# DOCTRINAL REDUNDANCIES

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ABSTRACT

*Courts often create redundant doctrines. Yet doctrinal redundancies have received little attention. Although courts and scholars have written extensively about other types of redundancy, they have hardly discussed doctrinal redundancies. This Article remedies that oversight. It begins by defining when doctrines are redundant, providing a number of examples of doctrinal redundancy, and presenting a typology of doctrinal redundancy. It then identifies various benefits and costs of doctrinal redundancy. Drawing on psychology, behavioral economics, and social choice theory, it shows that doctrinal redundancy may serve important roles in strengthening and developing the law, but that it also risks distorting the law, leading to inconsistent outcomes, and providing a basis for judicial manipulation. The Article argues that, despite the benefits, the costs of doctrinal redundancies are significant enough that courts should avoid creating doctrinal redundancies except in limited circumstances.*

## INTRODUCTION

In several recent decisions, the Supreme Court has stated that Article III's ripeness requirement is redundant with the Article III requirement of imminent injury for standing.[1] Although standing and ripeness are separate doctrines, they both require a plaintiff seeking prospective relief to prevent a threatened injury to establish that the threatened injury is imminent. Accordingly, the Court said, they "boil down to the same question."[2]

Judicially-created doctrinal redundancies of this sort are common in the law. In a variety of fields, courts have created multiple doctrines designed to protect the same values through similar means. In addition to ripeness and standing, common examples include the irreparable harm and inadequate legal remedy requirements for a permanent injunction and the multiple foreseeability requirements for finding a person liable for negligence.

The prevalence of doctrinal redundancies is surprising. Courts and commentators usually argue against redundancy in the law.[3] Emblematic is

1. *See* Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2341 n.5 (2014); MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 128 n.8 (2007).

2. *Driehaus*, 134 S. Ct. at 2341 n.5 (quoting MedImmune, Inc. v. Genetech, Inc., 549 U.S. 118, 128 n.8 (2007)).

3. *See, e.g.*, Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 32–38 (1994) (justifying broad interpretation of the Opinions Clause on the ground that a narrow interpretation would render it "a redundancy"); Stephen M. Rich, *A Matter of Perspective: Textualism, Stare Decisis, and Federal Employment Discrimination Law*, 87 S. CAL. L. REV. 1197, 1285 (2014) (describing redundancy as inappropriate). *But see* Akhil Reed Amar, *Constitutional*

the presumption that, when a statute is subject to two different interpretations, one of which renders part of the statute redundant, the correct interpretation is the one that avoids the redundancy.[4]

This general antipathy towards legal redundancy has not extended to doctrinal redundancies. Indeed, doctrinal redundancies have received little attention at all.[5] Although courts and commentators have occasionally noted isolated instances of doctrinal redundancies,[6] they have not evaluated doctrinal redundancies as a phenomenon.[7] They have not addressed whether there should be a presumption against doctrinal redundancies,[8] nor have they discussed what values doctrinal redundancies might promote and the costs that they impose. And all the while courts continue to create and apply redundant doctrines.

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*Redundancies and Clarifying Clauses*, 33 VAL. U. L. REV. 1, 10 (1998) (arguing that redundant constitutional provisions are good to the extent they clarify).

4. *See, e.g.*, United States v. Alaska, 521 U.S. 1, 59 (1997) ("The Court will avoid an interpretation of a statute that 'renders some words altogether redundant.'" (quoting Gustafson v. Alloyd Co., 513 U.S. 561, 574 (1995))); Platt v. Union Pac. R.R. Co., 99 U.S. 48, 58 (1878) ("Courts are to accord a meaning, if possible, to every [word] in a statute."). *See generally* WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 865–66 (4th ed. 2007) (collecting cases stating rule to avoid redundancy). The presumption is not "absolute," Marx v. Gen. Revenue Corp., 133 S. Ct. 1166, 1177 (2013), but it nevertheless reflects a strong preference against redundancy.

5. By contrast, a considerable amount of scholarship has addressed redundant statutory delegations to regulatory agencies. *See, e.g.*, Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 454 (1963) (arguing against jurisdictional redundancy for criminal cases); Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1045 (1977) (supporting that jurisdictional redundancy to protect constitutional rights); Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1138–45 (2012) (discussing benefits and costs of jurisdictional redundancy); Aziz Z. Huq, *Forum Choice for Terrorism Suspects*, 61 DUKE L.J. 1415, 1454–91 (2012) (evaluating redundant jurisdiction over terror suspects). Redundant delegations differ from doctrinal redundancy, because courts do not ordinarily fashion doctrines of delegation, *see generally* F. Andrew Hessick & Carissa Byrne Hessick, *The Non-Redelegation Doctrine*, 55 WM. & MARY L. REV. 163, 214 (2013) (discussing judicial delegations), though some of the same considerations relevant to redundant delegations apply to redundant doctrines.

6. *See, e.g.*, K-Mart Corp. v. Oriental Plaza, Inc., 875 F.2d 907, 914 (1st Cir. 1989) (noting redundancy in requirements of irreparable harm and inadequate legal remedy); 13B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3532.5, at 551 (2008) (noting redundancy between Article III ripeness and standing).

7. Although commentators have not evaluated doctrinal redundancy as a whole, they have criticized some particular redundancies. *See, e.g.*, Summers v. Earth Island Inst., 555 U.S. 488, 505 (2009) (Kennedy, J., concurring) (criticizing redundant use of standing for ripeness); Palmer v. City of Chicago, 806 F.2d 1316, 1318 (7th Cir. 1986) (Posner, J.) (criticizing "many multi-'pronged' legal tests" as "redundant"); RESTATEMENT (THIRD) OF TORTS § 7(b) cmt. j (2010) (disapproving redundant foreseeability requirements for negligence); DAVID I. LEVINE, DAVID J. JUNG & TRACY A. THOMAS, REMEDIES: PUBLIC AND PRIVATE 100 (5th ed. 2009) (criticizing redundancy in irreparable harm and inadequate legal remedy requirements for injunctions).

8. Some courts have implicitly created a presumption with respect to the redundant foreseeability requirements of negligence by concluding that the two doctrines must involve different inquiries. *See infra* note 53 and accompanying text. But they have not come to that conclusion based on a presumption against redundancy, nor have they extended that approach to other redundant doctrines.

This Article sheds much needed light on doctrinal redundancy. It has two goals. First, it brings attention to doctrinal redundancy as a phenomenon that cuts across legal doctrines. It provides a variety of examples of doctrinal redundancy, and evaluates and analyzes those redundancies. Second, the Article assesses the positive and negative aspects of doctrinal redundancies. Perhaps counterintuitively, doctrinal redundancies do have important benefits. To give the most obvious example, redundant doctrines provide extra protection for the values underlying the doctrines. Redundant doctrines provide insurance that courts will come to the right result even if they misapply one of the redundant doctrines. On the other hand, doctrinal redundancies also have less desirable consequences. Among other things, they risk causing unnecessary confusion about what the law requires, and they may increase the scope of judicial discretion by providing judges with a menu of doctrines under which to evaluate a single argument. These costs are substantial enough to suggest that, despite the benefits, courts should avoid doctrinal redundancies except when the benefits clearly exceed the costs.

The Article proceeds in four parts. Part I begins by defining doctrinal redundancy. As it explains, two doctrines are redundant when they seek to protect the same set of interests through the same basic inquiry. Although it leaves room for disagreement in application, the definition provides a workable basis for identifying many instances of redundancy. Part I then provides a typology of doctrinal redundancy, identifying two distinct forms of redundancy: internal redundancy, which describes redundancy that occurs within a single doctrine, and external redundancy, which refers to redundancies that occur across separate doctrines. Part I concludes by identifying the causes of doctrinal redundancies.

Part II explores the benefits of doctrinal redundancy. As it explains, doctrinal redundancy may increase protection for values underlying doctrines, and it may amplify the strength of the message communicated by doctrines by increasing the incidents of communication. Doctrinal redundancy also facilitates doctrinal experimentation.

Part III turns to the costs of doctrinal redundancy. Doctrinal redundancy may cause confusion by leading to the development of unnecessary doctrine. At the same time, it may result in the underdevelopment of some doctrines. There are also costs specific to different types of redundancy. Internal redundancy may skew legal tests in a way that affects outcomes, while external redundancy may increase the

scope of judicial discretion to choose doctrines to affect outcomes and may lead to cycling.[9]

Part IV turns from the descriptive to the normative. It discusses when courts should pursue doctrinal redundancy and when they should avoid it. It explains that, given the potentially high costs of doctrinal redundancy, courts should usually avoid creating doctrinal redundancies, but that there are circumstances when redundancies are warranted.

## I. AN OVERVIEW OF DOCTRINAL REDUNDANCY

To assess doctrinal redundancy, it is first necessary to give a definition of doctrine and doctrinal redundancy. This part provides those definitions and identifies different types of redundancy.

### *A. Defining Doctrinal Redundancy*

Courts make law through their decisions.[10] The rationales courts provide to justify their decisions become doctrines that apply in future cases.[11] The traditional realm in which judges create law through doctrine is in areas controlled by common law, such as tort and contract.[12] In deciding those common law cases, courts created doctrines based on their understandings of custom, economics, morality, and other aspects of society and culture.[13] These doctrines reflect efforts by judges to balance a host of different considerations and to implement that balance through a test that future courts can apply.[14]

Of course, judicially-created doctrine is not limited to the common law realm. Courts also make doctrine to implement indeterminate statutes, constitutions, and other types of codified law.[15] Consider the statute conferring jurisdiction on federal district courts over cases "arising under"

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9. Cycling refers to the instability of outcomes in a majority voting system where there are more than two possible outcomes and each voter may rank the outcomes differently. *See infra* note 167 and accompanying text.

10. *See* Nancy Leong, *Making Rights*, 92 B.U. L. REV. 405, 410 (2012) ("[A]djudication involves building doctrine through judicial pronouncements . . . .").

11. *See id.* at 431.

12. *See* RICHARD A. POSNER, HOW JUDGES THINK 82 (2008) ("Judges' legislative power is usually thought to reach its zenith in common law fields.").

13. *See* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 30–31 (2010 ed. 2010) (identifying "principle," "logic," "history," "morals," "justice," and "social welfare" as informing doctrine).

14. *See id.*

15. *See* CARDOZO, *supra* note 13, at 14 (stating that judicial doctrines address "gaps," "ambiguities," and "doubts" in statutes); Charles Fried, *Constitutional Doctrine*, 107 HARV. L. REV. 1140, 1140 (1994) ("The law of the United States Constitution has largely been made by the practice of the courts . . . .").

federal law.[16] The vagueness of that phrase has led to many disputes over the past century and continues to do so today, and the Supreme Court has created a wide range of doctrines—such as the well-pleaded complaint rule and complete preemption—to implement that statute.[17] Likewise, courts have developed doctrine implementing a variety of vague terms in the Constitution, such as "due process," "equal protection," "cases," and "controversies." Because these terms are too ambiguous to be enforced themselves, the doctrines implementing the terms play the central role in litigation.[18] As with common law doctrines, these implementation doctrines reflect judicial effort to balance competing values.[19] They depend on the text and the values underlying the provisions being implemented, as well as a host of other considerations, such as creating an administrable test to resolve future cases and making the law predictable for those whom the law regulates.[20]

Doctrinal redundancy occurs when two judicially-created doctrinal tests seek to protect the same set of interests through the same basic inquiry.[21] Because both doctrines protect the same interests, they are duplicative. They both aim at achieving the same goal of protecting those interests.

An example may clarify the definition. According to the Supreme Court, the "case" or "controversy" provision of Article III limits the power of federal courts to hear suits involving threats of future injuries. Two separate doctrines enforce this limitation. The first is ripeness. Ripeness defines when a person may bring suit in federal court.[22] It prohibits courts from hearing suits prematurely.[23] To establish ripeness, the plaintiff must show that the threatened injury is "certainly impending" or there is a

16. 28 U.S.C. § 1331 (2012).

17. *See* F. Andrew Hessick III, *The Common Law of Federal Question Jurisdiction*, 60 ALA. L. REV. 895, 916–25 (2009) (discussing the development of these doctrines).

18. *See* Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 62 (1997) (stating doctrine is necessary because "constitutional norms may be too vague to serve directly as effective rules of law").

19. *See* CARDOZO, *supra* note 13, at 142 (stating that all judicial doctrines derive from "the habits of life" and the institutions of society); Fried, *supra* note 15, at 1145 n.18 (noting that conflicting values inform constitutional doctrine); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 882 (1996) (arguing that moral judgments and other values dominate constitutional interpretation).

20. *See* Fallon, *supra* note 18, at 63–65 (noting doctrines reflecting interests of administrability and protecting officer safety).

21. This form of redundancy differs from the redundancy that results from stare decisis in which multiple sets of decisions repeat the same outcomes and reasoning. *See* Martin Shapiro, *Toward a Theory of Stare Decisis*, 1 J. LEGAL STUD. 125, 129 (1972).

22. *See* Gene R. Nichol, Jr., *Ripeness and the Constitution*, 54 U. CHI. L. REV. 153, 160–62 (1987).

23. *See* Abbott Labs. v. Gardner, 387 U.S. 136, 148 (1967).

"substantial risk" that the injury will occur.[24] The other doctrine is standing. Standing defines who may bring suit in federal court.[25] Although standing is not in its nature a timing rule, the Court has held that, to establish standing in cases seeking prospective relief to prevent future injuries, a plaintiff must make the same showing as is required for ripeness.[26] Both doctrines thus pose the same inquiry.[27] Moreover, the reason behind both doctrines is the same: to limit the power of the judiciary by prohibiting the judiciary from making judgments involving future threats beyond its institutional competence.[28] The doctrines accordingly are redundant, as the Supreme Court has explicitly acknowledged.[29]

By contrast, when doctrines protect different interests, they are not redundant. Thus, the tort of trespass accordingly is not redundant with the tort of battery because the two torts protect different interests. Trespass protects property interests,[30] while battery protects the interest in physical integrity of the person.[31] The example is easy—as discussed below, it often may be difficult to identify the interests underlying a doctrine—but its point is simply to illustrate when doctrines are not redundant.

Similarly, two doctrines are not redundant if they pose different basic doctrinal inquiries—for example, if one asks whether a lawsuit was timely and the other asks whether a party concealed evidence. As a matter of common sense, the mere fact of the difference in inquiries suggests that the doctrines are not redundant. But the reason that two doctrines are not redundant if they pose substantially different inquiries is that, if the two inquiries are so unrelated, they do not aim to protect the same interests. A doctrine is shaped by the interests underlying that doctrine,[32] and although there is not a single way to account for a set of interests, accounting for those interests underlying a doctrine substantially limits the scope of available doctrinal approaches. The legitimacy of a doctrine depends in large part on it producing results consistent with the values underlying that

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24. *See* Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2341 (2014).

25. *See id.*

26. *See id.* at 2341 n.5.

27. *See* F. Andrew Hessick, *Probabilistic Standing*, 106 NW. U. L. REV. 55, 62–63 (2012) (noting identity of the doctrinal tests).

28. *See* Nichol, *supra* note 22, at 172 (arguing that both doctrines serve the same purpose).

29. *See Driehaus*, 134 S. Ct. at 2341 n.5 (stating that ripeness and standing "boil down to the same question" for future injuries (quoting MedImmune, Inc. v. Genetech, Inc., 549 U.S. 118, 128 n.8 (2007)); 13B WRIGHT ET AL., *supra* note 6, § 3532.5, at 551 (noting that courts do not distinguish between ripeness and standing in evaluating threats of enforcement).

30. *See* Ben Depoorter, *Fair Trespass*, 111 COLUM. L. REV. 1090, 1124 (2011).

31. *See* Kenneth W. Simons, *A Restatement (Third) of Intentional Torts?*, 48 ARIZ. L. REV. 1061, 1070 (2006).

32. *See* OLIVER WENDELL HOLMES, JR., THE COMMON LAW 4 (ABA 2009) (1881) (explaining that "custom, belief, or necessity" gives rise to rules); Fried, *supra* note 15, at 1145 n.18 (noting that conflicting values inform constitutional doctrine).

doctrine,[33] yet two doctrines that pose substantially different inquiries cannot dependably yield similar outcomes on similar facts.

Although this definition of doctrinal redundancy—two tests seeking to protect the same set of interests through the same basic inquiry—provides a workable framework to identify doctrinal redundancy, it still leaves room for disagreement about when doctrinal redundancy occurs. One reason is that it is difficult to identify all the interests underlying a doctrine. Most doctrines implement a broad range of interests, including societal interests in prohibiting or encouraging particular conduct; the institutional limitations of the judiciary in making empirical and predictive judgments; and the desire to avoid undue judicial interference with political entities.[34] Because of the large number of interests, there may be disagreement about whether all the interests underlying one doctrine are identical to the interests underlying another doctrine.[35] Aggravating this problem is that the values underlying particular doctrines are not constant. As societal values change over time, existing doctrines are repurposed to protect these new values.[36] Thus, the values underlying potentially redundant doctrines may shift over time.

Disagreement may also stem from differing views on the appropriate level of generality to consider the interests underlying doctrines. When interests are considered at a more general level, the doctrines are more likely to be seen as redundant because general principles contain many different subprinciples.[37] For example, standing and the political question doctrine both seek to enforce the interest in the courts not usurping the role of the political branches by deciding disputes not fit for judicial resolution.[38] But at a more specific level, the interests are not identical.[39]

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33. Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1795–96 (2005) (legitimacy of doctrine depends on it producing socially acceptable outcomes); *see also* Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1310–11 (2006) [hereinafter Fallon, *Judicially Manageable Standards*] (acceptability of doctrine depends on it accurately implementing constitutional values).

34. Fallon, *supra* note 18, at 62.

35. One might argue that the same set of interest informs all legal doctrines; differences in doctrine are simply the result of weighing those interests differently. Thus, for example, trespass puts a high value on property and a low value on personal integrity, while battery does the opposite. This description seems at odds with how courts actually conceptualize doctrines—no one talks about property rights in defining battery—and in any event, adopting it would simply shift the definition of redundancy to identifying the interests carrying any appreciable weight.

36. *See generally* Oliver Wendell Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443 (1899) (identifying the phenomenon and providing numerous examples).

37. Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 747–48 (1993) (describing levels of generality for principles). Indeed, at a sufficiently high level of generality, all legal doctrines are likely redundant of each other.

38. *See* DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 341, 352 (2006) (stating that "standing" and the "political question" doctrine ensure that the "[j]udiciary respects the 'proper—and properly limited—role of the courts in a democratic society'" (quoting Allen v. Wright, 468 U.S. 737, 750 (1984))).

The interest underlying standing is to limit who can bring suit in court; the interest underlying the political question doctrine is to ensure that the courts do not decide certain substantive questions of law. Considering the doctrines on this specific interest level, one may argue that the two doctrines overlap in their efforts to contain judicial power but are not redundant.

Further, in almost every situation, there is more than one way to fashion doctrine to account for the same interests because of disagreement over how to weigh particular interests and balance them against other interests.[40] Because the interests underlying the doctrines are the same, the two doctrines will be similar, but the different balance may lead to small differences.[41] Consider limitations periods applicable to actions at law and actions at equity. For most actions at law, statutes prescribe bright-line limitations periods—for example, prohibiting suits filed more than three years after the cause of action accrues.[42] But when no statute of limitations applies, judicial doctrine directs courts to adopt the limitations period prescribed in a statute for an analogous action.[43] Accordingly, in actions at law, doctrine leads to specific limitations periods. By contrast, in equitable actions, courts apply laches, a flexible standard that requires a plaintiff to bring his suit within a reasonable time after his cause of action accrues.[44] Both doctrines seek to promote the same interests of avoiding loss of evidence and allowing defendants to have settled expectations while still providing the plaintiff an opportunity for relief.[45] Both doctrines also seek to provide guidance to litigants and courts on when too much time has passed. The difference is that statutes of limitations place greater weight on predictability than on the other factors,[46] while laches more evenly weighs all the factors. On the one hand, these doctrines are arguably redundant because they protect the same interests through the same basic test, and one can reasonably substitute for the other. On the other hand, the difference in

39. *See* Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) (discussing level of generality used to examine traditions to establish fundamental rights).

40. *See* Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 780 (1994) (describing incommensurability of values in law).

41. *See* Fallon, *Judicially Manageable Standards*, *supra* note 33, at 1328 (noting that, in implementing constitutional provisions, "more than one [doctrine] is available").

42. Limitations periods did not exist at common law. 1 HORACE GAY WOOD, A TREATISE ON THE LIMITATION OF ACTIONS AT LAW AND IN EQUITY § 2, at 4 (1883).

43. *See* N. Star Steel Co. v. Thomas, 515 U.S. 29, 33–34 (1995).

44. *See* Gardner v. Pan. R.R. Co., 342 U.S. 29, 31 (1951).

45. *See* United States v. Marion, 404 U.S. 307, 322–23 (1971) (statute of limitations); *Gardner*, 342 U.S. at 30–31 (laches).

46. Fox v. Millman, 45 A.3d 332, 344–45 (N.J. 2012) (noting that statutes of limitations are more predictable than laches); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989) (noting that rules place greater emphasis on predictability than standards).

balancing of interests and formulation of the test may lead some to argue that these two doctrines are not redundant.[47]

Despite these difficulties, there are several clear instances of doctrinal redundancy. The already mentioned Article III requirements of ripeness and standing provide an example. Both doctrines prohibit suits for relief from future injuries unless the threatened injury is imminent, and the Supreme Court has repeatedly said that standing and ripeness "boil down to the same question."[48]

Another example is the multiple foreseeability requirements for the tort of negligence. To establish negligence, a plaintiff must show that the defendant owed the plaintiff a duty, that he breached the duty, and that the breach proximately caused an injury to the plaintiff.[49] Traditionally, foreseeability was solely a requirement of proximate cause: the plaintiff had to show that his injury was reasonably foreseeable to the defendant.[50] But since *Palsgraf v. Long Island Railroad Co.*,[51] many jurisdictions have also defined duty in terms of foreseeability: a defendant has a duty to a plaintiff to avoid taking actions if it is reasonably foreseeable that the actions might hurt the plaintiff.[52]

Although some courts have tried to distinguish the two foreseeability requirements,[53] prominent commentators have persuasively argued that

47. The argument for redundancy is stronger when one considers that courts have developed doctrines of equitable tolling and estoppel that provide flexible exceptions to the bright-line limitations periods that apply to actions at law. F. Andrew Hessick, *The Challenge of Remedies*, 57 ST. LOUIS U. L.J. 739, 745 (2013).

48. Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2341 n.5 (2014) (quoting MedImmune, Inc. v. Genentech Inc., 549 U.S. 118, 128 n.8 (2007)).

49. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 30, at 164–65 (5th ed. 1984).

50. *See, e.g.*, Vázquez-Filippetti v. Banco Popular de P.R., 504 F.3d 43, 49 (1st Cir. 2007) (noting that foreseeability is an element of duty and proximate cause under Puerto Rico law); B.R. *ex rel.* Jeffs v. West, 2012 UT 11, ¶ 24, 275 P.3d 228, 235 (same).

51. 162 N.E. 99, 101 (N.Y. 1928).

52. *See* KEETON ET AL., *supra* note 49, § 43, at 281, 284 (noting that various jurisdictions address foreseeability under both duty and proximate cause).

53. The distinction that courts have drawn between the two is that the foreseeability requirement for duty is general while the requirement for proximate cause is fact-specific—in other words, duty asks whether a defendant of this sort could foresee harm to a plaintiff of this sort, while proximate cause asks whether this particular defendant could reasonably foresee harm to this particular plaintiff. *See, e.g.*, *Jeffs*, 2012 UT 11, ¶ 24, 275 P.3d at 235. But that distinction is illusory because in our legal system fact-specific determinations are not limited to their facts but are based on general principles that apply to other cases. *See* FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 17–37 (1991) (discussing generalization of principles in law). The only way that a particular defendant could reasonably foresee harm to a particular plaintiff is if a defendant of this sort could reasonably foresee harm to a plaintiff of this sort. *See* W. Jonathan Cardi, *The Hidden Legacy of* Palsgraf*: Modern Duty Law in Microcosm*, 91 B.U. L. REV. 1873, 1895–96 (2011) (noting that efforts to distinguish the two requirements have broken down in practice); *see also* Richard Thompson Ford, *Bias in the Air: Rethinking Employment Discrimination Law*, 66 STAN. L. REV. 1381, 1414 (2014) ("[I]t's clear that the question of proximate causation is . . . nothing more than an invitation for courts to define the scope of . . . duty of care."). To be sure,

they serve the same role.[54] Both tests ask whether the harm was reasonably foreseeable, and they both have the same goal of avoiding overdeterrence and the other costs that would result from imposing liability for consequences that could not be anticipated.[55]

Another example comes from the requirements of irreparable and inadequate legal remedy for a permanent injunction. To get an injunction, a plaintiff must show that (1) without the injunction, he will suffer irreparable harm and (2) his legal remedies (such as damages) are inadequate to remedy the complained of harm.[56] As others have noted, these requirements are redundant because a harm is irreparable if it cannot be repaired by a legal remedy; if a plaintiff could be satisfied by damages for his injury, those damages would "repair" the plaintiff for his harm.[57] And there are many other examples that will be brought up in the course of this Article.[58]

As the third example in particular shows, doctrines need not employ precisely the same formulation to be redundant. What is important for redundancy is that the tests seek to accomplish the same goals for the same reasons. Differences in the phrasing of tests do not suggest that the tests play different roles. Indeed, courts often use variable language to describe the same test, even within the same opinion.[59]

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one difference between the two foreseeability requirements is that a judge determines foreseeability for duty, while juries determine foreseeability for proximate cause. Kyle W. Ubl, *The (Un)foreseen Effects of Abrogating Proximate Causation in* CSX Transportation, Inc. v. McBride*: The New Role of Foreseeability Under FELA and the Jones Act*, 87 NOTRE DAME L. REV. 2261, 2262 (2012). But the difference in adjudicators does not bear on the substantive standard, which is the same for duty and proximate cause.

54. *See, e.g.*, KEETON ET AL., *supra* note 49, § 43, at 284 (stating that the foreseeability issue is the same under duty or proximate cause).

55. *See* William M. Landes & Richard A. Posner, *Causation in Tort Law: An Economic Approach*, 12 J. LEGAL STUD. 109, 130–32 (1983) (explaining foreseeability as a way to avoid overdeterrence and administrative costs).

56. *See* eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006).

57. *See* 1 DAN B. DOBBS, DOBBS LAW OF REMEDIES: DAMAGES—EQUITY—RESTITUTION § 2.5, at 123 (2d ed. 1993) (deeming the tests redundant); DOUGLAS LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE 8 (1991) (describing the two requirements as "equivalent"); LEVINE ET AL., *supra* note 7, at 100 ("[N]o adequate remedy at law, and . . . irreparable injury[] are two ways of saying the same thing . . . ."); Mark P. Gergen et al., *The Supreme Court's Accidental Revolution? The Test for Permanent Injunctions*, 112 COLUM. L. REV. 203, 207–08 (2012) ("[T]he test redundantly states requirements of irreparable injury and inadequacy of legal remedies."). David Shapiro has argued there was historically a difference between the two, with the inadequacy inquiry establishing whether the court of equity, as opposed to a court of law, had jurisdiction to act and the irreparability inquiry determining whether the court of equity should act. David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 548 (1985). But as Professor Chafee noted, after the merger of law and equity, the separate jurisdictional inquiry no longer makes sense, Z. CHAFEE, JR., SOME PROBLEMS OF EQUITY 310–16 (1950), making it redundant with the irreparable harm inquiry.

58. *See infra* notes 70–83 and accompanying text.

59. *See* Richard A. Posner, *Judges' Writing Styles (And Do They Matter?)*, 62 U. CHI. L. REV. 1421, 1429 (1995) (claiming that many opinions avoid formulaic language). Indeed, a search of majority opinions on the Supreme Court database on Westlaw for the terms "in other words" and "put

Another important point is that redundancy does not depend on the two tests yielding precisely the same result in each case. As noted earlier, even when two doctrines protect the same set of values, they may do so in slightly different ways because of disagreement over how to weigh and balance those values.[60] Moreover, as discussed below, redundant doctrines have different contours because each doctrine develops along its own path of judicial decisions.[61] Because redundant doctrines may differ by small degrees, they may yield different outcomes on the margins.

Redundancy also need not be symmetric. That doctrine A is redundant of doctrine B does not necessarily imply that doctrine B is redundant of doctrine A. Asymmetrical redundancy occurs when the interests protected by one doctrine are a subset of the interests protected by another doctrine. Consider the two-step test for deference under *Chevron*. Under the first step, a court will examine the statute to determine if it is unambiguous; if it is, the agency's interpretation will be upheld if it is consistent with that conclusion.[62] If the statute is ambiguous, however, the court will proceed to step two, under which it must defer to the agency's interpretation of the statute if it is reasonable.[63] Under both steps, a court must uphold an agency interpretation if it is based on a permissible construction of the statute.[64] For this reason, prominent scholars have argued that *Chevron* consists of only one step[65]—an assessment whether the agency's interpretation of the statute is reasonable—and a recent Supreme Court decision supports that view, stating that the only inquiry under *Chevron* is whether the agency interpretation is "a reasonable interpretation of the statute," and "if Congress has directly spoken to an issue then any agency interpretation contradicting what Congress has said would be unreasonable."[66] Step one is simply a special case of step two[67] and thus is redundant of step two. It protects the same interests as step two, but focuses

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differently" yielded over 5,000 results. Although those terms might not be used to describe the holding or test in some cases, in many others they undoubtedly do. *See, e.g.*, Loughrin v. United States, 134 S. Ct. 2384, 2393 (2014) (using "[i]n other words" to restate test).

60. *See supra* notes 40–46 and accompanying text.

61. Indeed, even when redundant doctrines do state the same test, they will neither occupy precisely the same space nor produce identical outcomes. That is because, even when two doctrines state the same test, those doctrines inevitably are not identical but instead diverge to some degree because they develop along separate paths in judicial decisions. *See infra* notes 133–134 and accompanying text.

62. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

63. *Id.* at 843–44.

64. Matthew C. Stephenson & Adrian Vermeule, Chevron *Has Only One Step*, 95 VA. L. REV. 597, 599 (2009). *But see* Kenneth A. Bamberger & Peter L. Strauss, Chevron*'s Two Steps*, 95 VA. L. REV. 611, 611 (2009) (arguing that *Chevron*'s two steps are separate).

65. Stephenson & Vermeule, *supra* note 64.

66. Entergy Corp. v. Riverkeeper, Inc., 556 U.S. 208, 218 & n.4 (2009).

67. Stephenson & Vermeule, *supra* note 64.

only on the narrow circumstance when Congress has spoken clearly. Step two is not redundant of step one, however, because step one does not account for situations where the statute is ambiguous.[68]

One final caveat is that, because a court may invoke multiple different doctrines in response to an argument, even if two doctrines protect the same value, they are not redundant to the extent that they do not both apply to the same set of cases. Consider for example the exhaustion and procedural default doctrines for federal habeas corpus. The exhaustion doctrine requires a prisoner to have properly presented to the state's highest court the issue that is the basis for habeas relief before raising the issue in federal court, unless the state does not provide habeas based on the prisoner's argument.[69] The procedural default doctrine, by contrast, prohibits a prisoner from raising in federal court an argument that he failed to raise properly in state court, unless he demonstrates that he had good cause for not raising the argument in state court and that the errors forming the basis for his claim actually prejudiced his state trial.[70] One might think that these doctrines are redundant because both aim to promote comity and efficiency by limiting the availability of federal habeas for arguments not properly raised in state court. But they often do not apply to the same cases. The exhaustion requirement would not bar a claim that a prisoner raises before the state's highest court, even if the state court refuses to pass on the claim on the ground that the prisoner failed to preserve the argument, but the procedural default rule would bar that claim in federal court. In those situations, the doctrines are not redundant because the two doctrines do not each provide a means for resolving one case; instead they each apply to different cases. Still, there are many instances in which both doctrines apply—such as when the procedural default is that the prisoner failed to exhaust the claim—and in those cases, the doctrines are redundant because they both protect the same values in the same case.

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68. Article III ripeness and standing present a similar asymmetry. Ripeness is redundant of standing because imminence is the only inquiry of Article III ripeness, but imminence is only one of many requirements for standing. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992) (stating that standing also requires that the injury in fact (1) involve "an invasion of a legally protected interest which is [] concrete and particularized"; (2) be "fairly traceable to the challenged action of the defendant"; and (3) "likely" to be "redressed by a favorable decision" (citations omitted)). Rules that implement broad standards in particular circumstances—such as the rule that ordinary traffic stops never satisfy the standard for determining whether a stop is custodial for purposes of *Miranda*, *see* Berkemer v. McCarty, 468 U.S. 420, 440 (1984)—also fall in this category. *See generally* Michael Coenen, *Rules Against Rulification*, 124 YALE L.J. 644, 674–75 (2014) (discussing rules implementing standards).

69. Teague v. Lane, 489 U.S. 288, 297 (1989).

70. Engle v. Isaac, 456 U.S. 107, 130 (1982).

### *B. A Typology of Doctrinal Redundancy*

Doctrinal redundancy comes in two different forms. The first is when two different doctrines are redundant. I call this form of redundancy "external redundancy." The second is when doctrinal redundancy appears within a single doctrinal test: when two elements or subelements of a doctrine are redundant. I call this form of redundancy "internal redundancy."

#### *1. External Redundancy*

External redundancy occurs when two separate doctrines protect the same values. Consider the separate actions of replevin and conversion, both actions to remedy deprivations of personal property. In some states, the elements for proof are identical for the two actions.[71] The sole difference is that the only remedy for replevin is return of the item, while conversion allows a plaintiff to recover the item or money damages.[72] Replevin is therefore redundant of conversion.

Another example comes from the doctrines enforcing the Equal Protection and Free Exercise Clauses of the Constitution. The two clauses each prohibit government discrimination against individuals based on religion, and they each have their own doctrines to enforce that limitation. The doctrines, however, are redundant. Both prohibit the government from purposefully discriminating among religions.[73]

As is the case with both of these examples, external redundancies usually provide litigants with separate avenues for pursuing arguments. A litigant facing undue discrimination may raise both the Free Exercise and Equal Protection Clauses, but he need not. Likewise, they provide courts

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71. First Nat'l Bank of Steeleville v. Erb Equip. Co., 972 S.W.2d 298, 300 (Mo. Ct. App. 1998) (stating that the elements of proof for conversion and replevin are the same).

72. *Id.*

73. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 538 (1993) (stating that the Free Exercise Clause prohibits discrimination based on "religious motivation"); McFaul v. Valenzuela, 684 F.3d 564, 577 (5th Cir. 2012) (requiring showing of "discriminatory intent" to establish Equal Protection claim based on religious discrimination); *see generally* David Smith, *Presumed Suspect: Post-9/11 Intelligence Gathering, Race, and the First Amendment*, 11 UCLA J. ISLAMIC & NEAR E. L. 85, 124 (2012) (discussing the redundancy). It should be noted, however, that *Lukumi* left open the possibility of the Free Exercise Clause barring a generally applicable statute passed without discriminatory intent. *See Lukumi*, 508 U.S. at 543 ("In this case we need not define with precision the standard used to evaluate whether a prohibition is of general application . . . ."). Other doctrines enforcing the Free Exercise Clause are also redundant with the Establishment Clause doctrines: the Court has held that both clauses separately forbid coercing a person to participate in a religious exercise. *See* Lee v. Weisman, 505 U.S. 577, 587 (1992) (holding that the Establishment Clause "guarantees that government may not coerce anyone to support or participate in religion"); Sherbert v. Verner, 374 U.S. 398, 402 (1963) (stating that, under the Free Exercise Clause, the government cannot "compel" support for religion).

with separate paths for evaluating legal arguments when the parties do not specify the basis for their positions. Unless a party explicitly raises both claims (which it has no obligation to do),[74] a court facing a claim of wrongful dispossession may choose to consider both conversion and replevin, or it may opt to evaluate the claim under one or the other doctrine.

This flexibility is reduced for doctrines that courts must consider sua sponte, like the redundant imminence requirement of standing and ripeness.[75] Litigants accordingly have less ability to frame their arguments to avoid one of the doctrines, and courts lack discretion to choose to apply only one doctrine to evaluate claims of prematurity. Instead, a court must assess ripeness even if it determines standing is satisfied and vice versa.[76]

### *2. Internal Redundancy*

Doctrinal redundancy can also exist within a single doctrine. That type of redundancy occurs when a doctrinal test consists of multiple elements and more than one of these elements serves the same role. The irreparable harm and inadequate legal remedy elements of the test for a permanent injunction provide an example. The purpose of both elements is to prohibit an injunction when a legal remedy (such as damages) would make the plaintiff whole.[77] The foreseeability requirements found in the duty and

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74. *E.g.*, Skinner v. Switzer, 562 U.S. 521, 530 (2011) ("[U]nder the Federal Rules of Civil Procedure, [however,] a complaint need not pin plaintiff's claim for relief to a precise legal theory.").

75. *See* Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 541 (1986).

76. Other examples of external redundancy include the tests for procedural due process and for whether habeas is adequate under the Suspension Clause, *see* Boumediene v. Bush, 553 U.S. 723, 784 (2008) (indicating that the Suspension Clause incorporates at least requirements of procedural due process); the parol evidence rule, which prohibits courts from considering evidence outside a contract, *see* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 284 (1990); the four corners rule, which prohibits consideration of extrinsic material when a contract is unambiguous, *see* United States v. Armour & Co., 402 U.S. 673, 682 (1971) (describing the four corners rule); Patton v. Mid-Continent Sys., Inc., 841 F.2d 742, 745 (7th Cir. 1988) (noting the redundancy between the parol evidence and four corners rules); the nondisclosure doctrine, which renders a contract voidable when one party fails to disclose material facts about the contract, *see* 25 RICHARD A. LORD, WILLISTON ON CONTRACTS § 67:25 (Danny R. Veilleux ed., 4th ed. 2002); the unilateral mistake doctrine, which renders a contract voidable when one party knows that the other has a mistaken understanding of material aspects of the contract, *see* 27 RICHARD A. LORD, WILLISTON ON CONTRACTS § 70:109 (Danny R. Veilleux ed., 4th ed. 2003); equitable servitudes and covenants at law, both of which impose restrictions on conveyed land, *see* Douglas Laycock, *The Triumph of Equity*, 56 LAW & CONTEMP. PROBS. 53, 68–69 (1993) [hereinafter *The Triumph of Equity*]; the overlap between injunctions and writs of mandamus against government officers seeking prospective vindication of constitutional rights, *see* Simmat v. U.S. Bureau of Prisons, 413 F.3d 1225, 1236 (10th Cir. 2005) (noting that the two are "interchangeable"); and a "host of narrower doctrines serve the same purpose" as the unclean hands doctrine, *The Triumph of Equity*, at 70. Another arguable example comes from the Equal Protection and Due Process Clauses of the Constitution. The Supreme Court has said that the Due Process Clause "contains within it the prohibition against denying to any person the equal protection of the laws," and the "equal protection guarantee of the Fourteenth Amendment makes that [due process] right all the more specific." United States v. Windsor, 133 S. Ct. 2675, 2695 (2013).

77. *See supra* notes 56–57 and accompanying text.

proximate causation elements for negligence actions also fall into this category,[78] and the two-part inquiry under *Chevron* arguably does as well.[79] Another example comes from the political question doctrine. That doctrine lists six circumstances under which a claim is not justiciable.[80] Two of those circumstances are that the court's independent resolution would express a lack of the respect due coordinate branches of government, and that the court's resolution would cause embarrassment if it differed from the resolution of the other branch. Those considerations are redundant because the embarrassment from the judiciary offering a different conclusion than another branch would be a reason that the judiciary's resolution expressed a lack of respect for that other branch.

The test for inferring a private cause of action from a statute provides another example. That test depends on three factors: (1) whether the plaintiff is within the class for whose benefit the statute was enacted, (2) whether the legislature intended to create or prohibit a cause of action, and (3) whether recognizing the remedy would be "consistent with the underlying purposes of the legislative scheme."[81] The first and second factors are redundant of the third because they are aimed at determining whether recognizing a private cause of action would be consistent with the purpose underlying the legislative scheme. Other multi-factor tests have similarly redundant prongs,[82] as do totality-of-the-circumstances tests.[83]

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78. *See supra* note 53 and accompanying text.

79. *See supra* notes 62–68 and accompanying text.

80. The six factors are

> a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. 186, 217 (1962).

81. Cort v. Ash, 422 U.S. 66, 78 (1975).

82. *See, e.g.*, Palmer v. City of Chicago, 806 F.2d 1316, 1318 (7th Cir. 1986) (Posner, J.) (noting that "many multi-'pronged' legal tests" are "redundant"); Barton Beebe, *An Empirical Study of the Multifactor Tests for Trademark Infringement*, 94 CAL. L. REV. 1581, 1603 (2006) (noting redundancies in trademark infringement tests).

83. *See* Sullivan v. Dollar Tree Stores, Inc., 623 F.3d 770, 783 n.7 (9th Cir. 2010) (noting redundancy in totality-of-circumstances test); *In re* Hardigan, 490 B.R. 437, 448 (Bankr. S.D. Ga. 2013) (same); *see also* Walter Christopher Arbery, *A Step Backward for Equality Principles: The "Reasonable Woman" Standard in Title VII Hostile Work Environment Sexual Harassment Claims*, 27 GA. L. REV. 503, 513 (1993) (noting that totality-of-circumstances tests are redundant with other requirements that a doctrine might impose). Another example comes from *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), which states that the degree to which courts should defer to agency interpretations depends on the agency's "thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements," as well as "all those factors which give it power to persuade." The specified factors, which are listed only because they may persuade, are redundant of the catch-all.

Unlike most external redundancies, internal redundancy does not provide independent paths for evaluating an argument because the redundant elements are part of the same overarching doctrinal inquiry. Ordinarily, a court may conclude that a test is satisfied only if each element of that test is met; therefore, courts have less discretion with internal redundancy to choose not to apply all redundant doctrines.[84] For example, if a court determining whether to issue an injunction concludes that an injury is irreparable, it still must evaluate whether the legal remedies are inadequate—though the court may conclude that the legal remedies are inadequate because the harm is irreparable.

One might argue that there is no distinction between external and internal redundancy because externally redundant doctrines can be conceived of as internally redundant elements of a more general doctrine. For example, ripeness and standing could each be conceived of as meta-elements of a more general Article III doctrine of justiciability. It is nevertheless useful to draw the distinction for two reasons. First, it more accurately reflects actual practice. Courts and practitioners do not describe doctrines and their elements as a single mass; instead, they organize those doctrines into discrete tests and then organize the requirements of those separate doctrines into discrete elements. Second, drawing the distinction between internal and external redundancy is useful because, although much of the same analysis applies to both external and internal redundancy, they do each raise some concerns that the other does not.[85]

## II. BENEFITS OF DOCTRINAL REDUNDANCY

Doctrinal redundancy has several potential benefits. Each redundancy provides an extra layer of protection for the values that the doctrines seek to enforce. Redundancy also increases the expressive power of the law. Laws send messages about what society expects, and redundancy increases the instances that the message is communicated, thereby making the message stronger. Redundancy also provides more opportunities for courts to improve doctrine through experimentation by softening the negative consequences that may result from bad doctrines produced through experimentation.

84. I say "ordinarily" instead of "always" because, in multi-factor balancing tests, none of the considerations is dispositive.

85. *Compare infra* Part III.C (costs of internal redundancy) *with infra* Part III.D (costs of external redundancy).

### *A. Multiple Layers of Protection*

One reason for legal redundancies is to increase the probability that the values, principles, and rights protected by those doctrines are enforced.[86] Each redundancy provides another opportunity for the court to enforce those values.[87] These extra opportunities reduce the chance courts will erroneously fail to implement the values, principles, and rights that the redundant doctrines seek to protect, much like extra engines on a plane that can fly with one engine reduce the chance of a crash from engine failure.[88]

Returning again to the example of Article III ripeness and the imminence requirement of standing: both doctrines limit the ability of federal courts to adjudicate claims involving harms that have not yet occurred. The Supreme Court has expressed deep concern with adjudicating such claims because allowing courts to hear any prospective claim raises the threat of judicial usurpation of the political functions.[89] The duplicative doctrines make doubly sure that a court will not hear a case that is prematurely brought in federal court. Indeed, in cases seeking equitable relief, there is third level protection against premature relief through the doctrine of equitable ripeness. That doctrine, which derives from the irreparable harm requirement for an injunction, prohibits a court from issuing an injunction unless the plaintiff faces "imminent harm."[90]

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86. *See* Jonathan Remy Nash, *Null Preemption*, 85 NOTRE DAME L. REV. 1015, 1057 (2010) (stating that "redundancy" reduces the chance that "undesirable behavior slips through the cracks").

87. *See* Martin Landau, *Redundancy, Rationality, and the Problem of Duplication and Overlap*, 29 PUB. ADMIN. REV. 346, 347 (1969) ("[R]edundancy is a powerful device for the suppression of error.").

88. The Federalist Papers made this point about the Necessary and Proper Clause of the Constitution. They argued that, even if Article I had not enumerated the power, the power to enact laws necessary and proper "would have resulted by necessary and unavoidable implication." THE FEDERALIST NO. 33, at 204 (Alexander Hamilton) (Jacob E. Cooke ed., 1961). The clause, they explained, was a "redundancy"—a "precautionary" measure to make express what was implicit to guard against arguments seeking to limit the power of Congress. *Id.* at 204–05; *see also* Amar, *supra* note 3, at 9 (noting this and other examples of precautionary redundancy in the Constitution).

89. Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1146 (2013) (stating the imminence requirement "serves to prevent the judicial process from being used to usurp the powers of the political branches").

90. City of Los Angeles v. Lyons, 461 U.S. 95, 111 (1983); *see also* Samuel L. Bray, *The Myth of the Mild Declaratory Judgment*, 63 DUKE L.J. 1091, 1135 (2014) ("[W]hen a plaintiff seeks an injunction there is not only the requirement of constitutional ripeness but also the requirement of 'equitable ripeness,' which usually means that there must be imminent harm."). Although equitable ripeness is generally redundant of jurisdictional ripeness in equity suit, *compare, e.g.*, Karls v. Alexandra Realty Corp., 426 A.2d 784, 790 (Conn. 1980) (invoking equitable ripeness as restraining power of the court to change the status quo) *with* Chapman Lumber, Inc. v. Tager, 952 A.2d 1, 15 (Conn. 2008) (describing jurisdictional ripeness as limiting courts to their appropriate institutional role), in the federal system, the two are not redundant because courts have claimed that the equitable ripeness doctrine enforces federalism but have not made similar claims for Article III ripeness. *See* F. Andrew Hessick, *Cases, Controversies, and Diversity*, 109 NW. U. L. REV. 57, 101–02 (2015) (gathering cases invoking federalism to analyze equitable ripeness but not Article III). But the difference is more rhetorical than real because federalism implicitly informs standing and ripeness determinations. *See id.*

The degree of extra protection provided by a redundant doctrine depends on how a court handles the redundancy. If a court evaluates two redundant doctrines independently, the probability that the court will err in applying both doctrines is the product of the probabilities that the court will err in applying each doctrine.[91] Thus, if there is a 30% chance that a court will misapply each redundant doctrine, there is a 9% that it will misapply both.

Although courts often evaluate redundant doctrines independently,[92] they do not always do so. Sometimes, courts have treated redundant doctrines as separate but still used their conclusions with respect to the first doctrine to inform their analysis of the redundant doctrine. In that case, the redundancy provides reduced protection against error because the two doctrines are not treated as independent.[93] If a court has a 30% chance of misapplying doctrine A and an 80% chance of misapplying doctrine B if it has misapplied doctrine A, then there is a 24% probability that the court will misapply both doctrines.[94] Other times, courts have concluded that a doctrine is satisfied because its redundant counterpart has been satisfied,[95] in which case the redundancy provides no extra layer of protection at all.

Although there is always some risk that courts will treat redundant doctrines as codependent, it stands to reason that courts will be more likely to evaluate redundant doctrines independently if the doctrines are not identical but instead differ in content or even in their phrasing.[96] Another mechanism that may increase the likelihood that courts evaluate redundant doctrines independently is separating the time at which those doctrines apply. That is the case with standing and ripeness, which courts consider at the beginning of the case, and equitable ripeness, which courts consider later in the remedy phase. Because the court must address the doctrines at separate times, it is less likely to view the doctrines as posing the same

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at 102 n.303 ("Although justiciability doctrines do not seek to promote federalism, courts may *use* justiciability doctrines to protect state interests.").

91. By stating that a court may err in applying a doctrine, I mean to capture not only errors in the application of the doctrine, but also errors resulting from the failure to apply the doctrine when it should apply.

92. *E.g.*, Entergy Nuclear Vt. Yankee, LLC v. Shumlin, 733 F.3d 393, 423 (2d Cir. 2013) (separately evaluating irreparable harm and inadequate legal remedies).

93. *See* Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639, 651 (1981).

94. When two variables, A and B, are dependent, the probability that both are satisfied is the probability of A and the probability of B given that A has occurred. In formal terms, P(A and B)=P(A)*P(B/A).

95. *See, e.g.*, Duke Power Co. v. Carolina Envtl. Study Grp., Inc., 438 U.S. 59, 81 (1978) (concluding that ripeness was satisfied because standing was satisfied).

96. As noted earlier, redundant doctrines need not be identical; they only must protect the same interests in similar ways. *See supra* text accompanying note 59.

question, and the time lag provides an opportunity for further reflection by the court.

In addition to providing more protection for a value in a *particular* case, redundancy increases protections across cases by reducing the consequences of an appellate decision that limits or abolishes a doctrine. Although the decision removes the protection of one doctrine, the second doctrine still exists to protect the same interests. A court may question the second doctrine in a later case, but the second doctrine provides protection until that time, and the later case gives the court an opportunity to reassess its prior decision.

The extra layer of protection provided by redundancy may even result in overprotection of particular values at the expense of other values not protected by the redundant doctrines.[97] Consider the probable cause requirement for obtaining a search warrant and the good-faith exception to relying on a defective warrant. Under the exception, when an officer relies in good faith on a magistrate's determination of probable cause in executing a warrant, the evidence is admissible, even if the magistrate's determination was erroneous.[98] That exception is redundant with the probable cause requirement for warrants.[99] The magistrate has probable cause to issue a warrant when it is objectively reasonable to believe that the search may yield evidence of a crime; the exception applies when it is objectively reasonable for the officer to conclude that the magistrate's conclusion was correct. The reasonableness of an officer's reliance turns on whether the magistrate's conclusion was objectively reasonable. The reason for the good faith exception, and the probable cause requirement (as opposed to a higher standard for searches), is to avoid overdeterring police searches.[100] But providing two doctrines under which a search may be justified tilts the balance more heavily in favor of searches at the expense of the public's interest against unwarranted searches.[101]

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97. *Cf.* Aziz Z. Huq, *Enforcing (But Not Defending) "Unconstitutional" Laws*, 98 VA. L. REV. 1001, 1082–83 n.300 (2012) (arguing that "redundant enforcement" may "generate excessive enforcement of one constitutional value . . . and diminish some other value").

98. *See* United States v. Leon, 468 U.S. 897, 920–21 (1984).

99. *See id.* at 958–59 (Brennan, J., dissenting) (noting the redundancy); Silas Wasserstrom & William J. Mertens, *The Exclusionary Rule on the Scaffold: But Was It a Fair Trial?*, 22 AM. CRIM. L. REV. 85, 122 n.264 (1984) (describing the two doctrines as "kill[ing] one bird with two stones").

100. *See* Richard A. Posner, *Rethinking the Fourth Amendment*, 1981 SUP. CT. REV. 49, 69 (1981).

101. *See id.* at 68. Another example comes from the redundant foreseeability requirements in negligence. The reason for foreseeability is to avoid overdeterring individuals from engaging in everyday activities. *See* Landes & Posner, *supra* note 55, at 131. But limiting liability in this way comes at the expense of preventing the victim from recovering for harms caused by another. *See* Comment, *Lost Profits As Contract Damages: Problems of Proof and Limitations on Recovery*, 65 YALE L.J. 992, 1020–23 (1956). Having two foreseeability requirements may tilt the balance more heavily in favor of the defendant, and by doing so may unwarrantedly preclude plaintiffs from recovering for harms received at the hands of another.

### *B. Amplification of Expression*

Legal doctrines not only regulate behavior but also express social messages.[102] For example, the tort of conversion not only provides a remedy against the wrongful taking of property but also expresses the message that taking property from others is against social norms.[103] Although usually discussed in terms of prohibitions on social behavior, the same point holds for legal doctrines limiting government power. For example, equal protection not only prohibits government discrimination on the basis of race; it more generally conveys the message, to both the public and government actors, that discrimination on the basis of race is not acceptable.[104]

Redundancies in legal doctrine amplify the message expressed through those doctrines.[105] Research on the psychology of advertising confirms the commonsense notion that the more a person is exposed to a particular message, the more likely he is to internalize that message[106] and to act in conformity with that message.[107] Redundant doctrines increase the

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102. *See, e.g.*, Avlana Eisenberg, *Expressive Enforcement*, 61 UCLA L. REV. 858, 860 (2014) ("Laws send messages . . . ."); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2024 (1996). *But see* Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363, 1462 (2000) (challenging the expressive theory).

103. *See* Sunstein, *supra* note 102, at 2024.

104. *See* Reva B. Siegel, *Foreword: Equality Divided*, 127 HARV. L. REV. 1, 63 (2013) (noting the "messages" conveyed by equal protection cases); *cf.* Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 MINN. L. REV. 1, 13–18 (2000) (arguing that laws that discriminate express messages of discrimination). Procedural regulations can also communicate messages. For example, Article III ripeness not only demands the dismissal of certain premature disputes but also expresses the message that courts should generally not resolve premature disputes even if they satisfy Article III—a message that has informed other doctrines. *See, e.g.*, New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 371 (1989) (considering whether a claim is "premature" in developing abstention doctrines); Nathaniel Persily, *Fig Leaves and Tea Leaves in the Supreme Court's Recent Election Law Decisions*, 2008 SUP. CT. REV. 89, 96 (arguing that in some cases the Court has "conflat[ed] the as-applied/facial doctrine with doctrines of ripeness" by upholding laws against facial challenges on the ground that "the true extent of the constitutional burden remained unknown at the time of the litigation").

105. *See* Alafair S. Burke, *Domestic Violence as a Crime of Pattern and Intent: An Alternative Reconceptualization*, 75 GEO. WASH. L. REV. 552, 563 (2007) (noting expressive function of redundant statutes).

106. *See* Heather M. Claypool et al., *The Effects of Personal Relevance and Repetition on Persuasive Processing*, 22 SOC. COGNITION 310, 311 (2004) (explaining that "message repetition increases one's ability to attain 'greater realization of the meaning, interconnections, and implications of the message arguments'" (citation omitted)); Juliana Fernandes, *Effects of Negative Political Advertising and Message Repetition on Candidate Evaluation*, 16 MASS. COMM. & SOC'Y 268, 269 (2013) ("Repetition . . . affects product evaluation, message acceptance, and recall . . . .").

107. *See* Ida E. Berger, *The Influence of Advertising Frequency on Attitude-Behavior Consistency: A Memory Based Analysis*, 14 J. SOC. BEHAV. & PERSONALITY 547, 563 (1999) (concluding that repeating advertisements influences behavior).

frequency with which people are exposed to the message contained in those doctrines, thereby increasing the likelihood that the message is absorbed.[108]

Redundant doctrines thus not only provide additional legal protection to the values underlying the redundant doctrine.[109] They may also increase legal compliance even when unlawful activity is unlikely to be detected. For example, a government official may be more averse to religious discrimination because of the two doctrines prohibiting it—the Equal Protection Clause and the Free Exercise Clause—even if that official knows there is little chance of his discrimination being detected. Indeed, the message strengthened through redundancy may increase adherence to the values underlying the doctrines even when the doctrines do not apply. For example, that there are two separate doctrines prohibiting government discrimination based on religion may lead to less private religious discrimination than there would be with only one doctrine.

Of course, redundancy is not the only way to emphasize the importance of a value, nor is it likely the most effective way to do so. Courts may more readily stress the importance of a value by explicitly noting the importance of the value in an opinion.[110] Nevertheless, redundancy may be a useful tool to reinforce the importance of a value.

Just as doctrinal redundancy may overprotect a value, amplification through redundancy may overemphasize a message. When the message is important, repeat communications are warranted because repetition increases the likelihood that the message is received and internalized by the relevant audience. By contrast, amplification through redundancy is less warranted when the message is less important. Stressing a less-important value through redundancy may place too much emphasis on that value, which may distort behavior.[111] Moreover, the repetition through redundancy may contribute to an availability cascade—the phenomenon that leads people to give more credence to a thing the more often it is said—that may make an undesirable message seem desirable.[112]

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108. Beth A. Simmons, *Reflections on Mobilizing for Human Rights*, 44 N.Y.U. J. INT'L L. & POL. 729, 747 (2012) ("If legal and treaty obligations are signals, presumably the intensity of the signal increases with the number of iterations of it. Thus adopting a norm at both the international and domestic levels reinforces the strength of the signal to the relevant audiences." (quoting ZACHARY ELKINS ET AL., GETTING TO RIGHTS: TREATY RATIFICATION, CONSTITUTIONAL CONVERGENCE, AND HUMAN RIGHTS PRACTICE IN THE LATE TWENTIETH CENTURY 24 (2010))).

109. *See supra* Part II.A.

110. *See, e.g.*, Metro Broad., Inc. v. FCC, 497 U.S. 547, 568 (1990) (noting various "important First Amendment values"), *overruled by* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

111. People may differ on the importance of a value and how much it should be emphasized. Although this disagreement makes it difficult to identify the perfect level of emphasis, it does create a spectrum of what constitutes a reasonable degree of emphasis.

112. *See* Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683, 685 (1999) ("[E]xpresssed perceptions trigger chains of individual responses that make these perceptions appear increasingly plausible through their rising availability in public discourse.").

Consider the irreparable harm requirement. That requirement is not particularly strong; courts regularly award injunctions even when injury appears to be reparable.[113] The redundancy in the adequate legal remedy test may have a tendency to make the requirements seem more desirable and to overemphasize the importance of irreparable harm to obtaining an injunction. That may lead people to conclude that they must always apply the requirement and consequently to stretch the irreparable harm rule to obtain injunctions where an injunction is warranted despite the failure to satisfy the rule, instead of acknowledging that it simply does not apply in certain circumstances.[114]

### *C. Facilitating Doctrinal Innovation*

Another potential benefit of redundant doctrinal tests is that they allow courts to experiment with different doctrinal approaches to protect a particular set of interests. Experimentation—the ability to change the common law to account for new developments—is often touted as one of the primary benefits of the common law.[115] As Lon Fuller explained, this process allows the common law to "adapt[] . . . to the needs of [the] day."[116] Experimentation also facilitates doctrinal innovation, under which courts may test different doctrinal approaches to protecting various interests.[117]

But courts face significant constraints in experimenting with doctrine because of the nature of precedent. Doctrine carries the baggage of prior decisions.[118] Inferior courts are bound by decisions of their superiors, and horizontal stare decisis instructs courts to follow their own past decisions.[119] In addition to these technical requirements of precedent, courts

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113. *See* Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687, 689 (1990) (gathering examples of courts adopting presumption of irreparable harm).

114. *See id.* at 691 ("Courts have . . . define[ed] adequacy in such a way that damages are never an adequate [remedy].").

115. *See* Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883, 906 (2006) ("[O]ne of the arguments for case-based lawmaking has always been the allegedly self-correcting character of the common law . . . .").

116. *See* LON L. FULLER, THE LAW IN QUEST OF ITSELF 140 (1940) (adopting Mansfield's phrase in saying that "the common law works itself pure and adapts itself to the needs of a new day").

117. *See* Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 388–89 (1998).

118. *See* Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1, 3 (1989) (naming the practice of following precedent "one of the core structural features of adjudication in common-law legal systems").

119. Adam N. Steinman, *To Say What the Law Is: Rules, Results, and the Dangers of Inferential Stare Decisis*, 99 VA. L. REV. 1737, 1738 (2013) ("Because of stare decisis, a judicial opinion creates law that can bind subsequent decision-makers just as much as a statute or constitutional provision.").

may feel pressure to adhere to past decisions.[120] Even non-binding precedent may anchor a court's analysis of the issue in a future case, as is reflected by the many decisions in which courts feel obliged to distinguish decisions of other courts when they disagree with those courts.[121] Moreover, following an old decision's take on a doctrine is easier than reassessing that doctrine and courts may be inclined to follow the path of least resistance.[122] Although courts can distinguish prior decisions or reject precedent in a particular case,[123] these limitations still constrain experimentation with settled doctrine.[124]

The binding effect of precedent also discourages experimentation because of its potential effects on future decisions. Just as doctrines announced yesterday constrain courts in making decisions today, doctrines announced in a decision today act as constraints on cases decided tomorrow. [125] One of the risks of experimentation is that it will modify a doctrine in a bad way.[126] If the decision is binding, that bad doctrine will apply and lead to bad outcomes in cases decided tomorrow.

Redundant doctrines expand the opportunity for experimentation by potentially curtailing the effects of both of these constraints. Redundancy increases the ability of courts to pursue new doctrinal avenues because it reduces the limitations imposed by earlier decisions. If there are multiple redundant doctrines, there are likely to be fewer constraints imposed on at least one of the doctrines by earlier decisions than there would be if there were only one doctrine. That is because decisions defining one doctrine may not involve the other doctrine. For example, Kenji Yoshino has argued that, although Equal Protection and Due Process doctrines both protect against discrimination, courts have turned to the Due Process doctrines to

120. *See* Mark J. Roe, *Chaos and Evolution in Law and Economics*, 109 HARV. L. REV. 641, 643–44 (1996) (noting that cultural practices may remain static even after the historical forces that provoked those practices have changed); Schauer, *supra* note 115, at 909.

121. *E.g.*, United States v. Sinclair, 770 F.3d 1148, 1158–59 (7th Cir. 2014) (distinguishing Eighth Circuit decision).

122. NEIL DUXBURY, THE NATURE AND AUTHORITY OF PRECEDENT 154 (2008) ("Favouring the path of least resistance is certainly a reason for following precedent . . . .").

123. *See* Hohn v. United States, 524 U.S. 236, 251 (1998) ("[*S*]*tare decisis* is . . . [not] 'an inexorable command.'" (quoting Payne v. Tennessee, 501 U.S. 808, 828 (1991)).

124. *See* Randy J. Kozel, *The Scope of Precedent*, 113 MICH. L. REV. 179, 196 (2014) (discussing the "constraining force" of precedent).

125. *See* CARDOZO, *supra* note 13, at 21–22 (noting the "directive force" precedent has on future decisions); Schauer, *supra* note 115, at 909 ("As long as precedent matters—as long as the rule made in the previous case actually has an influence on the resolution of a subsequent case independent of the wisdom of the rule made in the previous case—there is the omnipresent possibility that any mistake will be systematically more powerful than any later attempts to correct it.").

126. *See* Schauer, *supra* note 115, at 895–98 (discussing how developing law case-by-case can lead to bad doctrine).

avoid the constraining doctrinal framework under the Equal Protection clause.[127]

By the same token, redundancy may disrupt the path of least resistance that could result in a court simply following prior decisions in applying a doctrine. That is because a court may regard redundant doctrines as separate and, therefore, may conclude that a decision implementing one of those doctrines does not provide a starting point for analyzing the other doctrine.

Likewise, redundancy provides some assurance to courts that a bad doctrine announced today need not apply in a future case presenting a similar issue.[128] Instead of applying the undesirable doctrine, the court hearing the future case can apply the redundant doctrine that does not have the same negative characteristics.[129]

Redundancy thus allows courts to proceed down different paths in developing the law. One doctrine may evolve as a standard, the other a rule. One doctrine may frame the issue in a way that stresses the importance of one consideration, while another focuses on a different one. The differences in stress can impact how the doctrines are applied. That is clearly so when the doctrines impose different limits on what a court can consider. But even when the redundant doctrines do not impose different limits on what a judge may consider, but instead merely list different factors to guide courts in exercising their discretion,[130] those differences may affect outcomes because judges applying a doctrine tend to focus on the considerations enumerated in that doctrine.[131] Facilitating experimentation allows for the assessment of different doctrinal approaches so that courts can determine which approach is best.

Although this discussion has been framed around external redundancy, internal redundancy may also promote innovation by giving a court greater leeway to modify one of the redundant prongs. For example, courts are not

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127. Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 748 (2011) (arguing that "the Court has moved away from group-based equality claims . . . to individual liberty claims" because of the rigid group-based framework for Equal Protection claims).

128. *Cf.* John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 90 (1999) (arguing that qualified immunity "facilitates constitutional change by reducing the cost of innovation").

129. Doctrinal redundancy thus shares federalism's virtue of allowing states to act as laboratories so that they can "try novel social and economic experiments without risk to the rest of the country." New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); *see also* Cover, *supra* note 93, at 673; Dorf & Sabel, *supra* note 117, at 314.

130. For example, circuits have adopted a variety of multi-factor tests to determine trademark infringement. Although the factors are not exhaustive, the enumeration of those factors leads courts to focus on those factors. *See* Beebe, *supra* note 82, at 1593.

131. *See* Chad M. Oldfather, *Writing, Cognition, and the Nature of the Judicial Function*, 96 GEO. L.J. 1283, 1323 (2008) (explaining how the way in which judges think about an issue depends on how doctrine is framed); Schauer, *supra* note 115, at 897–98 (discussing the issue-framing bias, which leads courts to focus "disproportionately" on considerations that a case highlights).

constrained by decisions about irreparable harm in experimenting with the adequacy of the legal remedy requirement, and they have less to fear in adjusting the inadequate legal remedy consideration for an injunction because of the irreparable harm requirement. To be sure, modifying one prong may not change the outcome in the particular case if the court still has to apply the other prong that has not been changed. For example, an opinion relaxing the inadequate legal remedy requirement for an injunction will not lead to an injunction if the irreparable harm requirement is not relaxed as well—but the innovation may lead to future changes in the irreparable harm requirement.

Of course, experimentation need not be deliberate. Redundant doctrines almost inevitably diverge at some point because of the common law process. A court addressing an issue covered by redundant doctrines often does not need to apply both doctrines, and many decisions will not address both doctrines. Some decisions will address only one doctrine, and others will address only the other doctrine. Because of the nature of precedent, these two tracks of decisions will eventually develop into two separate strands of law with different contours. For example, suppose there are two redundant doctrines, doctrine A and doctrine B, addressing the sufficiency of pleadings. Some decisions address pleadings through doctrine A, and others through doctrine B. Over time, as these decisions accumulate, doctrine A and doctrine B will no longer be identical, because the decisions applying doctrine A differ from the decisions applying doctrine B. Each doctrine will be the product of its unique line of precedent.

That said, courts may realign diverging doctrines. Standing and ripeness provide an example. Although standing and ripeness play the same role, over the years, separate tests developed for standing and ripeness. For Article III standing, the inquiry was whether the plaintiff faced a risk of "imminent" harm.[132] For ripeness, by contrast, the test was (1) whether the parties would suffer hardship without prompt judicial consideration, and (2) whether the issues were fit for immediate judicial review.[133] (Although some decisions suggested that these ripeness considerations were prudential, other Supreme Court opinions suggested that they were rooted in Article III and many lower courts understood these inquiries to be relevant to Article III ripeness.[134]) But recently the Supreme Court reestablished that the Article III inquiry for ripeness is the same as the

132. *E.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

133. *E.g.*, Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 581 (1985).

134. *See id.* at 580–81; Simmonds v. INS, 326 F.3d 351, 359 (2d Cir. 2003) (describing the hardship and fitness inquires as "relevant to the constitutional ripeness determination"); *see also* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 2.4, at 121 n.8 (6th ed. 2012) (noting that the Supreme Court had not clearly stated whether these considerations are constitutional or prudential).

Article III inquiry for standing, and that the hardship and fitness inquiries for ripeness are separate prudential considerations.[135]

As with the other benefits of doctrinal redundancy, the innovations facilitated by redundancy are not cost free. The divergence between redundant doctrines results in more law because each doctrine has separate tests. This additional law increases costs for parties who must account for that law and for courts that must learn and apply the new law. The divergence also may lead to different outcomes in indistinguishable cases depending on the doctrine that is invoked, which both reduces predictability and conflicts with the principle of providing equal treatment to those similarly situated.[136] But all doctrinal innovations present these costs. Anytime a court announces a new doctrine, the litigants in that decision are treated differently from those who went before,[137] and the decision establishing the new doctrine inevitably leaves uncertainty about the exact contours of that doctrine.[138] Our acceptance of the common law system rests on the conclusion that the benefits of allowing the courts to create doctrine exceed these costs.

## III. RISKS OF DOCTRINAL REDUNDANCY

Doctrinal redundancy also presents a variety of potential negative effects. For instance, because there is a general aversion to redundancy in the law, redundancy may create pressure to develop unnecessary and confusing law. At the same time, doctrinal redundancy may lead to the underdevelopment of doctrine, because courts may feel it necessary to address only one of the redundant doctrines in cases that implicate those doctrines. There are also costs specific to each type of redundancy. For example, internal redundancy in multi-factor balancing tests raises the possibility of double counting that unjustifiably affects outcomes. External redundancy may lead to disparate outcomes in similar cases and confer on the courts an extra degree of discretion through which they can manipulate outcomes. This part considers these costs.[139]

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135. *See* Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2341 n.5, 2347 (2014).

136. *See* Scalia, *supra* note 46, at 1178 (noting this goal).

137. *See* James B. Beam Distilling Co. v. Georgia, 501 U.S. 529, 538–39 (1991) (noting that newly announced doctrines do not apply to previously decided cases).

138. *See* CARDOZO, *supra* note 13, at 15 (stating that even when "the principle . . . has been skillfully extracted and accurately stated[,] [o]nly half or less than half of the work has yet been done. The problem remains to fix the bounds . . . .").

139. One frequent criticism of redundant delegations of power is that they present collective action problems. *See* Michael M. Ting, *A Strategic Theory of Bureaucratic Redundancy*, 47 AM. J. POL. SCI. 274, 275 (2003). That problem generally does not apply to doctrinal redundancy because redundancy in doctrine does not imply that separate entities have the power to enforce each doctrine. To the contrary, a single adjudicator may decide most redundant doctrines. Rare counter examples include the two foreseeability requirements for negligence—one of which is for the judge, the other for the jury,

### *A. Unwarranted Law*

Although doctrinal redundancy allows for potentially beneficial innovation, it may also create affirmative pressure to create new law even when doing so may be undesirable. That is because the very existence of two doctrinal tests may create pressure on courts to conclude that the two tests are, or at least should be, different. This phenomenon rests on the idea that law serves a purpose, and a law should not exist if it is unnecessary. That theory underlies the canon against superfluity in statutory interpretation. When a statute is subject to two different readings, one of which renders the statute redundant with another statute, the presumption is that the interpretation that avoids the redundancy is correct.[140]

Courts have not expressly adopted a similar canon for judicially created doctrines. Indeed, they have said that their opinions should not be parsed like statutes, but instead should be read in context.[141] Nevertheless, the instinct to avoid redundancy may be strong enough to lead a court to conclude that, when the law sets forth two tests, those tests should be understood to impose different requirements, even if they seem aimed at the same goal. The pressure to create new law thus may drive courts to complicate doctrine merely for the sake of distinguishing that doctrine from another doctrine instead of out of an effort to implement the values informing the doctrine. That may lead to doctrine that poorly implements its underlying values and that is difficult for advocates and courts to apply.

Consider the two foreseeability doctrines for negligence. Traditionally, foreseeability was a component only of proximate cause. The practice of treating foreseeability as a part of duty stems from then-judge Cardozo's opinion in *Palsgraf v. Long Island Railroad Co.*[142] In arguing that foreseeability should be part of duty instead of proximate cause, Cardozo did not announce a new substantive test; he adhered to the view that the question for foreseeability is whether the defendant should have foreseen that his actions might harm the plaintiff.[143] But those courts that have

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*see* Ubl, *supra* note 53, at 2262—and the redundant probable cause requirement, which generally requires police to have probable cause to conduct searches and arrests, Kirk v. Louisiana, 536 U.S. 635, 638 (2002), and warrant requirement, which requires a magistrate to find probable cause before issuing a warrant, Kentucky v. King, 563 U.S. 452, 459 (2011).

140. *See* Platt v. Union Pac. R.R. Co., 99 U.S. 48, 58 (1878) ("Courts are to accord a meaning, if possible, to every word in a statute."). *But see* Mayer v. Spanel Int'l Ltd., 51 F.3d 670, 674 (7th Cir. 1995) ("Redundancy is common in statutes; we do not subscribe to the view that every enacted word must carry independent force."); Amar, *supra* note 3, at 10 (arguing that redundant constitutional provisions are good to the extent they clarify).

141. Reiter v. Sonotone Corp., 442 U.S. 330, 341 (1979) (stating that the "language of an opinion" must be "read in context" and not "parsed" like a statute).

142. 162 N.E. 99 (N.Y. 1928).

143. *See id.* at 101 (stating that foreseeability inquires into "[t]he range of reasonable apprehension").

required foreseeability for duty *and* proximate cause have, over time, sought to fashion those foreseeability requirements into different doctrines demanding different showings.[144] One likely explanation for this development was a sense among judges that, because it would make little sense to require a court to evaluate the same foreseeability twice, the two foreseeability tests must be different.

Another example comes from the irreparable harm and inadequate legal remedy inquiries for an injunction. Traditionally, those two requirements were simply different ways of phrasing the single limitation on the availability of an injunction when adequate legal relief was available.[145] But in more recent times, many courts have separated them into two distinct requirements.[146] The separation has led to failed "[a]ttempts to distinguish the two formulations" that have been inconsistent and confusing.[147]

A number of factors may contribute to the pressure to distinguish redundant doctrines. For instance, courts might be more inclined to treat redundant tests differently when the two tests are phrased differently because of the prevailing assumption that differences in language are meant to convey a difference in meaning.[148]

Similarly, courts may have a stronger instinct to create new law for internal redundancy than external redundancy. When the redundant tests are in the same doctrine, it is natural to conclude that the separate prongs did not accidentally develop in parallel, but instead were added for a reason. Similar reasoning underlies the Supreme Court's conclusion that "the canon against surplusage is strongest when an interpretation would render superfluous another part of the *same* statutory scheme."[149] The

144. *See, e.g.*, B.R. ex rel. Jeffs v. West, 2012 UT 11, ¶ 25–26, 275 P.3d 228, 235 (stating that duty asks whether a defendant of this sort could foresee harm to a plaintiff of this sort, while proximate cause asks whether this particular defendant reasonably foresee harm to this particular plaintiff). Those efforts at distinction, however, have failed. *See* Cardi, *supra* note 53, at 1890–98.

145. *E.g.*, DOBBS, *supra* note 57, § 2.5(1) (tracing the history of the inadequacy and irreparability tests).

146. *See* eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391–92 (2006); LAYCOCK, *supra* note 57, at 8 (gathering cases).

147. LAYCOCK, *supra* note 57, at 8 (noting that efforts to create distinctions are illogical and have produced "no common usage"); *see also* John M. Golden, *The Supreme Court as "Prime Percolator": A Prescription for Appellate Review of Questions in Patent Law*, 56 UCLA L. Rev. 657, 695 (2009) (criticizing the confusion from the separate requirements).

148. *See* Davis v. Fred's Appliance, Inc., 287 P.3d 51, 58 (Wash Ct. App. 2012) (stating that courts "presume when the legislature uses different words it intended a different meaning"). *But see* Trent v. Comm'r, 291 F.2d 669, 674 (2d Cir. 1961) (Friendly, J.) ("It seems questionable that Congress could have expected the courts to possess scales sufficiently sensitive to register such delicate differences in expression, although it surely would be nicer if the draftsmen of the revenue acts would use the same words when they mean the same thing and altogether different words when they mean different things.").

149. Marx v. Gen. Revenue Corp., 133 S. Ct. 1166, 1178 (2013) (emphasis added).

distinction bias may also create greater pressure to create new law for internally redundant doctrines. That bias reflects the tendency to view two options as more dissimilar when evaluating them simultaneously than when evaluating them separately.[150] Because internally redundant doctrines are regularly considered in tandem, courts are likely to perceive the differences between them more strongly than they would between externally redundant doctrines, which usually are not considered simultaneously.

### *B. Underdeveloped Law*

Somewhat in tension with the prior point, redundant doctrines can also result in underdeveloped doctrines. That is because decisions developing redundant doctrines may be split between those doctrines. For example, suppose there are two redundant doctrines, doctrine A and doctrine B, addressing the sufficiency of pleadings. Suppose further that half of all decisions address pleadings through doctrine A, and the other through doctrine B. Unless careful attention is paid to allowing the decisions for doctrine A to inform the decisions for doctrine B and vice versa,[151] both doctrines will be less developed than if there were only one doctrine instead of two for pleadings. Doctrines A and B will each benefit from only half of the decisions on the sufficiency of the pleadings. Consequently, both doctrines will be less nuanced and sophisticated. Of course, it is unlikely that half of all decisions would address one doctrine or the other. Instead, one doctrine would likely receive more attention than the other, and some decisions might discuss both doctrines A and B.[152] But the point still holds, because it is unlikely that all decisions would address both doctrines.

### *C. Additional Costs of Internal Redundancy*

Another potential negative consequence of internal redundancy is that it may lead to double counting, which can skew outcomes in the application of the test. That risk is most apparent when a standard sets forth various factors to be balanced. For those tests, courts resolve the issue by weighing

150. *See* Christopher K. Hsee & Jiao Zhang, *Distinction Bias: Misprediction and Mischoice Due to Joint Evaluation*, 86 J. PERSONALITY & SOC. PSYCHOL. 680, 691 (2004).

151. That scenario is unlikely. An aversion to the risk of misapplying a doctrine, as well as a desire to make decisions seem more consistent with past decisions, is likely to lead courts to cite decisions that invoke the same doctrine as the one that they are applying, as opposed to a redundant counterpart. This conclusion is borne out by the tendency of courts to cite ripeness decisions in ripeness cases and standing cases in standing cases, despite their redundancy. *See* 13B WRIGHT ET AL., *supra* note 6, § 3532.5, at 551.

152. *See, e.g.*, Herb Reed Enters., LLC v. Fla. Entm't Mgmt., Inc., 736 F.3d 1239, 1250 (9th Cir. 2013) (failing to address the adequacy of legal remedies after concluding harm was not irreparable).

each of the factors pointing in each direction.[153] Because redundant factors are aimed at the same concern, a court that concludes that one redundant factor is satisfied is likely to conclude that the other redundant factor is satisfied as well.[154] Consequently, the redundancy may lead to one concern being considered multiple times in one balancing test, which may unduly tilt the scales in favor of a particular result.[155]

The multi-factor tests for trademark infringement provide an example. Each circuit has devised a different multi-factor test, with tests ranging from six factors in the Eighth Circuit to thirteen factors in the Federal Circuit.[156] In a recent study, Professor Beebe demonstrated that many of the factors in these tests are redundant.[157] For example, he explained that one factor in most of the tests is whether the goods sold by the mark holder and the alleged infringer are so similar that a customer would conclude they come from the same source;[158] another factor is the similarity of advertising and marketing.[159] As Professor Beebe argued, because similar goods are bound to be marketed to similar customers, the advertising and marketing factor is redundant of the similarity of the goods factor.[160] Thus a conclusion that the goods are not similar should lead to a conclusion that the marketing is not similar.

Another example comes from the test for evaluating the proportionality of punishment under the Eighth Amendment. The Supreme Court has said that proportionality turns on four considerations: "the primacy of the legislature, the variety of legitimate penological schemes, the nature of our federal system," under which states may adopt different views, "and the requirement that proportionality review be guided by objective factors."[161] At least two of these factors—the nature of the federal system and the lack

153. *See* Beebe, *supra* note 82, at 1601 (explaining how courts ordinarily weigh each factor in a balancing test).

154. *See* Entrepreneur Media v. Smith, 279 F.3d 1135, 1141 (9th Cir. 2002) ("Since each factor represents only a facet of the single dispositive issue of likely confusion, the factors, not surprisingly, tend to overlap and interact, and the resolution of one factor will likely influence the outcome and relative importance of other factors . . . . [T]he determination of one factor is often, in essence, only another way of viewing the same considerations already taken into account in finding the presence or absence of another one."); Beebe, *supra* note 82, at 1654.

155. *See* Exacto Spring Corp. v. Comm'r, 196 F.3d 833, 835 (7th Cir. 1999) (concluding that redundancy in multifactor test skewed result); *cf.* United States v. Feemster, 572 F.3d 455, 471 (8th Cir. 2009) (Beam, J., dissenting) (arguing that consideration of redundant statutory sentencing factors led to unreasonably high sentence).

156. *See* Beebe, *supra* note 82, at 1582–83. According to Beebe, despite the diversity of tests, all circuits agree on the four factors of "the similarity of the marks, the proximity of the goods, evidence of actual confusion, and the strength of the plaintiff's mark." *Id.* at 1589.

157. *See id.* at 1614.

158. *See id.* at 1641–42.

159. *See id.* at 1643.

160. *See id.*

161. Ewing v. California, 538 U.S. 11, 23 (2003).

of a single penological theory—are redundant. The reason that states may adopt different theories of punishment is that the Eighth Amendment does not prescribe a theory of punishment. A conclusion that the punishment may be justified because of the nature of federalism leads to the further conclusion that the punishment is also justified because the Eighth Amendment does not prescribe a particular theory.

Of course, it may be that the underlying fact that satisfies one prong leads to the satisfaction of the other prong. But that is not always so. And courts may not always be careful to base their decision on the reason why the two prongs were satisfied. Instead, they may base their conclusion simply on the fact that more factors point toward one result than the other.

### *D. Additional Costs of External Redundancy*

External redundancies raise a different set of concerns. The ability of courts to choose among different redundant doctrine raises the possibility of cycling, which may lead to instability in the law or making it easier for judges to manipulate the outcome in cases. External redundancies facilitate judicial manipulation of outcomes in other ways as well.

#### *1. Doctrinal Cycling*

Externally redundant doctrines increase the opportunities for cycling, an evil identified under social choice theory.[162] Cycling refers to the instability of outcomes in a majority voting system where there are more than two possible outcomes, and each voter ranks those outcomes differently.[163] For example, if three judges face a case with possible outcomes A, B, and C, and they rank those outcomes ABC, BCA, CAB, no outcome is stable; a majority prefers A to B, B to C, and C to A. For every outcome with majority support, there is another outcome that has stronger majority support.[164]

Although cycling can result when only a single consideration is at stake,[165] cycling is more likely for "multidimensional" issues—that is, when there is more than one consideration that informs a decision.[166] The

162. *See* KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES 94–96 (2d ed. 1963) (describing cycling).

163. *See* Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 815–17 (1982).

164. *See id.* at 824.

165. *See* John S. Dryzek & Christian List, *Social Choice Theory and Deliberative Democracy: A Reconciliation*, 33 BRIT. J. POL. SCI. 1, 12–13 (2003) (explaining that "single-peakedness[] is already a sufficient condition" for avoiding cycling (footnote omitted)).

166. *See* Aziz Z. Huq, *Tiers of Scrutiny in Enumerated Powers Jurisprudence*, 80 U. CHI. L. REV. 575, 624 (2013).

more considerations relevant to a decision, the more opportunity there is for disagreement among the decisionmakers. Redundant doctrines pose this problem, because each doctrine is a new dimension.

Consider the following example. A three-judge panel hears a case involving an issue for which there are three redundant doctrines—doctrines A, B, and C. Judge 1 prefers to decide by doctrine A, but if forced to choose between doctrines B and C, would prefer doctrine B. Judge 2 prefers doctrine B, but if forced to choose between doctrines A and C, would prefer doctrine C. Judge 3 prefers doctrine C, but if forced to choose between doctrines A and B, would prefer doctrine A. Under this scenario, there is no stable outcome. For each outcome, there is another outcome that two judges prefer more. A defeats B (because of 1 and 3), B defeats C (because of 1 and 2), and C defeats A (because of 2 and 3).[167]

The potential for cycling does not inevitably lead to an endless loop in which the judges cannot reach an outcome. Judges may avoid cycling by voting strategically.[168] Judge 3, for example, may opt to support doctrine A instead of doctrine C, because by doing so he ensures that doctrine B does not become law. Although this strategy increases stability, it does so in an arbitrary way. It depends only on which judge opts to act strategically; each outcome is possible because each judge could act strategically.

To protect against the evils of cycling, courts have developed various institutional features. One is to designate an agenda setter who has some control over choosing the outcome, as is the case with a chief judge who may designate who writes an opinion; another is to develop norms of compromise; a third is stare decisis, which tends to limit the outcomes a judge may endorse.[169] But these mechanisms are no guarantee against cycling on courts.[170] Judges each vote independently, and stare decisis is not an absolute constraint. In any event, judges can almost always distinguish prior decisions.

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167. A case raising this possibility is *Ticor Title Ins. Co. v. FTC*, 814 F.2d 731 (D.C. Cir. 1987). The three judges on that panel each gave different reasons for why judicial review of an agency determination was premature. One said the petitioner had failed to exhaust his remedies before the agency, *id.* at 739 (opinion of Edwards, J.); another said that the agency decision was not final because further agency review was available, *id.* at 750 (opinion of Williams, J.); and the third concluded that the dispute was not ripe for judicial review because further agency review was available, *id.* at 752 (opinion of Green, J.). As the opinion of Judge Williams makes clear, the doctrines of finality, ripeness, and exhaustion are redundant because they serve the same interests through the same basic requirement that a court not intervene until agency review is complete. *Id.* at 745 (opinion of Williams, J.).

168. *See* Huq, *supra* note 166, at 622 (explaining how strategy can lead to "stable but arbitrary outcomes").

169. *See id.* at 624.

170. *See* LEO KATZ, WHY THE LAW IS SO PERVERSE 101 (2011).

*2. Other Avenues for Manipulation*

External redundancies increase the ability of the courts to manipulate the law in other ways. For example, when redundant doctrines diverge, that divergence confers a greater ability of the court to achieve the outcome it desires. A litigant seeking to press its best argument, or a court seeking a particular outcome, may rely on the doctrine more favorable to that outcome instead of on the less favorable redundant doctrine.[171] For example, although the Court acknowledged in *Lawrence v. Texas* that the Equal Protection Clause provided a basis to strike down Texas's anti-sodomy law,[172] the Court chose to employ the redundant protections of the Due Process Clause, not because it provides stronger anti-discrimination protection, but because employing the Equal Protection Clause could lead to future litigation based on idiosyncrasies of the Equal Protection doctrine.[173]

Redundancy also expands opportunities for judicial discretion by providing cover to judges seeking to create new doctrine. One constraint on judicial manipulation of doctrine is the threat of public criticism.[174] Redundancy allows courts to avoid that criticism to some degree. A court might change one of the redundant doctrines to achieve the result it wants without touching the other redundant doctrine, thereby allowing the court to claim that the doctrinal changes are not significant because the other doctrine still exists. So too, a judge dissatisfied with the outcome from an existing doctrine may create a redundant doctrine that achieves the result he wants without overturning old doctrine. In this way, he can claim that he is maintaining the old rule and that the new doctrinal development is separate. Under both scenarios, the existence of redundancy or the power to create it allows the court to avoid the full force of criticism usually targeted at doctrinal manipulation.

171. *Cf.* Huq, *supra* note 166, at 619 (noting that differing levels of scrutiny for different constitutional provisions increases judicial discretion to uphold or strike a law when Congress fails to specify the basis for that law).

172. 539 U.S. 558, 574–75 (2003) (stating that the Equal Protection Clause provided a "tenable" argument).

173. *See id.* at 575 ("Were we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants."). Internal redundancy poses less of an opportunity for manipulation because a court cannot enforce a doctrine unless each element of it is satisfied. For example, if a court assessing whether to grant an injunction determines that an injury is irreparable, it must make the further determination whether adequate legal remedies exist. It cannot avoid addressing the second doctrine by finding the existence of irreparable injury.

174. *See* Richard H. Fallon, Jr., *Constitutional Constraints*, 97 CAL. L. REV. 975, 993 (2009) (arguing views of "ordinary citizens" about "constitutional norms" may constrain officials).

## IV. AVOIDING DOCTRINAL REDUNDANCY

Doctrinal redundancies have virtues, but they also have substantial vices. They risk unnecessarily complicating the law, stifling the growth of the law, producing inconsistent outcomes in similar cases, distorting the application of tests, and providing an avenue for judicial manipulation of outcomes. These negatives undermine core features of our legal system. They undermine the rule of law, increase litigation and decision costs, and threaten the legitimacy of the judiciary. Moreover, even the potential benefits of doctrinal redundancies—such as increasing the protection of the value underlying a doctrine—can be undesirable for particular doctrines. For this reason, courts should generally avoid creating doctrinal redundancies.[175]

The doctrines of irreparability and inadequacy for an injunction provide an example of an undesirable redundancy. The redundant considerations have led to confusion,[176] and they have already demonstrated the potential to generate additional, unwarranted restrictions on injunctions as courts try to distinguish them.[177] Moreover, this redundancy does not capture the usual benefits associated with redundancies. The irreparable harm requirement has existed for centuries, and further development of the doctrine is likely unnecessary. Further, the redundancy likely overprotects the values underlying the doctrines. In days past, limiting equitable relief to situations when the law courts could not provide complete relief was a powerful premise of the legal system. But with the merger of law and equity that principle has become less important.[178]

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175. Of course, judges may create redundancies despite these negative consequences for various reasons unrelated to the redundancy. Some of these reasons are justifiable, such as when judges on a multi-judge panel create a redundancy as a compromise because they cannot agree how to apply existing doctrine. *See* F. Andrew Hessick & Jathan P. McLaughlin, *Judicial Logrolling*, 65 FLA. L. REV. 443, 456 (2013) ("[W]hen two judges disagree on doctrine, they often compromise in fashioning majority opinions."); *cf.* Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1749 (1995) (noting doctrines may obscure disagreement about underlying principles). Others are less so, as with a judge subject to election or retention votes who creates a redundant doctrine so that he can hold himself out as the source of a popular new law, just as legislators may enact redundant laws to play to interest groups. Michael Doran, *Legislative Organization and Administrative Redundancy*, 91 B.U. L. REV. 1815, 1844 (2011) (noting that Congress may create redundant legislation to placate interest groups).

176. *See* LEVINE ET AL., *supra* note 7, at 100 (criticizing redundancy in irreparable harm and inadequate legal remedy requirements for injunctions); Golden, *supra* note 147, at 695 (criticizing the confusion from the separate requirements).

177. *See* Doug Rendleman, *The Inadequate Remedy at Law Prerequisite for an Injunction*, 33 FLA. L. REV. 346, 346–47 (1981) (seeking to distinguish irreparable harm and inadequate legal remedy).

178. *See* Laycock, *supra* note 113, at 689 (stating that the irreparable injury rule "is not even close to the law").

But this does not mean that doctrinal redundancy is never warranted. To the contrary, doctrinal redundancy may be appropriate when redundancy would maximize the benefits of redundancy while minimizing the costs. For example, doctrinal redundancy may be useful when the courts seek to implement a highly important value but are uncertain about the best way to do it. In that situation, the redundancy provides additional protection to the underlying value, reinforces the message that the value is important, and facilitates doctrinal experimentation necessary for courts to ascertain the best way to protect the value.[179]

Redundancy is also an important tool to respond to situations when courts or other actors regularly apply an existing doctrine in a way that inadequately implements the values underlying that doctrine. The overlap between the Free Exercise Clause and the Establishment Clause arguably provide an example. Being free from government coercion to participate in religious events is a highly important value, yet many government actors have demanded participation in sectarian exercises. That experience may explain the development of redundant doctrines to protect against such coercion.

Redundancy is also useful to combat various biases, such as the availability and salience biases. The former leads people to overvalue a risk when an example of that risk occurring readily comes to mind, as when a person has a high fear of contracting Ebola because he has heard that others have contracted the disease, even though the risk of contracting the disease is low;[180] the latter bias leads people to pay more attention to information that is prominent in evaluating a situation, instead of basing their assessment on all of the information about that thing, as when a person is more affected by witnessing a fire than by merely reading a report about it.[181] These heuristics may result in recent events and an individual judge's personal experiences distorting his assessment of a risk. Doctrinal redundancy may reduce the effect of this heuristic by forcing the judge to assess arguments multiple times under different frameworks. For example, a judge whose child was recently laid off for bad reasons might overestimate the need for judicial intervention to prevent similar firings;

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179. Along similar lines, there may be good reason to create a redundant doctrine to avoid the undesirable aspects of an existing doctrine—if, for example, the existing doctrine has quirks that render it a less powerful tool for future case. *See, e.g.*, Yoshino, *supra* note 127, at 787 (noting that due process may protect equality better than the Equal Protection Clause).

180. *See* Norbert Schwarz & Leigh Ann Vaughn, *The Availability Heuristic Revisited: Ease of Recall and Content of Recall as Distinct Sources of Information*, *in* HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 103, 103 (Thomas Gilovich, Dale Griffin & Daniel Kahneman eds., 2002); *see also* Cass R. Sunstein, *On the Divergent American Reactions to Terrorism and Climate Change*, 107 COLUM. L. REV. 503, 534 (2007) (discussing the practical impact of the heuristic).

181. *See* Cass R. Sunstein, *What's Available? Social Influences and Behavioral Economics*, 97 NW. U. L. REV. 1295, 1301 (2003).

the redundant irreparable harm and inadequate legal remedy requirements for injunctive relief may mitigate that overestimation by requiring the judge to think twice about the need for immediate relief.

An important caveat is that the desirability of a redundancy may change over time. One reason is that the commitments to the value underlying potentially redundant doctrines may evolve. Courts should consider creating redundancies to protect strengthening commitments, and abandoning redundancies that protect values for which commitments have weakened. Similarly, even for redundancies that do protect important values, courts should abandon those redundancies if they have produced intolerable levels of confusion and incoherence. An example of courts following this path is occurring with the foreseeability requirements of negligence. Citing the confusion from that redundancy, the Restatement and several states have recently jettisoned the foreseeability requirement for duty.[182]

Moreover, in assessing existing redundancies, courts should realize that redundancies may not always be easy to detect. Redundant doctrines often are not labeled as redundant. The court that creates the redundant doctrine may not have been unaware of the existing doctrine[183] or at least may not have realized that the existing doctrine already serves the purpose of the new doctrine. The misapprehension might be because the creating court made a mistake.[184] Or it might be because it might not be apparent that the

182. *See* Gipson v. Kasey, 150 P.3d 228, 231 (Ariz. 2007) ("Foreseeability . . . is more properly applied to the factual determinations of breach and causation than to the legal determination of duty."); RESTATEMENT, *supra* note 7, § 7(b) cmt. j (2010) ("Despite widespread use of foreseeability in no-duty determinations, this Restatement disapproves that practice . . . ."). As noted earlier, internal redundancies are more likely to complicate law than external redundancy because of the distinction bias. *See supra* note 150 and accompanying text. Still, efforts to avoid confusion and incoherence may also explain the abandonment of some external redundancies, such as of the past practice of using the advisory opinion doctrine, in addition to standing and ripeness, to bar challenges to speculative threats. *See* United Pub. Workers v. Mitchell, 330 U.S. 75, 89 (1947) (dismissing a challenge to a "hypothetical threat" on the ground that it "seek[s] advisory opinions"); Hessick, *supra* note 27, at 81–82 (noting that subsequent cases rely on standing and ripeness only).

183. The decentralized nature of the judiciary may lead to lack of awareness of existing doctrines. For most courts, each judge hears only some portion of cases before that court. These judges create doctrine at different times through case-by-case adjudication, and there is little, if any, coordination between those judges—one panel of an appellate court does not usually consult with another panel of appellate judges in fashioning doctrine. These features create opportunities for courts to develop redundant doctrines in parallel. Moreover, even for courts on which all members do hear all cases before it, like supreme courts, gaps in knowledge might result from temporal change. The justices on today's court might not be aware of every doctrine announced by the justices on yesterday's court, and consequently might create a doctrine where one already exists. And while electronic databases do reduce the chance of missing an existing doctrine, they do not guarantee finding ancient doctrines, especially because of differences in expression.

184. *See* Golden, *supra* note 147, at 698 (suggesting that a mistake of this sort led to the redundant irreparable harm and inadequate legal remedy requirements for an injunction). It is even possible that a judge might create a redundant doctrine not because of a mistake but because he simply perceives the preexisting doctrine to serve a different function. *See* Edward Rubin & Malcolm Feeley,

new doctrine is redundant. Doctrine grows and evolves incrementally on a case-by-case basis.[185] Doctrine thus often does not embody a high-level abstract theory, but instead is the product of minor adjustments to achieve desirable results in particular cases.[186] Two strands of doctrine serving the same function thus may grow independently, yet the redundancy may not be apparent until the doctrines have expanded to the point that they apply to the same set of cases.[187] Arguably, the recent convergence of the doctrines implementing the Equal Protection Clause and anti-discrimination component of the Due Process Clause has followed this path.[188]

In sum, courts should usually avoid creating doctrinal redundancies because they carry so many potentially negative consequences, but there may be circumstances when a redundancy serves such a useful purpose that it is warranted despite the risks. Moreover, courts should reassess over time whether a particular doctrinal redundancy is warranted. The calculus for determining whether to create a redundancy may change over time as commitments to particular values shift and as the harms deriving from multiple doctrines vary. Likewise, they should be on the lookout for redundant doctrines that have emerged undetected through the common law process.

## CONCLUSION

Doctrinal redundancies are common in the law, but that they are common does not establish that they are always a good development. To the contrary, although they can be used to protect important values and to encourage legal developments, they also can lead to confusion and incoherence in the law, can skew outcomes, and provide an opportunity for judges to manipulate doctrines to achieve outcomes that they desire but that the law may not support. Courts accordingly should avoid creating redundant doctrines unless it is apparent that the benefits of the redundancy exceed the costs.

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*Creating Legal Doctrine*, 69 S. CAL. L. REV. 1989, 1999 (1996) (noting that "different judges will perceive doctrine differently").

185. *See* Sunstein, *supra* note 175, at 1764 (noting how "principles are developed over long periods").

186. *See* Oliver Wendell Holmes, *Codes, and the Arrangement of the Law*, 5 AM. L. REV. 1, 1 (1870) ("It is the merit of the common law that it decides the case first and determines the principle afterwards.").

187. *See* Holmes, *supra* note 36, at 448–49 (providing examples of separate doctrines converging). An analogous phenomenon is demonstrated by a study showing that individuals hearing a marble rolling around could not explain what made the sound, but once they were aware that a marble makes that noise, they could consistently identify the sound as coming from a marble. *See* Shapiro, *supra* note 21, at 128.

188. *See* Yoshino, *supra* note 127, at 787.

Capturing the benefits of redundancy while avoiding the costs in a sensible way requires courts and litigants to identify when doctrines are redundant and what purposes those redundancies serve. That exercise is hardly easy. Aside from the difficult abstractions that the conversation requires, people may reasonably disagree about when doctrines are redundant, what values those redundancies are protecting, and whether the benefits of a particular redundancy exceed the costs.

Nevertheless, the task is worth the effort. Open discussions increase transparency in a way that would limit the opportunity for judicial manipulation of doctrine, thereby promoting the rule of law and increasing judicial legitimacy. And it would facilitate a better use of doctrinal redundancy so that courts may more sensibly determine when they should create new redundancies and abandon existing ones.