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Precedent and Preclusion

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Preclusion rules prevent parties from revisiting matters that they have already litigated. A corollary of that principle is that preclusion usually does not apply to nonparties, who have not yet benefited from their own "day in court." But precedent works the other way around. Binding precedent applies to litigants in a future case, even those who never had an opportunity to participate in the precedent-creating lawsuit. The doctrines once operated in distinct spheres, but today they often govern the same questions and apply under the same circumstances, yet to achieve opposite ends. Why, then, does due process promise someone a "day in court" before she is bound by preclusion but not when she is bound—regarding the exact same matter—through precedent?

The doctrinal tension exposes a deeper and unresolved theoretical conundrum that cuts to the heart of what due process protects. This Article argues that two coherent, but distinct, visions of due process underpin the doctrines. Preclusion is rooted in a participation-oriented theory that values participation as an inherent good, whereas precedent reflects an outcome-oriented theory that emphasizes accuracy and reliance interests. This Article argues that the outcome-oriented theory is already the dominant approach in most areas of civil procedure and outside of the litigation context. Moreover, it is a normatively superior approach that holds the potential to resolve enduring problems of serial litigation in which real parties in interest have multiple opportunities to litigate the same matter.

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INTRODUCTION

Imagine a scenario in which, in the long run, plaintiffs can never lose and defendants can never win. Most people probably would assume that this Kafkaesque hypothetical must violate basic norms of due process. But it is precisely in the name of due process that such a scenario arises.

Consider a relatively recent case, *Taylor v. Sturgell*,[1] in which one plaintiff made a Freedom of Information Act (FOIA) request for documents related to a vintage aircraft, but the government denied the request based on a FOIA exemption that protects trade secrets. The plaintiff appealed that denial in federal court but lost at every stage.[2] A second plaintiff then requested the exact same documents. The government, yet again as the defendant, sought to argue that preclusion prevented the second plaintiff from relitigating whether the documents fell under FOIA's trade-secrets exemption. But preclusion—the power to bind someone to the results of a lawsuit—generally may apply only to someone who has enjoyed a "day in court."[3] Consequently, the Supreme Court unanimously found that due process prohibited a court from binding the second plaintiff through preclusion.[4] So, he was allowed to revisit the applicability of the FOIA exemption. And he won.[5] The documents then effectively became available to the entire world, including the first plaintiff.

A similar phenomenon arises in the class certification context. If a lawyer seeks class certification but a court denies the motion, that specific deci-

1 553 U.S. 880 (2008).

2 *See id.* at 885–87.

3 *Id.* at 892–93.

4 *See id.* at 904–06.

5 *See* Taylor v. Babbitt, 760 F. Supp. 2d 80, 85–90 (D.D.C. 2011). Admittedly, the court in the second lawsuit was able to consider two critical questions—whether the documents at issue were "secret" and "commercially valuable"—that the plaintiff in the first lawsuit had failed to raise. *See id.* at 87 n.6, 90.

sion—whether class treatment is appropriate—binds only the named plaintiffs. At that point, before a court actually certifies a class, only the named plaintiffs (rather than the members of the class that they hope to represent) are parties.[6] The lawyers and the putative class members may try again to get class certification in a different court. All they need are new named plaintiffs, and in many situations a lawyer "has available a seemingly endless string of totally fungible potential named plaintiffs."[7] Thus, the lawyers may try over and over and over until a court certifies the class.[8]

In both of these scenarios, regardless of how many times a defendant wins (either in preventing a document from being disclosed or in resisting class certification), people who did not participate in the lawsuit are not bound by the results of the earlier lawsuits. So, a new plaintiff may always come along to relitigate the same question. Notice what happens when even a single plaintiff prevails: that victory effectively nullifies *all* of the defendant's previous victories. If a document is finally disclosed under FOIA, that victory belongs to everyone, including plaintiffs who had previously lost. If a class is eventually certified, the plaintiffs' lawyers and the entire class of plaintiffs (minus the unsuccessful named plaintiffs from previous attempts) achieve what they wanted all along: class certification.[9] From the plaintiffs' perspective, this isn't quite a "heads I win, tails you lose" situation but more of a "heads I win, tails I get a do-over" scenario.

Although the problem of limitless serial litigation has become more urgent in recent years, attempts to combat it have run headlong into the presumption against nonparty preclusion. Preclusion rules prevent parties from revisiting matters that they have already litigated.[10] A corollary of that principle is that preclusion usually does *not* apply to nonparties, who have

6 *See* Smith v. Bayer Corp., 564 U.S. 299, 312–15 (2011); Martin H. Redish & Megan B. Kiernan, *Avoiding Death by a Thousand Cuts: The Relitigation of Class Certification and the Realities of the Modern Class Action*, 99 IOWA L. REV. 1659, 1674–78 (2014).

7 Redish & Kiernan, *supra* note 6, at 1670; *see also In re* Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig., 333 F.3d 763, 766–67 (7th Cir. 2003), *abrogated on other grounds by Smith*, 564 U.S. 299; Tobias Barrington Wolff, *Federal Jurisdiction and Due Process in the Era of the Nationwide Class Action*, 156 U. PA. L. REV. 2035, 2073–74 (2008).

8 The Supreme Court has suggested that comity among courts offers a flexible mechanism to ameliorate the problem of serial litigation. *See Smith*, 564 U.S. at 317.

9 *See Bridgestone/Firestone*, 333 F.3d at 766.

10 On a terminological note, I intentionally group together the distinct but related doctrines of claim preclusion and issue preclusion. For present purposes, the similarities rather than the differences are most germane. Consequently, references to "preclusion" pertain to both. If and when the differences are important, I make clear which species of preclusion I am discussing.

Claim preclusion generally means the extinguishing of all aspects of a claim that a party could have brought, but did not bring, as part of an earlier lawsuit. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 24 (AM. LAW INST. 1982). By contrast, *issue preclusion* generally prevents a party from relitigating a specific question that was actually litigated and decided in earlier litigation and arises again in another lawsuit. *See id.* § 27.

not yet benefited from their own "day in court." Although courts[11] and commentators[12] have suggested creative and roundabout ways to deal with serial litigation, those solutions are likely to be partial, imperfect, or infeasible.[13] The way out of the thicket, though, might have been hiding in plain sight all along.

While the Supreme Court has continued to reaffirm the "day-in-court" ideal and the overarching rule against nonparty preclusion, it has casually observed that precedent can achieve what preclusion cannot. In spare language and with no analysis, the Court has suggested that *precedent*, rather than *preclusion*, may prevent nonparties from revisiting matters that courts have already decided.[14] Return for a moment to the FOIA case, *Taylor v. Sturgell*, and assume that the second plaintiff had brought his claim in the same circuit as had the first plaintiff. A court could not bind the second plaintiff to the results of the first lawsuit through preclusion. Nonetheless, as the Supreme Court observed, binding precedent from the first lawsuit could achieve the same result—preventing the second plaintiff from relitigating whether FOIA's trade-secrets exemption applied to the documents in question.[15]

Does this mean that courts can solve the problem of serial litigation simply by invoking precedent instead of preclusion? Not quite. Binding precedent typically operates only within a single jurisdiction and thus can shut down multiple attempts to litigate a question only within that jurisdiction. Plaintiffs remain free to move from court to court within the federal system or between different states as they seek to relitigate certain matters, subject only to loose notions of comity among courts.

Nevertheless, juxtaposing the concepts of precedent and preclusion—and their inconsistent approaches to the "day-in-court" ideal—reveals a curious but ultimately productive conundrum. If binding a nonparty through preclusion is usually unconstitutional, why would accomplishing the same goal through stare decisis be so unobjectionable as to require no analysis? In both situations, a nonparty is bound by a lawsuit in which she had no opportunity to participate. But in only one situation may a party insist on her day in court.

Traditionally, courts and scholars have conceptualized the doctrines of precedent and preclusion as governing fundamentally different questions

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11 *See Smith*, 564 U.S. at 317 (arguing that stare decisis can "mitigate the sometimes substantial costs of similar litigation brought by different plaintiffs").

12 *See infra* note 30 and accompanying text.

13 *See infra* note 27 and accompanying text (describing why stare decisis cannot fully alleviate the problem of serial litigation); *see also* Tobias Barrington Wolff, *Multiple Attempts at Class Certification*, 99 IOWA L. REV. BULL. 137, 138 (2014) (criticizing proposal to bind lawyers in class certification context).

14 *See Smith*, 564 U.S. at 317 ("[O]ur legal system generally relies on principles of *stare decisis* . . . to mitigate the sometimes substantial costs of similar litigation brought by different plaintiffs.").

15 *See* Taylor v. Sturgell, 553 U.S. 880, 903 (2008) (noting that "*stare decisis* will allow courts swiftly to dispose of repetitive suits brought in the same circuit").

and operating with different force. In the usual telling, preclusion attaches only to fact-intensive determinations, and when it applies, it applies absolutely.[16] By contrast, precedent typically governs larger legal questions, and even though it can exert binding pressure in future cases, it supposedly applies with greater flexibility.[17] Indeed, as the Supreme Court has repeatedly counseled, stare decisis "is not an inexorable command."[18]

But the traditional distinctions between precedent and preclusion have largely faded and, in some instances, collapsed entirely. Increasingly, precedent and preclusion can govern the same questions and apply under the same circumstances, yet they offer diametrically opposed answers as to who is bound by the results of litigation. Although some scholars have started to document the doctrinal convergence,[19] this Article offers the first systematic analysis of the phenomenon and its surprising theoretical implications. The whole concept of binding precedent—a bedrock principle of Anglo-American legal systems—suggests that courts' unflagging insistence that each person is entitled to a day in court before preclusion may attach is misguided or even completely wrong.

The doctrinal tension between precedent and preclusion exposes a deeper and unresolved theoretical conundrum that cuts to the heart of what due process protects. In attempting to unravel that conundrum, I argue that two different visions of due process have animated the doctrines.

On the preclusion side, the Supreme Court has articulated a view of due process that vindicates *participation*-oriented autonomy concerns. It reflects the idea that individualized participation in a lawsuit—giving each person a day in court—serves values beyond just the desire to resolve cases accurately, including dignity and autonomy.

The precise due process theory that undergirds binding precedent is more obscure. I argue, though, that it is a fully justifiable practice, albeit one that is irreconcilable with the participation-oriented "day-in-court" ideal that features prominently in the preclusion context. Instead, binding precedent is rooted in an *outcome*-oriented theory of due process, a theory focused, in large part, on protecting expectations, predictability, repose, and—perhaps counterintuitively—accuracy.

The outcome-oriented theory that best explains binding precedent, in fact, dominates most areas of civil procedure. It is also the norm outside of the litigation context, particularly in the realms of administrative law and

16 *See* Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 603, 652 (1992).

17 *See* ROBERT C. CASAD & KEVIN M. CLERMONT, RES JUDICATA: A HANDBOOK ON ITS THEORY, DOCTRINE, AND PRACTICE 15 (2001).

18 Pearson v. Callahan, 555 U.S. 223, 233 (2009) (quoting State Oil Co. v. Khan, 522 U.S. 3, 20 (1997)) (internal quotation marks omitted); *see also, e.g.*, Lawrence v. Texas, 539 U.S. 558, 577 (2003).

19 *See* Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1071 (2003); Max Minzner, *Saving Stare Decisis: Preclusion, Precedent, and Procedural Due Process*, 2010 BYU L. REV. 597.

legislation.[20] Moreover, especially with respect to litigation, an outcome-oriented theory is normatively superior to a vision of due process that privileges participation for its own sake. Most critically, the outcome-oriented theory would afford courts a more capacious power to bind nonparties and thus could point the way toward solving the problem of potentially limitless serial litigation.

This Article proceeds in three Parts. Part I discusses why preclusion is uniquely suited to address problems of serial litigation but how the Supreme Court has unduly circumscribed that power. Part II illustrates the doctrinal tension between precedent and preclusion. It demonstrates that the two doctrines often govern the same questions but that precedent can achieve what preclusion cannot—the power to bind nonparties. Part III argues that two different theories of due process underpin the doctrines of precedent and preclusion in their current forms. It then demonstrates why the outcome-oriented theory, already dominant in most areas of law, holds the key to curtailing repetitive lawsuits.

I. Serial Litigation and the Limits of Preclusion

Problems of serial litigation have become particularly vexing in recent decades.[21] Although courts have various doctrinal mechanisms at their disposal to confront these problems, the most effective way to prevent litigants from getting multiple bites at the proverbial apple is to apply preclusion to a wider swath of people, including nonparties. Courts actually laid the theoretical foundation for a more capacious doctrine of nonparty preclusion when they expanded preclusion's reach in the twentieth century. But the Supreme Court has consistently affirmed the idea that due process generally prohibits courts from applying preclusion to someone who has not yet had her day in court. This Part explicates that basic dilemma—preclusion's unique potential to address serial litigation but the Court's cabining of that power. It also sets the stage for exploring the curious interaction of precedent and preclusion.

A. Unresolved Problems of Serial Litigation

Serial litigation raises a host of obvious concerns. When people are allowed to litigate the same question over and over, there are intuitively worries about inefficiency (devoting too many public resources to litigating the same matter) and even inaccuracy (if people litigating the same question achieve different results, at least one of the results must be wrong). Sometimes those risks are the necessary price of protecting litigants' due process rights, but the costs are real.

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20 *See infra* notes 260–268.

21 *See In re* Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig., 333 F.3d 763, 766 (7th Cir. 2003), *abrogated on other grounds by* Smith v. Bayer Corp., 564 U.S. 299 (2011) (noting proliferation of repeated attempts to certify class actions in different jurisdictions).

Certain classes of cases exacerbate those baseline concerns about inefficiency and inaccuracy, often with little or no corresponding due process benefit. The most problematic forms of serial litigation involve lawsuits, such as those briefly sketched above, that can effectively undo earlier litigation.[22]

This category includes public rights cases, such as FOIA lawsuits, and class certification denials. The Freedom of Information Act confers an individual right to request a document and to litigate whether the government may refuse to disclose the document.[23] In *Taylor*, notwithstanding that the two plaintiffs were friends and had coordinated their efforts to obtain particular documents,[24] each was allowed to bring his own separate claim and marshal his own arguments. Thus, when the second plaintiff won his lawsuit,[25] *both* got exactly what they wanted. The same thing would have happened if ninety-nine requesters had lost their lawsuits but the one hundredth person finally prevailed.

An almost identical phenomenon occurs with respect to class certification denials. If a lawyer seeks to certify a class of plaintiffs in one court but fails, only the named plaintiffs are bound by that futile attempt. The lawyers and all of the other members of the putative class may try again and again in different courts until they succeed.[26] Consequently, in both the public rights cases and the class certification denials, a single victory essentially nullifies the earlier losses.

Not every attempt to revisit a particular question will be problematic, but when serial litigation prevents a defendant from ever achieving repose or affords certain parties multiple opportunities to litigate a matter, there is at least the prospect of basic unfairness. Under these circumstances, nonparty preclusion offers the single best way to regulate the problem. Other doctrines and devices certainly can mitigate the inefficiency and unfairness, but they are, at best, partial fixes.

For example, stare decisis, as the Supreme Court has noted, eventually can shut down truly repetitive lawsuits.[27] But because precedent is binding only along the lines of vertical hierarchy within a particular jurisdiction, a defendant must still endure many lawsuits throughout the country. Moreover, a defendant's loss in any given lawsuit could undo all of its earlier victories.

Similarly, a class action, which can dispose of related claims in a single proceeding, is often of little help in these situations. In a FOIA case like

22 *See supra* notes 1–8 and accompanying text.

23 5 U.S.C. § 552(a)(3)(A) (2012).

24 *See* Taylor v. Sturgell, 553 U.S. 880, 887–89 (2008) (noting that Herrick and Taylor were friends, used the same lawyer, and otherwise assisted each other in pursuing the documents).

25 *See* Taylor v. Babbitt, 760 F. Supp. 2d 80, 85–90 (D.D.C. 2011). Although FOIA does not require an agency to make a document publicly available—but instead only to disclose it to the individual requester—nothing prevents the requester from sharing the document with others. *Id.* at 87.

26 *See Bridgestone/Firestone*, 333 F.3d at 766–67.

27 *Taylor*, 553 U.S. at 903.

Taylor, the initial plaintiff theoretically can satisfy the requirements of a class action under Federal Rule 23.[28] But no plaintiff would actually go to the trouble of seeking class certification because class treatment would offer him nothing that he could not achieve on his own (that is, the requested documents).[29] If anything, a plaintiff in a public rights case has an incentive *not* to seek certification precisely so that others can attempt to relitigate the matter in the event that the first plaintiff loses. And with respect to the problem of class certification denials, a class action—by definition—is ineffectual. Certifying a class for the purpose of determining whether that class should be certified would be the epitome of impermissible (and nonsensical) bootstrapping.

Commentators have suggested other mechanisms to deal with the most deleterious forms of serial litigation. For example, they have suggested preventing lawyers from bringing repetitive motions for class certification[30] or empowering courts to enjoin sister courts from entertaining such duplicative motions.[31] Such proposals, though, are likely to be partial, imperfect, or doctrinally infeasible, as even some of their advocates concede.[32]

In all of these situations, preclusion—and, in particular, nonparty preclusion—offers unique advantages for mitigating the most bedeviling inefficiencies and inequities that arise from serial litigation. Preclusion gives courts the power to find that when a matter has been fully and fairly litigated, a decision will be binding even on people who did not participate in the lawsuit. It is a doctrine that is not confined to a single jurisdiction, and it may readily apply in both state and federal courts. Binding a nonparty to the results of a lawsuit in which she did not participate undoubtedly presents a number of potential pitfalls. However, as discussed in Part III, those concerns do not justify the overwhelming rejection of nonparty preclusion. Most significantly for the purposes of this Article, limiting the reach of nonparty preclusion, particularly in the limited sense suggested here, is difficult to understand in light of how courts have long accepted the power of precedent to bind nonparties.

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28 *See* FED. R. CIV. P. 23(b)(2).

29 Samuel Issacharoff, *Private Claims, Aggregate Rights*, 2008 SUP. CT. REV. 183, 207.

30 *See* Redish & Kiernan, *supra* note 6, at 1674–78 (proposing a guardianship model that would preclude *lawyers*, rather than litigants, as a way to deal with serial attempts at class certification).

31 *See* Wolff, *supra* note 7, at 2066–72 (arguing that federal courts should be able to rely on an exception to the Anti-Injunction Act—for injunctions "in aid of" a federal court's jurisdiction—to enjoin certain successive attempts at class certification).

32 *See* Wolff, *supra* note 13, at 138 (criticizing Redish and Kiernan's proposal to preclude lawyers as frequently ineffectual and a violation of due process principles). Wolff's own proposal under the Anti-Injunction Act is cogent and eminently sensible. *See* Wolff, *supra* note 7, at 2066–72. It offers only a partial fix, most notably because it empowers only federal courts to enjoin duplicative litigation. *Id.* at 2043.

B. Expanding Preclusion

Considering preclusion's singular power to combat the worst excesses of serial litigation, the Supreme Court's continuing reaffirmation of each person's right to a day in court is at least somewhat surprising. Beginning in the middle of the twentieth century, courts expanded preclusion's reach in three important ways. Each of these developments was somehow incomplete, ill-fated, or at the very least undertheorized. Nonetheless, they all underscored preclusion's unique promise to deal with an array of modern procedural challenges and the importance of moving away from the intuitive, but ultimately unsatisfactory, attractiveness of the individual day-in-court ideal. Others have documented these developments in rich and informative detail. I sketch them briefly in order to elucidate the broader and enduring problems that they sought to resolve.

The first development is the modern class action. Although representative suits predated the class action device as lawyers know it today, the modern class action is unique because of the extent to which it denies individuals a day in court and uses nonparty preclusion to resolve related claims in a single proceeding.[33] The Federal Rules of Civil Procedure have always allowed for class actions. But until 1966, class actions—other than "true" class actions—did not bind absent class members.[34] In fact, members of what were then known as "hybrid" and "spurious" classes could sit out the litigation and later opt in to the class in order to take advantage of a favorable judgment.[35]

This all changed in 1966 when the federal class action rule took its modern form, abandoning the distinctions between the different kinds of classes and introducing a sweeping rule of preclusion. This revision was "first and foremost a res judicata device."[36] Although that development was and remains controversial, it transformed the class action into a broader tool for binding absentees—people who never have an individual day in court—to the results of the litigation. The expansion of nonparty preclusion in this context is rooted in the belief (and requirement) that the class representa-

33 *See* Robert G. Bone, *The Puzzling Idea of Adjudicative Representation: Lessons for Aggregate Litigation and Class Actions*, 79 GEO. WASH. L. REV. 577, 607–10 (2011); *see also* FED. R. CIV. P. 23(a), (b).

34 Bone, *supra* note 33, at 608. A true class action was one in which class members held rights jointly and in an undifferentiated way. For example, if the members of an unincorporated association bring a suit to vindicate an organizational interest, that interest is undifferentiated. James Wm. Moore & Marcus Cohn, *Federal Class Actions*, 32 ILL. L. REV. 307, 314 (1937).

35 Bone, *supra* note 33, at 608. As Moore and Cohn note, even though the members of a hybrid class (usually claimants to a limited fund) could formally choose to sit out the litigation, as a practical matter they had to join because the class action likely would have disposed of the entire fund and left nothing else that absentees could later pursue. *See* Moore & Cohn, *supra* note 34, at 317; *see also* David Marcus, *The History of the Modern Class Action, Part I:* Sturm und Drang*, 1953–1980*, 90 WASH. U. L. REV. 587, 600–01 (2013) (noting the limited preclusive effects of class actions before the 1960s).

36 Bone, *supra* note 33, at 609.

tives will adequately represent the absentees' interests.[37] Indeed, this explicit and formal procedural protection—ensuring that class representatives will litigate in the interests of absent members—has led the Supreme Court and some commentators to refer to class actions as exceptional in their ability to bind those absentees.[38] Although that characterization remains open to critical debate—both descriptively and normatively, as discussed later[39]—the class action signifies the greatest modern expansion of nonparty preclusion.

The second major development is that courts largely have abandoned the mutuality requirement in preclusion. Traditionally, preclusion required symmetry of the parties, such that only someone who was a party to earlier litigation could invoke the benefits of preclusion in a subsequent proceeding.[40] In the middle of the twentieth century, though, courts began to question the wisdom of the traditional approach and gradually allowed nonparties to the first litigation to take advantage of issue preclusion in later litigation.[41]

Initially, the expansion came as courts permitted someone who had not been a party to an earlier lawsuit to use preclusion *defensively* against someone who had participated in the first litigation.[42] Although somewhat more controversial, courts also began to allow nonparties to use issue preclusion *offensively*.[43] As courts overwhelmingly rejected the old doctrine of mutuality, though, they made one requirement abundantly clear: the person *against*

37 *See* FED. R. CIV. P. 23(a)(4) (articulating the requirement that "the representative parties will fairly and adequately protect the interests of the class").

38 *See, e.g.*, Taylor v. Sturgell, 553 U.S. 880, 901 (2008); Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 150–51 (2003).

39 *See infra* Section I.C; *see also* Bone, *supra* note 33, at 578 (challenging "class action exceptionalism").

40 DAVID L. SHAPIRO, CIVIL PROCEDURE: PRECLUSION IN CIVIL ACTIONS 102 (2001); 18A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4448 (2d ed. 2002).

41 This is one of the rare situations, for my purposes, when the difference between claim preclusion and issue preclusion is meaningful. Although courts largely have abandoned the doctrine of mutuality with respect to issue preclusion, mutuality endures as a requirement of claim preclusion. *See* Michael J. Waggoner, *Fifty Years of* Bernhard v. Bank of America *Is Enough: Collateral Estoppel Should Require Mutuality but Res Judicata Should Not*, 12 REV. LITIGATION 391, 392 (1993).

42 For example, *A* sues *B* for negligence in a three-way car accident, and *B* prevails on the ground that *A* was contributorily negligent. *A* then sues *C* for negligence stemming from the same accident. *C*, though not a party in the first lawsuit, may *defensively* argue that *A* is precluded from relitigating the question of his contributory negligence. The Supreme Court endorsed defensive nonmutual issue preclusion in 1971. *See* Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found., 402 U.S. 313, 328–50 (1971).

43 The most conspicuous problem is that unlike in the defensive context, a party that potentially wants to use nonmutual issue preclusion offensively often has an incentive to adopt a wait-and-see approach. The Supreme Court acknowledged this problem but nonetheless, with certain caveats, permitted offensive nonmutual issue preclusion. *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 329–33 (1979).

whom preclusion is being applied must have been a party to the initial litigation.[44]

Because the demise of mutuality changed only who is allowed to invoke preclusion (but not those against whom it is invoked), a serious asymmetry arose. To borrow Brainerd Currie's famous example,[45] imagine a train accident in which fifty people are injured. The first passenger sues the train company, which a jury finds not negligent. When the second passenger sues, the defendant may not take advantage of issue preclusion with respect to its non-negligence because the second passenger was not a party to the first lawsuit. Suppose that the second passenger also loses at trial. As do the third, fourth, and so on. Then the twenty-sixth passenger brings a lawsuit and prevails, with a jury finding the train company negligent. At that point, the remaining passengers could theoretically rely on issue preclusion against the train company, which was a party during the twenty-sixth trial when a jury found it negligent, yet the train company would still be barred from using the first twenty-five findings of non-negligence.[46] Thus, the asymmetry results.[47] A nonparty may invoke what it regards as a favorable judgment against the train company, but the train company may not invoke what it regards as a favorable judgment against a nonparty.

As courts increasingly have rejected the doctrine of mutuality, they have taken pains to preserve the traditional rule that a nonparty may not be bound by an unfavorable judgment. The results have led to a conceptual and theoretical tension. On the one hand, abandoning a rigid insistence on mutuality has expanded preclusion in a way that courts and scholars overwhelmingly regard as sensible. At the same time, the asymmetry has exposed a rift between the values that have animated a broader application of preclusion (including efficiency and accuracy) and those underpinning an insistence that a nonparty may not be bound by a judgment (including an emphasis on each party's right to an individual day in court).[48] Moreover, the asymmetry has laid the intellectual groundwork for some scholars to argue in favor of even more extensive nonparty preclusion.[49]

The third and final development that expanded the reach of nonparty preclusion over the last several decades was the reinvigoration of "virtual representation." In its modern form, the doctrine offered a way to bind a person

44 *See id.* at 327 n.7; *Blonder-Tongue*, 402 U.S. at 329; James R. Pielemeier, *Due Process Limitations on the Application of Collateral Estoppel Against Nonparties to Prior Litigation*, 63 B.U. L. Rev. 383, 387 (1983).

45 *See* Brainerd Currie, *Mutuality of Collateral Estoppel: Limits of the* Bernhard *Doctrine*, 9 Stan. L. Rev. 281 (1957).

46 *Id.* at 285–86.

47 *See* Michael A. Berch, *A Proposal to Permit Collateral Estoppel of Nonparties Seeking Affirmative Relief*, 1979 Ariz. St. L.J. 511, 530–31; Lawrence C. George, *Sweet Uses of Adversity:* Parklane Hosiery *and the Collateral Class Action*, 32 Stan. L. Rev. 655, 660 (1980).

48 *See* Pielemeier, *supra* note 44, at 384 (noting that the rule against binding nonparties usually rests only on "conclusory statements that all litigants must be given their 'day in court'").

49 *See* Berch, *supra* note 47, at 531–34; George, *supra* note 47, at 674–75.

to a judgment based on the theory that even though the person had not actually participated in the litigation, her interests had been adequately represented.[50] Unlike in a certified class action, though, the relationship between the nonparty and her "virtual representative" did not need to be formalized.[51] To some commentators, that practical fluidity was among the doctrine's principal virtues.[52] But to others, virtual representation was a "rash act of judicial frustration" that elided critical protections.[53]

The doctrine of virtual representation actually dates back to the eighteenth century when, in its earlier incarnations, it operated as a way to bind the holders of future property interests.[54] The modern version, though, is quite different in purpose and scope. It explicitly relies on the idea that preclusion can attach based on an alignment of parties' and nonparties' interests.[55]

Among the most useful applications of virtual representation was in the corporate context. A sole shareholder of a corporation (or the parent company of a wholly owned subsidiary) could be bound by a judgment against the other.[56] Even though the shareholder was not formally a party to the lawsuit in his individual capacity, the close alignment of the party's and nonparty's interests justified the application of preclusion to both.[57] Similarly, a corporate officer who was not formally a party to litigation involving the corporation itself could be bound by a judgment against the corporation. The

50 *See* Martin H. Redish & William J. Katt, Taylor v. Sturgell*, Procedural Due Process, and the Day-in-Court Ideal: Resolving the Virtual Representation Dilemma*, 84 NOTRE DAME L. REV. 1877, 1878 (2009).

51 *See id.* at 1881.

52 *See* Allan D. Vestal, *Res Judicata/Preclusion: Expansion*, 47 S. CAL. L. REV. 357, 377–81 (1974) (endorsing virtual representation and analogizing its operation to class actions); *see also* Bone, *supra* note 33, at 617, 624 (arguing that "there is no sharp distinction" between formal class actions and "other types of large-scale case aggregation").

53 Issacharoff, *supra* note 29, at 200; *see also* Redish & Katt, *supra* note 50, at 1882–83.

54 Robert G. Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193, 203–11 (1992).

55 The modern version of virtual representation arguably started to take shape in the 1960s. *See* Vestal, *supra* note 52, at 363–73 (documenting cases). Most scholars trace the modern doctrine's genesis to the 1970s. *See* Barrett, *supra* note 19, at 1037 n.103; Bone, *supra* note 54, at 219–20.

56 *See, e.g.*, *In re* Gottheiner, 703 F.2d 1136, 1138–40 (9th Cir. 1983) (binding sole shareholder); Waddell & Reed Fin., Inc. v. Torchmark Corp., 223 F.R.D. 566, 616–19 (D. Kan. 2004) (binding a subsidiary to a judgment against different subsidiaries of the same parent corporation); *cf.* Pollard v. Cockrell, 578 F.2d 1002, 1008–09 (5th Cir. 1978) (discussing virtual representation in the corporate context).

57 *See, e.g.*, RESTATEMENT (SECOND) OF JUDGMENTS § 59 cmt. e (AM. LAW INST. 1982) (noting that for preclusion purposes "there is no good reason why a closely held corporation and its owners should be ordinarily regarded as legally distinct").

corporation, in other words, could serve as the officer's virtual representative.[58]

The doctrinal contours of virtual representation were never especially clear.[59] Two of its most essential hallmarks, though, were an identity of interests between the nonparty and her virtual representative and the absence of a formal litigation arrangement between them.[60] What else the doctrine required and how broadly it would sweep varied—sometimes dramatically—from court to court. In its broadest formulation, virtual representation rested on nothing other than an alignment of interests,[61] but most courts required something else. Some insisted that there had to be a preexisting relationship of accountability between the nonparty and her virtual representative.[62] Others simply considered an amorphous multiplicity of factors, none of which were either necessary or sufficient.[63] Two courts attempted to rationalize the doctrine by grounding it in an identity of interests and adequate representation but also requiring courts to consider several other equitable factors.[64] Others intimated that virtual representation was not even a doctrine,[65] and at least one court explicitly rejected it.[66]

C. Retrenchment of the Day-in-Court Ideal

The three attempts to expand preclusion doctrine have proved to be something of a mixed bag. The modern class action undoubtedly has effected the greatest expansion of nonparty preclusion, but in recent years courts have limited which cases are suitable for class treatment.[67] While the demise of mutuality made preclusion more widely available—to the extent

58 *See, e.g.*, Irwin v. Mascott, 370 F.3d 924, 929–31 (9th Cir. 2004) (concluding that officer was bound by an injunction against the corporation and could be held in contempt for violating it).

59 *See* 18A WRIGHT ET AL., *supra* note 40, § 4457; *see also* Barrett, *supra* note 19, at 1038 (contrasting broad and narrow forms of virtual representation).

60 *See* Redish & Katt, *supra* note 50, at 1878.

61 *See, e.g.*, Aerojet-Gen. Corp. v. Askew, 511 F.2d 710, 719–20 (5th Cir. 1975).

62 *See, e.g.*, Klugh v. United States, 818 F.2d 294, 300 (4th Cir. 1987); Pollard v. Cockrell, 578 F.2d 1002, 1008–09 (5th Cir. 1978).

63 *See, e.g.*, Tyus v. Schoemehl, 93 F.3d 449, 455–56 (8th Cir. 1996) (articulating seven factors that a court should consider); *see also* Gonzalez v. Banco Cent. Corp., 27 F.3d 751, 760–61 (1st Cir. 1994) (noting that "[t]here is no black-letter rule").

64 *See* Taylor v. Blakey, 490 F.3d 965, 971–72 (D.C. Cir. 2007) (describing identity of interests and adequate representation as necessary factors and requiring an additional showing of a close relationship, substantial participation, or tactical maneuvering), *vacated and remanded sub nom.* Taylor v. Sturgell, 553 U.S. 880 (2008); Irwin v. Mascott, 370 F.3d 924, 929–30 (9th Cir. 2004) (similar).

65 *See Gonzalez*, 27 F.3d at 761 (describing virtual representation as an equitable theory); *see also Taylor*, 553 U.S. at 896 (noting that some virtual representation theories are no broader than existing exceptions to rule against nonparty preclusion).

66 *See* Tice v. Am. Airlines, Inc., 162 F.3d 966, 971–73 (7th Cir. 1998).

67 *See, e.g.*, Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011) (tightening the standards for "commonality" under FED. R. CIV. P. 23(a)(2) and limiting the availability of FED. R. CIV. P. 23(b)(2) class actions); *In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1300–02

that nonparties now may *invoke* it more readily—it has not led to a concomitant power to *bind* nonparties.[68] And in 2008, the Supreme Court in *Taylor v. Sturgell*, almost assuredly sounded the death knell for virtual representation,[69] disapproving what it regarded as "*de facto* class actions" minus the procedural protections of an actual class action.[70]

The Court repeatedly invokes the "deep-rooted historic tradition that everyone should have his own day in court."[71] Accordingly, before preclusion may attach, each person presumptively is entitled to her own day in court as part of the due process right to be heard.[72] As a result, even as many courts have expanded the availability of nonmutual issue preclusion, they have reiterated the overarching rule, subject to only "a handful of discrete and limited exceptions," that a nonparty is not bound by a judgment.[73] Moreover, the trends that some commentators had identified did not signal a broader approach to preclusion. Instead, the Supreme Court in recent years has expressly disapproved some of those experiments or treated them as exceptions that prove the rule.

When the Court in *Taylor* rejected virtual representation, it offered the most comprehensive defense of how the day-in-court ideal should function. After reiterating the presumption against nonparty preclusion, the Court organized "recognized exceptions" to that rule into a taxonomy of six categories.[74] Three of those exceptions permit preclusion when the nonparty has received additional procedural protections. They include situations in which the nonparty was the proxy of an actual party from earlier litigation, had assumed actual control of the prior lawsuit, or was adequately represented through a formal representative action (such as litigation by a fiduciary or through a properly certified class action).[75] Two exceptions essentially flow

(7th Cir. 1995) (limiting the availability of a class action in multistate mass tort cases when plaintiffs could not show that the applicable legal standards were truly the same).

68 *See, e.g.*, Parklane Hosiery Co. v. Shore, 439 U.S. 322, 327 n.7 (1979) ("It is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard.").

69 *See* Minzner, *supra* note 19, at 602 n.20; Richard A. Nagareda, *Embedded Aggregation in Civil Litigation*, 95 CORNELL L. REV. 1105, 1123 (2010); Redish & Katt, *supra* note 50, at 1878, 1887.

70 *Taylor*, 553 U.S. at 901 (quoting *Tice*, 162 F.3d at 973).

71 *Id.* at 892–93 (quoting Richards v. Jefferson Cty., 517 U.S. 793, 798 (1996)); *Richards*, 517 U.S. at 798 (quoting 18A WRIGHT ET AL., *supra* note 40, § 4449); Martin v. Wilks, 490 U.S. 755, 762 (1989) (quoting 18A WRIGHT ET AL., *supra* note 40, § 4449); *see also* Ortiz v. Fibreboard Corp., 527 U.S. 815, 846 (1999) (noting the "day-in-court ideal").

72 *See Richards*, 517 U.S. at 798–99 (linking day-in-court ideal with the due process right to be heard); *see also Martin*, 490 U.S. at 761–62 (discussing day-in-court ideal); Rock v. Arkansas, 483 U.S. 44, 51 (1987) (stating that the right to a day in court is a "necessary ingredient[ ]" of due process); Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (discussing due process right to be heard).

73 Smith v. Bayer Corp., 564 U.S. 299, 312 (2011); *see also Taylor*, 553 U.S. at 898.

74 *See Taylor*, 553 U.S. at 893–95. For a similar taxonomy that organizes the exceptions into eight categories, see Pielemeier, *supra* note 44, at 388–91.

75 *See Taylor*, 553 U.S. at 894–95; *see also* Minzner, *supra* note 19, at 619.

from the needs of property law, permitting nonparty preclusion based on certain preexisting legal relationships (such as between a property owner and a successor in interest) and certain statutory schemes (such as probate and bankruptcy proceedings) that conclusively resolve property claims.[76] And, most straightforwardly, a nonparty may be bound through actual consent.[77] *Taylor* emphasized the limited and discrete nature of these exceptions, and it was particularly critical of suggestions that a nonparty could be adequately represented without the formal procedural protections of a class action.[78]

In some ways, the reticence toward expanding nonparty preclusion might be surprising. Scholars had begun to identify nascent trends toward a more liberal approach to preclusion and had begun to call for courts to embrace broader preclusion principles.[79] To its detractors, though, nonparty preclusion was a siren song—an intellectually unsatisfying and potentially dangerous way to approach these problems.[80] What some scholars identified as the virtues of nonparty preclusion—including its flexibility and functional similarity to class actions[81]—ultimately wound up being the downfall of the more aggressive attempts to expand that doctrine.[82]

II. The Problem of Precedent

Despite the promise of nonparty preclusion, the Supreme Court has reiterated the strong presumption, subject to only carefully delineated exceptions, that preclusion may not apply to a person who has not had her day in court. At the same time, the day-in-court ideal hardly ever comes up with respect to precedent, which can bind nonparties in exactly the same way as preclusion. If binding nonparties through preclusion presents myriad due process concerns, why does binding nonparties through precedent raise no constitutional difficulties at all?

Most scholarship—including important doctrinal and philosophical discussions of precedent[83] and a robust debate about constitutional stare decisis[84]—approaches precedent as an institutional constraint that primarily

76 *See Taylor*, 553 U.S. at 894–95.

77 *See id.* at 893–94.

78 *See id.* at 901.

79 *See* Berch, *supra* note 47, at 531–34; George, *supra* note 47, at 655–56, 674–75; Vestal, *supra* note 52, at 377–81.

80 *See, e.g.*, Issacharoff, *supra* note 29, at 200; Pielemeier, *supra* note 44, at 384.

81 *See* Berch, *supra* note 47, at 520–21; George, *supra* note 47, at 664.

82 *See Taylor*, 553 U.S. at 901 (disapproving virtual representation because it lacked the formal protections of class actions).

83 *See, e.g.*, Neil Duxbury, The Nature and Authority of Precedent (2008); Larry Alexander, *Constrained by Precedent*, 63 S. Cal. L. Rev. 1, 1–5 (1989); Charles L. Barzun, *Impeaching Precedent*, 80 U. Chi. L. Rev. 1625, 1625 (2013); Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 Stan. L. Rev. 817, 817 (1994); Frederick Schauer, Essay, *Authority and Authorities*, 94 Va. L. Rev. 1931, 1931–35 (2008); Frederick Schauer, *Precedent*, 39 Stan. L. Rev. 571, 571–72 (1987) [hereinafter Schauer, *Precedent*].

84 Constitutional stare decisis refers to the Supreme Court's presumption that it should not lightly disturb its earlier interpretations of the Constitution. *See, e.g.*, Richard

affects other adjudicators.[85] Very little inquiry has focused on the potential *due process* concerns that binding precedent potentially raises.[86] This Part contributes to that nascent conversation. After briefly clearing some definitional and doctrinal underbrush, it explores the extent to which precedent and preclusion have converged. Specifically, it shows that binding precedent, like preclusion before it, now sweeps far more broadly than most courts and commentators assume; it demonstrates that the doctrines functionally (if not formally) are subject to similar exceptions; and it assesses the doctrines' procedural similarities. Critically, this Part also treats the remaining distinctions between precedent and preclusion—whether they apply across jurisdictional boundaries and whether a lower court can create law that a higher court must follow. Although these differences are real, they ultimately have no bearing on why one doctrine should be fraught with due process concerns while the other is not.

A. The Mechanics of Precedent

Broadly construed, precedent can mean that a decision, once made, has at least some persuasive force based only on its historical pedigree.[87] The present analysis, though, focuses on the concept of *binding precedent* to explore an obligation that inheres in certain types of precedential decisions.[88] The nature and force of this obligation can vary from court to court. For example, a precedent might be binding on some courts but not others; the obligation might be rather weak or verge on absolute. Although the variations are often quite interesting and feature in some of the analysis that follows, a working definition of the overarching concept is useful.

H. Fallon, Jr., Essay, *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570, 570 (2001); John Harrison, Essay, *The Power of Congress over the Rules of Precedent*, 50 DUKE L.J. 503 (2000); Thomas Healy, *Stare Decisis as a Constitutional Requirement*, 104 W. VA. L. REV. 43 (2001); Gary Lawson, *Controlling Precedent: Congressional Regulation of Judicial Decision-Making*, 18 CONST. COMMENT. 191 (2001); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723 (1988); Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey*?*, 109 YALE L.J. 1535 (2000); David L. Shapiro, *The Role of Precedent in Constitutional Adjudication: An Introspection*, 86 TEX. L. REV. 929 (2008).

85 *See* Barrett, *supra* note 19, at 1029; *see also* Barzun, *supra* note 83, at 1647 (noting rule-of-law values that precedent fosters, including political stability); Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 4–5 (2001) (describing stare decisis as a practice that arose in order to constrain courts' arbitrary exercise of discretion).

86 For rare exceptions, see Barrett, *supra* note 19, at 1060–74, and Minzner, *supra* note 19, at 600–12.

87 *See* Schauer, *Precedent*, *supra* note 83, at 571.

88 Courts and scholars sometimes use the term "stare decisis" to refer to one court's nearly absolute duty to follow another court's earlier decision. *See, e.g.*, Taylor v. Sturgell, 553 U.S. 880, 903 (2008) (noting that "*stare decisis* will allow courts swiftly to dispose of repetitive suits brought in the same circuit"). Stare decisis simply acknowledges that earlier decisions merit some weight, but I am principally concerned with stare decisis in its most absolute form.

Perhaps the easiest way to define binding precedent is in opposition to persuasive precedent. A court may refuse to follow merely persuasive precedent for any reason at all, including a simple disagreement with the prior decision.[89] By contrast, a court that confronts binding precedent may not depart from that precedent based solely on the conclusion that the precedential decision was incorrect. This working definition is intentionally capacious. It captures the varying degrees of bindingness that a particular decision might exert on any given court, from the weakest to the strictest forms of obligation.

Binding precedent can operate in three dimensions: vertical, horizontal, and diagonal.[90] Vertical stare decisis refers to the notion that superior courts create precedent that is binding on lower courts. It typically tracks the chain of appellate review.[91] Thus, at the federal level, a judge in the District of Massachusetts is bound by decisions of the U.S. Court of Appeals for the First Circuit, which hears appeals from the District of Massachusetts. But a judge in the District of Alaska, part of the Ninth Circuit, has no obligation to follow First Circuit decisions, which are merely persuasive.[92]

Horizontal stare decisis refers to one court's obligation to follow its own precedents. Here, the variation from jurisdiction to jurisdiction is significantly greater. Decisions of federal district courts, for instance, are not binding even within that district; such precedent is only persuasive.[93] By contrast, panels of any given U.S. Court of Appeals follow a rule of absolute stare decisis within the circuit, such that one panel may not overrule an earlier panel decision.[94] The theory is that the panel generates the opinion of the court,

89 This definition of persuasive precedent is quite close to what Larry Alexander calls the "natural model" of precedent in which a court gives a prior decision the weight that it deserves. *See* Alexander, *supra* note 83, at 5. One complication at the margin of my working definition is that even when a precedent is only persuasive, concerns about intertemporal equality and reliance might lead a court, which is under no formal obligation to follow precedent, nonetheless to give the precedent at least some weight based on its mere existence. *See id.* at 7.

90 The notions of vertical and horizontal stare decisis are well known in the literature. I introduce the term "diagonal" to describe the bindingness of certain decisions across jurisdictions.

91 *See* Caminker, *supra* note 83, at 824–25 (explaining that "a court can ignore precedents established by other courts so long as they lack revisory jurisdiction over it").

92 This is the usual way that vertical stare decisis works, but exceptions apply. For example, the Supreme Court of California has held that inferior courts must abide by decisions from *all* Courts of Appeal, even those that do not have revisory authority over the inferior courts. *See* Auto Equity Sales, Inc. v. Superior Court, 369 P.2d 937, 940 (Cal. 1962) (en banc). This rule applies even though different districts and divisions of the Courts of Appeal are not bound by one another's decisions. *See* 9 WITKIN, CALIFORNIA PROCEDURE § 498 (5th ed. 2008).

93 Caminker, *supra* note 83, at 825.

94 *See* Harrison, *supra* note 84, at 517 (noting an "absolute rule of stare decisis"); *see also* Barrett, *supra* note 19, at 1017–18 & n.20 (collecting cases from every circuit articulating the rule that one panel within the circuit may not overrule a prior panel decision).

and that opinion is binding within (but not outside of) the circuit.[95] Other courts chart a course somewhere between these extremes, according substantial (but not absolute) weight to their own precedents. Examples include the Supreme Court of the United States[96] and the state Courts of Appeal in California.[97]

Diagonal stare decisis involves one court's obligation to follow precedent from another jurisdiction, usually when applying the substantive law of that jurisdiction.[98] Perhaps the most prominent example is the *Erie* doctrine, which generally compels a federal court, when sitting in diversity, to apply state substantive law.[99] In this context, the federal court's obligation to apply state law faithfully is exceedingly strong.[100] The Supreme Court has given states greater latitude in terms of how they apply one another's laws, but the obligation still exists, just in a weaker form.[101]

Hardly any of this is inevitable. Several scholars have made a strong case that the Constitution requires hierarchical precedent—vertical stare decisis—with respect to lower federal courts' duty to abide by Supreme Court precedent.[102] Moreover, diagonal stare decisis—both the *Erie* doctrine and states' duty to apply one another's law faithfully—has roots in constitutional imperatives.[103] Otherwise, stare decisis is a highly contingent doctrine, albeit

95 *See* 18 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 134.02(1)(c) (3d ed. 2015).

96 *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 577 (2003) ("The doctrine of *stare decisis* is essential to the respect accorded to the judgments of the Court and to the stability of the law. It is not, however, an inexorable command.").

97 *See* 9 WITKIN, *supra* note 92, § 499 ("Normally, a Court of Appeal will follow prior decisions of its own or other districts or divisions."); *cf.* People v. Yeats, 136 Cal. Rptr. 243, 245 (Ct. App. 1977) (declining to follow prior panel decision).

98 *See* Minzner, *supra* note 19, at 607 ("In situations where jurisdictions are not applying their own law, flexibility is effectively eliminated.").

99 *See* Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 427 (1996).

100 *See, e.g.*, Johnson v. Fankell, 520 U.S. 911, 916 (1997); 19A CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4507 (3d ed. 2016).

101 *See* Sun Oil Co. v. Wortman, 486 U.S. 717, 730–31 (1988) (holding that one court's misconstruction of a sister state's law violates due process only when the misconstruction "contradict[s] law of the other State that is clearly established and that has been brought to the court's attention"); *see also* Alan M. Trammell, *Toil and Trouble: How the* Erie *Doctrine Became Structurally Incoherent (and How Congress Can Fix It)*, 82 FORDHAM L. REV. 3249, 3274–75 (2014).

102 *See* Steven G. Calabresi & Gary Lawson, Essay, *Equity and Hierarchy: Reflections on the* Harris *Execution*, 102 YALE L.J. 255, 273–75 (1992) (basing this conclusion on the Constitution's differentiation of a single Supreme Court and inferior courts); Caminker, *supra* note 83, at 865 (same).

103 *See* Trammell, *supra* note 101, at 3258–60 (summarizing and noting criticism of the constitutional justifications for *Erie*); *id.* at 3275 (noting that the Supreme Court has grounded states' duties in the Full Faith and Credit Clause, U.S. CONST. art. IV, § 1, and the Due Process Clause, U.S. CONST. amend. XIV, § 1).

one that some scholars have defended on sound pragmatic grounds.[104] But the variations in how stare decisis operates in the United States (between jurisdictions and at different judicial levels)[105] and in different legal systems[106] suggest that precedent need not bind courts or litigants as rigidly as it does. In fact, the complete absence of binding precedent in many European judicial systems has not caused them to devolve into chaos.[107]

Given that binding precedent need not operate exactly as it currently does in many American jurisdictions, the question becomes whether it *should* operate differently. In other words, even if stare decisis is eminently sensible from an institutional perspective, has it evolved into (or always been) a doctrine that is necessarily in tension with individual due process norms?

B. The Collapse of Traditional Distinctions

Traditionally scholars and courts have understood precedent and preclusion to govern fundamentally different inquiries and to operate in significantly different ways. Certain salient differences continue to exist. But the most plausible ways to distinguish the doctrines—and the due process concerns that they might raise—have largely collapsed. First, precedent is no longer a completely flexible tool and can often be just as binding as preclusion. Second, the distinction between fact and law can no longer justify treating preclusion and precedent so differently because both doctrines now apply in large measure to the same types of inquiries. Third, similar procedural rules govern how and when parties and courts may invoke the doctrines.

1. Precedent and Preclusion Often Apply With Equal (In)flexibility

The best traditional reason for viewing binding precedent as distinct from preclusion is that the two operate with differing degrees of flexibility. According to this argument, preclusion, when it applies, does so absolutely.[108] By contrast, even when precedent is binding, it supposedly retains a degree of flexibility.[109] If this is true, then preclusion is a different beast altogether because, when applied to nonparties, it conclusively resolves the rights and obligations of people who never had an individual opportunity to be heard. The supposed flexibility of binding precedent largely defuses any

104 *See* Caminker, *supra* note 83, at 867 ("The duty to obey circuit precedent *generally* is dictated by the balance of salient values; the extreme *rigidity* of the duty, while eminently sensible, reflects a far more controversial judgment.").

105 *See supra* notes 90–101 and accompanying text.

106 *See, e.g.*, 2 GIDEON BOAS ET AL., ELEMENTS OF CRIMES UNDER INTERNATIONAL LAW 344–45 (2008) (describing stare decisis within the United Nations ad hoc tribunals).

107 *See, e.g.*, Barrett, *supra* note 19, at 1070, 1073; Caminker, *supra* note 83, at 826–27.

108 *See* James Wm. Moore & Elizabeth B. A. Rogers, *Federal Relief from Civil Judgments*, 55 YALE L.J. 623, 623 (1946) (noting that preclusion "confers something approaching absolute stability upon final judgments"); *see also* Lee, *supra* note 16, at 652 (similar).

109 *See* CASAD & CLERMONT, *supra* note 17, at 15 (noting that, in contrast to preclusion, "stare decisis . . . permits courts to handle precedent much more flexibly").

due process concerns precisely because someone who had not participated in an earlier lawsuit can urge courts to distinguish or even overrule precedent.

The problem, as others have observed, is that precedent often applies just as absolutely as preclusion does.[110] This is most obvious with respect to vertical stare decisis, which one scholar has called "as close to an absolutely binding model of precedent as there is in Anglo-American law."[111] The Supreme Court, for example, has repeatedly held that lower courts should continue to apply precedent that directly governs the facts of a case, even when the precedent appears discredited, and leave to the Supreme Court "the prerogative of overruling its own decisions."[112]

The same is largely true with respect to certain aspects of diagonal stare decisis, particularly federal courts' virtually unflagging duty to apply state substantive law in diversity cases. Courts and commentators have long recognized that the *Erie* doctrine nearly always forbids federal courts from anticipatorily overruling an anomalous or antiquated decision of the state's highest court.[113] The rare exceptions essentially prove the strength of the overarching rule.[114]

A more recent development is the near absolute strength of horizontal stare decisis within federal courts of appeals. As noted above, those courts now follow a rule of absolute stare decisis, such that one panel may not overrule an earlier panel decision.[115] True, a litigant has the opportunity to seek en banc review from the entire court of appeals, but the chances of such review are exceedingly small—some estimates put the rate around one percent—largely because courts do not regard en banc rehearing as an avenue for mere error correction.[116] The opportunity for Supreme Court review is similarly small. In this sense, horizontal stare decisis at the court of appeals level is nearly as absolute as the dictates of vertical stare decisis and the *Erie* doctrine.

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110 *See* Barrett, *supra* note 19, at 1043–47; Minzner, *supra* note 19, at 606–09.

111 Barzun, *supra* note 83, at 1661.

112 Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989); *see also, e.g.*, Agostini v. Felton, 521 U.S. 203, 237 (1997) (quoting the language from *Rodriguez*).

113 *See, e.g.*, Johnson v. Fankell, 520 U.S. 911, 916 (1997) ("Neither this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the State."); Stern v. Cont'l Assurance Co. (*In re* Ryan), 851 F.2d 502, 509 (1st Cir. 1988) (observing that a federal court may not decline to follow an old precedent, even one from 1869, absent persuasive evidence that the state's highest court would overrule its decision).

114 *See, e.g.*, Mason v. Am. Emery Wheel Works, 241 F.2d 906, 909–10 (1st Cir. 1957) (not following Mississippi Supreme Court precedent from 1928 because that court itself had clearly called the precedent into question).

115 *See supra* notes 94–95 and accompanying text.

116 *See* Barrett, *supra* note 19, at 1045–46.

In some respects, the rigidity of binding precedent is a relatively new development.[117] Amy Coney Barrett, for example, describes the rule of absolute stare decisis in the federal courts of appeals as a development of the second half of the twentieth century.[118] The *Erie* doctrine, of course, dates slightly further back, to 1938.[119]

Although scholars have explored the rigidity of stare decisis—at least in some of its various guises—this is only part of the story about the convergence of precedent and preclusion. Just as stare decisis can prove less flexible than its rhetoric suggests, so too preclusion can function more malleably than its absolutist language insists. Preclusion's flexibility, though, typically comes at the front end of the inquiry—that is, when deciding whether it applies at all.[120] For example, the *Restatement (Second) of Judgments* recognizes an exception to issue preclusion when its application would have an "adverse impact" on "the public interest."[121] More generally, issue preclusion should not apply unless the party to be bound had a "full and fair" opportunity to litigate a particular question.[122] And when discussing preclusion, Charles Clark famously noted the "judicial tenderness towards defeated litigants."[123] Thus, when a judge determines the scope of claim preclusion—the realm of claims that a party no longer may bring because she failed to assert them in an earlier, related lawsuit—judges often define preclusion narrowly in order to give a party her day in court regarding the previously omitted claims.[124] Similarly, in the issue preclusion context, judges sometimes define the precise "issue" that was in stake in the first litigation quite narrowly, thereby preventing preclusion from attaching.[125] The upshot of these various excep-

117 Thomas Lee concludes that "the modern muddle over stare decisis has been with us since the founding era." Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647, 651 (1999). He does conclude, however, that the absolute bindingness of vertical stare decisis was well established. *See id.* at 663–64.

118 *See* Barrett, *supra* note 19, at 1066 & n.214.

119 *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

120 Once preclusion applies, it typically applies absolutely. Thus, any flexibility inheres in deciding whether it applies in the first instance.

121 *See* RESTATEMENT (SECOND) OF JUDGMENTS § 28(5)(a) (AM. LAW INST. 1982).

122 *See id.* § 28(5)(c).

123 CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 145 (2d ed. 1947).

124 *See* Alan M. Trammell, *Transactionalism Costs*, 100 VA. L. REV. 1211, 1239–40 (2014) (noting that in the compulsory counterclaim context, judges sometimes define the "transaction or occurrence" in explicitly narrow terms in order to give a party who had not asserted a claim in a prior lawsuit the opportunity to assert that claim in a subsequent lawsuit).

125 *See, e.g.*, Hardy v. Johns-Manville Sales Corp., 681 F.2d 334, 341–45 (5th Cir. 1982) (finding ambiguity as to whether a jury in the first lawsuit had determined that "all manufacturers of asbestos-containing insulation products knew or should have known of the dangers of their particular products at all relevant times").

tions is a fairly capacious (if occasionally surreptitious) safety valve that allows judges to avoid what they perceive as unfairness and injustice.[126]

These exceptions to preclusion's absoluteness often bear a striking resemblance to the factors that the Supreme Court has identified as counseling a departure from stare decisis. For instance, the Court has said that it is more likely to overrule an earlier precedent that has proved unworkable or has not generated significant societal reliance.[127] At a very high level of abstraction, courts tend to embrace flexibility across the doctrines when there are special concerns about accuracy, efficiency, and reliance. But in contrast to the way that the exceptions to preclusion work—as palliatives on the front end to determine whether preclusion applies at all—the exceptions to stare decisis typically come on the back end when a court assesses whether certain factors militate against adhering to otherwise applicable precedent. But when courts exercise discretion—on the front end or the back end—seems to have very little practical effect on the fundamental flexibility or inflexibility of the respective doctrines.

* * *

Although binding precedent does not operate uniformly, in many instances it applies just as rigidly and absolutely as preclusion does. Moreover, preclusion often admits of exceptions that function similarly to those that mitigate stare decisis, even if those exceptions come into play at different times during a court's analysis. But the overall conclusion is clear: precedent and preclusion frequently evince the same degree of flexibility (or lack thereof). Consequently, the received wisdom that binding precedent is constitutionally unproblematic because of its inherent flexibility does not withstand critical analysis.

2. The Law-Fact Distinction Has Little Explanatory Power

The other traditional basis for distinguishing between precedent and preclusion involves the law-fact distinction, with precedent typically governing legal questions and preclusion applying to intensive factual inquiries. Although courts and scholars have not deeply theorized that distinction as a basis for differentiating between precedent and preclusion, two principal justifications come to mind.

First, one might believe that an individual litigant is more entitled to a day in court—and thus that preclusion should apply only sparingly—with regard to factual questions that are highly particularized. The theory is that when resolving a factual matter, as opposed to broader legal norms, an initial party and the court might not adequately consider how that resolution will

126 *See* CASAD & CLERMONT, *supra* note 17, at 130 ("In actual practice, courts apply issue preclusion quite flexibly, invoking many exceptions in situations squarely within the rule's three requirements.").

127 *See* Lawrence v. Texas, 539 U.S. 558, 576–77 (2003); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854–55 (1992).

affect nonparties. As Part III explores at greater length, many of the assumptions underlying this intuition are sound, but that intuition—specifically, the importance of whether a decision-making process takes sufficient cognizance of nonparty interests—does not turn in any meaningful way on whether a matter is nominally factual or legal.

A second and far more practical justification stems from necessity, if not pure logic. In a common law system in which judicial decisions actually create law (for example, broad swaths of contract and tort law), judicial decisions, much like legislation, necessarily apply to society at large. The notion that judicial decisions on pure questions of law bind future litigants is axiomatic in a common law system and, almost by definition, cannot present due process problems. The axiom is arguably a feature of, rather than a bug in, the system.

The biggest problem for this argument is that, as a descriptive matter, the law-fact distinction lacks explanatory power. With respect to preclusion, the *Restatement (Second) of Judgments* has abandoned the distinction altogether,[128] in significant part because many issues present mixed questions of law and fact. Trying to parse the difference between questions of law versus the application of law to facts had become a difficult, arbitrary, and ultimately unnecessary exercise.[129]

In the last generation, courts largely have embraced the *Restatement*'s approach, rejecting the difference between law and fact for preclusion purposes. Among the more notable examples are two cases in which the Supreme Court applied issue preclusion to pure questions of law. *Montana v. United States* held that the U.S. government was bound by issue preclusion as to whether a Montana tax on public contractors was constitutional.[130] Similarly, in *United States v. Stauffer Chemical Co.*, the Court had no compunction about applying issue preclusion to a question of law—whether the term "authorized representatives," as used in the Clean Air Act, applied to private contractors.[131] Other courts have also applied issue preclusion in the context of a "pure legal question."[132] Such questions can include the existence of personal jurisdiction over a defendant,[133] the availability of certain documents under the Freedom of Information Act,[134] the existence of actual

128 RESTATEMENT (SECOND) OF JUDGMENTS § 27 (AM. LAW INST. 1982) (articulating the requirements of issue preclusion, which may apply to any "issue of fact or law").

129 *See* CASAD & CLERMONT, *supra* note 17, at 130.

130 Montana v. United States, 440 U.S. 147, 151–53 (1979).

131 United States v. Stauffer Chem. Co., 464 U.S. 165, 166, 172 (1984).

132 *See* Nat'l Classification Comm. v. United States, 765 F.2d 164, 169 (D.C. Cir. 1985) (applying issue preclusion against the Interstate Commerce Commission on the question whether it had exceeded its authority under two statutory provisions).

133 *See* Deckert v. Wachovia Student Fin. Servs., Inc., 963 F.2d 816 (5th Cir. 1992).

134 *See, e.g.*, Nat'l Treasury Emps. Union v. IRS, 765 F.2d 1174, 1176–78 (D.C. Cir. 1985).

authority to enter into contracts,[135] the reviewability of agency action,[136] and the existence of probable cause under the Fourth Amendment.[137]

Even as courts have overwhelmingly eliminated the distinction between law and fact in the preclusion realm, the distinction endures in one strange way. Courts and the *Restatement* have usually offered the caveat that issue preclusion should not apply to pure questions of law unless the lawsuits that raise those questions are substantially related.[138] In *Stauffer*, the Court expressed skepticism about this vestigial difference, observing that "the purpose underlying the exception for 'unmixed questions of law' in successive actions on unrelated claims is far from clear."[139] This exception is all the more curious because even scholars who endorse it observe that stare decisis can accomplish the same goal—that is, applying settled law to unrelated claims.[140]

Notwithstanding this slight caveat, whether preclusion applies no longer turns on the distinction between law and fact. A party who has had a full and fair opportunity to litigate a question—whether it is a factual question, a mixed question, or even a pure legal question—may be precluded. This much is relatively well established.[141]

A less appreciated aspect of how much precedent and preclusion have converged is the extent to which binding precedent now applies not just to broad legal matters but also to mixed questions and intensely factual issues. In some instances, courts are applying what looks strikingly like a version of nonparty preclusion under the guise of precedent. Because the courts are binding nonparties to determinations from earlier litigation, they generally may not rely on preclusion, lest they run afoul of extant due process constraints. Instead, they achieve the same result through a surprising and rather surreptitious use of binding precedent. Examples from two areas of law—the Religious Land Use and Institutionalized Persons Act (RLUIPA) cases and sexual harassment cases—illustrate how courts have expanded precedent's sweep.

Under RLUIPA,[142] a government may not impose a "substantial burden" on a prisoner's religious exercise unless imposing such a burden (1) "is in furtherance of a compelling governmental interest" and (2) "is the least restrictive means" of pursuing that interest.[143] The Supreme Court has

135 *See, e.g.*, Soults Farms, Inc. v. Schafer, 797 N.W.2d 92, 103–06 (Iowa 2011).

136 *See, e.g.*, Equitable Tr. Co. v. Commodity Futures Trading Comm'n, 669 F.2d 269, 275 (5th Cir. 1982).

137 *See, e.g.*, State v. Griese, No. 03-3097-CR, 2004 WL 2002492, at *1 (Wis. Ct. App. Sept. 9, 2004).

138 *See* Montana v. United States, 440 U.S. 147, 162 (1979); RESTATEMENT (SECOND) OF JUDGMENTS § 28(2) cmt. b (AM. LAW INST. 1982).

139 United States v. Stauffer Chem. Co., 464 U.S. 165, 172 (1984).

140 *See* CASAD & CLERMONT, *supra* note 17, at 130, 132.

141 Barrett, *supra* note 19, at 1049–51; Minzner, *supra* note 19, at 609–10.

142 Pub. L. No. 106-274, 114 Stat. 803 (2000) (codified as amended at 42 U.S.C. §§ 2000cc–2000cc-5 (2012)).

143 42 U.S.C. § 2000cc-1(a).

emphasized that this test requires an individualized, case-by-case assessment.[144] But in conducting what should be an individualized analysis, courts often circumvent that requirement by resorting to precedent that they consider binding.

Consider, for example, hair length regulations in prisons. Courts usually find or assume that requiring inmates to cut their hair imposes a substantial burden on religious exercise. Accordingly, the main question under RLUIPA is whether such regulations are the least restrictive means of pursuing the government's compelling interest in ensuring prison safety.[145] In 1996, when considering a Missouri prison regulation on hair length, the Eighth Circuit held that there was no less restrictive way to prevent contraband and thereby ensure safety within a maximum security facility.[146] Twelve years later, an inmate challenged a similar regulation in Arkansas. Under RLUIPA, the inmate was theoretically entitled to an individualized assessment of whether less restrictive ways of ensuring prison safety were available, and indeed he had adduced evidence on this point, including the fact that, unlike the Missouri prison, the Arkansas prison was not a maximum security facility.[147] Even though these assessments are supposed to be fact intensive—an inherent aspect of a least-restrictive-means analysis—the Eighth Circuit simply relied on precedent to declare that the Arkansas regulation was valid under RLUIPA.[148] Other courts have taken a similar approach with respect to hair length regulations.[149] These courts make a subtle, but sometimes explicit, move in treating a fact-intensive inquiry as a matter of law that becomes binding through precedent.[150] In other words, they seem to have blended nonparty preclusion with binding precedent.

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144 *See* Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 430–31, 436 (2006); *see also* Holt v. Hobbs, 135 S. Ct. 853, 863–64 (2015). The Court has also made clear that the RLUIPA test applies the same standards as those developed in the context of the Religious Freedom Restoration Action (RFRA). *See id.* at 860 (discussing the Religious Freedom Restoration Act of 1993, Pub L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. § 2000bb–2000bb-4 and 5 U.S.C. § 504 (2012)).

145 *See* James D. Nelson, Note, *Incarceration, Accommodation, and Strict Scrutiny*, 95 VA. L. REV. 2053, 2080–84, 2106 (2009) (discussing different courts' approaches to prison grooming regulations).

146 Hamilton v. Schriro, 74 F.3d 1545, 1554–55 (8th Cir. 1996). *Hamilton* involved RFRA, but as noted above, courts have construed the RFRA and RLUIPA standards to be the same.

147 Fegans v. Norris, 537 F.3d 897, 909 (8th Cir. 2008) (Melloy, J., concurring in part and dissenting in part).

148 *See id.* at 903 (majority opinion) (holding that "the rationale of *Hamilton* thus applies with equal force in this case" and that there was "no basis to distinguish these safety and security concerns from those deemed sufficient in *Hamilton*").

149 *See, e.g.*, Longoria v. Dretke, 507 F.3d 898, 902–04 (5th Cir. 2007) (per curiam); Gooden v. Crain, 405 F. Supp. 2d 714, 721 (E.D. Tex. 2005), *aff'd in part, vacated in part*, 255 F. App'x 858 (5th Cir. 2007) (per curiam).

150 *See, e.g.*, *Longoria*, 507 F.3d at 904 (holding that earlier Fifth Circuit precedent on a Texas grooming policy "provided sufficient basis for the district court to hold, *as a matter of law*, that Longoria did *not* state a claim under RLUIPA" (first emphasis added));

Perhaps the clearest example of this phenomenon in the RLUIPA context comes from a case in which a district court treated precedent as binding on an intensely factual matter, even though the underlying premises of the precedent had changed significantly. The precedential opinion by the Eighth Circuit, *Hamilton v. Schriro*, found that the government's compelling interest in safety justified a prison's prohibiting a Native American sweat lodge on prison grounds.[151] Even though the prison at issue in that case had later accommodated a sweat lodge,[152] a lower court treated *Hamilton* as applicable and binding precedent.[153] The lower court acknowledged what appeared to be drastically changed circumstances—namely, that the factual predicate of the precedential decision itself was no longer true—but nonetheless treated *Hamilton* as establishing, as a matter of law, that the denial of a sweat lodge in *any* Missouri prison represented the least restrictive means of ensuring prison safety.[154] Again, binding precedent seems to be doing the work of nonparty preclusion with regard to a very specific factual question.

The second context in which precedent often appears to be functioning as preclusion traditionally had is sexual harassment law. Under Title VII of the Civil Rights Act of 1964,[155] a plaintiff can state a claim for sexual harassment on the theory that an employer has created a hostile work environment by showing, among other things, that the harassment was "based on" her (or his) sex.[156] This element of a sexual harassment claim essentially turns on whether an employer evinced sex-based animus toward an employee, which necessarily is context and case specific.[157]

Atomanczyk v. Quarterman, No. 2:07-CV-0052, 2008 WL 941205, at *1–2 (N.D. Tex. Apr. 3, 2008) (holding that a Texas grooming policy was the least restrictive means of pursuing a compelling government interest and that the plaintiff's argument to the contrary "lacks an arguable basis in law and is frivolous").

151 *Hamilton*, 74 F.3d at 1555–56.

152 Pounders v. Kempker, 79 F. App'x 941, 943 n.2 (8th Cir. 2003) (per curiam).

153 Fowler v. Crawford, No. 05-4212-CV, 2007 WL 2137803, at *6 (W.D. Mo. July 23, 2007), *aff'd*, 534 F.3d 931 (8th Cir. 2008).

154 *See id.* at *7 ("Based on the precedent of this Circuit . . . there is no dispute of material fact that [the] restriction on a sweat lodge is supported by the state's compelling state interest in safety and security."); *id.* at *8 (holding that "no reasonable judge could distinguish this case from *Hamilton*").

155 42 U.S.C. § 2000e-16(a) (2012).

156 Generally courts recognize five elements of a prima facie case for sexual harassment. The employee must show (1) that he or she is a member of a protected class; (2) that he or she was subject to "unwelcome" harassment; (3) that the harassment was "based on" sex; (4) that the harassment affected "term[s], condition[s], or privilege[s]" of employment; and (5) that there is a basis for establishing the employer's liability. LITIGATING THE SEXUAL HARASSMENT CASE 5 (Matthew B. Schiff & Linda C. Kramer eds., 2d ed. 2000); *see* 2 SUSAN M. OMILIAN, SEX-BASED EMPLOYMENT DISCRIMINATION § 22:2 (Supp. 2006); *see also, e.g.*, Mendoza v. Borden, Inc., 195 F.3d 1238, 1245 (11th Cir. 1999) (en banc).

157 *See, e.g.*, Harris v. Forklift Sys., Inc., 510 U.S. 17, 22–23 (1993) (noting that hostile work environment claims are not subject to "a mathematically precise test" and that

Notwithstanding the supposed fact specificity of sexual harassment claims, courts frequently treat certain factual disputes as matters of law that precedent can resolve. Take, for example, how they handle the word "bitch." Some courts have held that an employer's use of that word automatically creates a jury question as to whether the employer has acted with animus toward the employee "based on" her sex. These courts have reasoned that "bitch" is sex-specific profanity and inherently degrading.[158] Some courts have even contrasted "bitch" with other terms, like "honey" and "baby," that are less inherently vulgar and thus do *not* necessarily give rise to a jury question regarding sex-based animus.[159] In other words, even though a sexual harassment inquiry is heavily fact dependent, these courts have effectively declared what the term "bitch" means as a matter of law.

One might argue that the RLUIPA and sexual harassment cases are simply wrong, that courts have shirked their duty to engage in fact-sensitive inquiries. My objective here, though, is not to assess the legal correctness of certain court decisions. Instead, the cases highlight a broader descriptive phenomenon—the law-fact distinction no longer distinguishes precedent from preclusion. Just as preclusion doctrine for decades has applied to all manner of factual and legal questions, so too binding precedent has come to govern not just legal disputes but also highly specific factual matters. Granted, precedent has expanded more surreptitiously. Sometimes an observer might have a difficult time determining whether a court is resolving factual disputes simply through analogies to earlier cases or whether a court is treating an earlier precedent as truly binding on an intensely factual question. But occasionally courts do explicitly invoke the language of binding precedent in this context.[160] Even if the two doctrines do not always apply in equal measure to every particular question, so little currently hinges on the law-fact distinction that it cannot explain why nonparties may be bound through stare decisis but not through preclusion.

"whether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances").

158 *See, e.g.*, Reeves v. C.H. Robinson Worldwide, Inc., 525 F.3d 1139, 1144 (11th Cir. 2008) (holding that "sex specific" language, like "bitch," "satisfies the 'based on' element in a sexual harassment hostile work environment case even when the language does not target the plaintiff"), *vacated and reh'g en banc granted*, 569 F.3d 1290 (11th Cir. 2009), *and rev'd on reh'g en banc*, 594 F.3d 798 (11th Cir. 2010); EEOC v. PVNF, L.L.C., 487 F.3d 790, 799 (10th Cir. 2007) (recognizing "bitch" as a sexual epithet and holding that "a jury should decide whether these comments were made because of gender animus"); *see also, e.g.*, Semsroth v. City of Wichita, 304 F. App'x 707, 725 (10th Cir. 2008); Murphy v. City of Aventura, 616 F. Supp. 2d 1267 (S.D. Fla. 2009), *aff'd*, 383 F. App'x 915 (11th Cir. 2010) (per curiam); Thornton v. Flavor House Prods., Inc., No. 1:07-CV-712, 2008 WL 5328492, at *8 (M.D. Ala. Dec. 19, 2008); Bryce v. Trace, Inc., No. CIV-06-775, 2008 WL 819494, at *3 (W.D. Okla. Mar. 25, 2008); Turton v. Kempthorne, No. 06-cv-00451, 2007 WL 2788618, at *6 (D. Colo. Sept. 21, 2007).

159 *See* Winsor v. Hinckley Dodge, Inc., 79 F.3d 996, 1000–01 (10th Cir. 1996).

160 *See, e.g.*, *supra* notes 148, 151–152 and accompanying text.

3. The Manner of Invoking the Doctrines

One of the less appreciated traditional distinctions between precedent and preclusion is the way that a party or a court may raise an argument based on the doctrines. A party may invoke the force of binding precedent at nearly any point in litigation—in a motion to dismiss, in an answer, at the summary judgment stage, and even when requesting jury instructions. Moreover, parties have an obligation to direct a court to binding authority.[161] And if the parties have failed to cite authority that controls a case, courts may raise the issue of binding precedent on their own. By contrast, preclusion is an affirmative defense in most jurisdictions.[162] Accordingly, a party that fails to raise a preclusion defense in its answer usually forfeits that defense altogether.[163] Moreover, a party may expressly waive a preclusion defense.[164]

But here, too, the traditional distinction has become much less stark. Over the last several decades, courts have expressly relaxed their approach to preclusion defenses. Some courts have allowed parties to raise the defense at stages other than in the answer to a complaint.[165] Perhaps most significantly, courts have increasingly held that a party's failure to invoke preclusion does not automatically forfeit the defense, in part because preclusion protects not just individual liberty interests but also institutional interests in efficiency and consistency.[166] Accordingly, a number of courts, including the Supreme Court, have recognized that courts may raise a preclusion defense—unlike nearly every other affirmative defense—on their own motion.[167]

Differences still remain. Even as courts largely recognize their power to raise preclusion defenses on their own, they often note that such power is discretionary and usually should reflect institutional concerns.[168] As courts

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161 *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(2) (AM. BAR ASS'N 1983).

162 *See, e.g.*, FED. R. CIV. P. 8(c)(1) (listing res judicata and estoppel as affirmative defenses).

163 *See, e.g.*, Arizona v. California, 530 U.S. 392, 410 (2000) (describing "res judicata" as "an affirmative defense ordinarily lost if not timely raised").

164 *See* 18 WRIGHT ET AL., *supra* note 100, § 4405; *see also, e.g.*, Nat'l Treasury Emps. Union v. IRS, 765 F.2d 1174, 1176 n.1 (D.C. Cir. 1985) (noting that parties may expressly waive a preclusion defense).

165 *See, e.g.*, Muhammad v. Oliver, 547 F.3d 874, 878 (7th Cir. 2008) (permitting a party to invoke preclusion in a motion to dismiss); Banco Santander de P.R. v. Lopez-Stubbe (*In re* Colonial Mortg. Bankers Corp.), 324 F.3d 12, 20 (1st Cir. 2003) (same).

166 *See, e.g.*, Clodfelter v. Republic of Sudan, 720 F.3d 199, 209 (4th Cir. 2013) (noting that "a concern for judicial efficiency" justified "the district court's sua sponte consideration of res judicata"); Consol. Edison Co. of N.Y. v. Bodman, 445 F.3d 438, 451 (D.C. Cir. 2006) ("[B]ecause interests of judicial economy are at stake in preclusion doctrines, courts retain the power to consider such doctrines sua sponte.").

167 *See Arizona*, 530 U.S. at 408–12 (noting that "special circumstances" can justify a court raising a preclusion defense on its own motion); *see also, e.g.*, *Clodfelter*, 720 F.3d at 207–10; *Consol. Edison*, 445 F.3d at 451; Mowbray v. Cameron Cty., 274 F.3d 269, 281–82 (5th Cir. 2001); Doe v. Pfrommer, 148 F.3d 73, 80 (2d Cir. 1998).

168 *E.g.*, Scherer v. Equitable Life Assurance Soc'y of the U.S., 347 F.3d 394, 398 n.4 (2d Cir. 2003).

have come to recognize that preclusion reflects both personal and institutional concerns—just as precedent does—they have adopted a more capacious view of when and how they can address whether preclusion should apply. The differences in this context, as in others, are less stark than they once were and offer further evidence that the doctrines have converged in terms of the circumstances under which they apply.

C. The Enduring Distinctions Between Precedent and Preclusion

At various points, I have cautioned that while precedent and preclusion are no longer hermetically sealed categories (if they ever were), they have not merged entirely. Differences remain, and that is unsurprising. Two enduring distinctions, though, seem particularly worthy of consideration, as they might offer the best justification for why precedent, but not preclusion, may readily bind nonparties.

First, the doctrines, as conventionally understood, have differing geographic scopes. Binding precedent is usually geographically confined and follows the line of appellate review, meaning that it typically exists only within a given jurisdiction.[169] By contrast, preclusion is not so geographically constrained. In fact, questions of interjurisdictional preclusion—how much preclusive effect a judgment in one jurisdiction should exert in a sister jurisdiction—have generated sustained attention from courts and scholars in recent decades.[170] Although those questions can be quite complicated, a very rough rule of thumb is that the court that renders a judgment also determines the preclusive consequences of that judgment.[171] Consequently, a rendering court usually dictates to other courts—both within and outside a given jurisdiction—how much preclusion flows from the judgment.

Second, the doctrines differ in terms of lower courts' power to bind higher courts. Precedent moves, so to speak, in only one direction: a superior court creates binding precedent for an inferior court but not vice versa.[172] Preclusion is different, though. At least under certain circumstances, a lower court can render a decision that, through preclusion, a higher court—even one that has appellate jurisdiction over the lower court—may not revise.[173] Consider a situation in which a lower court resolves a par-

169 *See supra* notes 91–92 and accompanying text.

170 *See, e.g.*, Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497 (2001); Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75 (1984); Stephen B. Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 CORNELL L. REV. 733 (1986); Ronan E. Degnan, *Federalized Res Judicata*, 85 YALE L.J. 741 (1976); Howard M. Erichson, *Interjurisdictional Preclusion*, 96 MICH. L. REV. 945 (1998).

171 *See, e.g.*, *Migra*, 465 U.S. at 81 ("It is now settled that a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered."); *see also* Degnan, *supra* note 170, at 773 (arguing that rendering courts should dictate the preclusive effects of their judgments).

172 Caminker, *supra* note 83, at 824–25.

173 *See, e.g.*, Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394, 398 (1981).

ticular question—say, a party's liability under a contract—and the losing party does not appeal. In a subsequent lawsuit involving the same contract, the losing party from the first lawsuit likely may not revisit the question of its liability,[174] even if the second lawsuit moves up the chain of appellate review. Issue preclusion from the first lawsuit is binding, and even a superior court in the second lawsuit must accept that question as settled.

These two enduring differences might suggest that preclusion is a more powerful tool than precedent: a lower court can generate preclusion even if a higher court has not reviewed the judgment, and those preclusive tentacles have greater reach throughout all court systems in the country. If this is true, then perhaps one could argue that courts have sensibly cabined their power to bind through preclusion but not precedent.

Despite these very real differences in how precedent and preclusion operate, they ultimately cannot bear the weight of explaining why *due process* severely constrains preclusion doctrine but allows stare decisis to operate unencumbered. First, precedent is not always geographically confined. As discussed above, diagonal stare decisis—when one court is applying law from another jurisdiction—means that precedent (like preclusion) can and does travel across jurisdictional borders.[175] Second, and more importantly, most potential concerns about preclusion that flow from the differences just described are institutional or structural in nature. They have almost nothing to do with due process.

What problems might derive from the fact that an inferior court can render a preclusion-generating (but not precedent-creating) judgment? In the main, the concerns are institutional—a superior court's desire to maintain its supervisory power over lower courts.

Consider, for example, the question of whether issue preclusion should apply to alternative, independently sufficient grounds of decision by a trial court. Some courts and the *Restatement (Second) of Judgments* take the position that preclusion should *not* apply.[176] They reason that giving preclusive effect to alternative holdings, which an appellate court has not yet reviewed, might unnecessarily incentivize a losing litigant to appeal all aspects of an adverse judgment and that, in any event, a lower court might not have given sufficient attention to alternative holdings.[177] In other words, on this view preclusion should not apply because of concerns about efficiency and accuracy. But many courts reject this departure from the usual rule that a holding by a

174 *See id.* (noting that a "final, unappealed judgment on the merits" is usually entitled to preclusive effect).

175 *See supra* notes 98–101 and accompanying text.

176 *See* RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. i (AM. LAW INST. 1982); *see also, e.g.*, *In re* Baylis, 217 F.3d 66, 71–72 (1st Cir. 2000) (applying Massachusetts law); Winters v. Diamond Shamrock Chem. Co., 149 F.3d 387, 393–96 (5th Cir. 1998); Arab African Int'l Bank v. Epstein, 958 F.2d 532, 535–37 (3d Cir. 1992) (applying New Jersey law).

177 *See* RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. I (AM. LAW INST. 1982).

lower court is entitled to preclusive effect.[178] Instead, they note that concerns for efficiency and fairness, as in most instances, call for preclusion to apply once a party has fully and fairly litigated a question, regardless of whether an appellate court has reviewed the judgment.[179]

This disagreement—like many similar debates about preclusion's sweep—pertains to whether a broad or narrow rule will advance preclusion's underlying structural or institutional purposes (efficiency, accuracy, and the like). Note what the disagreement is *not* about: due process. In the example above, courts assume that an actual party has fully and fairly litigated a question. To bind that party through preclusion cannot violate a due process norm precisely because the party has already enjoyed full participation rights. Accordingly, the debate about whether to cabin preclusion concerns matters ancillary to what due process requires.

Precedent and preclusion do differ in some of their particulars, and at times courts implicitly recognize that the doctrines reflect different structural or institutional goals. But if a nonparty is to be bound through precedent or preclusion, the individual due process concerns are almost identical. As a result, the enduring differences between precedent and preclusion ultimately cannot explain why courts treat preclusion, but not precedent, as raising a bevy of due process difficulties.

III. Theoretical Underpinnings of Precedent and Preclusion

In light of the tension between precedent and preclusion, the challenge now lies in explaining why they often generate such divergent results, and what, if anything, courts should do about the tension.

The first step in answering those questions is discerning what underlying theories of due process motivate the two doctrines. With respect to preclusion, the day-in-court ideal that features quite prominently in the caselaw is based on a participation-oriented theory that values individual participation for its own sake, not simply as a means toward the end of accurate decision-making.[180] This assessment should be rather uncontroversial. Discerning the due process theory that underlies precedent is less straightforward. I argue, though, that the concept of binding precedent—even absolutely binding precedent—is fully consistent with due process, but rests on an outcome-oriented theory that focuses on a mélange of factors, including reliance, predictability, and (perhaps counterintuitively) accuracy.

The second step, then, is deciding which theory should hold sway. I suggest that the outcome-oriented theory is consonant with most facets of civil litigation today. By contrast, the participation-oriented theory has become an anomaly—a costly one at that, considering that such participa-

178 *See* Jean Alexander Cosmetics, Inc. v. L'Oreal USA, Inc., 458 F.3d 244, 251 (3d Cir. 2006) (collecting cases from the Second, Seventh, Ninth, and Eleventh Circuits).

179 *See id.* at 254.

180 *See* Bone, *supra* note 54, at 205.

tion-oriented norms have prevented courts from realizing the full promise of nonparty preclusion.

At the outset, one might question whether the concept of precedent—even binding precedent—is subject to a due process analysis. It is, after all, a constitutive element of a common law judicial system and thus perhaps is an axiom that requires no due process justification.

Some constitutive elements of government indeed might be impervious to due process challenges—for example, the choice to have a bicameral legislature. Other working assumptions—for instance, state courts' power to create common-law crimes—might be subject to due process challenges (such as lack of fair notice) that would have been unheard of in the eighteenth century.

More importantly, though, the reason that most constitutive elements of government are not subject to individual due process challenges is because they provide a mechanism for making pure policy decisions. If a local government, for example, is trying to decide whether to build a new park, there is not really a right or a wrong answer. The only procedural rights that apply are in ensuring that elections and local board meetings are procedurally proper. But the question "Should we build a new park?" is fundamentally different than the question "Did an employer illegally fail to pay overtime to its employees?" The latter is a question that is susceptible to answers based on objective criteria under law. Courts are engaged in a truth-seeking enterprise, and, therefore, the means by which they resolve these kinds of questions are subject to individual due process challenges. Accordingly, the mechanism by which precedent can bind litigants by resolving concrete legal disputes requires a due process justification.

A. Two Competing Theories of Due Process

The due process theory that undergirds the current approach to preclusion is fairly clear. The Supreme Court has grounded preclusion rules in a participation-based theory, one that regards the individualized day in court as inherently valuable.[181] Someone who was not a party to an earlier lawsuit enjoys a strong presumption that she may revisit a matter that a court resolved in an earlier proceeding. Unlike in the stare decisis context,[182] the nonparty bears no special burden of proving that the earlier decision has

181 *See id.* (arguing that "the day in court ideal has always been tied in an essential way to a *process-oriented* theory of participation"); Redish & Katt, *supra* note 50, at 1880 (arguing that "the day-in-court rule springs from society's democratic commitment to the precept of process-based autonomy"); *see also* Roger H. Trangsrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. ILL. L. REV. 69, 74 (arguing that "individual claim autonomy . . . is an important personal right of the individual"); Roger H. Trangsrud, *Joinder Alternatives in Mass Tort Litigation*, 70 CORNELL L. REV. 779, 816–20 (1985) (noting and defending the historic tradition of individual litigant control).

182 *Cf.* Lawrence v. Texas, 539 U.S. 558, 576–77 (2003) (discussing hurdles to overcome stare decisis); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854–55 (1992) (same).

proved unworkable or even that additional process is likely to lead to a different (much less a better) result.[183]

The day-in-court ideal suggests that courts do not value participation because it leads to better results.[184] Defending participation rights because they foster better outcomes would certainly be coherent (if contestable), but that is not how courts have conceptualized the right to participate. Rather, they treat participation as an inherent good, even if the precise values that such participation fosters—whether dignity,[185] equality,[186] liberal democracy,[187] or something else—are open to debate. In fact, the Supreme Court has never been clear on defining those values with particularity. But figuring out which noninstrumental values are at stake is not critical for present purposes.[188] Rather, it suffices to observe that in the preclusion context, the Supreme Court has always regarded participation as intrinsically valuable, and that is the quintessence of a participation-based theory of due process.

The due process justification for precedent is far more enigmatic. In many ways, the idea that binding precedent is fully consistent with due process has been axiomatic, largely because it has always been ingrained in, and a defining feature of, American legal culture.[189] Discerning why this is so—and, specifically, the vision of due process that precedent vindicates—takes some work. The task of defending what nearly everyone regards as eminently

183 A *nonparty*'s presumed right to revisit a matter resolved in an earlier lawsuit—irrespective of potential accuracy gains—stands in contrast to the hurdles that a *party* must overcome. In the latter situation, a party can resist issue preclusion when the quality or extensiveness of the procedures applicable to the two lawsuits is significantly different. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 28(3) (AM. LAW INST. 1982). Critically, though, a party has already enjoyed certain participation rights, whereas a nonparty has not.

184 *See* Bone, *supra* note 54, at 205 (arguing that the day-in-court ideal "values freedom of strategic choice apart from its impact on outcome quality"); Redish & Katt, *supra* note 50, at 1889–90 (noting that process-based theories value participation "whether or not decisionmaking accuracy is improved as a result"); *see also* Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 275 (2004) (arguing that "[t]he value of participation cannot be reduced to the effect of participation on outcomes").

185 This view is most closely associated with some of Jerry Mashaw's seminal work. *See, e.g.*, JERRY L. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE 158–253 (1985); Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U. L. REV. 885, 887–98 (1981); Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge*: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 49–52 (1976) [hereinafter Mashaw, *The Supreme Court*].

186 *See* Jane Rutherford, *The Myth of Due Process*, 72 B.U. L. REV. 1, 70–74 (1992); *see also* Robert S. Summers, *Evaluating and Improving Legal Processes—A Plea for "Process Values,"* 60 CORNELL L. REV. 1, 25 (1974) ("[R]egardless of whether fair equality of access improves process results, the features that secure this equality are valuable.").

187 *See* Redish & Katt, *supra* note 50, at 1892–94.

188 This question might matter in a different context—for example, when trying to discern the precise circumstances in which a court may deviate from the day-in-court ideal. If the values that participation promotes are not at stake in a given case, then arguably the day-in-court ideal can operate more flexibly.

189 *See* CASAD & CLERMONT, *supra* note 17, at 16 (noting that "nobody questions the constitutionality of stare decisis").

defensible is not a purely academic exercise. Either binding precedent presents a tremendous due process problem[190] or else it reveals surprising insights into why preclusion can (and, I argue, should) function much differently than it currently does.

The first step in exploring binding precedent's due process underpinnings is to recognize that precedent, as currently understood and practiced in the United States, in many instances is simply irreconcilable with the day-in-court ideal. Courts and commentators do not value broad participation in this context. Admittedly, courts have been increasingly generous in allowing interested parties to intervene in litigation,[191] and the number of amicus filings, particularly at the Supreme Court, has been increasing rapidly over the last several decades.[192] While the opportunity to participate might be on the rise, the binding effect of precedent has never depended on such opportunities. More to the point, people who are interested in participating as intervenors or amici curiae usually do not receive any sort of formal notice that a particular case is pending. Consequently, even expanded opportunities to participate do not meaningfully comport with the day-in-court ideal, which presumptively entitles a party to notice and a right to be heard.[193]

Binding precedent instead most clearly reflects the values of a competing theory—an outcome-oriented theory that is consequentialist in nature.[194] In contrast to the participation-oriented theory that characterizes current approaches to preclusion, an outcome-oriented theory is principally concerned with the *results* that litigation aspires to achieve, and participation is valuable only to the extent that it facilitates the attainment of those results.[195]

What results does precedent aspire to achieve? Traditionally, courts and scholars have defended binding precedent based on a mélange of considera-

190 *See infra* Section III.B.

191 *See* FED. R. CIV. P. 24; *see also, e.g.*, Grutter v. Bollinger, 188 F.3d 394 (6th Cir. 1999) (finding that interested individuals and groups could intervene as a matter of right in high-profile affirmative action lawsuits); Carl Tobias, *Standing to Intervene*, 1991 WIS. L. REV. 415.

192 *See* Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 751–56 (2000); Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 VA. L. REV. 1757, 1758 (2014).

193 My analysis draws on the "no participation" theory that, according to Robert Bone, best explains the historical origins of virtual representation and the idea that courts may preclude nonparties from relitigating certain questions. *See* Bone, *supra* note 54, at 203.

194 Robert Bone refers to this as an efficiency-based theory of adjudication, and his focus is primarily on maximizing accurate decisionmaking. *See* Bone, *supra* note 54 at 238–51. Lawrence Solum calls this consequentialist vision of due process the Balancing Model. *See* Solum, *supra* note 184, at 252–57. However, an outcome-oriented theory need not be consequentialist. Drawing on Dworkinian theory, Bone develops a rights-based theory of adjudication that is also outcome-oriented. *See* Bone, *supra* note 54, at 256–64.

195 On the instrumental value of participation, see Susan P. Sturm, *The Promise of Participation*, 78 IOWA L. REV. 981, 996–97 (1993) (arguing that participation can help identify the relevant actors in a dispute, promote cooperation with the remedy that a court orders, yield better substantive outcomes through dialogue, and educate actors responsible for implementing a remedy).

tions—judicial economy (because courts have to decide fewer cases from scratch),[196] the rule of law (insofar as precedent cabins judicial discretion and thereby guards against abuses of power),[197] and basic fairness (by "treating like cases alike").[198] Although these defenses usually reflect institutional goals, they also promote individual fairness by creating uniformity, predictability, and reliance.[199]

From a due process perspective, reliance interests are overwhelmingly the reason that scholars have cited when justifying a rule of precedent following even when, in a particular case, a court believes that an earlier precedent is incorrect.[200] In some situations, that reliance interest is paramount. For example, if a society is deciding whether its members should drive on the left side or the right side of the road, there is not really a "correct" answer. But it is absolutely critical, from a reliance perspective, that people achieve clarity on that point. The same is probably true with respect to many legal filing deadlines. There is nothing magical, for instance, about the date April 15, but people have a strong interest in knowing the date by which they must file their federal income taxes. These are classic situations in which—as Justice Brandeis observed—it is far more important that the rule simply be settled rather than settled in any particular way.[201] In these cases there is no need for additional procedures. In fact, revisiting a settled decision will only upset reliance without any corresponding benefits.

Reliance cannot be the full story, though, in justifying binding precedent. Accuracy still matters for due process, and only the truly rare cases require little or no concern for accurate decisionmaking. Without offending any accuracy norm, a society could determine by coin flip whether its members will drive on the left side or the right side of the road. But in most cases, using a coin flip to establish a precedent will be an intolerable way of laying down the law that will apply to all future parties.

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196 *See, e.g.*, FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 145–49 (1991) (making the efficiency argument for precedent); Caminker, *supra* note 83, at 840–43 (arguing that precedent's bright-line rules foster judicial economy). *But see* Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029, 1042–43, 1047–48, 1066 (1990) (rejecting utilitarian defenses of precedent and defending precedent based on Burkean traditionalism).

197 *See, e.g.*, Barzun, *supra* note 83, at 1647 (arguing that precedent "curbs the discretion of judges, thereby limiting potential abuses of power").

198 RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 113 (1978); *cf.* Alexander, *supra* note 83, at 9–13 (noting that precedent fosters "intertemporal equality" but that such a value is weak).

199 *See, e.g.*, SCHAUER, *supra* note 196, at 137–45; Barzun, *supra* note 83, at 1658; Caminker, *supra* note 83, at 850–51; *see also* Schauer, *Precedent*, *supra* note 83, at 597 (noting that predictability can foster autonomy).

200 *See, e.g.*, Alexander, *supra* note 83, at 50–51. Max Minzner has linked due process and reliance interests most explicitly. *See* Minzner, *supra* note 19, at 615–21.

201 Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

If accuracy is part of an outcome-oriented defense of precedent, one might legitimately wonder whether *accuracy* is usefully definable. To my mind, it denotes the result (or discrete group of possible results within a decisionmaker's discretion) that best applies preexisting rules governing people's rights and responsibilities to the particular situation at hand. Put another way, an accurate outcome best conforms to the underlying substantive law.[202] Others might define accuracy in terms of whether a court fashions or applies rules that reflect a specific conception of justice (for example, a rule that maximizes efficiency, social welfare, or individual dignity). But very little hinges on the precise definition. One need only accept that more and less accurate results are possible when measured against whatever metric one chooses.

The idea that accuracy matters from a due process perspective is almost self-evidently true with profound legal questions like, for example, whether the Federal Constitution prohibits gender discrimination. Almost everyone probably intuits that resolving that question by coin flip would run afoul of due process. But this is true even when reliance interests are more important than accuracy concerns. For example, a state's highest court might be considering whether to announce a rule of contract law that presumptively disfavors contracts of adhesion. To my mind, the reliance interests are paramount here. Most people's primary concern lies simply in knowing what the default rule is. The content of the rule still matters, though. Based on whatever accuracy metric one chooses—efficiency, autonomy, etc.—one rule is probably superior to the other, and a court should choose among the various options through a reasoned process that is attuned to getting that choice right.

All of this suggests that the outcome-oriented theory of due process that best explains binding precedent is indeed focused on the results of litigation. The desired result, though, is not simply creating reliance. Rather, precedent is consistent with due process because it strikes a reasonable balance among a host of (sometimes) competing values. From a due process perspective, many of those values are derivative of the institutional goals that scholars have long identified as precedent's hallmarks—predictability, reliance, efficiency, and the like. Perhaps surprisingly, accuracy is also within the potpourri. Though rarely discussed in this context, accuracy concerns almost always lurk in the background and are a critical factor in explaining why one court's precedential decision may, without violating due process, bind people in future cases.

Defending precedent, at least in part, on the basis of accuracy obviously runs into the problem that stare decisis has the potential to entrench inaccurate results. If one court decides a matter incorrectly, binding precedent exacerbates the problem by compelling other courts to replicate the inaccurate result.

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202 *See* Bone, *supra* note 54, at 283.

One way to deal with this problem is essentially definitional. Precedent, by definition, may bind nonparties when the societal and individual interests in reliance outweigh the interests in improved accuracy.[203] Perhaps one might be able to predict a class of cases in which reliance interests will be particularly high—for example, many kinds of property disputes.[204]

The definitional approach, though, either assumes away the problem or is question begging. An outcome-oriented approach indeed suggests that reliance interests can trump accuracy concerns. How do we know whether reliance is more important than accuracy? According to the definitional approach, *every* time a court binds nonparties through precedent, the court has implicitly assumed that reliance is paramount. But that proves too much. This approach suggests that courts can disregard a due process concern for accuracy at will, even though they have not actually considered whether reliance interests are at stake. Moreover, predicting future reliance on any given decision in many instances is likely to be, at best, an educated guess. And perhaps most problematically, the definitional approach cannot explain why nonparties are entitled to a day in court before preclusion may attach, yet they may be bound through precedent (supposedly because of the preeminence of reliance interests) regarding the exact same question.

The challenge, then, comes into sharper relief. How is precedent consistent with due process if one assumes that due process, at the very least, guarantees some minimal degree of procedural rights that will facilitate the accurate resolution of cases? Judges have a variety of tools at their disposal to mitigate what they perceive as incorrect results. A court can distinguish or narrow a precedent that is arguably controlling.[205] It might explicitly overrule its own precedent. Or when confronting merely persuasive authority, a court can forthrightly disagree with that precedent and decline to follow it. None of these safety valves, though, is directly pertinent to the task at hand. Instead, the challenge lies in defending binding precedent in its most absolute form and, in particular, a court's obligation to follow precedent that is arguably (or even demonstrably) erroneous.[206] This is the degree of near absolute bindingness that characterizes many forms of vertical precedent, the rule of absolute stare decisis that federal courts of appeals follow, and some forms of diagonal stare decisis (in particular the *Erie* doctrine).[207]

With that problem squarely in focus, one might formulate the question in a slightly different way. Why should courts believe that a "meta-rule" of

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203 *See* Minzner, *supra* note 19, at 617.

204 *See* Taylor v. Sturgell, 553 U.S. 880, 894 (2008).

205 Richard Re differentiates the concepts of *distinguishing* (that is, concluding that "the precedent, when best understood, does not actually apply" to the case at hand) and *narrowing* (that is, interpreting a precedent as "more limited in scope than . . . the best available reading"). Richard M. Re, Essay, *Narrowing Precedent in the Supreme Court*, 114 COLUM. L. REV. 1861, 1862–63 (2014).

206 *See* Alexander, *supra* note 83, at 4 (noting that precedent poses a problem only when the constrained decisionmaker disagrees with the precedent).

207 *See supra* notes 110–15 and accompanying text.

following precedent will, in the aggregate, generate better results even when, in any given case, a second court might reach a better result than the initial court did?[208]

Although a defense of precedent on the basis of accuracy might seem ironic, it is actually a critical, if counterintuitive, part of the reason to believe that precedent comports with an outcome-oriented view of due process. The essential logic is that, with respect to the judicial system writ large, there is no ex ante reason to believe that one court's resolution of an issue will be more accurate than another court's.[209] In any particular case, of course, this might not be true, but the question is not whether revisiting the issue in *this case* might lead to a better result. Rather, the question is whether, as a matter of first principles, there is reason to believe that relitigating *cases* will lead to better results. To borrow Lawrence Solum's nomenclature, precedent fosters and prioritizes *systemic* accuracy rather than *case* accuracy.[210]

From an ex ante perspective, any decision is just as likely to reach a more accurate result as any other decision. Allowing a broad right to revisit matters that earlier courts have already decided would almost certainly lead to greater *variance* in terms of the results. But there is little ex ante reason—again, with respect to the judicial system as a whole rather than any given case or set of cases—to believe that a litigant who is able to achieve a *different* result has achieved a *more accurate* result.

The argument that the first court's resolution of a matter is just as likely to be correct as a second court's rests on a number of assumptions. First, it assumes that the law and circumstances have remained constant. If they have changed, then the precedent arguably does not apply any longer, such that a court can rightly distinguish it.[211] Second, the argument assumes that the first case adequately equipped the court with the information necessary to make as accurate a decision as possible. In the preclusion context, for example, a party who did not have an opportunity or incentive to litigate a question fully and fairly will typically not be bound by the results of earlier litigation.[212] Precedent does not have such explicit requirements, but a number of doctrines capture the same basic point indirectly. For example, by insisting on actual cases and controversies, as well as adversarial presenta-

208 *See* Alexander, *supra* note 83, at 49–50.

209 *See* Bone, *supra* note 54, at 240–41 (arguing a similar proposition that certain forms of nonparty preclusion effectuate an outcome-oriented view of due process). This analysis relies in significant part on what Bone calls the efficiency-based argument for achieving the greatest degree of accuracy that minimizes social costs. *See id.* at 238–51.

210 *See* Solum, *supra* note 184, at 247.

211 Admittedly, no two cases are ever exactly the same, and a court intent on evading the strictures of binding precedent can point to numerous distinctions. *See* SCHAUER, *supra* note 196, at 183–84. But if a court makes a good faith assessment that the case before it does not fall within the precedential rule, then the precedent simply is not applicable.

212 *See* RESTATEMENT (SECOND) OF JUDGMENTS § 28(5) (AM. LAW INST. 1982); *see also* Bone, *supra* note 54, at 240–41 (noting that the proposition that, ex ante, an initial proceeding is just as likely to generate an accurate result as would a second proceeding rests on an assumption that the parties vigorously litigated the matter in the first proceeding).

tion of issues,[213] courts strive to ensure that they are resolving disputes based on a comprehensive understanding of the issues involved and the future ramifications of their decisions. By no means do any of these doctrines guarantee that courts will have all of the information that they need to reach an accurate result. But they do offer reason to believe that any given court is in just as good a position as any other court to resolve a matter accurately.

One obviously can raise the objection that a court that initially adopts a precedent might reach an incorrect result and that a second court, if allowed to revisit the matter, could correct the error and decide a case more accurately. Nor would one have to reach far to find examples when courts have done just this. But an appeal to the corrigibility of bad decisions omits the flip side of the problem. A second court, if permitted to review a matter decided by the first court, might reach a worse result. This could happen for any number of reasons—less competent judges or lawyers, less motivated parties, or pure happenstance. But without a clear ex ante reason to believe that a second proceeding has structural advantages as compared with the first, then there is no sound reason to assume that allowing a second court to revisit a matter will produce more accurate results.

In fact, there are good reasons to believe that a meta-rule of following precedent will, in the aggregate, lead to more accurate decisionmaking than a case-by-case approach. What Barzun calls the "epistemic deference" rationale suggests that courts should follow precedent because they assume that the previous case or cases reached the correct result,[214] such that following precedent entrenches good decisionmaking. One version of the argument is essentially Burkean in nature—the notion that the collective wisdom of the past is more likely to generate better results than reasoning from abstract principles.[215] Another version essentially relies on institutional speculation—the idea that higher courts, because of the quality and specialization of the judges, are more likely than lower courts to reach better results and that lower courts should defer to those results.[216] Neither of these justifications is fully satisfying, particularly in explaining either why courts should defer to particularly young precedents or why binding precedent should exist outside the realm of vertical stare decisis. Instead, I want to suggest two reasons—one intensely practical and one more theoretical—for believing that a rule of following precedent will lead to more systemically accurate results.

First, at the more quotidian level, following precedent responds to the practical limitations of the real world. Relying on precedent likely leads to more accurate results than would a case-by-case determination of any given

213 *See, e.g.*, Flast v. Cohen, 392 U.S. 83, 95 (1968) (noting that case-and-controversy doctrine "limit[s] the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process").

214 Barzun, *supra* note 83, at 1648.

215 *See id.* at 1649; *see also* DAVID A. STRAUSS, THE LIVING CONSTITUTION 41 (2010); Kronman, *supra* note 196, at 1056.

216 *See* Caminker, *supra* note 83, at 846–47.

issue because of limited resources and the limited capacity of some decisionmakers. As Justice Cardozo observed, the judiciary would be strained to "the breaking point if every past decision could be reopened in every case."[217] Without precedent, a court would have to decide far more cases from scratch and either would buckle under the burden or else would give short shrift to every case. By severely limiting the number of cases that any given court must decide de novo, binding precedent channels scarce judicial resources into the task of deciding a case as accurately as possible the first time around and then allowing subsequent courts to trust in that judgment.

Relatedly, relying on precedent is "an application of the theory of the second-best."[218] Precedent is a type of rule-based decisionmaking under which judges decide cases based on a limited universe of factors. Although rules might prevent a truly enlightened judge from considering a broader array of factors and reaching the most just result in any given case, rules reduce the decisionmaking burden and thereby constrain less able judges' power to wreak havoc. Perhaps this is not the most edifying defense, but it does suggest that binding precedent can avoid worst-case scenarios that might result if less able decisionmakers were unconstrained.[219]

Second, from a more theoretical perspective, the creation of binding precedent is not just a matter of looking backward at past decisions. Instead, "an argument from precedent looks forward as well, asking us to view today's decision as a precedent for tomorrow's decisionmakers."[220] One of the insights from the preclusion literature is that preclusion should not apply to nonparties unless a court has taken adequate cognizance of whether and how a decision will affect the interests of nonparties.[221] This is precisely what happens in the context of precedent, even if that understanding of precedent is counterintuitive at first blush. When a court discerns, announces, and applies a rule of law, by definition it is not just looking backward but is also engaged in a forward-looking enterprise.

Sometimes that act of crafting a precedent-based rule does not actually happen during the time of the initial litigation. The true common-law approach to resolving cases suggests that the process of distilling a rule from prior cases does not happen until a second (or third or fourth) lawsuit takes place. One particularly nice example of this is the development of the category of "ultrahazardous" or, in modern parlance, "abnormally hazardous" activities, which are subject to strict liability rather than negligence.[222] Dur-

217 BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 149 (1921); *see also* SCHAUER, *supra* note 196, at 146–47 (arguing that reliance on precedent "free[s] time, money, and mental space for more worthwhile endeavors").

218 SCHAUER, *supra* note 196, at 152.

219 *See id.*

220 Schauer, *Precedent*, *supra* note 83, at 572–73; *see also* SCHAUER, *supra* note 196, at 182.

221 *See* Bone, *supra* note 54, at 231 (arguing that a nonparty's right to participate hinges on the extent to which the remedy affects her interests and the nonparty's extra-litigative autonomy to control the matters at issue in the lawsuit).

222 *See* RESTATEMENT (SECOND) OF TORTS § 519 (AM. LAW INST. 1977).

ing the nineteenth and twentieth centuries, a number of courts, in discrete situations, held a defendant strictly liable for certain activities. For many decades, American courts often explicitly rejected strict liability theories and, when they applied them, often did so in covert ways.[223] Not until the early twentieth century did courts and the American Law Institute begin to formulate these discrete cases as standing for a particular rule that pertained to an entire category of cases.[224]

At other times, an initial court self-consciously formulates a broad rule. Take for example the Supreme Court's recent decision in *Obergefell v. Hodges*,[225] the case announcing a constitutional right to same-sex marriage. Technically, the decision concerned only state-law prohibitions against same-sex marriage in Michigan, Ohio, Tennessee, and Kentucky.[226] Nevertheless, the breadth of the Court's holding was unmistakable when it declared that "the right to marry is a fundamental right inherent in the liberty of the person, and . . . couples of the same-sex may not be deprived of that right and that liberty."[227] Even lower courts that disagreed with the decision recognized that the rule from *Obergefell* was unambiguous.[228]

A precedent thus becomes a binding rule only when a particular court understands it to be a rule, one that constrains future courts unless they can distinguish or overrule it. By definition, then, the formulation of the rule is not just backward looking but also forward looking. Unlike in other contexts, this process of generating a rule that will be binding even on nonparties does not necessarily have all of the formal trappings that courts usually insist on, including adequacy of representation or the competence of the lawyers.[229] Nonetheless, the forward-looking quality of precedential rules properly trains the judge on the future, not just the past. For this reason, binding precedent, unlike some determinations to which preclusion might attach, is geared toward accurately resolving a matter that will have consequences for future parties in future cases.

From an ex ante perspective, then, absolutely binding precedent is at least as likely—and probably more likely—to produce accurate results than a system in which courts may not rely on precedent and afford each litigant an individual day in court. This claim is relatively modest. It does not insist that precedent in its most absolute form is likely to lead to the most accurate results. In fact, a system that incorporates some flexibility—for example, the

223 Virginia E. Nolan & Edmund Ursin, *The Revitalization of Hazardous Activity Strict Liability*, 65 N.C. L. Rev. 257, 266 (1987).

224 *Id.* at 260–66.

225 135 S. Ct. 2584 (2015).

226 *See id.* at 2593.

227 *Id.* at 2604.

228 *See, e.g.*, Order, *Ex parte* State *ex rel.* Ala. Policy Inst., 200 So. 3d 495, 561 (Ala. Mar. 4, 2016) (per curiam); *id.* at 600 (Bolin, J., concurring specially) ("I do not agree with the majority opinion in *Obergefell*; however, I do concede that its holding is binding authority on this Court."); Costanza v. Caldwell, 167 So. 3d 619 (La. 2015).

229 *Cf.* Fed. R. Civ. P. 23(a)(4) (adequacy of representation requirement for class representatives); Fed. R. Civ. P. 23(g) (requirements for class counsel).

Supreme Court's power to overrule its own precedents and federal district courts' inability to create binding precedent—is probably superior to a system in which a court may *never* revisit a precedent. The precise calibration of bindingness and flexibility that would lead to the most accurate results is probably elusive. But it is not especially critical for present purposes. From an outcome-oriented perspective, any system of precedent is likely to yield more accurate results than the alternative conception, one that would allow each person her own day in court to litigate a matter that is currently subject to stare decisis.

B. Responding to the Tension

In light of the competing theories of due process that have contributed to the tension between precedent and preclusion, three responses seem possible. First, courts could level up, so to speak, by relying on the participation-oriented theory—ensure that litigants enjoy the same presumption of an individual day in court before they can be bound through either preclusion or precedent. Second, courts could try to disentangle the doctrines and return them to their traditional spheres. Third, courts could embrace the outcome-oriented theory and level down—recognize that just as nonparties do not enjoy an unfettered right to contest the binding effect of precedent, so too they should not be entitled to a day in court before preclusion may attach. I briefly consider the first two approaches here and then defend the third—leveling down—in the following Section.

The idea of leveling up more or less corresponds to an argument advanced by then-Professor Amy Coney Barrett, whose pathbreaking article was the first to diagnose the modern tension between precedent and preclusion. She makes a convincing case that precedent can be so absolutely binding that at times it runs afoul of the day-in-court ideal that dominates the preclusion jurisprudence.[230] But that analysis implicitly assumes that a strong participation-based theory is the standard that should govern every inquiry about who can be bound by the results of prior lawsuits.[231] Even if that assumption were correct (and I contend below that it is not), the conclusion, as a logical matter, is too timid.

Barrett argues that binding precedent has, in some applications, lost essential flexibility.[232] She proposes that in order to save stare decisis, courts should level up—granting more due process protections in the stare decisis context—by restoring at least a modicum of flexibility to the doctrine.[233]

230 *See* Barrett, *supra* note 19, at 1038–39, 1043–47.

231 *See id.* at 1060–61 (arguing that stare decisis "poses the same due process problem as the application of issue preclusion to nonparty litigants").

232 *See id.* at 1043–47.

233 *See id.* at 1061 (arguing that courts should remove "structural barriers to error-correction," including the federal courts of appeals' adherence to a rule of absolute stare decisis); *id.* at 1062–64 (arguing that litigants should have an opportunity to prove that "precedent demonstrably conflicts with the statutory or constitutional provision it purports to interpret" and should be overruled).

But if the problem is that due process should afford every litigant her own day in court, how is extremely strong (to say nothing of absolutely binding) precedent consistent with that premise? Under the current approach to preclusion, a court may not bind a litigant who has not received notice of a lawsuit or had an opportunity to be heard. A court could not evade this stricture by articulating a strong presumption in favor of nonparty preclusion—for example, presumptively binding all future litigants, who then can overcome the presumption only by proving that the earlier decision was demonstrably erroneous. Such minimal flexibility in the preclusion context almost assuredly would run afoul of the day-in-court ideal.

If Barrett's diagnosis is correct, then the solution should be far more radical—the abolition of all binding precedent. By no means would that be catastrophic, as demonstrated by the traditions of many civil law systems that reject the notion of binding precedent.[234] But such an approach would be out of step with American jurisprudential traditions. If the day-in-court ideal were the lodestar according to which courts should orient both precedent and preclusion, then the entire concept of binding precedent would have to fall. The survival of binding precedent at all, even in a more circumscribed form, suggests that precedent necessarily reflects a very different theory of due process than the day-in-court ideal that currently animates preclusion doctrine. Consequently, eliminating the tension between precedent and preclusion by leveling up is nearly impossible because *any* concept of binding precedent is irreconcilable with giving each litigant her own day in court.

The second response to the doctrinal tension is that precedent and preclusion are two fundamentally different concepts, and even if they have become intertwined in recent years, they should return to their traditional functions. Precedent should govern large legal questions that apply broadly to everyone, and preclusion should apply to fact-intensive inquiries that affect litigants in uniquely personal ways.

The unalloyed version of this argument has a seductive elegance, but it winds up being unhelpfully reductionist. Although precedent and preclusion sometimes became entangled surreptitiously, or even through judicial sloppiness, there were (and remain) sound reasons for intentionally desegregating the doctrines.

The *Restatement (Second) of Judgments*, for example, reflects the considered view of numerous courts that preclusion's applicability should not turn on the oft-elusive fact-law distinction.[235] If a party has had a full and fair opportunity to litigate a matter, preclusion should attach. Whether that matter is purely legal, purely factual, or a mixed question of law and fact seems to have little (if any) relevance to preclusion's underlying goals.

Furthermore, from a practical perspective, figuring out whether a matter is sufficiently "factual" to merit preclusion or sufficiently "legal" to be binding through precedent can be a mind-bending exercise. Suppose that we return

234 *See id.* at 1070, 1073; Caminker, *supra* note 83, at 821, 826; Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 918–19 (1989).

235 *See* RESTATEMENT (SECOND) OF JUDGMENTS § 27 (AM. LAW INST. 1982).

to a world in which precedent governs law and preclusion governs facts. How would this dichotomy apply to mixed questions of law and fact? How should a court parse whether a particular holding is a legal conclusion, a factual conclusion, or an application of law to facts? Perhaps we could devise good ways to answer these questions, but the inquiries themselves do not seem calculated to lead to fruitful results.

Perhaps most critically, returning to a dichotomous world would not address a fundamental problem of due process that the current doctrinal tension exposes. If stare decisis applied only to strictly legal matters—situations in which courts are clarifying what "the law" is—why do the parties to an initial lawsuit have the right to formulate and present arguments, yet nonparties have no right either to participate in that lawsuit or to argue for a different rule in a subsequent lawsuit? In other words, even if disentangling precedent and preclusion were possible, such an approach would do nothing to clarify what precisely due process protects and why only some people may fully participate in shaping precedents that have the force of law.

Max Minzner has offered a more nuanced and sophisticated version of this second response, which seeks to differentiate precedent and preclusion.[236] He largely defends the status quo—the idea that precedent may readily bind nonparties, whereas preclusion may not—by placing the doctrines within the framework of *Mathews v. Eldridge*,[237] which articulates a balancing approach to determine whether due process requires a particular procedural safeguard.[238] Minzner argues that the balancing test takes cognizance of public and private reliance interests. The extent of reliance on a previous judgment justifies why precedent and preclusion operate so differently. Accordingly, precedent may bind nonparties when society has a strong interest in having certain questions settled and because reliance interests outweigh the potential value of giving litigants the opportunity to revisit those questions.[239] By contrast, preclusion typically applies only to actual parties to litigation because nonparties' reliance interest is low, meaning that the judicial system can afford to give those nonparties their own day in court while not upsetting settled expectations.[240] And, as Minzner points out, many of the exceptions to the rule against nonparty preclusion (principally those

236 *See* Minzner, *supra* note 19, at 621 (arguing that stare decisis is inappropriate when reliance interests are low and when the actual parties may challenge the binding effect of certain judgments, including those infected with corruption).

237 424 U.S. 319 (1976).

238 *Mathews* essentially requires courts to balance (1) the private interest in a given procedure, (2) the risk of an erroneous deprivation without that procedure (and the likely value that the procedure would add), and (3) the government's interest (including an interest in avoiding the cost of additional procedures). *See id.* at 335. *Connecticut v. Doehr* expanded the third factor to take account of civil litigation in which the opposing party might not be the government but nonetheless might have an interest antagonistic to the party seeking additional procedural safeguards. 501 U.S. 1, 11 (1991).

239 *See* Minzner, *supra* note 19, at 616–17.

240 *See id.* at 617–18.

exceptions concerning property rights) exist in large part because of important reliance interests.[241]

Minzner's analysis is elegant, but it is not fully satisfying. Although reliance interests are a principal justification for stare decisis, the *Mathews* framework is quite utilitarian and actually does not explain the current approach to preclusion, which values the individualized right to a day in court.[242] An important part of *Mathews* involves weighing the costs and benefits of additional process for purposes of achieving better (read: more accurate) results.[243] But the overarching rule against nonparty preclusion does not engage in that sort of balancing. To the contrary, as discussed earlier, the rule values participation for its own sake, irrespective of whether more process is likely to yield greater accuracy. In other words, the lack of broad reliance interests is not why preclusion generally applies only to parties but not nonparties.

Moreover, from a normative perspective, formulating the scope of stare decisis and preclusion based on how much reliance a case may or may not generate seems fraught with difficulties. Even if courts can identify certain classes of cases that are likely to generate significant reliance, trying to predict the extent of reliance will probably be, at best, a rough guess. Most problematically, it would inevitably require the resegregation of precedent and preclusion, and, as discussed above, there are good reasons why courts should be reluctant to treat the doctrines as hermetically sealed categories.

C. Leveling Down and Expanding Preclusion

Only one option remains for alleviating the tension between the doctrines and their underlying theories: leveling down. This approach would recognize that courts have relatively broad power to bind nonparties through both precedent and preclusion. Not only is it the sole remaining option, but it usefully embraces the outcome-oriented theory of due process that best explains binding precedent and, in fact, most approaches to procedural design both within and outside the litigation context. Moreover, an outcome-oriented approach to nonparty preclusion would help solve what, until now, have been intractable problems of serial litigation. This Section concludes by identifying some of the paradigmatic situations in which an expanded approach to nonparty preclusion would be especially desirable and briefly sketching how courts should address nonparty preclusion in other contexts.

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241 *See id.* at 619–20.

242 *See* Mashaw, *The Supreme Court*, *supra* note 185, at 46–57 (describing and criticizing *Mathews*'s utilitarian framework); Ryan C. Williams, *Due Process, Class Action Opt Outs, and the Right Not to Sue*, 115 COLUM. L. REV. 599, 616 (2015) (noting that the *Mathews* framework is "difficult to reconcile" with the day-in-court ideal).

243 *See Mathews*, 424 U.S. at 335; *see also Doehr*, 501 U.S. at 11.

1. The Dominance of the Outcome-Oriented Theory

An outcome-oriented theory of due process already is the dominant approach in most of civil procedure as well as in the legislative and administrative law contexts. Accordingly, the participation-oriented approach to preclusion—the day-in-court ideal—is actually anomalous.[244] In most areas of civil procedure, participation rights almost always must yield to countervailing concerns for efficiency and, especially, accuracy when those values conflict.

This subordination of participation rights is most readily apparent with respect to lawsuit structure.[245] In many instances, parties do not have complete power to decide when and where they litigate certain claims. Sometimes a plaintiff *must* bring another party into the lawsuit, usually when the litigation, in that required party's absence, would run the risk of generating incomplete relief or inconsistent judgments.[246] Similarly, litigants often *must* bring certain claims once a lawsuit has commenced (or else forfeit those claims).[247] In the federal system, and the overwhelming majority of states, a defendant must bring a counterclaim that stems from the "transaction or occurrence" that is the subject of the plaintiff's lawsuit.[248] In that situation, a defendant chooses neither the time nor the forum in which she must bring her claim. And in most jurisdictions, plaintiffs usually face a similar obligation—through claim preclusion, if not an explicit rule—to bring all transactionally related claims within a single lawsuit.[249] In such situations, the plaintiff is not truly the master of his own complaint.

Although mandatory joinder rules most obviously compromise litigant autonomy, permissive joinder rules and discretionary rules can have a similar, if somewhat more subtle, effect. If a plaintiff chooses to join multiple defendants together in one lawsuit, each defendant loses a degree of autonomy in terms of how to present her case.[250] The more defendants who wind

244 *See* Jay Tidmarsh, *Superiority as Unity*, 107 NW. U. L. REV. 565, 573 (2013) (noting that although "the Supreme Court has paid occasional homage to the 'day in court' ideal," it has "declined to read most aspects of the adversarial system into the Due Process Clause").

245 Much of the following discussion draws on Robert Bone's recent arguments about how various rules of civil procedure compromise party autonomy. *See* Bone, supra note 33, at 617–24. Given the comprehensiveness of his treatment of these issues, I sketch them only briefly and refer the interested reader to his excellent article.

246 *See, e.g.*, FED. R. CIV. P. 19(a)(1).

247 *See* Trammell, *supra* note 124, at 1221–22 (describing forfeiture rules with respect to transactionally related claims and compulsory counterclaims).

248 *See, e.g.*, FED. R. CIV. P. 13(a) (compulsory counterclaims); *see also* Trammell, *supra* note 124, at 1276–78 (noting that forty states and the District of Columbia have similar compulsory counterclaim provisions).

249 *See* Trammell, *supra* note 124, at 1270–75 (noting that at least "[t]hirty-four states and the District of Columbia unambiguously or quite likely take a transactional approach to claim preclusion").

250 *See, e.g.*, FED. R. CIV. P. 20(a).

up in the lawsuit, the less autonomy each enjoys.[251] Likewise, a nonparty's decision to intervene in a lawsuit forces the original parties to share a stage with the intervenor.[252] Moreover, a judge has discretion to consolidate or bifurcate cases for trial,[253] again diminishing the parties' power to control the lawsuit's structure.

In addition to the structure of lawsuits, the location of lawsuits frequently reflects an outcome- (rather than participation-) oriented theory of due process. Although the plaintiff initially chooses the forum, various mechanisms allow defendants and—most importantly from an outcome-oriented perspective—courts to move the lawsuit away from the plaintiff's chosen forum. For example, in the federal system, a defendant may seek to transfer a case to another federal court when the alternative forum is more convenient or "in the interest of justice."[254] Admittedly, the defendant bears the burden of demonstrating that the alternative forum is superior to the plaintiff's initial choice.[255] Critically, though, the decision whether to transfer a case ultimately rests with the judge, who is supposed to base such decisions on societal interests in fairness and efficiency.[256] Federal judges also have the power to concentrate related cases in a single forum. Under the Multidistrict Litigation statute, when cases presenting common factual questions are pending in different districts, a panel of judges may transfer those cases to a single judge for coordinated pretrial proceedings.[257] Here, too, such decisions prioritize broader societal interests in convenience, justice, and efficiency over any particular litigant's preferences.[258]

Some of the incursions on party autonomy, at first blush, might seem slight. After all, even if parties in the examples above do not enjoy unfettered autonomy, they are still formally involved and actually participate in the litigation. But a participation right has never depended solely on whether someone is a formal party. Instead, the right to participate—one's day in court—traditionally entails the power to exercise "actual control over

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251 *See* Bone, *supra* note 33, at 617.

252 *See, e.g.*, FED. R. CIV. P. 24(a), (b) (intervention as of right and permissive intervention).

253 *See* FED. R. CIV. P. 42(a), (b) (consolidation and separation).

254 28 U.S.C. § 1404(a) (2012).

255 *See, e.g.*, Delta Air Lines, Inc. v. Chimet, S.p.A., 619 F.3d 288, 295 (3d Cir. 2010); Filmline (Cross-Country) Prods., Inc. v. United Artists Corp., 865 F.2d 513, 521 (2d Cir. 1989) (quoting Ford Motor Co. v. Ryan, 182 F.2d 329, 330 (2d Cir. 1950)); Momenta Pharm., Inc. v. Amphastar Pharm., Inc., 841 F. Supp. 2d 514, 522 (D. Mass. 2012). Plaintiffs also may seek to transfer a case. *See* Alan M. Trammell & Derek E. Bambauer, *Personal Jurisdiction and the "Interwebs,"* 100 CORNELL L. REV. 1129, 1183 (2015). But such a move obviously does not impinge on the plaintiff's litigation autonomy.

256 *See* Trammell & Bambauer, *supra* note 255, at 1182; *see also, e.g.*, Ferens v. John Deere Co., 494 U.S. 516, 529 (1990) ("Section 1404(a) also exists for the benefit of the witnesses and the interest of justice, which must include the convenience of the court.").

257 *See* 28 U.S.C. § 1407(a).

258 *See id.* (authorizing MDL transfers that "will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions").

the lawsuit."[259] Thus, a diminution of someone's control over a lawsuit, by definition, restricts that person's participation right, at least as the Supreme Court has developed that concept in the preclusion context. Accordingly, even a relatively minor restriction on litigation autonomy demonstrates that courts have prioritized societal interests over autonomy. In other words, when autonomy conflicts with accuracy, fairness, or efficiency, procedural rules most often reflect an outcome-oriented (rather than a participation-oriented) theory of due process.

Outside of the litigation context, the dominance of the outcome-oriented approach is even more readily apparent, particularly in the legislative arena. As the Supreme Court has long recognized, there is no due process right to participate in the legislative process.[260] Some courts have explained this conclusion by observing that due process rights simply do not exist in this context.[261] The better view of the law, though, is probably that the legislative process itself sufficiently respects the due process rights of citizens.[262] But either way, individuals do not have the right to receive actual notice, the right to be heard, or the right to vote on any piece of legislation before it goes into effect.

In his thoughtful argument that participation is an essential component of procedural justice, Lawrence Solum suggests that there is a link between participation and legislative legitimacy. Even if citizens do not have a right to vote directly on proposed legislation, statutes are the work of the people's elected representatives. Thus, according to this argument, participation still matters, because unless citizens have an equal right to vote, any law is illegitimate.[263] This is an extremely attenuated vision of participation, particularly if applied in the judicial setting. In some ways, the whole problem with virtual representation in *Taylor v. Sturgell* was that someone could not be bound by a judgment simply on the theory that his interests were adequately represented; rather, the Supreme Court insisted, direct participation and control were necessary prerequisites for preclusion. Moreover, in the judicial setting,

259 *See, e.g.*, Bone, *supra* note 54, at 204; *see also id.* (noting that, in the nineteenth century, someone was a party to litigation only to the extent that he "had a right to make all significant litigation decisions"); Bone, *supra* note 33, at 616 (noting that the right to participate has never entailed a mere "right to appear and accept whatever meager control opportunities are available").

260 *See, e.g.*, Minn. State Bd. for Cmty. Colls. v. Knight, 465 U.S. 271, 283–85 (1984) (citing Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445 (1915)).

261 *See, e.g.*, Jackson Court Condos., Inc. v. City of New Orleans, 874 F.2d 1070, 1074 (5th Cir. 1989) (first citing *Bi-Metallic*, 239 U.S. at 445; then citing United States v. LULAC, 793 F.2d 636, 648 (5th Cir. 1986)); Rogin v. Bensalem Twp., 616 F.2d 680, 693 (3d Cir. 1980).

262 *See, e.g.*, Richardson v. Town of Eastover, 922 F.2d 1152, 1158 (4th Cir. 1991) ("Fairness (or due process) in legislation is satisfied when legislation is enacted in accordance with the procedures established in the state constitution and statutes for the enactment of legislation."); *see also* Hotel & Motel Ass'n of Oakland v. City of Oakland, 344 F.3d 959, 969 (9th Cir. 2003); Minzner, *supra* note 19, at 618–19 n.112.

263 *See* Solum, *supra* note 184, at 276–77.

even less attenuated forms of participation (for example, intervening or filing an amicus brief) are not sufficient to satisfy the day-in-court requirement. So, while it is true that people have a limited right to participate in choosing their representatives, the right to vote is a far cry from the level of participation that undergirds the day-in-court ideal.

The lack of direct participation rights in the legislative arena is, in some ways, a nod to the practical impossibility of conferring such individualized rights upon every person affected by a law. More importantly, though, it also reflects a deeper theoretical point: in the legislative realm, due process focuses on achieving a democratically legitimate outcome (as measured by established processes), rather than ensuring a broad-based participation right.[264]

A similar vision of due process is at work in the administrative law context. In the Supreme Court's classic articulation of the point: "Where a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption."[265] Thus, as with legislation, there is simply no right to participate when an administrative agency promulgates generally applicable rules and regulations. However, agency action that uniquely affects a discrete group of people can trigger a right to notice and a hearing.[266] Even here, though, the participation right is far more circumscribed than it is in the adjudicatory setting, and thus primarily reflects a concern for outcomes. Under the *Mathews v. Eldridge* balancing test, the type and amount of process to which someone is entitled before an administrative agency depends in large part on whether such participation is likely to lead to better results.[267] This is an explicitly utilitarian calculus.[268] Accordingly, it epitomizes an outcome-oriented approach to due process, insofar as it treats participation not as inherently valuable, but only as a means to an end.

2. Expanding Nonparty Preclusion

In closing, I offer a few preliminary thoughts on the practical level if courts were to reorient preclusion doctrine around an outcome-oriented view of due process. To my mind, there are two questions that courts and scholars should keep distinct. First, what are the outer boundaries of nonparty preclusion that due process would tolerate? Second, within those boundaries, how broadly *should* courts apply preclusion?

In answering the first question, there are probably no crisp lines between what is constitutionally permissible and impermissible. As noted above, though, precedent becomes binding only when a court formulates a

264 *See* Bone, supra note 33, at 610–11, 611 n.150.

265 *Bi-Metallic*, 239 U.S. at 445.

266 *See id.* at 445–46 (citing Londoner v. City & Cty. of Denver, 210 U.S. 373, 385 (1908)).

267 Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

268 *See* Williams, *supra* note 242, at 616 (arguing that *Mathews* balancing is in tension with the day-in-court ideal that dominates in the adjudicatory setting).

rule, and that process, by definition, is forward looking in critical respects.[269] On the preclusion side, resolving certain claims and issues can also be forward looking, insofar as courts—even without the formal trappings of a class action or party joinder—have adequately considered how a decision will affect future litigants. In those cases, expanding nonparty preclusion would not violate constitutional due process. Often this will probably reflect the same concerns from the administrative law setting and the classic *Londoner–Bi-Metallic* distinction. A rule that "applies to more than a few people"[270] triggers no individual participation right, whereas a rule affecting a "relatively small number of persons"[271] requires greater respect for individual participation. In the latter situation, due process probably forbids a broad application of nonparty preclusion precisely because a court has not sufficiently considered whether and how the rule will affect a wider swath of people.

At the end of the day, the answer to the first question probably does not matter all that much. The line is admittedly hazy, but an outcome-oriented view of due process is likely capacious and probably would tolerate far greater preclusion than is wise or desirable. The real question thus becomes how courts (and legislatures) *should* expand preclusion.

At this juncture, I hesitate to suggest a comprehensive catalogue of the types of cases in which nonparty preclusion should apply. To my mind, though, there are several obvious candidates, and I hope that future scholarly dialogue will prove fruitful in exploring even more possibilities.

The clearest examples in which courts should have greater latitude to apply nonparty preclusion are in the context of serial litigation by the real party in interest, including many of the situations discussed earlier.[272] For example, when a parent company or its subsidiary has already litigated a matter, binding the other to the results of that litigation will often be advisable. More importantly, when a subsequent lawsuit by the real party in interest can effectively negate the results of earlier lawsuits, nonparty preclusion is particularly attractive and even necessary. Such situations can include public rights cases, including FOIA, and class certification denials. The latter situation has proved particularly bedeviling for judges and scholars, who have considered various ways to deal with the problem, including through different provisions of the Anti-Injunction Act[273] and even via novel proposals that would bind lawyers directly rather than their clients.[274] Under an outcome-oriented view of due process, though, these contortions become unnecessary. Courts actually have the straightforward power to expand the reach of nonparty preclu-

269 *See supra* notes 220–24 and accompanying text.

270 *Bi-Metallic*, 239 U.S. at 445.

271 *Id.* at 445–46 (describing *Londoner*, 210 U.S. at 385).

272 *See supra* Section I.A.

273 *See, e.g.*, Smith v. Bayer Corp., 564 U.S. 299 (2011); *In re* Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig., 333 F.3d 763 (7th Cir. 2003), *abrogated on other grounds by Smith*, 564 U.S. 299; Wolff, *supra* note 7, at 2066–72.

274 *See* Redish & Kiernan, *supra* note 6, at 1662.

sion and should do so if they are satisfied that the question of class certification has been fully aired and vigorously litigated. In this situation, due process simply does not entitle every potential class member to her own day in court, especially if the matter has already been litigated multiple times.

Under an outcome-oriented view of due process, the Supreme Court should also reconsider one of its more controversial preclusion doctrines. In *United States v. Mendoza*, the Court held that the United States could *never* be bound through offensive nonmutual issue preclusion.[275] That is, if the United States litigates a question against one person and loses, someone else cannot use that finding against the government in a subsequent lawsuit. This is a departure from the usual rule that, absent countervailing considerations, offensive nonmutual issue preclusion can be permissible.[276] *Mendoza* reasoned that the United States is uniquely situated for preclusion purposes. The government is more likely than a private party to decline to appeal every adverse ruling, largely because of the amount of litigation that it faces as well as its acute resource constraints.[277] Moreover, broadly precluding the government could prevent the development of the law and eliminate circuit splits, which the Supreme Court uses as a metric to determine which issues are worth its attention.[278]

While the reasoning of *Mendoza* might demonstrate why the United States should not be precluded as readily as a private party, an absolute prohibition against this form of issue preclusion is problematic for two reasons. First, administrative agencies have often used the doctrine to justify nonacquiescence—agencies' refusal "to conduct their internal proceedings consistently with adverse rulings of the courts of appeals."[279] Based on *Mendoza*, agencies are not bound by preclusion to an adverse ruling, so—they argue—they can disregard a federal court's interpretation of law (at least with respect to people who were not parties to the earlier litigation) until the Supreme Court finally resolves the matter.[280] The practice is especially controversial with respect to intracircuit nonacquiescence—an agency's refusal to abide by circuit precedent even within the rendering circuit.[281]

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275 United States v. Mendoza, 464 U.S. 154, 162–63 (1984).

276 *See* RESTATEMENT (SECOND) OF JUDGMENTS § 29 (AM. LAW INST. 1982).

277 *See Mendoza*, 464 U.S. at 161.

278 *See id.* at 160.

279 Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 681 (1989).

280 *See id.* Estreicher and Revesz argue, though, that if nonacquiescence is a problem, *Mendoza* is not necessarily the culprit. "As a logical matter, the fact that the government may not be precluded in court from relitigating issues that it lost in prior cases does not imply that it may disregard rulings of the courts of appeals in the conduct of its internal proceedings." *Id.* at 685.

281 For views critical of the practice, see, for example, Dan T. Coenen, *The Constitutional Case Against Intracircuit Nonacquiescence*, 75 MINN. L. REV. 1339 (1991); Matthew Diller & Nancy Morawetz, *Intracircuit Nonacquiescence and the Breakdown of the Rule of Law: A Response to Estreicher and Revesz*, 99 YALE L.J. 801 (1990); Joshua I. Schwartz, *Nonacquiescence,* Crowell v. Benson*, and Administrative Adjudication*, 77 GEO. L.J. 1815 (1989).

Second, beyond facilitating the apparent lawlessness of intracircuit nonacquiescence, the *Mendoza* doctrine contradicts one of the underlying premises of binding precedent elucidated above. When there is no reason to believe that additional litigation is likely to lead to more accurate results, judicial economy and reliance suggest that the original decision can be binding.[282] That same premise should find expression in an outcome-oriented approach to preclusion. Under *Mendoza*, though, the first decision can *never* be binding in the face of the government's objection.

Perhaps somewhat ironically, *Mendoza* already reflects an outcome-oriented, rather than a participation-oriented, view of due process. If participation were all that mattered, then issue preclusion could apply to the United States, which by definition had already had its day in court in the first lawsuit. Instead, the reasoning of *Mendoza* is explicitly concerned with accuracy problems and the fear that the first decision against the government could be wrong and nonetheless could become entrenched.[283] As noted above in the context of precedent, though, this logic neglects the converse problem—that the first decision will be correct and that future litigation will lead to less accurate results.[284]

This is all to say that from an outcome-oriented perspective, *Mendoza* simply made the wrong calculation. More litigation—even if the United States is uniquely situated as a party—will not necessarily lead to more accurate results. *Mendoza* stakes out a position at one extreme—insisting that for accuracy-related reasons, offensive nonmutual issue preclusion should never apply against the government. The antidote is not to swing to the other extreme and automatically apply preclusion. (In fact, offensive nonmutual issue preclusion *never* applies automatically, even to private parties.)[285]

In revising the *Mendoza* doctrine, the Supreme Court should rely on insights about why precedent operates as it does. Preclusion against the government should at least be possible when the rendering court has taken adequate cognizance of the effect of its ruling in future cases—in other words, when future litigation is not likely to lead to greater accuracy.

CONCLUSION

On a conceptual level, the convergence of binding precedent and preclusion—in terms of the types of questions that they seek to answer and the circumstances under which they govern—is intriguing in its own right. Despite this convergence, the doctrines offer diametrically opposed answers as to whether a nonparty may be bound by the results of earlier litigation. That tension reveals distinct theories of due process that animate the doctrines. If courts were to embrace the outcome-oriented theory that under-

282 *See supra* notes 209–29 and accompanying text.

283 *See Mendoza*, 464 U.S. at 160–62.

284 *See supra* notes 211–13 and accompanying text.

285 *See* RESTATEMENT (SECOND) OF JUDGMENTS § 29(1)–(8) (AM. LAW INST. 1982).

pins precedent, they would finally have the power to resolve enduring problems of serial litigation.

This Article has not ventured to catalogue the precise circumstances under which nonparty preclusion should apply. Rather, it has advanced a theoretical argument that justifies a broader sweep for preclusion when additional lawsuits are likely to undermine the goals of reliance, repose, and accuracy. In other words, the hard question is not *whether* nonparty prelusion is broadly permissible. It is. Instead, courts and scholars should begin wrestling with the more salient and perhaps more difficult problem of *when* courts should draw upon preclusion's unique powers.