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## Redundant Public-Private Enforcement

Zachary D. Clopton

*Cornell Law School*, [zdc6@cornell.edu](mailto:zdc6@cornell.edu)

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## ARTICLES

### Redundant Public-Private Enforcement

*Zachary D. Clopton\**

*Redundancy is a four-letter word. According to courts and scholars, redundant litigation is costly, unfair, and confounding. Modern civil procedure has a (nearly) maximalist preference for centralization, and various rules seek to limit duplicative suits within and across court systems. This seemingly dominant view stands in marked contrast to the reality of the modern regulatory state. Redundant public-private enforcement, in which public and private actors have overlapping authority to enforce the law, is ubiquitous. Redundant enforcement also is noticeably underrepresented in the substantial literature on private and public enforcement, which typically treats government agencies and private attorneys general as substitutes rather than complements.*

*This Article seeks to fill these gaps. It begins with a survey of the myriad forms of redundant enforcement in U.S. law, and then turns to a defense of redundant public-private enforcement. Scholars of engineering and public administration have built up a powerful literature on the potential uses of*

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\* Assistant Professor of Law, Cornell Law School. I am grateful to Daniel Abebe, Janet Alexander, Douglas Baird, Stephen Burbank, Anthony Casey, Josh Chafetz, Adam Chilton, Kevin Clermont, Scott Dodson, William Hubbard, Aziz Hug, Lee Fennell, Todd Henderson, Margaret Lemos, Richard Marcus, Jonathan Masur, Jennifer Nou, Jeff Rachlinski, Judith Resnik, Kevin Stack, Nicholas Stephanopoulos, Lior Strahilevitz, and Tobias Barrington Wolff, as well as the participants in the Civil Procedure Workshop, the New Voices in Civil Justice Workshop, and the Junior Federal Courts Workshop. All errors are mine.

*redundancy, and this Article applies those insights to overlapping public and private enforcement in U.S. law. Drawing on those literatures, this Article derives principles of redundant enforcement that account for the diversity of agents and the potential for strategic behavior. It argues that redundancy may be an effective response to errors, resource constraints, information problems, and agency costs, if redundant-enforcement regimes harness multiple diverse agents and are tailored to the relevant regulatory environment. Specifically, if the lawmaker worries that public or private agents are missing good cases, redundant authority may help to reduce errors, increase resources, aggregate information, and improve monitoring—though permitting duplicative suits may undercut these gains. Meanwhile, if the lawmaker is concerned about under-enforcing settlements or judgments, symmetrically non-preclusive redundant litigation may be a valuable tool—though damages should offset to avoid multiple punishments, and procedural rules should maintain incentives and allocate cases.*

INTRODUCTION.....	287
I. EXISTING REDUNDANT PUBLIC-PRIVATE ENFORCEMENT....	291
A. <i>Redundant Enforcement Regimes</i> .....	292
1. “Private” Claims.....	293
2. “Public” Claims .....	294
3. Hybrid Regimes.....	295
B. <i>Managing Redundancy</i> .....	299
1. Preclusion .....	300
2. Damages .....	303
3. Claims Processing .....	304
II. DESIGNING REDUNDANT PUBLIC-PRIVATE ENFORCEMENT .	306
A. <i>Redundancy Theory</i> .....	307
B. <i>Redundant Authority and Case Selection</i> .....	314
C. <i>Redundant Litigation and Case Outcomes</i> .....	318
1. Preclusion: Redundant Authority v. Redundant Litigation.....	320
2. Damages: Multiple Punishments and Incentives.....	325
3. Claims Processing: Order and Timing.....	328
CONCLUSION.....	331

**REDUNDANT PUBLIC-PRIVATE ENFORCEMENT**

Chief Justice Roberts: “[W]hat prevents attorneys general from around the country sitting back and waiting until . . . the plaintiffs’ class prevails, taking the same complaint, maybe even hiring the same lawyers, to go and say, ‘Well, now we are going to bring our *parens patriae* action, we know how the trial is going to work out, or we know what the settlement is going to look like, and we are going to get the same amount of money for the State? . . .’

[T]he answer is that there is nothing to prevent fifty attorneys general—fifty-one, from saying, ‘Every time there is a successful class action as to which somebody in my State purchased one of the items, we are going to file a *parens patriae* action, the complaint is going to look an awful lot like the class action complaint, and we want our money? . . .’

[Y]ou can’t provide any reason why they wouldn’t do so and, presumably, would start doing so with greater frequency if you prevail in this case.

~Oral Argument in *Mississippi ex rel. Hood v. AU Optronics Corporation*.<sup>1</sup>

## INTRODUCTION

In *Mississippi ex rel. Hood*, the Attorney General of Mississippi filed a price-fixing suit on behalf of Mississippi residents against the manufacturers, marketers, and distributors of liquid crystal displays (LCD).<sup>2</sup> The Supreme Court unanimously held that the state’s lawsuit on behalf of residents could not be consolidated with private class actions adjudicating common claims.<sup>3</sup> Though this decision addressed the meaning of “mass action” in the Class Action Fairness Act,<sup>4</sup> lurking behind that definitional question was a concern about duplicative public-private litigation. Could the state bring claims on behalf of residents when overlapping claims were maintained in separate, private class actions? Permitting the state to sue separately could allow state governments to file lawsuits duplicating private class actions, extorting damages from defendants while free-riding on the efforts of private attorneys.

The Chief Justice’s concerns about follow-on government lawsuits recall the frequent criticism of private class actions trailing government investigations—so called coattail, tagalong, or piggyback class actions.<sup>5</sup> Professor Coffee, for example, colorfully exhorted the

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1. Transcript of Oral Argument at 18–19, 22, 134 S. Ct. 736 (2014) (No. 12-1036).

2. *Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S.Ct. 736, 736 (2014); *Miss. ex rel. Hood v. AU Optronics Corp.*, 701 F.3d 796 (5th Cir. 2012).

3. *Hood*, 134 S. Ct. at 745–46.

4. See Class Action Fairness Act, 28 U.S.C. § 1332(d)(11)(B)(i) (2012) (defining “mass action” as “any civil action . . . in which monetary relief claims of 100 or more persons . . .”).

5. E.g., Jaime Dodge, *Privatizing Mass Settlement*, 90 NOTRE DAME L. REV. 335, 375 (2014); Howard M. Erichson, *Coattail Class Actions: Reflections on Microsoft, Tobacco, and the Mixing of Public and Private Lawyering in Mass Litigation*, 34 U.C. DAVIS L. REV. 1, 2 (2000); Myriam Gilles

“spectacle, one resembling the Oklahoma land rush, in which the filing of the public agency’s action serves as the starting gun for a race between private attorneys, all seeking to claim the prize of lucrative class action settlements, which public law enforcement has gratuitously presented them.”<sup>6</sup> And Professor Rubenstein has remarked that coattail class counsel “provides no independent search skills, no special litigation savvy, and no nonpoliticized incentives. She simply piles on and runs up the tab.”<sup>7</sup>

Criticism of redundant enforcement is equal opportunity. Opponents of coattail class actions often prefer government enforcement to private suits. As Professor Ratliff quipped “[w]hy pay for a ‘private attorney general’ when there is a public attorney general who works for free?”<sup>8</sup> Others worry about government enforcement. The Chamber of Commerce, no friend to the plaintiffs’ bar, has championed environmental citizen suits *over* EPA intervention.<sup>9</sup> Then-Attorney General, now-Judge, William Pryor described “multigovernment litigation” as “the land of public corruption, constitutional subversion, and legalized antitrust conspiracies.”<sup>10</sup> And Chief Justice Roberts worried aloud that government attorneys would run up the tab against class-action defendants following the *Mississippi* decision.<sup>11</sup>

More broadly, the mere mention of duplication is met with resistance across a range of procedural contexts.<sup>12</sup> Modern civil

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& Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 156 (2006).

6. John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215, 228 (1983).

7. William B. Rubenstein, *On What a “Private Attorney General” Is—And Why It Matters*, 57 VAND. L. REV. 2129, 2151 (2004).

8. Jack Ratliff, *Parens Patriae: An Overview*, 74 TUL. L. REV. 1847, 1849 (2000).

9. See Stephen M. Johnson, *Sue and Settle: Demonizing the Environmental Citizen Suit*, 37 SEATTLE U. L. REV. 891, 906 (2014). For a related argument with respect to civil-rights enforcement, see Michael Selmi, *Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 UCLA L. REV. 1401, 1456 (1998).

10. William H. Pryor, Jr., *A Comparison of Abuses and Reforms of Class Actions and Multigovernment Lawsuits*, 74 TUL. L. REV. 1885, 1909 (2000).

11. Transcript of Oral Argument, *supra* note 1, at 18–19.

12. See, e.g., FLEMING JAMES, JR. & GEOFFREY C. HAZARD, JR., CIVIL PROCEDURE 582 (A. James Casner et al. eds., 3d ed. 1985) (“Failure [to join claims] has the consequences of multiplying and prolonging litigation, multiplying private and public legal costs, and bringing the system of justice into unnecessary disrepute.”); Richard Freer, *Avoiding Duplicative Litigation: Rethinking Plaintiff Autonomy and the Court’s Role in Defining the Litigative Unit*, 50 U. PITT. L. REV. 809, 811–12 (1989) (collecting sources); F. Andrew Hessick, *Doctrinal Redundancies*, ALA. L. REV. (forthcoming) (collecting sources); Alexandra D. Lahav, *Recovering the Social Value of Jurisdictional Redundancy*, 82 TUL. L. REV. 2369, 2389 n.83–88 (2008) (collecting sources); James E. Pfander, *Protective Jurisdiction, Aggregate Litigation, and the Limits of Article III*, 95 CAL. L. REV. 1423, 1461 (2007) (“Congress enacted CAFA in part because state court class action practices unfairly burden corporate defendants with overlapping and duplicative litigation.”).

procedure evinces a “maximalist” preference against redundancy;<sup>13</sup> the American Law Institute, in its measured way, has sought to increase opportunities for centralization in settlement and litigation;<sup>14</sup> and Professor Redish, less measuredly, has called for “zero tolerance” of duplicative litigation.<sup>15</sup>

As a general matter, these critics are correct. Duplication is costly and unfair, and we should worry that unjustified redundancy is the result of inattention or worse.<sup>16</sup> Accepting this conclusion, however, does not mean that redundancy is never justified. Scholars of engineering and public administration have built up a powerful literature about the potential uses of redundancy,<sup>17</sup> and this Article applies those insights to overlapping public and private enforcement in U.S. law.<sup>18</sup> This analysis thus rejects the use “redundant” as a rhetorical cudgel and invites those scholars and policymakers who deploy that label to engage in a more productive discussion of when and how redundancy can serve law’s enforcement goals.<sup>19</sup>

The focus of this Article is what I call “redundant public-private enforcement.” Redundant public-private enforcement describes legal regimes in which public and private agents may seek overlapping

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13. See Lahav, *supra* note 12, at 2382; Richard L. Marcus, *Cure-All for an Era of Dispersed Litigation? Toward a Maximalist Use of the Multidistrict Litigation Panel’s Transfer Power*, 82 TUL. L. REV. 2245, 2249–50 (2008); Judith Resnik, *From “Cases” to “Litigation,”* 54 LAW & CONTEMP. PROBS. 5, 19–21 (1991).

14. See, e.g., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION §§ 1.02, 2.02, 2.08, 2.12 (AM. LAW INST. 2010).

15. Martin H. Redish, *Intersystemic Redundancy and Federal Court Power: Proposing a Zero Tolerance Solution to the Duplicative Litigation Problem*, 75 NOTRE DAME L. REV. 1347, 1349 (2000). When redundant litigation creates a litigation option for some plaintiffs, as it seems to do in *Mississippi*, courts and scholars are particularly wary. See Zachary D. Clopton, *Transnational Class Actions in the Shadow of Preclusion*, 90 IND. L. J. 1387, 1396 n.5 (2015) (collecting sources and decisions denying class certification on this basis).

16. Public choice may explain some of the existing redundant-enforcement regimes. See, e.g., DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 1 (1991). This Article is indifferent to the causes of redundancy. Instead, the goal is to understand when and how redundancy can be a valuable legislative strategy.

17. See *infra* Section III.A (collecting and discussing relevant literatures).

18. See *infra* Part I (surveying areas of law). As noted below, occasionally legal scholars have discussed redundancy with respect to specific areas of law or to questions unrelated to enforcement. See *infra* notes 67–74.

19. This productive discussion is particularly significant in a legal environment in which litigation plays such a central role in enforcement. See generally ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 103 (2003); Stephen B. Burbank, Sean Farhang & Herbert M. Kritzer, *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 662 (2013); J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1176–1177 (2012).

remedies for the same conduct on substantially similar theories.<sup>20</sup> Importantly for the normative claims to follow, and in contrast to critics of redundancy, I further divide redundant enforcement into “redundant authority” and “redundant litigation.” Redundant authority describes the ability of multiple agents to bring separate enforcement actions that are mutually preclusive—public and private actors may have overlapping causes of action, but private-enforcement suits preclude future governmental litigation on the same claims, and vice versa. As argued below, redundant authority across diverse agents may respond to errors, resource constraints, information problems, or agency costs at the level of case selection. Redundant public-private authority should mean that fewer good cases are missed, and claims-processing rules should allocate cases in response to particular enforcement pathologies.

Redundant enforcement also may take the form of “redundant litigation.” Redundant litigation describes regimes in which public and private agents may file overlapping lawsuits, and the resolution of one suit does not preclude adjudication of the other.<sup>21</sup> Redundant litigation may respond to some of the same problems as redundant authority, but it targets case outcomes—undervalued settlements or judgments resulting from agent (under-) performance. This Article explains that redundant litigation may cure existing under-enforcement and deter future under-enforcement by allowing a second agent to fill the remedial gap, again depending on relevant differences between public and private enforcers. That said, redundant litigation by itself risks over-enforcement in the form of multiple punishments. Thus, legislatures adopting redundant litigation should rely on offsets to mitigate over-enforcement and claims-processing rules to reduce waste.<sup>22</sup> Moreover, critics of redundancy often are not clear on whether they are objecting to redundant-authority or redundant-litigation approaches. This Article seeks to clarify those definitions and articulate the circumstances that may justify each design.

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20. For further elaboration of what constitutes “redundant enforcement,” see *infra* notes 30, 41, 54.

21. Scholars typically treat public and private enforcers as substitutes. See *infra* notes 30, 41. As noted above, in redundant authority, agents have complementary authority, though they are substitutes in practice. In redundant litigation, however, agents are complementary in authority and in the courtroom.

22. Though not the subject of this paper, the distinction between redundant authority and redundant litigation also has consequences for the procedural protections necessary in each suit. Compare Prentiss Cox, *Public Enforcement Compensation and Private Rights*, MINN L. REV. (forthcoming) (debating protections necessary for individuals represented by government suits), with Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486, 507–10 (2012) (same).

The natural place for this defense of redundant public-private enforcement is the substantial and growing literature comparing public and private enforcement of law.<sup>23</sup> But this literature routinely fails to grapple with redundant enforcement. The typical article in this vein totes up the relative advantages and disadvantages of private and public enforcement. These articles treat public and private enforcers as engaged in a zero-sum contest for enforcement jurisdiction. These enforcement scholars rightly observe that public and private enforcers differ on meaningful dimensions. Indeed, these differences are necessary to allow redundancy to work in the ways described below. But the conclusions of these scholars, who assume that public and private enforcement are substitutes, miss both the descriptive reality and potential normative gains of complementary public and private enforcement. Filling these gaps, Part I documents the widespread use of redundant public-private enforcement in current law, and Part II draws on the engineering and political-science literatures to offer a defense of that practice and a transsubstantive template for its use. Redundancy may not be the right fit for every situation, but it would be misguided to reject it without a second thought.

## I. EXISTING REDUNDANT PUBLIC-PRIVATE ENFORCEMENT

Redundant public-private enforcement is nothing new. The private enforcement of public law has been a central regulatory strategy for decades,<sup>24</sup> with historical antecedents tracing back centuries.<sup>25</sup> Meanwhile, for hundreds of years, governments have sued to vindicate seemingly private claims of their citizens,<sup>26</sup> culminating in modern litigation such as the consumer-protection suit that was the subject of *Mississippi ex rel. Hood*.<sup>27</sup> In many of these cases, public and private suits overlap. And yet, as noted above, the enforcement literature often ignores redundant public-private enforcement.<sup>28</sup>

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23. See *infra* notes 30, 41 (collecting sources on public and private enforcement).

24. See, e.g., Burbank et al., *supra* note 19, at 645; Glover, *supra* note 19, at 1146.

25. See, e.g., Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275, 290–92 (1989); Rubenstein, *supra* note 7, at 2140 (quoting an email from Professor Steven Yeazell for the proposition that “private litigants for a millennium have sought prospective, specific remedies: replevin and ejectment were probably the two most commonly used remedies for 800 years, as long as land and livestock were major components of the economy.”).

26. See *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 257 (1972) (discussing the kingly roots of *parens patriae*).

27. See *supra* notes 1–3 and accompanying text (discussing *Hood*).

28. See *infra* notes 30, 41 (collecting sources). Not all literature on public-private enforcement ignores overlapping enforcement completely. Burbank, Farhang, and Kritzer’s study



This Part begins by surveying redundant public-private enforcement—i.e., enforcement schemes in which public and private actors may maintain separate but overlapping suits seeking the same remedies for the same conduct.<sup>29</sup> This Part then turns to those procedural and remedial rules that govern when overlapping public-private claims are maintained, managed, and extinguished. Significantly, there is no universal template for rules on preclusion, damages, and claims processing that modulate public-private enforcement.

Note that this discussion does not endeavor to identify every extant enforcement regime and its associated procedural and remedial rules. The minimal goal here is to contextualize the analysis of redundant enforcement in a legal environment in which redundancy is common, transsubstantive, and varied in its approaches. Thus, those scholars who fail to engage with the reality of redundant enforcement miss an important opportunity to shape policy that is (or at least should be) subject to debate.

### *A. Redundant Enforcement Regimes*

This Section describes a range of examples of public-private enforcement, loosely grouped into three categories: (1) “private” claims; (2) “public” claims; and (3) hybrid regimes. These categories are blurry, but crisp divisions are not necessary here. The purpose of these divisions is to draw a general outline of the public-private enforcement landscape.

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expressly identified private, public, and hybrid models. *See* Burbank et al., *supra* note 19, at 688. And yet, even when acknowledging this third option, they addressed the advantages and disadvantages of private enforcement without expressly discussing redundant litigation. *Id.* at 662, 667. Farhang and Yaver’s careful study of fragmented enforcement acknowledges overlapping public-private enforcement, but they do not differentiate between redundant authority and redundant litigation, nor do they breakout public-private overlap from public-public overlap. *See* Sean Farhang & Miranda Yaver, *Divided Government and the Fragmentation of American Law*, AM. J. POL. SCI. (forthcoming).

29. For example, private suits for compensatory damages would be redundant with public suits aggregating all compensable injuries among state residents, but would not be redundant with public suits seeking only reimbursement of state Medicaid funds. Without question, the scope of “redundancy” theory will depend of the level of identity required between suits. The analysis here is functionalist—focusing on the lawmaker’s enforcement goals and the incentives and effects for parties—though an institutional designer could limit redundant enforcement to formally defined redundant regimes. *See infra* note 45 (discussing statutory preclusion); *infra* notes 122–123, 125 and accompanying text (discussing offsets and remedial labels).

## 1. “Private” Claims

On one end of the spectrum are cases in which government actors bring claims that seem to address private rights.<sup>30</sup> I refer here to rights for which private parties have a remedy in court, so public enforcement necessarily has the capacity to overlap with private suits in these cases.

Many examples of the public enforcement of private claims fall under the *parens patriae* label.<sup>31</sup> *Parens patriae* refers to the common-law right of a sovereign to bring suit on behalf of its citizens, though the term has been used to describe a larger set of governmental actions that seek to vindicate private rights.<sup>32</sup> *Parens patriae* actions address a wide range of issues. Notable cases have involved claims related to asbestos,<sup>33</sup> tobacco,<sup>34</sup> and firearms,<sup>35</sup> and lesser known examples can be found in antitrust, tax, insurance, and other areas.<sup>36</sup>

A useful illustration comes from *Mississippi ex rel. Hood*, which provided the quotation at the start of this Article.<sup>37</sup> In that case, the State of Mississippi filed an antitrust and consumer-protection suit on behalf of state residents against the LCD industry.<sup>38</sup> The state sought equitable and monetary relief on behalf of its citizens under antitrust and consumer-protection statutes, even though citizens had private rights of action under the same laws.<sup>39</sup> The Supreme Court held that

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30. See, e.g., Cox, *supra* note 22; Seth Davis, *Implied Public Rights of Action*, 114 COLUM. L. REV. 1, 4–5 (2014); Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623, 661 (2012); Richard P. Ieyoub & Theodore Eisenberg, *State Attorney General Actions, the Tobacco Litigation, and the Doctrine of Parens Patriae*, 74 TUL. L. REV. 1859, 1864 (2000); Lemos, *supra* note 22, at 494–95; Adam S. Zimmerman, *Distributing Justice*, 86 N.Y.U. L. REV. 500, 535–36 (2011); Adam S. Zimmerman, *Mass Settlement Rivalries*, 82 U. CIN. L. REV. 381, 382–83 (2013).

31. See, e.g., *Parens Patriae*, BLACK’S LAW DICTIONARY (9th ed. 2009) (defining *parens patriae* to mean, *inter alia*, “[a] doctrine by which a government has standing to prosecute a lawsuit on behalf of a citizen”); see also *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 600–05 (1982) (discussing *parens patriae* in U.S. law).

32. See Lemos, *supra* note 22, at 494. These public suits may draw on common-law or statutory sources for substantive rights as well as for the authority to bring such actions. *Id.* at 495; see, e.g., *supra* note 2 (citing cases discussing Mississippi statutory claims).

33. *E.g.*, *Tioga Pub. Sch. Dist. No. 15 v. U.S. Gypsum Co.*, 984 F.2d 915 (8th Cir. 1993).

34. See generally Ieyoub & Eisenberg, *supra* note 30, at 1862 (discussing tobacco litigation).

35. See generally David Kairys, *The Origin and Development of the Governmental Handgun Cases*, 32 CONN. L. REV. 1163, 1173 (2000).

36. See, e.g., 11 U.S.C. § 526 (2012) (authorizing private and state actions against debt relief agencies); Lemos, *supra* note 22, 496 n.40 (collecting cases).

37. See *supra* notes 1–3 and accompanying text (discussing *Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736 (2014)).

38. *Hood*, 134 S. Ct. at 740.

39. See *Miss. ex rel. Hood v. AU Optronics Corp.*, 701 F.3d 796, 800–02 (5th Cir. 2012). Individual consumers had causes of action under the same statutes. *Id.* at 801. At least some

the state suit could go forward in state court despite a consolidated, nationwide class action alleging the same claims.<sup>40</sup>

## 2. “Public” Claims

On the other end of the spectrum are cases in which private actors litigate seemingly public rights.<sup>41</sup> Again, these private suits complement public enforcement of the same claims.

The so-called “citizen suit” exemplifies the private enforcement of public rights.<sup>42</sup> The citizen suit is characterized by a lawsuit for injunctive or declaratory relief in order to compel compliance with the law, though many citizen-suit provisions permit monetary awards as well.<sup>43</sup> Citizen-suit options are particularly common in environmental statutes.<sup>44</sup> Indeed, according to Professor Thompson, “[e]very major environmental law passed since 1970 now includes a citizen suit provision (with the anomalous exception of the Federal Insecticide, Fungicide, and Rodenticide Act).”<sup>45</sup> Explicit citizen-suit provisions also exist in consumer-protection and voting-rights statutes, among others.<sup>46</sup> And at common law, private and public actors may be able to

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private claims were settled prior to the Court’s decision. *See, e.g., In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. M 07-1827 SI, 2013 WL 1365900, at \*20 (N.D. Cal. Apr. 3, 2013).

40. *Hood*, 134 S. Ct. at 743–44. The nationwide suit was consolidated in federal court pursuant to the Class Action Fairness Act of 2005. 28 U.S.C. §§ 1332(d), 1453, 1711–15; *see supra* note 4.

41. *See, e.g., SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S.* 85 (Ira Katznelson et al. eds., 2010); Gary S. Becker & George J. Stigler, *Law Enforcement, Malfeasance, and Compensation of Enforcers*, 3 J. LEGAL STUD. 1, 13 (1974); Pamela H. Bucy, *Private Justice*, 76 S. CAL. L. REV. 1, 32–33 (2002); Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543, 1551 (2014); Burbank et al., *supra* note 19, at 665; Erichson, *supra* note 5, at 17; William M. Landes & Richard A. Posner, *The Private Enforcement of Law*, 4 J. LEGAL STUD. 1, 1 (1975); A. Mitchell Polinsky, *Private Versus Public Enforcement of Fines*, 9 J. LEGAL STUD. 105, 107 (1980); Rubenstein, *supra* note 7, at 2141, 2143–44; Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 117–19 (2005).

42. *See, e.g., Citizen Suit*, BLACK’S LAW DICTIONARY (9th ed. 2009) (defining “citizen suit” to mean “[a]n action under a statute giving citizens the right to sue violators of the law (esp. environmental law) and to seek injunctive relief and penalties”).

43. *See, e.g., Clean Water Act*, 33 U.S.C. § 1365(a) (2012) (granting district courts the authority to “apply any appropriate civil penalties” in Clean Water Act citizen suits).

44. *See, e.g., Endangered Species Act*, 16 U.S.C. § 1540(g) (2012); *Clean Air Act*, 42 U.S.C. § 7604 (2012); *Comprehensive Environmental Response, Compensation and Liability Act of 1980*, *id.* § 9659.

45. Barton H. Thompson, Jr., *The Continuing Innovation of Citizen Enforcement*, 2000 U. ILL. L. REV. 185, 192 (2000). *But see* National Environmental Policy Act of 1969, 42 U.S.C. § 4321 (2012) (no citizen suits for NEPA); Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701 (2012) (no citizen suits for Federal Land Policy and Management Act of 1976).

46. *Consumer Product Safety Act*, 15 U.S.C. § 2073(a) (2012) (creating a private right of action for injunction (and fees) to enforce product safety rules); *National Voter Registration Act of*

bring overlapping claims variously described as “diffuse private rights” or “common public rights”—for example, a suit for the enjoyment of natural resources.<sup>47</sup> In each of the cases, public and private parties have the option to enforce the law. Sometimes private and public enforcers may each seek monetary relief,<sup>48</sup> and sometimes private attorneys may collect attorney fees from defendants if they win.<sup>49</sup>

In addition, in some circumstances, private parties stand in the shoes of the government. In *qui tam* cases,<sup>50</sup> a private party prosecutes a claim on behalf of the government—for example, a claim that a government contractor has defrauded a federal agency.<sup>51</sup> Private parties may litigate these cases themselves, or the government may intervene and displace the private relator.<sup>52</sup> Either way, the private party may share in the government’s recovery.<sup>53</sup>

### 3. Hybrid Regimes

The grey area between *parens patriae* suits vindicating private claims and citizen suits pursuing public-interest enforcement is expansive in breadth and depth. It would be impossible to survey every such provision in a digestible format, but it is worth considering the

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1993, 52 U.S.C. § 20510 (2012) (private party may seek declaratory or injunctive relief and fees). Indeed, one might say that injunctive-relief provisions of any hybrid statute authorize citizen suits. *See infra* Section II.A.3 (collecting hybrid regimes).

47. *E.g.*, *Friends of Milwaukee’s Rivers v. Milwaukee Metro. Sewerage Dist.*, 382 F.3d 743, 748 (7th Cir. 2004); *Alaska Sport Fishing Ass’n. v. Exxon Corp.*, 34 F.3d 769, 771 (9th Cir. 1994).

48. *See, e.g.*, *Alaska Sport Fishing Ass’n.*, 34 F.3d at 770 (“Alaska Sportfishing Association and four individual sportfishers . . . [filed suit] seeking damages for loss of use and enjoyment of natural resources resulting from the 1989 *Exxon Valdez* oil spill.”). In the seminal decision *Porter v. Warner Holding Co.*, 328 U.S. 395, 399 (1946), the Court allowed a federal agency to use its statutory authority for injunctive relief to obtain monetary recovery (there, “recovery and restitution of illegal rents”).

49. *See* FARHANG, *supra* note 41, at 92 (collecting data). Public attorneys also may be able to recover costs. *See, e.g.*, *Pine River Logging Co. v. United States*, 186 U.S. 279, 296 (1902).

50. *Qui tam* is short for *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, or “who as well for the king as for himself sues in this matter.” *Qui tam*, BLACK’S LAW DICTIONARY (9th ed. 2009).

51. The most well-known U.S. *qui tam* statute is the Federal False Claims Act, 31 U.S.C. §§ 3729–3733 (2012), though *qui tam* provisions also exist in state false claims acts, e.g., CAL. GOV’T CODE §§ 12650–12656 (West 2011); DEL. CODE ANN. tit. 6, §§ 1201–1211 (2015); 740 ILL. COMP. STAT. 175/1–8 (2014), as well as in other federal statutes. 25 U.S.C. § 201 (2012) (Indian protection laws); 35 U.S.C. § 292 (2006) (false marking of patented goods, prior to 2011 amendments). In addition, twice the Supreme Court has suggested that a statute may imply a *qui tam* option if it entitles a private party to an informer award. *See* *Vt. Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 777 n.7 (2000); *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541 n.4 (1943).

52. 31 U.S.C. § 3730(b) (permitting the government to take over FCA suit).

53. *See id.* § 3730(d) (providing relator recovery of fifteen to twenty-five percent if the government intervenes, or twenty-five to thirty percent if the government does not).

range of regimes to better understand the place of redundant public-private enforcement in U.S. law.<sup>54</sup>

Perhaps the easiest way to organize this material is by area of law, and I will begin here with antitrust enforcement. Antitrust law serves both public and private values. According to the Supreme Court: “Congress created the Sherman Act’s private cause of action not solely to compensate individuals, but to promote ‘the public interest in vigilant enforcement of the antitrust laws.’”<sup>55</sup> There is overlapping public and private enforcement of the antitrust provisions of the Sherman Act, Clayton Act, and sections of the Robinson-Partman Act and Wilson Tariff Act.<sup>56</sup> Importantly for present purposes, public and private antitrust enforcement may proceed redundantly. Private enforcement of antitrust law frequently takes the form of “coattail class actions,” which are private suits following the announcement of public enforcement.<sup>57</sup> Private actions also might alert public regulators of a potential problem, leading to follow-on public enforcement.<sup>58</sup> Finally, public and private recoveries may interact as the Federal Trade Commission (FTC) has dedicated some disgorgement awards from government antitrust settlements for distribution to private parties.<sup>59</sup>

Securities enforcement tracks many elements of the antitrust-law story. Securities suits claim to vindicate both public and private values.<sup>60</sup> Securities law is characterized by a high degree of private

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54. Most of the examples here are from federal law, though state law also may provide for overlapping enforcement. *See, e.g.*, Ann K. Wooster, Annotation, *Private Attorney General Doctrine—State Cases*, 106 A.L.R. 5th 523 (2003) (collecting state cases).

55. *Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2313 (2013) (quoting *Lawlor v. Nat’l Screen Serv. Corp.*, 349 U.S. 322, 329 (1955)).

56. *See, e.g.*, 15 U.S.C. § 15 (2012) (authorizing suits by individuals injured by any conduct prohibited by “antitrust laws,” defined in 15 U.S.C. § 12); *id.* §§ 4, 9, 15a, 15b, 25 (authorizing federal or state enforcement of provisions of the aforementioned acts).

57. *See, e.g.*, Erichson, *supra* note 5, at 5–7 (noting that more than one hundred “coattail class actions” followed the government’s antitrust investigation of Microsoft).

58. *See, e.g.*, Arthur M. Kaplan, *Antitrust as a Public-Private Partnership: A Case Study of the NASDAQ Litigation*, 52 CASE W. RES. L. REV. 111, 114–16 (2001) (noting that private lawsuits “resuscitat[ed]” public antitrust enforcement against NASDAQ). This phenomenon is not unique to antitrust. *See* Michael L. Rustad, *Smoke Signals from Private Attorneys General in Mega Social Policy Cases*, 51 DEPAUL L. REV. 511, 518 (2001):

Private attorneys general, not government regulators, discovered that Firestone Tires mounted on Ford Explorers caused hundreds of rollover accidents due to tread separation. . . . The NHTSA [National Highway Traffic Safety Administration] based its recall of 6.5 million tires on information provided by plaintiff’s counsel, rather than [by] in-house government investigators.

59. *See, e.g.*, *In re First Databank Antitrust Litig.*, 209 F. Supp. 2d 96, 101 (D.D.C. 2002) (discussing FTC settlement offset); FED. TRADE COMM’N, Policy Statement on Monetary Equitable Remedies in Competition Cases, 68 Fed. Reg. 45820-03 (Aug. 4, 2003) (discussing FTC’s use of restitution).

60. *E.g.*, S. REP. No. 104-98, at 8 (1995) (discussing compensation and deterrence).

enforcement, whether through implied<sup>61</sup> or express<sup>62</sup> rights of action, but it also involves public enforcement by various federal and state agencies.<sup>63</sup> Private action may ride the coattails of public enforcement,<sup>64</sup> or may motivate it.<sup>65</sup> Finally, like the FTC, the Securities and Exchange Commission (SEC) may attempt to compensate victims of securities fraud through the “fair funds program,” which distributes recoveries collected in public enforcement actions to private parties—even when redundant private securities actions may be available or ongoing.<sup>66</sup>

Redundant private and public enforcement is also quite common in civil rights, labor, and employment. Public and private parties may bring overlapping employment suits alleging discrimination on the basis of race, color, religion, sex, national origin,<sup>67</sup> disability,<sup>68</sup> or age.<sup>69</sup> Public and private suits can vindicate federal rules on minimum wage or maximum hour,<sup>70</sup> family and medical leave,<sup>71</sup> whistleblower protection,<sup>72</sup> or migrant and seasonal agricultural worker standards.<sup>73</sup> The Fair Housing Act provides for overlapping public and private

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61. See, e.g., *Musick, Peeler & Garrett v. Emp'rs' Ins. of Wausau*, 508 U.S. 286, 294 (1993) (1934 Securities Exchange Act, Section 10(b) contribution action); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 394–95 (1982) (Commodities Exchange Act); *Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 13–14 (1971) (1934 Securities Exchange Act, Section 10(b)); *J. I. Case Co. v. Borak*, 377 U.S. 426, 430–31 (1964) (1934 Securities Exchange Act, Section 14(a)).

62. See, e.g., 15 U.S.C. § 78i (2012) (manipulation of security prices); *id.* § 78r (misleading statements); *id.* § 78t-1 (insider trading).

63. See N.Y. GEN. BUS. LAW §§ 352–359-h (McKinney 2015) (“Martin Act”) (providing authority to New York State Attorney General); *SEC v. Robert Collier & Co.*, 76 F.2d 939, 939–40 (1935) (holding that the SEC had independent litigating authority). For criticism of the claim that private enforcement supplements SEC enforcement, see Maria Correia & Michael Klausner, *Are Securities Class Actions “Supplemental” to SEC Enforcement? An Empirical Analysis 2–45* (May 15, 2012) (unpublished manuscript), [http://www.efmaefm.org/0EFMAMEETINGS/EFMA%20ANNUAL%20MEETINGS/2013-Reading/papers/EFMA2013\\_0593\\_fullpaper.pdf](http://www.efmaefm.org/0EFMAMEETINGS/EFMA%20ANNUAL%20MEETINGS/2013-Reading/papers/EFMA2013_0593_fullpaper.pdf) [<http://perma.cc/C834-456J>].

64. Erichson, *supra* note 5, at 6–7.

65. See Kaplan, *supra* note 58, at 114–16 (discussing NASDAQ case).

66. See 15 U.S.C. § 7246 (2012). See generally Urska Velikonja, *Public Compensation for Private Harm: Evidence from the SEC’s Fair Fund Distributions*, 67 STAN. L. REV. 331, 331–95 (2015); Verity Winship, *Fair Funds and the SEC’s Compensation of Injured Investors*, 60 FLA. L. REV. 1103, 1103–44 (2008). Private class actions were filed in sixty-five percent of cases in which the SEC created a fair fund, and investors were entitled to private recoveries in nearly half of these cases. Velikonja, *supra*, at 373.

67. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5 (2012).

68. Americans with Disabilities Act, *id.* § 12117(a).

69. Age Discrimination in Employment Act, 29 U.S.C. § 626 (2012).

70. Fair Labor Standards Act, *id.* § 216.

71. Family and Medical Leave Act, *id.* § 2617.

72. Sarbanes-Oxley Act, 18 U.S.C. § 1514A.

73. Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. §§ 1852–54 (2012).

enforcement,<sup>74</sup> and courts have found implied private rights of action in various civil rights statutes that also authorize public enforcement.<sup>75</sup>

Consumer protection is yet another area rife with redundant public-private enforcement options. Various federal and state consumer protection statutes permit private and public claims.<sup>76</sup> A recent report from the Consumer Financial Protection Bureau (CFPB) studied overlapping public-private enforcement in consumer finance, and even this limited study identified more than one hundred occasions of overlapping public and private enforcement from 2008 to 2012.<sup>77</sup> Government action preceded private enforcement in many of these cases,<sup>78</sup> fitting the “coattail class action” model,<sup>79</sup> though the CFPB identified far more cases in which public enforcement rode the coattails of private suits.<sup>80</sup>

Private and public enforcement overlap in any number of other federal and state enforcement schemes. The Employee Retirement Income Security Act (ERISA) relies on private and public actions<sup>81</sup>; the Electronic Communications Privacy Act provides for private and public civil suits;<sup>82</sup> and public and private civil actions may enforce the Racketeer Influenced and Corrupt Organizations (RICO) Act.<sup>83</sup> More obscurely, the U.S. Attorney General, state attorneys general, and “boxers” may sue under the Muhammad Ali Boxing Reform Act,<sup>84</sup> and educational institutions and the FTC may sue sports agents for unfair

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74. 42 U.S.C. § 3613 (2012).

75. *E.g.*, *Morse v. Republican Party of Va.*, 517 U.S. 186, 230–35 (1996) (Section 10 of the Voting Rights Act (“VRA”)); *Thornburg v. Gingles*, 478 U.S. 30, 43–51 (1986) (Section 2 of the VRA); *Cannon v. Univ. of Chi.*, 441 U.S. 677, 689–708 (1979) (Title IX); *Allen v. State Bd. of Elections*, 393 U.S. 544, 554–57 (1969) (Section 5 of the VRA).

76. *See, e.g.*, 15 U.S.C. §§ 1681n, 1681o, 1681s (2012) (public and private enforcement under the Truth in Lending Act); 39 U.S.C. § 3017 (2012) (liability for mailing skill contest or sweepstakes to individual who requested exclusion); 47 U.S.C. § 227 (2012) (liability for telephone solicitation to individual who requested exclusion); Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1430 n.189 (2000) (discussing Uniform Deceptive Trade Practices Act).

77. CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET AND CONSUMER PROTECTION ACT § 1028(A), § 9 (2015), [http://files.consumerfinance.gov/f/201503\\_cfpb\\_arbitration-study-report-to-congress-2015.pdf](http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf) [<http://perma.cc/94XG-V8QU>].

78. *Id.*

79. *See* Erichson, *supra* note 5, at 5–7.

80. *See* CONSUMER FIN. PROT. BUREAU, *supra* note 77, at § 9.

81. 29 U.S.C. § 1132 (2012).

82. 18 U.S.C. § 2520 (2012).

83. *Id.* § 1964.

84. 15 U.S.C. § 6309 (2012). “Boxer” is defined as “an individual who fights in a professional boxing match.” *Id.* § 6301.

and deceptive acts with respect to student athletes.<sup>85</sup> Finally, although not entirely relevant to this Article's inquiry, there are various statutory schemes in which public *criminal* enforcement operates in parallel with public or private civil enforcement.<sup>86</sup> RICO<sup>87</sup> and some antitrust rules<sup>88</sup> may be enforced through criminal prosecution or civil suits.<sup>89</sup> During Prohibition, criminal enforcement of the alcohol laws was supplemented by private civil actions for property damage by an intoxicated person against the provider of liquor.<sup>90</sup> And, amusingly, while the U.S. government offers awards to private parties who help detect customs violations, if a public official tips off a private party in exchange for a share of that award, she may be the subject of a criminal prosecution and the complicit private party may bring a civil action to get her money back.<sup>91</sup> Although criminal restitution reflects some elements of the public enforcement discussed here, this Article's focus remains on overlapping *civil* enforcement.

### B. Managing Redundancy

Whether private, public, or hybrid in subject matter, each of the described regimes allows both public and private actors to bring suit. But the authority to sue on the same claim does not tell the whole story. The procedural and remedial rules that govern these suits provide important context. Preclusion determines whether the redundant suit is maintained or extinguished. Damages rules determine whether consecutive actions will manifest in redundant payouts—whether defendants pay twice, and whether redundant plaintiffs recover irrespective of the result of the first case. Claims-processing rules determine whether redundant litigation is sequential or simultaneous, and if sequential, which suit goes first. This Section reviews the varied approaches to preclusion, damages, and claims processing in redundant

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85. *Id.* §§ 7803, 7805. For a few other examples, see 12 U.S.C §§ 1972, 1975 (2012) (private and public enforcement against bank tying arrangements); 47 U.S.C. §§ 206, 207, 274 (2012) (rights of action under the Communication Act); 50 U.S.C. app. §§ 597, 597a (2012) (private and public actions under the Servicemembers Civil Relief Act).

86. Criminal law also may overlap with common-law liability. *See, e.g.*, Thomas Koenig & Michael Rustad, "Crimtorts" as Corporate Just Deserts, 31 U. MICH. J.L. REFORM 289, 292–93 (1998).

87. 18 U.S.C. §§ 1961–1968 (2012).

88. 15 U.S.C. §§ 1–38 (2012).

89. Criminal and private civil enforcement also are available in connection with sexual exploitation or child abuse. 18 U.S.C. § 2255 (2012); *Paroline v. United States*, 134 S. Ct. 1710, 1718–22 (2014) (discussing criminal restitution to victims of child pornography).

90. Act of Oct. 28, 1919, ch. 85, title II, § 20, 41 Stat. 313 (repealed 1935).

91. 19 U.S.C. § 1620 (2012).



enforcement in U.S. law. At best, current law offers an extensive experiment in the many combinations of these rules. Less charitably, current law is a muddle calling out for the coherence that Part II hopes to offer.

### 1. Preclusion

The first potential management tool for redundant enforcement is preclusion. Although preclusion has a precise legal definition,<sup>92</sup> it is used here to refer to any situation in which prior adjudication forecloses a future suit, whether based on a statutory or judicially enunciated rule. Indeed, in these situations, preclusion more likely refers to a statutory rule that bars litigation than to the traditional form of judge-made preclusion.<sup>93</sup> The type of “preclusion” relevant here involves the effect of a prior disposition on a non-party plaintiff—the effect of a settlement or judgment in a public suit on a putative private plaintiff, or vice versa.<sup>94</sup> Again, if the first suit precludes the second, then redundant authority stops short of redundant litigation. If preclusion does not attach, redundant litigation is permitted and the second suit proceeds irrespective of the outcome in the first case.<sup>95</sup>

To begin with a general observation, public and private suits are neither universally preclusive nor universally non-preclusive. In some situations, public and private enforcement actions are mutually non-preclusive. In antitrust, for example, the Supreme Court explained that “the Government is not bound by private antitrust litigation to which it is a stranger,” while “private parties, similarly situated, are not bound by government litigation.”<sup>96</sup> In addition, in various voting rights cases,

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92. See RESTATEMENT (SECOND) OF JUDGMENTS ch. 3 (AM. LAW INST. 1982); Kevin Clermont, *Res Judicata as Requisite for Justice* 1–58 (Cornell Law Sch. Legal Studies Research Paper No. 15-22, 2015), <http://ssrn.com/abstract=2614433> [<http://perma.cc/TJV9-UACV>].

93. See *infra* note 94 and accompanying text. Note that because we are dealing with statutory rules of “preclusion,” the legislature has flexibility in defining which parties and which claims are subject to preclusion.

94. This discussion may bring to mind *United States v. Mendoza*, in which the Supreme Court held that nonmutual offensive issue preclusion does not apply against the federal government. 464 U.S. 154, 162–63 (1984). Nonmutual offensive issue preclusion describes a new plaintiff’s use of a finding of fact from an earlier proceeding to establish part of its case against the defendant from that earlier case. See, e.g., *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 329–33 (1979). Even if one accepted the *Mendoza* rule uncritically, it relates to findings adverse to a party to both proceedings—but here we are potentially dealing with the effect of findings on a nonparty.

95. See *supra* note 94 and accompanying text.

96. *Sam Fox Pub. Co. v. United States*, 366 U.S. 683, 690 (1961). State antitrust enforcement under the Clayton Act, however, does preclude private actions. 15 U.S.C. § 15c(b)(2)–(3) (2012); see Cox, *supra* note 22, at 23–29 (discussing this example).

courts have allowed public litigation to follow private suits on the same claims, or vice versa.<sup>97</sup> These cases thus permit redundant litigation.

In other situations, public and private suits are mutually preclusive. Traditionally, preclusion does not attach to non-parties.<sup>98</sup> But in some cases of redundant public-private enforcement, preclusion applies to non-parties as a result of common-law exceptions to the background rule,<sup>99</sup> special considerations for government representation,<sup>100</sup> or specific statutory provisions.<sup>101</sup> Courts have found preclusion between public and private actions in cases involving ERISA,<sup>102</sup> the Age Discrimination in Employment Act,<sup>103</sup> and the Fair Labor Standards Act,<sup>104</sup> to name a few.<sup>105</sup> *Qui tam* regimes also may

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97. *E.g.*, *Hathorn v. Lovorn*, 457 U.S. 255, 268 n.23 (1982) (“The Attorney General is not bound by the resolution of § 5 issues in cases to which he was not a party.”); *Cleveland Cty. Ass’n for Gov’t by People v. Cleveland Cty. Bd. of Comm’rs*, 142 F.3d 468, 473–74, 474 n.11 (D.C. Cir. 1998) (private following public).

98. *See, e.g.*, *Martin v. Wilks*, 490 U.S. 755, 761 (1989) (“[O]ne is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.”).

99. *See Taylor v. Sturgell*, 553 U.S. 880, 894 (2008) (discussing privity). For example, the Ninth Circuit held that California Attorney General restitution claims in an unfair competition case were precluded by a prior class action settlement on the same claims. *California v. IntelliGender, LLC*, 771 F.3d 1169, 1179–82 (9th Cir. 2014).

100. For example, whether the government adequately represented its citizens has been treated differently by courts than private versions of the same inquiry. *See Lemos, supra* note 22, at 508–10. Indeed, some courts “presum[e] that the state will adequately represent the position of its citizens.” *Alaska Sport Fishing Ass’n v. Exxon Corp.*, 34 F.3d 769, 773 (1994).

101. *See, e.g.*, *United States ex rel. Sarafoglou v. Weill Medical Coll. of Cornell Univ.*, 451 F. Supp. 2d 613, 619 (S.D.N.Y. 2006) (“In the *qui tam* context, the relator is in privity with the Government.”).

102. *E.g.*, *Herman v. S.C. Nat’l Bank*, 140 F.3d 1413, 1422–27 (11th Cir. 1998); *Beck v. Levering*, 947 F.2d 639, 642 (2d Cir. 1991); *Sec’y of Labor v. Fitzsimmons*, 805 F.2d 682, 687–97 (7th Cir. 1986) (en banc); *Donovan v. Cunningham*, 716 F.2d 1455, 1462–63 (5th Cir. 1983). Courts reaching this conclusion seek to cast ERISA in public-minded terms. *See, e.g.*, *Herman*, 140 F.3d at 1423:

[I]n suing for ERISA violations, the Secretary seeks not only to recoup plan losses, but also to supervise enforcement of ERISA, to guarantee uniform compliance with ERISA, to expose and deter plan asset mismanagement, to protect federal revenues, to safeguard the enormous amount of assets and investments funded by ERISA plans, and to assess civil penalties for ERISA violations.

One could say the same about any number of statutes that protect private rights. *See, e.g.*, 29 U.S.C. §§ 626, 1852–54, 2617 (2012); 42 U.S.C. § 2000e-5 (2012).

103. The ADEA provides that public enforcement bars subsequent private suits. *See* 29 U.S.C. § 626(c)(1) (2012). Some courts have treated private ADEA suits as preclusive on the EEOC. *E.g.*, *Equal Emp’t Opportunity Comm’n v. U.S. Steel Corp.*, 921 F.2d 489, 495 (3d Cir. 1990) (Alito, J.).

104. *Compare Chao v. A-One Med. Servs., Inc.*, 346 F.3d 908, 920–23 (9th Cir. 2003) (private FLSA suit bars public enforcement), *with* 29 U.S.C. § 216(b) (2012) (providing that public suits preclude subsequent private suits).

105. Sarbanes-Oxley’s whistleblower protections limit private actions if the DOL issued a final decision. 18 U.S.C. § 1514A (2012). At least one court held that a private judgment precluded future public enforcement. *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 961–63 (9th Cir. 2006).

apply mutual non-party preclusion,<sup>106</sup> though the meaning of “party” is complicated by this peculiar type of suit.<sup>107</sup>

In still other areas, preclusion is asymmetric. Some statutes codify one-way preclusion. A number of civil rights statutes provide that private actions may be cut off by public enforcement,<sup>108</sup> and EPA actions trump environmental citizen suits even though private suits would not preclude public enforcement.<sup>109</sup> Particularly when the government is pursuing a public-oriented remedy, there seems to be a background understanding that private actions do not preclude redundant public enforcement.<sup>110</sup> Meanwhile, many courts are willing to treat representative public actions as preclusive on private suits—i.e., private citizens may *not* litigate individual claims if the state previously litigated on their behalf.<sup>111</sup> Finally, note that issue preclusion<sup>112</sup> (or its analog<sup>113</sup>) also may operate in these cases to reduce the costs of the second suit by making findings from the original suit binding in the second.

To sum up briefly, public-private preclusion attaches in some but not all cases; it may depend on judicial doctrine, statutory language, and individual case factors; and it may be symmetrical, asymmetrical, or issue specific.

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106. *In re Schimmels*, 127 F.3d 875 (9th Cir. 1997), held that the government is bound by a *qui tam* judgment even if it did not intervene. *Id.* at 885. The government conceded this point at argument in *KBR v. U.S. ex rel. Carter*, 135 S. Ct. 1970 (2015). Relatedly, some courts reject pro se relators to avoid precluding the government. *See, e.g.*, *United States ex rel. Mergent Servs. v. Flaherty*, 540 F.3d 89, 94 (2d Cir. 2008).

107. For discussion of a related issue, see *Vt. Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765 (2000) (Article III standing in *qui tam* suits).

108. 29 U.S.C. § 216(b) (2012) (Fair Labor Standards Act); *id.* § 626(c)(1) (Age Discrimination in Employment Act); 42 U.S.C. § 3613 (2012) (Fair Housing Act).

109. *See supra* note 44. For example, according to the Ninth Circuit: “the United States would not be bound by the proposed consent judgment in this action [under the Federal Water Pollution Control Act] and could bring its own enforcement action at any time.” *Sierra Club, Inc. v. Elec. Controls Design, Inc.*, 909 F.2d 1350, 1356 n.8 (9th Cir. 1990) (internal citation omitted).

110. *See, e.g.*, WRIGHT & MILLER, 18A FED. PRAC. & PROC. JURIS. § 4458.1 (2d ed 2002.); Cox, *supra* note 22 (collecting cases). But this rough guide does not account for all cases nor does it explain which hybrid cases are public or private.

111. *See, e.g.*, *Satsky v. Paramount Commc’ns., Inc.*, 7 F.3d 1464, 1470 (10th Cir. 1993). Courts retain discretion to determine if the government suit sufficiently represented private interests. *See, e.g.*, *In re Exxon Valdez*, 270 F.3d 1215 (9th Cir. 2001).

112. *See, e.g.*, RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982); *see also* *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979).

113. Section 5 of the Clayton Act, for example, treats a finding of liability in a government action as *prima facie* evidence of a violation in a follow-on private suit. 15 U.S.C. § 16(a) (2012).

## 2. Damages

Damages rules are a second set of tools to structure public-private enforcement. Civil damages are the central form of deterrence and compensation in many of these areas, and the ability to obtain damages is a key incentive for enforcement actions.<sup>114</sup> Under various statutes, public and private actors may obtain overlapping remedies,<sup>115</sup> though at times damages are characterized differently for public and private parties.<sup>116</sup> Related to damages are private attorney fees, which may be a necessary incentive for private actions.<sup>117</sup> Attorney fees are available in some but not all cases.<sup>118</sup>

If redundant authority becomes redundant litigation, an important question is whether damages are cumulative or concurrent—will a defendant pay double because she is subject to sequential enforcement suits?<sup>119</sup> The answer to this question has significant consequences for (over- or under-) deterrence, (over- or under-) compensation, and fairness.<sup>120</sup> Again, outcomes are not consistent across regulatory areas.<sup>121</sup> In both antitrust and securities enforcement, for example, the general rule is that a defendant will be able to offset compensatory or disgorgement awards.<sup>122</sup> If recoveries in a public suit

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114. *See, e.g., supra* note 59.

115. *See, e.g.,* 29 U.S.C. § 1132 (2012) (ERISA); 42 U.S.C. § 1981a (2012) (employment discrimination); *id.* § 3613 (Fair Housing Act).

116. For example, private suits for bank-tying arrangements receive treble damages, while public enforcement seeks civil penalties. 12 U.S.C. §§ 1972, 1975 (2012). Available remedies also may differ markedly between public and private suits. *E.g.,* 15 U.S.C. §§ 78t-1(b), 78u-1(a)(2) (2012) (civil penalties to SEC and private actions for profit gained or loss avoided in insider trading).

117. *See, e.g.,* FARHANG, *supra* note 41; Burbank, et al., *supra* note 19 (collecting data on fee provisions in private-enforcement statutes).

118. Interestingly, attorney fees do not always depend on private recovery. In antitrust suits, even when a prior settlement with a co-defendant reduced a plaintiff's right to compensatory damages to zero, courts will permit litigation against the non-settling defendant for purpose of determining whether plaintiff is entitled to fees. *See, e.g.,* *Funeral Consumers All. v. Serv. Corp. Int'l*, 695 F.3d 330 (5th Cir. 2012).

119. *See infra* note 250 (collecting sources on “multiple punishments”).

120. *See, e.g.,* Winship, *supra* note 66 (discussing McAfee securities case).

121. The Supreme Court has cautioned on multiple occasions that “it goes without saying that the courts can and should preclude double recovery by an individual.” *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 297 (2002) (citing *Gen. Tel. Co. of Nw. v. EEOC*, 446 U.S. 318, 333 (1980)). But, of course, the issue here is not double recovery by the same party, but double liability paid by the same defendant to two different parties. *See infra* note 286 and accompanying text (discussing compensation). And, notably, the Court's logic depended in part on the equitable nature of Title VII remedies, a status unlikely to attach to damage awards in many statutory and common-law schemes. *See Gen. Tel. Co. of Nw. v. EEOC*, 446 U.S. 318, 333 (1980).

122. *E.g., In re First Databank Antitrust Litig.*, 209 F. Supp. 2d 96, 98–101 (D.D.C. 2002) (antitrust); *Litton Indus. v. Lehman*, 734 F. Supp. 1071, 1074–78 (S.D.N.Y.1990) (securities). That said, courts have found ways to permit redundant suits to go forward even following public

are characterized as civil penalties, they will be independent of private damages, i.e., they are not subject to offset.<sup>123</sup> Courts have taken steps in other areas to avoid double recovery,<sup>124</sup> but again public and private remedies do not always offset symmetrically.<sup>125</sup> Reliance on judicial discretion also adds uncertainty to the enforcement regime. In one particularly interesting set of cases, courts adopted different attitudes regarding whether punitive damages in state tobacco settlements should affect private damages in overlapping suits depending on how the court characterized the purposes of the punitive awards.<sup>126</sup> These cases not only subjected defendants to what might be called double liability, but they also suggested that future defendants could not rely on courts to offset damages in similar cases.

### 3. Claims Processing

Finally, relevant to both redundant authority and redundant litigation are various doctrines that loosely fall under the label “claims processing.”<sup>127</sup> Courts have at their disposal tools such as stays and anti-suit injunctions that can modulate otherwise simultaneous private and public enforcement actions.<sup>128</sup> Various enforcement statutes also include specific claims-processing rules. For example, environmental statutes often require private notice to the government<sup>129</sup> and the Class Action Fairness Act directs notice to state and federal officials of proposed class action settlements.<sup>130</sup> Meanwhile, the Civil Rights Act of

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disgorgement awards. *See, e.g., In re Spear*, 399 F. Supp. 2d 1350, 1360 (S.D. Fla. 2005). The relationship between fair fund distributions and private settlements also appears inconsistent. *See, e.g., In re Am. Int'l Grp.*, 293 F.R.D. 459, 466 (S.D.N.Y. 2013) (describing one settlement that accounts for fair funds and one that does not).

123. *E.g., First Databank*, 209 F. Supp. 2d at 101.

124. *See, e.g., Gen. Tel. Co. v. EEOC*, 446 U.S. 318, 333 (1980) (citing *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 n.14 (1974)).

125. *See, e.g., Herman v. S.C. Nat. Bank*, 140 F.3d 1413, 1424–25 (11th Cir. 1998) (collecting ERISA and non-ERISA cases).

126. *See Cox, supra* note 22 (collecting cases). In the cited case, a private litigant is permitted to pursue compensatory damages but not punitive ones, because the state previously claimed a punitive-damage award in its settlement agreement. *See Brown & Williamson Tobacco Corp. v. Gault*, 627 S.E.2d 549 (Ga. 2006). Although Cox (and the court) characterized this an issue of preclusion, one could easily conceptualize it as a question of damages.

127. *See Reed Elsevier v. Muchnick*, 559 U.S. 154, 161 (2010).

128. While courts have the inherent authority to enjoin parties before them, they have less power over other courts. *See, e.g., 28 U.S.C. § 2283* (2012) (Anti-Injunction Act).

129. *See, e.g., 33 U.S.C. § 1365(b)(2)* (2012) (Clean Water Act); *42 U.S.C. § 7604(b)(2)* (2012) (Clean Air Act). Environmental statutes are not unique in this regard. *See, e.g., 15 U.S.C. § 6104(b)* (2012) (private actions against telemarketers).

130. *28 U.S.C. § 1715(a)* (2012); *see, e.g., Catherine M. Sharkey, CAFA Settlement Notice Provision: Optimal Regulatory Policy?*, 156 U. PA. L. REV. 1971 (2008); Laurens Walker, *The Consumer Class Action Bill of Rights: A Policy and Political Mistake*, 58 HAST. L.J. 849 (2007).

1991 called for notice to affected private parties in government suits.<sup>131</sup> Sometimes the notice provision has direct consequences for litigation: in environmental statutes, private plaintiffs give notice to the government in order to permit the EPA to bring a public enforcement proceeding.<sup>132</sup>

Claims-processing rules may give priority to particular plaintiffs. Environmental citizen-suit provisions exhibit a preference for public enforcement, barring private suits if the government is diligently prosecuting.<sup>133</sup> Other statutes allow multiple parties to join the same suit: some enforcement regimes expressly allow for private intervention into public suits,<sup>134</sup> while others allow public intervention into private suits.<sup>135</sup> In some cases, failing to intervene may be understood as acquiescence in the first representation, thus triggering preclusion of future actions.<sup>136</sup>

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The takeaways from this brief survey are twofold. First, redundant public-private enforcement does not exist in a vacuum, but is subject to rules that structure how and when claims may be brought. Redundant authority becomes redundant litigation only if preclusion rules allow the second suit, while damages and claims-processing rules structure enforcement in both models. Second, there is no uniform template for how redundant public-private enforcement proceeds in U.S. law. Instead, legislatures and courts have applied different procedural approaches to different regulatory regimes. Indeed, in many circumstances, the statutes providing for redundant enforcement are unclear about the intended procedural rules, and courts have not always responded with precise answers. In this way, redundant

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Conversely, during debates leading up to the adoption of the Multidistrict Litigation Act of 1968, the Justice Department opposed efforts to consolidate public and private enforcement even for the limited purpose of pretrial proceedings. See Andrew Bradt, *A "Radical Proposal": The Multidistrict Litigation Act of 1968 and the Strategic Expansion of Judicial Power*, U. PA. L. REV. (forthcoming).

131. 42 U.S.C. § 2000e-2(n) (2012).

132. 33 U.S.C. § 1365(b)(1)(B) (2012) (Clean Water Act); 42 U.S.C. § 7604(b)(1)(B) (2012) (Clean Air Act).

133. See *supra* note 132. Not all government action is "diligent." See, e.g., *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167, 178 n.1 (2000).

134. See, e.g., 33 U.S.C. § 1365(b)(1)(B) (2012) (CWA); 42 U.S.C. § 2000e-5(f)(1) (2012) (Title VII).

135. See, e.g., 47 U.S.C. § 227 (2012) (private rights of action and FCC intervention in suits regarding telephone equipment); see also FED. R. CIV. P. 24(b)(2).

136. In *Adams v. Proctor & Gamble Manuf. Co.*, 697 F.2d 582 (4th Cir. 1983) the Fourth Circuit held that a private plaintiff who did not intervene in an EEOC suit was bound by the outcome of the government's action. *Id.* at 583 (en banc) (per curiam).

enforcement is both a doctrinal and policy challenge that deserves considered attention, which in turn demands a deeper understanding of the institutions and goals of redundant public-private enforcement.

## II. DESIGNING REDUNDANT PUBLIC-PRIVATE ENFORCEMENT

The foregoing discussion suggests that redundant authority and litigation exist across a range of enforcement schemes, yet the trend in modern procedure is to oppose duplication in favor of centralization.<sup>137</sup> The logic of this opposition is straightforward: redundancy, compared to one-shot enforcement, may increase direct costs, create complication through multiple enforcers, and lead to over-enforcement.<sup>138</sup>

I could spend countless pages highlighting devices that may mitigate these costs—settlements<sup>139</sup> and preclusion doctrines<sup>140</sup> reduce actual relitigation costs, agency gatekeeping may approximate monopoly control over prosecutorial discretion,<sup>141</sup> former-recovery doctrines often avoid over-enforcement<sup>142</sup>—but this Article aspires to change the discourse. Conceding that lawmakers should work to reduce unnecessary costs of enforcement, this Part argues that the conversation needs to include a fuller understanding of the benefits that redundant enforcement may provide.

This Part begins with redundancy theory, exploring the potential benefits of redundant enforcement with a focus on errors, resources, information, and agency costs. The claim here is that, despite obvious costs, redundant enforcement may serve valuable legislative goals, particularly when multiple diverse agents can be harnessed toward the same ends. Of course, the benefits of redundant enforcement will not spring up without careful husbandry in the form of institutional design. After completing its theoretical survey, this Part picks up the institutional-design challenge, looking first at redundancy as a response to problems with case selection and then as a response to problems with case outcomes. The result is a defense of redundant public-private enforcement and a transsubstantive template for its use.

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137. See *infra* notes 12–15 and accompanying text. Part II also suggests that scholars writing on public-private enforcement are wrong to ignore enforcement redundancy.

138. See, e.g., Burbank, et al., *supra* note 19; David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L.J. 616 (2013); Lahav, *supra* note 12; Adrian Vermeule, *Second Opinions and Institutional Design*, 97 VA. L. REV. 1435, 1458 (2011).

139. Settlement rates are generally quite high, see *infra* note 269, and one would expect them to be even higher in follow-on suits.

140. See *supra* notes 103–10 (discussing statutory and judge-made issue preclusion and related doctrines).

141. See, e.g., Engstrom, *supra* note 138.

142. See *supra* note 121.

This discussion is aimed not only at critics of redundant enforcement, but also at legislatures creating and updating enforcement regimes and at courts considering procedural decisions that interact with legislative choices.<sup>143</sup> The goal is to move beyond the pejorative use of “redundancy” to a more informed debate that considers the institutional and policy challenges of the relevant regulatory space.

### A. Redundancy Theory

While legal scholars have been slow to appreciate the benefits of redundancy, other disciplines have taken the lead.<sup>144</sup> Engineers have explored how redundant components can increase systemic reliability when components are independent.<sup>145</sup> Political scientists have applied these lessons to public administration, noting the presence of redundant structures within highly reliable organizations, and exploring how to manage strategic behavior within redundant systems.<sup>146</sup> This Section synthesizes these insights and applies them to

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143. See *infra* note 295 (discussing, for example, *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393 (2010)).

144. Works particularly helpful for the present study include JONATHAN B. BENDOR, *PARALLEL SYSTEMS: REDUNDANCY IN GOVERNMENT* (1985); C. F. LARRY HEIMANN, *ACCEPTABLE RISKS: POLITICS, POLICY, AND RISKY TECHNOLOGIES* (1998); Martin Landau, *Redundancy, Rationality, and the Problem of Duplication and Overlap*, 29 PUB. ADMIN. REV. 346 (1969); Allan Lerner, *There Is More than One Way to Be Redundant*, 18 ADMIN. & SOC'Y 334 (1986); Michael M. Ting, *A Strategic Theory of Bureaucratic Redundancy*, 47 AM. J. POL. SCI. 274 (2003).

Recently, a few legal scholars have praised redundancy. Professor Lahav revived Professor Cover's notion of complex concurrency. See Lahav, *supra* note 12 (discussing Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639 (1981)). Professor Gersen articulated the value of overlap in administrative law. See Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201 (2006). Professor Huq assessed redundancy in terrorism prosecutions. See Aziz Z. Huq, *Forum Choice for Terrorism Suspects*, 61 DUKE L.J. 1415 (2012). Professor Chafetz discussed “multiplicity” in the structural constitutional order. See Josh Chafetz, *Multiplicity in Federalism and the Separation of Powers*, 120 YALE L.J. 1084 (2011). And Professor Kobayashi reviewed redundant litigation in intellectual property. See Bruce H. Kobayashi, *An Economic Analysis of Relitigation Rules in Intellectual Property Litigation* (forthcoming). Notably, these few defenses focused on particular areas of law and/or have ignored the public-or-private identity of the redundant enforcers.

145. The engineering literature distinguishes between component failure and system failure. See, e.g., HEIMANN, *supra* note 144, at 78. Redundancy is understood to be more effective when dealing with component failure, *id.*, and therefore the discussion here focuses on component failure in law enforcement.

146. Modern debates about redundancy often pit the “highly reliable organization” (HRO) paradigm against “normal accident” theory. Compare KARL E. WEICK & KATHLEEN M. SUTCLIFFE, *MANAGING THE UNEXPECTED: ASSURING HIGH PERFORMANCE IN AN AGE OF COMPLEXITY* (1st ed. 2001), with CHARLES PERROW, *NORMAL ACCIDENTS: LIVING WITH HIGH-RISK TECHNOLOGIES* (1999). In the words of Larry Heimann, HRO theory accepts “the need for redundancy within and between organizations,” while normal accident theory “disputes[s] the value of redundancy” when facing “complex interactions and tight coupling.” HEIMANN, *supra* note 144, at 9. This is not a



law enforcement. This Section first outlines the basic claim that redundancy can improve enforcement with respect to errors, resources, information, and agency costs, if actors are sufficiently differentiated—applying the lessons of engineering to the problems of law enforcement. This Section then uses the insights of political science to identify and deal with the potential for strategic behavior, including efforts to harness strategic behavior in a positive direction. Note that this Section’s theory of redundancy depends on whether laws are over- or under-enforced (with respect to case selection and case outcomes).<sup>147</sup> This Article does not offer a universal baseline for these questions, but instead recognizes that results must be judged against legislative preferences expressed in the relevant regulatory regime.

First, however the optimum level of enforcement is defined, redundancy can respond to under-enforcement resulting from random or nonrandom (biased) errors.<sup>148</sup> Redundancy may reduce under-enforcement resulting from random error because enforcers will not repeat the same errors in case selection or prosecution.<sup>149</sup> This is the “purest” engineering theory of redundancy—if parallel components function independently, both must fail to result in system error.<sup>150</sup> Redundancy also may reduce under-enforcement resulting from nonrandom bias, as long as the agents have different biases.<sup>151</sup> Although neither public nor private agents are perfect, there are good reasons to believe that public and private enforcers possess different preferences and interests, and thus are susceptible to different nonrandom biases.<sup>152</sup> The result is that employing both public and

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forum to adjudicate every aspect of these debates, though I would note that there are reasons to think that law-enforcement regimes are not always “highly complex” or “tightly coupled.”

147. See generally, Robert D. Cooter, *Punitive Damages, Social Norms, and Economic Analysis*, LAW & CONTEMP. PROBS., Summer 1997; George J. Stigler, *The Optimum Enforcement of Laws*, 78 J. POL. ECON. 526 (1970) (discussing optimal enforcement levels). The distinction between case selection and case outcomes is taken up further in Sections III.B and III.C.

148. Note that this discussion primarily addresses the problems of under-enforcement. Redundancy is not likely a solution to over-enforcement, and its use in areas characterized by over-enforcement should be viewed with a jaundiced eye.

149. See, e.g., Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639, 654 n.51 (1981).

150. See David A. Weisbach, *Tax Expenditures, Principal-Agent Problems, and Redundancy*, 84 WASH. U. L. REV. 1823, 1826 (2006) (referring to this reliability-enhancing feature as “purely engineering”). Indeed, Landau’s early advocacy for redundancy was inspired by a commercial airliner. Landau, *supra* note 144, at 346.

151. See, e.g., Krishna K. Ladha, *The Condorcet Jury Theorem, Free Speech, and Correlated Votes*, 36 AM. J. POL. SCI. 617, 625–30 (1992); Ting, *supra* note 144, at 276.

152. See, e.g., Rubenstein, *supra* note 7, at 2158–59 (discussing distinction between the rewards for public and private attorneys). See generally Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289 (1983) (describing various incentives, and resulting biases, in the criminal context); Margaret H. Lemos & Max Minzner, *For-Profit Public*

private agents should reduce biased under-enforcement as well. Note, however, that while redundancy may decrease Type II errors (false negatives), it also may increase Type I errors (false positives).<sup>153</sup> This is the risk of over-enforcement noted by redundancy's critics, and certainly it must be part of the institutional-design discussion.<sup>154</sup>

A second explanation for under-enforcement is resource constraints—an agent may under-enforce because it lacks the resources to identify and prosecute all of the cases it wants.<sup>155</sup> It does not take a degree in engineering to understand that if independent redundant agents bring different resources to a problem, then the total resources available will be increased. Unsurprisingly, resource constraints are an oft-cited explanation for under-enforcement,<sup>156</sup> and redundancy should improve this state of affairs if agents possess different resource pools. Scholars have argued about whether public or private enforcers are comparatively more resource constrained,<sup>157</sup> but it seems reasonable to assume that their resources differ, particularly given that some funding mechanisms (e.g., alternative litigation financing and contingency fees) are not equally available to public and private parties.<sup>158</sup>

Third, under-enforcement may result if the relevant agent lacks the necessary information or expertise. Redundancy may help in these cases too. Redundancy may serve to reveal private information, aggregate disparate information, and facilitate learning.<sup>159</sup>

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*Enforcement*, 127 HARV. L. REV. 853, 858–63 (2014) (describing incentives for public and private enforcers). For a classic study of prosecutorial discretion, see Robert L. Rabin, *Agency Criminal Referrals in the Federal System: An Empirical Study of Prosecutorial Discretion*, 24 STAN. L. REV. 1036 (1972).

153. See, e.g., Huq, *supra* note 144, at 1464–68; Ting, *supra* note 144, at 275.

154. See *infra* Section III.C.2.

155. Resource constraints are, in a sense, just another cause of errors, but they merit special attention here because they are particularly salient for enforcement issues.

156. See, e.g., Burbank, et al., *supra* note 19, at 662. Regarding securities regulation, a SEC Chairman observed that “[t]he Commission has long maintained that private actions provide valuable and necessary additional deterrence against securities fraud, thereby supplementing the Commission’s own enforcement activities.” *Concerning the Impact of the Private Securities Litigation Reform Act of 1995: Before the Subcomm. on Banking, Housing & Urban Affairs*, 105th Cong. (1997) (testimony of Arthur Levitt Jr., Chairman, SEC).

157. Compare Lemos, *supra* note 22, at 523 (public enforcers more constrained), with Engstrom, *supra* note 138, at 633 (private parties cannot “scale up”).

158. But see generally David A. Dana, *Public Interest and Private Lawyers: Toward a Normative Evaluation of Parens Patriae Litigation by Contingency Fee*, 51 DEPAUL L. REV. 315 (2001) (discussing the use of contingency fee arrangements by attorneys general, particularly in tobacco litigation); Martin H. Redish, *Private Contingent Fee Lawyers and Public Power: Constitutional and Political Implications*, 18 SUP. CT. ECON. REV. 77 (2010) (discussing public use of contingency fee). In addition, it seems likely that public and private resources vary (but may not co-vary) with time, issue, litigant, etc.

159. See, e.g., Huq, *supra* note 144; Matthew Stephenson, *Information Acquisition & Institutional Design*, 124 HARV. L. REV. 1422 (2011).

Redundancy also permits “perspectival aggregation,” as agents may offer a diversity of problem-solving approaches.<sup>160</sup> This explanation is also a resource story—the benefits of redundancy attach when agents possess complementary intangible resources such as information,<sup>161</sup> and public and private enforcers likely differ in their access to information, expertise, and perspectives.<sup>162</sup>

A final potential source of under-enforcement is inherent in the agency relationship. Principals incur costs when agent preferences deviate from principal preferences and when principals expend effort to monitor agents and mitigate their deviations.<sup>163</sup> From an engineering perspective, these agency costs may be seen as another nonrandom bias, and thus redundancy is a potential response if agents differ with respect to agency costs.<sup>164</sup> Given their divergent preferences, structures, and accountability mechanisms, agency relationships in public and private enforcement likely differ in ways that permit beneficial redundancy.<sup>165</sup>

Redundancy also has a dynamic effect on agency costs. One particular challenge for principals is monitoring agent performance. For example, it is difficult for Congress to know from the outside whether the EPA is doing a good job enforcing environmental law. Redundant delegations have the effect of producing information that permits principals to compare multiple diverse agents—Congress may be able to compare public and private outcomes to better assess performance.<sup>166</sup> In this way, competition limits agency costs by making it cheaper for the lawmaker to monitor the agents. In addition, if agents are aware of this monitoring effect, redundancy should reduce

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160. See, e.g., Lu Hong & Scott E. Page, *Problem Solving by Heterogeneous Agents*, 97 J. ECON. THEORY 123, 143 (2001); Vermeule, *supra* note 138, at 1452.

161. See *supra* note 156 and accompanying text. If information can be easily transferred among agents—e.g., if the government could require or cheaply induce a private party to share private information—then we might say that the information pools are not sufficiently different.

162. Many sources identify private information as an advantage of private enforcement. See, e.g., Bucy, *supra* note 41, at 59, 61–62; Burbank, et al., *supra* note 19, at 662–64; Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698, 707 (2011); Stephenson, *supra* note 41, at 108–09. But public enforcers may have informational advantages as well; see also Glover, *supra* note 19, at 1180 (suggesting that public enforcement might be preferred for large datasets, comparative analyses, or complex facts). To give a simple example, a *qui tam* relator may have private information about a contractor’s fraudulent billing, while public attorneys may have an intimate knowledge of the government program.

163. See, e.g., Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 339 n.48 (1976).

164. See *supra* notes 148–154 and accompanying text.

165. See, e.g., Rubenstein, *supra* note 7 (preferences); Lemos, *supra* note 22 (structures); Stephenson, *supra* note 41 (accountability); Engstrom, *supra* note 138 (accountability).

166. See, e.g., WILLIAM A. NISKANEN, JR., BUREAUCRACY AND REPRESENTATIVE GOVERNMENT 9–11 (1971).

deviations because agents are competing against each other in a more open fashion.<sup>167</sup>

In short, although redundancy has direct costs and risks over-enforcement, it also can be effective at fighting under-enforcement resulting from errors, resource constraints, information problems, or agency costs, if agents are sufficiently diverse. But this “pure engineering” approach can get us only so far. The redundant o-rings on a space shuttle are not strategic actors,<sup>168</sup> so the insights from recent political-science literature are necessary to appreciate how these processes work in a world of strategic human players. Particularly relevant here are two types of strategic behavior—“shirking” and “cue taking”—that have the potential to reduce the effectiveness of redundant systems.<sup>169</sup>

Shirking is the risk that when a second agent is added, each agent will reduce its effort level because of the other player. For example, if information is endogenous—i.e., it is the result of agent effort in information gathering—the presence of a redundant agent might discourage that gathering effort.<sup>170</sup> This collective action problem should give pause to a lawmaker considering redundancy, particularly when the first agent is fairly reliable. That said, the political science literature suggests that this concern is not always dispositive.<sup>171</sup> First, the competitive redundancy described above cuts back on shirking when parties repeatedly compete over time.<sup>172</sup> A government agency concerned about its budget, for example, will be less inclined to shirk if Congress is watching. Second, not all shirking is created equal. Political scientists suggest that the less reliable the original agent, the less her

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167. See, e.g., Gersen, *supra* note 144, at 212–14; Huq, *supra* note 144, at 1479–84.

168. See, e.g., HEIMANN, *supra* note 144, at 53. The physical failure of o-rings in the Challenger disaster was compounded by human error at a number of levels. *Id.* at 51–52.

169. For an excellent summary of the relevant political-science literature on these issues, see *id.* at 17–71.

170. For example, assume Agent 1 or Agent 2 is tasked with finding evidence to prosecute an environmental violator. If either agent is tasked with this duty alone, the assigned agent will expend a certain amount of effort on the task. But if Agents 1 and 2 are given redundant responsibility, each one may offer less than full effort assuming that the other agent might pick up the slack. Further, if compensation is available only to the first agent to find the violation, then each agent in the redundant scenario will account for the reduced probability of compensation when choosing an effort level.

171. See Ting, *supra* note 144, at 276. The shirking story assumes a collective-action problem, but that is not preordained. Continuing the information example, information may be exogenous or differentially available. If the violation directly affects an individual, we would not suggest that this information was the product of her effort nor would we worry about other agents changing behavior in response. Shirking also is reduced if agents explicitly or implicitly coordinated, dividing the information space between them.

172. See *infra* notes 195–196.

shirking actually hurts the principal's interest.<sup>173</sup> Particularly when a principal is saddled with an unreliable agent, the addition of a redundant enforcer can improve outcomes despite the risk of shirking. Third, the shirking problem assumes that the relevant pieces of information are substitutes, e.g., both agents are seeking to identify a single violation of law.<sup>174</sup> But sometimes the relevant data will be complements, e.g., two pieces of information gain additional value when put together. In this circumstance, the incentive to gather each piece of information is increased rather than decreased.<sup>175</sup>

A second strategic problem is cue taking. Nominally independent agents may change their behavior to mirror another agent's actions, thus reducing the reliability enhancing features of redundant components. This, too, is a potential concern for redundant enforcement.<sup>176</sup> Here again, however, the political-science literature offers further clarity. First, interdependence can be avoided if agents are unaware of each other's activities or are incentivized to ignore them.<sup>177</sup> Indeed, the second agent may have the incentive to focus on exactly the areas that the first agent's biases cause it to miss. Second, if the first agent is *more reliable* than the second, then the literature suggests that cue taking by the second, less reliable agent might be preferred—the less reliable agent does better when following the more reliable agent's lead.<sup>178</sup> And, if the cue giver knows about the cue-taking behavior, then it can intentionally signal to the second agent to take actions that, for various reasons, the first agent prefers to hand off. For example, a resource strapped first agent can shift some of its burden to a less reliable second agent by cueing the work to be done.<sup>179</sup> Last, with respect to either shirking or cue taking, strategic behavior can be understood as a cost, and sometimes that cost is worth paying in order to achieve the benefits of redundancy described above.

The foregoing analysis suggests the following principles for structuring redundant-enforcement regimes:

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173. See Ting, *supra* note 144, at 283–85.

174. See Stephenson, *supra* note 41, at 110–12.

175. See Ting, *supra* note 144, at 284–85.

176. One classic example of cue taking is that voters may make decisions about ballot initiatives based on the cues of interest groups and high profile individuals. See, e.g., Arthur Lupia, *Shortcuts Versus Encyclopedias: Information and Voting Behavior in California Insurance Reform Elections*, 88 AM. POL. SCI. REV. 63, 63–76 (1994).

177. In other words, we can manipulate the system through incentives to return it to a state of independence.

178. See HEIMANN, *supra* note 144, at 94–97.

179. One could imagine, for example, that more routine tasks can be delegated to the less reliable agent. Cf. HEIMANN, *supra* note 144, at 125 (discussing programmatic functions).

1. Redundancy creates direct costs and risks over-enforcement. (Many critics stop here.)
2. However, redundancy may be a response to under-enforcement resulting from errors, resource constraints, information problems, and agency costs if agents are sufficiently differentiated. (This is the “engineering” claim.)
3. Shirking may reduce redundancy’s effectiveness, though this concern is mitigated if the first agent is unreliable or if effort is complementary. Cue taking may reduce redundancy’s effectiveness, though this concern is mitigated if the first agent is reliable or if incentives are properly constructed to manage independence. (These are the strategic behavior considerations.)

By failing to move beyond the first principle, critics of redundancy miss the potential of multiple diverse agents to improve law enforcement. In addition to potential cost-mitigation devices,<sup>180</sup> the “engineering” claim suggests that redundancy may respond to many causes of under-enforcement as long as agents are diverse, and public and private agents differ along meaningful dimensions.<sup>181</sup> The balance of this Part applies this general case for diverse-agent redundancy to problems with case selection and case outcomes. That said, the strategic behavior concerns give some pause. Although this paper is not the forum for the fine-grained assessment necessary to apply those insights to specific areas, where relevant this Article will suggest how strategic behavior may affect the analysis under particular conditions.

### *B. Redundant Authority and Case Selection*

As described above, under-enforcement may result from errors, resource constraints, information and perspectives, or agency costs. These issues can manifest in problems with case selection—agents may fail to bring cases they should. Or they may result in problems with case outcomes—settlements or judgments may understate the appropriate recovery. Potential responses differ depending on whether the problem is one of case selection or case outcomes.<sup>182</sup> This Section considers case selection, leaving case outcomes to Section C.<sup>183</sup>

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180. *See supra* notes 144–145.

181. *See supra* notes 144–145 and accompanying text.

182. Undifferentiated opposition to redundancy fails to appreciate this important distinction. *See supra* notes 144–147.

183. This Section thus assumes that once a case is selected by a public or private enforcer, the legislature is comfortable with potential outcomes. Why might a legislature worry about case selection and not case outcomes? Perhaps the legislature believes it is well positioned to monitor case prosecution, but lacks information necessary to monitor case selection. Or perhaps agent

The basic claim of this Section is that redundant authority, described as the ability of public and private agents to bring overlapping but mutually preclusive claims, responds to problems with case selection. Redundant authority may be valuable in these circumstances because it helps with errors, resources, information, and agency costs while avoiding the direct costs of truly redundant litigation. The notion that redundant authority may reduce under-selection of cases is not novel—indeed, the private-enforcement revolution assumed benefits from redundant authority.<sup>184</sup> However, it is useful to articulate the logic of redundant authority both to see its scope and to identify the procedural rules that should structure its use.

First, some cases may go unselected because of random or non-random errors. In some circumstances the lawmaker may be able to improve enforcement without redundancy by targeting agent incentives—providing bounties,<sup>185</sup> increasing the attorney fee,<sup>186</sup> or raising the political profile of an issue often will be sufficient.<sup>187</sup> But in some circumstances the legislature will be unable to tailor the incentives to satisfy public or private attorneys.<sup>188</sup> In those situations, the engineering version of redundancy suggests that redundant authority should reduce under-enforcement through diversification.<sup>189</sup> Because case selection is the issue here, redundant authority should be combined with preclusion to avoid costly (and unnecessary) relitigation. Note also that preclusion obviates the cue-taking problem because once a case is selected, there is no cue to take.<sup>190</sup>

Second, non-selection of cases may result from resource constraints. Because public and private enforcers draw on different resource pools, redundant authority should mitigate this under-selection by increasing available resources, as compared with public or

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incentives differ with respect to case selection and prosecution such that under-selection is likely but under-performance in litigation is not.

184. See *supra* notes 43–53 and accompanying text (collecting examples).

185. See, e.g., *supra* note 53 (citing False Claims Act recovery provisions).

186. See generally, e.g., FARHANG, *supra* note 41 (collecting examples).

187. See *supra* note 166 and accompanying text (public and private preferences). *But see* Lemos & Minzner, *supra* note 152 (discussing public-enforcement incentives).

188. For example, Professor Weisbach noted that legislatures are disabled from using high-powered incentives for government attorneys. See Weisbach, *supra* note 150, at 1847–48. For profit-motivated parties, due-process caps as well as available remedial metrics may limit potential recoveries. See, e.g., *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 515 (2008) (limiting punitive damages). Defendant's ability to pay also may blunt private incentives.

189. Random errors are avoided by repetition; bias is counteracted by multiple diverse agents (with diverse biases). See *supra* notes 144–145.

190. See *supra* notes 176–179.

private authority alone.<sup>191</sup> Indeed, existing redundant-authority regimes are often justified on this basis.<sup>192</sup> For example, the SEC has acknowledged that private enforcement provides a necessary supplement to public securities enforcement.<sup>193</sup> Notably, although redundant authority may increase resources, converting redundant authority to redundant litigation may be counterproductive on this score—duplication will sap already scarce enforcement resources. For this reason, inter-party preclusion is particularly important in these cases.<sup>194</sup>

Information presents a third challenge to case selection, and again redundant authority may be helpful while redundant litigation may go too far. The potential information challenge is straightforward—the party who can most efficiently prosecute the case may not know that it exists (or that it is cost effective). Redundancy, properly constructed, responds to this information problem: redundant authority permits either agent to file a case, claims-processing rules publicize and allocate cases, and preclusion stems over-selection. In light of the potential for shirking, these regimes are particularly apt when agents have differential access to information, reducing incentives to shirk and increasing the possibility of complementary efforts.<sup>195</sup> Whistleblower regimes also may be employed to solve information problems, though redundant authority may be preferred

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191. This assumes that resources are exogenous, at least for public actors, if not for private ones as well. The exogeneity of resources mitigates the shirking problem. *See supra* note 155.

192. *See supra* notes 92–94 (defining preclusion to include any rule that cuts off redundant litigation).

193. *See supra* note 156 (citing testimony of Chairman Levitt). Similarly, according to Roach and Trebilcock, when Congress first adopted private rights of action for antitrust violations, the appropriation for federal antitrust enforcement was zero. *See* Krent Roach & Michael J. Trebilcock, *Private Enforcement of Competition Laws*, 34 OSGOODE HALL L.J. 461, 465 (1996). That said, the government did prosecute a small number of antitrust cases in the early years of the Sherman Act. *See* Richard A. Posner, *A Statistical Study of Antitrust Enforcement*, 13 J.L. & ECON. 365, 366 (1970).

194. *But see supra* notes 96–97 (discussing examples of non-preclusion). Further, because the target is limited resources, claims-processing rules in these regimes should allocate cases between public and private enforcers with an emphasis on opportunity costs. For example, Congress might give private parties first priority, assuming that public resources should be reserved for cases that lack a private option.

195. If Agent 1 knows that Agent 2 cannot access information (or cannot gather it at a reasonable cost), then Agent 1 should not alter its behavior because of Agent 2. *See supra* notes 159–161. Similarly, intangible resources often are complementary, for example private information about harms and expertise at prosecuting them. *See supra* note 162.



because it incentivizes parties to bring cases,<sup>196</sup> and it insures against non-selection by the other agent.<sup>197</sup>

One potential example of this approach is the notice-and-intervention scheme of environmental statutes.<sup>198</sup> Private parties may have better information than the EPA about where and when environmental violations occur.<sup>199</sup> As a result, private parties are permitted to bring citizen suits.<sup>200</sup> But, Congress has indicated a preference for government enforcement: a claims-processing rule requires the private party to give notice to the government, and the government has the option to intervene and preclude private action.<sup>201</sup> If the government does not intervene, however, private litigation provides insurance against the government's non-selection.<sup>202</sup>

Agency costs are a final explanation for selection problems. For example, a government agency may be the most efficient enforcer, but because of capture, it would prefer not to prosecute an offending insider.<sup>203</sup> However, if case selection decisions were easy to monitor, then, in some of these situations, the agency will prefer to prosecute the suit itself. Redundant authority thus responds to agency problems by

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196. Although whistleblower regimes also could include incentives, the private-enforcement model represents an existing tool to incentivize private parties (damages) and attorneys (fees). *Cf.* Huq, *supra* note 144 (discussing cost mitigation resulting from the use of existing institutions). And litigation has the added benefit of deterring some bad cases, as the costs of filing suit and the threat of sanctions (or worse) may act as a screening mechanism for misleading or false allegations. *See, e.g.,* Anthony J. Casey & Anthony Niblett, *Noise Reduction: The Screening Value of Qui Tam*, 91 WASH. U. L. REV. 1169, 1189–98 (2014). Litigation may have other advantages as well. For example, litigation may smooth the information-sharing process, either because courts can endorse (and enforce) protective orders among parties, *e.g.,* FED. R. CIV. P. 26(c), or because courts can require information sharing even when parties are otherwise reluctant. *E.g., id.* 37. At the same time, civil litigation is replete with claims-processing procedures that can be used to ensure the priority enforcer litigates first. *See supra* Section I.C.

197. *See infra* note 202.

198. *See supra* notes 50–53 and accompany text (discussing citizen suits).

199. Most obviously, a direct victim of an environmental violation may be the first to learn of it, and indeed citizen-suit plaintiffs must show an “injury in fact” to have standing. *See, e.g.,* Lujan v. Defenders of Wildlife, 504 U.S. 555, 572–78 (1992). “Original sources” of information are prioritized in False Claims Act cases as well. *See infra* note 208. Note that this situation also tracks the observation that redundant authority is particularly helpful when agents have different access to information. *See supra* note 159.

200. *See supra* notes 50–53 (discussing citizen suits).

201. *See supra* notes 134–135 (citing intervention and preclusion provisions). Perhaps this preference responds to the EPA's prosecutorial expertise. And, indeed, it may be that private information and government expertise are complementary. *See supra* notes 102–106.

202. For example, if the EPA declined to prosecute due to bias, resources, or agency costs, the backstop of private enforcement does the job.

203. This is an extreme version of Professor Cover's concern with ideological commitments. *See Cover, supra* note 149, at 679.

announcing good cases to agents and principals.<sup>204</sup> And, because agents are in competition, these effects should feed back on selection decisions and (again because of competition) should be less susceptible to shirking and cue taking.<sup>205</sup>

The *qui tam* mechanism in the False Claims Act may track these informational and agency-costs stories.<sup>206</sup> Sometimes the government will have the information and the will to prosecute, and in those cases the government may bring an enforcement action that precludes further private efforts.<sup>207</sup> In other cases, government agents may not be aware of the fraud or may be complicit in it, so private parties may initiate suits.<sup>208</sup> Public enforcers, well versed in government litigation, may intervene once the case is announced by the private enforcer.<sup>209</sup> Duplicative litigation in either case is avoided as public and private suits are mutually preclusive.<sup>210</sup>

To summarize, redundant authority may improve case selection by reducing errors, aggregating resources and information, and improving monitoring. This logic supports redundant authority but not redundant litigation. Preclusion should bar duplicative suits in these circumstances, and claims-processing rules should be targeted to the particular challenges in the regulated area. Cue taking is not a significant issue here, while the risk of shirking points to certain circumstances particularly well-suited for redundant authority.

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204. Professor Stephenson argued that executive agencies should determine when to allow private rights of action. See Stephenson, *supra* note 41, at 95. But his proposal is susceptible to an agency-capture critique. Legislative, judicial, or market-based approaches reduce the effect of agency capture because the public enforcer is cooperating or competing with the private enforcer in the light of day.

205. See *supra* notes 176–179. Redundant authority may improve enforcement efficiency as well. Agents may select weak cases if they are unaware of strong cases—an information problem. Or, they may take weak cases to hide strong cases that they would rather not prosecute—an agency problem. Redundant authority can improve case-selection efficacy by publicizing strong cases and reducing monitoring costs.

206. See *supra* notes 51–53. The False Claims Act also might respond to resource constraints, as the government may not be able to prosecute all of the fraud against it.

207. 31 U.S.C. § 3730(a) (2012).

208. *Id.* § 3730(b)(1). Indeed, private suits must provide non-public information—the relator must satisfy the “public-disclosure bar” or be an “original source.” *Id.* § 3730(e)(4). This might be seen as cue giving from the more reliable agent. See *supra* notes 176–179.

209. *Id.* § 3730(b)(2) & (c).

210. See *supra* note 94. Private incentives are maintained independent of the government’s intervention decision. 31 U.S.C. § 3730(d) (2012) (providing award of fifteen to twenty-five percent if the government intervenes, or twenty-five to thirty percent if the government does not).

*C. Redundant Litigation and Case Outcomes*

Because redundant authority avoids much of the waste and over-enforcement risk that comes from truly redundant litigation, the case for redundant authority may seem straightforward. In many circumstances, diversifying potential enforcers has positive consequences for enforcement levels, while the costs of this redundancy—though not nonexistent—are much lower. Therefore, it may not be surprising that redundant authority is a relatively common regulatory strategy, and that its adoption is open and notorious.<sup>211</sup>

The costs are clearly higher in redundant litigation. Two lawsuits are more costly than one, and the risks of over-enforcement are higher when plaintiffs get two bites at the apple. Therefore, it may not be surprising that redundant litigation is more frequently the subject of criticism, and that its uses documented in Part I are perhaps less obvious to outside observers. Indeed, a default preference against redundant litigation would not be unjustified.

And yet, if lawmakers are concerned with settlements and judgments that understate the appropriate level of enforcement, redundant authority is insufficient.<sup>212</sup> Denying inter-party preclusion may remedy and deter under-enforcement in case outcomes, and damages and claims-processing rules can minimize some costs of over-enforcement and waste, though again these costs remain an important consideration for enforcement design. The balance of this Section unpacks these ideas, moving stepwise through the procedural decisions that manage redundant litigation: (1) preclusion; (2) damages; and (3) claims processing.<sup>213</sup>

Before delving into this analysis, though, there is one explanation for redundant litigation that should be mentioned. Perhaps the easiest case for redundant litigation exists when the lawmaker

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211. Environmental citizen suits, for example, should not surprise most observers of environmental law.

212. This Section addresses situations in which the first case results in a payout that may be too low. A special case of the model would be situations in which the first case results in a payout of zero—*i.e.*, a finding of no liability. My argument applies in this special case as well, though a legislature might be particularly wary of over-enforcement and defendant litigation costs in these situations, thus auguring more strongly in favor of the contingent delegation discussed *infra* note 249.

213. Of course, problems with case outcomes also could suggest non-litigation alternatives, and indeed Professors Cox and Thomas have recently explored how changes in corporate governance have responded to ineffectiveness and inefficiency in litigation aiming to rein in managerial agency costs. James D. Cox & Randall S. Thomas, *Addressing Agency Costs Through Private Litigation in the U.S: Tensions, Disappointments, and Substitutes* (Vanderbilt Law & Econ., Research Paper No. 15-20, 2015), <http://ssrn.com/abstract=2651863> [<http://perma.cc/5WCL-GM44>].

accepts the risk of over-enforcement in service of reducing under-enforcement.<sup>214</sup> It may be that for certain conduct, the lawmaker is so intent on punishment and deterrence that it tolerates over-enforcement.<sup>215</sup> Or it may be that the lawmaker assumes (rightly or wrongly) that agents will self-censor over-enforcement.<sup>216</sup> Either way, if the goal is a reduction in under-enforcement no matter the cost—and as long as constitutional protections are in place<sup>217</sup>—then the legislature could authorize redundant litigation purely as insurance against false negatives. However, concerns with over-enforcement are relevant,<sup>218</sup> and “multiple punishments” should not be the norm.<sup>219</sup> For these reasons, the balance of this Section assumes that lawmakers are not unconcerned with over-enforcement.<sup>220</sup>

### 1. Preclusion: Redundant Authority v. Redundant Litigation

Case outcomes may be insufficient for many of the same reasons that good cases may not be selected. Agents may make random errors or biased ones. Resource constraints may reduce the effectiveness of enforcement operations. Information gaps may lead enforcers to underperform at settlement or judgment. And agency problems may result in sham suits or suboptimal settlements.

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214. Bendor, for example, suggests that the justification for redundancy is stronger “the more critical or costly a failure would be.” BENDOR, *supra* note 144, at 53.

215. For two sources discussing but not endorsing this notion, see Richard H. Fallon, Jr., *The Core of an Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1693 (2008) (discussing constitutional rights); and Huq, *supra* note 144 (discussing terrorism).

216. Perhaps agents are so concerned with legislative approval—and legislatures are so transparent about their concern with over-enforcement—that the risk is small. Or perhaps the legislature concludes that norms sufficiently discourage duplicative suits.

217. See, e.g., U.S. CONST., amend. VIII (Excessive Fines Clause); *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 515 (2008) (limiting permissible punitive damages).

218. Cf. *infra* notes 294–295 and accompanying text (discussing *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393 (2010)).

219. See *infra* note 250 (citing sources on multiple punishments).

220. Although the lawmaker may not want to encourage over-enforcement, presumably most laws are designed to be enforced once. For example, a statutory or common-law claim for compensatory damages seeks to make the victim whole. One might say that there are statutory schemes for which under-enforcement is preferred, for example, speed limits, but recall that this Article judges enforcement against legislative preference, so those cases merely suggest a different baseline. See *supra* text accompanying notes 147–148. Admittedly, there may be circumstances in which some legislators desire no enforcement of a law on the books. In the context of aggregation, Professor Burbank suggested that “it seems entirely possible that—prior to the introduction of the small claims class action—a legislature may be been aware, and (collectively) content, that in some circumstances the right and its attendant statutory remedy were worth only the paper on which they were written.” Stephen B. Burbank, *Aggregation on the Couch: The Strategic Uses of Ambiguity and Hypocrisy*, 106 COLUM. L. REV. 1924, 1929 (2006). This Article does not make any assumptions about the intended level of enforcement, only that it is nonzero.

Redundant authority does not respond to problems with case outcomes, but redundant litigation might. The mechanism is direct: remove preclusion.<sup>221</sup> If a private suit understates recovery, then a second (non-precluded) public suit is available to remedy the under-enforcement; if a public suit is insufficient, a second (non-precluded) private suit could fill the gap.<sup>222</sup> The second litigation also aggregates information exposed in the first case with new information from the redundant agent—efforts may be complementary.<sup>223</sup> And, by improving monitoring through competition and publicity, redundant suits curtail agency problems.<sup>224</sup> The threat of redundant litigation also should feed back into improved outcomes in the first case, and thus may reduce the amount of redundant litigation that actually occurs.<sup>225</sup> Though redundant litigation has direct costs, a legislature may elect to pay these costs in order to remedy and deter under-enforcement in case outcomes.<sup>226</sup>

Why would a legislature select redundant litigation when it could just select the better enforcer? One set of answers is that the better enforcer cannot be stretched to cover all cases. Most clearly, the better enforcer may be hard capped by resource constraints—states with balanced-budget requirements, for example, can only increase public-enforcement spending so much. This fixed constraint has parallels in other areas—e.g., there may be something about the better agent that makes it impossible (or impractical) to overcome a particular bias or information problem. In these circumstances, redundant litigation may provide a backstop for under-enforcing outcomes.<sup>227</sup>

Perhaps a more interesting set of answers tracks the earlier observation that redundancy is particularly effective when the principal

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221. Of course, preclusion has its own set of purposes and values. *See, e.g.*, Tobias Barrington Wolff, *Preclusion in Class Action Litigation*, 105 Colum. L. Rev. 717, 790–95 (2005). This discussion treats “preclusion” as a tool of institutional design, but in practice lawmakers may account for preclusion’s values along with enforcement concerns when crafting a set of regulatory approaches.

222. Non-preclusion may reduce defendants’ incentives to settle. Because remedies are critical to this analysis, this issue is taken up in the discussion of damages below.

223. In this way, concern with shirking may be mitigated. *See supra* notes 176–179.

224. Publicity is relevant not only to inform legislators about agent performance, but also to inform voters about legislative performance.

225. This is a positive type of strategic behavior. *See supra* text accompanying notes 168–181.

226. Moreover, note that many of the costs of litigation do not need to be duplicated. For example, the costs of preservation and discovery may not be incurred twice. And, as it turns out, these costs seem to represent the largest share of defendants’ litigation costs. *See, e.g.*, William H.J. Hubbard, *The Discovery Sombrero*, 64 CATH. U. L. REV. 867, 885–97 (2015). Costs also are mitigated by the capacity for litigation among private parties, public enforcers, and the courts. *See generally* Huq, *supra* note 144 (discussing a related issue).

227. *See supra* Section III.A.

is saddled with an unreliable enforcer.<sup>228</sup> In those cases, allowing a second agent to sue may fill the gap. For example, for claims that have some “private” character—*e.g.*, torts—a legislature may be unwilling or unable to eliminate private enforcement.<sup>229</sup> And yet, for various reasons, private actions may be systematically suboptimal. Thus, redundant government litigation may be necessary to achieve socially optimal outcomes.

Consider the case of private mass litigation. Suboptimal settlements are a notorious concern in class actions. The notion is that plaintiffs’ attorneys have incentives to settle cases too easily, plaintiffs themselves are poor monitors because individual stakes are low and information is expensive, and courts supervising litigation are handicapped because they only have information presented to them by the parties.<sup>230</sup> This problem is magnified in the context of dueling class actions.<sup>231</sup> If class actions are filed in different jurisdictions,<sup>232</sup> defendants can hold a reverse auction among plaintiffs’ attorneys, bidding them down to lower and lower settlements.<sup>233</sup> Each class counsel is willing to negotiate because she wants her fee, and full-faith-and-credit rules mean that any judicially endorsed settlement may be preclusive in other U.S. courts.<sup>234</sup> But if the private settlement were not preclusive on government suits, then redundant public litigation could improve the outcome and mitigate the reverse-auction problem. The

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228. See *supra* Section III.A.

229. See *supra* notes 31–40 (discussing private causes of action). Non-tort claims may also have a personal connection. A district court recently certified an antitrust class action on behalf of women who donated eggs through fertility clinics and donation agencies. *Kamakahi v. Am. Soc. Reproductive Med.*, 305 F.R.D. 164 (N.D. Cal. Feb. 3, 2015). “Private” claims also may include those for which the private party has a nonpecuniary interest. For further discussion of the implications of these values for redundant enforcement, see *infra* notes 289–291.

230. See, *e.g.*, John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1356–67 (1995) (discussing these issues); Susan P. Koniak, *Feasting While the Widows Weep: Georgine v. Amchem Prods., Inc.*, 80 CORNELL L. REV. 1045, 1115–19 (1995) (discussing difficulties with court review); Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051, 1111–12 (1996) (discussing plaintiffs’ attorneys’ incentives to settle).

231. See Rhonda Wasserman, *Dueling Class Actions*, 80 B.U. L. REV. 461, 470–74 (2000) (discussing the pressures of class actions).

232. One conceivably could get the same effect within a jurisdiction if the cases are not consolidated and are not treated as *res judicata*.

233. See, *e.g.*, John C. Coffee, Jr., *The Corruption of the Class Action: The New Technology of Collusion*, 80 CORNELL L. REV. 851, 853 (1995) (discussing the problem of allowing defendants to choose among plaintiffs’ attorneys); Wasserman, *supra* note 231, at 473 (laying out this scenario).

234. See U.S. CONST. art. IV, § 1 (Full Faith and Credit Clause); 28 U.S.C. § 1738 (2015) (full faith and credit statute); see also *supra* note 106 (collecting sources).

threat of a redundant suit also may have a disciplining effect on the original settlement.<sup>235</sup>

A number of recent developments in complex-dispute resolution may call out for redundant public enforcement of this type. Private entities (like BP after Deep Water Horizon) have employed so-called “corporate settlement mills” to privately resolve disputes and procure litigation waivers without resorting to the legal process.<sup>236</sup> In a novel settlement, parties to a class action applied mandatory class procedures to an agreement waiving the right to future class relief, while leaving open the possibility of future individual suits.<sup>237</sup> Arbitration is another potential cause for concern, as enforceable class-arbitration waivers have drawn skepticism from many judges and scholars.<sup>238</sup> In each of these circumstances, a legislature may not object to the practice in theory, but may worry about its effect on case outcomes. Instead of an outright ban, a legislature could adopt non-preclusion to remedy or deter any under-enforcing outcomes that may result.<sup>239</sup> Indeed, despite justified criticism on other grounds, the Class Action Fairness Act

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235. Allowing serial private suits is another possible response, and indeed this was the state of affairs with respect to damages class actions prior to 1966. *See, e.g.*, Geoffrey C. Hazard, Jr., John L. Gedid & Stephen Sowle, *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. PA. L. REV. 1849, 1938 (1998) (discussing the practice of allowing joinder after a favorable judgment had been reached on the merits). But such an approach risks over-enforcement, *cf.* Brainerd Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281, 289 (1957) (arguing that allowing *res judicata* leads to aberrant results), and reduced incentives to settle. *See supra* notes 221–224.

236. *See* Dana A. Remus & Adam S. Zimmerman, *The Corporate Settlement Mill*, 101 VA. L. REV. 129, 178–88 (describing settlement mills). Remus and Zimmerman propose regulation, judicial scrutiny, participation, and ethical standards, but another response would be permitting redundant government litigation.

237. *See* D. Theodore Rave, *When Peace Is Not the Goal of a Class Action Settlement*, 50 GA. L. REV. (forthcoming 2016) (citing *In re Trans Union Corp. Privacy Litig.*, 741 F.3d 811 (7th Cir. 2014)). Using the mandatory aggregation procedure of Rule 23(b)(1)(A), the District Court approved a settlement agreement under which defendant offered some relief in exchange for waivers of the right to proceed in an “aggregated action.” *In re Trans Union Corp. Privacy Litig.*, 741 F.3d 811, 814–15 (7th Cir. 2014). The agreement did not seem to bar *parens patriae* actions on the same claims. *See id.* at 818–19.

238. *E.g.*, Einer Elhauge, *How Italian Colors Guts Private Antitrust Enforcement by Replacing It with Ineffective Forms of Arbitration*, 38 FORDHAM INT’L L. J. 771, 775 (2015) (discussing how arbitration clauses “waive the right to effective vindication of antitrust law”); Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2836–40 (2015) (discussing how arbitration agreements interfere with private rights); Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78, 118–22 (2011) (discussing the unfairness of boilerplate arbitration agreements).

239. This proposal would be particularly effective if combined with a setoff rule, such that the threat of relitigation would deter the most egregious versions of these practices but not deter their use entirely. *See infra* Section III.C.2.

requires notice to state and federal officials of class-action settlements, potentially inviting real or threatened redundant litigation.<sup>240</sup>

Still another version of this account of redundant litigation addresses situations in which reliability varies across cases. Imagine a government agency that is a reasonably reliable enforcer except that it occasionally settles suboptimally with political allies (or as a result of some other nonrandom bias). On this set of facts, the lawmaker is—in a sense—saddled with an unreliable enforcer for those few cases if it wants to preserve the reliable enforcer for all other cases.<sup>241</sup> Redundant litigation can be available for these suboptimal outcomes,<sup>242</sup> and the threat of redundant litigation—and its ability to publicize and substantiate those suboptimal outcomes—may have a feedback effect on the agency's behavior.<sup>243</sup>

Finally, redundant litigation could target cases based on disposition type. Specifically, a legislature may think differently about the reliability of settlements versus judgments. As noted above, under-enforcing settlements are a significant problem in class actions. There also are good reasons to be concerned about public settlements that cut off further investigation.<sup>244</sup> These concerns may support a non-preclusion rule for settlements. Agency problems seem less severe in cases litigated to judgment. Courts actively supervise litigants and attorneys, opportunities to collude are reduced, and the public nature of judicial proceedings compared with settlements should create some sunlight-as-disinfectant effects.<sup>245</sup> Under-enforcing judgments may be a problem, but it would not be unreasonable for a legislature to be less concerned than when cases settle.<sup>246</sup> Therefore, settlements could be

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240. See 28 U.S.C. § 1715 (2012) (rules on notice for class actions); Sharkey, *supra* note 130, at 1994–96 (discussing notice and state attorneys general).

241. This assumes that the lawmaker cannot identify these cases *ex ante* and legislate accordingly. For example, if we knew that the EPA had a problem with clean water cases, we could strip its jurisdiction in that area only.

242. See *supra* note 100 (discussing “diligent prosecution” requirements).

243. Of course, reliability may vary between public and private agents, and there are practical and democratic-theory differences between public and private enforcers. See, e.g., Engstrom, *supra* note 138, at 630–41 (discussing critiques of private enforcement); Stephenson, *Public Regulation*, *supra* note 41, at 106–21 (discussing advantages and disadvantages of private enforcement). For these reasons, legislatures may adopt asymmetric preclusion rules. See *supra* notes 207–210 (collecting statutes with asymmetric preclusion). For example, if a legislature concluded that public enforcement was more reliable, government outcomes could preclude private litigants asymmetrically. Less drastically, relative preclusion could vary depending on party order—e.g., it is harder, but not impossible, to relitigate a government case.

244. See, e.g., Johnson, *supra* note 9, at 902–05 (discussing criticisms of EPA intervention).

245. See, e.g., FED. R. CIV. P. 23 (judicial supervision of class-action representation).

246. One potentially relevant consideration is that redundancy might affect fact-finder behavior—it might increase errors in favor of defendants or discourage investment of judicial resources in light of the potential backstop. See, e.g., Jonathan Masur, *Patent Inflation*, 121 YALE



denied preclusive effect while relitigation of judgments would only be permitted if a high bar is cleared.<sup>247</sup>

This differentiation between the preclusive effect of settlements and judgments reflects what might be called *contingent delegation*. If an agent is willing to litigate cases, incur those costs, and subject itself to the scrutiny of the judicial process, then the lawmaker devolves significant authority. The litigating agent has full control unless its performance is so poor that it is susceptible to a collateral attack. If parties settle cases, however, the delegation is weaker—no preclusion attaches. The relative strength of the contingent delegation (*i.e.*, the relative strength of preclusion) is at the discretion of the legislature.<sup>248</sup> Redundant enforcement also may reveal information about public and private enforcers that informs future contingent delegations. And perhaps, at least under some conditions, the lack of preclusion associated with settlements may deter some plaintiffs bringing suit exclusively for the purpose of extracting nuisance settlements.<sup>249</sup>

## 2. Damages: Multiple Punishments and Incentives

This Section makes a simple claim—damages in redundant litigation should offset to reduce over-enforcement—and then considers various implications of this proposal.

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L.J. 470, 517–19 (2011) (showing how second-round review affects judicial behavior in the first case); David Rosenberg, *Decoupling Deterrence and Compensation Functions in Mass Tort Class Actions for Future Loss*, 88 VA. L. REV. 1871, 1904–05 (2002) (discussing adjudicative investment as a function of stakes). Exactly how these effects may play out in redundant enforcement is not clear, and the presence of government actors may complicate matters further. These effects thus deserve further study.

247. Cf. Marcel Kahan & Linda Silberman, *The Inadequate Search for “Adequacy” in Class Actions: A Critique of Epstein v. MCA, Inc.*, 73 N.Y.U. L. REV. 765, 771–73 (1998) (discussing collateral attack on judgments for inadequacy of representation); Lemos, *supra* note 22, at 532–35 (discussing class actions and *parens patriae* suits); William B. Rubenstein, *Finality in Class Action Litigation: Lessons from Habeas*, 82 N.Y.U. L. REV. 790, 820–41 (2007) (discussing habeas cases and class actions). Writing about public suits vindicating private claims, Professor Lemos rejected preclusion in favor of offset or opt-in. Lemos, *supra* note 22, at 546–48. Lemos’s arguments apparently apply to settlements and judgments, but the logic described here suggests that judgments could be treated more respectfully (and more preclusively) than settlements.

248. Potential standards could include rules borrowed from legal malpractice, *Gunn v. Minton*, 133 S. Ct. 1059, 1065 (2013), ineffective assistance of counsel in habeas cases, *Strickland v. Washington*, 466 U.S. 668, 686 (1984), or inadequate representation in class-action jurisprudence, *Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S. 367, 395–99 (1996) (Ginsburg, J., concurring in part and dissenting in part). See also *supra* note 130 (collecting sources).

249. Though fleshing out this notion is beyond the scope of this project, the logic may be as follows: Contingent delegation reduces the value of settlement, and thus defendants may be less willing to pay out a nuisance settlement in lieu of litigating their case to judgment. If a rational plaintiff knows that no nuisance settlement is coming, that might deter some suits seeking only this result.

As explained above, legislatures may be justified in turning to redundant public-private litigation to reduce under-enforcement in case outcomes. Adopting a non-preclusion rule, however, risks over-enforcement in the form of multiple recoveries. If both private and public enforcers can sue on the same offense, defendants could easily pay twice. This is the “multiple-punishments problem.”<sup>250</sup> A direct solution is to require that damages in the second case be offset by the value of the first recovery. That way, a defendant should never pay more than full value. In practice, pairing offset with non-preclusion is common in public-private litigation, though it is not the universal rule, and the lack of offsets in some areas should raise red flags.<sup>251</sup>

Note that this seemingly straightforward rejection of multiple damages has implications for alternative strategies to remedy under-enforcement in case outcomes. One potential response to under-enforcing outcomes would be to multiply damages—if parties routinely accept one half of the optimum, a legislature could prescribe double damages and save the cost of a second suit.<sup>252</sup> The multiple-punishments problem highlights reasons we may favor redundant litigation over damage multipliers. First, although a damage multiplier might *on average* result in optimum recovery, in any given case a defendant might pay too much. For fairness reasons, these multiple punishments may be disfavored.<sup>253</sup> The risk of multiple damages also may disproportionately affect risk-averse parties, while they will be

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250. For discussion on the multiple-punishments problem, see generally Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 MINN. L. REV. 583 (2003); Howard A. Denemark, *Seeking Greater Fairness when Awarding Multiple Plaintiffs Punitive Damages for a Single Act by a Defendant*, 63 OHIO ST. L.J. 931 (2002); Jim Gash, *Solving the Multiple Punishments Problem: A Call for a National Punitive Damages Registry*, 99 NW. U. L. REV. 1613 (2005); Samuel Issacharoff, “Shocked”: *Mass Torts and Aggregate Asbestos Litigation After Amchem and Ortiz*, 80 TEX. L. REV. 1925 (2002); Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347 (2003). See also *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 840–41 (2d Cir. 1967) (Friendly, J.). Although this literature focuses on punitive damages, the same multiple-punishments problem could result for overlapping suits by different plaintiffs, for example redundant suits seeking disgorgement of ill-gotten gains from a defendant. I should note, however, that this discussion is defendant focused. For the plaintiffs’ perspective, see *supra* note 188 and accompanying text.

251. See *supra* notes 115–116 (collecting examples in securities, antitrust, and ERISA). In many areas, public and private damages are described differently—e.g., private litigants may be able to recover punitive damages while public litigants recover civil penalties. The mere re-characterization of damages theories should not interfere with the offset regime. Only if damages truly seek different ends, should offset be reconsidered.

252. This is obviously an oversimplification, as one would expect dynamic effects resulting from a damage multiplier that may require a different ratio. However, the logic of this discussion holds no matter the proportions.

253. See *supra* note 250 (collecting sources). Indeed, in some areas, the Supreme Court has disallowed multiple punishments on constitutional grounds. See *supra* note 122.

ineffective against parties with a limited ability to pay.<sup>254</sup> Finally, multiplied damages may not be effective in response to many of the enforcement problems identified above—a truly captured agency, an enforcer with a fixed resource constraint, or a case involving difficult-to-transfer knowledge may still call out for multiple diverse agents rather than a multiplier.<sup>255</sup>

Returning to the main thread, the simple claim that offsets avoid multiple damages must grapple with the potential consequences for the likelihood of redundant suits. Redundant litigation options cannot deter or remedy under-enforcement if they are never cost-effective to exercise. Offsets thus present an incentive problem: whichever agent goes second will be pursuing a reduced opportunity for damages, and this reduction in incentives could result in non-selection or under-investment.<sup>256</sup>

With respect to government attorneys as redundant enforcers, the reduction in the purely pecuniary incentives to litigate may be less troubling. Public attorneys have motives beyond monetary recovery.<sup>257</sup> If one subscribes to a budget-maximizing view of public agencies, then it would make sense for government attorneys to demonstrate the shortcomings of private enforcement in order to acquire more resources in the next round of legislation.<sup>258</sup> Alternatively, if public attorneys were public spirited (or public-attention seeking), miscarriages of justice may call out for action. These same interests also may discourage public actors from relitigating cases in which prior outcomes were only slightly suboptimal. It would be hard to imagine a legislature responding positively to an agency that used valuable resources to recover a pittance, nor would such a suit maximize the public interest.<sup>259</sup>

The incentive problem is more acute when private actors are redundant enforcers. Private parties seem primarily motivated in these

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254. If a party had funds to pay a compensatory award but not a multiplied one, then it would not experience any greater deterrent effect from the multiplier.

255. *See supra* Section III.A.

256. Assuming multiple recoveries were disfavored, this is another reason to doubt serial private litigation as a policy response. *See supra* note 250.

257. *See supra* note 152 and accompanying text.

258. *See* WILLIAM A. NISKANEN, JR., BUREAUCRACY AND REPRESENTATIVE GOVERNMENT 155–61 (1971) (discussing competition among agencies); Gersen, *supra* note 144, at 220 (discussing implications of multiple jurisdiction).

259. *See, e.g.*, Bruce Hay & David Rosenberg, “Sweetheart” and “Blackmail” Settlements in Class Action: Reality and Remedy, 75 NOTRE DAME L. REV. 1377, 1394 (2000) (discussing the consequences of asymmetric stakes for accuracy). Of course, the asymmetric stakes between private plaintiffs and defendants in mass actions are notorious. *See* Alexandra D. Lahav, *Symmetry and Class Action Litigation*, 60 UCLA L. REV. 1494, 1498 (2013) (discussing asymmetry); Hay & Rosenberg, *supra* (same).

cases by profit,<sup>260</sup> and private parties necessarily will have reduced incentives in offset cases as compared with non-offset cases. If the legislature ranks cases according to potential recovery, then this reduction in incentives is appropriate—private parties will sue only when government underperformance is so extensive that it would be cost justified to bring a redundant suit to recover the remainder. If lawmakers want the disciplining effect of redundant litigation to reach beyond those cases, however, then they would need to construct incentives to encourage follow-on suits. Attorney fees are an obvious starting point.<sup>261</sup> For redundant suits, lawmakers could offer attorney fees calculated with reference to the pre-offset value.<sup>262</sup> To avoid private attorneys filing nearly frivolous suits in order to rack up attorney fees,<sup>263</sup> the legislature could limit the availability of fees to significant recoveries.<sup>264</sup> One could characterize this proposal as *contingent procurement*—the government is procuring substitute representation only if the private party achieves a certain level of recovery.<sup>265</sup>

Importantly, though, increasing the incentives to relitigate comes at a cost to settlement. If settlements are not preclusive, and if relitigation is likely, defendants may be reluctant to settle in the first place. The uncertainty of follow-on litigation undercuts the finality of settlement,<sup>266</sup> and defendants may worry about the signal that settlement sends to future enforcers.<sup>267</sup> Lawmakers must be aware of

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260. See *supra* note 152.

261. See, e.g., FARHANG, *supra* note 41, at 51–54 (collecting data on fee provisions).

262. For example, if a set of claims were worth \$10 million plus a \$2 million attorney fee, and the government settled the *parens patriae* case for \$5 million, a private attorney obtaining \$5 million in additional recovery could be entitled to the same \$2 million fee. Legislatures may view this as unfair to defendants and as creating a disincentive for government attorneys to achieve maximum settlements. A solution to both problems would require defendants to satisfy the difference in damages and the government to reimburse the attorney fee.

263. See *supra* note 118 (discussing an antitrust suit seeking zero-dollar recovery in order to qualify for an attorney-fee award).

264. For example, the attorney may recover only if damages exceed the fee, some multiple of the fee, or some fixed amount. To avoid inflection points, perhaps the attorney fee should grow in proportion to the difference between the private result and the offset.

265. If the redundant litigation followed a government judgment, different rules may be necessary. Perhaps private parties could be required to bring the underlying claim against the defendant and also argue inadequate representation, or they could have a takings-like claim against the government agency that failed them. It seems likely that a legislature would reject a rule in which the government could be liable for the full value of every claim it loses. But it would not be so unreasonable to provide restitution in those cases in which the government grossly underperformed.

266. See, e.g., Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 199–204 (2003) (discussing implications for the opt-out class).

267. See, e.g., Omri Ben-Shahar & John A. E. Pottow, *On the Stickiness of Default Rules*, 33 FLA. ST. U. L. REV. 651, 655 (2006) (describing signaling in this context).

this tradeoff when considering redundant litigation.<sup>268</sup> That said, settlement effects should not be overstated. The incentives to settle are already quite strong,<sup>269</sup> and parties settle even if general releases are not available.<sup>270</sup> Moreover, offset provisions should help to reduce settlement effects because they link the risk of relitigation to the adequacy of the settlement. Defendants' incentive to settle will be most disturbed when settlement values are most troubling from a social perspective.<sup>271</sup>

In sum, when adopting redundant public-private litigation, lawmakers can curtail over-enforcement by offsetting damages in the redundant case, though incentives may need attention to ensure that disciplining litigation remains cost effective.<sup>272</sup>

### 3. Claims Processing: Order and Timing

The foregoing discussion has assumed sequential enforcement, but public and private suits may be litigated simultaneously.<sup>273</sup> Simultaneous suits risk duplicative work and lose out on beneficial aggregation. Simultaneous suits also risk shirking, as both agents will prefer that the other makes costly investments in research. Finally, if simultaneous litigation creates a race, it may discourage enforcers from

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268. For example, lawmakers especially concerned with settlement effects could give defendants the protection of a fee-shifting provision tied to the redundant recovery.

269. See, e.g., STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 410 (2004) (suggesting that ninety-eight percent of cases settle). Although this ninety-eight percent figure overstates the case, see, e.g., Theodore Eisenberg & Charlotte Lanvers, *What is the Settlement Rate and Why Should We Care?*, 6 J. EMP. LEG. STUD. 111, 129–35 (2009), there is no doubt that a substantial number of civil cases settle.

270. Defendants settle antitrust and securities cases with government regulators even in light of follow-on private suits. And the notorious difficulty of enforcing releases has not deterred settlements in the vast majority of cases.

271. For this reason, it also should not be unfair to deprive defendants of the preclusive benefits of an illegitimate first disposition. See *supra* Section III.C.1.

272. The discussion here has focused on damages cases, but of course enforcement suits may seek declaratory or injunctive relief. To see that declaratory and injunctive relief should not be ignored, one need look no further than the classics of public-law litigation. See, e.g., *Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976). One simple way to translate this Section's recommendation to equity is to adopt its approach to preclusion rules, ignore offset rules (because there are no damages to offset), and turn directly to claims processing. Another view might be that governments never should be precluded from pursuing injunctive relief. A middle ground applies the former recommendation to private claims and the latter to public claims. And in some injunctive cases, remedies may be additive such that "offset" could apply.

273. The discussion here is simplified in that it assumes one public and one private enforcer. Of course, federal and state governments also may have overlapping claims, and multiple state governments may want a piece of the action. This paper takes no position on these questions. Instead, the focus here is how legislatures may tap public and private enforcers to improve law enforcement through redundant public-private action.

sharing information, while encouraging them to cut corners, strike sweetheart deals, or engage in inefficient gamesmanship.<sup>274</sup>

Legislatures may respond to these concerns by turning simultaneous enforcement actions into sequential ones. Claims-processing rules have the power to affect litigation timing. The simplest version is a stay rule: all suits except one are stayed pending its outcome.<sup>275</sup> To ensure that parties and courts are aware of simultaneous suits, parties could be required to give notice of potentially redundant litigation.<sup>276</sup> Citizen-suit provisions, for example, often call upon private parties to notify the government.<sup>277</sup> Another way to reduce waste is to limit the time in which overlapping claims can be brought. For example, private actors could have the option to intervene as co-plaintiffs or to replace a public enforcer only at the outset of litigation.<sup>278</sup> And courts have various capabilities that can improve coordination between seemingly separate proceedings.<sup>279</sup>

Whether the government suit should stay the private suit or vice versa is an important choice.<sup>280</sup> The strategic-behavior considerations described above are particularly relevant to this claims-processing issue. Recall that cue taking may be a good thing if the reliable agent cues the less reliable one.<sup>281</sup> The legislature may well conclude that the government enforcer is more reliable but lacks the resources to prosecute every case vigorously.<sup>282</sup> If the government is allowed to move first but calibrate its effort, this action can signal to follow-on private enforcers that further work is necessary. For example, the government could pursue injunctive relief or liability only, thereby cueing private

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274. Cf. Jack Hirshleifer, *The Private and Social Value of Information and the Reward to Inventive Activity*, 61 AM. ECON. REV. 561, 563 (1971) (discussing races). These effects should exist whether the first suit precludes or offsets the second.

275. Some statutes include stay provisions, *see supra* notes 128–135, and legislatures could take advantage of existing judicial tools for managing parallel proceedings.

276. *See supra* notes 129–132 and accompanying text (discussing notice provisions).

277. *See supra* note 130 and accompanying text. Similar provisions could exist in other statutory contexts and in either direction. Cf. Lemos, *supra* note 22, at 545 (proposing notice and opt-out for private parties in government suits).

278. Cf. 31 U.S.C. § 3730(b)(2) (2012) (permitting government intervention in False Claims Act suit within sixty days); 47 U.S.C. § 402 (2012) (permitting any interested party to intervene in judicial review of FCC decision within 30 days).

279. *See, e.g.*, MANUAL FOR COMPLEX LITIGATION § 22.2 (4th ed. 2004) (“Courts routinely order counsel to disclose, on an ongoing basis past, and pending related cases in state and federal courts and to report on their status and results.”); Clopton, *supra* note 15, at 1390 (discussing coordination in transnational litigation).

280. Particular circumstances also may call for more creative solutions such as auctions or tournaments. *See, e.g.*, Weisbach, *supra* note 150, at 1826–27.

281. *See supra* notes 176–179.

282. *See supra* notes 228–229 and accompanying text.

enforcers to take up damages actions. Indeed, in some areas, a finding of liability in a government enforcement action is *prima facie* evidence of a violation in the follow-on private suit,<sup>283</sup> and in others, government litigation automatically stays the statute of limitations for redundant private litigation.<sup>284</sup> Alternatively, if redundant litigation is only necessary to cure occasional lapses by the public (or private) enforcer, then public (or private) suits should go first.<sup>285</sup>

An additional consideration with respect to party ordering is compensation. The multiple punishments literature worries about defendants unfairly paying multiple judgments, but it often ignores the issue of compensation—which of the many potential plaintiffs collects the damage award, and why are others barred from recovery?<sup>286</sup> In an offset regime, the party suing first has access to the largest potential recovery. A legislature allowing government litigation to proceed first must be comfortable with reducing potential private compensation, or it must come up with another way to compensate.<sup>287</sup> If private litigation goes first, however, private plaintiffs have an opportunity at full recovery. This option could be understood as forfeiting further compensation from the government suit.<sup>288</sup>

Non-monetary values such as dignity and participation are also relevant here.<sup>289</sup> Though much of this Article is framed in instrumentalist terms, particularly for “private law” claims, there are reasons to think that an aggrieved party should have the right to an

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283. See *supra* note 113 (using the Clayton Act as an example).

284. See *supra* note 275.

285. See *supra* notes 128–136 and accompanying text (outlining this justification for redundant litigation).

286. See *supra* note 250 (collecting sources). Professor Sharkey, a notable objector to this trend, identified a particularly telling passage from a law-and-economics textbook: “[T]hat the damages are paid to the plaintiff is, from an economic standpoint, a detail. It is payment by the defendant that creates incentives for more efficient resource use. The transfer of the money to the plaintiff affects his wealth but does not affect efficiency or value.” Sharkey, *supra* note 250, at 370 (quoting RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 78 (1972)). Another response would be to decouple the award to plaintiff from the payment by defendant. *E.g.*, Rosenberg, *supra* note 246, at 1892–96 (discussing this approach).

287. Perhaps intervention is useful here. In many current regimes, intervention cuts off the second suit, but it also could have consequences for available damages. For example, if a party intervenes within the designated period, it would be entitled to full compensatory damages; if it does not, then a future suit would be subject to offset.

288. Even if the prior case took the form of a damages class action, plaintiffs had rights to receive notice, opt out of litigation, and object to settlement. See FED. R. CIV. P. 23. Certainly the government would be within its rights to distribute recoveries from the second suit, but such distributions should not be required.

289. See, *e.g.*, Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part I*, 1973 DUKE L.J. 1153, 1172–73 (discussing dignity, participation, effectuation, and deterrence values).

individual day in court seeking full redress from a defendant that did her wrong.<sup>290</sup> These values may suggest that a private party should have the right to proceed first, particularly for private-law claims. If private parties have this option and choose to decline or to accept socially suboptimal results, then government attorneys may be needed to fill the deterrence gap.<sup>291</sup> Indeed, as long as public actions do not preclude private ones, individuals will retain their right to a day in court independent of governmental action—and the monetary offset is less concerning for suits vindicating non-pecuniary interests.

## CONCLUSION

Law enforcement faces random errors, biases, resource constraints, information problems, and agency costs. Lawmakers can harness multiple diverse agents to help mitigate these concerns if they sensibly link institutional design to legislative preferences. Of course, redundant enforcement is not the right approach for all situations and in all forms. Legislatures must make the underlying judgments about which pathologies are sufficiently pernicious to justify redundant enforcement.<sup>292</sup> Legislatures have to decide whether to organize decisions based on enforcement unit or regulated area.<sup>293</sup> And legislatures must set enforcement policy by making choices about procedural and remedial design.<sup>294</sup> These are the hard questions: how should we weigh the costs and benefits, and how should we structure

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290. See, e.g., *Martin v. Wilks*, 490 U.S. 755, 762 (1989) (referring to “[o]ur deep-rooted historic tradition that everyone should have his own day in court”); Owen M. Fiss, *The Allure of Individualism*, 78 IOWA L. REV. 965, 967 (1993). For a discussion of the revival of “individual justice” in private law, see Nathan B. Oman & Jason Solomon, *The Supreme Court’s Theory of Private Law*, 62 DUKE L.J. 1119–25 (2013).

291. And because the private party had her chance, the government in the second suit need not be preoccupied by individual (as opposed to social) goals. Cf. *supra* notes 286–288 and accompanying text (making a similar argument regarding compensation).

292. See *supra* note 215 and accompanying text (discussing, for example, areas in which the legislature may be willing to accept over-enforcement).

293. One could think of CAFA, as applied in *Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736 (2014), as making a decision based on enforcement unit—state attorneys general pursuing *parens patriae* actions are treated differently than class counsel. See *supra* notes 1–11. The reliance on citizen-suits in nearly all environmental statutes might be seen as an enforcement strategy based on the regulated area. See *supra* notes 43–44 (listing environmental statutes).

294. See, e.g., FARHANG, *supra* note 41, at 94–95 (discussing the Civil Rights Act of 1964); Burbank, et al., *supra* note 19, at 715 (discussing the Civil Rights Act); Wolff, *supra* note 221 at 732–38 (discussing the Civil Rights Act and Title VII). See also *supra* notes 141–143, *infra* note 295 and accompanying text (discussing *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, 559 U.S. 393 (2010)).



enforcement regimes?<sup>295</sup> Rejecting redundancy out of hand, or ignoring its central role in the modern regulatory state, results in a failure to grapple with these debates. A better approach acknowledges that redundant public-private enforcement is part of the enforcement landscape and thinks more deeply about when and how this strategy can form a valuable part of a broader regulatory regime.

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295. Relatedly, courts should remain sensitive to enforcement priorities reflected in enforcement design. But there are reasons to be concerned that this is not always the case. Some have argued that the Supreme Court's decision in *Shady Grove* allowed a federal procedural rule to trump a legislative choice about the scope of private enforcement. *See, e.g.*, Stephen B. Burbank & Tobias Barrington Wolff, *Redeeming the Missed Opportunities of Shady Grove*, 159 U. PA. L. REV. 17, 31–32 (2010). Courts also may have flouted legislative choices when they converted one-way preclusion rules in federal civil rights statutes into mutual preclusion rules, *see supra* notes 67–75 and accompanying text, or when they inferred private causes of action. Readers also may think that *Hood* is another example of this phenomenon, as the Court rejected CAFA's preference for consolidation in favor of a strict definition of "mass action." *See supra* note 4 (describing the statute). That said, the *Hood* decision seems consistent with state law, so the outcome may reflect legislative primacy after all.