Dialectical Regulation

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I. INTRODUCTION

From the emergence of the New Deal state, through the rise of civil rights and risk regulation in the 1960s and 1970s, to the present day, the mass of public regulation—and the number of regulators charged with its design and implementation—has grown explosively over the 20th century.1 With this growth has come a concomitant increase in the engagement of regulatory institutions across jurisdictional lines. Independent regulatory authorities—Federal and state environmental agencies, U.S. and foreign banking regulators, and tribunals convened under the North American Free Trade Agreement (NAFTA) and Mississippi state law, among other examples—today engage one another in pursuit of their respective mandates. In the face of advances in communication technologies, the increased ease and decreased cost of long-distance travel, and the expanded and extended scope of economic and industrial activity, regulators today face the undeniable reality of a small, small world.2

In its most commonly acknowledged—but least controversial—form, such cross-jurisdictional interaction among regulatory entities is purely dialogic. In such cases, regulatory institutions with related missions engage one another to exchange information, share ideas, and otherwise

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2 While the present analysis is grounded in what can be understood as a supply-side treatment of regulation, one can appreciate the above point from the demand-side as well: individuals, institutions, and subject-matter issues increasingly manifest some cross-jurisdictional character. Multinational corporations may be the most obvious examples of cross-jurisdictional institutions, while environmental protection is a clear case of an issue not readily captured within any single jurisdiction. The most resonant regulatory issue of the moment—the control of global terrorism—exhibits cross-jurisdictional features of various forms.
learn from each other. Examples of purely voluntary interactions among regulatory entities situated across jurisdictional lines include regular gatherings of the National Governors Association, the varied pursuits of the Organization for Economic Cooperation and Development, and much of the work of the International Organization of Securities Commissions (IOSCO).

For the most part, such voluntary patterns of engagement have met little resistance in the study of regulation. Less welcome—if even acknowledged—has been a universe of cross-jurisdictional interactions motivated by jurisdictional “overlap.” In these cases, independent public agencies enjoy regulatory authority over the same individuals or institutions, with regard to the same or related issues. The extent of such overlap may be more or less in any given case. The jurisdiction of federal and state regulators to protect the environment exhibits substantial overlap. By comparison, the authority of federal and state banking regulators overlaps more slightly. Similarly, under Chapter 11 of NAFTA, national courts and international tribunals must interact, but only regarding a relatively constrained universe of issues. Whatever its breadth, however, the conventional account finds little wisdom—and much to fear—in such overlap.

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4 As the above examples suggest, the present discussion is not directed exclusively to what we ordinarily think of as “regulatory agencies.” Rather, the regulatory “entities” on whose interactions I hope to shed light include executive, legislative, and judicial institutions more generally. The entities engaged in intersystemic regulation are thus public regulatory agencies of one variety or another, established by, and operating under the authority of, distinct jurisdictions—or “systems.” Private regulators of one form or another likely deserve incorporation into a comprehensive theory of regulatory interaction across jurisdictional lines. See, e.g., infra note 41. This level of complexity, however, is beyond the scope of the present analysis.

Even less appreciated, in both senses of the word, have been interactions in which the relevant institutional dynamic produces both jurisdictional overlap and a degree of what I will term regulatory "dependence." In these cases, engagement among regulators is even less voluntary in nature than in cases of overlap alone. Rather, in this growing universe of regulatory interactions, each agency's pursuit of its mandate is shaped—in a non-trivial fashion—by the other entity's acts of commission or omission. Each entity is reliant on the other, in one way or another. As a result, there emerges a regulatory regime characterized by increased interaction, of a more recurrent nature, and by a close intermingling of regulatory conflict and cooperation. Ultimately, rather than increased regulatory cooperation supporting each agency's pursuit of its own mission, we may even see something akin to joint, or intertwined, regulation of relevant individuals, institutions, or subject-matter. In such regimes, discrete sets of regulatory rules may collapse into a collective whole.

By way of example, the present analysis highlights the regulation of securities markets. As financial markets have become global in nature, the enforcement of insider trading rules, the achievement of appropriate levels of disclosure, and other regulatory pursuits have become cross-jurisdictional endeavors, requiring the Securities and Exchange Commission (SEC) to work in increasingly close fashion with its transnational and foreign counterparts. Contemporaneously, the SEC has been forced to engage various sub-national regulators, as most dramatically highlighted in the recent case of New York Attorney General Eliot Spitzer. With his broad assertions of authority to regulate the New York financial markets.

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6 This is likely the most critical contribution of the present analysis, given the general orientation of the aforementioned literatures to voluntary, cooperative patterns of interaction among regulatory entities. This is largely the case in the study of transgovernmental networks, of cooperative federalism, and of regulatory cooperation generally, and in some significant portion of the analysis of regulatory interactions in particular subject-matter areas. A more comprehensive model, I would argue, needs to better incorporate the elements of regulatory conflict that are equally present in cross-jurisdictional regulatory interactions. See Robert A. Schapiro, Toward a Theory of Interactive Federalism, 91 IOWA L. REV. 243, 284 (2005); see also William W. Buzbee, Recognizing the Regulatory Commons: A Theory of Regulatory Gaps, 89 IOWA L. REV. 1 (2003); Daniel C. Esty, Toward Optimal Environmental Governance, 74 N.Y.U. L. REV. 1495, 1554, 1556–57 (1999).

7 See infra Part V.B.

8 One might thus conceive of the pattern I describe herein as falling between the more familiar realms of regulatory competition, see, e.g., Charles M. Tiebout, A Pure Theory of Local Expenditures, 64 J. POL. ECON. 416 (1956), and regulatory cooperation, see supra note 3.


10 To closely related effect, Raustiala and Victor have explored the implications of a growing density of international institutions. Such density gives rise to what they term "regime complexes," in which multiple institutions intertwine and cannot be readily "decomposed" into their constituent parts. See Kal Raustiala & David G. Victor, The Regime Complex for Plant Genetic Resources, 58 INT'L ORG. 277 (2004).
markets, Spitzer has repeatedly forced the SEC to follow his lead, or at least to join in his regulatory endeavors.

Yet such patterns of regulatory engagement, which I characterize as "intersystemic regulation," can be observed across an array of fields. Under the No Child Left Behind Act, federal and state education officials depend on one another's regulatory initiatives, mandates, and funding commitments in pursuit of their own education goals.11 Transnationally, one might note the reliance of the U.S. Comptroller of the Currency on the initiatives of various transnational and foreign regulators to combat money laundering, and the aforementioned dependence of domestic courts and international tribunals on one another under NAFTA. Perhaps the very best examples of intersystemic regulation can be found in environmental law, where the federal Environmental Protection Agency and state environmental regulators find themselves caught in complex—and expanding—patterns of interdependence.12

For the most part, patterns of intersystemic regulatory interaction combining overlap and dependence have not been emphasized in the regulatory literature.13 Notwithstanding the unavoidable familiarity with

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13 This is not to suggest that there is no relevant analysis to be found. Administrative and constitutional law scholars have explored such cross-jurisdictional regulatory interactions—though primarily in particular subject-matter areas, such as occupational health and safety and public health regulation. See, e.g., David Freeman Engstrom, Drawing Lines Between Chevron and Pennhurst: A Functional Analysis of the Spending Power, Federalism, and the Administrative State, 82 Tex. L. Rev. 1197, 1267 (2004). The most substantial analysis of such interactions in federal–state relations is in environmental regulation. See, e.g., Jonathan H. Adler, The Ducks Stop Here? The Environmental Challenge to Federalism, 9 Sup. Ct. Econ. Rev. 205 (2001); Richard L. Revesz, Federalism and Environmental Regulation: A Public Choice Analysis, 115 Harv. L. Rev. 553 (2001). Robert Schapiro's analysis of “polyphonic federalism” is the exceptional analysis of broader scope. See Schapiro, supra note 6, at 252–53. Though somewhat oriented to intersystemic judicial interactions, Schapiro's treatment is most closely akin to the present analysis.

More broadly, however, the burgeoning study of democratic experimentalism, see, e.g., Michael C. Dorf & Charles F. Sabel, A Constitution of Democratic Experimentalism, 98 Colum. L. Rev. 261 (1998) (proposing a system of governance in which power is decentralized and local agencies cooperate and share information through regional and national coordinating bodies to promote efficiency); the various subject-matter specific studies of the "new governance" literature, e.g., 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) (detailing scholarship on recent innovative forms of public governance, which reject the "familiar model of command-style, fixed-rule regulation by administrative fiat," in favor of "a new model of collaborative, multi-party, multi-level, adaptive, problem solving"); Orly Lobel, The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought, 89 Minn. L. Rev. 342 (2004) (using paradigm of governance to describe legal scholarship's shift away from the traditional model of formal state-produced regulation); and European efforts to contrast the "classic community method [of regulation] . . . based upon clear divisions of
such patterns on the ground, theoretical accounts have inadequately grappled with them.\textsuperscript{14} Even where acknowledged, such regulatory engagement is commonly disputed in one way or another. The extent of overlap, some would insist, is overstated; lines of jurisdiction are sufficiently clear. Even when overlap is self-evident, the presence of meaningful dependence may be disputed, with challenges to the actual power of one or the other regulatory authority to assert itself.\textsuperscript{15} Even when overlap and dependence are undeniable, finally, there is the standard dualist response: In the face of overlap and dependence, our normative task is to more effectively delimit each entity's jurisdiction and authority, and thereby eliminate the relevant overlap and dependence.\textsuperscript{16} The dualist paradigm of the federalism literature, with its single-minded commitment to the project of jurisdictional line-drawing, is suggestive in this regard.\textsuperscript{17}

Such reactions are hardly surprising. At heart, they reflect some visceral sense of law's project as one of categorization, clear definition, and line-drawing. Justice Scalia has spoken of the "Rule of Law" as the "law of rules."\textsuperscript{18} The majority in \textit{New York v. United States}, with its insistence on clear lines of federal and state accountability, spoke in a

\textsuperscript{14} In this sense, the present project can be construed as one of translation, \textit{cf.} Mark C. Suchman, \textit{Translation Costs: A Comment on Sociology and Economics}, 74 OR. L. REV. 257 (1995), here between the messy reality of regulatory interaction and conventional theoretical accounts of regulatory systems.


\textsuperscript{17} \textit{See} Schapiro, \textit{supra} note 6, at 246–49.

similar spirit.¹⁹

Yet such devotion to certainty and clarity—whatever its general utility—has minimized our appreciation, let alone embrace, of selective overlap and dependence in the interaction of regulatory entities across jurisdictional lines. A constrained mental map of potential patterns of regulatory design has caused us to overlook the presence of the divergent patterns described above. While corporate and securities scholars have showered endless attention on the internal affairs doctrine—a doctrine whose essential function is to minimize regulatory overlap and dependence²⁰—they have had far less to say about the muddled reality of corporate and securities regulation in practice.²¹

Thus, while theories of regulation abound, a theory of intersystemic regulation is lacking. The present analysis seeks to outline such a theory. In necessarily preliminary form, I explore the value and nature of intersystemic regulation—cross-jurisdictional interactions characterized by jurisdictional overlap and regulatory dependence—and particularly of the strongest forms of such engagement, which I term "dialectical regulation."²² Given their increasing prevalence, I would suggest, analysis of intersystemic regulatory interactions can and should shift from the margins of regulation theory to its center. In calling attention to the realities of overlap and dependence in modern regulatory regimes and exploring the integration of intersystemic and dialectical regulation into prevailing accounts of regulation, this Article seeks to begin this shift.

Across a variety of subjects—among them some of the most contentious topics in law today—such a shift toward greater awareness and appreciation of intersystemic regulation may be invaluable. Minimally, it may enhance our insight into the dynamic at work in these areas; at best, it may suggest alternative approaches to thorny challenges. Ongoing debates over federalism, for example, seem trapped in unnecessarily binary conceptions of the vertical allocation of power. Yet, a third way for the resolution of federalism questions—and one more closely comporting with the realities of day-to-day governance—might well be found in the overlap and dependence of intersystemic and dialectical regulation. Though a

²¹ In this spirit, one might note the sharp challenge that Mark Roe's recent work on federal–state competition has seemed to present to the dominant analysis. See Mark J. Roe, Delaware's Competition, 117 HARV. L. REV. 588 (2003); see also Robert B. Ahdieh, From 'Federalization' to 'Mixed Governance' in Corporate Law: A Defense of Sarbanes-Oxley, 53 BUFF. L. REV. 721 (2005).
degree removed, something similar might be said of the increasingly heated disagreements over U.S. courts' citation to foreign authorities. Once we allow for a more complex account of the allocation of power across jurisdictional lines, the perceived appropriateness of such citation might be expected to increase or decrease, depending on the particular relationship in play. In the growing body of "new governance" scholarship, and the study of transnational networks, of course, the relevance of intersystemic regulation is even clearer.

Several caveats are in order. Most importantly, the present analysis does not seek to offer a general model of regulation, or even a comprehensive account of intersystemic or dialectical regulation. Nor is the present analysis a broadly normative argument about cross-jurisdictional interactions. Descriptive, positive, and normative elements intertwine in this necessarily preliminary exploration. The ensuing discussion might thus be best understood to offer a frame for the closer study of cross-jurisdictional regulatory interactions. It sets out a working construct for the "microanalysis of institutions" prescribed by Edward Rubin, here targeted to the varied institutions of regulatory interaction across jurisdictional lines. Much more consequently remains to be said of intersystemic regulation. The present analysis, however, may constitute a useful first step. At a minimum, it moves us beyond the empty dichotomy of conventional jurisdictional line-drawing, on the one hand, and an undifferentiated universe of "other" approaches, on the other.

I begin, in Part II, by outlining the recent experience of the SEC with the patterns of jurisdictional overlap and regulatory dependence noted above. I offer the latter experience both as a frame of reference and source...

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23 In any given circumstance, thus, other institutional designs—such as regulatory competition—may better secure the benefits of intersystemic regulation that I enumerate in Part III.  
24 See Edward L. Rubin, The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions, 109 HARR. L. REV. 1393 (1996). The inherent generalization of the present analysis thus has its limits. Important features of regulatory interactions across jurisdictional lines are likely to be influenced by the particular regulatory modality—"legislating to address a new risk, setting environmental standards in legislation or a regulation, tailoring regulatory requirements to a particular setting, or taking enforcement actions against law violators"—that is at work. William W. Buzbee, Contextual Environmental Federalism, 14 N.Y.U. ENVTL. L.J. 108, 112–13 (2006) [hereinafter Buzbee, Contextual] (encouraging attention to modalities and context of relevant regulation in analysis of environmental federalism); see also William W. Buzbee, The Regulatory Fragmentation Continuum, Westway and the Challenges of Regional Growth, 21 J.L. & Pol. 323, 356–57 (2005) [hereinafter Buzbee, Westway]; Caroline de la Porte, Is the Open Method of Coordination Appropriate for Organising Activities at European Level in Sensitive Policy Areas?, 8 EUR. L.J. 38 (2002) (discussing how the application of an open method of coordination can vary based on the policy area to which it is applied). That Eliot Spitzer is engaged in the application of state law—specifically, the Martin Act, N.Y. GEN. BUS. LAW § 352 (2006)—rather than federal mandates for which the SEC is directly responsible, is thus an important aspect of his interaction with the SEC, and one distinguishing it from incidents of delegated program federalism, where a federal mandate is at stake. Further, that Spitzer is engaged in enforcement actions and is not, as such, the relevant law-maker is also important in any understanding of his relationship with the SEC.
of pertinent examples, but also to dispute—if only through the anecdotal experience of the SEC—nations of intersystemic regulation as a rare phenomenon. Regulatory overlap and dependence, from the SEC’s perspective, could not be more real.25

In Part III, I identify four substantial benefits of regulatory overlap and dependence: acknowledging more effectively the complex identity of the subjects of regulation; overcoming regulatory inertia; encouraging innovation in regulatory design; and facilitating integration across jurisdictional lines. Conventional regulatory accounts of overlap and dependence—and resulting patterns of intersystemic regulation—are incomplete without some acknowledgement of their benefits. Given these benefits, intersystemic regulation deserves a place in the toolbox of regulatory design.

If neither denial nor dismissal of intersystemic regulation (and its precursors) is in order—if it is real and has utility—we may better understand such regulation through an appreciation of both its relationship to other patterns of regulatory interaction across jurisdictional lines and its own varied forms. To this end, Part IV develops a typology of regulatory engagement, defined by (1) the degree of dependence in the relevant relationship and (2) the valence of any such dependence—whether a bidirectional interdependence or a unidirectional, non-reciprocal, or even hierarchical dependence of one agency on the other. Within this typology, we can plot out a range of potential interactions, from bounds of pure hierarchy and pure dialogue, to various forms of intersystemic regulation falling between these bounds, consummating in the strong-form intersystemic regulation I term dialectical regulation. With an eye to this broad typology of regulatory interactions, Part IV goes on to enumerate some of the criteria that might favor patterns of engagement at or closer to one pole or the other.

This leaves for Part V a fuller exposition of the strong engagement of dialectical regulation, standing at the heart of our typology. This is the consummate—and consequently most controversial—form of intersystemic regulation, in which significant overlap and interdependence combine to produce a degree of regulatory integration. Here, we find an active, iterative, and potentially even institutionalized, pattern of substantive regulatory engagement across jurisdictional lines, between simultaneously competing and coordinating regulators. Ultimately, such engagement might be expected to produce some pattern of co-regulation, in which collective regulatory norms can no longer be meaningfully parsed out as the product of

25 In focusing on the SEC, I do not mean to suggest that the pattern I describe is unique to the SEC, or even that the SEC is the best example of the pattern. Environmental regulation may offer even clearer indicia of intersystemic and dialectical regulation. Given my relative familiarity with the SEC’s work, where such patterns are clearly on display, I highlight it by way of example.
one regulatory entity or the other.

If intersystemic regulation offers significant potential payoffs, as described in Part III, those benefits are at their acme with the active and pronounced engagements of dialectical regulation. Part V thus identifies the predictive—and prescriptive—elements of a regulatory regime suited to this pattern of regulatory engagement. What features, it asks, might facilitate patterns of cross-jurisdictional regulatory interaction along the strong-form lines of dialectical regulation? Among others, I suggest the presence of some alignment and some divergence in perspectives across relevant jurisdictional lines; a certain density of regulatory interaction; and some opportunity for exit—an escape valve of sorts. As a matter of policy, if the universe of individuals, institutions, and subjects operating across jurisdictional lines truly is expanding, inclusion of such features in regulatory schemes—and the resulting prospect of dialectical regulation—may be of increasing importance in effective governance. In any case, it may be an unavoidable reality.

In negotiating the overlap of regulatory authority across jurisdictional lines, the traditional lawyerly task has been one of line-drawing. Practitioners and scholars of law have seen their comparative advantage in the definition of clear bounds between the jurisdiction of independent regulatory authorities. Most commonly, they have done so by denying the existence of overlap; where this proves inadequate, they have sought to define jurisdiction so as to eliminate what overlap might exist. In a shrinking world, however, such responses may be neither viable nor wise.

A more resonant project might therefore be that of the poet. This

26 Brad Karkkainen highlights this attitude, and suggests a contrasting approach, in the following excerpt:

Lawyers like rules. We like enforceable rules. We want our rules to be optimal, tidy, and timeless. And we prefer the institutions that make and enforce them also to be tidy, fitting neatly into the boxes on Mr. Madison's flow chart, with clear divisions of authority between rule-maker and ruled, between the rule-making, rule-executing, and rule-adjudicating powers, and between federal, state and local (well, at any rate, federal and state) tiers of government. Indeed, that has been the major thrust of public law over the course of our nation's history . . . .

Collaborative ecosystem management, by contrast, is often messy, elaborate, cumbersome, ad hoc, and defiantly unconventional. Lines of authority and divisions of responsibility are often neither formal nor transparent; institutional boundaries are fluid and permeable, if institutions can be discerned at all; and roles, identities, and allegiances are blurred in a jumble of hybrid public-private, national-and-local arrangements. Rules tend to be provisional and, for that matter, may not even be enforceable through the familiar channels of formal, compulsory processes. This all may sound singularly unpromising, especially to lawyers and legal scholars accustomed to policing relatively sharp-edged rules and lines of authority. It is hard to see where accountability comes from when the lines of authority become so blurred that no single party can be identified as the authoritative decision-maker. It violates our deep-seated sense of order, and it may even appear incompatible with 'the rule of law as a law of rules,' to borrow Justice Scalia's phrase.

Karkkainen, supra note 12, at 234–35 (citations omitted).
project lies not in line-drawing, distinguishing, or simplifying. To the contrary, it explores—and even encourages—overlap, interdependence, and attendant complexity. From this distinct regulatory perspective, the goal is not to identify the single regulatory actor best suited or most appropriately charged with responsibility for a given entity or subject-matter. Rather, multiple regulators are embraced as having a shared—if both competing and cooperating—place in a more inclusive and all-encompassing regulatory regime.27

II. THE SECURITIES AND EXCHANGE COMMISSION: JURISDICTIONAL OVERLAP AND REGULATORY DEPENDENCE, AT HOME AND ABROAD

The SEC is among the most influential regulatory agencies in the world. It has been widely acclaimed, if also forcefully criticized, for the impact it has had on U.S. and global financial markets since its creation in 1934. In recent years, however, the SEC has been under growing stress. Among the most notable aspects of its plight has been growing pressure to coordinate its pursuits with a variety of other domestic, foreign, and transnational market regulators.

Of late, particular attention has been showered on the SEC’s interactions with New York Attorney General Eliot Spitzer.28 Spitzer has pursued an aggressive agenda of enforcement actions against individuals and entire industries operating in the New York financial markets, thereby undermining the longstanding, if informal, allocation of responsibility for national securities cases to the SEC and small-time fraud cases to state regulators.29 Beginning with a bang in April 2002, Spitzer announced a court order against Merrill Lynch—among Wall Street’s most venerated institutions—demanding that the firm restructure its investment counseling practices to minimize conflicts of interest arising from research analysts’ simultaneous duty to their clients and desire to bring investment banking

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27 "The institutional arrangements in question depend upon, rather than resist, political fragmentation." Scott & Holder, supra note 13, at 21. Within the European open method of coordination, thus, "an attempt to define distinct and separate roles for the Member States and the EU respectively is not a major concern ... the process is a very mixed one with intersecting roles for national and EU actors at various stages." de Bürca, supra note 13, at 826.

28 See Renee M. Jones, Dynamic Federalism: Competition, Cooperation and Securities Enforcement, 11 CONN. INS. L.J. 107, 114–15 (2005). It bears noting, however, that Spitzer was not alone among state regulators in injecting himself into the traditional domain of the SEC. See id. at 120 (describing the Massachusetts secretary of state’s investigation of Putnam Funds); see also Di Trolio, supra note 9, at 1280.

business to their firm.30

In challenging Merrill Lynch's investment practices, Spitzer proceeded under the Martin Act, a once obscure provision of New York law.31 "[The Act's] basic provision, as [Louis] Loss . . . observed, 'has a majestic, one-sentence sweep.'"32 Based on "evidence satisfactory to [the Attorney General]" that a party has engaged in fraudulent practices in connection with a security (or commodity), the Attorney General is authorized to sue to enjoin those practices and to enjoin the defendant from selling securities in the state, and to seek any further relief he deems "proper."33

After securing an agreement with Merrill Lynch to make changes to its investment counseling business, Spitzer pushed further, to secure a broader settlement with the major Wall Street firms regarding research analysts' conflicts of interests. By the end of 2002, he had done just that. In conjunction with the SEC, the National Association of Securities Dealers, the North American Securities Administrators Association, the New York Stock Exchange, and various state regulators, Spitzer announced a "global settlement" dictating elaborate reforms across the brokerage industry.34

Spitzer then turned to other issues, including investment banks' selective provision of access to IPO shares and alleged cases of impermissible executive compensation.35 Most significant, however, was his aggressive pursuit of widespread misconduct in the mutual fund industry. Initially, Spitzer pursued Morgan Stanley brokers' promotion of in-house funds without disclosure of their elevated commissions for the sale of those funds.36 More significant, however, was his discovery of the widespread engagement of mutual fund management companies in impermissible after-hours trading and market timing.37 This investigation

32 See Macey, supra note 31, at 960.
33 See id. Perhaps most dramatically, the Act cites a refusal to testify as prima facie proof of fraud, for purposes of granting a permanent injunction. See id.
tracked Spitzer’s first, culminating in a series of dramatic agreements with the largest investment companies in the country, settling innumerable after-hours trading and market timing claims.\(^3\) As with his investment counseling settlements, moreover, these settlements went beyond fines and penalties to impose significant new fiduciary obligations on the directors of mutual fund companies.\(^3\)

Faced with Spitzer’s significant incursions into regulatory domain traditionally viewed as its own,\(^4\) the SEC was stirred to action.\(^4\) Whether because of the enthusiastic reception to Spitzer’s efforts, its own political weakness amidst recent corporate scandals, or other reasons, however, the SEC is best characterized as having simply “joined ‘em.”\(^4\) As to research analysts, the SEC participated in the “Global Resolution” regarding investment counseling\(^4\) and also adopted Regulation AC, mandating the truthfulness of analyst views expressed in research reports and public appearances.\(^4\) Similarly, the SEC joined in numerous Spitzer claims against, and settlements with, mutual fund companies,\(^4\) and introduced new compliance rules for the latter.\(^4\)

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\(^3\) See id.
\(^4\) See id. It bears noting that, as Spitzer’s various enforcement efforts proceeded, they increasingly engaged the participation of state attorneys general from across the country. Perhaps most notable was Spitzer’s formation of a multi-state task force, co-chaired by New York, New Jersey, and California officials, and charged to investigate securities law violations at Wall Street investment firms. See Press Release, Office of N.Y. State Att’y Gen. Eliot Spitzer, Spitzer to Co-Chair National Task Force Investigating Securities Law Violations (Apr. 23, 2002), http://www.oag.state.ny.us/press/2002/apr/apr23a_02.html.


\(^41\) See Jones, supra note 20, at 639. It bears noting that I leave out of this analysis, for purposes of simplicity, self-regulatory organizations such as the New York Stock Exchange, NASD, and the like—the third major regulator of the securities markets. See Di Trolio, supra note 9, at 1298–99.

\(^42\) This is not to suggest that the SEC did so with enthusiasm. To the contrary, it objected strongly to Spitzer’s interventions, at least at the early stages. See Jones, supra note 28, at 115–16 & n.45.


Through its involvement, however, the SEC not only responded to Spitzer’s initiatives but also shaped them.\textsuperscript{47} While Spitzer’s initial efforts were undertaken with relatively little advance consultation with the SEC, and pursued with limited attention to the SEC’s positions and concerns, this changed with time.\textsuperscript{48} Spitzer increasingly approached the SEC as an erstwhile partner, minimally in his settlement of cases, but even in their initiation and pursuit. With both the SEC and Spitzer facing a degree of interdependence in their pursuit of a largely shared anti-fraud mission, directed at perpetrators subject to their overlapping jurisdiction, a certain degree of regulatory integration emerged.\textsuperscript{49} Today, investment counseling and mutual fund practices are subject to a collective body of rules—particularly in the relevant global settlements—dictated not by the SEC or the New York Attorney General, but by them jointly.\textsuperscript{50} Important elements in the present-day regulation of New York financial markets are thus a product of coordinated regulatory initiatives of federal and state authorities.\textsuperscript{51}

Over the slightly longer window of the last twenty years, one can find parallel patterns of jurisdictional overlap and regulatory dependence between the SEC and its foreign and transnational counterparts.\textsuperscript{52} While some significant part of the SEC’s engagement with the latter has involved informal and episodic interactions, more formal and recurrent patterns of interaction are increasingly common.\textsuperscript{53} Such engagement includes both bilateral and multilateral interactions.\textsuperscript{54}

Most significant among the bilateral interactions have been those arising from the SEC’s efforts to enforce U.S. standards and modes of market regulation overseas. As the securities markets have grown


\textsuperscript{48} See Di Trollo, supra note 9, at 1279–80.

\textsuperscript{49} See id. at 1281.

\textsuperscript{50} To this effect, one might also note the active cooperation of the SEC and Spitzer in the course of the investigations, for which they paired up in teams to assess individual firms and otherwise divided up responsibilities. See Jones, supra note 28, at 118–19.

\textsuperscript{51} Of course, this pattern is not universal. Congress’ selective preemption of state securities law in the National Securities Market Improvement Act of 1996 and the Securities Litigation Uniform Standards Act, adopted in 1998, were important steps away from the intersystemic regulatory dynamic I describe herein. See Jones, supra note 28, at 113–14.

\textsuperscript{52} See International Agreements and Understandings for the Production of Information and Other Mutual Assistance, 29 INT’L LAW. 780, 795–96, 814–17, 823 (1995) [hereinafter International Agreements].

\textsuperscript{53} See id. at 795–96.

\textsuperscript{54} See id. at 796.
increasingly globalized, market activity of interest to the SEC increasingly occurs in locales across the globe. Among the drivers of this pattern have been dramatic increases in trading volume generally and in foreign portfolio investment particularly. The increase in foreign listings and cross-listings has likewise encouraged this trend, especially when coupled with growing transnational competition for listings. In this spirit, one might note the London Stock Exchange's aggressive advertising of the inapplicability of the Sarbanes-Oxley Act to its listings.

Such patterns of market globalization have added considerably to the complexity of securities enforcement. While this increased complexity is evident in any number of areas, it may be most notable with regard to U.S. insider trading rules. For many years, the United States deviated from global norms in its restriction of insider trading. Even aside from this obvious obstacle to enforcement, however, foreign limitations on discovery and foreign secrecy laws stymied the investigation of insider trading overseas.

Until the mid-1980s, the SEC sought to enforce U.S. insider trading rules through the blunt instrument of non-cooperative, direct enforcement efforts against non-citizens overseas. Unsurprisingly, such efforts were a source of ongoing conflict between the SEC and its foreign counterparts, including foreign courts. Reliance on U.S. courts to compel production of foreign-based information was also costly and time-consuming. However powerful and dominant U.S. regulators and securities markets were, the SEC could not easily impose its will in a global marketplace.

As it gradually acknowledged as much, the SEC undertook a succession of initiatives, progressively constructing what might be seen as a web of co-regulation of securities markets across the globe—shaped in

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58 See id.
62 International Agreements, supra note 52, at 795.
63 Id.
64 Id. at 795–96.
65 See Mann & Barry, supra note 61, at 940.
equal parts by SEC demands and by countervailing foreign values. Initially, the SEC entered into narrow agreements to facilitate foreign assistance in its regulatory efforts.\textsuperscript{66} As the scope of those efforts expanded, however, such constrained agreements proved too unwieldy a mechanism to support the SEC's work. Instead, the SEC and market regulators in major foreign markets adopted various "memoranda of understanding," providing for broad tools of engagement and coordination in their enforcement efforts.\textsuperscript{67} Among other things, relevant terms provided for enforcement assistance and broader discovery than otherwise afforded by the signatory foreign jurisdictions.\textsuperscript{68}

Ultimately, even the memoranda of understanding proved inadequate, as global financial markets grew yet larger and more sophisticated. The SEC thus undertook to press for the adoption of U.S.-style insider trading rules in individual markets with significant market trading activity.\textsuperscript{69} Though met with initial resistance, persistent efforts at dialogue and education ultimately bore fruit, as major markets gradually joined the United States in barring insider trading. Even this advance initially fell short, however, given lax foreign enforcement, as in Germany's early failure to impose any sanction for insider trading.\textsuperscript{70} With yet further SEC engagement, such enforcement issues were likewise addressed,\textsuperscript{71} producing insider trading rules directed to U.S. ends, yet shaped significantly by compromise with distinct normative conceptions prevailing in the enforcing jurisdictions.

Beyond bilateral engagements to constrain insider trading, a further example of transnational overlap and dependence, falling somewhere between bilateral and multilateral interactions of the SEC, is the Multijurisdictional Disclosure System (MJDS), presently in force only with Canada but susceptible to invocation between the SEC and other foreign

\textsuperscript{66} See International Agreements, supra note 52, at 795–96.
\textsuperscript{67} See id. An example was the September 23, 1991 joint statement of the SEC and the European Commission regarding mutual cooperation, which provided for collaboration to facilitate the exchange of information and mutual assistance. Id. at 814.
\textsuperscript{68} See id. at 796. The Treaty on Mutual Assistance in Criminal Matters Between the Swiss Confederation and the United States is emblematic in this regard, with its provisions for "broad assistance in ... criminal matters ... including assistance in locating witnesses, obtaining statements and testimony of witnesses, production and authentication of business records, and service of judicial or administrative documents." Id. at 782 (citations omitted).
\textsuperscript{70} See Anupama J. Naidu, Comment, Was its Bite Worse than its Bark? The Costs Sarbanes-Oxley Imposes on German Issuers May Translate into Costs to the United States, 8 EMMORY INT'L L. REV. 271, 300–01 (2004) (discussing limited enforcement of insider trading regulations in Germany).
regulators as well. Under the mutual recognition scheme of the MJDS, compliance with the disclosure standards of one participating jurisdiction permits marketing in the other without further disclosures.\textsuperscript{72} The operation of such an administrative system, however, necessarily requires significant interaction and coordination between the relevant regulatory agencies,\textsuperscript{73} and the development of standards of disclosure amenable to both.

More clearly multilateral has been the SEC’s pursuit of a number of its regulatory objectives under the auspices of the International Organization of Securities Commissions (IOSCO). Formed in 1983, IOSCO’s membership today encompasses 181 national and sub-national securities market regulators.\textsuperscript{74} At its inception, the IOSCO attracted little SEC involvement. Over time, however, the SEC became a more active participant, seeking to promote U.S.-style market regulation across the globe. The SEC, for example, has been involved in IOSCO’s efforts to develop international standards for non-financial statement disclosure, and thereby facilitate cross-border financing and listing by transnational companies.\textsuperscript{75}

To somewhat similar effect has been the relationship of the SEC with the International Accounting Standards Board (IASB) and its predecessor committee. Since 1973, the IASB has promoted the creation of a common set of accounting standards for universal adoption.\textsuperscript{76} For many years, the SEC was among the least cooperative national participants in these efforts, seeming to take the position that the U.S. Generally Accepted Accounting Principles were incapable of improvement.\textsuperscript{77} More recently, however, the SEC has joined more actively and regularly in the work of the IASB.\textsuperscript{78} Faced with the indisputable need for common standards in the operation of a global financial market, and the likelihood that some standard would ultimately emerge, the SEC has again elected to “join ’em.” In light of the dominance of the IASB’s standards, the SEC has sought to ensure incorporation of its views and concerns into their design. Although still unprepared to endorse wholesale adoption of the standards, the SEC has


\textsuperscript{74} OICU-IOSCO, IOSCO Historical Background, http://www.iosco.org/about/index.cfm?section=history (last visited Mar. 15, 2006).

\textsuperscript{75} See Lawrence A. Cunningham, Commonalities and Prescriptions in the Vertical Dimension of Global Corporate Governance, 84 CORNELL L. REV. 1133, 1170 (1999).


\textsuperscript{78} See id. at 882–83.
shown growing receptivity to them, most recently evident in its decision to permit foreign issuers to use them.  

Ultimately, the SEC’s various engagements with foreign and transnational regulators have gained sufficient importance so as to require institutionalization within the SEC. In 1989, the SEC established its Office of International Affairs. Charged to “promote[] investor protection in the global capital market by advancing international regulatory and enforcement cooperation [and] promoting the adoption of high regulatory standards worldwide,” the Office of International Affairs coordinates a growing pattern of regulatory cooperation and coordination with foreign and multinational regulatory entities.

Perceptions of the SEC as among the strongest regulatory agencies within the so-called “fourth branch” of the U.S. government remain well-justified. The SEC continues to be respected by Congress and the White House, by deferential courts, and in both the national and international financial community. As the foregoing examples make clear, however, the SEC is increasingly less and less alone in its regulatory pursuits. Rather, its jurisdiction increasingly overlaps with that of its sub-national, foreign, and transnational counterparts. Further, important aspects of the SEC’s regulatory project have come to depend significantly on cooperation and coordination with those counterparts. From Eliot Spitzer to the IASB, a world of jurisdictional overlap and regulatory dependence have led the SEC to a paradigm of regulatory engagement dramatically different from what has gone before.

III. THE ENDS OF INTERSYSTEMIC REGULATION: IDENTITY, INERTIA, INNOVATION, AND INTEGRATION

If the experience of the SEC in recent years is representative, overlapping jurisdiction and a certain dependence on other regulatory entities are an unavoidable fact of life for the modern administrative agency. With notable exceptions, however, scholars of regulation have been inattentive to those patterns and the resulting dynamic of regulatory interaction across jurisdictional lines. Even when acknowledged, the significance of any observed overlap and dependence is commonly downplayed. More importantly for present purposes, when overlap and dependence cannot be denied, the contrary aspirations of dualism are invoked by way of response. Predictability, accountability, and legitimacy, among a litany of other pious virtues, are trotted out to demand that lines of jurisdiction be drawn so as to

eliminate the prospect of overlap and dependence.

Before further exploring the patterns of regulatory engagement manifest in the recent experience of the SEC, it is useful to place criticisms of overlap and dependence in some perspective. I begin, as such, by considering the potential utility of a degree of jurisdictional overlap and regulatory dependence, and of resulting patterns of intersystemic regulation. As the SEC negotiates its overlapping enforcement authority with Eliot Spitzer, pursues memoranda of understanding with national market regulators in Europe, and coordinates with Canadian securities regulators under the MJDS, what are the benefits? Why might we choose to reject the dualist imperative and embrace a pattern of overlapping and dependent regulatory authority? From distinct vantages, a handful of scholars have suggested potential answers.

Responding to critics of expansive federal court jurisdiction twenty-five years ago, Robert Cover sought to enumerate the benefits of what he termed “jurisdictional redundancy” between federal and state judiciaries. To begin, such redundancy might serve as an effective constraint on judicial corruption. In Cover’s terms, judges’ individual “interests” might be more effectively excluded from decision-making where extrinsic review and judicial competition of a sort are introduced. To similar effect, Cover saw redundancy as an antidote to substantive bias in adjudication—to the influence of judges’ individual “ideology.” Thus, jurisdictional redundancy between federal and state courts might diminish the ability of judges to inject their idiosyncratic preferences and personal prejudices into their decision-making. Finally, jurisdictional redundancy might encourage judicial “innovation,” by creating an extrinsic source of pressure and ideas. In this, Cover drew on his earlier suggestion, offered jointly with Alex Aleinikoff, that the overlapping authority of state courts and lower federal courts over the rules of constitutional criminal procedure had helped to advance the development of that body of law.

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84 Cover, supra note 82, at 664 (explaining that the source of substantive adjudicative bias may be the fact that “the decisionmaker’s construction of reality was distorted by the social determinants of his mental world”).
85 See id. at 672–73.
86 See Cover & Aleinikoff, supra note 22; see also Jenny S. Martinez, Towards an International Judicial System, 56 STAN. L. REV. 429, 465–66 (2003) (“As Robert Cover and T. Alexander Aleinikoff pointed out in their article on ‘dialectic federalism,’ . . . ‘jurisdictional rules link state and federal tribunals and create areas of overlap in which neither system can claim total sovereignty,’ thus triggering a dialogue between federal and state courts through which constitutional values could be translated into legal rules by way of a dialectic process. Certain legal doctrines, Cover and Aleinikoff suggest, ‘structured a dialogue on the future of constitutional requirements in criminal law in which state and federal courts were required both to speak and listen as equals.’” (quoting Cover &
Exploring the appropriate scope of personal jurisdiction in the face of both globalization and the growing role of cyberspace in economic and social ordering, Paul Berman has suggested the need to extend our conventional conceptions. In the face of a changing global landscape, Berman posits that “minimum contacts” can no longer serve as the appropriate metric of jurisdictional reach. In some cases, the exercise of jurisdiction may be unwarranted, notwithstanding a minimal degree of contact; in others, the absence of such contact may not constitute a coherent bar to jurisdiction. Instead, Berman encourages a focus on the “communities” with which a subject individual or entity identifies. From this, he develops what he terms a “cosmopolitan pluralist” conception of jurisdiction—“cosmopolitan,” to acknowledge the multiple identities of individuals and entities within a globalized community, and “pluralist,” to suggest the multiple sources of authority in play, of both formal and informal varieties. Berman’s vision thus rests on a conception of regulated entities as subject to multiple nodes of control and influence.

Most recently, Robert Schapiro has offered a model of “interactive federalism” as a substitute for the failed project of dual federalism. While the latter seeks to draw lines between realms of federal and state authority, Schapiro grapples with a reality of jurisdictional overlap. Extant approaches to federalism, in Schapiro’s view, do not adequately serve their asserted ends. Perhaps most notably, they offer little more than a fig leaf

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89 Id. at 321 (arguing “that, just as a rigidly territorial conception of jurisdiction eventually gave way in the first part of the twentieth century to the idea of jurisdiction based on contacts with a sovereign entity, so too a contacts-based approach must now yield to a conception of jurisdiction based on community definition”).

90 Id. at 322 (“A cosmopolitan approach allows us to think of community not as a geographically determined territory circumscribed by fixed boundaries, but as ‘articulated moments in networks of social relations and understandings.’ This dynamic understanding of the relationship between the ‘local’ community and other forms of community affiliation (regional, national, transnational, international, cosmopolitan) permits us to conceptualize legal jurisdiction in terms of social interactions that are fluid processes, not motionless demarcations frozen in time and space.” (internal citation omitted)).

91 See Schapiro, supra note 6, at 248 (proposing “an alternative concept of federalism that focuses on the interaction of state and national governments . . . [because the] key to understanding the promise of federalism lies in considering state and national power not in isolation, but in interconnection”).

92 See id. at 274–75 (using the No Child Left Behind Act to illustrate problems inherent in dual
of protection for state regulation, given the juxtaposition of broad preemption and Dormant Commerce Clause doctrines alongside more prominent, yet quite limited, constraints on the federal government's Commerce Clause authority.  

Schapiro identifies a series of potential benefits of a contrary approach to federal and state authority, which recognizes an overlapping capacity to regulate a wide range of issues. To begin, Schapiro can be read to suggest that such overlap, and a resulting interactive federalism, may most effectively serve the asserted goals of dual federalism, including the heightened efficiency of regulatory competition, the expansion of opportunities for public engagement in political discourse, and the constraint of tyranny. Further, Schapiro identifies a succession of goals served particularly by interactive federalism: first, such a regime offers a "plurality" of regulatory approaches to particular issues; second, regulatory overlap is likely to enhance the extent of "dialogue" surrounding the construction and evolution of regulatory choices; finally, Schapiro sees his interactive federalism as serving fail-safe goals of "redundancy."

With an eye to the recent regulatory experience of the SEC, and drawing on these several analyses, I identify four critical benefits of jurisdictional overlap and regulatory dependence, and of resulting patterns of intersystemic regulation and "dialectical regulation," which I construct as the strongest form of intersystemic regulation. First, overlap, dependence, and ensuing intersystemic regulation may better capture the true nature of regulated individuals and institutions and thereby enhance

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93 Id. at 260–64.

94 See id. at 288–90.

95 Id. at 288 ("With the overlap of federal and state power comes the possibility of multiple approaches to a particular problem. State and federal governments operate within different institutional frameworks, which give them varying perspectives. Their different geographical scope also may endow them with divergent strengths and weaknesses. Some solutions may work better when imposed nationally, while others function more efficiently on a local scale." (citing PAUL E. PETERSON, THE PRICE OF FEDERALISM 17–20 (1995))).

96 Id. ("[T]he concurrence of federal and state authority provides a valuable opportunity for dialogue. The states and the federal government can attempt alternative means of preventing employment discrimination or defining the fundamental right to privacy. The different governments can learn from each other. They can sharpen their understanding of how best to define and to implement important governmental safeguards.").

97 Id. at 290 (arguing that regulatory redundancy provides an element of protection where one or the other governments takes an insufficient or inappropriate regulatory action).

98 See infra Part III.B–E. It bears emphasizing that jurisdictional overlap—authority over the same individual or institution, with regard to the same or related issues—may alone offer some of the benefits described below. Yet the relevant payoffs are likely to be more episodic, and perhaps more limited, when dependence is lacking. It is such dependence that demands the patterns of engagement that underlay the below enumeration. It is in the combination of overlap and dependence that intersystemic regulation becomes especially valuable, thus, and in increasing dependence that it reaches its acme, in dialectical regulation.
the quality of regulatory matching. Second, they may serve a fail-safe function, minimizing the prospect that desirable regulation will fail to be adopted or enforced. Third, the phenomena of overlap and dependence, and resulting patterns of intersystemic regulation, may be an effective means to encourage innovation. Finally, these elements may serve to facilitate a degree of integration across systems.

A. Acknowledging Identity

Much of the pressure on the SEC to include other regulatory agencies in its work has arisen from the changing nature of the global financial markets and their participants. Between 1990 and 1999, the number of U.S. depository receipt programs allowing foreign corporations to trade indirectly on U.S. exchanges rose from 352 to 1,800. The number of countries participating in such programs grew from twenty-four to seventy-eight. Represented foreign corporations had a market capitalization of more than $6 trillion. Direct listings of foreign corporations on the New York Stock Exchange and NASDAQ grew from 170 in 1990 to 750 in 2000. Given the foregoing, the subjects of U.S. securities law look dramatically different today than seventy-five, or even twenty-five, years ago.

Most simply, the SEC’s regulatory obligations now extend to an array of foreign individuals and entities. Such regulation of foreign subjects itself poses significant regulatory challenges. Additionally, however, global financial markets are increasingly populated by individuals and entities with multiple, overlapping identities. Rather than distinctly foreign or domestic, they are exceedingly complex regulatory subjects,

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99 See Esty, supra note 6, at 1524 n.88 (defining the matching principle as “governance and the provision of public goods by authorities at a geographic scale that encompasses substantially all cost bearers and beneficiaries of the policy in question, but [is] no broader”).

100 Intersystemic regulation is not, of course, the only institutional scheme suited to promote these ends. To the contrary, an array of other regulatory arrangements—from regulatory cooperation to regulatory competition—may advance them. The jurisdictional overlap and regulatory dependence of intersystemic regulation, however, may be especially effective in this regard.

101 Coffee, supra note 57, at 1770.

102 Id.

103 Id.


105 See Moon, supra note 55, at 153–54.

106 See U.S. Sec. & Exch. Comm’n, Office of Int’l Affairs Home Page, http://www.sec.gov/about/offices/onia.htm (last visited March 24, 2006) (noting that, as part of the SEC’s investor protection mandate, the Office of International Affairs analyzes the effect of SEC rules on foreign participants, takes part in the regulation of “globally-active” market participants, advises on and assists in cross-border securities investigations, and provides training for foreign regulators).

107 See Moon, supra note 55, at 153–56 & n.26, 167 (discussing globalization of the securities market and multiple forms of cross-border order flow).
with an array of loyalties and ties shaping their "identity." A modern public corporation may produce goods in wholly owned facilities in China, market them in Latin America, be incorporated in Germany, be cross-listed on the New York Stock Exchange and the London Stock Exchange, be subject to majority control by American shareholders, and have a collection of officers and board members variously comprised of U.S., German, and English nationals.

This is the world of Paul Berman’s “cosmopolitan pluralism.” In Berman’s conception, such an entity cannot fairly be conceived as the exclusive, or even primary, creature of any single jurisdiction. Rather, it is at once U.S., German, and Chinese, among other things. Such cosmopolitan subjects, with their multiple identities, are best regulated by a pluralist regulatory regime, with its multiple regulatory authorities. A holistic appreciation of such a corporation, and its effective regulation, may require a regulatory regime suited to multiplicity and complexity.

In the case of the SEC, by making room for intersystemic regulation, the SEC may be able to more effectively appreciate, and regulate, such entities as a cohesive whole. Regulatory balkanization, by contrast, may produce piecemeal and ineffective regulation.

Without some intersystemic dynamic, then, the United States would regulate our hypothetical corporation’s stock listing, while Germany would determine its corporate structure and China would have primary responsibility for its production. Because no regulatory system captures the entity generally, the collective corpus of regulation is, at a minimum, likely to impose a suboptimal degree of regulatory constraint. Yet it could even make things worse. Michael Kang has posited a paradigm of “hydraulics” in the regulation of election financing; whenever one means of financing is foreclosed, other ways are found to pursue the same ends. One might imagine a similar dynamic in the regulation of individuals and institutions with multiple sources of identity. Fragmented regulation imposed by multiple regulators may variously push and pull such subjects of regulation in different directions, producing greater distortion and regulatory evasion in their individual behavior and institutional design.

Of course, it is not universally true that individuals and institutions have complex, cross-jurisdictional identities. Further, as I discuss below, there are indisputable costs to overlapping regulation and regulatory dependence—

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109 See id. at 322.
110 Cf. id. (advocating a similar approach for courts and envisioning, under a cosmopolitan pluralist approach to community, the ability of a court in one country to appropriately assert jurisdiction over a dispute in another country, despite insufficient contacts with that country under a territorial approach to jurisdiction).
DIALECTICAL REGULATION

and risks—such that an indiscriminate embrace of intersystemic regulation is inadvisable.112 Where the underlying character of relevant subjects of regulation favor it, however, intersystemic regulation may be useful. Some integration of the efforts of relevant regulatory entities—driven by the presence of jurisdictional overlap and regulatory dependence—may offer a greater prospect of effectively capturing the true nature of the subjects of regulation.113 If the universe of regulated entities with identities extending across jurisdictional lines is growing, moreover, increased use of intersystemic regulation may be in order.114

B. Overcoming Inertia

By all accounts, the aggressive enforcement activities of Eliot Spitzer in recent years helped to prompt SEC regulation on a number of fronts.115 Perhaps most notable was the shift away from limited federal regulation of conflicts between the interests of stock analysts' clients and the underwriting interests of the analysts' employer banks.116 To similar effect was the expansion in the SEC's previously limited regulation of mutual fund management companies.117

In each of these cases, initial investigations or filings by Spitzer triggered SEC action. In April 2002, Spitzer highlighted research analysts' conflicting incentives, given their clients' interest in sound counsel and their investment banking colleagues' interest in underwriting business.118 As Spitzer's investigation gained steam, the SEC unexpectedly introduced Regulation AC, requiring analysts to certify the truthfulness of the views expressed in their research reports and public appearances.119 Thereafter, the SEC also agreed to join Spitzer's Global Research Analyst

112 See infra Part III.E.

113 As noted above, this analysis echoes Esty's concept of "mismatched" regulation, in which the scope of the relevant regulatory issues does not match the jurisdictional reach of relevant regulatory agencies. See Esty, supra note 12, at 587–90, 647–48.

114 Naturally, one might challenge the actual incidence of complex identities among regulated entities. A more nuanced challenge might suggest that such cases can be adequately managed without any structured pattern of intersystemic regulation. At some level, I would not dispute as much. Where particular cases can be effectively managed, the greater complexity of intersystemic regulation is likely inadvisable. Unless the claim is that there are never circumstances in which the recurrence of a particular issue might cause the benefits of a standard approach to outweigh its costs, however, the more effective acknowledgement of identity remains a potential benefit of intersystemic regulation.

115 See supra notes 28–51 and accompanying text.


117 See Fisch, supra note 116, at 620.

118 Id.

As to the mutual fund industry, Spitzer called attention to companies' common engagement in "market timing" and "late trading" practices, both illegal. Thereafter, the SEC adopted new regulations, requiring investment companies to appoint a chief compliance officer and maintain certain official records beyond their prior obligations. Further, the SEC initiated a number of its own enforcement actions against management companies engaged in such practices.

Similar patterns have played out transnationally. While the Securities Exchange Act of 1934 lacked any explicit proscription against insider trading, such a bar was subsequently read into the antifraud rules of Section 10(b).

In major financial markets outside the United States, however, insider trading long remained permissible. As financial markets grew more global, this divergence proved increasingly problematic for the SEC. Insider trading could be conducted with relative impunity overseas. The SEC has sought to respond to this predicament with progressive efforts to extend the reach of U.S. regulatory standards overseas. Early on, the SEC relied on relatively unilateral approaches to overseas enforcement. With time, however, it came to favor the adoption of bilateral agreements in one of two forms—memoranda of understanding and mutual legal assistance treaties. Under such agreements, the SEC could engage more actively and effectively with their overseas counterparts in securing discovery, identifying and engaging witnesses, and otherwise enforcing relevant procedural and substantive rules.

Additionally, the SEC pursued the adoption of U.S. legislation strengthening its capacity for overseas enforcement.

Ultimately, the procedural limits of these tools, as well as the continued concerns they engendered among foreign regulators, demanded a further step. In recent years, the SEC has promoted introduction of insider trading laws in major financial markets across the globe. Working with foreign legislative and administrative officials, the SEC involved itself in the

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121 Fisch, supra note 116, at 620.
123 Steven T. Taylor, New Cost-Saving Compliance Product Great for Clients, Better for Reed Smith, OF COUNSEL, Jul. 2005, at 3. On the general role of federal-state jurisdictional overlap in overcoming inertia in securities law, see Di Trolio, supra note 9, at 1304-05.
124 Roe, supra note 21, at 611 n.73.
127 Id. at 359-69.
128 Id. at 359-63.
129 Id. at 369-74.
130 Id. at 358.
drafting and promotion of relevant legislation.\textsuperscript{131} Yet even as these efforts succeeded, enforcement remained weak.\textsuperscript{132} Continued U.S. commitment to the regulation of insider trading activity in foreign markets, and engagement with their overseas counterparts to this effect, however, has ultimately helped to encourage more rigorous foreign enforcement of the new rules.\textsuperscript{133}

In these respective domestic and transnational cases, regulatory engagement across jurisdictional lines might be seen as a "fail-safe" mechanism of sorts. Originally arising in the field of cybernetics, fail-safe systems of redundancy are designed to ensure achievement of desired outcomes, notwithstanding the failure of any single component in a given system.\textsuperscript{134} They offer a back-up, given the inevitable prospect of some degree of failure. With time, such fail-safe conceptions of redundancy have found application in various non-technological fields, from the nature of industrial production in the context of international trade\textsuperscript{135} to the design of criminal sentencing schemes.\textsuperscript{136}

Robert Cover saw some such fail-safe function as the backdrop for his analysis of jurisdictional redundancy between federal and state courts.\textsuperscript{137} In particular, both the interest and ideology elements of his analysis rely on a certain fail-safe redundancy.\textsuperscript{138} Similarly, Robert Schapiro identifies redundancy as a benefit of his "interactive federalism."\textsuperscript{139} The availability of alternative federal and state remedies in any number of situations—from the securities laws to Section 1983's civil rights remedies,\textsuperscript{140} and from constitutional rights to the authorization of civil suits under the Violence

\textsuperscript{132} See id.
\textsuperscript{133} See id. at 1293.
\textsuperscript{135} See id. at 2110–11.
\textsuperscript{136} See Steven L. Chanenson, Guidance from Above and Beyond, 58 STAN. L. REV. 175, 193–94 (2005); see also DANIEL J. ELAZAR, EXPLORING FEDERALISM 30–31 (1987). A distinct but related benefit of jurisdictional overlap and regulatory dependence may be their capacity to minimize the consequences of regulatory capture. In essence, if particular interest groups are more likely to enjoy influence at one level of government, intersystemic regulation may facilitate greater representation—or at least balance—in the regulatory process. See Esty, supra note 12, at 604. Thus, in corporate law, management interests may be more influential in Delaware, while investors' voices may be better heard in Washington. See Jones, supra note 20, at 636–37. To related effect, overlapping regulatory authority may reduce regulatory externalities. See Esty, supra note 12, at 573, 647–48. At a minimum, multiple layers of regulation can be expected to increase the costs of regulatory capture. See Jones, supra note 28, at 122, 124.
\textsuperscript{137} See Cover, supra note 82, at 650–52.
\textsuperscript{138} See id. at 649.
\textsuperscript{139} See Schapiro, supra note 6, at 288–89 (suggesting that "[t]he overlap of federal and state authority" provides additional legal protection).
Against Women Act\(^{141}\)—can help ensure that relevant rights and privileges are effectively protected.\(^{142}\) Paul Berman’s cosmopolitan pluralism might also be seen to echo this notion, in its effort to define jurisdiction such that it does not go unexercised in cases in which community ties warrant its imposition.\(^{143}\)

Some pattern of regulatory engagement between the SEC and both state officials and foreign and transnational market regulators may play a similar role in reducing the prospect of regulatory error.\(^{144}\) One might expect, however, that such error-reduction would arise particularly in reducing the prospect of inertia. One can readily imagine regulatory errors of both exclusion and inclusion.\(^{145}\) In the former case, regulatory entities fail to adopt or enforce desirable regulation. In the latter, agencies over-regulate, subjecting issues or entities to regulation where they would be better left unregulated.

Regulatory regimes characterized by overlapping jurisdiction and a degree of dependence are more likely to redress under-regulation than over-regulation. Most obviously, this follows from the redundancy at work. If two entities are regulating a given subject, one would naturally expect some greater prospect of “complete” regulation. More interesting than this autarkic function, however, is the potential that the recurrent engagement of intersystemic regulation may prod increased regulation by each regulatory body.\(^{146}\) Such an increase is arguably suggested by the experience of the SEC. The SEC’s degree of supervision, monitoring, and constraint of mutual fund management companies’ illegal trading practices, for example, has not only been supplemented by the enforcement efforts of Eliot Spitzer, but has increased on account of the latter. Spitzer’s regulatory efforts, in turn, have grown bolder—and perhaps more comprehensive—with federal involvement.\(^{147}\)


\(^{142}\) Schapiro, supra note 6, at 289–90. To related effect, Bill Buzbee has spoken of the capacity of redundancy to minimize the prospect of “regulatory underkill.” See William W. Buzbee, Regulatory Underkill in an Era of Anti-Environmental Majorities, in STRATEGIES FOR ENVIRONMENTAL SUCCESS IN AN UNCERTAIN JUDICIAL CLIMATE (Michael Allan Wolf ed., 2005); see also Buzbee, Contextual, supra note 24, at 114–19 (stating that accuracy can be increased through increased redundancy).

\(^{143}\) See Berman, Globalization, supra note 87, at 490–94.

\(^{144}\) Renee Jones has advocated a pattern of federal–state interaction in corporate law that is to just this effect. In her view, regulatory overlap may serve to address inaction at either the federal or state level. See Jones, supra note 20, at 644–46. By way of example, she describes the Delaware courts’ seeming “response” to the Sarbanes-Oxley Act. See id.


\(^{146}\) See Ahdieh, supra note 22, at 2080–81.

\(^{147}\) See Fisch, supra note 116, at 620. Spitzer’s willingness to demand far-reaching structural reforms at the numerous large brokerage firms implicated in his investigation of conflicts of interest in investment counseling might thus be tied to his recruitment of the SEC to join in his settlements with
In part, this may be the salutary result of regulatory competition. Jill Fisch identifies numerous areas in which federal and state officials compete to regulate corporate governance. In Spitzer’s case, state litigation may be an important node of competition over areas in which federal regulation has been limited. Beyond regulatory competition, however, recurrently interacting agencies may also be driven to pursue more active regulation through adaptive learning from one another. Thus, regulatory engagement may produce regulation going well beyond a given agency’s initiatives to date. The expansion in SEC actions against mutual fund management companies can be seen in this light. The introduction and effective enforcement of insider trading rules in foreign jurisdictions may also evidence interactive learning.

I do not wish to suggest that intersystemic regulation cannot reduce errors of inclusion as well. Regulatory competition is understood to cut both ways, at least occasionally deterring regulation or even inducing deregulation. For the most part, however, it is fair to assume that the jurisdictional overlap and regulatory dependence present in intersystemic regulation will address the inertia of failures to regulate more thoroughly than it will constrain patterns of over-regulation. Given as much, it is necessary to acknowledge the danger that intersystemic regulation may serve as the handmaiden of over-regulation. This danger is readily appreciated in a framework of regulatory competition. In agencies’ competition for legislative appropriations, over-regulation may be more

the firms. See Ide, supra note 34, at 831 n.16 (citing Press Release, Office of N.Y. State Att’y Gen. Eliot Spitzer, supra note 34).

148 See Esty, supra note 6, at 1556–57.
149 See Fisch, supra note 116, at 619–23.
150 Id. at 621–22.
151 Information consolidation and enhanced expertise have been identified as aspects of this result in collaborative environmental regulation. See Karkkainen, supra note 12, at 219–20. The potential for learning within groups might also be noted. See Robert B. Ahdieh, The Role of Groups in Norm Transformation: A Dramatic Sketch, in Three Parts, 6 CHI. J. INT’L L. 231, 254 (2005).

152 The role of “veto players,” as analyzed in the political science literature, may be one important element in this result. See Josephine T. Andrews & Gabriella R. Montinola, Veto Players and the Rule of Law in Emerging Democracies, 37 COMP. POL. STUD. 55 (2004), available at http://cps.sagepub.com/content/vol37/issue1. To similar effect is the analysis of William Fischel, see WILLIAM A. FISCHEL, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS 251–52 (1995), and James Buchanan and Yong Yoon, see James M. Buchanan & Yong J. Yoon, Symmetric Tragedies: Commons and Anticommons, 43 J.L. & ECON. 1, 11–12 (2000), as well as Michael Heller, see Michael A. Heller, The Tragedy of the Anticommons: Property in the Transition from Marx to Markets, 111 HARV. L. REV. 621 (1998). In corporate and securities law, overlapping federal and state regulation of certain corporate activity, including the use of proxies, might be argued to produce some degree of under-regulation. Ultimately, the particular mode of regulation in a given case may be determinative of whether regulatory overlap encourages or discourages inertia. Cf. Buzbee, Westway, supra note 24, at 357–58.

likely to elicit largesse than under-regulation.\footnote{154}{See Buzbee, supra note 6, at 30–32; cf. John C. Coffee, Jr., Competition Versus Consolidation: The Significance of Organizational Structure in Financial and Securities Regulation, 50 Bus. Law. 447, 466 (1995).}

In corporate law, the claim of a "race-to-the-top" posits that regulatory competition will produce an optimal regulatory balance.\footnote{155}{See Ralph K. Winter, Jr., State Law, Shareholder Protection, and the Theory of the Corporation, 6 J. Legal Stud. 251, 254 (1977).} The feedback mechanism at work in corporate law, however, may be distinct from that at work in regulatory competition generally. In corporate law, over-regulation is discouraged by the penalty of out-of-state reincorporations and elections not to incorporate within the state.\footnote{156}{Id. at 252–53.} Where both the source and the mechanism of inter-jurisdictional reward and punishment is less visible and direct than in corporate law, we may not see the same patterns of competition. Rather, a one-way competitive ratchet may commonly favor more, and rarely less, regulation.

Besides acknowledging the complex identity of regulated subjects, then, intersystemic regulation may minimize regulatory inertia, through patterns of regulatory competition and learning. This role may be especially important amidst transition. When financial markets are globalizing or otherwise changing at a rapid pace, by way of example, the prospect of under-regulation and regulatory gaps may be especially significant.

C. Encouraging Innovation

A rapidly changing marketplace also requires a capacity for regulatory reform. Modern regulatory regimes thus demand mechanisms of innovation and evolution.\footnote{157}{See Ahdieh, supra note 22, at 2123–24. Hinting at the role of intersystemic regulation in promoting innovation, Bill Buzbee has spoken of a "learning function" of regulatory overlap. See Buzbee, Contextual, supra note 24, at 122–25.} In the SEC context, this may be most evident in the SEC's work with foreign national regulators, as well as IOSCO and the International Accounting Standards Board (IASB), to develop generally applicable international accounting standards.\footnote{158}{Hannah L. Buxbaum, Conflict of Economic Laws: From Sovereignty to Substance, 42 VA. J. INT'L L. 931, 949–50 (2002).} Such standards are increasingly necessary, given the aforementioned patterns of transnational market activity, including the growth in cross-listings.\footnote{159}{See Coffee, supra note 57, at 1770–71.} The SEC has thus been compelled to work more actively with its overseas counterparts to develop a common accounting regime imposing consistent rules across jurisdictional boundaries.\footnote{160}{See supra text accompanying notes 76–79.} The SEC's efforts to introduce insider trading rules in European jurisdictions can be understood in a similar light.\footnote{161}{See supra text accompanying notes 62–71.}
Domestically, one might characterize the SEC's decision to more forcefully regulate research analysts and mutual fund management companies as another case of innovation. Eliot Spitzer's enforcement efforts, in essence, forced the SEC to develop new rules to better capture extant patterns of market activity. The SEC's promulgation of Regulation AC, requiring certification of the truthfulness of views expressed in research reports and in public appearances, is but one example.162

Cover sees such innovation as a significant benefit of the jurisdictional redundancy enshrined within the United States's dual judicial system.163 He and Aleinikoff point to innovation in the criminal procedure jurisprudence of the Warren Court by way of example.164 In their account, the interaction of state courts enforcing state criminal law, and lower federal courts engaged in federal constitutional analysis of convictions on habeas review, encouraged the development of new legal norms.165 The state courts' "pragmatic" perspective, the federal courts' "utopian" perspective, and each system's need at least to engage, and even offer some deference to, the other, resulted in cross-pollination, learning, and legal evolution.166

Schapiro also highlights the capacity for regulatory innovation, with his suggestion of the utility of interactive federalism as the source of a plurality of regulatory approaches, and as a mechanism of dialogue.167 Overlapping federal and state jurisdiction may thus give rise to "multiple approaches to a particular problem," such as environmental protection or workplace safety, driven by distinct institutional or geographic perspectives.168 Further, such overlap may help to encourage a productive dialogue, in which federal and state regulatory institutions learn from one another.169 Minimally, the contribution of one entity may constitute a dissent from the predominant will of the other.170 Plurality and any resulting dialogue are thus the warp and woof of the pursuit of regulatory innovation. With these features, overlapping regulatory regimes may encourage optimal legal evolution.

I have previously highlighted the potential role of intersystemic judicial

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162 See Fisher, supra note 44, at 965.
163 See Cover, supra note 82, at 672–73.
164 See generally Cover & Aleinikoff, supra note 22.
165 See id. at 1049–50.
166 See id. at 1050–51. As I argue in greater detail below, see infra Part V.C, the shared legal and regulatory culture present in the interaction of federal and state courts studied by Cover and Aleinikoff is likely important in producing innovation. In the broader universe of interactions I consider under the heading of intersystemic regulation, some commonality of perspective is also likely to be essential.
167 See Schapiro, supra note 6, at 288.
168 Id.
169 Schapiro points to the evolution of the U.S. Supreme Court's jurisprudence from Bowers v. Hardwick, 478 U.S. 186 (1986), to Lawrence v. Texas, 539 U.S. 558 (2003), as suggestive of such learning. Schapiro, supra note 6, at 288–89; see also de Búrca, supra note 13, at 824 (discussing "mutual learning" from regulatory overlap).
170 See Schapiro, supra note 6, at 289 (suggesting that states may symbolically enact legislation that is preempted by federal law but serves as an official statement of disagreement).
interaction in fostering innovation, particularly in the development of international norms of due process.\footnote{171} In that context, I suggested the potential for path dependence to constrain the evolution of judicial norms within any single judicial system.\footnote{172} Yet such path dependence is not unique to judicial norms.\footnote{173} Regulation generally might be expected to favor existing norms over alternative approaches.\footnote{174} If this is so, then intersystemic regulation and other institutional mechanisms designed to encourage innovation may serve as a beneficial corrective.

Intersystemic regulation may help to facilitate innovation in several ways, most simply, by incorporating the alternative perspectives of distinctly situated regulatory entities.\footnote{175} Such differences in perspective may arise from institutional design, national or international context, and sources of authority, among other factors.\footnote{176} Whatever the source, distinctly situated agencies may encourage regulatory innovation, simply by offering each other something new. Eliot Spitzer’s more aggressive pursuit of research analysts and mutual fund management companies might thus have derived from his political orientation as an elected state official or from some other motivation favoring stronger investor protection. The SEC’s participation in the evolution of international accounting standards involves a similar clash—and synthesis—of distinct perspectives.\footnote{177}

Beyond its integration of distinct perspectives, intersystemic regulation furthers innovation because neither regulatory body can foreclose the relevant engagement and dialogue in an untimely fashion.\footnote{178} Within a single, hierarchical system, or across systems lacking regulatory dependence, by contrast, engagement and resulting innovation will likely be more limited.

To slightly different effect, intersystemic regulation may also encourage innovation, and perhaps optimal policy outcomes, through its enhancement of the quality of available information.\footnote{179} By pooling the

\footnote{171} See generally Ahdieh, supra note 22, at 2123—39.
\footnote{172} See id. at 2064—68.
\footnote{174} See Buzbee, supra note 6, at 33—34 (discussing the “status quo bias”). In fact, path dependence may be even stronger outside the judicial context than within it.
\footnote{175} See Buzbee, Contextual, supra note 24, at 121—22 (“Similarly, parallel, overlapping, and cooperative regulatory federalism structures can offer opportunities for innovation, copying of regulatory ‘templates,’ incremental improvement, and local tailoring of national goals.”); de la Porte, supra note 24, at 39 (arguing that the coordination approach of the EU works to achieve common objectives while respecting divergent values).
\footnote{176} See infra notes 298—302 and accompanying text.
\footnote{177} See supra notes 76—79 and accompanying text. Analogous patterns of innovation have been observed in corporate law. See generally Jones, supra note 28.
\footnote{178} A distinct, but related, contribution of overlapping regulatory authority may be a heightened potential to encourage the engagement and involvement of relevant constituencies. In essence, by providing additional nodes for engagement, and perhaps a more dynamic dimension to regulation of a particular subject, the cumulative involvement of interested individuals and entities may grow.
\footnote{179} See Jones, supra note 28, at 119.
resources and capacities needed for information collection and analysis, thus, regulatory engagement can improve decision-making.\textsuperscript{180} Notably, this has been an important factor in calls for cross-jurisdictional coordination in environmental regulation.\textsuperscript{181}

To be sure, any value of intersystemic regulation as a source of regulatory innovation must be tempered against the risks of "innovation" in the form of regulatory excess. Relevant innovation may also come at the expense of democratic accountability and legitimacy.\textsuperscript{182} We can appreciate these possibilities in the interaction of Spitzer and the SEC. Rather than a case of desirable innovation, one might alternatively see their interaction as a cautionary tale of regulatory capture: A politically motivated attorney general, his sights set on the governor's mansion,\textsuperscript{183} forces the SEC to abandon its longstanding, \textit{optimal} decision to limit the regulation of certain industries. In this account, innovation remains at the center; the normative dimension of the tale, however, is dramatically different.

Transnationally, this negative story of innovation may be even more relevant. From a U.S. perspective, the Multijurisdictional Disclosure System and the broader pursuit of international accounting standards might arguably be seen as an erosion of United States disclosure and accounting standards, resulting in diminished protection of U.S. investors.\textsuperscript{184} From the perspective

\begin{verbatim}

\textsuperscript{181} See, e.g., Karkkainen, supra note 12, at 219–20. An element of both the democratic experimentalism and new governance literatures is "the periodic pooling of information . . . to reveal the defects of parochial solutions, . . . allow[] for the elaboration of standards for comparing local achievements . . . [and] expose[] poor performers to criticism from within and without, making good ones (temporary) models for emulation." Scott & Holder, supra note 13, at 17.

\textsuperscript{182} See generally Paul B. Stephan, \textit{Accountability and International Lawmaking: Rules, Rents and Legitimacy}, 17 NW. J. INT'L L. & BUS. 681 (1996–1997) (analyzing how accountability constraints, or the lack thereof, influence the behavior of international lawmaking bodies).

\textsuperscript{183} Cf. Buzbee, \textit{Contextual, supra} note 24, at 108.

\textsuperscript{184} See Hal S. Scott, \textit{Internationalization of Primary Public Securities Markets}, 63 LAW & CONTEMP. PROBS. 71, 81–82, 85 (2001); see also Joel Seligman, \textit{The Obsolescence of Wall Street: A Contextual Approach to the Evolving Structure of Federal Securities Regulation}, 93 Mich. L. Rev. 649, 663 n.76 (1995) (stating that the system has "achieved only limited success"). Paul Stephan's public choice analysis of the agency costs of international cooperation in competition policy is suggestive. See Stephan, supra note 16, at 198–99; see also id. at 202–03 (arguing that political differences between the legislative and executive branches of government tend to result in standardless harmonization agreements). Presumptions of public mindedness are surely no more justified with reference to international regulators or national regulators engaged in transnational coordination, than with reference to regulators acting in a purely domestic capacity. Potentially greater monitoring costs, meanwhile, may make such self-interested conduct more difficult to control in the former cases. In a regime of intersystemic regulation, however, as opposed to a truly international regime, such costs may not necessarily be elevated. This may be true, among other reasons, given the relatively greater degree of institutional flexibility in an intersystemic, rather than international, regulatory regime. See id. at 203 (discussing the general inflexibility of "[l]aw-based international institutions"). Given as much, the dangers of regulatory innovation may at least be no greater with reference to intersystemic regulation, than ordinary domestic regulation.
\end{verbatim}
of European regulators, meanwhile, the imposition of insider trading regulation, in the face of pressure from the United States, might be seen as similarly sub-optimal.\textsuperscript{185}

Such arguments do not obviate the potential utility of intersystemic regulation in fostering an optimal degree of regulatory innovation. They suggest, however, that regulatory change need not, and perhaps ought not, be equated with progress. Given as much, careful attention to the particular products of intersystemic regulatory interactions is essential.

D. Facilitating Integration

The SEC's efforts to cooperate with foreign and transnational regulators to develop a shared set of accounting standards highlight the final potential contribution of intersystemic regulation—the facilitation of integration. Through such engagements, regulatory institutions across the globe have sought to articulate accounting standards applicable to the financial markets generally. Because of the increasingly integrated nature of such markets, some integration in standards is likely essential.\textsuperscript{186}

The Multijurisdictional Disclosure System in place between Canada and the United States similarly facilitates integration. In essence, the mutual recognition regime of the MJDS outlines a shared set of disclosure requirements sufficient to meet the regulatory needs of each participant.\textsuperscript{187} If that common standard is fulfilled, any demand for re-registration in the alternative jurisdiction is necessarily redundant. Under the MJDS, thus, stock issuances in either jurisdiction are marketable in the other.\textsuperscript{188}

Milder forms of integration can also be identified. In the foregoing cases, the common standards operate as both a minimum requirement and a maximum imposition. Thus, if accounting standards are met in one jurisdiction, no further regulatory demands can be imposed. However, in the SEC's efforts to promote insider trading regulation in Europe, the integration involved only a minimum threshold. European regulators have imposed some minimum insider trading rules.\textsuperscript{189} Yet the presence of such

\textsuperscript{185} See Harvey L. Pitt & David B. Hardison, Games Without Frontiers: Trends in the International Response to Insider Trading, 55 LAW & CONTEMP. PROBS. 199, 200 (1992) ("[If the current attitude in the United States is that those found guilty of insider trading should be left 'naked, homeless, and without wheels,' many [European] countries appear to view the practice as meriting no more than a stiff warning, akin to a traffic ticket.").

\textsuperscript{186} See generally Moon, supra note 55 (calling for the implementation of an integrated global securities market).


\textsuperscript{188} See id. at 551; see also Anna T. Drummond, Securities Law Internationalization of Securities Regulation—Multijurisdictional Disclosure System for Canada and the U.S., 36 VILL. L. REV. 775, 789–90 (1991).

\textsuperscript{189} Caroline A.A. Greene, Note, International Securities Law Enforcement: Recent Advances in
minimum requirements does not prevent the United States from prosecuting a wider array of conduct.

Paul Berman expressly eschews a commitment to integration in his cosmopolitan pluralism.\(^{190}\) It is not clear, however, that his view deviates significantly from my citation of integration as a benefit of intersystemic regulation. Any integration resulting from overlapping and dependent regulatory regimes need not involve complete integration and the attendant elimination of diversity. In fact, the latter might be seen as contrary to the very dynamic of intersystemic regulation.\(^{191}\) Instead, the present analysis posits intersystemic regulation as helping to facilitate the optimal degree of integration in a given case, whatever that might be.

Some such notion appears to be in the background of Cover’s and Schapiro’s analyses as well. Each sees the interaction between federal and state judicial systems as a source of at least some harmonization in standards, procedural approaches, or the like. Cover’s conception of redundancy in constitutional criminal procedure aspires to some ultimate integration of federal and state perspectives in a shared constitutional norm.\(^{192}\) Schapiro’s identification of dialogue as a function of interactive federalism, meanwhile, seemingly points toward a closer alignment of intersystemic norms.\(^{193}\) Neither Cover nor Schapiro, however, seeks comprehensive integration.

To be sure, we should not underestimate the potential of intersystemic regulation to facilitate significant integration, whether for better or worse.\(^{194}\) In the context of interactions between international arbitral tribunals formed under NAFTA and domestic courts in the United States, I have offered a relatively strong conception of integration in international norms of due process.\(^{195}\) Even there, I do not suggest a “harmonization” or “unification” of law. Nonetheless, such norms may well come to exhibit a significant degree of consistency, by way of judicial interaction.\(^{196}\)

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\(^{190}\) Berman, Globalization, supra note 87, at 397–400.

\(^{191}\) With complete integration, the divergence of perspectives that contributes to a fruitful pattern of engagement is necessarily diminished, if not eliminated.

\(^{192}\) See Cover & Aleinikoff, supra note 22, at 1036.

\(^{193}\) See Schapiro, supra note 6, at 288.

\(^{194}\) Paul Stephan has questioned the wisdom, as well as the feasibility, of analogous efforts at international integration of antitrust rules. See Stephan, supra note 16, at 198–99; see also Stephan, supra note 180 (expressing skepticism of efforts directed at harmonizing international law). At least some of Stephan’s public choice criticisms of international integration, however, may be addressed within a paradigm of intersystemic regulation. While issues of accountability undoubtedly arise with such engagement, see supra notes 182–83 and accompanying text, domestic mechanisms of accountability retain greater force in a regime integrated through intersystemic regulation, rather than through patterns of international harmonization and institutionalization of legal regimes.

\(^{195}\) See generally Ahdieh, supra note 22, at 2123–39.

\(^{196}\) See id. at 2139 (characterizing dialectical interaction as a “complex process ... whereby international legal norms seep into, are internalized, and become embedded in domestic legal and political processes”) (quoting Harold Hongju Koh, Transnational Legal Process, 75 NEB. L. REV. 181, 205 (1996)).
The results of an interaction among courts, however, might reasonably be expected to be distinct from the fruit of any engagement among other regulatory institutions. The distinct—and likely less consistent—institutional designs and procedural approaches in play beyond the courts might be expected to stymie patterns of integration. Further, legislative and executive officials, who are less removed than courts from local politics and preferences, may more strongly resist integration. While comprehensive integration may be a possibility, then, it is not likely to be the ordinary result of intersystemic regulation. Rather, selective patterns of integration may be the norm.

Regardless of degree, intersystemic regulation is likely to be an effective mechanism of integration. Regulatory interaction offers an effective mechanism for gradual, incremental shifts in law and norms, rather than catastrophic changes. Further, it allows more room for evolution in the common norm, such that the ultimate deviation from the prevailing standard in each relevant jurisdiction may be minimized. Thus, intersystemic regulation may permit characterization of any integration as the development of a new standard, rather than one participant’s adoption of the existing standard of another. Finally, integration driven by intersystemic regulation may be more susceptible to marginal modifications and adjustments than other, perhaps more deterministic, mechanisms of integration.

E. The Costs of Intersystemic Regulation

Beyond the aforementioned concerns particular to each of the potential benefits of overlap and dependence, and of resulting intersystemic regulation, regulatory engagement across jurisdictional lines may also raise certain general concerns. To begin with, it is important to acknowledge the costs of regulatory overlap—in both dollars and legal certainty. Additionally, regulatory shirking and related patterns of neglect may be significant dangers of intersystemic regulation. Finally, there are the political costs of intersystemic regulation.

197 See id. at 2066–68.
198 Notably, an overly high degree of integration might cut against the functions of intersystemic regulation as a fail-safe remedy to regulatory inertia and as a source of innovation. See supra Part III.B–C. The greater the degree of alignment across relevant regulatory entities, thus, the lesser the likely capacity of the collective system to redress inaction by either agency and, even more clearly, to offer meaningful variety and innovation.
199 See, e.g., Karkkainen, supra note 12, at 220 (noting “common set of understandings” born of collaborative regulation). The open method of coordination in Europe might similarly be understood as a mechanism of integration. See de Búrca, supra note 13, at 816, 825; de la Porte, supra note 24, at 39.
200 An informational perspective is central to “new governance” conceptions of such integration. See, e.g., Scott & Holder, supra note 13, at 8–9.
201 See Stephan, supra note 16, at 203 (arguing that the unanimity requirement in altering international institutions causes inflexibility).
The regulatory overlap underpinning intersystemic regulation is inherently costly. By charging a pair of regulators with the authority and responsibility to regulate a given subject matter or entity, one necessarily multiplies the cumulative cost of regulation. Redundancy has its costs. Of course, the utility of redundancy may outweigh such costs. Nonetheless, they should be acknowledged in any election of overlap and dependence over the elimination of redundancy through effective line-drawing.

Another cost of intersystemic regulation is the loss of certainty that is attendant to it. Much of the appeal of the law's conventional project of jurisdictional line-drawing, described at the outset, lies in its enhancement of legal certainty. In law, as elsewhere, good fences may make good neighbors. They may not, however, make good law. Ultimately, degree is likely to be everything. While a refined scheme of intersystemic regulation might offer the right balance of complexity and certainty, the danger lies in flawed schemes, with too much complexity, and consequently too little certainty.

Regulatory “shirking” and its analogues might be seen as further costs of intersystemic regulation. In the mildest potential critique, intersystemic regulation might be seen to diminish the quality of oversight. While two heads may be better than one on numerous counts, two sets of eyes may also be less cautious than one. Experimental psychologists thus observe a tendency toward diminished oversight and engagement by individuals within groups. Similarly, in the presence of multiple regulators, some free-riding on the expected contributions of one's counterpart agency may be likely. While the net degree of oversight might be expected to be greater in the ordinary case of intersystemic

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202 See Buzbee, Contextual, supra note 24, at 127.
203 Cf. Cover, supra note 82, at 654 n.51.
204 See supra notes 17–21 and accompanying text.
205 See Ahdieh, supra note 151, at 254 n.87 (discussing the phenomenon of “social loafing”): Karkkainen, supra note 12, at 225 (hypothesizing the lack of accountability absent an identifiable decision-maker).
207 See Ahdieh, supra note 151, at 254 n.87 (explaining potentially negative consequences of group decision-making).
209 See Buzbee, supra note 6, at 17–18; cf. Alan A. Altshuler & Robert W. Curry, The Changing Environment of Urban Development Policy: Shared Power or Shared Impotence, 10 URB. L. ANN. 3, 40 (1975) (arguing that the proliferation of veto votes among interested parties leads to inaction where any one party's interests may be adversely affected). Karen Alter and Sophie Meunier suggest a distinct, but related, point. Intertwined legal regimes may engender significant regulatory complexity and thereby undermine effective regulatory decision-making. See generally Karen J. Alter & Sophie Meunier, Nested and Overlapping Regimes in the Transatlantic Banana Trade Dispute, 13 J. EUR. PUB. POL’Y 362 (2006) (suggesting that nesting and overlapping international regimes may stymie public decision-making).
regulation, thus, sufficient free-riding in any particular case could produce a net decline. More affirmatively, regulatory agencies may directly rely on the presence of multiple regulators as a basis to avoid their legal obligations. \(^{210}\) With someone else to blame, each agency loses its incentive to get it right. \(^{211}\) In the event of failure, one's regulatory "partner" can always be stuck with the blame.

Finally, one might emphasize the above costs in the political terms of democratic accountability and regulatory authority. In its abandonment of clear lines of jurisdiction and authority, intersystemic regulation necessarily challenges certain traditional notions of democratic constraint. Where regulatory institutions are dependent on counterparts beyond the reach of their formal and even informal constituencies, the politics of regulation grow more complex, and problematic. \(^{212}\) On the other hand, intersystemic regulation might also be seen to enhance political legitimacy in appropriate cases, through its heightened capacity for more efficient capture and accommodation of relevant externalities. \(^{213}\)

Naturally, cognizance of the costs and risks of intersystemic regulation is critical to the project of regulatory design to which this analysis ultimately speaks. One might well attempt to address the latter issues through such institutional design, including through the incorporation of some mechanism of joint accounting across relevant jurisdictional lines or some instrument of external oversight. Additionally, we do well to recall the "fail-safe" functions of jurisdictional overlap, regulatory dependence, and intersystemic regulation. \(^{214}\) The latter naturally cut against some of the regulatory shirking concerns noted above. While intersystemic regulation may give rise to certain "regulatory commons" and other problems, then, these may ultimately be outweighed by the countervailing benefits of such a regime.

IV. A TYPOLOGY OF INTERSYSTEMIC REGULATION

As defined herein, intersystemic regulation encompasses more than any single pattern of regulatory engagement across jurisdictional lines. Rather, an array of interactions—distinct in the degree of dependence and the valence of the relationship, among other factors—is encompassed within the universe of intersystemic regulation.

Intersystemic regulation does not, however, encompass the entire

\[^{210}\text{See Buzbee, supra note 6, at 44 n.158, 49–51 & n.191.}\]
\[^{211}\text{Id. at 30–31.}\]
\[^{212}\text{This may be even more true in regulatory interactions than in the judicial engagements I have previously studied. See Ahdieh, supra note 22. Given the lesser formality and greater obscurity of agency action, intersystemic regulation may raise democratic deficits above and beyond those attendant to overlap and dependence among courts.}\]
\[^{213}\text{See Esty, supra note 12, at 587–90.}\]
\[^{214}\text{See supra Part III.B.}\]
universe of regulatory interactions across jurisdictional lines. Regulatory agencies may interact, to begin, even absent any meaningful jurisdictional overlap—regulatory authority over the same individual or institution, with regard to the same or related issues. Even once overlap is added to the equation, interactions lacking a degree of dependence—reliance of at least one of the relevant agencies on the action or inaction of the other—fall outside our definition of intersystemic regulation. Finally, interactions shaped by a strong degree of hierarchy—and analogous circumstances characterized by dramatic power imbalance—are also outside the universe of intersystemic regulation. In such cases, the pattern of interaction lacks the reciprocal dynamic essential to the emergence of intersystemic regulation.

With an eye to further theorizing the nature of intersystemic regulation, and building on the above parameters, the ensuing discussion attempts to plot out the types of cross-jurisdictional relationships falling within and around the universe of intersystemic regulation. Taking jurisdictional overlap as the baseline predicate and seeking to define relevant interactions by reference to the dependence at work, it dissects the latter into two elements: the degree of dependence between the relevant agencies and the valence of any such dependence. How much dependence is present in the relationship and to what extent is that dependence more in the nature of unilateral hierarchy, versus bilateral inter-dependence?

The resulting typology of regulatory interactions offers a spatial representation of the relations of regulatory entities across jurisdictional lines. In doing so, it might first be expected to enhance our appreciation of such interactions. Further, such a typology represents a framework within which both the architects of and participants in regulatory regimes can analyze and debate appropriate patterns of interaction. Finally, by mapping out some typology of the interactions of regulatory entities across jurisdictional lines, the relative normativity of intersystemic regulation and its consummation in dialectical regulation can be better understood.

Beyond delineating the broad strokes of a proposed spectrum of regulatory interactions, the ensuing analysis includes some preliminary discussion of those aspects of institutional design or extrinsic circumstance that might variously motivate, facilitate, and even normatively favor one or another pattern of regulatory interaction across jurisdictional lines—including particularly those patterns of engagement falling at or closer to the bounds of our spectrum. While intersystemic regulation is the focus of the present analysis, I would not argue that it is invariably preferable to other patterns of engagement; the same is true of dialectical regulation's strong patterns of interaction. In appropriate circumstances, the hierarchical power characteristic of one bound of our spectrum and the pure dialogue attendant to the other may have greater utility. In other cases, more unidirectional or more dialogic patterns of intersystemic regulation, or strongly dialectical regulation, may be ideal.
A. Hierarchy and Dialogue in Regulatory Engagement

In framing the interactions of regulatory institutions across jurisdictional lines, one might fruitfully define them within a spectrum characterized by dependence. Along the x-axis, one might plot the degree of dependence in the relevant regulatory relationship. To what extent does the ability of at least one of the participants to pursue a given regulatory task rely on the cooperation of the other? From the opposite perspective, to what extent may the action or inaction of one entity hold up the work of the other?

Along the y-axis, meanwhile, we can attempt to capture what might variously be termed the reciprocity of any dependence, the equivalence or parity of power between the relevant agencies, or (in some subset of cases) the degree of hierarchy in their relationship. To what extent is any dependence that is present unidirectional versus bilateral in nature? Is one agency dependent on the other, while the other enjoys significant independence, placing us low on the y-axis? Or is the dynamic one of meaningful interdependence, falling higher up on the y-axis?

Within this construct, data points falling on the x-axis are those characterized by the lowest degree of reciprocity (or highest degree of hierarchy). In these cases, the pattern of dependence is entirely one-sided. One agency is completely dependent on the other, while the latter is essentially independent of the former. Such patterns of interaction are quite common within jurisdictions, as evident in the supervisory relationship between home and regional offices of a given administrative agency and in the authority of appellate courts over trial courts.

Such hierarchy is less likely to be found across jurisdictional lines. Federal power to preempt state law under the Supremacy Clause may be a notable exception. The constitutional authority of the federal government is constructed to permit issuance of federal regulatory mandates with intersystemic effect. In securities law, for example, one might note the

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215 Beyond the plotting of two dimensions of dependence presented below, one might potentially incorporate a third axis capturing the extent of jurisdictional overlap between relevant agencies. This is a project for another day.
216 See Ahdieh, supra note 22, at 2045–49 (describing the nature of appellate review).
220 Even the federal power of preemption is limited, however, given some constitutional limit on the scope of federal legislation. See, e.g., United States v. Morrison, 529 U.S. 598 (2000) (holding that the Commerce Clause did not provide Congress with authority to enact a civil remedy for victims of gender-motivated violence); United States v. Lopez, 514 U.S. 549 (1995) (holding that the Gun-Free School Zone Act of 1990 exceeded the authority of Congress under the Commerce Clause because it neither regulated a commercial activity nor contained a requirement that the relevant gun possession be connected in any way to interstate commerce). Beyond the constitutional limits on preemption,
selective preemptions of state securities law by the National Securities Markets Improvement Act of 1996\textsuperscript{221} and the Securities Litigation Uniform Standards Act of 1998.\textsuperscript{222} With this legislation, state securities law was abruptly contracted, by federal fiat.

Points falling on the $y$-axis, meanwhile, capture occasions on which jurisdictional overlap remains, but regulatory dependence is lacking. Regulatory agencies enjoy the ability to proceed as they wish, without regard to the will of regulatory entities beyond their jurisdiction. In such circumstances, any interaction that occurs is purely voluntary, arising at the discretion of the participating agencies. When interaction does occur, the choices and approaches of an agency's regulatory counterpart are not binding either as a formal or practical matter. Such interaction is pure dialogue. Given as much, it is also likely to be of a relatively intermittent character.

The decision to enter into foreign treaty relationships falls within this category. The same can be said of the SEC's interactions with the general membership of IOSCO, as opposed to members with significant securities markets or foreign portfolio investment in the United States.\textsuperscript{223} Nothing compels SEC interaction with the Albanian Securities Commission or the Securities and Exchange Commission of Zambia. Rather, to whatever extent they occur, such interactions are a product of voluntary dialogue, to be initiated and abandoned at will.

Putting together our axes capturing the degree of dependence and the reciprocity/parity of any such dependence, we have the bounds of our typology. On the horizontal axis are various more imbalanced or hierarchical patterns of interaction among regulatory entities, including federal–state relations under the Supremacy Clause and, slightly removed from the present analysis, the supervisory relationship of central and regional offices of a single administrative agency. On the vertical axis we have voluntary dialogue among regulatory institutions, including treaty relationships and SEC interaction with the mass of IOSCO membership.\textsuperscript{224}

Within these bounds falls the universe of intersystemic regulation. Here, to start with the baseline assumption of our schematic, the relevant

\textsuperscript{221} 15 U.S.C. § 77r (2000) (precluding states from imposing registration requirements on securities offered to qualified purchasers by a company listed on a national exchange).


\textsuperscript{223} See C. Todd Jones, Compulsion Over Comity: The United States' Assault on Foreign Bank Secrecy, 12 NW. J. INT'L L. & BUS. 454, 479 (1992) (noting that the SEC focuses most of its international efforts on major industrialized nations).

\textsuperscript{224} Such purely dialogic interactions might be alternatively characterized as grounded in a form of "comity." See Joel R. Paul, Comity in International Law, 32 HARV. INT'L L.J. 1, 3-4 (1991) (describing the cacophony of definitions of comity).
regulatory agencies exercise overlapping regulatory authority over the same individuals, institutions, or issues. Further, given some dynamic of reciprocity, or parity, in the dependence at work, any interaction is not of a purely hierarchical nature. As the relevant regulatory entities are at least somewhat dependent on one another, we also have something more than dialogue. While conceptually less familiar than points falling on the axes of our spectrum—unidirectional/hierarchical relations and pure dialogue—such “intermediate” interactions represent an important (and growing) subset of the universe of cross-jurisdictional interactions among regulatory institutions.

![Diagram: The Bounds of Regulatory Dependence in Cross-Jurisdictional Regulatory Interaction](image)

Figure 1.
The Bounds of Regulatory Dependence in Cross-Jurisdictional Regulatory Interaction

To further appreciate the realm of intersystemic regulatory interaction, it is useful to divide it further. One might cite, to begin, various cases of intersystemic regulation falling in the range immediately adjacent to the x-axis and its one-sided interactions. Congressional reliance on the U.S. Constitution’s Spending Clause as a constraint on state law is one example. Given the Supreme Court’s recognition of broad federal authority to condition state access to federal funds on compliance with federal mandates, Congress enjoys significant authority to impose its will on state governments. For years, federal insistence on state imposition of a

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fifty-five mile-per-hour speed limit as a condition to the receipt of certain federal highway funds made that limit the common law of the land. Yet federal-state interaction under the Spending Clause remains something less than hierarchy, given states’ ability to maintain their preferred policies, by declining federal funds.

Other examples can be found within the broad category of delegated federal programs. In numerous areas of environmental law, for example, federal mandates define certain minimum standards for environmental protection. Implementation of these goals, however, is largely delegated to the states, in the form of broad regulatory and enforcement authority coupled with recurrent occasions for federal oversight. In many cases, such delegation has allowed states to create a more balanced pattern of interdependence and a consequently less hierarchical pattern of intersystemic regulation. Even where a degree of slippage occurs, however, relevant standards remain those of the federal government. Federal permitting and auditing of state implementation plans offers a further element of hierarchy or inequivalence.

Transnational examples of regulatory interactions close to our x-axis boundary of non-reciprocity/hierarchy are, unsurprisingly, harder to come by. A potential example might be Security Council resolutions. While compliance with the latter can—at some basic level—be resisted, the availability of economic sanctions and even military intervention to enforce resolutions limits the potential for such avoidance. Thus, compliance with Security Council resolutions is likely to be the norm.

The SEC experiences relatively little such interaction transnationally. But SEC pressure on regulators in smaller foreign markets to cooperate with U.S. enforcement efforts and even to alter domestic legislation might be seen as a relatively one-sided pattern of intersystemic regulation. Domestically, actual threats of federal preemption—as in the proposed response to

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226 See Nevada v. Skinner, 884 F.2d 445, 446 & n.1 (9th Cir. 1989) (summarizing the history of federal regulation of speed limits).

227 Cf. Rumsfeld v. Forum for Academic and Inst’l Rights, Inc., 547 U.S. ___, 126 S. Ct. 1297, 1306 (2006) (noting that universities that were opposed to visits by military recruiters could bar them by simply refusing to accept federal funds).


230 In the administration of the Clean Water Act’s total maximum daily load rules, for example, the practical complexities of day-to-day implementation undermine the credibility of any federal threat of takeover. See OLIVER A. HOUCK, THE CLEAN WATER ACT TMDL PROGRAM: LAW, POLICY AND IMPLEMENTATION (2000).

231 See Murchison, supra note 229, at 540–41.

Spitzer’s interventions\textsuperscript{233}—might be said to give rise to some such dynamic. The potential for SEC intervention in state litigation, causing removal to a federal forum,\textsuperscript{234} has a similar character.

In the foregoing interactions, each entity is dependent on the other—to varying degrees—in the pursuit of its regulatory mission. Yet such dependence is not evenly distributed. While the SEC is faced with some dependence on regulators in small foreign markets, it is exceedingly limited in degree. Its independent capacity to act remains quite great. Albanian securities market regulators also enjoy some independence from the SEC. Yet they are heavily dependent on access to global financial markets, which the SEC can significantly influence. The cases of intersystemic regulation falling closest to the x-axis of our typology thus exhibit a relatively unidirectional dependence.

A degree of dependence is similarly present on the occasions for intersystemic regulation falling alongside the y-axis and its characteristic pattern of voluntary dialogue. Relevant transnational examples of intersystemic regulation of this form might include a variety of interactions in the category of foreign relations. In fact, foreign relations generally might be said to fall in this range.\textsuperscript{235} Additionally, one might think of the relatively minimal obligations attendant to Friendship, Commerce and Navigation (FCN) treaties,\textsuperscript{236} as well as the relations established under military cooperation agreements,\textsuperscript{237} as relatively dialogic patterns of intersystemic regulation. In each of these cases, the level of obligation—and resulting dependence—is low, yet produces something more than pure dialogue. Turning to the domestic sphere, certain interactions among state regulators are exemplary of relatively dialogic patterns of intersystemic regulation. Cooperative economic development programs may be occasions for this pattern of interaction; regulation of certain non-critical, overlapping resources might also fall within this category.

The SEC’s work with IOSCO on non-essential aspects of market regulation fits within this subset of intersystemic regulation.\textsuperscript{238} Here, one

\textsuperscript{233} See Jones, supra note 28, at 115–16.

\textsuperscript{234} See 7 U.S.C. § 78bb(f)(2) (2000) (providing for removal of "any covered class action brought in any State court involving a covered security . . . to the Federal district court for the district in which the action is pending").


\textsuperscript{236} Under FCN treaties, states pledge to provide nationals of other signatories with limited rights of entry and access and opportunities to engage in business inside state borders. See RUDOLF DOLZER & MARGARETE STEVENS, BILATERAL INVESTMENT TREATIES 10 (1995).


\textsuperscript{238} The International Competition Network—"an international organization of government regulators that sponsors conferences to promote harmonization"—is another example. See Stephan, supra note 16, at 195.
finds some element of dependence, in that global financial markets are characterized by a degree of integration. As a consequence, even the smallest markets can be expected to receive some heed from the SEC. Yet such attention is not significant enough to distinguish the relevant interactions sharply from a pattern of dialogue. The same can be said of joint, or at least coordinated, litigation by the SEC and state regulators. Again, we have something more than dialogue; given the ability of each entity to proceed on its own, however, it is not a great deal more.

Relatively dialogic patterns of intersystemic regulation, then, are characterized by some degree of dependence alongside varying degrees of reciprocity or bidirectionality in that dependence. At the margin, the SEC cares about certain Albanian legal norms, and Mississippi cares about certain policy choices of the state of Louisiana. Given their substantial independence, however, the SEC's and Mississippi's dependence on their counterparts is limited. Whatever interest the SEC might have in working with Albanian market regulators, or in litigating jointly with state authorities, it is not heavily dependent on either in pursuing its regulatory goals.

Figure 2.
Relatively Hierarchical and Relatively Dialogic Patterns of Intersystemic Regulation

Given the relatively non-reciprocal, or hierarchical, patterns of interaction closest to our x-axis and the relative independence that is characteristic of interactions closest to the y-axis, it becomes clear that it is the intersystemic regulatory interactions falling beyond these near bounds that are most rife for "dialectical regulation"—for a pattern of regulatory engagement that is "genuinely multilevel in nature." Here, we surely have something more than dialogue. The relevant interactions are far from voluntary. Given real dependence, participants cannot ignore one other. On the other hand, a strong dynamic of hierarchy, or other tendency toward unidirectional dependence, is also lacking. There is little place for coercion. What potentially emerges from this juxtaposition is a complex interplay of regulatory conflict, cooperation, and coordination especially well-suited to offer the various benefits enumerated in Part III. As Scott and Holder suggest:

Here, the multiplicity of sites and levels of . . . governance emerge as opportunity not threat. The processes and mechanisms for revision imply the construction of a relationship between [regulatory institutions] which is collaborative, not hierarchical, and which is premised on the positive value of diversity, experimentation and learning.

As evident in those occasions on which delegated federal programs in the environmental arena produce a strong dynamic of federal–state interdependence, cross-border environmental regulation may offer the best examples of intersystemic regulation falling in the middle range of our typology, both transnationally and domestically. As between the United States and Canada, environmental harms committed in one jurisdiction will often produce effects in the other. Thus, after negotiation of a reciprocal agreement on acid rain, domestic legislation in both the United States and

240 de Búrca, supra note 13, at 815–16 (suggesting open method of coordination "offers a methodology which can neither be dismissed as 'primarily national' or 'primarily EU-level' but which is genuinely multilevel in nature").
241 See Esty, supra note 6, at 1556–57 & n.214 (labeling such combinations "regulatory co-opetition") (citing ADAM M. BRANDENBURGER & BARRY J. NALEBUFF, CO-OPETITION (1996)).
242 Scott & Holder, supra note 13, at 42–43.
243 See, e.g., David H. Gteches, The Metamorphosis of Western Water Policy: Have Federal Laws and Local Decisions Eclipsed the States' Role?, 20 STAN. ENVTL. L.J. 3, 42–47 (2001) (describing federal-local collaboration in water policy reform); see also Karkkainen, supra note 12, at 214–15 (explaining the challenges of institutional coordination among state and local governments). The direct coordination among Environmental Protection Agency and state officials regarding "new source review" issues under the Clean Air Act is emblematic. In that case, the Director of the EPA's Air Enforcement Division joined with enforcement officials in state attorneys general's offices, as well as environmental protection groups, to coordinate litigation strategies. Buzbee, Contextual, supra note 24, at 123–24.
Canada was amended to better protect non-nationals. Analogous interstate interactions, particularly between the states of New England and its neighbors to the south and southwest, are to similar effect.

Beyond environmental regulation, other examples might also be offered. Transnationally, some of the clearest incidents of dialectical regulation may come in the law enforcement context, including efforts to curtail money laundering, the drug trade, and even terrorism. Domestically, a great deal of commercial regulation has some such quality. Regional markets cutting across state lines are likely to drive dialectical patterns of engagement among state authorities. Cross-border resources subject to commercial exploitation, including natural gas, also demand such active and engaged interaction.

In the experience of the SEC, of course, examples abound. Transnational cases include the SEC’s active engagement with national market regulators and IOSCO in its enforcement efforts. Its interactions in pursuit of harmonization, with the IASB, and with the Canadian Securities Administrators Association, and particularly the Ontario Securities Commission, regarding the Multijurisdictional Disclosure System, are to similar effect. Domestically, the SEC’s engagement with Eliot Spitzer in the regulation of the New York-based financial markets is emblematic of the strong-form engagement of dialectical regulation.

In this category of regulatory interactions, dependence is at its peak and is strongly bilateral. The core regulatory pursuits of relevant participants depend on the cooperation of their counterparts. Absent

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248 See supra text accompanying notes 72–79. As the examples discussed above make clear, while the SEC is surely first among equals when it comes to its foreign counterparts, its powers remain limited in important respects. The realities of national sovereignty and the limitations on extraterritoriality make even the SEC dependent on others when it goes abroad.
249 See supra notes 28–51 and accompanying text.
recurrent and substantive coordination with foreign market regulators and Eliot Spitzer, the SEC's effective pursuit of its regulatory mission will be undermined. Independence, of course, remains; each regulatory institution has the capacity to act on its own. Yet such independence is overshadowed by the cross-jurisdictional dependence that is also present.  

Collectively, then, we might construct the following picture:

![Diagram showing relationship between Dialogue, Reciprocity, Partial (Unilateral Dependence), Strong (Reciprocal Reciprocity), and Dialectical Regulation]

With this typology of cross-jurisdictional regulatory interactions arising from jurisdictional overlap in mind, we can next explore the characteristics of a given regulatory relationship that might encourage one or another pattern of engagement—whether dialogue or hierarchy, intersystemic regulation of a relatively more dialogic or hierarchical character, or strong-form dialectical regulation. Depending on such variables as the centrality of information, individual rights issues, the range

250 See, e.g., Klaus W. Grewlich, Telecommunications and 'Cyberspace': Transatlantic Regulatory Cooperation and the Constitutionalization of International Law, in TRANSATLANTIC REGULATORY COOPERATION, supra note 3, at 273, 297–99 (discussing cross-border interdependence in the context of regulating global telecommunications).

251 At the intersection of our axes is a null set of sorts. Strong unidirectionality or hierarchy, thus, cannot be reconciled with a low degree of dependence.
of perspectives in play, and the continuity of the relationship, particular patterns of engagement may be more desirable, whether for reasons of legitimacy, efficiency, or upside-potential. To analogous effect, when a particular pattern of engagement is sought after, incorporation of certain institutional characteristics—mechanisms of continuity are an obvious example—may serve to move a regulatory relationship in that direction.

Before turning to such variables for the balance of the present analysis, it is useful to briefly highlight the ways in which the distinct patterns of engagement captured within our typology of interactions might impact the management of regulatory challenges. A recent decision of the Office of the Comptroller of the Currency to preclude the enforcement of state anti-discrimination laws against federally chartered banks offers a useful foil.\footnote{Comptroller of the Currency v. Spitzer, 396 F. Supp. 2d 383 (S.D.N.Y. 2005).} Notwithstanding its prior willingness to share the regulation of federally chartered banks with state regulators, in 2004, the Comptroller issued new guidelines barring state enforcement actions against the banks.\footnote{Id. at 385. Notably, the Comptroller did not dispute the applicability of state anti-discrimination laws to the relevant banks, but challenged only the enforcement of those rules by state authorities. Id.}

In doing so, the Comptroller of the Currency might be seen as moving the relevant relationship from dialectical regulation of a sort to a far more hierarchical dynamic falling at or near the x-axis of our typology. With this, of course, the potential benefits of intersystemic regulation, and dialectical regulation particularly, in overcoming inertia, encouraging innovation, and the like were necessarily sacrificed.\footnote{See supra Part III.} In some cases, one might find reason to surrender such benefits, given attendant costs, including the potential for state regulation of a given subject to significantly undermine effective federal regulation. In the enforcement of state anti-discrimination laws, however, it is not easy to identify such costs. As such, the weakening of intersystemic regulation in the above case sits uneasily with the present account.

One might even go a step further, to favor the initial federal-state dynamic in bank regulation over more dialogic patterns of engagement falling at or alongside the y-axis of our typology. In the latter case, perhaps more familiar in state-state relations, federal and state regulators would enjoy wide discretion to regulate at will. Given as much, however, their engagement of one another would likely exhibit a lesser intensity, with attendant implications for the payoffs in innovation, integration, and the like.

A final point on the normativity of dependence, as used herein, also deserves emphasis. In the interest of offering some preliminary synthesis of jurisdictional overlap and regulatory dependence in the interaction of regulatory entities across jurisdictional lines, the present analysis skirts the
line of normative and descriptive analysis. This is most evident in its treatment of dependence. For the most part, I aspire merely to offer a positive account of the ways in which a degree of dependence of independently constituted regulatory agencies may drive particular patterns of engagement. In positing the utility of such engagement in acknowledging identity, overcoming inertia, encouraging innovation, and facilitating integration, however, I also hope to suggest some normative benefit of jurisdictional overlap and regulatory dependence.

This, in turn, points to a mixed positive-and-normative claim about the types of problems well suited to intersystemic regulation, and dialectical regulation particularly. When identity is ambiguous, inertia is present, innovation is lacking, or integration is needed, jurisdictional overlap and, even more importantly, some meaningful degree of regulatory dependence, may be of value. Such overlap and dependence may be a way to secure the benefits of acknowledging identity, overcoming inertia, encouraging innovation, and facilitating integration. Conversely, intersystemic regulation and dialectical regulation, can be understood as a way to manage a degree of overlap and dependence.

B. The Variables of Intersystemic Regulatory Design

As the very articulation of a typology of cross-jurisdictional regulatory interactions helps to suggest, there is nothing inherently superior to intersystemic regulation over either the non-reciprocity/hierarchy or the pure dialogue that constitute its bounds. Nor is dialectical regulation categorically preferable to the relatively more non-reciprocal or more dialogic forms of intersystemic regulation. Rather, selected indicia may variously favor pure hierarchy or pure dialogue, more hierarchical or more dialogic patterns of intersystemic regulation, or dialectical regulation, in any given case.255

What features of institutional design or extrinsic circumstance might motivate, facilitate, or normatively favor a particular choice of where within our typology of cross-jurisdictional engagement a particular incident of regulatory interaction falls? What variables might encourage domestic or transnational regulators to pursue one or another pattern of interaction? What factors are likely to render a particular pattern effective in securing the benefits of intersystemic regulation in any given case? Finally, what factors might counsel our design of regulatory regimes to favor particular patterns of engagement? Here, I note some of the features that might encourage patterns of interaction at or alongside the bounds of our typology, leaving for Part V a more detailed treatment of the essential

255 Cf. Esty, supra note 12, at 574.
prerequisites and predictors of the pattern of dialectical regulation standing at the heart of our spectrum.

A comprehensive theory of the broad universe of cross-jurisdictional interactions and the variables suited to their emergence is beyond the scope of the present, necessarily preliminary analysis. Furthermore, context is highly relevant to how cross-jurisdictional regulatory interaction will play out in any given case.\(^{256}\) Hence the need for the microanalysis of institutions suggested at the outset.\(^{257}\) Building on our proposed typology of interactions, however, we can begin to identify potentially salient factors in the emergence of one or another pattern of interaction. These are offered without claim of exclusivity or ranking. They merely represent some of the factors that might be weighed in determining the optimal institutional design for regulatory engagement in any given case.

Several factors can be seen as favoring non-reciprocity or hierarchy, or at least intersystemic interactions of a more non-reciprocal nature. A heightened need for particularized expertise in the regulation of a given subject, to begin, might favor such unidirectional patterns of interaction. Where expertise is essential, one might imagine a related perception, however inaccurate, that the underlying knowledge behind such expertise is itself of some singular nature. If this is so, one regulatory institution might logically be seen as best suited to design appropriate regulation. Both entities, in this view, could not be equally "expert."

A strong interest to ensure accountability, finality, and uniformity\(^{258}\) might also favor some degree of hierarchy. Hierarchy may help to minimize ambiguity in the lines of authority,\(^{259}\) and hence evasions of responsibility. Everyone knows where "the buck stops." By contrast, more dialogic patterns of engagement, let alone the pluralistic regulatory dynamic of dialectical regulation, are likely to leave greater room for potential shirking.\(^{260}\)

Finally, a desire to protect specific and discrete individual rights may—at least in some circumstances—also favor more hierarchical modes of interaction. While such hierarchy may threaten individual rights in some ways,\(^{261}\) the more formalized regimes falling closer to the x-axis may better

\[^{256}\text{See generally Buzbee, Contextual, supra note 24 (arguing that context is critical in analyzing the background and circumstances of regulatory responses).}\]

\[^{257}\text{See supra note 24 and accompanying text.}\]

\[^{258}\text{See Schapiro, supra note 6, at 290–92.}\]

\[^{259}\text{See, e.g., Mehmet Bac, The Scope, Timing, and Type of Corruption, 18 INT'L REV. L. & ECON. 101, 104–06 (1998) (illustrating through game theory that a clear hierarchical structure that rewards supervision by authorities may curb corruption levels within an organization); see also Schapiro, supra note 6, at 291 (stressing that ambiguity and a lack of clear, demonstrative control by a designated wing of the government can lead to confusion among citizens).}\]

\[^{260}\text{See Karkkainen, supra note 12, at 225; Scott & Holder, supra note 13, at 51–52.}\]

\[^{261}\text{Cf. Myers v. United States, 272 U.S. 52, 291–95 (1926) (Brandeis, J., dissenting).}\]
ensure attention to, and protection of, certain rights. At a minimum, a focus on individual rights might at least raise concerns about looser dialogic patterns of interaction, and dialectical regulation even more so, given their potential to impact rights in significant ways, yet offer limited mechanisms of formal recourse to victims. Notably, this has been among the most significant concerns with the rise of non-traditional patterns of regulation in the European Union, under the open method of coordination.  

An initial factor favoring more dialogic patterns of engagement, whether pure dialogue or intersystemic regulation of a dialogic character, might equally be understood as a factor weighing against reliance on more unidirectional patterns of interaction. The more information-intensive a given subject of regulation, the greater the attraction of a more open system of engagement. Dialogic patterns of interaction thus create ready opportunities for information enhancement. The same is true of dialectical regulatory regimes, as suggested by the important place of jurisdictional overlap, regulatory dependence, and active engagement in the information-intensive universe of environmental regulation.

Other factors favoring dialogic forms of interaction can also be identified. The more limited the general alignment of policy preferences across relevant jurisdictional lines, the more attractive will be purely dialogic interactions and intersystemic regulatory relationships characterized by more limited dependence. Generally speaking, such alignment may be substantially less across national boundaries than domestic ones. Whatever their origins, however, divergent preferences are likely to make unidirectional dependence, and even dialectical regulation, less viable. Where policy goals are characterized by some general alignment, the relatively invasive patterns of interaction along our x-axis—and surely patterns of dialectical regulation—may be more acceptable. Where preference alignment is limited, however, dialogue may be embraced as a low impact means to facilitate learning among independent

262 See Grainne de Búrca & Joanne Scott, New Governance, Law and Constitutionalism, at 833–34 (Chapter draft, forthcoming). Enshrined in the European Union’s employment policy, the “open method of coordination” (OMC) was first introduced at the Lisbon European Council Summit. de Búrca, supra note 13, at 825. In its purest form, the OMC prescribes four elements: The first is the setting of EU level guidelines for achieving certain goals/objectives, the second the establishment of benchmarks and specific indicators as a way of comparing best practices, the third the translation of the European guidelines into national (and regional) policies suited to the needs of different States and regions and the fourth entails monitoring, evaluation and peer review on a periodic basis.

Id. Besides the OMC, other collaborative governance schemes have also been utilized in Europe, including the use of broad committee structures in the implementation of European-wide structural funding initiatives. See Joanne Scott & David M. Trubek, Mind the Gap: Law and New Approaches to Governance in the European Union, 8 EUR. L.J. 1, 4 (2002).

263 See Karkkainen, supra note 12, at 219–20 (describing how overlapping federal, state and local institutions results in an increase in the amount and availability of information in environmental management).
regulatory institutions.

A greater degree of uncertainty in a given area of regulation may also favor more dialogic interactions. Stating it slightly differently, if a given regulatory field is in the midst of or susceptible to rapid change, it may be more or less amenable to particular patterns of regulatory interaction. While other conclusions might be asserted, at least some argument might be made that uncertainty will ordinarily favor pure dialogue or intersystemic regulation of a dialogic nature. In essence, the willingness to accept greater degrees of dependence may be limited amidst transition.

A relatively less dense universe of ties across the relevant jurisdictional lines, beyond the particular regulatory questions at stake, may also favor more dialogic patterns of interaction. In fairly spare relationships, little more than dialogue may be realistic. As I will describe more fully below, however, greater density of relationships may facilitate the emergence of closer and more active patterns of interaction.

Lesser capacity for the institutionalization of cross-jurisdictional interactions may also favor more dialogic engagements. As we move from pure non-reciprocity or hierarchy to relatively hierarchical patterns of intersystemic regulation, through the active and recurrent interactions of dialectical regulation, and reach the range of dialogic patterns of interaction, there is likely to be increasingly less demand for institutional continuity and stability. Dialogue requires far less of an institutional framework than hierarchy, or even dialectical regulation. Given as much, where such frameworks are likely to be excessively costly or otherwise difficult to establish, more dialogic patterns of interaction might be favored.

Finally, a potentially mixed factor might be the socio-political dynamic within which the relevant regulatory interaction takes place. One might imagine, for example, a context of special sensitivity to the protection and preservation of national autonomy. In such circumstances, pure dialogue

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264 Relatively greater complexity in a given area of law may be to similar effect. Cf. Stephan, supra note 16, at 199 (noting that a lack of understanding of competition policy makes vesting regulatory power in an international agency especially disadvantageous).

265 See Scott & Holder, supra note 13, at 51–52 (discussing the difficulties of different models in the complex and rapidly changing area of European Union environmental law).

266 One could also argue that uncertainty and change open the door to dialectical regulation. Minimally, stakeholder resistance to more active engagement may potentially be diminished.

267 See infra Part V.D.

268 It is notable, thus, that even more intermediate patterns of regulatory interaction—though often conceived as alternatives to formalized patterns of regulatory engagement—are increasingly characterized by a certain degree of institutionalization. See, e.g., Karkkainen, supra note 12, at 217–18 (discussing the creation of a Chesapeake Bay Commission and Chesapeake Executive Council as examples of regional coordinating mechanisms); Scott & Holder, supra note 13, at 28–29.

269 For example, elements of dialectical review in European courts developed only incrementally, as tempered by national sentiment. See Ahdieh, supra note 22, at 2145. States may reject outright a system of interaction that too heavily constrains sovereignty. See, e.g., Lawrence R. Helfer, Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean
or dialogic patterns of intersystemic regulation may be favored. Such interactions may help to advance certain of the enumerated benefits of intersystemic regulation, yet minimize the risk of political backlash. On the other hand, one might also imagine a political dynamic favoring more robust patterns of dialectical regulation. Active regulatory competition within a given system, for example, might encourage an agency to look outside its jurisdiction for sources of greater regulatory efficacy, legitimacy, and authority. Even absent regulatory competition, a weak regulatory agency might secure some advantage from an active pattern of engagement with regulatory institutions beyond its jurisdiction: It might acquire both legitimacy and even affirmative power from a dialectical partner.

Again, it bears emphasizing that this enumeration is far from exclusive. Further, its operationalization necessitates some multivariate analysis. Even as it stands, however, the above factors may hint at a systemic treatment of growing patterns of regulatory interaction across jurisdictional lines. As such interactions move from spontaneous incidents to purposeful elements in the institutional design of particular regulatory schemes, it is essential to think carefully about the appropriate pattern of regulatory interaction in any given situation. In this way, the prospect of approaching optimal patterns of regulatory engagement is likely to grow, and the promised benefits of enhanced regulatory design are more likely to be achieved.

V. TOWARD A MODEL OF DIALECTICAL REGULATION

As suggested above, the benefits of intersystemic regulation enumerated in Part III—acknowledging identity, overcoming inertia, encouraging innovation, and facilitating integration—are likely to be greatest where we find the relatively strong form of intersystemic regulatory interaction I have termed dialectical regulation. In this pattern of interaction, regulatory entities situated across jurisdictional lines, driven by jurisdictional overlap and regulatory dependence upon one another, engage in an active pattern of recurrent interaction, experimentation, learning, and growth. Collectively, these features encourage some degree of integration in the collective regulatory regime—a co-regulation of sorts.

Several factors—some inherent to institutional context, but others


270 See Ahdieh, supra note 22, at 2143–47.

271 See generally Edward J. Kane, Regulatory Structure In Futures Markets: Jurisdictional Competition Between the SEC, the CFTC, and Other Agencies, 4 J. FUTURES MKTS. 367, 383–84 (1984) (discussing the efficiency advantages of regulatory competition among agencies).


susceptible to regulatory design—might be seen to motivate and facilitate a dialectical pattern of regulatory engagement. I begin with a handful of precursor elements. Beyond these, I identify three core features that are likely to be needed, if general patterns of intersystemic regulation are to rise to the level of strong-form dialectical regulation: a measure of both dependence and independence, the simultaneous presence of some alignment and some divergence in perspectives, and a certain density of regulatory interaction. Finally, the prospects for dialectical regulation may be somewhat enhanced by some capacity for exit.

Two points bear highlighting. First, while I draw on the experience of the SEC to add greater clarity to each of the factors below, I do not claim to derive the latter from that experience. Rather, the enumerated factors represent hypotheses about what elements might produce stronger patterns of regulatory engagement across jurisdictional lines. This highlights a second point, that the ensuing enumeration is not intended to capture sufficient elements to produce dialectical regulation, or even necessary elements, for that matter. Rather, dialectical regulation might not emerge, even with each of the factors below in place. Likewise, it might emerge, with one or more of the elements missing. As each factor is in greater evidence, however, the relative likelihood that patterns of dialectical regulation will emerge increases.

A. Precursors to a Regulatory Dialectic

As a baseline premise of the analysis offered herein, the most obvious predicate to the dialectical engagement of regulators across jurisdictional lines is the reality of some overlap in authority. Dialectical regulation can only arise in those circumstances in which the relevant subject of regulation—whether individual, institutional, or subject-matter—itself manifests an intersystemic character. In the case of the SEC, by way of example, this is evident in the nature of cross-listed corporations, in overseas securities trading, and in the operation of mutual fund managers and investment advisors within the overlapping jurisdiction of both federal and state authorities.274

Similarly elemental in the emergence of any pattern of intersystemic regulation, and hence of dialectical regulation particularly, are the distinct origins of the overlapping regulatory regimes. While some pattern of interactive regulation may operate within a single system—the early interactions of the Federal Trade Commission and the Antitrust Division of the U.S. Department of Justice are one example275—this pattern exhibits

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274 See supra Part II.
different characteristics than the pattern explored herein, and is unlikely to lead to similar ends. The grounding of relevant regulatory entities in distinct sources of power is thus an important precursor to any dialectical regulatory regime.

As suggested by the very nature of the present analysis, however, overlapping jurisdiction of independently constituted regulatory entities need not produce a dynamic of intersystemic regulatory engagement, let alone the active engagement of dialectical regulation. Rather, these predicate features have more often triggered one of two alternative responses. First, the presence of overlap is often denied, whether by denying that the competing regulatory entity has the power to exercise meaningful influence, asserting clear lines separating the relevant entities’ jurisdiction, or blatantly disregarding the other body. Alternatively, a second response is to acknowledge overlap, but press for the drawing of jurisdictional lines in such a fashion as to eliminate it. Given these conventional responses to cross-jurisdictional regulatory overlap, more is needed to lay the groundwork for dialectical regulation.

To begin with, the interaction of regulatory institutions across jurisdictional lines may be most likely to produce intersystemic regulation, and particularly an iterative dialectical engagement, where such interaction is voluntary, yet somewhat unavoidable. In substantial part, the dialectical engagement of regulatory entities arises where the continued efficacy of each is dependent on such engagement. In the SEC context, one might recall the transnational interactions arising from the SEC’s insider trading enforcement efforts, and its need to engage Eliot Spitzer on mutual fund regulation when he appeared ready to go it alone. In each case, the SEC was constrained in how it might proceed.

Yet in each case, one also finds some dimension of choice and discretion. This is particularly clear in the SEC’s enforcement of insider trading rules. It was the SEC’s own decision to pursue aggressive enforcement of insider trading rules overseas, that created its dependence on European regulators. As to its interaction with Spitzer, to similar effect, the SEC was not previously interested in regulating the entities Spitzer brought within his sights, and might have left any such regulation to Spitzer alone to pursue. The dynamic of interaction thus arose from the SEC’s pursuit of its own goals and, perhaps more significantly, from its

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276 See Schapiro, supra note 6, at 264 (criticizing the Supreme Court’s continued insistence on jurisdictional divisions).
277 See, e.g., id. at 262–64 (discussing the Supreme Court’s reasons for continuing to follow a dualist approach in cases involving federal and state overlap).
278 See Stephan, supra note 16, at 203–05 (noting various efforts to delineate clear lines of jurisdictional authority in transnational antitrust enforcement).
279 See supra Part II.
280 See supra text accompanying notes 60–65.
DIALECTICAL REGULATION

desire to expand its goals and arguably its jurisdictional reach.

Purely voluntary interactions among regulatory entities across jurisdictional lines might therefore be seen as insufficiently forceful to produce a dialectical pattern of engagement. At a minimum, such engagement may be selective, such that sensitive cases and issues are avoided. Yet these may well be the cases in which dialectical regulation has its greatest capacity to drive innovation and integration, among other ends. On the other hand, a degree of choice may also help to encourage a dynamic pattern of regulatory engagement. Such choice may produce a greater willingness to engage in interaction instead of denying the presence of overlap or competing regulatory power, or seeking to define clear and exclusive lines of jurisdictional authority. An overlapping jurisdictional pattern deriving from the discretionary efforts of independent regulatory agencies to advance their respective mandates may therefore offer the best soil for the growth of dialectical engagement. At a minimum, a degree of voluntariness may help to obviate political resistance to regulatory dependence across jurisdictional lines.

A final precursor to a strong pattern of engagement across jurisdictional lines is a degree of functional thinking regarding the regulatory obligations of each institution. Each entity must avoid overly formalistic conceptions of the ends being pursued. In comparative law, functionalism encourages attention to respective nations’ relevant legal ends, rather than their characterizations of particular rules of law. The question is not whether a country has a consideration doctrine, but how it determines which private promises it will enforce through state-sponsored adjudication. Some similar mindset is necessary for the emergence of a regime of dialectical regulation. The extent of jurisdictional overlap is likely to be paltry given an overly formalist assessment of the relevant subject of regulation. To be more precise, the extent of overlap may not be that different. The extent to which such overlap is acknowledged and appreciated, however, will vary. With the broader potential scope of overlap arising from a functional analysis, opportunities for engagement will necessarily increase as well.

281 Cf. de Bûrca, supra note 13, at 827–28 (explaining that the open method of coordination model allowed member states operational discretion).


283 See Reitz, supra note 282, at 621; see also Arthur T. von Mehren, Civil-Law Analogues to Consideration: An Exercise in Comparative Analysis, 72 HARV. L. REV. 1009 (1959) (comparing French and German consideration doctrines through the type of problems the doctrine addresses and resolves).
B. Dependence and Independence in a Regulatory Dialectic

With the precursors to a dialectical pattern of engagement in mind, we can turn to the first of three substantive characteristics of such engagement, and hence correlates of its potential emergence. The most essential feature of a regulatory dialectic is the presence of a degree of both dependence and independence in the relevant relationship. We can begin with the element of dependence, arguably the most determinative feature in a pattern of dialectical regulation.

Dialectical regulation arises from the focused engagement of regulatory entities with one another. Yet engagement across jurisdictional lines—and even within a given system—is not the norm. Conventional accounts emphasize regulatory institutions' focus on their own interests, interest groups, and agendas. Whether one sees regulatory entities as responsive to public welfare or private interests, their focus is not ordinarily seen to be other regulatory institutions. Where it is, it is more likely to be seen as motivated by regulatory competition, than by a dynamic of engagement and interaction. Patterns of regulatory balkanization are the norm—in perception, and at least to some extent even in practice—rather than the exception.

For active and significant engagement to arise, some effective demand must be placed on participating regulatory institutions to pursue it. Such demand arises naturally where each relevant entity needs the other to achieve some part of what it must, or what it hopes to, accomplish. In the interaction of courts, I have pointed to the indirect pressures that international tribunals might place on domestic courts, through judgments imposed on their coordinate executive and legislative branches. Further, such tribunals may sometimes undermine the effect—even if not the formal decree—of domestic courts. A domestic judgment granting punitive damages, for example, or the rejection of liability of a governmental entity, would essentially be undone by even a collateral international award respectively denying or granting relief. In various ways, then, international tribunals may elicit the attention and engagement of domestic courts.

Analogous patterns of dependence exist in other circumstances of regulatory interaction as well. Financial market regulation is no exception. The SEC's desire to effectively regulate insider trading, even where practiced overseas, makes the SEC dependent on the cooperation of foreign

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284 See Ahdieh, supra note 22, at 2089–91, 2094–95; see also Karkkainen, supra note 12, at 217–18.
286 See Ahdieh, supra note 22, at 2102.
287 Id. at 2102–03.
regulators.\textsuperscript{288} Similarly, the SEC’s preservation of its mandate and its preeminent role in the New York financial markets require it to acknowledge and coordinate effectively with Eliot Spitzer.\textsuperscript{289} The SEC’s pursuit of its goals, in essence, depends on Spitzer’s cooperation.

While the latter examples invoke the vantage of the entity engaged in affirmative regulation, one can also understand patterns of regulatory dependence from the perspective of the non-regulating entity. In the presence of meaningful dependence, the ‘non-moving party’ of sorts can interfere with the ability of its regulatory counterpart to regulate effectively. In this view, dialectical regulation might be seen to arise from some capacity for “hold-up.”\textsuperscript{290} In such circumstances, one regulatory institution enjoys the capacity to stymie the other’s regulatory efforts.

However characterized, such dependence constitutes the most critical determinant of a dialectical regulatory regime. As a dynamic matter, regulatory interdependence is the essential driving force behind the active interaction of regulatory entities across jurisdictional lines. Given the aforementioned demands on agency action, a status quo of non-interaction is likely to persist absent some dependence. Dependence is also critical to an understanding of dialectical regulation as the most significant indicator of those circumstances in which it may arise. Dependence is the phenomenon conventionally lacking across jurisdictional lines. With its introduction, the potential for intersystemic regulation emerges; with its growing magnitude, we have the prospect of dialectical regulation.

As a corollary to the foregoing, independence may have its own, distinct role in the emergence of dialectical regulation. Absent some ability to act autonomously, a participating regulatory entity may simply be too weak to assert itself in any potential interaction.\textsuperscript{291} Yet such assertion goes to the heart of dialectical regulation and its beneficial results, including the potential for desirable innovation. The dialogue at the center of such interaction might be expected to descend to monologue, without some degree of autonomy or independence.

Minimally, such independence might mean that neither regulatory entity can silence the other, even where it can obviate the effect of its actions.\textsuperscript{292} In the strong case of dialectical regulation, however, regulatory

\textsuperscript{288} See supra text accompanying notes 55–61.
\textsuperscript{289} See supra notes 40–46 and accompanying text. As noted above, the federal power of preemption is not—in and of itself—sufficient to undermine such dependence. As evident in the failed efforts to preempt Spitzer’s enforcement efforts, even preemption has its limits. See Jones, supra note 28, at 115–16.
\textsuperscript{291} See Ahdieh, supra note 22, at 2089–90 (emphasizing the importance of autonomy). Conversely, of course, too much independence undermines the pattern of interaction as well. See Karkkainen, supra note 12, at 216.
\textsuperscript{292} See Schapiro, supra note 6, at 289 (emphasizing the symbolic importance of state enactments
independence ought to mean more. Each entity must enjoy some range of motion within its own domain. In the case of the SEC and Eliot Spitzer, beyond the ability of each to undermine the other, each also has the capacity to pursue its own goals independently.

Two additional points regarding dependence and independence deserve note. It is important, to begin, that the relevant power of each entity not be overly indirect or diffuse in nature. While social sanction may be an effective regulatory tool, the threat of vague and broad reputational harm may not suffice to produce an active pattern of dialectical engagement. Rather, more focused or targeted social impacts, if not more direct influences, are preferable. In the case of the SEC and Spitzer, the threat was not of some generalized harm to the SEC’s regulatory reputation, but of direct interference with its mission.

Additionally, it is important to highlight that relevant regulatory power need not be shared equally. It is unnecessary for dialectical regulation that the relationship across regulatory systems be characterized by complete parity. While the latter might make for a particularly strong and fruitful dialectic, as suggested by our typology of cross-jurisdictional interactions, it is likely to be quite rare, and is not essential to the emergence or success of such a pattern. Rather, a dialectical pattern of engagement can arise out of imperfectly balanced dependence and independence, so long as there is some proportion of each.

C. Perspective and Dialectics

For dialectical regulation to contribute along the lines suggested in Part III, a degree of both alignment and divergence in the relevant entities’ perspectives is also needed. To begin with, some alignment of perspectives is essential. Participating regulatory institutions must minimally share some commonality in their goals. A common commitment to the effective regulation of market fraud and the achievement of “efficient” financial markets, for example, is likely a prerequisite to dialectical regulation in the securities markets. Absent such shared goals, it is unclear what distinct market regulators would even have to talk about.

Beyond goals, some alignment in values may also be necessary. Absent shared values, political barriers to engagement may be difficult to overcome. Such alignment in values does not require interacting regulators to be culturally similar. In that case, dialectical regulation would be an
exceedingly rare phenomenon. Rather, there is need for some commonality in foundational principles. A shared sense of the social utility of efficiency, or perhaps a normative condemnation of fraud and misrepresentation, would be examples in financial market regulation. However general in nature, such shared values may serve to obviate potential resistance to active regulatory engagement and coordination.

With reference to the benefits of dialectical regulation enumerated above, the importance of some alignment in perspectives is readily apparent. Minimally, any prospect of integration must depend on aligned goals and values. It is unclear what integration would mean, absent at least some correlation of goals. Even shared values may be important, however, given the likely resistance to integration absent some common framework of values. Practically speaking, the Multijurisdictional Disclosure System might be feasible between the United States and Canada, but perhaps not more universally. A degree of alignment in perspective may be similarly important in dialectical regulation’s reduction of regulatory inertia. The latter function presumes, in some sense, pursuit of a common goal. Thus, were a particular state attorney general in pursuit of dramatically different ends than the SEC, her interventions would not likely trigger engagement with the SEC.

Nevertheless, much of the utility of dialectical regulation is also lost absent a countervailing divergence in perspective. This is most apparent with reference to the potential for innovation. If perspectives are too closely aligned, the capacity of dialectical regulation to induce innovation is necessarily limited. Innovation depends on distinctly situated regulators offering their distinct contributions in the collective development of regulatory regimes. The source of Eliot Spitzer’s impact is his distinct vantage. Some part of the acknowledgement of identity may also be tied to a divergence in perspective, given that the latter may explain the divergent components of identity.

Divergent regulatory perspectives may arise from any number of sources. Most generally, they derive from the distinct sources of power out of which relevant regulatory entities emerge. Given their differential origins, some distinct set of goals and values is likely to be embraced by each entity, which in turn shapes their perspectives. Aspects of institutional design may also contribute to diversity in perspective. In the judicial context, I have identified distinct mechanisms of appointment and rules of

296 See Ahdieh, supra note 22, at 2095–97; see also Esty, supra note 6, at 1558 (“Policies constructed on the basis of multiple perspectives permit decisionmakers to triangulate on the ‘truth.’”).

297 On the other hand, the fail-safe functions of dialectical regulation (and hence the capacity to overcome inertia), as well as the pursuit of integration, may be better served by minimal divergence.

298 See supra note 275 and accompanying text.

299 See Karkkainen, supra note 12, at 218.
tenure, varied compositions of the bench, and divergent standards of review as potential sources of diverse institutional perspectives. In the financial markets, Eliot Spitzer's elected position necessarily offers him a distinct view, favoring different approaches than the SEC. European Union regulators may similarly enjoy distinct perspectives, arising from their distinct vantage point; even the geographic reach of an agency may thus play a role in shaping its perspective and approach.

D. The Density of Dialectical Regulation

Beyond a mix of dependence and independence, and of aligned and divergent perspectives, the third critical characteristic and predicate of a dialectical pattern of intersystemic regulatory engagement is some context of repeat interaction. Dialectical regulation thus requires a pattern of interaction, rather than episodic incidents of regulatory overlap, dependence, and engagement. While random and intermittent regulatory interactions across jurisdictional lines are likely quite common, such sporadic interactions are unlikely to produce truly dialectical regulation. Whatever utility it may have, such intermittent engagement is unlikely to advance the ends outlined above. Rather, those goals require a certain density of interaction. This is most apparent in the pursuit of innovation and integration.

Starting with the former, it is largely the need to interact recurrently with one's regulatory counterpart that demands creative thinking and resulting innovation. In essence, where one regulatory body knows that some aspect of its efforts will consistently be tested for conformance with the perspective of a counterpart, efforts to accommodate the latter are more likely. While sporadic interactions might potentially produce the same result, one would expect the occasional need for accommodation to be less likely to prompt adjustments in prevailing norms. If I am more likely to pay heed to an entity with which I will recurrently engage, I may also be more likely to actually learn from it. Resulting innovations may also, as a result, be more than skin-deep.

A context of recurrent interaction may be similarly essential to the goal of integration. The latter is likely to depend on some context of familiarity

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300 See Ahdieh, supra note 22, at 2109–10.
301 Relative proximity to one interest group versus another may also impact an agency's perspective. See Jones, supra note 20, at 636–37.
302 See Schapiro, supra note 6, at 252, 288. But see Buzbee, Contextual, supra note 24, at 110–11 (suggesting limits of geography).
303 See generally Ahdieh, supra note 22, at 2097–101.
304 See id. at 2098.
305 See id. at 2100 (discussing the benefit of precedent arising from repeat plays).
306 See id. at 2097–101.
307 See id. at 2098–99.
and trust. The integration of the MJDS might be seen to derive from a history of interaction among United States and Canadian securities market regulators.\textsuperscript{308} Further, since integration—at least of the variety I intend—is incremental rather than wholesale in nature, repeat interactions are its essential medium.

Two aspects of "density" suggest themselves. Most obviously, it bespeaks a recurrence or continuity of engagement.\textsuperscript{309} In essence, a given issue needs to arise with some regularity. It is the SEC's recurrent need to seek discovery and take other steps to enforce United States insider trading rules abroad that motivates its active engagement with foreign regulators. Any single case might be abandoned or handled with more onerous procedures, but a succession of cases necessitates greater cooperation and systematic interaction.\textsuperscript{310} Where a particular issue is likely to be a recurrent concern, then, the potential for dialectical regulation is greater.\textsuperscript{311}

A further dimension of the relevant density of interaction might be seen in the SEC's engagement with Eliot Spitzer. While recurrent presentation of the same issue can be important, a certain multiplicity of distinct and independent ties may also be significant. In essence, multiple nodes of interaction between the relevant regulators—and resulting means of influence between them—may further advance a pattern of dialectical regulation. In the case of Spitzer, the SEC's incentives to engage actively may not have been primarily about the potential recurrence of his claims against research analysts or mutual fund management companies. Given Spitzer's preference for global settlements,\textsuperscript{312} the latter may have been especially unlikely. Rather, the SEC's engagement was more likely a result of the ability of the New York Attorney General to impact any number of aspects of financial market regulation, given the concentration of those markets in New York.

At a minimum, then, the existence of multiple nodes of potential interaction and influence may help to encourage more active regulatory engagement. The presence of multiple nodes of interaction and influence may also be important for other reasons. Most significantly, it may permit

\textsuperscript{309} See Ahdieh, supra note 22, at 2098–99.
\textsuperscript{310} See supra text accompanying notes 66–71.
\textsuperscript{311} To related effect, a further potential precursor to an active dynamic of intersystemic regulation may be a pattern of broad regulatory access. At the most basic level, one might think of this as an issue of standing. Cf. Schapiro, supra note 6, at 302–06 (discussing mechanisms for state vindication of federal rights). Thus, opportunities for engagement and interaction will necessarily be limited, insofar as individuals and entities are unable to assert their interest in issues across jurisdictional lines. This does not mean that overlapping regulation will not occur. It may, however, be less active in character. Ultimately, then, access may have an important impact on the density of interactions at work.
\textsuperscript{312} See supra text accompanying note 34.
trade-offs between participating regulatory bodies.\textsuperscript{313} In such circumstances, collective concessions need not be secured within any single regulatory sphere, but may instead cut across distinct subject-matter areas.\textsuperscript{314} The potential for effective concessions—and hence agreement—may therefore be exponentially greater. Thus, in a dialectical pattern of engagement across jurisdictional lines, multiple avenues of influence allow for a more productive and cooperative pattern of engagement.

Both recurrence of a given issue and multiple nodes of interaction, then, may help to encourage interaction and permit valuable trade-offs, and thereby further the goals of dialectical regulation. More fundamentally, recurrence/continuity and multiple nodes of interaction are arguably the heart of a pattern of dialectical regulation. Such a regulatory dynamic, at its most basic level, rests on an iterative pattern of engagement among relevant players.\textsuperscript{315} In slightly different terms, dialectical regulation involves a repeat-player dynamic of sorts.\textsuperscript{316} In such games, the incentives to cooperate are different in kind than single-shot interactions.\textsuperscript{317} Because I know we will meet again, the utility of defection—of conflict over coordination—decreases dramatically. Regulatory coordination, in this sense, becomes possible on account of recurrence and multiple nodes of interaction.

One might also think of the pattern of dialectical regulation, and particularly the role of recurrence and multiple nodes of interaction, within alternative conceptions of trust and knowledge. To begin, with repeat interactions, one might expect the emergence of some framework of trust.\textsuperscript{318} This has both a backward- and a forward-looking quality to it. First, past experience may produce trust where prior interactions evince reliability, credibility, veracity, and the like. In addition, however, the

\textsuperscript{313} See Joel F. Handler, \textit{Dependent People, The State, and the Modern/Postmodern Search for the Dialogic Community}, 35 \textit{UCLA L. Rev.} 999, 1032 (1988). By way of example, the SEC and Eliot Spitzer engage one another not only on the regulation of research analysts, mutual funds, and insurance companies, but on a wide array of other subjects as well. See, \textit{e.g.}, Jones, supra note 28, at 117. Compromise over any single issue within their shared purview may consequently be facilitated by simultaneous compromise on other issues as well.

\textsuperscript{314} By way of analogy, one might note the occasional insistence of participants in WTO negotiations on broad negotiating agendas. See Geoff Winestock, \textit{EU, U.S. Squabble Over Agenda for WTO: Europe Wants Broad Discussions at Millennium Round}, \textit{WALL ST. J. EUR.}, Oct. 25, 1999, at 4. In essence, the latter permit sectoral trade-offs of the variety suggested above.

\textsuperscript{315} Cf. de Bürca, supra note 13, at 824. It is notable, in this vein, that students of the "new governance," including particularly those writing on environmental regulation, have highlighted the potential for greater institutionalization of non-traditional regulatory interactions. See, \textit{e.g.}, Karkkainen, supra note 12, at 217-18; Scott & Holder, supra note 13, at 28-29 (discussing the European Common Implementation Strategy, which has been developed to coordinate European Union member states' implementation of river basin management devices).

\textsuperscript{316} See Ahdieh, supra note 22, at 2099.

\textsuperscript{317} See JAMES D. MORROW, \textit{GAME THEORY FOR POLITICAL SCIENTISTS} 260-61 (1994).

\textsuperscript{318} Cf. id. at 291 (explaining that repeat players are constrained by their own expectations of the other party's behavior).
expectation of future interaction may encourage reliance on that past.\textsuperscript{319} The gains from repeat plays can also be understood within a framework of enhanced knowledge. Where the SEC and Spitzer, or the SEC and Swiss bank regulators, the IASB, or IOSCO, have recurrent interactions, they come to understand each other better. As such, they can coordinate their regulatory efforts in a more effective fashion. Density of regulatory interactions is not the only way to achieve such knowledge, but it is surely an important way to do so.

Ultimately, one might think about patterns of dense cross-jurisdictional interaction between regulatory institutions as grounded in a "systems analysis" of sorts. Such analysis can be understood as follows: "To analyze a system is to break it down into its component parts, and to examine how those parts relate to one another and contribute to the functioning of the whole. The emphasis in systems analysis is on relationships rather than on the component parts themselves."\textsuperscript{320} In this spirit, the recurrent and potential future interactions of the SEC and Eliot Spitzer have essentially forced the SEC to conceive of the regulation of the New York financial markets in distinct terms. Rather than construct a model of SEC regulation and limited state regulation, the SEC has been forced to think instead of a common body of regulation, derived out of the relationship of distinct regulatory entities. To similar effect is the rise of the cross-listed multinational corporation. Such an entity operates within a different frame of analysis than existing regulatory institutions of relevance. Its effective regulation requires agencies with limited jurisdictional reach to examine the component parts at work, to appreciate their relationship, and to design mechanisms of cooperation, coordination, and co-regulation that encompass the true system at work.\textsuperscript{321}

E. Exiting the Dialectic

A final potential feature that can be expected to help facilitate the emergence of dialectical regulation is the presence of some means of "exit."\textsuperscript{322} Is there some mechanism by which participants in the relevant


\textsuperscript{321} In some sense, this analysis can be seen to echo Paul Berman's cosmopolitan pluralism. See generally Berman, Globalization, supra note 87, at 490–96. Rather than thinking of jurisdiction within bounded lines, modern regulation requires a more comprehensive conception, in which jurisdiction is derived from a variety of factors. Further, it must be a more fact-specific analysis, geared to the realities of an individual's or entity's character, rather than abstract theory. Cf. id. at 519. This might be said to more effectively capture the true identities at work, in line with the initial benefit of intersystemic regulation suggested above. By proceeding in terms of a cohesive, coherent, and collective system of regulation, dialectical regulation may more effectively capture who or what the subjects of regulation really are.

dialectical regime can withdraw from the interaction if political, constitutional, economic, or other pressures so demand? If, for example, dialectical regulation demands concessions that do not merely press the bounds of existing usages or encourage limited innovation or integration, but instead demand radical and rapid transition, is there a way for an agency to exit the regulatory dialectic?

Perhaps most dramatically, one might think of the capacity for preemption by the SEC, or more definitively by federal legislation, as such an escape valve in the interaction of the SEC and Eliot Spitzer. More mildly, the United States could elect to withdraw from the MJDS if relevant changes in Canada so demanded. Even in the enforcement of insider trading rules, the SEC might fall back on more selective and labor-intensive enforcement mechanisms if more comprehensive and systematic engagement proved undesirable.

Such a capacity for exit may be important in progressive expansions in the scope of regulatory interaction. In essence, each successive step may be more palatable if it can—in extremis—be undone. Yet the potential for exit may be even more important at the very outset, where there is little context of interaction against which any acknowledgment, let alone embrace, of regulatory dependence might be measured. At this early stage, unlike in subsequent expansions of the scope of interaction, the relative unknowns are at their high point. For this reason, institutional designs permitting some means of exit may be especially important for the emergence of dialectical regulation.

VI. CONCLUSION

Through the 20th century, and continuing into the 21st century, the collective mass of transnational, national, and sub-national regulation has grown exponentially. The universe of regulators responsible for its articulation, implementation, and enforcement has similarly expanded. Occasions for interaction among such regulators, finally, are also increasing, as the delineation of clear lines of jurisdiction and authority—whether across domestic or transnational boundaries—becomes an increasingly futile exercise. Collectively, these trends demand a better appreciation of the nature and utility of regulatory engagement across jurisdictional lines. Notwithstanding strongly felt inclinations toward exclusive allocations of authority among regulatory agents, an increasingly

324 See Helfer, supra note 322, at 1643.
325 See id. at 1642. Naturally, the availability of exit also may create opportunities for abuse. This may be the price to be paid for the heightened regulatory dependence of dialectical regulation.
complex world may require increasingly complex regulatory regimes.\textsuperscript{326}

Jurisdictional overlap and regulatory dependence, and the interactive regulatory regimes that naturally follow from them, may offer a variety of benefits, including better acknowledging the identity of regulated subjects, overcoming regulatory inertia, encouraging innovation, and facilitating integration. This is not to suggest the invariable utility of such patterns of regulatory engagement. Depending on a variety of factors, distinct regulatory relationships across jurisdictional lines might be preferable. At least in some cases, however, circumstances will favor engaged patterns of regulatory interaction, with benefits along the aforementioned lines.

Naturally, a fuller understanding of intersystemic regulatory engagement will require closer attention to particular regulatory modalities than I offer herein. Microanalysis of the various incidents and institutions of intersystemic regulation is therefore likely to be of great importance. In particular, the design of regulatory regimes would benefit significantly from greater attention to the features of institutional design or extrinsic circumstance that favor one pattern or another of cross-jurisdictional regulatory interaction. The foregoing, however, highlights the modern reality of some pattern of overlapping and dependent regulatory interaction, beyond conventional, autarkic analyses of agency behavior, and offers a potential framework for study of the nature and character of such engagement.

Ultimately, one might imagine a version—or perhaps, given the range of regulatory modalities at work, several versions—of a European-style "open method of coordination" applicable in the face of meaningful jurisdictional overlap and regulatory dependence. As articulated with some degree of formalization in Europe, such a system might offer certain flexible channels for regulatory interaction across jurisdictional lines, advancing the potential benefits of such engagement while also protecting against its shortcomings. While any such systematization will necessarily require analysis well beyond the present work, the foregoing may at least suggest the outlines of a new synthesis of interdependent regulatory interaction across the globe today.

\textsuperscript{326} See Scott & Trubek, \textit{supra} note 262, at 6–7.