
RES JUDICATA AS REQUISITE FOR JUSTICE

*Kevin M. Clermont**

Abstract

From historical, jurisprudential, and comparative perspectives, this Article tries to synthesize res judicata while integrating it with the rest of law. From near their beginnings, all systems of justice have delivered a core of res judicata comprising the substance of bar and defense preclusion. This core is universal not because it represents a universal value, but rather because it responds to a universal institutional need. Any justice system must have adjudicators; to be effective, their judgments must mean something with bindingness; and the minimal bindingness is that, except in specified circumstances, the disgruntled cannot undo a judgment in an effort to change the outcome.

By some formulation of rules and exceptions, each justice system must and does deliver this core of res judicata. Fundamental fairness imposes some distant outer limit on res judicata, too. In between those minimal and maximal limits, context-specific policy will decide how far res judicata will go in any particular country, with huge implications for its legal system. At one extreme the United States loves preclusion, and so it goes well beyond the bare minimum. Thus far, China sticks close to the core. Perhaps for both of these prime examples, the optimum lies closer to the middle.

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INTRODUCTION

Res judicata appears to be another one of those procedural excesses that seemingly overrun the United States. It is not. Rather than exemplifying American exceptionalism, it is omnipresent. This Article will try to explain the res judicata law that every legal system has, had, and should have in place.

Res judicata law answers the unavoidable question of what impact a previously rendered adjudication has in subsequent disputes, a question of both practical and systemic importance. In particular, in what circumstances and to what extent should courts give preclusive effects to a judgment, in respect of its being the judicial branch's end-product?¹ The answer comes as a specified degree of finality that will yield a specified extent of preclusion. Res judicata's motivation in decreeing finality lies in the phrase *interest reipublicae ut sit finis litium*, which translates to "it is in the interest of the State that there be an end to litigation." Its modality in decreeing preclusion lies in the phrase *res judicata pro veritate accipitur*, which translates as "a matter adjudged is taken as the truth."

The theme herein will be that all systems of justice deploy a core of res judicata that forbids routinely undoing the judgment itself, and have done so over the centuries (Part I) pursuant to a jurisprudence that transcends all borders (Part II).² In any particular country, the law has varied as to how much farther it goes in extending res judicata (Part III). The United States has gone far (Part IV), while China has not (Part V). Indeed, these two countries mark the ends of the spectrum of the developed world's res judicata laws. The United States has reintroduced a note of exceptionalism with its expansiveness.³ China is grudging: as any country strives toward establishing the rule of law,⁴ it

1. Other doctrines, such as stare decisis and double jeopardy, supplement res judicata to form the more general topic of "former adjudication." See ROBERT C. CASAD & KEVIN M. CLERMONT, RES JUDICATA: A HANDBOOK ON ITS THEORY, DOCTRINE, AND PRACTICE 13–19, 22–27 (2001). Other doctrines, such as those that treat entering, amending, attacking, satisfying, and enforcing judgments, join former adjudication to form the still more general topic of "judgments." See 2 A.C. FREEMAN, A TREATISE OF THE LAW OF JUDGMENTS §§ 546–560, at 1165–264 (Edward W. Tuttle ed., 5th ed. 1925) (1873).

2. These contentions are basic to all of res judicata. Accordingly, although res judicata has very broad application, I can defend the contentions while pretty much confining discussion to the effects of a personal and coercive judgment rendered by a court in a civil case. In rem and declaratory judgments are subject to specialized res judicata provisions. Likewise, criminal judgments, administrative adjudications, and arbitration awards have res judicata effects. See CASAD & CLERMONT, *supra* note 1, at 196–209.

3. See *infra* Part IV.

4. See TOM BINGHAM, THE RULE OF LAW 6–7 (2010); KATRIN BLASEK, RULE OF LAW IN

will encounter controversy regarding the topic of res judicata; but the question it faces is not whether it should adopt res judicata, but only the contentious question of how far it should go with the idea.

To get started, I should impart some legal background and a bit of introductory vocabulary. Any res judicata law would entail (1) limits on collateral attacks on and other relief from judgments outside the ordinary course of review in the initial action's trial and appellate courts and (2) at least some stunted version of preclusion rules applicable to final judgments.⁵ The former, in setting a valid judgment as the prerequisite to preclusion, gives the limited circumstances in which the bound party can set aside a judgment other than by appeal.⁶ The latter set of rules expresses the outer extent of preclusion, (3) while exceptions to the rules constitute the permitted escapes from preclusion.⁷ Thus the law runs: if a judgment is valid and final, it will have preclusive effects to a specified degree, unless exceptional circumstances prevail.⁸

As to the actual content of a country's res judicata—prerequisite of a valid and final judgment; rules of preclusion; and exceptions to preclusion—the contention is that every justice system has provided at least a core that prohibits routinely undoing the judgment. This mandatory core of res judicata may comprise a degree of either claim preclusion or issue preclusion.

Claim preclusion is the part of res judicata that would typically say a party may not, outside the context of the initial action, relitigate a claim decided therein by a valid and final judgment, subject to certain exceptions. As a verbal matter, many countries seem to operate without claim preclusion; where the doctrine exists, a judgment will extinguish the whole claim, precluding all matters within the claim that were or could have been litigated in that initial action. Claim preclusion subdivides into three subparts: (1) If the judgment in the initial action was in the defendant's favor, the plaintiff's claim is said to be barred by the judgment. *Bar* says that the plaintiff generally cannot bring a second action on the claim in the hope of winning this time. (2) If the judgment in the initial action was in the plaintiff's favor, the plaintiff's

CHINA: A COMPARATIVE APPROACH 1 (2015); JOHN W. HEAD, CHINA'S LEGAL SOUL: THE MODERN CHINESE LEGAL IDENTITY IN HISTORICAL CONTEXT 59–63, 105–61, 188–89 (2009); Mortimer N.S. Sellers, *What Is the Rule of Law and Why Is It So Important, in* THE LEGAL DOCTRINES OF THE RULE OF LAW AND THE LEGAL STATE (RECHTSSTAAT) 3, 3–4 (James R. Silkenat et al. eds., 2014).

5. See KEVIN M. CLERMONT, PRINCIPLES OF CIVIL PROCEDURE 381–86 (4th ed. 2015).

6. *Id.*

7. RESTATEMENT (SECOND) OF JUDGMENTS § 26(1) (AM. LAW INST. 1982).

8. DAVID L. SHAPIRO, CIVIL PROCEDURE: PRECLUSION IN CIVIL ACTIONS 14 (2001).

claim is said to merge in the judgment. *Merger* says that the plaintiff generally cannot bring a second action on the claim in the hope of winning a more favorable judgment. (3) However, the plaintiff can seek to enforce the favorable judgment, and the defendant cannot then raise defenses that were or could have been interposed in that initial action. *Defense preclusion* is the subdoctrine that generally precludes the losing defendant from later asserting mere defenses to the claim.⁹

Issue preclusion is the part of *res judicata* that says, outside the context of the initial action, regardless of who won the judgment, a party generally may not relitigate any issue of fact or law if its determination was essential to a valid and final judgment,¹⁰ subject to exceptions.¹¹ Issue preclusion sees variation across the countries that employ it. Under the U.S. view, issue preclusion should reach only matters that were actually litigated and determined, unlike claim preclusion which reaches even matters that could have been, but were not, litigated; most countries do not require actual litigation and determination, which allows issue preclusion to play the role of claim preclusion for them.¹² Issue preclusion subdivides as well: (1) If the second action is on the same claim as the initial action, then the applicable variety of issue preclusion is *direct estoppel*. (2) If the second action is on a different claim, then the applicable variety of issue preclusion is *collateral estoppel*. In fact, most foreign countries do not employ collateral estoppel, because this extension of *res judicata* goes beyond the necessary in order to pursue preclusion for the sake of efficiency and other perceived policies.¹³

I. HISTORICAL IMPORTANCE OF RES JUDICATA

Res judicata is old. For example, some commentators have suggested “roots” of Anglo-American *res judicata* going back far.¹⁴ One can find these roots in various ancient systems, importantly including preclusion in the Germanic *estoppel by record* of Anglo-Saxon times that looked to the party’s behavior¹⁵ and in the later-arriving Roman *res*

9. See RESTATEMENT (SECOND) OF JUDGMENTS § 18(2) (AM. LAW INST. 1982).

10. *Id.* § 27.

11. *Id.* § 28.

12. See *infra* Section II.B.

13. See Arthur T. von Mehren & Donald T. Trautman, *Recognition of Foreign Adjudications: A Survey and a Suggested Approach*, 81 HARV. L. REV. 1601, 1676 (1968) (“It follows a fortiori that the German system does not recognize any collateral estoppel effects whatsoever.”).

14. See ALLAN D. VESTAL, RES JUDICATA/PRECLUSION V-17 to -18 (1969).

15. See Robert Wyness Millar, *The Historical Relation of Estoppel by Record to Res*

judicata that looked instead to the judgment's effect as instantiating the truth.¹⁶ But in reality these were inspirational analogies, acting more as borrowed verbal formulations rather than transplants or true roots. Other than in colonization-like transitions, each legal system seems to generate internally its own *res judicata* law through its courts, often doing so independently in response to its own felt need for judicial finality and often ending up in a unique spot. In this sense, *res judicata* "is as old as the law itself."¹⁷

True, in England one did not hear much talk of *res judicata* in the very early days of a disorganized court system and undeveloped record-keeping. But soon English courts saw the need for some finality so that their judgments meant something, and notions akin to *res judicata* started to emerge.¹⁸ By the 1200s Bracton recognized that the principle of *res judicata* lay in English cases.¹⁹ From those beginnings the English law of *res judicata* developed, with little reference to the foreign analogies.²⁰ In the ensuing centuries, the courts revised and complexified the doctrine. For example, in connection with *Ferrer v. Arden*, Edward Coke as reporter explained in 1598:

For as it hath been well said *Interest reipub. ut sit finis litium*; otherwise great oppression might be done under colour and pretence of law; for if there should not be an end of suits, then a rich and malicious man would infinitely vex him who

Judicata, 35 ILL. L. REV. 41, 52–53 (1940) (suggesting that the Germanic idea led to issue preclusion, although today issue preclusion rests on the judgment itself rather than the party's behavior, while the Roman idea eventually permitted evolution in some countries from issue preclusion to claim preclusion). The word "estoppel" comes from the Old French word for bung or stopper plug (*estoupail*). As Sir Edward Coke explained, "it is called an estoppel or conclusion, because a man's owne act or acceptance stoppeth or closeth up his mouth to alleage or plead the truth." 2 EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND; OR, A COMMENTARY UPON LITTLETON § 667, at 352a (London, J. & W.T. Clarke, 19th ed. 1832) (1628).

16. See K.R. HANDLEY, SPENCER BOWER AND HANDLEY: RES JUDICATA 324–25 (4th ed. 2009) ("The Roman rule [which required the same parties and the same 'ground of complaint'] did not distinguish between the effect of a *res judicata* as a bar to contradiction, and as a bar to repetition, but was a general prohibition against reopening the *res judicata*, in any form, and for any purpose.").

17. *Marsh v. Pier*, 4 Rawle 273, 288 (Pa. 1833).

18. See GEORGE SPENCER BOWER & ALEXANDER KINGCOME TURNER, THE DOCTRINE OF RES JUDICATA 149 (2d ed. 1969).

19. *E.g.*, 3 BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND 296 (Samuel E. Thorne trans., 1977) (c. 1260) ("The assise also falls if the demandant claims by assise what he lost by judgment, for the assise falls because of the exception of *res judicata* [*propter exceptionem rei iudicatae*] . . .").

20. SPENCER BOWER & TURNER, *supra* note 18, at 170–71.

hath right by suits and actions; and in the end (because he cannot come to an end) compel him (to redeem his charge and vexation) to leave and relinquish his right, all which was remedied by the rule and reason of the ancient common law, the neglect of which rule . . . hath therewith introduced four great inconveniences. 1. Infiniteness of verdicts, recoveries, and judgments in one and the same case. 2. Sometimes contrarieties of verdicts and judgments one against the other. 3. The continuance of suits for 20, 30, and 40 years, to the utter impoverishing of the parties. 4. All this tends to the dishonour of the common law, which utterly abhors infiniteness, and delaying of suits; wherein is to be observed the excellency of the common law; for the receding from the true institution of it introduces many inconveniencies, and the observation thereof is always accompanied with rest and quietness, the end of all human laws.²¹

This unsystematized body of the law remained shrouded in the mists, even if some major doctrinal shifts occurred in response to shifting policies behind *res judicata*. Progress was slow but fairly steadily expansive.

Its colonies received England's *res judicata* law. With time, however, the law of the United States diverged to meet the need felt here. The fact that the English law still lay in the mists facilitated this divergence. Slowly a distinctive, and more expansive, U.S. approach emerged. Treatises appeared.²² Yet courts still stumbled about. Consequently, even the leading articles in the modernizing field were largely attempts to get the precedents in sensible order.²³ The average lawyer or academic gave *res judicata* little thought. Few perceived its significance. The subject was not yet satisfactorily systematized, nor theorized of course.

Res judicata's retarded development resulted from a couple of factors. Often *res judicata* came up only when a litigant had taken a misstep that mired the court in repetitive litigation, and therefore *res*

21. (1598) 77 Eng. Rep. 263, 266, 6 Co. Rep. 7a, 9a (C.P.).

22. See, e.g., 2 HENRY CAMPBELL BLACK, A TREATISE ON THE LAW OF JUDGMENTS, INCLUDING THE LAW OF RES JUDICATA § 500, at 759–61 (2d ed. 1902) (1891); 2 FREEMAN, *supra* note 1, § 546, at 1165–68; 1 JOHN M. VAN FLEET, RES JUDICATA: A TREATISE ON THE LAW OF FORMER ADJUDICATION 2–3 (Indianapolis, Bowen-Merrill Co. 1895); J.C. WELLS, A TREATISE ON THE DOCTRINES OF RES ADJUDICATA AND STARE DECISIS 1–9 (Des Moines, Mills & Co. 1878).

23. E.g., Robert von Moschzisker, *Res Judicata*, 38 YALE L.J. 299 (1929).

judicata tended to be envisaged as an arcane jumble of technical and arbitrary provisions to handle this peculiar problem. Otherwise the res judicata law lay scattered in the interstices of a variety of areas like (1) collateral attacks on and other relief from judgments,²⁴ (2) enforcement of judgments,²⁵ and (3) full faith and credit or international comity.²⁶

First, relief from judgments links to res judicata because only a valid judgment has res judicata effects, and so a party can escape res judicata by successfully attacking the validity of the prior judgment. Although the law pigeonholes relief from judgment separately from res judicata, the two must be studied together. The more liberal the system is with relief from judgment, the less bite the preclusion rules will have.²⁷

Second, although enforcement has recognition of the judgment as a prerequisite, and recognition means the giving of res judicata effect, the law on enforcement emphasizes recognition for enforcement purposes rather than recognition for res judicata purposes. Enforcement law thus has done little to help synthesize res judicata law.

Third, recognition and enforcement in the interjurisdictional context involve tangential matters of res judicata, too. Ideally, conflict-of-laws principles call for the rendering court's res judicata law to define the judgment, subject of course to the second court's power to second-guess the judgment on grounds such as public policy.²⁸ That is, when the second court faces a question of the extent or reach of res judicata based on the prior judgment, it normally should apply the res judicata law that the rendering court would apply. The basic approach to judgments is retroverse, in the sense of turning backward to look at the rendering court's view of its own judgment: the second court lets the first court's law decide what it conclusively adjudicated.²⁹ Therefore,

24. See CLERMONT, *supra* note 5, at 381–86.

25. See, e.g., ENFORCEMENT OF FOREIGN JUDGMENTS (Louis Garb & Julian Lew eds., 2013); ROBERT E. LUTZ, A LAWYER'S HANDBOOK FOR ENFORCING FOREIGN JUDGMENTS IN THE UNITED STATES AND ABROAD 5–9 (2007).

26. See CLERMONT, *supra* note 5, at 425–37, 440–52.

27. See Albrecht Zeuner & Harald Koch, *Effects of Judgments (Res Judicata)*, in 16 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW: CIVIL PROCEDURE §§ 9-16 to -17 (Mauro Cappelletti ed., 2014).

28. See RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE § 4 (AM. LAW INST. 2006); RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 94–97 (AM. LAW INST. 1971) (amended 1988); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 481(1) cmt. c (AM. LAW INST. 1987); Robert C. Casad, *Issue Preclusion and Foreign Country Judgments: Whose Law?*, 70 IOWA L. REV. 53, 70–76 (1984).

29. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 93, 100 (AM. LAW INST. 1971).

studies of full faith and credit or international comity have shed some dim light on the details of res judicata.

The point here is that this doctrinal dispersion long distracted the legal mind. The giant step toward consolidation and comprehension was the American Law Institute's *Restatement of Judgments* in 1942, which recognized the emergence of claim preclusion and so established a full doctrine of bar, merger, and collateral estoppel.³⁰ The courts could now understand what they were doing, and res judicata's coverage immediately grew by leaps.³¹ Commentators then looked at recent judicial developments and called for doctrinal overhaul.³² Forty years later, the *Restatement (Second) of Judgments* tried to express and refine the efforts of the federal courts and the progressive state courts. It also embodied the modern academic approach to res judicata in the United States, fleshing out claim and issue preclusion as the conceptual vehicles.³³ It is unarguably a work of high quality, and it merits careful study because it has so influenced the courts and because it has managed to bring much order to the field. Since then, the courts have built on the *Second Restatement*. In particular, the U.S. Supreme Court in a sizable series of cases has embraced res judicata with an especially fervent ardor.³⁴ As a consequence of this judicial gloss on the *Second*

30. See RESTATEMENT OF JUDGMENTS §§ 47–48, 68 (AM. LAW INST. 1942); Austin Wakeman Scott, *Collateral Estoppel by Judgment*, 56 HARV. L. REV. 1, 1 (1942) (“In [the *Restatement of Judgments*] we have not dealt with the numerous questions of mere procedure which are commonly included in the text books and digests and encyclopedias under the heading of ‘Judgments.’ . . . We have limited our treatment to the effect of judgments upon subsequent controversies. In other words, we have dealt with the doctrine of res judicata.”).

31. *E.g.*, *Bernhard v. Bank of Am. Nat’l Trust & Sav. Ass’n*, 122 P.2d 892, 893–95 (Cal. 1942) (endorsing nonmutual collateral estoppel, while the *Restatement* was still in draft).

32. *E.g.*, VESTAL, *supra* note 14, at V-36 to -42; *Developments in the Law—Res Judicata*, 65 HARV. L. REV. 818, 820 (1952).

33. See RESTATEMENT (SECOND) OF JUDGMENTS § 17 (AM. LAW INST. 1982).

34. *E.g.*, *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1302–06 (2015) (extending preclusion running from administrative agencies to courts); *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 375 (1996) (extending state-to-federal issue preclusion, even for cases within exclusive federal jurisdiction); *Univ. of Tenn. v. Elliott*, 478 U.S. 788, 796–99 (1986) (endorsing preclusion from administrative agencies to courts); *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 84–85 (1984) (extending state-to-federal preclusion); *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 476 (1982) (endorsing state-to-federal preclusion); *Federated Dep’t Stores, Inc. v. Moitie*, 452 U.S. 394, 401–02 (1981) (rejecting loose exceptions to claim preclusion, like “simple justice” and “public policy,” despite appealing facts); *Allen v. McCurry*, 449 U.S. 90, 104–05 (1980) (extending criminal-to-civil preclusion); *Montana v. United States*, 440 U.S. 147, 162–64 (1979) (taking narrow view of exceptions to issue preclusion); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331–33 (1979) (endorsing offensive nonmutual collateral

Restatement, a coherent and very expansive modern law of res judicata has become perceptible and accepted. Indeed, the United States today enjoys a semi-codification of most of res judicata law, one that is fairly uniform, albeit unofficial. Certain pockets and details of the law remain unsettled, of course. There remain variations state by state. But most of the big questions are settled for the time being.

The reason for the sudden growth of U.S. res judicata lies in the peculiar context of the local litigation system. The growth came during the period of liberalization of pleading, joinder, and discovery. Now res judicata could with fairness be more demanding as the parties' opportunities to express their position in the initial action grew. More significantly, the expansion occurred while a national obsession with litigiousness and dockets bloomed.³⁵ The Supreme Court's ardor demonstrated a rather remarkable acceptance of simplistic notions of efficiency and a disregard of real costs in fairness.³⁶ The point here is that the actual extent of res judicata in any particular country depends on a debatable balance of efficiency, fairness, and substantive policies.

As res judicata's reach extends, it becomes ever more a topic for policy debate and controversy. Consequently, res judicata today seems very significant to American legal minds. A reflection of res judicata's significance here is its place as part of the basic curriculum in American law schools. Res judicata is a major and critical topic in the first-year law-school course in civil procedure; indeed, it ties the course together, showcasing the eternal tension between validity and finality. Also, American lawyers have come to understand the practical impact of this doctrine. A judgment is the embodiment of what a court has decided, and res judicata performs the straightforward but profound mission of delineating the scope or content of the judgment.

Less perceived, even among academics, is how an expansive res judicata infiltrates and shapes the rest of law. Within procedure, an awareness of this doctrine illuminates every topic. But its influence is far broader. Res judicata currently reverberates into all corners of the U.S. legal system.

First, because a judgment, as defined by res judicata law, is the primary and climatic objective of most adjudicative proceedings, a knowing eye trained on res judicata will greatly affect the party's

estoppel); *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 324–25 (1971) (endorsing defensive nonmutual collateral estoppel).

35. See Maurice J. Holland, *Modernizing Res Judicata: Reflections on the Parklane Doctrine*, 55 IND. L.J. 615, 616–20 (1980) (mentioning also the shift from formalism to treatment of res judicata as public law).

36. See, e.g., cases cited *supra* note 34.

implementation of *procedure*, both way before and way after judgment. From composing pleadings in an initial lawsuit to settling or otherwise ending the case and then to attacking the judgment whether by appeal or in a second lawsuit, the party must bear *res judicata* in mind.

Second, at a more profound level, *res judicata* operates as much more than a mere part of the technical rules on the conduct of litigation. It is essential to *judicial operation*, to the orderly working of the judicial branch. If disputants could just reopen adjudicated disputes, there would be no end to the case, nor any beginning of judicial authority.

Third, as to *courts' structure*, *res judicata* implies at least some respect for prior adjudication across the whole judicial branch. Without such respect, the more powerful courts would inevitably extinguish their competitors. If disputants could reopen their disputes in the superior court, they would come to skip over the inferior court. The royal courts in England prevailed over the local courts in part through their willingness to allow litigation anew. Contrariwise, the continued thriving of state and federal courts in the United States is owing to a healthy doctrine of *res judicata*.

Fourth, *res judicata*, being the law that specifies what a judgment decides and what it does not decide, shores up *separation of powers* by setting the boundaries on the output of the judicial branch of government. It is *res judicata* law that restrains the applicability of judicial decisions to nonparties and the retroactivity of legal change to already adjudicated matters. Because *res judicata* thus determines how a judgment differs from legislation and administration, the doctrine plays a basic role in understanding the governmental system. Meanwhile, *res judicata* offers protection from inroads in the other direction. It helps to ensure judicial independence by prohibiting the other branches from overturning judgments.³⁷

Fifth, on the level of *international law*, *res judicata* might not be absolutely necessary. The law of the jungle might suffice, because each nation has a zone of autonomous operation. But especially today, with ever-increasing globalization, a sensible international order commends

37. See *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218–19 (1995) (“Article III establishes a ‘judicial department’ with the ‘province and duty . . . to say what the law is’ in particular cases and controversies. The record of history shows that the Framers crafted this charter of the judicial department with an expressed understanding that it gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy. . . . By retroactively commanding the federal courts to reopen final judgments, Congress has violated this fundamental principle.” (first alteration in original) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803))).

an international law of res judicata. The United States should, and does, respect the judgments of France, and vice versa.

As a result, the United States increasingly recognizes the importance of res judicata, already granting it a prominence that is hard for the rest of world to understand. This prominence is limited to the United States, however, and has prevailed only over the last few decades. Therefore, no one has synthesized the subject while integrating it with the rest of the law. The time remains right for a reflective overview.

II. JURISPRUDENTIAL BASIS OF RES JUDICATA

Given that res judicata plays a key role in procedure, judicial operation, courts' structure, separation of powers, and international law, it is naturally a difficult subject. Moreover, like any policy, it has its costs as well as its benefits. As to obvious costs, one readily perceives that litigating about whether to relitigate is inefficient, and some applications of res judicata do seem outrageously unfair. Often frustrated students and other victims of res judicata, after realizing its difficulties and lamenting its costs, ask whether we would be better off without res judicata. Yet, I contend that this question is nonsensical in itself.

A justice system must deliver res judicata. I do grant that the actual extent and content of res judicata can range from minimal to extensive res judicata, and its formulation comes in many flavors. Sure, the system could lop off some extensions and some details of res judicata.³⁸ But the essential core of res judicata is mandatory.

A. *Weak Contention: Every Legal System Has a Res Judicata Law*

The jurisprudential task of synthesis and integration can begin with a comparative overview, although documenting a comparative review of res judicata is a challenging task postponed until the next part of this Article. I shall now undertake to make some sweeping comparative generalizations, and indeed I shall do so on a worldwide basis. I begin with the seemingly bold contention that res judicata is absolutely universal, that every legal system must have a body of res

38. Lee E. Berlik, *Claim Preclusion, Issue Preclusion, and the Various Forms of Res Judicata*, VA. BUS. LITIG. BLOG (Sept. 17, 2015), <http://www.virginiabusinesslitigationlawyer.com/2015/09/claim-preclusion-issue-preclus.html>.

judicata law.³⁹ Although that contention would seem to require foolhardy courage, in fact that contention is so weak as to be a truism.

A simple but elusive insight is that res judicata is nothing more or less than the body of law that defines “judgment.” Res judicata proves critical in interpreting the judgment’s scope. A judgment is more than a concrete embodiment of what an adjudicator has decided. By necessity, a judgment decides certain things and does not decide other things. Res judicata performs its job of delineating the real content of a judgment not only by marking what the judgment decided and what it did not decide, but also by specifying the binding effects and noneffects of the adjudication. It dictates whether decided matters are immune to reopening, as well as dictating which actually undecided matters nevertheless fall within the bounds of a judgment and so receive treatment as if decided and which matters lie outside the boundaries of the judgment. Therefore, res judicata serves to define judgment by means of fixing the boundaries of the definitive judgment, even if res judicata appears to be only an obscure jumble of rules.

This one insight informs all sorts of historical and comparative inquiries. Res judicata’s mission of delineating judgment is nonoptional. A version of res judicata must apply to every judgment ever rendered anywhere. Every legal system, from its very beginnings, has produced a law of res judicata. Even if the res judicata law said a judgment has no effects whatsoever, that would be a res judicata law. Hence, by definition, res judicata is universal.

Yet, each jurisdiction has produced its own variation of res judicata law. Because it is so broad in the United States, it has a special prominence here. In other countries, the very concept of res judicata will stay hidden until it achieves a certain breadth. In any particular country, can the extent of preclusion really range from 0 to 100? No. There is a required minimum. A judgment must not only say something, it must mean something binding.

B. Strong Contention: Every Justice System Delivers Res Judicata’s Minimal Core

Empirically, every system of justice around the world, from near its beginnings, has generated a common core of res judicata law to make adjudications binding. “The doctrine of res judicata is a principle of

39. 2 FREEMAN, *supra* note 1, § 627, at 1321 (“The doctrine of res judicata is a principle of universal jurisprudence forming part of the legal systems of all civilized nations.”).

universal jurisprudence forming part of the legal systems of all civilized nations.”⁴⁰ It is this empirical observation that drives my strong contention. But how would one explain the empirical fact?

As usually stated, the motivating rationale behind *res judicata* is that at some point the pursuit of truth should and must cease: justice demands that there be an end to litigation. This rationale involves two different ideas.

First, an end to litigation serves the process values of fairness and efficiency. Indulgence of the loser, who wants a redo, must sometimes bow to fairness for the winner. Likewise, no realistic conception of justice would call for pursuing truth or any other aim without concern for cost:

The main purpose inherent in the concept of *res judicata* is to ensure that once a matter has been decided further controversy or uncertainty about it is eliminated. This implies on the procedural level that the rendering of an inconsistent decision concerning the same subject matter must be prevented. For as long as the possibility remains that a different judgment may be rendered in a new proceeding, legal certainty has not yet been achieved and the litigation is not yet finally concluded.⁴¹

As always, one must be careful with fairness and efficiency arguments, which cut both ways against a complicated background. Moreover, each society should decide on its own how much to pay, in terms of expense or uncertainty, for truth and those other aims. The balance would seem to call for no more *res judicata* law than some formless principle of “enough is enough.” Yet, at a minimum, this principle would result, under almost any conceivable set of prevailing policies, in rules providing that in the absence of contrary agreement, a losing plaintiff cannot sue again on the same claim and a losing defendant cannot defend it again.

Second, finality is not just an extremely good principle that serves fairness and efficiency, it is a necessary condition for the existence of an effective judiciary that imposes nonconsensual, or even consensual, judgments. The parties cannot be allowed freely to undo the judgment. But also, the courts themselves cannot go unrestrained from unraveling a final judgment on their own. Other courts and, even more so, nonjudicial officials cannot regularly bestow relief from judgment:

40. *Id.*

41. Zeuner & Koch, *supra* note 27, § 9-25.

If a final, valid judgment served only as the tribunal's advice on how a controversy should be resolved, leaving it to other tribunals (or even other officials) to consider the controversy anew if they and the parties wished, it would be hard even to think of the initial tribunal as a "court" in the accepted sense.⁴²

Satisfying this institutional requirement will move *res judicata* from formless principle to developed law. This institutional reason behind *res judicata* also takes us from balanceable values to unavoidable need.

Admittedly, this need is not a need on the order of food and water. One could imagine a legal system without finality, that is, without what theorists think of as adjudicators who issue binding judgments. An example might be a military legal system that allows the commander freely to overturn any decision, in avowed pursuit of military readiness. But such a system would be a dispute-resolution system different from what theorists conceive as a system of justice. Another example would be mediation, which could have a notion of *res judicata* but need not.

So let us just consider a "system of justice" to be one that has developed enough to involve individualized imposition of the substantive law by a neutral decisionmaker in accordance with predetermined procedures and that tries to operate in a way to make benefits outweigh costs. Every such system must adjudicate in order to apply the law to facts. It might adjudicate in a variety of ways and in pursuit of a variety of aims, such as truth, social harmony, political control, or whatever. Nonetheless, every such system will face the question of when to close the books on any one adjudication. That question is universal.

There is an obvious tradeoff between getting things right and getting them finished. A small system with huge resources could stand eternally ready to reconsider thoroughly, and would do so as long as it thought that the benefits of doing so outweighed the costs in fairness and efficiency and any other costs. But as the system scales up, effective operation will need to specify when enough is indeed enough. The universal answer to the universal question will be that a judgment at some point cannot be routinely undone.

The more critical insight is that the adjudicator needs not only to avoid wasteful relitigation, but also needs to establish its authority against the disgruntled. This authority is an indispensable feature of an

42. SHAPIRO, *supra* note 8, at 14; *see also* William H.J. Hubbard, *The Fourfold Credibility Problem in War and Law* 33 (2016) (unpublished manuscript) (on file with author) (arguing that *res judicata* is a prerequisite for the credible commitment that makes settlement possible).

effective adjudicator. Other than by authorized appeal, a judgment cannot be routinely undone by the loser, whether the judgment was litigated or defaulted.⁴³ An adjudicator must be able to say to the loser definitively, “you lose.” It and others must routinely turn a deaf ear to a request to start again, to reconsider *au fond*.

Relief from judgment thus cannot lie for mere error of fact or law; a plaintiff who loses cannot sue again on the same claim, and a defendant who loses cannot defend anew. A country could, based on its own policy context, go much farther with the idea of *res judicata*. But every system of justice must accept at least this minimal bindingness for its judgments. Implicit in the nature of adjudication, as ordinarily understood, is the power to give judgments that are binding.

In sum, based on observation of comparative laws and based on theory of adjudication, the essential core of *res judicata* is nonoptional. Still, I am not arguing a universal value that demands a minimal amount of content in *res judicata* law, but rather a universal institutional need for a minimal amount.

Bar. Thus emerges the intuitive principle of claim preclusion that a losing plaintiff cannot sue again in the hope of winning this time.⁴⁴ If the judgment in the initial action was in the defendant’s favor, the plaintiff’s claim is barred by the judgment.⁴⁵ A valid and final judgment bars the claim and any further suit on it, both as to elements that were asserted in the first suit and those that might have been.⁴⁶

The country’s implementing law would have to define the dimensions of the claim that is to be precluded. Note that I am using “claim” here only in the sense of the scope of the thing precluded by the doctrine of claim preclusion, not in some technical sense with which one country or another uses the term for other purposes. Within reason the dimensions of the thing precluded could be narrow or broad, according to the dictates of policy as the country sees them. For example, a country might narrowly preclude only a new action on the same legal theory or for the same remedy based on the same right. Or instead, a country might broadly preclude any new action arising from the same transactional set of facts. The broader the definition of claim, the more reach the rule of bar will have.

43. RESTATEMENT (SECOND) OF JUDGMENTS §§ 18–19 (AM. LAW INST. 1982).

44. *See id.* § 19.

45. *Id.*

46. *Id.* §§ 18–19.

A rule of bar of palpable reach is not merely a desirable provision of law. It is a mandatory provision. A justice system must provide for its judgments to be binding in the way that bar would provide.

Defense Preclusion. Just as unarguable, although perhaps not as obvious at first glance, is that a valid and final judgment must preclude a losing defendant from later asserting mere defenses to the claim.⁴⁷ Defense preclusion's barrier to undoing judgments may seem to occupy some arcane corner of the specialty of res judicata. But it in fact is critical to any justice system. Most frequently, courts and parties apply it intuitively. Although it is intuitive, it is still deeply important. Indeed, its intuitive application proves its criticality.

Also, any judgment must somehow cut off defenses asserted offensively. Therefore, an implication of this idea is that once a plaintiff obtains a judgment, the defendant generally cannot bring a new action to undo the judgment by reopening the plaintiff's claim and pushing those defenses (whether or not a written compulsory counterclaim provision applies in the circumstances).⁴⁸ The rule's reach is suggested by consideration of its genesis: the defendant cannot later pursue an action that is essentially a way to defend anew against an already adjudicated claim.⁴⁹ It applies whether or not the prior judgment is by default; indeed, it is this rule that makes default judgments mean something.⁵⁰

My contention goes no farther than maintaining that the substance of bar and defense preclusion is necessary. But it goes that far. In fact, no one disputes this need, even if people seldom acknowledge expressly that a minimal core of res judicata must exist. Those thinkers who do attack res judicata do not train their weapons against the core. For example, the well-known attack on res judicata by Professor Cleary argued that it was too punitive.⁵¹ But his attack aimed only at merger when applied to parties who split their cause of action along remedial lines.⁵² For such claim-splitting that employs two lawsuits to do the work of one, he would have assessed expenses rather than cutting off the right to recovery.⁵³ He made no attempt to undermine the broader

47. *See id.* § 18(2).

48. *See id.* § 22(2)(a)–(b).

49. *Id.* § 19.

50. *Id.*

51. Edward W. Cleary, *Res Judicata Reexamined*, 57 YALE L.J. 339 (1948).

52. *Id.* at 342–46.

53. *Id.* at 347.

idea of preclusion. He would have preserved the rest of claim preclusion, including bar, and all of America's issue preclusion.⁵⁴

Merger. One could argue that merger, with its prohibition on the winning plaintiff trying to start over,⁵⁵ is necessary for a judgment really to mean something. This position is more arguable when a plaintiff wants a new try to get an even better result, less arguable when the plaintiff has split the claim and now wants to pursue relief on the remainder.

Nonetheless, redoing a judgment is less serious than undoing a judgment. While allowing the plaintiff to sue again undercuts the fairness and efficiency of finality, it does not undermine the position of courts. It seems that the institutional concern must be in play to make mandatory a branch of res judicata. So, legal systems that provide a version of merger arguably do so as a matter of policy rather than necessity.⁵⁶

Yet, most legal systems do provide a version of merger. The reason is that the policy call is an easy one in most instances. Permitting the plaintiff a redo would be wasteful and burdensome, with no real policy reasons arguing in favor of it. As a system of justice would already be providing the substance of bar and defense preclusion, symmetry alone would counsel prohibiting the winning plaintiff from trying to start over.

Issue Preclusion. Claim preclusion could provide all the required core content.⁵⁷ By its terms, the losing plaintiff generally cannot sue again on the same claim, and the losing defendant generally cannot undo the prior judgment. The doctrine of bar would achieve the first aim: it says the losing plaintiff cannot try again. Defense preclusion would achieve the second: it says that the losing defendant cannot defend anew. Bar and defense preclusion are therefore mandatory; the rest of preclusion is not. So, if the jurisdiction goes the claim preclusion route, any addition of issue preclusion is optional; a legal system would add this prohibition on relitigation of issues only if the policies of finality so inclined the lawmakers. Issue preclusion would then

54. See *id.* at 342, 346, 349–50.

55. See RESTATEMENT (SECOND) OF JUDGMENTS § 18(1) (AM. LAW INST. 1982).

56. See Zeuner & Koch, *supra* note 27, § 9-26 (“However, when a plaintiff who had been successful in asserting a partial claim is prevented from asserting further partial claims, the main policy objective is not the avoidance of contradictory decisions. Rather, it is the policy of concentrating all aspects of a single, controversy in one proceeding resulting in one judgment.”).

57. See PRINCIPLES OF TRANSNATIONAL CIVIL PROCEDURE princ. 28 (AM. LAW INST. & UNIDROIT 2006) (choosing to rely mainly on a narrow brand of claim preclusion).

constitute a separate doctrine, one that could grow to reach different claims and even extend its benefits to persons neither parties nor privies.⁵⁸

Nonetheless, a legal system could choose to deliver the substance of bar and defense preclusion by embracing issue preclusion rather than claim preclusion. That is, issue preclusion could be substituted for, rather than merely added to, claim preclusion. It would preclude the loser on the issues necessarily involved in rendering judgment on the claim. Early American law took this route before evolving toward claim preclusion. One might suppose that this issue-preclusive approach is a less expansive route than minimal claim preclusion. “This could be called a minimal concept of *res judicata*; without it, a judgment would not conclusively decide anything. It seems clear that the adjudicative process would fail to serve its social and economic functions if it did not have this minimal effect.”⁵⁹ In actuality, however, it at best is equivalent in effect to claim preclusion, while being more awkward in conceptualization and implementation. Issue preclusion can provide the effect of bar if it employs a wide definition of the issue in play; if the issue equates to the cause of action, then the plaintiff does not get another shot by shifting the grounds of his or her suit.⁶⁰ Similarly, issue preclusion can achieve the effect of defense preclusion by abandoning any actually-litigated-and-determined requirement; the defendant loses on all defensive issues, asserted or not.⁶¹ Issue preclusion is thus able to deliver the minimal core because without a narrow definition of issue and without the actually-litigated-and-determined requirement, the rules of issue preclusion and claim preclusion are indistinguishable.

Prerequisites and Exceptions. As already noted, only a valid judgment has *res judicata* effects, and so a party can escape *res judicata* by successfully attacking the validity of the prior judgment. But relief from judgment should provide a corrective only for fundamental flaws, not for mere errors. For example, relief from judgment will normally lie for lack of notice in the initial action to the would-be bound party; but

58. See generally RESTATEMENT (SECOND) OF JUDGMENTS §§ 27, 29 (AM. LAW INST. 1982).

59. GEOFFREY C. HAZARD, JR. ET AL., CIVIL PROCEDURE 608 (6th ed. 2011) (discussing preclusion of “the issues necessarily involved in awarding the judgment”).

60. See 2 FREEMAN, *supra* note 1, § 676, at 1426 (treating issue preclusion as including bar); *id.* § 676, at 1427–28 (saying that a judgment blocks the plaintiff by being “an absolute estoppel as to every matter that might be urged in support” if “the cause of action in the second action is the same as that in the first action”).

61. See *id.* § 774, at 1646 (treating issue preclusion as defense preclusion); *id.* § 774, at 1648 (“The failure to interpose a defense is equivalent to interposing it and having it overruled . . .”).

relief should not lie for mere error of fact.⁶² The easier it is to get relief from judgment, the less reach the rules of preclusion will have. This line between fundamental error and mere error must be drawn to avoid defeating the essential core of bar and defense preclusion.

A final judgment is a prerequisite for the preclusion rule to apply, just as is the validity of the judgment.⁶³ That is, the action must have proceeded far enough procedurally for the law to treat its outcome as preclusive. The more steps required before a judgment becomes final, the less preclusion there will be. Clear analysis must separate this legal prerequisite of a “final judgment” from the policy principle of “finality” that posits the need for an end to litigation.

Qualifications to preclusion, stated by these prerequisites and by any exceptions, will turn largely on policy determinations made in the country’s own context. Those qualifications, however, cannot be so extensive as to defeat the essential core of bar and defense preclusion. For example, a country should not provide relief from a civil judgment on the ground of mere mistake of law.

Formulated Doctrine. Whether by claim or issue preclusion, then, a justice system must provide the equivalent of bar and defense preclusion. It might possibly, but not necessarily, provide for more rules of res judicata. Whatever route and extent adopted, res judicata would necessitate a fair amount of elaborative doctrine.

The manner of implementation of res judicata law matters. A country could leave the law buried and obscure, delivering the minimal core through intuitive principles. Further extensions could come from disparate and unbounded principles like good faith. Or instead a country could feature res judicata and formulate it in a sensible and detailed fashion that would foster understanding. The legal system could then optimize res judicata in a way that “enough is enough” would not permit. The United States took the elaborative route beginning with

62. Yet validity here does not mean that a judgment possesses a checklist of attributes. In this context, validity means that the judgment must be of sufficient quality to withstand an attack in the form of a request for relief from judgment. That formulation may sound circular, but it is not. Because relief from judgment lies by various procedural techniques and ultimately rests on a discretionary balancing of equities that takes into account the distance and time from rendition, the law cannot define the prerequisite of validity by specifying certain attributes of judgment. Instead, it must define validity as the outcome of a process: to be valid, a judgment must be of sufficient quality to withstand an attack in the form of a request for relief from judgment. That is, rather than trying to employ the more usual kind of definition by category, the law uses a so-called operational definition, a logically sound kind of definition that specifies a process in order to define a term.

63. See RESTATEMENT (SECOND) OF JUDGMENTS § 18 cmt. a (AM. LAW INST. 1982).

the *Restatement of Judgments*.⁶⁴ The major benefit of this route was that it illuminated the policy choices regarding how far the United States wanted to take res judicata beyond the mandatory core.

The precise form of a developed res judicata turns on the jurisprudential interplay of rules and exceptions, which can further facilitate the pursuit of justice. The formulation must reduce litigation in the second action about the reach of res judicata, and it must optimize litigant behavior in the first action. Here, “rule” includes prerequisites and refers to the series of statements constituting a general formulation of inclusion that establishes the prima facie reach of res judicata, and “exception” includes both rule-like formulations and case-by-case determinations but must remain exceptional in excluding only certain special situations from the rules’ reach. What is the optimal form for most countries? Clear, simple, and rigid rules should approximate with minimal overinclusion the outcome of the balance of the efficiency, fairness, and substantive policies behind res judicata. Exceptions should then work to remedy overinclusion in the particular circumstances, but the exceptions should be small in scope even if unavoidably flexible and considerable in number. Finally, there should be no exceptions to exceptions, because so extending preclusion is costly with few benefits.⁶⁵

C. Medium-Strong Contention: Fairness Imposes a Maximum on Res Judicata

If one were to analogize my four contentions to the four basic atomic forces, I now pass from the weak and strong forces to the gravitational force. Everywhere the doctrine of res judicata is a restrained one. Almost nowhere does the doctrine extend so far as to raise concerns of basic fairness. Nowhere does the doctrine spin off to dictate that any judicial decision is binding for all time on all people.

Res judicata is the doctrine that defines a judgment, which is the output of the judicial branch. By the nature of the judicial branch, a judgment decides certain things and does not decide a lot of other

64. See generally RESTATEMENT OF JUDGMENTS (AM. LAW INST. 1942).

65. See *Taylor v. Sturgell*, 553 U.S. 880, 901 (2008) (“Preclusion doctrine, it should be recalled, is intended to reduce the burden of litigation on courts and parties. ‘In this area of the law,’ we agree, “‘crisp rules with sharp corners” are preferable to a round-about doctrine of opaque standards.” (citation omitted) (quoting *Bittinger v. Tecumseh Prods. Co.*, 123 F.3d 877, 881 (6th Cir. 1997)); LUÍS DUARTE D’ALMEIDA, ALLOWING FOR EXCEPTIONS 3–8 (2015); CASAD & CLERMONT, *supra* note 1, at 41; Zeuner & Koch, *supra* note 27, § 9-105.

things. Unlike the legislature or the executive, which can act on all citizens, the court acts against only the parties before it and a very limited set of others. The loose demands of due process explain how legislators and administrators can bind people and their property, even though those people have received representation only in the loosest sense. But strangers to the judicial proceeding (that is, those neither parties nor privies) are allowed their separate day in court. This feature of self-restraint flows from *res judicata* law, not from due process. This feature indeed gives the judicial branch its distinctive nature. *Res judicata* thus encapsulates the essence of the judicial branch: more or less individualized decision with limited future effects, albeit with finality as to those effects.

Does justice impose a mandatory limit on *res judicata*, aside from this institutional self-restraint? Yes. Recall that *res judicata* law runs (1) if a judgment is valid and final, (2) it will have preclusive effects to a specified degree, (3) unless exceptional circumstances prevail.⁶⁶ If fundamental fairness were accepted as a value, it would restrain each of the three components of the law. Therefore, the following three restrictions on *res judicata* would seem appropriate to ensure its consistency with justice.

First, it would be basically unfair to give greater effect to a judgment than it would have at its source. The parties litigating in *F-1* should know what is at stake and what the potential judgment will mean anywhere. A person should know the detrimental effect of the potential judgment, and the effect should not change with the particular *F-2* in which the opponent later chooses, perhaps surprisingly, to invoke it.⁶⁷ Consequently, any person to be bound ought to be able to challenge at least the validity of the prior judgment, up to the extent permitted in the same circumstances under the law of the rendering court.⁶⁸

Second, if *res judicata* were to start to reach out toward binding strangers, basic fairness would require that their interests were adequately represented in the prior proceeding.⁶⁹ But that is a loose limit. The right to a day in court does not demand the formal joinder of

66. See RESTATEMENT (SECOND) OF JUDGMENTS ch. 1 (AM. LAW INST. 1982).

67. See *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 469–72 (2000) (discussing similar due process concerns).

68. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 481(1), 482 (AM. LAW INST. 1987); RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 92–93, 107 (AM. LAW INST. 1971).

69. See *Hansberry v. Lee*, 311 U.S. 32, 40–46 (1940) (imposing this requirement as a matter of constitutional due process).

every party to be affected by the judgment, now or later. For instance, once an issue relating to an interest in real property has been fully litigated between the title owner and another party, the issue is settled against later purchasers or devisees; also under current law, a beneficiary may be bound on issues litigated by the trustee. Nonparties, then, may be bound. All that basic fairness guarantees is a full and fair day in court enjoyed in person *or through an adequate representative*. Without that qualification, the right to a “day in court” is but a misleading slogan. With that qualification, it becomes apparent that basic fairness would allow binding many more nonparties than most persons assume. Parenthetically, it is only the res judicata law that normally requires a day in court before binding strangers, thereby creating the illusion of some more fundamental day-in-court rule. Mere representation of the stranger’s interests, however adequate, does not suffice for res judicata law.⁷⁰ Res judicata binds by adjudication only those nonparties closely related to the representative party or, as the law phrases it, those in privity with a party.⁷¹ Society has chosen, as expressed in its res judicata law, to bind far fewer nonparties by judgment than it could. The current res judicata rules represent how far the society has chosen to go, not how far the society could go. It is res judicata’s restraint that helps sharply to distinguish adjudication from the rest of governmental decisionmaking and to preserve its distinctive nature.

Third, all persons to be bound by claim or issue preclusion must have had, in person or through an adequate representative, a full and fair opportunity to litigate the claims and defenses or the issues in the prior proceeding.⁷² Basic fairness would require that the law not preclude on the basis of a judgment if the proceeding did not afford a full and fair opportunity to litigate.

The important point here is that these outer bounds are very distant ones. Even in the United States, res judicata law stays well within the outer limit.

70. *See Taylor*, 553 U.S. at 894.

71. *See id.*

72. *See Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 480–83 (1982) (imposing this requirement as a matter of constitutional due process).

D. Medium-Weak Contention: Local Policy Fixes Extent of Res Judicata Law

Between minimal and maximal limits, the extent of res judicata is a matter of cost-benefit policy. Legal systems must accept the impulse of res judicata's mandatory core content, and then they must formulate law to implement it without violating fundamental fairness. The remaining arena of policy is where the lawmakers fight over and hammer out the res judicata law. It is, in a sense, where all the action is. At that stage, the law gets uglier, but in different ways in different systems. Most significantly, systems may differ in how far the bindingness of res judicata should reach, as each legal system pursues its more refined notions of justice.

Res judicata is policy-driven. As a result, it has been a surprisingly uncertain and contentious area of law.⁷³ Some questions of res judicata have not been authoritatively resolved, and there is considerable dissatisfaction with some of the solutions that have been given. Indeed, there has been a certain basic uneasiness, even in the courts, as exemplified by Judge Clark's aphorism: "The defense of res judicata is universally respected, but actually not very well liked."⁷⁴ And there has long been strong advocacy of drastic change.

Strong, but contesting, policies underlie the scope of res judicata. The most influential values of justice here, generating a variety of policies, are procedural efficiency and fairness.⁷⁵ Various substantive policies, which range from optimizing market conditions to regulating attorney-client relations, can play a role too. Obviously the range and content of the relevant policies turn on the particulars of the local legal system, as already mentioned. A procedural system of liberal pleading, joinder, and discovery, on the one hand, or reliance on documentary evidence, absence of juries, and admissibility of prior judgments as evidence, on the other hand, will affect the system's res judicata reach. So similarly, the role of government in the particular society and the role of litigation in that government will shape the res judicata law. These are policy considerations that do not affect the core but rather

73. See Robert Ziff, Note, *For One Litigant's Sole Relief: Unforeseeable Preclusion and the Second Restatement*, 77 CORNELL L. REV. 905, 929 (1992) (noting three categories of "unforeseeable preclusion" as (1) "expansions of issue preclusion," (2) "application of claim preclusion even though the first court lacked authority," and (3) "application of claim preclusion despite the intent of the prior court or the parties to the contrary").

74. *Riordan v. Ferguson*, 147 F.2d 983, 988 (2d Cir. 1945) (Clark, J., dissenting).

75. See *Montana v. United States*, 440 U.S. 147, 153-54 (1979).

influence how much farther the country goes in adopting res judicata rules.

Under the heading of *procedural efficiency*, as it underlies res judicata law, comes society's interest in avoiding the expenditure of time and money in repetitive litigation.⁷⁶ Society also has an interest in avoiding any increase of uncertainty in the primary conduct of private and public life outside the courtroom, as well as in reducing instability in the judicial branch of the legal system. Efficiency argues for achieving the certainty and stability of repose. Society has an interest in avoiding possibly inconsistent adjudications, which at the least would erode faith in the system of justice.⁷⁷ These policies deserve consideration in connection with both the instant case and the long run of cases. An important efficiency consideration is the long-run deterrent effect of res judicata: a harsh result in the case at hand might encourage many future litigants to dispose of their disputes in a single lawsuit, which they will take seriously.

The policies of *procedural fairness* support the use of res judicata to avoid the burdens of repetitive litigation on the party invoking the doctrine, to avoid infringing on reliance interests, and to avoid the possibility of the other party's causing renewed litigation or profiting from sneaky or otherwise undesirable litigation tactics.⁷⁸ A litigant may be entitled to a day in court, but not to inflict a repetition of it.

Contrary considerations, especially those resting on fairness in the individual case, support exceptions to res judicata's principle of finality. Some potential applications of the doctrine will seem deeply unfair. After all, courts trying to pursue policies against repetitive litigation must recognize that those policies are far from being absolute. Clearly, other policies will often point in the other direction and sometimes overwhelm. Iron-clad rules of preclusion hardly seem the appropriate resolution, and so restrictions and exceptions abound.

Efficiency policies can cut the other way too. Litigating about res judicata can be seriously inefficient. In addition to these "direct costs," the fear of future preclusion might stimulate overlitigation in the initial action. Also, there are the inefficient "error costs" of deciding to live with an incorrect judgment. Moreover, these economic arguments play

76. See, e.g., *Whole Woman's Health v. Lakey*, 769 F.3d 285, 301 (5th Cir.) (noting that res judicata operates "[i]n the interests of efficiency and finality"), *vacated in part*, 135 S. Ct. 399 (2014); *Universal Ins. Co. v. Office of the Ins. Comm'r*, 755 F.3d 34, 39 (1st Cir. 2014) (limiting exceptions to res judicata so as to promote finality and efficiency).

77. See *Montana*, 440 U.S. at 154 (noting that res judicata "fosters reliance on judicial action by minimizing the possibility of inconsistent decisions").

78. Ziff, *supra* note 73, at 911–14.

out against a complicated background. For example, the parties' settlement in light of prior outcomes would often avoid relitigation without any preclusion rule.⁷⁹

How do these conflicting policies balance out? With the march of time, and across many different countries, the grand trend in the development of *res judicata* has been to expand the theoretical applicability of the finality principle.⁸⁰ That is, many countries have yielded to the call of policy to grow *res judicata* at least a little beyond its mandatory core of bar and defense preclusion. Most expand to include merger, and some go on to provide for collateral estoppel.⁸¹

At the same time, the growth of *res judicata* has called for recognizing more and more exceptions of some scope and discretionary nature.⁸² On the one hand, even the many existing exceptions do not remove all the bite from the sometimes harsh law of *res judicata*.⁸³ On the other hand, as exceptions continue to grow in significance, the question arises whether the slight narrowing yielded by the exceptions and the increasingly discretionary nature of *res judicata* are really preferable to a bare but clearer minimum of preclusion, perhaps a law that would keep judgments from being reopened but not preclude any underlying issues. At the least, one must acknowledge that if a fuller *res judicata* is deemed worth developing, it must be applied with some woodenness in order not to defeat its purposes of economy and repose.

III. COMPARATIVE PREVALENCE OF RES JUDICATA

A comparative study will help with synthesis and integration. It documents *res judicata*'s common core—bar and defense preclusion, whether delivered as claim preclusion or cloaked equivalently in issue preclusion terminology. The core stands regardless of any extrusions that prevail locally.

It is challenging to draw these lessons from comparative study, however. The reason is that very little comparative work on *res judicata* has been done. The standard citation is to a brief comparative foray in some decades-old article.⁸⁴ If you look at most books about foreign legal

79. See ROBERT G. BONE, CIVIL PROCEDURE: THE ECONOMICS OF CIVIL PROCEDURE 232–58 (2003).

80. See OSCAR G. CHASE ET AL., CIVIL LITIGATION IN COMPARATIVE CONTEXT 461 (2007).

81. See *id.* at 453, 462.

82. See *id.* at 461.

83. See *id.* at 462.

84. E.g., Casad, *supra* note 28, at 61–70; see also CHASE ET AL., *supra* note 80, at 435–62; VESTAL, *supra* note 14, at ch. 16.

systems and go to the index, you will find nothing on *res judicata*. Or go to books on transnational litigation, and look in vain for a chapter on *res judicata*.

Does this paucity suggest that *res judicata* is unimportant? No, it suggests instead that comparative study of *res judicata*, properly done, is very hard to do. First, countries other than the United States give the subject little prominence. They tend to deal with it as nineteenth-century America did, leaving it undeveloped and scattered in the interstices of subjects like collateral attacks on and other relief from judgments,⁸⁵ recognition and enforcement of judgments,⁸⁶ or even in foreign pigeonholes like abuse of process or good faith.⁸⁷ So the comparativist must burrow into the foreign system, needing to understand the whole system in order to construct its approach to *res judicata*. Second, because of the absence of systemization, the law is usually encapsulated in an idiosyncratic vocabulary in each country. Research becomes a daunting task, even at the level of terminology. Third, responding to felt need, each justice system has generated its own distinctive body of *res judicata* law, even among countries of the same legal family.⁸⁸ The researcher must ascend to higher levels of abstraction to make comparisons. Fourth, even in civil-law countries, one cannot simply open a code. The *res judicata* law is mostly made by judges, when courts are called upon to deal with a prior judgment. Fifth, in most countries, the doctrine often proceeds case-by-case, being on the whole somewhat flexible and therefore resistant to generalization. Despite any first impression, it comprises principles or flexible standards as much as fixed rules and exceptions. Sixth, the comparativist must research a moving target because any country's *res judicata* law keeps changing. It is a policy-driven subject, and the policies are always evolving, with a general trend toward expansion of *res judicata*.

I can testify personally to the difficulty of comparative study. I was called upon to write a brief summary of French *res judicata* law, a country and a language I know.⁸⁹ The task proved challenging.

85. See Peter E. Herzog & Delmar Karlen, *Attacks on Judicial Decisions*, in 16 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW: CIVIL PROCEDURE ch. 8, at 3–4 (Mauro Cappelletti ed., 2014).

86. See Konstantinos D. Kerameus, *Enforcement Proceedings*, in 16 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW: CIVIL PROCEDURE ch. 10 (Mauro Cappelletti ed., 2014).

87. See *infra* notes 100 & 121.

88. See CHASE ET AL., *supra* note 80, at 461.

89. RICHARD H. FIELD ET AL., MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE 774–76 (11th ed. 2014).

Nowhere could I find a nice comparative summary that Americans would be able to understand. Nowhere could I find even a noncomparative treatment of detailed French law that I could readily understand. It was so hard to fit the French ideas into my intellectual schema. A tremendous intellectual effort was required to master the French law that was spread over many categories and cases and was in the process of evolution, and then break it down to its components and reconstruct it into a legal framework comprehensible to Americans.

I shall nevertheless attempt to document my assertions comparatively and widely, despite the difficulties of comparative study of *res judicata*. I shall have to rely on secondary sources primarily, but I defend that move on the ground that my interest is grand theme rather than extreme detail.

I am assisted in the task by the preceding historical and jurisprudential insights. I believe that my view—mandatory core plus optional extensions—provides a new metric for comparative study. It makes the world more comprehensible. It does not surrender by making only the usual statement that *res judicata* varies greatly around the world. Indeed, it almost eliminates the need for a chart of world laws. With the new metric, *res judicata* falls into two camps. First, most nations deliver the core, sometimes expressly as claim preclusion but more often confusingly garbed as issue preclusion, and then add only a little more *res judicata* in response to local conditions. These intuitive and nearly unspoken brands of *res judicata*, because they are confusing in terminology and minimal in extent, get little attention or study. Second, in the part of the world based on English law, *res judicata* has markedly expanded outward from the core. With *res judicata* coming into focus there, the doctrine of issue preclusion becomes a separately enunciated extrusion on the core. However, around the world, almost all systems' *res judicata* has shown a tendency to expand in coverage over time.

A. *England and Most of Its Progeny: Issue Preclusion*

English and Commonwealth⁹⁰ law on *res judicata* is somewhat undersystematized.⁹¹ It at first stayed close to the early Germanic

90. See Casad, *supra* note 28, at 62–63.

91. See PETER R. BARNETT, *Preface to RES JUDICATA, ESTOPPEL, AND FOREIGN JUDGMENTS: THE PRECLUSIVE EFFECTS OF FOREIGN JUDGMENTS IN PRIVATE INTERNATIONAL LAW*, at ix (2001) (referring to England's "res judicata, that delightfully arcane yet fundamental body of law").

tradition,⁹² providing that a valid and final judgment precluded a misbehaving party on the same issue arising later: “a party to litigation is precluded thereafter . . . from denying in subsequent litigation the correctness of a decision on a matter of law or fact given in the earlier litigation between them.”⁹³ England thus utilized issue preclusion rather than claim preclusion to do most of its work of preclusion. To complete the job, however, it had to extend this issue preclusion to issues that were “necessary steps to the decision,” sometimes even if not actually litigated and determined and so including admitted and unraised matters.⁹⁴ It utilized this confusing slackness to establish today’s “cause of action estoppel” as a branch of issue preclusion that gave bar-like effect to the cause of action and also defense preclusion effect even to default judgments.⁹⁵ Thus, English law came to deliver the minimal core of *res judicata*.

English law chose early on to add a “merger” doctrine in order to reach the successful plaintiff trying to sue again on the same cause of action: a valid and final judgment for the plaintiff extinguishes the cause of action by merging it in the judgment.⁹⁶ After that step, English *res judicata* for a long time resembled what would become the mid-nineteenth-century American law, which after all came from England.⁹⁷

More recently, English law has gone further with another branch of issue preclusion called “issue estoppel” in order to construct a fairly modern doctrine of issue preclusion: a valid and final judgment precludes issue determinations, arising anew on the same or different cause of action, as between the same parties (and privies).⁹⁸ The

92. See *supra* text accompanying note 15.

93. SPENCER BOWER & TURNER, *supra* note 18, at 2–3.

94. *Id.* at 37–39, 152, 157–70; cf. HANDLEY, *supra* note 16, at 107–12 (bringing the description of English law up to date).

95. See SPENCER BOWER & TURNER, *supra* note 18, at 149 (“Its operation prevents a party to an action from asserting or denying as against the other party the existence of a particular cause of action the non-existence or existence of which has been determined . . .”); *id.* at 151 (explaining that this estoppel “denies the unsuccessful defendant [or plaintiff] the opportunity of relitigating a case which he has already lost”). Currently, the definition of cause of action is a factual situation giving rise to a right to a particular remedy. See BARNETT, *supra* note 91, at 120–21; HANDLEY, *supra* note 16, at 93–101.

96. See SPENCER BOWER & TURNER, *supra* note 18, at 355–404 (“Res judicata has a twofold operation. Not only does it estop the parties from afterwards controverting any question or issue thereby decided, but it also bars the party who has obtained relief thereby from receiving again the same relief against the same party.”).

97. See 2 FREEMAN, *supra* note 1, § 546, at 1165–68 (merger); *id.* §§ 627, 676, 774, at 1321–25, 1425–29, 1646–50 (issue preclusion, including bar and defense preclusion).

98. See HANDLEY, *supra* note 16, at 103–23; SPENCER BOWER & TURNER, *supra* note 18, at 149–57. To keep the discussion simple, I omit elaboration on English preclusion extending to immediate privies, or to other persons in the case of an *in rem* judgment. See

English intuit that default judgments should not produce issue estoppel (as opposed to cause of action estoppel).⁹⁹

England is now moving to embrace preclusion even more generally than the above-described (1) cause of action estoppel, (2) merger, and (3) issue estoppel. It is increasingly reaching matters that could and should have been litigated in the prior case and is beginning to allow use by persons neither parties nor privies.¹⁰⁰ Thus, with its own odd terminology, England today has a fairly expansive doctrine, one that on average reaches about as far as mid-twentieth-century American *res judicata*.

B. Civil-Law Countries: Direct Estoppel

Drawing on the Roman tradition,¹⁰¹ the civil-law countries in Europe,¹⁰² Latin America,¹⁰³ and Asia¹⁰⁴ take approaches that differ from England's and that have worked out to provide a narrower *res judicata* than England's. They rely on issue preclusion to enforce a

HANDLEY, *supra* note 16, at 125–68.

99. See HANDLEY, *supra* note 16, at 106–12 (indicating an abiding English tendency to preclude some admitted and unraised issues).

100. See BARNETT, *supra* note 91, at 23–24, 183–244 (discussing this new use of the doctrine of abuse of process as a so-called extended doctrine of *res judicata*); HANDLEY, *supra* note 16, at 305–21; ADRIAN ZUCKERMAN, ZUCKERMAN ON CIVIL PROCEDURE: PRINCIPLES OF PRACTICE ch. 24 (3d ed. 2013); Garry D. Watson, *Issue Estoppel, Abuse of Process and Repetitive Litigation: The Death of Mutuality*, in INTERNATIONAL PERSPECTIVES ON CIVIL JUSTICE 179 (I.R. Scott ed., 1990). In addition, England has recently added the somewhat shaky beginnings of a doctrine of jurisdiction to determine (no) jurisdiction. See BARNETT, *supra* note 91, at 145–51.

101. See *supra* text accompanying note 16.

102. See CIVIL JUSTICE IN SPAIN 181–92 (Carlos Esplugues-Mota & Silvia Barona-Vilar eds., 2009); FIELD ET AL., *supra* note 89, at 774–76 (France); PETER L. MURRAY & ROLF STÜRNER, GERMAN CIVIL JUSTICE 355–65 (2004); Casad, *supra* note 28, at 67–68 (Sweden); Robert Wyness Millar, *The Premises of the Judgment as Res Judicata in Continental and Anglo-American Law* (pt. 1), 39 MICH. L. REV. 1, 21–28 (1940) (Austria, Denmark, Norway); Pelayia Yessiou-Faltsi, *Greece*, in 3 INTERNATIONAL ENCYCLOPAEDIA OF LAWS: CIVIL PROCEDURE ¶¶ 237–243 (Piet Taelman ed., 2011); Zeuner & Koch, *supra* note 27, §§ 9-78 to -79 (Italy). Compare K.D. Kerameus, *Res Judicata: A Foreign Lawyer's Impressions of Some Louisiana Problems*, 35 LA. L. REV. 1151 (1975) (describing old civilian approach), with 1 LA. CIV. L. TREATISE, CIVIL PROCEDURE § 6:7 (2d ed. 2008) (describing the state's shift in 1990 to common-law preclusion).

103. See ROBERT C. CASAD, CIVIL JUDGMENT RECOGNITION AND THE INTEGRATION OF MULTIPLE-STATE ASSOCIATIONS 67–135 (1981); Casad, *supra* note 28, at 65–66, 68–70.

104. See TAKAAKI HATTORI & DAN FENNO HENDERSON, CIVIL PROCEDURE IN JAPAN § 7.09[8] (Yasuhei Taniguchi et al. eds., rev. 2d ed. 2009); Kuo-Chang Huang, *Res Judicata—Its Subjective Scope*, 38 TAIWAN JURIST 57 (2005) (article in Chinese); Soonhyung Kwon, *Comparison of Res Judicata in Korea and the U.S.*, 31 KOR. J. INT'L & COMP. L. 67 (2003).

judgment's instantiation of truth. That preclusion prevents a second decision from contradicting the first, and the reach of that preclusion extends all the way to default judgments. This is not to suggest that the civil law takes a uniform approach. Important differences exist between France and Germany, for instance, with Germany's *res judicata* being slightly narrower.¹⁰⁵

To generalize, though, the bindingness of the court's specific decisions on the parties' stated positions will normally work to prevent the losing party from asserting new evidence or theories in order to change the outcome and also to prevent the winning party from relitigating in order to improve position, provided that the second suit involves the same demand, ground, and parties.¹⁰⁶ In other words, the civil law binds both parties to judicial determinations of the ultimate issues, as opposed to preliminary issues involved in the reasoning;¹⁰⁷

105. See Casad, *supra* note 28, at 65; Zeuner & Koch, *supra* note 27, §§ 9-61 to -77, -102 to -103 (discussing differing definitions of preliminary issues); *infra* text accompanying notes 110 & 117. The German code, ZPO § 322(1), specifies: "Judgments are able to attain legal force only insofar as they decide the demand raised by the complaint or counterclaim." CHASE ET AL., *supra* note 80, at 447; see also *infra* text accompanying note 319.

106. See FIELD ET AL., *supra* note 89, at 774-75 (explaining that the demand means "the end the action has in view" or "generally the same juridical right sought as to the same matter"; the ground or cause means "the ultimate facts and legal principle upon which the action was grounded"; and the "same parties" includes privies but not the same person who later sues in a different capacity). The French code, CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1351 (now renumbered as art. 1355), specifies: "The authority of *res judicata* extends only to what was the subject matter of the judgment. The thing claimed must be the same; the action must be based on the same ground; the action must be between the same parties, and brought by and against them in the same capacities." FIELD ET AL., *supra* note 89, at 775.

107. See MURRAY & STÜRNER, *supra* note 102, at 361 ("A judgment is binding not only on the party which commenced the case, but also on the defendant. So, for instance, a defendant who was adjudged liable to the plaintiff in a case for damages may not bring his own action against the plaintiff seeking a declaratory judgment of non-liability or any limitation of liability directly inconsistent with the prior judgment."); Zeuner & Koch, *supra* note 27, § 9-102 (treating preliminary issues). An illustration of a preliminary issue would assist:

For example, when a plaintiff brings a suit which seeks to obliterate the registration of a defendant's land ownership, a court must first decide who has the ownership of the land. Even though the court dismissed the action on the grounds that the defendant has the ownership, the claim preclusion effect applies to the inexistence of the plaintiff's right to demand the obliteration of registration of the defendant's ownership, but does not apply to the judgment of the defendant's ownership which was decided in the reason of the opinion. Therefore, the plaintiff cannot again file the second action identical to the initial action, but he can again file a second suit which seeks to confirm his ownership.

Kwon, *supra* note 104, at 70-71. But an ultimate finding can have an effect like ordinary issue preclusion:

but the determinations are usually binding only when they arise in the same judicial context, that is, an assertion of the same subject matter and not of a different claim.¹⁰⁸

This civil-law approach to preclusion is difficult to grasp for the American legal mind. Americans would probably call it largely a type of direct estoppel. It works to kill off the narrowly defined claim. Although the exact definition of claim is heavily disputed and varies from country to country, one can say by way of illustration that a plaintiff may maintain separate suits for property and personal damages.¹⁰⁹

Thinking of civil-law preclusion in terms of the mandatory core makes it much more comprehensible. By its direct estoppel, the civil law delivers the minimal core of *res judicata* equivalent to bar and defense preclusion. To avoid contradiction by a second judgment, the civil law also delivers a narrow merger-like effect that keeps winning plaintiffs from suing again on the same claim, although a few civil-law countries allow claim-splitting of even their narrowly defined claims.¹¹⁰

A legal system that relies heavily on documentary evidence and does not heavily employ juries might have less need for preclusion.¹¹¹ Such considerations do not affect the core, but rather they influence the balance of policies that determines how much farther the country goes in adopting *res judicata* rules. Certainly, the civil law provides neither broad claim preclusion nor really any collateral estoppel.¹¹²

Meanwhile, if the judgment included in the order of an opinion is the interlocutory problem in the second action, it naturally binds the court and parties. . . . For example, when a plaintiff files suit for transfer of the object after winning an ownership confirmation suit in which the ownership was decided in the order of the opinion, the defendant cannot again dispute the plaintiff's ownership in a second suit.

Id. at 71.

108. See MURRAY & STÜRNER, *supra* note 102, at 357; *cf.* Zeuner & Koch, *supra* note 27, § 9-61 ("object of the lawsuit").

109. See UGO A. MATTEI ET AL., SCHLESINGER'S COMPARATIVE LAW 818 (7th ed. 2009); MURRAY & STÜRNER, *supra* note 102, at 357 (Germany); Zeuner & Koch, *supra* note 27, § 9-76 (France).

110. See MATTEI ET AL., *supra* note 109, at 818–19 (describing German law that allows the plaintiff to sue for part of the damages and then sue for the rest, which is a desirable course when costs and fees are tied to the amount demanded); MURRAY & STÜRNER, *supra* note 102, at 357; Zeuner & Koch, *supra* note 27, §§ 9-61 to -62.

111. See J. MARK RAMSEYER & MINORU NAKAZATO, JAPANESE LAW: AN ECONOMIC APPROACH 144–45 (1998) (attributing the narrowness of Japanese preclusion law to the low cost of proving anew in a system that relies largely on documentary evidence and operates without juries); Kwon, *supra* note 104, at 92 (mentioning also the prevalence of *pro se* litigation in South Korea as discouraging preclusion law).

112. Compare von Mehren & Trautman, *supra* note 13, at 1676 ("It follows a fortiori that the German system does not recognize any collateral estoppel effects whatsoever."), with MURRAY & STÜRNER, *supra* note 102, at 358–59, 361 (discussing minor extensions).

However, any quick conclusions about the civil law's res judicata narrowness should await consideration of its evidential use of prior judgments, a use that is generally prohibited by the common law's hearsay rule.¹¹³ In order to affect other causes of action as well as other persons, civil-law countries broadly allow this evidential use, weighing the prior judgment along with the new evidence.¹¹⁴ This practice also reduces the need to expand preclusion law beyond the core.¹¹⁵

The civil law nevertheless exhibits some signs of movement toward broader res judicata.¹¹⁶ For example, French courts might be moving toward claim preclusion, knocking out unasserted arguments and maybe even unasserted demands by, in effect, broadening their definition of claim.¹¹⁷ Meanwhile, Greece, for one example, has introduced some notions of issue preclusion that would affect actions on different claims.¹¹⁸

On rudimentary jurisdiction to determine (no) jurisdiction, see Zeuner & Koch, *supra* note 27, §§ 9-58 to -59.

113. See Hiroshi Motomura, *Using Judgments as Evidence*, 70 MINN. L. REV. 979, 979 (1986). On the one hand, policy arguments exist against extending evidential weight to factual findings: (1) combining a past decision with new evidence, especially new oral evidence, is a bit like combining apples and oranges, (2) U.S. juries especially would have trouble in weighing a past decision, and (3) the evidential approach lacks res judicata's advantage of altogether avoiding trial, an especially burdensome procedural stage in the common-law systems. On the other hand, common-law systems do employ stare decisis. Intended to give stability to the law and to improve judicial performance, this doctrine provides that a court's holding on a legal question will normally be followed without serious reconsideration, by the same court and any lower courts in the judicial hierarchy, in future cases presenting indistinguishable facts. Contrasted with res judicata, stare decisis (1) permits courts to handle precedent more flexibly, (2) applies only to issues of law, as well as only to holdings and not to dicta, and (3) governs even in cases involving wholly new parties on both sides. *Id.* at 1017-18.

114. See FIELD ET AL., *supra* note 89, at 776; MATTEI ET AL., *supra* note 109, at 822-23; cf. CARL F. GOODMAN, JUSTICE AND CIVIL PROCEDURE IN JAPAN 421 (2004) (describing informal effects of prior judgment in bureaucratic Japanese judiciary).

115. FIELD ET AL., *supra* note 89, at 776.

116. The emergence of a broader European Union res judicata law is another trend worth noting. See BRITISH INST. OF INT'L & COMPARATIVE LAW, THE EFFECT IN THE EUROPEAN COMMUNITY OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS: RECOGNITION, RES JUDICATA AND ABUSE OF PROCESS 5 (2009). Compare MURRAY & STÜRNER, *supra* note 102, at 365-66, with HANDLEY, *supra* note 16, at 328.

117. See LOÏC CADIET & EMMANUEL JEULAND, DROIT JUDICIAIRE PRIVÉ 572-74 (8th ed. 2013). Compare FIELD ET AL., *supra* note 89, at 775-76, with PETER HERZOG & MARTHA WESER, CIVIL PROCEDURE IN FRANCE 551-55 (Hans Smit ed., 1967) (giving older, narrower view). While France reformed its law by judicial decision, Spain took similar steps legislatively. See Robert C. Casad, *Issue Preclusion in the Law of Spain: Cosa Juzgada Positiva*, in LAW AND JUSTICE IN A MULTISTATE WORLD 595 (James A.R. Nafziger & Symeon C. Symeonides eds., 2002).

118. See Yessiou-Faltsi, *supra* note 102, ¶ 242; cf. Teresa Arruda Alvim Wambier, *What Is Covered by Res Judicata in Brazilian Civil Procedure Law: The Current Law and*

Japan provides an interesting example, being patterned on Germany but subject, after World War II, to considerable American influence.¹¹⁹ Taking a more straightforward path to a typically restrained civil-law scope, Japanese *res judicata* law more overtly expresses itself in terms of a claim-preclusive law that binds plaintiff and defendant, but that is applicable only within the claim narrowly defined as the same substantive right.¹²⁰ In some recent cases, the Japanese courts seem to be introducing a very restricted doctrine of collateral estoppel too.¹²¹

C. Socialist Law and Other Models: Variation

Socialist law derives from the civil law, and tends not to differ greatly from it at the “micro” level of procedure.¹²² Russia delivers the minimum of *res judicata* via claim preclusion, with claim defined by grounds and by relief.¹²³

Perspectives of Change, in THE DYNAMISM OF CIVIL PROCEDURE—GLOBAL TRENDS AND DEVELOPMENTS 267 (Colin B. Picker & Guy I. Seidman eds., 2016) (discussing pending bill that would create some issue preclusion). While Greece reformed its law legislatively, Portugal took similar steps by judicial decision. See MATTEI ET AL., *supra* note 109, at 820–21 (also mentioning other countries that could serve as examples); *cf. id.* at 823 (mentioning civil-law use of declaratory actions).

119. See Takeshi Kojima, *Japanese Civil Procedure in Comparative Law Perspective*, 46 U. KAN. L. REV. 687, 693–96 (1998).

120. See MINJI SOSHŌHŌ [MINSOHŌ] [C. CIV. PRO.] arts. 114–115 (Japan); HATTORI & HENDERSON, *supra* note 104, § 7.09[8][c]. Traditionally the Japanese law “recognizes a separate claim for each substantive right involved even though arising from a single transaction,” but perhaps the dimensions of the claim are seeing the beginnings of expansion. *Id.* § 7.09[8][d].

121. See HATTORI & HENDERSON, *supra* note 104, § 7.09[8][b][i] (discussing the new use of the principle of good faith as a kind of collateral estoppel); *cf. Casad, supra* note 28, at 66–67 (describing earlier Japanese moves in this direction). With a different history, Taiwan is showing a similar trajectory from claim preclusion to a case-based law of collateral estoppel. See Huang, *supra* note 104. It begins from Taiwan Code of Civil Procedure art. 400, which provides: “Except as otherwise provided, *res judicata* exists as to a claim adjudicated in a final judgment with binding effect.” See also Kwon, *supra* note 104, at 67–68 (“The K[orean] CPL recognizes *res judicata* (claim preclusion), but in principle does not recognize collateral estoppel (issue preclusion).”); *cf. id.* at 72–73, 75, 87–88, 90 (reporting academic support for collateral estoppel).

122. John Quigley, *Socialist Law and the Civil Law Tradition*, 37 AM. J. COMP. L. 781, 800, 808 (1989) (stressing “the historical connection of socialist law to civil law and the continuing relevance in socialist law of civil law rules, methods, institutions, and procedures”).

123. See Kirill Trofimov, *Russian Federation (Russia)*, in 5 INTERNATIONAL ENCYCLOPAEDIA OF LAWS: CIVIL PROCEDURE ¶ 322 (Piet Taelman ed., 2013) (“The legal doctrine of *res judicata* precludes re-litigation of the same claim between the same parties . . . [if] identical . . . by grounds and by relief sought.”); Zeuner & Koch, *supra* note 27, §§

Islamic legal systems seem to have a doctrine of claim preclusion, even if it is little discussed. “In general, in Islamic law it is agreed upon, that a judgment is binding and not able to be challenged. . . . This was so obvious, that it was never greatly discussed in Islamic legal texts and even in contemporary texts; it seems to be no need to discuss this issue.”¹²⁴ Details of *res judicata* law beyond the core are so hard to come by in English, however, that it would be foolish to attempt almost any generalization about an Islamic approach.

Still, one can say that *res judicata* appears to be virtually universal. Every justice system that has moved beyond its primitive beginnings, becoming one that imposes nonconsensual judgments, has a rule that the disgruntled cannot undo the judgment itself in most circumstances.¹²⁵ This is the core of *res judicata* that is omnipresent. Some countries may not recognize a doctrine translatable as *res judicata*, but they will have this basic and intuitive rule.¹²⁶

9-30, -39; cf. Viorel Mihai Ciobanu & Claudia Ana (Moarcă) Costea, *Romania*, in 5 INTERNATIONAL ENCYCLOPAEDIA OF LAWS: CIVIL PROCEDURE ¶¶ 225–26 (Piet Taelman ed., 2013); Katalin Kelemen & Balázs Fekete, *How Should the Legal Systems of Eastern Europe Be Classified Today?*, in INTERNATIONAL CONFERENCE FOR THE 10TH ANNIVERSARY OF THE INSTITUTE OF COMPARATIVE LAW, 2014, at 197, 207 (A. Badó et al. eds., 2015), <http://ssrn.com/abstract=2614944>; Imre Szabó & Adél Köblös, *Hungary*, in 3 INTERNATIONAL ENCYCLOPAEDIA OF LAWS: CIVIL PROCEDURE ¶¶ 238–240 (Piet Taelman ed., 2014).

124. Meyer-Reumann & Partners, *Res Judicata in Sharjah Rent Law*, LEX ARABIAE (Apr. 2014), <http://lexarabia.meyer-reumann.com/res-judicata-in-sharjah-rent-law/>. Compare AHMED AKGÜNDÜZ, INTRODUCTION TO ISLAMIC LAW: ISLAMIC LAW IN THEORY AND PRACTICE 29–30 (2010) (arguing that the West’s concept of *res judicata* may have Islamic origins), with H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD 188 (5th ed. 2014) (arguing that Islamic *res judicata* is weakened by ample relief from judgment obtainable in the judgment-rendering court). Of course, many Muslim countries have mixed legal systems whose *res judicata* shows signs of the civil law, see, e.g., Abdellah Boudahrain, *Morocco*, in 5 INTERNATIONAL ENCYCLOPAEDIA OF LAWS: CIVIL PROCEDURE ¶¶ 518–520 (Piet Taelman ed., 1998), or the common law, see, e.g., Mirazul Hossain Khan, *Bangladesh*, in 1 INTERNATIONAL ENCYCLOPAEDIA OF LAWS: CIVIL PROCEDURE ¶ 253 (Piet Taelman ed., 2006). See also *Res Judicata and Code of Civil Procedure*, LAWTEACHER, <http://www.lawteacher.net/free-law-essays/constitutional-law/res-judicata-and-code-of-civil-procedure-constitutional-law-essay.php> (last visited Apr. 1, 2016) (describing *res judicata* in India as “an all pervading concept present in all jurisdictions of the world” and one “[u]nderstood in the distant past by both Hindu lawyers and Muslim jurists”); Brajesh Ranjan, *A Restatement of the Law of Res Judicata in India* (July 10, 2016), <https://ssrn.com/abstract=2810683> (describing interplay of statute and interpretation); cf. GLENN, *supra*, at 294 (treating Hindu law).

125. See BARNETT, *supra* note 91, at 24.

126. See, e.g., Meyer-Reumann, *supra* note 124; see also Yuval Sinai, *Reconsidering Res Judicata: A Comparative Perspective*, 21 DUKE J. COMP. & INT’L L. 353, 387–88 (2011).

True, Israeli rabbinical courts supposedly do without almost all of *res judicata* law,¹²⁷ thus declining to follow Israel's approach based on English *res judicata*.¹²⁸ Those rabbinical courts exercise exclusive jurisdiction over matters of marriage and divorce of Jews in Israel, as well as exercising some other jurisdiction.¹²⁹ They have eradicated *res judicata* by expanding relief from judgment, giving the parties significant ongoing power to attack validity in order to correct mere factual and legal error.¹³⁰ "Consequently, an incorrect judgment is absolutely null and void, and it may be said that the judge has not finished his work until he gives a true judgment."¹³¹ Their explanation is that they, without parallel among other advanced systems of law, put the pursuit of truth above all other aims.¹³² "Jewish law is religious law, and as such the central idea guiding the judge is truth-based litigation, an objective imposed on the judge as a religious obligation."¹³³ All other developed systems have found themselves obliged to adopt the more realistic view that justice comprises more aims than just truth or accuracy. Those other systems feel an undeniable institutional need to have courts issue binding judgments. However, one way or another, the rabbinical courts do not contradict my general rule. Perhaps the rabbinical courts, although called courts, are operating as non-court religious institutions dispensing *gemeinschaft*-type dispute-resolution.¹³⁴ An alternative view would be that absence of *res judicata* has proven either insignificant or untenable for the rabbinical courts. Worth noting are both the parties' infrequent use of that power to reopen judgments and the rabbinical authorities' recent efforts to hem

127. See GLENN, *supra* note 124, at 105 ("Put another way, the notion of *res judicata* (chose jugée, Rechtskraft) has little or no place in the thinking, and the truthful solution is of greater value than decisional efficiency and stability."); SINAI, *supra* note 126, at 387–94 ("Rabbinical sources indicate that, if the court acquits the defendant in a suit and the plaintiff lodges a claim against the defendant in another court, the defendant need not litigate or answer the plaintiff's complaint in the second court; in addition, the second court is not permitted to hear the plaintiff because the defendant has already been acquitted by the first court. Thus, some RJ-like principles can be found in Jewish law, but this role is minimal. In the Jewish legal system, a judgment is in principle subject to revision, normally by the court that issued it.").

128. See STEPHAN GOLDSTEIN ET AL., *CIVIL PROCEDURE IN ISRAEL* 138–43 (2d rev. ed. 2013); CASAD, *supra* note 28, at 63 (grouping Israel); ELIAHU HARNON, *Res Judicata and Identity of Actions Law and Rationale*, 1 ISR. L. REV. 539, 541–42 (1966).

129. Sinai, *supra* note 126, at 387–88.

130. *Id.*

131. *Id.* at 396.

132. *Id.*

133. *Id.* at 395.

134. See Michelle Greenberg-Kobrin, *Religious Tribunals and Secular Courts: Navigating Power and Powerlessness*, 41 PEPP. L. REV. 997, 1008 (2014).

in the power to reopen.¹³⁵ Also important to note is that the venue for relief is the judgment-rendering court itself, which can thereby try to patrol the degree to which its judgments are undercut.¹³⁶

Less developed legal systems might dispense even more completely with any conscious notion of *res judicata*. Navajo courts are said not to have much sense of *res judicata*.¹³⁷ These systems might be exceptions that prove the rule, but really they do not fall within the rule. To see this, consider the interesting illustration of pre-1959 Tibetan law, which was medieval and Buddhist in nature:

Cases could be reopened right after they were decided, even when the parties had both agreed to the judge or conciliator's decision. Tibetans considered this one of the best aspects of their system: they were free to disagree until they felt that the dispute had been correctly decided. Judicial decisions had no finality in the way we understand finality; calming the mind and reaching real harmony were necessary before a dispute could actually be over. In Buddhism, this continuing freedom to disagree is part of the infinite potential of the mind to change and choose.¹³⁸

A Tibetan court could not impose its decision unless the parties agreed, and a party could withdraw its agreement at any time and reopen the case even in another court.¹³⁹ Perhaps the approach was instrumental:

Tibetans realize that if courts make final decisions in civil cases, the parties to the dispute, mainly neighbors, may not reconcile to the point that they could work together Absence of *res*

135. See Sinai, *supra* note 126, at 387–88.

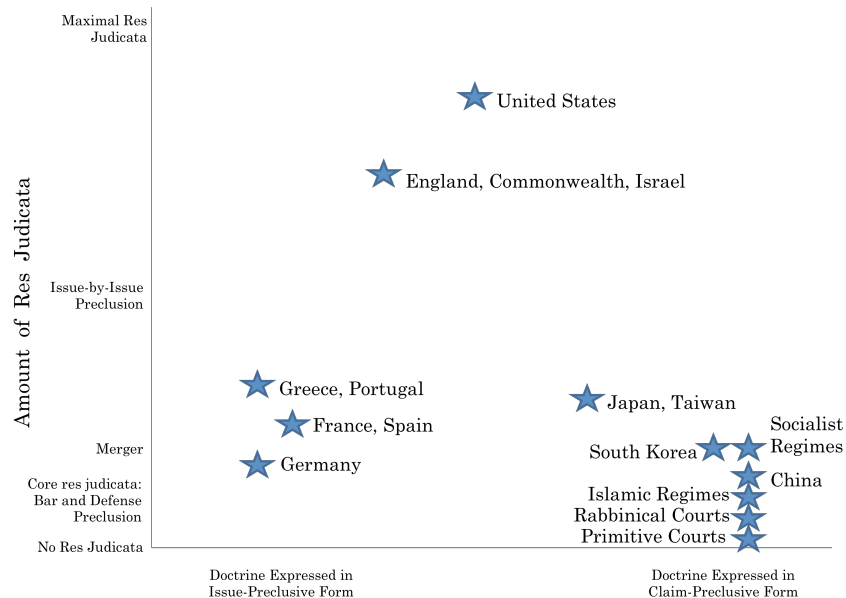
136. See *id.* at 389–93.

137. See Dale Beck Furnish, *The Navajo Nation: A Three-Ingredient Mix*, 12 ELEC. J. COMP. L., May 2008, no. 1, art. 8, at 22, <http://www.ejcl.org/121/art121-8.pdf> (discussing “an important aspect of Navajo law’s consensual nature”).

138. REBECCA REDWOOD FRENCH, *THE GOLDEN YOKE: THE LEGAL COSMOLOGY OF BUDDHIST TIBET* 9, 126, 137–40, 344–45 (1995); see also Tenzin Namgyal, *History of Tibetan Legal System*, TIBETAN POL. REV. (Dec. 18, 2013 8:27 PM), <https://sites.google.com/site/tibetanpoliticalreview/articles/historyoftibetanlegalsystem> (“The finality of the case reached when both the parties agreed with each other on fact not with the reality. . . . Thus if both the parties agreed the sky was red, the factual consensus had been achieved.”).

139. Namgyal, *supra* note 138.

judicata forces the parties to come to a mutually agreeable conclusion.¹⁴⁰



IV. UNITED STATES: THE EXAMPLE OF BROAD EXTENT

My comparative tour of the world could suggest a spectrum of res judicata extending from the aboriginal and rabbinical courts up to Germany and then France from the civil law, next to England and finally to the expansive U.S. law. But closer examination shows only the English-law-derived countries adopting res judicata much greater than the minimal core, with all other countries concentrated around the core. I shall therefore take the United States and China as the prime, albeit extreme, examples of the two camps.

Zooming in on the United States, one sees that the mix of policies has prompted its distinctive res judicata to become a good deal more expansive than res judicata law in all other countries.¹⁴¹ Hence, res

140. Daniel P. Strouthes, *Aboriginal and Indigenous Peoples, Legal Systems of*, 1 ENCYCLOPEDIA OF LAW & SOCIETY 1, 2 (David S. Clark ed., 2007).

141. The best commentaries on this modern law of res judicata lie in particular volumes of the two wonderful multivolume works on civil procedure, namely, 18 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND

judicata is more prominent here and, accordingly, more hotly debated on the ground of policy. Although it is clear that the triumph of finality by virtue of res judicata is not unconstitutional, some analysts believe that the U.S. law has gone too far as a matter of policy. The most obvious candidate for criticism is the radical expansion of nonmutual issue preclusion, which allows strangers to benefit from the binding effect of a prior judgment to which they were neither party nor privy.¹⁴² But a general description of the American law must precede that criticism.

The leading work of comparative law on res judicata tries, in a rather formalistic way, to identify some characteristics by which to measure national variations. In addition, of course, to the binding effects on claims, issues, and persons, these characteristics include (1) when a decision becomes final enough to generate preclusion,¹⁴³ (2) whether a judge will raise res judicata or the parties must,¹⁴⁴ and (3) whether the doctrine is inapplicable to certain procedural or preliminary issues.¹⁴⁵ So, to begin consideration of American res judicata law, I shall tick off these three incidental characteristics before summarizing the extent of the doctrine.

First, a judgment must be a final judgment to have res judicata effects.¹⁴⁶ In the United States, the rendering court must have uttered its last word on the decided claim or issue to qualify the ruling as final.¹⁴⁷ The law does not want to preclude on the basis of the tentative, contingent, or provisional.¹⁴⁸ The effective date of the judgment is its date of rendition, having nothing to do with the date of the action's commencement.¹⁴⁹ Fearing the effects of undue delay, U.S. law provides that the status of final does not await expiration of the time to seek review by motion or appeal, and remains unaffected by the actual

PROCEDURE (2d ed. 2002), which is simply brilliant in many instances, and 18 SUSAN BANDES & LAWRENCE B. SOLUM, MOORE'S FEDERAL PRACTICE (3d ed. 1999). For shorter overviews, see CASAD & CLERMONT, *supra* note 1, and SHAPIRO, *supra* note 8. The following summary is drawn largely from CASAD & CLERMONT, *supra* note 1; CLERMONT, *supra* note 5, ch.5; and of course the RESTATEMENT (SECOND) OF JUDGMENTS (AM. LAW INST. 1982), all of which provide much fuller citations.

142. See 18A WRIGHT ET AL., *supra* note 141, § 4464.1.

143. See Zeuner & Koch, *supra* note 27, §§ 9-7, -49.

144. See *id.* § 9-47.

145. See *id.* § 9-59 (procedural decisions, which are usually binding); *id.* § 9-102 (preliminary issues, which are not binding in the civil law).

146. See RESTATEMENT (SECOND) OF JUDGMENTS § 13 (AM. LAW INST. 1982).

147. *Id.* §§ 13-14.

148. See *id.* § 13 cmt. b, § 14 cmt. a.

149. *Id.* § 14.

pursuit of review.¹⁵⁰ The judgment is final upon its rendering, and it stays final unless and until it is actually overturned.¹⁵¹ Nevertheless, a final judgment has a meaning slightly variable as between claim preclusion and issue preclusion.

For the purposes of claim preclusion, a judgment becomes final when the trial court has concluded all regular proceedings on the claim other than award of costs and enforcement of judgment.¹⁵² A judgment is final even though a motion for new trial or an appeal is pending.¹⁵³ But a determination of liability is not final if the trial court still has to determine damages, or if some other issue of law or fact involved in the merits stays open.¹⁵⁴

For issue preclusion, some courts treat an adjudication as a final judgment at an earlier stage. According to some recent authorities, the court in the second action has discretion cautiously to treat a prior determination as final if the initial court made a firm decision on the issue after adequate hearing and full deliberation, even though in that initial action there is as of yet no final judgment on the whole claim.¹⁵⁵ But this fuzzy extension of issue preclusion in pursuit of rather small benefits can cause some major complications when later decisions come in the initial action, and so the better view is that the prerequisite for issue preclusion should return to the same strict standard of finality that applies for claim preclusion.¹⁵⁶

Second, U.S. *res judicata* law is not self-executing.¹⁵⁷ The person wishing to rely on it must raise it or suffer waiver.¹⁵⁸ This result flows from the premises of the adversary system, coupled with the fact that most policies underlying *res judicata* are not so critical as to require judicial invocation and none of the policies require invocation in every single case. Nonetheless, the court has the power to raise *res judicata*

150. *See id.* § 14 & cmt. a.

151. *Id.* § 13 cmt. f.

152. *Id.* § 13 cmt. b.

153. *Id.* § 16.

154. *Id.*

155. *See, e.g.,* *Avondale Shipyards, Inc. v. Insured Lloyd's*, 786 F.2d 1265, 1269–71 (5th Cir. 1986) (refusing to give preclusive effect to a partial summary judgment that was nonappealable).

156. *Id.*

157. *See, e.g.,* *Arizona v. California*, 530 U.S. 392, 412–13 (2000) (“[T]rial courts must be cautious about raising a preclusion bar *sua sponte*, thereby eroding the principle of party presentation so basic to our system of adjudication.”); *Carbonell v. La. Dep’t of Health & Human Res.*, 772 F.2d 185, 189 (5th Cir. 1985).

158. *See* FED. R. CIV. P. 8(c); *Arizona*, 530 U.S. at 409–10.

on its own, although it does so only when its own interests are endangered and, even then, does so rarely.¹⁵⁹

Third, U.S. law does not exclude certain kinds of issues from the reach of res judicata.¹⁶⁰ Indeed, the expansive U.S. law does not draw many of the distinctions that bedevil civil-law res judicata.¹⁶¹ Moreover, U.S. courts need not struggle with fitting res judicata into commands from on high. On the one hand, American res judicata is an almost entirely judge-made body of law. Each jurisdiction's courts have responded to the needs they most acutely felt by formulating, revising, and complexifying the doctrine. Thus, the states and the federal government have their own doctrine of res judicata applicable to their own judgments. On the other hand, it is true that constitutions, legislation, and rulemaking could override the judicial doctrine. The U.S. Constitution has a potential, albeit limited, impact on res judicata doctrine; in many jurisdictions, statutes deal with small parts of the subject; most court rules avoid most of the subject. The belief is that in general, res judicata is just too complex a subject for successful codification.

A. *Claim Preclusion*

Outside the context of the initial action, a party (or privy) generally may not relitigate a claim decided therein by a valid and final judgment, whether that judgment came about through litigation, default, dismissal, or consent.¹⁶² The judgment extinguishes the whole claim, precluding all matters within the claim that were or could have been litigated in that initial action.¹⁶³

159. See, e.g., *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 231 (1995) ("What may follow from our holding that the judicial power unalterably includes the power to render final judgments is not that waivers of res judicata are always impermissible, but rather that, as many Federal Courts of Appeals have held, waivers of res judicata need not always be accepted—that trial courts may in appropriate cases raise the res judicata bar on their own motion."); *Disimone v. Browner*, 121 F.3d 1262, 1267 (9th Cir. 1997).

160. See *Plaut*, 514 U.S. at 231.

161. See *Zeuner & Koch*, *supra* note 27, § 9-2 (res judicata versus constitutive effects); *id.* § 9-8 (formal and material res judicata); *id.* § 9-28 (substantive and procedural theories of res judicata).

162. RESTATEMENT (SECOND) OF JUDGMENTS § 27 (AM. LAW INST. 1982).

163. *Id.*

1. Bar and Merger Rule

Claim preclusion subdivides into bar and merger.¹⁶⁴ If the judgment in the initial action was in the defendant's favor, the plaintiff's claim is said to be barred by the judgment.¹⁶⁵ If the judgment in the initial action was in the plaintiff's favor, the plaintiff's claim is said to merge in the judgment.¹⁶⁶ In brief, bar and merger prohibit repetitive litigation of the same claim once adjudged.¹⁶⁷ Besides the prerequisites of a valid and final judgment, the only requirement is identity of claim.¹⁶⁸ This requirement necessitates definition of a "claim."¹⁶⁹

The old view, to which some American jurisdictions still adhere, defined claim narrowly, but foggily, in terms of a single legal theory or a single substantive right or remedy of the plaintiff.¹⁷⁰ Indeed, the courts used the term "cause of action" rather than claim.¹⁷¹ This analytical definition is similar to the narrow definitions still prevailing in the rest of the world.¹⁷²

America's new "transactional" view is that a claim includes all rights of the plaintiff to remedies against the defendant on any theory with respect to the transaction from which the action arose.¹⁷³ Whether particular facts constitute a single "transaction" is a pragmatic question, turning on the efficiency-fairness rationale of *res judicata* and therefore on such factors "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."¹⁷⁴ Still, a claim will be big enough to include: (1) different harms; (2) different evidence; (3) different legal theories, whether cumulative, alternative, or even inconsistent; (4) different rights and remedies, whether legal or equitable; and (5) a series of related events.¹⁷⁵ So, if *P* sues *D* for

164. *See id.* §§ 18–19.

165. *Id.* § 19.

166. *Id.* § 18(1).

167. *Id.* §§ 18–19.

168. *Id.* § 24.

169. *Id.*

170. *Id.* § 24 cmt. a.

171. *See id.*

172. *See, e.g.,* FIELD ET AL., *supra* note 89, at 775 (France).

173. RESTATEMENT (SECOND) OF JUDGMENTS § 24 (AM. LAW INST. 1982).

174. *Id.* § 24(2). Even under the transactional view, however, the typical claim involves only a single plaintiff and a single defendant. That is, multiple parties on either side typically mean multiple claims.

175. *Id.* § 24.

personal injury resulting from an automobile accident and later, after valid and final judgment, *P* sues *D* for property damage in the same accident, *D* can successfully plead claim preclusion under the transactional view.¹⁷⁶

The transactional view rests on the idea that the plaintiff *should* in a single lawsuit fully litigate his or her grievances arising from a transaction, considering that under the modern and permissive rules of procedure the plaintiff *may* do so.¹⁷⁷ This requirement increases efficiency, with an acceptable burden on fairness. Accordingly, the plaintiff must be careful to put any asserted claim entirely before the court, because judgment will not only preclude actual relitigation, but also preclude later pursuit of the claim's unasserted portion, that is, the part that could have been, but was not, litigated.¹⁷⁸ Any plaintiff who asserts only a part of the claim is said to have impermissibly split the claim.¹⁷⁹

Although in its early years the transactional approach was vigorously criticized as being too vague and leaving too much to the whim of the judge, in recent times it has come to be recognized that much of the certainty of application supposedly exhibited by the older approach was illusory. Judges can and will find ways to avoid the rigors of any test when the interests of justice seem to require it. The transactional test has the advantage of recognizing this fact of legal life and of focusing the inquiry upon factors that are really relevant to the administration of justice, rather than masking them under some largely artificial analytical construct.¹⁸⁰ The transactional test better realizes the sum of efficiency and fairness policies. Also, it clearly is more consonant with present-day legal reasoning in the United States than the older tests, as shown by the prevalence of transactional approaches in other contexts such as jurisdiction, joinder, and amendments. Consequently, the trend of decisions is toward ever wider acceptance of it.

2. Defense Preclusion Rule

Once the plaintiff prevails on a claim, the defendant cannot forward new (or old) defenses to defend it anew.¹⁸¹ So, if the plaintiff were to

176. *See id.* § 24 cmt. c, illus. 1.

177. *Id.* § 24(1) & cmt. a.

178. *Id.* § 24.

179. *Id.* § 24 cmt. h.

180. *See id.* § 24(2).

181. *See id.* § 18(2).

seek to enforce the judgment, as by an action upon the judgment, the defendant could not then raise defenses that were or could have been interposed in that initial action.¹⁸² The formal reasoning is that the plaintiff is now suing on the judgment, not on the merged claim, so the defendant's defenses to the claim are immaterial.¹⁸³ The deeper reason is that if a judgment is to have meaning, both the plaintiff and the defendant must forward their grounds and arguments before rendition, not after. That much seems intuitively obvious.

The defendant would lose all use of defenses after rendition of judgment.¹⁸⁴ Because the system must thus prevent the defendant from taking the offense against the judgment, defense preclusion says that the defendant cannot bring an action to "unravel" the judgment.¹⁸⁵ This so-called common-law compulsory counterclaim rule emerges from the just-described intuitive principle of claim preclusion that a valid and final judgment generally precludes the defendant from later asserting mere defenses to the claim.¹⁸⁶ The implicit extension is that once a plaintiff obtains a judgment, the defendant generally cannot bring a new action to undo the judgment by reopening the plaintiff's claim and pushing those defenses offensively.¹⁸⁷ The extension's evident rationale is that defense preclusion simply must apply when the effect of the defendant's collaterally asserted defense would be to undo the earlier judgment for the plaintiff,¹⁸⁸ because otherwise judgments would not be worth much.

This barrier to offensive collateral attack may seem to occupy some arcane corner of the specialty of *res judicata*. But the common-law compulsory counterclaim rule in fact is critical to any justice system. That is, although it is intuitive, it is also very important. Note first that

182. *Id.*

183. *Id.* § 18 cmt. a.

184. *Id.* § 18(2).

185. Under U.S. law, this rule against defending offensively has a long lineage, although it was originally accomplished through issue preclusion rather than claim preclusion. See 2 FREEMAN, *supra* note 1, § 774, at 1646–50 (discussing the rules of "defense" preclusion); cf. 18 WRIGHT ET AL., *supra* note 141, § 4414 (discussing the rules of "defendant" preclusion). Now, the U.S. law calls it the common-law compulsory counterclaim rule. See RESTATEMENT (SECOND) OF JUDGMENTS § 22(2)(b) & reporter's note f (AM. LAW INST. 1982); Kevin M. Clermont, *Common-Law Compulsory Counterclaim Rule: Creating Effective and Elegant Res Judicata Doctrine*, 79 NOTRE DAME L. REV. 1745, 1752 (2004).

186. See RESTATEMENT (SECOND) OF JUDGMENTS § 22(2)(b) (AM. LAW INST. 1982); Clermont, *supra* note 185, at 1752–53.

187. RESTATEMENT (SECOND) OF JUDGMENTS § 22(2) (AM. LAW INST. 1982).

188. See *id.* § 22(2)(b).

the rule applies whether or not the prior judgment was by default.¹⁸⁹ This application indeed is especially important because the rule works to guarantee that default judgments mean something and cannot normally be undone by later litigation. Note also that the rule applies whether or not a compulsory counterclaim statute or court rule appears on the books and applies in the circumstances.¹⁹⁰ That fact explains why the rule's very name declares it to be a common-law, or judge-made, doctrine.

Failure to assert an available counterclaim will preclude bringing a subsequent action thereon if granting relief would "nullify" the judgment in the initial action.¹⁹¹ To illustrate, the common-law compulsory counterclaim rule therefore (1) precludes a defendant seeking to impair the plaintiff's property interest declared by the initial judgment, (2) precludes a defendant seeking restitution for money paid pursuant to the initial judgment, and a fortiori (3) prohibits injunctive or declaratory relief against enforcement of the initial judgment.¹⁹² Thus, an uncontested judgment quieting title to real estate in the plaintiff precludes a later action by the defendant to claim title based on facts existing at the time of the earlier judgment.¹⁹³ Also, if *P* sues *D* for contract damages, wins, and executes on the valid and final judgment, and if *D* later sues to rescind the contract for mutual mistake and obtain restitution of the amount recovered, *D* will run into defense preclusion.¹⁹⁴ Finally, the defendant is precluded from bringing an action for a declaratory judgment of nonliability after the plaintiff has obtained a favorable judgment on the same transaction.

But note that the narrow principle behind the common-law compulsory counterclaim rule applies only where the relief sought in the second action would inherently undo the first judgment.¹⁹⁵ Thus, in the absence of a compulsory counterclaim statute or rule of court, *D* may default in *P*'s personal injury action and then bring a separate action against *P* for *D*'s injuries sustained in the same accident, the idea being that a judgment in favor of *D* for *D*'s injuries would not nullify *P*'s prior judgment for *P*'s injuries.¹⁹⁶ *D*'s recovery might be logically and practically incompatible, but it does not undo the prior judgment.

189. *Id.* § 22 cmt. f.

190. *Id.*

191. *Id.* § 22(2)(b).

192. *Id.* § 22 cmt. f.

193. *Id.* § 22 cmt. f, illus. 10.

194. *Id.* § 22 cmt. f, illus. 9.

195. *See id.* § 22(2)(b).

196. *Id.* § 22 cmt. b & illus. 1.

So also, although the defendant purchaser of medical services should be precluded from suing for restitution after the plaintiff seller obtained and executed on a default judgment for the contract price, an action by the defendant seeking damages for medical malpractice (as opposed to return of the contract price paid pursuant to the default judgment) should not be precluded in the absence of a compulsory counterclaim statute or rule of court.¹⁹⁷ These examples clarify that the defendant loses only the ability to defend anew the first action, not the ability to seek relief arising from the transaction in question.

Those last few explanatory paragraphs expose that the scope of the common-law compulsory counterclaim rule is tricky. The rule applies to prevent a second action only if it seeks to nullify the first.¹⁹⁸ Centrally, what does nullify mean precisely? The word has an unavoidable fuzziness that will trouble courts, while both leaving defendants in doubt about their exposure during the initial action and also providing them room for maneuver in structuring their claims for relief in the second action. Nevertheless, the fuzziness does not deserve exaggeration. Taking a wide view of the rule's purposes and of its genesis helps in determining its proper scope. Recall that it emerged as a specific means to effectuate the principle that a valid and final judgment generally precludes the defendant from later asserting mere defenses to the claim.¹⁹⁹ Therefore, the defendant cannot later pursue an action that is essentially a way to defend anew against an already adjudicated claim.²⁰⁰

In addition, of course, a compulsory counterclaim statute or court rule might effectively provide that, under certain circumstances, failure to assert an available counterclaim precludes bringing a subsequent action thereon.²⁰¹ But adopting such a provision is a matter of policy, not necessity.

197. *Id.* § 22 cmt. b, illus. 2.

198. *Id.* § 22(2)(b).

199. *See id.*; Clermont, *supra* note 185, at 1752–53.

200. In the future, there could be pressure to expand the common-law compulsory counterclaim doctrine. *See* 18 WRIGHT ET AL., *supra* note 141, § 4414 (arguing for preclusion of omitted defenses in successive actions by plaintiff against defendant on separate but related claims); *cf.* FIELD ET AL., *supra* note 89, at 711, 714–15, 726 (recounting pressure to expand the dimensions of an issue and to loosen the requirements for issue preclusion). Other pressure points for expanding *res judicata*—by watering down the requirement of a final judgment, limiting the availability of relief from judgment, expanding the dimensions of a claim, limiting the reach of preclusion exceptions, and extending benefits to strangers—are a theme in the above text on the U.S. law.

201. *See, e.g.*, FED. R. CIV. P. 13(a); *see also* RESTATEMENT (SECOND) OF JUDGMENTS § 22(2)(a) (AM. LAW INST. 1982); CLERMONT, *supra* note 5, at 459–62.

3. Exceptions to Claim Preclusion

Predictably, this broad conception of claim preclusion has generated a few exceptions. As a result, the claimant sometimes is permitted to bring a second action on part, or all, of the same claim. There is, however, no general exception based on the interests of justice or the like. The best way to convey this case law is to turn to the *Second Restatement*:

When any of the following circumstances exists, the general rule of [bar or merger] does not apply to extinguish the claim, and part or all of the claim subsists as a possible basis for a second action by the plaintiff against the defendant:

- (a) The parties have agreed in terms or in effect that the plaintiff may split his claim, or the defendant has acquiesced therein; or
- (b) The court in the first action has expressly reserved the plaintiff's right to maintain the second action; or
- (c) The plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy or form of relief in the first action because of the limitations on the subject matter jurisdiction of the courts or restrictions on their authority to entertain multiple theories or demands for multiple remedies or forms of relief in a single action, and the plaintiff desires in the second action to rely on that theory or to seek that remedy or form of relief; or
- (d) The judgment in the first action was plainly inconsistent with the fair and equitable implementation of a statutory or constitutional scheme, or it is the sense of the scheme that the plaintiff should be permitted to split his claim; or
- (e) For reasons of substantive policy in a case involving a continuing or recurrent wrong, the plaintiff is given an option to sue once for the total harm, both past and prospective, or to sue from time to time for the damages incurred to the date of suit, and chooses the latter course; or

(f) It is clearly and convincingly shown that the policies favoring preclusion of a second action are overcome for an extraordinary reason, such as the apparent invalidity of a continuing restraint or condition having a vital relation to personal liberty or the failure of the prior litigation to yield a coherent disposition of the controversy.²⁰²

Additionally, a judgment against the claimant may be given for various reasons that have nothing to do with the substantive validity of the claim.²⁰³ For example, a claim may be dismissed for certain procedural defects in the form or manner of its presentation. A claimant should not be penalized to the extent of losing all right to a day in court on the substantive merits of the claim just because of such a technical defect. The *Second Restatement* captures this idea in a separate exception to bar, one that notably has been shrinking over time:

(1) A personal judgment for the defendant, although valid and final, does not bar another action by the plaintiff on the same claim:

(a) When the judgment is one of dismissal for lack of jurisdiction, for improper venue, or for nonjoinder or misjoinder of parties; or

(b) When the plaintiff agrees to or elects a nonsuit (or voluntary dismissal) without prejudice or the court directs that the plaintiff be nonsuited (or that the action be otherwise dismissed) without prejudice; or

(c) When by statute or rule of court the judgment does not operate as a bar to another action on the same claim, or does not so operate unless the court specifies, and no such specification is made.

(2) A valid and final personal judgment for the defendant, which rests on the prematurity of the action or on the plaintiff's failure to satisfy a precondition to suit, does not bar another action by the plaintiff instituted after the claim has matured, or the

202. RESTATEMENT (SECOND) OF JUDGMENTS § 26(1)(a)–(f) (AM. LAW INST. 1982).

203. *Id.* § 20.

precondition has been satisfied, unless a second action is precluded by operation of the substantive law.²⁰⁴

B. Issue Preclusion

Claim preclusion aims at limiting the number of lawsuits that may be brought with respect to the same controversy.²⁰⁵ If claim preclusion applies, a second lawsuit on the same claim will wholly terminate, regardless of what issues were or were not litigated in the first lawsuit.²⁰⁶ By contrast, U.S. issue preclusion concerns only repeated litigation of the same issues.²⁰⁷ Thus, issue preclusion would apply only if claim preclusion were inapplicable, either because an exception to claim preclusion applied or because a different claim was in suit.

While the core of claim preclusion is necessary, issue preclusion in the United States is not a necessary doctrine, but rather the product of policy determinations in favor of finality. Here, issue preclusion need not do the work of claim preclusion, which already is in place. Instead, it can act as a supplemental doctrine that blocks relitigation of issues, even on a different claim and perhaps even for the benefit of persons neither parties nor privies.

1. Issue Preclusion Rule

Outside the context of the initial action, a party (or privy) generally may not relitigate the same issue of fact or of law (or the same mixed issue of law and fact) that was actually litigated and determined therein if the determination was essential to a valid and final judgment.²⁰⁸ Indeed, U.S. issue preclusion applies in a second action brought on the same claim (direct estoppel) or on a different claim (collateral estoppel).²⁰⁹

This doctrine of issue preclusion rests on the premise that one court should be as capable as any other to resolve the issues in dispute. Once a judgment resolves the issues, after the adversary system of adjudication has run its full and fair course, the issues should not again be open to dispute by the same parties in any court.²¹⁰ Issue preclusion

204. *Id.* § 20(1)–(2).

205. FIELD ET AL., *supra* note 89, at 668

206. *See* RESTATEMENT (SECOND) OF JUDGMENTS §§ 18–19 (AM. LAW INST. 1982).

207. *See id.* § 27.

208. *Id.*

209. *Id.* § 27 cmt. b.

210. *See id.* § 27 & cmt. a.

not only accords with the dictates of fairness but also serves the interests of economy of judicial effort, fosters the certainty and stability of repose, and tends to prevent the anomalous situation, damaging to public faith in the judicial system, of two authoritative, but conflicting answers, being given to the very same question. Nevertheless, an overly aggressive doctrine of issue preclusion would be unfair to a person who had good reason to limit the scope of the prior litigation, and it would instigate overlitigation of that prior litigation in anticipation of possible preclusion.²¹¹

In brief, when claim preclusion does not apply, issue preclusion acts to prevent inappropriate relitigation of essential issues. That is, issue preclusion reaches only the same issues that were actually litigated and determined, not those that were defaulted, admitted, stipulated, or consented; and issue preclusion reaches only essential determinations, not dicta or other asides.²¹² This doctrinal statement implies three requirements for application of issue preclusion: (1) same issue, (2) actually litigated and determined, and (3) essential to judgment.²¹³

First, prohibiting relitigation of the same issue critically requires definition of an "issue." The modern, or so-called functional, view is that the scope of an issue should be determined in light of the efficiency-fairness rationale of *res judicata*. Whether a matter to be presented in a subsequent action constitutes the same issue as a matter presented in the initial action is a pragmatic question, turning on such factors as the degree of overlap between the factual evidence and legal argument advanced with respect to the matter in the initial action and that to be advanced with respect to the matter in the subsequent action.²¹⁴

Consider two contrasting illustrations. In a litigated tort action that an allegedly speeding defendant won because of the plaintiff's failure to prove negligence, an issue would be the broad matter of the defendant's negligence, thus precluding in a subsequent action between the parties the former plaintiff's assertion of a different manner in which the former defendant was negligent in that incident, such as by drunkenness.²¹⁵ It was efficient and fair to require the plaintiff to air all negligence grounds in the first action, because of the heavy overlap of factual evidence and legal argument between grounds of negligence. However, in an installment contract action that a plaintiff won, where the sole litigated and determined issue was the narrow defensive

211. *See id.* § 27 cmt. e.

212. *Id.* § 27 & cmts. e, h.

213. *See id.* § 27.

214. *Id.* § 27 cmt. c.

215. *Id.* § 27 cmt. c, illus. 4.

matter of the contract's illegality, the judgment would leave open the defense of the contract's nonexecution as a different issue in a subsequent action for a later installment.²¹⁶ In view of the differing factual evidence and legal argument for the two defenses, it was not efficient and fair to require the defendant to air both defenses in the first action.

Fixing the dimensions of an issue, then, is critical to the reach of issue preclusion. Broad or narrow dimensions mean either a widely applicable doctrine, which starts to overlap with claim preclusion as it reaches matters not really contested, or a much less significant doctrine, which would extend only to absolutely indistinguishable matters. The difficulty is that it is always logically possible to state an issue in a variety of ways, in ascending levels of generality. American courts do not fix the issue in the narrowest terms possible, nor do they resort to the broadest terms possible. Instead, courts fix the issue in the middle in accordance with the particularistic dictates of efficiency and fairness, but guided primarily by what the parties actually contested, unless the first action's question is evidentially and legally as much a unity as negligence is.

Note finally that if a different legal standard applies in the second action, or if the facts have changed, then the issue is different, so preventing issue preclusion. Changed circumstances change the issue. If the invoker of issue preclusion makes a prima facie showing in support of the issue preclusion rule but the invokee challenges the identity of issues, the invoker must show that the two cases involve the same issue.

Second, for preclusive effect, the issue must have been "actually litigated and determined."²¹⁷ The meaning here is that the potentially bound parties must have submitted the issue for determination (by the pleadings or otherwise) and that their adjudicator must have decided the issue (whether by careful weighing of evidence and arguments or by mechanical application of some rule like the burden of proof).²¹⁸ Thus, issue preclusion can result after full-blown trial or from a motion decided on papers, but it does not result from admission or stipulation or from a default or consent judgment.²¹⁹ The idea is that a rule of issue preclusion without the actually-litigated-and-determined requirement would unnecessarily and undesirably intensify litigation by encouraging

216. *Id.* § 27 cmt. a, illus. 2.

217. *Id.* § 27.

218. *See id.* § 27 cmt. d.

219. *Id.* § 27 cmts. d, e.

parties to raise and fight every conceivable issue, without sufficient offsetting benefits.

Some cases have departed from this requirement in order to apply issue preclusion to default judgments.²²⁰ The theory of these cases is that the truth of all the facts alleged by the plaintiff and necessary to the recovery are raised by the plaintiff's pleading, and the defendant should not be able to escape the effect of judgment by waiving the right to contest them.²²¹ Others have treated consent judgments similarly, in spite of the usual rule.²²² However, these cases' approach is not only unfair and inefficient, but also fictional in treating as established many matters that were never decided. Although a default or consent judgment can have claim preclusion effect, it should not generate issue preclusion.

Third, under the majority view, issue preclusion applies only to a determination that was "essential to judgment."²²³ Thus, a determination not strictly necessary to reaching the court's ultimate result is not binding.²²⁴ Some submitted issues actually determined may have no bearing on the ultimate outcome of the case, and some issues may be decided against the party who ultimately wins the judgment, but such determinations, even though the apparent products of actual and vigorous litigation, do not have issue-preclusive effect. The idea behind this requirement is that a nonessential determination is in the nature of dicta and so may not really have been fully and fairly contested and considered, and also appeal on it may have been unavailable or the winning party may have been unmotivated to appeal.²²⁵ Moreover, society wants neither to stimulate the parties to fight further over such asides nor to encourage courts so to make unnecessary pronouncements. Accordingly, decisions that led toward the judgment are essential, but not those that standing alone would have led toward the opposite outcome.

For example, in a state following the common law's contributory-negligence rule, if the court specifically found in an accident case both that the plaintiff had been contributorily negligent and that the defendant had been negligent, the determination of the latter issue would have no issue-preclusive effect, because it was not essential to the judgment rendered for the defendant. That is, the contributorily

220. *See, e.g.*, *Lynch v. Lynch*, 94 N.W.2d 105, 109 (Iowa 1959).

221. *See, e.g., id.*

222. *See, e.g.*, *Twp. of Washington v. Gould*, 189 A.2d 697, 700-01 (N.J. 1963).

223. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 27 (AM. LAW INST. 1982).

224. *Id.* § 27 & cmt. h.

225. *Id.*

negligent plaintiff would have lost the case, whether or not the defendant had been negligent. Therefore, the court's finding on the defendant's negligence should just vaporize. Note, in particular, that no argument that the finding of the defendant's negligence was factually, legally, or logically primary or prior to the finding of the plaintiff's contributory negligence would succeed in overcoming the result of nonpreclusion.

2. Exceptions to Issue Preclusion

Courts apply issue preclusion quite flexibly, invoking several exceptions, albeit of narrow scope. Efficiency concerns might counsel exceptions, especially the policy against encouraging parties to overlitigate the initial action by fighting every conceivable issue to the death.²²⁶ Fairness concerns also might suggest exceptions, as where there was no full and fair opportunity to litigate the issue.²²⁷ Finally, independent substantive policies might overwhelm the policies behind applying *res judicata*. To sum up, the *Second Restatement* provides:

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

- (1) The party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action; or
- (2) The issue is one of law and (a) the two actions involve claims that are substantially unrelated, or (b) a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws; or
- (3) A new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by factors

226. *See id.* § 27 cmt. e.

227. *See id.* § 28(5).

relating to the allocation of jurisdiction between them;
or

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

(5) There is a clear and convincing need for a new determination of the issue (a) because of the potential adverse impact of the determination on the public interest or the interests of persons not themselves parties in the initial action, (b) because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action, or (c) because the party sought to be precluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.²²⁸

3. Extensions to Issue Preclusion

A judgment does not bind a person who is neither party nor privy.²²⁹ That person is called a stranger to the judgment.²³⁰ Good policy entitles a stranger to a day in court before a judgment has any legally binding effect on that person. However, the stranger could conceivably benefit from the judgment. The most important form of potential benefit is a stranger's using of the prior judgment for collateral estoppel against a former party or privy.²³¹

The old doctrine of mutuality of estoppel held that a person may not benefit from a prior judgment if he or she would not have been bound by any outcome of that initial action.²³² Because strangers were never

228. *Id.* § 28.

229. *Id.* § 27 & cmt. a.

230. FIELD ET AL., *supra* note 89, at 740.

231. See RESTATEMENT (SECOND) OF JUDGMENTS § 29 (AM. LAW INST. 1982); *cf.* 18A WRIGHT ET AL., *supra* note 141, § 4464.1 (treating nonmutual claim preclusion for secondary-liability situations).

232. See RESTATEMENT OF JUDGMENTS § 93 (AM. LAW INST. 1942).

bound, they could therefore never benefit.²³³ Unless both persons arguing about res judicata could have been bound, neither was bound as to the other.²³⁴ Thus, a judgment's estoppels were mutual.²³⁵

Under the mutuality doctrine there came to exist, however, substantial extensions of res judicata that allowed strangers to benefit in some compelling circumstances. The most important extension concerned a person whose liability was secondary, allowing that person to claim the benefit of issues adjudicated successfully by the one primarily liable.²³⁶ So if an injured person sues an employee and loses—the employee having been found not negligent—and if the injured person next sues the employer—who has only vicarious liability for the tort of the employee—then the employer can claim the issue-preclusive benefit of the employee's judgment, even though it would not have been bound had the employee lost. Courts built on this justifiable secondary-liability extension, so as to allow preclusion in a range of facially similar situations involving some sort of derivative liability.²³⁷

Eventually, most American jurisdictions have come to reject mutuality of estoppel much more completely. Thus, the modern view is that a stranger may invoke collateral estoppel against a former party (or privy).²³⁸ Still, in an attempt to avoid real threats to fairness and efficiency, courts apply the modern view with great flexibility. They apply all the usual exceptions to issue preclusion.²³⁹ Additionally, courts exercise discretion to deny preclusion when the former party lacked a full and fair opportunity, or incentive, to litigate in the initial action or when all the circumstances otherwise justify allowing the former party to relitigate the issue.²⁴⁰ Factors affecting that discretion include among many others: (1) whether there is some reason to suspect the accuracy of the prior determination, such as where it is inconsistent with some other adjudication of the same issue (a factor partially solving the "multiple-plaintiff anomaly," where a string of potential plaintiffs sue an alleged mass tortfeasor seriatim until one wins and theoretically so triggers collateral estoppel for all the future plaintiffs, thus creating an incentive for the most sympathetic plaintiffs to sue first and a disincentive for all plaintiffs to join in a single lawsuit); (2) whether the

233. *See id.* § 93 & cmt. b.

234. *See id.*

235. *See id.*

236. *See id.* §§ 96–97.

237. *See id.* §§ 96–97, 99.

238. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 29 (AM. LAW INST. 1982).

239. *Id.* § 28.

240. *Id.* § 29.

former party did not choose the occasion, adversary, and forum for the initial action (so extending some needed extra protection to former defendants); and (3) whether the stranger could reasonably have been expected to join or intervene in the initial action (although in fact courts have seldom invoked this as a factor).²⁴¹

To summarize, the law faced a basic choice between the rule of mutuality, with a few defined extensions for derivative liability, and the rule of nonmutuality, with lots of mainly fuzzy exceptions. Most American jurisdictions chose the latter approach, meaning that today a stranger can widely invoke nonmutual collateral estoppel, subject to full-and-fair-opportunity-like exceptions.²⁴²

Was this modern choice of nonmutuality a good one? No.²⁴³ The rationale behind nonmutuality is that the former party is entitled to only one opportunity to litigate an issue, regardless of any change in adversaries, and so should be able to inflict no more litigation.²⁴⁴ But perhaps this rationale elevates simplistic notions of efficiency over real concerns of fairness and substantive policy: (1) Nonmutuality may inefficiently discourage plaintiffs from joining in a single lawsuit, and stimulate overlitigation during the initial action in anticipation of possible preclusion, as well as impose extra litigation about the flexible application of *res judicata* in the subsequent action. (2) Fairness argues for treating a decision between specific litigants as a contextual truth with limited effect, rather than as a determinate truth that free-floats to conclusiveness in all other contexts. (3) Most fundamentally, nonmutuality destroys the equivalence of litigating risk by weighting the scale against the common party, and so undercuts the most basic of the procedural system's rules, namely, procedure should provide a level playing field. Take mass tort as an example: the first plaintiff risks losing only the one case, which is all the defendant can win; meanwhile, the defendant risks losing all the cases at once; the first plaintiff thereby acquires tremendous settlement leverage, while in the absence of settlement he or she will face an opponent willing to litigate down to the scorched earth; and the defendant faces, over the series of cases, overwhelmingly unfavorable odds. This fundamental departure from procedural neutrality will inevitably have many unintended substantive effects.

241. *Id.*

242. *See id.* § 29 reporter's note.

243. *See CASAD & CLERMONT, supra* note 1, at 184–88.

244. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 29 & cmts. a, b (AM. LAW INST. 1982).

Interestingly, besides just leaving the whole matter to the parties' settlement in light of prior outcomes, other ways exist to achieve nonmutuality's aim to eliminate relitigation. The most mainstream alternative would be to expand mandatory joinder of the concerned persons. This route would efficiently dispose of common matters in one shot, but in a fair shot. The joined parties would be bound, but only after being heard. Their common opponent would be bound if it lost, but if it won it would win against all the joined parties. By so equating the parties' litigating risk, this procedural technique would restore procedural neutrality. Nevertheless, society has chosen, after balancing benefits and costs, to follow this mandatory joinder route no farther than provisions such as Federal Rule of Civil Procedure 19 on compulsory joinder go. Because society has in fact chosen not to pursue this joinder alternative, the choice by the courts to adopt on their own the inferior reform of nonmutuality looks even more questionable.

C. Jurisdiction to Determine Jurisdiction

The United States likes *res judicata* so much that it has formulated a third branch, one that is not necessary but one that some other countries have adopted in a limited form. It applies to an attack on a judgment, not in the ordinary course of review in the trial and appellate courts, but in subsequent litigation.²⁴⁵ It addresses what effect the rendering court's determination rejecting a defense of subject-matter jurisdiction, territorial jurisdiction, or adequate notice should have on that later attack.²⁴⁶

This is a different kind of question from those posed in claim and issue preclusion: it does not involve preclusive use of a valid judgment, but instead involves preclusive use of prior determinations in order to establish validity.²⁴⁷ In this setting, the U.S. desire for finality generally outweighs its concern for validity, giving the determination preclusive effect and thus generating a special variety of *res judicata* called *jurisdiction to determine jurisdiction*.²⁴⁸ That is to say, an affirmative ruling on jurisdiction or notice can foreclose relitigation of that ruling

245. *See id.* §§ 10(2), 12.

246. *See id.*

247. Kevin M. Clermont, *Sequencing the Issues for Judicial Decisionmaking: Limitations from Jurisdictional Primacy and Intrasuit Preclusion*, 63 FLA. L. REV. 301, 316 (2011).

248. *Id.*

and so preclude the parties from attacking the resultant judgment on that ground in subsequent litigation.²⁴⁹

On the one hand, this doctrine means that a court has jurisdiction to decide whether it has subject-matter jurisdiction over a case presented to it.²⁵⁰ Its final ruling on that question, even if erroneous, will be binding unless set aside on appeal and will have preclusive effect on a later attack.²⁵¹ Indeed, because supposedly the court always implicitly determines unraised subject-matter jurisdiction to exist in any action litigated to judgment by some contesting parties, this implicit determination has that same preclusive effect. However, an explicit or implicit finding of the existence of subject-matter jurisdiction will not preclude the parties from attacking the resultant judgment on that ground in special circumstances, such as where the first court plainly lacked subject-matter jurisdiction or where the judgment substantially infringes on the authority of another court or agency.²⁵²

On the other hand, a finding of the existence of territorial jurisdiction or of adequate notice precludes the appearing parties from attacking the resultant judgment in subsequent litigation.²⁵³ Indeed, upon a challenge in the initial action to the existence of either territorial jurisdiction or adequate notice, an affirmative final ruling of valid service precludes the defendant from attacking the resultant judgment on either ground in subsequent litigation.²⁵⁴ That is, if the court rules that the requisites of territorial jurisdiction or adequate notice are present, the defendant will be bound by that ruling of valid service, whether the defendant participates further or not.²⁵⁵ If the ruling is not set aside on appeal, it will be binding, and the territorial jurisdiction and adequate notice issues cannot again be litigated in attacking the judgment.²⁵⁶

This doctrine of jurisdiction to determine jurisdiction really is a third body of res judicata law, separate from claim and issue preclusion. It is obviously similar to issue preclusion, but it differs in several respects.²⁵⁷ First, issue preclusion requires a valid prior judgment.²⁵⁸

249. *Id.*

250. *Id.* at 315-17; *see also* RESTATEMENT (SECOND) OF JUDGMENTS § 11 cmt. c (AM. LAW INST. 1982).

251. Clermont, *supra* note 247, at 315-17.

252. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 12(1)-(2) (AM. LAW INST. 1982).

253. *Id.* § 10(2).

254. *Id.*

255. *See id.*

256. *See id.*

257. Clermont, *supra* note 247, at 318.

258. RESTATEMENT (SECOND) OF JUDGMENTS § 27 (AM. LAW INST. 1982).

Jurisdiction to determine jurisdiction does not require validity, but instead works to make invulnerable what could otherwise be an invalid judgment. Second, issue preclusion applies only in a subsequent action, and so does not apply on a motion for relief from judgment, which is technically a continuation of the initial action.²⁵⁹ Jurisdiction to determine jurisdiction, however, does apply to preclude a validity attack by such a motion, as well as by the other methods for relief from judgment.²⁶⁰ Third, issue preclusion usually does not work to bind the party prevailing on the issue. Jurisdiction to determine jurisdiction will preclude the successful plaintiff if the unsuccessful defendant would be precluded on the jurisdiction or notice issue. Fourth, issue preclusion applies only to issues actually litigated and determined.²⁶¹ Jurisdiction to determine jurisdiction sometimes applies to issues of subject-matter jurisdiction that were not litigated at all.²⁶² Fifth, and most importantly, special policies and concerns are at work with respect to the jurisdiction and notice defenses, so the law needs to develop special rules and exceptions for jurisdiction to determine jurisdiction.

This third body of res judicata is a significant one in the context of comparative study. What it does is cut back sharply on the theoretically available grounds for relief from judgment. The three major grounds for relief in U.S. law are lack of subject-matter jurisdiction, territorial jurisdiction, or adequate notice.²⁶³ But in reality most such attacks are cut off, except in some default situations, by the operation of jurisdiction to determine jurisdiction (and by the operation of waiver for defendants who fail to raise lack of territorial jurisdiction or adequate notice). This subdoctrine of res judicata precludes those attacks by establishing that courts have authority to determine their own judgments' validity. Thus, relief from judgment is fairly narrow in the United States.

Passing beyond the res judicata effects of affirmative rulings on forum-authority, what if the initial court decides that it lacks jurisdiction or failed to give notice? That is, can a court, which is admittedly without authority to enter a valid judgment, make any rulings that have preclusive effect? Yes, under the so-called doctrine of *jurisdiction to determine no jurisdiction*.

The initial court's ruling that it lacks authority will prevent a second try that presents exactly the same issue. Common sense

259. *Id.* § 27 & cmts. d, e.

260. *See id.* §§ 10(2), 12.

261. *Id.* § 27.

262. *Id.* § 12 cmt. d.

263. *See* FIELD ET AL., *supra* note 89, at 498–99, 801.

supports preclusion on the threshold issue, in order to prevent the plaintiff from suing repetitively. Thus, the court had authority to determine its lack of authority. For such purposes, the prior judgment is a valid one.

Of course, the dismissal of the initial action on such a threshold defense does not generate a bar to a second action in an appropriate court. Moreover, the initial court's ruling probably should have no res judicata effects in such later action, whether to establish the jurisdiction of the other court or to preclude an issue on the merits of the same or any other claim. For these purposes, the prior judgment is an invalid one.²⁶⁴

V. CHINA: THE EXAMPLE OF NARROW EXTENT

China has four levels of courts, whose judges sit in collegial panels.²⁶⁵ The Chinese procedural system resembles the civil-law model, with socialist touches and Chinese characteristics. Appeal is a de novo trial, but lies only to the level just above where the case originated.²⁶⁶ The procuratorate is a set of prosecutorial offices at each level, but it also acts as a state organ for legal supervision of all courts.²⁶⁷

I can begin consideration of Chinese res judicata law by ticking off the same three incidental characteristics of a country's law on the subject: (1) when a decision becomes final enough to generate preclusion, (2) whether a judge will raise res judicata or the parties must, and (3) whether the doctrine is inapplicable to certain procedural or preliminary issues.

First, a final judgment is a prerequisite for the Chinese preclusion rule to apply, just as is the validity of the judgment.²⁶⁸ That is, a judgment must be final, or "legally effective" as the Chinese phrase it, to have res judicata effects.²⁶⁹ China takes the approach common in the

264. See Clermont, *supra* note 247, at 320.

265. PITMAN B. POTTER, CHINA'S LEGAL SYSTEM 67-69 (2013); CONTEMPORARY CHINESE LAW 105-06 (Zexian Chen ed., 2009).

266. CONTEMPORARY CHINESE LAW, *supra* note 265, at 24.

267. See *id.* at 25-28.

268. Organic Law of the People's Courts of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., July 5, 1979, effective Jan. 1, 1980) art. 11, http://www.npc.gov.cn/englishnpc/Law/2007-12/13/content_1384078.htm.

269. *Id.*

civil law that a judgment does not become final until it is no longer subject to appeal.²⁷⁰

Second, Chinese *res judicata* law is self-executing. Like an inquisitorial civil-law judge, Chinese judges should raise preclusion *sua sponte*.²⁷¹

Third, Chinese law, like the U.S. law, does not treat specially certain kinds of issues or draw the fine distinctions that bedevil the typical civil-law *res judicata* law. But unlike the U.S. law, Chinese *res judicata* law's smoothness is likely owing to its undeveloped state. Moreover, the Chinese courts share the civil-law trait of looking to the legislature for the general framework of the doctrine. They have not gone far in elaborating the doctrine.

A. *Robust Relief from Judgment*

At first glance, China might seem to fall perilously close to the practice of the rabbinical courts.²⁷² It downplays the role of *res judicata* by expanding relief from judgment.²⁷³

The main avenue to downplaying finality in this way runs through its so-called trial supervision procedure.²⁷⁴ This avenue allows what

270. See *id.*; Civil Procedure Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 2012, effective Aug. 31, 2012) art. 175 [hereinafter Civil Procedure Law], <http://www.inchinalaw.com/wp-content/uploads/2013/09/PRC-Civil-Procedure-Law-2012.pdf>; JIE HUANG, INTERREGIONAL RECOGNITION AND ENFORCEMENT OF CIVIL AND COMMERCIAL JUDGMENTS 191 (2014) ("In Mainland China, a judgment becomes final when all appeals are exhausted or parties do not appeal within the time set by the statute Judgments of the Supreme People's Court are final."). As for the effect of the new-trial procedure, execution on the judgment can proceed until an actual decision to retry is made. See Civil Procedure Law, *supra*, arts. 199, 206.

271. See HUANG, *supra* note 270, at 244.

272. See *supra* text accompanying note 127.

273. See Nanping Liu, *A Vulnerable Justice: Finality of Civil Judgements in China*, 13 COLUM. J. ASIAN L. 35, 35–36 (1999).

274. See Civil Procedure Law, *supra* note 270, arts. 198–213; Supreme People's Court Provisions on Strict Application of Ordering Retrials and Remand for New Trial in Civil Trial Supervision Work (promulgated by the Sup. People's Ct., Feb. 2, 2015), <http://chinalawtranslate.com/en/retrial/> (attempting to standardize retrial practice); Shizhou Wang, *People's Republic of China*, in 2 INTERNATIONAL ENCYCLOPAEDIA OF LAWS: CIVIL PROCEDURE ¶¶ 235–239 (Piet Taelman ed., 2014). Russia does the same. See Dmitry Mareshin, *The Russian Style of Civil Procedure*, 21 EMORY INT'L L. REV. 543, 550–55 (2007) (discussing its aggressive relief from judgment via a supervisory procedure); Trofimov, *supra* note 123, ¶¶ 363–371. Russia is seemingly the source of the Chinese procedure. See Zhong Jianhua & Yu Guanghua, *Establishing the Truth on Facts: Has the Chinese Civil Process Achieved This Goal?*, 13 J. TRANSNAT'L L. & POL'Y 393, 422, 427 (2004).

seems to be almost a perpetual inquiry into validity.²⁷⁵ First, generally within six months of a judgment becoming final,²⁷⁶ a party can petition a deciding court (trial or appellate) or a higher court for a new trial.²⁷⁷ The retrial will be before a different collegial panel of the court, or more often before the higher court or its designated court.²⁷⁸ Second, without time limit, the procuratorate, on petition by a party or on its own, can request or demand a retrial.²⁷⁹ Third, without time limit, the court or a higher court can decide on its own to order a retrial.²⁸⁰

The grounds for ordering a new trial constitute a long but not unlimited list. They appear in article 200 of the Chinese Civil Procedure Law:

- (1) There is new evidence which is conclusive enough to overrule the original judgment or ruling;
- (2) The [basic facts] used in the original judgment or ruling to find the facts was insufficient;
- (3) The main evidence used in the original judgment or ruling to find the facts was forged;
- (4) The main evidence used in the original judgment or ruling to find the facts was not cross-examined;

275. Lawmakers have trended over recent years consistently to restrict retrials and increasingly to respect the finality of judgments. For instance, the Supreme People's Court is clamping down on repetitive petitions by the parties. See Supreme People's Court Interpretation on the Application of the "Civil Procedure Law of the People's Republic of China" (promulgated by the Sup. People's Ct., Jan. 30, 2015) art. 383, <http://chinalawtranslate.com/en/specivilprovedurelawint/>. There now can be only one retrial. See HUANG, *supra* note 270, at 203.

276. See Civil Procedure Law, *supra* note 270, art. 205. Until 2012, the period had been two years. See Civil Procedure Law of the People's Republic of China (2007 Amendment) (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 28, 2007, effective Apr. 1, 2008) art. 184 [hereinafter Civil Procedure Law (2007 Amendment)], <http://www.lawinfochina.com/display.aspx?id=6459&lib=law>; WEI LUO, THE CIVIL PROCEDURE LAW AND COURT RULES OF THE PEOPLE'S REPUBLIC OF CHINA art. 182, at 100 (2006) (setting out the 1991 version of the civil procedure law).

277. Civil Procedure Law, *supra* note 270, art. 199. On the one hand, the parties cannot petition as to a judgment on dissolution of marriage. *Id.* art. 202. On the other hand, even affected third parties can sue, generally within six months, to alter or revoke a judgment. See *id.* art. 56(3); Supreme People's Court Interpretation on the Application of the "Civil Procedure Law of the People's Republic of China," *supra* note 275, art. 300.

278. See Civil Procedure Law, *supra* note 270, arts. 204, 207.

279. See *id.* arts. 208, 209.

280. See *id.* art. 198.

(5) The parties concerned are unable to collect the main evidence of the case by themselves for objective reasons and apply for help to the people's court, but the people's court fails to collect such evidence;

(6) There was an error in the application of the law in the original judgment or ruling;

(7) The trial organization was unlawfully formed or the adjudicators that should withdraw have not done so;

(8) The person incapable of action is not represented by a legal agent, or the party that should participate in the litigation failed to do so because of the reasons not attributable to himself or his legal agent;

(9) The party's right to debate was deprived of in violation of the law;

(10) The default judgment in the absence of the party was made whereas that party was not served with summons;

(11) Some claims were omitted or exceeded in the original judgment or ruling;

(12) The legal document on which the original judgment or ruling was made is cancelled or revised; or

(13) The judicial officers have committed embezzlement, accepted bribes, engaged in malpractices for personal benefits or perverted the course of law when trying the case.²⁸¹

On the one hand, it is surprising to allow reopening a case for mere errors of fact and law (as opposed to newly discovered evidence).²⁸² In

281. *Id.* art. 200; *cf.* Civil Procedure Law of the People's Republic of China 2012 (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 2012, effective Aug. 31, 2012) art. 200, *translated* by <http://wenku.baidu.com/view/bf0ffb4de45c3b3567ec8b62.html> (last visited Apr. 3, 2016) (providing a slightly different translation, justifying my using "basic facts" rather than "main evidence" in article 200(2)). It is possible to read "basic facts" to mean only facts regarding the parties' identities, rights, obligations, and responsibilities and the nature of the case. HUANG, *supra* note 270, at 194–95.

282. *See* Civil Procedure Law, *supra* note 270, art. 200(2), (6). The Supreme People's

the rest of the world the principle of finality trumps the desire to get every case decided correctly, but the Chinese would rather say “truth is truth” than “enough is enough.” On the other hand, noticeably absent from China’s current list is the lack of jurisdiction. The idea here is that China is a unitary country, so that at least for domestic cases the court without jurisdiction would have been applying the same law anyway.²⁸³

Before concluding that China’s trial supervision scheme completely undercuts *res judicata*, one should note that all countries have a scheme for relief from judgment, and some are quite liberal.²⁸⁴ Moreover, relief

Court has interpreted the meaning of error of law:

The court shall consider there was an erroneous application of law in the original judgment or ruling as provided in article 200(6) of the Civil Procedure Law if any of the following circumstances exist:

- (1) the content of the law does not strongly match the matter of the case;
- (2) the liability decided by the judges represents deals between the parties, or is against the law;
- (3) the applied law is invalid or not yet valid;
- (4) violates the rule of retroactive effect;
- (5) violates the rule of law application;
- (6) goes against the obvious purpose of the lawmaker.

Supreme People’s Court Interpretation on the Application of the “Civil Procedure Law of the People’s Republic of China,” *supra* note 275, art. 390 (translation by Man Li, on file with author).

283. See HUANG, *supra* note 270, at 194 n.197. However, article 179(7) of the 2007 version of the civil procedure law did provide for relief if: “The jurisdiction was in violation of legal provisions and was improper.” Civil Procedure Law (2007 Amendment), *supra* note 276, art. 179(7).

284. See, for example, FED. R. CIV. P. 60, which in part provides:

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
- (6) any other reason that justifies relief.

(c) Timing and Effect of the Motion.

- (1) *Timing*. A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.
- (2) *Effect on Finality*. The motion does not affect the judgment’s finality or suspend its operation.

from judgment under China's trial supervision scheme is actually uncommon.²⁸⁵ Thus, its scheme is not as extreme as it first appears. "It is argued that the purpose of the trial supervision regime is not to defeat the finality and binding effect of a judgment, but to provide a judicial remedy in exceptional circumstances in which the decision is intolerably wrong."²⁸⁶

Nonetheless, so far this summary of China's procedure has said nothing of the extra-judicial petitioning processes that the Communists instituted beginning in the 1950s. Most important is the heavily used *Xinfang* (letters and visits), an administrative review by which one can more or less endlessly petition designated governmental bureaus to push for relief from judgment.²⁸⁷ This *Xinfang* system, aimed at

(d) Other Powers to Grant Relief. This rule does not limit a court's power to:

- (1) entertain an independent action to relieve a party from a judgment, order, or proceeding;
- (2) grant relief under 28 U.S.C. § 1655 to a defendant who was not personally notified of the action; or
- (3) set aside a judgment for fraud on the court.

It provides extraordinary relief, not correction of mere errors. The most important ground is being "void," which means a lack of subject-matter jurisdiction, territorial jurisdiction, or adequate notice. See CLERMONT, *supra* note 5, at 381–86; Herzog & Karlen, *supra* note 85, at 3–9.

285. Fewer than one percent of cases are retried in this way, and a good majority of those cases are upheld. See HUANG, *supra* note 270, at 203–06; Jie Huang, *Conflicts Between Civil Law and Common Law in Judgment Recognition and Enforcement: When Is the Finality Dispute Final?*, 29 WIS. INT'L L.J. 70, 90–94 (2011). But statistics can be misleading. Almost all retrials are directed at second-instance judgments, not first-instance judgments. See HUANG, *supra* note 270, at 205–06. As a percentage of second-instance judgments, retrials are a much bigger percentage. See Fu Yulin, *Comparative Research on Judicial Hierarchy*, SOC. SCI. IN CHINA, Spring 2003, at 39, 39 n.1 (giving twenty-five percent as that percentage for 1999).

286. Lu Song, *The EOS Engineering Corporation Case and the Nemo Debet Bis Vexari Pro Una et Eadem Causa Principle in China*, 7 CHINESE J. INT'L L. 143, 154–55 (2008) ("Accordingly, the trial supervision regime, which reflects Chinese public policy, does not frustrate the finality and conclusiveness of judgments in civil litigation in a legal sense. One may say that this system strikes a delicate balance between the finality and conclusiveness of a judgment and the demand of fundamental justice in any dispute adjudication.").

287. See Benjamin L. Liebman, *A Populist Threat to China's Courts?*, in CHINESE JUSTICE 269, 270 (Margaret Y.K. Woo & Mary E. Gallagher eds., 2011) (arguing that this system results "in courts that are extremely responsive to populist pressures, perhaps to the detriment of adherence to rule of law principles"); Carl F. Minzner, *Xinfang: An Alternative to Formal Chinese Legal Institutions*, 42 STAN. J. INT'L L. 103, 130 (2006) ("*Xinfang* regulations avoid bright lines regarding the finality of decisions."); Taisu Zhang, *Why the Chinese Public Prefer Administrative Petitioning over Litigation*, 3 SHEHUI XUE YANJIU (SOCIOLOGICAL STUD.) 139 (Apr. 20, 2009), <http://ssrn.com/abstract=1098417> (chronicling public distaste and distrust of current court

ensuring social stability, puts considerable outside pressure on judges to revise judgments, either through the trial supervision procedure or by other means.²⁸⁸ The result may be judgments revised to correct mere error or changed even in the absence of error.²⁸⁹

It is thus hard to deny that China appears more interested in getting things resolved in a certain way than in putting an end to litigation. To understand its pursuit of that interest, one must consider the broader Chinese context. Possible explanations for its robust scheme for relief from judgment abound. First, the explanation could be internal to the procedural system. For example, one brilliant analysis sees Chinese relief from judgment as serving as a kind of further appeal and, indeed, as compensating for the stunted system of appeal that exists today.²⁹⁰ Thus, reform of appellate review would allow restricting later attacks on judgments. Second, the explanation could link to the role of courts in China. Courts there are not especially competent or neutral; moreover, they are weak, being susceptible to public opinion and arguably serving as clumsy tools of the government in imposing its will to rule.²⁹¹ Thus, one would expect China to have a robust scheme for relief from judgment, whereby courts can give relief from judgment other than on behalf of a party and also nonjudicial officials can impose relief from judgment. Third, the explanation could be more broadly cultural. From Confucianism to Marxism, the Chinese have felt the urge to seek endlessly the right answer, while believing that no earthly authority has the capacity to give a final and correct answer.²⁹² Thus,

procedure).

288. See Liebman, *supra* note 287, at 289.

289. *Id.* (“Some judges acknowledge ignoring the law on the books or reaching strained interpretations of the law to assuage petitioners.”); Minzner, *supra* note 287, at 129, 134, 172.

290. See Fu, *supra* note 285.

291. See Liebman, *supra* note 287, at 307 (“The influence of petitioning on the courts reflects the perseverance of problems that undermine court authority, including the continued legitimacy of official interference, lack of finality, and courts’ close ties to local authorities.”); Liu, *supra* note 273, at 90 (noting that the “quality of judges is still a problem”; “the Chinese court has historically never been treated as a real judicial institution”; and “it is Party policy, not the law, that regulates Chinese society”).

292. See Yu Xingzhong, *Nonfinality, “Lord Blue-Heaven,” and the Superjudge Hercules: On the Traditional Chinese Concept of Justice*, J. HANGZHOU NORMAL UNIV. (SOC. SCI.), May 2012, at 102, 104 (article in Chinese, but English version on file with author); *cf.* Liu, *supra* note 273, at 89 (“[I]t is simply impossible to achieve genuine judicial finality in Communist China.”); *id.* at 91 (“Therefore, if the application of any facts or law is found to be in error, a people’s court is obliged to make corrections . . . at any other stage.”); Zhong & Yu, *supra* note 274, at 433–38 (elaborating Chinese preference for “substantive truth over procedural value”).

Chinese courts could ironically fall into a position analogous to religious courts, and *res judicata* could appear to be peculiarly un-Chinese.

Seeking the explanation for China's robust scheme for relief from judgment takes me far away from the heart of the subject of *res judicata*. Anyway, the quest might be impossible, and certainly it is for an outsider like me. Still, whether its origins are fully understood or not, the extent of relief from judgment in general is relevant to the task at hand: laying out the Chinese law of *res judicata*. Recall that the easier it is to get relief from judgment, the less bite the rules of preclusion will have.

B. Bare Preclusion

The Chinese Civil Procedure Law does not use any linguistic counterpart in Chinese of “*res judicata*.” That said, in the list of cases that courts must not accept, article 124(5) provides:

For cases in which a judgment, a ruling, or a mediation decision has become legally effective, if either party files another suit, the court shall advise that party to apply for a retrial instead. This, however, does not include a prior ruling in which the court allowed withdrawal of suit.²⁹³

So if a party tries to file a case that has already been decided, the second court will refuse to accept the case and tell the party that it may file a petition to reopen the case under the trial supervision procedure. Giving advice to parties is not at all unusual, as Chinese courts follow the civil-law elucidation principle whereby the court will undertake to keep the parties on the right track. Indeed, the first court may very well have advised the parties in the prior litigation not to omit any part of their claim or defense.²⁹⁴

While recognizing that case law is not a formal source of law in China, one should nevertheless note that the Supreme People's Court

293. Civil Procedure Law, *supra* note 270, art. 124(5) (translation by Frank Zhang, on file with author). The provision is substantially the same as article 111(5) in the 2007 and 1991 versions of the civil procedure law. On February 4, 2015, the Supreme People's Court called for change from a “case filing review system” to a “case filing registration system,” forcing courts to accept filings and so pushing any *res judicata* decision later in time. See Opinion of the Supreme People's Court on Comprehensively Deepening Reform of the People's Courts: Outline of the Fourth Five-Year Reform Plan of the People's Courts (2014–2018) (promulgated by the Sup. People's Ct., Jan. 30, 2015) ¶ 17, <http://chinalawtranslate.com/court-reform-plan/?lang=en>.

294. See Lu, *supra* note 286, at 152–54.

has spoken on how to read article 124(5). In its 2003 decision in the *EOS Engineering Corporation* case, the court applied the statute rather broadly.²⁹⁵ The decision demonstrates that the country adheres in both legal theory and actual practice to “the principle of ‘one matter is not to be tried twice’”²⁹⁶—even if everyone acknowledges that nowhere in Chinese legislation can one find the elements or scope of this no-double-adjudication principle.

In the *EOS* case, the American plaintiff made a \$1 million deposit with the Chinese defendants’ agent in connection with construction of a power plant, but the money disappeared.²⁹⁷ The plaintiff sued *for unjust enrichment*.²⁹⁸ The plaintiff prevailed in the High People’s Court of Shanxi Province.²⁹⁹ Upon appeal, the Supreme People’s Court remanded for reconsideration.³⁰⁰ The lower court then dismissed on the ground there was no unjust enrichment of the defendants.³⁰¹ The plaintiff appealed, but later withdrew its appeal.³⁰²

The next year the plaintiff brought a new suit *for tort* against the same defendants in the same court based on the same facts.³⁰³ This time the High People’s Court dismissed on the basis of article 124(5).³⁰⁴ The Supreme People’s Court affirmed.³⁰⁵ The holding, then, was that shifting the legal theory or grounds, or the arguments or relief, did not create a different claim outside the no-double-adjudication principle. Instead, the measure of the barred claim would be tied to the factual dispute between the parties. The elements of the no-double-adjudication principle “are (i) whether the parties are identical in the two related proceedings and (ii) whether the particular substantive [i.e., factual] dispute is the same in the two related proceedings.”³⁰⁶ The second court will not accept a dispute between the parties that has already been decided by the first court.

295. *EOS Eng’g Corp. v. Xinjiang Elec. Prod. Co.*, 10 SUP. PEOPLE’S CT. GAZ. 21 (Sup. People’s Ct. 2003).

296. Lu, *supra* note 286, at 151.

297. *Id.* at 149.

298. *Id.* at 150.

299. *Id.*

300. *Id.*

301. *Id.*

302. *Id.*

303. *Id.*

304. *Id.*

305. *Id.*

306. *Id.* at 157.

It was at least arguable that this “same dispute” test could be analogous to the United States’ transactional approach.³⁰⁷ But unsurprisingly, the Supreme People’s Court, following the socialist tradition of guiding explanations,³⁰⁸ has since issued an official “judicial interpretation” of the Chinese Civil Procedure Law that argues against a broad reading.³⁰⁹ It interpreted same dispute to mean something like the civil law’s requirement of same parties, ground, and demand.³¹⁰

The litigation shall be considered repetitive if the following circumstances exist when the parties bring a new litigation with the same matter as another litigation that is pending or legally effective already:

- (1) the parties of the two litigations are the same;
- (2) the subject matters of the two litigations are the same;
- (3) the second suit seeks the same relief as the first suit, or the relief in the second suit would substantively negate the results of the first suit.

When the litigation is considered repetitive, the court shall issue a ruling to refuse to accept the case, or issue a ruling to dismiss the action if it was accepted already, except as otherwise provided in laws and judicial interpretations.³¹¹

If one were to analogize to the civil law’s requirements, the “subject matter” or legal relationship would refer to the legal principle upon which the action is *grounded*, and the “relief” would refer to the remedy or end *demand*ed.

One scholar describes the policies underlying the no-double-adjudication principle in this way:

307. *See id.* at 152 (stating that the new “same dispute” test differs from the test previously “advanced by Chinese academic thought”).

308. *See* Quigley, *supra* note 122, at 792; Marcus Wang, *Dancing with the Dragon: What U.S. Parties Should Know About Chinese Law When Drafting a Contractual Dispute Resolution Clause*, 29 NW. J. INT’L L. & BUS. 309, 310–11 (2009).

309. *See* Supreme People’s Court Interpretation on the Application of the “Civil Procedure Law of the People’s Republic of China,” *supra* note 275.

310. *See supra* note 106 and accompanying text.

311. Supreme People’s Court Interpretation on the Application of the “Civil Procedure Law of the People’s Republic of China,” *supra* note 275, art. 247 (translation by Man Li and Frank Zhang, on file with author).

The Principle is of obvious value and significance in the legal and commercial world, as it is a reflection of the public interests of a State in modern society. First, litigation shall not drag on forever and there shall be an end to any dispute adjudication in order to maintain stability of the social and economic life of the people. And efforts shall be made to attempt to solve any dispute that comes to a court of law once and for all. Disputes adjudged should not be permitted to retrial unless in exceptional cases.

Secondly, the principle of non-double adjudication aims at avoiding conflicting or irreconcilable judgments resulting from separate proceedings. . . .

Thirdly, saving legal resources and reduction of court caseload is another major purpose of applying the principle.³¹²

So, putting legislation, case, judicial interpretation, and policy together, it appears that China has *res judicata* similar in effect to that of the civil law. First, as to formulation, China uses bar and defense preclusion, precluding claims and defenses arising from the same dispute. China thus delivers the minimal core of *res judicata* law. Second, as to merger, the legislation's wording implies that China might prohibit the winning plaintiff from suing again. However, a few civil-law countries such as Germany have not fully embraced merger despite having a similar code provision, because they read the code as more for blocking losers than winners.³¹³ Third, China does not employ issue preclusion.³¹⁴ But, in the civil-law style,³¹⁵ China does allow the evidential use of prior judgments.³¹⁶

The lawmakers have not worked out the details of Chinese *res judicata*, including the status of merger. Both the reach of privity and the application of exceptions, such as the statutory off-the-merits

312. Lu, *supra* note 286, at 145.

313. See *supra* notes 105 & 110 and accompanying text.

314. See Liu, *supra* note 273, at 53–54.

315. See *supra* text accompanying note 115.

316. See Supreme People's Court Interpretation on the Application of the "Civil Procedure Law of the People's Republic of China," *supra* note 275, art. 93(5); Some Provisions of the Supreme People's Court on Evidence in Civil Procedures (revised by the Sup. People's Ct., Dec. 31, 2008), art. 9(4), <http://www.lawinfochina.com/display.aspx?lib=law&id=2197&CGid=>.

exception for “a prior ruling in which the court allowed withdrawal of suit,” have yet to be worked out.³¹⁷

Nonetheless, China has a solid foundation of res judicata law. Like its Asian neighbors,³¹⁸ it has delivered the minimal core of res judicata by the more straightforward and comprehensible route of claim preclusion rather than issue preclusion. With that formulation, China seems to extend preclusion for valid and final judgments as far as civil-law countries like Germany.³¹⁹ For illustration, the *EOS* case would turn out the same way in Germany today,³²⁰ as the change of legal theory would not raise a different “subject matter of the controversy” or *Streitgegenstand*.³²¹ Still, if one considers relief from judgment in conjunction with preclusion rules, China has a less extensive res judicata law than Germany and the other civil-law countries.

C. Room for Growth

This overview of Chinese res judicata might prompt the concern that China has too little res judicata as a matter of justice. Res judicata is, after all, a necessary component of every system of justice. If China were to grow its res judicata, the preceding two sections mark two paths along which growth might occur: narrowing the grounds for relief from judgment and broadening preclusion flowing from both the claim preclusion it has and the issue preclusion it does not have.

1. Narrowing Relief from Judgment

Even though China’s loose restrictions on challenging a judgment’s validity by seeking relief from judgment may be inherent to the Chinese procedural outlook, it is this aspect of res judicata that attracts the most criticism in case and commentary.³²² As a reform, consider

317. Civil Procedure Law, *supra* note 270, art. 124(5); *see also* WENLIANG ZHANG, RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN CHINA 37 (2014) (“[T]here is no systematic clarification made by Chinese law in regard to the effects Chinese judgments can produce . . .”); Lu, *supra* note 286, at 152 n.38, 157.

318. *See supra* notes 121 & 123 and accompanying text.

319. *See supra* note 105 and accompanying text.

320. *See* MURRAY & STÜRNER, *supra* note 102, at 358; Zeuner & Koch, *supra* note 27, §§ 9-63 to -64 (explaining that this expansion of German res judicata is a recent development).

321. MURRAY & STÜRNER, *supra* note 102, at 357.

322. *See, e.g.*, Chiyu Banking Corp. v. Chan Tin Kwun, [1996] 2 H.K.L.R. 395 (H.C.); ZHANG, *supra* note 317, at 78–84.

restricting the trial supervision system.³²³ Some argue that the door is so open to challenges that any pretense of finality is compromised. Others counterargue that the mere existence of a retrial system to correct error does not frustrate finality. Debate centers on whether the current retrial system has struck the optimal balance. Others have suggested moving retrials more exclusively to higher courts.³²⁴ More obviously, China should clarify the meaning of the terms used in describing the grounds for relief.³²⁵

I would add to the debate the dimension of whether Chinese relief from judgment is so extensive as to defeat the essential core of bar and defense preclusion. This consideration should perhaps push China to restrict its scheme for retrial. My view is that the list of grounds should be both legislatively shortened and judicially interpreted in a restrictive way. Of course, suggestions for reform coming from outside, especially for a legal system as complex as China's, should be taken lightly.

My premise again is that relief from judgment should provide a corrective only for fundamental flaws, not for mere errors.³²⁶ This line between fundamental error and mere error must be drawn to avoid defeating the core of bar and defense preclusion. In the Chinese trial supervision procedure, its allowing correction of the prior judgment for mere errors of fact or law seems to cross that line. Subdivisions 200(2) and 200(6) misconceive the idea of relief from judgment and should thus be dropped.

More broadly, the list of grounds should cover only extraordinarily significant failures. It is for the particular society to decide which failures are significant enough, but an outsider might think that the denial of the right to cross-examine or to argue could be left to an adequate system of appeal.³²⁷ In the United States, one can argue for relief from judgment on the ground of failure to receive notice, but one cannot argue for relief on the ground that the prior court otherwise denied procedural due process, even though the U.S. legal system sanctifies due process as the absolute floor of fundamental fairness.

323. Likewise, the path to administrative relief from judgment premised on mere error or less should probably continue toward closure. But socially a change to *Xinfang* would be much harder to accomplish. See Minzner, *supra* note 287, at 136 ("The *xinfang* system may be in the middle of a long process of evolution rather than replacement.").

324. See HUANG, *supra* note 270, at 213–15.

325. See *id.* at 194–95.

326. See Fu, *supra* note 285, at 43 ("Exceptional remedies are facilities like 'fire exits' or 'emergency exits' in buildings [and therefore] no threat to the structure of the judicial hierarchy.").

327. See Civil Procedure Law, *supra* note 270, art. 200(4), (9).

U.S. courts give no relief because they believe that the notified party could have remedied such denials of due process by taking an appeal.

Furthermore, the fact that “[s]ome claims were omitted or exceeded in the original judgment or ruling”³²⁸ hardly seems a ground for a belated new trial. A claim omitted by the judges would seem an appropriate exception to claim preclusion, while an exceeding of the asserted claims would require nothing more than its being a ground for appeal.³²⁹

If the list of grounds for relief from judgment were pruned, then China’s *res judicata* would look much like the rest of the legal world’s. Of course, this prescription rests on an assumption that China wants to move in that direction. On the one hand, it could be that the government and the people of China do not want court-like courts:

Courts are evolving, but not necessarily toward a Western-style system. The influence of petitioning shows that courts remain subject to extensive external pressures, continue to play a range of roles in addition to deciding cases, and do not appear to be distinguishing themselves from other state institutions in the minds of those who use the courts.³³⁰

On the other hand, the rule of law beckons the Chinese legal community. “A final say on legal disputes is the most important test of an independent judiciary in modern society.”³³¹

Even if one cannot unearth all the reasons that China has such robust relief from judgment, and even if one does not account for the country’s internal struggles to control the direction of reform, one can say that *if* China were to decide fully to embrace an effective rule of law—once the political will and technical skills for it are in place—China must deliver the core of *res judicata*. And to do so, it must restrict relief from judgment sufficiently so as not to defeat that essential core of bar and defense preclusion.

328. *Id.* art. 200(11).

329. See HUANG, *supra* note 270, at 194.

330. Liebman, *supra* note 287, at 310.

331. Liu, *supra* note 273, at 97. Obviously, for China, a big issue of judicial independence lurks in the background. If China were to aspire to a “thick” version of rule of law, see HEAD, *supra* note 4, at 127–46, it would have to restrict relief from judgment offered by nonjudicial officials.

2. Broadening Preclusion

One can argue that Chinese law has inadequately formalized *res judicata*, fixed its reach, and eliminated its ambiguities.³³² Yet, even without these refinements, *res judicata* is undoubtedly recognized by China today. Still, optimization would require unearthing and theorizing the subject of *res judicata*. Lawmakers have to perceive the law before they can improve it. Progress would come from the Chinese Civil Procedure Law being made more explicit or the Supreme People's Court issuing another judicial interpretation.

Further, policy could argue for more than bare claim preclusion in China, much as it has in many other countries. Comparative study suggests that the optimum of *res judicata* law in any particular country lies at least somewhat above the minimal core, and that over time developed legal systems tend to expand their *res judicata* law. But they do so as a matter of balancing their own efficiency, fairness, and substantive policies.

In China, the two main routes to expansion involve broadening the dimensions of a "claim" or adding to claim preclusion a separate body of issue-preclusive law. First, the Supreme People's Court in 2015 refused to broaden the dimensions of claim. Second, China now feels, probably correctly given how the Chinese court system works, that it does not need issue preclusion. Someday China might feel differently, so that it would then elaborate and expand its *res judicata* law. Currently, however, there is no need for China to broaden claim preclusion or adopt issue preclusion and, in any event, no likelihood of movement in those directions.

CONCLUSION

Looking at *res judicata* over history and across borders, one sees that all systems of justice deliver a core comprising the substance of bar and defense preclusion. This core does not represent a universal value but rather responds to a universal institutional need. Such a system must have adjudicators, and an effective adjudicator must have its judgments mean something with bindingness. The minimal bindingness is that, except in certain circumstances, the disgruntled cannot undo

332. See ZHANG, *supra* note 317, at 40–41 (describing thrust of recent scholarly proposals for reform); Weng Xiao-bing, *The Scopes of Res Judicata in China's Civil Decisions*, 26 MOD. L. SCI., Dec. 2004, no. 6, at 78 (abstract in English, but article in Chinese), http://en.cnki.com.cn/Article_en/CJFDTOTAL-XDFX200406011.htm.

the judgment in an effort to change the outcome. Hence the core of bar and defense preclusion.

By some formulation, each justice system must deliver the core. Context-specific policy will decide how much farther res judicata will go in any particular country. The United States loves preclusion, and by indulging in nonmutual preclusion it goes to an extreme well beyond the bare minimum. Thus far, China sticks to the core, even endangering it by indulging attacks on prior judgments' validity. Perhaps for both countries, the optimum lies closer to the middle. Where each of the two countries' law of res judicata will end up depends on local context, which makes it safe to say that they will not and should not end up in the same spot.