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## National Injunctions and Preclusion

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# NATIONAL INJUNCTIONS AND PRECLUSION

Zachary D. Clopton\*

*Critics of national injunctions are lining up. Attorney General Jeff Sessions labeled these injunctions “absurd” and “simply unsustainable.” Justice Clarence Thomas called them “legally and historically dubious,” while Justice Neil Gorsuch mockingly referred to them as “cosmic injunctions.” Scholars in leading law reviews have called for their demise. Critics argue that national injunctions encourage forum shopping, unfairly burden the federal government, and depart from the history of equity. They also claim that national injunctions contradict the Supreme Court’s decision in *United States v. Mendoza* to exempt the federal government from offensive nonmutual issue preclusion—a doctrine that permits nonparties to benefit from a prior finding against a party from an earlier case.*

*Critics are right to identify the connection between national injunctions and nonmutual preclusion. Both of these doctrines describe when judgments can benefit nonparties. But critics are wrong to see *Mendoza* as an argument against national injunctions. For one thing, the rise of nonmutual preclusion that prompted *Mendoza* undercuts crucial arguments against national injunctions by offering an alternative explanation for the absence of analogous injunctions in the history of equity. For another, *Mendoza* was not preordained; instead, it was a highly policy-driven decision. And *Mendoza*’s policy arguments were dubious when it was decided and even more dubious today. Scrutinizing these arguments should make us less comfortable in extending *Mendoza* to a new context—as the Supreme Court may be poised to do.*

*Indeed, this Article goes one step further. The Supreme Court or Congress should take advantage of the attention on nonparty relief to reconsider, and overrule, *Mendoza*. Federal-government litigants do not deserve special treatment with respect to preclusion in every case, and the existing rules of preclusion adequately protect the interests purportedly at stake in *Mendoza*. Moreover, rejecting *Mendoza* has feedback effects for the national-injunctions debate. Overruling *Mendoza* would not only reduce the need for national injunctions (because preclusion could do some of the work) but also provide a framework for limiting national injunctions without eliminating*

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them completely. This is especially important given recent decisions that make relying on class actions a tenuous response. More generally, overruling *Mendoza* would create a system that is fairer to governmental and nongovernmental litigants alike while reaffirming each branch's role in the making of national policy.

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#### INTRODUCTION

The national injunction is a cause célèbre. Sometimes referred to as absent-party, nationwide, universal, global, or cosmic, this remedial tool has attracted attention because it applies to defendants (usually federal-government defendants) in their interactions with parties and nonparties alike.<sup>1</sup> Federal district courts have issued national injunctions addressing

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1. See, e.g., Spencer E. Amdur & David Hausman, Response, *Nationwide Injunctions and Nationwide Harm*, 131 HARV. L. REV. F. 49 (2017); Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417 (2017); Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065 (2018); Kate Huddleston, *Nationwide Injunctions: Venue Considerations*, 127 YALE L.J.F. 242 (2017); Suzette M. Malveaux, Response, *Class Actions, Civil Rights, and the National Injunction*, 131 HARV. L. REV. F. 56 (2017); Michael T. Morley, *Nationwide Injunctions, Rule 23(b)(2), and the Remedial Powers of the Lower Courts*, 97 B.U. L. REV. 615 (2017); Zayn Siddique, *Nationwide Injunctions*, 117 COLUM. L. REV. 2095 (2017); Howard M. Wasserman, “Nationwide” Injunctions Are Really “Universal” Injunctions and They Are Never Appropriate, 22 LEWIS & CLARK L. REV. 335 (2018). The term “cosmic injunction” was used by Justice Gorsuch in the oral argument in *Trump v. Hawaii*. Transcript of Oral Argument at 73, *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (No. 17-965) (“We have this

high-profile issues including the Travel Ban, sanctuary cities, and more.<sup>2</sup> Commentators have homed in on the national injunction as a target of criticism. Leading the way, Samuel Bray argued in the *Harvard Law Review* that the national injunction is inconsistent with the history of equity, and he called for a strict party-based limit on injunctive relief.<sup>3</sup> Concurring in the Travel Ban case, Justice Thomas adopted Bray's position and called for an end to national injunctions.<sup>4</sup> Other scholars have criticized national injunctions, while a few have stepped up in their defense.<sup>5</sup>

Both critics and defenders of national injunctions have acknowledged the connection between these injunctions and the law of preclusion.<sup>6</sup> In particular, critics of national injunctions have argued that granting an injunction against the federal government that protects nonparties would be contrary to the Supreme Court's decision in *United States v. Mendoza*.<sup>7</sup> That 1984 decision held that the federal government is exempt from the doctrine of offensive nonmutual issue preclusion<sup>8</sup>—a doctrine that permits plaintiffs to invoke a prior adjudication in a subsequent action even though they were not parties to the original suit.<sup>9</sup> Because *Mendoza* says that a nonparty cannot get the preclusive benefit of a prior adjudication against the federal government, critics argue that the same nonparty should not get the remedial benefit of a national injunction against the federal government either.<sup>10</sup> Proponents of national injunctions, meanwhile, take pains to distinguish the national injunction from *Mendoza*'s requirement of mutuality.<sup>11</sup>

While scholars of national injunctions are right to see the connection to nonmutual preclusion, they have failed to appreciate the consequences of that interaction. A fuller evaluation of the relationship between national in-

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troubling rise of this nationwide injunction, cosmic injunction . . ."). The solicitor general earlier characterized these orders as "absent-party injunctions." Reply Brief for Petitioners at 30, *Trump v. Hawaii*, 138 S. Ct. 2392 (No. 17-965).

2. See *supra* note 1 (collecting sources that have done considerable work collecting cases).

3. See Bray, *supra* note 1, at 420.

4. *Trump v. Hawaii*, 138 S. Ct. at 2424–29 (Thomas, J., concurring).

5. See *supra* note 1 (collecting sources).

6. Scholars writing about "agency nonacquiescence" have also observed the potential connection between preclusion and federal agency behavior. See, e.g., Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 684–86 (1989).

7. 464 U.S. 154 (1984).

8. See *Mendoza*, 464 U.S. at 158 ("[W]e agree with the government that . . . nonmutual offensive collateral estoppel is not to be extended to the United States.").

9. See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331–33 (1979) (endorsing offensive nonmutual issue preclusion).

10. For example, Morley's opposition to national injunctions relies particularly heavily on *Mendoza*. See Morley, *supra* note 1, at 627–33.

11. See, e.g., Frost, *supra* note 1, at 1112–14.

junctions and nonmutual preclusion gives a clearer picture of the history and suggests a new—and perhaps better—way forward.<sup>12</sup>

First, reckoning with nonmutual preclusion problematizes the received history of national injunctions. Critics of national injunctions make much of the fact that such injunctions did not exist throughout the history of equity, only appearing in U.S. courts in the second half of the twentieth century.<sup>13</sup> Before that time, injunctions typically applied to parties (and their privies). Critics of national injunctions, including Justice Thomas, have suggested that this history compels a categorical rule barring national injunctions.<sup>14</sup>

Preclusion also applied to parties and their privies. Under the doctrine of “mutuality,” nonparties were not bound by judgments, and they could not benefit from them either. But the twentieth century saw the rise of “nonmutual” preclusion, whereby nonparties could benefit from prior judgments (against former parties), even though those nonparties could not be bound by the same judgment. This shift was a policy choice ultimately endorsed by the Supreme Court.<sup>15</sup>

The shift to allowing nonmutual preclusion, which reached a crescendo with *Parklane Hosiery Co. v. Shore* in 1979,<sup>16</sup> means that any earlier history must be interpreted in light of the different legal environment.<sup>17</sup> To wit, the fact that courts were reluctant to grant injunctions benefiting nonparties prior to the rise of nonmutuality might mean only that nonparties should not be entitled to *more* benefits from injunctions than they receive from preclusion.<sup>18</sup> Appeals to this history, therefore, are not such strong reasons to oppose national injunctions today. This corrective is especially important as the Supreme Court—and its fair-weather historicism—may soon take up the issue of national injunctions.<sup>19</sup>

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12. In ongoing work, Alan Trammell has focused on the institutional and structural relationships between preclusion and national injunctions. Alan M. Trammell, *Demystifying Nationwide Injunctions*, SSRN (Nov. 26, 2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3290838](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3290838) [<https://perma.cc/M4PC-E5DG>]. Central to Trammell’s argument are issues of nonacquiescence and bad faith. *Id.* His conclusions dovetail with proposals described *infra* Part IV, though arise from a different perspective on the preclusion–injunction connection. As the scholarly and political conversations about national injunctions continue, these perspectives (and others) will be central to the debate.

13. See, e.g., Bray, *supra* note 1, at 425; Wasserman, *supra* note 1, at 353.

14. See *Trump v. Hawaii*, 138 S. Ct. 2392, 2424–29 (2018) (Thomas, J., concurring).

15. See *infra* Section I.B.

16. 439 U.S. 322 (1979).

17. Indeed, one could find a parallel to this claim in the law of preclusion: a determination of a purely legal issue is not conclusive between parties if there had been an intervening change in the legal environment. See *Comm’r v. Sunnen*, 333 U.S. 591, 599 (1948).

18. The timing is also highly coincidental: national injunctions appeared on the scene exactly as nonmutual preclusion took hold. See *infra* Part I.

19. See, e.g., Transcript of Oral Argument at 73–74, *Trump v. Hawaii*, 138 S. Ct. 2392 (No. 17-965) (discussing national injunctions in the Travel Ban case); Application for Partial Stay Pending Rehearing En Banc in the U.S. Court of Appeals for the Seventh Circuit & Pend-

Second, recognition of the relationship between national injunctions and nonmutual preclusion suggests a different way to think about the “problem” of national injunctions. Recall that opponents of national injunctions have found support for their position in *Mendoza*’s holding that the federal government is not subject to offensive nonmutual issue preclusion. At a minimum, a reexamination of the *Mendoza* opinion reminds us that it was a highly policy-driven decision, suggesting that it is policy—not some historical or structural inevitability—that should dictate how the law treats nonparties.<sup>20</sup>

I would go further: any inconsistency between *Mendoza* and national-injunction practice should be taken as an opportunity to reevaluate *Mendoza*, not the other way around. The policy arguments marshaled in *Mendoza* were weak when it was decided. There is no justifiable reason to reflexively treat federal defendants differently from other defendants for preclusion purposes, and there are other preclusion doctrines that protect the interests purportedly at stake.<sup>21</sup> *Mendoza*’s policy arguments are even weaker today, when tightening rules on court access might prevent judges from granting relief sufficiently broad to constrain the federal government.<sup>22</sup> For these reasons, the Supreme Court or Congress should overrule *Mendoza*.

Even without this change, the preclusion–injunction connection suggests a way that courts might respond to concerns with national injunctions.<sup>23</sup> One of the often overlooked strengths of the *Parklane* regime—from which *Mendoza* excepts the federal government—is that it does not declare that nonmutual preclusion attaches in every case. Instead, it holds that courts may decline to apply that doctrine if circumstances call for it.<sup>24</sup> Among the relevant factors are whether the party invoking preclusion declined to participate in the first suit and whether there were prior decisions reaching inconsistent results.<sup>25</sup>

If courts elected to retain the authority to issue national injunctions but wanted to adopt a new limiting principle, the *Parklane* regime offers a suggestion: grant injunctions broad enough to protect those nonparties who

ing Further Proceedings in This Court, Sessions v. City of Chicago, No. 17A1379 (U.S. June 18, 2018) (seeking stay of a national injunction in the sanctuary cities litigation).

20. In this way, Justice Thomas had it backwards when he complained that national-injunction proponents offer only “a policy judgment” rather than “explain[ing] how these injunctions are consistent with the historical limits on equity and judicial power.” See *Trump v. Hawaii*, 138 S. Ct. at 2429 (Thomas, J., concurring) (quoting *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1225 (2015) (Thomas, J., concurring)).

21. See *infra* Sections III.A–B.

22. These limits include changes in the law of Rule 23, standing, personal jurisdiction, and others. See *infra* Section III.C.

23. I take up in Section IV.A the consequences for national injunctions if *Mendoza* were overruled. In brief, overruling *Mendoza* might reduce pressure on courts to issue national injunctions by offering an alternative channel to protect nonparties.

24. See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 (1979).

25. See *id.*; RESTATEMENT (SECOND) OF JUDGMENTS § 29 (AM. LAW INST. 1982).

would be likely candidates for nonmutual preclusion, but follow *Parklane* in questioning any wait-and-see plaintiffs and exercising caution when there are inconsistent prior judgments.<sup>26</sup> In order to ensure universal relief, plaintiffs would still have the incentive to include all affected persons in the first suit, most obviously through a class action.<sup>27</sup> If they don't—or can't<sup>28</sup>—then courts would have the flexibility to protect deserving nonparties by thinking through the well-known framework for nonmutual preclusion. This preclusion-based approach would avoid the parade of horrors offered by critics of national injunctions, and instead it would harness plaintiff and defendant incentives to achieve fair and binding resolutions of important disputes.<sup>29</sup>

Not only does the linking of preclusion and injunctions have practical consequences but it also reveals untapped theoretical connections between remedies and preclusion.<sup>30</sup> Critics of national injunctions worry that allowing one district judge to make national law violates some deep principle of judicial hierarchy.<sup>31</sup> While it may be true that a district court opinion would lack precedential effect in a neighboring district, the American law of judgments shows that this insight is not universally applicable. Under full faith and credit principles, federal and state courts are bound to recognize the judgments of other U.S. courts.<sup>32</sup> Indeed, American preclusion law is so strong that it applies a presumption of full faith and credit to foreign-country judgments too.<sup>33</sup> This calls into question any claimed structural limit on the scope of injunctive relief. Instead, these are context-specific questions that require deep thinking about law and policy.

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26. I expand on these requirements as well as *Parklane*'s other exceptions *infra* Part III.

27. See FED. R. CIV. P. 23(b)(2) (providing for class actions when “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole”). Critics of national injunctions frequently argue that nonparty protection is inappropriate because the plaintiffs could have sought a national class action instead. See *supra* note 1 (collecting sources).

28. Impediments to class-wide relief include rules on class certification, standing, personal jurisdiction, and more. See *infra* Section III.C. So even if class certification under Rule 23 seems like an alternative to national injunctions, it may not be one in practice.

29. The uncertainty of *Parklane*'s inquiry will incentivize plaintiffs to pursue intervention or class certification when possible, without punishing those nonparties who are unable to join the case. Meanwhile, federal-government defendants knowing *Parklane*'s rejection of wait-and-see plaintiffs will have an incentive to make sure that potentially affected persons are aware of the litigation and given procedural opportunities to become parties to it.

30. For a discussion of the intriguing (and related) connections between nonmutual preclusion and standing, see James E. Pfander, *Standing to Sue: Lessons from Scotland's Actio Popularis*, 66 DUKE L.J. 1493, 1528–31, 1547–54 (2017).

31. See, e.g., *Trump v. Hawaii*, 138 S. Ct. 2392, 2426 (2018) (Thomas, J., concurring); Morley, *supra* note 1, at 621–22.

32. See U.S. CONST. art. IV, § 1 (Full Faith and Credit Clause); 28 U.S.C. § 1738 (2012) (full faith and credit statute).

33. See, e.g., *Hilton v. Guyot*, 159 U.S. 113, 181–82 (1895).

The balance of this Article proceeds as follows: Part I provides background and history on national injunctions and the law of preclusion. As noted above, critics of national injunctions see the law of preclusion as an argument against national injunctions. Part II shows that the history of preclusion undercuts critics of national injunctions by calling into question their historical claim. This Part thus contributes to current debates about national injunctions, which are even more pressing as the Supreme Court seems poised to take up this issue with history in mind.

A better use of the connection between national injunctions and preclusion is as an opportunity to rethink the exceptional treatment provided to the federal government in *United States v. Mendoza*.<sup>34</sup> Part III explains that *Mendoza* was wrong when it was decided and that recent developments make it look even worse. Part IV then further develops the relationship between preclusion and national injunctions. Were the Court (or Congress) to overrule *Mendoza*, the availability of nonmutual preclusion would decrease the pressure to issue national injunctions. If *Mendoza* remained good law, the connection between preclusion and injunctions would still provide a template for a more restrained use of national injunctions. Not insignificantly, this approach leaves issues of preclusion and remedial scope to Congress in the first instance—something that cannot be said for arguments, such as the Justice Department’s, that resonate in Article III.<sup>35</sup>

In sum, scholars have been right to note the connection between nonmutual preclusion and national injunctions. But rather than allowing an unjustified exception to preclusion to distort the law of equitable relief, we should take the opportunity to reform the law of preclusion, at which point the “problem” of national injunctions becomes less severe and more easily resolved.

## I. BACKGROUND

Both sides of the national-injunctions debate acknowledge that there is a relationship between the law governing national injunctions and the law of preclusion.<sup>36</sup> I have no quarrel with that aspect of the conventional wisdom, but observing the relationship does not tell us what to make of it.

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34. 464 U.S. 154 (1984).

35. See Supplemental Brief for Appellant at 9–15, *City of Chicago v. Sessions*, No. 17–2991, 2018 WL 4268814 (7th Cir. Aug 10, 2018), 2018 WL 3533168; OFFICE OF THE ATTORNEY GEN., LITIGATION GUIDELINES FOR CASES PRESENTING THE POSSIBILITY OF NATIONWIDE INJUNCTIONS 1–3 (2018), <https://www.justice.gov/opa/press-release/file/1093881/download> [<https://perma.cc/6U5D-FPFR>].

36. See *supra* note 1 (collecting sources). In addition, the *Mendoza*-injunction connection was made by at least three briefs in the Travel Ban case. Brief for the Petitioners at 75–76, *Trump v. Hawaii*, 138 S. Ct. 2392 (No. 17-965); Brief Amicus Curiae of Citizens United et al. in Support of Petitioners at 33–35, *Trump v. Hawaii*, 138 S. Ct. 2392 (No. 17-965); Brief Amicus Curiae of Eagle Forum Educ. & Legal Def. Fund in Support of Petitioners at 34–35, *Trump v. Hawaii*, 138 S. Ct. 2392 (No. 17-965).



To begin that task, this Part reviews the histories of national injunctions and nonmutual preclusion. These strikingly parallel histories set the stage for the historical, theoretical, and policy-oriented arguments to come.

### A. National Injunctions

The injunctions that are the subject of this Article have gone by many names,<sup>37</sup> but the key feature is that they “prohibited or purported to prohibit enforcement of the challenged laws, regulations, and policies not only against the named plaintiffs, but against all persons everywhere who might be subject to enforcement of those laws.”<sup>38</sup> In 2017, Professor Samuel Bray offered a leading (though contested) account of the history of these so-called national injunctions.<sup>39</sup> Justice Thomas later relied heavily on this history to frame his opposition to national injunctions.<sup>40</sup> This Section briefly reviews that history.

Professor Bray’s history is roughly divided into three periods. First, Bray identifies a pre-history of national injunctions that runs up through the middle of the twentieth century, during which time the scope of injunctions was limited to parties.<sup>41</sup> Bray explains: “There is an easy, uncomplicated answer to the question whether the national injunction is traceable to traditional equity: *no*. . . . Through the middle of the twentieth century, there do not appear to have been *any* national injunctions.”<sup>42</sup> Second, federal courts dipped their toes into the water of national injunctions in the 1960s and 1970s, but national injunctions remained few and far between in this peri-

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37. See *supra* note 1 (collecting sources). The title of this Article is not an endorsement of the label “national,” and indeed I do not think any of the listed descriptors perfectly captures the concept.

38. See Wasserman, *supra* note 1, at 338. For a discussion of the related concept of extraterritorial state injunctions, see generally Polly J. Price, *Full Faith and Credit and the Equity Conflict*, 84 VA. L. REV. 747 (1998).

39. See Bray, *supra* note 1, at 424–45.

40. See *Trump v. Hawaii*, 138 S. Ct. at 2424–29 (Thomas, J., concurring). Justice Thomas repeatedly cited Bray, and even where he did not, their histories are parallel. See *id.*

41. See Bray, *supra* note 1, at 428. Bray acknowledges but distinguishes “bill[s] of peace,” which he characterizes as “proto-class action[s].” *Id.* at 426. As noted below, even under Bray’s conception, it is more accurate to say that injunctions were limited to parties *and privies*, see *infra* Section II.A, though that distinction is not relevant to Bray’s discussion at this point.

I should also note that the success of Bray’s (and Justice Thomas’s) attempt to distinguish bills of peace is significant for their argument. Amanda Frost, for one, is not convinced. See Frost, *supra* note 1, at 1081 n.77. These issues are also explored in more detail in an amicus brief in the sanctuary cities litigation on behalf of this author (among others). See Brief of Law Professors as Amici Curiae in Support of Plaintiff-Appellee, *City of Chicago v. Barr*, No. 18-2885 (7th Cir. Nov. 15, 2018).

42. Bray, *supra* note 1, at 425, 437 (second emphasis added). Bray adds: “They seem to have been rejected as unthinkable as late as *Frothingham v. Mellon* [262 U.S. 447 (1923)] and to have been conspicuously absent as late as *Youngstown Sheet & Tube Co. v. Sawyer* [343 U.S. 579 (1952)].” *Id.* at 428.

od.<sup>43</sup> Third, and seemingly out of nowhere, national injunctions rose to prominence: “By the 1980s and 1990s, to some judges they were an ordinary part of the remedial arsenal of the federal courts.”<sup>44</sup>

The Obama and Trump Administrations have been “peak” national injunction. National injunctions have been sought or issued against President Trump’s Travel Bans;<sup>45</sup> against the operation of Deferred Action for Parents of Americans and Lawful Permanent Residents (“DAPA”) and against the rescission of Deferred Action for Childhood Arrivals (“DACA”);<sup>46</sup> against President Obama’s transgender bathroom policy and against President Trump’s transgender military ban;<sup>47</sup> and against Obama Administration environmental policies and against Trump (and Bush) Administration attempts to rescind environmental policies.<sup>48</sup> Academics have written countless articles.<sup>49</sup> Congress has held hearings<sup>50</sup> and a bill has been proposed.<sup>51</sup> It is only a matter of time before John Oliver gets wind of the issue.<sup>52</sup>

Critics have raised a series of objections to national injunctions.<sup>53</sup> Most importantly, the availability of national injunctions seems unfair to defendants because it encourages forum shopping and because its effects are asymmetric.<sup>54</sup> National injunctions encourage forum shopping by permitting plaintiffs to sue in any court for national relief.<sup>55</sup> It is no surprise, therefore, that public-law plaintiffs routinely sued Obama in Texas and Trump in

43. See *id.* at 437–44.

44. *Id.* at 428. Bray traces the rise of national injunctions to the structure of the federal courts and to a change in the way that judges conceived of equitable relief. *Id.* at 445–57.

45. *E.g.*, *Hawaii v. Trump*, 878 F.3d 662, 672 (9th Cir. 2017); *Hawaii v. Trump*, 859 F.3d 741, 755–56 (9th Cir. 2017); *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554, 572 (4th Cir. 2017); *Washington v. Trump*, 847 F.3d 1151, 1156 (9th Cir. 2017).

46. *E.g.*, *Texas v. United States*, 809 F.3d 134, 146 (5th Cir. 2015), *aff’d by an equally divided court*, 136 S. Ct. 2271 (2016); *Batalla Vidal v. Nielsen*, 279 F. Supp. 3d 401, 420 (E.D.N.Y. 2018); *Regents of Univ. of Cal. v. U.S. Dep’t of Homeland Sec.*, 279 F. Supp. 3d 1011, 1048 (N.D. Cal. 2018).

47. *E.g.*, *Doe 1 v. Trump*, 275 F. Supp. 3d 167, 176–77 (D.D.C. 2017); *Texas v. United States*, 201 F. Supp. 3d 810, 835–36 (N.D. Tex. 2016).

48. *E.g.*, *Nat. Res. Def. Council v. Nat’l Highway Traffic Safety Admin.*, 894 F.3d 95, 100 (2d Cir. 2018); *In re EPA*, 803 F.3d 804, 805–06 (6th Cir. 2015); *Earth Island Inst. v. Pengilly*, 376 F. Supp. 2d 994, 1011 (E.D. Cal. 2005).

49. See *supra* note 1 (collecting sources).

50. See, e.g., *The Role and Impact of Nationwide Injunctions by District Courts: Hearing Before the Subcomm. on Courts, Intellectual Prop. & the Internet of the H. Comm. on the Judiciary*, 115th Cong. (2017).

51. Injunctive Authority Clarification Act of 2018, H.R. 6730, 115th Cong. § 2(a) (2018).

52. If he is willing to cover special purpose districts, sovereign debt, and flood insurance, surely civil procedure is coming soon.

53. See *supra* note 1 (collecting sources).

54. See Wasserman, *supra* note 1, at 363.

55. See, e.g., *id.* at 363–64.

the Ninth Circuit.<sup>56</sup> Compounding this effect, national injunctions are also asymmetric. Even if plaintiffs' first-choice forum denied an injunction, other potential plaintiffs could keep shopping until a court issued one.<sup>57</sup> These potential plaintiffs could sit on the sidelines during the first case, and wait and see if they needed to file a second (or third or n-th) suit after the first suit lost. Thus, the federal government must win every case to defeat a proposed national injunction, while plaintiffs only need to win once to obtain national relief.<sup>58</sup> Critics have also argued that national injunctions limit percolation, risk inconsistency, exceed Article III, complicate the contempt remedy, and (as noted above) conflict with the history of equity and the spirit of the Supreme Court's decision in *United States v. Mendoza*.<sup>59</sup> Though, again, forum shopping and asymmetry have been central to the critique.

### B. Nonmutual Preclusion

To a student of civil procedure, the aforementioned concerns with forum shopping and asymmetry will sound familiar: they are exactly the arguments made in favor of mutuality in preclusion. But those arguments lost, at least for everyone but the federal government. This Section briefly retells the story of the rise of nonmutual preclusion that paralleled the rise of the national injunction.

The focus of this Section is the doctrine of issue preclusion.<sup>60</sup> The Second Restatement of Judgments defines issue preclusion as follows: "When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim."<sup>61</sup> In other words, once a court resolves an issue against a party, that finding will be binding in future cases between the parties. Issue preclusion also contains a series of exceptions,<sup>62</sup> some of which I take up below.<sup>63</sup>

56. See, e.g., *id.* at 363.

57. See, e.g., *id.* at 363–64.

58. *Id.*; see also Andrew D. Bradt & Zachary D. Clopton, *MDL v. Trump: The Puzzle of Public Law in Multidistrict Litigation*, 112 NW. U. L. REV. 905, 917 (2018) (exploring this phenomenon and its relationship to multidistrict litigation (MDL)); Alex Botoman, Note, *Divisional Judge-Shopping*, COLUM. HUM. RTS. L. REV., Winter 2018, at 297, 300–08 (speculating that the state of Texas selected particular divisions of federal districts in order to secure its preferred judges in suits against the U.S. government).

59. 464 U.S. 154 (1984); see *supra* note 1 (collecting sources). I take up the *Mendoza* issue below.

60. Nonmutuality may apply to claim preclusion as well, but that is less relevant for my analysis. See, e.g., 18A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4464.1 (3d ed. 2017); Note, *Nonmutual Issue Preclusion Against States*, 109 HARV. L. REV. 792 (1996).

61. RESTATEMENT (SECOND) OF JUDGMENTS § 27 (AM. LAW INST. 1982).

62. *Id.* § 28.

63. See *infra* Section II.A.

Historically, issue preclusion typically applied between parties.<sup>64</sup> If I successfully sued AT&T for deceptive advertising, the finding that a particular advertisement was deceptive would be binding between AT&T and me. But if you sued AT&T about the same ad, you could not invoke the prior judgment. This feature of preclusion is called “mutuality.”<sup>65</sup> A finding in favor of AT&T from my suit would not be binding against you (because you did not have your day in court), so mutuality says that you also should not be able to get the benefit of any finding against AT&T from my earlier suit. The major exception to party-based preclusion was for “privies,” those with a sufficiently strong legal relationship to a party such that it would not be unfair to bind them even if they were not formally parties to the prior judgment.<sup>66</sup> This doctrine was applied against the federal government as well.<sup>67</sup> Yet even for these quasi-parties, the law of preclusion usually maintained its requirement of mutuality—binding privies only to the extent that it protected them.<sup>68</sup>

Starting in the middle of the twentieth century, cracks began to appear in the bedrock of mutuality.<sup>69</sup> An important development was a 1942 decision by the California Supreme Court. In *Bernhard v. Bank of America*,<sup>70</sup> Justice Traynor approved the use of nonmutual issue preclusion by defendants. Specifically, *Bernhard* permitted a defendant to use a finding from a prior lawsuit in which it was not a party against a plaintiff that was a party to the prior suit.<sup>71</sup>

64. See, e.g., WRIGHT ET AL., *supra* note 60, § 4463.

65. *Id.*

66. *Id.*

67. See *United States v. Des Moines Valley R.R. Co.*, 84 F. 40, 42–43 (8th Cir. 1897) (permitting nonparty preclusion against the federal government based on a prior adjudication involving a landowner because, in the new suit, the United States was only a nominal party representing the interest of the same landowner); see also *Taylor v. Sturgell*, 553 U.S. 880, 899–900 (2008) (characterizing *Des Moines Valley* as applying (to the United States) the principle that “[a] party may not use a representative or agent to relitigate an adverse judgment”); *Chi., Rock Island & Pac. Ry. Co. v. Schendel*, 270 U.S. 611, 619–20 (1926) (quoting *Des Moines Valley* approvingly).

68. See, e.g., RESTATEMENT (FIRST) OF JUDGMENTS § 83 (AM. LAW INST. 1942) (“A person who is not a party but who is in privity with the parties in an action terminating in a valid judgment is, to the extent stated in §§ 84–92, bound by and entitled to the benefits of the rules of res judicata.”). The limited exceptions to this rule are not relevant here. See *id.* §§ 84–92.

69. See, e.g., *B.R. DeWitt, Inc. v. Hall*, 225 N.E.2d 195 (N.Y. 1967). See generally WRIGHT ET AL., *supra* note 60, § 4464; Jack Ratliff, *Offensive Collateral Estoppel and the Option Effect*, 67 TEX. L. REV. 63 (1988).

Professor James Pfander’s work on Scottish procedure—and its connections to American law—have surfaced earlier examples on nonparty preclusion in public litigation in the Scottish Court of Session. See Pfander, *supra* note 30, at 1528–31. Pfander’s work suggests some intriguing connections among preclusion, standing, and injunctions, though they are beyond the scope of this project.

70. *Bernhard v. Bank of Am. Nat’l Tr. & Sav. Ass’n*, 122 P.2d 892 (Cal. 1942).

71. *Id.* at 895–96. In *Bernhard*, the California Supreme Court permitted Bank of America to use issue preclusion against an administrator of a will who previously litigated (and lost) the same issue in a suit against beneficiaries. *Id.* Preclusion, and nonmutual preclusion in par-

*Bernhard's* authorization of "defensive" nonmutual issue preclusion did not necessarily extend to "offensive" nonmutual issue preclusion. Defensive nonmutual issue preclusion allows a defendant to get the benefit of a prior judgment against a former-party plaintiff. An offensive use would allow a new plaintiff to file a lawsuit and assert "offensively" a prior judgment against a former-party defendant.<sup>72</sup> Offensive nonmutual preclusion thus expanded the remedial effect of judgments to include nonparties bringing future claims. The difference between defensive and offensive is more than just a label. Indeed, a highly influential 1957 law review article by Brainerd Currie argues that defensive and offensive uses of nonmutual issue preclusion are categorically different, with the latter being much more objectionable than the former.<sup>73</sup>

Currie's objections to offensive nonmutual preclusion boil down to two related worries. First, he worries about plaintiffs selecting "a very inconvenient forum, where the opportunity to present an effective defense is subject to maximum handicaps."<sup>74</sup> Second, he worries about the "multiple-claimant anomaly."<sup>75</sup> Imagine, he writes, that there was a train crash injuring 50 people. The claimants elected to sue the railroad successively. The defendant won the first 25 cases. But if the 26th plaintiff won, then all remaining claimants could use offensive nonmutual issue preclusion against the defendant.<sup>76</sup> So, despite the fact that the railroad defendant won 25 out of 26 cases, half of the plaintiffs would recover based on the lone plaintiff victory.<sup>77</sup>

Sound familiar? These arguments about forum shopping and asymmetry are exactly the ones that critics of national injunctions have raised. But just as courts have countenanced national injunctions, courts have countenanced offensive nonmutual issue preclusion despite Currie's protestations.

Although one can find earlier federal court cases on the issue,<sup>78</sup> the major development was the 1979 decision in *Parklane Hosiery Co. v. Shore*.<sup>79</sup> Briefly, the Securities and Exchange Commission ("SEC") successfully sued

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ticular, have been linked to "finality and the preservation of resources." Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 973-74 (1984).

72. See, e.g., WRIGHT ET AL., *supra* note 60, § 4464.

73. Brainerd Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281 (1957).

74. *Id.* at 288.

75. *Id.* at 285-89.

76. *Id.* at 285-86.

77. *Id.*; see also Note, *A Probabilistic Analysis of the Doctrine of Mutuality of Collateral Estoppel*, 76 MICH. L. REV. 612 (1978) (criticizing this result and its consequences for accuracy).

78. See WRIGHT ET AL., *supra* note 60, § 4464 (collecting cases).

79. 439 U.S. 322 (1979). For more about the *Parklane* litigation and its connection to the perceived litigation crisis, see generally Lewis A. Grossman, *The Story of Parklane: The "Litigation Crisis" and the Efficiency Imperative*, in CIVIL PROCEDURE STORIES 405 (Kevin M. Clermont ed., 2d ed. 2008).

Parklane for issuing a false and misleading proxy statement.<sup>80</sup> In a private suit with similar allegations, stockholder plaintiffs sought the benefit of the prior adjudication against Parklane.<sup>81</sup> The Supreme Court dispensed with the proposed offensive–defensive distinction: “We have concluded that the preferable approach for dealing with these problems in the federal courts is not to preclude the use of offensive [nonmutual issue preclusion].”<sup>82</sup>

Instead, the Supreme Court concluded that a better approach would be “to grant trial courts broad discretion to determine when [nonmutual preclusion] should be applied.”<sup>83</sup> The Court went on to explain how it expected the discretion to be exercised: “The general rule should be that in cases where a plaintiff could easily have joined in the earlier action or where . . . the application of offensive estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive [nonmutual issue preclusion].”<sup>84</sup> I should add that this discretion lives on today. In a set of 49 federal district court cases from 2000 to 2017, judges exercised their discretion to decline nonmutual preclusion in 43% of cases, including when plaintiffs could have joined the prior action or when there were inconsistent prior judgments.<sup>85</sup> Although these results may not be representative,<sup>86</sup> it is fair to say that *Parklane* discretion is not a dead letter.

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80. *Parklane*, 439 U.S. at 324–25.

81. *Id.* at 325.

82. *Id.* at 331. The Court also was not troubled by the fact that the first proceeding was a bench trial while in the second the defendant would have been entitled to a jury. *Id.* at 333–37 (finding no Seventh Amendment problem with offensive nonmutual issue preclusion from an equitable proceeding to a legal one). More generally, the Supreme Court has explained that preclusion principles are the same whether the first judgment is based in law or equity. *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 234 (1998) (“The Court has never placed equity decrees outside the full faith and credit domain. . . . We see no reason why the preclusive effects of an adjudication on parties and those ‘in privity’ with them, *i.e.*, claim preclusion and issue preclusion (*res judicata* and collateral estoppel), should differ depending solely upon the type of relief sought in a civil action.” (footnote omitted)).

83. *Parklane*, 439 U.S. at 331.

84. *Id.*

85. *See, e.g.*, *T.G. v. Remington Arms Co.*, No. 13–CV–0033–CVE–PJC, 2014 WL 1310285, at \*8–9 (N.D. Okla. Mar. 28, 2014) (discussing inconsistent prior judgments); *Paramount Pictures Corp. v. Int’l Media Films, Inc.*, No. CV 11–09112 SJO (AJWx), 2012 WL 12884852, at \*3 (C.D. Cal. Apr. 6, 2012) (discussing “wait and see” plaintiffs); *see also, e.g.*, *Petit v. City of Chicago*, No. 90 C 4984, 2001 WL 914457, at \*6–9 (N.D. Ill. Aug. 13, 2001) (offering a thoughtful discussion of *Parklane* discretion). To identify these cases, I used Westlaw’s federal court database to search for federal district court decisions from 2000 to 2017 in which “nonmutual!” appeared in the same paragraph as “*Parklane*.” I then reviewed all 92 results, which produced 49 cases in which the court decided whether to invoke nonmutual preclusion. In 21 cases (43%), the court declined to extend nonmutual preclusion to some or all issues identified by the invoking party.

86. For example, this search only identified written opinions that expressly considered *Parklane*. It is quite possible that in other cases a court invoked nonmutual preclusion without discussion. And, of course, parties make strategic decisions about when to assert (and contest) nonmutual preclusion in the first place. But again, the minimal claim here is that courts at times exercise *Parklane* discretion.

In any event, after *Parklane* nonmutual preclusion became the dominant approach, including under federal law.<sup>87</sup> But not for all parties, it turns out. Traditionally, the same preclusion doctrine applied to government and non-government parties in civil cases.<sup>88</sup> And even today, the federal government may assert nonmutual issue preclusion against private parties.<sup>89</sup> But a difference of opinion developed about whether offensive nonmutual issue preclusion should be available *against* the government. Federal court decisions went both ways.<sup>90</sup>

In 1984, the Supreme Court weighed in. The case involved a statute that permitted the naturalization of Filipinos serving in the U.S. military during World War II.<sup>91</sup> The problem was that the United States did not maintain a representative in the Philippines with the authority to naturalize service members, and a federal court later held that this denied due process to a group of Filipino veterans seeking U.S. citizenship.<sup>92</sup> A series of follow-on lawsuits sought the benefit of this finding against the United States in order to support other veterans' claims for naturalization.<sup>93</sup> These cases included one filed by a doctor in his seventies named Sergio Mendoza.<sup>94</sup>

In an opinion authored by then-Justice William Rehnquist, a dissenter from *Parklane*, the Supreme Court held that offensive nonmutual issue preclusion was not available against the federal government.<sup>95</sup> The Court offered a number of reasons for its decision, including that preclusion would thwart the development of the law and that the government was a unique litigant necessitating different protections.<sup>96</sup> I will take up the reasoning below, but for the moment, the take-home message is that U.S. courts adopted a de-

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87. See WRIGHT ET AL., *supra* note 60, § 4464.

88. Criminal law—and double jeopardy—would be a different matter. See, e.g., *id.*

89. See, e.g., *Park Lake Res. Ltd. Liab. Co. v. U.S. Dep't of Agric.*, 378 F.3d 1132, 1138 (10th Cir. 2004).

90. See WRIGHT ET AL., *supra* note 60, § 4465.4 (collecting cases). Cases that granted preclusion against the government included *Nevada Power Co. v. Watt*, 711 F.2d 913, 932 & n.17 (10th Cir. 1983); *Starker v. United States*, 602 F.2d 1341, 1348–50 (9th Cir. 1979); *Johnson v. United States*, 576 F.2d 606, 613–15 (5th Cir. 1978); *Speaker Sortation Systems v. United States Postal Service*, 568 F.2d 46 (7th Cir. 1978); and *Williams v. Schweiker*, 541 F. Supp. 1360, 1365 (E.D. Mo. 1982). Cases that denied preclusion to the government included *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975); *Victory Highway Village, Inc. v. Weaver*, 634 F.2d 1099, 1101 (8th Cir. 1980); *Divine v. Commissioner*, 500 F.2d 1041 (2d Cir. 1974); *Consumer Product Safety Commission v. Anaconda Co.*, 445 F. Supp. 498 (D.D.C. 1977); and *United States v. Anaconda Co.*, 445 F. Supp. 486 (D.D.C. 1977).

91. *United States v. Mendoza*, 464 U.S. 154, 156 (1984).

92. *In re Naturalization of 68 Filipino War Veterans*, 406 F. Supp. 931, 940–42 (N.D. Cal. 1975).

93. See *Mendoza*, 464 U.S. at 155–57.

94. *Id.*; *Mendoza v. United States*, 672 F.2d 1320, 1322–25 (9th Cir. 1982).

95. *Mendoza*, 464 U.S. at 164.

96. See *id.* at 159–63.

fault rule that permitted offensive nonmutual issue preclusion—but that default rule did not apply to federal-government defendants.<sup>97</sup>

## II. RETELLING THE NATIONAL INJUNCTIONS HISTORY

The history of preclusion offers a new vantage on the received history of national injunctions. It is this new vantage, I contend, that scholars of national injunctions have not appreciated. And it is this new vantage, I further contend, that can serve as a useful corrective for judges and legislators contemplating changes to national-injunctions law.<sup>98</sup>

Twenty years ago, the Supreme Court unwittingly presaged the connection between preclusion and national injunctions. “For claim and issue preclusion (*res judicata*) purposes,” the Court explained, “the judgment of the rendering State gains *nationwide* force.”<sup>99</sup> This Part makes that connection clear.

### A. *Early History*

Perhaps the most striking aspect of Bray’s early takedown of national injunctions was the absence of national injunctions for most of the history of equity (other than the “bill of peace”).<sup>100</sup> Critics of national injunctions use this history to argue that modern judges have stepped beyond their historic role—Attorney General Jeff Sessions labeled these judges with the scarlet-A (“activist”).<sup>101</sup>

97. The *Mendoza* opinion seemingly circumscribed its holding to “issues such as those involved in this case,” *id.* at 162, but courts have generally extended it to all attempted uses of *Parklane* against federal-government defendants. See *Nat’l Med. Enters., Inc. v. Sullivan*, 916 F.2d 542, 545 (9th Cir. 1990) (noting the “the well-established rule that nonmutual offensive collateral estoppel cannot be asserted against the government” (footnote omitted)); *Am. Fed’n of Gov’t Emps., Council 214 v. Fed. Labor Relations Auth.*, 835 F.2d 1458, 1462 (D.C. Cir. 1987) (“[*Mendoza*] held that the rules governing offensive issue preclusion between private litigants do not apply when the government is a party. Collateral estoppel will apply against the government only if mutuality of parties exists.”); *WRIGHT ET AL.*, *supra* note 60, § 4465.4 (noting that the relatively few exceptions have relied on law of the case or law of the circuit principles, or on the government’s pursuit of “essentially private interests”). Indeed, some courts have extended *Mendoza* to cover *defensive* nonmutual issue preclusion against the federal government as well. See *Kanter v. Comm’r*, 590 F.3d 410, 419–20 (7th Cir. 2009).

98. See, e.g., *supra* note 19 (citing pending cases); *supra* note 50 (citing congressional hearing).

99. *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 233 (1998) (emphasis added) (footnote omitted).

100. See Bray, *supra* note 1, at 425–27. The significance of bills of peace is important to the national-injunctions debate, see *supra* note 41, though it is not central to the argument here.

101. See Jeff Sessions, *Nationwide Injunctions Are a Threat to Our Constitutional Order*, NAT’L REV. (Mar. 10, 2018, 12:20 PM), <https://www.nationalreview.com/2018/03/nationwide-injunctions-stop-elected-branches-enforcing-law> [<https://perma.cc/4BJ-9M3E>].



This historical argument has doctrinal consequences too. Because the equitable powers of federal courts are to be traced to the history of equity,<sup>102</sup> the lack of historical precedents for national injunctions calls into question the authority of federal courts. Indeed, Bray suggested that translating this history to the modern context “requires” a rule forbidding injunctions against federal defendants that protect nonparties.<sup>103</sup> Justice Thomas, picking up this thread, argued that the federal courts’ authority to grant equitable relief “*must* comply with longstanding principles of equity that predate this country’s founding.”<sup>104</sup> He then added: “[National] injunctions do not seem to comply with those principles.”<sup>105</sup>

The history of preclusion suggests an alternative reading. During the long era of mutuality, parties to a lawsuit could receive the direct benefits of preclusion. Nonparties typically could not repair to court and invoke the prior adjudication.<sup>106</sup> Symmetrically, during the long era of party-protecting injunctions, typically only parties to a lawsuit could receive the direct benefits of injunctive relief.<sup>107</sup> Both doctrines also made room for privies. Nonparties in privity with parties were able to obtain the advantages (and disadvantages) of preclusion.<sup>108</sup> During the same period, and seemingly unacknowledged by national-injunction critics,<sup>109</sup> privies may have been able to obtain the advantages (and disadvantages) of injunctive relief.<sup>110</sup> So far, so good.

102. See *Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 318–29 (1999). But see Stephen B. Burbank, *The Bitter with the Sweet: Tradition, History, and Limitations on Federal Judicial Power—A Case Study*, 75 NOTRE DAME L. REV. 1291, 1314–15 (2000) (criticizing the decision); Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223, 234–55 (2003) (same). Justice Thomas made this point as well. See *Trump v. Hawaii*, 138 S. Ct. 2392, 2426 (2018) (Thomas, J., concurring). Note also that *Grupo Mexicano*’s principle derives from jurisdictional statutes, *Grupo Mexicano*, 527 U.S. at 318, whereas some national-injunction critics have looked to Article III. See, e.g., OFFICE OF THE ATTORNEY GEN., *supra* note 35 (citing DOJ’s position).

103. See Bray, *supra* note 1, at 421.

104. *Trump v. Hawaii*, 138 S. Ct. at 2426 (Thomas, J., concurring) (emphasis added).

105. *Id.*

106. See *supra* Section I.B.

107. See *supra* Section I.A.

108. See *supra* Section I.B.

109. See *supra* note 1 (collecting sources). Indeed, the first bill proposed in Congress seemingly prohibits federal courts from enjoining privies. See Injunctive Authority Clarification Act of 2018, H.R. 6730, 115th Cong. § 2(a) (2018) (allowing injunctions to protect nonparties only if they are “represented by a party acting in a representative capacity pursuant to the Federal Rules of Civil Procedure”).

110. Injunctions traditionally bound privies. See, e.g., *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 14 (1945) (describing “the common-law doctrine that a decree of injunction not only binds the parties defendant but also those identified with them in interest, in ‘privity’ with them, represented by them or subject to their control”); 11A CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 2956 (3d ed. 2013); see also *Nat’l Spiritual Assembly of the Bahá’ís of the U.S. Under the Hereditary Guardianship, Inc. v. Nat’l Spiritual Assembly of the Bahá’ís of the U.S., Inc.*, 628 F.3d 837, 854 (7th Cir. 2010) (noting connection between in-

But the rise of nonmutual preclusion upset the background principle about who is entitled to the benefits of a prior judgment. Since the middle of the twentieth century, nonparties might be able to invoke prior adjudications, including offensively, in subsequent cases.<sup>111</sup> This revolution in preclusion paralleled the revolution in national injunctions.<sup>112</sup> The timing is also highly conspicuous. The green shoots of national injunctions developed in the 1960s and 1970s, and they bloomed in the 1980s and 1990s.<sup>113</sup> The Supreme Court formally endorsed offensive nonmutual issue preclusion in 1979.<sup>114</sup>

This parallelism is more than just an amusing coincidence. One interpretation of the received history of national injunctions is that courts would not grant injunctive relief any broader than the preclusive effect of their judgments.<sup>115</sup> Or to put it another way, only those who could obtain the benefits of preclusion were candidates to be protected by an injunction.

junction and preclusion privity). *But see* Doug Rendleman, *Beyond Contempt: Obligors to Injunctions*, 53 TEX. L. REV. 873 (1975) (identifying limits to this principle).

Privies also could be protected by injunctions. For example, Justice Thomas and Bray relied on *Scott v. Donald*, 165 U.S. 107 (1897), for the proposition that injunctions against government defendants (here, South Carolina government defendants) should only protect plaintiffs. *See* *Trump v. Hawaii*, 138 S. Ct. 2392, 2428 (2018) (Thomas, J., concurring); Bray, *supra* note 1, at 429. In turn, *Scott* relied on *Cutting v. Gilbert*, 6 F. Cas. 1079 (C.C.S.D.N.Y. 1865) (No. 3519), which rejected a bill of peace where the parties shared only a common interest in the question involved—which does not qualify as a “unity or joinder of interest” necessary for a bill of peace. *Id.* at 1080. But *Cutting* implied that this inquiry was necessary only when there “not be any privity between the numerous parties.” *Id.*

Indeed, privity expanded the scope of injunctive relief against government defendants too. Less than a decade after *Scott*, the Supreme Court heard another case filed against South Carolina government defendants. In *Gunter v. Atlantic Coast Line Railroad Co.*, the railroad sued various state and municipal defendants seeking an injunction against the collection of taxes. 200 U.S. 273, 281–82 (1906). The railroad relied on a previous injunction issued against defendants in a case brought by its predecessor in interest, *Pegues*. *Id.* at 279–80 (citing *Humphrey v. Pegues*, 83 U.S. (16 Wall.) 244 (1872)). The Supreme Court began its analysis: “First. We at once treat as undoubted the right of the Atlantic Coast Line Railroad Company to the benefits of the decree in the *Pegues* case, since it is conceded in the argument at bar that that company, as the successor to the rights of *Pegues*, is entitled to the protection of the original decree rendered in his favor.” *Id.* at 283. This is consistent with prevailing views of privity at the time. *See* RESTATEMENT (FIRST) OF JUDGMENTS § 89 (AM. LAW INST. 1942); *see also* *Wilson v. Alexander*, 276 F. 875, 880 (5th Cir. 1921) (characterizing *Atlantic Coast* and *Pegues* as in privity).

Privies also may sue for civil contempt, *see* E.H. Schopler, Annotation, *Who May Institute Civil Contempt Proceedings*, 61 A.L.R.2d 1083, § 4(c) (1958), and may enforce injunctions against former parties, *see Atl. Coast*, 200 U.S. 273; *see also* *Ahearn ex rel. NLRB v. Int’l Longshore & Warehouse Union, Locals 21 & 4*, 721 F.3d 1122, 1131–32 (9th Cir. 2013) (describing some circumstances in which contempt sanctions may be awarded to non-parties).

111. *See supra* Section I.B.

112. *See supra* Section I.A.

113. *See* Bray, *supra* note 1, at 437–45; *see also supra* Section I.A.

114. *See* *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979); *see also supra* Section I.B.

115. Indeed, a nonparty from the first suit may seek an injunction enjoining a former party (or privy) from relitigating an issue that should be nonmutually precluded. *See* WRIGHT

So, if we view the history of injunctions as symmetrical with the history of preclusion, then critics' invocations of the early history of national injunctions are inapposite. The world changed with the rise of nonmutual preclusion such that earlier data are not conclusive. Or, when Bray says that the early history must be "translated" to the modern era,<sup>116</sup> that translation also must include an acknowledgement that nonparties are candidates for the benefits of preclusion in ways they did not used to be.<sup>117</sup> At a minimum, and contra Justice Thomas, the history alone does not obviously rule out national injunctions today.

### B. Modern History

Nonmutual preclusion also has something to say about the modern history of national injunctions.

First, it may not be a coincidence that judges cottoned to national injunctions around the time that nonmutual preclusion was being acknowledged.<sup>118</sup> Perhaps the acceptance of nonmutual preclusion in cases such as *Parklane* changed judges' views about the acceptable effects of judgments on nonparties.<sup>119</sup> Parties themselves might also have been more inclined to ask for nonparty-protecting injunctions once the notion of nonparty preclusion

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ET AL., *supra* note 60, § 4405.1 nn.17–18 (collecting cases). For example, in *Thomas v. Powell*, the D.C. Circuit approved an injunction sought by class counsel—not a party—against dissident plaintiffs' attempt to litigate a separate professional negligence claim against the attorney because those plaintiffs would be subject to nonmutual preclusion. 247 F.3d 260, 262–63 (D.C. Cir. 2001); see also *Thomas v. Albright*, 77 F. Supp. 2d 114, 124 (D.D.C. 1999) (granting the injunction and collecting cases doing the same). Or, in *Samuel C. Ennis & Co. v. Woodmar Realty Co.*, the Seventh Circuit approved of an injunction protecting parties and nonparties against relitigation in state court, invoking nonmutual preclusion for the latter group. 542 F.2d 45 (7th Cir. 1976). See also *Quintero v. Klaveness Ship Lines*, 914 F.2d 717 (5th Cir. 1990) (privy-protecting injunction). The decision in *Smith v. Bayer Corp.*, 564 U.S. 299 (2011), discussed further below, does not make this type of injunction improper. See WRIGHT ET AL., *supra* note 60, § 4464.1.

116. Bray, *supra* note 1, at 469.

117. *Parklane* offers a lesson here as well. A second issue in *Parklane* was whether the Seventh Amendment should protect a defendant in a jury trial from the effects of nonmutual preclusion from a non-jury judgment. *Parklane*, 439 U.S. at 333–37. The Supreme Court said no. *Id.* at 336. Because the Seventh Amendment "preserves" the right to trial by jury, and preclusion from equity to law was permitted at the time of the Founding, the Seventh Amendment is no obstacle to preclusion. *Id.* at 333. But if you had been paying attention, you would notice the sleight of hand—mutual preclusion was permitted at the time of the Founding, but not nonmutual preclusion. Yet the Supreme Court found "no persuasive reason . . . why the meaning of the Seventh Amendment should depend on whether or not mutuality of parties is present." *Id.* at 335. In other words, the translation of the Seventh Amendment to 1979 included an acknowledgement that nonparties may receive greater benefits of preclusion than in 1791. This does not mean that these doctrines share similar origins. While nonmutual preclusion has been traced to the perceived litigation crisis, different circumstances have seemingly motivated judges to issue national injunctions. See *supra* Part I.

118. See *supra* Part I.

119. See *supra* Part I.

had set in. It is also possible that the same reasons led judges to conclude that injunctions and preclusion should be expanded. Nothing here establishes a causal link between preclusion and injunctions, but at a minimum the interconnection between these doctrines makes the rise of national injunctions less anomalous.<sup>120</sup>

This history also has something to say about legal change. The switch to nonmutual preclusion exemplified by *Parklane* and the exception for the government acknowledged in *Mendoza* are not compelled by history or doctrine.<sup>121</sup> Nor is there some deep structure of federal courts that confines their judgments to their home jurisdictions.<sup>122</sup> Instead, *Parklane* and *Mendoza* were policy choices made by federal lawmakers<sup>123</sup> motivated by views about the right balance of efficiency and fairness.<sup>124</sup>

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120. It is also possible that *Mendoza's* special treatment of government defendants has consequences for the willingness of judges to award national injunctions. Imagine a judge operating in an environment of nonmutuality. This judge is used to her rulings affecting nonparties via nonmutual preclusion. But in walks a federal defendant exempted from *Parklane's* general rule. Critics of national injunctions suggest that this exemption should translate to an exemption from national injunctions—but it is at least possible that a judge, seeing this exemption, might be more inclined to give a national injunction against a federal defendant in order to remedy the unequal treatment of federal and nonfederal defendants. Cf. Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—and Their Connections to Substantive Rights*, 92 VA. L. REV. 633 (2006) (discussing the interrelationship among decisions about justiciability, remedies, and merits); Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857 (1999) (arguing that rights and remedies are tightly intertwined in constitutional law). Such inclinations might be enhanced by recent changes in the way that courts have handled aggregate litigation, meaning that courts may not have the option to convert nonparties to parties through the class action mechanism. I have more to say about the law of aggregate litigation below, but here the point is more explanatory—the rise of nonmutual preclusion and the exemption of the federal government might help explain why we have more national injunctions today.

121. See *supra* Section I.B.

122. This is true even without nonmutuality, see U.S. CONST. art. IV, § 1 (Full Faith and Credit Clause); 28 U.S.C. § 1738 (2012) (full faith and credit statute), but it became perhaps more obvious once nonmutual preclusion took hold. In this way, even before *Parklane*, critics of national injunctions would have been wrong to claim a jurisdiction-based limit to the reach of federal judgments. Cf. *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 233 (1998) (“A final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land. For claim and issue preclusion (*res judicata*) purposes, in other words, the judgment of the rendering State gains nationwide force.” (footnote omitted)).

123. Both *Parklane* and *Mendoza* are federal common law decisions. See, e.g., *United States v. Mendoza*, 464 U.S. 154, 158 (1984). As such, they are susceptible to Supreme Court or congressional revision. See *City of Milwaukee v. Illinois*, 451 U.S. 304, 314 (1981) (“[W]hen Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears.”); see also *infra* Part IV (discussing institutional choice and preclusion law).

124. See, e.g., *Montana v. United States*, 440 U.S. 147, 153–54 (1979) (“To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial

Indeed, this history reveals that many of the same policy considerations are relevant to decisions about the scope of preclusion and the scope of injunctive relief. As mentioned above, the exact charges against national injunctions were leveled against nonmutual preclusion—and appeals to efficiency and fairness characterize defenses of both doctrines.<sup>125</sup> This is not to say that preclusion law must be perfectly symmetrical with the scope of injunctions.<sup>126</sup> But preclusion–injunction symmetry, as a rough guide, would be consistent with the overlapping policy arguments that connect these issues.<sup>127</sup>

In sum, contrary to the claim of critics, history does not so clearly require a hard-and-fast rule against national injunctions. Indeed, the history might be read to call for injunctions to track preclusion, which today permits substantial nonparty protection. The best reading, though, is that the history neither requires nor prohibits national injunctions. Instead, this history gives space for courts (and legislators) to assess the relevant policies that undergird the law of remedies and judgments.

### III. OVERRULING *MENDOZA*

So far this Article has explored the relationship between injunctions and preclusion. This Part goes further, jumping off from that relationship to propose a different sort of law reform: overruling *United States v. Mendoza*.

Earlier comments on national injunctions and preclusion show that neither history nor structure require overruling the *Mendoza* decision. *Mendoza* itself is a decision based on policy,<sup>128</sup> and it is on this terrain that I challenge its reasoning. This Part's arguments could also be deployed by those seeking to narrow *Mendoza*, but the course described here involves overruling *Mendoza* and leaving open the option for Congress to later develop preclusion exceptions where needed.

Importantly, nothing in this argument *requires* parallelism between *Mendoza* and national injunctions. One could agree that *Mendoza* should be overruled and then support either allowing or prohibiting national injunctions.<sup>129</sup> Instead, this Part takes advantage of the recent fervor around non-

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resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.”).

125. See *supra* Part I.

126. For one thing, at the time a court crafts equitable relief, it may be difficult to imagine the exact contours of a judgment's future preclusive effect. See, e.g., *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 396 (1996) (Ginsburg, J., concurring in part and dissenting in part) (“A court conducting an action cannot predetermine the res judicata effect of the judgment; that effect can be tested only in a subsequent action.”).

127. I take up this framework *infra* Section IV.B.

128. See *infra* Section III.A. Though not addressing *Mendoza* specifically, Professor Resnik similarly characterized the Supreme Court's preclusion precedents as reflecting “value choices.” Resnik, *supra* note 71, at 972.

129. I discuss *infra* Part IV how these arrangements might work together. Estreicher and Revesz similarly conclude that the law of nonmutual preclusion, though analytically similar, is

party protection to argue that the Supreme Court (or Congress) should overrule *Mendoza* regardless of the resolution of the national-injunctions debate. The next Part takes up what this choice would mean for national injunctions.<sup>130</sup>

### A. *Mendoza Was Wrong*

I turn first to the reasoning of *Mendoza*. After asserting that the government is not identical to a private litigant<sup>131</sup>—a point that does little to answer the question at issue—the Supreme Court offered a series of arguments for exempting the United States from offensive nonmutual issue preclusion. Notably, the Court’s arguments were not about history, structure, or the Constitution. Instead, the Court offered six *policy* reasons to exempt the government from nonmutual preclusion:

- First, the federal government is a party to a substantial number of cases across the entire geography of the United States.<sup>132</sup>
- Second, government litigation frequently involves issues of substantial public importance that have consequences for many non-parties.<sup>133</sup>

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not dispositive of questions about agency nonacquiescence. See Estreicher & Revesz, *supra* note 6, at 684–85.

130. This Part does not address the institutional question whether legislators or judges are best positioned to define preclusion law. But this Part assumes that the policy-inflected choices will not be constitutional rules and thus will be amenable to revision. See *infra* notes 265–267 and accompanying text. Nor does this Part address the relationship between *Mendoza* and *Chevron*. In *Brand X*, the Supreme Court held that an agency interpretation may be entitled to *Chevron* deference even if it contradicted prior circuit-court precedent. See *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980–82 (2005). It is conceivable that Congress or the Court might want to extend this rule to issue preclusion (if *Mendoza* were overruled), though I suspect that existing requirements of and exceptions to issue preclusion would likely negate preclusion for most of these cases. See RESTATEMENT (SECOND) OF JUDGMENTS §§ 27–29 (AM. LAW INST. 1982).

131. *United States v. Mendoza*, 464 U.S. 154, 159 (1984). Because this section focuses on the arguments for and against *Mendoza*, I quote from the Supreme Court extensively in the following footnotes.

132.

We have long recognized that “the Government is not in a position identical to that of a private litigant,” both because of the geographic breadth of Government litigation and also, most importantly, because of the nature of the issues the Government litigates. It is not open to serious dispute that the Government is a party to a far greater number of cases on a nationwide basis than even the most litigious private entity; in 1982, the United States was a party to more than 75,000 of the 206,193 filings in the United States District Courts. In the same year, the United States was a party to just under 30% of the civil cases appealed from the District Courts to the Court of Appeals.

*Id.* at 159–60 (citations omitted) (quoting *INS v. Hibi*, 414 U.S. 5, 8 (1973), and citing 1982 ANN. REP. DIRECTOR ADMIN. OFF. U.S. CTS. 98, <https://hdl.handle.net/2027/msu.31293018513584> (on file with the *Michigan Law Review*)).

- Third, nonmutual preclusion would impede the development of the law through “percolation” in the lower courts, especially in cases of public importance.<sup>134</sup>
- Fourth, applying nonmutual preclusion would require the solicitor general to change its policy concerning appeals and to appeal every adverse decision in order to avoid foreclosing further review.<sup>135</sup>
- Fifth, applying nonmutual preclusion would interfere with the ability of different presidential administrations to take different positions on the law.<sup>136</sup>

133.

Government litigation frequently involves legal questions of substantial public importance; indeed, because the proscriptions of the United States Constitution are so generally directed at Governmental action, many constitutional questions can arise only in the context of litigation to which the Government is a party. Because of those facts the government is more likely than any private party to be involved in lawsuits against different parties which nonetheless involve the same legal issues.

*Id.* at 160.

134.

A rule allowing nonmutual collateral estoppel against the Government in such cases would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue. Allowing only one final adjudication would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari. Indeed, if nonmutual estoppel were routinely applied against the Government, this Court would have to revise its practice of waiting for a conflict to develop before granting the government’s petitions for certiorari.

*Id.* (citations omitted).

135.

The Solicitor General’s policy for determining when to appeal an adverse decision would also require substantial revision. . . . Unlike a private litigant who generally does not forgo an appeal if he believes that he can prevail, the Solicitor General considers a variety of factors, such as the limited resources of the Government and the crowded dockets of the courts, before authorizing an appeal. The application of nonmutual estoppel against the government would force the Solicitor General to abandon those prudential concerns and to appeal every adverse decision in order to avoid foreclosing further review.

*Id.* at 160–61 (footnote omitted) (citation omitted).

136.

In addition to those institutional concerns traditionally considered by the Solicitor General, the panoply of important public issues raised in governmental litigation may quite properly lead successive administrations of the Executive Branch to take differing positions with respect to the resolution of a particular issue. While the Executive Branch must of course defer to the Judicial Branch for final resolution of questions of constitutional law, the former nonetheless controls the progress of Government litigation through the federal courts. It would be idle to pretend that the conduct of government litigation in all its myriad features, from the decision to file a complaint in the United States district court to the decision to petition for certiorari to review a judgment of the

- Sixth, the indeterminacy of *Parklane's* approach would be unfair to the government.<sup>137</sup>

For these policy arguments to be persuasive, they would need to offer more than a broadside against *Parklane* generally and explain why the government deserves special treatment.<sup>138</sup> In short, I am not convinced.<sup>139</sup>

We can quickly dispense with the concern that the solicitor general's office would have to change its appeals policy—an argument that, on its own, should move no one.<sup>140</sup> In addition, the geographic spread of government litigation is verging on non sequitur, and the quantity of cases does not explain why preclusion should or should not attach.<sup>141</sup>

We also can dispense with arguments that apply equally to all uses of nonmutual preclusion. Concerns about incentivizing over-litigation,<sup>142</sup> sacri-

court of appeals, is a wholly mechanical procedure which involves no policy choices whatever.

*Id.* at 161.

137.

The Court of Appeals did not endorse a routine application of nonmutual collateral estoppel against the government, because it recognized that the Government does litigate issues of far-reaching national significance which in some cases, it concluded, might warrant relitigation. But in this case it found no “record evidence” indicating that there was a “crucial need” in the administration of the immigration laws for a redetermination of the due process question decided in *68 Filipinos* and presented again in this case. The Court of Appeals did not make clear what sort of “record evidence” would have satisfied it that there *was* a “crucial need” for redetermination of the question in this case, but we premit further discussion of that approach; we believe that the standard announced by the Court of Appeals for determining when relitigation of a legal issue is to be permitted is so wholly subjective that it affords no guidance to the courts or to the Government. Such a standard leaves the Government at sea because it cannot possibly anticipate, in determining whether or not to appeal an adverse decision, whether a court will bar relitigation of the issue in a later case. By the time a court makes its subjective determination that an issue cannot be relitigated, the Government's appeal of the prior ruling of course would be untimely.

*Id.* at 162 (citation omitted).

138. Of course, if one felt that nonmutual preclusion were an outrage to justice, perhaps paring it back unevenly (such as for federal defendants only) would be better than nothing. See Email from Kevin M. Clermont to author (Mar. 27, 2018) (on file with author); see also ROBERT C. CASAD & KEVIN M. CLERMONT, *RES JUDICATA: A HANDBOOK ON ITS THEORY, DOCTRINE, AND PRACTICE* 184–88 (2001). This Article, though, presumes the continued existence of nonmutual preclusion.

139. I take the Court on its own terms, though of course there may have been other reasons for its decisions. Cf. Judith Resnik, *Precluding Appeals*, 70 CORNELL L. REV. 603, 618–19 (1985) (“[I]n the rare instances when the Court permits more procedural opportunities, the ‘winner’ is often the government, and particularly the United States. . . . [I]n *United States v. Mendoza*, the Court created a special exception to the nonmutual collateral estoppel rule for the federal government. Thus, the government may be permitted multiple chances to litigate but the rest of us are not. The Court's work in this area may be explained by hostility towards certain categories of rights and to the individuals claiming them.” (footnotes omitted)).

140. *Contra Mendoza*, 464 U.S. at 159–60.

141. *Contra id.* at 160–61.

142. *Contra id.*



ficing percolation,<sup>143</sup> and fostering indeterminacy<sup>144</sup> are common critiques of nonmutual preclusion generally. And, of course, the Supreme Court has been able to overcome these objections for all defendants but the federal government.<sup>145</sup>

Deserving more attention is *Mendoza*'s claim that government cases involve issues of public importance.<sup>146</sup> First of all, this claim does not distinguish government litigation. Countless private defendants—think Big Tobacco, Facebook, Wal-Mart, etc.—are involved in geographically disparate and sometimes publicly significant litigation.<sup>147</sup> Indeed, the issues of public importance litigated by the federal government are invariably issues litigated with private parties who remain subject to nonmutual preclusion. In *Parklane* itself, for example, nonparties were able to use nonmutual preclusion against a private party based on a prior government suit.<sup>148</sup> But after *Mendoza* they would not have been able to use an adverse finding against the federal government in the same circumstance.<sup>149</sup> In other cases, the federal government itself has invoked nonmutual preclusion against private parties.<sup>150</sup>

Nor does *Mendoza*'s claim about public importance accurately describe government litigation. Although the government litigates some cases of public interest, not all government cases are important.<sup>151</sup> It would be one thing if the Supreme Court announced a special rule for cases of public importance,<sup>152</sup> and one might read certain exceptions to preclusion generally as

143. *Contra id.* at 160.

144. *Contra id.* at 162.

145. *See supra* Section I.B (discussing *Parklane*).

146. *See Mendoza*, 464 U.S. at 160. Indeed, much of the Court's reasoning relies on an implicit (and unjustified) assumption that government cases are of public importance and nongovernment cases are not. This applies to issues labeled first, second, third, and sixth above.

147. States, too, may be subjects of such litigation, and they are not automatically covered by *Mendoza*. *See* WRIGHT ET AL., *supra* note 60, § 4465.4.

148. *See supra* Section I.B (discussing *Parklane*).

149. *See supra* Section I.B (discussing *Mendoza*).

150. *See, e.g.*, SEC. v. Resnick, 604 F. Supp. 2d 773 (D. Md. 2009); SEC. v. Grotto, No. 05 Civ. 5880(GEL), 2006 WL 3025878 (S.D.N.Y. Oct. 24, 2006).

151. For example, the United States is routinely sued under the Federal Tort Claims Act ("FTCA") after postal workers get into automobile accidents. *See* 28 U.S.C. §§ 2671–80 (2012); *see also* Dalehite v. United States, 346 U.S. 15, 28 (1953) ("Uppermost in the collective mind of Congress [when adopting the FTCA] were the ordinary common-law torts. Of these, the example which is reiterated in the course of the repeated proposals for submitting the United States to tort liability, is 'negligence in the operation of vehicles.'" (footnote omitted) (quoting H.R. REP. NO. 76-2428, at 3 (1940)).

152. Prior to *Mendoza*, the Second Circuit seemingly accepted that offensive nonmutual issue preclusion might apply to the government but that it should be declined for "issues of national concern." *Olegario v. United States*, 629 F.2d 204, 215 (2d Cir. 1980).

reflecting this concern.<sup>153</sup> But *Mendoza* seemingly applies to lower-profile government litigation too.<sup>154</sup>

On this score, it is worth pausing on what government litigation looks like. In the *Mendoza* opinion, Justice Rehnquist attempted to show the unique status of the federal government by relying on a report from the Administrative Office of U.S. Courts for the fact that “in 1982, the United States was a party to more than 75,000 of the 206,193 filings in the United States District Courts.”<sup>155</sup> This statement is true but incomplete. The same report showed that the U.S. government was almost twice as likely to be a plaintiff as a defendant in federal court,<sup>156</sup> and that almost 30,000 of those cases involved the United States seeking to recover defaulted student loans and overpaid veterans’ benefits.<sup>157</sup> Today, the United States is party to 40% fewer district-court cases than in 1986, comprising less than 16% of district-court dockets.<sup>158</sup> The subject matter of these suits is highly varied, with the vast majority being prisoner petitions and social security appeals.<sup>159</sup> While certainly some of these cases are of public importance, they do not seem to make the federal government sound so special that it deserves a blanket ex-

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153. I say more about these exceptions below. See *infra* notes 173–176 and accompanying text.

154. Although the *Mendoza* opinion described its holding as applicable to “issues such as those involved in this case,” *United States v. Mendoza*, 464 U.S. 154, 162 (1984), courts have generally applied its holding to all federal litigation, see WRIGHT ET AL., *supra* note 60, § 4465.4. Prior to *Mendoza*, some courts limited nonmutual preclusion in government litigation to “narrow, fact-bound issues that will not jeopardize any of the public interests described by the Court.” *Id.* This Article’s call to overrule *Mendoza*, in the first instance, would sweep beyond this limit, subject to the general law of preclusion. As mentioned below, Congress could pull back further on preclusion as it sees fit.

155. *Mendoza*, 464 U.S. at 159–60.

156. 1982 ANN. REP. DIRECTOR ADMIN. OFF. U.S. CTS. 4, <https://hdl.handle.net/2027/msu.31293018513584> (on file with the *Michigan Law Review*). Note, too, that at times courts have been more willing to apply nonmutual preclusion to former *plaintiffs* rather than former *defendants*, because former plaintiffs chose when to sue, whom to sue, and where to sue. See, e.g., RICHARD H. FIELD ET AL., MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE 854–55 (12th ed. 2017).

157. 1982 ANN. REP. DIRECTOR ADMIN. OFF. U.S. CTS., *supra* note 156, at 92, 101. The United States was also a party to thousands of cases in each of torts, contracts, employment, and real property. *Id.* at 99.

158. See Table C-3: *U.S. District Courts—Civil Cases Commenced, by Nature of Suit and District, During the 12-Month Period Ending September 30, 2018*, U.S. CTS. (Sept. 30, 2018), [https://www.uscourts.gov/sites/default/files/data\\_tables/jb\\_c3\\_0930.2018.pdf](https://www.uscourts.gov/sites/default/files/data_tables/jb_c3_0930.2018.pdf) [<https://perma.cc/E93J-AYW3>].

Not included in these figures are immigration appeals, for which review proceeds in the courts of appeals. In 2016, the government won 89% of immigration appeals. See Jonah B. Gelbach & David Marcus, *Rethinking Judicial Review of High Volume Agency Adjudication*, 96 TEX. L. REV. 1097, 1112 n.78 (2018).

159. See Table C-3, *supra* note 158. See generally Gelbach & Marcus, *supra* note 158 (discussing social security appeals). Note also that prisoner petitions are subject to various special rules that make success quite challenging. See, e.g., 28 U.S.C. § 2255 (2012) (federal habeas); 42 U.S.C. § 1997e (2012 & Supp. 2018) (Prison Litigation Reform Act).

ception from the normal rules of preclusion. And presumably many of these cases turn on case-specific determinations for which nonmutual preclusion would not be relevant.<sup>160</sup>

Even if *Mendoza* were correct that government litigation involved issues of public importance, it is not obvious why this should countenance against nonmutual preclusion. Issues of public importance are seemingly more likely to get Supreme Court review, so erroneous lower-court decisions can be quickly resolved.<sup>161</sup> It is also not clear why we should be troubled if the government invested a few more litigation resources in cases that might affect large groups of potential litigants.<sup>162</sup> This might be exactly what the Justice Department should be doing.

*Mendoza*'s most compelling argument to exempt the federal government from nonmutual preclusion is the issue of changing administrations.<sup>163</sup> Although private defendants may also change leadership, the democratic process is qualitatively different on this dimension. In particular, it is possible that the Court was worried about one administration "locking in" future administrations through preclusion.<sup>164</sup>

160. See RESTATEMENT (SECOND) OF JUDGMENTS § 27 (AM. LAW INST. 1982) (limiting issue preclusion to situations in which cases address the same issue).

161. This critique also applies to the national-injunction critics: it seems somewhat odd to point to examples such as the Travel Ban litigation as national-injunction problems when those cases are (relatively) quickly resolved by the Supreme Court. See *infra* Part IV (applying this argument to national injunctions). Those cases, too, are poor illustrations of the need for percolation. *Infra* Part IV.

162. See *United States v. Mendoza*, 464 U.S. 154, 160–61 (1984). These resources might reflect more investment in the trial court or a greater willingness to appeal.

163. *Mendoza*, 464 U.S. at 161.

164. Analogous discussions arise in the context of structural injunctions and consent decrees. See, e.g., *Horne v. Flores*, 557 U.S. 433, 448–49 (2009) (“[T]he dynamics of institutional reform litigation differ from those of other cases. Scholars have noted that public officials sometimes consent to, or refrain from vigorously opposing, decrees that go well beyond what is required by federal law. Injunctions of this sort bind state and local officials to the policy preferences of their predecessors and may thereby ‘improperly deprive future officials of their designated legislative and executive powers.’ States and localities ‘depen[d] upon successor officials, both appointed and elected, to bring new insights and solutions to problems of allocating revenues and resources.’ Where ‘state and local officials . . . inherit overbroad or outdated consent decrees that limit their ability [to] respond to the priorities and concerns of their constituents,’ they are constrained in their ability to fulfill their duties as democratically elected officials.” (second and third alterations in original) (citations omitted) (first quoting *Frew v. Hawkins*, 540 U.S. 431, 441 (2004), then quoting *Frew v. Hawkins*, 540 U.S. 431, 442 (2004), and then quoting Brief on Behalf of the Am. Legislative Exch. Council & Certain Individual State Legislators as *Amicus Curiae* in Support of Petitioners at 7, *Horne v. Flores*, 557 U.S. 433 (2009) (No. 08-294))); Michael W. McConnell, *Why Hold Elections? Using Consent Decrees to Insulate Policies from Political Change*, 1987 U. CHI. LEGAL F. 295, 298 (“I contend that a narrow but important class of consent decrees, if judicially enforced, would violate the structural provisions of the Constitution by denying future executive officials the policymaking authority vested in them by the Constitution and laws. These consent decrees circumvent democratic change by precluding subsequent Presidents from changing policies set, through consent decree, by a previous Administration (or, for that matter, by preventing a single President from

Upon further scrutiny, this change-in-administrations concern is overblown. For one thing, there is no inviolable principle against “locking in” the federal government.<sup>165</sup> Cross-administration lock-in can arise from contract, including from contract-like devices such as plea bargains and nonprosecution agreements.<sup>166</sup> Perhaps more importantly, it is beyond doubt that the federal government may be locked in by judgments. The *Mendoza* opinion worried about nonmutual preclusion locking in future administrations, but the opinion readily conceded that *mutual* preclusion may attach to the federal government.<sup>167</sup> And continuing the preclusion–injunctions parallel from above, there is no doubt that future administrations may be bound by injunctions in the normal course.<sup>168</sup>

Not only do we tolerate other forms of lock-in, but the law of preclusion also provides various outs that help avoid bad outcomes. First, as noted above, *Parklane* is not a mandatory rule.<sup>169</sup> *Parklane* gives courts discretion

changing his mind.”). See generally Catherine Y. Kim, *Changed Circumstances: The Federal Rules of Civil Procedure and the Future of Institutional Reform Litigation After Horne v. Flores*, 46 U.C. DAVIS L. REV. 1435 (2013).

165. I would also submit that, to the extent there is a “lock-in” problem, it does not attach differently to the federal government than it would to states and localities, yet they are not given special treatment under *Mendoza*.

166. See, e.g., *United States v. Castaneda*, 162 F.3d 832, 835–36 (5th Cir. 1998) (“Nonprosecution agreements, like plea bargains, are contractual in nature, and are therefore interpreted in accordance with general principles of contract law. Under these principles, if a defendant lives up to his end of the bargain, the government is bound to perform its promises.” (footnote omitted)); *United States v. Johnson*, 861 F.2d 510, 512–13 (8th Cir. 1988) (explaining when specific performance is the appropriate remedy against the government for breach of a cooperation agreement). See generally Cindy R. Alexander & Mark A. Cohen, *The Evolution of Corporate Criminal Settlements: An Empirical Perspective on Non-Prosecution, Deferred Prosecution, and Plea Agreements*, 52 AM. CRIM. L. REV. 537 (2015).

167. See *Mendoza*, 464 U.S. at 163–64 (“Today in a companion case we hold that the Government may be estopped under certain circumstances from relitigating a question when the parties to the two lawsuits are the same. . . . The application of an estoppel when the Government is litigating the same issue with the same party avoids the problem of freezing the development of the law because the Government is still free to litigate that issue in the future with some other party. And, where the parties are the same, estopping the Government spares a party that has already prevailed once from having to relitigate—a function it would not serve in the present circumstances.” (footnote omitted) (citations omitted)); see also *United States v. Stauffer Chem. Co.*, 464 U.S. 165, 168 (1984) (holding, on the same day as *Mendoza*, that “the doctrine of mutual defensive [issue preclusion] is applicable against the Government to preclude relitigation of the same issue already litigated against the same party in another case involving virtually identical facts”).

168. The prominent critiques of nonparty-protecting injunctions do not raise objections to party-protecting injunctions. See *supra* note 1 (including several sources objecting to nonparty-protecting injunctions); *supra* note 164 (discussing injunctions that bind the federal government across administrations). And this says nothing of political choices that functionally lock in future administrations. Cf. David Freeman Engstrom, *Drawing Lines Between Chevron and Pennhurst: A Functional Analysis of the Spending Power, Federalism, and the Administrative State*, 82 TEX. L. REV. 1197, 1237–71 (2004) (exploring how the federal government politically locks states into federal programs).

169. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 (1979).

with respect to nonmutual preclusion, and it advises courts to decline preclusion when it would be “unfair.”<sup>170</sup> Similarly, the Restatement’s version of nonmutual issue preclusion may be avoided for issues of law or when “[o]ther compelling circumstances make it appropriate that the party be permitted to relitigate the issue.”<sup>171</sup> For example, following a successful federal-government suit against tobacco companies, seven different courts used their discretion to decline to give private parties the benefit of nonmutual preclusion against the company defendants.<sup>172</sup>

Second, there are general exceptions to issue preclusion that might alleviate these concerns, which also seem to respond to the “public importance” issue mentioned above. The Second Restatement of Judgments provides that issue preclusion should not attach when, among other reasons, “[t]he issue is one of law and (a) the two actions involve claims that are substantially unrelated, or (b) a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws.”<sup>173</sup> These exceptions were endorsed by the Supreme Court in cases involving the federal government. *United States v. Moser* (and later *Montana*) explained that determinations of pure law are not binding across unrelated proceedings.<sup>174</sup> *Sunnen* (and later *Montana*) as

170. *Id.* Complaining about *Parklane*’s indeterminacy—as *Mendoza* does—falls into the category of generalized grievances that are not specific to the government. See *Mendoza*, 464 U.S. at 161. And, of course, the Supreme Court wrote *Parklane*, and it could “rulify” *Parklane* if it wanted to. Cf. Frederick Schauer, *The Tyranny of Choice and the Rulification of Standards*, 14 J. CONTEMP. LEGAL ISSUES 803, 805–06 (2005) (“Rather than embracing standards as the logical corollary to resisting rules, interpreters and enforcers have systematically resisted standards almost as much as they have resisted rules, sharpening the soft edges of standards just as they have rounded off the crisp corners of rules. Whether it be by importing rules from elsewhere, or imposing rules of some sort on their own otherwise unconstrained decision-making, or filling decisional voids with three- and four-part tests, interpreters and enforcers of standards have tried to convert those standards into rules to a surprising degree, surprising especially because the effect of such action is to constrain the very choices that those interpreters and enforcers would otherwise have had . . . .” (footnote omitted)).

171. RESTATEMENT (SECOND) OF JUDGMENTS § 29(7)–(8) (AM. LAW INST. 1982).

172. See *Shaffer v. R.J. Reynolds Tobacco Co.*, 860 F. Supp. 2d 991, 995–96 (D. Ariz. 2012) (“Courts in six states (Massachusetts, Missouri, Maine, Minnesota, California, and New York) handling tobacco litigation have been asked by various plaintiffs to use offensive nonmutual issue preclusion to apply hundreds or thousands of the findings of fact from the DOJ Case to establish liability in their respective cases. All of these courts have rejected these requests and exercised their broad discretion not to allow offensive nonmutual issue preclusion relating to the DOJ Case. Like these courts, this Court finds that using offensive nonmutual issue preclusion to apply findings of fact from the DOJ Case to establish liability in this case is inappropriate, and therefore exercises its broad discretion not to allow the use of the doctrine in this case.” (citations omitted)).

173. RESTATEMENT (SECOND) OF JUDGMENTS § 28(2). The law of injunctions also acknowledges the need for flexibility in light of changes in circumstances. See *Rufo v. Inmates of Suffolk Cty. Jail*, 502 U.S. 367, 383–93 (1992).

174. *Montana v. United States*, 440 U.S. 147, 162–63 (1979); *United States v. Moser*, 266 U.S. 236, 242 (1924). So, a determination of law against the United States will not be binding in later cases against the United States if the cases were sufficiently unrelated so that nonpreclu-

well) found an exception to issue preclusion for legal issues when preclusion might create unequal legal treatment.<sup>175</sup> Both of these exceptions would be useful to courts seeking to excuse a new administration from the preclusive effects of judgments against prior administrations.

The Restatement further provides that issue preclusion should not attach when:

There is a clear and convincing need for a new determination of the issue (a) because of the potential adverse impact of the determination on the public interest or the interests of persons not themselves parties in the initial action, (b) because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action, or (c) because the party sought to be precluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.<sup>176</sup>

Here, a change in administrations could be the “special circumstances” under clause (c). Clause (a) protects the public interest, which also may be at issue. Indeed, this option may be especially significant when changes in government policy are justified by appeals to the public interest—which, I would submit, are the changes in policy most deserving of special treatment.<sup>177</sup>

In short, therefore, there is a well-developed system of exceptions to preclusion (and to nonmutual preclusion) that would seem to meet all of the Supreme Court’s concerns without reflexively resorting to a special rule applicable only when the government loses an issue.

### B. Government Preclusion

The case for preclusion is well known, relying primarily on efficiency and fairness. This Section will not rehash every detail of that case—nor should it be read to endorse unqualifiedly any of these arguments. Instead, the Section argues that the values of preclusion apply at least as strongly to government litigants.

One classic justification for preclusion is that it avoids relitigation, which is costly in terms of resources and also in terms of the risk of inconsistent adjudications.<sup>178</sup> A major theme in modern civil procedure has been the desire to bring together in a single proceeding all related claims and parties—think liberal claim and party joinder, class actions, and the merger of

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sion is more than just a second bite at the apple. *Montana*, 440 U.S. at 162–63; *Moser*, 266 U.S. at 242.

175. *Montana*, 440 U.S. at 158–62; *Comm’r v. Sunnen*, 333 U.S. 591, 599 (1948).

176. RESTATEMENT (SECOND) OF JUDGMENTS § 28(5).

177. After all, the Supreme Court justified the governmental exception because the government is often involved in litigation of public concern. See *supra* note 146 and accompanying text.

178. WRIGHT ET AL., *supra* note 60, § 4403.

law and equity.<sup>179</sup> The same logic applies to preclusion: the broader the preclusion rule, the greater the incentives to litigate everything up front. For high-profile cases destined for the Supreme Court, there seems to be even less reason to wait.<sup>180</sup>

Preclusion also sounds in fairness.<sup>181</sup> Preclusion protects winning parties from having to relitigate their successful claims. While those resisting non-mutual preclusion typically argue unfairness, it is not unfair to bind a defendant who had a full and fair opportunity to litigate an issue.<sup>182</sup> It is one thing if, through no fault of its own, a party did not litigate an issue to the fullest. The law of issue preclusion generally has an exception in these terms,<sup>183</sup> and *Parklane* seemingly expands that exception in nonmutual situations.<sup>184</sup> But if a defendant completely litigated an issue, why should we give that defendant a second bite at the apple?<sup>185</sup> Indeed, if a defendant knew that

179. See generally Charles E. Clark & James W.M. Moore, *A New Federal Civil Procedure* (pt. 1) 44 YALE L.J. 387 (1935); Martin H. Redish, *Intersystemic Redundancy and Federal Court Power: Proposing a Zero Tolerance Solution to the Duplicative Litigation Problem*, 75 NOTRE DAME L. REV. 1347 (2000).

180. See *supra* note 161 and accompanying text (making this argument in opposition to *Mendoza*).

181. See generally WRIGHT ET AL., *supra* note 60, § 4403.

182. Some critics have argued that nonmutuality is unfair because the expected recovery in nonmutual jurisdictions will deviate from the expected recovery of the original claim. See, e.g., Note, *supra* note 77. This is an argument about error costs, and it is true as far as it goes. But, first, it fails to account for decision costs on the court or transaction costs on parties. Those are costs too. Second, this argument assumes that the probability of winning is exogenous. That is an erroneous assumption. The probability of victory depends, in part, on the effort expended. So a party facing nonmutual preclusion will invest more resources, thus increasing its probability of winning. (This is the “over-litigation” concern marshaled by opponents of nonmutuality, here marshaled as a reason to be less concerned about nonmutuality’s effects on accuracy.)

More generally, as Professor Bone explains: “[A] mutuality rule has potential benefits in reducing litigation costs and preventing systematic trial and settlement error. At the same time, mutuality creates substantial costs of its own by requiring the relitigation of issues that have already been vigorously litigated and carefully determined in previous suits. It is not possible to determine how the balance comes out without more empirical information and a more careful analysis.” ROBERT G. BONE, *CIVIL PROCEDURE: THE ECONOMICS OF CIVIL PROCEDURE* 253 (2003).

183. See RESTATEMENT (SECOND) OF JUDGMENTS § 28 (AM. LAW INST. 1982).

184. See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 (1979); see also RESTATEMENT (SECOND) OF JUDGMENTS § 29.

185. As the Court explained in *Blonder-Tongue*:

In any lawsuit where a defendant, because of the mutuality principle, is forced to present a complete defense on the merits to a claim which the plaintiff has fully litigated and lost in a prior action, there is an arguable misallocation of resources. To the extent the defendant in the second suit may not win by asserting, without contradiction, that the plaintiff had fully and fairly, but unsuccessfully, litigated the same claim in the prior suit, the defendant’s time and money are diverted from alternative uses—productive or otherwise—to relitigation of a decided issue. And, still assuming that the issue was resolved correctly in the first suit, there is reason to be concerned about the plaintiff’s allocation of resources. Permitting repeated litigation of the same issue as long as the

nonmutual preclusion could apply, then we should expect that defendant to increase its litigation effort in light of the expanded stakes.<sup>186</sup>

Even if one were to quibble with the efficiency or fairness arguments in favor of nonmutual preclusion, I would contend that these arguments offer no reason to treat federal defendants differently. Arguments about efficiency are difficult to parse,<sup>187</sup> but government and nongovernment defendants seemingly present the same tradeoffs in this space. Arguments about fairness are also slippery,<sup>188</sup> but it is difficult to understand why the governmental status of the losing party (rather than the subject matter of the litigation or the relationship between the parties) necessarily predicts the fairness of nonmutual preclusion.

If anything, these values might point more strongly toward preclusion in government cases. One might think that the awesome power of the government<sup>189</sup>—not to mention its highly successful track record in federal litigation<sup>190</sup> and its noted pattern of “nonacquiescence” to court decisions<sup>191</sup>—would suggest being more cautious about giving the government an advantage over analogous private parties. Yet we protect the government from

supply of unrelated defendants holds out reflects either the aura of the gaming table or ‘a lack of discipline and of disinterestedness on the part of the lower courts, hardly a worthy or wise basis for fashioning rules of procedure.’ Although neither judges, the parties, nor the adversary system performs perfectly in all cases, the requirement of determining whether the party against whom an estoppel is asserted had a full and fair opportunity to litigate is a most significant safeguard.

Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found., 402 U.S. 313, 329 (1971) (quoting *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 185 (1952)).

186. It also might be true that courts—knowing that nonmutual preclusion is possible—will avoid cavalier decisions that might have ripple effects across government programs. This dynamic effect is speculative but plausible in at least some cases.

187. See Robert G. Bone, *Rethinking the “Day in Court” Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193, 248–51 (1992).

188. See *id.* at 256–64.

189. This is a power that seems even more awesome today than it did at the Founding. Cf. Bray, *supra* note 1, at 445–57 (discussing government power and national injunctions).

190. See, e.g., Gelbach & Marcus, *supra* note 158, at 1112 n.78 (noting that, in 2016, the government won 89% of immigration appeals); David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 171 (2010) (collecting studies finding that courts affirm between 58–76% of federal agency decisions).

191. E.g., Estreicher & Revesz, *supra* note 6, at 681 (“The selective refusal of administrative agencies to conduct their internal proceedings consistently with adverse rulings of the courts of appeals—a practice commonly termed agency nonacquiescence—is not new in American law. Over the past sixty years, many agencies have insisted, in varying degrees, on the authority to pursue their policies, despite conflicting court decisions, until the Supreme Court is prepared to issue a nationally binding resolution.”); Nancy M. Modesitt, *The Hundred-Years War: The Ongoing Battle Between Courts and Agencies over the Right to Interpret Federal Law*, 74 MO. L. REV. 949 (2009) (surveying nonacquiescence); Wendy Wagner, *Revisiting the Impact of Judicial Review on Agency Rulemakings: An Empirical Investigation*, 53 WM. & MARY L. REV. 1717, 1760–66 (2012) (reporting results of study showing EPA nonacquiescence). For more on the connection between this topic and nonacquiescence, see *supra* notes 6 & 129 and *infra* notes 243 & 265.



nonmutual preclusion while allowing the government to invoke nonmutual preclusion against other parties<sup>192</sup> and while magnifying government victories by attaching nonmutual preclusion to them.<sup>193</sup>

We might also be more comfortable with a default rule permitting nonmutual preclusion against the government because Congress might more closely monitor these cases for systemic problems. It is not unreasonable to expect that Congress is more attuned to issues that affect the federal government directly. For example, in their massive study of congressional overrides of Supreme Court decisions, Professors Christiansen and Eskridge found that “the Executive Branch of the federal government is the biggest player, and usually the big winner, in the override process.”<sup>194</sup> So if Congress concluded that the federal government, in certain circumstances, needed an exemption from the normal rules of preclusion, it could so legislate.<sup>195</sup> Con-

192. As mentioned above, the government has invoked nonmutual preclusion in its favor. See, e.g., *SEC v. Resnick*, 604 F. Supp. 2d 773, 778–80 (D. Md. 2009); *SEC v. Grotto*, No. 05 Civ. 5880(GEL), 2006 WL 3025878, at \*3 (S.D.N.Y. Oct. 24, 2006). Indeed, the United States has invoked nonmutual preclusion against other government defendants. See *United States v. Wash. State Dep’t of Transp.*, No. 08-5722RJB, 2010 WL 2698854, at \*6–7 (W.D. Wash. July 7, 2010) (using *Parklane* discretion to decline to apply nonmutual preclusion against the Washington State Department of Transportation as requested by the U.S. government).

193. See, e.g., *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331–32 (1979); *id.* at 355–56 (Rehnquist, J., dissenting).

194. Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 TEX. L. REV. 1317, 1376 (2014). The authors explained:

The legal position of the United States prevails in more than two-thirds of the statutory cases decided by the Court, and the United States is usually a winner in the override process as well: a large majority of the overrides adopt the policy or legal position advanced by the United States during the congressional deliberation process. . . . No group or institution enjoys the attention of Congress more than the Executive Branch of the federal government: its officials testified, in depth, in a large majority of overrides and supported the large majority of those overrides. The federal government took an explicit position in just under three-quarters of the overrides, supporting the override in 75% of those instances. . . . [T]he Department of Justice, the Internal Revenue Service, the Department of Health and Human Services, the Equal Employment Opportunity Commission, the Departments of State and of Defense, and the Federal Trade Commission are among the most prominent agencies providing important congressional testimony. . . . [T]heir position usually prevails. But even when it does not, the Executive Branch’s position often affects the compromise ultimately reached.

*Id.* at 1376–78. For interesting results following congressional overrides, see generally Deborah A. Widiss, *Shadow Precedents and the Separation of Powers: Statutory Interpretation of Congressional Overrides*, 84 NOTRE DAME L. REV. 511 (2009).

195. *Parklane* and *Mendoza* are federal common law, which Congress can overrule. See *City of Milwaukee v. Illinois*, 451 U.S. 304, 316–17 (1981). And Congress has been known to legislate preclusion. See, e.g., 15 U.S.C. § 16(a) (2012) (discussing issue-preclusive effect of anti-trust judgments); 28 U.S.C. § 1738 (2012) (full faith and credit statute); see also *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 485 (1982) (“In our system of jurisprudence the usual rule is that merits of a legal claim once decided in a court of competent jurisdiction are not subject to redetermination in another forum. Such a fundamental departure from traditional rules of preclusion, enacted into federal law, can be justified only if plainly stated by Congress.” (emphasis added)).

gress also could fairly easily make changes to the administrative systems that precede federal litigation with nonmutual preclusion in mind.<sup>196</sup> And, again, courts retain the flexibility to deny nonmutual preclusion on a case-by-case basis when it would be unfair or otherwise problematic.<sup>197</sup>

### C. Recent Developments

Finally, recent developments have made nonmutual preclusion against the government even more important. Here, it is helpful to return to an argument raised in the context of national injunctions. In brief, a common refrain from opponents of national injunctions is that these remedies are unnecessary because plaintiffs can always seek a Rule 23(b)(2) class action against the federal government.<sup>198</sup>

The (b)(2) class action, less well known than the damages class action under Rule 23(b)(3), requires that “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.”<sup>199</sup> This provision, drafted in order to accommodate desegregation litigation in the middle of the twentieth century,<sup>200</sup> seems like an

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196. For example, Congress could employ “agency class actions” in order to resolve common issues in a single proceeding, rather than across multiple ones. See generally Shannon M. Grammel & Joshua C. Macey, *The Costs of Aggregating Administrative Claims*, 70 STAN. L. REV. ONLINE 123 (2018); Michael D. Sant’Ambrogio & Adam S. Zimmerman, *The Agency Class Action*, 112 COLUM. L. REV. 1992 (2012); Michael Sant’Ambrogio & Adam S. Zimmerman, *Inside the Agency Class Action*, 126 YALE L.J. 1634 (2017).

197. See *Parklane*, 439 U.S. at 331; RESTATEMENT (SECOND) OF JUDGMENTS § 29 (AM. LAW INST. 1982).

Finally, I cannot leave *Mendoza* without noting a bitter irony of Justice Rehnquist’s position. Justice Rehnquist dissented in *Parklane* because, in part, he worried about an asymmetry that would favor the federal government. See *Parklane*, 439 U.S. at 355–56 (Rehnquist, J., dissenting). Justice Rehnquist asserted that offensive nonmutual issue preclusion “will have the result of coercing defendants to agree to consent orders or settlements in agency enforcement actions,” and therefore the Court’s decision “added a powerful club to the administrative agencies’ arsenals that even Congress was unwilling to provide them.” *Id.* And yet, five years later, he tilted the scales further in favor of the government, giving it a new club in the form of an exemption from *Parklane*. See *supra* Section I.B.

198. See, e.g., Bray, *supra* note 1, at 475–76; Wasserman, *supra* note 1, at 366–68. Jack Ratliff (among others) also argues that class actions would ameliorate many of the perceived downsides of offensive nonmutual issue preclusion. Ratliff, *supra* note 69. And Richard Nagareda (among others) notes the deep conceptual connections between class actions and nonmutual preclusion. See generally Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149 (2003).

199. FED. R. CIV. P. 23. See generally Maureen Carroll, *Class Action Myopia*, 65 DUKE L.J. 843 (2016). For a court to certify a (b)(2) class, the usual requirements of Rule 23(a) also must be satisfied. See FED. R. CIV. P. 23(a) (discussing numerosity, typicality, commonality, and adequacy).

200. See FED. R. CIV. P. 23 advisory committee’s note to 1966 amendment; David Marcus, *Flawed but Noble: Desegregation Litigation and Its Implications for the Modern Class Action*, 63 FLA. L. REV. 657, 702–08 (2011).

obvious candidate in national-injunction litigation. Many critics of national injunctions suggest that plaintiffs should seek a national (b)(2) class action so that any “national” injunction would still be limited to parties.<sup>201</sup> This logic also seems like a response to critics of *Mendoza*—you do not need nonmutual preclusion when you can convert nonparties into parties using the formal procedures of Rule 23.

But there is a problem with this simple command: at the same time as national injunctions have become more popular, the ability to obtain a national (b)(2) class has waned. Some of the challenges have come from within class-action law. *Wal-Mart v. Dukes*, for example, articulated a principle of “indivisibility” applicable to (b)(2) classes<sup>202</sup> that has been used by lower courts to cut off class certification where it would have seemed possible before *Wal-Mart*.<sup>203</sup> If a federal agency adopted for its employees exactly the policy that plaintiffs alleged was discriminatory in *Wal-Mart*, wouldn’t a court be compelled to deny class certification in the government case?<sup>204</sup> If the government applied a *Wal-Mart*-like policy to the approval of asylum claims or security clearances or disability benefits, wouldn’t courts be compelled to deny class certification in cases challenging those policies too?<sup>205</sup> Though not ruling on a policy exactly like *Wal-Mart*’s, the Supreme Court last term instructed a lower court to consider the applicability of *Wal-Mart* to a class action challenging the federal government’s use of indefinite detention during immigration proceedings.<sup>206</sup>

201. See, e.g., Bray, *supra* note 1, at 475–76; Wasserman, *supra* note 1, at 367–68.

202. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360–61 (2011).

203. See Carroll, *supra* note 199, at 875–902; Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 788–92 (2013); Suzette M. Malveaux, *The Modern Class Action Rule: Its Civil Rights Roots and Relevance Today*, 66 U. KAN. L. REV. 325, 366–75 (2017); A. Benjamin Spencer, *Class Actions, Heightened Commonality, and Declining Access to Justice*, 93 B.U. L. REV. 441, 463–75 (2013). For examples of *Wal-Mart* being used to deny class certification in injunctive-relief cases, see *Phillips v. Sheriff of Cook County*, 828 F.3d 541 (7th Cir. 2016), and *Jamie S. v. Milwaukee Public Schools*, 668 F.3d 481 (7th Cir. 2012).

204. See *Wal-Mart*, 564 U.S. at 344–45 (“[Plaintiffs] claim that their local managers’ discretion over pay and promotions is exercised disproportionately in favor of men, leading to an unlawful disparate impact on female employees. And, [plaintiffs] say, because *Wal-Mart* is aware of this effect, its refusal to cabin its managers’ authority amounts to disparate treatment.” (citations omitted)); Segar v. Mukasey, 508 F.3d 16, 18–20 (D.C. Cir. 2007) (discussing extensive set of stipulations agreed to in response to the liability determination); Segar v. Smith, 738 F.2d 1249 (D.C. Cir. 1984) (affirming district court’s decision finding that the Drug Enforcement Agency engaged in a pattern or practice of discrimination in employment).

205. As noted *supra* note 204, a central problem with the *Wal-Mart* class was that it was objecting to a policy that devolved discretion to local managers—a pattern that could easily be replicated in these other contexts.

206. Specifically, in *Jennings v. Rodriguez*, a class of detained immigrants sought an injunction against indefinite detention by the federal government. 138 S. Ct. 830 (2018). The Supreme Court rejected the immigrants’ statutory claim but remanded for consideration of their due process claim. *Jennings*, 138 S. Ct. at 841–52. At the end of the opinion, Justice Alito also invited the Ninth Circuit to consider on remand whether (b)(2) certification was appropriate:

Potential problems exist even if we move away from the *Wal-Mart* model. In the suits to challenge the constitutionality of the Travel Ban, it is not clear that a single class could have included state universities, travel agents, putative refugees, and all others affected by the Executive Order.<sup>207</sup> And in the suit to challenge the Trump Administration's "child separation" policy, the government vigorously opposed class certification on various grounds.<sup>208</sup> The court ultimately certified a class of all parents with children detained and separated at the border, though the court excluded those apprehended in the interior of the United States.<sup>209</sup> Meanwhile, some courts have applied a so-called necessity doctrine to deny class certification when the court could issue a broad decree in an individual suit.<sup>210</sup> So, even if there were some idealized (b)(2) that would cover all of the major government cases, it is not clear that today's federal courts would agree.<sup>211</sup>

Meanwhile, developments in other areas of law have further imperiled (b)(2) classes. For one, the Supreme Court has narrowed the law of Arti-

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The Court of Appeals should also consider whether a Rule 23(b)(2) class action continues to be the appropriate vehicle for respondents' claims in light of *Wal-Mart Stores, Inc. v. Dukes*. We held in *Dukes* that "Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class." That holding may be relevant on remand because the Court of Appeals has already acknowledged that some members of the certified class may not be entitled to bond hearings as a constitutional matter. Assuming that is correct, then it may no longer be true that the complained-of "conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them."

*Id.* at 851–52 (citations omitted) (quoting *Wal-Mart*, 564 U.S. at 360); see also Maureen Carroll et al., *Government Class Actions After Jennings v. Rodriguez*, HARV. L. REV. BLOG (May 8, 2018), <https://blog.harvardlawreview.org/government-class-actions-after-jennings-v-rodriguez> [<https://perma.cc/PFK6-L3PK>] (discussing this decision); Maureen Carroll, *Class Actions, Indivisibility, and Rule 23(b)(2)*, 99 B.U. L. REV. 59 (2019).

207. See, e.g., Frost, *supra* note 1, at 130 (noting this issue). One potential problem would be if a court required that the class be "currently and readily ascertainable," as the Third Circuit does. See *Carrera v. Bayer Corp.*, 727 F.3d 300, 305 (3d Cir. 2013) (quoting *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 593 (3d Cir. 2012)).

208. See Respondent-Defendants' Opposition to Petitioners-Plaintiffs' Motion for Class Certification, *Ms. L. v. U.S. Immigration & Customs Enf't*, 302 F. Supp. 3d 1149 (S.D. Cal. 2018) (No. 18-CV-428 DMS MDD).

209. *Ms. L. v. U.S. Immigration & Customs Enf't*, No. 18CV0428 DMS (MDD), slip op. at 11, 17 (S.D. Cal. June 26, 2018) (order granting in part class certification). The order also excluded from the class definition individuals with communicable diseases or criminal histories. *Id.* at 11.

210. See *M.R. v. Bd. of Sch. Comm'rs*, 286 F.R.D. 510, 518 & n.11 (S.D. Ala. 2012) (collecting cases); Maureen Carroll, *Aggregation for Me, but Not for Thee: The Rise of Common Claims in Non-Class Litigation*, 36 CARDOZO L. REV. 2017, 2026–27, 2077–79 (2015) (describing and criticizing this doctrine). Carroll also describes the various incentives that encourage plaintiffs to pursue individual rather than class relief, even for "aggregate" claims. *Id.* at 2027–39.

211. Cf. Carroll, *supra* note 199, at 850 ("[I]t is unclear whether the paradigmatic post-*Brown* desegregation cases could be certified as class actions under today's restrictive standards.").

cle III standing.<sup>212</sup> At a minimum, named plaintiffs must articulate a concrete and particularized injury,<sup>213</sup> and some have argued that all members of the class must establish their standing.<sup>214</sup> Applying these requirements in major public-law cases might exclude potential plaintiffs whose injuries are as-of-yet speculative.<sup>215</sup> Other challenges to named plaintiffs also could imperil the class. For example, in the “child separation” case mentioned above, the government argued that because one named plaintiff’s claims were moot and the other named plaintiff lacked proper venue, the entire class action should be dismissed.<sup>216</sup>

212. See Zachary D. Clopton, *Justiciability, Federalism, and the Administrative State*, 103 CORNELL L. REV. 1431, 1440 (2018) (collecting cases and sources). See generally Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459 (2008).

213. See, e.g., *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547–50 (2016). See generally Rachel Bayefsky, *Constitutional Injury and Tangibility*, 59 WM. & MARY L. REV. 2285 (2018) (discussing *Spokeo*).

214. Some have called for the Supreme Court to require Article III standing for every member of the class, not just the named plaintiff. See Aaron-Andrew P. Bruhl, *One Good Plaintiff Is Not Enough*, 67 DUKE L.J. 481, 486 (2017); Joan Steinman, *The Effects of Case Consolidation on the Procedural Rights of Litigants: What They Are, What They Might Be* (pt. 1), 42 UCLA L. REV. 717, 726–50 (1995); see also *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1053 (2016) (Roberts, C.J., concurring) (“Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not.”); Brief for the U.S. as Amicus Curiae Supporting Neither Party at 14, *Frank v. Gaos*, 139 S. Ct. 1041 (2019) (No. 17-961), 2018 WL 3456069. But see *Langan v. Johnson & Johnson Consumer Cos.*, 897 F.3d 88, 93 (2d Cir. 2018) (“[A]s long as the named plaintiffs have standing to sue the named defendants, any concern about whether it is proper for a class to include out-of-state, nonparty class members with claims subject to different state laws is a question of predominance under Rule 23(b)(3), not a question of ‘adjudicatory competence’ under Article III.” (citation omitted) (quoting *Morrison v. YTB Int’l, Inc.*, 649 F.3d 533, 536 (7th Cir. 2011))).

215. The scholarship of Wasserman, Morley, and Bruhl suggests that national injunctions might be problematic, in part, because they protect parties who would lack Article III standing on their own. See Bruhl, *supra* note 214, at 511–14; Michael T. Morley, *De Facto Class Actions? Plaintiff- and Defendant-Oriented Injunctions in Voting Rights, Election Law, and Other Constitutional Cases*, 39 HARV. J.L. & PUB. POL’Y 487, 523–27 (2016); Wasserman, *supra* note 1, at 359–63. The federal government has taken this position as well. See Supplemental Brief for Appellant, *supra* note 35, at 9–15 (“[W]here no class has been certified, no justiciable controversy exists once the injury to the actual plaintiffs has been remedied.”); OFFICE OF THE ATTORNEY GEN., *supra* note 35, at 1–3.

The rise of nonmutual preclusion also calls into question the logic of this view. If a nonparty who could not have obtained standing would be a candidate for nonmutual preclusion, then why is it so anomalous to include that person within the scope of the initial injunction? For additional responses to the Article III-based critique, see Frost, *supra* note 1.

216. See Respondent-Defendants’ Memorandum of Points & Authorities in Support of Motion to Dismiss, *Ms. L. v. U.S. Immigration & Customs Enf’t*, 302 F. Supp. 3d 1149 (S.D. Cal. 2018) (No. 18-CV-428 DMS MDD); see also *Ms. L.*, 302 F. Supp. 3d at 1156–59 (rejecting these arguments). For a discussion of strategies to moot pending class actions, see Clopton, *supra* note 212.

Personal jurisdiction also could be an issue, especially in cases purporting to join nonfederal defendants. See *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1779–84 (2017). Although the Supreme Court’s recent decision in *Bristol-Myers Squibb* did not explicitly apply to class actions, it might soon. See *id.* at 1789 n.4 (Sotomayor, J., dissenting) (“The

As a result of these developments, there may be cases in which *Parklane* would dictate nonmutual preclusion but—for other doctrinal reasons—plaintiffs would be unable to certify a (b)(2) class.<sup>217</sup> I raise this issue not to criticize those other doctrines, though I have my problems with them. Instead, these decisions also cast new light on the effects of *Mendoza*. At the time of *Mendoza*, it may have appeared that the (b)(2) class action would cover up any unfairness resulting from preferential preclusion rules for the federal government.<sup>218</sup> But under the law today, that may not be true. As the gap between (b)(2) and nonmutual preclusion increases, the magnitude of the “governmental advantage” also increases. And as explained above, this growing governmental advantage is not justified by *Mendoza*’s policy arguments.<sup>219</sup>

In sum, *Mendoza* was wrong when it was decided: the government is not always different from other litigants; the law of preclusion contains exceptions necessary to protect the public interest; and there are affirmative values of preclusion that apply equally to government and nongovernment litigation. *Mendoza* is even more wrong today: other legal developments have made it more difficult for those aggrieved by the government to achieve universal relief up front, so the inability to rely on nonmutual preclusion is even more consequential in this growing number of cases.<sup>220</sup> For these reasons, the Supreme Court or Congress should overrule *Mendoza* independent of any changes to the law of national injunctions.

#### IV. CONSEQUENCES FOR NATIONAL INJUNCTIONS

The foregoing Part made the case to overrule *Mendoza*, putting the government on equal preclusion footing with other litigants. What, then, does *Mendoza* have to say about national injunctions?

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Court today does not confront the question whether its opinion here would also apply to a class action in which a plaintiff injured in the forum State seeks to represent a nationwide class of plaintiffs, not all of whom were injured there.”)

217. Indeed, an early commentator on *Parklane* conceptualized the effect of nonmutuality as creating a “collateral class action” among those who could benefit from nonmutual preclusion. See Lawrence C. George, *Sweet Uses of Adversity: Parklane Hosiery and the Collateral Class Action*, 32 STAN. L. REV. 655, 660 (1980). And, as noted above, class actions are often offered as alternatives to nonmutual preclusion. See Ratliff, *supra* note 69.

218. This is analogous to the national-injunction critics’ argument about (b)(2). See *supra* note 201 and accompanying text.

219. Overruling *Mendoza* thus has the added benefit of avoiding any further distortions in the aforementioned court-access doctrines (Rule 23, standing, etc.), as courts will not be tempted to adjust those doctrines to compensate for an inequality in preclusion. Cf. Fallon, *supra* note 120, at 637 (“[C]ourts, and especially the Supreme Court, decide cases by seeking what they regard as an acceptable overall alignment of doctrines involving justiciability, substantive rights, and available remedies. When facing an outcome or pattern of outcomes that it regards as practically intolerable or disturbingly sub-optimal, the Court will adjust or manipulate the applicable law.” (footnote omitted)).

220. Cf. Frost, *supra* note 1, at 1090–1103 (making similar policy arguments in the context of national injunctions); Malveaux, *supra* note 1, at 62–64 (same).

First, and contrary to claims of national-injunction critics, *Mendoza* does not compel a prohibition on national injunctions. As noted above, *Mendoza* might be read to suggest that the propriety of nonparty-protecting relief is a matter of policy—not history or structure.<sup>221</sup>

This emphasis on policy does not mean that *Mendoza*'s specific policy arguments are instructive in this context. Indeed, these arguments are poor fits for the national-injunctions debate. Recall that the *Mendoza* Court emphasized the substantial number of lawsuits against the federal government, each of which—if resolved against the government—could affect numerous other cases.<sup>222</sup> Even if this concern were valid in the context of issue preclusion, it does not resolve the national-injunctions debate. National injunctions are only contemplated in a relatively small number of cases.<sup>223</sup> The government should not be taken by surprise if an injunction in such a case has consequences beyond those parties. And when a national injunction issues, it would make sense for the government to quickly appeal.<sup>224</sup>

In addition, the *Mendoza* Court worried about percolation,<sup>225</sup> and the U.S. government has made this argument in national-injunction cases as well.<sup>226</sup> But a policy preference in favor of percolation is not a trump card. In *Califano v. Yamasaki*, for example, the Supreme Court acknowledged that percolation countenanced against nationwide class actions but declined to issue a categorical rule against them.<sup>227</sup> And, of course, *Parklane* itself has the effect of reducing percolation, but that was no obstacle to the Supreme Court.<sup>228</sup> Moreover, national-injunction cases are seemingly weak candidates

221. See *supra* Section II.B.

222. See *United States v. Mendoza*, 464 U.S. 154, 159–61 (1984).

223. See, e.g., *City of Chicago v. Sessions*, 888 F.3d 272, 290 (7th Cir. 2018) (“[O]nce a court determines that preliminary relief is required, the court must be able to engage in the ‘equitable balancing’ to determine the relief necessary. Rarely, that will include nationwide injunctions.”); *City of Chicago v. Sessions*, No. 17 C 5720, 2017 WL 4572208, at \*4 (N.D. Ill. Oct. 13, 2017) (“[I]ssuing a nationwide injunction should not be a default approach. It is an extraordinary remedy that should be limited by the nature of the constitutional violation and subject to prudent use by the courts.”).

224. See *supra* Section III.A. Indeed, that is what we have seen in cases when courts issued national injunctions related to the Travel Ban, sanctuary cities, DACA, and more. See, e.g., *City of Chicago*, 888 F.3d 272 (sanctuary cities); *Hawaii v. Trump*, 878 F.3d 662 (9th Cir. 2017) (Travel Ban); *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015) (DACA).

225. See *Mendoza*, 464 U.S. at 160.

226. See Supplemental Brief for Appellant, *supra* note 35, at 21–23; see also OFFICE OF THE ATTORNEY GEN., *supra* note 35, at 4.

227. 442 U.S. 682, 702–03 (1979) (“It often will be preferable to allow several courts to pass on a given class claim in order to gain the benefit of adjudication by different courts in different factual contexts. For this reason, a federal court when asked to certify a nationwide class should take care to ensure that nationwide relief is indeed appropriate in the case before it, and that certification of such a class would not improperly interfere with the litigation of similar issues in other judicial districts. But we decline to adopt the extreme position that such a class may never be certified.”).

228. See *supra* Section I.B. Indeed, that was part of the point. See *supra* note 79 (noting connection to the perceived litigation crisis).

for a percolation argument, given that they proceed quickly to appellate (if not Supreme Court) review and involve numerous interveners and amici curiae who can provide the functional equivalent of district-court percolation.<sup>229</sup> For the same reason, even if a single district court attempted to “lock in” the federal government via national injunction,<sup>230</sup> the government could quickly appeal the adverse ruling,<sup>231</sup> and in many cases the Supreme Court would soon provide a “national” resolution.<sup>232</sup>

In short, not only are *Mendoza*’s justifications weak as applied to issue preclusion, they are even weaker when translated to national injunctions. There may be good policy reasons to oppose national injunctions, but those reasons do not derive from *Mendoza*.

That said, a decision to overrule *Mendoza* would have salutary effects for the national-injunctions issue—and it would point to a way forward that might accommodate all sides in the national-injunctions debate. The balance of this Part looks first at the consequences of overruling *Mendoza* on national injunctions and then asks how overruling *Mendoza* fits with proposals to prohibit or limit national injunctions.

#### A. Preclusion and National Injunctions

Consider two lawsuits seeking to enjoin the federal government. In one version, a fastidious plaintiff files a lawsuit in federal court seeking the broadest possible class definition. The court finds a constitutional or statutory violation, for example, by concluding that a particular executive policy was motivated by animus.<sup>233</sup> But because of limits imposed by current law—Rule 23, standing, or others<sup>234</sup>—the court cannot certify a class sufficiently broad to cover potential future claimants who are only subject to the specu-

229. And, of course, a court could consider percolation when deciding the scope of injunctive relief. *See, e.g., City of Chicago*, 888 F.3d at 290 (“[O]nce a court determines that preliminary relief is required, the court must be able to engage in the ‘equitable balancing’ to determine the relief necessary. Rarely, that will include nationwide injunctions. Granted, it is an imprecise process, but that is endemic to injunctions, and courts are capable of weighing the appropriate factors while remaining cognizant of the hazards of forum shopping and duplicative lawsuits.”). *Cf. Califano*, 442 U.S. at 702–03 (making a similar point with respect to the certification of nationwide classes).

230. *See supra* Section III.A.

231. Preliminary injunctions, though not final judgments, are immediately appealable in federal court. *See* 28 U.S.C. § 1292(a)(1) (2012). *See generally* 16 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3921 (3d ed. 2012).

232. *See, e.g., Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

233. *See, e.g., United States v. Windsor*, 570 U.S. 744, 770 (2013); *Int’l Refugee Assistance Project v. Trump*, 241 F. Supp. 3d 539, 558–59 (D. Md.), *vacated*, 138 S. Ct. 353 (2017); *see also* Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887 (2012) (attempting to systematize precedent on animus and state action); Katherine Shaw, *Beyond the Bully Pulpit: Presidential Speech in the Courts*, 96 TEX. L. REV. 71, 137–40 (2017) (discussing issues of presidential intent).

234. *See supra* Section III.C.



lative threat of injury. What happens to these future claimants? If the Supreme Court were to overrule *Mendoza*, then they could get the benefit of *Parklane* (because they could not have joined the first case) whenever their claims are ripe.<sup>235</sup> And, even though nonmutual preclusion is not guaranteed,<sup>236</sup> the threat of preclusion may deter the federal government from treating them in a way that would have violated the court's decision. The result is nonparty protection without a nonparty injunction.

In a second version, imagine that challengers to a federal statute strategically sequence their lawsuits. The first plaintiff sues in the district most likely to grant an injunction; if she loses, a new plaintiff tries in the district next most likely to grant relief; if both lose, yet another new plaintiff tries again in a third district.<sup>237</sup> None of these plaintiffs seeks a mandatory class action, which would bind the entire class.<sup>238</sup> Eventually one of these plaintiffs finds a judge willing to issue an injunction. In this situation, nonparties should not benefit from nonmutual preclusion even if the Court overruled *Mendoza*—the putative plaintiffs who were “waiting and seeing” should be denied the benefit of nonmutual preclusion because they could have easily joined the prior suit.<sup>239</sup> This is a public-law version of Currie's train crash and its multiple plaintiff anomaly.<sup>240</sup> And *Parklane* has a built-in response to this situation, denying preclusion as unfair.<sup>241</sup>

The foregoing hypotheticals illustrate the benefits of *Parklane*'s screening approach. The most heavily criticized aspects of national injunctions—the multiple plaintiff anomaly and the risk of inconsistent adjudications—are minimized. Their virtues—protecting those who cannot join the first case and discouraging government noncompliance—are maintained. And although “forum shopping” might still occur, without the multiple plaintiff anomaly the forum shopping in these cases is not so different from the fo-

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235. Questions such as animus would be prime candidates for issue preclusion. If the second court considered the issue to be “pure law” and the claims to be unrelated, it is possible that the government could avoid preclusion based on the *Moser* exception. See *supra* note 174 and accompanying text. But that result would not depend on the governmental status of the defendant and instead would just return the government to equal footing with other litigants.

236. Preclusion is not guaranteed because of the *Parklane* discretion discussed *supra* Section I.B.

237. This version mirrors those hypothetical cases that critics of national injunctions hold out as reasons to prohibit the practice. See, e.g., Bray, *supra* note 1, at 464–65.

238. See generally WRIGHT ET AL., *supra* note 60, § 4455.

239. See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 330–31 (1979); RESTATEMENT (SECOND) OF JUDGMENTS § 29 (AM. LAW INST. 1982).

240. See *supra* notes 75–76 and accompanying text.

241. See *Parklane*, 439 U.S. at 331; RESTATEMENT (SECOND) OF JUDGMENTS § 29. Importantly, nothing here should be read as contrary to the principle that a court may issue injunctions broad enough “to provide complete relief to the plaintiffs.” *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979).

rum shopping that we usually tolerate.<sup>242</sup> Here, too, overruling *Mendoza* has the effect of “normalizing” government litigation.<sup>243</sup>

Because nonmutual preclusion can protect some nonparties, overruling *Mendoza* would lower the pressure on courts to issue national injunctions in the first place. Today, a federal court inclined to stop a constitutional or statutory violation by federal defendants must turn to the national injunction; otherwise, its decisions could be ignored because they are not binding on other courts.<sup>244</sup> Parties seeking injunctions face the same dynamic. These worries are minimized when federal courts deal with nongovernmental defendants because nonmutual preclusion (and full faith and credit)<sup>245</sup> will ensure that court judgments are not so easily ignored.<sup>246</sup> Allowing nonmutual preclusion against the federal government, even on a case-by-case basis, will thus reduce the pressure to award universal relief because some future plaintiffs might be able to invoke the prior judgment. And, again, the threat of nonmutual preclusion should discourage the government from flouting the first court’s decision.

Nonmutual preclusion also harnesses party incentives to achieve the goal of a single resolution binding on all sides. Today, plaintiffs may be incentivized to strategically pursue national injunctions in multiple proceed-

242. See, e.g., *The Atlantic Star*, [1974] AC 436 (HL) 471 (Eng.) (“‘Forum shopping’ is a dirty word; but it is only a pejorative way of saying that, if you offer a plaintiff a choice of jurisdictions, he will naturally choose the one in which he thinks his case can be most favourably presented: this should be a matter neither for surprise nor for indignation.”); Pamela K. Bookman, *The Unsung Virtues of Global Forum Shopping*, 92 NOTRE DAME L. REV. 579 (2016). See generally Huddleston, *supra* note 1.

243. Cf. Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897 (2015) (explaining how the Supreme Court has normalized foreign relations law). Of course, relying on preclusion instead of an injunction has its costs. Preclusion puts the burden on future litigants to assert it, and future courts would have to decide whether *Parklane* applies to new plaintiffs. Still, litigating preclusion is cheaper than relitigating the merits, and it comes with lesser risks of inconsistent judgments. See *supra* Section III.B (discussing the justifications for preclusion). And, again, preclusion might tamp down on non-acquiescence.

244. As Wasserman notes, the Seventh Circuit seemingly justified its approval of a national injunction against the federal government’s sanctuary cities policy, in part, because judicial economy counseled against asking every sanctuary city to sue. See Wasserman, *supra* note 1, at 345 (citing *City of Chicago v. Sessions*, 888 F.3d 272, 292 (7th Cir. 2018)).

245. See *Semtek Int’l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 507–08 (2001) (full faith and credit among federal courts); see also U.S. CONST. art. IV, § 1 (Full Faith and Credit Clause); 28 U.S.C. § 1738 (2012) (full faith and credit statute). See generally Stephen B. Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 CORNELL L. REV. 733 (1986).

246. See *supra* Section I.B. Importantly, preliminary injunctions may be candidates for issue preclusion. See *Hawksbill Sea Turtle v. Fed. Emergency Mgmt. Agency*, 126 F.3d 461, 474 n. 11 (3d Cir. 1997) (“[F]indings made in granting or denying preliminary injunctions can have preclusive effect if the circumstances make it likely that the findings are ‘sufficiently firm’ to persuade the court that there is no compelling reason for permitting them to be litigated again.” (quoting *Dyndul v. Dyndul*, 620 F.2d 409, 412 (3d Cir. 1980))); RESTATEMENT (SECOND) OF JUDGMENTS § 13, illus. 1; WRIGHT ET AL., *supra* note 60, §§ 4434, 4465.2.

ings—a central critique offered by national-injunction critics.<sup>247</sup> *Parklane* denies preclusion to wait-and-see plaintiffs, so they gain no advantage from sitting on the sidelines.<sup>248</sup> Instead, it would be in their interest to contribute to the first case in hopes of swaying the result. Moreover, because nonmutual preclusion is not assured, plaintiffs interested in universal relief who are already in the case should pursue a class action when possible, exactly as critics of national injunctions have advised.<sup>249</sup>

On the flipside, while calls for plaintiffs to use (b)(2) class actions do not offer any guidance to federal defendants,<sup>250</sup> *Parklane* provides a roadmap. Federal defendants would have an incentive to make sure potential plaintiffs are notified of the litigation, thus inducing them to join the case or lose their access to nonmutual preclusion. Federal defendants also might not fight so vigorously against attempts at intervention or class certification that seek to bring all potential claimants into the first case.<sup>251</sup> The result would be that plaintiffs, defendants, and courts would work together to achieve a single binding resolution—a result that all sides seem to desire.

### B. *The Future of National Injunctions*

Even if *Mendoza* remained good law, connecting preclusion and injunctions would offer a new vantage on when national injunctions might be justified.

Suppose that judges or legislators were interested in ways to limit (but not categorically prohibit) national injunctions.<sup>252</sup> In that circumstance, nonmutual preclusion offers guidance about the prudential considerations that could attend to nonparty relief. In particular, a court considering an application for a national injunction might ask itself the questions raised by

247. See *supra* Section I.A.

248. For example, in the DACA litigation, the Southern District of Texas concluded that plaintiffs had standing to challenge DACA and likely would succeed on the merits, but that a preliminary injunction was not justified in part because it conflicted with prior federal court decisions upholding DACA. See *Texas v. United States*, 328 F. Supp. 3d 662 (S.D. Tex. 2018). This, too, resonates with *Parklane*'s limits on nonmutual preclusion. See *supra* Section I.B.

249. See, e.g., Bray, *supra* note 1, at 456; Wasserman, *supra* note 1, at 368; see also Carroll, *supra* note 210, at 2052–55 (making a similar point about the virtue of class treatment).

250. See *supra* note 1 (collecting sources).

251. See FED. R. CIV. P. 23, 24. Though defendants' acquiescence is not supposed to affect the class certification decision as a legal matter, it is hard to imagine that this does not happen as a practical matter. See, e.g., John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1356–67 (1995); Rhonda Wasserman, *Dueling Class Actions*, 80 B.U. L. REV. 461, 470–74 (2000). I also have speculated elsewhere that the government might try to use multidistrict litigation to achieve this effect. See Bradt & Clopton, *supra* note 58 (exploring this possibility and arguing that the MDL panel should reject it).

252. If the Supreme Court or Congress prohibited national injunctions, see, e.g., Injunctive Authority Clarification Act of 2018, H.R. 6730, 115th Cong. § 2(a) (2018), then nonmutual preclusion could ameliorate some of the effects in line with the discussion in the previous section.

*Parklane*.<sup>253</sup> Although “predicting” preclusion is not always easy,<sup>254</sup> courts could decline to issue national injunctions when nonparties likely would not be candidates for nonmutual preclusion.<sup>255</sup>

Using the examples from above, if a court observed wait-and-see plaintiffs and the strategic avoidance of class certification, it should be disinclined to grant a national injunction that would protect nonparties in a way that preclusion would not. And presumably a federal defendant opposing a national injunction would alert a court to the presence of wait-and-see plaintiffs.<sup>256</sup> But if the court observed a category of potential plaintiffs who could not intervene—either because of doctrinal barriers or because they are still unidentifiable as a practical matter—then an injunction protecting nonparties seems more reasonable.<sup>257</sup> One implication, therefore, is that national injunctions may be more justified in the penumbra around Rule 23(b)(2). When parties would like to heed the calls of critics and seek a (b)(2) class action,<sup>258</sup> but current law prevents it,<sup>259</sup> a court might approximate the effect of nonmutual preclusion by issuing a national injunction.<sup>260</sup>

253. Most naturally, a court might consider these questions as part of the usual balancing of interests. *See, e.g.,* *City of Chicago v. Sessions*, 888 F.3d 272, 290 (7th Cir. 2018) (“[O]nce a court determines that preliminary relief is required, the court must be able to engage in the ‘equitable balancing’ to determine the relief necessary. Rarely, that will include nationwide injunctions. Granted, it is an imprecise process, but that is endemic to injunctions, and courts are capable of weighing the appropriate factors while remaining cognizant of the hazards of forum shopping and duplicative lawsuits.”). Similarly, Professor Linda Mullenix argued that *Parklane*’s discretionary factors should be incorporated into her proposed federal statute dealing with mass torts. Linda S. Mullenix, *Class Resolution of the Mass-Tort Case: A Proposed Federal Procedure Act*, 64 TEX. L. REV. 1039, 1081 (1986).

254. *See Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 396 (1996) (Ginsburg, J., concurring in part and dissenting in part) (“A court conducting an action cannot predetermine the res judicata effect of the judgment; that effect can be tested only in a subsequent action.”).

255. The most committed legal realist might say that every judge inclined to issue a national injunction under today’s law would also issue a national injunction under a *Parklane*-based regime. Perhaps, but if legal rules had no effect at all, then would not the same judge also certify a Rule 23(b)(2) class just to be safe? I tend to think that legal rules can have some effect, and I proceed here based on that assumption. And I discuss below the benefits of this particular legal principle for the policymaking choices of Congress and the courts.

256. One could tell a similar story about inconsistent judgments. Federal defendants would have incentives to alert courts to prior inconsistent judgments, which would trigger *Parklane*’s discretion (and thus would imply that the court might deny a nonparty-protecting injunction). *See supra* Section I.B (discussing *Parklane*).

257. Or, returning to the change-in-administration issue, if a court observed that the federal defendant was a lame-duck executive offering a weak defense in order to lock in its successor, then the court might conclude it would be unfair to extend the outcome to nonparties. *See supra* Section III.A (discussing this issue in the context of *Mendoza*).

258. *See supra* note 201 and accompanying text.

259. *See supra* Section III.C.

260. One might think that this approach contradicts the Supreme Court’s decision in *Smith v. Bayer Corp.*, in which the Supreme Court rejected an injunction against a state court that purported to dictate the preclusive effect of a federal-court judgment. 564 U.S. 299 (2011); *see* Howard Wasserman, *Universality as Judicial Impatience and Control*, PRAFWISBLAWG (May

Linking the national-injunctions framework to preclusion serves various goals. Bringing preclusion and remedy into closer alignment clarifies the stakes.<sup>261</sup> Rather than having the effects on nonparties hidden in multiple inquiries, this approach enables courts and parties to focus on the issues in light of a clear sense of the consequences.<sup>262</sup> Bringing these standards together also makes things easier for future lawmakers, who might fail to appreciate the multifarious pathways to nonparty protection.<sup>263</sup>

There is also value in reframing the national-injunctions debate in terms of the common law of preclusion rather than in terms of history or constitutional structure.<sup>264</sup> Questions of preclusion and remedial scope are matters of policy that are—and should remain—subject to the normal lawmaking process.<sup>265</sup> Congress can legislate preclusion, and Congress should be the branch that addresses national injunctions.<sup>266</sup> Framing the national-injunctions debate in terms of the separation of powers, however, risks tempting the Supreme Court into an Article III decision, which would disempower the legislative process.<sup>267</sup>

#### CONCLUSION

Justice Thomas chided defenders of national injunctions because their arguments “at best ‘boi[l] down to a policy judgment’ about how powers

24, 2018, 7:26 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2018/05/universality-as-judicial-impatience-and-control.html> [<https://perma.cc/44RA-HECZ>] (drawing exactly this connection). But *Bayer* was interpreting the Anti-Injunction Act, 22 U.S.C. § 2283 (2012), as applied to a federal-court injunction against a state court. Special considerations apply in that context because Congress has spoken to the issue and because of deep commitments to federalism. See *Bayer*, 564 U.S. at 317–18; WRIGHT ET AL., *supra* note 60, § 4405.1. Even in those circumstances, *Bayer* did not completely rule out preclusion injunctions. *Bayer*, 564 U.S. at 306–07. Instead, much of the analysis turned on the fact that the injunction purported to apply to different issues and to bind nonparties. *Id.* at 308–18. In other words, the problem with the injunction was that it exceeded the scope of preclusion, not that it was intended to enforce it.

261. See *supra* note 182 (discussing this issue).

262. This argument reflects a similar intuition to requiring something like “foreseeability” for preclusion to attach. See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 330–31 (1979); RESTATEMENT (SECOND) OF JUDGMENTS §§ 28–29 (AM. LAW INST. 1982).

263. Again, these lawmakers include both judges and legislators who (typically) address only one aspect of nonparty protection at a time.

264. See generally *supra* note 1 (collecting sources).

265. Estreicher and Revesz reach a similar conclusion about agency nonacquiescence. See, e.g., Estreicher & Revesz, *supra* note 6, at 754 (“Where Congress has provided in an agency’s governing statute that nonacquiescence should be treated in a particular manner, that determination must control.”).

266. See *supra* note 123 and accompanying text (discussing lawmaking and preclusion).

267. See Supplemental Brief for Appellant, *supra* note 35, at 9–15; OFFICE OF THE ATTORNEY GEN., *supra* note 35; cf., Patrick J. Borchers, *The Death of the Constitutional Law of Personal Jurisdiction: From Pennoyer to Burnham and Back Again*, 24 U.C. DAVIS L. REV. 19, 87–101 (1990) (calling for the Court to deconstitutionalize personal jurisdiction in favor of legislative solutions).

ought to be allocated among our three branches of government.”<sup>268</sup> But of course they do. History and structure do not provide unambiguous answers about the scope of injunctions. There may be good reasons that federal judges should not universally enjoin federal defendants, but those reasons should be matters of policy judgment, not constitutional law or history.

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268. *Trump v. Hawaii*, 138 S. Ct. 2392, 2429 (2018) (Thomas, J., concurring) (quoting *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1225 (2015) (Thomas, J., concurring in the judgment)).

