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Modernizing Res Judicata: Reflections on the
Parklane Doctrine
MAURICE J. HOLLAND*

FROM RULE TO DISCRETION

The enormous expansion in the scope of application of the doctrine of res judicata in recent decades is an often remarked phenomenon.1 With respect to the merger and bar, or claim preclusion,2 branch of the doctrine, this expansion is primarily attributable to the enlarged, transactionally defined concept of a "claim," in lieu of the more restricted "cause of action," as the minimum permissible unit of litigation in modern civil practice.3 With respect to the collateral estoppel, or issue preclusion,4 branch of the doctrine, the widespread and growing repudiation of the requirement of mutuality of estoppel5 is doubtless the single factor

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2 The term "merger and bar" and the more recent coinage, "claim preclusion," are synonymous, and refer to the effect of an adjudication on the merits of a claim in extinguishing the claim, as well as any defense to it, either by merging the claim in the judgment if for the claimant or by barring further suit upon it if for the opponent. See A. VESTAL, RES JUDICATA/PRECLUSION V-43 to V-48 (1969). "Issue preclusion," like its twin, "claim preclusion," see note 4 infra, seems to be gaining ground as the preferred usage and has been adopted in RESTATEMENT (SECOND) OF JUDGMENTS (Tent. Drafts Nos. 1-5, 1973-1978). The law of former adjudication is fraught with confused terminology. Some writers, including the eminent Professor Moore, apply the label "res judicata" only to merger and bar, as distinct from collateral estoppel. See, e.g., 1B J. MOORE, FEDERAL PRACTICE ¶ 0.405[3] (2d ed. 1974). This article will follow the more general practice of using the term to refer to both merger and bar and collateral estoppel.

3 See F. JAMES & G. HAZARD, supra note 1, at 541-57.

4 "Collateral estoppel," or "issue preclusion" in the newer parlance, refers to the preclusive effect of the determination of a given issue in one adjudication upon relitigation of the same issue in subsequent litigation. See 1B J. MOORE, supra note 2, ¶ 0.441[2].

5 The mutuality requirement requires, for collaterally estopping a party from relitigating a previously determined issue, that the opposing party would have been similarly bound by an adverse determination of the same issue. Since it has been generally assumed that only one who is a party, or in privity with a party, can be bound by the outcome of a litigation, the practical effect of the mutuality requirement was, and remains in the diminishing number of jurisdictions which still adhere to it, to confine the operation of collateral estoppel to subsequent litigation between the same parties or their privies. This restriction, when com-
most responsible for its expanded application. In both of its manifestations, the more frequent recourse to res judicata has been encouraged by the steadily increasing concern with backlogged civil dockets, even as it has proved an important means of addressing that concern by enforcing consolidation of litigation in the interest of conserving judicial resources.

This broadening of scope has brought with it a remarkable transformation in the substance and structure of res judicata. Classically, as propounded in such seminal nineteenth-century cases as Cromwell v. County of Sac, res judicata was a doctrine of finality expressed and implemented through a cluster of axiomatic rules of law specific in form, absolute in force, and mandatory in application. These rules were specific in the sense that cases to which they properly applied were thought to be clearly distinguishable from those to which they were not solely by reference to the terms in which they were stated. They were absolute in the sense of controlling results without regard to any competing elements of decision, which is merely to say that they were genuine rules of law. Finally, they were mandatory in that their controlling effect

bined with the doctrine of merger and bar, allows a relatively narrow range of application for collateral estoppel, since it can only be invoked in subsequent litigation between parties or their privies having issues identical to those determined in prior litigation between them, but at the same time not precluded by merger or bar. The expanding requirement that compulsory counterclaims be interposed in the first action arising out of a given transaction or occurrence, combined with the latitudinarian construction accorded to the concept of a single transaction or occurrence, has further limited the application of collateral estoppel in jurisdictions where mutuality of estoppel is still required.

Among the earliest, and surely the most renowned and influential, American opinions explicitly rejecting the mutuality requirement was Bernhard v. Bank of America, 19 Cal. 2d 807, 122 P.2d 892 (1942). Partly because of the eminence of the author of the Bernhard opinion, Justice Roger Traynor, the movement away from mutuality soon gathered force, and it now obtains in an ever diminishing number of jurisdictions. It is currently doubtful that, as Professor Moore asserted in the 1974 edition of his treatise, most federal and state courts still adhere to mutuality. Compare 1B J. MOORE, supra note 2, ¶ 0.412[1], at 1803-06 with id. ¶ 0.412[1], at 119-22 (Cum. Supp., J. Lucas ed. 1978). The triumph of the Bernhard doctrine, as the abandonment of mutuality has come to be known, has been capped by its acceptance in the new Restatement of Judgments. Compare RESTATEMENT OF JUDGMENTS § 93 (1942) with RESTATEMENT (SECOND) OF JUDGMENTS § 88 (Tent. Draft No. 3, 1976).

* 94 U.S. 351 (1876).

7 Much could have, and has, been said by way of defining rules of law and differentiating them from other legal precepts, but for purposes of this article, the author accepts the following definition:

A rule of law is a precept attaching a precisely defined fixed consequence to a definite detailed fact or state of facts. There is no scope given for application to circumstances. The cases are fitted to the straightjacket of the rule, not the rule shaped in its application to the circumstances of fact of the case.

Pound, Discretion, Dispensation, and Mitigation: The Problem of the Individual Special
was not subject to equitable dispensation or qualification on grounds of general notions of fairness or justice in particular cases. In the manner of the formal or, to use the pejorative description later applied to it by Roscoe Pound, “mechanical” jurisprudence of the late nineteenth century, the rules of res judicata were thought to embody in themselves every consideration of fairness or justice which judges were entitled to take into account.

Even a cursory comparison of court opinions and scholarly liter-


A rule of law may, of course, be invalidated, abandoned or limited by exceptions, but within whatever remains of its acknowledged scope of application, it cannot properly be deprived of its full governing effect without ceasing to be a rule.

 Thus, a leading treatise writer on the subject of judgments in the heyday of legal formalism wrote as follows:

That the solemn and deliberate sentence of the law, pronounced by its appointed organs, upon a disputed fact or state of facts, should be regarded as a final and conclusive determination of the question litigated... [i]s more than a mere rule of law. It is more even than an important principle of public policy. It is not too much to say that this maxim is a fundamental concept in the organization of every jural society. For unless every judgment should at some point become final, and have the quality of establishing its contents as irrefragable truth, litigation would become interminable, the rights of parties would be involved in endless confusion, the courts, stripped of their most efficient powers, would become little more than advisory bodies, and thus the most important function of government—that of ascertaining and enforcing rights—would go unfulfilled. ... Out of the multiplicity of controversies that have come before them, presenting a thousand minute shades of difference, [the courts] have framed continually more and more detailed rules for the application of the main principle. In this way... the jurisprudence of the subject has attained a breadth, a depth, and a closeness of texture, which would seem to promise an immediate precedent for the decision of any imaginable case.

2 H. Black, A Treatise on the Law of Judgments § 500, at 599-600 (1891). These pronouncements did not represent merely the musings of a doctrinaire scholar; they were echoed in many judicial opinions of the period, of which the following excerpt from an opinion of Justice Campbell is not unrepresentative:

[T]he maintenance of public order, the repose of society, and the quiet of families, require that what has been definitely determined by competent tribunals shall be accepted as irrefragable legal truth. So deeply is this principle implanted in [Louisiana’s] jurisprudence, that commentators upon it have said that res judicata renders white that which is black, and straight that which is crooked. Facit excurvo rectum, ex albo nigrum.

ature on the subject of res judicata dating from the era of judicial formalism—an era whose apogee occurred in the closing decades of the nineteenth century but whose style of decision persisted well into the twentieth—with their modern counterparts will reveal both the extent and character of the transformation of the doctrine, which can perhaps best be epitomized as the displacement of rule-orientation by a broadly equitable discretion as the predominant mode of decision. In recent decades, there seems to have developed a nearly universal agreement among judges and scholarly commentators alike that res judicata cannot be soundly administered by means of resolute adherence to a battery of self-enclosed rules of the kind so confidently pronounced by Justice Field in *Cromwell v. County of Sac* as constituting the sole and sufficient grounds of decision in cases involving the preclusive effect of judgments. Res judicata has in the process largely sloughed off the marked rule-orientation by which it was characterized in its former, or what might be termed its common law, incarnation. It has become imbued with the administrative traditions of equity litigation, whereby each proceeding has been thought of as a phase in a connected and on-going process, whereby joinder of claims and parties has been treated in a broadly pragmatic and malleable fashion, and wherein matters have been regarded as concluded only in a more or less provisional way, subject to being reopened, re-examined, and readjusted to take account of subsequent events; all in sharp contrast to the common law model of adjudication, which has tended to fragment disputes, handle them in the narrowest, most discrete possible mold, and to encapsulate each proceeding by investing its conclusion with nearly unqualified finality. In a manner strikingly paralleling the contemporaneous change that has occurred in the adjacent field of choice of law, with its

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12 94 U.S. 351 (1876).

13 Cases modifying or dispensing with the black letter precepts of res judicata either in the interest of attaining a just result in a particular case or of giving effect to one or another policy deemed of paramount importance are too numerous to cite. Leading cases of such tenor are collected and approvingly discussed in 1B J. Moore, supra note 2, ¶ 0.405[10]-[11]. See generally Degnan, Federalized Res Judicata, 85 Yale L.J. 741 (1976); Hazard, Res Nova in Res Judicata, 44 S. Cal. L. Rev. 1036 (1971); Semmel, Collateral Estoppel, Mutuality, and Joinder of Parties, 68 Colum. L. Rev. 1457 (1968); Vestal, Res Judicata/Preclusion by Judgment: The Law Applied in Federal Courts, 66 Mich. L. Rev. 1723 (1968); Note, Res Judicata: Exclusive Federal Jurisdiction and the Effect of Prior State-Court Determinations, 53 Va. L. Rev. 1380 (1967).
movement away from preoccupation with certainty of result to be achieved through unblinking application of black-letter rules, as exemplified in the first Restatement of Conflict of Laws, and in the direction of multifaceted analysis and balancing of competing and vaguely defined governmental and private interests and relationships as exemplified in the second,\(^2\) res judicata has assumed many aspects of public law. By this is meant that it has become less exclusively focused upon honoring \emph{a priori} rights of litigants supposedly created by previous judgments, and more concerned with balancing a desire to achieve a "fair" result in individual cases against the public policy dictate of efficient and economical

\(^2\) A comparison of \emph{Restatement of Conflict of Laws} (1934) with \emph{Restatement (Second) of Conflict of Laws} (1971) at almost any point will illustrate the shift away from the rule orientation of the former toward the rather general, often amorphous "principles" of the latter. This and other differences in approach are discussed in Von Mehren, \emph{Recent Trends in Choice-of-Law Methodology}, 60 CORNELL L. REV. 927, 963 (1975). A remarkably similar difference will be apparent from a comparison of \emph{Restatement of Judgments} (1942) with \emph{Restatement (Second) of Judgments} (Tent. Drafts Nos. 1-5, 1973-1978). A prime example is afforded by contrasting the former's mode of expressing exceptions, \emph{e.g.}, \emph{Restatement of Judgments} §§ 69, 71-72 (1942), to the basic rule of collateral estoppel as to questions of fact, \emph{id.} § 68, which were cast in the form of square-cornered rules, with \emph{Restatement (Second) of Judgments} § 68.1 (Tent. Draft No. 3, 1976) ("Exceptions to the General Rule of Issue Preclusion") which states:

Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:

(a) The party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment by an appellate court in the initial action; or

(b) The issue is one of law and (i) the two actions involve claims that are substantially unrelated, or (ii) a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws; or

(c) A new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them; or

(d) The party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action; the burden has shifted to his adversary; or the adversary has a significantly heavier burden than he had in the first action; or

(e) There is a clear and convincing need for a new determination of the issue (i) because of the potential adverse impact of the determination on the public interest or the interests of persons not themselves parties to the initial action, (ii) because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of the subsequent action, or (iii) because the party sought to be concluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.
management of litigation. In choice of law this fundamental alteration has been importantly facilitated by the nearly complete jetisoning of the "vested rights" theory, whereby it was supposed that litigants had an entitlement, almost in the nature of a property right, to application of the substantive law of a particular jurisdiction identified by reference to axiomatic rules. Similarly with res judicata, its leavening by generous admixtures of equitable discretion and permeation by qualifying considerations of public policy have been accompanied by a total abandonment of the once-held notion that the preclusive effects of judgments are matters of substantive right akin to property.

Res judicata, of course, expresses the public policy of economizing judicial resources by enforcing consolidation of related claims and by precluding relitigation of questions once determined. This policy is congruent with the interest of individual litigants, at least prevailing litigants, in finality. In recent decades, largely owing to the broadened scope of both merger and bar, and collateral estoppel, both the public policy underlying res judicata and litigants' interest in finality have come to be opposed by certain countervailing public policies, of which by far the most important has been maintaining the primacy of federal courts in determining questions of federal law and questions of fact as to which federal law is applicable. In many instances, res judicata has yielded to this supposedly paramount policy. For a list of some of the more important cases, see 1B J. Moore, supra note 2, at ¶ 0.405111, at 783-87. Overriding of the normal operation of res judicata tends to occur when it would preclude a federal court, as a consequence of a prior state court judgment, from adjudicating a claim, defense, or issue implicating federal law, particularly in such areas as civil rights or bankruptcy, where the policy of preserving the primacy of federal courts is regarded as especially compelling. The Federal Habeas Corpus Act, 28 U.S.C. §§ 2241-2255 (1976), represents a statutory modification of the normal principles of res judicata in the interest of the latter policy. For a discussion of the general problem, see Currie, Res Judicata: The Neglected Defense, 45 U. Chi. L. Rev. 317 (1978); Theis, Res Judicata in Civil Rights Act Cases: An Introduction to the Problem, 70 Nw. U.L. Rev. 859 (1976); Note, The Preclusive Effect of State Judgments on Subsequent 1983 Actions, 78 Colum. L. Rev. 610 (1978); Note, The Collateral Estoppel Effect of Prior State Court Findings in Cases Within Exclusive Federal Jurisdiction, 91 Harv. L. Rev. 1281 (1978); Note, Developments in the Law: Section 1983 and Federalism, 90 Harv. L. Rev. 1133, 1330 (1977).

While the notion that prevailing litigants have something akin to a vested or property right in the preclusive effect of a judgment is not wholly implausible with respect to merger and bar, it would strike any student of modern res judicata as preposterous if applied to collateral estoppel, and it certainly finds no recognition in modern decisions. In the era of rule-oriented res judicata, however, such a conception does seem to have prevailed. Thus, a leading treatise writer asserted:

Every judgment directly enforces some right or suppresses some wrong, thereby producing the end sought by every humanely conceived law. Its incidental results, extending far beyond the time at which it is pronounced, and the parties whose rights it determines, attach themselves to property or to privies in blood or in estate, and continue in binding force and obligation for an indefinite period of time.

1 A. FREEMAN, A TREATISE OF THE LAW OF JUDGMENTS § 1, at 3 (1925); accord, Kessler v. Eldred, 206 U.S. 285, 288-89 (1907):

This judgment, whether it proceeds upon good reasons, whether it was right or wrong, settled finally and everywhere . . . that Kessler had the right to
RES JUDICATA

By its decision in *Parklane Hosiery Co. v. Shore*, the Supreme Court has lent important renewed impetus to the trend toward investing collateral estoppel with the raiment of equitable discretion. The occasion for the Court's approval of trial courts exercising "broad discretion" in deciding whether to permit the invocation of collateral estoppel was also the occasion for its first explicit approval of so-called offensive issue preclusion under circumstances of non-mutuality of estoppel. The case affords an apt illustration

manufacture, use and sell the electric cigar lighter before the court. The court, having before it the respective rights and duties of the parties to the litigation, conclusively decreed the right of Kessler to manufacture and sell his manufactures free from all interference from Eldred by virtue of the Chambers patent, and the corresponding duty of Eldred to recognize and yield to that right everywhere and always. If rights between litigants are once established by the final judgment of a court of competent jurisdiction those rights must be recognized in every way by those who are bound by it.

The New Jersey Court of Chancery put the matter even more emphatically in Mayor of Patterson v. Baker, 51 N.J. Eq. 49, 59, 26 A. 324, 327 (1893):

"Collateral estoppel is not a mere rule of procedure, limited in its operation, and only to be enforced in cases where a defeated suitor attempts to litigate anew a question once heard and decided against him, but a rule of justice, unlimited in its operation, which must be enforced whenever its enforcement is necessary for the protection and security of rights, and for the preservation of the repose of society.

Aside from the almost mystical reverence accorded to judgments and their asserted finality during the era of formal jurisprudence, it is difficult to account satisfactorily for the association of collateral estoppel with vested rights. It might have stemmed in part from the fact that, prior to the adoption in 1938 of the Federal Rules of Civil Procedure and the subsequent adoption by many states of rules modeled upon them, very few American jurisdictions required counterclaims as such, however closely bound up with the principal claim pleaded in an action, to be interposed therein. R. MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 135-39 (1952). Absent such a requirement as a matter of merger or bar, the difficulty of distinguishing true counterclaims from affirmative defenses, set-offs, and recoupments, all of which did have to be pleaded in the first instance, might well have encouraged the view that very stringent enforcement of the rubrics of collateral estoppel was necessary to ensure that parties were not deprived of the direct benefits of their judgment, clearly a matter of substantive right, through relitigation of issues determined in support thereof under the guise of a counterclaim asserted in a subsequent independent proceeding. In any event, the detachment of collateral estoppel in recent decades from substantive rights has proved important for the shift from rule-orientation to discretion, since our legal system is more comfortable with avowed discretion in matters denominated as procedural. Modern res judicata doctrine recognizes, at most, a procedural interest, but surely not a vested right, of a prevailing party not to be required to relitigate an issue previously determined in his favor, just as it recognizes a public interest in avoiding the costs of repetitious adjudication. Interests, unlike rights, can be legitimately curtailed or subordinated to opposing interests when the sound exercise of judicial discretion calls for such a result.

18 Id. at 331.
19 The case that gave its name to the doctrine whereby mutuality of estoppel was dispensed with as a requirement for collateral estoppel, Bernhard v. Bank of America, 19 Cal.
of how each successive step in broadening the application of preclusion techniques tends to be accompanied by a corresponding expansion of the parameters of permissible discretion within which they are to be implemented.

THE Parklane Decision

It would be difficult to imagine a set of circumstances more auspicious for recourse to non-mutual offensive issue preclusion than that of Parklane. The case involved a stockholder class action

2d 807, 122 P.2d 892 (1942), involved what came to be known as defensive issue preclusion or defensive non-mutual collateral estoppel. This term refers to the situation wherein a claimant, usually a plaintiff, against whom an issue was determined in litigation against a given opponent is then precluded from relitigating that issue in a subsequent action against a different opponent. The latter is said to invoke preclusion against relitigation of the issue common to the initial and subsequent actions defensively. The traditional requirement of mutuality would, generally, have disallowed any use of collateral estoppel, i.e., issue preclusion, unless the opponent in the subsequent action was the same as, or in privity with, the party in whose favor the common issue was determined in the initial litigation.

In the years immediately following Bernhard, most jurisdictions which adopted its doctrine limited the dispensation with the mutuality requirement to cases involving defensive preclusion. See Note, Developments in the Law: Res Judicata, 65 HARV. L. REV. 820, 862-65 (1952). By the 1960's, however, a considerable number of state and lower federal courts had abandoned the distinction between defensive and offensive preclusion, and had thus abolished the mutuality requirement across the board. See 1B J. MOORE, supra note 2, ¶ 0.412[1], at 1805-12; id. ¶ 0.411, at 107-11 (Cum. Supp. Lucas ed. 1978). In 1967, the New York Court of Appeals pronounced the mutuality requirement “a dead letter” in that jurisdiction. B. R. DeWitt, Inc. v. Hall, 19 N.Y.2d 141, 225 N.E.2d 195 (1967). This development, sanctioning offensive preclusion under circumstances of non-mutuality, meant that a claimant not a party to an initial action wherein an issue was determined adversely to his present opponent could invoke preclusion as to that issue affirmatively or offensively against such opponent provided the latter was a party to the initial action and had had a “fair and full opportunity” to litigate the common issue therein.

The Supreme Court denied certiorari in several of the lower federal court cases wherein non-mutual collateral estoppel was permitted to be used defensively or offensively. See, e.g., Zdanock v. Glidden, 327 F.2d 944 (2d Cir.), cert. denied, 377 U.S. 934 (1964) (offensive collateral estoppel). In 1971, the Court overruled Triplett v. Lowell, 297 U.S. 638 (1936), and approved the defensive use of collateral estoppel against a patentee in an infringement action on the basis of a determination of invalidity of the same patent in a prior action by the same patentee against a different alleged infringer. Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971). Justice White's opinion stressed that there was no longer a rule against, or in favor of, defensive preclusion absent mutuality of estoppel, but that the question was to be determined on the basis of whether the party against whom preclusion is urged had “a fair opportunity procedurally, substantively and evidentially to prove his claim the first time.” Id. at 333 (quoting Eisell v. Columbia Packing Co., 181 F. Supp. 298, 301 (D. Mass. 1960)). Although much of the language of the Blonder-Tongue opinion was addressed to considerations especially pertinent to patent infringement litigation, taken as a whole it could be said to have fairly anticipated the generalized approval of non-mutual collateral estoppel, to be implemented with discretion on a case-by-case basis, along the lines finally approved in Parklane.
against Parklane Hosiery Company, Inc. and several of its officers, directors, and controlling shareholders, in which the defendants were alleged to have violated various sections of the Securities Exchange Act of 1934\textsuperscript{20} and pertinent regulations by issuing a false and misleading proxy statement in connection with a "going private" merger. The complaint, filed in the U.S. District Court for the Southern District of New York, sought damages, rescission of the merger, and recovery of costs. Prior to the trial of this action, but subsequent to its commencement, the Securities and Exchange Commission (SEC) obtained, in a separate proceeding for injunctive relief in the same court, a declaratory judgment to the effect that the proxy statement in question contained materially false and misleading statements.\textsuperscript{21} In the SEC proceeding, only the corporation and its president, who was also the owner of a controlling block of shares, were named as defendants. Invoking this declaratory judgment, the plaintiff in the shareholder's action moved for summary judgment on the issue of the material falsity and misleading character of the proxy statement. The district court denied the motion on the ground that to collaterally estop the corporation and its president from relitigating this issue would deprive them of their right to a jury trial as guaranteed by the seventh amendment, since no jury had determined this question in the SEC litigation.\textsuperscript{22}


\textsuperscript{21} SEC v. Parklane Hosiery Co., 422 F. Supp. 477 (1976), aff'd, 558 F.2d 1083 (2d Cir. 1977). The injunction was denied because the district judge found no likelihood of future violations. Appointment of special counsel to appraise the Parklane shares was also refused.

\textsuperscript{22} Since damages, among other forms of relief, were sought in the stockholders' action, a jury would, at the behest of any party thereto, have determined anew all issues bearing upon defendants' liability, including the issue of whether the proxy statement was materially false and misleading, which was decided adversely to the defendants in the SEC injunction suit. See Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962); Beacon Theatres v. Westover, 359 U.S. 500 (1959). The estoppel sought by plaintiff in the stockholders' action would not, of course, have extended to those officer and director defendants not joined in the SEC proceeding. To obviate this difficulty, the plaintiff agreed that, in the event the motion for partial summary judgment were granted, he would drop the additional, non-common defendants. Shore v. Parklane Hosiery Co., 565 F.2d 815, 821 n.4 (2d Cir. 1977). Clearly the remedy of rescission of the merger could be granted against the corporation and its controlling shareholder alone, but since the money damage liability asserted was joint and several, a serious question might arise as to whether, under Federal Rule of Civil Procedure 19(a), the additional defendants could be properly dismissed, at least if the remaining individual defendant would be entitled to contribution from among those who were dropped. This is because the practical effect of a right to contribution is to convert joint and several liability into joint liability considered from the perspective of joint tortfeasors \textit{inter se}. Since the district court denied the estoppel motion and published no opinion, it can only be surmised that this issue was not addressed by it. Neither the court of appeals nor the Supreme Court adverted to it in their respective opinions. An alternative to dropping the additional defen-
The order denying the motion was certified as a controlling question of law for purposes of interlocutory appeal, and the court of appeals reversed, holding that the offensive use of collateral estoppel sought by the plaintiff stockholders was fair, in accordance with sound judicial policy, and not violative of the seventh amendment. The Supreme Court granted certiorari in order to resolve an intercircuit conflict between the court of appeals decision in this case and the Fifth Circuit decision in Rachal v. Hill, and approved the former.

Justice Stewart's opinion for the Court forthrightly acknowledged the important respects in which non-mutual collateral estoppel differs when used defensively, as approved in Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, as opposed to when it is invoked offensively. First, allowing a defensive use of the technique will conduce to joinder in a single action of as many defendants as venue and jurisdictional limitations permit by a plaintiff having related claims against them. This is because if a plaintiff proceeds against defendants singly, the first adverse determination of the common issue will impede, in fact will most often wholly defeat, prosecution of related claims against the remaining defendants, whereas a favorable determination will not be binding upon the latter. When offensive use is permitted, a number of defendants would have been to hold that their interests were so closely identified with those of the corporate and controlling shareholder defendants in the SEC proceeding as to warrant precluding them on that basis, though there appears to be no direct authority for such an extension of the notion of "privity." Another alternative would have been to sever the trial of the claims against the additional defendants, pursuant to Federal Rule of Civil Procedure 42(b), but such a step would have forfeited the gains in judicial economy achieved by estopping the common defendants.

26 435 F.2d 59 (5th Cir. 1970). This decision was criticized, with elegant learning, in Shapiro & Coquillette, The Fetish of Jury Trial in Civil Cases: A Comment on Rachal v. Hill, 85 Harv. L. Rev. 442 (1971). The historical analysis in this article was drawn upon substantially by the Supreme Court in its Parklane opinion.
28 By "related claims" is meant claims with one or more identical issues of fact or law. An apt illustration is afforded by Blonder-Tongue, id., where the issue of patent validity, a mixed question of law and fact, would obviously be identical as it arose in each claim of infringement.
29 Issues of fact or law common to a number of related claims will nearly always be those bearing upon, and often dispositive of, liability, as opposed to the measure of recovery.
30 The Parklane opinion reiterated the traditional doctrine that a judgment cannot bind one who was not a party, or in privity with a party. 439 U.S. at 327 n.7 (citing Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971), and
plaintiffs with related claims against one or more defendants will
derive incentive therefrom to avoid consolidation or joinder to the
extent possible, since the first favorable determination of a com-
mon issue will inure to the benefit of any plaintiffs whose actions
have not gone to judgment. This consideration was not present in
Parklane, however, as the stockholder class which sought the ben-
efit of collateral estoppel from the declaratory judgment in favor of
the SEC commenced its action before the Commission’s and was
statutorily prevented from consolidating its litigation with the
latter’s.\textsuperscript{31}

Additionally, and more pertinent to the present discussion, off-
defensive non-mutual collateral estoppel is fraught with possibilities
for unfairness to parties against whom it is utilized which are not
inherent in its defensive counterpart. These possibilities all derive
from the fact that a defendant faced with a number of related
claims against him will typically have little control over the nature
of the forum in which the first claim is litigated, or the magnitude
of the stakes therein. A defendant in such a situation might be
lacking either certain procedural advantages or sufficient incentive
to contest the adjudication of issues which turn out to be identical
with those which could prove dispositive in subsequent litigation of
related claims, where the size of the recovery sought and the avail-
ability of procedural devices, such as discovery, might prompt
stouter resistance or facilitate the defense. Of course, the problem
of inadequate incentive to contest the first adjudication of common
issues will disappear once the propriety of offensive non-mutual
collateral estoppel is established, at least when, as in Parklane, the
likelihood of related claims involving larger stakes is apparent to
the defendant from the outset.

Aside from the matter of jury trial, Justice Stewart’s opinion
rightly noted that none of the possibilities for unfairness to the
defendants from allowance of the estoppel urged unsuccessfully in
the district court were presented by the circumstances of Park-
lane.\textsuperscript{32} The SEC proceeding, from which preclusion was sought,
was litigated in the same court as the stockholder suit, wherein

\textsuperscript{31} 15 U.S.C. § 78u(g) (1976) provides in substance that no other action may be consoli-
dated with one instituted by the SEC without the latter’s consent. The SEC’s policy is to
deny such consent. Brief for the United States and the Securities and Exchange Commis-
sion as Amici Curiae 30-31.

\textsuperscript{32} 439 U.S. at 331-32.
preclusion would operate to dispose of the common liability issues. Thus, not only were the same opportunities for discovery and other procedural advantages available to the defendants in the SEC as in the stockholder action, but there could be no unfairness on grounds of a remote or otherwise inconvenient venue in the former proceeding. Further, the stockholder action, with the magnitude of the claims involved, was not merely foreseeable; it was actually pending at the time the SEC suit was tried. The defendants could not, to be sure, foresee with certainty that offensive collateral estoppel as invoked against them would ultimately be approved, but any unfairness on that score amounted to nothing more than what is inherent in a regime of judicial law-making in which prospective overruling is the exception rather than the rule. Moreover, the precedents in the Supreme Court and Second Circuit upon which defendants might have relied to shield them from such estoppel all long antedated Blonder-Tongue and had been so eroded by the general shift in preclusion doctrine which culminated in that decision that neither court felt obliged to accord them the dignity of an explicit overruling.

Because the circumstances of Parklane argued so strongly as a matter of procedural fairness and judicial policy in favor of estopping the defendants common to both the SEC and the stockholder actions, most of the discussion in both the Supreme Court and court of appeals opinions was directed to the constitutional issue presented by the case.\(^3\) That issue was whether, consistently with

\(^3\) Of all the judges and justices who participated in the Parklane decision at the district court, court of appeals, and Supreme Court levels, only Justice Rehnquist opposed the decision on nonconstitutional as well as constitutional grounds. There was no published opinion from the district court judge. His order, however, is set forth in the course of the court of appeals opinion as follows: "The within motion is denied. Rachal v. Hill, 435 F.2d 59 (5th Cir. 1970). So ordered." 565 F.2d at 818. In Rachal collateral estoppel was denied under the supposed compulsion of the seventh amendment right to jury trial. The court of appeals opinion reads as though only the constitutional impediment, which it concluded did not exist, was worth extended discussion, so strong was the case for estoppel on the basis of nonconstitutional considerations. Justice Rehnquist did not see it that way and objected to the "respondent's 'heads I win, tails you lose' theory of this litigation." 439 U.S. at 338 (Rehnquist, J., dissenting). This recourse to a gambling metaphor recalls, though presumably not intended to do so, Jeremy Bentham's oft-quoted aspersion upon the mutuality doctrine as "a maxim which one would suppose to have found its way from the gaming-table to the bench." 7 WORKS OF JEREMY BENTHAM 171 (J. Bowring ed. 1843). Whether one believes, with Justice Rehnquist, that there is something inherently unfair about permitting a litigant to benefit from a determination of an issue in a prior adjudication wherein he invested nothing, when an adverse determination could not be utilized by his opponent, depends upon how far one is to carry over essentially intuitive notions of fairness from the context of games and sports to that of litigation. In games, the outcome is usually supposed to have no external determinant corresponding to the controlling rules of law and the actual facts in
RES JUDICATA

the seventh amendment, the defendants against whom damages,

litigation. Furthermore, games are commonly regarded as being properly conducted when victory goes to the participant having the greatest skill, exerting the greatest effort, or, perhaps, the one most favored by luck. None of these attributes is, of course, ideally true of litigation and hence any objection to non-mutual collateral estoppel, whether offensive or defensive, deriving from game analogies would seem to be misplaced. There are, to be sure, possibilities of collateral estoppel, particularly of the offensive variety, functioning unfairly, but these all arise from the internal dynamics of multiparty litigation. They were all addressed in Justice Stewart's opinion for the Court. See text accompanying notes 46-47 infra.

A demonstration of the essential unfairness of collateral estoppel, especially under circumstances of non-mutuality, by recourse to probability theory rather than game analogies was recently attempted in Note, A Probabilistic Analysis of the Doctrine of Mutualy of Collateral Estoppel, 76 Mich. L. Rev. 612 (1978). Here it is ingeniously argued that, even if courts are Solomonically wise in administering non-mutual collateral estoppel on a discretionary basis and under the broad standard of “a full and fair opportunity to litigate” subsequently adopted in Parklane, the abandonment of the traditional mutuality requirement will nonetheless result in an unfair allocation of the risk of erroneous outcome against the common party. This analysis begins with an assumption which cannot be denied; namely, that the outcome of any given litigation might be “erroneous” either because of misapprehension of the actual facts or misapplication of the law. Since no number of repeated retrials of the same case would, as a theoretical matter, totally avoid the possibility of error or indicate which among divergent outcomes was “correct” in the sense of being in accord with the actual facts and in conformity with pertinent legal standards, an erroneous outcome is defined for purposes of this analysis as one contrary to the majority outcome that would obtain were a particular claim retried an infinite number of times. The ratio of correct, i.e., majority, outcomes to incorrect, i.e., minority, outcomes, can of course never be known but, hard as it may be for one unversed in the arcana of probability theory to accept, this is irrelevant as long as one agrees that, as to any single trial of a claim, there is some statistical possibility that its outcome will differ from the majority of outcomes were there an infinity of retrials.

One example given posits that a plaintiff has related claims against 10 defendants of the value of $100 each and that if these claims were retried an infinite number of times the plaintiff would win 50% of the time. Thus, at any single trial the plaintiff has a 50% chance of winning. This means that if the 10 claims were consolidated in a single trial, or if they are tried separately without defensive collateral estoppel being operative, the plaintiff will have a statistical expectancy of recovery of the value of $500. If, however, defendants in litigation subsequent to the first one to go to judgment against the plaintiff are given the benefit of defensive collateral estoppel, the plaintiff's statistical expectancy of recovery is reduced to $100. This note also asserts, correctly from a probabilistic standpoint, that when the situation is reversed and 10 plaintiffs are assumed to have related claims, of a value of $100 each, against one defendant, allowance of offensive collateral estoppel to plaintiffs following the first litigation to go to judgment against the defendant will increase the latter's statistical expectancy of liability from $500 to $900. The conclusion reached in this note is that offensive and defensive collateral estoppel are equally unfair in disproportionately allocating the risk of erroneous outcomes against the common party.

Though, as far as this author is qualified to say, the statistical demonstrations in the note are sound, its conclusion is flawed in not taking sufficient account of the realities of litigation or procedural context. Even if its statistical premises are accepted, the note's conclusion that defensive collateral estoppel places an error risk on plaintiffs equal to that which offensive collateral estoppel places on defendants is not legally realistic. That is so, first, because plaintiffs have much more freedom to join multiple defendants in a single action, and thereby avoid the reduction in their statistical expectancy of recovery consequent upon allowance of defensive collateral estoppel, than defendants have to consolidate actions
among other forms of relief, were sought in the stockholder action could be collaterally estopped from relitigating before a jury the material falsity of the proxy statement based on the prior adverse determination of the question by the judge as trier of fact in the equitable action brought by the SEC.

The Court accepted the basic premise contended for by the defendants, namely, that the scope and meaning of the jury-trial right must be ascertained by reference to the so-called "historical test," under which the necessary inquiry is whether a given claim, although unknown in England and America at the time the Bill of Rights was adopted, is in essence sufficiently similar to what was comprehended in the term "suits at common law" as to render the seventh amendment guarantee applicable. There was no question but that the stockholders' claim in Parklane was, in this sense, essentially a "suit at common law," since money damages were sought as a remedy for statutorily defined fraud. If the defendants were properly denied a jury trial in this case, that could only be because common law courts in the late eighteenth century would have given preclusive effect to a prior determination of a common issue by a court of equity. Relying in part upon its own prior decisions which either held or assumed that there was such an effect,

brought against them by plaintiffs with related claims, and thereby avoid the enhancement of their statistical expectancy of liability consequent upon allowance of offensive collateral estoppel. Second, it is difficult, if not impossible, to conjure up cases where a single plaintiff would have claims against multiple defendants closely enough related for collateral estoppel to apply but at the same time so unrelated that recovery against one or more of the latter would not preclude or reduce recovery against the others by virtue of the rule of damages against double recovery for the same harm. This rule significantly diminishes the difference between the plaintiff's statistical expectancy of recovery as that is affected by the allowance or disallowance of defensive collateral estoppel. No such diminution is applicable to offensive collateral estoppel, since when multiple plaintiffs rather than multiple defendants are involved there is no rule corresponding to the one against double recovery to narrow the difference.

These objections aside, it is likely that notions derived from probability theory are as little pertinent to problems of procedure as are analogies from games. This is because the validity of litigation rests upon premises which have little in common with the premises of statistics. While the probabilistic risk of error must be acknowledged, the outcome of a single trial free from legal error and abuse of judicial discretion is commonly regarded as entitled to conclusive effect, even when human life is at stake. If a verdict in a single trial of a criminal case is sufficient to send the defendant to the gallows, it is difficult to see why a verdict in a single trial of a civil case should not be taken as reliable enough to dispose, in whole or in part, of related claims.

34 "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. . . ." U.S. CONST. amend. VII.
36 439 U.S. at 333 (citing Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959) (collateral estoppel effect assumed)); Smith v. Kernochen, 48 U.S. (7 How.) 198 (1849) (prior de-
and in part upon the historical research of David Shapiro and Daniel Coquillette, the Court concluded that the Parklane defendants could be constitutionally deprived of trial to a jury of the liability issues previously adjudicated in the SEC proceeding, and hence that the seventh amendment posed no obstacle to collateral estoppel. In so concluding, Justice Stewart's opinion reiterated prior language of the Court to the effect that the seventh amendment "[w]as designed to preserve the basic institution of jury trial in only its most fundamental elements, not the great mass of procedural forms and details." This distinction between fundamentals and incidentals as related to what the seventh amendment preserves was required because it was conceded on all sides that, under eighteenth-century practice and until the recent general abandonment of the mutuality doctrine, collateral estoppel could not have been invoked against the Parklane defendants, without which they would have been entitled to jury trial. The precise

termination in equity proceeding held to have collateral estoppel effect in subsequent legal action; Hopkins v. Lee, 19 U.S. (6 Wheat.) 109 (1821) (prior determination in equity proceeding held to have collateral estoppel effect in subsequent legal action).

77 439 U.S. at 333 (citing Shapiro & Coquillette, supra note 26, at 448-58). Under eighteenth century English practice, it seems that equity courts did not reciprocate by according preclusive effect to prior determinations in common law actions. See Millar, The Premises of the Judgment as Res Judicata in Continental and Anglo-American Law, 39 Mich. L. Rev. 238 (1940). This has no bearing, of course, upon the seventh amendment issue presented in Parklane.

78 439 U.S. at 337 (quoting Galloway v. United States, 319 U.S. 372, 392 (1943)).

79 While conceding that it is only "the substance of the right of jury trial that is preserved . . .," 439 U.S. at 344 (Rehnquist, J., dissenting), Justice Rehnquist, was "unwilling to accept the Court's presumption that the complete extinguishment of petitioners' right to trial by jury can be justified as a mere change in 'procedural incident or detail,'" id. at 350. His opinion emphasized that prior decisions of the Court had established the peculiarly historical nature of the right to jury trial, and stressed the point that willingness to modify that right to accomodate ongoing procedural innovation would inevitably lead to its erosion. His reasoning was remarkably similar to that of Justice Marshall's dissent in Colgrove v. Battin, 413 U.S. 149 (1973), a case which held a six-person jury empanelled pursuant to a local rule consistent with the seventh amendment, a holding in which, oddly enough in view of his historicist Parklane dissent, Justice Rehnquist joined. The thrust of Justice Marshall's dissent in Colgrove was that considerations of efficiency and functionality cannot be imported into areas necessarily determined by history. Id. at 166-88. It might be thought at least equally odd that Justice Stewart, the author of the Parklane opinion, joined in Justice Marshall's historicist Colgrove dissent, and that the latter registered no dissent in Parklane.

If one is willing to grant the seventh amendment propriety of directed verdict and summary judgment in their modern forms merely because of their vague antecedents in 1791 common law practice, as Justice Rehnquist appears to be, it seems difficult to cavil at non-mutual collateral estoppel as having any greater effect in extinguishing, as opposed to incidentally depriving a litigant of, the right to jury trial. The difference between impermissibly extinguishing, and incidentally curtailing, entitlement to jury trial is analytically meaningless; these are simply conclusory expressions registering approval or disapproval of the re-
question was whether there is any meaningful difference between estopping a defendant, and hence depriving him of a jury determination when the precluded issue was previously resolved by a judge, at the behest of a party who was a plaintiff in the prior proceeding—a technique that had already been found to pass constitutional muster—\(^{40}\) as opposed to when the estoppel is asserted by a stranger to the earlier litigation.\(^{41}\) Concluding that there is not, Justice Stewart wrote:

The petitioners have advanced no persuasive reason, however, why the meaning of the Seventh Amendment should depend upon whether or not mutuality of parties is present. A litigant who has lost because of adverse factual findings in an equity action is equally deprived of a jury trial whether he is estopped from relitigating the factual issues against the same party or a new party. . . . In either case there is no further factfinding function for the jury to perform, since the common factual issues have been resolved in the previous action.\(^{42}\)

As a logical matter, it is difficult to find fault with this proposition, which was critical to the Court’s disposition of the seventh amendment question. The only caveat that might be noted is that, as long as collateral estoppel was confined within the banks of mutuality, cases in which it would work to deprive a party of a jury trial when it would otherwise be available were extremely rare. That is because, in by far the greater number of situations where one party has legal and equitable claims against another so closely


\(^{41}\) The question of the right to jury trial in the context of non-mutual collateral estoppel would seem to be no different whether it is invoked offensively or defensively. The critical factor is whether allowing the estoppel on the basis of prior findings by a judge deprives the party against whom it is invoked of the opportunity to have the issue passed upon by a jury in subsequent proceedings. The Supreme Court, when it first approved defensive, non-mutual collateral estoppel in Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971), did not advert to the jury trial question, apparently because neither party had demanded a jury in the district court even though money damages were sought in addition to an injunction. There was no published opinion of the district court in Blonder-Tongue, but the court of appeals opinion refers at several points to “findings” on various issues below. See University of Illinois Foundation v. Blonder-Tongue Laboratories, Inc., 422 F.2d 769 (7th Cir. 1970).

\(^{42}\) 439 U.S. at 335-36.
related as to implicate identical issues upon which preclusion might operate, the claimant is compelled by the modernly prevalent, transactionally grounded doctrine of merger and bar to join such claims in a single action. Thus Parklane's dispensation with the mutuality limitation will have the effect of sanctioning a vast increase in the number of instances in which collateral estoppel will operate to deny to parties the option of demanding a jury. This has relevance, however, only to its fairness and propriety as a procedural technique, since the matter of whether it infringes upon a constitutional right cannot plausibly be thought to depend upon the frequency with which it comes into play.

The principal significance of the Parklane decision lies, not in the approval of collateral estoppel on its particular facts, which militated about as strongly in favor of the result reached as any that could be imagined, but in its more general pronouncements concerning the appropriate role of case-by-case discretion in the implementation of preclusion techniques by federal courts. Specifically, Parklane carried forward the process begun in Blonder-Tongue and dispensed with the mutuality rule in the context of offensive uses of estoppel, where the rule had been thought most justified as a reliable safeguard against unfairness to defendants against whom multiple related claims are asserted in individual actions. Casting aside the flat prohibition of the rule in the interest of judicial economy, the Court would have defendants in such circumstances henceforth rely for fair treatment upon the prudent and judicious exercise of particularized, equitable discretion.

Discretion, at least of the judicial variety, is as dependent upon guiding principles and at least vaguely delineated outer limits as it is independent of fixed rules. The Parklane opinion was at some pains to at least adumbrate the criteria which trial court judges are to consider in deciding whether to permit or deny estoppel. Among those mentioned were whether the party against whom estoppel is urged had adequate incentive to contest the common issues vigorously in the prior litigation, whether there were available to him therein procedural advantages substantially equivalent to those otherwise available in the present proceeding, whether the relia-

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43 See note 5 supra.
45 See note 19 supra.
46 Trial to a jury might have been regarded as an obvious procedural advantage available.
The source from which these criteria were drawn was acknowledged to be section 88 of the proposed Restatement (Second) of Judgments. From the wording and structure of that section, it is apparent that the criteria (out of collateral estoppel) to the Parklane defendants in the stockholder action which was not available to them in the SEC equity suit. Somewhat surprisingly in view of the encomia heaped upon the role of the civil jury by the Court in a line of decisions of relatively recent vintage, Justice Stewart's opinion in this case stated that "the presence or absence of a jury as factfinder is basically neutral . . . ." 439 U.S. at 332 n.19. By this was presumably meant that there is no reason to believe that a jury would view the common issues more favorably to the defendants than did the judge in the SEC action. But one is then led to wonder what all the fuss was about in cases like Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962), and Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959), which commanded, contrary to long established practice, that deference be accorded to jury findings on issues common to legal and equitable claims consolidated in a single action. The Parklane Court might have decided, had it been so inclined, that trial to a jury is a significant procedural difference, even if not an evident, a priori advantage to the defendants, without necessarily deciding that jury trial was required by the seventh amendment. See Byrd v. Blue Ridge Cooperative, 356 U.S. 525 (1958) (jury trial held to be required as a matter of policy rather than constitutional mandate). The Court in Parklane could reasonably have decided that the defendants were entitled to a jury determination of the common issues as a matter of fairness and sound judicial policy, simply because of the mere possibility that a jury might make a practical difference as to how those issues were resolved, without thereby committing itself to a holding that the historical seventh amendment test constitutionally compelled it. Some of the factors which the opinion did specify as relevant procedural advantages, such as a more convenient forum in the subsequent litigation, obviously favor the defendant but others, such as availability of copious discovery devices, would seem as "basically neutral" as a jury.

The logic of the last factor is not entirely clear. It would seem to have no necessary bearing on the reliability of the prior determination of common issues or on the ability or incentive of the defendant to contest them. The Parklane opinion generally approved Restatement (Second) of Judgments § 88(3) (Tent. Draft No. 2, 1975), where this factor is included as one weighing against estoppel. The rationale given in the pertinent comment is more a fuller statement of this factor than an explanation for its inclusion. See id., Comment e. Unless the failure to join can be shown to have significantly reduced the defendant's incentive to contest the common issues to the point where their determination becomes of doubtful reliability, counting it as a factor against allowance of collateral estoppel appears to rest upon nothing more than a game-like conception of fair play. See note 33 supra. On the other hand, although not assigned this function in either the Parklane opinion or the Restatement, the joinder requirement might well be necessary to prevent Parklane-type preclusion from subverting the integrity of certain kinds of class actions. See text accompanying notes 51-57 infra.

A party precluded from relitigating an issue with an opposing party . . . is also precluded from doing so with another person unless the fact that he lacked full and fair opportunity to litigate the issue in the first action or unless circumstances justify affording him an opportunity to relitigate the issue. The circumstances to which consideration should be given include those enumerated in §
teria are intended to, and must necessarily, be administered in the flexible and non-categorical manner of principles which merely guide decision in individual cases, and not in the fashion of rules mandating particular results as, for example, the rule of mutuality, ridden with exceptions as it is, mandates that there be no collateral estoppel when that condition is not satisfied. Apart from the decidedly open-ended character of much of the language of this section, it is clear that none of the enumerated “circumstances” is to function as a flatly prohibitory rule disallowing estoppel. Since the non-specificity of section 88 is further broadened by the only slightly less non-directive language of section 68.1, which sets forth considerations relevant to whether issue preclusion should be allowed even as between the same parties, the result is substantially to recast collateral estoppel as an equitable technique for the economical management of litigation rather than a cluster of common law rules mechanically determining the preclusive consequences of judgments.

**Ramifications of the Parklane Doctrine**

Balancing the often opposing goals of efficiency in the handling

68.1 and also whether:

(1) Treating the issue as conclusively determined would be incompatible with an applicable scheme of administering the remedies in the actions involved;

(2) The forum in the second action affords the party against whom preclusion is asserted procedural opportunities in the presentation and determination of the issue that were not available in the first action and that might likely result in the issue’s being differently determined;

(3) The person seeking to invoke favorable preclusion, or to avoid unfavorable preclusion, could have effected joinder in the first action between himself and his present adversary;

(4) The determination relied on as preclusive was itself inconsistent with another determination of the same issue;

(5) The prior determination may have been affected by relationships among the parties to the first action that were not present in the subsequent action, or was based upon a compromise verdict or finding;

(6) Treating the issue as conclusively determined may complicate determination of issues in the subsequent action or prejudice the interests of another party thereto;

(7) The issue is one of law and treating it as conclusively determined would inappropriately foreclose opportunity for obtaining reconsideration of the legal rule upon which it was based;

(8) Other compelling circumstances that make it appropriate that the party be permitted to relitigate the issue.

*Id.*

**For the text of this section, see note 14 supra.**
of an ever-mounting mass of claims against scrupulous fairness to litigants in every case is obviously the most urgent challenge facing modern civil procedure. Consolidation of actions having sufficient factual or legal elements in common to make their disposition in one proceeding both manageable and economical of judicial resources has been the principal expedient resorted to by courts in their effort to meet this challenge. Historically, a variety of devices fashioned by equity, including the requirement of joinder of certain categories of parties, impleader and interpleader, intervention, and the class action, have been available, increasingly so under merged procedure, to overcome the cumbersome, duplicative, and fragmentary model of adjudication that was a hallmark of the common law. *Parklane* can usefully be viewed as having legitimated, at the highest level of the judicial system, yet another consolidation device in the form of non-mutual collateral estoppel freed from its restricted application to strictly defensive uses. Because consolidation is always fraught with difficulties of manageability and possibilities of unfairness to individual litigants, it is not surprising that, on the occasion of its being launched upon the seas of federal practice, this newly christened device should be accoutered with a plentitude of equitable discretion. The converse of the traditional mutuality role could not, by its very nature, be formulated as a rule of general application, prescribing collateral estoppel in every instance of identity of issues.

What might be referred to as the free-form movement in procedure, of which *Parklane* is an exemplar, is not without its hazards and drawbacks, however. One of the hazards posed by the technique sanctioned by *Parklane* is that it might prove mercurial, difficult to keep within bounds and prevent from infiltrating the proper domain of other consolidation techniques with which it will, so to speak, be in competition.

Preeminent among the latter would seem to be type of class action which *Parklane*-type preclusion most closely resembles—that provided for by Rule 23(b)(3) of the Federal Rules of Civil Procedure, where the plaintiff class is composed of a number of claimants having claims wherein “[t]he questions of law or fact common to the members of the class predominate over any questions affecting only individual members . . . .”1 By definition, claims involved in this kind of class action are separate and independent in the sense that no such commonality of interest or relationship ex-

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ists among members of the class as would preclude their being maintained in individual actions. Prior to the 1966 amendments of the Rules its antecedent was unofficially known as a "spurious" class action. Its most objectionable feature, which the 1966 amendments of Rule 23 were largely designed to inter, was that judgments in such actions were binding only upon parties who initially appeared or subsequently intervened.\textsuperscript{2} Intervention was permitted even after judgment, which meant that absentee members of the "class" would have every reason to await the outcome of trial and then intervene to get the benefit of the judgment if it was favorable to their claims. This "wait and see" option was deemed so unfair that the Rule was amended to provide that judgments in class actions of this kind should bind all those whom the court finds to be members of the class to whom notice has been directed, and who have not requested exclusion from the class.\textsuperscript{5} Thus, a balance was struck between the institutional interest in the enforced consolidation of numerous related claims and the freedom of individual claimants to conduct their own litigation; with considerable deference being accorded the latter. By "opting out," however, any "collateral" benefit from a favorable judgment that might be obtained in the class action was forfeited.

If the Parklane doctrine does not necessarily disinter the spurious class action supposedly buried for good in 1966, it may at least loosen its shrouds. Unless circumscribed in ways not suggested in the opinion, Parklane could have the effect of resurrecting non-mutual preclusion by means of collaterally estopping defendants faced with multiple related claims in subsequent independent actions rather than by post-judgment intervention in a spurious class action. In Parklane itself, no difficulty of this sort was presented, since the SEC does not act as a class representative and no class action certification was possible.\textsuperscript{4} But it may be appropriate to ask what will happen in multiple related claim situations following Parklane when the original action is eligible for class action certification. If certification is granted, then the least that must be done, if the integrity of this kind of class action is to be preserved, is to deny Parklane-type preclusion to any persons with related claims

\textsuperscript{3} FED. R. Civ. P. 23(c)(3). See generally Advisory Committee Note of 1966 to Rule 23 as Revised in 1966 in 3B J. Moore, supra note 2, ¶ 23.01[8].
\textsuperscript{4} See note 31 supra.
who receive notice of the action and elect to be excluded. Otherwise, they might reasonably deem themselves better off by remaining outside the class so that they would not be barred by an adverse judgment, but would retain the option of invoking collateral estoppel when they bring their own independent actions if the judgment is favorable. Ironically, after Parklane, claimants in such circumstances might have reason to account themselves fortunate if, for some reason or other, no notice of the class action is directed to them.

Other questions are prompted by the potential of the Parklane doctrine for encroachment upon the field hitherto reserved to the separate-but-related-claim class action. For instance, will defendants, faced with the prospect of defending against multiple related claims, be heard to insist that the initial action brought against them be maintained as a class action so that other claimants will be barred by any judgment adverse to the class? What are the responsibilities of the trial judge if the initial plaintiff filing an individual action resists being cast in the role of class representative, preferring instead to “paddle his own canoe”? If the judge determines that the defendant’s interest in being protected against the “heads I win, tails you lose” feature of Parklane preclusion should be protected,\(^5\) may an unwilling plaintiff and his counsel be dragooned into service as named representative of a class comprising all those having related claims? If the plaintiff does not volunteer for this role, will he nonetheless have to bear the substantial additional financial burden, in the form of added counsel fees and administrative costs necessitated by directing notice to all class members, or can this burden be shifted to a defendant upon whose motion class action certification is granted? Is willingness to shoulder these burdens, which normally must be borne by the representative plaintiff,\(^6\) a condition of the defendant’s avoiding Parklane preclusion should the judgment in the initial action be favorable to the plaintiff? If certification is granted at the defendant’s insistence and over the opposition of the initial plaintiff, and the additional counsel fees and notice expenses are shifted to the defendant in the first instance, upon whom will they ultimately fall if the defendant finally prevails on the merits?

All of the foregoing questions are likely to be raised when the number of related claims are sufficient to satisfy the “numerosity”

\(^5\) See note 33 supra.
requirement of Rule 23\textsuperscript{57} for class certification, so that in a sense the formal class action provided for by that rule will be more or less directly “in competition” with what might be thought of as the kind of informal class action apparently countenanced by \textit{Parklane}. But what if there is the prospect of only three or four related claims, a situation wherein class certification would almost certainly be denied? It would seem somewhat anomalous that a defendant should be exposed to the more onerous sort of preclusion envisaged by \textit{Parklane} and deprived of the \textit{quid pro quo} to which he is entitled in a “formal” class action (i.e., a judgment unfavorable to the class is binding upon all members thereof to whom notice is directed)\textsuperscript{68} simply because there are potentially four, rather than forty or four hundred, related claims against him. Justice Stewart’s \textit{Parklane} opinion\textsuperscript{89} and section 88 of the new Restatement\textsuperscript{90} both attempt to deal with this difficulty by saying that failure, without good reason, to join or intervene in the initial action is a factor to be weighed against allowing collateral estoppel at the instance of a plaintiff who has failed to do so. Except in situations like \textit{Parklane}, where there was a special impediment to joinder or intervention,\textsuperscript{63} intervention, at least, will nearly always be a theoretical possibility. It is not amiss to ask how much difficulty or inconvenience in intervening a plaintiff who subsequently invokes \textit{Parklane} preclusion must show as a condition of being excused his failure to have done so. A district court decision, handed down after \textit{Parklane}, blandly excused plaintiffs who had failed to intervene, though it was conceded they might have done so without any evident difficulty, and granted estoppel on the liability issues, reasoning that the defendants might just as easily have moved to consolidate the actions.\textsuperscript{65} The teaching of this case seems to be that the duty to attempt to achieve the maximum feasible consolidation

\textsuperscript{57} FED. R. CIV. P. 23(a) (“Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impractical . . . “). On the numerosity requirement generally, see 7 \textsc{Wight} \& \textsc{Miller}, Federal Practice and Procedure: Civil \S 1762 (1972).

\textsuperscript{68} See text accompanying note 52 supra.

\textsuperscript{69} “The general rule should be that in cases where a plaintiff could easily have joined in the earlier action . . . a trial judge should not allow the use of offensive collateral estoppel.” 439 U.S. at 331.

\textsuperscript{63} See note 49 supra. The “prior joinder” requirement thus seems to be premised upon \textit{Parklane}-type preclusion being considered a kind of \textit{faute de mieux} consolidation technique, to be resorted to only when preferred techniques, such as intervention or maintenance of a class action, are shown to have been impracticable.

\textsuperscript{65} See note 31 supra.

in the initial-action will be at least as likely to be imposed upon defendants seeking to escape Parklane preclusion as upon plaintiffs seeking its benefit, at least where all of the relevant litigation is concentrated in a single district. Even when the litigation is not thus concentrated, it is an open question whether defendants will be placed under some obligation to move for interdistrict transfer and subsequent consolidation in the transferee district.6

The advantage which doubtless attracted the Supreme Court to the vastly broadened type of preclusion sanctioned in Parklane was clearly the gains in judicial economies which it would seem to promise. The ideally favorable circumstances in which Parklane posed the issue—primarily the fact that the litigation in which estoppel was invoked was pending at the time when, and in the same district court in which, the preclusive SEC action went to judgment—may have caused the Justices to overestimate the savings it would accomplish, and to underestimate difficulties that might be encountered in its administration. The factors which must be considered by the trial judge in a subsequent action to determine whether the defendant had a “full and fair opportunity to litigate” the common issues in prior adjudication are many, and present difficult questions of degree. Some of them, such as whether a plaintiff who urges estoppel had sufficient reason for not joining in the prior adjudication, and whether a prior judgment was based upon a compromise verdict, are likely to implicate questions of fact and thus require an evidentiary hearing for their resolution.64 Illustrative of the complications which can ensue is a post-Parklane case, Katz v. Eli Lilly & Co.,65 wherein a defendant drug manufacturer, faced with the prospect of being precluded from relitigating the

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64 See note 49 supra. The possibilities for confusion on a wholesale scale would be vastly compounded should it ever be held that questions of fact as to whether the “full and fair opportunity to litigate” standard was met in a prior adjudication are for the jury in the litigation where estoppel is invoked. Since the Court in Parklane held, by implication, that the standard had been met as a matter of law, it had no occasion to mention this problem. In a concededly different, though not wholly unrelated, context there is at least one court of appeals case holding that whether a plaintiff is barred from maintaining a claim because omitted as a compulsory counterclaim in a prior action in which the same parties were reversed is a question of waiver or estoppel, and that the jury in the second action must consider all the facts and circumstances surrounding the omission of the counterclaim to determine whether they amounted to a waiver or estoppel. Dindo v. Whitney, 451 F.2d 1 (1st Cir. 1971).
65 84 F.R.D. 378 (E.D.N.Y. 1979). The problems illustrated by this case cannot, however, be laid to the charge of Parklane. Since the prior judgment invoked as preclusive was rendered by a state court, the federal court was obligated to adhere to the preclusion law of New York. See note 70 infra.
issue of the harmfulness of one of its drugs on the basis of a prior judgment against it in a New York state court, was permitted by the district court judge to take the depositions of two of the jurors in the New York action in an effort to establish that the verdict was reached on the basis of compromise. The decision to allow such discovery of juror misconduct in another forum was stated to be limited to situations where the party seeking discovery “through permissible investigation apart from the compulsion of any court order . . . demonstrates a factual basis for a belief that a judgment asserted against it as collateral estoppel was based on a compromise verdict . . . ." 66 The potential for harassment of jurors which this procedure opens up is obvious, to say nothing of the intense embarrassment to the judicial system if discovery of this sort “impeaches” a verdict rendered in another court system for purposes of collateral estoppel, while at the same time the information disclosed cannot be used to obtain relief from the verdict itself. 67

Experience with the practical workings of the Parklane doctrine may reveal that the savings of judicial resources will be less than hoped for. In the absence of settlements, which Parklane preclusion might well encourage, there will almost always have to be a jury trial in subsequent adjudications on the often complex issues of causation and damages. It is at least doubtful whether juries having to resolve those issues, which are often intertwined with issues of liability, will be spared great amounts of time and effort simply by not having to grapple with evidence relevant solely to the latter. Much of whatever time and effort is saved by preclusion of liability issues may be partially offset by the necessity for evidentiary hearings by the court to determine whether the “full and fair opportunity to litigate” 68 standard was satisfied in the prior litigation on the basis of which estoppel is invoked.

Remitting various questions of procedure formerly controlled by rule to a regime of discretion, always presumed to be enlightened and principled, has proved a seductively attractive recourse in recent years. This trend has been facilitated by an abandonment of the nineteenth-century concept that “vested rights,” akin to property, inhere in such essentially procedural institutions as judg-

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66 84 F.R.D. at 382.
67 Under the law of New York, id. at 381, as under federal law, FED. R. EVID. 606(b), it appears that jurors are incompetent to give testimony regarding jury deliberations for purposes of impeaching their verdict.
68 See note 49 supra.
Abandoned as well, and with little lament, is the insistence, also associated with nineteenth-century jurisprudence, that law in all its aspects should achieve the degree of precision and independence of individual judgment and intuition then so much admired in the physical sciences, with the inexorable, mechanistic workings of their rules. Modern American law has long since turned its gaze from the natural to the social sciences, and is no longer beguiled by the illusion of impersonal decisionmaking, whereby axiomatic rules, absolute and unqualified in their operation, are simply applied to the data at hand.

The migration from the domain of rule to that of discretion is not without its costs, however. Viewed from one perspective, assigning questions to be handled as matters of discretion represents a concession to practical necessity and a departure from the norm that decisions upon which important rights and interests depend should be made under the discipline of legal precepts of reasonable specificity susceptible to uniform application. The rule of mutuality, among others, long and well served the interests in certainty and predictability by enabling litigants to anticipate the collateral consequences of judgments. Parklane completed the process of abolishing that rule for the federal courts, except in limited circumstances where the judicial code commands adherence to the preclusion doctrine of a state which retains the mutuality requirement in whole or in part. What was swept away by this decision could obviously not be replaced with a rule of opposite tenor—a rule prescribing that parties invariably and forever be estopped from litigating an issue once decided against them. The Supreme Court instead adopted the only course open to it, once it determined to jettison the mutuality rule, and that was to invest lower court judges with broad discretion to decide under what circumstances a losing litigant should thereafter be subject to collateral estoppel in subsequent actions. The practical necessity which induced this delegation of weighty authority was the recognized fact that the circumstances when offensive issue preclusion should be permitted are too multifarious to be captured and expressed in a rule.

The kind of discretionary authority conferred upon trial judges in Parklane differs in significant ways from many, if not all, of the

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68 See note 16 supra.
70 28 U.S.C. § 1738 (1976). This statutory partial implementation of the full faith and credit clause of the Constitution requires federal courts to attach the same consequences to state court judgments as does the law of the state of rendition.
types of discretion they have traditionally been accorded. In such matters as the myriad of detailed questions which arise as to the conduct of trials, whether to grant or deny a new trial, whether to permit extensions of time or amendments of pleadings, whether to grant or deny interlocutory relief and the terms upon which it is conditioned, when to terminate discovery, and the like, an ample measure of discretion is accorded trial judges as a matter of practical necessity. It is understood that the considerations bearing upon judicial decisionmaking in these areas are far too variant and unforeseeable to permit satisfactory handling by reference to hard and fast rules. Additionally, although rulings of this kind can often be decisive of the outcome of any given case, these matters have about them the appearance of being somewhat peripheral and incidental, presenting issues which could reasonably be resolved either way; decisions about which, in favor of one party or another in the course of a trial, are likely to "wash out" in a more or less neutral fashion. Because of these characteristics, the practice has been long established that appellate courts will subject decision in these traditionally discretionary areas to a far less stringent standard of review, reversing only for clear abuse, than is applicable to decisions governed by legal rules. Litigants, or at least their counsel, are usually perfectly aware of how unpromising is an appeal directed solely to rulings made in one or another of these areas.

Except for the multifariousness and imponderable quality of the factors to be considered, the kind of trial court discretion contemplated by Parklane, and the consequences stemming from its exercise, share little in common with the foregoing categories of discretion sanctioned by tradition. Trial judge decisions on whether to permit Parklane-type preclusion will be anything but peripheral or incidental—indeed, they will usually be central and crucial to the outcome of the case. It is difficult to imagine a defendant, in a position like those in Parklane, against whom collateral estoppel is allowed being deterred from appealing the final judgment following determination of damages by any sense that, as with, for example, a ruling cutting off presentation of cumulative evidence, the decision was one that might reasonably have gone either way. When the estoppel decision is for the plaintiff, there will almost surely be an appeal in every case, and it is quite likely to be an interlocutory appeal, which is especially consumptive of judicial resources as it does not necessarily obviate a second appeal from the final judg-
ment. It would be unfortunate, but not wholly surprising, if whatever judicial economies are achieved under the Parklane doctrine at the trial court level prove to be substantially offset by the proliferation of appeals it engenders. To the extent that these appeals are of the interlocutory variety, the offsetting losses are likely to be particularly serious.

The difficulties presented by appeals from Parklane rulings are apt to prove considerable. Despite the language in Justice Stewart's opinion about committing the question of whether to grant or deny estoppel to the trial judge's discretion, it is open to some doubt whether appellate courts will in fact accord as much leeway in reviewing such rulings as they customarily do with respect to most matters traditionally assigned to trial court discretion. For one thing, estoppel rulings will not be in any sense peripheral or incidental. To the contrary, they will usually be dispositive of the case. They will not be presented in a "firing line" context, wherein trial judges must rule in haste, and where there is little disposition to second-guess them at the appellate level. Most importantly, perhaps, the various factors bearing upon estoppel rulings will normally be as accessible to appellate as to trial judges, and as authoritatively weighed by them. Unlike, for example, rulings on motions

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71 This is because a trial judge who is in any doubt as to whether the appellate court would affirm his ruling allowing estoppel would presumably be loath to go forward with the trial on the damages. If a Parklane ruling were upset on appeal from final judgment it is doubtful whether upon remand there could properly be a "split trial" limited to issues of liability. See generally Wright, Procedural Reform: Its Limitations and its Future, 1 Ga. L. Rev. 563 (1967). In addition to Parklane itself, the ruling on offensive estoppel precipitated an interlocutory appeal in Consolidated Express, Inc. v. New York Shipping Ass'n, 602 F.2d 494 (2d Cir. 1979). Appeals by plaintiffs from rulings denying estoppel are likely to come up only in the form of interlocutory appeals, to the extent they are permitted. If a plaintiff's estoppel motion (i.e., typically a motion for partial summary judgment on some or all of the liability issues) were denied, and interlocutory appeal were not sought or were not allowed, it is difficult to see how the issue could be presented on appeal from final judgment. If final judgment were, despite the disallowance of collateral estoppel, for the plaintiff any error in such disallowance would obviously be rendered unreviewable. If the plaintiff ultimately loses on the merits, it is nearly inconceivable that any appellate court would reverse and deprive the defendant of his verdict obtained in actual litigation, even if it considered the failure to permit estoppel an abuse of discretion. Realizing that their appeal rights may otherwise be lost, plaintiffs who are denied the benefits of Parklane-type estoppel will presumably always seek certification of the ruling as a controlling question of law for purposes of interlocutory appeal. Trial judges will be under no compulsion to certify the question, nor will courts of appeals necessarily allow interlocutory appeal. Some sense that such appeals should be allowed, at least at the behest of plaintiffs, may arise, however, from the awareness that plaintiffs will otherwise receive less protection from appellate review than defendants against erroneous rulings on collateral estoppel motions.

72 See text accompanying notes 45-50 supra.
for new trial, Parklane rulings will not turn upon any sort of “feel” or situation-sense as to which trial judges, as ones “who have seen and heard,” are better situated to have the last word.

Application of the Parklane doctrine will inevitably increase the degree of uncertainty and enhance the element of fortuity in the litigation of multiple related claims. It will do so partly because, despite what has just been stated about the probable standard of appellate review, Parklane rulings must incorporate some discretionary latitude if the doctrine of that case is to achieve any of its expected benefits. To the extent this does eventuate, however, to precisely that extent will the outcome of cases, many of them likely to involve enormous stakes, depend quite directly upon the sound exercise of discretion and the weighing of largely imponderable factors by individual trial judges.

A good deal of more or less unreviewable discretion seems to be a necessary, and in many ways no doubt a positive, element in the method of conducting modern litigation. The great problem, of course, is to keep the respective workings of rule and discretion in a stable balance, avoiding both rigidity and excessive fluidity which, if viewed too indulgently, can verge on lawlessness. The sort of discretion authorized by the Parklane decision may well prove particularly difficult to retain within manageable bounds and prevent from becoming the agent of serious miscarriages of justice. Fortuities, such as the apparently happenstance discovery of the allegedly compromise verdict in Katz,28 are apt to bulk especially large when achieving judicial economies, through after-the-fact consolidation, requires splicing together, for limited purposes, the results of two separate adjudications.

The Parklane doctrine is still at a very early stage in its judicial career. Some jurisdictions, notably New York, have had longer experience with it, though with what measure of success this writer is not now prepared to say. Reflection upon it at this date may well be somewhat premature. There does, however, seem to be some reason to doubt whether it will work as easily and as effectively, or that it will achieve as much, as its framers—the Justices comprising the Parklane majority—may have been lead to believe by the ideally propitious circumstances of the case itself. Future refinement and elaboration, and perhaps here and there a bit of patchwork repair, will almost certainly be called for as the doctrine is worked through future cases. While no full-fledged retreat and re-

28 See text accompanying notes 65-67 supra.
turn to the mutuality rule would seem to be in prospect, it may well be that some more narrowly crafted rules will have to be formulated to keep the Parklane doctrine under decent restraint and to preserve its integrity as an instrument of judicial statesmanship.