NOTE

EXTENDING *UNITED STATES V. MENDOZA*: WHY DEFENSIVE NONMUTUAL ISSUE PRECLUSION IS UNAVAILABLE AGAINST THE FEDERAL GOVERNMENT

Jake E. Goodman†

Imagine a situation where the U.S. Securities and Exchange Commission (SEC) is looking to enforce the antifraud provision of the Securities Exchange Act of 1934 against two different companies, arising out of the same transaction. Now suppose the SEC sues Company A first. However, the court finds no violation based on the factual determinations of the transaction and renders a judgment refusing to impose liability against Company A. Unsatisfied, the SEC decides to sue Company B under the same provision. Company B, however, believes the factual issues were already litigated and determined against Company A and wants to preclude relitigation by simply applying the previous factual determinations to the current case. Can they do so? This legal mechanism is classified as defensive nonmutual issue preclusion.[1] *The United States Supreme Court has not addressed whether this mechanism is available against the federal government.*

This Note examines the use of defensive nonmutual issue preclusion against the federal government—the basic question being whether the doctrine is available. In United States v. Mendoza, *the Supreme Court announced that offensive nonmutual issue preclusion was unavailable against the federal government.*[2] *The policy interests announced in* Mendoza *support expanding that exception to the defensive context.*

---

† B.A., Temple University, 2015; J.D., Cornell Law School, 2020; Notes Editor, *Cornell Law Review*, Vol. 105. I would like to thank Professor Zachary Clopton for his unwavering support—in both his advice for this Note and his mentorship as I begin my legal career. To George El-Khoury: thank you for supporting me throughout my journey and navigating the complex world of issue preclusion for this Note. Special thanks to the entire staff of *Cornell Law Review* for your indefatigable effort and vital contributions. Finally, to my parents: thank you for everything—I could not be here without you two.

1 *See* 47 AM. JUR. 2D *Judgments* § 551, Westlaw (database updated August 2019).

2 United States v. Mendoza, 464 U.S. 154, 164 (1984).

The Introduction will explain the pertinent terminology and set forth nonmutual issue preclusion's doctrinal development. Part I will provide a detailed analysis of how the law currently stands. Part II will analyze the current legal framework and argue that defensive nonmutual issue preclusion is likely unavailable against the federal government. Primarily, this extension flows from the policy arguments postulated in United States v. Mendoza.

INTRODUCTION

A. Terminology

Res judicata principles entail a relationship between separate legal actions. In practice, the doctrine effectuates the preclusive effects of prior adjudications. From a macro level, res judicata entails two distinct legal doctrines: claim preclusion and issue preclusion.[3] Claim preclusion merges a judgment into the claim and that claim—or cause of action—is henceforth barred from relitigation.[4] Once the judgment is rendered, "[it is] the full measure of relief to be accorded between the same parties on the same 'claim' or 'cause of action.'"[5] Claim preclusion's aim is to avoid repetitive litigation between the same parties on the same claim. The second doctrine, issue preclusion, operates differently. Issue preclusion recog-

---

3 *See* 18 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4402 (3d ed. 1998) ("Although the time has not yet come when courts can be forced into a single vocabulary, substantial progress has been made toward a convention that the broad 'res judicata' phrase refers to the distinctive effects of a judgment separately characterized as 'claim preclusion' and 'issue preclusion.'").

4 Kaspar Wire Works, Inc. v. Leco Eng'g & Mach., Inc., 575 F.2d 530, 535 (5th Cir. 1978).

5 *Id.*

nizes that a claim in one suit may present relevant issues to a claim in another suit. To effectuate its public policy goal of reducing repetitive litigation, issue preclusion "bars the relitigation of issues actually adjudicated, and essential to the judgment, in a prior litigation between the same parties."[6]

According to the Second Restatement of Judgments, issue preclusion is defined as "an issue of fact or law [that] is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, [such that] the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim."[7] Notably, this concept extends to *new* parties, too. When issue preclusion extends to new parties (i.e., parties absent from the previous lawsuit),[8] the legal designation is "nonmutual." In the SEC example, Company B is considered nonmutual. The law makes a further distinction between "offensive" and "defensive" uses. Offensive nonmutual issue preclusion[9] allows a *new plaintiff* in a subsequent lawsuit to use a prior judgment against a former-party litigant.[10] Alternatively, defensive nonmutual issue preclusion[11] allows a *new defendant* in a subsequent lawsuit to use a prior judgment against a former-party litigant.[12] Under our example, Company B is applying defensive nonmutual issue preclusion.

B. Doctrinal Development

As a practical matter, res judicata "presents a particularly delicate balance between the values of clear theory and the need for pragmatic adjustment."[13] While "[c]lear rules are important if a dispute is to be settled by a single litigation,"[14] res judicata operates with less clarity than it strives to produce. The analytical argument to bar litigation through res judicata

---

6 *Id.* at 535–36.

7 RESTATEMENT (SECOND) OF JUDGMENTS: FORMER ADJUDICATION § 27 (AM. LAW INST. 1982).

8 A party in privity is often considered mutual. If a court determines that a current party is in privity to a previous party, issue preclusion may apply against the current party. *See* 18A WRIGHT & MILLER, *supra* note 3, § 4463.

9 In symbolic form, the two suits look as follows: (Suit 1) P1 sues D, and D loses on issue 1; (Suit 2) P2 sues D, and P2 asserts the judgment from issue 1 in suit 1 against D.

10 *See* 18A WRIGHT & MILLER, *supra* note 3, § 4464.

11 The symbolic relationship: (Suit 1) P sues D1, and P loses on issue 1; (Suit 2) P sues D2, and D2 asserts the judgment from issue 1 in suit 1 against P.

12 *See* 18A WRIGHT & MILLER, *supra* note 3, § 4464.

13 18A WRIGHT & MILLER, *supra* note 3, § 4401.

14 *Id.*

retains space for distinct legal and analytical theories[15] which, in turn, can independently generate preclusive outcomes.[16] As a corollary, preclusion often raises complex consequences on litigation strategies that flow as undercurrents throughout adjudicative proceedings.[17]

However, the doctrinal origins of issue preclusion were more symmetrical than the nonmutual doctrine suggests. The original doctrine of mutuality held that a party may not benefit from a prior judgment unless they would have been bound by any unfavorable effects.[18] Historically, because unfavorable judgments never bound nonparties (without privity), they could never benefit. In the context of our example: because an unfavorable judgment against Company A could never bind Company B—as a nonparty—Company B could never benefit, unless in privity. This concept was markedly influential. The Supreme Court of the United States once detailed that it is "a principle of general elementary law that the [preclusion] of a judgment must be mutual."[19] Eventually, the requirement for

---

15 *See, e.g.*, *Developments in the Law Res Judicata*, 65 HARV. L. REV. 818, 840 (1952) ("[Issue preclusion] is that aspect of res judicata concerned with the effect of a final judgment on subsequent litigation of a different cause of action involving some of the same issues determined in the initial action." (footnote omitted)); *id.* at 824 ("[Under res judicata/claim preclusion], [i]f a plaintiff brings an action that proceeds to final judgment, his 'cause of action' is said to be 'merged' in the judgment if he wins or 'barred' by it if he loses. This means that what was considered or should have been considered in the first action cannot form the basis of a subsequent action." (footnote omitted)).

16 *See* 18 WRIGHT & MILLER, *supra* note 3, § 4406 ("As useful as the distinction between issue and claim preclusion may be, it is important to note that the distinction is not complete. Foreclosure of an issue by prior litigation may often extend beyond the supporting arguments actually made to preclude new arguments that never were made. The distinction is one of emphasis and degree, no more." (footnote omitted)).

17 *See, e.g.*, Howard M. Erichson, *Interjurisdictional Preclusion*, 96 MICH. L. REV. 945, 950–51 (1998) ("Under [a mutuality regime], a rational litigant will consider only the stakes between the current parties, either in the immediate lawsuit or in foreseeable further lawsuits between the same parties. By contrast, when nonmutual issue preclusion is allowed, a rational litigant will consider the stakes not only between the current parties, but also the stakes in foreseeable lawsuits with others. Thus, wherever a litigant can foresee related litigation with nonparties, nonmutual issue preclusion produces incentives to invest greater resources into winning in order to prevent adverse determinations that may carry a damaging issue-preclusive effect in subsequent suits.").

18 *See* 18A WRIGHT & MILLER, *supra* note 3, § 4463 ("For many years, most courts followed the general rule that the favorable preclusion effects of a judgment were available only to a person who would have been bound by any unfavorable preclusion effects.").

19 Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U.S. 111, 127 (1912).

mutuality was abandoned,[20] and a slew of cases marked its doctrinal erosion beginning in the Supreme Court of California in 1942.[21]

In *Bernhard v. Bank of America*, Justice Roger J. Traynor rendered a decision that amounted to an unqualified rejection of the mutuality doctrine. In part, he stated, "[t]here is no compelling reason . . . for requiring that the party asserting the plea of res judicata must have been a party, or in privity with a party, to the earlier litigation."[22] Departing from previous canon, *Bernhard* permitted a defensive use of issue preclusion by a nonparty.[23]

Justice Traynor believed that the mutuality doctrine was not aligned with the policy justifications of res judicata, arguing that "[t]he rule is based upon the sound public policy of limiting litigation by preventing a party who has had one fair trial on an issue from against drawing it into controversy."[24] Justice Traynor's concise opinion ended with three central questions to determine the validity of using nonmutual issue preclusion in a given context: whether the issues in each case were identical, whether the final judgment was on the merits, and whether the party against whom the plea was asserted was a party or privy to the prior adjudication. Over the years, the idea that prior parties needed a full and fair opportunity to litigate in former adjudications developed as an adjunct requirement.[25]

About three decades later, in *Blonder-Tongue Laboratories v. University of Illinois Foundation*, the United States Supreme Court announced a major departure from the mutuality requirement.[26] Contextually, the case involved patent litigation, but *Blonder-Tongue* is doctrinally interpreted as authorizing the defensive use of nonmutual issue preclusion more gener-

---

20 *See* 18A WRIGHT & MILLER, *supra* note 3, § 4464 ("[The] traditional rule [of mutuality] has been abandoned as to issue preclusion by federal courts and a continually increasing majority of state courts.").

21 *See* Bernhard v. Bank of Am. Nat'l Tr. & Sav. Ass'n., 122 P.2d 892, 893 (1942).

22 *Id.* at 894.

23 In the first proceeding, a probate court determined that the decedent made a lifetime gift of her savings account to the executor. In the second lawsuit, an objector sued the bank to recover the money, arguing that the decedent had never authorized to executor to withdraw it. The court permitted the bank to use the probate judgment to preclude relitigation on the issue of who owned the money. Notably, the bank would *not* have been bound by the probate court's determination in the first suit.

24 *Bernhard*, 122 P.2d at 894.

25 *See* 18A WRIGHT & MILLER, *supra* note 3, § 4464.

26 Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found., 402 U.S. 313 (1971).

ally.[27] Portions of the Court's opinion justify a generalized application. In particular, the Court noted *Bernhard*'s "significant impact," while addressing the growing criticisms of mutuality and acknowledging the trend in federal courts to reject it.[28]

The Court in *Blonder-Tongue* addressed fairness concerns by qualifying the doctrine for instances where a defendant is invoking preclusion against a former-party plaintiff; the presumption being that the plaintiff already had his choice of time and place for the prior litigation.[29] Ultimately, however, preclusion depends on whether the parties in the first suit were awarded a "full and fair opportunity to litigate."[30] Despite a mix of patent-specific and generalized reasoning, the post-*Blonder-Tongue* message was clear: defensive nonmutual issue preclusion was an acceptable doctrine.

The doctrinal development took yet another significant turn in 1979. In *Parklane Hosiery Co. v. Shore*,[31] the Court addressed the idea of using *offensive* nonmutual issue preclusion.[32] The Court 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], but to grant trial courts broad discretion to determine when it should be applied."[33] The Court qualified its rule and declared that

---

27 *See* 18A WRIGHT & MILLER, *supra* note 3, § 4464 ("On this foundation, the Court built an opinion to abandon a strict mutuality requirement that could easily be limited to the setting of patent litigation. . . . Nonetheless, the opinion paved the way for the wholesale rejection that quickly followed, first in lower courts and then in the Supreme Court itself.").

28 *Blonder-Tongue*, 402 U.S. at 324 ("Many state and federal courts rejected the mutuality requirement, especially where the prior judgment was invoked defensively in a second action against a plaintiff bringing suit on an issue he litigated and lost as plaintiff in a prior action . . . . The federal courts found Bernhard persuasive.") (footnotes omitted).

29 *See id.* at 332 ("Even conceding the extreme intricacy of some patent cases, we should keep firmly in mind that we are considering the situation where the patentee was plaintiff in the prior suit and chose to litigate at that time and place. Presumably he was prepared to litigate and to litigate to the finish against the defendant there involved.").

30 *See id.* at 329 ("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.").

31 439 U.S. 322 (1979). In the first lawsuit, the SEC sought injunctive relief and successfully sued Parklane for a materially false and misleading statement in connection with a merger. Subsequently, in a private stockholder's class action against Parklane, the judgment in favor of the SEC was held available against Parklane. *Id.* at 322–25.

32 *See supra* note 9.

33 *Parklane Hosiery Co.*, 439 U.S. at 331.

the doctrine should be unavailable in "cases where a plaintiff could easily have joined in the earlier action or where . . . the application of offensive [issue preclusion] would be unfair to a defendant."[34]

Although the *Parklane* decision implicated both offensive and defensive issue preclusion, the Court distinguished the two on grounds of judicial economy and implicit fairness.[35] The Court noted that offensive use promotes less judicial economy because it incentives plaintiffs to sue defendants individually.[36] On fairness concerns under an offensive regime, defendants in the second suit may have entirely more incentive to litigate than the former parties, but the second-suit defendants nonetheless are still bound.[37] This is especially true where a party in the first suit lacked strong incentive to litigate because the award was nominal or future suits were unforeseeable. The Supreme Court attempted to mitigate these risks by granting broad discretion to trial courts.[38]

In the post-*Parklane* era, both defensive and offensive nonmutual issue preclusion are available options in federal litigation.[39] However, the federal government's status as a party in litigation complicates nonmutual issue preclusion's doctrinal availability.[40] While the doctrines are available for the federal government to *assert against private parties*, the United States Supreme Court held that offensive nonmutual issue preclusion was *unavailable against the federal government*.[41]

C. Policy Rationale Behind Issue Preclusion

Understanding the policy rational behind issue preclusion, more generally, provides a contextual understanding for *Mendoza*'s doctrinal exception. At its foundation, the doctrine of issue preclusion prevents relitigation on the "principles of final-

---

34 *Id.*

35 *See id.* at 329–31.

36 *See id.* at 329–30 ("Thus defensive [issue preclusion] gives a plaintiff a strong incentive to join all potential defendants in the first action if possible. Offensive use of [issue preclusion], on the other hand, creates the precisely opposite incentive.").

37 *Id.* at 330.

38 *Id.* at 331.

39 *See* 18A WRIGHT & MILLER, *supra* note 3, § 4464 ("As would be expected, both defensive and offensive nonmutual [issue] preclusion have continued to be available in federal case after the Parklane decision." (footnotes omitted)).

40 *See id.* § 4465.4.

41 *See* United States v. Mendoza, 464 U.S. 154, 162 (1984).

ity and repose."[42] More specifically, its doctrinal emphasis on finality is intended to promote issue preclusions' twin goals of fairness and judicial economy.[43] If anything, consistency between judgments promotes faith in our judicial system and the structural integrity needed to avoid inconsistent answers to the same question.[44]

Fairness concerns address the notion of avoiding repetitive litigation, promoting reliance interests, and avoiding unsavory litigation tactics.[45] In fact, "[t]he central role of adversary litigation in our society is to provide binding answers."[46] Fairness considerations also encompass reliance interests. Legal judgments are of little value to litigants without systematic reliance on that judgment.[47] Without systematic reliance on a judgment, a large void would encourage a litigant to relitigate any adverse finding against the same party. Consequently, a key purpose of issue preclusion is to assure litigants of the reliability of their judgment, as they prepare for life after litigation. As a corollary, the inability to relitigate prevents the risk of inconsistent judgments,[48] which also entails various enforcement issues.[49] Relatedly, res judicata aims to "free people from the uncertain prospect of litigation, with all its costs to emotional peace and the ordering of future affairs. Repose is the most important product of res judicata."[50] Repose also limits legal expenditures by protecting the outcome of litigation. In private litigation, fairness concerns are most asymmetrical when facing a wealthy, litigious adversary, who is prepared to endlessly litigate.[51]

---

42 *See* Del Mar Avionics, Inc. v. Quinton Instrument Co., 836 F.2d 1320, 1323–24 (Fed. Cir. 1987) (quoting 18A WRIGHT & MILLER, *supra* note 3, § 4402).

43 *See* 18A WRIGHT & MILLER, *supra* note 3, § 4416.

44 *See* Kevin M. Clermont, *Res Judicata As Requisite for Justice*, 68 RUTGERS U. L. REV. 1067, 1115–16 (2016).

45 *See id.* at 1091 ("The policies of *procedural fairness* support the use of [issue preclusion] to avoid the burdens of repetitive litigation on the party invoking the doctrine, to avoid infringing on reliance interests, and to avoid the possibility of the other party's causing renewed litigation or profiting from sneaky or otherwise undesirable litigation tactics.").

46 18A WRIGHT & MILLER, *supra* note 3, § 4403.

47 *See id.*

48 *See*, e.g., Montana v. United States, 440 U.S. 147, 154 (1979) (describing that res judicata, which entails issue preclusion, "fosters reliance on judicial action by minimizing the possibility of inconsistent decisions").

49 *See* 18A WRIGHT & MILLER, *supra* note 3, § 4405.

50 *Id.* § 4403.

51 *See* Robert Ziff, *For One Litigant's Sole Relief: Unforeseeable Preclusion and the Second Restatement*, 77 CORNELL L. REV. 905, 912 (1992).

Issue preclusion's additional aim, judicial economy, entails more than mere resourcefulness—it promotes stability.[52] Notably, the "true efficiency benefit . . . is the reallocation of legal resources away from cases that can be resolved through preclusion."[53] In other words, the maximum benefits of judicial economy are realized when resources which would otherwise be required for litigation are allotted elsewhere. Where a litigant had a "full and fair opportunity to litigate," issue preclusion reduces litigation costs by prohibiting a litigant from contesting an issue he lost in a previous proceeding.[54] This "full and fair opportunity to litigate" requirement furthers preclusion's efficiency goals by ensuring due process[55] and that the "past proceeding[] [was] sufficiently rigorous to make the subsequent court doubt that it will have a better opportunity to discover the truth of the matter."[56]

Alternatively, motions for preclusion entail inherent costs. By definition, the doctrine is administered only after inquiries into the previous litigation, which, of course, entail monetary expenditures.[57] For issue preclusion to apply, a court must determine whether the previous issue was actually litigated after a full and fair opportunity;[58] whether the issue was actually decided by a final, valid judgment on the merits;[59] whether

---

52 *See* Clermont, *supra* note 44, at 1091 ("Society also has an interest in avoiding any increase of uncertainty in the primary conduct of private and public life outside the courtroom, as well as in reducing instability in the judicial branch of the legal system. Efficiency argues for achieving the certainty and stability of repose. Society has an interest in avoiding possibly inconsistent adjudications, which at the least would erode faith in the system of justice.").

53 Ziff, *supra* note 51, at 914.

54 RESTATEMENT (SECOND) OF JUDGMENTS: FORMER ADJUDICATION § 29 (AM. LAW INST. 1980).

55 *See* Ziff, *supra* note 51, at 916.

56 *Id.* at 916–17.

57 *See, e.g.*, Kaspar Wire Works, Inc. v. Leco Eng'g & Mach., Inc., 575 F.2d 530, 535 (5th Cir. 1978) (discussing the availability of claim preclusion).

58 *See* LaFleur v. Teen Help, 342 F.3d 1145, 1150 (10th Cir. 2003) ("We are presented with no evidence that the issue was fully and fairly litigated in another case, so we decline to apply [issue preclusion]."); Cmty. Nat'l Bank v. Fidelity & Deposit Co. of Maryland, 563 F.2d 1319, 1323 (9th Cir. 1977) (noting there is no preclusion of an issue that "was not actually litigated.").

59 *See* Brown v. Felsen, 442 U.S. 127, 139 n.10 (1979) ("Whereas res judicata forecloses all that which might have been litigated previously, [issue preclusion] treats as final only those questions actually and necessarily decided in a prior suit."); Montana v. United States, 440 U.S. 147, 153 (1979) ("Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits . . . .").

it was necessary to decide the issue;[60] and, formalistically, whether the issues are the same.[61]

I
DOCTRINAL ACCOMMODATIONS FOR THE FEDERAL GOVERNMENT IN CIVIL LITIGATION

This Part summarizes the doctrinal implications of the federal government's involvement as a party in civil litigation. This Note's central concern is the availability of *defensive nonmutual* issue preclusion against the federal government. However, it is important to understand how defensive mutual (*Stauffer Chemical Co.*) and offensive nonmutual (*Mendoza*) issue preclusion apply against the federal government. Both inform this Note's defensive nonmutual analysis. Subpart B will provide state and circuit court decisions for additional context.

A. Doctrinal Clarification

When the United States is a party-litigant, the difference between mutual and nonmutual designation has significant doctrinal consequences.[62] To better understand this Note's argument, it is important to discern how the Court treats this distinction. In *United States v. Stauffer Chemical Co.*, the United States Supreme Court held that the doctrine of defensive mutual issue preclusion was available against the federal government. In *Stauffer*'s companion case, *United States v. Mendoza*, the Court alternatively held that offensive nonmutual issue preclusion was unavailable against the federal government.

---

60 *See* Bobby v. Bies, 556 U.S. 825, 835 (2009) ("A determination ranks as necessary or essential only when the final outcome hinges on it." (quoting 18 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4421 (2d ed. 1988))); Block v. Bourbon Cty. Comm'rs, 99 U.S. 686, 693 (1878) ("Now that a judgment in a suit between two parties is conclusive in any other suit between them, or their privies, of every matter that was decided therein, and that was essential to the decision made, is a doctrine too familiar to need citation of authorities in its support. A few cases go farther, and rule that it is conclusive of matters incidentally cognizable, if they were in fact decided. To this we do not assent. But it is certain that a judgment of a court of competent jurisdiction is everywhere conclusive evidence of every fact upon which it must necessarily have been founded.").

61 *See* 18A WRIGHT & MILLER, *supra* note 3, § 4417–21.

62 *Compare* United States v. Stauffer Chem. Co., 464 U.S. 165, 174 (1984) (holding that the doctrine of defensive mutual issue preclusion is available against the government), *with* United States v. Mendoza, 464 U.S. 154, 163–64 (1984) (holding that the doctrine of offensive nonmutual issue preclusion was unavailable against the federal government).

In *Stauffer Chemical Co.*, the Environmental Protection Agency (EPA) sought to hold Stauffer Chemical Company in contempt for refusal to permit an inspection under the Clean Air Act.[63] The United States District Court for the Middle District of Tennessee dismissed the contempt citation, without nullifying an administrative warrant, so then Stauffer appealed. The Sixth Circuit reversed judgment and the government brought certiorari. On appeal, Stauffer argued that the contractors were not "authorized representatives" under the Clean Air Act for inspection purposes. Stauffer had used this same argument in a similar case from Wyoming, involving the same parties.[64] In that case, the Tenth Circuit eventually held the parties were not "authorized representatives."[65] In the second case, the Supreme Court of the United States ultimately held that defensive mutual issue preclusion was available against the Government to preclude relitigation on this issue.[66]

The Court relied on principles of judicial economy[67] and protecting litigants from the burdens of relitigation.[68] Notably, *Stauffer Chemical Co.* involved the same defendants—unlike our SEC example.[69] The government provided various arguments for overriding concerns of judicial economy in favor of applying an exception and prohibiting defensive issue preclusion against the federal government.

First, the government argued—as it did in *Mendoza*—that applying issue preclusion against the government will freeze development of the law, as the government often litigates reoccurring issues of public importance.[70] The Court dismissed this argument by noting that "[the government's] argument is persuasive only to prevent the application of [issue preclusion] . . . in the absence of mutuality."[71] The Court believed the government's policy argument was attenuated in this context

---

63 *See Stauffer Chem. Co.*, 464 U.S. 167.

64 *See id.* at 168.

65 *See id.*

66 *See id.* at 174.

67 *See id.* at 172 ("[W]e think that there is no reason to apply [an exception] here to allow the Government to litigate twice with the same party an issue arising in both cases from virtually identical facts.").

68 *See id.* ("Indeed we think that applying an exception to the doctrine of mutual defensive [issue preclusion] in this case would substantially frustrate the doctrine's purpose of protecting litigants from burdensome relitigation and of promoting judicial economy.").

69 *See supra* Abstract.

70 *See Stauffer Chem. Co.*, 464 U.S. at 173.

71 *Id.*

because the EPA would otherwise litigate "the same issue arising under virtually identical facts against the same party."[72]

Next, the government argued that because the EPA is a federal agency charged with administering specific laws nationwide, issue preclusion would require it to apply different rules to similarly situated parties.[73] In other words, the EPA's position would result in inequitable administration of the law. The EPA argued that if relitigation was foreclosed, Stauffer chemical plants in the Ninth Circuit would benefit from a rule that precludes inspections by private contractors, while Stauffer's competitors—also in the Ninth Circuit—would be subject to a contrary rule. Notably, the Court declined to express an opinion on this argument.[74]

Additionally, the government contended that the possibility of binding future litigation would influence the Solicitor General to "appeal or seek certiorari from adverse decisions when such action would otherwise be unwarranted."[75] However, a contextual understanding is implicit in the Court's response. The Court—and the government—noted that "thousands of businesses are affected each year by the question of contractor participation in [the Clean Air Act inspector qualification section]."[76] Therefore, the Court concluded, the government's concerns were unrealistic because there were thousands of other affected parties against whom the government could still litigate. Thus, issue preclusion, as constrained by mutuality, is an important distinction the Court acknowledged.[77]

Alternatively, the Court reached a different conclusion in *Mendoza*. Here, the Court found an exception to offensive nonmutual issue preclusion: the doctrine is unavailable against the federal government.[78] In *Mendoza*, the Court dealt with a Filipino national who petitioned for naturalization under the Nationality Act of 1940 based on his service in the United States Army during World War II. While the naturalization examiner recommended denying the petition, the federal district court granted it without reaching the merits of Mendoza's constitutional claim. The court held that the government was

---

72 *See id.*

73 *See id.* at 174.

74 *See id.* ("Following our usual practice of deciding no more than is necessary to dispose of the case before us, we express no opinion on that application of [issue preclusion].").

75 *See id.* at 173 n.6.

76 *Id.*

77 *See id.* at 172–73.

78 *See* United States v. Mendoza, 464 U.S. 154, 162 (1984).

precluded from litigating the constitutional issues because of an earlier, unappealed federal district court decision against the government from other Filipino nationals. While the Ninth Circuit affirmed, the Supreme Court of the United States ultimately held that parties may not offensively preclude[79] the United States from litigating issues already determined[80] in prior government litigation.[81]

As a fundamental matter, the Court concluded that "[t]he conduct of Government litigation in the federal courts is sufficiently different from the conduct of private civil litigation . . . so that what might otherwise be economy interests underlying a broad application of nonmutual [issue preclusion] are outweighed by the constraints which peculiarly affect the Government."[82] In particular, given "the nature of the issues the government litigates" and "the geographic breadth of government litigation," the government differs significantly from private litigants.[83]

In rejecting Mendoza's arguments, the Court set forth six specific policy arguments, justifying the government's exemption from offensive nonmutual preclusion. First, the federal government is a party to a large number of cases across the United States;[84] second, government litigation often involves legal questions of substantial public importance;[85] third, nonmutual issue preclusion against the government "would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal

---

79 The action is classified as "offensive" because Mendoza wanted to apply the adverse ruling against the government from another case into his current case against the federal government. *See id.*

80 *See* In re Naturalization of 68 Filipino War Veterans, 406 F. Supp. 931, 934 (N.D. Cal. 1975).

81 *See Mendoza*, 464 U.S. at 154.

82 *Id.* at 163.

83 *See id.* at 159.

84 *Id.* ("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 that the government is a party to a far greater number of cases on a nationwide basis than even the most litigious private entity . . . ." (citation omitted)).

85 *Id.* at 160 ("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.").

issue";[86] fourth, nonmutual issue preclusion would mandate that the Solicitor General appeal every adverse decision to avoid foreclosing further review;[87] fifth, nonmutual issue preclusion would obstruct the executive branch's ability to adopt different positions on the law;[88] and sixth, the Court was concerned about the Ninth Circuit's approach.[89] More specifically, the Court ruled the Ninth Circuit's approach to nonmutual issue preclusion against the government was unfair, given the uncertainty in determining whether a court will bar relitigation of the issue—and subsequent uncertainty on whether or not to appeal an adverse decision.[90]

---

86 *Id.* ("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 [issue preclusion] 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.").

87 *Id.* at 160–61 ("The Solicitor General's policy for determining when to appeal an adverse decision would also require substantial revision. The Court of Appeals faulted the government in this case for failing to appeal a decision that it now contends is erroneous. . . . But the government's litigation conduct in a case is apt to differ from that of a private litigant. Unlike a private litigant who generally does not forego 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 [issue preclusion] 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." (footnote omitted)).

88 *Id.* at 161 ("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 Court of Appeals, is a wholly mechanical procedure which involves no policy choices whatever.").

89 *See id.* at 162.

90 *Id.* ("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 . . . we believe that the

B. Circuit and State Court Determinations

The law post-*Mendoza* is relatively clear: the federal government is exempt from litigants asserting offensive nonmutual issue preclusion against it. As this Note acknowledges, the Supreme Court has never addressed whether defensive nonmutual issue preclusion is available. However, various federal circuit courts have addressed the issue.[91]

In *Reich v. D.C. Wiring, Inc.*, the United States District Court for the District of New Jersey determined that defensive nonmutual issue preclusion was unavailable against the federal government.[92] More specifically, the court directly extended *Mendoza*'s policy rationale to the defensive context.[93] Contemporaneously, the court acknowledged the key differences between mutual and nonmutual issue preclusion.[94] How the defendants presented the doctrinal issue to the court is noteworthy. The defendants directly distinguished *Mendoza*'s "offensive" holding with their case's "defensive" issue,[95] and the court rejected their argument categorically.[96] 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 can not 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." (citation omitted)).

91 *See, e.g.*, Am. Fed'n of Gov't Emps., Council 214, AFL-CIO v. Fed. Labor Relations Auth., 835 F.2d 1458, 1462–63 (D.C. Cir. 1987) (extending *Mendoza*'s rationale to the defensive context and exempting the federal government); Reich v. D.C. Wiring, Inc., 940 F. Supp. 105, 107 (D.N.J. 1996) (holding parties cannot apply defensive nonmutual issue preclusion against the federal government).

92 *Reich*, 940 F. Supp. at 107–08.

93 *Id.* ("Although the facts of *Mendoza* naturally limited its holding to cases involving nonmutual offensive [issue preclusion], lower courts, in interpreting this holding, have generally concluded that its logic applies with equal force to cases involving [defensive nonmutual issue preclusion]. . . . Thus, it is clear that the government may not be bound by a prior litigation to which the instant defendants were not a party, as the mere fact that the government is a plaintiff in this case, as opposed to a defendant, does not alter the persuasive nature of the policy articulated by the Supreme Court in *Mendoza*.").

94 *Id.* at 108 ("[Defendant's concern about dealing with different standards in different states] ignores the mutuality doctrine in that should defendants be successful in this action in this forum, the government would then likely be estopped from relitigating the issue on the basis of *mutual* defensive [issue preclusion].").

95 *Id.* at 106 ("In response, defendants argue that this is not a case of nonmutual offensive [issue preclusion], but a case of nonmutual defensive [issue preclusion], and therefore assert that *Mendoza* is distinguishable.").

96 *See id.* at 107.

court also relied on other circuits that addressed the same question and came to the same conclusion.[97]

In 2005, the Ninth Circuit addressed a similar issue.[98] In *State of Idaho Potato Comm'n v. G & T Terminal Packaging, Inc.*, the Ninth Circuit dealt with whether the defendant—through defensive nonmutual issue preclusion—could bar a state agency from relitigation the issue of whether a no-challenge provision was enforceable in a breach of contract dispute.[99] The court held that *Mendoza*'s policy arguments apply to not only defensive nonmutual issue preclusion but also against a state government.[100]

In 2009, the Seventh Circuit held that defensive nonmutual issue preclusion could not be applied against the government.[101] In *Kanter v. Commissioner of Internal Revenue*, a Special Trial Judge (STJ) made initial factual determinations in favor of the appellant.[102] Later, the Tax Court overturned some of the STJ's findings.[103] Appellant then appealed to the Seventh Circuit Court of Appeals.[104] There he invoked defensive nonmutual issue preclusion to estop the government from establishing liability against him by relitigating the factual determinations the STJ found. In rejecting his argument, the Seventh Circuit reasoned that "[t]he policy reasons for treating the government differently, however, seem to us to be just as powerful when applied to defensive preclusion."[105] While addressing the possibility that purely factual issues could be precluded, the court found it "more likely, however, that the [Supreme Court] intended to create a uniform rule precluding the use of the doctrine against the government."[106]

---

97 *See id.* (acknowledging cases from the 11th Circuit and the D.C. Circuit that also addressed whether nonmutual defensive issue preclusion applied against the state or federal government, respectively, and concluded that it did not).

98 *See* State of Idaho Potato Comm'n v. G & T Terminal Packaging, Inc., 425 F.3d 708, 713 (9th Cir. 2005).

99 *Id.* Specifically, G & T wanted to prevent the state agency from challenging the district court's determination that the no-challenge clause of the licensing agreement was unenforceable.

100 *Id.* at 714 ("*Mendoza*'s rationale applies with equal force to [the defendant's] attempt to assert nonmutual defensive [issue preclusion] against [a state agency].").

101 *See* Kanter v. Comm'r of Internal Revenue, 590 F.3d 410, 414 (7th Cir. 2009).

102 *Id.* at 418–19.

103 *Id.* at 419.

104 *Id.* at 415.

105 *Id.* at 419.

106 *Id.* at 420.

The Eleventh Circuit, only one year after *Mendoza*, addressed whether nonmutual issue preclusion could bar state governments from relitigating issues.[107] In *Hercules Carriers, Inc. v. Florida*, the defendant tried to preclude Florida from relitigating issues originating from a ship's allision that caused over three dozen deaths.[108] In denying its application, the court addressed portions of *Mendoza*'s policy arguments that apply to state governments,[109] while dismissing any substantive distinctions between offensive and defensive uses.[110] While the court did make a "critical" distinction from *Mendoza*,[111] the case represents the same jurisprudential trend throughout federal circuits and states: defensive nonmutual issue preclusion is unavailable against the government.[112]

II
EXTENDING *Mendoza* to Defensive Nonmutual Issue Preclusion

A. Why Apply *Mendoza*

Before applying *Mendoza*'s arguments in the defensive context, this Part will address the underlying assumption of why *Mendoza* should apply despite the abundance of policy rationale in favor of issue preclusion.[113] There are, after all, critics

---

107 *See* Hercules Carriers, Inc. v. Claimant State of Fla., Dep't of Transp., 768 F.2d 1558, 1578 (11th Cir. 1985).

108 *Id.* at 1561–63.

109 *Id.* at 1580.

110 *Id.* at 1579 ("Nor do we see any substantive difference between nonmutual offensive [issue preclusion] which the Supreme Court addressed and nonmutual defensive [issue preclusion] . . . .").

111 *See id.* at 1580 ("[T]he circumstances of this case present stronger reasons than those present in *Mendoza* for not applying non-mutual collateral estoppel. In *Mendoza*, the relevant government agency . . . was a party to both proceedings, and in the second proceeding sought to litigate the identical issue involved in the first proceeding. . . . [T]his case involves two wholly separate state agencies with different interests and functions. The distinction is a critical one given the varied interests a governmental body must pursue; if *Mendoza* stands for anything, it must stand for the proposition that a government's agencies in pursuing their stated goals must not be put in the untenable position of collaterally estopping one another when they pursue the same issue for wholly different purposes.").

112 Some states, however, have declined to apply *Mendoza* to state governments, primarily based on the distinction between state and federal governments. *See Nonmutual Issue Preclusion Against States*, 109 HARV. L. REV. 792, 804 (1996) ("A cogent and thorough example is *State v. United Cook Inlet Drift Ass'n* . . . . The court directly addressed *Mendoza*'s reasoning and cogently distinguished state litigation from federal litigation.").

113 *See, e.g.*, A. Leo Levin & Susan M. Leeson, *Issue Preclusion Against the United States Government*, 70 IOWA L. REV. 113, 134 (1984) (arguing against *Mendoza*'s special exception and for application of issue preclusion against government in order to prevent wasteful government relitigation).

of *Mendoza*.[114] It is important to note that, traditionally, courts were more willing to grant defensive than offensive issue preclusion.[115] Consequently, critics may argue that *Stauffer Chemical Co.*'s holding should extend doctrinally because, like our SEC example and unlike *Mendoza*, it deals with defensive applications of issue preclusion. After all, the Court in *Stauffer Chemical Co.* addressed some of the same arguments from *Mendoza*,[116] while coming to a different conclusion.[117]

While that distinction is correct, it is simply not enough to overcome the *Mendoza* policy arguments[118] or issue preclusion's doctrinal undercurrents. The mutual and nonmutual distinction creates more doctrinal turbulence than the difference between offensive and defensive preclusion does.[119] It is the mutual and nonmutual distinction that ultimately determines the scope of application. In other words, it categorically determines *who* is precluded from relitigation (subject to exceptions). While inequity stemming from defensive or offensive preclusion differs by a matter of degree, the mutual and nonmutual distinction is what determines *how far* preclusion actually reaches. The mutual and nonmutual distinction operates as a limiting or expanding principle which defines the exact ambit of that preclusive determination. The extent that offensive or defensive preclusion is problematic, in turn, depends on how far it reaches. The influence of offensive or defensive applications is limited to the scope that the mutual and nonmutual distinction sets for it. Consequently, the transition from mutual to nonmutual does the heavy lifting in our doctrinal analysis.

The Court in *Mendoza* and *Stauffer Chemical Co.* also treated the mutual and nonmutual distinction as dispositive. The Court in *Stauffer Chemical Co.* put special emphasis on the fact that its holding would prevent the government from "relitigation of the same issue already litigated against the same party in another case involving virtually identical facts."[120] More specifically, the Court treated the difference between mutual and nonmutual as authoritative by stating that an exception to preclusion is persuasive only "in the absence of

---

114 For a general critique of *Mendoza*, see Zachary D. Clopton, *National Injunctions and Preclusion*, 118 MICH. L. REV. 1 (2019).

115 *See* 18A WRIGHT & MILLER, *supra* note 3, § 4464.

116 *See supra* Part I.

117 *See* United States v. Stauffer Chem. Co., 464 U.S. 165, 174 (1984).

118 *See infra* subpart II.B.

119 *See* 18A WRIGHT & MILLER, *supra* note 3, § 4464.

120 *See Stauffer Chem. Co.*, 464 U.S. at 165.

mutuality."[121] In *Mendoza*, the Court echoed its opinion in *Stauffer Chemical Co.* and conceded that mutual preclusion probably prevents the federal government from relitigation.[122] Specifically, the Court stated that "[t]he concerns underlying disapproval of [issue preclusion] against the government are for the most part inapplicable where mutuality is present."[123] The Court distinguished its companion cases on the grounds of mutuality—not offensive or defensive application.

With circuit courts also relying on *Mendoza* to defend an exception for defensive nonmutual issue preclusion,[124] using *Stauffer Chemical Co.* as a doctrinal reference point seems logically attenuated and doctrinally dissident. Subpart B of this Part assumes the continuing validity of *Mendoza*'s arguments and addresses how they logically extend from offensive to defensive nonmutual issue preclusion.

B. Applying *Mendoza*

Recall *Mendoza*'s first policy argument: the federal government is a party to a large number of cases across the United States.[125] In *Mendoza*, the Court noted that more than 75,000 of the 206,193 filings in the United States District Courts involved the United States as a party.[126] However, as critics may argue, the percentage of cases in which the United States is involved has declined from 1982.[127] From June 30, 2017 to June 30, 2018, the federal government was a party to 42,940 of 281,202 cases. While accurate, this argument requires a deeper textual analysis of *Mendoza*. The Court in *Mendoza* was not comparing the government's litigation numbers with that of

---

121 *Id.* at 166.

122 United States v. Mendoza, 464 U.S. 154, 163–64 (1984) ("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 concerns underlying our disproval of [issue preclusion] against the government are for the most part inapplicable where mutuality is present, as in *Stauffer Chemical* . . . . 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.").

123 *Id.*

124 *See supra* subpart I.B.

125 *See supra* Part I.

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

127 *See Table C-1—U.S. District Courts–Civil Statistical Tables For The Federal Judiciary (June 30, 2018)*, U.S. CTS. (June 30, 2018), https://www.uscourts.gov/statistics/table/c-1/statistical-tables-federal-judiciary/2018/06/30 [https://perma.cc/A83D-4V62].

private litigation as a whole.[128] Rather, the Court was comparing the government with private, individual entities—specifically, the Court noted that 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."[129] Even with the overall decrease in government litigation, this logic undoubtedly holds today for both offensive and defensive issue preclusion. For example, in our SEC hypothetical each company will conduct a cost-benefit analysis[130] for litigation "based on commercial business realities"[131] to determine if continued litigation is viable, which is absent from the government's decision-making process. Regardless of the litigious nature of either company, the government is simply unfettered by the commercial realities that limit private entities from litigation.[132]

The government deserves special treatment here. Of those 42,940 cases, any adverse factual determination against the government could, theoretically, preclude it from relitigation under a nonmutual regime. This presents the government with a substantially higher risk of experiencing preclusive effects than any single private litigant. Under a defensive nonmutual regime this could limit the government from enforcing the law against unrelated entities from any one of those 42,940 cases. The next five policy reasons highlight why this numeric reality is problematic.

Second, *Mendoza*'s argument that government litigation frequently involves legal questions of substantial public importance[133] logically extends to the defensive context.[134] A textual

---

128 *See supra* note 84.

129 *Mendoza*, 464 U.S. at 159.

130 *See* PATRICK J. FLINN, *The Decision to Litigate*, *in* HANDBOOK OF INTELLECTUAL PROPERTY CLAIMS & REMEDIES § 1.02 (1st ed. Supp. 2019) ("Lawsuits are expensive and . . . the costs of legal fees and expenses do not reflect the true cost of litigation. Searching for and assisting in the production of documents, helping in fact investigation, serving as deponents, preparing trial witnesses, and participating in settlement discussions absorb enormous amounts of time and energy. Usually this time is extracted from the most valuable employees in the company—senior executives, inventors, scientists, and key accounting personnel.").

131 *Id.*

132 *See* ROBERT G. BONE, CIVIL PROCEDURE: THE ECONOMICS OF CIVIL PROCEDURE 246–49 (2003).

133 *See id.* at 160.

134 This Note merely argues that the offensive versus defensive formalism is not strong enough to limit *Mendoza*. Concededly, commentators note that not every issue the government litigates is of great substantive importance. *See, e.g.*, Levin & Leeson, *supra* note 113, at 113, 134 (arguing against *Mendoza*'s special exception and for application of issue preclusion against government in order to prevent wasteful government relitigation).

analysis of *Mendoza* supports this conclusion: the Court noted that "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."[135] Notably, the Court made no distinction regarding *how* the government was a party—whether a plaintiff or defendant. Even without constitutional issues, the subject matter of a legal dispute retains the possibility of public import irrespective of whether the government is a plaintiff or defendant.[136] The SEC, for example, can regulate companies directly or reach the market indirectly through individuals[137]—both of which entail the potential for substantial legal importance.[138]

This logic extends to issues of constitutional importance. Imagine a situation where the Department of Justice sues the Secretary of Education for State A—in her official capacity—for failure to enforce the funding requirements under the Civil Rights Act of 1964. The predicate issue, which is fully litigated and determined, is racially discriminatory admission practices of School B, within State A. Here, the government loses, and then decides to sue School B directly (assuming it was not in privity). As one can imagine, the lawsuit's consequences have great implications on nonparties, too. Arguing the offensive and defensive distinction as dispositive surely misses the point—the government can litigate issues of substantial public importance in either capacity.[139]

---

135 United States v. Mendoza, 464 U.S. 154, 160 (1984).

136 Using our SEC hypothetical, the analytical classification as "defensive" or "offensive" is entirely unrelated to the actual subject matter of the dispute.

137 *See, e.g.*, Ann Maxey, *SEC Enforcement Actions Against Securities Lawyers: New Remedies vs. Old Policies*, 22 DEL. J. CORP. L. 537, 537 (1997) ("The SEC is . . . concerned with the misconduct of the securities markets' principal players—the lawyers' clients. By disciplining lawyers for failing to adhere to standards of conduct that, in the SEC's view, are adequate, lawyers will have an incentive to monitor and deter their clients' misconduct. Deterring violations protects the investing public for whose benefit the securities laws were enacted. Lawyers, in the SEC's view, can be required to participate in providing that protection because lawyers owe a responsibility, if not a duty, to the investing public.").

138 While private litigants can bring securities actions, the government does so with the intention of executing administrative policies that stem from the Executive. Courts should be more reluctant to stymie the enforcement policies of an independent agency that litigates issues of substantial public importance pursuant to Executive prerogative.

139 Similarly, in the context of our example, whether Company B is getting sued by the government and wants to use a judgment (defensive preclusion), or is suing the government and wants to use a judgment (offensive preclusion) has no relation on the lawsuit's subject matter.

Furthermore, mere exceptions to a general rule of nonmutual issue preclusion *applying against the government* fail to adequately protect this policy concern. For example, the Second Restatement of Judgments calls for an exception where "[t]here is a clear and convincing need for a new determination . . . because of the potential adverse [effect] . . . on the public interest or the interests of [nonparties]."[140] However, the Restatement proceeds to describe these instances as "rare" and that "litigation to establish an exception in a particular case should not be encouraged."[141] In the context of *Mendoza*'s second policy concern, it seems incomplete for the government to rely on an exception to a general rule whereby litigation to establish that exception "should not be encouraged."

Third, the Court in *Mendoza* concluded that applying nonmutual issue preclusion against the government would "substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue."[142] Here, it is more persuasive to distinguish the differences between mutual and nonmutual regimes.[143] Under the mutuality regime, questions of law may freeze, but they are limited to the context of parties that are the same or in privity. The government is free to litigate the same issue in the future with other litigants. In the defensive versus offensive context, this argument fails. Take our DOJ example: if *any* nonmutual party could apply issue preclusion—for the issue of whether School B employed racially discriminatory practices—that issue is frozen on a broader scale and impacts more parties. This reality survives the offensive versus defensive debate. Notably, part of the Court's limiting principle in *Stauffer Chemical Co.* was the ambit of mutuality, not the distinction between offensive and defensive.[144]

The same holds true for our SEC example. Let us assume the SEC sues Company A on a new, potentially influential legal theory. Under a mutuality regime, any judgment against the SEC is strictly limited to those parties or privies, leaving open the possibility for the SEC to further develop its legal theory

---

140 RESTATEMENT (SECOND) OF JUDGMENTS § 28, at para. 5 (AM. LAW INST. 1982).

141 *Id.* at cmt. g.

142 United States v. Mendoza, 464 U.S. 154, 160 (1984).

143 *Cf.* United States v. Stauffer Chem. Co., 464 U.S. 165, 173 (1984).

144 *Id.* ("[The argument against freezing the first final decision] is persuasive only to prevent the application of collateral estoppel against the government in the absence of mutuality. When estoppel is applied in a case where the government is litigating the same issue arising under virtually identical facts against the same party, as here, the government's argument loses its force.").

against Company B. Intuitively, under a nonmutual regime, the SEC is thwarted from further developing that theory because the factual judgment from its lawsuit against Company A precludes relitigation in its lawsuit against Company B. Critics may argue that the SEC can still develop law against new parties for new issues. Analytically this is true, but this would require the SEC to engage in a wait-and-see approach to develop new areas of law when there would otherwise be a viable option for litigation against Company B.

Fourth, the Court in *Mendoza* argued that nonmutual issue preclusion would force the Solicitor General to change its appeal policy and appeal every adverse decision to avoid foreclosing further review.[145] In the Court's view, nonmutual issue preclusion would force the Solicitor General to forego prudential concerns. Critics may argue that in the defensive context, because the government initiated litigation, it can better determine which issues to litigate—vitiating the concern that the government would be forced to litigate issues it needs to appeal. While this criticism may be true, it is incomplete. While the government *technically* decided to bring litigation, there are instances where the decision is more complicated.

Imagine, once again, our SEC example.[146] Irrespective of whether the SEC brought the first action against Company A, the Solicitor General is still faced with the same determinations the Court in *Mendoza* adumbrated.[147] With the understanding of potential litigation against Company B, the Solicitor General's determination to appeal remains intact. Whether the SEC sued Company A or Company A sued the SEC, any adverse decision for the SEC would incentivize the Commission to appeal. Without an appeal, the SEC runs the risk of having potential litigation against Company B precluded. In our example, the Solicitor General's problem of overzealous appeal procedures,[148] when facing defensive preclusion, is commensurate with that of offensive preclusion. In a legal system where defensive nonmutual issue preclusion is available against the federal government, the analytical order of the initial litigation is a superficial concern.

---

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

146 *See supra* Abstract.

147 In other words: despite the SEC bringing its action against Company A, the Solicitor General would still have incentive to appeal any issue that potentially gives rise to another action the government wants to initiative.

148 The Attorney General has delegated discretionary authority to the Solicitor General to determine when to appeal from a judgment adverse to the interests of the United States. 28 C.F.R. § 0.20(b) (1982).

Fifth, the Court in *Mendoza* argued that nonmutual issue preclusion would obstruct the Executive Branch's ability to adopt different positions on the law. More specifically, the Court cautioned that "for the very reason that such policy choices are made by one Administration, and often reevaluated by another Administration, courts should be careful when they seek to apply expanding rules of [issue preclusion] to government litigation."[149] The court in *Mendoza* addressed the example whereby "in recommending to the Solicitor General in 1977 that the government's appeal in *68 Filipinos* be withdrawn, newly appointed INS Commissioner Castillo commented that such a course 'would be in keeping with the policy of the [new] Administration,' described as 'a course of compassion and amnesty.'"[150]

As a pragmatic reality, policy affects the judicial system; the Court noted how "[i]t 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 Court of Appeals, is a wholly mechanical procedure which involves no policy choices whatever."[151] For our example, assume under Administration 1 that the SEC sues Company A and the court renders a judgment in favor of Company A. Administration 1 prioritizes the issue relatively low, and they decided not to appeal. However, Administration 2 prioritizes that issue relatively high. Unfortunately for Administration 2, it is now stuck with the adverse ruling from Administration 1 because Administration 1 did not appeal. Under a regime of mutuality, Administration 2 cannot relitigate the same issue against the same company, but it is free to advance its administrative priorities through litigation against separate and distinct parties.[152] Although just one example, the notion of changing administrations—and corollary deviations in policy enforcement—is a pragmatic concern that nonmutual preclusion cannot ameliorate.

Finally, the Court was especially concerned with the Ninth Circuit's approach. The approach required a finding of "record evidence" indicating that there was a "crucial need" for redetermination of the issue.[153] Notably, the Ninth Circuit failed to

149 *Mendoza*, 464 U.S. at 161.
150 *Id.*
151 *Id.*
152 *See* 18A Wright & Miller, *supra* note 3, § 4463.
153 *See Mendoza*, 464 U.S. at 162.

delineate what type of "record evidence" is enough to satisfy a "crucial need,"[154] while acknowledging that the government litigates issues of far-reaching national significance which might warrant relitigation. The Court in *Mendoza* determined that applying nonmutual issue preclusion against the government under this approach is unfair, given the uncertainty in determining whether a court will bar relitigation of the issue and subsequent uncertainty on whether or not to appeal an adverse decision.

With the subjective nature of the Ninth Circuit's approach, the government would lack any reliable indicia for when to appeal adverse decisions. The "wholly subjective"[155] test offers little reassurance to ameliorate the Court's concerns of what *satisfies* the "crucial need" standard. This is particularly important with government litigation because of the first[156] and third[157] *Mendoza* policy arguments. This approach does little to address the concern that the Solicitor General would need to appeal every adverse decision. Without any reliable indicia for the Solicitor General under this "wholly subjective" test, he is left with the same appeal policy the Court cautioned against in *Mendoza*. With the United States as a party to 42,940 cases, it is simply impracticable for the Solicitor General to appeal every adverse decision. Although potentially more acute under an offensive regime,[158] these issues undoubtedly apply in the defensive context. Under either regime, the Ninth Circuit's approach fails to adequately address *Mendoza*'s policy concerns.

CONCLUSION

With federal courts readily applying *Mendoza*'s policy rationale to prevent offensive nonmutual issue preclusion against the federal government, the doctrinal differences entailed in *defensive* nonmutual issue preclusion are simply too attenu-

154 *See id.*

155 *Id.*

156 The federal government is a party to a large number of cases across the United States.

157 The Solicitor General changing its appeal policy and appealing every adverse decision to avoid foreclosing further review.

158 This concern is likely more acute in the offensive setting because the government cannot predict who will sue it in the future. By comparison, under the defensive setting, the government is the party initiating litigation. In the defensive context, the government would at least have the ex ante understanding that the issue it wants to relitigate is facing a subjective judicial standard that remains relatively obscure. The government could adequately prepare for that reality before initiating litigation, unlike the circumstances it faces under an "offensive" situation.

ated to overcome *Mendoza*'s policy arguments. For the structural integrity of the federal court system to remain intact post-*Mendoza*, courts should reject rigid doctrinal inertia and, alternatively, should look at the practical considerations that warrant extending *Mendoza*'s policy rationale to the defensive context.