegated international legal framework is one that cannot be as effectively deployed in lawfare-like efforts to tie down Gulliver with so many regulatory threads. More, in short, may be less.

Courts, of course, are traditionally thought to be relatively neutral venues for dispute settlement, focused on law rather than power; right over might. There may even be some truth to this aspiration, and, to the degree there is, it suggests that the rapid judicialization of international relations ought to influence the assessment of who benefits from rising density and fragmentation. Perhaps whatever advantages the strong gain from, say, the proliferation of negotiating forums may be partially counterbalanced by advantages that accrue to the weak in dispute settlement. But there is some reason for skepticism. In the WTO context, for instance, many have pondered how the move to a more legalized process of dispute resolution has altered the balance between the weak and the strong. In recent work, Busch, Reinhardt, and Shaffer conclude that while there are some benefits for weak states, legal capacity is a serious constraint on their ability to prevail in disputes. In their words, the “greater legalization of the multilateral trade regime poses asymmetric challenges for developing countries, perhaps allaying some concerns over the distribution of economic power, but raising new ones over the distribution of legal capacity” (Busch, Reinhardt, and Shaffer 2009: 576–77).

A final consideration is this: whether rising complexity is welcome or not, is it intentional or accidental? The idea that it is largely unintentional – perhaps, as described above, simply a sort of natural corollary of the growth of cooperation – has

a strong intuitive appeal in a vast and complex international system. But there are reasons to think otherwise. The strong case for intentionality is laid out by Benvenisti and Downs (2009: 597–98):

A fragmented system's piecemeal character suggests an absence of design and obscures the role of intentionality. As a result, it is often considered to be solely the accidental byproduct of historical events and broad social forces. This has helped obscure the fact that fragmentation is in part the result of a calculated strategy by powerful states to create a legal order that both closely reflects their interests and that only they have the power to alter.

If they are correct that intentionality has a strong role to play, their argument opens up a fascinating coda to the literature on postwar order building by the United States – the most obvious protagonist in Benvenisti and Downs's “calculated strategy.” As Ikenberry (2000, 2011) has most famously argued, the United States used its overwhelming power in the wake of World War II to build a variegated and multilateral system that would, by restraining its freedom of action, ultimately husband its strength and extend its dominance over time. The core of that approach was the creation of a set of significant rule-governed institutions that knit together the economic and security interests of the West.

Is the United States pursuing a different strategy today? Turning institutionalism on its head, perhaps it (and perhaps others) may be slowly – and surreptitiously – untying these fetters by proliferating treaties and IOs. This denser system allows the United States, through a diversity of forums, to have much greater

latitude to pursue the policies it desires. To what degree this assessment is accurate, and what it means in a world increasingly focused on the rise of powers like China, is a question that ought to be explored in much greater detail (Hachigian and Sutphen 2008; Zakaria 2008).²⁶

IV. Conclusion

The “move to institutions” that characterized the twentieth century continues (Kennedy 1987). Institutional proliferation may be less dramatic than it was in the crucial years of the 1940s, but it is undeniable that the international system is more densely populated and fragmented than ever before. Certainly, more rules and, perhaps most importantly, many more authoritative rule interpreters, exist, and the cumulative output of this strikingly complex system is bewildering.

What these developments mean for international order is a question that has only begun to be asked. Yet, as the international system continues to grow in complexity, this question will become even more significant. The prospect of another great war, and concomitant great reordering, is too terrible to imagine – and, in the view of many, increasingly remote as a practical matter (Goldstein 2011). If that belief is accurate, the international system we have today will not be swept clean as new powers, such as China and India, rise to the fore and cast a new world order on the ashes of the old. The existing system will instead be augmented, layer-cake-like, by new institutions expressly created to address new (or even old) problems and, increasingly, to serve the differing interests of these rising powers. These new institutions will inevitably rub up against or even clash with existing institutions,

leading to more overlap, more conflict, and more forum shopping. In short, the most interesting question for the future is probably not whether international institutions matter – they do – nor why they are designed the way they are. It will be how to manage and navigate an international order that is growing ever more complex.

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Notes

- ¹ On these and other questions, see, for example, Aggarwal (1998), Raustiala and Victor (2004), Young (2008)[[AQ? Young is et al. in ref, please add names]], Alter and Meunier (2009), Keohane and Victor (2011).[[COMP: Unlinked ref]]
- ² For an overview of recent interdisciplinary research, with some reference to cognate issues of density, delegation, and institutional design, see Hafner-Burton, Victor, and Lupu (2012).
- ³ Interactions between great powers and many weaker entities were often structured via overseas empires, a fundamentally coercive mode of organization that has few direct parallels today. David Lake (2009) explores less overt modes of dominance.
- ⁴ Union of International Associations (2012). [[COMP: Unlinked ref]] Compare with Shanks, Jacobson, and Kaplan (1996) (stating that, in 1981, there were 1,063; by 1992, 1,147). Shanks et al. compare the same UIA dataset with one of their own and argue that IOs die more frequently than many imagine, leading the birth rate of IOs to be even higher than it appears – in particular for “emanations,” which are IOs formed by existing IOs. For an earlier study, see Wallace and Singer (1970).
- ⁵ North American Free-Trade Agreement, U.S.-Can.-Mex., Dec 17, 1992, 32 I.L.M. 289 (1993), art. 2005(1).
- ⁶ Nevertheless, NAFTA members settle most of their trade disputes in the WTO (Davis 2009).
- ⁷ United States Trade Representative [[COMP: Unlinked ref]] (November 2009). United States Initiates NAFTA Dispute with Mexico over Mexico’s Failure to Move Its Tuna-Dolphin Dispute from the WTO to the NAFTA [press release], available at <http://www.ustr.gov/about-us/press-office/press-releases/2009/november/united-states-initiates-nafta-dispute-mexico-over>.
- ⁸ There are many versions of this image, some reflecting regions, some the globe. See e.g. Baier et al, 2007. But the impression given is always the same: a mess. (Or, for lawyers, an opportunity for larger bills as client’s advice needs rise).

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- ⁹ United Nations Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, February 24, 2004, 2244 UNTS 337.
- ¹⁰ Strictly speaking, there is no doctrine of *stare decisis* in international law, but, as a practical matter, international courts do follow precedents, however construed, in many cases.
- ¹¹ The term comes from Keohane (1997). [[COMP: Unlinked ref]]
- ¹² A Google Ngram search of “legal fragmentation” shows essentially no mention of the phrase until the mid 1950s, and then a dramatic rise peaking around 2000.
- ¹³ As discussed further later in the chapter, however, these conflicts may not always be as great as some fear or imagine; Charney’s (1998) extensive survey of how basic questions of international law have been treated in international courts, while now dated, suggests that most rulings are broadly aligned.
- ¹⁴ At least those on the same topic, an often-crucial caveat. See also Gourgourinis (2011).
- ¹⁵ *Prosecutor v. Tadic*, Case No. IT-94–1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995). See also Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), 2007 I.C.J. Case 91 (February 26).
- ¹⁶ That is much less true today. See Hafner-Burton et al. (2012).
- ¹⁷ This reflected reality; for much of the postwar period, regimes were indeed “‘decomposable’ from the rest of the system, in the sense that they operated without close links to other regimes in other issue-areas” (Keohane and Nye 2001). [[COMP: Unlinked ref]]
- ¹⁸ Even so, Aggarwal (1998: 213) noted the problems with nested institutions, writing that “the temptation to create new institutions as a solution to new problems may be a perilous illusion.”
- ¹⁹ Although surely someone will seize this opening soon.
- ²⁰ Shanks, Jacobson, and Kaplan (1996: 598). [[COMP: Unlinked ref]] Their study ends in 1992, however.
- ²¹ I thank Karen Alter for emphasizing this point.

²² Helfer notes, however, that in some cases “weaker states and networks of states and NGOs can engage also engage in regime shifting, although the specific rationales and the strategies they employ may differ from those of well-resourced nations” (Helfer 2004: 17).

²³ These advantages are not guaranteed, however; as they note, “dispersed institutions can also be associated with chaos, a proliferation of veto points and gridlock...” (Keohane and Victor 2011: 16).

²⁴ *New State Ice Co. v. Liebmann*. 285 U.S. 262 (1932); c.f. Dorf and Sabel (1998).

²⁵ But see Alter and Meunier (2009: 14): “sometimes complexity empowers powerful state actors, while at other times NGOs and weaker actors gain for the overlap of institutions and rules.”

²⁶ This strategy may also reflect declining American power, in that a weaker United States may prefer to pursue bilateral and plurilateral cooperation, where it can wield greater influence over outcomes. I thank Richard Steinberg for this suggestion.

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