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ON REGULATORY DISCORD AND PROCEDURE

ELIZABETH CHAMBLEE BURCH\*

Businesses are increasingly global. But domestic courts' jurisdiction remains largely provincial; both public and private regulators have overlapping, mismatched authority. Take General Motors, for example. What started in 1908 as a leading manufacturer of horse-drawn carriages morphed into an international company in the 1980s and eventually emerged from bankruptcy in 2009 with China, the United States, Brazil, the United Kingdom, and Germany as its top five markets.<sup>1</sup> When General Motors then recalled defective ignition switches, Congress, the U.S. Justice Department, and the National Highway Traffic Safety Administration were not the only enforcers. The recall also prompted private claims and suits by states' attorneys general.<sup>2</sup>

This regulatory discord is readily apparent in consumer protection cases. When the Dodd-Frank Wall Street Reform and Consumer Protection Act empowered state regulators while simultaneously creating an encompassing federal regula-

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\* Copyright © 2015 by Elizabeth Chamblee Burch. Associate Professor, University of Georgia School of Law. This short Comment is an extension of a much larger project titled *Constructing Issue Classes*. I am grateful to participants at the Center on Civil Justice at New York University School of Law's 2014 Fall Conference on *The Future of Class Action Litigation: A View from the Consumer Class* for their comments on that project. All opinions and errors are my own.

1. *Company History: History & Heritage*, GENERAL MOTORS, <http://www.gm.com/company/historyAndHeritage.html> (last visited Apr. 1, 2015).

2. *GM Ignition-Switch Defect Response Probed by 9 States*, AUTOMOTIVE NEWS (June 12, 2014), <http://www.autonews.com/article/20140612/OEM11/140619951/gm-ignition-switch-defect-response-probed-by-9-states>.

tor—the Consumer Financial Protection Bureau<sup>3</sup>—it further contributed to overlap between federal agencies, states, and private litigation.<sup>4</sup> Examples abound: when Johnson & Johnson recalled metal-on-metal hip implants, the U.S. Justice Department investigated whether the company made false claims, a group of state attorneys general looked into deceptive marketing practices, the U.S. Attorney’s Office considered whether false statements impacted federal healthcare programs, and over 8,000 patients sued for personal injuries.<sup>5</sup>

Whether this regulatory magnetism is optimal in terms of fundamental goals like compensation and deterrence is a hotly debated normative and empirical question.<sup>6</sup> Yet, one need not wade too far into the substantive debate to appreciate the descriptive point that multiple regulatory layers exist and—whether normatively desirable or not—impact the procedural goals of aggregation. Aggregation, whether through a certified

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3. Catherine M. Sharkey, *Agency Coordination in Consumer Protection*, 2013 U. CHI. LEGAL F. 329, 331.

4. *Id.*

5. Karen Gullo, *J&J Settles with Oregon in First State Deal Over Hip Implants*, BLOOMBERG BUSINESSWEEK (July 2, 2014), <http://www.bloomberg.com/news/articles/2014-07-02/jj-oregon-settle-in-first-state-deal-over-hip-implants>.

6. See, e.g., Todd S. Aagaard, *Regulatory Overlap, Overlapping Legal Fields, and Statutory Discontinuities*, 29 VA. ENVTL. L.J. 237, 286–300 (2011) (claiming that regulatory overlap is an efficient way to ensure against regulatory gaps); Robert B. Ahdieh, *Dialectical Regulation*, 38 CONN. L. REV. 863 (2006) (suggesting that regulatory overlap encourages innovation and overcomes inertia); Lawrence G. Baxter, *Capture Nuances in Financial Regulation*, 47 WAKE FOREST L. REV. 537, 539 (2012) (suggesting that regulatory overlap between public and private regulators makes agency capture more difficult); Elizabeth Chamblee Burch, *Securities Class Actions as Pragmatic Ex Post Regulation*, 43 GA. L. REV. 63 (2008) (arguing that securities class actions provide a public good and that integrating public and private suits diminishes collective action problems, and agency inaction); William W. Buzbee, *Recognizing the Regulatory Commons: A Theory of Regulatory Gaps*, 89 IOWA L. REV. 1, 5–6 (2003) (expressing concern about under-regulation as a result of agencies with overlapping jurisdiction); Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1138–51 (2012) (arguing that overlapping agency jurisdiction can generate efficiency gains if coordinated); J.B. Ruhl & James Salzman, *Mozart and the Red Queen: The Problem of Regulatory Accretion in the Administrative State*, 91 GEO. L.J. 757 (2003) (highlighting problems with over-regulation). For an excellent overview of the regulatory and adjectival conceptions of Rule 23, see David Marcus, *The History of the Modern Class Action, Part I: Sturm Und Drang, 1953–1980*, 90 WASH. U. L. REV. 587, 592–98 (2013).

class action or multidistrict litigation, should not only enable regulators to enforce substantive rights, but should likewise encourage efficient resource use (of both litigants' resources and judicial resources), generate binding resolutions, and produce accurate results through trial and settlement.<sup>7</sup> Once cases conclude, procedure can intervene again through issue preclusion and stymie parties from relitigating issues that have already been decided, thereby preventing inconsistent verdicts.

But provincial jurisdictional restrictions, state law intricacies, and regulators' limited authority have hindered aggregation's ex ante utility, placing preclusion as the chief means for ensuring consistency ex post. This has backfired. Defendants litigate in the shadow of preclusion, carefully tiptoeing around adjudication on the merits that could be invoked against them in subsequent litigation. The result is settlement-oriented litigation that risks mispricing claims.<sup>8</sup> Bellwether trials help a bit, but the selection process itself can skew the results if cases do not represent the full spectrum of injuries and claims.

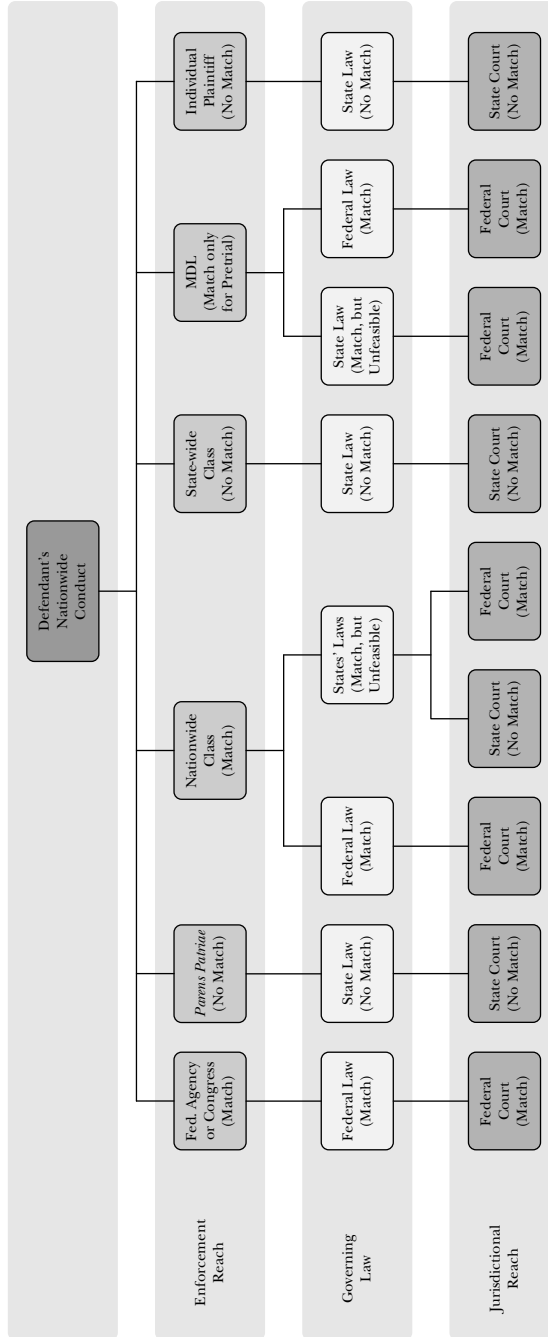
Without parity between the regulator's authority, the governing law, the court's jurisdiction, and the corporation's nationwide conduct, there is seemingly little role for procedure to play in coordinating enforcement actions ex ante. As Figure 1 illustrates, below, this mismatch between enforcement power and nationwide conduct runs deep; it can distort the regulatory response even when a defendant's actions are uniform. Unless the regulatory authority mirrors the defendant's nationwide conduct—and sometimes even if it does—multiple regulators will scrutinize the same company decisions, courts may reach inconsistent outcomes, and over- or under-enforcement may result.

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7. AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 1.03 (2010).

8. Howard M. Erichson, *The Problem of Settlement Class Actions*, 82 GEO. WASH. L. REV. 951, 953 (2014).

**FIGURE 1: THE PRISM EFFECT**  
*Illustrating how mismatches between defendant's conduct, a regulator's authority, applicable governing law, and a court's jurisdictional constraints can hamper enforcers' ability to target the full scope of defendant's conduct.*



First, consider the rare cases in which parity does exist. There is a match when federal agencies like the Equal Employment Opportunity Commission sue national retailers like Wal-Mart Stores, Inc. for discriminating against Latino employees in violation of federal law under Title VII.<sup>9</sup> A regulator's authority likewise corresponds to nationwide conduct where Congress, the Justice Department, and the National Highway Traffic Safety Administration investigate and fine companies like General Motors over defective ignition switches.<sup>10</sup> In these situations, the regulatory reach, federal substantive standards, and (when necessary) federal courts' jurisdiction match the regulated entity's conduct.

But a mismatch between enforcement power and conduct occurs more often than not. In *parens patriae* actions, a state attorney general can sue only on behalf of the state and its citizens. As for individual claims, most people prefer not to sue and those who do may find that the economics of their claim make individual litigation non-viable. Multidistrict litigation corrects this cost imbalance in part by placing the onus of funding and developing these claims on the plaintiffs' steering committee, but transferee judges have authority only over pre-trial procedures.<sup>11</sup> Even class actions can suffer from the mismatch. Unless there is a nationwide class invoking federal law in federal court, classes based on state law face tremendous certification hurdles, and federal courts frequently find that choice-of-law concerns render classes unwieldy and uncertifiable.<sup>12</sup>

The result is a cacophony of enforcement actions that lack a means for procedural coordination. For example, in the Toyota sudden acceleration cases, multiple private attorneys filed class action complaints before the company's recall,<sup>13</sup>

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9. Press Release, *Wal-Mart Sued by EEOC for Harassment of Latinos at Fresno Sam's Club*, EEOC (May 7, 2009), <http://www.eeoc.gov/eeoc/newsroom/release/5-7-09.cfm>.

10. Tom Krisher, *GM Issues 3 More Recalls, Covering 474,000 Vehicles*, HUFFINGTON POST (June 27, 2014), [http://www.huffingtonpost.com/2014/06/27/gm-recalls-sierra-silverado\\_n\\_5538542.html](http://www.huffingtonpost.com/2014/06/27/gm-recalls-sierra-silverado_n_5538542.html).

11. 28 U.S.C. § 1407 (1968).

12. Elizabeth Chamblee Burch, *Constructing Issue Classes*, 101 VA. L. REV. (forthcoming 2015).

13. *Class Actions Against Toyota Mount as Nationwide, State Suits Are Filed*, CLASS ACTION LITIG. REP. (BNA) (Feb. 26, 2010).

plaintiffs' lawyers filed nearly 400 wrongful-death and personal-injury lawsuits,<sup>14</sup> twenty-nine states' attorneys general filed suit after the recall,<sup>15</sup> and the U.S. Department of Justice fined the company \$1.2 billion.<sup>16</sup> Of these enforcement actions, the Department of Justice's reach mirrors Toyota's nationwide conduct as might a nationwide class action, but only insofar as the claims are certifiable—they were not, at least at first. After denying class certification,<sup>17</sup> Judge Selna approved a "settlement class" in the economic loss cases, which swept both manageability problems and the case's merits under the rug.<sup>18</sup> Statewide class actions and state attorneys general can partially alleviate class certification difficulties, since state actors need not rely on Rule 23. But again, they can address Toyota's conduct only insofar as it impacts their particular state.<sup>19</sup>

Courts' ability to formally aggregate these actions is jurisdictionally limited: private parties and state attorneys general continue to craft their claims to defeat removal to federal court and even federal cases pending before a transferee judge are coordinated for only pretrial purposes.<sup>20</sup> Absent a regula-

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14. Danielle Douglas & Michael A. Fletcher, *Toyota Reaches \$1.2 Billion Settlement to End Probe of Accelerator Problems*, WASH. POST (Mar. 19, 2014), [http://www.washingtonpost.com/business/economy/toyota-reaches-12-billion-settlement-to-end-criminal-probe/2014/03/19/5738a3c4-af69-11e3-9627-c65021d6d572\\_story.html](http://www.washingtonpost.com/business/economy/toyota-reaches-12-billion-settlement-to-end-criminal-probe/2014/03/19/5738a3c4-af69-11e3-9627-c65021d6d572_story.html).

15. Chris Woodyard, *Toyota Recall Nightmare Results in Deal with 29 States*, USA TODAY (Feb. 14, 2013), <http://www.usatoday.com/story/money/cars/2013/02/14/toyota-recalls-attorney-general-settlement/1919883/>.

16. Douglas & Fletcher, *supra* note 14.

17. *In re Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Prods. Liab. Litig.*, 785 F. Supp. 2d 925, 927 (C.D. Cal. 2011) (denying plaintiffs' request to apply California law as a precursor to a motion to certify a nationwide class).

18. *Final Order Approving Class Action Settlement*, TOYOTA ECONOMIC LOSS SETTLEMENT, available at <https://www.toyotaelsettlement.com/pdf/Final%20Order%20Approving%20Class%20Action%20Settlement.PDF> (last visited Apr. 15, 2015).

19. After Congress passed the Class Action Fairness Act (CAFA), unless defendants decided to not to remove, statewide class actions would have to fit within one of CAFA's local exceptions to avoid federal jurisdiction. 28 U.S.C. § 1332(d).

20. See, e.g., *Mississippi ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736 (2014); *In re Vioxx Prods. Liab. Litig.*, 843 F. Supp. 2d 654, 668–69 (E.D. La. 2012) (concluding that the Kentucky attorney general's action against Merck did not "fall within the 'slim category' defined by Grable" and that it

tory overhaul, perfect coordination is impossible—and likely undesirable.<sup>21</sup>

Yet, there are two ways that we might begin to address these issues. First, we might rely on ad hoc coordination. Several patterns have developed in this regard: private class actions that follow on the heels of public enforcement actions, state attorneys general hiring private attorneys on the state's behalf, multi-state groups of attorneys general, and state attorneys general freeriding on the heels of private lawsuits. Second, courts might begin to use issue classes to target defendant's uniform, non-individuated conduct such that subsequent cases could use issue preclusion to prevent these conduct-related questions from relitigation.<sup>22</sup> The following paragraphs consider each possibility in turn.

The most conventional ad hoc coordination pattern is the so-called “coattail class.”<sup>23</sup> Private actors wait for a governmental entity to bring an enforcement action against the target defendant and successfully establish liability so that they can then use the government's success to benefit private claimants either informally by incorporating the findings into their complaints or formally through issue preclusion. The now classic case of *Parklane Hosiery Co. v. Shore* involved just such a scenario.<sup>24</sup> After the U.S. Securities and Exchange Commission successfully proved that Parklane Hosiery issued a materially false

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merely required the court to interpret FDCA provisions). Some courts addressing pharmaceutical products liability cases have held that federal question jurisdiction exists under *Grable & Sons Metal Prods., v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005), because they present a substantial and disputed federal issue and intricate federal regulatory scheme. See, e.g., *In re Zyprexa Prods. Liab. Litig.*, 2008 WL 398378, at \*3 (E.D.N.Y. Feb. 12, 2008). But see *Kentucky ex rel. Conway v. Janssen Pharm., Inc.*, 978 F. Supp. 2d 788, 794 (W.D. Ky. 2013) (distinguishing *Zyprexa* and citing *Vioxx* as favorable authority because “Kentucky sought ‘civil penalties pursuant to the KCPA and not federally-funded Medicaid reimbursement payments’”).

21. Private actions provide some public good by acting as a failsafe to agency capture, a check on government abuse, and an impediment to political overreaching. John C. Coffee, Jr., *Litigation Governance: Taking Accountability Seriously*, 110 COLUM. L. REV. 288, 345 (2010).

22. For more on the use of issue classes, see Burch, *Constructing Issue Classes*, *supra* note 12.

23. 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 (2000).

24. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979).



and misleading proxy statement, the Supreme Court allowed a private class representative to borrow that finding and prevent Parklane Hosiery from relitigating the issue.<sup>25</sup> As the Court explained, a private litigant could not have joined in the SEC's action;<sup>26</sup> allowing issue preclusion would thus prevent inconsistent outcomes.

After *Parklane*, “coattail classes” proliferated. For instance, the 1998 antitrust action against Microsoft involved the Department of Justice, nineteen state attorneys general, and a private class action.<sup>27</sup> But private classes found their footing only after the Department of Justice successfully litigated the antitrust claims against Microsoft in a bench trial, which allowed private attorneys to piggyback on federal efforts.<sup>28</sup>

States' attorneys general have also coordinated among themselves—finding strength in numbers via multistate groups.<sup>29</sup> While their level of coordination and organizational methods are not always clear,<sup>30</sup> state attorneys general have formed groups to investigate for-profit colleges,<sup>31</sup> misleading statements by drug companies,<sup>32</sup> marketing medical devi-

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25. *Id.* at 332–33.

26. *Id.* at 331–32.

27. Erichson, *supra* note 23, at 6–7.

28. *Id.* at 8; Mike France, *Bashing Microsoft (Whatever That Is)*, *BUS. WK.*, Jan. 31, 2000, at 6.

29. Jason Lynch, *Federalism, Separation of Powers, and the Role of State Attorneys General in Multistate Litigation*, 101 *COLUM. L. REV.* 1998, 2003–04 (2001).

30. The National Association of Attorneys General's mission statement includes facilitating interaction among attorneys general “to facilitate the enhanced performance of Attorneys General and their staffs” and notes that it “fosters an environment of “cooperative leadership” to help “respond effectively—individually and collectively—to emerging state and federal issues.” *About NAAG*, NAAG, [http://www.naag.org/about\\_naag.php](http://www.naag.org/about_naag.php) (last visited Apr. 1, 2015).

31. David Halperin, *State Attorneys General Open Major Investigations of Big For-Profit Colleges*, *HUFFINGTON POST* (Jan. 27, 2014), [http://www.huffingtonpost.com/davidhalperin/state-attorneys-general-o\\_b\\_4677145.html](http://www.huffingtonpost.com/davidhalperin/state-attorneys-general-o_b_4677145.html) (“Each school said it was being probed by a group of 12–13 state AGs, with the AGs of Kentucky, Iowa, Pennsylvania, and Connecticut each taking the lead on investigating one of the companies . . . . Kentucky Attorney General Jack Conway is leading a total of 32 state AGs who are investigating this troubled industry for misleading students . . . .”).

32. Press Release, Arizona Attorney General, Attorney General Tom Horne, 44 Other Attorneys General Reach \$105 Million Settlement with GlaxoSmithKline Over Asthma Drug Advair (June 4, 2014), *available at*

ces,<sup>33</sup> defective vehicles,<sup>34</sup> and BP's Deepwater Horizon oil spill,<sup>35</sup> among others. Although each state files its own action, like private plaintiffs' lawyers working together, they collaborate on legal theories, discovery, strategy, and litigation expenses, often following guidelines set by the National Association of Attorneys General.<sup>36</sup> In the consumer context, where claims are often too small to justify private individual litigation, state legislatures have eased collaboration efforts by enacting Uniform and Deceptive Practices Acts, which are modeled after the Federal Trade Commission Act.<sup>37</sup>

Occasionally state attorneys partner with federal agencies, as was done in the litigation against SunTrust Mortgage for improper origination and servicing practices.<sup>38</sup> Sometimes multidistrict litigation judges even encourage state attorneys general to work cooperatively with the private attorneys' steering committee. In litigation against BP over the Deepwater Horizon oil spill, Judge Carl Barbier praised Alabama's Attorney General for reaching a cooperative agreement with

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<https://www.azag.gov/press-release/attorney-general-tom-horne-44-other-attorneys-general-reach-105-million-settlement>.

33. Karen Gullo, *J&J, Oregon Settle in First State Deal Over Hip Implants*, BLOOMBERG BUSINESSWEEK (July 2, 2014), <http://www.bloomberg.com/news/articles/2014-07-02/jj-oregon-settle-in-first-state-deal-over-hip-implants>.

34. Woodyard, *supra* note 15; *GM Ignition-Switch Defect Response Probed by 9 States*, AUTOMOTIVE NEWS (June 12, 2014), <http://www.autonews.com/article/20140612/OEM11/140619951/gm-ignition-switch-defect-response-probed-by-9-states> ("We are a member of a multistate group that is looking into complaints about General Motors.")

35. Paula Cotter, *Deepwater Horizon Litigation*, 5 NAT'L ASS'N OF ATT'YS GEN. GAZETTE 8, 8-9 (2011), *available at* <http://www.naag.org/assets/files/pdf/gazette/5.8.Gazette.pdf>.

36. STATE ATTORNEYS GENERAL POWERS AND RESPONSIBILITIES (Emily Myers ed., 3d ed. 2013); Lynch, *supra* note 29, at 2004, 2007-08.

37. Memorandum from James E. Tierney, Esq., Attorney General of Maine (1980-1990) and Director of the National Attorneys General Program at Columbia Law Sch. to All Attorneys General-Elect (Nov. 20, 2008), *available at* <http://web.law.columbia.edu/sites/default/files/microsites/ca-reer-services/Overview%20of%20the%20Powers%20and%20Duties%20of%20the%20Office%20of%20State%20Attorney%20General.pdf>.

38. Press Release, U.S. Dep't of Justice, Federal Government and State Attorneys General Reach Nearly \$1 Billion Agreement with SunTrust to Address Mortgage Loan Origination as Well as Servicing and Foreclosure Abuses (June 17, 2014), *available at* <http://www.justice.gov/opa/pr/2014/June/14-civ-638.html>.

the plaintiffs' steering committee and chastised the Louisiana Attorney General for failing to do so.<sup>39</sup>

Cooperative relationships with the private bar have also turned formal, with state attorneys capitalizing on the private bar's experience and resources by appointing them to represent the state on a contingent-fee basis.<sup>40</sup> For example, in the tobacco litigation, after years of unsuccessful efforts due to resource imbalances and affirmative defenses like assumption of the risk and contributory negligence,<sup>41</sup> private attorneys convinced Mississippi Attorney General Mike Moore to sue for Medicaid recoupment on the State's behalf.<sup>42</sup> Moore hired his close friend and law school classmate, Dickie Scruggs, to wield his extensive private law experience suing tobacco companies to Mississippi's benefit.<sup>43</sup> Eventually, involvement from fifty states' attorneys general in partnership with the private bar substantially leveled the playing field, skirted sticky personal-responsibility defenses,<sup>44</sup> and resulted in a massive \$206 billion settlement.<sup>45</sup> Kick-started by the tobacco

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39. *In re* Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on Apr. 20, 2010, MDL No. 2179, 2011 WL 6817982, at \*1 (E.D. La. Dec. 28, 2010), *amended and superseded by*, 2012 WL 161194 (E.D. La. Jan. 18, 2012).

40. Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623, 668 (2012). *E.g.*, *Merck Sharp & Dohme Corp. v. Conway*, 947 F. Supp. 2d 733 (E.D. Ky. 2013); *State v. Lead Indus. Ass'n, Inc.*, 951 A.2d 428, 474–75 (R.I. 2008); *State ex rel. Nixon Am. Tobacco Co., Inc.*, 34 S.W.3d 122, 136 (Mo. 2000); *State v. Eli Lilly & Co.*, 2009 WL 6058383 (S.C. Com. Pl. Sept. 22, 2009).

41. *Castano v. Am. Tobacco Co.*, 160 F.R.D. 544 (E.D. La. 1995), *rev'd*, 84 F.3d 734 (5th Cir. 1996); *Barnes v. Am. Tobacco Co.*, 161 F.3d 127 (3d Cir. 1998); Erichson, *supra* note 23, at 9–10.

42. CURTIS WILKIE, *THE FALL OF THE HOUSE OF ZEUS* 49–50 (2010); Erichson, *supra* note 23, at 10; Timothy Meyer, *Federalism and Accountability: State Attorneys General, Regulatory Litigation, and the New Federalism*, 95 CALIF. L. REV. 885, 899–900 (2007).

43. WILKIE, *supra* note 42, at 49–50.

44. Erichson, *supra* note 23, at 10; Donald G. Gifford, *Impersonating the Legislature: State Attorneys General and Parens Patriae Product Litigation*, 49 B.C. L. REV. 913, 933, 939 (2008). Several scholars have suggested that recoupment claims improperly did away with personal responsibility defenses since the states' only viable claim was subrogation—a claim that would still be subject to those defenses. Hanoch Dagan & James J. White, *Governments, Citizens, and Injurious Industries*, 75 N.Y.U. L. REV. 354, 373–76 (2000).

45. *Master Settlement Agreement*, ATT'Y GEN., CAL. DEP'T OF JUSTICE, <http://oag.ca.gov/tobacco/msa> (last visited Apr. 5, 2015).

cases,<sup>46</sup> state attorneys general have enlisted private plaintiffs' attorneys with greater experience and expertise in class actions and mass torts to assist them with *parens patriae* cases.<sup>47</sup>

Ad hoc coordination ex ante and invoking issue preclusion ex post alleviate some regulatory discord, but can also prompt some backlash. To avoid reaching the merits and having issue preclusion invoked against them, defendants may offer a quick settlement. But, without testing the merits, settlement values may be hard to price and soft forms of collusion, whether between state attorneys and defendants or plaintiffs' lawyers and defendants, may persist.<sup>48</sup> Trading settlement classes for issue classes, where parties litigate particular issues under Rule 23(c)(4), might alleviate this problem, in part, if judges are willing to certify non-individuated issues surrounding defendant's conduct.<sup>49</sup>

Because issue classes preclude subsequent cases from relitigating the same issues, they also have the potential to bridge jurisdictional boundaries. When a defendant's misconduct toward plaintiffs is uniform, adjudicating conduct elements collectively via an issue class can promote aggregation's goals of encouraging efficient resource use, generating binding resolutions, and producing accurate results through trial and settle-

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46. WILKIE, *supra* note 42, at 49–50. Teaming up with private lawyers is no longer unusual and has been done in lead paint litigation, gun control cases, and environmental remediation suits. John H. Beisner et al., *Class Action "Cops": Public Servants or Private Entrepreneurs?*, 57 STAN. L. REV. 1441, 1461 (2005); Erichson, *supra* note 23, at 22; Deborah R. Hensler, *The New Social Policy Torts: Litigation As a Legislative Strategy—Some Preliminary Thoughts on a New Research Project*, 51 DEPAUL L. REV. 493, 497 (2001).

47. See, e.g., *Miss. ex rel. Hood v. AU Optronics Corp.*, 134 S. Ct. 736, 738 (2014) (listing private attorney Jonathan S. Massey as representing the State of Mississippi); Donald G. Gifford & William L. Reynolds, *The Supreme Court, CAFA, and Parens Patriae Actions: Will It Be Principles of Biases?*, 92 N.C. L. REV. ADDENDUM 1, 3 (2013) (“A *parens patriae* action is filed by the state attorney general, but often with the assistance of private plaintiffs' counsel specializing in mass tort actions.”).

48. See, e.g., *Eubank v. Pella Corp.*, 753 F.3d 718, 720–21 (7th Cir. 2014); *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 284–85 (7th Cir. 2002) (requiring district courts to estimate “the range of possible outcomes and ascrib[e] a probability to each point on the range”); Eric Lipton, *Lobbyists, Bearing Gifts, Pursue Attorneys General*, N.Y. TIMES, Oct. 28, 2014, at A1 (reporting that state attorneys can be bought with timely campaign contributions).

49. For a far more detailed description of how this would work in practice, see Burch, *Constructing Issue Classes*, *supra* note 12.

ment.<sup>50</sup> The large number of states that do not require mutuality<sup>51</sup> to assert issue preclusion afford public regulators the luxury of freeriding on private counsel's efforts, which can promote consistency as well as substantive goals.<sup>52</sup> State attorneys general are uniquely positioned to litigate small claims that are not economically viable standing alone, and can thus avoid the pitfalls private cy pres awards present.<sup>53</sup> Conversely, if private litigants suffer substantial damages, an issue class could defray the cost of litigating individual issues such as reliance, privity of contract, personal injuries, or damages.

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50. AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 1.03 (2010).

51. Steven P. Nonkes, *Reducing the Unfair Effects of Nonmutual Issue Preclusion Through Damages Limits*, 94 CORNELL L. REV. 1459, 1467–68 n.60 (2009) (“Today, most states have abandoned mutuality for both defensive and offensive applications of collateral estoppel. A sizeable minority, however, retain the traditional mutuality requirement. Still others allow only defensive use of nonmutual collateral estoppel.”). States that do not require mutuality for offensive or defensive issue preclusion include Arizona, Arkansas, Colorado, Connecticut, Delaware, Idaho, Illinois, Indiana, Maine, Minnesota, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, Oregon, Pennsylvania, South Carolina, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. Kentucky and Massachusetts allow offensive nonmutual issue preclusion. *Id.* at 1467 n.59 (citing cases from each jurisdiction). *Moore v. Cabinet for Human Res.*, 954 S.W.2d 317, 318–19 (Ky. 1997) (“Thus, the Court abandoned the mutuality requirement of res judicata in adopting non-mutual collateral estoppel, applicable when at least the party to be bound is the same party in the prior action.”); *Coastal Oil New Eng., Inc. v. Citizens Fuels Corp.*, 769 N.E.2d 309, 312 (Mass. App. Ct. 2002). Finally, states permitting only defensive use of nonmutual issue preclusion include Hawaii, Ohio, Iowa, Maryland, Michigan, North Carolina, and Tennessee. *Id.* at 1468 n.61 (citing cases). Federal courts assessing federal causes of action do not require mutuality for offensive or defensive issue preclusion. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979) (permitting offensive non-mutual issue preclusion); *Blonder-Tongue Labs. v. Univ. of Ill. Found.*, 402 U.S. 313 (1971) (permitting defensive non-mutual issue preclusion).

52. To be sure, adequate representation is a vital component. I spell out this concern and one potential solution in Burch, *Constructing Issue Classes*, *supra* note 12, and Elizabeth Chamblee Burch, *Adequately Representing Groups*, 81 FORDHAM L. REV. 3043, 3070–77 (2013). *See also* *California v. Intelligender, LLC*, 771 F.3d 1169 (9th Cir. 2014) (precluding the state from relitigating part of the underlying claims against the manufacturer of fetal gender prediction tests).

53. *See* AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.07(b) (discussing when cy pres awards are appropriate).

Consequently, combining issue classes with ad hoc coordination efforts and formal preclusion doctrines could provide a viable means to curb regulatory discord on non-individuated issues that litigants share in common—namely issues relating to a defendant’s uniform conduct (such as a common defect, warranty, representation, or advertisement).<sup>54</sup> Issue classes on a defendant’s conduct could likewise avoid adjudicating individuated issues that relate to a specific litigant’s ability to recover, such as specific causation, damages, or assumption of the risk. In areas of consumer protection, using the procedural combination of preclusion and issue classes on defendant’s conduct could bolster deterrence by facilitating cross-pollination between public and private enforcers. To be sure, these procedural remedies prove helpful only insofar as parties are adequately represented and state laws do not require mutual parties.<sup>55</sup> Nevertheless, issue classes and preclusion can reduce inconsistent results across multiple jurisdictions and remedy, in part, the prism effect that persists from courts’ limited jurisdiction and regulators’ mismatched enforcement power.

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54. I have expanded substantially on these ideas in Burch, *Constructing Issue Classes*, *supra* note 12.

55. *See supra* note 51 and accompanying text.