

October 1985

Supreme Court Doctrine in the Trenches: The Case of Collateral Estoppel

John Bernard Corr

Follow this and additional works at: <https://scholarship.law.wm.edu/wmlr>



Part of the [Supreme Court of the United States Commons](#)

Repository Citation

John Bernard Corr, *Supreme Court Doctrine in the Trenches: The Case of Collateral Estoppel*, 27 Wm. & Mary L. Rev. 35 (1985), <https://scholarship.law.wm.edu/wmlr/vol27/iss1/8>

Copyright c 1985 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/wmlr>

SUPREME COURT DOCTRINE IN THE TRENCHES: THE CASE OF COLLATERAL ESTOPPEL

JOHN BERNARD CORR*

[When] the Supreme Court renders an opinion, everybody gets in line.¹

I. INTRODUCTION

Well, maybe; but notwithstanding Reynolds' confidence in the efficacy of the High Court, lower courts that are willing and anxious to "get in line" are not always able to do so. Gaps occur between aspirations and performance. In the descent from the Olympus of the Supreme Court to the boiler room of the lower courts, a picture of judicial doctrine emerges that differs from the antiseptic abstractions which comprise so much doctrinal analysis. These gaps often stem from judicial doctrine that is just and logical in the abstract but difficult to apply in concrete situations. How well a doctrine actually will operate, therefore, should be a central consideration when the Supreme Court develops new law.

This Article uses the recently declared Supreme Court doctrine of nonmutual collateral estoppel to examine how the development of judicial doctrine might be altered to account for problems of application in the lower courts. The study focuses on collateral estoppel as a case study from which general principles of doctrinal

* Associate Professor of Law, Marshall-Wythe School of Law, College of William and Mary. A.B., 1963, A.M., 1964, John Carroll University; Ph.D., 1971, Kent State University; J.D., 1978, Georgetown University.

I am grateful to my colleagues, Frederick F. Schauer and Robert C. Palmer, for their encouragement and their thoughtful criticisms of an earlier draft of this article. I also am indebted to my former research assistant, Kenneth H. Boone, who had the tedious but important job of locating the large number of federal court decisions upon which this article is based.

Research for this article was supported in part by a grant from the Marshall-Wythe Alumni Association.

1. Washington Post, June 14, 1984, at A10, col. 3 (quoting William Bradford Reynolds, Assistant Attorney General, Civil Rights Division, Department of Justice).

development may be drawn rather than examining possible improvements in the doctrine itself. The technique for this analysis involves several steps. First, the Article lays out the doctrine of nonmutual collateral estoppel as it has evolved through Supreme Court decisions. Next, the Article compares lower court application of nonmutual collateral estoppel with the doctrinal principles enunciated by the Supreme Court. The Article then contrasts the relatively successful operation of nonmutual collateral estoppel with the less successful application of another recent Supreme Court doctrine, retroactivity, which a previous Article examined in depth.² Finally, the Article identifies the general principles of doctrinal analysis which can be gleaned by examining and comparing the two doctrines.

Nonmutual collateral estoppel is part of a larger group of rules which, for purposes of this Article, may be referred to collectively as "finality doctrine." Finality doctrine is composed of two major parts: *res judicata*, which prevents parties and their privies from relitigating claims or causes of action previously reduced to final judgment;³ and collateral estoppel, which precludes relitigation of issues necessarily decided in a prior suit, even if the causes of action in the suits are not identical.⁴ Nonmutual collateral estoppel is a relatively recent addition to the federal rules of collateral estoppel. Before 1971, the federal courts generally recognized the principle of mutuality.⁵ Under this doctrine, according to a recent Supreme Court description, "neither party could use a prior judgment as an estoppel against the other unless both parties were bound by the judgment."⁶ In 1971, however, the Court rejected the

2. See Corr, *Retroactivity: A Study in Supreme Court Doctrine "As Applied"*, 61 N.C.L. Rev. 745 (1983). For a definition of retroactivity, see *id.* at 745-46. See also *infra* notes 203-20 and accompanying text for a discussion of retroactivity doctrine.

3. *Cromwell v. County of Sac*, 94 U.S. 351, 352 (1876). The term "*res judicata*" commonly "incorporate[s] both true *res judicata* and collateral estoppel." *White v. World Fin. of Meridian, Inc.*, 653 F.2d 147, 150 n.5 (5th Cir. 1981). To avoid confusion, however, this Article will use *res judicata* only to describe the doctrine governing when claims or causes of action may not be relitigated. Finality doctrine will be used as the umbrella term for both *res judicata* and collateral estoppel.

4. *Southern Pac. R.R. v. United States*, 168 U.S. 1, 48-49 (1897).

5. There were, however, a few prominent exceptions to the general practice of requiring mutuality of estoppel. See, e.g., *Bruszewski v. United States*, 181 F.2d 419, 421 (3d Cir. 1950) ("[N]o unfairness results here from estoppel which is not mutual.").

6. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326-27 (1979).

mutuality requirement and embraced the more liberal doctrine of nonmutual collateral estoppel. Under the new rule, federal courts have the discretion to apply collateral estoppel if the issue was litigated fully and fairly in the first action, regardless of mutuality.⁷

Nonmutual collateral estoppel was chosen for analysis because: (1) it is a doctrine of fairly recent origin in the federal courts, demonstrating a clear break with the past, but old enough that evidence of its application in lower courts is now available; (2) it is almost entirely judge-made doctrine, substantially free of constitutional and statutory constraints; and (3) it is an abandonment of a previous hard-and-fast rule, affording lower courts little discretion, in favor of a case-by-case analysis, providing lower courts with substantial discretion. The third element is particularly significant, because it represents an approach to doctrinal development that nonmutual collateral estoppel shares with retroactivity, the doctrine this Article compares with nonmutual estoppel.⁸

II. THE SUPREME COURT: 1971-84

A. *Blonder-Tongue*: The Advent of the Rule of Nonmutuality

The Supreme Court first departed from the requirement of mutuality in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*,⁹ a patent case.¹⁰ In prior litigation involving an unrelated defendant, the plaintiff foundation had prosecuted a patent infringement suit unsuccessfully. In that case, the plaintiff lost because the court concluded that the patent in question was invalid. In *Blonder-Tongue*, the validity of the same patent was at issue, but under the established rule of mutuality a change in defendants meant that the foundation could not be estopped from relitigating the patent's validity. In fact, the rule of mutuality was established so firmly that the defendant in *Blonder-Tongue* did

7. *Id.* at 328.

8. See *supra* note 2. Retroactivity also possesses the first two traits. Even if retroactivity and collateral estoppel did not share any of these characteristics, however, comparison of the doctrines still would be feasible.

9. 402 U.S. 313 (1971).

10. See *Standefer v. United States*, 447 U.S. 10, 21 (1980) ("This Court first applied the doctrine [of nonmutual collateral estoppel] in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*.").

not even raise the collateral estoppel defense until the Supreme Court asked both parties to argue the issue.¹¹

Writing for a unanimous Court, Justice White described the thirty-year process during which many courts, including some lower federal courts, had eroded or rejected outright the mutuality requirement which was once so central to collateral estoppel.¹² Duplicative litigation and the accompanying misallocation of litigants' resources had inspired this judicial evolution.¹³ In patent law, the mutuality rule had produced these problems in unusual abundance,¹⁴ making it a particularly appropriate vehicle for termination of the mutuality requirement.

The Court ruled that collateral estoppel could apply to patent cases when the party against whom estoppel was sought previously had enjoyed "a full and fair opportunity to litigate," without regard for mutuality between the parties.¹⁵ Justice White acknowledged that the "fairness" determination would require a factual examination in every case, but he presented some general considerations to guide that investigation. Limiting its holding to patent situations involving "defensive" collateral estoppel,¹⁶ the Court

11. 402 U.S. at 317-20. *But cf.* *Bruszewski v. United States*, 181 F.2d 419 (3d Cir. 1950) (giving res judicata effect to prior finding of no negligence in spite of lack of privity between United States and prior defendants).

12. 402 U.S. at 325-26.

13. *Id.* at 328-29.

14. *Id.* at 334-49. According to the Supreme Court, mutuality requirements produced especially acute problems in the area of patent law for two reasons. First, patent holders often brought allegations of infringement against small businesses. This maneuver placed the burden of establishing the invalidity of the patent upon the small businesses. Patent litigation is particularly expensive, so these businesses had a strong incentive to settle by purchasing rights to a patent, even when they had no confidence in the validity of the patent. Such settlements increased operational costs and disadvantaged small businesses in relation to larger competitors with the time and financial resources to contest effectively the validity of a patent. Second, patent cases typically absorb an inordinate amount of judicial time and energy. The Court believed that eliminating the mutuality requirement would result in either a more frequent application of collateral estoppel or a decline in the number of dubious patent suits filed, or both. *Id.*

15. *Id.* at 329.

16. *Id.* at 332. Nonmutual collateral estoppel comes in two varieties. The type at issue in *Blonder-Tongue* was "defensive" collateral estoppel, in which a plaintiff is estopped from proving an issue the plaintiff litigated and lost against another party in an earlier proceeding. See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 329 (1979). The other type is "offensive" collateral estoppel, in which "a litigant who was not a party to a prior judgment . . .

suggested that usually no unfairness would result from the invocation of estoppel against a plaintiff who had chosen the forum in the first action, who had incentive to litigate fully in the original case, and who had faced no procedural difficulties.¹⁷ In patent cases, lower courts also might consider whether the first judicial determination of a patent's validity employed the proper legal standards, and whether the first court fully grasped the technical questions in the case.¹⁸ Notwithstanding these considerations, the Court emphasized that the decision rested ultimately in the discretion of the judge. "[A]s so often is the case," the Court said, "no one set of facts, no one collection of words or phrases, will provide an automatic formula for proper rulings on estoppel pleas. In the end, [the] decision will necessarily rest on the trial courts' sense of justice and equity."¹⁹ Justice White apparently believed that a grant of discretion to lower courts would improve judicial quality. He noted that the decline in mutuality had been accompanied by "a corresponding development of the lower courts' ability and facility in dealing with questions of when it is appropriate and fair to impose an estoppel against a party who has already litigated an issue once and lost."²⁰

Blonder-Tongue scrupulously avoided the questions of whether nonmutuality applies to "offensive" collateral estoppel, and whether estoppel can be applied in a civil case to preclude relitigation of an issue decided in a prior criminal judgment.²¹ In fact, if the Court's holding is read very narrowly, it could be interpreted as lifting mutuality requirements only for cases involving "a plea of estoppel by one facing a charge of infringement of a patent that has once been declared invalid."²² *Blonder-Tongue* represented High Court approval of nonmutuality, but only with substantial circumspection.

nevertheless [seeks to] use that judgment 'offensively' to prevent a defendant from relitigating issues resolved in the earlier proceeding." *Id.* at 326.

17. *Id.* at 332.

18. *Id.* at 333.

19. *Id.* at 333-34.

20. *Id.* at 349.

21. *Id.* at 327, 330.

22. *Id.* at 350.

B. Parklane: Extending the Scope of Nonmutuality

After *Blonder-Tongue*, the Supreme Court did not return to the mutuality issue until the 1978 Term. When it did, however, the result was anything but conservative. If *Blonder-Tongue* was the harbinger of change, *Parklane Hosiery Co. v. Shore*²³ was the locus of that change. The plaintiff in *Parklane*, Shore, sued on behalf of a class of the company's shareholders, alleging that a proxy statement issued by the company's officers and directors was materially false and misleading. Shore sought damages and costs. Shortly after the complaint was filed, the Securities and Exchange Commission sued the same defendants, alleging the same wrong but seeking equitable relief. The Commission's case was decided first, and the court in that case found that the proxy statement indeed was materially false and misleading. When Shore sought to estop the defendants from denying that finding in his class action, two major questions arose: (1) whether the holding of *Blonder-Tongue* was limited to patent cases; and (2) whether the rule in *Blonder-Tongue*, developed in the context of defensive collateral estoppel, applied equally to offensive collateral estoppel.

Blonder-Tongue had been most circumspect about how far nonmutuality would reach beyond patent cases.²⁴ Writing for the majority in *Parklane*, Justice Stewart acknowledged that *Blonder-Tongue* was a patent case,²⁵ but he also noted that the case addressed the "broader question" of whether it was fair to permit a party to litigate an issue previously decided against that party.²⁶ The High Court thus found some precedential mandate to impose nonmutuality beyond patent cases.

The Supreme Court appreciated the possibility that offensive collateral estoppel might raise considerations not present in defensive collateral estoppel, and that the *Blonder-Tongue* "full and fair opportunity to litigate" test might not be complete when it was

23. 439 U.S. 322 (1979).

24. See *supra* notes 21-22 and accompanying text.

25. 439 U.S. at 327-28.

26. *Id.* at 328. One year after *Parklane*, the Court returned to a narrower characterization of *Blonder-Tongue*. See *Standefer v. United States*, 447 U.S. 10, 21 (1980) (In *Blonder-Tongue* "we held that a determination of patent invalidity in a prior infringement action was entitled to preclusive effect against the patentee in subsequent litigation against a different defendant.").

applied to offensive collateral estoppel. More specifically, the Court recognized that offensive estoppel might offer a potential litigant an incentive not to intervene in the first action. By staying out, a non-intervenor could ensure that an unfavorable judgment would not bind him, but if the issues were decided favorably, he still could obtain the benefit of collateral estoppel. As a result, two lawsuits would be filed when one would have been sufficient. In addition, the Court noted that offensive collateral estoppel carries the special risk of injustice for a defendant who did not contest the first action vigorously because it did not involve large stakes or because he did not foresee the consequences of estoppel in subsequent cases.²⁷

The Court in *Parklane* also raised concerns about nonmutual collateral estoppel in general. The Court noted that either form of nonmutual collateral estoppel could preclude relitigation of an issue that had been decided inconsistently in two prior decisions. Moreover, the majority expressed concern that the application of nonmutual collateral estoppel could be unjust if the second action "affords the [litigant] procedural opportunities unavailable in the first action that could readily cause a different result."²⁸

The Court concluded, however, that these problems were surmountable. According to the majority, "broad discretion" for trial judges represented the most equitable approach to nonmutual collateral estoppel.²⁹ In short, the Supreme Court held that, under this discretionary approach, nonmutual collateral estoppel might be appropriate in both offensive and defensive contexts.³⁰

Applying its new rule, the Court articulated four considerations relevant to the reasonableness of estopping the *Parklane* defendants from denying that the proxy statement was materially false and misleading. First, the class "probably could not have joined in

27. 439 U.S. at 330. *Blonder-Tongue* also mentioned that collateral estoppel should not be applied unless the litigant opposing estoppel had substantial incentive to litigate in the first action. 402 U.S. at 332-33. In *Parklane*, however, the Court noted that in defensive collateral estoppel the "incentive to litigate" problem usually would not arise. 439 U.S. at 329-30.

28. 439 U.S. at 331. The Court also raised the issue of procedural disadvantage in *Blonder-Tongue*. 402 U.S. at 333.

29. 439 U.S. at 331.

30. *Id.* at 331-32.

the injunction action.”³¹ Second, the seriousness of the case and the possibility of subsequent claims by private parties gave the defendants substantial incentive to contest the first action.³² Third, the decision in the injunction action did not contradict any previous decision.³³ Finally, no new procedural advantages likely to produce a different result had accrued to the defendants in the second action.³⁴ Taken together, these four factors convinced the Court that collateral estoppel should be applied to preclude relitigation of the proxy statement’s veracity.³⁵

C. Nonmutuality in Other Contexts

The Supreme Court returned to the mutuality question during the 1979 Term in *Standefer v. United States*.³⁶ *Standefer* represented the Court’s first consideration of the issue in the context of criminal litigation and the first consideration of the applicability of nonmutual collateral estoppel to a governmental litigant.³⁷ In *Standefer* a criminal defendant sought to estop the federal government from prosecuting him for aiding and abetting a federal official who had been accused of taking a bribe. Because the federal official already had been acquitted of the bribery charges, the defendant argued that the government could not prosecute him for aiding a bribe, the existence of which the government previously had been unable to establish beyond a reasonable doubt.³⁸ Writing for a unanimous Court, Chief Justice Burger acknowledged that nonmutual collateral estoppel could be applied against the federal government, but he did not find it appropriate in this case. Using the “full and fair opportunity to litigate” test established in *Blonder-Tongue* and *Parklane*,³⁹ he argued that a criminal case presented factors not relevant to civil actions. The Chief Justice

31. *Id.* at 332.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 332-33.

36. 447 U.S. 10 (1980).

37. Although collateral estoppel was invoked against the federal government in a previous case, mutuality was not a consideration because the government was in privity with a party to the first suit. *Montana v. United States*, 440 U.S. 147 (1979).

38. 447 U.S. at 14.

39. See *supra* notes 15-20, 23-35 and accompanying text.

reasoned that the government should not be estopped from relitigating issues previously decided in other criminal actions because of the special rules and procedures involved, including limited discovery rights, the unavailability of directed verdicts or judgments notwithstanding the verdict, the government's inability to appeal adverse judgments, and the possibility that the exclusionary rule would be applied to the first case but not to the second. All of these considerations, according to the Court, tend to deprive the government of a full opportunity to litigate.⁴⁰ The Court also noted that criminal cases involve an "important . . . interest in the enforcement of the criminal law," a consideration not present in civil actions.⁴¹ This interest, Chief Justice Burger reasoned, outweighs the advantage of economy of litigation which nonmutual collateral estoppel could provide.⁴²

The Court's discussion of the applicability of nonmutual collateral estoppel against the federal government in *Standefer* was significant for two reasons. First, the Court's use of the general "full and fair opportunity to litigate" test of *Blonder-Tongue* and *Parklane* left open the possibility that application of nonmutual collateral estoppel against the government still might be appropriate, at least in civil cases.⁴³ On the other hand, by emphasizing that public interest considerations in litigation involving the government could outweigh factors that usually might support application of nonmutual collateral estoppel, the Court suggested that a refusal to invoke nonmutual collateral estoppel against the government could be premised on a countervailing public interest present in a particular case.⁴⁴

In the 1980 Term, the Supreme Court decided *Allen v. McCurry*,⁴⁵ a collateral estoppel case involving federal civil rights statutes. In *Allen*, a defendant in a prior criminal case had sought to suppress certain evidence because the police allegedly had

40. 447 U.S. at 22-24.

41. *Id.* at 24.

42. *Id.* at 25.

43. *But see* United States v. Mendoza, 104 S. Ct. 568 (1984); *infra* notes 52-67 and accompanying text.

44. 447 U.S. at 25.

45. 449 U.S. 90 (1980).

searched the defendant's home unlawfully. At a state pretrial suppression hearing, the court had held that any evidence in plain view was seized lawfully, and at trial the defendant had been convicted using that evidence.⁴⁶ The convict subsequently brought a Section 1983⁴⁷ suit against the police who had seized the evidence. The police argued that collateral estoppel applied to the state court finding that the evidence had been taken lawfully, but the United States Court of Appeals for the Eighth Circuit held that collateral estoppel principles could not preclude relitigation in a federal civil rights suit of issues previously decided in a state court.⁴⁸ The Supreme Court, with Justice Stewart writing for the majority, reversed.⁴⁹ The Court held that the legislative history of the post-Civil War civil rights statutes did not demonstrate a congressional intent to exempt civil rights suits from the rules of res judicata and collateral estoppel.⁵⁰ *Allen* had great significance for civil rights law, but it also illustrated how far collateral estoppel had come since *Blonder-Tongue*. Notwithstanding the public interest caveat attached to nonmutuality in *Standefer*,⁵¹ by the 1980 Term nonmutual collateral estoppel had become part of the fabric of standard judicial doctrine.

The Court decided a case in the 1983 Term which had a more significant impact on collateral estoppel doctrine. In *United States v. Mendoza*,⁵² an alien seeking American citizenship attempted to apply offensive collateral estoppel to an earlier court decision in which similarly situated citizenship applicants had successfully challenged the government's denial of their citizenship petitions on constitutional grounds. The United States Court of Appeals for the Ninth Circuit affirmed the application of collateral estoppel, characterizing *Parklane* as having "sounded the death knell to [sic] the

46. *Id.* at 92.

47. 42 U.S.C. § 1983 (1982).

48. 606 F.2d 795, 799 (8th Cir. 1979).

49. 449 U.S. at 105.

50. *Id.* at 99-105.

51. See *supra* notes 36-44 and accompanying text.

52. 104 S. Ct. 568 (1984).

common law doctrine of mutuality of parties.”⁵³ Noting the government’s strong incentive to litigate the first case fully and the failure of the government to appeal the adverse decision, the Ninth Circuit pointed out that “[i]t is by now well settled . . . that collateral estoppel may be invoked against the government.”⁵⁴ The appellate court was alert to the Supreme Court’s caveat that application of nonmutual collateral estoppel against the government still was special,⁵⁵ but concluded that the government simply had failed to identify a “‘critical’ need for redetermination of the [relevant constitutional] rights.”⁵⁶

The Supreme Court reversed. In doing so, it abandoned the discretionary approach of *Blonder-Tongue* and *Parklane* and established a non-discretionary rule for collateral estoppel litigation involving the government. Writing for a unanimous Court, Justice Rehnquist rejected the Ninth Circuit’s characterization of *Parklane* as heralding the “death” of mutuality requirements,⁵⁷ claiming instead that the Court had only “conditionally approved” the offensive use of collateral estoppel in *Parklane*.⁵⁸ Perhaps the High Court had become somewhat less hostile to mutuality requirements.

In any event, *Mendoza* was most significant because of the Court’s decision to bar the general use of nonmutual collateral estoppel against the government. Citing *Standefer v. United*

53. *Mendoza v. United States*, 672 F.2d 1320, 1325 n.6 (9th Cir. 1982), *rev’d*, 104 S. Ct. 568 (1984).

54. *Id.* at 1329.

55. *Id.* The Ninth Circuit cited *Montana v. United States*, 405 U.S. 147 (1979), but a citation of *Standefer v. United States*, 440 U.S. 10 (1980), would have been more appropriate. See *supra* notes 36-44 and accompanying text.

56. 672 F.2d at 1329.

57. *Id.* at 1325 n.6.

58. 104 S. Ct. at 571. Justice Rehnquist continued to describe *Blonder-Tongue* as “abandoning the requirement of mutuality of parties,” *id.*, but he repeated his description of *Parklane* as “conditionally approving the ‘offensive’ use of collateral estoppel by a non-party to a prior lawsuit.” *Id.* at 572.

Justice Rehnquist’s statement is intriguingly contrary to his decision in *Nevada v. United States*, 463 U.S. 110 (1983) (approving the application of res judicata against the government despite mutuality questions). In that case, Justice Rehnquist stated that “mutuality has been for the most part abandoned in cases involving collateral estoppel,” and cited *Parklane* and *Blonder-Tongue*. *Id.* at 143.

States,⁵⁹ Justice Rehnquist explained that suits involving the government typically were different from suits involving only private parties.⁶⁰ According to the Court, such suits often involve issues of national importance that transcend the consequences attendant to most private litigation.⁶¹ Because the government often is the only party against whom such important suits can be brought, a decision adverse to the government in the first action might foreclose continuing legal analysis of an issue of national consequence if offensive collateral estoppel were invoked successfully in subsequent suits.⁶² This phenomenon would force both the government and the Supreme Court to revise current appellate practices. When deciding whether to appeal, the Solicitor General would have to reduce institutional concern for limited government resources and crowded dockets and worry much more about the binding effect of prior decisions.⁶³ The Supreme Court would have to grant government petitions for certiorari more routinely, lest the government be pinned by collateral estoppel.⁶⁴

The heart of the *Mendoza* holding was that lower courts should not even consider whether there was a national interest in particular governmental litigation.⁶⁵ Instead, the Court held simply that the use of offensive collateral estoppel against the government generally would not be countenanced.⁶⁶ According to Justice Rehnquist:

The Court of Appeals did not make clear what sort of "record evidence" would have satisfied it that there was a "crucial need" for determination of the question in this case, but we pretermit further discussion of that approach; we believe that the standard announced by the Court of Appeals for determining when relitigation of a legal issue is to be permitted is so wholly subjective that it affords no guidance to the courts or to the government. Such a standard leaves the government at sea because it

59. 447 U.S. 10 (1980); see *supra* notes 36-44 and accompanying text.

60. 104 S. Ct. at 572.

61. *Id.*

62. *Id.*

63. *Id.* at 573.

64. *Id.* at 572.

65. *Id.* at 573.

66. *Id.* at 574.

cannot possibly anticipate, in determining whether or not to appeal an adverse decision, whether a court will bar relitigation of the issue in a later case. By the time a court makes its subjective determination that an issue cannot be relitigated, the government's appeal of the prior ruling of course would be untimely.

We hold, therefore, that nonmutual offensive collateral estoppel simply does not apply against the government in such a way as to preclude relitigation of issues such as those involved in this case.⁶⁷

Mendoza, therefore, stripped the lower courts of discretion in determining when a suit involving the government contained an issue of sufficient national importance to bar application of collateral estoppel against the government.

Midway through the 1984 Term, the Supreme Court's doctrine on nonmutual collateral estoppel had achieved substantial definition. Following *Blonder-Tongue*, the requirement of mutuality no longer applied to patent cases in which a party invoked defensive collateral estoppel. The appropriateness of applying collateral estoppel instead would be tested by whether the party against whom estoppel was sought had been afforded a full and fair opportunity to litigate the issue in the first action.⁶⁸ In *Parklane*, the Court expanded this doctrine in two ways: first, nonmutuality was extended to non-patent cases, and second, offensive use of collateral estoppel was approved subject to recognition of factors that make the test of fairness more rigorous.⁶⁹ The four factors articulated in *Parklane* also gave added definition to the Supreme Court's grant of "broad discretion" to trial judges.⁷⁰ *Mendoza* represented the first and, so far, the only retreat from the broad discretion the Supreme Court had vested in the lower courts. Following *Mendoza*, attempts to assert nonmutual collateral estoppel against the government generally will fail because the Supreme Court has made

67. *Id.* at 573-74. In a footnote, Justice Rehnquist clarified that the statement "issues such as those involved in this case" did not refer to the traditional hesitation about applying collateral estoppel to unmixed questions of law. *Id.* at 574 n.7 (citing, *inter alia*, *Montana v. United States*, 440 U.S. 179 (1980)); see also *supra* note 37 (discussing applicability of *Montana v. United States* to mutuality questions).

68. See *supra* notes 15-20 and accompanying text.

69. See *supra* notes 25-35 and accompanying text.

70. See *supra* notes 31-34 and accompanying text.

the government immune from most assertions of nonmutual collateral estoppel.⁷¹

D. Simultaneous Developments in General Finality Doctrine

The development of nonmutual collateral estoppel doctrine did not take place in a vacuum. In the years between *Blonder-Tongue* and *Mendoza*, the Supreme Court also decided several finality issues which were related only indirectly to nonmutuality, but which placed nonmutual collateral estoppel in a more understandable context. In *Harris v. Washington*,⁷² for example, the Court reaffirmed the principle that the fifth⁷³ and fourteenth⁷⁴ amendment protections against double jeopardy preclude retrying an ultimate fact necessarily determined in a prior valid and final judgment.⁷⁵ Similarly, in *Sea-Land Services, Inc. v. Gaudet*⁷⁶ the Court clearly established that federal rules of res judicata do not preclude the assertion of claims that could not have been raised in an earlier action.⁷⁷ Shortly after *Parklane*, the Supreme Court also decided that collateral estoppel could apply to unmixed questions of law,⁷⁸ and that res judicata did not preclude a bankruptcy court from rehearing a previously decided state claim.⁷⁹

Two res judicata cases decided between 1981 and 1983 continued the Supreme Court's practice of interweaving nonmutual collateral

71. See *supra* notes 52-67 and accompanying text. The first case to hint at the possibility that nonmutual collateral estoppel generally would not be applicable to the government as a litigant was *Standefer v. United States*, 447 U.S. 10 (1980). See *supra* notes 36-44 and accompanying text.

Although the Supreme Court has not addressed the issue yet, many of the considerations the Court cited as reasons for not preventing relitigation of decided issues by the federal government on a nonmutual basis seem to apply with nearly equal force to state governments. Such a ruling by the Court could open a hole of greater social consequence in the new nonmutual collateral estoppel doctrine.

72. 404 U.S. 55 (1971) (per curiam).

73. U.S. CONST. amend. V, cl. 2.

74. *Id.* amend. XIV, § 1, cl. 3.

75. 404 U.S. at 56-57.

76. 414 U.S. 573 (1974).

77. *Id.* at 591-95.

78. *Montana v. United States*, 440 U.S. 147 (1979).

79. *Brown v. Felsen*, 442 U.S. 127 (1979).

estoppel with other aspects of finality doctrine. In *Federated Department Stores, Inc. v. Moitie*,⁸⁰ the Court held that res judicata rules afforded little discretion to lower courts.⁸¹ Apparently these more settled rules required none of the broad experimentation the Court was encouraging in the area of nonmutual collateral estoppel. Later, in *Nevada v. United States*,⁸² the Court compared the abandonment of the mutuality requirement for collateral estoppel to the continuation of the requirement in res judicata,⁸³ but it held that the mutuality requirement for res judicata cases had exceptions, including situations in which parties involved in the second litigation but not the first nonetheless relied on the initial decree to establish their rights.⁸⁴

Federal civil rights claims were a particularly frequent source of finality doctrine disputes during this general period. In 1982, for example, the Court held in *Kremer v. Chemical Construction Corp.*⁸⁵ that an employment discrimination complaint based on federal civil rights law could not be relitigated in federal court once it had been reduced to judgment in state court.⁸⁶ The Court built on *Kremer* during the 1983 Term, in *Migra v. Board of Education*,⁸⁷ by holding that federal civil rights claims that were actionable, but not raised in a prior state court proceeding, were subject to the same res judicata rules in federal court that would have been applied in state court.⁸⁸

Several other decisions in the 1983 Term decided finality issues not related directly to nonmutual collateral estoppel. In *United States v. One Assortment of Eighty-nine Firearms*,⁸⁹ the Court held that an acquittal in a criminal proceeding creates no collateral estoppel consequences applicable to a subsequent civil proceeding involving some of the same issues.⁹⁰ In *McDonald v. City of West*

80. 452 U.S. 394 (1981).

81. *Id.* at 398-402.

82. 463 U.S. 110 (1983).

83. *Id.* at 143.

84. *Id.* at 144.

85. 456 U.S. 461 (1982).

86. *Id.* at 485.

87. 104 S. Ct. 892 (1984).

88. *Id.* at 896.

89. 104 S. Ct. 1099 (1984).

90. *Id.* at 1107.

Branch,⁹¹ the Court established that federal courts hearing suits brought under 42 U.S.C. § 1983 should not afford preclusive effect to prior arbitration awards.⁹² Finally, in *Cooper v. Federal Reserve Bank of Richmond*,⁹³ the Supreme Court explained that a prior unfavorable decision in a civil rights class action alleging a general practice of racial discrimination did not preclude litigation of an individual class member's claim that he had been a victim of unlawful racial discrimination.⁹⁴

The development of doctrinal theory is only one facet of the operation of the American judicial system. Judicial doctrine also must be obeyed and applied. A test of the applicability of a judicial doctrine requires more than mere discovery of Supreme Court holdings. Observers also must examine the operation of the doctrine in lower courts, where the great bulk of cases are decided and where the doctrine is subject to further explication. This Article now examines nonmutual collateral estoppel in federal appellate courts.⁹⁵

III. NONMUTUAL COLLATERAL ESTOPPEL AND THE LOWER COURTS

A. *The Context of Finality Doctrine*

Blonder-Tongue and its Supreme Court progeny did not develop in isolation, and the lower courts did not apply them as if they had. Because the doctrine of nonmutual collateral estoppel was only part of the more comprehensive body of Supreme Court doctrine dealing with judicial finality,⁹⁶ lower courts working with nonmutuality also devoted substantial time and resources to questions of res judicata and collateral estoppel that did not bear directly on *Blonder-Tongue* problems. In the thirteen years between *Blonder-Tongue* and *Mendoza*, the appellate courts addressed

91. 104 S. Ct. 1799 (1984).

92. *Id.* at 1804.

93. 104 S. Ct. 2794 (1984).

94. *Id.* at 2802.

95. The following portion of this study derives exclusively from an examination of finality doctrine in the federal circuit courts of appeals. It does not examine the operation of that doctrine in the federal district courts because the percentage of district court opinions published is too small to constitute a reliable sample of all district court decisions.

96. See *supra* notes 72-94 and accompanying text.

such concerns as the definition of identical issues or causes of action,⁹⁷ the requirements for privity between parties,⁹⁸ the effect of intervening changes of law or fact on collateral estoppel,⁹⁹ and the applicability of collateral estoppel to pure issues of law.¹⁰⁰ These problems all relate to features of finality doctrine older than *Blonder-Tongue*, and taken together constitute a body of legal rules larger and more important than nonmutuality standing alone. For that reason, the bulk of finality doctrine cases decided in the lower courts during the period between *Blonder-Tongue* and *Mendoza* dealt with questions of res judicata or collateral estoppel unrelated to nonmutuality. This conclusion, in turn, suggests two

97. See, e.g., *Anthan v. Professional Air Traffic Controllers Org.*, 672 F.2d 706 (8th Cir. 1982) (issue of emotional distress not identical in second action because applicable law in second action required proof of an additional element to complete the tort); *Schneider v. Lockheed Aircraft Corp.*, 658 F.2d 835 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 994 (1982) (issue of nature of child's injury in first action not identical to issue of whether another child received the same injury in the same airplane crash); *White v. World Fin. of Meridian, Inc.*, 653 F.2d 147 (5th Cir. 1981) (issue not identical when elements to be proved in second action vary from elements proved in first action); *Shimman v. Frank*, 625 F.2d 80 (6th Cir. 1980) (difference between burden of proof in first action and second action makes issues dissimilar); *International Ass'n of Machinists v. Nix*, 512 F.2d 125 (5th Cir. 1975) (issues in first and second actions held identical even though first issue was framed under federal labor law while second was framed under state contract law).

98. See, e.g., *Gottheiner v. United States*, 703 F.2d 1136 (9th Cir. 1983) (individual who controlled corporation is in privity with corporation); *Vulcan, Inc. v. Fordees Corp.*, 658 F.2d 1106 (6th Cir. 1981), *cert. denied*, 456 U.S. 906 (1982), (indemnatee is in privity with indemnitor); *Expert Elec., Inc. v. Levine*, 554 F.2d 1227 (2d Cir.), *cert. denied*, 434 U.S. 903 (1977) (individual members of umbrella organization are in privity with organization); *In re Johnson*, 518 F.2d 246 (10th Cir.), *cert. denied*, 423 U.S. 893 (1975) (trustee representing trust against outsiders operates in different capacity than trustee defending allegation of breach of fiduciary duty; difference in capacities vitiates possibility of trustee being in privity with himself).

99. *Dracos v. Hellenic Lines Ltd.*, 705 F.2d 1392 (4th Cir. 1983) (sudden changes in shipping industry preclude application of collateral estoppel to earlier findings); *Mizokama Bros. of Ariz., Inc. v. Mobay Chem. Corp.*, 600 F.2d 712 (8th Cir. 1981) (finding of first forum's inconvenience does not estop assertion of another forum's convenience); *Sydney v. Commissioner*, 647 F.2d 813 (8th Cir. 1977) (collateral estoppel invoked when, *inter alia*, facts and law had not changed since first decision); *Moch v. East Baton Rouge Parish School Bd.*, 548 F.2d 594 (5th Cir.), *cert. denied*, 434 U.S. 859 (1977) (intervening change of law bars invocation of collateral estoppel).

100. *Herring v. SEC*, 673 F.2d 1191 (11th Cir. 1982) (collateral estoppel invoked on issue of law); *American Medical Int'l, Inc. v. Secretary of HEW*, 677 F.2d 118 (D.C. Cir. 1981) (*per curiam*) (collateral estoppel not invoked on an issue of law due to a distinction in the facts of the two cases); *Western Oil & Gas Ass'n v. EPA*, 633 F.2d 803 (9th Cir. 1980) (collateral estoppel not invoked when federal agencies seek to relitigate issues of law).

other considerations. First, nonmutuality is of relatively limited importance in the larger context of res judicata and collateral estoppel.¹⁰¹ Second, the appellate courts considering *Blonder-Tongue* questions could draw upon analogies from related areas of finality doctrine. The significance of these two considerations will be more apparent following an analysis of the appellate courts' application of nonmutual collateral estoppel.

B. Lower Court Decisions In The Post-Blonder-Tongue Era

In the years between *Blonder-Tongue* and *Parklane*, the circuits were guided only by *Blonder-Tongue* in deciding nonmutual collateral estoppel cases. The *Blonder-Tongue* opinion was rooted so firmly in considerations unique to patent law¹⁰² that a reluctance to transplant nonmutuality to other legal conditions would have been understandable. The United States Court of Appeals for the Second Circuit displayed some of that caution in *Divine v. Commissioner*,¹⁰³ a tax case in which the taxpayer sought to use offensive collateral estoppel to prevent the government from relitigating an issue previously decided in another circuit.¹⁰⁴ Refusing to invoke collateral estoppel, the Second Circuit relied on the Supreme Court's characterization of *Blonder-Tongue* as predominantly a patent law decision:

It would be incorrect . . . to assume that the [mutuality] requirement has met its demise. . . . In fact, the continuing life of the mutuality requirement in certain circumstances is suggested by the Supreme Court's careful and precise phrasing of the issue before it in *Blonder-Tongue*. . . .

. . . .

101. The importance of nonmutual collateral estoppel may be less than the aggregate importance of other areas of res judicata and collateral estoppel doctrine. Nevertheless, until the Supreme Court eliminated the mutuality requirement, some courts were unable to address questions such as the identity of an issue, the impact of changing law or facts, or any other collateral estoppel problem. See, e.g., *Southern Pac. Transp. Co. v. Smith Material Corp.*, 616 F.2d 111 (5th Cir. 1980) (discussing the collateral estoppel benefits nonparties may derive from a prior action).

102. See *supra* notes 21-22 and accompanying text.

103. 500 F.2d 1041 (2d Cir. 1974).

104. *Id.* at 1044-45. The Commissioner was trying to relitigate the identical legal issue against a taxpayer who was a shareholder in the same corporation as the defendant in the suit for which collateral estoppel was sought.

. . . The Court disclaimed any intention to decide more than "whether mutuality of estoppel is a viable rule where a patentee seeks to relitigate the validity of a patent once a federal court has declared it to be invalid."¹⁰⁵

Despite the Second Circuit's circumspect approach to nonmutual collateral estoppel,¹⁰⁶ this was not the major legacy of *Blonder-Tongue*. Even in *Divine*, the court cited reasons other than the restrictive language of *Blonder-Tongue* for not invoking nonmutual collateral estoppel.¹⁰⁷ In fact, the court in *Divine* was almost bold in one respect, because it refused to disqualify *Divine's* assertion of offensive collateral estoppel even though *Blonder-Tongue* eschewed any consideration or approval of offensive collateral estoppel.¹⁰⁸

The United States Court of Appeals for the Fifth Circuit was even bolder. In *Johnson v. United States*,¹⁰⁹ the court routinely applied nonmutuality principles to a case involving offensive collateral estoppel. In *Johnson*, a negligence suit brought under the

105. *Id.* at 1046, 1048.

106. The *Divine* court was not alone in its reluctance. Even as late as 1978, the United States Court of Appeals for the Fifth Circuit held that "[c]ollateral estoppel is applicable only if the same parties or their privies are involved in both actions and if it was foreseeable that the facts to be the subject of estoppel would be of importance in future litigation." *Mosher Steel Co. v. NLRB*, 568 F.2d 436, 440 (5th Cir. 1978).

Similarly, in *Scooper Dooper, Inc. v. Kraftco Corp.*, 494 F.2d 840 (3d Cir. 1974), the circuit court described *Blonder-Tongue* as a "severe attack" on the mutuality doctrine, implying that the "attack" had not ended the war against mutuality. *Id.* at 844. The court applied nonmutual collateral estoppel anyway, describing the doctrine as "available as a defense in this Circuit regardless of whether . . . the party asserting the plea was a party (or privy) to the prior litigation." *Id.*

107. The Second Circuit refused to invoke collateral estoppel primarily because its application against the government raised policy considerations not present in litigation between private parties. 500 F.2d at 1047-49. The Second Circuit's decision anticipated by ten years the Supreme Court's ruling in *United States v. Mendoza*, 104 S. Ct. 568 (1984), that offensive collateral estoppel generally would not be available against the government. *See supra* notes 52-67 and accompanying text.

108. 402 U.S. at 330 ("[T]he case before us involves neither due process nor 'offensive use' questions.").

109. 576 F.2d 606 (5th Cir. 1978), *cert. denied*, 451 U.S. 1018 (1981). The United States Court of Appeals for the Fifth Circuit decided *Johnson* a year before the Supreme Court decided *Parklane*.

Federal Tort Claims Act,¹¹⁰ the plaintiff asserted offensive collateral estoppel against the government with respect to a prior finding in a related decision. Noting that the government had not been prejudiced procedurally in the first action and that the government had a substantial incentive to litigate that case, the Fifth Circuit concluded that the government had been afforded a full and fair opportunity to litigate. The court therefore invoked offensive collateral estoppel to bar relitigation of the negligence issue. The only bow the Fifth Circuit made to the disavowal of offensive collateral estoppel expressed in *Blonder-Tongue* was an acknowledgement that "the offensive use of collateral estoppel calls for the courts to use special care in examining the circumstances to ascertain that the defendant has in fact had a full and fair opportunity to litigate and that preclusion will not lead to unjust results."¹¹¹ Although reaching a different result, the United States Court of Appeals for the Seventh Circuit followed a similar approach in *Butler v. Stover Bros. Trucking Co.*¹¹² In that case, the court rejected application of offensive collateral estoppel not because the Supreme Court had withheld approval of offensive collateral estoppel, but because evidentiary restrictions unique to the first litigation had prejudiced the defendants in that case.¹¹³

The most striking feature of these circuit decisions is the willingness of the appellate courts to anticipate the Supreme Court concerning offensive collateral estoppel. The cases also are noteworthy, however, because they remain faithful in all other respects to the *Blonder-Tongue* test of fairness for nonmutual collateral estoppel. The circuits may have had some doubts about *Blonder-Tongue*'s applicability outside the context of patent law,¹¹⁴ but in

110. 28 U.S.C. § 1346(b) (1983).

111. 576 F.2d at 614.

112. 546 F.2d 544 (7th Cir. 1977).

113. *Id.* The evidentiary restriction in the first case was a state dead man's statute, which prevented one of the defendants from testifying on his own behalf in that litigation. Because the second action involved no deceased persons, the defendant was eligible to testify if collateral estoppel was not invoked. *Id.* at 551.

114. See *supra* notes 105-06 and accompanying text.

cases in which those doubts were resolved in favor of invoking non-mutual collateral estoppel, the appellate courts showed substantial facility in applying the *Blonder-Tongue* approach.¹¹⁵

C. *The Influence of Parklane on Nonmutual Collateral Estoppel*

1. *Introduction: Offensive Collateral Estoppel*

Parklane affected the circuits' approach to collateral estoppel in several ways: first, it ratified the already existing practice of applying nonmutual collateral estoppel offensively;¹¹⁶ second, it warned the appellate courts that offensive collateral estoppel should be approached with particular caution;¹¹⁷ and third, it added new discretionary considerations to those identified in *Blonder-Tongue*.¹¹⁸ The third consequence was particularly significant because it represented the most guidance the Supreme Court had ever given in identifying specific factors to be considered in normal collateral estoppel analysis. Of the four factors identified in *Parklane*,¹¹⁹ two had been mentioned already in *Blonder-Tongue*: the potential absence of incentive to litigate the first action, and the possibility of some procedural disadvantage to a party in the first suit.¹²⁰ This overlap created an opportunity to blend the approaches to both

115. In *Scooper Dooper, Inc. v. Kraftco Corp.*, 494 F.2d 840 (3d Cir. 1974), for example, the court granted defensive collateral estoppel under *Blonder-Tongue* because, *inter alia*, "[t]here ha[d] been no demonstration that Scooper Dooper was denied a full and fair opportunity—procedurally, substantively, or evidentially—to present its case." *Id.* at 845.

116. See *supra* note 30 and accompanying text.

117. See *supra* notes 27-28 and accompanying text.

118. Apart from considerations apparently unique to patent law, the Court in *Blonder-Tongue* identified two factors that might have general application in nonmutual collateral estoppel analysis: disincentive to litigate the first action and procedural disadvantages in the first action. See *supra* note 17 and accompanying text. In *Parklane*, the Court added the concern that offensive collateral estoppel might undermine the purpose of finality doctrine to encourage judicial economy because it provided the plaintiff with an incentive to remain outside the first litigation, hoping for a favorable result. See *supra* note 27 and accompanying text. The Court also suggested that offensive collateral estoppel might not be appropriate if a decision existed with a result inconsistent with the decision for which estoppel was sought. See *supra* note 28 and accompanying text.

119. See *supra* notes 31-34 and accompanying text.

120. See *supra* note 17 and accompanying text.

types of nonmutual collateral estoppel. The circuits have taken advantage of that opportunity by treating these common factors similarly whether the estoppel has been asserted offensively or defensively. The central difference in appellate court approaches to offensive and defensive collateral estoppel is in the circuits' response to the High Court admonition to apply offensive collateral estoppel more gingerly.¹²¹ The circuits have responded chiefly by considering the *Parklane* factors that are largely unique to offensive collateral estoppel.

2. Failure To Join the Prior Action

A plaintiff's failure to join an earlier action is a discretionary consideration which has been raised in a number of cases.¹²² The majority of circuits have followed *Parklane* closely, holding that persons who could have joined an initial action without difficulty may not benefit from offensive collateral estoppel in a subsequent action.¹²³ In *Hicks v. Quaker Oats Co.*,¹²⁴ the United States Court

121. See, e.g., *Luben Indus., Inc. v. United States*, 707 F.2d 1037, 1039 (9th Cir. 1983) (district court has "broad discretion to deny the application of offensive collateral estoppel where 'the application of offensive estoppel would be unfair to a defendant'"); *Nations v. Sun Oil Co.*, 705 F.2d 742, 744 (5th Cir.) (per curiam), cert. denied, 104 S. Ct. 239 (1983) ("Collateral estoppel is an equitable doctrine. Offensive collateral estoppel is even a cut above that in the scale of equitable values."); *Mancuso v. Harris*, 677 F.2d 206, 209 (2d Cir.), cert. denied, 459 U.S. 1019 (1982) (lower courts have authority, not an obligation, to apply collateral estoppel offensively); *Carr v. District of Columbia*, 646 F.2d 599, 605 (D.C. Cir. 1980) (offensive use of collateral estoppel is "use of issue preclusion as a sword").

122. Mere failure to join in the earlier action by itself should not cause a court to refuse invocation of offensive collateral estoppel. The decision rests instead on the party's motives for not joining the earlier action.

123. See, e.g., *Oldham v. Pritchett*, 599 F.2d 274, 280 (8th Cir. 1979) (offensive collateral estoppel not invoked because no "impediment prevented the Oldhams from filing a complaint or complaints against Pritchett and the other defendants for consolidation with the claims adjudicated in the first proceeding"); *Butler v. Stover Bros. Trucking Co.*, 546 F.2d 544, 551 (7th Cir. 1977) ("This court believes that it would be unfair to allow plaintiff to assume a position better than that which he would have enjoyed had he participated in the state action."); see also *Olegario v. United States*, 629 F.2d 204, 215 (2d Cir.), cert. denied, 450 U.S. 980 (1980) (petitioner actually had not foregone a reasonable opportunity to intervene in the first action, but the court denied estoppel, citing *Parklane's* holding that "collateral estoppel should not be applied when the plaintiff could have easily joined the prior action"); cf. *Carr v. District of Columbia*, 646 F.2d 599, 605 (D.C. Cir. 1980) (offensive collateral estoppel granted because, *inter alia*, plaintiff who did not join other action had "compelling reasons" not to join).

124. 662 F.2d 1158 (5th Cir. 1981).

of Appeals for the Fifth Circuit described the phenomenon of abstaining from participation in the first action and seeking offensive collateral estoppel in the second as a "ride on [the coattails]" of the first plaintiff.¹²⁵ In *Nations v. Sun Oil Co.*,¹²⁶ the Fifth Circuit again demonstrated its fidelity to the practice of dealing sternly with parties who do not pursue aggressively opportunities to participate in the first action. Nations was injured in an industrial accident in which two co-workers were killed. Representatives of the deceased workers' estates sued promptly and won, in part because the court found that the defendant was a statutory employer. By the time Nations sued, however, state law on the status of the defendant had changed, and the Fifth Circuit held that the new law applied to Nations' case. Rejecting his plea for application of collateral estoppel on the issue of the defendant's status, the court remarked that "the application of current law [to Nations] is the result of his delay in bringing suit. His choice to await maturity of all sequela of his injuries and the decision in the [first] case resulted in the intervention of the [state] decision."¹²⁷ Although the Fifth Circuit had conceded that Nations "had the right to await the full development of his injuries within the statute of limitations period,"¹²⁸ Nations lost the benefit of offensive collateral estoppel partly because he did not participate as a plaintiff in the first suit.

In some cases, lower courts have permitted offensive collateral estoppel without discussing the plaintiff's failure to join an earlier

125. *Id.* at 1172. More than "coattails," however, were involved in *Hicks*. The decision for which collateral estoppel was sought rested on alternate grounds, and the argument of the plaintiff in the first case was so strong on one issue that the Fifth Circuit suspected the trial judge might not have considered the other issue—which was more important in the second action—as carefully as he would have otherwise. The court also disavowed any suspicion "that there was any collusion between the plaintiffs in *Hicks* and [the first plaintiff], or that the *Hicks* plaintiffs deliberately waited for the [first] litigation to conclude before filing their own lawsuits. There was no evidence in the record which would support such a hypothesis, nor was there any showing that intervention in [the first case] was possible for any or all of them." *Id.* Nevertheless, the court spoke in terms of "coattails" and added, "It is difficult to imagine a more sympathetic plaintiff than [the first plaintiff]." *Id.*

126. 705 F.2d 742 (5th Cir.) (per curiam), *cert. denied*, 104 S. Ct. 239 (1983).

127. *Id.* at 745.

128. *Id.* at 744.

action. This apparent lapse may be explained by the plaintiff's inability to join an earlier action easily.¹²⁹ In the United States Court of Appeals for the Ninth Circuit, however, a party's burden of explaining why he did not join an earlier action is extraordinarily light. In *Starker v. United States*,¹³⁰ for example, a taxpayer sought the benefit of offensive collateral estoppel for the same issue litigated previously by his son and daughter-in-law. Although the Ninth Circuit acknowledged that the opportunity-to-join principle of *Parklane* presented "troublesome questions,"¹³¹ it ultimately resolved them in favor of the plaintiff:

In the present case, Fed. R. Civ. P. 20 may have technically authorized T.J. Starker's joinder in his son and daughter-in-law's refund suit. The father's suit differs from that of his son in so many respects, however, that there are numerous possible explanations why T.J. Starker—or for that matter, Bruce and Elizabeth Starker—might have wanted the lawsuits tried separately. We decline to speculate on motivation. This is not a case in which a litigant adopted a "wait-and-see" attitude for the obvious purpose of eluding the binding force of an initial resolution of a simple issue.¹³²

The Ninth Circuit's conclusion, however, is nearly as "troublesome" as the questions the court believed it faced. For example, it may well be that the taxpayer had not adopted a "wait-and-see" attitude, but the Ninth Circuit offers only a conclusion on that point, without explaining its reasoning. Moreover, though the father's suit "differ[ed] from that of his son in so many respects,"¹³³ those differences were not particularly material to the resolution of

129. See, e.g., *Mendoza v. United States*, 672 F.2d 1320 (9th Cir. 1982), *rev'd on other grounds*, 104 S. Ct. 568 (1984); *Bank of Heflin v. Landmark Inns of Am., Inc.*, 604 F.2d 354 (5th Cir. 1979). In *Mendoza*, the plaintiff simply might not have known of the prior action. Both actions were brought in federal district courts in California, but the first action was heard in the Northern District while the second was heard in the Central District. In *Landmark Inns*, the plaintiff may have been unaware of the prior actions, or its case may have had sufficiently different facts to justify not entering the other actions.

130. 602 F.2d 1341 (9th Cir. 1979).

131. *Id.* at 1349.

132. *Id.* at 1349-50.

133. *Id.* at 1349; see also *id.* at 1349 n.6 (detailing the factual distinctions between the cases).

either dispute.¹³⁴ Finally, the Ninth Circuit implicitly placed the burden of demonstrating why the plaintiff should have joined the prior action on the opponent of offensive collateral estoppel. In *Starker*, at least, the court probably should have required the plaintiff to demonstrate good cause for not having joined the prior action.

3. Incentive to Litigate

In *Parklane* the Court was sensitive to the risk that offensive collateral estoppel could unfairly preclude relitigation of an issue that a defendant had insufficient incentive to litigate in a prior action. The Supreme Court hypothesized a suit involving a relatively trivial sum followed by an unforeseen and more consequential suit involving the same issue.¹³⁵ The Court found three facts, however, demonstrating that the defendant in *Parklane* had sufficient incentive to litigate: the first suit involved serious charges; the trial lasted four days and was followed by an appeal, which indicated that the defendant had in fact litigated vigorously; and the plaintiff began his suit before the action on which the defendant claimed estoppel was filed.¹³⁶

The circuits generally have followed *Parklane*'s "incentive" guideline with little difficulty. The United States Court of Appeals for the District of Columbia Circuit echoed *Parklane* in holding that robust litigation in the first action would negate an allegation of insufficient incentive to litigate.¹³⁷ In the same case, the court also held that the plaintiff could establish the adequacy of the defendant's incentive to litigate by showing that all arguments made in the second case were presented in the first suit.¹³⁸

134. See *id.* at 1342-44, 1349 n.6.

135. 439 U.S. at 330.

136. *Id.* at 322 n.18. The United States Court of Appeals for the Fifth Circuit identified similar considerations even before *Parklane* was decided. See *Johnson v. United States*, 576 F.2d 606, 614 (5th Cir. 1978), *cert. denied*, 451 U.S. 1018 (1981).

137. *Carr v. District of Columbia*, 646 F.2d 599, 605 (D.C. Cir. 1980); *accord Lujan v. Department of Interior*, 673 F.2d 1165, 1168 (10th Cir.), *cert. denied*, 459 U.S. 969 (1982) (actual prior litigation established incentive to litigate).

138. *Carr*, 646 F.2d at 605.

Because the circuits have agreed that insufficient incentive to appeal is tantamount to insufficient incentive to litigate, the absence of a good motive or opportunity to appeal the first decision will bar subsequent application of offensive collateral estoppel.¹³⁹ *Hicks v. Quaker Oats Co.*¹⁴⁰ illustrates particularly well how the incentive to appeal differs from the incentive to litigate at trial. In the prior litigation for which Hicks sought collateral estoppel, the plaintiff had prevailed on two alternate grounds, either of which would have sustained the judgment. Only one was relevant to *Hicks*. The facts supporting the other decisional basis were so strong that any attempt to appeal and win on the ground relevant to *Hicks* would have been pyrrhic even if successful. The United States Court of Appeals for the Fifth Circuit, therefore, had little difficulty finding that the defendant had no incentive to appeal.¹⁴¹

The courts have differed concerning which factors should be considered in determining whether a party had an adequate incentive to appeal. The split typically appears when public entities are the intended targets of offensive collateral estoppel.¹⁴² The United States Court of Appeals for the Second Circuit has held twice that, for a state or federal government defendant, the mere loss of a trial court decision may not be a sufficient incentive to appeal. In *Olegario v. United States*,¹⁴³ the court refused to apply offensive collateral estoppel to a prior decision unfavorable to the government, partially because the government had considered factors other than the merits of the first case in deciding not to appeal.¹⁴⁴ In reasoning that ultimately would be adopted by the Supreme Court

139. See, e.g., *Mancuso v. Harris*, 677 F.2d 206 (2d Cir.), cert. denied, 459 U.S. 1019 (1982) (no collateral estoppel because, *inter alia*, state did not have sufficient incentive to appeal adverse decision); *Hicks v. Quaker Oats Co.*, 662 F.2d 1158 (5th Cir. 1981) (no collateral estoppel because defendant lacked incentive to appeal first decision).

140. 622 F.2d 1158 (5th Cir. 1981).

141. *Id.* at 1171-72.

142. The Supreme Court ruled recently that offensive collateral estoppel generally will not be available against the federal government. *United States v. Mendoza*, 104 S. Ct. 568 (1984); see *supra* notes 52-67 and accompanying text. The Court never has held, however, that the same insulation against offensive collateral estoppel is available to governmental entities below the federal level. See *supra* note 71.

143. 629 F.2d 204 (2d Cir. 1980), cert. denied, 450 U.S. 980 (1981).

144. *Id.* at 215.

for the broader purpose of barring application of offensive collateral estoppel in most cases involving the government as a defendant,¹⁴⁵ the Second Circuit commented:

a determination to forego further judicial review of an adverse decision . . . may result from a variety of factors—scarcity of resources, potential impact, public interest—which are unrelated to the legal issues in the case. . . . If each adverse decision were accorded the collateral estoppel effect urged . . . the Solicitor General would be forced to seek review of cases that would not otherwise be appealed.¹⁴⁶

The United States Court of Appeals for the Ninth Circuit adopted a contrary position in a case involving the preclusive effect of the same decision at issue in *Olegario*. The Ninth Circuit gave short shrift to the government's arguments that it had not appealed the earlier decision because it had not appreciated the case's subsequent significance, and that offensive collateral estoppel should not be applied against the government in any case. Finding "no 'critical' need" for relitigating the issues decided previously,¹⁴⁷ the Ninth Circuit remarked, "It is not for this court to speculate on the reason the Solicitor General reversed his position after withdrawing the government's appeal in [the first litigation]."¹⁴⁸

The Ninth Circuit also conflicts with another circuit regarding the amount of money that must be at stake to provide a defendant with sufficient incentive to litigate the original case fully. In *Starker v. United States*,¹⁴⁹ the Ninth Circuit held that offensive collateral estoppel could be applied in a \$300,000 suit because a

145. *United States v. Mendoza*, 104 S. Ct. 568 (1984); see *supra* notes 52-67 and accompanying text.

146. 629 F.2d at 215; accord *Mancuso v. Harris*, 677 F.2d 206, 210 (2d Cir.), *cert. denied*, 459 U.S. 1019 (1982) ("It also cannot be assumed that the State has an equal incentive to vigorously litigate claims for habeas corpus brought by each of several co-defendants. Differences in culpability and in willingness to plead guilty no doubt influence the State's decisions in this regard.").

147. *Mendoza v. United States*, 672 F.2d 1320, 1329 (9th Cir. 1982), *rev'd on other grounds*, 104 S. Ct. 568 (1984).

148. *Id.* at 1328; cf. *Starker v. United States*, 602 F.2d 1341, 1349 (9th Cir. 1979) (government's failure to appeal used only to indicate that decision for which offensive collateral estoppel was sought was not inconsistent with established law).

149. 602 F.2d 1341 (9th Cir. 1979).

prior suit, which involved \$37,000, gave the government "plenty of incentive" to litigate seriously.¹⁵⁰ By contrast, the United States Court of Appeals for the Fifth Circuit refused to apply collateral estoppel to a decision in which the defendant had to pay a judgment of \$35,000, because it was "a small amount" compared to the \$400,000 at issue in the subsequent action.¹⁵¹ Apart from the manifest disagreement about the significance of the sum of money at stake in the first litigation, these decisions also leave undecided other issues which relate to money at stake as a measure of incentive to litigate. For example, neither court addressed whether incentive is measured merely by the absolute sum at stake in the first litigation, or whether a court also should consider the relation between that sum and the amount at issue in the second action¹⁵² or the subjective importance of the amount of money to a defendant of a particular financial status.

4. *Prior Inconsistent Decisions*

The Ninth Circuit decision in *Starker* also considered the effect of prior inconsistent decisions on the ability to invoke offensive collateral estoppel. In *Starker*, the court held that the absence of

150. *Id.* at 1349.

151. *Hicks v. Quaker Oats Co.*, 662 F.2d 1158, 1171 (5th Cir. 1981). In *Hicks*, the court also noted that other potential plaintiffs existed, and that if they sued and sought collateral estoppel effect for the first decision the financial consequences of the initial adjudication would be even greater. *Id.* Similarly, in *Carr v. District of Columbia*, 646 F.2d 599 (D.C. Cir. 1980), the United States Court of Appeals for the District of Columbia Circuit found that the government had sufficient incentive to litigate a prior action apparently involving title to six parcels of property in the District of Columbia, noting that "only one alley is involved in the current *Carr* litigation." *Id.* at 605.

The Ninth Circuit also conflicts with the Second Circuit concerning the collateral estoppel effect of the government's ability to foresee the consequences of a particular adjudication. Compare *Mendoza v. United States*, 672 F.2d 1320, 1326-28 (9th Cir. 1982), *rev'd on other grounds*, 104 S. Ct. 568 (1984) (government could foresee possibility of substantial subsequent litigation), with *Olegario v. United States*, 629 F.2d 204 (2d Cir. 1980), *cert. denied*, 450 U.S. 980 (1981) (implicitly accepting government argument that consequences of first decision could not be foreseen adequately).

152. Money was not involved in *Carr v. District of Columbia*, 646 F.2d 599 (D.C. Cir. 1980), but the court seemed to measure the value of the items at issue in the first suit against the value of the item at issue in the second suit.

prior inconsistent decisions is a factor indicating the fairness of invoking collateral estoppel in a particular situation.¹⁵³ The *Starker* decision is in line with the Supreme Court opinion in *Parklane*, in which the Court held that prior inconsistent decisions usually should prevent the invocation of collateral estoppel.¹⁵⁴

A subsequent Ninth Circuit decision indicates that prior inconsistent decisions will not always prevent the operation of offensive collateral estoppel. In *Mendoza v. United States*,¹⁵⁵ the Ninth Circuit ignored an inconsistency between a federal district court decision and the holding of another circuit court, explaining: "In this case, there is only one inconsistent judgment, and the inconsistency stems from a conflict between the courts of two circuits, not from any apparently fortuitous jury decision or an intervening statutory change in the law."¹⁵⁶ The United States Court of Appeals for the District of Columbia Circuit also ignored a prior inconsistent decision in *Carr v. District of Columbia*.¹⁵⁷ In *Carr*, the court noted that the local court decision to which it afforded preclusive effect was based on superior information not available to the Court of Claims when it made its prior inconsistent decision.¹⁵⁸ *Mendoza* and *Carr*, however, both involved special circumstances. The Ninth Circuit's routine use of prior inconsistent decisions in a case not involving the special circumstances of *Mendoza* or *Carr* suggests that the circuits generally have little difficulty applying the prior inconsistent decisions factor first mentioned in *Parklane*.¹⁵⁹

153. *Starker v. United States*, 602 F.2d 1341, 1349 (9th Cir. 1979) ("The fairness aspects of *Parklane Hosiery* do not preclude our applying collateral estoppel here. . . . The judgment in [the prior case] was not inconsistent with any known prior authority.").

154. 439 U.S. at 331, 332; see *supra* notes 28, 33 and accompanying text.

155. 672 F.2d 1320 (9th Cir. 1982), *rev'd on other grounds*, 104 S. Ct. 568 (1984).

156. *Id.* at 1329.

157. 646 F.2d 599 (D.C. Cir. 1980).

158. *Id.* at 606.

159. See *Crawford v. Ranger Ins. Co.*, 653 F.2d 1248, 1252 (9th Cir. 1981) (intervening unreported inconsistent decision justified denial of offensive collateral estoppel). Given the Ninth Circuit's occasional tendency to differ with the other circuits in its use of the *Parklane* factors, see *supra* notes 129-34, 147-52 and accompanying text, *Crawford* might seem to have some particular significance. In another decision, however, the Ninth Circuit refused to apply offensive collateral estoppel because the circuit court decision for which estoppel was sought conflicted with decisions from other circuits, remarking, "[W]e generally do not consider ourselves bound by the law of other circuits in environmental cases." *Western Oil*

5. Procedural Disadvantages in Prior Litigation

The perceived unfairness of permitting the use of offensive collateral estoppel against a defendant who suffered from procedural disadvantages in the first suit¹⁶⁰ has evoked two lines of response from the circuits. One reaction has been to use the absence of procedural disadvantage as a factor that supports application of offensive collateral estoppel.¹⁶¹ This approach usually produces little real harm, but it is difficult to reconcile with the proposition that the burden of proving the applicability of collateral estoppel falls on the party seeking its benefit. The party opposed to its application should have no obligation to show that it should not be imposed.¹⁶² The other response has been to the various procedural disadvantages present in the first litigation which make application of collateral estoppel unfair. For example, in *Luben Industries, Inc. v. United States*,¹⁶³ the United States Court of Appeals for

& Gas Ass'n v. EPA, 633 F.2d 803, 808 (9th Cir. 1980). This comment is fairly innocuous when viewed as a statement that the Ninth Circuit is free to ignore the *stare decisis* effect of decisions from the other circuits. Offered as an additional reason for not applying offensive collateral estoppel to the decision of another circuit, however, it seems at odds with the basic underpinnings of the finality doctrine itself. *But see* American Medical Int'l, Inc. v. Secretary of HEW, 677 F.2d 118, 123 (D.C. Cir. 1981) ("[C]ourts of appeals . . . have never considered themselves hidebound by other circuits on legal questions involving federal agency defendants.").

160. *See supra* note 28 and accompanying text. In *Blonder-Tongue*, Justice White raised procedural disadvantage as a factor to be evaluated in determining the fullness and fairness of the parties' prior opportunity to litigate. *See supra* note 17 and accompanying text. In *Parklane*, the Court recognized the continuing applicability of this factor to cases involving both offensive and defensive collateral estoppel. 439 U.S. at 331 n.15.

161. *See Starker v. United States*, 602 F.2d 1341, 1349 (9th Cir. 1979) ("[T]he government does not argue that the first trial did not afford it a full and fair opportunity to present its theory of the case.") On this point the Court of Appeals for the Ninth Circuit is not as isolated as it has been in other matters of offensive collateral estoppel, *see, e.g., supra* note 159, because other courts have made similar remarks. *See, e.g., Carr v. District of Columbia*, 646 F.2d 599, 605 (D.C. Cir. 1980) (offensive collateral estoppel held applicable because "the United States does not assert, nor could it plausibly, that federal court procedures afford it outcome influencing opportunities unavailable in the District of Columbia courts"); *Wolfson v. Baker*, 623 F.2d 1074, 1078 (5th Cir. 1980), *cert. denied*, 450 U.S. 966 (1981) (issue was "hotly contested"); *Oldham v. Pritchett*, 599 F.2d 274, 280 (8th Cir. 1979) (approving application of defensive collateral estoppel because, *inter alia*, "the Oldhams were not restricted substantively or evidentially in the [prior] action").

162. *See, e.g., Oldham v. Pritchett*, 599 F.2d 274, 277 (8th Cir. 1979) (party seeking collateral estoppel has burden of establishing its applicability).

163. 707 F.2d 1037 (9th Cir. 1983).

the Ninth Circuit refused to apply offensive collateral estoppel to a prior interlocutory holding, partly because there had been no opportunity to appeal that holding.¹⁶⁴

6. Considerations of Nonmutuality Beyond *Parklane*

The Supreme Court left open the possibility that considerations not enumerated in *Parklane* might govern the applicability of collateral estoppel in a particular case.¹⁶⁵ In fact, underlying the Court's call for a case-by-case determination of the fairness of applying collateral estoppel is the Court's desire to preserve the lower courts' discretion to consider variables other than those articulated in *Parklane*.¹⁶⁶ So far, however, the lower courts have not found it necessary to stray substantially from the general guidelines of *Parklane*. In *Western Oil & Gas Association v. EPA*,¹⁶⁷ the United States Court of Appeals for the Ninth Circuit remarked that *Parklane* "did not purport to provide an exhaustive list of factors to be considered in making [a collateral estoppel] determination."¹⁶⁸ The

164. *Id.* at 1040; see also *Haung Tang v. Aetna Life Ins. Co.*, 523 F.2d 811, 814 (9th Cir. 1975) (refusing to invoke offensive collateral estoppel partly because the procedures of the foreign court which previously had decided the issue provided less protection than California procedures; court applied California's essentially similar rules concerning collateral estoppel); *Butler v. Stover Bros. Trucking Co.*, 546 F.2d 544 (7th Cir. 1977) (described below).

In *Butler*, an offensive collateral estoppel case decided before *Parklane*, a truck driver involved in a three-truck accident sued the driver and owner of one of the other trucks, alleging negligence. In an earlier state court action, the administrator of the estate of the driver of the third truck maintained a successful suit against the current defendants for wrongful death. The plaintiff in *Butler* sought to use the result of the prior action to estop the defendants' denial of negligence. The Seventh Circuit, applying the federal rule on non-mutual collateral estoppel, concluded that the invocation of collateral estoppel against the defendants would be unfair. The court reasoned that because the defendant driver had been barred by a state dead man's statute from testifying in the wrongful death suit but was not disabled from testifying in the instant suit, the invocation of collateral estoppel would deny the defendants the full opportunity to litigate which the doctrine of nonmutual collateral estoppel required. *Id.* at 551. In short, *Blonder-Tongue* had provided sufficient guidance for the court to make the transition from *Blonder-Tongue*'s holding in a defensive collateral estoppel context to the offensive collateral estoppel problem in *Butler*. On another point, however, the Seventh Circuit did not do as well. Nowhere did the court explain why it used federal collateral estoppel rules when a federal statute required the use of state law to determine the collateral estoppel effect of a state judgment. See 28 U.S.C. § 1738 (1982).

165. See *Parklane*, 439 U.S. at 331.

166. See *id.*

167. 633 F.2d 803 (9th Cir. 1980).

168. *Id.* at 809.

court used its discretion, however, merely to include consideration of an older, but still applicable, collateral estoppel doctrine holding that either a change in the law or separability of the facts of two cases could be grounds for precluding collateral estoppel.¹⁶⁹ Additionally, two other circuits elected not to require adversity between co-parties to prior litigation before either could invoke collateral estoppel.¹⁷⁰ In most cases, however, the appellate courts have not ventured far beyond the considerations enumerated in *Blonder-Tongue* and *Parklane* when making collateral estoppel decisions.

D. Nonmutual Collateral Estoppel Applied to the Government

The Supreme Court's decision in *United States v. Mendoza*¹⁷¹ foreclosed the possibility that nonmutual collateral estoppel could be available against the government.¹⁷² Prior to *Mendoza* many circuit court decisions had considered the government's status in collateral estoppel analysis identical to that of private parties,¹⁷³

169. *Id.* For a discussion of some of the pre-existing rules of collateral estoppel, see *supra* notes 97-101 and cases cited therein.

170. *Oldham v. Pritchett*, 599 F.2d 274, 278 (8th Cir. 1979); *Scooper Dooper, Inc. v. Kraftco Corp.*, 494 F.2d 840, 845 (3d Cir. 1974). *Scooper Dooper* predates *Parklane*, so the source of the court's assumption of discretion seems to be both *Blonder-Tongue* and the traditional assumption of the Third Circuit that it has substantial freedom to act in matters relating to collateral estoppel. See *id.* at 844 (Third Circuit decisions have resulted in "[t]he virtual obliteration of the mutuality doctrine in this Circuit").

171. 104 S. Ct. 568 (1984).

172. See *supra* notes 52-67 and accompanying text.

173. In some cases, courts permitted offensive collateral estoppel against the government. *Mendoza v. United States*, 672 F.2d 1320 (9th Cir. 1982), *rev'd*, 104 S. Ct. 568 (1984); *Starker v. United States*, 602 F.2d 1341 (9th Cir. 1979); *Johnson v. United States*, 576 F.2d 606 (5th Cir. 1978), *cert. denied*, 451 U.S. 1018 (1980). Courts in other cases refused to apply offensive collateral estoppel against the government, but only after application of the standard *Blonder-Tongue/Parklane* factors. *Luben Indus., Inc. v. United States*, 707 F.2d 1037 (9th Cir. 1983); *Western Oil & Gas Ass'n v. EPA*, 633 F.2d 803 (9th Cir. 1980).

The United States Court of Appeals for the District of Columbia Circuit also invoked offensive collateral estoppel against the government, but described the litigation before the court as "this unique case." *Carr v. District of Columbia*, 646 F.2d 599, 605 (D.C. Cir. 1980). The same court later suggested that it had not yet opted for the general application of nonmutual collateral estoppel against the government. *American Medical Int'l, Inc. v. Secretary of HEW*, 677 F.2d 118, 122 (1981) (*per curiam*); see *infra* notes 185-86 and accompanying text.

although the United States Court of Appeals for the Second Circuit had reached a different conclusion. In *Divine v. Commissioner*,¹⁷⁴ a tax case decided nearly five years before *Parklane*, the Second Circuit had characterized *Blonder-Tongue* merely as a patent case establishing a principle of nonmutual collateral estoppel applicable only "to certain classes of issues which for policy reasons it has been decided should generally be litigable only once."¹⁷⁵ The court noted that tax litigation gives rise to different policy considerations.

More so than most laws, the tax statutes are far reaching and affect or might affect millions of citizens. The issues which arise in the course of administering these laws are thus of importance not only to the particular litigants but also to the general public. Moreover, because of the sheer extent of the subject matter of the revenue laws and their intricate language, the issues which confront the courts will often be pure issues of law concerning the interpretation of novel and cryptic sections of the Code. Thus, because of the unusual complexity of the tax laws, judicial conflicts over interpretations of law, as opposed to disagreement as to how the law should be applied to specific facts, are much more apt to occur than in other areas of federal concern. For example, judicial conflicts in the patent area typically concern the application of undisputed principles of law to a complicated array of facts and do not reflect differences over what the governing principles of law mean.¹⁷⁶

The court concluded that nonmutual collateral estoppel was not applicable to tax decisions.¹⁷⁷ The geographic reach of tax law and the unusual complexity of the pure issues of law in most tax litigation convinced the court of the special public interest in thoroughly developing tax doctrine. The Second Circuit feared such development would be thwarted if it was applied to nonmutual collateral estoppel.¹⁷⁸

Several years later the Second Circuit reaffirmed its refusal to invoke nonmutual collateral estoppel against the government. The

174. 500 F.2d 1041 (2d Cir. 1974).

175. *Id.* at 1047.

176. *Id.* at 1048-49.

177. *Id.* at 1050.

178. *Id.* at 1049-50.

court's opinion, however, contained some subtle but significant changes. Although *Divine* had emphasized the special public interest in tax law,¹⁷⁹ *Olegario v. United States*¹⁸⁰ rested on the public interest involved in all government litigation, particularly the issues of immigration law and constitutional interpretation involved in *Olegario* itself.¹⁸¹ The court refused to apply offensive collateral estoppel, reasoning that "[i]n contrast to *Parklane*, the government is the defendant here, and the case raises important issues of national concern."¹⁸² At the very least, *Olegario* indicated that the Second Circuit now was prepared to deny application of nonmutual collateral estoppel in all government¹⁸³ litigation involving an important national interest. The court, however, did not specify how to measure the importance of a public interest.¹⁸⁴

The Second Circuit's reluctance to invoke nonmutual collateral estoppel against the government, as modified by *Olegario*, soon attracted a disciple. In *American Medical International, Inc. v. Secretary of HEW*,¹⁸⁵ the United States Court of Appeals for the District of Columbia Circuit refused to apply *Blonder-Tongue* and *Parklane* because offensive collateral estoppel was sought against the government. The court stated:

Were this a case involving only private litigants or only simple issues of fact, we would not hesitate to conclude that an estoppel should arise. . . . This is not, however, a typical case. A federal agency, not a private party, lost on an issue of federal law, not an issue of fact, in the first lawsuit. To allow nonparties to the [prior] ruling to win simply on the basis of an estoppel would

179. *Id.*; cf. *Porter & Dietsch, Inc. v. FTC*, 605 F.2d 294, 300 (7th Cir. 1979), *cert. denied*, 445 U.S. 950 (1980) (nonmutual collateral estoppel denied in part because the government was protecting an important public interest).

180. 629 F.2d 204 (2d Cir. 1980), *cert. denied*, 450 U.S. 980 (1981).

181. *Id.* at 207-12.

182. *Id.* at 215.

183. Using similar reasoning, the Second Circuit also has refused to invoke offensive collateral estoppel against state governments. See *Mancuso v. Harris*, 677 F.2d 206 (2d Cir.), *cert. denied*, 459 U.S. 1019 (1982).

184. In contrast to the Second Circuit's decision in *Olegario*, the United States Court of Appeals for the Ninth Circuit concluded that the public interest issues at stake in *Olegario* were not important enough to justify a special exemption from offensive collateral estoppel for the government. See *Mendoza v. United States*, 672 F.2d 1320, 1329 (9th Cir. 1982), *rev'd on other grounds*, 104 S. Ct. 568 (1984).

185. 677 F.2d 118 (D.C. Cir. 1981) (*per curiam*).

mean that we simply and uncritically bind ourselves to follow another court's interpretation of a federal statute in virtually all cases involving that legislation. The broader and more serious implication of such a holding is that the first court to hear a case raising a public law issue litigable only with the Federal Government would—if it ruled against the Government—rigidify the law to be applied by every court in every case presenting that issue.¹⁸⁶

The District of Columbia Circuit identified the same two reasons as the Second Circuit for not routinely applying *Parklane* principles when the government was threatened with collateral estoppel: the presence of pure issues of law, and the special public interest inherent in any litigation involving the government.¹⁸⁷ When the Supreme Court made *Blonder-Tongue* and *Parklane* inapplicable to the government,¹⁸⁸ it adopted the general assumption of these two circuits that government litigation was characterized by matters of public interest important enough to preclude application of nonmutual collateral estoppel against the government.¹⁸⁹

186. *Id.* at 121.

187. In *American Medical*, the Court of Appeals for the District of Columbia Circuit was able to distinguish its decision in *Carr* to grant offensive collateral estoppel against the government, because *Carr* had addressed “legal issues of only local import—those unlikely to be raised in other circuits.” *Id.* at 122, n.28. This distinction is analogous to decisions in which other circuit courts have allowed the principles of *Blonder-Tongue* and *Parklane* to operate against the government when the issue for which nonmutual collateral estoppel was sought was unlikely to arise again. See, e.g., *Johnson v. United States*, 576 F.2d 606 (5th Cir. 1978), *cert. denied*, 451 U.S. 1018 (1981).

No Supreme Court, Second Circuit, or District of Columbia Circuit decision precludes the use of nonmutual collateral estoppel by the government against a private party. Moreover, the United States Court of Appeals for the Tenth Circuit has approved the invocation of nonmutual collateral estoppel by the government against a private party. *Lujan v. Department of Interior*, 673 F.2d 1165 (10th Cir.), *cert. denied*, 459 U.S. 969 (1982).

188. *United States v. Mendoza*, 104 S. Ct. 568 (1984); see *supra* notes 52-67 and accompanying text.

189. See *supra* notes 60-67 and accompanying text. The High Court, however, rejected the alternative ground raised by the Second and District of Columbia Circuits. Justice Rehnquist explained in a footnote that the Supreme Court's decision “in no way depends” on the theory that collateral estoppel should not apply to unmixed questions of law. *United States v. Mendoza*, 104 S. Ct. 568, 574 n.7 (1984). Moreover, the Court took pains to ensure that the prohibition against the use of nonmutual collateral estoppel against the government would be general and would not depend on the ability of lower courts to identify a particular public interest. See *id.* at 574.

E. Summary of Nonmutual Collateral Estoppel in the Lower Courts

A review of the decade-long effort of the appellate courts to construe and apply Supreme Court nonmutual collateral estoppel doctrine discloses several notable features. For example, the circuits adapted easily to the change from the mutuality requirement to the new test of fairness. Confusion of the magnitude that followed some other doctrinal changes¹⁹⁰ simply did not occur. Questions about the applicability of *Blonder-Tongue* to litigation not involving issues of patent law created some uncertainty,¹⁹¹ but this uncertainty undoubtedly was attributable to the patent law pigeon-hole into which the Supreme Court first placed the new doctrine.¹⁹² For the most part, however, the appellate courts demonstrated a marked facility in applying the case-by-case analysis the Supreme Court had envisioned.¹⁹³

Parklane's approval of offensive collateral estoppel proved to be more of an opportunity than a burden for the lower courts. Some circuits already had applied the new nonmutuality doctrine offensively, even though the Supreme Court had not addressed offensive collateral estoppel in *Blonder-Tongue*.¹⁹⁴ After *Parklane*, other circuits followed suit. The lower courts were faithful, even scrupulous, in their efforts to apply the more elaborate indicia of fairness suggested in *Parklane*, and for the most part the circuits' discretionary use of those factors has worked quite well.¹⁹⁵

The Supreme Court's decision in *Mendoza* to afford the government general immunity from nonmutual collateral estoppel clearly caught some circuits off guard.¹⁹⁶ Misleading language in *Standefer*

190. For an extreme example of the confusion that can follow the introduction of new doctrine, see *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), and its progeny.

191. See *supra* notes 105-06 and accompanying text.

192. See *supra* note 22 and accompanying text.

193. See, e.g., *Butler v. Stover Bros. Trucking Co.*, 546 F.2d 544 (7th Cir. 1977); see also *supra* note 164 (describing facts and holding in *Butler*).

194. See *Johnson v. United States*, 576 F.2d 606 (5th Cir. 1978), *cert. denied*, 451 U.S. 1018 (1981).

195. The Ninth Circuit has some trouble making analyses consistent with the other circuits in approach and results. See *supra* notes 129-34, 147-52, 159. The differences, however, are not dramatic and merely may reflect the discretion the Supreme Court intended to vest in the lower courts.

196. See *supra* notes 171-89 and accompanying text.

*v. United States*¹⁹⁷ may have caused that surprise. In *Standefer* the High Court recognized only the possibility that nonmutuality would not apply because in some cases involving government defendants a relevant public interest outweighed considerations of economy and efficiency.¹⁹⁸ *Standefer* apparently influenced some pre-*Mendoza* appellate decisions which rejected blanket immunity for the government, because some courts searched for a public interest and used it to determine whether the government was immune from nonmutual collateral estoppel.¹⁹⁹ When *Mendoza* provided general immunity because the government was a public party commonly involved in repetitious litigation, without regard to the presence of any significant public interest in a particular issue,²⁰⁰ the language in *Standefer* finally was identified as a false trail.

Apart from the misunderstanding *Standefer* may have created, the *Mendoza* exception created no more disruption for the appellate courts than reasonably might have been anticipated during the development of a Supreme Court doctrine that could have been resolved more than one way. Minimal disruption occurred because the High Court waited for the circuits to thrash out the various arguments concerning the government exception. The Court acted only after the positions of both sides had been considered sufficiently. *Mendoza* affected enough decisions to indicate that the best arguments for a more limited immunity rule had been made, but it did not come so late that a legion of circuit court decisions were overturned. In the end, the Court created a rule the lower courts could apply with little difficulty.²⁰¹ Overall, the development

197. 447 U.S. 10 (1980).

198. *Id.* at 24-25; note 43 and accompanying text.

199. The Ninth Circuit's decision in *Mendoza* itself is similar in reasoning to *Standefer*. See 672 F.2d at 1329 (government has shown no crucial public need for denying use of nonmutual collateral estoppel). The opinion never refers to *Standefer* by name, but the case may have been discussed in the government brief. One other post-*Standefer* Ninth Circuit decision used the standard *Blonder-Tongue/Parklane* test to determine the applicability of nonmutual collateral estoppel against the government, but also did not refer to *Standefer*. *Luben Indus., Inc. v. United States*, 707 F.2d 1037 (9th Cir. 1983).

200. See *supra* notes 59-67 and accompanying text.

201. In *Mendoza*, the Court hinted that nonmutual collateral estoppel still may be applied against the government in a case in which the facts are not likely to be repeated. See 104 S. Ct. at 574. The status of this potential exception, which could prove troublesome to lower courts, remains uncertain.

and application of the doctrine of nonmutual collateral estoppel appears to have been a substantial success.

Success with one doctrine, however, does not necessarily indicate that success can be replicated with other doctrines. More important than the happy evolution of one judicial rule is identification of the causes of that success. Only after these causes are identified and evaluated for their generic applicability can generalizations be drawn concerning the appropriate steps and the potential pitfalls in developing other judicial doctrine. One method of identifying these causes is to compare the operation of one doctrine to that of another. When successful doctrines have common features, correlation suggests that subsequently developed judicial doctrines should attempt to incorporate those features. Additionally, much can be learned even when one doctrine is successful and the other is not. Differences between doctrines may stand out as causal elements of success or failure. To obtain the benefit of comparison, this Article reviews briefly the judicial doctrine of retroactivity, examined at length in an earlier Article.²⁰²

IV. A SURVEY OF THE JUDICIAL DOCTRINE OF RETROACTIVITY

Retroactivity analysis is the process by which a court determines whether a recent judicial alteration in the law should be applied to events that occurred prior to the announcement of the change. The Supreme Court occasionally has enunciated various retroactivity rules for certain categories of cases such as federal diversity litigation, disputes concerning agency decisions, matters relating to federal court jurisdiction, and civil cases with a direct appeal pending when the law is changed.²⁰³ The aspect of retroactivity analysis that has drawn the most attention in the last twenty years, however, is the doctrine first enunciated by the Court in *Linkletter v. Walker*.²⁰⁴ *Linkletter* addressed the retroactive effect of *Mapp v. Ohio*,²⁰⁵ in which the Court held that the exclusionary rule applied to warrantless searches by state officers in violation of the fourth²⁰⁶

202. See Corr, *supra* note 2.

203. See *id.* at 762-63, 784-92.

204. 381 U.S. 618 (1965).

205. 367 U.S. 643 (1961).

206. U.S. CONST. amend. IV.

and fourteenth²⁰⁷ amendments to the United States Constitution. The Court held that no constitutional command made *Mapp* automatically retroactive, so the approach to retroactivity could be shaped at the Court's discretion. Justice Clark, writing for the majority, said, "Once the premise is accepted that we are neither required to apply, nor prohibited from applying, a decision retrospectively, we must then weigh the merits and demerits in each case."²⁰⁸ He concluded that *Mapp* should not be applied retroactively.²⁰⁹

Three factors enunciated in *Linkletter* were of even greater consequence to retroactivity doctrine than the decision itself. These considerations, which soon became the factors used in making retroactivity decisions in areas not covered by other rules, were the purpose of the new rule, the degree to which parties reasonably may have relied on the old rule, and the real-world consequences that would follow if the new rule of law were made generally retroactive.²¹⁰ Several years later, in *Chevron Oil Co. v. Huson*,²¹¹ the Supreme Court announced a doctrine applicable to civil cases not controlled by other retroactivity rules which resembled the factors mentioned in *Linkletter*.²¹² Together, *Linkletter* and *Chevron*

207. *Id.* amend. XIV, § 1, cl. 3.

208. 381 U.S. at 629.

209. *Id.* at 640.

210. *Id.* at 629, 636-38. In *Mapp*, every consideration pointed to prospectivity. The purpose of the exclusionary rule is to deter police misconduct; applying the exclusionary rule to conduct that already had taken place would not have served that purpose. Also, state trial judges, in reliance on the old rule permitting the use of unlawfully obtained evidence, had not segregated lawfully seized evidence from evidence which would be inadmissible under *Mapp*. Finally, retroactive application of *Mapp* would have required retrials in many cases where the defendant's guilt was not at issue. If the passage of time had made retrials practically impossible, the result might have been a wholesale release of persons whose guilt already was established. *Id.*

The three considerations articulated by the Court in *Linkletter* did not become generally applicable until the Court's decision in *Stovall v. Denno*, 388 U.S. 293 (1967). The Court said: "The criteria guiding resolution of the question implicates (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." 388 U.S. at 297. See Beytagh, *Ten Years of Non-Retroactivity: A Critique and a Proposal*, 61 VA. L. REV. 1557, 1566 (1975).

211. 404 U.S. 97 (1971).

212. For examples of other retroactivity rules dealing with cases exempt from the doctrine of either *Linkletter* or *Chevron*, see *supra* note 203 and accompanying text.

stand for the proposition that lower courts cannot rely on an automatic rule of retroactivity in many areas of criminal and civil law. This principle has been modified and sharpened over time,²¹³ but the fundamental holding of these cases has remained intact.

The application of *Linkletter* and *Chevron* by the lower courts has been quite another matter. Despite the apparent diligence of the lower courts in trying to follow the meandering paths of *Linkletter*, *Chevron*, and their progeny, they have been unable to apply the new doctrines consistently. Almost every feature of the three-pronged approach has been a source of uncertainty and confusion. For example, under *Linkletter* some lower courts have exhibited uncertainty concerning how far a decision must depart from established precedent before it is "new" enough to be restricted to prospective application.²¹⁴ For reasons not related directly to retroactivity, the Supreme Court left the matter unsettled, at least in cases raising fourth amendment considerations, for a substantial period.²¹⁵ The lower courts also have struggled in deciding which of the three *Linkletter* and *Chevron* factors is most important,²¹⁶ whether the courts may look to the substantive law altered by the new rule when determining the new rule's purpose,²¹⁷ and the requirements for a sufficient claim of good faith reliance on the old law.²¹⁸ Additionally, for several years many courts mistakenly believed that *Linkletter* and *Chevron* did not enunciate distinct rules for criminal and civil litigation.²¹⁹ In fact, perhaps only the third prong of the *Linkletter* and *Chevron* approach, which requires the courts to use their sense of fairness when deciding whether retroactivity should apply,²²⁰ has achieved substantially uniform and consistent lower court application.

213. See Corr, *supra* note 2, at 748-63.

214. See *id.* at 763-66.

215. See *id.* at 792-95.

216. See *id.* at 766-69.

217. See *id.* at 769-72.

218. See *id.* at 773-79.

219. See *id.* at 781-84.

220. See *id.* at 779-81.

V. COMPARING NONMUTUALITY AND RETROACTIVITY

A. *Basic Points in Common*

The doctrine of nonmutuality appears to have enjoyed substantially more success in application than the doctrine of retroactivity.²²¹ This discrepancy suggests that the doctrines may not share certain characteristics equally. Those differences must be identified. At the same time, however, two characteristics common to both nonmutual collateral estoppel and retroactivity should be acknowledged. First, both doctrines were inspired by a desire to promote more efficient and just results.²²² The two doctrines may allow different measures of discretion,²²³ but in both the Supreme Court apparently sacrificed some of the certainty associated with the older hard-and-fast rules in favor of more just and flexible analytical techniques.²²⁴ Second, both doctrines are characterized by the avidity with which lower courts have sought to follow even the most minor twists in Supreme Court pronouncements.²²⁵ These traits have significant consequences for the manner in which doctrine is applied. Together with the relevant differences between the doctrines, they help explain how doctrine can be formulated to achieve maximum success in operation.

B. *Relative Novelty of the Doctrines*

Some disruption in application accompanies virtually every doctrinal change, and the more abrupt the change the greater the resultant disruption because the courts are less confident when treading new judicial ground. *Linkletter* represented a very abrupt doctrinal change, but the Supreme Court decided that case six years before it introduced nonmutual collateral estoppel in

221. Compare *supra* notes 190-202 and accompanying text (describing lower court application of nonmutuality) with *supra* notes 214-20 and accompanying text (describing lower court application of retroactivity).

222. See *Blonder-Tongue*, 402 U.S. at 328-29 (purpose behind nonmutual collateral estoppel is fairness to parties and efficiency in judicial administration); *Stovall v. Denno*, 338 U.S. 293, 297 (1967) (reliance of parties and effect of retroactivity on administration of justice to be considered in new doctrine).

223. See *infra* notes 240-56 and accompanying text.

224. See *supra* notes 19, 29, 208 and accompanying text.

225. See, e.g., *supra* notes 196-200 and accompanying text.

Blonder-Tongue, making retroactivity the older federal doctrine from a purely chronological perspective. The lower courts have had the considerable advantage of extra time in developing and applying the retroactivity doctrine compared to the doctrine of non-mutual collateral estoppel.

From another perspective, however, nonmutual collateral estoppel is the "older" doctrine by a substantial margin. The Supreme Court abandoned the mutuality requirement in *Blonder-Tongue* thirty years after Justice Traynor's celebrated opinion adopting nonmutuality in California.²²⁶ The Supreme Court had the benefit of decades of state experience with nonmutuality when it built the federal doctrine.²²⁷ With retroactivity, by contrast, the Court was writing on a nearly clean slate. A scattering of precedent existed for the proposition that elementary justice occasionally required nonretroactive application of a new judicial rule²²⁸ but, unlike nonmutuality, the real impetus for a change in retroactivity doctrine did not come from a measured evaluation of a pre-existing analysis slowly maturing with time. Instead, *Linkletter* arose from the need to face quickly the administrative and social consequences that would follow from suddenly applying the exclusionary rule to "hundreds" of pre-*Mapp* unlawful searches and seizures.²²⁹

C. Relative Rate of Change in the Doctrines

When the Supreme Court develops a new and complex doctrine, the first word on the doctrine inevitably will not be the last. Crafting a doctrine is not easy. A cautious approach like the Court's

226. *Bernhard v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 19 Cal. 2d 807, 122 P.2d 892 (1942). As the Supreme Court noted, the origin of nonmutual collateral estoppel in American Courts even predated *Bernhard*. See *Blonder-Tongue*, 402 U.S. at 322-23.

227. See *Blonder-Tongue*, 402 U.S. at 324 ("Many state and federal courts rejected the mutuality requirement [after *Bernhard*], especially where the prior judgment was invoked defensively.").

228. For a listing of a few earlier state cases in which courts made their law-changing decisions automatically nonretroactive, see Levy, *Realist Jurisprudence and Prospective Overruling*, 109 U. PA. L. REV. 1, 8 (1960).

229. As the Supreme Court noted in *Linkletter*, retroactive application of *Mapp* might have produced the release of literally "hundreds" of guilty persons. 381 U.S. at 637. Nowhere in *Linkletter* did the Court refer to the gradual development of retroactivity doctrine which characterized the development of nonmutuality in collateral estoppel in the years before *Blonder-Tongue*.

decision in *Blonder-Tongue*²³⁰ may reduce most effectively the backtracking and amending that often occurs in other cases testing and expanding the doctrine. An excess of caution, of course, could cast the lower courts adrift by forcing them to apply an overly circumscribed pronouncement to varied fact patterns. The Court should follow a narrow line between overly bold pronouncements that mislead and diffidence that fails to guide. Because all possible fact patterns cannot be foreseen, even the best doctrinal work will require some adjustment. In nonmutual collateral estoppel, for example, the Court has adjusted the broad grant of discretion in *Blonder-Tongue* and *Parklane* for situations in which nonmutual collateral estoppel is asserted against the government.²³¹

Alterations to retroactivity doctrine since *Linkletter* have been considerably more pronounced. For example, the Court may not have intended *Linkletter* to represent an exhaustive list of the criteria relevant to retroactivity analysis, but subsequent cases established quickly that when *Linkletter*'s three factors are applicable, no other factors should be considered.²³² Moreover, the Supreme Court used *Chevron* and a later decision²³³ to negate any suggestion implicit in *Linkletter* that distinctions should not be made between criminal and civil cases.²³⁴ Another retroactivity decision also reduced the scope of *Linkletter* by making the three-factor approach inapplicable to matters affecting jurisdiction or rules of criminal procedure that constitute entirely new law.²³⁵ Additionally, the Supreme Court hinted in another case that *Linkletter* is

230. See *supra* notes 21-22 and accompanying text.

231. See *supra* notes 52-67 and accompanying text.

232. See *Stovall v. Denno*, 388 U.S. 293 (1967).

233. *United States v. Johnson*, 457 U.S. 537, 563 (1982) ("all questions of civil retroactivity continue to be governed by the standard enunciated in *Chevron*"); see also *id.* at 550 n.12 (citing the test for civil retroactivity established in *Chevron*).

234. In *Linkletter*, the Court did not say directly that civil and criminal cases would be subject to the identical retroactivity analysis, but it seemed to suggest the use of the same approach. See 381 U.S. at 627-29.

235. See *Corr*, *supra* note 2, at 754-56, 760-71, 790-92 (jurisdictional questions); *id.* at 753, 759 (new rules of criminal procedure).

not applicable to retroactivity issues affecting tax law.²³⁶ The number of alterations to the original *Linkletter* doctrine is striking, especially when compared to the relative stability of the doctrine of nonmutual collateral estoppel.

D. Relative Importance of the Doctrines

Related closely to the relative novelty of the Supreme Court's retroactivity and nonmutual collateral estoppel doctrines is the magnitude of change each doctrine represents. The new approach to retroactivity was significant not only in the degree of change it represented, but also in the number of cases to which it applied. Although some older retroactivity doctrines, applicable to relatively narrow fact patterns, remained in place even in the heyday of *Linkletter* and *Chevron*,²³⁷ the single most important approach to retroactivity after *Linkletter* was the three-part analysis the Supreme Court applied to virtually all civil and criminal litigation.²³⁸ By contrast, the new nonmutual collateral estoppel doctrine appears to have affected a substantially lower percentage of res judicata and collateral estoppel cases. In fact, the unfolding doctrine of *Blonder-Tongue*, *Parklane* and *Mendoza* did not affect directly the great majority of res judicata and collateral estoppel decisions arising in the federal courts.²³⁹

236. See *id.* at 758.

237. Perhaps the two most important exceptions to the general applicability of either *Linkletter* or *Chevron* are civil cases in which the change in law occurred while the case was pending on direct appeal and cases in which the federal court was sitting in diversity. See *Corr*, *supra* note 2, at 756-57, 762, 784-85.

238. Of the more than two hundred cases examined in preparing the study of retroactivity, the overwhelming majority addressed retroactivity issues in circumstances other than those involving changes in law while a case was pending on direct appeal. Cases based on diversity jurisdiction were not researched as thoroughly as federal question cases, but diversity cases still seemed to comprise much less than a majority of the litigation in which questions of retroactivity arose. See *Corr*, *supra* note 2.

239. The collection of res judicata and collateral estoppel decisions gathered for this Article was not exhaustive, but of the roughly eighty-five circuit decisions examined, nearly two-thirds addressed other areas of finality doctrine and had nothing to do with nonmutual collateral estoppel. Moreover, in the remaining one-third, the nonmutual collateral estoppel issue was sometimes less important than other finality issues. The Supreme Court addressed areas of finality doctrine unrelated to nonmutual collateral estoppel in roughly two-thirds of its finality doctrine cases. Those ratios change, of course, when cases are counted in which res judicata and collateral estoppel were related so closely that they were not treated as distinct doctrines. See, e.g., *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 467 n.6 (1982).

This disparity may produce disadvantages in both cases, but the problems associated with the large, abrupt change in the retroactivity doctrine may produce particular problems. *Linkletter* and *Chevron* "crowded out" more established doctrine than *Blonder-Tongue* and *Mendoza*. As a result, more cases are available to help refine the doctrine, but the courts have had to apply retroactivity analysis without recourse to undisturbed, analogous rules. Whether the application of retroactivity doctrine has suffered from this phenomenon or whether nonmutual collateral estoppel has benefitted by its status as a corollary of larger doctrines is not clear. Few judges or lawyers, however, would want to forego the advantage of readily available analogy.

E. Comparing Discretion in the Doctrines

The new doctrines of nonmutual collateral estoppel and retroactivity both represent an abandonment of prior rules that afforded courts little discretion in favor of more flexible, fact-oriented approaches designed to achieve more just results by vesting the lower courts with considerable discretion.²⁴⁰ In the case of nonmutual collateral estoppel, the court abandoned mutuality.²⁴¹ Before the change, if a court determined that mutuality did not exist its work was done. The absence of identical parties, and the resulting lack of mutually binding obligations arising from the prior judgment, prevented estoppel from operating in the second action. The mutuality principle was subject to the longstanding qualification that privity between the parties to the two actions also might satisfy the mutuality requirement. The circumstances under which a court could make an additional determination concerning privity did not extend materially a court's discretion. Courts merely applied an additional body of largely non-discretionary rules to address the

("[T]his Court has consistently emphasized the importance of the related doctrines of res judicata and collateral estoppel in fulfilling the purpose for which civil courts had been [sic] established, the conclusive resolution of disputes within their jurisdiction."). Even disregarding res judicata cases, however, nonmutual collateral estoppel decisions in both the Supreme Court and the circuits make up a smaller percentage of all collateral estoppel decisions than the percentage of all retroactivity decisions that can be categorized exclusively under *Linkletter* or *Chevron*.

240. See *supra* notes 19, 29, 208, 224 and accompanying text.

241. See *supra* notes 5-7 and accompanying text.

privity issue and then completed their application of mutual collateral estoppel.²⁴²

With respect to judicial discretion, the difference between mutuality and the new nonmutual approach hardly could be more striking. Mutuality dictated a hard-and-fast determination, with little discretion, but the Supreme Court's approach to nonmutual collateral estoppel established a test of general fairness and vested a maximum amount of discretion in the lower courts. As Justice White remarked in *Blonder-Tongue*, "no one set of facts, no one collection of words or phrases, will provide an automatic formula for proper rulings on estoppel pleas. In the end, [the] decision will necessarily rest on the trial courts' sense of justice and equity."²⁴³ Justice Stewart echoed this sentiment in *Parklane*. "We have concluded," he said, "that the preferable approach for dealing with these problems in the federal courts is not to preclude the use of offensive collateral estoppel, but to grant trial courts broad discretion when it should be applied."²⁴⁴

The Court has retreated from this broad grant of discretion only once, but that retreat is significant. In *Mendoza*, the Supreme Court reimposed the mutuality requirement for most cases in which a party invokes collateral estoppel against the government.²⁴⁵ In general, the reimposition of mutuality on efforts to estop the government collaterally represents an abandonment of discretion in cases to which *Mendoza* applies.

In the area of retroactivity, some authority prior to *Linkletter* indicated that retroactive application of changes in law was neither automatic nor non-discretionary.²⁴⁶ In the bulk of pre-*Linkletter* opinions, however, courts held that their function was limited simply to applying the new law.²⁴⁷ Compared to this mechanistic approach, *Linkletter* afforded a great deal of discretion:

242. For a further discussion of issues of privity, see *supra* note 98 and cases cited therein.

243. 402 U.S. at 333-34.

244. 439 U.S. at 331.

245. See *supra* notes 52-67 and accompanying text.

246. See *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371 (1940).

247. See *Norton v. Shelby County*, 118 U.S. 425, 442 (1886) (an unconstitutional statute "in legal contemplation, [is] as inoperative as though it had never been passed"); *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801) (appellate courts should apply the law as it presently exists, not as it once was). In *Chicot County Drainage Dist. v. Baxter*

[T]he effect of [a change in law] on prior final judgments when collaterally attacked is subject to no set "principle of absolute retroactive invalidity" but depends upon a consideration of "particular relations . . . and particular conduct . . . of rights claimed to have become vested, of status, of prior determinations deemed to have finality"; and "of public policy in the light of the nature both of the statute and of its previous application." . . .

. . . .

Once the premise is accepted that we are neither required to apply, nor prohibited from applying, a decision retrospectively, we must then weigh the merits and demerits in each case.²⁴⁸

Current doctrine in both nonmutual collateral estoppel and retroactivity, therefore, clearly affords more discretion than previously was available. The degree of discretion available to the lower courts, however, is not the same for both doctrines. A comparison of the rules governing nonmutual collateral estoppel and retroactivity demonstrates that the amount of discretion given to courts considering retroactivity is significantly lower than for nonmutuality. In *Blonder-Tongue*, the Court clarified not only that no hard-and-fast rule would apply, but also that no established body of criteria would govern every case.²⁴⁹ *Parklane* added a special consideration for cases involving offensive collateral estoppel, prohibiting its use "where a plaintiff could easily have joined in the first action."²⁵⁰ This apparent restriction of trial court discretion may be vitiated, however, by the Court's acknowledgment in the same passage that other unarticulated reasons could determine the outcome of a lower court's use of discretion.²⁵¹ In short, the Court intended the grant of discretion in nonmutual collateral estoppel analysis to

State Bank, 308 U.S. 371 (1940), Chief Justice Hughes said that *Norton* "must be taken with qualifications," *id.* at 374, but nothing even that tepid ever has been attached to the rule in *Schooner Peggy* concerning civil cases pending on direct appeal. See *supra* note 203 and accompanying text.

248. 381 U.S. at 627, 629 (quoting *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 374); see also *Johnson v. New Jersey*, 384 U.S. 719, 726-27 (1966) ("in criminal matters, the Court may in the interest of justice make the rule prospective . . . where the exigencies of the situation require such an application").

249. 402 U.S. at 333-34.

250. 439 U.S. at 331.

251. *Id.*

be virtually absolute, governed only by the broad concept of fairness to the parties, and apparently tested only by the standard of abuse of discretion.

Although *Linkletter* clearly afforded more latitude than older retroactivity doctrine,²⁵² it also provided less discretion than is available to courts deciding nonmutuality cases. The new rule quickly evolved into limited discretion because the three considerations identified in *Linkletter* became essentially the only factors which lower courts could consider. The Supreme Court's language in *Stovall v. Denno*,²⁵³ one of the more important early decisions in the *Linkletter* line,²⁵⁴ demonstrated the manner in which the High Court circumscribed lower court discretion in applying retroactivity doctrine. According to the Court in *Stovall*, "The criteria guiding resolution of the question implicates (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards."²⁵⁵ In contrast to *Parklane*, the Court in *Stovall* did not suggest that lower courts could consider other factors peculiar to a particular case.²⁵⁶

252. See *supra* note 208 and accompanying text.

253. 388 U.S. 293 (1967).

254. See *supra* note 210.

255. 388 U.S. at 297.

256. Somewhat weaker evidence also suggests that lower courts have greater discretion with nonmutuality than with retroactivity. In both *Blonder-Tongue* and *Parklane*, the Supreme Court emphasized that "trial courts," defined as tribunals operating well below the level of the High Court, were the institutions to whom a broad grant of discretion had been made. See *supra* notes 19, 29 and accompanying text. In matters of retroactivity, however, the Court's literal language suggested that only the High Court enjoyed discretion. *Linkletter v. Walker*, 381 U.S. 618, 628 (1965) ("the [Supreme] Court may in the interest of justice make the rule prospective"). In the early years of the *Linkletter* doctrine, the Court may not have realized fully that retroactivity would be more than just an occasional decision, but rather a doctrine with which all federal courts would have to grapple. Until the Court recognized the magnitude of the retroactivity problems it had unearthed with *Linkletter*, it may have believed that lower court discretion was unnecessary. Later, when the Court recognized that retroactivity would be a recurring question in the lower courts, its only adjustment was to extend to them the authority to use the three factors of *Linkletter*.

VI. CONCLUSIONS

A. The Role of Novelty in Judicial Doctrine

One point which the comparison of nonmutual collateral estoppel and retroactivity makes clear is that a new doctrine based on limited judicial experience, such as retroactivity,²⁵⁷ is more difficult to apply. This conclusion is not startling, but the axiom that shiny new doctrine takes longer to develop and flesh out than a less dramatically changed doctrine conceals another truth: in applying judicial doctrine, novelty itself can impose substantial costs.

When the Supreme Court changes doctrine to achieve more just and efficient results, others often debate whether the desired results are in fact better or even attainable. Few, however, question the Supreme Court's willingness to attempt doctrinal improvement. Unquestionably, the Court should be willing to change rules when justice requires a change, but the Court also should consider the hidden costs of lower court confusion and uncertainty which change imposes. If the Supreme Court painstakingly crafts the new doctrine and successfully avoids unforeseeable complications, perhaps these costs can be minimized. Even so, the transition period and the associated costs can be significant.²⁵⁸

Because some cost is inevitable, the Court should consider the magnitude of the short-term loss in justice and efficiency that may occur while lower courts are adapting to a new doctrine, especially when the Court does not anticipate substantial long-term gains in justice and efficiency. Although no mechanical cost/benefit calculation has been established, the courts' experience with collateral estoppel and retroactivity suggests that the Supreme Court should consider: (1) the lower courts' experience with analogous doctrines; (2) the lower courts' access to the experience of other jurisdictions, particularly state courts, with identical or similar doctrines; (3) the problems interested parties may have in predicting how the lower courts will adapt to a new rule; and (4) the importance of the need

257. See *supra* notes 226-29 and accompanying text.

258. See, e.g., Corr, *supra* note 2, at 766-79, 781-84, 790-92 (documenting continuing confusion in the lower courts between 1972 and 1982 concerning various aspects of the new retroactivity doctrine).

for rapid change.²⁵⁹ When the first three considerations are unfavorable, the Supreme Court should consider whether a doctrinal change is really appropriate.²⁶⁰

B. Complexity as it Affects the Quality of Judicial Doctrine

The perceived complexity of a particular doctrine is proportional to its novelty. Doctrines that initially appear fiendishly difficult may become more manageable as they become more familiar. Even so, complexity has a component distinct from novelty because, regardless of the opportunity to examine different mechanisms, some doctrines are more intricate than others by their very nature.

To afford the prospect of justice to all members of a complex society, good doctrines often must be complex; yet complexity can impede the development and application of these doctrines. Excessively complex doctrines may be too difficult for courts and parties to understand, effectively precluding just application. Moreover, a comprehensible doctrine still may be so intricate in application

259. The Supreme Court normally has measured benefits in terms of increased efficiency in the judicial system and more just results. *See, e.g., supra* note 20 and accompanying text.

260. Cynics and judicial conservatives might say that admonishing the Court about the dangers of novelty may be like warning an alcoholic not to drink too much liquor. The principle may be understood readily in the abstract, but those who should heed the warning often will be the least able to decide when it should be applied. In any event, sometimes the Supreme Court rightly feels compelled to consider altering a doctrine notwithstanding the risks that sudden and substantial change entails. *Linkletter*, which concerned the consequences of *Mapp v. Ohio*, arguably presented such a circumstance. *See supra* notes 204-10. For that matter, *Mapp* itself reasonably can be defended as a necessary change because substantial analogies clearly existed given the prior federal experience with the exclusionary rule.

Just as importantly, diffidence in deciding to fashion a new doctrine should not be equated with trepidation in following a chosen course. The Supreme Court's circumspection about whether *Blonder-Tongue* was a wholesale abandonment of mutuality or was applicable merely to patent cases, *see supra* notes 21-22 and accompanying text, did no good, and even may have done some harm. *See supra* notes 102-06 and accompanying text. The Court's self-serving post-*Blonder-Tongue* representation that mutuality really had been abandoned in 1971 did not rectify that harm. *See supra* notes 25-26 and accompanying text. The same reluctance to come to grips with doctrine also surfaced with retroactivity. *See* *Diedrich v. Commissioner*, 457 U.S. 191, 200 n.10 (1982) (Supreme Court "frequently" has applied tax decisions retroactively).

In short, caution in making a decision to change a doctrine is understandable and appropriate, but once the Court introduces a new doctrine it should explain that doctrine fully, to provide the lower courts with adequate guidance. Caution in areas of manifest uncertainty may be reasonable, but Delphic pronouncements offering no standard create confusion.

that even those who grasp the doctrine's abstractions cannot apply it well. The Supreme Court's task, then, is to introduce as much complexity as necessary to make a doctrine theoretically just without making it either incomprehensible or too intricate for practical application.²⁶¹

In the areas of nonmutual collateral estoppel and retroactivity, the Court successfully has avoided complexity severe enough to prevent understanding. Perhaps the most dispositive evidence of this success is the law review commentary on these subjects. Usually, law review commentators are not the Court's most diffident critics, but in these areas they have focused their remarks on the perceived fairness of the new rules and have not raised questions about the intelligibility of either doctrine.²⁶² This approval by silence is good news for these doctrines, but it also means that an examination of nonmutual collateral estoppel and retroactivity offers little instruction concerning how to develop comprehensible doctrines. The loss may not be great, however, because the courts inevitably will discover unintelligible doctrines quickly, and they can alter those doctrines before they have caused significant damage.

When excessive complexity affects only a doctrine's application and not its intelligibility, the damage may be more severe. Typically, much time will pass before anyone realizes that the lower courts' confusion is not merely a product of the doctrine's novelty. By that time, even assuming the excessive complexity is readily correctable and the court acts promptly, considerable harm may

261. See Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 305-07 (1981) (free speech doctrines must be "learnable" by those who must apply them). Although Professor Schauer remarks that "codes must in fact be applied to new situations by persons other than the ones who create or promulgate the code," *id.* at 305, his comments assume that a doctrine which is "learnable" also will be applicable. Schauer, therefore, does not consider the related problem of possible difficulties in applying doctrine even when it is comprehensible.

262. See, e.g., Shapiro and Coquillette, *The Fetish of Jury Trial in Civil Cases: A Comment on Rachal v. Hill*, 85 HARV. L. REV. 442 (1971) (not unfair to invoke nonmutual collateral estoppel, even when it forecloses possibility of a jury trial); Schwartz, *Retroactivity, Reliability and Due Process: A Reply to Professor Mishkin*, 33 U. CHI. L. REV. 719 (1966) (*Linkletter* unfair to criminal defendants).

have resulted from misapplication of the doctrine. The circumstances that give rise to excessive complexity in application, therefore, must be uncovered and avoided.

Nonmutual collateral estoppel and retroactivity afford an opportunity to identify these circumstances because the Supreme Court has had difficulty controlling the complexities that obstruct application by lower courts. This Article shows that the application of the new nonmutual collateral estoppel doctrine has been smooth and simple,²⁶³ while application of the retroactivity doctrine has been a morass.²⁶⁴ Apart from the difficulty produced by the number of retroactivity doctrines²⁶⁵ and the High Court's occasional inconsistency in choosing among them,²⁶⁶ the sheer complexity of *Linkletter* and *Chevron* has left lower courts floundering. For example, courts seem able to grasp intellectually their mandate to consider the parties' reliance on existing law, but they have been unable to identify any consistent standard for determining what constitutes justifiable reliance.²⁶⁷ Many other examples exist. In fact, most of the features of *Linkletter* and *Chevron* have caused uncertainty,²⁶⁸ and neither the lower courts nor affected parties can predict with confidence what most of the considerations mandated by these two cases will produce when applied.

263. See *supra* notes 190-201 and accompanying text.

264. See *supra* notes 203-20 and accompanying text.

265. See *supra* note 203 and accompanying text. The United States Court of Appeals for the Fifth Circuit recently demonstrated the ease with which the variety of retroactivity doctrines can confuse a court. In *Nations v. Sun Oil Co.*, 705 F.2d 742 (5th Cir.) (per curiam), cert. denied, 104 S. Ct. 239 (1983), a diversity action, the Fifth Circuit used the *Chevron* factors of purpose, reliance and effect, see *supra* notes 210-12 and accompanying text, to conclude that a particular change of law should be retroactive. 705 F.2d at 744. The result was correct, but only by coincidence. The rule the Fifth Circuit should have used was that of *Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538 (1941), requiring automatic retroactivity in diversity cases. *Chevron*, by contrast, holds out at least the possibility of prospectivity.

266. See Corr, *supra* note 2, at 790-92.

267. See *supra* note 218 and accompanying text.

268. See, e.g., *supra* note 217 and accompanying text (uncertainty about how to apply the "purpose" factor of *Linkletter* and *Chevron*); *supra* note 219 and accompanying text (uncertainty about whether *Linkletter* and *Chevron* establish different rules for criminal and civil cases); and *supra* notes 214-15 and accompanying text (uncertainty about whether *Linkletter* and *Chevron* incorporate a requirement that the rule in question must be in fact a new rule).

The third factor of *Linkletter* and *Chevron*, however, which may be described as either "a consideration of the equities, or the effect of retroactivity upon the administration of justice,"²⁶⁹ is a significant exception to the courts' confusion in the application of retroactivity doctrine. Characterized either way, the third factor represents an attempt to consider the basic fairness of retroactivity both to private parties and to the society represented by the judicial system. Fairness is not a complex concept to grasp, and its presence or absence may be noted readily. Not surprisingly, therefore, the cases examined in the course of the investigation of retroactivity doctrine disclosed relatively few problems in applying this third factor.²⁷⁰

A potentially useful correlation has begun to appear. The Supreme Court's freewheeling approach to nonmutual collateral estoppel, based on fairness to the parties, has enjoyed striking success.²⁷¹ Similarly, the only identifiable kernel of success in retroactivity doctrine rests in the considerations of fairness found in the third factor of *Linkletter* and *Chevron*.²⁷² At the same time, excessive complexity begins when the Supreme Court mandates a case-by-case analysis, and establishes relatively inflexible techniques to be used in making that analysis. Of course, undue complexity cannot always be avoided and success achieved merely by granting the lower courts unbridled discretion to follow their instincts of fairness.²⁷³ A flat mandate simply to be fair is a mandate

269. See Corr, *supra* note 2, at 779. In *Chevron*, the Court focused on principles of equity, while in *Linkletter* the Court discussed the issue in terms of administration of justice. *Id.* at 779 n.212.

270. *Id.* at 779-81.

271. See *supra* notes 190-93, 264 and accompanying text.

272. See *supra* note 220 and accompanying text.

273. Another way the Supreme Court can avoid the excessive complexity which can damage a doctrine's application is to grant no discretion at all to the lower federal courts. Such an approach presents no problems related to complexity, but a general prohibition on the use of discretion has its own substantial costs. Under the old non-discretionary requirement of mutuality, for example, a great deal of court time and litigants' resources had to be expended relitigating matters previously decided. See *supra* notes 13-14 and accompanying text. Similarly, if the old doctrines of automatic retroactivity had been applied to the facts of *Linkletter*, many convicted felons would have been released from prison, creating a manifest injustice to society at large. See *supra* note 229.

Such costs do not indicate necessarily that a denial of discretion is always bad. Often, a firm rule is the best approach. For instance, in *United States v. Mendoza*, 104 S. Ct. 568

to judge by personal bias. Excessive complexity may be a problem, but uncontrolled discretion is not the solution.²⁷⁴

The proper conclusion to the dilemma posed by complexity is that, when the Supreme Court identifies a need to abandon a rigid rule in favor of a case-by-case analysis, it can achieve the best results by following through on its intention and granting the lower courts substantial discretion. The High Court should guide that discretion by articulating possible decisive considerations, but the Court should hold the reins of supervision lightly. The experience of lower courts with most current retroactivity doctrine testifies to what can happen if the Court posits a case-by-case analysis and

(1984), the Court denied lower courts the authority to decide whether a public interest prevented application of nonmutual collateral estoppel against the government. Justice Rehnquist explained why the Supreme Court chose to bar application of nonmutual collateral estoppel in most circumstances in which it was sought against the government instead of allowing an assessment of public interest:

[W]e believe that the standard announced by the Court of Appeals for determining when relitigation of a legal issue is to be permitted [i.e., when the government is able to establish the presence of an important national interest] is so wholly subjective that it affords no guidance to the courts or to the government. Such a standard leaves the government at sea because it cannot possibly anticipate, in determining whether or not to appeal an adverse decision, whether a court will bar relitigation of the issue in a later case.

Id. at 573; see also *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981) (no public policy exception in *res judicata*; "[s]imple justice is achieved when a complex body of law developed over a period of years is evenhandedly applied").

These examples indicate that no single approach to the development of doctrine always will be best. The best approach for a particular legal question, however, should recognize and try to minimize problems such as the difficulty of application associated with a particular approach.

274. One remaining problem is rooted in the nagging fact that, notwithstanding the absence of a straitjacket controlling nonmutuality, courts applying the doctrine have hewn closely to Supreme Court guidelines. See *supra* notes 165-70 and accompanying text. With that in mind, one reasonably might ask whether greater discretion really helps explain why nonmutuality has been applied more successfully than retroactivity. After all, how much difference could discretion make if discretion goes unused?

A likely answer lies in the greater experience courts have had with nonmutuality. Forty years after Justice Traynor first popularized a break with mutuality, courts probably already knew most of what they needed to know about the discretionary features of nonmutuality. In that sense, the suggested guidance the Supreme Court offered in *Parklane* was no straitjacket. Instead, it represented more than a generation's experience, including all the likely permutations in which nonmutual collateral estoppel was likely to be found. The lower courts' lack of deviation from that experience speaks to the wisdom of avoiding rapid breaks with the past.

then straitjackets the approach with factors binding lower court discretion.

VII. EPILOGUE

The conclusions of this Article are drawn within the narrow framework of two judicial doctrines as the federal courts recently have developed and applied them. Because the base of information on the operation of these doctrines in the lower courts is not yet large enough to justify broad generalization, more sweeping statements about the relative wisdom of various doctrinal approaches cannot be made. Such conclusions must await additional examinations of other judicial doctrines at work. Examination of doctrine in the trenches, however, clearly produces a substantially different view than that obtained from the mountaintops on which so much analysis takes place. The study of doctrine as applied may require different methodology than is used to study doctrine as declared. It also may involve far more drudgery, but the potential for improving judicial doctrine seems to justify the effort. Doctrine can be improved by studying more than just its appearance as it falls from the lips of the High Court. The tools of improvement are readily at hand.