

## FROM FEDERALISM TO INTERSYSTEMIC GOVERNANCE: THE CHANGING NATURE OF MODERN JURISDICTION

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In a mosaic of recent works, legal scholars have sought to grapple with new realities and conceptions of jurisdiction. In this literature, jurisdiction entails more than territorial and formalistic inquiries into applicable law and the authority of a given court in a particular dispute. These authors have instead engaged it as a “locus for debates about community definition, sovereignty, and legitimacy.”<sup>1</sup>

The impressive collection of work in this volume—the results of a symposium on *The New Federalism: Plural Governance in a Decentered World*—both advance and begin to draw together the varied strands of this discourse. Exploring the changing nature of jurisdiction at both the transnational and domestic level, the ensuing articles describe regimes of “translocal institutional transnationalism,”<sup>2</sup> “dialectical transnationalism,”<sup>3</sup> “horizontal federalism,”<sup>4</sup> “polyphonic federalism,”<sup>5</sup> “interaction’s promise,”<sup>6</sup> “network federalism,”<sup>7</sup> “neo-medievalism,”<sup>8</sup> and “intersystemic governance.”<sup>9</sup>

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<sup>1</sup> See Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311, 319 (2002).

<sup>2</sup> See Judith Resnik, *Foreign as Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism*, 57 EMORY L.J. 31, 34 (2007).

<sup>3</sup> See *id.* at 54. To related effect, Judith Resnik also invokes “translocal institutionalism,” see *id.* at 44, and “democratic iteration,” see *id.* at 82.

<sup>4</sup> See *id.* at 44.

But the basic patterns they explore actually resonate far more broadly. An overlong—if still incomplete—list of works is instructive, in suggesting the breadth of the relevant literature. At a minimum, it might include Paul Berman’s studies of “cosmopolitan pluralism”;<sup>10</sup> Benedict Kingsbury’s and Richard Stewart’s explorations of global administrative law;<sup>11</sup> George Bermann’s analysis of transatlantic regulatory cooperation;<sup>12</sup> the study of transnational networks by Anne-Marie Slaughter and others;<sup>13</sup> studies of the European Union, including especially work on the judiciary, on “comitology,” and on framework statutes, the open method of coordination, and related paradigms of “soft law”;<sup>14</sup> related to the latter, explorations by Chuck Sabel

<sup>5</sup> See Robert A. Schapiro, *Federalism as Intersystemic Governance: Legitimacy in a Post-Westphalian World*, 57 EMORY L.J. 115, 118 (2007).

<sup>6</sup> See William W. Buzbee, *Interaction’s Promise: Preemption Policy Shifts, Risk Regulation, and Experimentalism Lessons*, 57 EMORY L.J. 145 (2007).

<sup>7</sup> See Charles H. Koch, Jr., *The Devolution of Implementing Policymaking in Network Governments*, 57 EMORY L.J. 167, 169 (2007).

<sup>8</sup> See David J. Bederman, *Diversity and Permeability in Transnational Governance*, 57 EMORY L.J. 201, 213 (2007).

<sup>9</sup> See Schapiro, *supra* note 5, at 121; cf. Robert B. Ahdieh, *The Dialectical Regulation of 14a-8: Intersystemic Governance in Corporate Law*, 2 J. BUS. & TECH. L. 165 (2007).

<sup>10</sup> See, e.g., Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155 (2007); Berman, *supra* note 1, at 490.

<sup>11</sup> See, e.g., Nico Krisch & Benedict Kingsbury, *Introduction: Global Governance and Global Administrative Law in the International Legal Order*, 17 EUR. J. INT’L L. 1 (2006); Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, LAW & CONTEMP. PROBS., Summer/Autumn 2005, at 15; cf. Andrew Lang & Joanne Scott, *The Hidden World of WTO Governance: Law and Constitutionalism in the WTO*, in RULING THE WORLD: CONSTITUTIONALISM, INTERNATIONAL LAW AND GLOBAL GOVERNANCE (Jeffrey Dunoff & Joel P. Trachtman eds.) (forthcoming 2008).

<sup>12</sup> See, e.g., TRANSATLANTIC REGULATORY COOPERATION: LEGAL PROBLEMS AND POLITICAL PROSPECTS (George A. Bermann, Matthias Herdegen & Peter A. Lindseth eds., 2000).

<sup>13</sup> See, e.g., ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004); David Zaring, *National Rulemaking Through Trial Courts: The Big Case and Institutional Reform*, 51 UCLA L. REV. 1015 (2004); Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT’L L. 1 (2002).

<sup>14</sup> See, e.g., LAW AND NEW GOVERNANCE IN THE E.U. AND THE U.S. (Gráinne de Burca & Joanne Scott eds., 2006); KAREN J. ALTER, *ESTABLISHING THE SUPREMACY OF EUROPEAN LAW: THE MAKING OF INTERNATIONAL LAW IN EUROPE* (2001); Richard B. Stewart, *The Global Regulatory Challenge to U.S. Administrative Law*, 37 N.Y.U. J. INT’L L. & POL. 695, 748–50 (2005); David M. Trubek & Louise G. Trubek, *Hard and Soft Law in the Construction of Social Europe: The Role of the Open Method of Coordination*, 11 EUR. L.J. 343 (2005); Francesca E. Bignami, *The Democratic Deficit in European Community Rulemaking: A Call for Notice and Comment in Comitology*, 40 HARV. INT’L L.J. 451 (1999); Anne-Marie Burley & Walter Mattli, *Europe Before the Court: A Political Theory of Legal Integration*, 47 INT’L ORG. 41 (1993); J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403 (1991); Daniel Halberstam, *Constitutional Heterarchy: The Centrality of Conflict in the United States and Europe*, in RULING THE WORLD, *supra* note 11.

and others of democratic experimentalism;<sup>15</sup> the varied new governance literature;<sup>16</sup> studies of cross-jurisdictional “engagement”;<sup>17</sup> Greg Shaffer’s research on “transnational transformations of the state”;<sup>18</sup> work on the interaction of international and national tribunals;<sup>19</sup> strands of the latter literature focused on judicial citation of international and foreign authority<sup>20</sup> and on broader questions of legitimacy;<sup>21</sup> the discourse of global constitutionalism;<sup>22</sup> Harold Koh’s studies of transnational legal process;<sup>23</sup> Hari Osofsky’s analysis of multiscalar governance;<sup>24</sup> and a growing literature on increasingly complex dynamics of federalism within the United States, in constitutional law, corporate law, environmental law, and other areas.<sup>25</sup> In my

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<sup>15</sup> See, e.g., Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998).

<sup>16</sup> See, e.g., Bradley Karkkainen, *Marine Ecosystem Management & A “Post-Sovereign” Transboundary Governance*, 6 SAN DIEGO INT’L L.J. 113 (2004); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004).

<sup>17</sup> See, e.g., Mattias Kumm & Victor Ferreres Comella, *The Primacy Clause of the Constitutional Treaty and the Future of Constitutional Conflict in the European Union*, 3 INT’L J. CONST. L. 473, 476 (2005); Vicki Jackson, *Constitutional Cosmology: Convergence, Resistance and Engagement in Transnational Constitutionalism* (unpublished manuscript, on file with author).

<sup>18</sup> See, e.g., GREGORY C. SHAFFER & MARK A. POLLACK, *COMPETING LEGAL ORDERS: LAW, POLITICS AND THE STRUGGLE TO GOVERN GENETICALLY MODIFIED FOODS* (forthcoming 2008).

<sup>19</sup> See, e.g., Laurence R. Helfer, *Redesigning the ECHR: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*, 19 EUR. J. INT’L L. (forthcoming 2008); Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L.J. 487 (2005); Robert B. Ahdieh, *Between Dialogue and Decree: International Review of National Courts*, 79 N.Y.U. L. REV. 2029 (2004).

<sup>20</sup> See, e.g., Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT’L L. 1 (2006); Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109 (2005).

<sup>21</sup> See, e.g., Martin S. Flaherty, *Judicial Globalization in the Service of Self-Government*, 20 ETHICS & INT’L AFF. 477 (2006); T. Alexander Aleinikoff, *Thinking Outside the Sovereignty Box: Transnational Law and the U.S. Constitution*, 82 TEX. L. REV. 1989 (2004); Robert O. Keohane, Stephen Macedo & Andrew Moravcsik, *Democracy-Enhancing Multilateralism* (unpublished manuscript, on file with author).

<sup>22</sup> See, e.g., Jeffrey L. Dunoff, *Constitutional Conceits: The WTO’s “Constitution” and the Discipline of International Law*, in *RULING THE WORLD*, *supra* note 11.

<sup>23</sup> See, e.g., Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996).

<sup>24</sup> See, e.g., Hari M. Osofsky, *The Geography of Climate Change Litigation: Implications for Transnational Regulatory Governance*, 83 WASH. U. L.Q. 1789 (2005).

<sup>25</sup> See, e.g., Kimberly Jenkins Robinson, *The Case for a Collaborative Enforcement Model for a Federal Right to Education*, 40 U.C. DAVIS L. REV. 1653 (2007); Robert B. Ahdieh, *Dialectical Regulation*, 38 CONN. L. REV. 863 (2006); Kirsten H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 159 (2006); William W. Buzbee, *Contextual Environmental Federalism*, 14 N.Y.U. ENVTL. L.J. 108 (2005); Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243 (2005); Renee M. Jones, *Rethinking Corporate Federalism in the Era of Corporate Reform*, 29 J. CORP. L. 625 (2004); Mark J. Roe, *Delaware’s Competition*, 117 HARV. L. REV. 588 (2003); Robert B. Thompson, *Collaborative Corporate Governance: Listing Standards, State Law, and Federal Regulation*, 38 WAKE FOREST L. REV. 961 (2003); Mark D. Rosen, *Extraterritoriality and Political Heterogeneity in American Federalism*, 150 U. PA. L. REV. 855 (2002); Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of*

own work, by way of further example, I have found occasion to explore the dynamics of jurisdictional overlap and regulatory engagement in international trade and finance,<sup>26</sup> in domestic corporate law,<sup>27</sup> and in the interaction of U.S. securities regulators with both subnational and supranational actors engaged in correlated regulatory pursuits, which analysis I reprise and further develop in my contribution to this symposium volume.<sup>28</sup>

Although these various works are directed to distinct subjects of study and only occasionally engage one another, taken together, they bespeak something broader at work. Our collective conceptions of jurisdiction would seem to be in significant flux, with increasing attention to complex patterns of overlap and engagement, not only among courts, but also among social, political, and economic actors more generally.<sup>29</sup> This is not an entirely new phenomenon;<sup>30</sup> yet the flurry of recent academic attention to patterns of cross-jurisdictional regulatory engagement suggests a certain Renaissance, at least in our analysis of them, and perhaps in their scale and scope as well.

For all the attention, however, I believe we have made insufficient effort to draw the strands of this discourse together in meaningfully trans-substantive ways; too few of the authors cited above read one another. The works collected in this volume and the symposium it chronicles—as well as a predecessor symposium and volume of the *Emory Law Journal*<sup>31</sup>—represent

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*the Telecom Act*, 76 N.Y.U. L. REV. 1692 (2001). The literature of cooperative federalism might also be highlighted in this category. See, e.g., Daniel J. Elazar, *Cooperative Federalism*, in COMPETITION AMONG STATES AND LOCAL GOVERNMENTS: EFFICIENCY AND EQUITY IN AMERICAN FEDERALISM (Daphne A. Kenyon & John Kincaid eds., 1991).

<sup>26</sup> See Robert B. Ahdieh, *The Role of Groups in Norm Transformation: A Dramatic Sketch*, In *Three Parts*, 6 CHI. J. INT'L L. 231 (2005); Ahdieh, *supra* note 19.

<sup>27</sup> See Robert B. Ahdieh, *From "Federalization" to "Mixed Governance" in Corporate Law: A Defense of Sarbanes-Oxley*, 53 BUFF. L. REV. 721 (2005).

<sup>28</sup> See Ahdieh, *supra* note 9; Ahdieh, *supra* note 25; see also Robert B. Ahdieh, *From Federal Rules to Intersystemic Governance in Securities Regulation*, 57 EMORY L.J. 233 (2007).

<sup>29</sup> Paul Berman has perhaps been the most consistent herald of both the emergence of a new conception of jurisdiction and—in his emphasis on pluralism—on the complex of actors relevant to that conception. See Berman, *supra* note 1. Robert Schapiro's longstanding emphasis on the need to go beyond the courts in the construction and maintenance of federalism norms might also be noted. See Schapiro, *supra* note 5, at 121; Schapiro, *supra* note 25, at 294–96; see also Mark Tushnet, *Judicial Enforcement of Federalist-Based Constitutional Limitations: Some Skeptical Comparative Observations*, 57 EMORY L.J. 135, 141–44 (2007).

<sup>30</sup> See *infra* note 64 and accompanying text.

<sup>31</sup> See generally 56 EMORY L.J. 1–188 (2006) (works by Kirsten Engel, Steven Greene, Michael Heise, Chip Lupu & Robert Tuttle, and Robert Schapiro, exploring symposium theme of "Interactive Federalism" in areas including religious liberty, education, and environmental protection).

one effort to encourage such a dialogue.<sup>32</sup> This introductory piece takes a further step, identifying common threads to be found in the facially diverse articles and essays compiled in this volume. These threads, in turn, might also be traced through the broader universe of works cited above. Although necessarily preliminary, then, the enumeration of common characteristics I offer may suggest elements of a research agenda for those engaged with the broad dynamic of jurisdiction I will characterize as “intersystemic governance.”<sup>33</sup>

Drawing on the contributions to this symposium, this introduction identifies and explores four facets of modern jurisdiction that run through them and, perhaps, through the relevant literature more generally. Successively, I highlight suggestions in the articles, both explicit and implicit, of *complexity* and *overlap*, of a dynamic of *coordination*, of patterns of *dependence* among regulatory institutions, and of a growing role for *persuasion*, rather than hierarchical mechanisms of control, in regulatory design. These characteristics are intertwined and overlap in significant ways.<sup>34</sup> In attempting to systematize the exploration of cross-jurisdictional engagement, however, “some splitting” may be in order, “as antidote to overzealous lumping.”<sup>35</sup>

In my brief essay at the close of this volume, I bring these strands of analysis to bear in one of the areas in which I have explored patterns of intersystemic governance—U.S. securities law. Highlighting relevant examples, I paint a picture of how the common threads identified in this introduction might play out in the actual operation of legal regimes. In the final analysis, our understanding of intersystemic governance will turn on such microanalytic explorations of institutions across diverse fields.<sup>36</sup> Much of the above cited work, in fact, can be understood as just such microanalysis.

It is important to be clear about what these introductory remarks do and do not attempt. A comprehensive account of the nature of modern jurisdiction,

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<sup>32</sup> Central to planning and organizing each of these symposia has been Emory University’s Center on Federalism and Intersystemic Governance, a program aimed at advancing just such dialogue on the nature and implications of increasing jurisdictional overlap and cross-jurisdictional regulatory engagement.

<sup>33</sup> Cf. Ahdieh, *supra* note 9.

<sup>34</sup> Perhaps most importantly, all might be understood as aspects of the initial dimension of complexity. Overlap, coordination, dependence, and persuasion might thus be seen as patterns to be discovered if we go beyond the initial sense of chaos and complexity in cases of intersystemic governance.

<sup>35</sup> Bradley C. Karkkainen, “*New Governance*” in *Legal Thought and in the World: Some Splitting as Antidote to Overzealous Lumping*, 89 MINN. L. REV. 471 (2004).

<sup>36</sup> See Edward L. Rubin, *The New Legal Process, The Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393 (1996).

most importantly, lies beyond its scope. At best, it may help to facilitate development of such an account, by identifying key elements for analysis. I do not wish to suggest, however, that this is an exclusive enumeration of the characteristics of the cross-jurisdictional engagements I refer to as “intersystemic governance.” Other features might be identified as well. Robert Schapiro, for example, notes the functional and pragmatic orientation of his construct of “polyphonic federalism”<sup>37</sup>—an orientation paralleled in the other articles herein. I offer merely a starting point for discussion about the common elements of the diverse and growing literature of intersystemic governance.

Given this goal, the ensuing discussion does not attempt to systematically weigh or dissect the enumerated elements. Nor does it engage the normative implications of these features of intersystemic governance in terms of transparency, accountability, and legitimacy. While both tasks will be essential, I hope simply to highlight the ways in which each element can be found in the articles compiled herein.

Ultimately, then, my goal is not to offer conclusions but to raise possibilities: first, about the common features that might be found across the independent literatures focused on interactive dynamics of modern jurisdiction; second, about future research directed to the nature of jurisdiction—perhaps to be pursued jointly and severally across our erstwhile scholarly bounds.

#### 1. COMPLEXITY AND OVERLAP IN INTERSYSTEMIC GOVERNANCE

By way of first impressions, the pieces in this volume evoke a quite palpable sense of complexity. The analysis looks to complex social, political, economic, and even psychological patterns to understand the legal and regulatory dynamics at work. A complex world, of course, fosters the emergence of more complex regimes of law and regulation.

Beyond this initial sense of complexity, however, one might identify a particular focus on jurisdictional overlap. Such overlap motivates much of the analysis herein. It is overlap that shifts the basic ground rules in regulatory function and design and motivates the creation of more complex regimes of law and regulation. It is nevertheless useful to begin our discussion with the generalized sense of complexity that is one’s first impression of the

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<sup>37</sup> See Schapiro, *supra* note 5, at 118.

jurisdictional regimes explored in this volume—and too often one’s last. The dimensions of overlap, coordination, dependence, and persuasion might thus be understood as regulatory patterns that can be teased out, once we move beyond our initial, vague sense of regulatory complexity.<sup>38</sup>

*a. Regulatory Complexity: Of Actors and Structures*

Judging by the ensuing works, complexity arises in intersystemic governance at two levels. First, increasingly complex patterns of social, political, and economic behavior—more actors, with more diverse and multifarious interests, placing more moving parts into more potential positions, with more far reaching consequences—are challenging existing legal norms and institutions. Charles Koch suggests this dimension of complexity in his analysis of administrative delegation as a response to social complexity: “The more complex the society and the more complicated the demands on government, the more elusive [a] balance [between legislative and administrative authorities] becomes.”<sup>39</sup> Bill Buzbee offers a similar sense of underlying complexity in the predicates to the risk regulation regime he studies.<sup>40</sup>

More directly relevant to the functional nature of intersystemic governance are the complexities of regulatory design that follow from the latter trends. This begins with the wide range of actors that operate within regimes of intersystemic governance—perhaps the primary source of the sense of cacophony that may be the first reaction to such regimes. Collectively, the articles in this volume tell a story of the emergence of new actors, both as participants and third parties in the regulatory process; of old actors playing new roles; of distinct actors taking precedence, and of new questions arising from the foregoing. Judith Resnik’s analysis of cross-jurisdictional networks of local governments and their involvement in foreign affairs provides a particularly resonant example. Localities’ collective action only adds to this complexity, as such networks “blur the line between nongovernmental organizations (“NGOs”) and government organizations, for they are voluntary, quasi-private associations of public actors.”<sup>41</sup>

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<sup>38</sup> I nonetheless analyze jurisdictional overlap as a facet of complexity, as it is the characteristic most likely to be behind observers’ generalized sense of complexity in regimes of intersystemic governance.

<sup>39</sup> Koch, *supra* note 7, at 167; *see also id.* at 171.

<sup>40</sup> *See* Buzbee, *supra* note 6, at 153 (“[M]any areas of regulation are characterized by volatility and diversity, with concomitant changing states of knowledge.”).

<sup>41</sup> Resnik, *supra* note 2, at 34.

Although he questions whether things have changed sufficiently to justify talk of the death of the nation-state, David Bederman likewise highlights the emergence of newly important transnational actors in his analysis of the institutional nature of transnational governance.<sup>42</sup> Over the past century, he suggests, “both the subjects of international law (the authoritative lawmaking actors and parties affected by international rules) and objects of international law (the legitimate topics of international legal regulation) have grown and diversified.”<sup>43</sup> This is paralleled domestically, with courts, regulators, and political subdivisions playing an ever-increasing role in U.S. governance.<sup>44</sup>

Focusing on U.S. governance, Robert Schapiro—along with Mark Tushnet in his exploration of the role of courts in enforcing federalism—looks to a broader range of actors than standard U.S. constitutional analysis would suggest. Courts are not alone in shaping U.S. federalism in Schapiro’s more complex scheme. As he notes, courts “are good at drawing lines, but polyphonic federalism does not require lines to be drawn.”<sup>45</sup> Rather, the evaluation of comparative institutional advantage is a more nuanced exercise, where “[e]xpertise or responsiveness or ease of redistribution may suggest the superiority of state or federal regulators, but subject matter as such should not be relevant in choosing the appropriate level of government to be the primary regulator.”<sup>46</sup> At a minimum, the cast of characters in modern law and regulation has grown in size. Traditionally defined roles, however, would also seem to be in flux.

With the interaction of new, newly empowered, and traditional regulatory actors, complex new patterns of governance begin to emerge. Resnik highlights a telling example in the peculiar efforts of *federal executive* authorities to secure *federal judicial* protection against *state and local*

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<sup>42</sup> See Bederman, *supra* note 8, at 201.

<sup>43</sup> *Id.* at 203. To related effect, Bederman highlights the emergence of new international organizations as a particular category of new actor, as well as the growing role of transnational corporations in shaping public policy. See *id.* at 205–06, 209.

<sup>44</sup> See *id.* at 206–07. Some subset of the newly relevant actors in more complex regulatory regimes are not direct parties to the regulatory process, but third parties subject to the heightened external effects of intersystemic processes.

<sup>45</sup> Schapiro, *supra* note 5, at 121 (“Courts have little institutional capacity to manage the complex issues of overlap.”); see also Tushnet, *supra* note 29, at 143–44.

<sup>46</sup> Schapiro, *supra* note 5, at 120. With the influx of new actors and new roles for existing actors, as outlined above, new questions of institutional priority are inevitable. Resnik, by way of example, asks whether national or subnational actors should be privileged as the “principal agents of trade” in international and foreign law and which particular actors within the chosen category should take precedence. See Resnik, *supra* note 2, at 64.

*legislative* initiatives in the realm of foreign affairs.<sup>47</sup> Yet the full story may be even more complex than this pattern of relations suggests: In *Zschernig v. Miller*<sup>48</sup> and in the National Foreign Trade Council's recent challenge to Illinois' Sudan divestment law,<sup>49</sup> the relevant courts actually went *beyond* what the executive branch and corporate plaintiffs respectively demanded.<sup>50</sup> Amidst a complex of new and emboldened actors, operating within complex new institutional schemes, one is left to wonder who actually speaks for the foreign relations concerns said to be at stake?

The other articles collected herein offer similar stories of complexity in the operational patterns of governance: Bederman sees a growing shift from melting pot to mosaic conceptions of social, political, and economic ordering, and a resulting "neo-medievalism" in law and regulation. "Under the new *lex mercatoria*, public and private international law merge into an indistinguishable and seamless complex of commercial norms, practices, rules, and laws."<sup>51</sup> Koch describes multiple patterns and directions of regulatory influence in federal regimes, particularly among the complex of actors within the European Union's "network" federalism.<sup>52</sup> Even in the divided federalism of the United States, Koch finds a complex dynamic of delegation;<sup>53</sup> the involvement of E.U. member states at every level of regulatory design and implementation makes this even more so in Europe.<sup>54</sup> Finally, Buzbee sees similar complexity in the regulation of risk, where "clashing interests and a somewhat messy set of institutions" create an environment "where no one controls the agenda and final choice."<sup>55</sup>

Complexity is also evident in the ensuing articles' discussions of what follows from the operation of intersystemic regulatory structures. Again,

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<sup>47</sup> See *id.* at 71.

<sup>48</sup> 389 U.S. 429 (1968).

<sup>49</sup> Nat'l Foreign Trade Council v. Giannoulis, 2007 WL 627630 (N.D. Ill. Feb. 23, 2007).

<sup>50</sup> See Resnik, *supra* note 2, at 75–76, 79–80.

<sup>51</sup> Bederman, *supra* note 8, at 220. Bederman highlights a distinct pattern of complexity as well, arising from the interplay of law and policy with science and technology. See *id.* at 230.

<sup>52</sup> See Koch, *supra* note 7, at 167–68, 169.

<sup>53</sup> See *id.* at 179–80.

<sup>54</sup> See *id.* at 168, 176; see also *id.* at 167 ("These coordinated governments raise increasingly complex implementation and devolution issues.")

<sup>55</sup> Buzbee, *supra* note 6, at 164. Ernie Young might be read to echo this dimension of institutional complexity, in suggesting a broader scope of the "constitutional" order in the United States, see Ernest A. Young, *Toward a Framework Statute for Supranational Adjudication*, 57 EMORY L.J. 93, 100 (2007), and in his suggestion that the regime he proposes operate on a case-specific basis, to capture relevant variation and nuance, see *id.* at 112.

Resnik is instructive. At a functional level, she notes the operation of her inter-governmental networks as both “importers and exporters” of law,<sup>56</sup> rather than only the former—scholars’ traditional focus.<sup>57</sup> Further, she disputes the common claim “that a turn to ‘foreign’ law intrinsically poses problems for majoritarianism and for federalism.”<sup>58</sup> Instead, federalism offers a legitimate point of entry for international and foreign law and a means to its domestication.<sup>59</sup> Where cities and other localities embrace international or foreign norms, the use of such law is quite democratic in character.<sup>60</sup>

While thereby dismissing simplistic condemnations of the use of transnational norms, Resnik emphasizes that her inter-governmental networks are not a normative panacea. There is no necessary correlation between inter-governmental coordination and normatively attractive policy choices. The historical record of such networks is rife with pursuits we might find distasteful.<sup>61</sup>

Finally, perhaps related to the ambiguous normative implications of intersystemic governance, several authors suggest some resistance to such patterns. Resnik cites provisions of the Military Commissions Act of 2006, which bar judges from using international or foreign sources to interpret the Geneva Conventions.<sup>62</sup> Robert Schapiro and Mark Tushnet find similar resistance in the traditionally exclusive role of certain courts in construing U.S. federalism.<sup>63</sup>

In the constructs of jurisdiction offered in the ensuing works, then, we find complex dynamics of law and regulation: new and changed actors, altered patterns of governance, and normative ambiguity, all arising from underlying

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<sup>56</sup> See Resnik, *supra* note 2, at 34.

<sup>57</sup> But see Waters, *supra* note 19.

<sup>58</sup> Resnik, *supra* note 2, at 35.

<sup>59</sup> See *id.* at 34.

<sup>60</sup> See *id.* at 63.

<sup>61</sup> See *id.* at 89–91. David Bederman also suggests the complex utility calculation for intersystemic governance, in a different respect: Complex transnational regimes may offer far less predictability and stability than the traditional nation-state system. See Bederman, *supra* note 8, at 216. Mark Tushnet’s focus on the lack of a normative theory of federalism might be understood to suggest a related dimension of complexity in intersystemic governance. See Tushnet, *supra* note 29, at 137–38.

<sup>62</sup> See Resnik, *supra* note 2, at 66.

<sup>63</sup> See Schapiro, *supra* note 5, at 121; Tushnet, *supra* note 29, at 143–44. Vicki Jackson has spoken of the over-empowerment of lawyers and judges as a potential cost of heightened complexity in legal ordering and suggested the need to identify “default rules” of a sort, to govern regulatory interactions of the type explored herein. See Vicki Jackson, Closing Remarks: Workshop on *Ruling the World: Constitutionalism, International Law and Global Governance* (Dec. 8, 2007).

complexity in the social, political, and economic order. An altered cast of characters comes together in new ways, with new priorities, raising new questions. Institutional design follows suit, sometimes for better, sometimes for worse. In particular, patterns of jurisdictional overlap—perhaps the most direct by-product of a more complex cast of characters—emerge as the order of the day. Beyond overlap, I will suggest in subsequent sections, patterns of coordination, dependence, and persuasion might also be discovered in the seeming complexity and chaos of intersystemic governance.

*b. Jurisdictional Overlap in Intersystemic Governance*

Patterns of jurisdictional overlap among independent regulators are not a new phenomenon. As Robert Schapiro points out, echoing other contributors, “In the West . . . this legal polyphony was the norm until the modern period. Ecclesiastical law, municipal law, and trade law all overlapped and intersected. A variety of bodies exercised political authority and the accompanying lawmaking power.”<sup>64</sup> Yet patterns of overlap are at least enjoying a Renaissance of interest of late, if not actually expanding in incidence and depth, through globalization of the economy and attendant changes.

Such overlap has its genesis in the blurring of jurisdictional lines. In multiple respects, the law’s traditional project of line-drawing is no longer what it used to be. This pattern is evident at a substantive level and—following directly from the increased number of actors described above—in the nature and interactions of those actors.<sup>65</sup> Twin sides of the same coin, I consider these in turn. After suggesting an increased overlap in the underlying issues subject to regulation, I highlight the resulting tendency of law and regulation to reach beyond jurisdictional lines. Thereafter, I note tendencies toward overlap in the nature and interactions of both the public actors who generate law and the private actors subject to it.

*i. The Substantive Levels of Overlap*

Our sense of jurisdictional overlap might begin with the growing number of social, political, and economic phenomena of a cross-jurisdictional character.

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<sup>64</sup> Schapiro, *supra* note 5, at 122 (internal citations omitted); *see also* Bederman, *supra* note 8, at 213–14.

<sup>65</sup> Again, it bears emphasizing that the complexity I describe above is very much a product of the overlap I describe here—and of the need for coordination, the reality of dependence, and the role of persuasion, if to a somewhat lesser extent. Thus do I cast jurisdictional overlap as a particular facet of the complexity generally observed in regimes of intersystemic governance.

The ready flow of capital across borders—whether national or subnational—is perhaps the most familiar example.<sup>66</sup> More generally, Robert Schapiro highlights the growing lack of substance in “the dichotomy of ‘truly local’ and ‘truly national,’”<sup>67</sup> while Judith Resnik questions our ability to cabin the universe of foreign versus domestic affairs.<sup>68</sup> From a slightly different angle, David Bederman arrives at the same conclusion, pointing to a “century-long progression of developments,” by which “the legitimate topics of international legal regulation . . . have grown and diversified.”<sup>69</sup>

Given such pressure on the alignment of jurisdictional boundaries with the issues subject to regulation, a further substantive dimension of overlap emerges in the reach of law and regulation beyond jurisdictional lines.<sup>70</sup> In its simplest form, this is evident in extraterritorial applications of law. Highlighting such applications<sup>71</sup> as part and parcel of a broader “interpenetration” of legal regimes,<sup>72</sup> Bederman foresees a pattern in which “complex webs of domestic law [are] incorporated and applied into international practice, not only in the international economic field (such as trade or sanctions), but also for global health and environmental issues.”<sup>73</sup>

As in Ernie Young’s discussion of the shaping of U.S. commercial law by both federal and state courts<sup>74</sup>—a pattern he analogizes to the regime of concurrent jurisdiction between U.S. and supranational courts that he proposes—Bederman sees these patterns of interpenetration as giving rise to a

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<sup>66</sup> See Bederman, *supra* note 8, at 217.

<sup>67</sup> See Schapiro, *supra* note 5, at 120, 124.

<sup>68</sup> See Resnik, *supra* note 2, at 35.

<sup>69</sup> Bederman, *supra* note 8, at 203–04.

<sup>70</sup> As in the discussion of complexity above, such overlap in the reach of legal rules responds to a reality of overlap extrinsic to law. In Schapiro’s account, patterns of intersystemic governance arise “in circumstances in which political boundaries do not align with the jurisdictional reach of laws.” Schapiro, *supra* note 5, at 118. Resnik similarly highlights the overlapping scope of foreign and domestic affairs, and a resulting tendency toward overlap in local, national, and international law. See Resnik, *supra* note 2, at 35. In the face of these successive trends, Resnik counsels U.S. judges not to reject concurrency in local and national jurisdiction absent clear evidence of its harm. See *id.* at 41–42.

<sup>71</sup> See Bederman, *supra* note 8, at 221–23. Bederman cites the actual effects doctrine in antitrust law, and the regulation of citizens’ conduct abroad, by way of example. See *id.* at 222–23.

<sup>72</sup> See *id.* at 219.

<sup>73</sup> *Id.* at 224. Like Charles Koch, Bederman invokes patterns of overlap within the European Union—as in the preliminary reference procedure—by way of example. See *id.* at 228.

<sup>74</sup> See Young, *supra* note 55, at 108–09. More generally, Young’s suggestion of a shift in international law to be more in the nature of *federal courts law*, is implicitly grounded in a story of overlap and the need to mediate conflicts across jurisdictional lines. His proposed statutory regime, in turn, directly embraces jurisdictional overlap with its provision for concurrency of jurisdiction and shared law. See *id.* at 103–04.

new *lex mercatoria* and a resulting new layer of overlapping governance.<sup>75</sup> Bederman describes this as a neo-medievalism of sorts, embodying the “notion that there can be, in fact, multiple authorities exercised over the same individuals, communities, transactions, relationships, events, or bodies of law.”<sup>76</sup>

Finally, Robert Schapiro’s scheme of polyphonic federalism likewise turns on the reach of the law beyond jurisdictional lines. “Polyphonic federalism emphasizes that, as a descriptive matter, states and federal government in fact exercise extensive concurrent authority.”<sup>77</sup> Having long attended to such patterns in domestic settings, Schapiro here highlights similar patterns of overlap and polyphony in transnational settings:

Laws promulgated by one polity have effect in other polities. Many factors account for the increasingly porous nature of legal boundaries. Transactions often have transnational effects, subjecting them to multiple schemes of regulation; and international agreements have greater domestic impact, both because of their increasing number and because of their increasing likelihood of applying to conduct within a state, rather than simply to the conduct of a state.<sup>78</sup>

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<sup>75</sup> See Bederman, *supra* note 8, at 209–10.

<sup>76</sup> *Id.* at 214. Bederman’s elaboration of this pattern is worth quoting at length:

As in the Middle Ages, before the advent of the modern, Westphalian nation-state in Europe, an individual or community might have a multitude of sovereign or corporate loyalties, that run in different directions. A local war-lord might have held feudal obligations to a superior noble and to the Church, while he, himself, may have been owed obligations by nearby vassals and townships. Merchant guilds and university colleges may have reported to higher secular or religious authority, even as they exercised substantial power of their own . . . . Neo-medievalism is the notion that there can be, in fact, multiple authorities exercised over the same individuals, communities, transactions, relationships, events, or bodies of law. As in the Middle Ages, multiple authorities create multiple loyalties, thus destroying a monolithic system of governance (as in the Westphalian nation-state model) in which all authority in a domestic polity derives from the sovereign (whether a monarch or a republican government of representative institutions) and is exercised against all subjects in a vertical fashion. Contemporary global politics has been likened to medieval models insofar as we have, at present, a variety of species of entities that can exercise authority over matters of international concern: States, treaty-based public international organizations (such as the United Nations and its specialized agencies), subnational entities (autonomous municipalities or provinces), regional bodies (such as the North American Free Trade Agreement, the European Union, or European Court of Human Rights), supranational organs (such as the World Trade Organization), [transnational corporations], nongovernmental organizations and networks, and other non-State players. Together, these entities, polities, and actors create a mosaic of governance and international lawmaking, application, and enforcement.

*Id.* at 213–14.

<sup>77</sup> Schapiro, *supra* note 5, at 121.

<sup>78</sup> *Id.* at 123.

ii. *The Overlapping Nature of Actors*

Overlap in the substantive reach of law is intertwined with overlap in the nature of relevant actors. This begins with overlap among the public actors who generate overlapping legal norms. It is also evident in overlapping features of private entities subject to legal regulation.

Variouly highlighted by all the articles herein, “multiple, overlapping layers of authority”<sup>79</sup> are described in particular detail by Judith Resnik, Bill Buzbee, and Charles Koch. Resnik seeks to assert a place for localities alongside national institutions in the incorporation of international and foreign norms into U.S. law. By way of example, she highlights the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). CEDAW’s substantive demands, she suggests, look beyond the Senate as a locus of action,<sup>80</sup> extending to local governments as well. Relevant local initiatives thus go beyond simply encouraging Senate ratification of CEDAW; instead, they seek to “turn[] ‘transnational’ law into ‘local’ law.”<sup>81</sup> Such a local role engages an entirely new set of public actors in the shaping of foreign affairs. In doing so, it evinces one dimension of overlap among public actors.<sup>82</sup>

Bill Buzbee finds similar overlap among public actors in his analysis of risk regulation, arguing that “a diversity of actors and institutions” is essential to effective regulatory decisionmaking.<sup>83</sup> Buzbee sees such diversity as a result of both legislative and regulatory choices designed to “harness[] the strengths of state and federal institutional actors and forc[e] the two to interact.”<sup>84</sup> Contrary to conventional notions, overlap is not to be avoided or corrected in Buzbee’s analysis, but to be embraced. With it, “numerous levels of regulatory action are venues for innovation.”<sup>85</sup>

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<sup>79</sup> *Id.* at 131.

<sup>80</sup> *See* Resnik, *supra* note 2, at 56.

<sup>81</sup> *See id.* at 58.

<sup>82</sup> Mark Tushnet’s discussion of the political safeguards of federalism also evokes this multiple-regulatory-actors facet of overlap, in suggesting the role of both legislative and judicial institutions in shaping federal regimes. *See* Tushnet, *supra* note 29, at 142; *see also* Schapiro, *supra* note 5, at 121.

<sup>83</sup> *See* Buzbee, *supra* note 6, at 154. The operation of the common law in areas of risk regulation adds a particularly significant dimension of overlap. *See id.* at 157.

<sup>84</sup> *See id.* at 146.

<sup>85</sup> *Id.* at 162. Schapiro likewise highlights the utility of overlap, including in the broader scope of standing to bring federal constitutional claims in state courts. *See* Schapiro, *supra* note 5, at 128.

Resnik's exploration of the role of local government *networks* in the engagement of localities with foreign affairs highlights another dimension of overlap among public actors.<sup>86</sup> Such networks "both mirror the jurisdictional boundaries of the United States and cross them."<sup>87</sup> Beyond the increasing number of public actors engaged in regulation of any given issue, this highlights a growing subset of regulatory institutions that are cross-jurisdictional by design. Where localities come together under the auspices of the National League of Cities and the transnational umbrella of United Cities and Local Governments, they respond to underlying social, political, and economic overlap not by trying to beat it—a possibility I take up in a moment—but by joining it. Now, the relevant regulatory institution is itself cross-jurisdictional.

Charles Koch's study of administrative delegation in Europe echoes this analysis of local government networks. Within the European Union's "network" federalism, patterns of engagement and coordination among legislative and administrative authorities produce a regulatory dynamic akin to Resnik's local government networks.<sup>88</sup> In present-day Europe, regulatory authority is exercised through complex networks, in which power "move[s] both vertically and horizontally."<sup>89</sup> As increasing areas of European law are characterized by formal schemes of co-administration, in which "competences are shared between the E.U. and the member state[s]," the transnational quality of public actors becomes even more evident.<sup>90</sup> A network dynamic of overlap among relevant public actors is likewise evident in patterns of judicial policymaking in Europe, including the much-discussed preliminary reference procedure, through which courts similarly coordinate the development of cross-jurisdictional norms.<sup>91</sup>

As noted at the outset, cross-jurisdictional characteristics are also evident among private entities subject to regulation. Most familiarly, this is the story

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<sup>86</sup> See generally Resnik, *supra* note 2. Bederman likewise highlights political subdivisions' engagement of other subdivisions as bringing a new set of overlapping social and political orders into play. See Bederman, *supra* note 8, at 206–07.

<sup>87</sup> Resnik, *supra* note 2, at 34. To related effect, Resnik emphasizes that cross-jurisdictional interactions are not either vertical or horizontal in nature, but instead fall along a spectrum between those extremes. See *id.* at 40; see also Ahdieh, *supra* note 25.

<sup>88</sup> See Koch, *supra* note 7, at 167–68, 173.

<sup>89</sup> See *id.* at 168 (quoting WALTER VAN GERVEN, *THE EUROPEAN UNION: A POLICY OF STATES AND PEOPLES* 159 (2005)).

<sup>90</sup> See *id.* at 178.

<sup>91</sup> See *id.* at 178, 184.

of multinational corporations subject to overlapping regulation in the various jurisdictions in which they operate.<sup>92</sup> David Bederman highlights a similar dynamic among individuals, given widespread immigration and movement of peoples, as well as regimes of dual nationality and the “law of return.”<sup>93</sup> “[C]ore concepts of citizenship and national allegiances,” he suggests, have changed.<sup>94</sup> Whether at the corporate or individual level, the changing nature of private actors provides a further engine of increasing jurisdictional overlap.

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Perhaps given its direct challenge to our prevailing, line-drawing conceptions of jurisdiction, jurisdictional overlap in intersystemic governance appears to be a particular target of resistance and critique. Judith Resnik highlights judicial resistance to overlap in jurisdictional regimes.<sup>95</sup> In *Banco Nacional de Cuba v. Sabbatino*,<sup>96</sup> the Court’s insistence on shaping its own preemptive federal common law rule can be understood in this spirit.<sup>97</sup> *Zschernig v. Miller*<sup>98</sup> and *Crosby v. National Foreign Trade Council*<sup>99</sup> are to similar effect.<sup>100</sup> Resnik questions this line of judicial reasoning, finding “such an expansionist view of ‘the foreign’ and of national power . . . unduly intolerant of variation and unduly empowering of national prerogatives and of the Executive in particular.”<sup>101</sup> Yet it has remained the dominant conception to date. Judicial resistance to overlap may even be growing, if the courts’ receptivity to expansive constitutional notions of “dormant foreign affairs” powers and “field preemption” are any indication.<sup>102</sup>

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<sup>92</sup> See Bederman, *supra* note 8, at 217.

<sup>93</sup> See *id.* at 218.

<sup>94</sup> *Id.*

<sup>95</sup> Charles Koch’s account of judicial resistance to jurisdictional overlap, as exemplified by *New York v. United States*, 488 U.S. 1041 (1992), and *Printz v. United States*, 521 U.S. 898 (1994), perhaps most closely echoes Resnik’s account. See Koch, *supra* note 7, at 181. Schapiro, too, finds resistance to overlap in the persistence of dual federalism and in challenges to the legitimacy of federal courts’ interpretation of state law—what Schapiro terms “intersystemic adjudication.” See Schapiro, *supra* note 5, at 117. In prior work, I have cited *New York v. United States* as emblematic of our traditional resistance to jurisdictional overlap. See Ahdieh, *supra* note 25, at 867–68.

<sup>96</sup> 376 U.S. 398 (1964).

<sup>97</sup> See Resnik, *supra* note 2, at 85.

<sup>98</sup> 389 U.S. 429 (1968).

<sup>99</sup> 530 U.S. 363 (2000).

<sup>100</sup> See Resnik, *supra* note 2, at 85. Such resistance might be expected to grow stronger, Resnik suggests, as concerns with terrorism take center stage. See *id.*

<sup>101</sup> *Id.*

<sup>102</sup> See *id.* at 72, 74–75, 76–77. In the latter doctrines’ very emergence, on the other hand, one might find some implicit acknowledgement of the reality of overlap. Why would field preemption be needed but for a reality of jurisdictional overlap?

Bill Buzbee offers a similarly detailed story of resistance to overlap in what he characterizes as “unitary federal choice ceiling preemption.” This species of preemption, as evident in examples such as the Department of Homeland Security’s recently proposed regulations supplanting state and local regulation of chemical plant risks,<sup>103</sup> can be understood by reference to the traditional regulatory scheme of regulatory *floors*. By contrast with unitary federal choice ceiling preemption, traditional regulatory floors encourage cooperative federalism strategies, “leav[ing] room for more protective state and local regulation or incentives created through common law regimes.”<sup>104</sup> The recent embrace of ceiling preemption thus resists the embrace of overlap and complexity in the literature of intersystemic governance.<sup>105</sup>

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Collectively, the articles herein suggest the emergence of an increasingly complex dynamic of law and regulation that both reflects and seeks to manage underlying social, political, and economic dynamics. The world is growing more complex, and regulation is following suit. In particular—and perhaps most relevant for present purposes—the ensuing articles paint a picture in which jurisdictional line-drawing is increasingly futile. The emergence of an array of new actors; heightened mobility; increasing external effects driven by new and varied technologies, and a litany of related trends have collectively undermined the meaning—and perhaps the singular utility—of boundaries. Overlap is increasingly the reality in law and regulation.

Concrete manifestations of this phenomenon can be found in the realm of securities law, which I consider in my essay at the close of this volume.<sup>106</sup> There, the substantive dimension of overlap might be seen in the growing demand for harmonized accounting standards across jurisdictional lines. In the meantime, a kind of extraterritorial approach has been the norm in U.S. disclosure rules. Overlap in the nature and function of relevant actors, meanwhile, can be found in the overlapping regulatory authority of state and federal officials over the shareholder proxy and in enforcement matters, among other areas.

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<sup>103</sup> See Buzbee, *supra* note 6, at 149–50.

<sup>104</sup> See *id.* at 147–48.

<sup>105</sup> See *id.* at 157 (“Handing all regulatory power to one actor is the antithesis of the diversity of actors called for in experimentalist literature.”).

<sup>106</sup> See Ahdieh, *supra* note 28.

## 2. REGIMES OF INTERSYSTEMIC COORDINATION

Perhaps in response to the above patterns of jurisdictional overlap, mechanisms of coordination figure prominently in the analyses herein, suggesting a second important facet of intersystemic governance. The need for coordination is implicit, for example, in Mark Tushnet's emphasis on the political "deals" that define federalism in the United States.<sup>107</sup> Such bargains, at heart, are coordination games.<sup>108</sup> Federalism, as such, represents a regime of coordination. Ernie Young's suggestion that international law should be more like federal courts law than constitutional law likewise highlights the need for coordination—the essential function of federal courts law.<sup>109</sup> Finally, David Bederman notes potential coordination failures and their costs, including a decline in the coordinative capacity of traditional international institutions,<sup>110</sup> under-regulation by national authorities,<sup>111</sup> potential races to the bottom,<sup>112</sup> and the alternative prospect of extraterritorial applications of national law.<sup>113</sup>

By way of response to the latter possibilities, the authors describe various efforts at coordination among both private and public entities. On the private side, Bederman notes the extent to which transnational corporations play a coordinative role across jurisdictions,<sup>114</sup> and perhaps related efforts to coordinate transnational standards and ease the movement of capital.<sup>115</sup> More generally, he highlights the "re-emergence of private-ordering mechanisms and customs among international economic actors (a 'new' *lex mercatoria*)."<sup>116</sup>

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<sup>107</sup> See Tushnet, *supra* note 29, at 139. As he elaborates: "Federal systems consist of deals struck in light of the perceived circumstances of the nation when its federalism is created." *Id.*

<sup>108</sup> See Robert B. Ahdieh, *The Strategy of Boilerplate*, 104 MICH. L. REV. 1033 (2006).

<sup>109</sup> See generally Young, *supra* note 55.

<sup>110</sup> See Bederman, *supra* note 8, at 207.

<sup>111</sup> See *id.* at 229.

<sup>112</sup> See *id.* at 229–30.

<sup>113</sup> See *id.* at 221.

<sup>114</sup> See *id.* at 209.

<sup>115</sup> See *id.* at 217.

<sup>116</sup> *Id.* at 201. A step further down this line, Bederman points to the role of private organizations in developing regulatory rules. See *id.* at 210. More generally, in Bederman's account, private coordination plays out in two ways—both through the coordinative efforts of a transnational civil society of non-governmental organizations, and through "more inchoate network mechanisms." See *id.* at 211. Exemplifying the latter—"groups of like-minded individuals and subject-matter experts that collaborate in guiding the course of international affairs," *id.* at 212—Bederman cites the International Chamber of Commerce and the Comité Maritime International, see *id.* at 219.

Judith Resnik highlights the presence of such networks on both sides of various regulatory questions.<sup>117</sup> She begins with the private side, citing the role of “networks of activists . . . across a spectrum of issues,” among other examples.<sup>118</sup> Her primary focus, however, is the emergence of cross-jurisdictional coordination among public actors,<sup>119</sup> frequently in response to efforts at private coordination.<sup>120</sup> Citing the National League of Cities and other examples,<sup>121</sup> Resnik describes growing cross-jurisdictional coordination among public actors and agencies as a dynamic of “horizontal federalism.”<sup>122</sup>

Charles Koch’s analysis likewise explores coordination among public actors. He offers a complex dynamic of coordination, vertically between legislative and administrative authorities and horizontally among administrative agencies.<sup>123</sup> Such coordination grows even more complex, he suggests, as multiple levels of government are combined in “coordinated governments” such as the European Union.<sup>124</sup>

Koch highlights various European framework measures and soft law regimes as mechanisms of coordination. Collectively, these constitute Europe’s “network” system of governance.<sup>125</sup> Even where E.U. entities take the lead in an area of regulation, they must coordinate effectively with member state regulators charged with regulatory implementation.<sup>126</sup> Two structures of coordinative governance in the European Union might be particularly highlighted in this vein. First is the central role given to subject-matter committees, which essentially serve as vehicles of coordination.<sup>127</sup> One might also cite the “open method of coordination” and more general reliance of European law on member state best practices grounded in open-ended E.U.

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<sup>117</sup> See Resnik, *supra* note 2, at 34–35.

<sup>118</sup> See *id.* at 40, 45. Among business groups, Resnik cites USA\*Engage and the National Foreign Trade Council, by way of example. See *id.* at 78–79.

<sup>119</sup> See *id.* at 47.

<sup>120</sup> See *id.* at 42.

<sup>121</sup> See *id.* at 47–48.

<sup>122</sup> See *id.* at 44. Resnik’s emphasis on the lack of any consistent normative payoffs from such coordination bears reiterating. Coordination may advance unattractive goals, as in the case of certain efforts to sustain discriminatory policies and practices and in the advocacy of the Bricker Amendment, as well as attractive ones, as evident in the examples Resnik highlights throughout her analysis. See *id.* at 89.

<sup>123</sup> See Koch, *supra* note 7, at 167–68, 174.

<sup>124</sup> See *id.* at 167. Resnik cites the National League of Cities’ integration with United Cities and Local Governments as exemplifying such layers of coordination. See Resnik, *supra* note 2, at 49.

<sup>125</sup> See Koch, *supra* note 7, at 167.

<sup>126</sup> See *id.* at 178. Thus, “the Council itself not only reflects the interests of the member states but joins together those in the member states concerned about particular matters.” *Id.* at 175.

<sup>127</sup> See *id.* at 187–88.

guidelines.<sup>128</sup> On their face, the latter are complex mechanisms of coordination.<sup>129</sup>

Finally, Bill Buzbee offers additional insight into the nature of public coordination in regimes of intersystemic governance.<sup>130</sup> Among its proponents, the unitary federal choice ceiling preemption he describes is justified by the need for effective coordination.<sup>131</sup> It might be critiqued, on the other hand, as a means of avoiding a true dynamic of regulatory coordination among relevant actors. Regulatory ceilings can thus be contrasted with regulatory floors. The latter are to be preferred, as they integrate federal, state, and local interests in a scheme of “cooperative federalism.”<sup>132</sup>

In the design and evaluation of modern jurisdictional regimes, a capacity for coordination is an increasingly central feature. In the face of regulatory complexity and jurisdictional overlap, mechanisms of coordination are all the more essential. Coordination-driven regulatory structures, as such, may have an important role to play among the constituent elements of the modern administrative state—and perhaps even more so in its engagements across national borders.<sup>133</sup> As I will suggest in my essay in this volume, this has been precisely the experience of the SEC. From below, it has been forced to coordinate more closely with state officials, given the independent regulatory

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<sup>128</sup> See *id.* at 189; see also Ahdieh, *supra* note 25, at 912 n.262.

<sup>129</sup> A related approach to coordination might be seen in Ernie Young’s analysis of how the relationship between domestic and international courts should be structured, with a framework statute facilitating coordination between them. See Young, *supra* note 55, at 95. As to coordination within this framework, Young describes supranational tribunals as playing the “coordinating role.” See *id.* at 107.

<sup>130</sup> Robert Schapiro might also be read to offer an interesting counterpoint to the standard story of public coordination in citing the presence of various diffuse mechanisms of coordination as obviating the need for widespread use of federal preemption. See Schapiro, *supra* note 5, at 131–32.

<sup>131</sup> See Buzbee, *supra* note 6, at 149–50; see also John M. Broder & Felicity Barringer, *E.P.A. Says 17 States Can’t Set Greenhouse Gas Rules for Cars*, N.Y. TIMES, Dec. 20, 2007, at A1.

<sup>132</sup> See Buzbee, *supra* note 6, at 147–48. Buzbee’s attention to “learning by monitoring” schemes highlights yet another coordination dynamic at work. In the latter, monitoring, information pooling, and benchmarking motivate a practice of regulatory adjustment designed to achieve optimal ends. See *id.* at 154.

<sup>133</sup> The centrality of coordination may also highlight a broader point about intersystemic governance. The latter might be distinguished from the constitutional and administrative law literatures with which it otherwise most clearly intersects, on account of its distinct orientation. It is not focused on the limitation of regulatory power, thus, but on enabling the effective use of such power. It is best understood as seeking to understand—and enhance—the mechanisms of modern governance. Vicki Jackson has spoken of this as a question of the efficacy of governance. See Jackson, *supra* note 63; see also David Golove, *A Brief Mediation on Law and War*, at 3 (unpublished manuscript, on file with author) (noting failure to “appreciate how law is an essential component in a larger system of political decision-making, a primary purpose of which is to enhance, not impede, the effectiveness of executive action). “In the main, law and effectiveness are not at odds; rather, law is a crucial precondition of executive effectiveness.” *Id.*

initiatives of Eliot Spitzer and others. From above, the SEC's engagement with transnational efforts to harmonize accounting standards has dramatically increased in recent years, producing a regime of both substantive and procedural coordination.

### 3. INDEPENDENT REGULATORS AND INTERDEPENDENT REGULATION

A somewhat less apparent, but no less critical, strand of analysis in the ensuing works is a dynamic of intersystemic regulatory dependence. Less explicitly than the aforementioned features of regulatory complexity, jurisdictional overlap, and regulatory coordination—and even than the dynamic of persuasion I take up next—the articles herein evoke a tendency of (otherwise independent) regulatory agencies toward dependence on one another.

Given the more ephemeral evidence of it in the works collected herein, I confess that this feature of intersystemic governance fits less easily in my proposed enumeration than the other elements I identify. It is also among the most politically salient dimensions of intersystemic governance, however, given the involuntary quality that it introduces to such regimes. As such, it deserves our attention. If independent agencies operating across jurisdictional lines are indeed dependent on one another, our basic conceptions of the dynamics of regulation and its legitimacy must necessarily change.

In significant part, patterns of regulatory dependence among independent regulatory institutions can be traced to the nature of the national and global economy. Bederman sees the ready flow of capital as creating an interdependence of financial markets, as well as a heightened dependence of nation-states on those markets and on the transnational corporations operating within them.<sup>134</sup> In her analysis of “translocal networks,” meanwhile, Resnik cites a number of policy areas characterized by economic dependence, including economic development and immigration policy.<sup>135</sup>

Unsurprisingly, legal and regulatory regimes track these lines of economic interdependence. Bederman notes various applications of national law to citizens abroad, including attempts to bar subsidiaries of U.S. firms from facilitating construction of a Soviet gas pipeline into Western Europe and the

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<sup>134</sup> See Bederman, *supra* note 8, at 209, 217.

<sup>135</sup> See Resnik, *supra* note 2, at 60.

freezing of Iranian assets in foreign branches of U.S. banks.<sup>136</sup> With these examples, he suggests the dependence of national regulation on a capacity to discipline conduct overseas. Federal authorities' resistance to state and local laws regulating spending and business activities tied to Burma or Sudan likewise arises from economic interdependence across jurisdictional lines<sup>137</sup>—a kind of “spillover effect” of local economic decisionmaking, as Resnik characterizes it.<sup>138</sup> Robert Schapiro's emphasis on the externalities of state regulation is to similar effect.<sup>139</sup>

Beyond patterns of regulatory dependence motivated by an underlying reality of economic dependence, the ensuing works also highlight other sources of such dependence. Bederman notes the degree to which overburdened and non-specialized U.S. courts are dependent on arbitral courts charged to interpret the *lex mercatoria*.<sup>140</sup> Perhaps even more notable is his suggestion that state actors may depend on regulatory institutions beyond their borders to circumvent internal obstacles to achieving desired policy ends—including potential domestic capture.<sup>141</sup> Resnik echoes as much, noting localities' establishment of the predecessor to the National League of Cities as a response to state-level restrictions on “special legislation” favoring local interests.<sup>142</sup> The same dynamic arises in her pattern of “democratic iteration,” by which federal legislators may depend on local action, either as a means to circumvent federal resistance to their policy preferences or as a way to force federal action in that direction.<sup>143</sup> A final example is Resnik's suggestion of the dependence of federal executive authorities on the courts to secure protection against state and local initiatives in the realm of foreign affairs.<sup>144</sup>

Charles Koch's study of administrative delegation, meanwhile, suggests the potential for more recurrent and structured forms of cross-jurisdictional regulatory dependence. Implementation of European Union framework

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<sup>136</sup> See Bederman, *supra* note 8, at 222–23.

<sup>137</sup> See Resnik, *supra* note 2, at 75.

<sup>138</sup> See *id.* at 88.

<sup>139</sup> See Schapiro, *supra* note 5, at 116. Framing the story of economic interdependence even more broadly, Schapiro highlights interconnections in the economy, the potential influence of out-of-state political speech, and the dispersal of stakeholders in the modern public corporation as motivating an unavoidable dependence among states. See *id.* at 131–32.

<sup>140</sup> See Bederman, *supra* note 8, at 220.

<sup>141</sup> See *id.* at 230–31.

<sup>142</sup> See Resnik, *supra* note 2, at 47–48.

<sup>143</sup> See *id.* at 80, 83.

<sup>144</sup> See *id.* at 71–72.

measures and soft law depends entirely on member state action,<sup>145</sup> forcing the E.U. to attend to member-state interests in the regulatory process.<sup>146</sup> A similar process plays out in the United States in various efforts at federal coercion or inducement of state and local officials.<sup>147</sup>

While largely implicit in the ensuing articles, a certain interdependence of nominally independent regulatory entities may represent an important feature of emerging jurisdictional paradigms—both domestically and across national lines. Such dependence may be less visible, in fact, because of its very significance. As new jurisdictional patterns spread, take hold, and deepen in their impact, heightened regulatory dependence might be seen as inversely correlated with the voluntariness of the resulting regulatory regime. As such, it may represent our most significant step away from existing paradigms of autonomously articulated and implemented law and regulation. Where the SEC is variously dependent, as outlined in my contribution to this symposium, on state courts and legislatures in defining the scope of shareholder access to the proxy; on state attorneys general and other enforcement officials in regulating investment and brokerage services; and on transnational networks of public and private standard-setters in defining disclosure standards, our understanding of its operation—and perhaps its very nature—must necessarily change.

#### 4. THE ROLE OF PERSUASION IN INTERSYSTEMIC GOVERNANCE

A final characteristic running through the contributions to this volume, and echoed in related explorations of the nature of modern jurisdiction, is the central role of persuasion in relevant regulation. This feature of intersystemic governance is particularly significant, in its deviation from familiar notions of what “law” and “regulation” do. Within regimes of intersystemic governance,

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<sup>145</sup> See Koch, *supra* note 7, at 168.

<sup>146</sup> See *id.* at 186–87.

<sup>147</sup> See *id.* at 181. Ernie Young’s embrace of concurrent jurisdiction between supranational tribunals and U.S. courts might also be understood as a story of dependence. Given the United States’ unavoidable dependence on supranational tribunals, he essentially suggests, such concurrence at least allows the U.S. to play a role in shaping their jurisprudence. See Young, *supra* note 55, at 103–04. The political safeguards of federalism discussed by Mark Tushnet likewise involves a kind of dependence between federal and state authorities, see Tushnet, *supra* note 29, at 142, as does his expectation that even weak incentives of any given legislator to protect the states will cumulatively provide adequate protection, given legislators’ interdependence upon one another, see *id.* at 143. Finally, the unitary federal choice ceiling preemption critiqued by Bill Buzbee is also fairly understood as a response to a certain dependence of federal regulation on the constraint of state and local action. See Buzbee, *supra* note 6, at 149–50.

the quality of argument and analysis takes a front seat in determining regulatory effect. The task of regulation, in significant respects, becomes persuasion rather than coercion.<sup>148</sup> Judith Resnik suggests this distinct emphasis early in her analysis, noting the importance of “acts of pronouncing, reiterating, implementing, and internalizing legal obligations.”<sup>149</sup>

This is not to dispute any of what has gone before. There is significant jurisdictional overlap. Independent regulators increasingly need to coordinate with one another. In relevant cases, in fact, they may be highly dependent on one another. Both the operationalization and longevity of these trends, however, may depend heavily on regulators’ ability to persuade fellow regulators to join them in advancing common projects. More directly, a heightened role for persuasion in the regulatory toolkit of the modern administrative state may follow from the foregoing features of intersystemic governance.

In a coordination game dynamic, the operative strategic need is to align expectations, rather than alter incentives.<sup>150</sup> Given as much, coercive intervention is unnecessary. Effective persuasion—persuasion capable of influencing its subject’s expectations of the advocate’s future behavior—is enough. In the face of dependence, on the other hand, such persuasion is not optional. It may be essential to accomplishing desired regulatory objectives. With the flattening of power suggested by the above elements, finally, the role of persuasion becomes even clearer. Absent a certain hierarchy, coercive approaches are simply not viable. Persuasion may be the only option.

To explore the role of persuasion in a new paradigm of jurisdiction, we can successively consider structural features of persuasion’s role and what I will describe as the internally and externally directed dimensions of persuasion in regimes of intersystemic governance.

In important respects, the articles herein can be read to tell a story of the flattening of power. They suggest, in various explicit and implicit ways, a

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<sup>148</sup> Cf. H. Patrick Glenn, *Persuasive Authority*, 32 MCGILL L.J. 261 (1987). One might recall, in this vein, Richard Neustadt’s conception of presidential power as “the power to persuade.” See RICHARD E. NEUSTADT, *PRESIDENTIAL POWER: THE POLITICS OF LEADERSHIP* (1960); see also JEFFREY K. TULIS, *THE RHETORICAL PRESIDENCY* (1987).

<sup>149</sup> Resnik, *supra* note 2, at 33. Resnik’s emphasis on “expressive” initiatives by localities is in a similar spirit. See *id.* at 46.

<sup>150</sup> See Ahdieh, *supra* note 108, at 1052–53. The contrast, of course, is the Prisoner’s Dilemma, in which the players’ incentives favor defection. See *id.* at 1051 n.84.

softening of the sharp edges of hierarchy in law and regulation. If not quite democratic, the allocations of power described herein are at least more dispersed. David Bederman highlights the greater political space for interest groups' efforts at persuasion in neo-medieval regimes.<sup>151</sup> Charles Koch echoes as much, finding that policy choices are “buffeted by winds from many directions.”<sup>152</sup> Amidst multiple nodes of power, operating within various complex schemes,<sup>153</sup> “[p]olicymaking goes down, up, and sideways.”<sup>154</sup> In this flattened power structure, by way of example, the World Trade Organization—powerful as it is—must nonetheless persuade a wide array of international stakeholders of its legitimacy.<sup>155</sup>

A flattening of power, and resulting need for regulatory institutions to engage in persuasion to advance their aims, follows quite naturally from the generalized sense of complexity I highlighted at the outset. Purely as a matter of complexity, regulatory power is distributed in far more varied, and less predictable, patterns than it once was. But the articles herein go a step beyond this initial sense of complexity, to suggest particular patterns of governance that are emerging to replace prior norms.

In lieu of hierarchical regimes, most importantly, a number of the authors describe structures that foster direct engagement, and even conflict, among relevant regulatory actors. Such engagement and conflict, in turn, invite advocacy and persuasion. The various networks described herein can be understood in this light.

Consider Resnik's intergovernmental networks, which can be seen as mechanisms of persuasion designed to advance the interests of localities, both externally and amongst one another.<sup>156</sup> This essentially is Resnik's story of the local role in advancing CEDAW, as well as climate change legislation, in the United States.<sup>157</sup> More broadly, it is her story of federalism generally:

For me, the federated system within the United States—with its hundred-plus mentions of the word *state* in the Constitution and its tripartite division of federal power—entails aspirations for transparent, redundant debates about laws and policies. These

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<sup>151</sup> See Bederman, *supra* note 8, at 216.

<sup>152</sup> See Koch, *supra* note 7, at 179.

<sup>153</sup> See *id.* at 167.

<sup>154</sup> *Id.* at 179.

<sup>155</sup> See Bederman, *supra* note 8, at 215–16.

<sup>156</sup> See Resnik, *supra* note 2, at 45.

<sup>157</sup> See *id.* at 56–57, 62.

multiple sites for conflicts about social norms are the opportunities provided by democratic federalism to permit problems to be argued in more than one forum and more than once.<sup>158</sup>

David Bederman's talk of the "re-emergence of private-ordering mechanisms and customs among international economic actors" is to similar effect.<sup>159</sup> The latter bespeaks a certain kind of network, advanced through the persuasiveness of its rules and institutions among its members and potential members rather than through any capacity for coercion.

One can see this structured dynamic of engagement and conflict more concretely in a pair of examples. First, consider Bill Buzbee's discussion of learning by monitoring, a critical dimension of regulatory experimentalism.<sup>160</sup> Learning by monitoring is essentially an exercise in engagement and ensuing persuasion, with its successive pooling of information, benchmarking, and monitoring,<sup>161</sup> to achieve shared regulatory understandings. Even more broadly, it seeks to create incentives to criticize<sup>162</sup> and otherwise participate,<sup>163</sup> ultimately producing a dynamic of engaged discourse and persuasion.<sup>164</sup>

Judith Resnik's discussion of the reporting requirements of CEDAW, which mandate that signatories report on their progress in advancing the substantive terms of the treaty, offers a second example. Upon submission of such reports, a public dialogue regarding each signatory's successes and challenges ensues.<sup>165</sup> Each nation is thereby forced "to interrogate its own understandings of equality by comparing its rules and practices to those of others and to talk with a diverse group of experts . . . about what equality means in context."<sup>166</sup> The iterative, pedagogic nature of this process is worth emphasizing: "[A]s different localities generate various provisions, one can interrogate one's own norms through a comparative exercise."<sup>167</sup> Ultimately, the entire scheme can be seen as an attempt to trigger both collective and

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<sup>158</sup> *Id.* at 41; *see also id.* ("[T]he reiterated conflicts are desirable because they enable us to watch and to participate in struggles over the content of the law of the United States.").

<sup>159</sup> *See* Bederman, *supra* note 8, at 201.

<sup>160</sup> *See* Buzbee, *supra* note 6, at 154.

<sup>161</sup> *See id.*

<sup>162</sup> *See id.* at 157.

<sup>163</sup> *See id.* at 159, 160–61.

<sup>164</sup> *See id.* at 163, 164.

<sup>165</sup> *See* Resnik, *supra* note 2, at 53.

<sup>166</sup> *Id.* at 53–54; *see also id.* at 53 ("This form of norm elaboration provides a mechanism to integrate transnational premises of equality into the very different contexts of nation-states.").

<sup>167</sup> *Id.* at 86.

individual engagement with relevant norms and thereby encourage the evolution of such norms toward preferred ends.

As regulatory regimes move toward a flatter allocation of power, with institutional mechanisms of engagement and even conflict, two vectors of persuasion might be expected to play out—the first internal and the second external. Internally, the dynamic of persuasion is one of discourse. At a fundamental level, this is what the many networks described above are all about. Both the public networks emphasized by Resnik and the private ones described by Bederman are designed, among other things, to encourage a vibrant and ongoing discourse among their members. Such discourse, of course, involves a dynamic of persuasion rather than coercion.

Koch's analysis of "network" federalism offers further insight into the internal dimension of persuasion in its exploration of the dynamic of *comitology* in Europe.<sup>168</sup> E.U. committees, with members nominated by member states, play a central role in European governance. Both the design of Europe-level policies and their translation in member-state implementation owe much to the committee structure. More functionally, the committees help to overcome barriers including language, ethnicity, and the like.<sup>169</sup> At all levels, the committees emerge as nodes of advocacy—downward, upward, and sideways as well. The persuasion of various European and member state regulators is thus at the heart of their role.<sup>170</sup>

The distinct importance of persuasion in the new paradigms of jurisdiction explored herein, however, is clearest in externally directed efforts at persuasion. Here, the strength of relevant ideas is dispositive of the regulatory dynamic at work. This is readily apparent in the ensuing works' discussions of the interaction of judges across jurisdictional lines. Robert Schapiro offers some hint of this in his description of polyphony in federal regimes,<sup>171</sup> but Charles Koch and Ernie Young give it particular emphasis.

In Koch's case, the centrality of externally directed efforts at persuasion is evident in the judicial dialogue between European and member-state courts,

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<sup>168</sup> See Koch, *supra* note 7, at 188.

<sup>169</sup> See *id.*

<sup>170</sup> Koch's discussion of language might also be understood to evoke a dynamic of persuasion. See *id.* at 198.

<sup>171</sup> Within Schapiro's regimes of polyphonic federalism, thus, the efficacy of cross-border assertions of jurisdiction, legal analysis, and the like ultimately depend on their power in a marketplace of sorts. See Schapiro, *supra* note 5, at 131.

particularly by way of the preliminary reference procedure.<sup>172</sup> Ultimately, this engagement rests on a dynamic of judicial persuasion, in which courts advance their agendas by enlisting the agreement and support of their fellow judges on independent courts. Consider the European Court of Justice's gradual persuasion of the German Constitutional Court to accept its jurisdiction to regulate questions of individual rights, notwithstanding the German court's early resistance to that prospect.<sup>173</sup> Over a series of cases, the European Court of Justice convinced the German court of its (arguably newfound) commitment to human rights, thereby bringing it around.<sup>174</sup>

Young's proposed scheme of concurrent jurisdiction and shared law between national and international tribunals—with generalized deference to the latter—is to similar effect.<sup>175</sup> Within this regime, the persuasiveness of national courts' arguments and analyses is critical, as is the persuasiveness of the supranational tribunal, ongoing deference to which cannot be taken for granted. Young's ultimate intent, “to promote the discipline of written reasoning and public criticism,” affirms this dynamic of persuasion.<sup>176</sup>

More direct efforts at external persuasion can also be found in the analyses herein. David Bederman highlights the regulatory impacts of transnational corporations (and their trade associations),<sup>177</sup> of nongovernmental organizations (including by way of amicus briefs),<sup>178</sup> and of less structured epistemic communities.<sup>179</sup> In each case, the efficacy of the relevant institutions relies on persuasion, rather than anything in the nature of coercion.<sup>180</sup> Judith Resnik's account of “democratic iteration,” and particularly the ways in which federal actors both stoke and invoke local policy initiatives, is a further example of externally directed efforts at persuasion.<sup>181</sup>

More broadly, one might understand Resnik's effort to shift scholarly discussion of the domestic use of international and foreign legal authority to

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<sup>172</sup> See Koch, *supra* note 7, at 177–78, 194.

<sup>173</sup> See Ahdieh, *supra* note 19, at 2155–60.

<sup>174</sup> See *id.*

<sup>175</sup> See Young, *supra* note 55, at 103–04.

<sup>176</sup> *Id.* at 111.

<sup>177</sup> See Bederman, *supra* note 8, at 209.

<sup>178</sup> See *id.* at 211–12.

<sup>179</sup> See *id.* at 213.

<sup>180</sup> See *id.* at 201; see also *id.* at 210.

<sup>181</sup> See Resnik, *supra* note 2, at 80–83. Tushnet's emphasis on the role of political mechanisms, rather than exclusively the courts, in the construction of federalism might also be cited in this vein. See Tushnet, *supra* note 29, at 141–44.

move toward a more explicit dynamic of persuasion. By shifting the focus away from *judicial* citation of international and foreign authority—a football of scholarly debate and recrimination in recent years—and toward the choices of democratically elected executive and legislative institutions functioning at the local level,<sup>182</sup> Resnik gets to the critical question: the true value and utility of transnational law and norms. Within this framework, the use of international or foreign authority turns on the question of its substantive utility and appeal—of its persuasiveness—rather than the perhaps overheated question of its legitimacy.<sup>183</sup>

The foregoing suggests a need for greater attention to noncoercive lines of regulatory action. As legal scholars, we remain overly prone to give precedence to coercive patterns of regulatory intervention. This may be especially true among international legal scholars, given a certain sensitivity to inquiries about the truly *legal* character of international law. Yet changing dynamics in the substantive areas explored by the articles herein, and in the broader literature that I would bring under the umbrella of intersystemic governance, may warrant greater attention to—and appreciation of—the role of persuasion in law and regulation. In the regulation of the securities markets, which I consider in my essay herein, this is readily apparent. In significant respects, the modern project of the SEC is one of advocacy and persuasion among both state institutions with the authority and capacity to impact shareholder proxy access, investment counsel, and mutual fund trading and among foreign and transnational institutions charged to define the requirements of financial disclosure overseas.

## CONCLUSION

The limitations of the foregoing should be self-evident. I do not claim to offer a comprehensive exploration of the nature and features of intersystemic governance. Nor do I consider the normative implications of that pattern, in terms of transparency, accountability, and legitimacy. I do not even assert that

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<sup>182</sup> See Resnik, *supra* note 2, at 63.

<sup>183</sup> Much of the dynamic of persuasion in the analyses herein might be traced to a heightened role for norms in the operation of regimes of intersystemic governance. This is apparent in Resnik's analysis of the potential impact of CEDAW's reporting procedures, as described above. See *supra* notes 165–67 and accompanying text. To related effect, Resnik notes the invocation of asserted universal norms in localities' encouragement of the ratification of CEDAW. See Resnik, *supra* note 2, at 58; see also *id.* at 34, 45 (describing role of localities as “norm entrepreneurs”). If norms have a central role to play, then persuasion—among the central tools for shaping norms—becomes essential as well.

my enumeration of its characteristics is complete. The basis of that enumeration, as well as my evaluation of those characteristics, thus draws almost exclusively on the works collected in this volume.

For the introductory purposes intended, however, the foregoing proceeds as hoped. First, it offers an angle of approach to the fascinating collection of work published herein. Second, and likewise by way of introduction, it identifies common strands found in those works, which might also be found in the broader literature engaged with the nature of modern jurisdiction.

In doing so, it introduces the possibility of thinking in more systematic and trans-substantive ways about our serial discussions of the European Union, courts' citation of international or foreign authority, U.S. federalism, global administrative law, and the like. With this, it aspires to encourage a broader dialogue across these literatures. If it succeeds in doing so, it will have well served its purpose.