CLAIM PRECLUSION AND THE PROBLEM OF FICTIONAL CONSENT

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The doctrine of claim preclusion promotes fairness and finality by preventing parties from raising claims that already were (or could have been) raised in a prior proceeding. This strict consequence can be imposed only when the litigant received minimal due process protections in the initial proceeding, including notice and direct or indirect participation.

Modern litigation has caused a new problem. In some cases, a party may be precluded from ever raising a claim on the grounds of "fictional consent" to a prior court's decisionmaking authority. Litigation devices have expanded the potential reach of judgments through aggregation and broad jurisdictional grants, and certain environments—such as bankruptcy—require that the parties consent to the initial court's authority to decide a dispute. Applying claim preclusion to unraised claims in such environments poses a serious due process threat. Subsequent courts satisfy the claim preclusion standard by relying on fictional consent, i.e., by presuming that the litigant would have consented to the court's power to decide the claim if she had brought the claim in her initial proceeding. But the litigant did not actually bring the claim, and therefore did not actually consent to the initial court's exercise of authority.

This Article is the first to highlight the problem of claim preclusion by fictional consent. By looking to bankruptcy as a paradigmatic example, this Article concludes that precluding unraised claims on the basis of fictional consent favors finality at a

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perilous cost to due process. To solve this problem, this Article develops a taxonomy of claim preclusion scenarios based on different litigation contexts. The taxonomy neutralizes fictional consent and accounts for due process concerns. Reducing claim preclusion to ensure due process may give rise to opportunistic litigation tactics. This Article therefore identifies existing doctrinal tools that courts may use to reduce wasteful opportunism.

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INTRODUCTION

"For the sake of repose, res judicata shields the fraud and the cheat as well as the honest person. It therefore is to be invoked only after careful inquiry."[1]

Claim preclusion is strong medicine. The doctrine, grounded in principles of finality, operates as a judge-created bar to duplicative litigation. In short, it dictates that litigants who had a fair shot to have their legal issues resolved in a previous proceeding cannot later seek another bite at the apple in a second proceeding. This simple foundation has inherent allure. Litigation is relentlessly taxing, and without finality doctrines such as claim preclusion there would be little to prevent advocates from advancing their client's interests over and over in different forums until they are successful (or the litigation budget runs dry).

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[1] Brown v. Felsen, 442 U.S. 127, 132 (1979). "Because res judicata may govern grounds and defenses not previously litigated, however, it blockades unexplored paths that may lead to truth." *Id.*

But the doctrine's focus on discouraging repetitive litigation has a critical counterbalance: the party facing preclusion must have had sufficient opportunity for the first forum to hear its claim. If not, the preclusive bar unjustly silences litigants, undercutting its fundamental focus on fairness and violating due process protections. The various tests for applying claim preclusion all touch on this "sufficiency" question, seeking to preclude only those claims that received a sufficient opportunity to be heard in a prior proceeding.

As with many equitable doctrines, decisionmakers' application of claim preclusion at the margins has developed in complicated and imperfect ways. After hundreds of years, the straightforward case of claim preclusion is just that—straightforward. But in complex modern structures, the application of claim preclusion is neither consistent nor predictable due to two primary factors. First, nontraditional collective litigation proceedings do not fit neatly within the elements of claim preclusion, making the analysis vulnerable to strained application. Second, pragmatic concerns, such as the potentially massive cost of repeat litigation, are amplified in collective environments. Where a court is asked to stretch claim preclusion doctrine to fit modern molds, while also being warned about the doomsday effect that preclusion avoids in those contexts, there is no surprise that the outcome leans toward functionalist expansion. Expanding claim preclusion in this way may indeed protect finality in environments where it is most critical. The cost, however, is that some categories of claimants will be stripped of their day in court in ways that violate the bedrock principle of fundamental fairness.

This Article focuses on one such functionalist expansion: preclusion of unraised claims that could only have been heard in the initial proceeding with litigant consent. Claim preclusion requires a court of competent jurisdiction to decide the initial claim. In some contexts, courts have the power to decide a claim only if the parties consent (this Article will refer to such claims as "consent claims"). Where consent claims are not raised in the first proceeding, subsequent courts must grapple with a legal fiction: absent any indication of consent with regards to the claim at issue, should preclusion apply? Was the first proceeding before a court of "competent jurisdiction" where the claim "should have been raised"? These questions have real consequences, both for the individual litigants who are precluded and for the overall systems in which they arise.

Understanding the role of consent in claim preclusion doctrine requires a clear distinction between actual consent and fictional consent. Actual consent, as used in this Article, means some indication through words or actions that the party consented to have the initial court decide his claim. Fictional consent, by contrast, describes a backward-looking presumption about what the party is deemed to have consented to for purposes of claim preclusion. When the parties actually consent[2] to a court hearing their consent claim, the resulting decision may have preclusive effect. Conversely, where actual consent to jurisdiction is altogether absent from the initial proceeding, claim preclusion does not apply.

In today's litigation landscape, however, a court's authority to decide claims is not an all or nothing proposition. Fictional consent arises when the parties were properly before the court for some claims but did not raise other claims that would have required party consent. Subsequent courts correctly acknowledge that the first court's jurisdiction over the unraised claim relied upon the party's consent, but then presume that consent existed for purposes of claim preclusion. This creates a problematic legal fiction, because nobody knows whether the party in the first proceeding actually would have consented.[3]

The problem of fictional consent in claim preclusion lies at the nexus of many fields of law, requiring consideration of jurisdiction and authority, due process, and consent. For this reason, scholars of procedure, federal courts, and constitutional law have each touched on different threads of the conversation. For example, Professor Alan Trammell highlights the role that autonomy and participation play in testing claim preclusion's due process limits.[4] Professor Howard Erichson's scholarship identifies tension points in claim preclusion doctrine that center on jurisdictional matters,[5] and identifies the role of

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2 Section I.B offers a deeper explanation of the difference between actual and fictional consent, especially as compared to other concepts of consent in the law (such as "implied" and "constructive" consent).

3 Indeed, as explained in Section II.B, parties might have had reason and motivation to withhold consent, had the issue been actually before the initial court.

4 Alan M. Trammell, *Precedent and Preclusion*, 93 NOTRE DAME L. REV. 565, 568 (2018) [hereinafter Trammell, *Precedent and Preclusion*]; Alan M. Trammell, *Transactionalism Costs*, 100 VA. L. REV. 1211, 1239–40 (2014) [hereinafter Trammell, *Transactionalism Costs*].

5 Howard M. Erichson, *Interjurisdictional Preclusion*, 96 MICH. L. REV. 945, 980–81 (1998) (exploring contexts where jurisdictional elements impact claim preclusion).

consent in preclusion doctrine.[6] Professor Kevin Clermont contributes to the debate through multiple works, and grapples at length with the balance between fairness and finality that honors claim preclusion while satisfying due process.[7] Many procedural scholars have explored due process concerns that arise when preclusive effect attaches to certain forms of aggregate litigation.[8] Absent from the dialogue to date is a discussion of the larger threat fictional consent poses to due process and the departure its use represents from both traditional and modern tenets of preclusion. This Article broadens the debate by identifying fictional consent[9] and how it problematically manifests in modern litigation structures. By drawing lessons from bankruptcy, this Article highlights circumstances where the due process threat is most acute and proposes a solution that can restrain overexpansion of claim preclusion doctrine.

To better understand the broader problem, consider the way fictional consent arises in the bankruptcy context. Bankruptcy court jurisdiction is expansive, and includes all matters that are "related to" the debtor's estate. This includes both creditors' claims against the debtor and claims between different creditors. Although bankruptcy courts may hear a wide variety of suits, they may not finally decide many claims without the parties' consent due to statutory[10] and/or constitutional[11] limitations.

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6 Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265, 299–301 (2011).

7 *See, e.g.*, Kevin M. Clermont, *Res Judicata as Requisite for Justice*, 68 RUTGERS U. L. REV. 1067, 1069 (2016).

8 *See, e.g.*, Samuel Issacharoff, *Preclusion, Due Process, and the Right to Opt Out of Class Actions*, 77 NOTRE DAME L. REV. 1057 (2002) (arguing for a tailored preclusive effect premised upon the level of due process that was afforded absent claimants); Tobias Barrington Wolff, *Preclusion in Class Action Litigation*, 105 COLUM. L. REV. 717, 764–65 (2005) (highlighting ways in which courts are either avoiding or incorrectly addressing the preclusive effect of their decisions and urging greater focus on preclusion at the certification stage by imposing "prospective imposition of constraints upon the preclusive effect of class judgments"); Debra Lyn Bassett, *Just Go Away: Representation, Due Process, and Preclusion in Class Actions*, 2009 BYU L. REV. 1079 (2009).

9 The concept of fictional consent has been mentioned by other scholars under different names, albeit in less detail. *See* discussion *infra* note 39.

10 Noncore claims are set forth in 28 U.S.C.§ 157(b)(2)(B) of the Bankruptcy Code.

11 Stern v. Marshall, 564 U.S. 462, 482 (2011) (identifying that some claims which were considered "core" under the Bankruptcy Code could not constitutionally be heard by non-Article III courts). The phrase "*Stern* claims" was adopted by practitioners and commentators in the aftermath of *Stern v. Marshall*, and the Supreme Court embraced it in *Executive Benefits Insurance Agency v. Arkison*, 573 U.S. 25, 34–35 (2014).

In practice, creditors usually consent to the bankruptcy court's jurisdiction when raising or defending consent claims.[12] However, many creditors do not fully grasp the broad range of claims that a bankruptcy judge may hear.[13] These litigants do not consider whether to raise their consent claims, let alone evaluate whether they should agree to the bankruptcy court's ability to finally decide those claims. Fictional consent arises in this scenario when a creditor brings its consent claim against another creditor in a later lawsuit, only to face a claim preclusion defense. The bankruptcy court could have decided the claim, but only with both parties' consent.

Courts are split about how to interpret consent claims that were never raised in a prior bankruptcy case for claim preclusion purposes. A minority of courts conclude that, absent party consent, the bankruptcy court was not a court of "competent jurisdiction" for purposes of claim preclusion with regard to unraised consent claims. Other courts are dismissive of the authority issue and give claim preclusive effect to unraised claims that a bankruptcy court could have heard with party consent. From the majority perspective, both parties likely would have consented to the bankruptcy court's jurisdiction had the claim been raised, and, even if the party withheld consent, the bankruptcy court would simply issue proposed findings of fact and conclusions of law to the district court.[14] To these courts, denying preclusive effect for such claims would improperly place form over function.

I agree that drawing a formalistic line on consent-based jurisdiction has functional consequences, and that rejecting claim preclusion on the basis of fictional consent would permit more claims to proceed. I also recognize that finality is particularly important in collective litigation scenarios. Yet, form matters, even when—especially when—the costs are high. In the case of bankruptcy, a creditor bringing a state-law claim that threatens the entire treatment of a previously resolved bankruptcy estate

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12 Whether the creditor should be considered a "party" to all parts of the bankruptcy case for claim preclusion purposes is a separate question that I address in Part II below.

13 For example, a creditor who files a proof of claim seeking repayment of a loan made to the debtor is unlikely to know that, with consent, the bankruptcy court could have jurisdiction to finally decide his state law contract claim against another of the debtor's creditors. See *infra* Section II.C.1 for a hypothetical example of how these seemingly unrelated noncore claims could arise.

14 These courts insert further confusion by looking at the issue from the defendant's perspective; in most fictional consent cases, it is the plaintiff who did not consent to jurisdiction in the initial proceeding, which is usually given by raising a claim.

could cause disastrous results. But Congress designed the Bankruptcy Code with an eye toward limited authority, and the Supreme Court's line of bankruptcy jurisdiction cases further emphasize the constitutional limits on what a bankruptcy court may decide. Sweeping aside these considerations in pursuit of finality and repose is both misguided and unnecessary.[15]

Extending claim preclusion doctrine through fictional consent is inconsistent with its origins. This Article's first Section offers a brief history of claim preclusion and its underlying purposes and then introduces the Supreme Court's recognition of due process requirements for preclusion to apply, focusing on the "day in court" ideal that commentators tie to a participatory theory of due process.

This Article next explores the role of consent and how claim preclusion is applied to consent claims in various contexts. In most situations, there is no dispute over whether there was a court of competent jurisdiction for claim preclusion purposes.[16] For example, parties must clearly consent to a federal magistrate judge's jurisdiction over all claims before decisions on such claims are given preclusive effect. And parties appearing before an administrative agency affirmatively consent to their jurisdiction to decide even tangential claims. Why would claims in bankruptcy be treated differently? This Article concludes that the doctrine of claim preclusion should not turn on fictional consent where due process threats are high.

This Article's final Section recognizes that claim preclusion by fictional consent may arise differently, and require different solutions, depending upon the litigation environment. It creates a new taxonomy for courts to readjust the claim preclusion standard for unraised consent claims, asking them to evaluate two key indicators of due process threat—breadth of jurisdiction and litigant awareness. This Article then identifies

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15 *See infra* Part III (outlining alternatives to preclusion that may remedy many of the concerns that encourage expansion of the preclusion doctrine).

16 In commercial arbitration, for example, companies negotiate and consent to the scope of an arbitrator's authority in their private contract. If claims between the companies fall within the arbitration clause, then the arbitrator's decision can have claim preclusive effect. In contrast, where a company's claim is beyond the scope of the arbitrator's jurisdiction, that company may raise it in another proceeding without fear of being barred. The consent, or lack thereof, is directly correlated with whether claim preclusion applies. Of course, the company could have consented to the arbitrator's authority over other claims, but—unlike in bankruptcy—no court would assume that consent would have been given. *See infra* Section I.C.2.

specific challenges that would result from the proposed application and suggests a number of alternative measures to minimize the impact of increased proceedings. By highlighting ways to achieve the same finality incentives through other means, this Article makes the case for realigning the role that claim preclusion plays in modern litigation.

I. CONSENT AND CLAIM PRECLUSION

Claim preclusion has a rich history and strong establishment in American legal institutions. Commentators and courts alike have evaluated the varying approaches to claim preclusion, traced the doctrine's origin, and outlined its underlying motivations. Missing from that conversation, so far, is the fundamental problem that surfaces when unraised claims collide with the necessity of consent. This Part introduces the claim preclusion doctrine. It then examines the role that consent plays in claim preclusion and identifies a specific threat to the delicate balance between finality and fairness—fictional consent.

A. *Foundational Principles of Claim Preclusion*

Claim preclusion, also known as res judicata, is a finality doctrine that protects litigants from duplicative litigation.[17] Res judicata, roughly translated from Latin as "a thing decided," traces back centuries to the earliest systems of societal dispute resolution.[18] Roman treatises described res judicata as originating from a policy of protecting litigants in private disputes from ongoing challenges, noting that the doctrine creates law between parties.[19] Finality was the core motivation, as "it is in

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17 *See* 18 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4403 (3d ed. 2020). Other forms of estoppel, including collateral and direct estoppel, arose later, which in modern times are called "issue preclusion." Since the Restatement clarified its terminology to reduce confusion, "res judicata" became synonymous with both claim and issue preclusion. For simplicity, I use claim preclusion throughout this Article.

18 *See* ALLAN D. VESTAL, RES JUDICATA/PRECLUSION V-17–18 (Matthew Bender, 1969).

19 Robert Wyness Millar, *The Premises of the Judgment as Res Judicata in Continental and Anglo-American Law*, 39 MICH. L. REV. 1, 6 (1940) (discussing the maxim *res judicata facit jus inter partes*).

the interest of the State that there be an end to litigation."[20] Since the doctrine's inception, different legal systems throughout the world have incorporated the basic principles of claim preclusion into various forms and under various names. This includes the English common law tradition from which our United States system developed.[21]

The modern "transactional" approach[22] to claim preclusion bars claims where (1) there is a final judgment on the merits; (2) the decision was rendered by a court of competent jurisdiction; (3) the parties or their privies to be bound are identical in both suits; and (4) the same cause of action is involved in both cases.[23] Where the elements are met, claim preclusion will bar litigants from bringing all claims arising out of the same transaction in a later proceeding.[24] Claim preclusion is an affirmative defense that must be raised by a party, otherwise it will be waived. The arbiter of the second proceeding evaluates claim preclusion by applying the law of the jurisdiction where the initial case was decided.[25] For example, if the initial decision was rendered in a bankruptcy court, the second reviewing court would apply the claim preclusion law of the

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20 Clermont, *supra* note 7, at 1069 (pointing to the phrase "*interest reipublicae ut sit finis litium*").

21 *See* Clermont, *supra* note 7, at 1072–73 (describing the development and progression of claim preclusion in England).

22 *See* RESTATEMENT (SECOND) OF JUDGMENTS § 17 (AM. LAW INST. 1982) (providing the general standards used to evaluate claim preclusive effect). Some courts use a slightly different standard, which evaluates (1) a final decision on the merits, (2) between the same parties, (3) in which the plaintiff litigated or should have litigated the same issue, (4) involving the same cause of action. *See* New Hampshire v. Maine, 532 U.S. 742, 748–49 (2001); Richards v. Jefferson Cty., 517 U.S. 793, 798 (1996); Rawe v. Liberty Mut. Fire Ins. Co., 462 F.3d 521, 529 (6th Cir. 2006).

23 Although the core principles are consistent, claim preclusion doctrine has many distinctions in different forums. The claim preclusive effect of an earlier adjudication is "discussed in varying and, at times, seemingly conflicting terminology." Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 77 n.1 (1984).

24 The United States' modern approach to claim preclusion is both strict and expansive relative to other legal systems. *See* Clermont, *supra* note 7, at 1073 (observing the United States' expansive view of claim preclusion relative to other nations).

25 *See* Midway Motor Lodge v. Innkeepers' Telemanagement & Equip. Corp., 54 F.3d 406, 409 (7th Cir. 1995) ("In the law of preclusion . . . the court rendering the first judgment does not get to determine that judgment's effect; the second court is entitled to make its own decision . . . ."); Brown v. R.J. Reynolds Tobacco Co., 576 F. Supp. 2d 1328, 1339 (M.D. Fla. 2008) ("It is the duty of the second trial court—which knows both what the earlier finding was and how it relates to a later case—to independently determine what preclusive effect a prior judgment may be given.").

federal circuit in which the bankruptcy judge heard the case to determine whether claim preclusion applies.[26]

Although claim preclusion doctrine primarily addresses individuals' private interest in finality, the aggregation of those interests expands to the point that the need for finality becomes a public benefit.[27] Finality is one of the fundamental values underpinning the civil litigation system. Bringing parties' disputes before the nation's courts and other arbitral bodies requires significant monetary and personal resources. To justify such expenses, the parties must trust the system to decide the outcome of their disputes. The finality of an arbiter's decision is one element that provides legitimacy to, and encourages trust in, litigation systems. The basic concept of finality in litigation provides reassurance that, once a dispute is resolved, a party will not have to re-litigate that same dispute again. Myriad standards, procedural rules, laws, and equitable doctrines weave together to create the fabric of finality, which blankets courts and proceedings across forums. Parties rely upon finality when they seek resolution of their disputes. Without finality, the investment of resources that litigation requires would increase to all sides. Courts would be further burdened by litigants who have the means to continue bringing claims until they get a desired result. Eventually, without the check of finality, litigation would become unpredictable, unreliable, and ultimately disfavored among businesses and individuals alike.

Although finality is critical to a functioning system of dispute resolution, finding the appropriate scope requires careful consideration of the interests and claims that are being excluded. The contours of finality doctrines are intentionally created to prevent some claims from being raised. This motivates litigants to bring their claims at the appropriate time and removes strategic incentives for gamesmanship. But the balance must not overshadow a related core litigation value: the litigant's due process right to freely test claims and to stand and be heard on those claims before an arbiter. Woven improperly, finality doctrines

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[26] The choice of law analysis in claim preclusion is both nuanced and interesting, but for purposes of this Article—which primarily focuses on the claim preclusive effect of bankruptcy court decisions—the applicable law is federal common law of claim preclusion. *See* ROBERT C. CASAD & KEVIN M. CLERMONT, RES JUDICATA: A HANDBOOK ON ITS THEORY, DOCTRINE, AND PRACTICE 213–26 (Carolina Academic Press, 2001). *But see* Richard L. Marcus, *Conflicts Among Circuits and Transfers Within the Federal Judicial System*, 93 YALE L.J. 677, 720 (1984) (noting that a "transferee court is fully competent to decide issues of federal law").

[27] Allan D. Vestal, *Rationale of Preclusion*, 9 ST. LOUIS U. L.J. 29, 31 (1964).

can silence litigants in a way that also threatens a system's legitimacy.[28] Unraveling and re-evaluating the balance between competing interests of fairness and finality in claim preclusion doctrine presents an ongoing challenge.

One critical feature of claim preclusion doctrine is that it bars not only claims that were actually raised between the parties but also those that could have been raised. Unraised claims fall at the tension point between finality and fairness. The tension is acute on unraised claims because claim preclusion "blockades unexplored paths that may lead to truth."[29] While precluding unraised claims may not seem "fair" in a colloquial sense,[30] the critical legal inquiry is whether it violates a party's constitutional right to a day in court. Assuming a party raised her claim in the first proceeding, few would argue that finality does not align with fairness considerations in support of claim preclusive effect. When the party does not raise their claim in proceeding one, however, finality and fairness in favor of the party who raises the claim preclusion defense in the second proceeding collide with interests of fairness to the party who will be barred from ever having his day in court on a potentially meritorious claim. Because an unraised claim, if precluded, will never truly have a day in court, due process requires a careful review of whether the missed opportunity in proceeding one was sufficient.

The Due Process Clause[31] protects litigants' ability to litigate issues depriving their life, liberty, or property rights by setting minimum

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28 This expands beyond the general perception of whether a particular dispute resolution process is legitimate. When claim preclusion attaches to unraised claims in a distant initial forum (such as pure state law claims in a bankruptcy court), the subsequent forum is doubly harmed by (1) developing problematic claim preclusion precedent and (2) losing the opportunity to develop its precedent regarding the precluded claim.

29 Brown v. Felsen, 442 U.S. 127, 132 (1979).

30 In fact, whether the doctrine leads to unjust results should have no bearing on the analysis. Roche Palo Alto LLC v. Apotex, Inc., 531 F.3d 1372, 1380 (Fed. Cir. 2008) ("The district court, however, correctly recognized that there is no 'change of law' or fairness exception to prevent application of claim preclusion."). *But see* Trammell, *Transactionalism Costs*, *supra* note 4 (explaining judges' "tenderness towards defeated litigants" that results in narrowly applying the standard to evade preclusion).

31 *See* U.S. CONST. amend. V (Due Process Clause applicable to federal government requires that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law"); *id.* amend. XIV, § 1 (Due Process Clause applicable to states provides that "[n]o State shall . . . . deprive any person of life, liberty, or property without due process of law").

procedural requirements.[32] The Supreme Court's interpretation of due process protection requires, at minimum, notice of the proceeding and an opportunity to be heard,[33] and will be analyzed by balancing the relevant interests at stake.[34] If such protections were provided, then litigants' initial failure to pursue their claims does not permit a second bite at the apple. In *Taylor v. Sturgell*, the Supreme Court revisited the intersection of due process and claim preclusion, and firmly reinforced the right to directly or indirectly participate in a proceeding.[35] It is these rights that form the basis of the "fairness" counterbalance in claim preclusion analysis. Scholars evaluating this issue note the individualized, participatory nature of procedural due process rights.[36] The next Section

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[32] *See* William V. Luneburg, *The Opportunity to Be Heard and the Doctrines of Preclusion: Federal Limits on State Law*, 31 VILL. L. REV. 81 (1986); Max Minzner, *Saving Stare Decisis: Preclusion, Precedent, and Procedural Due Process*, 2010 BYU L. REV. 597, 633 (identifying procedural due process limitations on preclusion); Trammell, *Precedent and Preclusion*, *supra* note 4, at 597 ("[I]n the preclusion context, the Supreme Court has always regarded participation as intrinsically valuable, and that is the quintessence of a participation-based theory of due process."); *see also* Richard A. Epstein, *Class Actions: Aggregation, Amplification, and Distortion*, 2003 U. CHI. LEGAL F. 475, 510 ("[T]he control of one's own litigation cannot be regarded as a small detail within the overall scheme of civil procedure.").

[33] Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950) ("Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case."). The Supreme Court explained that "the right to be heard ensured by the guarantee of due process 'has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.'" Richards v. Jefferson Cty., 517 U.S. 793, 799 (1996) (quoting *Mullane*, 339 U.S. at 314).

[34] Mathews v. Eldridge, 424 U.S. 319 (1976).

[35] Taylor v. Sturgell, 553 U.S. 880 (2008); *see also* Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1035 (2003) (noting a common theme in preclusion doctrine of evaluating whether the litigant received their "day in court"). The *Taylor* Court pushed back against the notion that a nonparty will always be precluded by a previous action where the initial suit included a party who "adequately represented" the nonparty, instead allowing nonparty preclusion on that basis only in "certain limited circumstances." *Sturgell,* 553 U.S. at 894. Due process challenges to preclusion are often based upon the lack of direct representation. Bassett, *supra* note 8, at 1113 ("In terms of due process, in terms of ensuring one's 'day in court,' in terms of fundamental fairness, and in terms of representation in litigation, preclusion in the class action context consistently comes up short. For unnamed class members, every purported due process protection is a substituted or constructive form of due process rather than a direct protection.").

[36] *See* Robert G. Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193, 204–05 (1992). Other scholars accept that due process is satisfied when the litigant's interests are adequately represented, even if they did not have a meaningful opportunity to participate. This perspective is understandable when the representative actually raised the claim in

evaluates the role that consent plays in claim preclusion and looks at the impact that consent may have on litigants' participatory due process rights.

B. *Consent and Claim Preclusion*

1. Framing Consent

Before examining the ways that consent impacts claim preclusion, it is necessary to set out the types of consent that will be discussed throughout this Article and distinguish them from various other forms or conceptions of consent. From criminal statutes to contract interpretation, consent plays a significant role in other corners of the law, and many conversations about consent turn on similar underlying concerns.[37] Scholarship on consent offers a variety of ways to name, structure, and conceptualize consent in different contexts, all of which form the foundation for this Article's particular use.[38]

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an initial proceeding. If, however, the claim by a representative was never raised, the question remains whether the absent party was adequately represented if the foreclosed claim should have been raised in the initial proceeding. *See* David A. Dana, *Adequacy of Representation After Stephenson: A Rawlsian/Behavioral Economics Approach to Class Action Settlements*, 55 EMORY L.J. 279, 280–83 (2006) ("More generally, fundamental principles of fairness dictate that class members be held to settlements only if the relief provided to them by the settlement is something that a person *conceivably could have accepted*, before knowing her exact position within the class, in return for ceding for all time her legal claims for redress.") (emphasis added).

[37] *See, e.g.*, Larry A. DiMatteo & Bruce Louis Rich, *A Consent Theory of Unconscionability: An Empirical Study of Law in Action*, 33 FLA. ST. U. L. REV. 1067, 1110 (2006) (providing empirical analysis of unconscionability claims to contract enforcement through the lens of a "consent theory" of application); Nancy S. Kim, *Relative Consent and Contract Law*, 18 NEV. L.J. 165, 168 (2017) (describing the role of consent in various elements of contract law); Alex B. Long, *The Forgotten Role of Consent in Defamation and Employment Reference Cases*, 66 FLA. L. REV. 719, 721–23 (2014) (highlighting the impact of consent in the context of defamation suits against employers); Andrew T. Guzman, *Against Consent*, 52 VA. J. INT'L L. 747 (2012) (calling for reevaluation of the role of state consent in international law proceedings).

[38] *See, e.g.*, JOHN RAWLS, A THEORY OF JUSTICE 121 (Harvard University Press, 1971) (exploring the concept of hypothetical consent); Frank Lovett, *Should Justice Be Based on Consent?*, 12 J. POL. PHIL. 79, 87–89 (2004) (challenging the role that consent plays in a procedurally oriented system and categorizing different forms of consent); PETER WESTEN, THE LOGIC OF CONSENT: THE DIVERSITY AND DECEPTIVENESS OF CONSENT AS A DEFENSE TO CRIMINAL CONDUCT 284 (Routledge, 2017); Tobias Barrington Wolff, *Federal Jurisdiction and Due Process in the Era of the Nationwide Class Action*, 156 U. PA. L. REV. 2035, 2083–86 (2008) [hereinafter Wolff, *Federal*

Here, the consent at issue falls into one of two distinct categories: actual consent and fictional consent.[39] Actual consent is defined by an ex ante action that indicates the party's intent to consent. Actual consent may be express, through words, or implied, by the party's actions. In either case, the key consideration to evaluate actual consent is whether it was knowing and voluntary.[40] If not, the consent is not valid, and should not bind the litigant. In practice, reliance on actual consent may pose due process problems, especially in instances where the "consent" is determined by statute to apply but the party has little meaningful opportunity to withhold the consent.[41] At bottom, courts evaluating actual consent are doing so by looking to identifiable words or actions.

In contrast, I define fictional consent as an automatic assumption placed upon a litigant ex post about what the litigant would have consented to under the objective circumstances. It does not turn on any

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Jurisdiction and Due Process] (describing three different theories of consent the Supreme Court deploys in their discussion of jurisdiction); Troy A. McKenzie, *Toward a Bankruptcy Model for Nonclass Aggregate Litigation*, 87 N.Y.U. L. REV. 960 (2012) (noting concerns with litigant consent in aggregate litigation).

39 Other commentators have identified the same dichotomy between actual and fictional consent, although the latter concept has not been consistently identified by any single name. *See* Debra Lyn Bassett, *Class Action Silence*, 94 B.U. L. REV. 1781, 1799, 1804 (2014) (describing the difference between actual consent and what she calls "fictitious" consent in class actions); Wolff, *Federal Jurisdiction and Due Process*, *supra* note 38, at 2092 (explaining the Supreme Court's decision in *Shutts* as mischaracterizing "constructive" consent as simple consent); WESTEN, *supra* note 38, at 8 (describing "hypothetical" consent in the medical context).

40 *See* Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1948 (2015) (consent requires a party's "knowing and voluntary" consent and such consent may be express or implied by "actions rather than words"); Roell v. Withrow, 538 U.S. 580, 590 (2003) (permitting implied consent after indication of awareness and knowledge of the implication of appearing in court); *Consent*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "consent" as "agreement, approval, or permission regarding some act or purpose, esp[ecially] given voluntarily by a competent person; legally effective assent").

41 For example, corporations may be deemed to consent to general personal jurisdiction pursuant to mandatory registration statutes in many states. *See* Brown v. Lockheed Martin Corp., 814 F.3d 619, 641 (2d Cir. 2016) (noting, but declining to address, potential Due Process Clause issues that arise when state registration statutes create general personal jurisdiction); Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 CARDOZO L. REV. 1343, 1352, 1379 (2015) (concluding that coerced consent through mandatory statutes should not subject a corporation to general personal jurisdiction). Similarly, the October 3, 2018, Anti-Terrorism Clarification Act (ATCA) expressly classifies a number of actions—including, for example, accepting aid from the United States—as indicative of "consent" to personal jurisdiction. *See* Pub. L. No. 115-253, § 4, 132 Stat. 3183, 3184 (2018) (codified as amended at 18 U.S.C. § 2334 (2018)).

specific factors about the individual litigant's autonomous decision.[42] This is fundamentally at odds with the normal understanding of consent, and in tension with the individualized theory of due process rights.

2. Impact of Consent on the Elements of Claim Preclusion

Claim preclusion prevents parties who have already had their day in court from later bringing claims that were not raised. As described above, the doctrine's reach to unraised claims motivates litigants to bring all possible claims in the initial proceeding. But not all categories of unraised claims were automatically possible to bring in the first case. For many claims, the litigant's consent is required ("consent claims"). Here, the relevant analysis is whether a party consented in a previous proceeding to a court's ability to decide his dispute. If the party did not consent, then the party's failure to bring the consent claim in the first proceeding has no claim preclusive effect. If, however, the second court finds that the party did consent, then that party may be precluded from raising the consent claim.[43] Consent may be at issue in a number of claim preclusion elements, including consent that the initial court is one of "competent jurisdiction" and/or consent that the court may "finally decide" issues before it.[44] Without actual consent, however, preclusion of unraised consent claims presents a troublesome fiction. Courts applying claim preclusion to these claims must conclude that the party would have consented to jurisdiction over the claim if it had been raised in the initial proceeding.

In the case of jurisdiction, courts and commentators evaluate at great length whether consent is sufficient to waive a core constitutional

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[42] Sample instances of fictional consent in the law include analysis into removal of life support and affirming emergency medical intervention. In either case, the decision turns on what someone in the person's position would have agreed to had they been in the position to consent. Their consent is fictional because they are not able to actually consent. *See* WESTEN, *supra* note 38, at 287 (discussing these examples under the title of "hypothetical consent").

[43] As explained above, this Article analyzes claim preclusion as a means to bar unraised claims that require litigant consent. The claims that are barred in the second proceeding could only have been heard if the party being precluded gave its consent.

[44] As will be relevant in the discussion of consent jurisdiction in bankruptcy, competent jurisdiction has been interpreted by most courts to mean it can actually decide the claim and offer relief, not simply hear the case. *See Jurisdiction*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "competent jurisdiction" as "having power to decide a case").

protection of having disputes heard in a certain forum.[45] Their analysis is most probing in litigation contexts where the legal consequences of consent threaten due process and systemic integrity. This includes instances when Article III review is prevented in favor of Article I courts, when Article I courts supersede state court determinations on state law issues, and when claimants are tied to a distant aggregated proceeding without direct representation.[46] Issues surrounding consent as the foundation for a court's jurisdiction are already complicated when discussed with regard to an initial proceeding. Whether that same consent is sufficient to preclude collateral review is an even thornier topic, especially when the consent was not actually given because the claim was never raised. In the claim preclusion context, applying the fiction of consent to unraised claims layers the harsh consequence of silencing a litigant's right to raise a claim on top of these well-trodden concerns about meaningful consent to jurisdiction. The following Section provides examples where claim preclusion applies to unraised claims based upon the litigant's actual consent to contrast with claims that are precluded on the basis of fictional consent.

C. *Actual Consent in Claim Preclusion*

Affording claim preclusive effect to unraised claims relies upon the initial decisionmaker's underlying ability to decide the claim if it had been raised. In some litigation environments, the arbiters' ability to do so turns on litigant consent. This Section focuses on instances where parties give actual consent to the arbiter's decision making power.[47] By giving

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[45] Specifically, instances where a party may consent to a court's jurisdiction in a way that waives constitutional protections, such as in bankruptcy and before magistrate judges. *See* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, tit. 1, § 101(a), 98 Stat. 333 (effective July 10, 1984) (establishing bankruptcy consent jurisdiction); Federal Magistrate Act of 1979, Pub. L. No. 96-82, § 2, 93 Stat. 643 (effective Oct. 10, 1979) (adding consent provisions for magistrates).

[46] *See, e.g.*, F. Andrew Hessick, *Consenting to Jurisdiction Outside the Article III Courts*, 71 VAND. L. REV. 715, 718–19 (2018) (exploring the concept of jurisdiction by consent and arguing that parties should not be able to proceed in Article I bodies where Article III review is constitutionally required).

[47] Whether the actual consent in any individual case is sufficient to be meaningful and not itself a legal fiction is a separate question that is worth separate analysis. This Article focuses on a greater evil: instances where there is no fig leaf of consent to the court to decide unraised claims.

affirmative and advance consent to the arbiter's jurisdiction over a certain category of claims, there is no concern that the parties would have refused consent over the unraised claim and application of claim preclusion poses little due process threat.

1. Consent and Magistrate Judges

The most straight-forward instance where the claim preclusive effect of unraised claim turns on actual consent is for proceedings before a magistrate judge. By design, magistrate judges are adjuncts to Article III judges, and are given judicial power only by designation of the district court.[48] The findings of fact and conclusions of law made by magistrates are subject to de novo review in the Article III courts, remedying constitutional challenges to their resolution of private rights. Where the parties give affirmative consent, the magistrate judge's ruling may be final.[49] These consent-based final determinations may have claim preclusive effect in future proceedings. Because consent to a magistrate judge's ability to finally decide claims automatically extends to all matters that the district court has jurisdiction to decide, there is no concern about fictional consent. Stated another way, a party must affirmatively consent to all claims in proceeding one in order for any claim in that proceeding to have preclusive effect.

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[48] Magistrate Judges Div., Admin. Office of the U.S. Courts, *A Constitutional Analysis of Magistrate Judge Authority*, 150 F.R.D. 247, 252 (1993) ("[T]he Court has not decided whether the authority of magistrate judges to preside over civil trials with the consent of the parties pursuant to 28 U.S.C. § 636(c) is permissible under Article III of the Constitution.").

[49] *See, e.g.*, Peretz v. United States, 501 U.S. 923, 935–36 (1991) (concluding that a defendant's consent would constitutionally permit a magistrate judge to oversee a felony trial voir dire process); Gomez v. United States, 490 U.S. 858 (1989) (holding that consent is required). The constitutional protection of Article III arises out of both structural and individual concerns. The Supreme Court has held that individual constitutional deprivations are waivable, so long as doing so does not undermine the broader structural limitations designed to protect the separation of powers. *See* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 848–49 (1986); *see also infra* Part II (describing similar logic as applied to bankruptcy courts). By giving consent, the individual parties release their ability to challenge constitutional deprivation of Article III review.

2. Consent and Arbitration

Arbitration is a second environment where claim preclusive effect is based upon actual, rather than fictional, consent.[50] The scope of an arbitrator's power to decide issues turns on the parties' consent,[51] usually manifested in the form of ex ante provisions in a private contract.[52] Arbitration agreements may be incredibly broad, or instead carefully drawn to limit arbitration to specific categories of claims.[53] Because the parties actually consent to the scope of issues before the arbitrator—meaning there is evidence that the parties intended to grant the arbitrator's authority—there is no risk of claim preclusion by fictional consent.[54] To be sure, arbitration clauses present many other potential injustices, including the absence of meaningful consent associated with mandatory arbitration provisions and the likelihood that a party's consent to arbitrate will be knowing and voluntary but will misapprehend

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50 *See* Anthony G. Buzbee, *When Arbitrable Claims Are Mixed with Nonarbitrable Ones: What's a Court to Do?*, 39 S. TEX. L. REV. 663, 670 (1998); G. Richard Shell, *Res Judicata and Collateral Estoppel Effects of Commercial Arbitration*, 35 UCLA L. REV. 623, 628 (1988). Arbitration orders, alone, are not claim preclusive, but the order affirming them can be, if challenged. An interesting, but out of scope, challenge arises when the parties in a later proceeding question whether claim preclusion bars only the claims that could have been raised in the arbitration, or instead also those claims that could have been raised in the proceeding to confirm the judgment.

51 Wolf v. Gruntal & Co., 45 F.3d 524, 528 (1st Cir. 1995) (noting, as the basis for limiting the claim preclusive effect of arbitral awards, that "the authority of an arbitrator to decide a controversy is derived entirely from the consent of the parties").

52 *Id.* (observing that arbitrators' authority is usually "predetermined by contract"); *see also* Volt Info. Scis., Inc. v. Bd. of Trs., 489 U.S. 468, 479 (1989) (due to the private nature of arbitration, parties are entitled to create their own boundaries via contract). Unlike magistrate judges, arbiters' power is not jurisdictional per se; rather, it is a creation of contract between the parties. However, the example is analogous in ways that can inform the analysis and role of actual, voluntary consent for claim preclusion purposes.

53 *See* David S. Schwartz, *Understanding Remedy-Stripping Arbitration Clauses: Validity, Arbitrability, and Preclusion Principles*, 38 U.S.F. L. REV. 49, 57 n.31 (2003) (describing arbitration agreement language that limits the scope of jurisdiction); *see also* Lagatree v. Luce, Forward, Hamilton & Scripps, 88 Cal. Rptr. 2d 664, 669 (Ct. App. 1999) (arbitration clause only reached common law contract and tort claims, and expressly excluded statutory claims); Davis v. Schwartz, 155 U.S. 631, 637 (1895) (explaining that the degree of judicial deference depends on the scope of consent); *In re* Kaplan, 143 F.3d 807, 815 (3d Cir. 1998) ("Generally applicable res judicata rules must sometimes be adapted to fit the arbitration context.").

54 The same could be said of jurisdiction provisions in contracts that constitute a party's consent to personal jurisdiction in a forum.

the scope of claims that will be before the arbitrator.[55] But for purposes of this Article there is a critical difference between some knowing and voluntary action—however problematic that action may be—and a complete absence of action. Arbitration escapes fictional consent because the parties actually consented to the arbitrator's authority over every claim that it decides.[56]

3. Consent and Article 1 Administrative Proceedings

Administrative adjudicatory proceedings present another litigation environment that may rely upon litigant consent for its ability to hear claims. Claim preclusion applies to agency adjudications,[57] which do not provide blanket jurisdiction. Based on a number of procedural safeguards, individuals who are parties to agency proceedings are commonly required to expressly consent to the agency's jurisdiction over

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[55] This is compounded by the Supreme Court's presumption in favor of arbitration. *See* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24–25 (1983) ("The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability."); AT&T v. Comm. Workers of Am., 475 U.S. 643, 650 (1986) (noting that the strong presumption in favor of arbitrability must be rebutted by "positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute").

[56] Furthermore, the parties can agree in the arbitration agreement to limit the preclusive effect of arbitration. *See Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24–25; *Comm. Workers*, 475 U.S. at 650.

[57] Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 107–08 (1991). Claim preclusion may be applied with more flexibility before administrative agency courts. *See* Maldonado v. U.S. Att'y Gen., 664 F.3d 1369, 1377–78 (11th Cir. 2011) (concluding that claim preclusion "applies even more flexibly in the administrative context than it does when a second court of competent jurisdiction is reviewing the decision of a first court"); Alvear-Velez v. Mukasey, 540 F.3d 672, 677 (7th Cir. 2008) ("[W]e have applied res judicata much more flexibly in the administrative context."); Collins v. Pond Creek Mining Co., 468 F.3d 213, 229 n.3 (4th Cir. 2006) (Shedd, J., dissenting); Quiñones Candelario v. Postmaster Gen., 906 F.2d 798, 801 (1st Cir. 1990) ("[I]n the context of administrative proceedings, *res judicata* is not automatically and rigidly applied in the face of contrary public policy."); Facchiano v. U.S. Dep't of Labor, 859 F.2d 1163, 1167 (3d Cir. 1988) ("[A]dministrative preclusion . . . is not as rigidly enforced as preclusion in judicial proceedings."); Artukovic v. INS, 693 F.2d 894, 898 (9th Cir. 1982) ("[I]n the administrative law context . . . *res judicata* [is] applied flexibly."); Parker v. Califano, 644 F.2d 1199, 1202 (6th Cir. 1981) ("[A]dministrative res judicata . . . is applied with less rigidity than its judicial counterpart."); United States v. Smith, 482 F.2d 1120, 1123 (8th Cir. 1973); Cartier v. Sec'y of State, 506 F.2d 191, 196 (D.C. Cir. 1974) ("[T]he doctrine of administrative *res judicata* . . . has not evolved into a rigid system that is to be blindly applied in every context.").

their claims (even claims that may be distant from the agency's regulatory function, such as a constitutional challenge within an enforcement proceeding).[58] By obtaining broad and direct litigant consent, the decisionmaker in proceeding one leaves no doubt that it was able to decide the claims before it.[59] With actual consent, there are no unanswered questions about whether the application of claim preclusion leads to an imbalance between repose and representation, finality and fairness.[60]

D. *Fictional Consent in Claim Preclusion*

In contrast to the scenarios where consent is actually given, fictional consent cases lack knowing and voluntary manifestation. Litigants in fictional consent scenarios are precluded from bringing unraised consent claims—claims that required litigant consent to decide—even though they never provided (or withheld) consent to the initial court's jurisdiction over those claims. Subsequent courts that apply claim preclusion over unraised consent claims assume that the party would have consented. The court embraces fictional consent, thereby eradicating the fundamental due process protection that consent provides.

Bankruptcy is the paradigmatic example of fictional consent. Bankruptcy courts frequently make final decisions on a variety of issues by way of litigant consent, likely due to their vast jurisdictional reach[61]

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58 *See generally* Hessick, *supra* note 46. Courts rely upon the doctrine of exhaustion to avoid constitutional challenges to the agency adjudicator's ability to reach claims that otherwise would be heard in the first instance by an Article III court. Whether this ultimate review on appeal—after exhaustion in the Article I labyrinth and with only deferential review—provides meaningful Article III oversight may, itself, be a legal fiction.

59 Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 589 (1985) (focusing on the voluntary nature of defendants who were subject to agency arbitration proceedings).

60 *See* United States v. Utah Constr. & Mining Co., 384 U.S. 394, 418–19 (1966) (declaring as final only those agency determinations made within the scope of the agency's authority). Applying claim preclusion in administrative law contexts is far from straightforward, but for the most part the specific problem of fictional consent addressed in this Article does not arise. For example, consent to jurisdiction mitigates some of the concerns about the independence of agency adjudication. *See* Aaron L. Nielson, *Beyond* Seminole Rock, 105 GEO. L.J. 943, 982–89 (2017) (discussing agency incentives to use adjudication to develop policies and noting potential concerns).

61 *See* Section II.A.

and well-established tradition of consent-based authority.[62] Bankruptcy cases move quickly to restructure an ailing debtor that is losing value like a "melting ice cube."[63] Resolving the debtor's issues often requires a bankruptcy court to evaluate broad categories of issues. In the trenches of a bankruptcy case, litigants and judges commonly pursue creative resolutions to endless challenges that a debtor may face. Bankruptcy is a wonderfully nimble specialized environment, but it is also one that mystifies many participants. These characteristics make it a vulnerable forum for the problem of fictional consent. In Part II, I further outline the limits to bankruptcy court jurisdiction that create a reliance on litigant consent, as well as the ways reviewing courts use fictional consent to give claim preclusive effect to unraised claims in bankruptcy.

Courts may also use fictional consent to preclude claims that are forced into a forum by statute. This is true in the context of takings claims, which litigants are required to ripen in state court proceedings before raising them in federal court.[64] Generally, a litigant may elect to raise constitutional claims in either state or federal court.[65] As commentators note, the takings plaintiff may be precluded from bringing the constitutional claim in federal court due to an initial proceeding in state court.[66] This preclusion occurs even though the litigant did not consent to state court resolution of her constitutional claim, but was instead mandated there and did not expressly withhold consent.[67] Courts reaching this conclusion acknowledge that the state court would only have jurisdiction over the constitutional claim with consent, but conclude

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62 Ralph Brubaker, *The Constitutionality of Litigant Consent to Non-Article III Bankruptcy Adjudications*, BANKR. L. LETTER, Dec. 2012, at 1, 7.

63 Melissa B. Jacoby & Edward J. Janger, *Ice Cube Bonds: Allocating the Price of Process in Chapter 11 Bankruptcy*, 123 YALE L.J. 862 (2014).

64 Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186–97 (1985).

65 This consent conundrum arises when a party has both statutory and constitutional claims, because the "transactional" approach to claim preclusion may require that all claims must be brought together. RESTATEMENT (SECOND) OF JUDGMENTS § 24(2) (AM. LAW INST. 1982) ("What factual grouping constitutes a 'transaction' . . . [is] to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.").

66 *See* J. David Breemer, *You Can Check Out but You Can Never Leave: The Story of San Remo Hotel—the Supreme Court Relegates Federal Takings Claims to State Courts Under a Rule Intended to Ripen the Claims for Federal Review*, 33 B.C. ENVTL. AFF. L. REV. 247, 248 n.3 (2006).

67 In effect, the doctrine requires affirmative nonconsent to reserve a plaintiff's federal rights.

that the litigant is "deemed to have consented" to resolution in state court according to the statutory requirements.[68] Because no actual consent was given, courts rely on fictional consent to impose preclusive effect.

As this Part illustrates, consent plays an important role in claim preclusion doctrine, in different ways and different environments. To highlight the problem of fictional consent, the next Part takes a closer look at bankruptcy and the specific challenges that claim preclusion presents in that system.

II. CLAIM PRECLUSION AND BANKRUPTCY COURTS

After years of uncertainty, recent Supreme Court decisions outlining the proper scope of bankruptcy court jurisdiction have—at least temporarily—provided a degree of stability to the system's well-documented Article III fault lines. Bankruptcy courts have jurisdiction to finally determine certain categories of claims but may only issue final determinations for other categories of claims if the parties give their express or implied consent to the bankruptcy court's jurisdiction. While this resolution provides welcome clarity to those who litigate and hear bankruptcy cases, the notion of "jurisdiction by consent" leaves significant instability in its stead relating to future claims.

Because bankruptcy cases frequently involve issues and disputes of state law, state courts are commonly asked to evaluate the claim preclusive effect of claims which were, or could have been, raised in the context of a prior restructuring case. But neither the states, nor the federal circuit courts of appeals, have reached a consensus about whether and when claim preclusion reaches consent claims that were never raised in the bankruptcy court.

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[68] *Id.* at 258 ("If so, then some state court litigants who did not consent to state adjudication of constitutional claims could nevertheless be deemed to have so consented and to have waived their right to district court review out of an effort to comply with *Windsor*.").

A. *Bankruptcy Court Jurisdictional Limits*

For decades, courts and commentators alike have analyzed the various contours of bankruptcy court jurisdiction.[69] Bankruptcy courts are not Article III courts, but instead derive their power from Article I of the Constitution in an adjunct role to the federal district courts. Because bankruptcy courts are frequently asked to hear and decide issues involving private rights between creditors and debtors—the types of claims that the Constitution preserves for Article III courts—there is constant tension and uncertainty surrounding bankruptcy court jurisdiction. Congress created the modern bankruptcy system in 1978, and since then has made various revisions to provide appropriate statutory guidance on the issue of jurisdiction. The Supreme Court has also drastically impacted the role, structure, and power of bankruptcy courts through its decisions relating to bankruptcy court authority. While many open questions remain, there is relative clarity on a number of key concepts surrounding bankruptcy court jurisdiction and authority.

Bankruptcy courts are created pursuant to Congress's powers "[t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States."[70] In *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, the Supreme Court highlighted bankruptcy judges' lack of structural protections such as life tenure and salary, and concluded that as a result bankruptcy judges may constitutionally exercise "the judicial Power of the United States" only over those matters that lie "at the core of the federal bankruptcy power."[71]

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[69] *See, e.g.*, Charles J. Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 23 (1995); Ralph Brubaker, *A "Summary" Statutory and Constitutional Theory of Bankruptcy Judges' Core Jurisdiction After* Stern v. Marshall, 86 AM. BANKR. L.J. 121 (2012); Michelle Wright, *From Stem to* Stern*: Navigating Bankruptcy Practice After* Stern v. Marshall, 77 MO. L. REV. 1159, 1170–73 (2012); Bethany A. Corbin, *Losing at Dodge Ball: Understanding the Supreme Court's Implied Authorization of Consent in* Executive Benefits Insurance Agency v. Arkison *and Why Revision of 28 U.S.C. § 157(B) Is Critical for Clarity*, 63 DRAKE L. REV. 109, 118 (2015).

[70] U.S. CONST. art. I, § 8, cl. 4.

[71] N. Pipeline Constr. Co. v. Marathon Pipeline Co., 458 U.S. 50, 61–63, 71, 87 (1982) (plurality opinion) ("We conclude that 28 U.S.C. § 1471, as added by § 241(a) of the Bankruptcy Act of 1978, has impermissibly removed most, if not all, of 'the essential attributes of the judicial power' from the Art. III district court, and has vested those attributes in a non-Art. III adjunct. Such a grant of jurisdiction cannot be sustained as an exercise of Congress' power to create adjuncts to Art. III courts." (citations omitted)).

Congress responded to the Supreme Court's *Northern Pipeline* decision by passing the Bankruptcy Amendments and Federal Judgeship Act of 1984 (BAFJA), which amends Title 28 of the United States Code to include sections 157 and 1334.[72] These sections provide a "patch" to the constitutional deficiency by clarifying the jurisdictional structure in § 1334,[73] and categorizing core and noncore claims in § 157.[74] The 1984 revisions make clear that the bankruptcy court has authority to hear cases by referral from the district court, and the district court maintains passive oversight authority.[75] Under § 157(b)(1), the bankruptcy court has jurisdictional power to decide claims "arising under" or "arising in" the Code.[76] The bankruptcy court also exercises "related to" jurisdiction, which extends to all matters in which "the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy."[77] Related-to jurisdiction is remarkably broad, and reaches many nonbankruptcy claims that turn on state law.[78]

The revised § 157 also created a statutory divide between "core" and "noncore" proceedings that may come before a bankruptcy court. The bankruptcy court could finally decide core claims, but could only resolve

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[72] Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, §§ 101, 104, 98 Stat. 333, 333, 340–41.

[73] 28 U.S.C. § 1334(a)–(b) (2018) (granting district courts "original and exclusive jurisdiction of all cases under title 11" and original, but not exclusive, jurisdiction "of all civil proceedings arising under title11, or arising in or related to cases under title 11").

[74] *Id.* § 157(b)–(c).

[75] *Id.* § 157(d). This oversight role includes taking appeals from bankruptcy court matters, as well as the ability to withdraw the reference and regain active administration of a bankruptcy case at will or upon a party's request.

[76] "Arising under" claims are those that are created or determined by a statutory provision under Title 11, while "arising in" claims include those that are not expressly created by the Bankruptcy Code but which could not exist outside of the bankruptcy case. Stern v. Marshall, 564 U.S. 462, 476–79 (2011).

[77] Celotex Corp. v. Edwards, 514 U.S. 300, 308 n.6 (1995) (quoting Pacor, Inc. v. Higgins, 743 F.2d 984, 994 (3d Cir. 1984)).

[78] Michael H. Goldstein, *Res Judicata Strikes Twice*, 2002 AM. BANKR. INST. J. 16, 41 ("The types of third-party claims that could potentially fall within this scenario include (1) claims among holders of different tranches of debt, (2) breach of fiduciary duty related claims and (3) torturous interference claims, to the extent that such claims are inextricably linked to the facts and circumstances leading to the bankruptcy case."). There is historical precedent for broad jurisdictional reach dating back to the judicial power of bankruptcy commissioners in England. *See* James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 719–20 (2004) (noting the role of English bankruptcy commissioners to decide certain claims in addition to administering the estate).

noncore claims by either the parties' consent, or by submitting proposed findings of fact and conclusions of law to the district court for de novo review.[79] In 2011, that distinction became further complicated by *Stern v. Marshall*.[80] In *Stern*, the Supreme Court held that certain claims Congress identified as "core" under the Bankruptcy Code (a statutory basis) still required Article III review (on a constitutional basis). In two later cases, the Supreme Court clarified that the constitutional infirmity it found in *Stern* claims could be remedied similarly to the Code's treatment of noncore claims: by either giving the claims de novo review in the district court,[81] or through litigants' express or implied consent.[82]

B. *Claim Preclusion Arising out of Bankruptcy Cases*

Claim preclusion extends to bankruptcy court decisions,[83] and the special nature of the bankruptcy process creates interesting and challenging questions about how and when claim preclusion applies.[84]

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79 28 U.S.C. § 157(c)(2) (2018); *see also* Harvey v. Dambowsky (*In re* Dambowsky), 526 B.R. 590, 595 (Bankr. M.D.N.C. 2015) ("Although they are related concepts . . . the scope of the bankruptcy courts' subject matter jurisdiction, their statutory authority to hear and/or determine any particular matter, and their constitutional authority to do so, each are delineated by different statutory, constitutional, and/or judicial authorities.").

80 564 U.S. 462 (2011).

81 Exec. Benefits Ins. Agency v. Arkison, 573 U.S. 25, 34–36 (2014).

82 Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1947–48 (2015). In *Wellness*, the Supreme Court also recognized the possibility that implied consent is sufficient to permit a bankruptcy court to exercise its judicial power over a litigant's claims. Implied consent in this context is different from fictional consent because it refers to a party's knowing and voluntary actions, rather than words. *Id.*; *see also* Richard K. Milin & Yitzhak Greenberg, Wellness *on Bankruptcy Court Jurisdiction: Practically Speaking, Silence Can Mean Consent*, NORTON BANKR. L. ADVISER, May 2015, at 1, 7. For a discussion of ways in which the Supreme Court takes a formalist approach to deciding the constitutionality of non-Article III adjudications but a functionalist review of the party's consent to such adjudications, see Ralph Brubaker, *Non-Article III Adjudication: Bankruptcy and Nonbankruptcy, With and Without Consent*, 33 EMORY BANKR. DEVS. J. 11, 15–16 (2016).

83 Brown v. Felsen, 442 U.S. 127, 134–39 (1979).

84 For example, scholars struggle to interpret and predict whether and how key milestones of the bankruptcy process will have claim preclusive effect. *See* Christopher Klein, Lawrence Ponoroff & Sarah Borrey, *Principles of Preclusion and Estoppel in Bankruptcy Cases*, 79 AM. BANKR. L.J. 839, 888 (2005) ("One of the most perplexing problems in bankruptcy is determining the preclusive effect of plan confirmation."); Kevin M. Lewis, Paul M. Lopez, Scott Lawrence & Tim S. Springer, *Recent Developments in Estoppel and Preclusion Doctrines in Consumer Bankruptcy Cases; Volume*

Congress designed the bankruptcy process to expansively address any issues related to the debtor's estate. Each bankruptcy case involves a complicated web of relationships between the debtor and its creditors, between different categories of creditors (secured, unsecured, etc.), and between individual creditors. Bankruptcy procedure permits claims arising out of these different relationships to be tested under the umbrella of a single debtor's case, even if the disputes only tangentially involve the debtor.

Most issues directly involving the debtor's restructuring will be resolved in the main bankruptcy case. Parties may challenge all elements of the debtor's bankruptcy, including common issues like the terms of the proposed debtor-in-possession financing, the process by which the debtor seeks to sell the business, and the distribution of assets in a bankruptcy plan of reorganization. Other claims must be brought in an adversary proceeding, a "case within a case" that closely mirrors standard civil litigation.[85] Adversary proceedings require the bankruptcy court to decide any number of claims between seemingly endless combinations of parties.[86] Recall that claim preclusion bars parties or their privies from bringing in a second proceeding any claim that was (or could have been) raised in the first proceeding. In bankruptcy, claim preclusion could apply to hundreds or even thousands of "parties" and reach just as many diverse claims that were raised before the bankruptcy court.

The complexity grows exponentially when a party seeks to raise claim preclusion as a defense to claims that were not raised in a prior bankruptcy case. For unraised claims, the preclusion analysis turns on whether they "could have been raised" in the bankruptcy, which in turn relates back to the bankruptcy court's jurisdiction. One challenging aspect of bankruptcy claim preclusion doctrine springs from the

II of II: Preclusion, 67 OKLA. L. REV. 733 (2015) (describing the contours of claim preclusion in bankruptcy cases).

85 FED. R. BANKR. P. 7001 (outlining instances where an adversary proceeding is required).

86 In *Taylor v. Sturgell*, the Supreme Court identified bankruptcy as one of the "special statutory scheme[s]" that warrant nonparty preclusion, as long as the schemes are "otherwise consistent with due process." 553 U.S. 880, 895 (2008). At first glance this reference seems to end the inquiry about claim preclusion of nonparties in bankruptcy. Such an assumption is true in the simplest example, involving silent creditors who are precluded from bringing claims against the debtor after the bankruptcy court confirms a plan of reorganization. However, the list of claim preclusion scenarios in bankruptcy reaches far beyond the simplest example, and defining whether a particular entity is a "party" or "nonparty" with regard to a specific claim is not always an easy task.

core/noncore distinction outlined in the previous Section.[87] Due to the constitutional limitations that prevent a bankruptcy court from finally deciding certain claims without a litigant's consent, it remains uncertain whether the bankruptcy court is a court of "competent jurisdiction" that can "finally decide" those claims for claim preclusion purposes without consent.

There is no dispute that a bankruptcy court's decision in "core" matters, such as confirming a plan of reorganization, is final and has claim preclusive effect. Imagine a retail company files for bankruptcy and confirms a plan of reorganization that discharges all of the company's debt. If one of the company's vendors did not object to the bankruptcy plan but instead tries to pursue a later claim for breach of contract against the debtor in state court, then claim preclusion will bar the state suit. The same parties are involved in both proceedings; the bankruptcy court is a court of competent jurisdiction; the same debt is at issue; and the bankruptcy plan confirmation finally decided the issue. Each element of the claim preclusion test is satisfied, and the interests of fairness and finality are in harmony.

The outcome is less certain in the context of "noncore" claims. If the same vendor has a breach of contract claim against another vendor (not the debtor) that the vendor did not raise in the bankruptcy case, but later brought in state court. For instance, the defendant vendor could have been obligated to provide some service to the debtor under a contract between the defendant vendor and the plaintiff vendor. The plaintiff vendor might allege that she was harmed when the defendant vendor did not perform services to the debtor, resulting in the debtor's inability to pay the plaintiff vendor. Because the unraised claim was noncore, the bankruptcy court would not have been able to resolve it without both vendors' consent.[88]

Had the plaintiff vendor raised the claim before the bankruptcy court, she would have given actual consent, either impliedly by asking the

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[87] One ongoing area of inconsistency and uncertainty in bankruptcy court authority relates to which claims qualify as core and noncore. Since *Stern*, courts have grappled with different types of claims, different parties, and different contexts to decide in which bucket a particular claim should fall. This Article recognizes, but then sets aside, that issue and focuses on unraised claims that are undisputedly noncore. As the dust settles on the core/noncore divide over time, the potential impact of fictional consent could grow even broader as the number of noncore claims increases.

[88] This claim would arise in the context of an adversary proceeding, where most noncore claims are resolved.

bankruptcy court to decide the dispute, or expressly by making a statement of jurisdictional consent in accordance with Federal Rule of Bankruptcy Procedure 7008.[89] The vendors' consent would make the bankruptcy court a court of "competent jurisdiction" that could "finally decide" the breach-of-contract claim for preclusion purposes. But because the plaintiff vendor did not raise the claim until after the bankruptcy concluded, the state court in proceeding two is obligated to hypothetically question whether the vendor would have consented.[90] Courts that are asked to evaluate the claim preclusive effect of unraised consent claims in bankruptcy do not agree on the proper treatment, and follow one of two approaches.

1. The Majority Approach to Preclusion of Unraised Consent Claims

A majority of courts reviewing the question conclude that claim preclusion should bar unraised noncore claims, notwithstanding the fact that the bankruptcy court would have needed litigant consent for authority to finally decide such claims.[91] These courts conclude that there

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[89] Recall that bankruptcy courts have authority to decide some, but not all, of a party's claims without consent, based upon whether they are designated as core or noncore. In this hypothetical, the defendant vendor would have the opportunity to withhold consent in a responsive pleading. *See* FED. R. BANKR. P. 7012 (requiring a statement regarding consent or non-consent to jurisdiction).

[90] At first glance it may seem like this question is simply resolved. The Restatement explains that unasserted supplemental claims should be precluded in a second proceeding if there was concurrent jurisdiction in the first proceeding, unless the first court would "clearly have declined to exercise [its jurisdiction] as a matter of discretion." RESTATEMENT (SECOND) OF JUDGMENTS § 25 cmt. e (AM. LAW INST. 1982). To be sure, this example alludes to the concept of fictional consent by considering what the initial court would have done had a claim been raised (even though it never happened). However, the Restatement's discussion of supplemental claims focuses on jurisdiction that relies on court discretion, not litigant consent, and does not resolve the problem of fictional consent in bankruptcy.

[91] Davenport v. Djourabchi, 296 F. Supp. 3d 245, 255–56 (D.D.C. 2017) (weighing the two lines of interpretation, and concluding that claim preclusion should apply to both core and noncore unraised claims), *on reconsideration*, 316 F. Supp. 3d 58 (D.D.C. 2018); Plotner v. AT&T Corp., 224 F.3d 1161, 1173 (10th Cir. 2000) (finding the claim preclusion standard satisfied, even if the bankruptcy court was not able to issue a final decision without the party's consent); CoreStates Bank, N.A. v. Huls Am., Inc., 176 F.3d 187, 197 (3d Cir. 1999) (same); Robertson v. Isomedix, Inc. (*In re* Int'l Nutronics, Inc.), 28 F.3d 965, 969–70 (9th Cir. 1994) (same); Sanders Confectionery Prods. v. Heller Fin., Inc., 973 F.2d 474, 483 (6th Cir. 1992) (same); Sure-Snap Corp. v. State St.

are heightened risks to finality in the bankruptcy context, and that the litigant would likely have consented to the claim being decided had it been raised. Without consent, the bankruptcy court may still hear a dispute, and then issue findings of fact and conclusions of law. Still more, the district court (which referred the bankruptcy matter to the bankruptcy court in the first instance) is standing at the ready to grant a jurisdictionally sound final order that provides the vendor's remedy. Through this perspective, the bankruptcy court's lack of authority to finally decide issues without consent does not prevent it from being a "court of competent jurisdiction" for claim preclusion purposes.[92]

The majority approach is misguided for a number of reasons. First, the Supreme Court's recent narrowing of bankruptcy courts' constitutional authority offers a strong indication that the limits and distinctions trigger significant separation of powers structural norms. Second, claim preclusion's evaluation of the "competent jurisdiction" and "final decision" elements traditionally turn on the forum's ability to offer a remedy, not merely hear the dispute. The bankruptcy court, alone, cannot offer a remedy unless the party consents. Presuming that the party would have made the decision to simply accept the bankruptcy court's jurisdiction ignores the real implications of that decision. Beyond withholding consent and insisting on district court de novo review,[93] the party could have asked the district court to withdraw the reference altogether (securing direct Article III adjudication to build the record in the first instance) or, in certain cases, seek the bankruptcy court's permissive or mandatory abstention in favor of state courts.[94]

Next, applying claim preclusion to noncore claims in bankruptcy may already press upon a party's due process right to a day in court due to the attenuated nature of the claims. Many noncore claims in the bankruptcy context are so distant from the litigant's likely understanding of the proceeding's scope that it is questionable whether their actual

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Bank & Tr. Co., 948 F.2d 869, 870–74 (2d Cir. 1991) (same). Although many of these cases pre-date *Stern*, their logic would apply equally to noncore claims and *Stern* claims.

92 *See, e.g.*, Ralph E. Avery, *Chapter 11 Bankruptcy and Principles of Res Judicata*, 102 COM. L.J. 257, 259, 286–89 (1997) (rejecting the validity of any distinction between the bankruptcy court's authority and the combination of district court and bankruptcy court review).

93 This is the default outcome when consent is removed, and the one that most courts and commentators consider when dismissing the problem of fictional consent. *See* Avery, *supra* note 92, at 286–89.

94 *See* 28 U.S.C. § 1334(c) (2018) (providing for mandatory and permissive abstention).

consent to being before a bankruptcy court via filing a proof of claim against the debtor should constitute consent for purposes of claim preclusion. For example, litigants who file a proof of claim may not anticipate or understand that it constitutes consent over their lawsuits against the debtor or impacting the debtor's assets under a plan of reorganization. Applying claim preclusion on the basis of fictional consent layers another problematic dimension, all in the interest of finality. Finally, practically speaking, if parties are precluded from attenuated consent claims, the likely result is that the bankruptcy court would be flooded with prophylactic adversary proceedings on "related to" claims. This would draw the court's attention to dark corners of state law and delay the core focus of bankruptcy: the quick and efficient administration of the debtor's estate.[95] "Preclusion doctrine . . . is intended to reduce the burden of litigation on courts and parties,"[96] not increase it.

2. The Minority Approach to Preclusion of Unraised Consent Claims

A minority of circuits do not extend claim preclusion to unraised consent claims through fictional consent. Courts taking this approach offer a simple—and formalistic—analysis: because the bankruptcy court could not finally decide the noncore claim without consent, and because no consent was given, claim preclusion does not apply.[97] The minority-approach courts recognize that the claim at issue could have been raised under the court's "related to" jurisdiction and approved by a district court

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[95] Goldstein, *supra* note 78, at 40–41 (observing the "staggering" impact of expanding claim preclusion to claims by a creditor against a non-debtor under the bankruptcy court's "related to" jurisdiction).

[96] Taylor v. Sturgell, 553 U.S. 880, 901 (2008).

[97] E. Minerals & Chems. Co. v. Mahan, 225 F.3d 330, 337–38 (3d Cir. 2000) ("Claim preclusion only bars claims arising from the same cause of action previously raised, not every conceivable claim that could have been brought in the context of a bankruptcy case over which the court would have had jurisdiction."); *see also* Eastman Kodak Co. v. Atlanta Retail, Inc., 456 F.3d 1277, 1285 (11th Cir. 2006) (applying section 27 of the Restatement (Second) of Judgments); George A. Martinez, *The Res Judicata Effect of Bankruptcy Court Judgments: The Procedural and Constitutional Concerns*, 62 MO. L. REV. 9 (1997) (collecting cases and summarizing the two approaches to claim preclusion of unraised, noncore claims).

on de novo review, but conclude that the lack of actual consent ends the analysis.[98]

The minority approach misses the mark by insulating too many claims from preclusion. If all unraised consent claims escape preclusion, then certain claims that likely should have been raised during the bankruptcy process can drag the relevant parties back to court in a second proceeding. Consider noncore claims raised by a debtor against a creditor. The debtor files the bankruptcy case and is responsible for identifying and sharing all of its possible claims as part of its mandatory disclosures.[99] There is little doubt that the debtor knows the bankruptcy is the appropriate place to resolve all of its claims, and the debtor will have a full and fair opportunity to be heard before the bankruptcy court. Under these facts, the fundamental due process concerns that may arise in other contexts involving unraised, noncore claims do not apply.[100] Both finality and fairness weigh in favor of precluding the debtor's suit, notwithstanding the absence of actual consent.[101]

C. *The Problem of Fictional Consent in Bankruptcy*

As identified above, fictional consent is most pronounced in bankruptcy courts. Because bankruptcy courts have such broad related-to jurisdiction,[102] the number of claims that could be heard by the bankruptcy court—and which become subject to claim preclusion if not raised—is quite large.[103] Additionally, the collective structure of

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98 Colvin v. Amegy Mortg. Co., LLC, 507 B.R. 169, 190 (W.D. Tex. 2014) (declining to give claim preclusive effect to a party's failure to bring an avoidance action counterclaim in lift stay motion, notwithstanding the fact that the party *could* have raised the claim).

99 *See* 11 U.S.C. § 521(b)(1) (2018) (obligating the debtor to disclose its assets, which include claims).

100 *See* Section II.C.

101 Even the debtor must consent to final bankruptcy court resolution of noncore claims. The debtor's consent to the bankruptcy court's resolution of some claims may not operate as consent to resolving all claims.

102 *See* Section II.A.

103 This fiction is compounded by the miniscule actions that are necessary to "consent" to the bankruptcy courts' jurisdiction. *See* DePaola v. Sleepy's LLC (*In re* Prof'l Facilities Mgmt.), No. 14-31095-WRS, 2015 Bankr. LEXIS 3643, at *6 (Bankr. M.D. Ala. Oct. 27, 2015) (finding consent where an adversary proceeding defendant filed a counterclaim against the estate slightly in excess of the debtor's claim and expressly declined to consent). *But see* Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1948 (2015) (requiring implied consent to be such that "counsel was made aware of the

bankruptcy involves seemingly endless parties in interest. Courts have observed that the oddities of the forum make claim preclusion an "awkward fit" in bankruptcy.[104] Each of these parties may be involved in a bankruptcy case by means of their claim against a debtor, but may also have claims against other creditors or the bankruptcy estate professionals. Another court could use claim preclusion to prevent any claims that could have some conceivable effect[105] on the debtor's plan of confirmation in the initial bankruptcy case.

1. Fictional Consent in Action

To better understand the problems posed by fictional consent claim preclusion in bankruptcy, consider the following hypothetical example. Imagine a microchip company, Mister Chips Inc. ("Mr. Chips" or the "debtor"), files for chapter 11 protection in bankruptcy court. As part of the bankruptcy claims allowance process, many creditors file a proof of claim. Two of these creditors, in particular, merit our focus. First is Sal's Sand Emporium ("SSE"). SSE provided bulk specialized sand to the debtor for use in its fabrication process and filed a claim in the bankruptcy for $50,000 in unpaid invoices. The second creditor is Mobilecon Cellular ("Mobilecon"), a small, domestic cell phone manufacturer that incorporates Mr. Chips microchips into its products. Around five months prior to the bankruptcy, the debtor ordered and received 200 specialized phones from Mobilecon for corporate use, but never paid, leaving Mobilecon with a $175,000 bankruptcy claim. As the bankruptcy progressed, the court approved a sale of substantially all of the debtor's assets to a separate entity, and then confirmed a liquidating plan to wind down the remaining affairs and distribute the small collected value to creditors. After the plan is confirmed, the court bids goodbye to Mr. Chips[106] and the case concludes.

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need for consent and the right to refuse it, and still voluntarily appeared to try the case before the non-Article III adjudicator").

104 *See* Brown Media Corp. v. K&L Gates, LLP, 854 F.3d 150, 154–55 (2d Cir. 2017) (collecting cases identifying the same peculiarities).

105 This connection may be as attenuated as a potential guarantee that upon certain narrow circumstances could be triggered in a way that could harm the debtor's estate.

106 *See generally* JAMES HILTON, GOODBYE, MR. CHIPS (Hoddler & Stoughton, 1934).

Sometime prior to the petition date of Mr. Chips's bankruptcy, SSE also had ordered phones from Mobilecon.[107] SSE was not happy with the phones it received, one of which caught on fire and burnt an employee. After the bankruptcy concluded, Mobilecon began attempting to collect the outstanding payment amounts that SSE refused to pay. Sensing trouble, SSE went on the offensive by filing a state court lawsuit against Mobilecon in Washington (where both companies are headquartered), alleging a defect under the state products liability statute.[108] Mobilecon raised claim preclusion as a defense, claiming that SSE could have brought the products liability claim before the bankruptcy court, and therefore was not permitted to have a second bite at the apple in state court. In the course of discovery, Mobilecon produced a version of its contract with Mr. Chips. The contract contained an indemnification provision under which Mobilecon could conceivably seek indemnification from Mr. Chips for any amounts due to SSE (per the terms of the contract, this indemnification obligation would turn on whether the problem with the phone was caused by a faulty microchip).

The outcome in this hypothetical would depend on where Mr. Chips filed for bankruptcy. The Washington state court would evaluate claim preclusion under the federal standard applied in the circuit where the first proceeding was held. If the bankruptcy was filed in the minority-approach circuits, there would be no claim preclusive effect because the bankruptcy court was not a court of "competent jurisdiction" vis-à-vis the noncore products liability claim. The litigants did not actually consent to the court's jurisdiction; therefore, the bankruptcy court had no authority to offer the parties any remedy.

In contrast, the majority-approach circuits would find that the bankruptcy plan's confirmation had claim preclusive effect on SSE's state law claim. Both parties to the state court suit were parties to the bankruptcy because they each filed a proof of claim. The bankruptcy court would be deemed a court of "competent jurisdiction," because the products liability claim would fall under the bankruptcy court's "related to" jurisdiction through the remote possibility that the debtor's indemnification obligation would impact the estate's assets. It does not matter that the unraised claim is noncore and that the bankruptcy court

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107 Generally, bankruptcy resolves pre-petition claims against the debtor.

108 *See* Washington Products Liability Act, WASH. REV. CODE §§ 7.72.010–.070 (1981). Assume for purposes of this example that the claims were all within the respective statutes of limitation.

would have required the parties' consent to finally decide it.[109] Last, the presence of the debtor's possible indemnification obligation, however slight, is sufficient to say that the products liability suit is the "same claim" as the bankruptcy confirmation order (which finally resolved the debtor's assets and liabilities).[110]

Surely this is not how claim preclusion was designed to operate. To say that SSE should have known to bring this unrelated claim against a non-debtor in the bankruptcy process, and to presume that SSE would have consented to the bankruptcy court's jurisdiction over the purely state law claim, is preposterous. Constitutional due process limitations on claim preclusion focus on the day-in-court ideal, asking whether the parties had adequate notice and opportunity to be heard. Neither element is present under these circumstances. Even sophisticated businesses could misunderstand the degree to which the bankruptcy court's broad jurisdiction operates as a claim preclusion vacuum. SSE may have followed the bankruptcy closely and yet still not understood that its claim against another creditor would be barred. Of course, had SSE brought the products liability challenge in the bankruptcy case, nobody would challenge any decision's preclusive effect. But when faced with the option of presuming that SSE would have consented, versus the opposite presumption—that it would have declined consent[111]—the support of finality must yield to due process protections.

2. Testing the Due Process Limit

Due process "fairness" requirements for whether a party is bound by a court's decision should be analyzed separately from whether a party is

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109 In this way, applying claim preclusion to unraised, noncore claims in bankruptcy embraces the fiction of consent.

110 These parties would not be completely without remedy. SSE could technically move to reopen the bankruptcy, a remedy that requires extraordinary circumstances that are not obvious on these facts.

111 Avery, *supra* note 92, at 288 ("Since the bankruptcy court can enter a final judgment in a noncore matter with the consent of the parties, it is entirely conceivable that, had a non-core matter actually been litigated, the parties might have consented to the entry of a final order by the bankruptcy court. When addressing this point in the context of an attempt to litigate a non-core matter in a second proceeding, however, the plaintiff in effect seeks a conclusive presumption that it would not have consented to the entry of a final order by the bankruptcy court in the first proceeding.").

precluded from bringing unraised claims as a result of that decision. For example, in bankruptcy, there are minimum notice requirements for approving a sale free and clear of other interests.[112] If the parties who might make claims against the sold property received sufficient notice and an opportunity to be heard, then they are precluded from later challenging the sale. But under claim preclusion doctrine in bankruptcy cases, the sale order could preclude creditors from making claims against other creditors (not against the purchaser or the debtor). The notice that is necessary to adequately apprise creditors of the latter impact surely ought to be evaluated separately from the former.[113]

The key analysis for purposes of claim preclusion should turn on (1) the degree to which the party challenging preclusion was a "party" in the initial proceeding with respect to the specific claim facing preclusion, and (2) as a result, what level of notice is appropriate.[114] In the most-often discussed bankruptcy final order, confirmation of a bankruptcy plan, the parties should include the debtor and all creditors who may want to make a claim with respect to the debtor's asset. Plan confirmation is the final step in the bankruptcy case that decides how the debtor's estate will be distributed, extinguishes any rights not provided for or reserved in the plan, and sets in motion a chain of events that replaces the debtor with a new legal entity. While unknown or silent creditors are non-parties because they have not filed a proof of claim against the bankruptcy

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112 *See* 11 U.S.C. § 363 (2018); FED. R. BANKR. P. 2002(a)(2), 6004(a). The Federal Rules of Bankruptcy Procedure provide standard notice guidelines, however, courts have made clear that due process may require additional protections. *See In re* Motors Liquidation Co., 829 F.3d 135 (2d Cir. 2016); United Student Aid Funds, Inc. v. Espinosa, 559 U.S. 260 (2010).

113 Various commentators have evaluated the intersection of due process and bankruptcy, some even noting the potential implications of claim preclusion in that analysis. *See, e.g.*, Ralph Brubaker, *Supreme Court Upholds "Discharge by Declaration" of Student Loan Debts in Chapter 13 (or Does It?)*, BANKR. L. LETTER, June 2010, at 1. This topic, especially in the context of claim preclusion, merits additional scholarly attention.

114 In *Taylor v. Sturgell*, the Supreme Court identified bankruptcy as one of the "special statutory schemes" that warrant nonparty preclusion, as long as the schemes are "otherwise consistent with due process." 553 U.S. 880, 895 (2008). At first glance, this reference seems to end the inquiry about claim preclusion of non-parties in bankruptcy. Such an assumption is true in the simplest example, involving silent creditors who are precluded from bringing claims against the debtor after the bankruptcy court confirms a plan of reorganization. However, the list of claim preclusion scenarios in bankruptcy reaches far beyond the simplest example, and defining whether a particular entity is a "party" or "nonparty" with regard to a specific claim is not always an easy task.

estate,[115] the bankruptcy plan nonetheless extinguishes their pre-bankruptcy rights against the debtor under an approved nonparty due process requirement for in rem proceedings.[116]

Consider a simple plan through which a debtor is distributing its remaining assets among creditors. In that case, the only "party" relationships at issue are between the individual creditors filing a proof of claim and the debtor, and due process is satisfied by the simple notice followed by a hearing on plan confirmation required by the bankruptcy rules. Nonparty creditors or claimants against the debtor may also be bound without notice due to the unique nature of finality in bankruptcy. While a creditor is a "party" to the plan confirmation for purposes of resolving its claim against the debtor,[117] it should not automatically be considered a "party" in the context of a separate claim against another creditor that is "related to" the bankruptcy case.[118] Technically this creditor is a "party" because it filed a proof of claim in the bankruptcy case against the debtor; however, it is unlikely that the creditor will be evaluating the proceeding in the capacity of its separate claim. Claims between creditors in a bankruptcy are conceptually similar to crossclaims

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115 With a few exceptions, such as future claimants, only creditors who file a proof of claim are eligible to receive distribution from the creditor. By filing a proof of claim, the creditor becomes a "party" to the bankruptcy case. This definition of a "party" does not, however, diminish the binding nature of a bankruptcy discharge on absent claimants who received notice of the bankruptcy but never brought a claim.

116 Minzner, *supra* note 32, at 604 n.37 ("The Supreme Court has not clearly explained why nonparty preclusion is constitutional in [bankruptcy] cases, but the answer probably lies in the need for finality. In this way, these proceedings can be seen as another example of Mathews-style balancing where the value of finality is allowed to overcome the general rule against nonparty preclusion."). This exclusion, and cases cited to support it, focuses on the collective nature of bankruptcy to distribute the debtor's assets through claims allowance process.

117 With basic notice and a hearing, the creditor is on notice of all disputes against the debtor and due process would be satisfied as to precluding all unraised claims against the debtor. The same is true of the debtor's claims against creditors, because the debtor has notice of everything that occurs in the bankruptcy case and has strong leverage to drive the direction of the proceedings.

118 Compare this example with the plan confirmation in *United Student Aid Funds v. Espinosa*, 599 U.S. 260 (2010). There, a student loan creditor argued that due process was insufficient when default interest payments were discharged in a Chapter 13 plan, rather than a separate adversary proceeding (as required by the Bankruptcy Code). *Id.* at 272. The Supreme Court disagreed, holding that the notice in the plan was sufficient to prevent overturning the confirmation as void. *Id.* Unlike the hypothetical creditor in this Article, who had a claim against the debtor that was completely separate from one against another creditor, the loan creditor in *Espinosa* was pursuing the very same interest under the plan and in the missing adversary proceeding: collection of penalties on the student loan.

between defendants in civil litigation.[119] But unlike claims between creditors, a defendant's failure to bring a crossclaim against his co-defendant in civil litigation will not preclude the claim in a later proceeding.[120] For this reason, the bankruptcy creditor should be entitled to more robust notice before her separate, unraised claim can be precluded in future proceedings.[121]

As to how much notice is sufficient for claim preclusive effect, it will depend on the circumstances.[122] Courts evaluating notice look for three elements: (1) content that reasonably conveys to the recipient all the required information; (2) transmission of the information in a manner that is reasonably calculated to reach all interested parties; and (3) a reasonable time for response.[123] Because the bankruptcy system already imposes a robust notice regime, the content and timing elements are most relevant to the application of claim preclusion to fictional consent claims.[124] As to content, perhaps the due process concerns highlighted above could be addressed by adding a simple disclaimer to every

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119 FED R. CIV. P. 13(g); *see also* Mary Kay Kane, *Original Sin and the Transaction in Federal Civil Procedure*, 76 TEX. L. REV. 1723, 1729 (1998) (describing the contours of crossclaims).

120 *See* CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, 6 FEDERAL PRACTICE AND PROCEDURE § 1431 (3d ed. 2020) ("A party who decides not to bring a claim under Rule 13(g) will not be barred by res judicata, waiver, or estoppel from asserting it in a later action . . . ."); *see also* Wis. Pub. Serv. Corp. v. Arby Constr., Inc., 798 N.W.2d 715, 719–22 (Wis. Ct. App. 2011) (rejecting a claim preclusion defense that a defendant used to challenge an unraised crossclaim from a prior proceeding).

121 The specific components of a bankruptcy plan may impact this analysis. For example, certain circuits permit bankruptcy plans to include third-party releases as part of the debtor's bargain. *See, e.g.*, *In re* Metromedia Fiber Network, Inc., 416 F.3d 136, 143 (2d Cir. 2005); *In re* Washington Mut., Inc., 442 B.R. 314, 352 (D. Del. 2011); Nat'l Heritage Found., Inc. v. Highbourne Found., 760 F.3d 344, 351 (4th Cir. 2014); *In re* Dow Corning Corp., 280 F.3d 648, 657–58 (6th Cir. 2002); *In re* Airadigm Commc'ns., Inc., 519 F.3d 640, 656 (7th Cir. 2008); *In re* Seaside Eng'g & Surveying, Inc., 780 F.3d 1070, 1078 (11th Cir. 2015). In such instances, the parties to the dispute would also include creditors/third parties who have claims against the released parties, as the nature of the "case" relates to their claims. The potential implications of third-party releases are subject to independent concerns relating to the court's constitutional authority, all of which is beyond the scope of this Article.

122 Mathews v. Eldridge, 424 U.S. 319, 333–35 (1976) (creating a balancing test to evaluate how much process is due in a given system); *see also* Gregory Germain, *Due Process in Bankruptcy: Are the New Automatic Dismissal Rules Constitutional?*, 13 U. PA. J. BUS. L. 547, 586–87 (2011) (explaining the application of *Mathews* to bankruptcy proceedings).

123 Greyhound Lines, Inc. v. Rogers (*In re* Eagle Bus Mfg., Inc.), 62 F.3d 730, 735 (5th Cir. 1995).

124 Although bankruptcy notice obligations may be costly and burdensome, they do a relatively good job of providing notice to parties. In this context, the bigger issues involve whether the parties have time to do anything with the notice or understand what they should be on notice of.

bankruptcy filing, stating "please be aware that any claim you may have against any other party that has a potential impact on the debtor's estate will be barred if you do not bring it in response to this proceeding." It is unclear whether this notice would satisfy minimal due process standards, especially given logistical constraints in the bankruptcy process. Under the current system, it is extremely unlikely that creditors will know which claims "have a potential impact" on the debtor. A debtor could be required to list out its obligations in more detail to provide additional notice, yet this option is practically impossible in some cases given the already costly and burdensome disclosure requirements in the bankruptcy process. The same is true with regard to timing. In many parts of the bankruptcy process, there is not sufficient time between notice and a hearing for the creditor to evaluate and appreciate the claims that will be decided, especially in instances where the debtor files with a prepackaged plan of reorganization that allows bankruptcy to conclude quickly.[125] Perhaps the better option is to recognize that it is simply not possible to give claim preclusive effect to certain unraised claims.

3. Practical Challenges

The procedural complexity and urgency in bankruptcy cases exacerbates the due process problem. Claim preclusive effect may be given to other bankruptcy milestones, such as a sale order under § 363. Unlike in traditional civil litigation, where parties are more likely to have an interest in (and therefore focus on) the full dispute, bankruptcy cases can involve multiple components all proceeding simultaneously at a rapid pace. It is commonplace for a large business chapter 11 case to amass thousands of docket entries in just months.[126] Creditors, especially those who are following the case without hiring bankruptcy attorneys, may know to follow some parts of the case that would directly impact their interest. Other parts of the case, including those that may be "core"

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[125] *See* Foteini Teloni, *Chapter 11 Duration, Preplanned Cases, and Refiling Rates: An Empirical Analysis in the Post-BAPCPA Era*, 23 AM. BANKR. INST. L. REV. 571 (2015) (noting a significant drop in bankruptcy case-time as prepackaged bankruptcies became more common).

[126] For example, in the recent Toys "R" Us bankruptcy, the docket swelled to 4000 entries within just thirty-three days after the company filed its bankruptcy petition. *See Toys "R" Us, Inc.*, *Docket*, PRIME CLERK, https://cases.primeclerk.com/toysrus/Home-DocketInfo [https://perma.cc/59S6-XC9A].

and trigger claim preclusion, could be completely off the creditor's radar. Notice provisions in the Federal Rules of Bankruptcy Procedure offer mere weeks advance notice of substantive hearings, with objections due in advance. The pleadings may span hundreds of pages, followed by still more pages of underlying contracts and deal documents. For the average creditor, the bankruptcy process is like a runaway train barreling through the station. Most parties could identify the caboose,[127] but few could recognize individuals within the passenger railcars as the train speeds by.

Returning to our hypothetical example, assume that the Mobilecon contract is now going to be sold in a § 363 sale, which requires just twenty-one days' notice. Creditor SSE would have been notified of the sale and hearing, but would have no meaningful time or opportunity to understand that the Mobilecon contract being sold (listed deep in a hundred-page sale agreement along with dozens of other contracts) contained an indemnification provision relating to the cell phones that SSE purchased from Mobilecon.

Finality is no doubt important in bankruptcy cases; the debtor will cease to exist in its pre-bankruptcy form, and creditors will resolve their outstanding claims against the debtor all within the bankruptcy case. For this reason, all unraised claims that have a material impact on the bankruptcy case will be precluded without reliance upon fictional consent.[128] But fictional consent claims pose only a limited risk to the heightened bankruptcy finality considerations because, at most, they involve noncore claims between third parties.[129] Litigants who are precluded by fictional consent in bankruptcy are unlikely to know that they face claim preclusion. In this way, claim preclusion is a harsh consequence for unraised claims, but imposing it by fictional consent compounds the injustice.

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127 The caboose here represents plan confirmation, an obvious and important bankruptcy milestone.

128 This includes all "core" claims. *See supra* Section II.A.

129 Claims by a creditor against a debtor are released in the plan confirmation process, the most typical "final" order in the bankruptcy court that triggers claim preclusion. Other relevant milestones in the bankruptcy process that have triggered claim preclusion include approval of a sale order, approving a fee application, and approving settlements under section 9019 of the Bankruptcy Code. *See, e.g.*, FED. R. BANKR. P. 9019(b).

III. RESOLVING THE PROBLEM OF FICTIONAL CONSENT

The previous Part presented the problem of fictional consent through the lens of bankruptcy proceedings. With that example in mind, this Part begins the work of unraveling and ultimately resolving the problem of fictional consent in claim preclusion.

A. *Narrowing Fictional Consent in Different Environments*

The Sections above highlight the fundamental problem of applying claim preclusion by fictional consent. Beyond that basic conclusion, the particular scope and characteristics of the problem will vary by system.[130] Although the Supreme Court suggests that "'crisp rules with sharp corners' are preferable to a round-about doctrine of opaque standards,"[131] desire for simplicity in claim preclusion analysis cannot overshadow fundamental threats to personal rights and structural protections.[132] The presence of such threats in a given system requires deeper analysis. In some contexts, and under certain circumstances, applying claim preclusion to unraised claims in fictional consent scenarios may be appropriate to preserve the interest of finality. In other instances, at the opposite end of the spectrum, there should be no claim preclusion against unraised claims to protect fairness norms and the requirements of due process. Additional instances may fall at various points between these poles. This Part undertakes the challenge of proposing a meaningful

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130 Other commentators have suggested that preclusion standards should adapt when faced with the unique challenges of applications in different environments. *See, e.g.*, Riley T. Keenan, *Identity Crisis: Claim Preclusion in Constitutional Challenges to Statutes*, 20 U. PA. J. CONST. L. 371, 406 (2017) (arguing for a series of structural-based exceptions to strict application of claim preclusion in constitutional challenges to statutes); Karen L. Jones, Comment, *Still Fair After All These Years? How Claim Preclusion and Issue Preclusion Should Be Modified in Cases of Copyright's Fair Use Doctrine*, 58 UCLA L. REV. 1071, 1110 (2011) (advocating for special preclusion rules to reflect nuances in copyright law); Nathan D. Sturycz, *The King and I?: An Examination of the Interest Qui Tam Relators Represent and the Implications for Future False Claims Act Litigation*, 28 ST. LOUIS U. PUB. L. REV. 459, 492 (2009) (exploring claim preclusion challenges and proposing interpretation for qui tam actions).

131 Taylor v. Sturgell, 553 U.S. 880, 901 (2008).

132 This aspirational quote also ignores the expansive body of claim preclusion law that is neither "crisp" nor "sharp." The administrability concerns related to applying claim preclusion came into being long before this Article and will continue long into the future.

solution that is narrowly tailored to each specific system by first calling for an analytical shift in the elements of claim preclusion, and then second, incorporating that shift into a new taxonomy for applying claim preclusion by fictional consent.

1. Repurposing the "Could Have/Should Have" Divide

One of the more puzzling inconsistencies in claim preclusion jurisprudence is the way courts describe claim preclusion's reach to unraised claims. Most standards preclude claims that "could" have been raised in the initial proceeding, while others instead give claim preclusive effect to claims that "should" have been previously raised. Still another approach, perhaps attempting to resolve the inconsistency, concludes without analysis that a litigant "should" have raised any claim that he "could" have raised.[133] This is nonsense. Any child with a hammer and a piggy bank can understand the difference between "could" and "should." There is no clear origin for this divide and evidence suggests that using one standard versus another impacts the claim preclusive outcome. Underlying claim preclusion doctrine recognizes a distinction between the two categories of claims,[134] yet many opinions are imprecise and inconsistent on which category should be used in which context. Whether a result of inadvertence, local development, or something altogether different, the could-have-should-have inconsistency provides a useful tool that can be repurposed to approach the problem of fictional consent.

In the claim preclusion context, whether a party "could" raise a claim relates to pure possibility. Courts should ask if the cause of action was available, and whether the initial court had jurisdiction over the claim. In contrast, an honest analysis of whether a party "should" have previously raised his claim seeks a more nuanced evaluation of the circumstances. A court might decline to say a party should have brought a claim that was hypothetically possible in the initial proceeding due to its attenuation from the initial proceeding. In other words, all claims that should have been raised, could have been raised; however, not all claims that could

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133 *See* Browning v. Levy, 283 F.3d 761, 771–73 (6th Cir. 2002) (concluding that any claim within the bankruptcy court's jurisdiction also falls within the "should have been litigated" test).

134 For example, a plaintiff need not raise claims that should be brought against a defendant if the plaintiff could not bring them due to a procedural or jurisdictional limitation.

have been raised should have been raised. After all, claim preclusion is designed to prevent parties from bringing claims that were captured in the earlier proceeding in the interest of finality, while also balancing the litigant's autonomy and day in court. Often the former interest is stronger, but other times the latter should prevail. By building an element of discretion ("should have") into the analysis for fictional consent claims, decisionmakers can avoid the jarring impact of a "sharp corner." Such discretion will permit claim preclusion to retain its potency where the unraised claims fall within the doctrine's core focus, and also eliminate the problem of fictional consent on unraised claims that are beyond claim preclusion's intended scope.

2. Introducing a Taxonomy for Determining Claim Preclusive Effect

The following taxonomy is designed to determine whether claim preclusion bars fictional consent claims.[135] It offers different standards for applying claim preclusion to unraised claims based upon two factors: (1) the breadth of jurisdiction available in the first proceeding, and (2) the party facing preclusion's likelihood of awareness about the impact of their actions in proceeding one.[136] These factors are inspired by the lessons from bankruptcy, an environment where fictional consent claim preclusion is particularly troublesome.[137]

The jurisdictional breadth factor aims to identify circumstances where many, varied claims will be precluded if they are not raised. Arbiters that may resolve many categories and types of claims would be considered broad, while decisionmakers who are given focused and limited jurisdictional mandates fall within the narrow category. What constitutes "broad" and "narrow" jurisdiction may fall along a spectrum rather than squarely within a category, yet the analysis should be

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[135] Courts evaluating claim preclusion of fictional consent claims can alternatively view this taxonomy as creating an exception to the claim preclusion rules.

[136] This taxonomy is intended to evaluate fictional consent environments and should be completed in the abstract with regard to the overall system. The goal of this framework is not to shield specific litigants facing claim preclusion, however sympathetic their individual situation may be.

[137] *See* Section II.C (explaining that, in bankruptcy, (1) the number of potential claims that could arguably be raised is quite large due to broad jurisdiction; and (2) the individual litigants are unlikely to recognize the extent to which they will be impacted by claim preclusion).

relatively simple (if imperfect) to classify for purposes of this framework. The analysis should focus on identifying whether claims that fall within the decisionmaker's authority—meaning that they could be precluded if a litigant does not raise them—are likely to ensnare unaware litigants. As described above, a bankruptcy court's jurisdiction is so broad that many participants in a bankruptcy process are likely to misunderstand the full scope of bankruptcy authority.

The litigant awareness factor[138] seeks to identify systems where the precluded party is at an information disadvantage and is less likely to recognize the negative consequences of their inaction. Relatively aware litigants are likely to (1) have direct, rather than constructive representation by an attorney,[139] (2) actively engage in the initial proceeding, and (3) have familiarity with the forum and its limits. In contrast, unaware litigants may have an attenuated relationship with attorneys advocating on behalf of their interests, are unlikely to know about the breadth of the court's jurisdiction, and may be involved only tangentially in the initial proceeding. Additionally, inherent qualities about the forum, such as mechanisms that suggest claims will be preserved, can contribute to an unaware litigant.[140] Evaluating litigant awareness will require the court to ask whether someone standing in the litigant's shoes in this system would be aware—an objective analysis—rather than whether the actual litigant had subjective knowledge.[141]

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138 *See* Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265, 301 (2011) (discussing consent in the context of mass litigation settlements and identifying "sophistication" of litigants as a relevant factor).

139 Constructive representation occurs when a party's interest is presumed to be represented by an attorney that he did not select and may have limited influence to guide in the process. Some examples include bankruptcy's unsecured creditors' committee, or counsel appointed to represent members of a class action.

140 For example, in bankruptcy the code provides a mechanism by which debtors may preserve claims, 28 U.S.C. § 1123(b)(3)(B), however, courts are split on the specificity with which a debtor must reserve claims to escape claim preclusion. *See* MAI Sys. Corp. v. C.U. Techs., Inc. (*In re* MAI Systems), 178 B.R. 50, 55 (Bankr. D. Del. 1995); Guttman v. Martin (*In re* Railworks Corp.), 325 B.R. 709, 717 (Bankr. D. Md. 2005); Burlington Motor Carriers, Inc. v. APL Ltd. (*In re* Burlington Motor Carriers, Inc.), No. CIV. A.99-157MMS, 1999 WL 1427683, at *11 (D. Del. Dec. 30, 1999); Apparel Art Int'l v. Amertex Enters., 48 F.3d 576, 586 (1st Cir. 1995). This leads to uncertainty among debtors who may have assumed that their claims were properly preserved, only to later discover that they are subject to claim preclusion.

141 The irony of evaluating claim preclusion for fictional consent claims by engaging in a hypothetical analysis of the litigant's position is not lost on the author. The challenge with this approach is that inevitably some litigants who objectively should have raised their claim will not

Once these two factors are identified, the proposed taxonomy classifies litigation contexts and identifies how courts should treat fictional-consent claim preclusion. One additional factor that is reflected in the taxonomy's proposed standards is the presence of litigation gamesmanship. Claim preclusion was designed, in part, to prevent strategic litigation maneuvering. The taxonomy is designed to reduce the negative consequences of claim preclusion by fictional consent while also honoring the foundational concepts of claim preclusion. For this reason, when the party raising a preclusion defense provides evidence that the other party is taking strategic advantage of the process, then the policy favoring finality should prevail and preclude the unraised claim.

The taxonomy can be illustrated as follows:

	Broad Jurisdiction	Narrow Jurisdiction
Unaware Litigants	No fictional-consent claim preclusion, unless evidence of litigation gamesmanship	Fictional-consent claim preclusion only for claims that a litigant *should* have raised in initial proceeding
Aware Litigants	Fictional Consent Claim preclusion only for claims that a litigant *should* have raised in initial proceeding	Fictional consent claim preclusion applies to all claims that *could* have been raised in initial proceeding

Whether the claim should have been raised in the initial proceeding turns on the same factors that form the framework: breadth of jurisdiction and degree of litigant awareness. The court should consider whether the party had "actual or imputed awareness" of a "real potential" for claims against the other party, and whether the initial court offered

actually know the claim exists. This outcome, while unjust to the individually precluded party, is better than either the majority approach taken by bankruptcy courts (resulting in over-preclusion) or the minority approach (resulting in under-preclusion).

"procedural mechanisms" through which the party could have effectively pursued their claims.[142]

At times, the "should have been raised" standard will reach identical outcomes as the "could have been raised" standard; other times, it will not. By creating a limited equitable release valve whereby the court may functionally evaluate the circumstances at issue in proceeding one, this taxonomy reduces the primary due process problem of fictional consent in claim preclusion, while also minimizing the threat to finality.[143] The following analysis provides more detail and examples for each category.

a. Category 1: Narrow Jurisdiction/Unaware Litigants

In systems where jurisdiction is broad and litigant awareness is minimal, fictional-consent claim preclusion poses the most acute due process threat. In such circumstances, claim preclusion should not apply to unraised claims unless the party raising the claim preclusion defense provides evidence that the unraised claim resulted from litigation gamesmanship. Where the court sees that the party challenging preclusion actually did know about their rights, and purposefully avoided pursuing them, then the court can embrace the fiction of consent and preclude the claim.[144]

The bankruptcy claim between SSE and Mobilecon falls cleanly within this category. Bankruptcy courts have incredibly broad jurisdictional authority, and the claim being precluded falls near the outer edges of that authority. Additionally, the litigants (here, each an unsecured creditor) are unlikely to be aware of critical facts about their rights. This includes awareness that the bankruptcy court could hear their

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142 This standard is also borrowed from decisions relating to bankruptcy. *See* Osherow v. Ernst & Young, LLP (*In re* Intelogic Trace, Inc.), 200 F.3d 382, 388 (5th Cir. 2000).

143 Critics of this taxonomy may identify concerns with administrability or overcomplicating an already difficult doctrine. Other scholars, however, have approached the preclusion problem with similar balancing tests to conceptualize the parties' different interests. *See, e.g.*, Clermont, *supra* note 26, at 31–38 (identifying balancing factors in mathematical form). The problems at issue in this Article are complicated, and meaningful efforts to address those problems without undermining the core finality purpose of fictional consent may require nuanced adjustments. From my perspective, the solution is worth the cost.

144 For example, in *Wingnet v. JP Morgan Chase Bank, N.A.*, the second court noted that the party challenging preclusion had initially brought his unraised claim before the bankruptcy court, then dismissed it. 537 F.3d 565, 572 (6th Cir. 2008). This evidence should overcome a presumption against claim preclusion, because the party was plainly aware of the rights and made a decision, however misguided, to stop pursuing the claim. *Id.*

state law claim; awareness that the debtor would have rights that are tied up in the claim; and awareness that those rights are addressed in a sale or confirmation order. Finally, the representative nature of the bankruptcy process suggests that the creditors may not be incentivized to hire counsel to watch the case unfold. Unsecured creditors are rarely eligible for recovery large enough to justify retaining counsel, and their interests are presumed to be represented by the unsecured creditors committee.[145] Even a prudent bankruptcy counsel could be completely unaware that the creditor has a claim against another creditor. To realistically rule this out, counsel would need to print a list of the creditor matrix—which can include thousands of names that are constantly updated—and ask her client whether the client has potential claims against anyone, then further investigate any relationship to the debtor. In bankruptcy, where claimants are jockeying to receive even a percentage of what they are owed, few creditors would approve attorney's fees for such a fishing expedition.

b. Category 2: Narrow Jurisdiction/Unaware Litigants

Where jurisdiction is narrow, but litigants are unaware, the second court should give claim preclusive effect to unraised claims that should have been raised in the initial proceeding. Because the first court's jurisdiction is narrow, the universe of claims that may be precluded is not large and there is less risk that the precluded claims are beyond the parties' anticipation. Relatedly, even though the parties are likely aware of the potential claims that fall within the courts' jurisdiction, there may be forum-specific representational challenges that may reduce their ability to effectively assert their due process rights.[146] When deciding

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[145] Recognizing the value of this representation and advocacy on behalf of unsecured creditors—who otherwise have little leverage in a bankruptcy case—the Bankruptcy Code provides that the estate must pay for reasonable compensation to the creditor's committee professionals. This ensures that the Uniform Commercial Code's (UCC) representation is both professional and meaningful. Similar to the status of class counsel in aggregate litigation, the UCC does not advocate the interests of any one creditor, and the idea that they are "represented" in the traditional sense is itself a fiction.

[146] Conceptually, mass aggregation devices such as class actions and multidistrict litigations (MDLs) may also fall within this category. While courts addressing class actions rely on "adequate representation" of absent claimants to preclude unraised claims, it is uncertain that claim preclusion on unraised claims can satisfy due process. *See* Basset, *supra* note 8 (arguing that due process requires unnamed class members be given the right to opt-in for preclusion to apply in representative litigation); Scott Dodson, *An Opt-In Option for Class Actions*, 115 MICH. L. REV. 171, 198 (2016) (same); Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in*

whether the claim should have been raised, the court can look to subjective factors surrounding the forum and process that led to the imposition of fictional consent.

An example of this scenario involves a foreign defendant that faced claims under the Anti-Terrorism Act, and later brought a second lawsuit for against the same parties.[147] Claim preclusion should bar any unraised consent claims at issue in proceeding two that would have been, in effect, a defense to the Anti-Terrorism Act claims that were actually decided in proceeding one. The foreign defendant should have raised those claims so that the initial court could have evaluated the full scope of the underlying situation. But the foreign defendant's unraised consent claims against the same parties that involve the same transaction are conceptually distinct from the underlying suit—for instance, a defamation suit against the plaintiff for statements made about the underlying incident—should not be precluded. The foreign defendant was not deemed to have consented to all potential claims in the United States and is exceedingly unlikely to understand the claim preclusive effect of not appearing, consenting to jurisdiction, and raising any possible claim. Under such circumstances, the court should look to whether the claimant knew that their claims could be raised, and whether the initial proceeding was a sufficient place to challenge them. If so, finality concerns are not overcome by due process considerations and the claim should be precluded. If not, the litigant has not effectively been

Class Action Litigation: Theoretical and Empirical Issues, 57 VAND. L. REV. 1529, 1561 (2004) (explaining that "[t]he overwhelming inaction displayed by class members in the reported cases suggests that a class member's failure to opt out should not readily be equated to an affirmative consent to jurisdiction . . . [and] that apathy, not decision, is the basis for inaction"); Martin H. Redish & Nathan D. Larsen, *Class Actions, Litigant Autonomy, and the Foundations of Procedural Due Process*, 95 CALIF. L. REV. 1573, 1612 (2007) (observing the due process limitations of the opt-in mechanism). The MDL plaintiff may face greater due process threats, as he did not benefit from the court's review of certification requirements under Rule 23 of the Federal Rules of Civil Procedure, and did not consent to being consolidated for trial, to being represented by group counsel, or (in some cases) to the specific terms of any settlement put before him. *See* Linda S. Mullenix, *Policing MDL Non-Class Settlements: Empowering Judges Through the All Writs Act*, 37 REV. LITIG. 129, 149 (2018) (comparing the due process protections of Rule 23 in class actions to the absence thereof in MDLs); Christopher B. Mueller, *Taking a Second Look at MDL Product Liability Settlements: Somebody Needs to Do It*, 65 U. KAN. L. REV. 531, 564–65 (2017). Precluding unraised claims against the settling defendant under such circumstances suggests a fiction of consent that I hope to explore in future work.

147 See *supra* note 41, for more discussion of the Act and its impact on foreign defendants.

given a day in court in the first proceeding and should be permitted to proceed.

c. Category 3: Broad Jurisdiction/Aware Litigants

Courts should ask whether a claim "should have been raised" in environments where jurisdiction is broad, but litigants are more aware of the impact of their role in the initial proceeding. Such litigants are better able to protect themselves against a claim preclusion minefield, but still are challenged by a broad jurisdictional grant that corresponds with a higher likelihood that unanticipated claims fall within the initial proceeding. For this reason, the reviewing court must look to the subjective circumstances of the individual claimant, including their actions and knowledge and the specific connection between the initial action and the precluded claim.

The claims brought by a bankruptcy debtor against one of its creditors fall within this category.[148] As described above, bankruptcy courts have incredibly broad jurisdiction, so it is conceivable that a party would have less knowledge about whether a particular claim could be heard. That concern is mitigated, to a degree, due to the likelihood that the debtor is adequately represented, has superior knowledge about the bankruptcy process in general and the case in particular. The reviewing court must evaluate the circumstances in the initial case and decide whether that claim should have been raised.[149]

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148 Other examples may include limited issue class actions that address just one portion of the possible claim, or even a class action that abandons certain claims in the interest of certification. *See* Edward F. Sherman, *"Abandoned Claims" in Class Actions: Implications for Preclusion and Adequacy of Counsel*, 79 GEO. WASH. L. REV. 483 (2011) (describing various instances where a class would abandon or narrowly define class claims for purposes of certification and exploring the preclusive effect of doing so). The claim being challenged is likely closely connected to the certified claim (perhaps a claim for damages rather than equitable relief). Notwithstanding the claim's similarity, the litigants are unlikely to be aware of the claim preclusive effect of proceeding one. Individual unnamed class members are notoriously attenuated from a class action and may have no meaningful connection to their purported counsel. There is also some risk that the litigant would not even know that they were a class member.

149 One consideration, among many, is whether there were time constraints during the initial proceeding. Pidcock v. Schwab (*In re* SII Liquidation Co.), No. 10-60702, 2016 WL 197570, at *22 (Bankr. N.D. Ohio Jan. 15, 2016) (noting that, given the timing circumstances, "full litigation of a breach of fiduciary claim was nearly impossible while preserving the sale").

d. Category 4: Narrow Jurisdiction/Aware Litigants

Finally, in circumstances where jurisdiction is narrow, and litigants are aware of the circumstances, claim preclusion should bar any unraised claims that "could have been raised," meaning all claims that fall within the court's jurisdiction. The strict application of claim preclusion under such circumstances does not offend due process protections, because there is little chance that the litigant did not receive notice and an opportunity to be heard in the first proceeding. Absence of actual consent does not require the court to ignore the strong support for finality and give the litigant a second bite at the apple. In the takings context, for example, the precedent that requires a party to bring her takings claim in state court prior to seeking federal review may be procedurally frustrating, but the scope of claims that could be impacted by fictional consent are extremely narrow. Additionally, the funneling requirement has a long history, and takings plaintiffs who hire an attorney that litigates these disputes is certain to know about the need to seek relief in the state court.

e. Creating a "Sharp Corner" Alternative

The proposal outlined above is flexible by design, and while it would permit courts to effectively balance fairness and finality concerns in fictional consent scenarios, it could also result in less clarity and predictability. If the imposition of rigid and clear standards is a fundamental requirement for preserving claim preclusion doctrine, then an alternative solution is to remove claim preclusion's reach to fictional consent claims altogether. Claim preclusion doctrine is littered with exceptions and carveouts in response to many complex litigation scenarios. Imposing yet another limitation in a narrow category of circumstances is unlikely to undermine the doctrine. In instances where either party would have been asked to consent to jurisdiction, but consent was never discussed because the claim was never raised, preclusion should not apply. The benefit of this approach is that the concept and underlying role of consent will be preserved. The cost, however, is that more claims may survive than under the existing approach, and scheming litigants could strategically withhold consent claims for a later time. Though strategic litigation behavior is a real problem, claim preclusion is not the only doctrine that defends against duplicative litigation. The

following Section identifies additional checks that would guard against (or at minimum, reduce the incentive for) strategic use of different courts.

B. *Providing Additional Checks*

Adjusting, or even removing, claim preclusion's application to unraised claims in fictional consent scenarios is necessary to address the current imbalance that inappropriately values finality to the detriment of fairness.[150] That is not to say, however, that such adjustments will be costless. Reducing the expansiveness of claim preclusion doctrine will inevitably result in heightened litigation costs and uncertainty for litigants by increasing the number of claims that may be raised in subsequent litigation. The following concepts can help mitigate the negatives of reducing claim preclusion's role in fictional consent systems by disincentivizing opportunistic re-litigation and minimizing the additional cost to parties.

1. Judicial Estoppel

Judicial estoppel provides one check on repeat litigation where claim preclusion does not apply. Judicial estoppel is a flexible equitable doctrine that supplements preclusion by protecting the integrity of the judicial process.[151] Cases applying this doctrine stop parties from taking inconsistent positions in cases.[152] Judicial estoppel may mitigate some of

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[150] This is in addition to other benefits that may come from collateral challenges, including offering an independent check on the judicial approach taken in the underlying proceeding.

[151] *See* New Hampshire v. Maine, 532 U.S. 742, 750–51 (2001). The Supreme Court identified a three-part test for judicial estoppel, including: (1) "a party's later position must be 'clearly inconsistent' with its earlier position;" (2) whether the "party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create 'the perception that either the first or second court was misled;'" and (3) "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Id.*

[152] *See, e.g.*, Payless Wholesale Distribs. Inc. v. Alberto Culver (P.R.) Inc., 989 F.2d 570, 571 (1st Cir. 1993) ("Payless, having obtained judicial relief on the representation that no claims existed, can not [sic] now resurrect them and obtain relief on the opposite basis."); Hamilton v. State Farm Fire & Cas. Co., 270 F.3d 778, 784–85 (9th Cir. 2001); Browning Mfg. v. Mims (*In re* Coastal Plains), 179 F.3d 197, 208 (5th Cir. 1999); Hay v. First Interstate Bank of Kalispell, N.A., 978 F.2d 555, 557 (9th Cir. 1992); Oneida Motor Freight Inc. v. United Jersey Bank, 848 F.2d 414, 419 (3d Cir. 1988).

the challenges and cost posed by multiple proceedings by adding a limit to what could be argued in that proceeding. This limit would make it less attractive for litigants to sit on their rights and later challenge an undesirable determination.

Consider SSE's products liability claim against Mobilecon. If, in the bankruptcy case, SSE had agreed in a 9019 settlement[153] with debtor Mr. Chips that devices containing Mr. Chips's microchip are not defective, then SSE would be barred by arguing any contrary position in the later state court proceeding. Under this hypothetical, judicial estoppel would at minimum eliminate any recovery SSE would have against Mr. Chips by way of the indemnification provision.[154]

2. Remedy Limitation Devices

Additionally, courts reviewing previously unraised claims may impose remedy limitations on any eventual recovery.[155] When claim preclusion does not apply, the court must hear and decide the party's claim, giving them a day in court and satisfying their due process rights. But due process does not require that the plaintiff's recovery be paid in full. Where a court observes that awarding payment could threaten finality and encourage repeat litigation, they could deploy equitable authority to either reduce or prevent recovery altogether. This serves the dual purposes of minimizing cost to the defending party and decreasing the incentive to pursue multiple proceedings.[156]

If judicial estoppel is unavailable, the doctrine of equitable estoppel, or estoppel in pais, can also supplement claim preclusion in cases where a party takes inconsistent positions—either in or out of court—and the other party relies on that conduct to his detriment. *See* WRIGHT, MILLER & COOPER, *supra* note 17, § 4477; T. Leigh Anenson, *From Theory to Practice: Analyzing Equitable Estoppel Under a Pluralistic Model of Law*, 11 LEWIS & CLARK L. REV. 633, 640 (2007) (outlining the contours of equitable estoppel and its application to various scenarios).

153 FED. R. BANKR. P. 9019.

154 It may in fact also prevent any recovery against Mobilecon, which would deter SSE from bringing the suit in the first place. This deterrence serves the same purpose as claim preclusion.

155 Laches is an obvious idea, to the extent it can be deployed in fictional consent scenarios. *See* Samuel L. Bray, *A Little Bit of Laches Goes a Long Way: Notes on* Petrella v. Metro-Goldwyn-Mayer, Inc., 67 VAND. L. REV. EN BANC 1 (2014) (emphasizing the appropriate limitation on laches to equitable claims).

156 Remedy-limitation provisions would provide similarly useful assistance in the context of equitable mootness, a separate equitable doctrine under which courts decline to hear an appeal of a bankruptcy matter that is substantially consummated in a way that cannot easily be unwound.

Take, for example, the claim by SSE against Mobilecon that may trigger indemnification obligations against the debtor. Due process requires that the state court decline to give claim preclusive effect to the unraised products liability claim. The state court should consider and decide whether the Mobilecon is liable to SSE for violating the state products liability statute. To protect the finality concerns that are strong in the bankruptcy process, the state court's ruling in favor of SSE should be reduced by the amount that Mobilecon could have recovered through indemnification. This insulates the debtor from repeat litigation and does not harm Mobilecon (the party raising claim preclusion). Any injustice caused by delay is borne by SSE, the party who did not seek relief before the bankruptcy court.

C. *Supplemental Solutions*

The fictional consent taxonomy outlined above offers an effective way to mitigate some of the most egregious claim preclusion outcomes. In addition to adopting that framework, Congress and/or the judiciary could institute modest measures designed to reduce the problems caused by fictional consent. Each of these steps aims to increase the likelihood that litigants would be aware of the claim preclusive effect of their inaction, thereby reducing the unexpected sting that accompanies preclusion.

1. Increased Notice

One way to improve the conditions surrounding imposition of claim preclusion by fictional consent is to increase notice to litigants. Various environments already require notice of key proceedings affecting litigants' rights, but critics highlight the inadequacy of such notice to reflect the potential claim preclusive effect.[157] Making the notice more robust would reduce instances where parties inadvertently abandon claims. This could take a number of forms, including mandatory language in bankruptcy plans and settlement agreements, or pre-hearing

Courts' ongoing reliance on equitable mootness to silence litigant appeals presents similar threats to due process norms and jurisdictional requirements.

[157] Well-founded criticism focuses on both content and delivery.

notices that reflect the claim preclusive implications of the courts' resolution.

Notice is only effective if it is read, and skeptics might observe the possibility that increased notice would actually harm parties. For example, if most notices are not reviewed by a party in a litigation environment, then increasing the content of any individual notice will not improve the litigants' position; however, the increased content will disadvantage litigants that received the notice when a court is asking whether claim preclusion should apply. To remedy this concern, stakeholders should look to improve both content and delivery, meaning taking steps to increase the likelihood that notice will be reviewed.

2. Express Carve-Outs or Opt-In language

Another alternative remedial measure involves increasing the practices that clearly stake out which claims are tied up in a proceeding and which are not. Some litigation systems already have a tradition of establishing boundaries for claims that should be expanded to other systems. For example, bankruptcy plans of reorganization often expressly carve out causes of action that will be reserved by the estate, and some class actions expressly reserve claims that are not raised and indicate that such claims should not be precluded.[158] The United States Trustee, a neutral watchdog agency that appears in bankruptcy cases, could assist with evaluating whether plans of reorganization appropriately put interested parties on notice and do not carve away attenuated claims between creditors.[159]

Relatedly, beyond bankruptcy there is an ongoing push to return class actions to an opt-in regime. Commentators have observed the due process benefits of imposing an opt-in mechanism,[160] and one such benefit would be avoiding the problem of fictional consent. Other structures, such as the Fair Labor Standards Act and the Age

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158 *See* Sherman, *supra* note 148, at 503–04 (observing that such statements are persuasive, but not binding on courts evaluating claim preclusion in a subsequent proceeding).

159 *See* Lindsey D. Simon, *The Guardian Trustee in Bankruptcy Court and Beyond*, 48 N.C. L. REV. (forthcoming 2020) (describing the role and powers of the United States Trustee and its potential to serve as a neutral check both in and outside of bankruptcy).

160 *See supra* note 146 (discussing opt-in classes).

Discrimination in Employment Act, already adopt this approach.[161] When considering supplemental safeguards, both courts and Congress should consider other opportunities to implement elements of an opt-in system.

CONCLUSION

By balancing the interests of fairness with those of finality, the underlying justification for claim preclusion's bar on unraised claims is apparent. Existing safeguards and exceptions to claim preclusion doctrine already limit a number of circumstances where unraised claims would prove particularly concerning to individual litigants' concerns. In situations where claim preclusion rests solely on fictional consent, however, there is no similar explanation for precluding unraised claims. Fictional consent causes problems at the individual level by pulling unaware litigants into the dragnet of preclusion. Fictional consent also poses problems at a structural level, threatening the fundamental concepts of jurisdiction and consent in favor of finality. Where legal fictions cause more harm than they provide benefits, something has to give. Moving to the proposed claim preclusion framework explained above would represent a significant first step toward acknowledging and fixing the problem of fictional consent.

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161 *See* Fair Labor Standards Act, 29 U.S.C. § 216(b) (2018) ("No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought."); Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 626(b) (2018) (providing that the ADEA "shall be enforced in accordance with the powers, remedies, and procedures provided in . . . [the Fair Labor Standards Act]").