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ABSTRACT

Judgments do not bind nonparties. This core due process constraint on issue preclusion means that courts can only adjudicate questions of fact and law with respect to those individuals appearing in court. However, the operation of stare decisis routinely extinguishes the rights of nonparties without notice or an opportunity to be heard. This Article examines the due process challenge to the operation of precedent. The traditional justifications for applying a due process analysis only to preclusion and not to precedent are inadequate. Instead of excepting stare decisis from the operation of procedural due process, we should see it as meeting those requirements. Using the Supreme Court's analysis from Mathews v. Eldridge, *stare decisis can survive a due process challenge based on the central value of third party reliance. While stare decisis survives in general, applying notions of procedural due process changes the traditional view of precedent in important situations. In cases where reliance is nonexistent, or where the initial process was corrupted, application of stare decisis may not withstand a due process challenge.*

I. INTRODUCTION

In June 2008, the Supreme Court handed down *Taylor v. Sturgell*,[1] the most recent in a series of decisions over the last ten years reaffirming the due process limitations on nonparty preclusion. The United States Court of Appeals for the District of Columbia Circuit had applied a broad doctrine of preclusion to bar a Freedom of Information Act[2] claim on the theory that the plaintiff had been

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1. 128 S. Ct. 2161 (2008).

2. 5 U.S.C. §§ 552–552b (2006).

"virtually represented" by his friend in a prior lawsuit over an identical FOIA claim.[3] The Supreme Court reversed, quoting its own sweeping language from *Richards v. Jefferson County*,[4] which held that the "application of claim and issue preclusion to nonparties runs up against the deep-rooted tradition that everyone should have his own day in court."[5] *Richards* itself reversed the Alabama Supreme Court's attempt to apply claim preclusion to plaintiffs who had not been party to a prior lawsuit challenging the constitutionality of a state tax regime. Even though the Alabama Supreme Court had already decided the constitutionality of the tax in question,[6] it could not preclude the plaintiffs from relitigating the issue.[7] Both *Taylor* and *Richards* recognize strong due process protections for nonparties, establishing a constitutional right to relitigate issues already decided in prior lawsuits.

Simultaneously, though, both courts accepted, without analysis, a different nonparty preclusion doctrine. The Court agreed that the precedential effect of the prior lawsuit *could* bar the claim. The *Richards* Court states, but does not explain, that "a state court's freedom to rely on prior precedent in rejecting a litigant's claims does not give it the freedom to bind a litigant to a prior judgment to which he was not a party."[8] *Taylor* not only fails to draw a distinction between stare decisis and preclusion, it explicitly relies on the value of stare decisis in attempting to justify its preclusion conclusion: "Stare decisis will quickly allow courts to swiftly dispose of repetitive lawsuits."[9] The Supreme Court made no attempt to explain why the broad "day in court" due process protections limiting the effect of preclusion does not impose an identical limit on the effect of precedent.[10] The arguments offered in the academic literature for this

3. Taylor v. Blakely, 490 F.3d 965 (D.C. Cir. 2007).

4. 517 U.S. 793, 798 (1996).

5. *Taylor*, 128 S. Ct. at 2171.

6. Jefferson County v. Richards, 662 So. 2d 1127, 1128 (Ala. 1995). The prior challenge to the constitutionality of the tax scheme only raised state law questions while the challenge in *Richards* itself dealt with a federal constitutional claim. *Richards*, 517 U.S. at 796.

7. *Richards*, 517 U.S. at 804–05.

8. *Id*. at 805.

9. *Taylor*, 128 S. Ct. at 2178.

10. This due process based challenge differs from the argument that stare decisis is unconstitutional because it requires the Supreme Court sometimes to favor precedent over original meaning or the claim that stare decisis is subject to abrogation by Congressional statute. *See, e.g.*, John Harrison, *The Power of Congress over the Rules of Precedent*, 50 DUKE L.J. 503 (2000); Michael Stokes Paulsen, *Does the Supreme Court's Current Doctrine of Stare*

distinction between the due process restrictions on preclusion, but not precedent, have been similarly unpersuasive.[11]

This Article attempts to fill this gap and save stare decisis by grounding it in the Supreme Court's procedural due process jurisprudence. While not used explicitly in the preclusion literature, the three-prong test from *Mathews v. Eldridge*[12] provides a mechanism to understand why we treat issue preclusion and stare decisis differently from a due process standpoint. In particular, the effect on absent nonparties does not simply endanger stare decisis from a due process standpoint; it saves it as well. Because we expect third parties to rely on prior decisions of courts, we have to bind them as well.

The rest of the Article is organized as follows. Part II.A outlines the Supreme Court case law on the due process constraints on preclusion and contrasts it to the very limited case law from any court raising due process concerns about stare decisis. Stretching from *Hansberry v. Lee* to the recent decision in *Taylor*, the Court has been clear that nonparties cannot suffer from the preclusive effects of judgments, but courts have given little attention to the question of whether the precedential effects of those decisions raise comparable concerns. Part II.B analyzes the traditional justifications for drawing a line between preclusion and precedent. Two primary arguments are used to support the distinction. First, stare decisis is more flexible than preclusion, leaving nonparties free to argue that the prior decision was misguided and should not be followed. Second, courts

Decisis Require Adherence to the Supreme Court's Current Doctrine of Stare Decisis?, 86 N.C. L. REV. 1165 (2008); Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289, 289 (2005); Michael Stokes Paulsen, *The Irrepressible Myth of* Marbury, 101 MICH. L. REV. 2706, 2731–34 (2003); Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey*?*, 109 YALE L.J. 1535 (2000); Michael Stokes Paulsen, *Captain James T. Kirk and the Enterprise of Constitutional Interpretation: Some Modest Proposals from the Twenty-Third Century*, 59 ALB. L. REV. 671, 679–81 (1995). *But cf.* Michael Abramowicz, *Constitutional Circularity*, 49 UCLA L. REV. 1 (2002) (responding to these critiques).

11. *See infra* Part I.B. One recent article suggests that some aspects of stare decisis are unconstitutional. Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1012 (2003) ("I argue that the preclusive effect of precedent raises due process concerns, and, on occasion, slides into unconstitutionality."). While Professor Barrett and I reach some different conclusions, her excellent analysis helped shape this Essay, especially Part I.

12. 424 U.S. 319 (1976). The *Mathews* factors are (1) the private interest affected by the official action, (2) the risk of erroneous deprivation and the value of additional procedures, and (3) the burden on the government from providing additional process. *Id.* at 335.

may view issue preclusion as applying solely to questions of fact while stare decisis covers questions of law. Neither of these arguments carries the day.

Part III argues that while the line of cases from *Hansberry* to *Taylor* would not support the current doctrine of stare decisis, we can save the doctrine by considering it through the lens of the Supreme Court's three-part test in *Mathews v. Eldridge*. *Mathews* provides a cost-benefit analysis for determining the necessary procedure to be provided. Through this lens, the value of stare decisis can allow it to survive in situations where preclusion falls. Because we expect third parties to rely on decisions that receive precedential effect, but not on those that merely receive preclusive effects, this reliance interest tips the scale of the *Mathews* balancing test.

Part IV explores the implications of applying *Mathews* to preclusion and stare decisis. I argue that while *Mathews* saves stare decisis generally, current aspects of the Supreme Court's approach to stare decisis still remain at risk. In particular, the Supreme Court has treated reliance as merely a policy consideration in most cases involving challenges to precedent. However, the key role reliance plays in saving stare decisis means that, in cases where reliance does not exist, due process may impose limits on courts' ability to rely on precedent. Second, applying due process constraints means that in cases where the original process was fundamentally flawed, stare decisis cannot survive.

II. THE DUE PROCESS CHALLENGE TO STARE DECISIS

A. Due Process and Preclusion

The term preclusion covers two distinct and related doctrines. Claim preclusion, classically known as res judicata, bars the relitigation of a claim that was, or should have been, raised in the first lawsuit as long as the first lawsuit ended in a valid final judgment on the merits.[13] Claim preclusion requires that both the plaintiff and

13. If the judgment in the first lawsuit was in favor of the plaintiff, the claim is extinguished, merges with the judgment, and then the plaintiff, if necessary, can sue on the judgment. *See* RESTATEMENT (SECOND) OF JUDGMENTS §§ 17–18. If the judgment was in favor of the defendant, the judgment extinguished the claim and bars any future claim. *Id.* § 19. As a result, claim preclusion was classically referred to as the doctrine of merger and bar. *See* Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 77 n.1 (1984).

the defendant be identical in both suits.[14] Claim preclusion defenses frequently arise when a party has unsuccessfully litigated a claim in the first lawsuit and later attempts to bring a different, related claim in a subsequent lawsuit.[15] Issue preclusion, in contrast, does not bar the entire claim but simply precludes relitigating a discrete issue.[16] As long as the issue was actually litigated and decided in the first suit, resolution of the issue was essential to the result, and there was a full and fair opportunity to litigate, parties are barred from challenging the resolution in the first litigation.[17] Notably, unlike claim preclusion, issue preclusion does not require the parties to be identical. With the rise of nonmutual issue preclusion, parties can benefit from an initial lawsuit in which they did not participate.[18]

While courts have generally abandoned the requirement that the party benefitting from preclusion must have participated in the initial lawsuit, there is no such flexibility with respect to the party burdened by preclusion. The due process limits on nonparty preclusion are staples of the traditional civil procedure course—a party is only bound by a prior decision if they, or their privity, participated in the original lawsuit.[19] The Supreme Court recognized, though, that

14. *See* Montana v. United States, 440 U.S. 147, 154 (1979) ("Preclusion of . . . nonparties falls under the rubric of collateral estoppel rather than res judicata because the latter doctrine presupposes identity between causes of action."); RESTATEMENT (SECOND) OF JUDGMENTS § 17 ("A valid and final judgment is conclusive between the parties . . . .").

15. *See* Alvear-Velez v. Mukasey, 540 F.3d 672, 678 (7th Cir. 2008) (discussing the rule against claim-splitting); Barrett *ex rel.* Estate of Barrett v. United States, 462 F.3d 28, 38 (1st Cir. 2006) (same).

16. RESTATEMENT (SECOND) OF JUDGMENTS § 27 ("When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.").

17. *Id.*; New Hampshire v. Maine, 542 U.S. 742, 749–50 (2001).

18. Justice Traynor's opinion for the California Supreme Court in *Bernhard v. Bank of America*, 122 P.2d 892, 895 (1942) was the key event in the decline of the mutuality requirement for issue preclusion. At the federal level, the Supreme Court abandoned the mutuality requirement in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 322 (1971) (permitting nonmutual defensive issue preclusion) and *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 (1979) (permitting nonmutual offensive issue preclusion). While nonmutuality is now the majority rule, mutuality continues to exist. Stogniew v. McQueen, 656 So. 2d 917, 919 (Fla. 1995) (holding that Florida law continues to require mutuality); Quinn v. Monroe County, 330 F.3d 1320, 1330 (11th Cir. 2003) (relying on *Stogniew* as good law).

19. The Supreme Court has repeatedly held that due process requires that the party suffering as a result of preclusion must have been a party in the initial lawsuit. The Supreme Court's due process case law surrounding preclusion stretches back to *Hansberry v. Lee*. 311 U.S. 32 (1940). *Hansberry*, a challenge to the issue preclusive effect of a fraudulent stipulation

preclusion was appropriate in certain situations, such as properly constituted class actions, where parties absent from the litigation were adequately represented by the parties who were present. Lower courts repeatedly attempted to expand the scope of this "adequate representation" exception,[20] and the Supreme Court has frequently rebuffed these attempts.[21]

Most recently, the Court handed down *Taylor v. Sturgell*, which involved a dispute between two airplane enthusiasts and the FAA. Greg Herrick, the owner of an antique F-45 airplane, sought information in a FOIA request from the FAA in order to help him restore his plane.[22] The manufacturer of the airplane, the Fairchild Engine and Airplane Corporation, had submitted technical data to the FAA in 1935 as part of the process of getting the plane certified for manufacture and sale.[23] The FAA retained all of this information but denied the FOIA request on the theory that the information fell within the FOIA trade secret exception.[24] Herrick filed suit in district court, arguing that the manufacturer had surrendered its trade secret claim by submitting a 1955 letter to the FAA's predecessor agency authorizing documents to be released to the public for use in making repairs or replacement parts. The district court rejected this

in a prior lawsuit, set up a two-part holding. First, due process prohibits binding nonparties, and second, class actions are only effective when the representative parties adequately represent the class members. *Id.*

20. Most recently, several circuits have applied a "virtual representation" theory, permitting claim preclusion when the party in the second lawsuit was similarly situated to the party in the first lawsuit, an approach usually dated back to the Fifth Circuit's decision in *Aerojet v. Askew*, 511 F.2d 710 (5th Cir. 1975). The Circuits varied in the requirements for virtual representation. *See, e.g.,* Taylor v. Blakely, 490 F.3d 965, 971 (D.C. Cir. 2007); Gonzalez v. Banco Cent. Corp., 27 F.3d 751 (1st Cir. 1994). For a historical justification of the virtual representation theory, see Robert G. Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193 (1992). The Supreme Court's decision in *Taylor* likely represents the end of the virtual representation line of cases.

21. For instance, in 1996, the Supreme Court overturned the Alabama Supreme Court's decision in *Richards v. Jefferson County*, 517 U.S. 793 (1996) (discussed in the introduction), even though the lower court concluded that the plaintiffs in the first action adequately represented those in the second action. Just three years later, in *South Central Bell Telephone Co. v. Alabama*, 526 U.S. 160 (1999), the Court came to the same conclusion that the state could not rely on adequate representation even when the lawyers were identical and the plaintiffs in the second action were aware of the first lawsuit.

22. *Taylor*, 128 S. Ct. at 2168.

23. *See* Herrick v. Garvey, 200 F. Supp. 2d 1321, 1322 (D. Colo. 2000).

24. *Id.* at 1323. FOIA exemption 4 permits the government to withhold "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4).

argument on two theories. First, since the documents were never released to the public, they retain trade secret status; and second, even if the documents had lost trade secret status as a result of the 1955 letter, they regained it when the manufacturer successfully reversed the waiver of trade secret status by objecting to the FAA after Herrick's FOIA request.[25] The Tenth Circuit affirmed.[26] While it disagreed with the district court's conclusion on the waiver of trade secret status, it accepted the FAA's argument that the reclamation of trade secret status was successful.[27] Notably, the Tenth Circuit merely assumed, and did not hold, that trade secret status could be reclaimed and further assumed that the timing of the reclamation of the statutes was irrelevant.[28] The FAA and the manufacturer were allowed to argue that the status had been reclaimed even though the reclamation took place after Herrick filed the FOIA request.

Enter Herrick's friend Brent Taylor, another airplane enthusiast. After submitting his own FOIA request to which the FAA failed to respond, he filed suit in the Federal District Court in the District of Columbia making arguments identical to those raised by Herrick.[29] In addition, he raised the arguments waived by Herrick in the court of appeals, claiming both that the manufacturer could not revive trade secret status for the documents and that even if revival was possible, it could not happen after the FOIA request took place.[30] The district court dismissed on a virtual representation theory since Herrick and Taylor were close associates, were represented by the same lawyer, and had apparently shared litigation documents.[31] The Court of Appeals for the D.C. Circuit affirmed, announcing its own version of the virtual representation test.[32]

The Supreme Court reversed and clearly identified the limited situations in which nonparty preclusion is appropriate. The *Taylor* Court outlined six categories of nonparties who can suffer as a result

25. *Herrick*, 200 F. Supp. 2d at 1327–29.
26. Herrick v. Garvey, 298 F.3d 1184 (10th Cir. 2002).
27. *Id*. at 1194.
28. *Id*. at 1194 n.10.
29. Taylor v. Blakely, 490 F.3d 965, 968 (D.C. Cir. 2007).
30. Taylor v. Sturgell, 128 S. Ct. 2161, 2168 (2008).
31. *Taylor*, 490 F.3d at 969.
32. *Id*. at 972.

of litigation.[33] First, nonparties who agreed to be bound are precluded even if they did not initially participate.[34] Second, individuals who assumed control of the litigation, even if they did not act as a party, are bound.[35] Third, nonparties to the first suit who act in a representative capacity for someone who was a party in the initial litigation can be precluded.[36] Fourth, nonparty preclusion can operate pursuant to a special statutory scheme, such as bankruptcy or probate.[37] Fifth, nonparties in particular legal relationships with parties can be precluded.[38] Finally, in certain situations, nonparties

33. The Court drew on the Restatement in establishing these categories. *Taylor*, 128 S. Ct. at 2172 n.6.

34. *Id.* at 2172; *see also* Sampson v. Sony Corp. of Am., 434 F.2d 312, 315 (2d Cir. 1970) (holding parties bound by stipulation that the decision in a separate lawsuit would resolve their claims); RESTATEMENT (SECOND) OF JUDGMENTS § 40.

35. *Taylor*, 128 S. Ct. at 2173. The classic example of this type of nonparty preclusion arose in *Montana v. United States*, 440 U.S. 147 (1979), where the United States government directed and financed litigation by a government contractor in a Montana state court lawsuit challenging the constitutionality of a state gross receipt tax. Even though the federal government was not a party, the Supreme Court found that the state court decision that the tax did not violate the Supremacy Clause had preclusive effect in a later federal court lawsuit since the government "exercised control" over the state court litigation. *Id.* at 155.

36. *Taylor*, 128 S. Ct. at 2173. The canonical preclusion-by-representation case is *Chicago Rock Island & Pacific Railway Co. v. Schendel*, 270 U.S. 611 (1926). In *Schendel*, the administrator of the estate of a deceased employee brought an action against the railroad employer under the Federal Employer's Liability Act. The railroad had previously brought a worker's compensation proceeding against the employee's widow, the sole beneficiary of the estate, in which the arbitrator determined that the employee was engaged in intrastate, rather than interstate commerce. *Id.* at 614–15. The Supreme Court found the determination with respect to interstate commerce to be preclusive in the second suit even though the parties were formally different since "[t]he essential consideration is that it is the right of the widow, and of no one else, which was presented and adjudicated in both courts." *Id.* at 618.

37. *Taylor*, 128 S. Ct. at 2173. Probate and bankruptcy both adjudicate the rights of absent parties. Claims against estates and bankrupts are lost if not properly presented. *See* Tulsa Prof'l Collection Serv., Inc. v. Pope, 485 U.S. 478 (1988) (probate); NLRB v. Bildisco & Bildisco, 465 U.S. 513, 529–30 n.10 (1984) (bankruptcy). The Supreme Court has not clearly explained why nonparty preclusion is constitutional in these cases, but the answer probably lies in the need for finality. In this way, these proceedings can be seen as another example of *Mathews*-style balancing where the value of finality is allowed to overcome the general rule against nonparty preclusion. See *infra* Part II for a broader discussion of *Mathews*.

38. *Taylor*, 128 S. Ct. at 2172. Classically these relationships have been called "privity," although the *Taylor* Court recognized that privity had lost its content and had simply come to stand for the proposition that nonparty preclusion was appropriate. *Id.* at 2172. *See also, e.g.*, Nash Bd. of Educ. v. Biltmore Co., 640 F.2d 484, 493 (4th Cir. 1981) (providing an example of a collecting case); Bruszewski v. United States, 181 F.2d 419, 421 (3d Cir. 1950) (Goodrich, J., concurring).

adequately represented by the participants in the initial lawsuit may be bound.[39]

If we accept that the same due process standards outlined in *Taylor* and its predecessors apply to both issue preclusion and preclusion by precedent, how does stare decisis fare?[40] Not particularly well. Consider again the facts of *Taylor*. If the Tenth Circuit had actually held that trade secret status could be "reclaimed" under FOIA, *Taylor* holds that it would be unconstitutional to find that Taylor was issue precluded[41] from relitigating this question.[42] However, Taylor would clearly be barred by stare decisis from relitigating this issue[43] in the courts of the Tenth Circuit, at least until the level of en banc review.[44]

39. *Taylor*, 128 S. Ct. at 2172.

40. One difficulty with applying the analysis in *Taylor* to different contexts is that the Court has never clearly explained why nonparty preclusion is so unacceptable aside from the "deep-rooted historic tradition that everyone should have his own day in court." *Id.* at 2171 (quoting Richards v. Jefferson, 517 U.S. 793, 798 (1996)). Prior case law takes a similar approach, simply citing to the history without explaining it. *See* Hansberry v. Lee, 311 U.S. 32, 40 (1940) (citing Pennoyer v. Neff, 95 U.S. 714 (1878)).

41. One might try to distinguish this hypothetical on the grounds that *Taylor* and its most relevant predecessor cases involve claim preclusion, and therefore, perhaps the due process standards are reduced for issue preclusion. The Supreme Court's jurisprudence, though, leaves no room for this argument. *Taylor* views issue preclusion and claim preclusion as identical. "A person who was not a party to a suit generally has not had a 'full and fair opportunity to litigate' the claims and issues settled in that suit. The application of claim and issue preclusion to nonparties thus runs up against the 'deep rooted historic tradition that everyone should have his own day in court.'" *Taylor*, 128 S. Ct. at 2171 (quoting *Richards*, 517 U.S. at 798). The Supreme Court's previous case law on issue preclusion reaches exactly the same conclusion. "Some litigants—those who never appeared in a prior action—may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position." Blonder-Tongue Lab., Inc. v. Univ. of Ill. Found., 402 U.S. 313, 329 (1971).

42. Nor do any of the *Taylor* exceptions apply differently when seen through the lens of issue preclusion or preclusion by precedent. The relationship between Taylor and Herrick remains the same. Taylor still would not have agreed to be bound by the first litigation, would not have taken control of the initial litigation, and would not be acting as Herrick's representative. No special statutory scheme exists to permit nonparty preclusion. Since Taylor does not fall within any of the six categories for purposes of issue preclusion, it is hard to argue that he would qualify for one of them for purposes of preclusion by precedent.

43. Arguably, a party is not barred from relitigating an issue by stare decisis; they are simply prevented from winning on the point. This argument hardly distinguishes preclusion and precedent sufficiently for constitutional purposes. In fact, stare decisis is arguably more binding in some ways than issue preclusion. Preclusion is a defense and must be raised in a defendant's answer or is waived. *See* FED. R. CIV. P. 8. The argument that the stare decisis effect of a prior decision bars a claim, though, can be raised on a motion to dismiss under

Despite this straightforward argument, courts have seldom faced the question whether stare decisis is unconstitutional and have not taken the argument very seriously when presented with it.[45] The following section deals with the traditional justifications for treating issue preclusion and stare decisis differently and argues that they are inadequate.

B. The Traditional Distinctions Between Preclusion and Precedent

Two major justifications have been put forth to explain the more lenient due process treatment of stare decisis when compared to issue preclusion. The first is the alleged flexibility of stare decisis.[46] In the cases where it applies, issue preclusion acts as an absolute bar to relitigation of the identical issue. Parties cannot argue that the issue should be reexamined simply because the outcome is wrong.[47] In contrast, stare decisis theoretically leaves courts open to revisit the legal issue. Courts can and do change their mind on legal questions, and under the Federal Rules, parties are free to make any nonfrivolous argument in favor of changing the law.[48] Similarly, parties can also distinguish prior decisions, arguing that the legal issues are actually not the same between the two suits.

Rule 12. A defendant need not file an answer, and if not raised then, it can be raised up to, during, or after trial. *See* FED. R. CIV. P. 12(h)(2).

44. The Tenth Circuit, like other circuits, follows the rule that one panel cannot overrule a prior panel. *See* Thompson R2-J Sch. Dist. v. Luke P. *ex rel.* Jeff P., 540 F.3d 1143, 1150 n.6 (10th Cir. 2008).

45. *See* Kent v. Johnson, 821 F.2d 1220, 1228 (6th Cir. 1987). On occasion district courts have been reversed for giving decisions from other district courts undue weight. *See* Nw. Forest Res. Counsel v. Dombeck, 107 F.3d 897, 898 (D.C. Cir. 1997); Colby v. J.C. Penney Co., 811 F.2d 1119, 1123 (7th Cir. 1987). *See generally* Barrett, *supra* note 11, at 1026–27 (discussing *Dombeck* and *Colby*). Additionally, in *Atlantis Development Corp. v. United States*, the court found intervention as of right proper on the theory that the intervening party might be affected by the decision as a matter of stare decisis even though they would not be bound as a nonparty. 379 F.2d 818, 829 (5th Cir. 1967). For a more extensive discussion of intervention and stare decisis, see *infra* at Part II.B.

46. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 29 cmt. i (1982) (noting that stare decisis is "less limiting" than preclusion because courts can revisit issues); 18 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4425 (3d ed. 1998) (noting that stare decisis is "flexible").

47. *See* Federated Dep't Stores v. Moitie, 452 U.S. 394, 398 (1981); Consol. Edison Co. v. Bodman, 449 F.3d 1254, 1257 (D.C. Cir. 2006); Goss v. Goss, 722 F.2d 599, 605 (10th Cir. 1983).

48. *See* FED R. CIV. P. 11.

The second primary defense of the different treatments of issue preclusion and stare decisis turns on the distinction between fact and law.[49] Perhaps issue preclusion simply applies to questions of fact while stare decisis governs questions of law, and while due process prohibits binding nonparties to factual determinations made by the court, there is no due process violation in binding nonparties to the legal determinations of a prior court.

Both of these justifications are deeply flawed.[50] Stare decisis doctrine, as it is now applied in some courts, is far from flexible. While it is true that the United States Supreme Court retains the option of reopening any question of law presented to it, other courts do not have that flexibility. First, as a matter of vertical stare decisis, decisions of higher courts bind lower courts.[51] The United States Supreme Court has frequently made clear that lower courts are not free to reexamine its decisions, even when intervening precedent severely calls them into question.[52] Furthermore, horizontal stare decisis in the United States Courts of Appeal is similarly inflexible. In all circuits, decisions of prior panels bind current panels even if they are wrong.[53] These legal questions are not open to reargument on the theory that they are incorrect. At the very least, these rules require nonparties to the first litigation to seek review at a higher level than would have been required had the first lawsuit never taken place.

Perhaps even more troubling, the notion of flexibility assumes that review is available within the court system considering the second case. In situations where jurisdictions are not applying their own law, flexibility is effectively eliminated. Take for example,

49. *See* Montana v. United States, 440 U.S. 147, 162 (1979); United States v. Moser, 266 U.S. 236, 242 (1924); 18 WRIGHT ET AL., *supra* note 46, § 4425 n.3.

50. Professor Barrett persuasively argues that these justifications fail. *See* Barrett, *supra* note 11, at 1043–49.

51. *See* Stefanie A. Lindquist & Frank B. Cross, *Empirically Testing Dworkin's Chain Novel Theory: Studying the Path of Precedent*, 80 N.Y.U. L. REV. 1156, 1161 (2005) (drawing the distinction between vertical and horizontal precedent). For the seminal article analyzing the binding effect of decisions on lower courts, see Even H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817 (1993).

52. *See, e.g.*, Agostini v. Felton, 521 U.S. 203, 207 (1997) ("The Court neither acknowledges nor holds that other courts should ever conclude that its more recent cases have, by implication, overruled an earlier precedent. Rather, lower courts should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." (citing Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989)).

53. *See* Barrett, *supra* note 11, at 1017 n.19.

Ruzicka v. Conde Nast Publications,[54] in which an interviewee for a magazine article brought a breach of contract action against the magazine publisher and the journalist, claiming that the reporter did not honor her promise of anonymity.[55] Sitting in diversity, the federal court was bound to apply Minnesota state substantive law.[56] The Minnesota Supreme Court had recently held that confidentiality agreements between sources and reporters did not constitute a legally enforceable contract under state law.[57] The Court of Appeals (correctly) viewed this decision as absolutely binding under *Erie*.[58] The plaintiff's rights were extinguished by the prior case in as inflexible a manner as would have occurred had she been a party.[59]

At least theoretically, the plaintiff could have sought certification to the Minnesota courts to revisit the question. Minnesota, like many states, has adopted the Uniform Certification of Questions of Law Act,[60] allowing federal courts to certify questions of state law to the state supreme court.[61] Certification, though, is not available for all states;[62] and, more to the point, is strongly disfavored under precisely these circumstances. Certification is a process designed to clarify the law and is specifically disallowed when a party wants to argue that a previous decision was incorrect and should be changed.[63] A party in

54. 939 F.2d 578 (8th Cir. 1991).

55. *Id*. at 579–80.

56. *Id*. at 582. *See generally* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) (providing the standard regarding whether state substantive law should apply).

57. Cohen v. Cowles Media Co., 457 N.W.2d 199, 203 (Minn. 1990), *rev'd on other grounds*, 501 U.S. 663 (1991).

58. *Ruzicka*, 939 F.2d at 582.

59. While the plaintiff in *Ruzicka* selected the federal forum and could have filed in state court in an effort to preserve her opportunity to reargue the question before the Minnesota Supreme Court, the defendant could simply have removed the case to federal court under 28 U.S.C. § 1441(a) (2006). No defendant was a Minnesota citizen. *See* 28 U.S.C. § 1441(b) (2006).

60. MINN. STAT. § 480.065 (2008).

61. *See* 17A WRIGHT ET AL., *supra* note 46, § 4248 (discussing history of certification); Jonathan Remy Nash, *Examining the Power of Federal Courts to Certify Questions of State Law*, 88 CORNELL L. REV. 1672, 1687–90 (2003).

62. 17A WRIGHT ET AL., *supra* note 46, § 4248.

63. *Id*. ("If the state court has already said what the law is, a federal court, which disagrees with that statement of the law, should not certify a question in the hope of persuading the state court to change its mind."); *see also* Tarr v. Manchester Ins. Co., 544 F.2d 14, 15 (1st Cir. 1976) ("The purpose of certification is to ascertain what the state law is, not, when the state court has already said what it is, to afford a party an opportunity to persuade the court to say something else.").

federal court sitting in diversity (or in a state court applying the law of a different state) is inflexibly bound by the out-of-jurisdiction precedent.

The ability to distinguish precedent also fails to save stare decisis.[64] Cases certainly can be distinguished factually, and recent empirical work examining the binding nature of precedent has reached mixed conclusions.[65] It is clear, though, that for the parties within the scope of a decision, the decision still has bite. The plaintiff in *Ruzicka* had no plausible argument to distinguish the prior decision. She still bases a contract claim on an agreement between source and reporter—exactly the facts rejected by the Minnesota courts.

Finally, the distinction between fact and law does not save stare decisis. The distinction between fact and law, while once true, is no longer so clear. The First Restatement of Judgments applied issue preclusion purely to questions of fact,[66] a rule the Supreme Court followed as well.[67] More modern doctrine has changed this approach. Under the Second Restatement, issue preclusion is

64. *See* Barrett, *supra* note 11, at 1020; Lea Brilmayer, *The Sociology of Article III: A Response to Professor Brilmayer: A Reply*, 93 HARV. L. REV. 1727, 1728–29 (1980).

65. *See* Lindquist & Cross, *supra* note 51, at 1203–05 ("Our research suggests that precedent has some constraining effect on judicial decisions, but not that precedent is the overriding determinant. Precedent appears to have a moderately constraining effect on judicial freedom.").

66. *See* RESTATEMENT (FIRST) OF JUDGMENTS § 68 (1942); Geoffrey C. Hazard, *Preclusion as to Issues of Law*, 70 IOWA L. REV. 81, 89 (1984) (explaining the historic development of preclusion of issues of law).

67. In *United States v. Moser*, the plaintiff had entered the Naval Academy during the Civil War and had successfully argued in previous litigation that this service constituted "service during the civil war" within the meaning of a statute providing increased benefits for veterans meeting that requirement. 266 U.S. 236, 240 (1924). When he again brought suit for enhanced benefits, the Court found this decision preclusive because while preclusion "does not apply to unmixed questions of law . . . a fact, question or right distinctly adjudged in the original action cannot be disputed in a subsequent action." *Id*. at 242 (emphasis omitted). The Court did not explain how to draw the line between the "unmixed question of law" and the "fact, question, or right." *See id*. The Court's opinion in *Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591 (1948), further struggled with these issues. In *Sunnen*, the taxpayer had assigned royalties from patents to his wife in a series of contracts and had succeeded in previous litigation in avoiding tax liability for the royalties on those patents. *Id*. at 595–96. The Supreme Court, though, viewed each contract as involving "separable" facts making preclusion inappropriate. *Id*. at 601. This separable facts doctrine has received substantial criticism. *See* 18 WRIGHT ET AL., *supra* note 46, § 4425.

available whether the question is factual or legal.[68] The Supreme Court has followed the Second Restatement and applied issue preclusion to unmixed questions of law.[69] The Court reached the Second Restatement result in *United States v. Stauffer Chemical Co.*[70] In *Stauffer*, the Environmental Protection Agency had attempted to inspect one of the defendant's plants in Tennessee using private contractors along with EPA employees.[71] The Clean Air Act[72] only permitted "authorized representatives" to participate in inspections,[73] and Stauffer contended that private contractors were not within the scope of the statute.[74] Stauffer previously had litigated this question successfully against the EPA with respect to an inspection in Wyoming.[75] The Supreme Court found preclusion to be appropriate, recognizing that "the doctrine of collateral estoppel can apply to preclude relitigation of both issues of law and issues of fact."[76]

Similarly, courts frequently apply a version of stare decisis to certain types of factual decisions.[77] The clearest example of facts

68. RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982). "[T]he phrase 'issue of fact or law' has been substituted for 'question of fact' so that the Section is now applicable to questions of law and law application as well as questions of fact." *Id.* § 27 Reporter's Notes.

69. In *Montana v. United States*, the Court held that, having sponsored state court litigation over the constitutionality of a state tax, the United States was issue precluded in federal court. 440 U.S. 147, 156–62 (1979). The Court accepted the Second Restatement's limitation on preclusion "when issues of law arise in successive actions involving unrelated subject matter." *Id.* at 162–63; *see also* Barrett, *supra* note 11, at 1050.

70. 464 U.S. 165 (1984).

71. *Id.* at 166.

72. *See* 42 U.S.C. § 7414(a)(2) (2006); *Stauffer*, 464 U.S. at 166.

73. 42 U.S.C. § 7414(a)(2).

74. *Stauffer*, 464 U.S. at 166.

75. *Id.* at 166–67. This outcome further highlights the close relationship between preclusion and stare decisis in the context of the absolutely binding nature of circuit precedent. The first lawsuit between the parties was in the Tenth Circuit. Stauffer Chem. Co. v. EPA, 647 F.2d 1075 (10th Cir. 1981). The second suit took place in the Sixth Circuit. United States v. Stauffer Chem. Co., 684 F.2d 1174 (6th Cir. 1982). Had the first suit also taken place in the Sixth Circuit, there would have been no question of preclusion. The EPA, Stauffer Chemical, and everyone else in the circuit simply would have been bound by the decision.

76. *Stauffer*, 464 U.S. at 170–71. The Court left open the possibility that the *Moser* exception survives but was critical of it: "Admittedly the purpose underlying the exception for 'unmixed questions of law' . . . is far from clear. But whatever its purpose or extent, we think that there is no reason to apply it here . . . ." *Id.* at 172.

77. *See, e.g.*, Nat'l R.R. Passenger Corp. v. One 25,900 Square Foot More or Less Parcel of Land, 766 F.2d 685, 689 (2d Cir. 1985) (concluding that court was bound by a prior determination that the parcel of land had access to a public road); *see also* 18 WRIGHT ET AL., *supra* note 46, § 4449 n.30 (discussing *Nat'l R.R. Passenger Corp.*).

serving as precedent is what Kenneth Culp Davis initially identified as "legislative facts," those not relating to the immediate parties but instead underlying the decisions about law and policy.[78] The classic example of legislative fact may be the use of the social science data relating to the effect of segregation on African-American children in *Brown v. Board of Education*.[79] The determination that segregation has negative consequences is indisputably factual, but certainly binds nonparties. The clearest demonstration of this comes from the cases in which Southern courts attempted to "revisit" the facts underlying the social science data and conclude, on preclusion grounds, that school systems not parties to *Brown* were not bound by the factual decision, an argument correctly rejected by the court of appeals.[80] *Brown* is not an outlier; courts often treat prior conclusions about social science data as binding.[81] It is hard to see how we could interpret these holdings as legal in any coherent way.

Both the flexibility and law-versus-fact justifications suffer from a more significant flaw. Courts have not offered a coherent theoretical explanation as to why they deserve such different treatment. In the case of flexibility, stare decisis is certainly designed to have an impact on nonparties. The point of the doctrine is to make relitigation of previously decided issues more difficult, and as a result, the doctrine only escapes constitutional suspicion to the extent that it does not serve its purposes. Similarly, courts have not explained why factual and legal questions should be treated so differently. From the point

78. *See* Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 402–04 (1942).

79. 347 U.S. 483, 494 n.11 (1954). For articles discussing the *Brown* use of social science data as an example of a legislative fact, see, e.g., Bryan L. Adamson, *Federal Rule of Civil Procedure 52(A) as an Ideological Weapon?*, 34 FLA. ST. U. L. REV. 1025, 1061 (2007); Scott Brewer, *Scientific Expert Testimony and Intellectual Due Process*, 107 YALE L.J. 1535, 1556–57 (1998); John Monahan et al., *Contextual Evidence of Gender Discrimination: The Ascendance of "Social Frameworks,"* 94 VA. L. REV. 1715, 1720–21 (2008) ("Judicial acceptance of social science research as a form a legislative fact was most famously embodied in *Brown v. Board of Education*.").

80. *See* Stell v. Savannah-Chatam County Bd. of Educ., 220 F. Supp. 667, 680 (S.D. Ga. 1963), *rev'd*, 333 F.2d 55, 61 (5th Cir. 1964) ("[T]he District Court was bound by the decision of the Supreme Court in *Brown*. We reiterate that no inferior federal court may refrain from acting as required by that decision even if such a court should conclude that the Supreme Court erred either as to its facts or as to the law.").

81. *See* Laurens Walker & John Monahan, *Social Facts: Scientific Methodology as Legal Precedent*, 76 CAL. L. REV. 877, 885 (1988); Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559, 562 (1987) (collecting cases).

of view of the losing litigant, the effect of the doctrines works identically. Both bar a party from arguing a position based on the result of prior lawsuit to which he was not a party.

In Part III, I try to fill this theoretical gap. While the Court has never used it, we have a well-established doctrinal framework we can use to preserve stare decisis. Both the flexibility and the law-fact distinction fit well into the Supreme Court's test from *Mathews v. Eldridge*,[82] which gives us a mechanism to weigh the value of additional procedures against their costs.

III. SAVING STARE DECISIS

Despite these arguments, *Taylor* cannot mark the end of stare decisis. The Court explicitly relies on the ongoing value of stare decisis as a justification for its decisions in *Taylor* and *Richards*, using the theory that the stare decisis effect of a ruling will prevent the possibility of frivolous and burdensome litigation.[83] Viewed through the narrow lens of the due process analysis in preclusion cases, however, stare decisis appears to have serious constitutional problems.

Mathews v. Eldridge is the saving grace for stare decisis. The Supreme Court's decision in *Mathews* analyzed procedural due process through the lens of a cost-benefit analysis.[84] *Mathews* requires courts to consider the private interest affected by the court's decision, the risk of an erroneous deprivation as a result of the procedures that are in place, the added value that would be provided by any additional process, and the Government's interest, including the cost of additional process.[85] Additional process is only required when the increased likelihood of a correct outcome outweighs the cost of the process.[86] This Part outlines when the *Mathews* test applies and why applying *Mathews* to preclusion and stare decisis

82. 424 U.S. 319 (1976).

83. Taylor v. Sturgell, 128 S. Ct. 2161, 2178 (2008) ("[*S*]*tare decisis* will allow courts swiftly to dispose of repetitive suits brought in the same circuit."); Richards v. Jefferson County, 517 U.S. 793, 805 (1996) ("A state court's freedom to rely on prior precedent in rejecting a litigant's claims does not afford it similar freedom to bind a litigant to a prior judgment to which he was not a party.").

84. 424 U.S. at 334–35. For an excellent recent summary of *Mathews*, see Alexander Blair-Stanek, *Understanding* Bell Atlantic v. Twombly *as* Mathews v. Eldridge *Applied to Discovery*, 62 FLA. L. REV. 1, 8–16 (forthcoming 2010).

85. *Mathews*, 424 U.S. at 335.

86. *Id.* at 348.

explains our differential treatment of the impact of prior decisions on nonparties.[87]

A. When Mathews *Applies*

Mathews, of course, is not universally applicable to all questions of due process under the Constitution, even though the Court has described it as "a general approach for testing challenged state procedures"[88] under the Due Process Clause. The Supreme Court has never clearly outlined which type of due process questions are subject to the *Mathews* calculation. For instance, the Court has rejected claims that *Mathews* applies, as a general matter, in the criminal context or in the context for military courts-martial.[89] Even in some civil contexts, the Court has refused to apply *Mathews*.[90]

However, in order to save stare decisis, we do not need a broad theory outlining when the *Mathews* factors apply. We simply need to know that it applies in cases where nonparties lose important legal rights without being present. The Supreme Court has already accepted arguments that *Mathews* applies to these facts in *Connecticut v. Doehr*.[91] *Doehr* is the capstone case in the Supreme Court's preliminary remedies jurisprudence. Over the course of two

87. *Mathews* has frequently been subject to academic criticism. Professor Mashaw immediately critiqued the overly utilitarian nature of the *Mathews* balancing, arguing that the Due Process Clause reflected values other than a purely functional ideal. *See* Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge*: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 50–51 (1976). If one takes this view, of course, my proposed save for stare decisis is unsuccessful. The more rigorous a due process standard one imposes, the more endangered stare decisis becomes.

88. Parham v. J.R., 442 U.S. 584, 599 (1979).

89. *See* Weiss v. United States, 510 U.S. 163, 177 (1994) (military); Medina v. California, 505 U.S. 437, 445 (1992) (criminal). *Weiss* and *Medina* both suggest that the decision not to apply *Mathews* arises out of concerns of deference. In both cases, the Supreme Court selected a less restrictive standard than *Mathews* in order to defer to legislative expertise. *See Weiss*, 510 U.S. at 177 ("Judicial deference thus 'is at its apogee' when reviewing congressional decisionmaking in [the military context].") (quoting Rostker v. Goldberg, 453 U.S. 57, 70 (1981)); *Medina*, 505 U.S. at 445–46 ("[B]ecause the States have considerable expertise in matters of criminal procedure and the criminal process is grounded in centuries of common-law tradition, it is appropriate to exercise substantial deference to legislative judgments in this area."). No such deference argument applies in the stare decisis context.

90. In the case of due process challenges to the sufficiency of the notice provided to a defendant, the Supreme Court has retained a more flexible rule of reasonableness rather than the three-prong analysis from *Mathews*. *See, e.g.*, Dusnebery v. United States, 534 U.S. 161, 168 (2007) ("[W]e have never viewed *Mathews* as announcing an all-embracing test for deciding due process claims.").

91. 501 U.S. 1 (1991).

decades, the Supreme Court refined its analysis of when parties could be deprived of their rights without notice and a hearing.

Starting with *Sniadach v. Family Finance*,[92] the Court found that due process prohibited certain types of ex parte preliminary remedies. While the doctrine wandered through a series of cases,[93] *Doehr* eventually concludes that the three-prong *Mathews* test governs these types of cases.

Doehr involved a challenge to Connecticut's *ex parte* lien procedure, which allowed plaintiffs to attach real property owned by the defendant upon submission of an affidavit demonstrating probable cause to "sustain the validity of the plaintiff's claims."[94] The Court used the *Mathews* framework to invalidate the process.[95] First, the Court found that the temporary cloud placed on the landowner's title constituted a deprivation of property under the meaning of the Due Process Clause.[96] Next, the Court accepted the argument that the risk of erroneous deprivation was high, since the court issuing the lien could only review a one-sided complaint and affidavit. Even though the state provided additional protections, including a quick postattachment hearing, judicial review, and a double damages remedy in case of error, the lack of a preattachment hearing was fatal to the statute.[97] Finally, the Court concluded that the plaintiff's lack of a preexisting interest in the property, as well as the absence of any exigent circumstances, gave him too limited an interest in obtaining the remedy without notice and a hearing.[98]

The decision in *Doehr* to apply the *Mathews* framework in the context of preliminary remedies strongly suggests that it is

92. 395 U.S. 337 (1969).

93. *Sniadach* itself appears to apply a set of rules that varies based on the nature of the property: "[W]ages . . . [are] a specialized type of property." *Id*. at 340. *Fuentes v. Shevin*, in contrast, explicitly states that notice and prior hearing are always required absent "extraordinary situations." 407 U.S. 67, 82 (1972). Just two years later, though, the Court upheld a preliminary remedies statute lacking a preattachment hearing on facts virtually identical to those of *Fuentes*. *See* Mitchell v. W.T. Grant, 416 U.S. 600 (1974). Finally, in 1975, the Court again disapproved of a statute based on the absence of adequate state procedures. *See* N. Ga. Finishing v. Di-Chem, 419 U.S. 601 (1978). The decision to apply *Mathews* here was almost certainly an attempt to clean up precedent that was very difficult to reconcile.

94. *Doehr*, 501 U.S. at 5.

95. *Id*. at 10.

96. *Id*. at 11–12.

97. *Id*. at 12–15.

98. *Id*. at 16.

appropriate to judge stare decisis and preclusion under the same standard. All three of these situations involve a court's determination about the rights of parties who do not appear before them. In the preliminary remedies context, the resolution of the rights of the absent party is precisely the point of the proceeding, while in stare decisis and preclusion, the impact on nonparties is a collateral effect of the original judgment.

Indeed, if anything, the due process concerns surrounding stare decisis and issue preclusion are potentially more troubling than those that arise in the preliminary remedies cases. *Doehr* and its predecessors make clear that due process is implicated even when the initial determination is reversible at a later post-seizure hearing. The existence of a later opportunity to relitigate the court's order is relevant to the due process calculation under the *Mathews* analysis, but it is not determinative.

B. Applying Mathews

How does *Mathews* help explain the difference between the binding effect of stare decisis and issue preclusion? The difference cannot lie in the first step relating to the interest affected by the decision. The party denied victory in the second lawsuit due to the outcome of the first lawsuit is affected exactly the same way regardless of the label applied to the type of preclusion. Nor is there a difference in the second *Mathews* step. Additional process is hardly more likely to correct a prior erroneous decision as a matter of preclusion than as a matter of stare decisis. In fact, there is every reason to believe the opposite is true, especially in questions of historical fact. Revisiting issues will often achieve error correction in the context of precedent but not preclusion. Consider a classic example of issue preclusion involving a three-car accident and a factual question about whether a traffic light was red or green. If two drivers litigate the question of the color of the light to a decision, that factual question will not preclude the third driver in a later lawsuit. Even though memories fade and evidence might disappear in the interim, the third driver will be permitted to relitigate the question of the color of the light in a lawsuit brought years later. As a general matter, however, it is not much more difficult for a court to reconsider a pure question of law years after the question first arose. Viewed through the lens of the second *Mathews* prong, issue

preclusion and precedent may be exactly reversed in their effect on third parties.[99]

Instead, the difference must lie in the third prong—the private or governmental interest. The third prong of *Mathews* focuses on the government or private interest in *not* providing additional process. Some of the classic benefits usually ascribed to stare decisis do not successfully distinguish precedent and preclusion. For instance, stare decisis can be seen as a theory protecting institutional legitimacy by building confidence in courts through preventing different outcomes in similar cases,[100] or as a mechanism of judicial efficiency, allowing courts to avoid relitigating issues when the outcome is likely to be the same the second time around.[101] Neither of these arguments, though, distinguishes precedent and preclusion. If courts lose legitimacy from inconsistent decisions, the cost should be the same regardless of the label applied to the inconsistency. If courts can save costs by avoiding relitigation of issues, the savings is identical for both preclusion and precedent.[102]

99. I thank Margaret Lemos for this insight.

100. *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 865 (1992); Moragne v. States Marine Lines, Inc., 398 U.S. 375, 403 (1970) (identifying as a goal of stare decisis "the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments"). *Cf.* Michael Abramowicz, *Constitutional Circularity*, 49 UCLA L. REV. 1, 27 (2002) (reading *Casey*'s language about judicial integrity as "related to but independent of principles of stare decisis").

101. *See, e.g.*, *Moragne*, 398 U.S at 403 (stare decisis furthers "fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case"); BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 149 (1921) ("[T]he labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case."); William S. Consovoy, *The Rehnquist Court and the End of Constitutional Stare Decisis:* Casey, Dickerson *and the Consequences of Pragmatic Adjudications*, 2002 UTAH L. REV. 53, 54 (2002); Thomas R. Lee, *Stare Decisis in Economic Perspective: An Economic Analysis of the Supreme Court's Doctrine of Precedent*, 78 N.C. L. REV. 643, 648 (2000); Robert von Moschzisker, *Stare Decisis in Courts of Last Resort*, 37 HARV. L. REV. 409, 410 (1924). This argument, of course, requires the cost of revisiting the issue to be balanced against the cost of researching precedent. *See* RICHARD A. POSNER, OVERCOMING LAW 125 (1999).

102. Indeed, these are standard arguments made in favor of issue preclusion when cases involve the same parties. *See* Allen v. McCurry, 449 U.S. 90, 94 (1980) ("[R]es judicata and collateral estoppel relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication."); Montana v. United States, 440 U.S. 147, 153 (1979); 18 WRIGHT ET AL., *supra* note 46, § 4403.

One standard justification of stare decisis does usefully distinguish preclusion and precedent: the value of reliance.[103] From this standpoint, the binding nature of precedent on third parties is precisely the point. In order to induce reliance on court decisions through the operation of stare decisis, we are willing to accept the increased impact on nonparties' abilities to challenge those decisions.[104] Precisely because decisions do not bind nonparties generally, due process prohibits case-by-case exceptions. Drawing this line between preclusion and precedent recognizes that the distinction is mostly a matter of labels.[105] Decisions for which it is valuable to bind nonparties earn the label of precedent. Decisions for which it is not valuable to bind nonparties are merely preclusive.

Noting the difference in terminology, though, does not answer the functional question. For which types of court decisions is the value of binding nonparties sufficiently high that it overcomes the due process bar? A full typology is impossible, of course, but one central result involves the number of nonparties affected. When a

103. *See, e.g.*, *Casey*, 505 U.S. at 856 (1992); Payne v. Tennessee, 501 U.S. 808, 828 (1991); *Moragne*, 398 U.S. at 403.

104. Courts have recognized a wide range of interests under the third *Mathews* prong as supporting a reduced right to process. The first category of interest that courts have recognized as undermining the need for additional process is the simple cost of that process. Procedure is not free, and gains in accuracy come at an administrative cost. Along these lines, the Court recently rejected a challenge to Ohio's process for designating inmates for solitary confinement without the opportunity to call witnesses in a pre-designation hearing, in part because of the expense of providing more extensive procedural opportunities. Wilkinson v. Austin, 545 U.S. 209, 227 (2005); *see also* Los Angeles v. David, 538 U.S. 715 (2003). A second common justification for a reduction in process is exigency. In *Doehr*, the Court recognized that in cases where additional process poses a risk that the burdened party will endure additional injury in the interim, deprivation without a hearing may be appropriate. Connecticut v. Doehr, 501 U.S. 1, 16 (1991). Similarly, in *Gilbert v. Homar*, 520 U.S. 924 (1997), the Court recognized that the need to quickly remove a police officer facing criminal charges justified a lack of a preremoval hearing. Finally, on occasion, courts have recognized a version of reliance as supporting reduced process in the third *Mathews* step. *See* Grayson v. King, 460 F.3d 1328, 1342 (11th Cir. 2006) (governmental interest in finality at third *Mathews* step); Foss v. Nat'l Marine Fisheries Serv., 161 F.3d 584, 589–90 (9th Cir. 1998) (finding the government had an interest in establishing strict application deadlines for access to a fisheries pool in order to maintain predictability and a stable market value).

105. The Seventh Circuit has expressed a version of this view: "It is res judicata that bars the same party from relitigating a case after final judgment . . . . It is stare decisis that bars a different party from obtaining the overruling of a decision. The existence of different parties is assumed by the doctrine, rather than being something . . . outside its reach." Bethesda Lutheran Homes & Servs., Inc. v. Born, 238 F.3d 853, 858 (7th Cir. 2001) (citations omitted); *see also* Barrett, *supra* note 11, at 1041 (noting that *Bethesda* "asserts that the whole point of stare decisis is to function as a kind of nonparty preclusion").

court decision can affect a large number of nonparties, thus potentially inducing reliance, the label "precedent" and the resulting nonparty preclusion make sense.[106] When a decision only matters to a small group, there is little value in binding nonparties because few nonparties will rely on the result. This analysis explains the difference between the treatment of historical facts and legislative facts. Consider the traffic light example discussed earlier. In that example, the only other person with an interest in the result is the third party bringing a later lawsuit; there is little, if any, reliance benefit in making the prior decision binding. By contrast, the decisions on social science data in *Brown* bind widely and induce reliance as a result.

Indeed, the Court has already adopted a version of this analysis in some of its earliest jurisprudence on procedural due process, arising in the context of administrative law. In *Bi-Metallic Investment Co. v. State Board of Equalization*[107] and *Londoner v. City and County of Denver*,[108] the Court wrestled with the application of procedural due process to local administrative decision-making. In *Londoner*, the Court struck down a property tax assessment for street improvements where those affected by the tax did not receive notice or a hearing.[109] In contrast, in *Bi-Metallic*, the Court rejected a due process challenge to a broad-based increase in the valuation of all property, establishing a rule that due process rights are reduced when the deprivation applies broadly rather than narrowly.[110] "Where a rule of conduct applies to more than a few people, it is impracticable that everyone should have a direct voice in its adoption. . . . There must be a limit to individual argument in such matters if government is to go on."[111] *Bi-Metallic* thus represents a very early example of *Mathews* balancing.[112] When the costs of

106. In the related context of the law-fact distinction, Ronald J. Allen and Michael S. Pardo draw a similar line between "matters of general import and highly specific and localized phenomena." Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 NW. U. L. REV. 1769, 1770 (2002).

107. 239 U.S. 441 (1915).

108. 210 U.S. 373 (1908).

109. *Id.* at 386.

110. 239 U.S. at 444.

111. *Id.* at 445. The Court distinguished *Londoner* precisely because it established a legal rule that applied narrowly to a small group of people rather than broadly. *Id.*

112. Some courts incorrectly describe *Bi-Metallic* as establishing a rule that due process protections simply do not apply to broad-based policy decisions. *See* Jackson Court

additional process are too high, deprivation can take place without allowing a hearing. The value of a broad rule of behavior applying generally overpowers the individual right of personalized adjudication. Similarly, when court decisions apply broadly and the reliance values are high, we treat them as precedent rather than merely preclusive.

Aside from the number of nonparties affected by the decision, *Taylor* itself recognizes that particular substantive areas of law may involve heightened reliance interests. Although the *Taylor* Court did not explicitly discuss its due process analysis in terms of *Mathews*, the Court's six exceptions to the general rule of nonparty preclusion can be seen as an application of the *Mathews* framework.[113] In three of the *Taylor* categories (litigation by proxy, assumption of control, and adequate representation), the nonparty being precluded received additional process when compared to the ordinary nonparty, indicating a reduced due process concern under the second *Mathews* prong, while a party agreeing to be bound waives his due process rights. In the last two categories, involving cases of a preexisting substantive legal relationship between the nonparty and a party, i.e., those in privity with a party, and those involving specialized statutory schemes, such as probate or bankruptcy, reliance is the central notion that permits nonparty preclusion. As the Court notes, the need to bind those in privity with parties arose in order to establish clear title to property.[114] Nonparties in privity are not bound because they received additional process; they are bound because the societal value in binding them is increased compared to the ordinary case. The

Condos., Inc. v. New Orleans, 874 F.2d 1070, 1074 (5th Cir. 1989) ("[I]t is well established law that once an action is characterized as legislative, procedural due process requirements do not apply."); U.S. Labor Party v. Oremus, 619 F.2d 683, 690 (7th Cir. 1980) ("No process is required where, as here, a legislative enactment is used to affect the property of an individual."); Rogin v. Bensalem Twp., 616 F.2d 680, 693 (3d Cir. 1980) ("Long ago, the Supreme Court decided that the protections of procedural due process do not extend to legislative actions."). *Bi-Metallic*, though, is explicit in holding that due process requirements apply but are met through the political process rather than individual adjudication. 239 U.S. at 445; *see also* O'Bannon v. Town Court Nursing Home, 447 U.S. 773, 802 (1980) (Blackmun, J., concurring) (applying *Mathews*-style balancing in connection with *Bi-Metallic)*.

113. Taylor v. Sturgell, 128 S. Ct. 2161, 2172–74 (2008).

114. The privity exceptions "originated 'as much from the needs of property law as from the values of preclusion by judgment.'" *Id.* at 2172 (quoting 18 WRIGHT ET AL., *supra* note 46, § 4448). Wright and Miller go on to explain that "[i]n each case, the underlying analysis begins with the requirements of sound property relationships. Preclusion is extended or denied in an effort to protect conflicting property interests rather than an effort to implement concepts of participation or representation." *Id.*

specialized statutory schemes such as probate and bankruptcy are similar in that they involved increased reliance interests. Both are designed to extinguish all claims on the probate or bankruptcy estate in a fixed period of time and because of this enhanced reliance value, the decisions are allowed to bind nonparties.

This notion of nonparty reliance as the central purpose of stare decisis appears in the interpretation of the Federal Rules of Civil Procedure as well. Federal Rules 19 and 24 contain virtually identical language that the federal courts have interpreted very differently. Rule 19 governs compulsory party joinder: a person is "required to be joined if feasible" if, among other requirements, the person "claims an interest relating to the action and is so situated that disposing of the action in the person's absence may as a practical matter impair or impede the person's ability to protect the interest."[115] Rule 24(a) governs intervention as a matter of right: the court must permit a person to intervene who "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest."[116] The current versions of both rules were adopted in 1966 and were consciously drafted to use identical language.[117]

Under both Rule 19 and Rule 24, parties have argued that the stare decisis effect of having a lawsuit proceed in their absence would impair their ability to protect their interests. Under Rule 24, this argument has succeeded in multiple circuits.[118] This split in authority

115. FED. R. CIV. P. 19(a)(1).

116. FED. R. CIV. P. 24(a)(2).

117. FED. R. CIV. P. 24 advisory committee's note; FED. R. CIV. P. 19 advisory committee's note; Benjamin Kaplan, *The Continuing Work of the Civil Committee: 1966 Amendments to the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 400 (1967).

118. *See* Huber v. Taylor, 532 F.3d 237, 250 (3d Cir. 2008) ("[T]he requirements of Rule 19(a) are not satisfied simply because a judgment against Defendants in this action might set a persuasive precedent in any potential future action . . . ."); Schulman v. J.P. Morgan Inv. Mgmt., Inc., 35 F.3d 799, 805 (3d Cir. 1994); Janney Montgomery Scott, Inc. v. Shepard Niles, Inc., 11 F.3d 399, 407 (3d Cir. 1993) ("[W]e are not inclined to hold that any potential effect the doctrine [of stare decisis] may have on an absent party's rights makes the absent party's joinder compulsory . . . ."); NGV Gaming, Ltd. v. Upstream Point Molate, LLC, 355 F. Supp. 2d 1061 (N.D. Cal. 2005); Bellaire Corp. v. Apfel, No. C-2-99-532, 2000 WL 33910112, at *2 (S.D. Ohio 2000) ("[T]he threat of negative precedent is not enough to require compulsive joinder."). *But see* Pulitzer-Polster v. Pulitzer, 784 F.2d 1305, 1310 (5th Cir. 1986). The cases relying on the effect of stare decisis as grounds for joinder under Rule 19 often involve other additional factors indicating that the decision might have an impact on the nonparty. *See* Acton Co. v. Bachman Foods, 668 F.2d 76, 78 (1st Cir. 1982) (combination of

makes little sense from a textual standpoint, but is perfectly reasonable given the purpose of stare decisis as a doctrine of inducing nonparty reliance. Allowing a nonparty to join a lawsuit based on the potential precedential effect recognizes the real consequences of stare decisis, but treating a nonparty as required due to the stare decisis impact of a judgment is nonsensical since the central purpose of stare decisis is to have precisely such an effect.

IV. DUE PROCESS CONSTRAINTS ON STARE DECISIS

So what? When you started reading this Article, you probably thought stare decisis was constitutional and you (perhaps) have been convinced that you were right. The focus on *Mathews* and the role of due process, though, changes the framework through which we see stare decisis. Two implications flow from the *Mathews* analysis. First, as argued above, the key difference between preclusion and precedent comes at the third step, through the value of nonparty reliance. We accept the impact on third parties as part of the effort to create legal rules on which people can rely. This result means, though, that reliance takes a new central role. In particular, the Supreme Court has traditionally viewed reliance as a discretionary policy concern. However, when seen through the lens of *Mathews*, reliance becomes mandatory. Unless the decision in the first suit can and does induce nonparty reliance, stare decisis and preclusion are not different and precedent can run afoul of the due process clause. Stare decisis cannot be saved in cases where reliance is low.

Second, if due process constrains both precedent and preclusion, in situations where parties may raise due process challenges to the binding effects of judgments, nonparties must be able to challenge their precedential effect. Specifically, we generally permit parties to obtain relief from judgments issued by judges who were corrupt. I examine the application of this anticorruption rule in connection with two famous cases of judicial bribery: the Martin Manton scandal on the Second Circuit in the 1930s and the Oklahoma Supreme Court bribery scandal of the 1960s.[119]

preclusion and stare decisis); Rotella v. Mid-Continent Cas. Co., No. 3:08-CV-0486-G, 2008 WL 5272787, at *2 (N.D. Tex. 2008) (combination of stare decisis and preclusion); Tycom Corp. v. Redactron Corp., 380 F. Supp. 1183, 1190 (D. Del. 1974) (combination of stare decisis and contractual rights).

119. Of course, these are hardly the only changes that might result from an explicit focus on reliance interests. *See* Barrett, *supra* note 11, at 1063–64 (noting that reliance interests

A. Reliance, Stare Decisis, and Due Process

The idea that stare decisis is closely linked to reliance is hardly a new concept. Reliance is one of the standard and oldest justifications for the binding effect of precedent. Nineteenth-century case law tended to focus on reliance in the context of property and contract law. Historical analysis has identified this trend in the stare decisis tradition of both the United States Supreme Court[120] and state courts.[121] More recently, the Supreme Court's decision in *Casey* recognized the importance of noneconomic societal reliance. "[F]or two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail."[122] Since *Casey*, the Supreme Court has continued to identify societal reliance as a relevant factor in the stare decisis calculation. The Supreme Court reaffirmed the ongoing vitality of *Miranda v. Arizona*[123] in *Dickerson v. United States*[124] based on its widespread societal acceptance.[125] In *Lawrence v. Texas*, the Supreme Court overruled *Bowers v. Hardwick*,[126] relying in part on the absence of noneconomic reliance.[127]

might vary based on which court issued an opinion and the extent to which a decision conflicts with prior precedent).

120. *See* Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 645, 699 (1999).

121. *See* Polly J. Price, *A Constitutional Significance for Precedent: Originalism, Stare Decisis and Property Rights*, 5 AVE MARIA L. REV. 113, 119 (2007) ("The evidence here suggests that most state judges in the formative era did consider judicial abandonment of precedent potentially to be a retroactive impairment of property rights.").

122. Planned Parenthood v. Casey, 505 U.S. 833, 856 (1992).

123. 384 U.S. 436 (1966).

124. 530 U.S. 428 (2000).

125. *Id.* at 443 ("We do not think there is such justification for overruling *Miranda*. *Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture."). Similarly, in *Randall v. Sorrell*, 548 U.S. 230, 244 (2006), the Court refused to overrule *Buckley v. Valeo*, 424 U.S. 1 (1976), on the theory that Congress and state legislatures relied on the decision in drafting legislation.

126. 478 U.S. 186 (1985).

127. 539 U.S. 558, 577 (2003) ("The holding of *Bowers*, however, has not induced detrimental reliance comparable to some instances where recognized individual rights are involved. Indeed, there has been no individual or societal reliance on *Bowers* of the sort that could counsel against overturning its holding once there are compelling reasons to do so.").

This notion of noneconomic-societal reliance has been the subject of much academic discussion[128]—a dispute outside the scope of this Article. Regardless of the type of interest that counts for reliance purposes, the central result of a due process view on precedent is that reliance is mandatory for applying stare decisis, rather than a discretionary factor in the decision of whether to overrule a prior case. The Supreme Court has generally discussed reliance as one of the special justifications counseling against overruling prior erroneous decisions.[129] A due process framework takes stare decisis and elevates it. Rather than failing to overrule incorrect decisions if reliance exists, courts need to ask if reliance is present before allowing an erroneous decision to bind.

In order to see the effect of this changed perspective, consider two decisions widely viewed as wrongly decided, but followed on a stare decisis theory even though reliance is absent. In *Marshall v. Marshall*[130] and *Ankenbrandt v. Richards*,[131] the Supreme Court recently evaluated the probate and domestic relations exceptions to federal jurisdiction. In both cases, the Court was confronted with dubious old precedent, which it accepted primarily based on stare decisis. In 1859, the Supreme Court had stated in *Barber v. Barber*, "We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony."[132] Similarly, in the 1946 decision in *Markham v. Allen*, the Supreme Court denied federal courts "jurisdiction to probate a will

128. *See, e.g.*, MARK TUSHNET, THE NEW CONSTITUTIONAL ORDER 93 (2004); Consovoy, *supra* note 101, at 64; Tom Hardy, Note, *Has Mighty* Casey *Struck Out?: Societal Reliance and the Supreme Court's Modern Stare Decisis Analysis*, 34 HASTINGS CONST. L.Q. 591, 594 (2006).

129. *See Randall*, 548 U.S. at 244 (stating that "[d]eparture from precedent is exceptional and requires 'special justification'" and identifying reliance as one factor to consider); Planned Parenthood v. Casey, 505 U.S. 833, 854–61 (1992) (listing reliance along with workability, undermining by subsequent cases, and changed facts as one of many factors to consider in the stare decisis analysis); Moragne v. States Marine Lines Inc., 398 U.S. 375, 403 (1969).

130. 547 U.S. 293 (2006). *Marshall* arguably did not approve the probate exception. The Supreme Court instead assumed a probate exception existed but decided that the case before fell outside the scope of any such exception. *Id.* at 308. Despite this approach, the circuits have read *Marshall* as reaffirming the existence of a probate exception and have dismissed cases as a result. *See, e.g.*, Three Keys Ltd. v. SR Util. Holding Co., 540 F.3d 220, 229 (3d Cir. 2008); Lefkowitz v. Bank of N.Y., 528 F.3d 102, 107 (2d Cir. 2007); Wisecarver v. Moore, 489 F.3d 747 (6th Cir. 2007).

131. 504 U.S. 689 (1992).

132. 62 U.S. 582, 584 (1858); *see also Ankenbrandt*, 504 U.S. at 694.

or administer an estate."[133] As a matter of first impression, the traditional tools of statutory interpretation would suggest that these decisions are almost certainly incorrect. Both doctrines establish free-floating exceptions to federal court jurisdiction. However, the jurisdictional statutes in both cases (like all of the federal jurisdictional statutes) are written broadly,[134] and do not include any exception for probate or domestic relations cases. The primary argument that this nontextual reading should control is that the 1789 Judiciary Act was intended to exclude from the equity jurisdiction of the federal courts those matters in which the English chancery courts lacked jurisdiction.[135] This claim, though, is very likely a misreading of English history.[136]

Despite the weakness of the prior precedent, both *Marshall* and *Ankenbrandt* declined to overrule it on stare decisis grounds.[137] Explicitly in *Ankenbrandt*, and implicitly in *Marshall*, the Court viewed this decision as a policy choice,[138] declining to find jurisdiction based on the "special proficiency"[139] of state courts in resolving these types of matters. Neither case discusses any reliance

133. 326 U.S. 490, 494 (1946); *see also Marshall*, 547 U.S. at 310.

134. Jurisdiction in *Barber* was based on the diversity statute, 28 U.S.C. § 1332 (2006), while *Markham* was brought by officers of the United States, and thus jurisdiction was appropriate under 28 U.S.C. § 1345. *See* Markham v. Allen, 326 U.S. 490, 491–92 (1946); *Barber*, 62 U.S. at 584.

135. *See Marshall*, 547 U.S. at 308; *Ankenbrandt*, 504 U.S. at 699–700; *Markham*, 326 U.S. at 494.

136. *See Marshall*, 547 U.S. at 316 n.2 (Stevens, J., concurring) (pointing out that *Bleak House* discusses a probate case in chancery); Peter Nicolas, *Fighting the Probate Mafia: A Dissection of the Probate Exception to Federal Court Jurisdiction*, 74 S. CAL. L. REV. 1479, 1508 (2001) (discussing history of chancery jurisdiction over probate cases); Naomi R. Cahn, *Family Law, Federalism, and the Federal Courts*, 79 IOWA L. REV. 1073, 1089–90 (1994) (discussing history underlying domestic relations exception).

137. 547 U.S. at 308–09; 504 U.S. at 700. Both the probate and the domestic relations exemptions have been widely identified as cases where the Court veered from the traditional tools of statutory interpretation based on concerns of stare decisis. *See, e.g.*, Peter J. Smith, *Textualism and Jurisdiction*, 108 COLUM. L. REV. 1883, 1928 (2008) (noting both *Ankenbrandt* and *Marshall* are "atextual"); Nicolas, *supra* note 136, at 1483–85 (describing the rationale for the probate exception as "mired in confusion" and arguing for a legislative override); Wilson R. Huhn, *Teaching Legal Analysis Using a Pluralistic Model of Law*, 36 GONZ. L. REV. 433, 471 (2001) (noting the "sharp conflict between text and precedent" in *Ankenbrandt*); Cahn, *supra* note 136, at 1083–87 (critiquing *Ankenbrandt*).

138. "Not only is our conclusion rooted in respect for this long-held understanding, it is also supported by sound policy considerations." *Ankenbrandt*, 504 U.S. at 703; *see also Marshall*, 547 U.S. at 308.

139. *Marshall*, 547 U.S. at 308; *Ankenbrandt*, 504 U.S. at 704.

interest in the prior decision, and it would be difficult to take a claim about such reliance interest seriously. Whether viewed through an economic lens or a social reliance lens, it is difficult to imagine anyone shaping their conduct based on the absence of federal jurisdiction in these types of cases, either explicitly or as a background norm.[140] Applying the *Mathews* analysis of due process, these cases become impossible to distinguish from issue preclusion. Due process prohibits binding nonparties to the decisions in *Barber* and *Markham*. While inducing reliance interests generally provides the public benefit that permits binding nonparties as a matter of stare decisis, such reliance is absent here, so precedent collapses into issue preclusion and due process prohibits it from binding.

B. Stare Decisis, Due Process, and Corrupt Process

Collapsing the distinction between preclusion and precedent also eliminates the distinction between those bound by the stare decisis impact of decisions and those bound directly by the judgment. When the process in the initial suit was corrupt, litigants cannot be bound by the judgment. For instance, the Supreme Court has made clear that when judges have a direct financial stake in the outcome of a case, due process prohibits their participation in the decision.[141] Quite sensibly, judgments made by judicial officers who accept bribes cannot be binding on litigants without running afoul of the Constitution. This section looks at the effect of those same decisions on nonlitigants, analyzing the stare decisis effects of corrupt decisions on nonparties. First, I examine the case of Martin Manton, a judge on the United States Court of Appeals for the Second Circuit. Manton accepted bribes from litigants in a number of cases over a series of years. Second, I consider the bribery scandal on the Oklahoma Supreme Court that came to light in the mid-1960s, where multiple judges accepted payments for the deciding vote.

140. The Supreme Court in both *Marshall* and *Ankenbrandt* relied in part on the fact that Congress had failed to overrule the prior statutory interpretation. *See Marshall*, 547 U.S. at 307; *Ankenbrandt*, 504 U.S. at 703. Whatever validity this argument has generally, it is especially weak in cases involving jurisdictional statutes where Congress is very unlikely to pay much attention to the interpretation. Even if this argument is correct here, this is not a reliance argument, simply an argument that stare decisis does not apply. If Congress approves of the interpretation, it means that it was the correct reading of the statute, not that it should be followed even though it was in error.

141. *See* Aetna Ins. Co. v LaVoie, 475 U.S. 813, 824 (1986) (holding that judges with a direct, pecuniary interest in a case must be recused as a matter of due process).

I argue that, as the bribed decisions are invalid with respect to the parties before the court, they are equally invalid with respect to nonparties.

1. Martin Manton

Before the bribery scandal that led to his resignation, Martin Manton was one of the most influential judges in the country.[142] His strong connections to the New York Tammany Hall machine led to early, prestigious judicial appointments.[143] In 1916, President Wilson appointed Manton to the United States District Court for the Southern District of New York when he was only thirty-six, making him the youngest federal judge in the country.[144] Eighteen months after his appointment to the district bench, he was elevated to the Second Circuit.[145] In 1923, President Harding seriously considered Manton for the seat on the United States Supreme Court left open by the resignation of William Day.[146] Members of both the bench and the bar strongly opposed the potential appointment. Judge Learned Hand and Chief Justice Taft both were openly negative about Manton and the Judiciary Committee of the Association of the Bar of the City of New York was unanimously against the appointment.[147] In part due to this opposition, Harding appointed Pierce Butler instead.[148]

Manton became the presiding judge of the Second Circuit after twelve years on the court.[149] As a result of the Great Depression, Manton began to take out large loans from (among others) individuals with cases pending before the Circuit.[150] "In the period

142. For general background on the Manton scandal, see, e.g., JOSEPH BORKIN, THE CORRUPT JUDGE: AN INQUIRY INTO BRIBERY AND OTHER HIGH CRIMES AND MISDEMEANORS IN THE FEDERAL COURTS 25 (Potter 1962); GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 503–13 (Knopf 1994); JOHN T. NOONAN, JR., BRIBES 567–71 (MacMillan 1984); and Allan T. Vestal, *A Study In Perfidy*, 35 IND. L.J. 17 (1959).

143. *See* GUNTHER, *supra* note 142, at 503; NOONAN, *supra* note 142, at 567.

144. NOONAN, *supra* note 142, at 567.

145. *See* GUNTHER, *supra* note 142, at 503; NOONAN, *supra* note 142, at 567.

146. *See* GUNTHER, *supra* note 142, at 503; NOONAN, *supra* note 142, at 567.

147. *See* GUNTHER, *supra* note 142, at 503; NOONAN, *supra* note 142, at 567.

148. *See* GUNTHER, *supra* note 142, at 503; NOONAN, *supra* note 142, at 567.

149. *See* Vestal, *supra* note 142, at 18.

150. *Id.* at 22. In 1934, Manton's net worth increased by about $1.5 million dollars, turning $750,000 dollars in debt into $750,000 in assets. *See* WILLIAM H. REHNQUIST, GRAND INQUESTS 123 (1992).

1932–1938, Manton . . . received large sums of money from litigants in at least a dozen cases."[151] The Manton scandal initially broke on January 27, 1939, in an article in the *New York World-Telegram*.[152] Two days later, Thomas Dewey, the District Attorney for New York County, disclosed a letter he had sent to the Chair of the House Judiciary Committee, identifying six incidents since 1932 in which Manton received money from parties with cases pending before the circuit.[153] Manton resigned almost immediately.[154]

While resignation had customarily provided protection against charges,[155] Manton was indicted in April 1939 for conspiracy to defraud the United States.[156] The indictment identified six Second Circuit cases in which Manton had allegedly taken bribes from litigants.[157] Manton was convicted after a short trial, was sentenced to two years in prison, and was fined.[158] Due to the disqualification of most of the Second Circuit, a special panel was convened to hear Manton's appeal.[159] The Circuit affirmed[160] and Manton served seventeen months in prison.[161]

151. NOONAN, *supra* note 142, at 568. The total amount of money at issue is unclear, with estimates ranging from $435,000 to $600,000. *Id.*; Vestal, *supra* note 142, at 41, n.156.

152. *See* GUNTHER, *supra* note 142, at 504.

153. *See id.*; *Dewey Says Judge Manton Got $400,000 From Litigants; Sends Charges to Congress*, N.Y. TIMES, Jan. 30, 1939, at 1. Gunther suggests that Dewey sent the letter because the two-year statute of limitations on the potential state law charge, income tax evasion, would prevent prosecution on most of the payments. GUNTHER, *supra* note 142, at 504.

154. *Manton Quits as Federal Judge; Defends His Business Deals*, N.Y. TIMES, Jan. 31, 1939, at 1.

155. NOONAN, *supra* note 142, at 568.

156. 18 U.S.C. § 371 (2006); NOONAN, *supra* note 142, at 568; Vestal, *supra* note 142, at 40.

157. *See* BORKIN, *supra* note 142, at 44–45; Vestal, *supra* note 142, at 40. The six cases were *Schick Dry Shaver, Inc. v. Dictograph Products Co.*, 89 F.2d 643 (2d Cir. 1937); *United States* ex rel. *Lotsch v. Kelly*, 86 F.2d 613 (2d Cir. 1936); *Smith v. Hall*, 83 F.2d 217 (2d Cir. 1936); *General Motors Corp. v. Preferred Electric & Wire Corp.*, 79 F.2d 621 (2d Cir. 1935); *Elec. Auto-Lite Co. v. P. & D. Manufacturing Co.*, 78 F.2d 700 (2d Cir. 1935); and *Art Metal Works, Inc. v. Abraham & Straus, Inc.*, 70 F.2d 639 (2d Cir. 1934). *See* United States v. Manton, 107 F.2d 834 (2d Cir. 1939).

158. GUNTHER, *supra* note 142, at 506.

159. The panel consisted of retired United States Supreme Court Justice George Sutherland, Justice Harlan Fiske Stone, and Second Circuit Judge Charles E. Clark, who took the bench in March 1939, after Manton left the court. *See* Vestal, *supra* note 142, at 43 n.167; GUNTHER, *supra* note 142, at 505.

160. United States v. Manton, 107 F.2d 834 (2d Cir. 1939).

161. NOONAN, *supra* note 142, at 569.

After the scandal was revealed, the Second Circuit was confronted with the question of how to handle the cases in which Manton had taken bribes. The Court generally granted rehearing and reviewed the decision with a new panel.[162] Substantial efforts were made to make whole those injured by the judicial misconduct. In *Art Metal Works, Inc. v. Abraham & Straus, Inc.*,[163] Manton wrote an opinion holding that a patent holder forfeited its right to sue for patent infringement by overstating the holding in a prior decision in its favor.[164] Manton had accepted a bribe from the victorious party on the day of the decision.[165] The Second Circuit not only reversed the decision on rehearing,[166] accepting Judge Learned Hand's original dissenting opinion as the new opinion of the court, but Art Metal Works also successfully petitioned Congress for a seven-year extension of the patent term as a result of the delay between the 1932 initial decision and the 1939 reversal on rehearing.[167]

But what about the stare decisis effect of the bribed decisions? Before the bribery was revealed, courts cited the decisions in which Manton took bribes, binding nonparties to the result. Consider, for example, *Electric Auto-Lite Co. v. P. & D. Manufacturing Co.*, in which Manton accepted loans facilitated by counsel for P. & D. Manufacturing, the defendant accused of unfair competition and patent infringement.[168] Electric Auto-Lite, of course, received rehearing when the scandal was revealed.[169] In the interim, though, the decision was binding to the detriment of other litigants. In

162. *See, e.g.*, Elec. Auto-Lite Co. v. P. & D. Mfg. Co., 78 F.2d 700 (2d Cir. 1935) *on reh'g*, 109 F.2d 566, 567 (2d Cir. 1940) (per curiam); Gen. Motors Corp. v. Preferred Elec. & Wire Corp., 79 F.2d 621 (2d Cir. 1935), *on reh'g*, 109 F.2d 615 (2d Cir. 1940) (per curiam); Art Metal Works, Inc. v. Abraham & Straus, Inc., 70 F.2d 639 (2d Cir. 1934), *on reh'g*, 107 F.2d 940 (2d Cir. 1939).

163. 70 F.2d 639 (2d Cir. 1934).

164. *Id.* at 639–40.

165. GUNTHER, *supra* note 142, at 508.

166. Art Metal Works, Inc. v. Abraham & Straus, Inc., 107 F.2d 944 (2d Cir. 1939).

167. *See* BORKIN, *supra* note 142, at 59; Tyler T. Ochoa, *Patent and Copyright Term Extension and the Constitution: A Historical Perspective*, 49 J. COPYRIGHT SOC. 19, 73 & n.338 (2001).

168. *See* Vestal, *supra* note 142, at 31–32; United States v. Manton, 107 F.2d 834, 844 (2d Cir. 1939).

169. Elec. Auto-Lite Co. v. P. & D. Mfg. Co., 109 F.2d 566 (2d. Cir. 1940) (per curiam).

Parrot Speed Fastener Corp. v. E.W. Carpenter Manufacturing Co.,[170] decided just days before the bribery scandal was revealed, a plaintiff in an unfair competition suit lost due to the precedential impact of *Electric Auto-Lite*.[171] If due process would require that rehearing be granted to the plaintiff in *Electric Auto-Lite* itself, it should have the same result for those parties injured by the stare decisis impact of those decisions.

In the end, a due process perspective on stare decisis likely would not change the result in *Parrot Speed Fastener*. Neither the result nor the legal theory in *Electric Auto-Lite* changed on rehearing.[172] There is some reason to believe that the Second Circuit has adopted an informal rule to avoid relying on decisions where Manton's vote made the difference.[173] The result, of course, is not the central question. If we are not willing to accept binding litigants to decisions where judges were bribed, it makes little sense to bind *nonparties* based on stare decisis.

2. Bribery in the Oklahoma Supreme Court

The bribery scandal on the Oklahoma Supreme Court, which broke in the mid-1960s, has received less attention than the Manton scandal, but it was more serious in many ways. Over the course of

170. 26 F. Supp. 622 (D. Conn. 1939).

171. *Id.* at 623.

172. *Parrot Speed Fastener* relied on *Electric Auto-Lite* for the proposition that copying a product does not establish an unfair competition claim unless the purchaser is deceived. 26 F. Supp. at 623. On rehearing, the Second Circuit reaffirmed this proposition. *See Elec. Auto-Lite*, 109 F.2d at 567 ("There is nothing unlawful in copying the unpatented products of another dealer down to the last detail, except in so far as the resulting similarity may become a means of securing his customers through their belief, so induced, that your goods are his.").

173. *See* Mark V. Tushnet, *Clarence Thomas: The Constitutional Problems*, 63 GEO. WASH. L. REV. 466, 477 (1995) (book review) ("It is part of the lore of the Second Circuit that one should not cite cases in which Manton's was the deciding vote."); Benjamin Weiser, *Hang Him Up? The Bad Judge and His Image*, N.Y. TIMES, Jan. 28, 2009, at A1 ("In some ways, the legacy of Judge Manton has already been erased from the legal annals: two federal judges in Manhattan recalled that when they were law clerks, their judges admonished them never to cite Judge Manton's opinions."). If the rule exists, it is not honored consistently. The Second Circuit has on several occasions cited cases where Manton not only was the deciding vote, but wrote the opinion over a dissent. *See, e.g.*, Blue Tree Hotels Inv. Can., Ltd. v. Starwood Hotels & Resorts, Inc., 369 F.3d 212, 224 n.9 (2d Cir. 2004) (citing Biddle Purchasing Co. v. Fed. Trade Comm'n., 96 F.2d 687, 691 (2d Cir. 1938)); Itar-Tass Russian News Agency v. Russian Kurier, Inc., 140 F.3d 442, 448 (2d Cir. 1998) (citing Brooks v. Mandel-Witte Co., 54 F.2d 992, 994 (2d Cir. 1932)); U.S. *ex rel.* Bergen Point Iron Works v. Md. Cas. Co., 384 F.2d 303, 304 (2d Cir. 1967) (citing Tokio Marine & Fire Ins. Co. v. Nat'l Union Fire Ins. Co., 91 F.2d 964 (2d Cir. 1937)).

three decades, beginning in the 1930s, at least four Justices on Oklahoma's highest court took bribes for favorable votes in cases.[174] In 1964 and 1965, Justice Nelson Corn confessed to accepting bribes on behalf of himself and colleagues in at least three cases[175]: *Marshall v. Amos*,[176] *Selected Investment Corp. v. Oklahoma Tax Commission*,[177] and *Oklahoma Co. v. O'Neil*.[178] Justice Corn then passed on the funds he received to those colleagues on the court necessary to guarantee a favorable decision.[179]

As was true in the cases where Manton accepted bribes, the court granted rehearing to those litigants directly affected by the bribes, but there was no consideration for those merely affected by the stare decisis effect of the decisions. Take, for instance, *Oklahoma Co. v. O'Neil*[180] and *Marshall v. Amos*.[181] In *O'Neil*, a group of Florida and Massachusetts investors had purchased shares of an Oklahoma oil and gas lease from the Oklahoma Company.[182] The investors argued that they were entitled to rescind the purchase on the grounds that the husband-and-wife owners of the Oklahoma Company had fraudulently induced the investment by overstating the value of the leases.[183] The trial court found for the investors but the Oklahoma Supreme Court reversed in a 5 to 4 decision, concluding that the investors were not entitled to make use of oral representations when there was a written contract.[184] Justice Corn later confessed that the father of one of the owners of the Oklahoma Company paid him $7,500 and he shared the funds equally with two colleagues on the court, both of whom voted for reversal.[185] After the bribery scandal

174. *See* Johnson v. Johnson, 424 P.2d 414 (Okla. 1967); WILLIAM A. BARRY & JAMES EDWIN ALEXANDER, JUSTICE FOR SALE: SHOCKING SCANDAL OF OKLAHOMA SUPREME COURT (1996); Malcom Hall, Note, *Courts: Scandal in the Oklahoma Supreme Court*, 20 OKLA. L. REV. 417, 418 (1967*); Oklahoma's Shocking Scandal*, TIME MAG., Apr. 16, 1965. The bribes were initially only paid for a sixth vote on the nine-judge court, but by the mid-1950s, Justices were paid to decide cases outright. *See* Hall, *supra* at 418.

175. *See* BARRY & ALEXANDER, *supra* note 174, at 158–59; Hall, *supra* note 174, at 418.

176. 300 P.2d 990 (Okla. 1955).

177. 309 P.2d 267 (Okla. 1957).

178. 333 P.2d 534 (Okla. 1958).

179. *See* BARRY & ALEXANDER, *supra* note 174, at 4.

180. 333 P.2d 534 (Okla. 1958).

181. 300 P.2d 990 (Okla. 1955).

182. *See O'Neil*, 333 P.2d at 538; BARRY & ALEXANDER, *supra* note 174, at 182.

183. *See O'Neil*, 333 P.2d at 538; BARRY & ALEXANDER, *supra* note 174, at 182.

184. *See O'Neil*, 333 P.2d at 545–46; BARRY & ALEXANDER, *supra* note 174, at 182.

185. *See O'Neil*, 333 P.2d at 545–46; BARRY & ALEXANDER, *supra* note 174, at 183.

was revealed, the original decision was vacated and on rehearing, the Oklahoma Supreme Court affirmed the lower court's decision that the investment had been fraudulently induced.[186]

Marshall v. Amos[187] followed a similar path. The case also involved a fraud claim in connection with oil leases. The trial court concluded that the defendants had defrauded plaintiffs of their royalties and held that a constructive trust had been created for the benefit of the plaintiffs.[188] The Supreme Court reversed, again in a 5 to 4 decision, concluding that the standards for a constructive trust had not been met.[189] Justice Corn, though, admitted to receiving $4,000 as a bribe to vote for the defendants and the case was vacated in 1968.[190] The Oklahoma Supreme Court issued a decision affirming the trial court on rehearing in 1970.[191]

For both of these cases, in the decade or more between the initial decision and the court's subsequent reversal on rehearing, these decisions were viewed as binding[192] and litigants lost in part because of the cases' precedential effect. For instance, in *Perdue v. Hartman*[193] the Oklahoma Supreme Court concluded that *Marshall*, among other cases, established a high standard for the creation of a constructive trust that was not met.[194] Along the same lines, the Oklahoma Supreme Court in *Albert & Harlow, Inc. v. Fitzgerald*[195] concluded that *O'Neil* barred the introduction of parol evidence in connection with a written contract and reversed the trial court's finding in favor of the defendant.[196] To the extent that the corrupt decisions precluded litigants by precedent, they were as entitled to rehearing as the parties directly involved in *Marshall* and *O'Neil*.

186. Oklahoma Co. v. O'Neil, 440 P.2d. 978 (Okla. 1968).

187. Marshall v. Amos, 300 P.2d 990 (Okla. 1955).

188. *Id*. at 994.

189. *Id*. at 990.

190. 442 P.2d 500 (Okla. 1968).

191. 471 P.2d 896 (Okla. 1970).

192. *See, e.g.*, Hill v. Field, 384 F.2d 829, 833 n.5 (10th Cir. 1967) (relying on *O'Neil* as establishing Oklahoma law); Peter Fox Brewing v. Sohio Petroleum Co., 189 F. Supp. 743 (C.D. Ill. 1961) (relying on *O'Neil* as establishing Oklahoma law); Barry v. Frizzell, 371 P.2d 460, 463 (Okla. 1962) (quoting *Marshall*, 300 P.2d at 994).

193. 408 P.2d 293 (Okla. 1965).

194. *Id*. at 297.

195. 389 P.2d 994, 996 (Okla. 1964).

196. *Id*. at 997.

Such a result would not dramatically undermine the rule of law. As was true in the Manton cases, rehearing likely would not have changed the result. The central holding of *Marshall* relied on in *Perdue* was that a constructive trust could not be established by a preponderance of the evidence, but instead required a higher level of proof.[197] This is an accurate statement of trust law as a general matter and contemporaneous cases in Oklahoma reached the same result.[198] *Albert & Harlow, Inc.* saw *O'Neil* as holding that absent fraud or mistake, written contracts supersede prior oral discussions and parol evidence cannot change the terms of a written agreement,[199] a version of the parol evidence rule that is uncontroversial.[200]

Moreover, the fact that some litigants are entitled to rehearing does not reopen decisions broadly to collateral attack. In the Oklahoma cases, the Supreme Court drew a distinction between those cases where bribes had been known to take place and those where the corrupt judges were the deciding vote but no bribery was known. Litigants were not able to disqualify the judges in 5 to 4 decisions of the Oklahoma Supreme Court merely because there were bribes in unrelated cases.[201] In the cases where no known bribes took place, the judgments retain their preclusive value and as a result, they should retain their stare decisis effect as well.

V. CONCLUSION

The core claim of this Article is that from the standpoint of due process, preclusion and precedent operate identically on nonparties. Stare decisis survives while preclusion fails precisely because it has a broad impact and allows nonparties to shape their conduct with the expectation that precedent will bind them and others. Since preclusion does not generally apply to those not before the courts, it fails to provide the reliance benefits that allow precedent to survive.

This approach shifts the analysis from a formalist view on preclusion and stare decisis to a functional one. Ronald J. Allen and

197. 408 P.2d at 297.

198. *See* G.G. BOGERT & G.T. BOGERT, THE LAW OF TRUSTS AND TRUSTEES, § 472 (2d ed. 1978); Starnes v. Barker, 340 P.2d 463, 465 (Okla. 1959) ("It is also well settled in this jurisdiction that a constructive trust cannot arise from presumption but must be established by clear, unequivocal and decisive evidence.").

199. *Albert & Harlow, Inc.*, 389 P.2d at 996.

200. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 214–15 (1981).

201. *See* Johnson v. Johnson, 424 P.2d 414, 418 (Okla. 1967).

Michael S. Pardo have taken a similar approach in drawing the distinction between law and fact.[202] They argue that functional considerations, e.g., the relationship between the judge and the jury, determine whether an issue is labeled as legal or factual.[203] The same analysis applies here. Stare decisis is allowed to bind nonparties because that is exactly the function of a doctrine of precedent.

202. Allen & Pardo, *supra* note 106.

203. *Id*. at 1770 ("[T]he quest to find 'the' essential difference between the two that can control subsequent classifications of questions as legal or factual is doomed from the start, as there is no essential difference. . . . [F]unctional considerations underlie the decision to label any given issue 'legal' or 'factual.'").