Precluding Government Relitigation of Statutory Interpretations: Clark-Cowlitz Joint Operating Agency v. Federal Energy Regulatory Commission

I. INTRODUCTION

Within the judiciary and the fields of administrative law and civil procedure, a debate continues concerning the applicability of the preclusion doctrines of res judicata and collateral estoppel[1] against the government. In general, the government

1. This Note will use the terms res judicata and collateral estoppel in their traditional sense; namely to refer to the preclusion of relitigating previously decided claims or issues. The terms preclusion, preclusion doctrines, or preclusion principles will be used as an umbrella term encompassing both concepts. The classic statement of the two related principles was set forth over a hundred years ago by the U.S. Supreme Court:

> In considering the operation of this judgment, it should be born in mind . . . that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them.
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> . . . But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined.

Cromwell v. County of SAC, 94 U.S. 351, 352-53 (1876).

Recent attempts to clarify these often confusing doctrines have apparently met with little success. The most ambitious effort was put forth by the American Law Institute with the compilation of the RESTATEMENT (SECOND) OF JUDGMENTS in 1982.

Under the general rubric of preclusion, the Restatement sought to redefine res judicata and collateral estoppel. If a claim is litigated and a valid and final judgment is rendered on behalf of the *plaintiff*, that claim is said to be extinguished and merged in the judgment (merger). RESTATEMENT (SECOND) OF JUDGMENTS § 17 (1982). If a claim is litigated and a valid and final judgment is rendered on behalf of the *defendant*, that claim is said to be extinguished and the judgment bars subsequent litigation on the same claim (bar). *Id.* at § 19. If an issue of fact or law is actually litigated and necessary to a judgment, that determination is conclusive in subsequent litigation between the parties on the same or different claim (issue preclusion) *Id.* at § 27. The Restate-

argues that it should have full use of these procedural doctrines, but that the role and function of the government sufficiently distinguish it from private litigants such that the preclusion doctrines should have no force against the government.[2] Conversely, others argue that the doctrines should be applied uniformly against either private parties or the government.[3] As for the judiciary, the courts have failed to propound any reasoned analytic approach for determining when the preclusion doctrines may be applied against the government and have instead vacillated between the two extremes on a case-by-case analysis.[4]

This Note explores the issue of the applicability of the preclusion doctrines against the government. Specific focus will be placed upon the doctrines' application in cases where the government has previously litigated a question of statutory interpretation. The exploration begins with the recent case of *Clark-Cowlitz Joint Operating Agency v. Federal Energy Regulatory Commission*[5] (*Clark-Cowlitz*), a classic factual setting for analyzing this issue. The Note will then proceed to briefly examine the historical developments of the preclusion doctrines and the United States Supreme Court's recent and continuing struggle with the application of the doctrines against the government. It is the position of this Note that the Court's struggle stems from a failure to analyze the doctrines within the context of the conflicts between the policies served by the application of preclusion doctrines and the policies and purposes underlying government administration. From an analy-

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ment uses the term res judicata broadly, as encompassing all three concepts. *Id.* at 131. *See also infra* notes 50-53 and accompanying text.

2. It is a "long-standing policy of the United States government to look upon repetitive litigation not only as permissible but as desirable. The government's policy is supported by those cases in which, after a decade of relitigation in various circuits, its position is vindicated." Levin & Leeson, *Issue Preclusion Against the United States Government*, 70 IOWA L. REV. 112, 113-14 (1984). The government generally takes the position that preclusion is inappropriate in either the criminal or civil context, and that considerations such as mutuality and the fine distinctions between offensive and defensive uses of estoppel are irrelevant. This position is based upon the view that relitigation of decided issues and inter-circuit conflicts are valuable activities that lead to a conclusive decision by the Supreme Court with the benefit of many reasoned opinions by lower courts. *Id.* at 125 n.91 (referencing the Brief for Petitioner filed by the United States in Mendoza v. United States, 464 U.S. 154 (1984)). *See also infra* notes 141-150 and accompanying text.

3. Levin & Leeson, *supra* note 2, at 112 (discussing the views of the late Professor Allan Vestal).

4. *See infra* text accompanying notes 73-126.

5. 775 F.2d 366 (D.C. Cir. 1985).

sis of these competing policies, this Note will then propose a functional standard for determining when the preclusion doctrines should be applied against the government to preclude relitigating questions of statutory interpretation. Applying this standard to the facts presented by *Clark-Cowlitz* demonstrates that the holding of the District of Columbia Circuit Court of Appeals, while ultimately correct, was flawed in its analysis.

A. Clark-Cowlitz Joint Operating Agency v. FERC

The factual setting from which *Clark-Cowlitz* arose is complex. At the center of the controversy is the interpretation of a provision of the Federal Water Power Act, passed by Congress in 1920.[6] The Act, designed to promote the orderly development of the nation's hydroelectric power potential,[7] authorizes the federal government to issue licenses for limited periods of duration (usually 50 years) for the construction and operation of dams on the nation's waterways.[8]

A key provision of the Act made public utility entities[9] preferred applicants in the licensing process.[10] If a particular hydroelectric generating site was sought by both a public and a private utility,[11] the Act provided that if the competing public entity was "equally well adapted, to conserve and utilize in the public interest the water resources,"[12] then "the [Federal Energy Regulatory] Commission shall give preference" to the public utility in the issuance of the license.[13]

During the 1970's, some of the initial licenses granted by the federal government began to expire. Most of these original licenses had been issued to private utilities. However, since the 1920's the number of public utilities within the country has grown enormously.[14] Many of these public utilities were

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6. 16 U.S.C. § 800 (1982).

7. *See* J. KERWIN, FEDERAL WATER-POWER LEGISLATION (1926). *See also* Chemehuevi Tribe v. FPC, 489 F.2d 1207, 1215-22 (D.C. Cir. 1973).

8. 16 U.S.C. § 800(a) (1982).

9. As used throughout this Note, the term public utilities refers to not-for-profit electric utilities such as state, county, or municipal utility systems, including public utility districts.

10. 16 U.S.C. § 800(a) (1982).

11. As used throughout this Note, the term private utilities denotes investor owned electric utilities, either publicly or privately held.

12. 16 U.S.C. § 800(a).

13. *Id.*

14. AMERICAN PUBLIC POWER ASSOCIATION, CONSUMERS, COMPETITION AND THE PUBLIC INTEREST: THE CASE FOR PREFERENCE IN RELICENSING OF HYDROELECTRIC

located adjacent to or had taken over private utility service territories. Thus, as the old licenses expired, some public utilities filed competing applications to become the new licensees of existing hydroelectric projects held by private utilities. This placed FERC in the position of having to determine whether the Act's public preference provision applied to relicensing proceedings.

In the mid-1970's, the public utility of Bountiful, Utah filed the first competing application for a license held by a private utility. Shortly thereafter, in 1976, the Clark and Cowlitz Public Utility Districts (PUDs) of Washington formed a joint operating agency for the express purpose of filing a competing application for another existing project, the Merwin Dam, located in southwestern Washington State.[15] The Merwin Dam was originally constructed by a private utility pursuant to a 50 year license issued by the Federal Power Commission[16] in 1929, and was scheduled for a relicensing in 1979.[17]

FERC recognized the critical nature of the issue of whether the Act's public utility preference provision applied to relicensing as well as original licensing cases. In September of 1978, FERC announced the initiation of a generic proceeding to resolve this issue of statutory interpretation by declaratory order.[18] Because of the national implications of this issue, intervention was sought by both the public and private utility industry, en masse.[19] In May, 1979, FERC granted the interventions and established a briefing schedule for the "resolution of a purely legal issue, a question of statutory construction which in no way hinges upon the facts of a particular case."[20]

Following the filing of briefs by all interested parties, FERC conducted an unprecedented full day of oral argument.[21] Then, in June, 1980, FERC issued an order (hereinaf-

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PROJECTS 10-13 (1983). Conversely, the number of private utilities has dropped from approximately 4,000 in 1920 to about 200 today. *Id.* at 10.

15. Brief for Petitioner at 9, *Clark-Cowlitz*.

16. The Federal Power Commission was the predecessor to the Federal Energy Regulatory Commission (FERC).

17. *Clark-Cowlitz*, 775 F.2d at 368.

18. Brief for Petitioner at 10, *Clark-Cowlitz*.

19. Among the parties were the American Public Power Association, on behalf of the nation's public utilities, and the Edison Electric Institute, on behalf of the nation's private utilities.

20. *Order Granting Interventions and Setting Briefing Schedule*, No. EL78-43 (FERC May 3, 1979).

21. *Clark-Cowlitz*, 775 F.2d at 369.

ter the *Bountiful* decision) declaring that preference did apply in relicensing cases so long as the public utility applicant's plans were first found "equally well adapted."[22]

Disappointed by FERC's *Bountiful* decision, the private utilities appealed to the Eleventh Circuit Court of Appeals.[23] Approximately two years later, on September 17, 1982, the Eleventh Circuit rendered its decision affirming FERC's interpretation in the case of *Alabama Power v. FERC*.[24] The *Alabama Power* court held that FERC's interpretation of the Act, that public utility preference applied in relicensing cases, was "consistent with the statute's language, structure, scheme, and available legislative history."[25]

Between the time of FERC's initial ruling in *Bountiful* and the Eleventh Circuit's affirmance in *Alabama Power*, President Reagan was elected. Within the first two years of office, President Reagan appointed four new members to the five member FERC Commission.[26] The new Commission members' disdain for public utilities in general, and the Federal Water Power Act's preference provision in particular, soon became apparent.[27] On April 25, 1983, the Commission met in secret session[28] to assess available methods for reversing the Commis-

22. Opinion and Order Declaring Municipal Preference Applicable to Hydroelectric Relicensings, 11 FERC 337 (June 27, 1980) *reh'g denied*, 12 FERC 179 (August 21, 1980).

23. Alabama Power v. FERC, 685 F.2d 1311 (11th Cir. 1982).

24. *Id.* at 1318.

25. *Id.*

26. Brief for Petitioner at 18, *Clark-Cowlitz*.

27. On September 14, 1983, at a public meeting, FERC Commission Chairman Butler described the prior Commission's *Bountiful* decision and the Eleventh Circuit's subsequent affirmance in the following terms: "As far as the legal merits are concerned, it seems to me that there is no question. I almost choke over this Eleventh Circuit claim that our legal position before them, and as we espoused in Opinion 88 [*Bountiful*] is defensible. I think it's indefensible." Brief for Petitioner at 26 n.11, *Clark-Cowlitz*.

Five months earlier, on the day the administrative law judge rendered his opinion in the *Merwin Dam* case, a spokesman for the FERC said, "[I]t is clear to me that they [the Commission] may not affirm [the ruling of the administrative law judge]." Brief for Petitioner at 18, *Clark-Cowlitz*. In a specific reference to the *Bountiful* decision of the prior Commission, the spokesman stated, "[T]hat decision was made during the Carter . . . administration . . . this is a different Commission." *Id.*

28. *Clark-Cowlitz*, 775 F.2d at 369. This secret meeting, and FERC's subsequent decision not to turn the minutes or transcripts of the meeting over to Clark-Cowlitz, resulted in a companion piece of litigation under the Government In the Sunshine Act. Clark-Cowlitz v. FERC, 775 F.2d 359 (D.C. Cir. 1985).

FERC's decision at this meeting to attempt to reverse *Bountiful* resulted from purely internal discussions between the staff and the Commission. No notice or opportunity to comment was provided to any interested party. Furthermore, none of

sion's prior ruling in the *Bountiful* decision.[29]

Prior to the Commission's secret meeting, the actual Merwin Dam relicensing case was tried before an administrative law judge. During this proceeding, the existing Merwin Dam license holder, the Pacific Power and Light Company, conceded that the *Bountiful* decision was controlling on the issue of whether the Act's preference provision applied to the specific Merwin Dam case.[30] At the conclusion of the Merwin Dam proceeding, the administrative law judge ruled that Clark-Cowlitz was as "equally well adapted" to operate the project as the current private utility license holder; "preference shall therefore be given, pursuant to section 7(a) of the Act, to the application of [Clark-Cowlitz] and a license should be issued to" Clark-Cowlitz.[31]

When the administrative law judge's decision in the Merwin Dam case came before the FERC Commission, the Commission chose to utilize this individual case as the vehicle for reversing the statutory interpretation issue decided in *Bountiful*.[32] The Commission stated:

> Today, in the perspective of this adversary relicensing proceeding, we have come to the conclusion that *Bountiful* was wrong and should be overruled. We believe that *Bountiful*'s conclusion was legally erroneous and that [public utilities] have a relicensing preference against all adversary non-preference applicants other than the "original licensees" in possession [of the existing project] . . . .[33]

The Commission also stated that "no legal impediment" to overruling *Bountiful* existed.[34] It hinted that the Eleventh

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the parties had requested such a ruling from FERC. *Clark-Cowlitz*, 775 F.2d 359 (D.C. Cir. 1985).

29. The Commission first chose to join with the private utilities in filing a request for certiorari of the *Alabama Power* case with the Supreme Court. *Clark-Cowlitz*, 775 F.2d at 369. In his brief, the Solicitor General informed the Court of FERC's change in position and requested that the case be remanded. The Solicitor General also stated that "under traditional res judicata principles, if this court denies certiorari . . . [the parties] may be bound by the Commissions order in any future relicensing proceeding." *Id.* at 369-70. Despite this request, the Supreme Court denied the petition for certiorari in July, 1983. Utah Power & Light Co. v. FERC, 463 U.S. 1230 (1983).

30. *Clark-Cowlitz*, 775 F.2d at 370.

31. Brief for Petitioner at 16, *Clark-Cowlitz*.

32. *Clark-Cowlitz*, 775 F.2d at 370.

33. Opinion and Order Overruling Op. No. 88, Reversing Initial Decision and Issuing New License to Original Licensee, 25 FERC 174 (Oct. 6, 1983).

34. *Clark-Cowlitz*, 775 F.2d at 370.

Circuit may have been "misled" by the prior FERC Commission when it decided the *Alabama Power* case and, therefore, its decision did not bind FERC.[35]

Clark-Cowlitz then filed suit against FERC in the District of Columbia Circuit Court of Appeals. Since Clark-Cowlitz was one of the first entities to file a competing license in a relicensing proceeding before FERC, Clark-Cowlitz was a party in each of the proceedings designed to resolve the statutory construction of the Act's preference provision. Clark-Cowlitz appeared before FERC in the *Bountiful* case and intervened as a defendant with FERC when the private utilities challenged FERC's *Bountiful* holding in *Alabama Power*.[36] Accordingly, Clark-Cowlitz's suit alleged, among other things,[37] that the preclusion doctrines of res judicata and collateral estoppel prevented FERC from reversing the previously adjudicated question of statutory interpretation, at least as against entities who were parties to the prior litigation, such as Clark-Cowlitz.[38]

In its decision, the D.C. Circuit Court of Appeals first noted the "[c]onfusion as to whether the problem involved is one of res judicata (claim preclusion) or collateral estoppel (issue preclusion) . . . ."[39] The court acknowledged that this was the "understandable result of the unusual circumstances of this case and the ambiguities in the doctrines themselves."[40]

After analyzing the doctrines and some recent cases, the court tentatively designated the issue as one of res judicata, as opposed to collateral estoppel.[41] Nevertheless, the court concluded that the "choice of label is of little import."[42] Regard-

35. *Id.* The Commission also made clear that it fundamentally disagreed with the policies embodied in the preference concept. The Commission stated that the preference policy contained in the Act was a "conception of that era," and that its relationship to the public interest is "considerably weaker today than in 1920." Brief for Petitioner at 20, *Clark-Cowlitz*.

36. *Clark-Cowlitz*, 775 F.2d at 369, 375.

37. Clark-Cowlitz also challenged FERC's revised interpretation on its merits. The court sustained Clark-Cowlitz's contention that the language of the Federal Water Power Act and the legislative history supported application of the public utility preference provision to relicensing as well as original license cases. *Id.* at 376-77.

38. *Id.* at 371 (Clark-Cowlitz actually plead res judicata, collateral estoppel, and the "mandate rule"). *See, e.g.*, Ithaca College v. NLRB, 623 F.2d 224 (2d Cir.) *cert. denied*, 449 U.S. 975 (1980); City of Cleveland v. Federal Power Commission, 561 F.2d 344, 346 (D.C. Cir. 1977). *See also* Brief for Petitioner at 25-31, *Clark-Cowlitz*.

39. *Id.* at 371.

40. *Id.*

41. *Id.* at 374.

42. *Id.*

less of the label used, the court found that the situation presented "a model for the application of preclusion principles."[43]

In ruling for Clark-Cowlitz, and concluding that the government could be estopped from reversing the previously decided question of statutory interpretation adjudicated in *Bountiful* and *Alabama Power*, the majority focused on five factors. First, in both *Bountiful* and *Alabama Power*, all parties, including Clark-Cowlitz, had expended enormous energy and resources in reliance upon FERC's assurances and intent that that forum would conclusively determine the preference question. Second, FERC had represented to the parties and to the Eleventh Circuit that the issue was independent of and unaffected by the facts in any individual relicensing case. Third, the Solicitor General, on behalf of FERC, had indicated to the Supreme Court his belief that a denial of certiorari in *Alabama Power* would give binding effect to the Eleventh Circuit's decision. Fourth, the parties in the present case were parties in the prior proceedings, there had been little lapse of time between the cases, and there was no material change in the circumstances of the parties. Fifth, the facts were more than " 'virtually' the same"; they were identical.[44]

Judge Wright wrote separately, concurring with the majority in their construction of the statute and legislative history.[45] He dissented, however, on the issue of whether res judicata should be applied in this case.[46] Judge Wright viewed the case as posing a separate claim than the one initially decided in *Alabama Power*. He stated:

> The court [in *Alabama Power*] found that FERC's initial interpretation was reasonable. Therefore, any challenge to the reasonableness of *that* interpretation by the parties to *Bountiful* would certainly be precluded. But Clark-Cowlitz is not challenging the reasonableness of that initial interpretation, it is challenging the Commission's revised interpretation. It may be difficult to imagine how two directly opposite interpretations can both be reasonable, but saying that the Commission's new interpretation is unreasonable is different from saying that the Commission is precluded from

43. *Id.*

44. *Id.* at 375.

45. *Id.* at 382-83.

46. *Id.*

asserting it.[47]

The majority's decision in *Clark-Cowlitz* is fundamentally correct. However, as with most opinions that address the issue of whether the rules of preclusion are appropriate for application against the government, the majority's decision lacks the force and clarity of a reasoned, workable approach. This shortcoming prevents the decision from having the impact that it could have on future decisions that will address the same issue. In light of the D.C. Circuit's decision to rehear the case en banc,[48] and the likelihood of appeal to the Supreme Court,[49] the opportunity to overcome these shortcomings may not yet be lost.

B. Historical Perspective

In order to focus on the issue, it is appropriate to first review the historical context in which the preclusion doctrines developed. The concept of res judicata had its origins in early Roman law[50] while collateral estoppel originated in medieval Germanic law.[51] Although the two doctrines are conceptually integrated, their divergent historical origins led to judicial and academic attempts to keep them distinct.[52] However, modernized pleading practices have led to a recognition that the two

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47. *Id.* at 382.

48. *Id.* at 366.

49. The financial importance of the Merwin Dam to the parties and the importance of the preclusion issue will likely result in an appeal to the Supreme Court.

50. Adopting the principle that judicial decisions should be respected, Roman law provided that prior decisions were conclusive in subsequent actions involving the same legal basis and same central issue. W. BUCKLAND, TEXT-BOOK OF ROMAN LAW, 690-92 (1921); Comment, *Developments in the Law: Res Judicata*, 65 HARV. L. REV. 818, 820 (1952) (hereinafter *Developments*); *see also* Perschbachaer, *Rethinking Collateral Estoppel: Limiting the Preclusive Effect of Administrative Determinations in Judicial Proceedings*, 35 U. FLA. L. REV. 422, 426 (1983) (hereinafter *Rethinking Collateral Estoppel*).

51. Collateral estoppel was premised on the idea that because the parties dominated the proceedings, their allegations at trial, subsequently proven, should create an estoppel. While the principle was based on a party's own allegations or conduct, a final judgment was required, leading to the terms "estoppel by record" or "estoppel by judgment." Millar, *The Historical Relation of Estoppel by Record to Res Judicata*, 35 ILL. L. REV. 41, 44 (1940); *Accord* A. ENGELMANN, HISTORY OF CONTINENTAL CIVIL PROCEDURE 149 (Millar Trans. 1927).

52. *Developments*, *supra* note 50, at 821. Some commentators argue that the underlying purposes of the two doctrines remain distinct and that greater emphasis should be placed on separating the two doctrines so as to not mistakenly apply one doctrine on the basis of policies that are served by another. *Rethinking Collateral Estoppel*, *supra* note 50, at 45-57.

concepts are, in reality, related aspects of a single procedural doctrine—preclusion.[53]

During the last forty years, preclusion doctrines have been significantly liberalized in their application.[54] Much of this liberalization resulted from an erosion of the ancient requirement that there be mutuality of parties in both the prior and subsequent litigation in order for preclusion rules to apply.[55] The slow demise in judicial adherence to the mutuality requirement culminated with the United States Supreme Court decisions in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*[56] and *Parklane Hosiery Co. v. Shore*.[57]

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53. A. Englemann, *supra* note 51, at 149. *See also supra* note 1.

54. *Rethinking Collateral Estoppel*, *supra* note 50, at 423. The primary motivational force behind this liberalization has been the burgeoning workload of the judicial system. *Id.* at 425; Blonder-Tongue Laboratories Inc., v. University of Illinois Foundation, 402 U.S. 313 (1971). Courts and commentators have long recognized the expediency and judicial economy that can be achieved through a more expansive application of the rules of preclusion. *See, e.g.*, Zdanok v. Glidden Co., Durkee Famous Foods Div., 327 F.2d 944, 953 (2d Cir. 1964), *cert. denied*, 377 U.S. 934 (1964); Pharmadyne Laboratories v. Kennedy, 466 F. Supp. 100, 108 n.16 (D.N.J. 1979); Vestal, *Relitigation by Federal Agencies: Conflict Concurrence and Synthesis of Judicial Policies*, 55 N.C. L. REV., 123, 143-46 (1977); Vestal, *Rationale of Preclusion*, 9 ST. LOUIS U.L.J. 29, 31-33 (1964); Kelly & Rothenberg, *The Use of Collateral Estoppel by a Private Party in Suits Against Public' Agency Defendants*, 13 U. MICH. J.L. REF. 303, 304 (1980).

55. The mutuality requirement was historically called an "obviously just and proper rule" based on the notion that a former judgment should have no bearing upon one who had no part in the prior proceeding. Moschzisker, *Res Judicata*, 38 YALE L.J. 299, 301-304 (1929). Nonetheless, the mutuality requirement had been criticized for over 150 years. Jeremy Bentham (1748-1831), an English philosopher who trained as a lawyer but never practiced, wrote that mutuality was unfounded in reason, "a maxim which one would suppose to have found its way from the gaming table to the bench." *Zdanok*, 327 F.2d at 954 (quoting 3 J. BENTHAM, RATIONAL OF JUDICIAL EVIDENCE 578 (1827), *reprinted in* 7 WORKS OF JEREMY BENTHAM 171 (J. Browning, ed. (1943)). This passage is cited with approval by many cases that have addressed the mutuality requirement. *See, e.g.*, Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 322-323 (1971); Bernhard v. Bank of Am. Nat'l Trust & Savings Ass'n, 19 Cal. 2d 807, 812, 122 P.2d 892, 895 (1942). Commentators have also found Bentham's criticism equally persuasive. *See also* Currie, *Mutuality of Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281, 284 n.5 (1957).

56. 402 U.S. 313 (1971). *Blonder-Tongue* involved the relitigation of the validity of a patent. A prior Supreme Court case, Triplett v. Lowell, 297 U.S. 638 (1936), had held that mutuality was strictly required in cases involving the litigation of an alleged infringement on a patent. The Court in *Blonder-Tongue* held that "*Triplett* should be overruled to the extent it forecloses a plea of estoppel by one facing a charge of infringement of a patent that has once been declared invalid." *Blonder-Tongue*, 402 U.S. at 349. Thus, the question remained whether the Court would abandon mutuality in the context of other types of litigation.

57. 439 U.S. 322 (1978). In *Parklane*, a group of shareholders sought to estop Parklane from relitigating the issue of whether the company issued materially

In *Blonder-Tongue*, the Court adopted the "full and fair opportunity to litigate" standard to determine whether a non-party to the prior litigation should be permitted to invoke the preclusion doctrines to prevent a party to the prior case from relitigating an issue he had already lost.[58] The "full and fair opportunity" standard recognizes that there are two elements essential to the analysis. Both elements focus on the person or entity who had been a party to the prior litigation and against whom the preclusion doctrines are subsequently asserted. First, the fullness of the opportunity is determined by the party's incentive to have vigorously litigated in the prior adjudication.[59] Second, the fairness element looks to the procedural protections afforded the party in the prior litigation and whether the subsequent case presents significant procedural differences.[60]

In *Parklane*, the Court was faced with an attempted offensive application of the preclusion doctrines by a non-party to the prior litigation.[61] Noting the academic and judicial criticisms raised against the use of offensive nonmutual collateral estoppel,[62] the Court concluded that the preferable approach for determining whether to permit its application was to vest broad discretion in the trial courts.[63] However, in an effort to

misleading proxy statements, an issue which had been decided against the company in a prior suit with the Securities and Exchange Commission.

58. *Blonder-Tongue*, 402 U.S. at 329. The "full and fair opportunity" standard was adopted from prior circuit court opinions that had addressed and abandoned the mutuality requirement.

59. *Rethinking Collateral Estoppel*, *supra* note 50, at 456 n.163.

60. *Id.*

61. The Court stated:

> [O]ffensive use of collateral estoppel occurs when the plaintiff seeks to foreclose the defendant from litigating an issue the defendant has previously litigated unsuccessfully in an action with another party. Defensive use occurs when a defendant seeks to prevent a plaintiff from asserting a claim the plaintiff has previously litigated and lost against another defendant.

Parklane, 439 U.S. at 326 n.4 (quoted in United States v. Mendoza, 464 U.S. 154, 159 n.4 (1984)).

62. *Parklane*, 439 U.S. at 329-31. These included the limited judicial economy that results from offensive use; the potential disincentive for a possible plaintiff to join in the initial action, since he could offensively make use of the prior adjudication if its results were favorable to his case while at the same time escaping the results if they proved unfavorable; and the potential unfairness that can result from the application of the prior judgment in subsequent litigation if the likelihood of future litigation was not foreseeable. *Id.* These concerns formed the basis for the Court's enunciation of five factors which may warrant a refusal to apply nonmutual collateral estoppel. *See infra* note 64 and accompanying text.

63. "We have concluded that the preferable approach for dealing with these problems in the federal courts is not to preclude the use of offensive collateral

guide the trial courts in their analysis, the Court in *Parklane* set forth five factors which could warrant a refusal to apply the rules of preclusion in a subsequent case. These factors were when the party seeking to assert the prior judgment could have easily joined in that action but chose not to; when the defendant in the first action was sued for small or nominal damages, particularly when the potential for future suits to which the initial judgment could be applied was not foreseeable; when the prior judgment is inconsistent with other judgments in favor of the defendant; when the defendant is afforded procedural opportunities in the second action that were unavailable in the first; and finally, when there are "other reasons" for denying the application of offensive nonmutual collateral estoppel in the second suit.[64]

C. Application of Preclusion Doctrines Against the Government

Historically, rules of preclusion were applied uniformly in cases between private parties, and cases in which the government was a party.[65] The first exception to this rule was carved out by the Supreme Court in *United States v. Moser*.[66] In *Moser*, the government sought to avoid the effect of a prior judgment by arguing that it should be free to relitigate questions of law, as opposed to questions of fact. The Court partially agreed, and adopted an exception to the application of preclusion principles for "unmixed questions of law."[67]

Even after *Moser*, the question of whether preclusion doctrines could be applied against the government on issues of law, such as statutory interpretation, remained largely aca-

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estoppel, but to grant trial courts broad discretion to determine when it should be applied." *Parklane*, 439 U.S. at 331.

64. *Id.* at 329-32.

65. Corr, *Supreme Court Doctrine in the Trenches: The Case of Collateral Estoppel*, 27 WM. & MARY L. REV. 35, 66 (1985).

66. 266 U.S. 236 (1924).

67. The Court stated:

> . . . In a sense, . . . [the government's contention] is true. It [res judicata] does not apply to unmixed questions of law. Where, for example, a court in deciding a case has enunciated a rule of law, the parties in a subsequent action upon a different demand are not estopped from insisting that the law is otherwise, merely because the parties are the same in both cases. But a *fact, question*, or *right*, distinctly adjudged in the original action cannot be disputed in a subsequent action, even though the determination was reached upon an erroneous application of the law.

Id. at 242 (emphasis in original).

demic,[68] as witnessed by the first Restatement of Judgments' refusal to address the topic.[69] This was primarily due to the paucity of litigation on the matter.[70] However, there has been a recent series of Supreme Court cases that obliquely address the issue, though none have contributed a viable standard or approach for determining whether to apply the preclusion doctrines against the government on previously adjudicated questions of statutory interpretation.[71] Nonetheless, these recent cases provide an initial framework for analysis by placing the issue in the perspective of competing public policies and interests.[72]

In the first of the series, *Montana v. United States*,[73] the State of Montana sought to preclude the government from relitigating whether a Montana tax on the gross receipts of public, but not private, construction projects discriminated against the federal government in violation of the Supremacy Clause.[74] In a prior decision, *Peter Kiewit Sons' Co. v. State Board of Equalization*,[75] the Montana Supreme Court had ruled that the tax was constitutional. While not a party to that case, the federal government had been significantly involved in the dispute and exercised considerable control over the course of the litigation.[76]

Inexplicably, the Court in *Montana* began its opinion with an analysis of the mutuality requirement.[77] Both the *Blonder-*

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68. Hazard, *Preclusion as to Issues of Law: The Legal System's Interest*, 70 IOWA L. REV. 81, 90-93 (1984) [hereinafter *Hazard*].

69. The first RESTATEMENT OF JUDGMENTS made no provisions for the application of preclusion doctrines on issues of law. RESTATEMENT OF JUDGMENTS § 60 (1942).

70. Hazard, *supra* note 68, at 89.

71. *See infra* notes 73-126 and accompanying text.

72. *See infra* notes 127-150 and accompanying text.

73. 440 U.S. 147 (1979).

74. *Id.* at 149-151.

75. 161 Mont. 140, 505 P.2d 102 (1973) (hereinafter *Kiewit I*).

76. In *Montana*, the government stipulated that in the prior suit it had:

(1) required the *Kiewit I* lawsuit to be filed;
(2) reviewed and approved the complaint;
(3) paid the attorneys' fees and costs;
(4) directed the appeal from State District Court to the Montana Supreme Court;
(5) appeared and submitted a brief as *amicus* in the Montana Supreme Court;
(6) directed the filing of a notice of appeal to this Court; and
(7) effectuated Kiewit's abandonment of that appeal on advice of the Solicitor General.

Montana, 440 U.S. at 155.

77. *Id.* at 153-55.

Tongue and *Parklane* decisions preceded the Court's ruling in *Montana* and had seemingly abandoned the mutuality requirement.[78] Yet, with the exception of a passing reference to *Parklane*,[79] neither opinion is discussed or distinguished in *Montana*.[80] Instead, the Court devotes considerable attention to the mutuality issue and finds that while not a party to the prior litigation, the government "plainly had a 'sufficient laboring oar' in the conduct of the state-court litigation to actuate the principles of estoppel."[81]

In addition to the revival of a mutuality requirement, the *Montana* Court set forth three further considerations. First was whether the issues presented in the instant litigation were "in substance" the same as those resolved in the prior adjudication.[82] Second was "whether controlling facts or legal principles have changed significantly since the state-court judgment."[83] Third was whether "other special circumstances" existed to warrant a refusal to apply the rules of preclusion.[84] Finding for Montana in each instance, the Court held that the government was precluded from relitigating the constitutional question resolved in the state court action.[85]

Following the Court's decision in *Parklane*, and the unexplained rebirth of mutuality in *Montana*, there remained the question of whether nonmutual collateral estoppel could be invoked against the government, either offensively or defensively. The Supreme Court's first opportunity to address this issue arose in a criminal case *Standefer v. United States*.[86] Standefer was charged with aiding and abetting a federal official accused of taking bribes.[87] However, in a prior adjudication, the federal official had been acquitted of the bribery charge.[88] Since the government was unable to establish the existence of a bribe beyond a reasonable doubt in the prior case, Standefer now sought to preclude the government from

78. *See supra* notes 58-64 and accompanying text.

79. The Court merely used *Parklane* as a reference for the traditional definition of mutuality. *Montana*, 440 U.S. at 153.

80. *Id.* at 153-64.

81. *Id.* at 155.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. 447 U.S. 10 (1980).

87. *Id.* at 11-12.

88. *Id.* at 14.

prosecuting him for aiding and abetting a bribe.[89]

Writing for the majority, Chief Justice Burger implied that nonmutual collateral estoppel could, in some instances, be applied against the government, but that it would be inappropriate to do so in this case.[90] Utilizing the "full and fair opportunity" test established in *Blonder-Tongue*, the Chief Justice found that significant differences were presented in the criminal context that were absent in civil cases.[91] Chief among these differences was that criminal cases involve "the important . . . interest in the enforcement of the criminal law."[92]

The Court's opinion in *Standefer* created mixed results in the circuit courts.[93] By injecting a new "important public interest" factor, the court opened the door to a case-by-case search for countervailing public interests that could serve to defeat the application of the rules of preclusion.[94]

The Court's next opportunity to espouse a definitive test for determining when to permit the application of preclusion doctrines against the government was in *Nevada v. United States*.[95] In *Nevada*, the federal government sought to secure additional water rights to the Truckee River on behalf of the Pyramid Lake Indian Reservation.[96] Sixty years earlier the government had initiated a suit on behalf of the same tribe and

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89. *Id.*

90. *Id.* at 23-24.

91. *Id.* at 22-24.

92. *Id.* at 24.

93. *See infra* cases cited note 94.

94. By relying upon the "full and fair opportunity" test, the Court implied that nonmutual collateral estoppel could be applied against the government, at least in a civil case. Corr, *Supreme Court Doctrine in the Trenches: The Case of Collateral Estoppel*, 27 WM. & MARY L. REV. 35, 43 (1985). *See infra* note 95. *See also* Mendoza v. United States, 672 F.2d 1320 (9th Cir. 1982), *rev'd*, 464 U.S. 154 (1984) (finding no "critical" need for redetermining the issue adjudicated previously and thus permitting the application of preclusion against the government). *See infra* notes 119-31 and accompanying text. *Accord* Olegario v. United States, 629 F.2d 204 (2d Cir. 1980), *cert. denied*, 450 U.S. 980 (1981) (finding that the case raised important public issues and a general public interest in all government litigation, thus refusing to apply preclusion); American Medical Int'l, Inc. v. Secretary of HEW, 677 F.2d 118 (D.C. Cir. 1981) (the chilling effect that application of nonmutual estoppel against the government would have on the development of issues of federal law makes it inappropriate); Luben Industries, Inc. v. United States, 707 F.2d 1037 (9th Cir. 1983) (refusing to apply nonmutual estoppel against the government after application of the "full and fair opportunity" test); Western Oil & Gas Ass'n. v. EPA, 633 F.2d 803 (9th Cir. 1980) (applying *Blonder-Tongue* and *Parklane* factors and finding application of preclusion rules against the government inappropriate).

95. 463 U.S. 110 (1983).

96. *Id.* at 113.

a reclamation project against all other Truckee River water users with the intent of conclusively resolving various parties' right to the river.[97] In *Nevada*, the government sought to characterize the prior litigation as involving a claim for water for irrigation purposes only.[98] The government alleged that the present suit involved a claim for water for fisheries purposes and was, therefore, a separate and distinct claim, not barred by the preclusion doctrines.[99]

In analyzing whether the prior litigation involved the same cause of action as that presented in *Nevada*, the Court relied heavily upon the intent of the government in the prior case. Having intended to adjudicate all rights and claims to the waters of the Truckee River in the prior litigation, the government, the Court held, could not now attempt to circumvent that earlier ruling by attempting to characterize the current proceeding as one involving a specific claim not addressed in the initial litigation.[100] In other words, the Court refused to reward artful pleading.

The two most recent pronouncements by the Supreme Court on the issue of the applicability of preclusion rules against the government were decided on the same day in early 1984.[101] In *United States v. Stauffer Chemical Co.*,[102] the Court permitted the application of "mutual defensive collateral estoppel" against the government on a question of statutory interpretation.[103] In the prior litigation in the Tenth Circuit,[104] Stauffer successfully asserted that private contractors under contract with the Environmental Protection Agency (EPA) were not "authorized representatives" under the Clean Air Act.[105] As such, Stauffer prevented the private contractors from conducting an inspection of a Stauffer facility in Wyoming when the private contractors refused to sign an agreement not to disclose trade secrets discovered during their inspection.[106] When the EPA again sought to use private con-

97. *Id.*

98. *Id.* at 119, 121.

99. *Id.*

100. *Id.* at 132-34.

101. Both cases were decided on January 10, 1984. *See infra* notes 102 and 114.

102. 464 U.S. 165 (1984).

103. *Id.*

104. Stauffer Chemical Co. v. EPA, 647 F.2d 1075 (10th Cir. 1981).

105. *Id.* at 1079 (interpreting § 114 of the Clean Air Act, 42 U.S.C. § 7414(a)(2) (1982)).

106. Stauffer Chemical Co. v. EPA, 647 F.2d at 1079.

tractors to inspect a Stauffer facility in Tennessee, Stauffer again refused and the EPA brought the present action.[107]

Justice Rehnquist, writing for the majority, relied on the four-part test established in *Montana*.[108] He found that the first three requirements were easily met: mutuality of parties, issue identity, and the lack of any changes in the controlling facts or legal principles.[109] As to the fourth, whether there were "any special circumstances warranting an exception to the otherwise applicable rules of preclusion," the Court focused on the potential applicability of the "unmixed questions of law" exception[110] first announced in *Moser*.[111] Noting that the doctrine was conceptually troublesome and "difficult to delineate,"[112] the Court nonetheless found "no reason to apply it here to allow the Government to litigate twice with the same party an issue arising in both cases from virtually identical facts."[113]

The companion case to *Stauffer* was *United States v. Mendoza*.[114] Mendoza sought to assert offensive nonmutual collateral estoppel against the government on a constitutional question[115] previously decided against the government.[116] In a resounding retreat from the current trend toward liberalizing the applicability of the rules of preclusion, the Court held that nonmutual offensive collateral estoppel could not be applied against the government, at least to "preclude relitigation of issues such as those involved in this case."[117]

The Court's opinion in *Mendoza* is significant in a number

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107. United States v. Stauffer Chemical Co., 464 U.S. at 167-68.

108. *Id.* at 169-173. *See supra* text accompanying notes 77-84.

109. *Id.* at 169.

110. *Id.* at 170-73.

111. *See supra* text accompanying notes 66 and 67.

112. United States v. Stauffer Chemical Co., 464 U.S. at 170 (quoting *Montana*, 440 U.S. at 163).

113. *Id.* at 172.

114. 464 U.S. 154 (1984).

115. The question was whether the government's administration of § 701 of the Nationality Act during a nine-month period in the Philippines following the end of World War II had violated Mendoza's due process rights. The Act provided that noncitizens who served honorably in the Armed Forces of the United States during World War II were exempt from some of the requirements for citizenship. For a nine-month period following the end of the War, the United States had no Immigration and Naturalization Service agent available in the Philippines. *Mendoza*, 464 U.S. at 156-57.

116. *In re* Naturalization of 68 Filipino War Veterans, 406 F. Supp. 931 (N.D. Cal. 1975) (The government did not appeal this decision). For a summary of this case, *see Mendoza*, 464 U.S. at 157 n.2.

117. *Mendoza*, 464 U.S. at 162.

of respects. First, extending the distinctions espoused in *Standefer*,[118] the Court noted that certain factors distinguish the federal government from private litigants. The Court cited two particular differences in the nature of the government as litigant as opposed to private parties: The jurisdictional multiplicity that results from the geographic breadth of the government; and the special nature of the issues the government litigates and their collective importance to the citizenry.[119] Because of these factors, the government "is more likely than any private party to be involved in lawsuits against different parties which nonetheless involve the same legal issues."[120] Second, the Court concurred with the government's concern that nonmutual collateral estoppel could "substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue."[121] Third, the Court found that permitting nonmutual collateral estoppel would force significant revisions in the Supreme Court's appellate procedures and in the policies and practices of the Solicitor General.[122] The Supreme Court would have to grant government petitions for certiorari far more often in order to free the government from far-ranging estoppel effects of individual cases.[123] The Solicitor General would have to forego or strongly de-emphasize the institutional concerns relating to limited government litigation resources and crowded court dockets, and replace those with concerns regarding the binding effects of prior decisions.[124]

Unfortunately, *Mendoza* left unsettled the question of whether nonmutual collateral estoppel could be applied against the government. This uncertainty stems from the Court's use of conflicting language in its holding,[125] its failure

118. 447 U.S. 10 (1980). *See also supra* text accompanying notes 91 and 92.

119. *Mendoza*, 464 U.S. at 159-60.

120. *Id.* at 160.

121. *Id.* The Court noted that it benefited from receiving input from several courts of appeals before it explored difficult questions. *See also infra* notes 141-45 and accompanying text.

122. *Id.* at 160-61.

123. *Id.* at 160 (citing SUP. CT. R. 17.1).

124. *Id.* at 160-61.

125. For example, at one point the Court flatly states that "nonmutual offensive collateral estoppel is not to be extended to the United States [government]." *Mendoza*, 464 U.S. at 158. However, the Court later states that "nonmutual offensive collateral estoppel simply does not apply against the government in such a way as to preclude relitigation of *issues such as those involved in this case*." *Id.* at 162 (emphasis added). Thus, the court implied that nonmutual defensive collateral estoppel may possibly be

to specifically require mutuality, and its unwillingness to overrule or distinguish its prior holding in *Standefer*, which implied that nonmutual collateral estoppel could appropriately be applied against the government, at least in some instances.[126]

The Court's holding in *Mendoza* can be criticized for its apparent inability or unwillingness to espouse a substantive test for determining when the preclusion doctrines can be applied against the government. Nevertheless, the Court contributed to a proper analysis of the issue by examining the conflict between the underlying policies and purposes of government administration and the policies served by the application of the preclusion doctrines. It is only within the context of these competing policies that any reasoned approach can be developed for determining when the rules of preclusion can be applied against the government.

D. The Policies Underlying Preclusion Doctrines And Their Conflict With The Purposes of Government Administration

The application of the rules of preclusion in subsequent litigation is said to rest on the policies of (1) protecting litigants from the expense and vexation of repeated litigation;[127] (2) protecting courts from the burdens of repetitious and unnecessary litigation;[128] (3) promoting respect, deference, and confidence in the judicial process and the finality of judicial determinations;[129] (4) avoiding the confusion and embarrassment of inconsistent and conflicting judicial results;[130] and (5) assisting in the general peace and repose of society.[131]

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applied against the government and that nonmutual offensive collateral estoppel might be applicable under certain situations.

126. *See supra* notes 90-94 and accompanying text.

127. *Mendoza*, 464 U.S. at 158 (quoting Allen v. McCurry, 449 U.S. 90, 94 (1980)); *Parklane*, 430 U.S. at 326; *Blonder-Tongue*, 402 U.S. at 328-29; *Clark-Cowlitz*, 775 F.2d at 373. *See, also Rethinking Collateral Estoppel*, *supra* note 50, at 425; Vestal, *Rationale of Preclusion*, 9 ST. LOUIS U. L.J. 29, 34 (1964). *See generally* Moschzisker, *Res Judicata*, 38 YALE L.J. 299 (1929).

128. *See supra* note 127.

129. *Montana*, 440 U.S. at 153-54; *Nevada*, 463 U.S. at 129; *Clark-Cowlitz*, 775 F.2d at 373. *See generally* Hazard, *Res Nova in Res Judicata*, 44 S. CAL. L. REV. 1036 (1971); Note, *Collateral Estoppel: The Demise of Mutuality*, 52 CORNELL L. REV. 724 (1967).

130. *Mendoza*, 440 U.S. at 158 (quoting Allen v. McCurry, 449 U.S. at 94); *Montana*, 440 U.S. at 154; *Clark-Cowlitz*, 775 F.2d at 373. *See also Developments*, *supra* note 50 at 820.

131. *Nevada*, 463 U.S. at 129 (quoting Southern Pacific Railroad v. United States,

The applicability and force with which these policies come into play in any particular litigation vary depending upon the type of preclusion being asserted (e.g., mutual or nonmutual) and the context in which the prior and subsequent litigation is presented.[132] For example, collateral estoppel, by definition, has minimal impacts on the policies of preventing the expense and vexation of repeated litigation, protecting the courts from repetitious litigation, and aiding in the finality of judgments.[133] First, the parties are already in court in the subsequent litigation, although on a different claim or demand.[134] Second, the court will have to hear and address arguments over whether collateral estoppel should apply, as well as any other issues or claims outside the scope of the potential estoppel.[135] Third, because the estoppel will only prevent a relitigation of an issue or issues, the actual judgment in the second case could still be inconsistent with a prior adjudication if, for example, the outcome of the second case turns on a matter not previously addressed in the prior litigation.[136]

Offensive nonmutual collateral estoppel presents even weaker supporting policies.[137] Because the party against whom the estoppel is asserted will undoubtedly desire to resist its invocation, and because he is the only party who has previously litigated the issue, he is unlikely to be concerned with whatever expense and vexation may be caused by subsequent relitigation of the issue.[138]

A completely different set of policies and purposes are involved when the government seeks to relitigate a previously decided issue. These policies center around the purposes and functions of the government and its unique position with respect to private litigants.[139] While the government, as any party, must follow established laws, it is also responsible for

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168 U.S. 1, 49 (1897)). *See also Clark-Cowlitz*, 775 F.2d at 373. *See generally* Moschzisker, *Res Judicata*, 38 YALE L.J. 299 (1929).

132. *See infra* notes 134-38 and accompanying text.

133. *See infra* notes 134-38 and accompanying text.

134. *Rethinking Collateral Estoppel*, *supra* note 50, at 449.

135. *Id.*

136. *Id.*

137. *Id.*; *see also Parklane*, 439 U.S. at 329-30.

138. *See supra* note 137.

139. *Rethinking Collateral Estoppel*, *supra* note 50, at 447-48; *Mendoza*, 464 U.S. at 159-62; United States v. Stauffer Chemical Co., 464 U.S. 165, 173-74 (1984). *See also infra* notes 141-49 and accompanying text.

creating, implementing, and administering the law.[140]

When the government is a party in litigation involving an issue of law, such as statutory interpretation, the primary policy concern when applying the rules of preclusion against the government is said to be the effect such application would have on the development of the law.[141] Courts[142] and commentators[143] have consistently expressed the concern that preclusion doctrines developed for private conflict litigation should not be used so as to freeze or retard the development of the law. This is particularly so where the issue of law under consideration is part of an administrative or regulatory act, and the government is responsible for its implementation.[144] The need for flexibility and adaptability to adjust to changing social, economic, political, or technical needs is perceived by many to be a necessary element in the government's administration of the laws.[145]

Relitigation of issues is also said to be an essential and beneficial element of our judicial system. Having numerous courts address a particular issue of national significance results in the "percolation" of an issue. The issue can then be authoritatively determined by the Supreme Court with the benefit of the thoughts and analysis of many lower courts.[146] In fact, this percolation process often serves as the basis for a grant of certiorari by the Supreme Court because the Court typically waits for inter-circuit conflicts before addressing an issue.[147] Thus, there is often an incentive for the government to seek relitigation of an issue in order to create a decisional conflict and thereby attract the attention of the Supreme Court.

Another policy concern is the general public importance of many of the issues the government litigates and the number of

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140. For a general discussion of the administrative law and governmental functions and particular instances of conflicts between the government's role as administrator of the law and the duty to obey the law, *see generally* K. DAVIS, ADMINISTRATIVE LAW (5th ed. 1973).

141. *See infra* notes 142-43 and accompanying text.

142. *Mendoza*, 464 U.S. at 160; *Montana*, 440 U.S. at 162-63. *Cf.* United States v. Stauffer Chemical Co., 464 U.S. at 173.

143. *Rethinking Collateral Estoppel*, *supra* note 50, at 451-55. *See generally* Hazard, *supra* note 68.

144. *Mendoza*, 464 U.S. at 159-61. *Accord* American Trucking Ass'n v. Atchison, 387 U.S. 397, 416 (1967) ("flexibility and adaptability to changing needs and patterns . . . is an essential part of the office of a regulatory agency.").

145. *See supra* note 144.

146. *Mendoza*, 464 U.S. at 160.

147. Levin & Leeson, *supra* note 2, at 118.

cases in which the government is involved.[148] The need for continuing judicial scrutiny of prior determinations in today's changing society and the potential harm that can result from an erroneous opinion favors at least an occasional judicial revisitation of prior decisions.[149]

Because of these concerns the government generally takes the position that rules of preclusion are simply inapplicable against the government.[150] Relitigation should not only be permitted, the government argues, it should in many instances be encouraged.

On the other hand, permitting the government to relitigate previously decided issues raises separation of powers and delegation doctrine questions. For example, if Congress has passed a statute and delegated its administration to a department of the executive branch, and the interpretation of that statute has been previously adjudicated, for all practical purposes, the law is settled. The relitigation could result in a statutory interpretation which differs from, if not totally reverses, the prior interpretation. Permitting the government to relitigate the interpretation of the statute, as opposed to having Congress amend or repeal the law, implicitly authorizes legislating by the courts and administrative agencies.

Furthermore, permitting relitigation by the government may have a chilling effect upon the activities of those who must act in reliance upon certain statutes and their interpretation. If a party knows that a statutory interpretation resulting from an administrative proceeding or judicial action will not necessarily be binding in the future, two things may occur. First, parties will probably be less likely to devote the attention and resources that they would otherwise devote in an administrative or judicial proceeding designed to interpret the statute. Second, a party will be hesitant to make significant capital and labor investments in reliance upon a statutory interpretation.

It is against the backdrop of these competing policies that a reasoned approach to the application of the preclusion doctrines against the government must be developed. On the one

148. *See supra* notes 119-120 and accompanying text.

149. *Id.* This is especially true in the arena of constitutional questions. Vestal, *Relitigation by Federal Agencies: Conflicts, Concurrence and Synthesis of Judicial Policies*, 55 N.C.L. REV. 123, 178 (1977).

150. *See supra* note 2.

hand are the policies favoring judicial finality, economy, conclusiveness, the prevention of litigious harassment, and the separation of powers and proper delegation of legislative functions. On the other are the policies favoring governmental flexibility and adaptability in order to implement and administer the law in a changing political, social, technical, and economic society.

E. Synthesizing a Workable Approach

As a starting point, the four-part test established in *Montana* serves as a sturdy foundation upon which to model a workable approach.[151] However, additional factors must be added into the analysis in order to accommodate the competing policies and interests underlying the preclusion doctrines and government administration.

The first step of the proposed test addresses mutuality.[152] Both the *Standefer* and *Mendoza* decisions articulate and demonstrate the unique role and function of the government in litigation.[153] These factors justify the requirement that the government be bound by prior litigation only with respect to the actual parties or their privies. A requirement of mutuality is further supported by the diminished force of the policies favoring the application of preclusion doctrines when a nonparty to the prior adjudication seeks to preclude relitigation.[154] Furthermore, requiring mutuality lessens the concern that development of the law will be frozen or thwarted since the government will still be free to relitigate a claim or issue against new parties.[155] This in turn can result in the beneficial "percolation" of an issue through continuing analysis by various courts, which can then be addressed by the Supreme Court.[156]

The second element of the proposed test examines whether the claim or issue being presented is in substance the

151. *See supra* text accompanying notes 77-84.

152. *Montana*, 440 U.S. at 154-55.

153. *See supra* notes 91-92 and 119-124 and accompanying text. Of particular relevance to the application of preclusion rules is the public importance of the issues the government litigates and the number of cases in which the government is involved. A decision in one case, for example, a welfare benefits case, if applied nationally or even within one circuit because of the preclusion doctrines, could have far reaching economic and social effects.

154. *See supra* notes 133-38 and accompanying text.

155. *Mendoza*, 464 U.S. at 163-64.

156. *See supra* notes 146-47 and accompanying text.

same as that previously litigated.[157] Modern pleading practices broadly define the terms "claim" or "issue."[158] In addition, artful pleading and subtle characterizations can conceivably result in an even broader preclusive effect of prior decisions.[159] Yet neither of these liberalizing forces finds strong support in the policies underlying the application of preclusion doctrines.[160] Conversely, the factors that distinguish the government from private litigants[161] support a careful circumscription of the issue or claim allegedly precluded from being relitigated. Such an approach already exists within the field of administrative law.[162]

In addition to carefully defining the claim or issue previously litigated, reference should also be made to the government's intent in the prior adjudication. Such an approach serves a purpose similar to equitable estoppel if, for example, the government intended a conclusive resolution of the particular claim or issue in the prior suit.[163] This factor was utilized by the Supreme Court in *Nevada* when it precluded the government from attempting to characterize the subsequent litigation as involving a claim not previously adjudicated.[164]

Focusing on the government's intent in the prior litigation satisfies a number of policy concerns on both sides of the preclusion equation. First, if the government indicates a desire to resolve a matter of statutory interpretation, the parties in that proceeding will generally act in reliance upon that intent, both in the resources they devote to the proceeding itself and the capital and labor they invest subsequent to the interpretation. Second, holding the government to its expressed intent pro-

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157. *Montana*, 440 U.S. at 155.

158. *Blonder-Tongue*, 402 U.S. at 327; Vestal, *Res Judicata/Preclusion by Judgment: The Law Applied in Federal Courts*, 66 MICH. L. REV. 1723, 1724 (1968).

159. Such an attempt was made by the government in *Nevada* when it attempted to characterize the subsequent litigation as involving a claim not previously adjudicated. *See supra* notes 96-100 and accompanying text. *See also infra* notes 180-81 and accompanying text.

160. *See supra* notes 127-131 and accompanying text.

161. *See supra* notes 141-49 and accompanying text.

162. THE RESTATEMENT (SECOND) OF JUDGMENTS notes that the jurisdiction of administrative agencies is often closely circumscribed and argues that this jurisdictional limitation should carry with it a correspondingly narrow definition of claim or issue for the purpose of determining the application of preclusion doctrines. RESTATEMENT (SECOND) OF JUDGMENTS § 83 comment g (1982).

163. Asimov, *Estoppel Against the Government: The Immigration and Naturalization Service*, 2 CHICANO L. REV. 4 (1975).

164. *See supra* text accompanying note 100.

motes respect and confidence in the prior judicial determination and in the government itself. Third, such a rule would induce the government to more carefully consider and coordinate its litigation strategies in light of its administrative needs and the purposes of its administrative proceedings.

The third leg of the proposed test looks to whether there has been any "significant change" in the controlling facts or legal principles.[165] The mere passage of time alone should not be sufficient to defeat the application of the rules of preclusion.[166] Whether a change in government administrations should be a basis for refusing to apply the preclusion doctrines is a more difficult question. One can argue that a change in administrations is a manifestation of new political choices which should be reflected in permitting administrative and judicial revisitation of prior decisions. Yet such an argument begs the question of who should be allowed to legislate. Furthermore, why should a change in administrations be viewed as a "controlling fact"? The better view is that an administrative change should not be a sufficient reason, in and of itself, to refuse to apply preclusion doctrines.[167] However, if there has been a substantial change in the political, social, technical, or economic climate in conjunction with a change in administrations, relitigation may be warranted, particularly in the arena of constitutional questions.[168]

The fourth and final element of the test is whether "special circumstances" exist which warrant denying preclusive effects to a prior judgment.[169] The *Blonder-Tongue* "full and fair opportunity to litigate" standard provides a helpful analytic structure to this inquiry by giving some definition and direction. Thus, the analysis would initially focus on the prior litigation and the government's incentive to have vigorously litigated, as well as the procedural opportunities and protections that were afforded.[170] This focus can be sharpened by incorporating the five factors cited in *Parklane* as reasons for denying the application of preclusion doctrines to prior judgments,[171]

165. *Montana*, 440 U.S. at 155.

166. *See, e.g.*, *Nevada*, 463 U.S. at 110 (where 60 years had passed between the prior litigation and the government's subsequent attempt to relitigate).

167. United States v. Ortiz, 176 U.S. 422 (1900); 2 AM. JUR. 2D *Administrative Law* § 532 (1972).

168. American Trucking Ass'n. v. Atchison, 387 U.S. 397 (1967).

169. *Montana*, 440 U.S. at 155.

170. *See supra* text accompanying notes 58-60.

171. *See supra* text accompanying note 64.

an approach which has been successfully applied in numerous district and circuit court cases.[172] Finally, if there is a clear need for judicial revisitation of a prior decision because of harmful impacts of that judgment on the public or individuals who were not parties, or because it was not foreseeable that the issue would arise in a substantially different context, then courts should deny the application of preclusion principles against the government.[173]

It also should be noted that one circumstance occasionally discussed by the courts as a conceivable basis for refusing to apply preclusion doctrines, the "unmixed questions of law" doctrine, should be abolished and removed from consideration. The doctrine, as first enunciated in *Moser*, beyond its obvious problems of characterization and manipulation, has proved too conceptually difficult to continue as a viable tool of analysis.[174]

F. Application to Clark-Cowlitz

Applying the approach described above to *Clark-Cowlitz* demonstrates that the D.C. Circuit Court of Appeals reached the correct result. However, the reasoning of the court was flawed in that it failed to base its decision upon a proper analysis of the underlying policies and purposes of the preclusion doctrines and government administration.

In the context of the first requirement, mutuality, *Clark-*

172. Berner v. British Commonwealth Pac. Airlines, 346 F.2d 532 (2d Cir. 1965) (small claim in trial from which there was no appeal did not support the application of collateral estoppel in second action for much larger claim); Nasem v. Brown, 595 F.2d 801 (D.C. Cir. 1979) (lack of procedural opportunities in administrative hearing prevented the application of preclusion in subsequent trial); Lykes Bros. S.S. Co. v. General Dynamics Corp., 512 F. Supp. 1266 (D. Mass. 1981) (limited discovery, biased tribunal, and restricted opportunity to present evidence justify failure to apply preclusion doctrines); Sierra Club v. Alexander, 484 F. Supp. 455 (N.D.N.Y. 1980) (de minimus amount of claim in first action meant little incentive to litigate vigorously); Shimman v. Frank, 625 F.2d 80 (6th Cir. 1980) (differences in burden of proof in first and second action make issues different); Haung Tang v. Aetna Life Ins. Co., 523 F.2d 811 (9th Cir. 1975) (preclusion not appropriate because of differences in procedures between foreign court which initially decided the issue); Butler v. Stover Bros. Trucking Co., 546 F.2d 44 (7th Cir. 1977) (defendant had been barred from testifying in wrongful death action by virtue of state dead man's statute, but was permitted to testify in present action, thus making preclusion inappropriate).

173. RESTATEMENT (SECOND) OF JUDGMENTS § 28 (1982).

174. United States v. Stauffer Chemical Co., 464 U.S. at 171-72 ("[W]e are frank to admit uncertainty as to its application . . . . Admittedly, the purpose underlying the exception for 'unmixed questions of law' in successive actions on unrelated claims is far from clear."); *Montana*, 440 U.S. at 163. ("the scope of the *Moser* exception may be difficult to delineate").

Cowlitz presents some conceptual difficulty. While both Clark-Cowlitz and FERC were parties in the prior litigation, they were aligned on the same side.[175] Some courts have held that adversarial mutuality is required in order for preclusion principles to be applicable.[176] However, adopting this principle in cases involving the government would often defeat the purposes of the preclusion doctrines. For example, suppose that a statute is subject to two contradictory interpretations, as was the case in *Clark-Cowlitz*.[177] If the government adopted an interpretation opposed by party A, but supported by party B, and party A then litigated the issue with the government and lost (the government's interpretation being upheld), party A would not seek to estop the government from subsequently reversing its interpretation since the government would then be adopting the interpretation supported by party A. As to party B, who supported the government's initial interpretation and presumably intervened on the side of the government in the first suit, party B would be unable to preclude the government from reversing its interpretation since party B would not have been an adversary of the government in the prior litigation. Thus, the government would be free to shift back and forth between contradictory statutory interpretations without being bound by any previous adjudication.

The better view is to not require adversarial mutuality in order to preclude the government from relitigating previously adjudicated questions of statutory interpretation.[178] The *Clark-Cowlitz* court implicitly adopted this approach when it focused merely on the mutuality of the parties without regard to their alignments or alliances in the prior proceeding.[179]

The second step of the analysis, identification of the issue or claim previously litigated, also poses conceptual difficulties in this case. On the one hand, *Clark-Cowlitz* can be characterized as a relitigation of the issue of whether preference applies in relicensing cases, an interpretation apparently adopted by the majority.[180] On the other hand, it can be viewed as a totally separate cause of action litigating the reasonableness of

175. *Clark-Cowlitz*, 775 F.2d at 366.

176. Oldham v. Pritchett, 599 F.2d 274, 278 (8th Cir. 1979); Scooper Dooper, Inc. v. Kraftco Corp., 494 F.2d 840, 845 (3d Cir. 1974).

177. *Clark-Cowlitz*, 775 F.2d at 366.

178. *See supra* text accompanying note 177.

179. *Clark-Cowlitz*, 775 F.2d at 383.

180. *Id.* at 376.

the current interpretation, a view adopted by Judge Wright.[181]

The problems inherent in the approach espoused by Judge Wright are similar to those that would flow from a requirement of adversarial mutuality. By Judge Wright's definition, any governmental attempt to revise or reverse a previously adjudicated statutory interpretation would involve a challenge to the new interpretation and thus be free from the effects of the preclusion doctrines. Such an approach also would raise questions of administrative or judicial legislating[182] and have a chilling effect upon the resource decisions of interested parties.[183]

The proper approach to defining the scope of the claim or issue previously adjudicated is to examine the intent of the government in the initial proceeding.[184] In its own administrative proceedings, and in its presentation before the Eleventh Circuit in *Alabama Power*, FERC clearly indicated that it intended a conclusive and final determination of the applicability of the public utility preference clause in relicensing cases.[185] In light of this intent and the parties' reliance on it, the government should not now be able to escape the application of preclusion doctrines by contending that the prior interpretation is of no moment, and that *Clark-Cowlitz* merely concerns the reasonableness of FERC's current interpretation.[186]

The third part of the analysis asks whether there has been any significant change in the controlling facts or legal principles. The only apparent change between *Bountiful* and *Clark-Cowlitz* was the addition of new members to the FERC Commission who politically disagreed with the prior Commission.[187] As discussed previously, such an administrative change is an insufficient basis to warrant a refusal to apply the preclusion doctrines.[188] Furthermore, as noted by the court in *Clark-Cowlitz*, FERC itself indicated that the resolution of the statute's construction involved "a purely legal issue, . . . which in no way hinges upon the facts of a particular case."[189]

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181. *Id.* at 383.

182. *See supra* note 150 and accompanying text.

183. *Id.*

184. *See supra* notes 163-64 and accompanying text.

185. *Clark-Cowlitz*, 775 F.2d at 369, 375.

186. *Id.*

187. *See supra* notes 26-29 and accompanying text.

188. *See supra* note 167 and accompanying text.

189. *See supra* note 20 and accompanying text.

The fourth part of the analysis, a combination of the "full and fair opportunity to litigate" standard and the "special circumstances" exception, also fails to uncover a basis for refusing to apply the preclusion doctrines. First, FERC's incentive to litigate in *Alabama Power* was strong inasmuch as FERC indicated the ultimate decision would be binding in all future relicensing cases.[190] Second, FERC was neither burdened by any procedural disadvantages in *Alabama Power* nor provided additional procedural opportunities in *Clark-Cowlitz*.[191] Third, none of the "special circumstances" exists which would call for denying preclusive effect to the decision in *Alabama Power*.[192]

II. CONCLUSION

While the holding of the majority in *Clark-Cowlitz* was correct, the analysis of the court was flawed. The case presented "a model for the application of preclusion principles," yet the court failed to respond in kind by presenting a cogent test that could serve courts in the future that are presented with the same issue.

The D.C. Circuit (and the Supreme Court if they hear the case) should rise above the piece-meal, case-by-case approach previously applied by courts to cases that address the question of whether preclusion doctrines should be applied against the government. Instead, the court should explore the issue on the basis of the underlying policies and interests involved. As proposed in this Note, such an analysis can provide a workable model upon which to evaluate the applicability of the ancient doctrines of preclusion to the modern and changing field of government litigation and administration.

Bradley Bishop Jones

190. Brief for Petitioner at 10, *Clark-Cowlitz*.

191. It has been argued that the government is "an experienced litigant" in all federal forums and thus "suffers no handicap in any Case I forum." For this reason, some have argued that factors such as the initiative in choosing the forum, whether the government is a defendant or plaintiff, competency of counsel, and foreseeability of future suits are all inappropriate considerations when the government is involved. Kelly & Rothenberg, *The Use of Collateral Estoppel By a Private Party in Suits Against Public Agency Defendants*, 13 U. MICH. L. REV. 303, 316 (1980).

192. *See supra* notes 171-73 and accompanying text.