

NOTES

PRECLUSIONS

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Preclusion law is notoriously convoluted. Courts have made no secret of their distaste for the doctrine, describing it variously as “conflicting,” “inconsistent,” “breeding confusion,” and ultimately “not very well liked.” Though the Supreme Court has consolidated issue and claim preclusion into a single coherent whole, this Note argues that the merger of res judicata and collateral estoppel in our modern preclusion law is incomplete. These different preclusions are motivated by different rationales: Res judicata protects private closure of parties, while estoppel began as a defense of judicial interests and expanded to forward systemic ones. Though private and systemic interests may often align, this alignment is not inevitable. In the case of public rights, failure to keep these doctrines distinct has undermined judicial ability to offer closure. Attention to the differences in historic preclusion doctrines ultimately provides a direction for modernization in the form of intervention.

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INTRODUCTION

In 2008, the Supreme Court handed down its decision in *Taylor v. Sturgell*, a case involving sequential suits by two airplane enthusiasts who had both been denied the same Freedom of Information Act (FOIA) request concerning antique airplane parts.¹ Less than a month

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¹ 553 U.S. 880 (2008).

after the first airplane enthusiast, Herrick, lost his FOIA appeal seeking the plans of a vintage F-45 aircraft, his “friend” Taylor hired the same lawyer and brought an identical claim.²

At about the same time, another group of litigants took Taylor and Herrick’s litigation strategy to the extreme. By late 2008, a bevy of claims challenging Barack Obama’s constitutional eligibility for the American presidency had made their way into federal courts.³ As either a “citizen of his father’s native Kenya” or Indonesia, one early complaint alleges, Obama was no “natural born Citizen,” and thus did not meet the Constitutional requirements to serve as President.⁴ That claim lost, but it proved no bar to future suit. Long after President Obama had released his birth certificate, dozens of suits questioning his eligibility for the presidency flooded into U.S. courts. The suits assumed the same broad form, alleging, one after another, that Obama was not a natural-born citizen, that he was party to a RICO conspiracy to defraud the American public, that his failure to turn over his birth certificate to interested Americans constituted a FOIA violation, and so on.⁵ The birther FOIA requests grew in number to the degree that the Hawaii Department of Health (DOH), which held Obama’s birth certificate, was forced to lobby Congress for help; the “considerable” time and state resources consumed by “these often convoluted inquiries” overwhelmed the agency.⁶

In theory, preclusion law—made up of claim preclusion and issue preclusion—exists to solve just this problem. Preclusion is designed to prevent duplicative litigation where individual issues or claims have already been adjudicated. Yet in both *Taylor* and the birther cases, preclusion law failed to perform its task.⁷

² *Id.* at 887. For a summary of the factual and procedural background of the case, see *id.* at 885–91.

³ See Stephen Parks, *The Birthers’ Attacks and the Judiciary’s Article III “Defense” of the Obama Presidency*, 38 S.U. L. REV. 179, 182 n.14, 185 n.21 (2011) (referencing multiple lawsuits brought to challenge President Obama’s citizenship).

⁴ *Berg v. Obama*, 574 F. Supp. 2d 509, 513–14 (E.D. Pa. 2008) (citing U.S. CONST. art. II, § 1).

⁵ See, e.g., *Drake v. Obama*, 664 F.3d 774, 785–86 (9th Cir. 2011); *Kerchner v. Obama*, 612 F.3d 204, 207 (3d Cir. 2010); *Sibley v. Obama*, 866 F. Supp. 2d 17, 19 (D.D.C.), *aff’d*, No. 12-5198, 2012 WL 6603088 (D.C. Cir. Dec. 6, 2012); *Taitz v. Obama*, 707 F. Supp. 2d 1, 3 (D.D.C. 2010).

⁶ See Ben Smith, *Hawaii’s ‘Birther Bill,’* POLITICO: BEN SMITH BLOG (May 13, 2010, 9:07 AM), <http://www.politico.com/blogs/ben-smith/2010/05/hawaiiis-birther-bill-026966> (quoting Hawaii Governor Linda Lingle’s response to the onslaught of FOIA requests).

⁷ Most of the birther claims were dismissed on Article III standing grounds. *Berg*, 574 F. Supp. 2d at 518 (“The alleged harm . . . is not concrete or particularized enough to constitute injury in fact.”). Courts faced with birther suits thus did not have to reach the preclusion issue. Not all public rights claims encounter standing obstacles, however; the underlying preclusion issue could persist even when standing is resolved.

Modern preclusion law consists of two main strands. Claim preclusion, also known as *res judicata*, bars relitigation of any issues that were or could have been raised in an earlier action between the same parties. Issue preclusion, also known as collateral estoppel, bars a party from relitigating an adverse finding on an individual issue in an earlier proceeding.⁸ Notionally, these two forms of preclusion combine to prevent needless relitigation; they promise finality for parties and courts alike. The birther litigation, however, revealed the shortcomings of our purportedly coherent doctrine of preclusion. Claim preclusion did not apply: Courts heard birther claim after birther claim because they were bound by *Hansberry v. Lee*'s famous maxim that "[i]t is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party."⁹ Nor did issue preclusion apply: Obama had won every birther suit, such that there was no adverse finding to use preclusively against him. *Taylor* fell into the same gap between claim and issue preclusion.

That gap has manifested clearly in the vocabulary of our modern preclusion law. In short, "[t]he terminology of preclusion concepts, that is, of *res judicata* and other related doctrines, is varying, imprecise, and lacking in clarity. It has been characterized as conflicting, inconsistent, and convoluted, and as having the effect of breeding confusion."¹⁰ The Supreme Court has declared that "[c]ollateral estoppel" is an awkward phrase,¹¹ and, in Professor David Shapiro's words, "the chameleon-like character of 'res judicata' . . . still haunts us."¹²

According to the Supreme Court, issue and claim preclusion alike have "the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation."¹³ This Note argues that assigning claim and issue preclusion "dual purpose[s]"¹⁴ obscures significant differences which tacitly bear on our contemporary preclusion law. The Note makes the historical point that our modern claim and issue preclusion derive from separate legal traditions—*res judicata* from the Roman rule of the same name, and

⁸ See *infra* notes 19–23 and accompanying text (describing the differences and relationship between claim preclusion and issue preclusion).

⁹ 311 U.S. 32, 40 (1940).

¹⁰ 50 C.J.S. JUDGMENTS § 927 (2016) (footnotes omitted).

¹¹ *Ashe v. Swenson*, 397 U.S. 436, 443 (1970).

¹² DAVID L. SHAPIRO, CIVIL PROCEDURE: PRECLUSION IN CIVIL ACTIONS 10 (2001).

¹³ *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979).

¹⁴ See *id.*

collateral estoppel from Anglo-Norman estoppel—each bearing their own motivating rationales.¹⁵ Ignoring the difference between these rationales begets terminological complications which, compounded by judicial uncertainty, become doctrinal difficulties that unsettle our court system.

This Note is about the incomplete merger of *res judicata* and collateral estoppel in our modern preclusion law. It proceeds in three parts: Part I surveys the terminological instability of preclusion law, and considers how problems of language reflect problems of doctrine. Part II turns to the historical origins of modern preclusion to explain our contemporary terms, the doctrines they represent, and the policy concerns they forward. It argues that *res judicata* and collateral estoppel emerged from two distinct legal traditions, with distinct purposes: Roman *res judicata* aimed to provide closure to private parties, while Anglo-Norman estoppel was motivated by institutional interests. Part III.A first considers those cases in which the goals of private closure and systemic efficiency correspond, apparently leaving only terminological disagreement. While repose and efficiency often push toward the same conclusion, they are not always in sync. Part III.B turns to a case study in public rights in order to illustrate how these interests might misalign. When individual litigants bring public rights claims, the private closure rationale of claim preclusion is inapposite; the systemic efficiency drive of issue preclusion better captures the finality interests at play. Yet in its current form, issue preclusion—and indeed, preclusion law broadly—cannot accommodate the public rights problem. The Note concludes by suggesting how, where our current doctrine fails, the historical doctrines of Part II point toward a modern solution based in Rule 24 intervention.

I

CONFUSION IN THE COURTS

Confusion surrounding the meaning and application of preclusion terminology abounds in federal courts. The Supreme Court recognized in *Migra v. Warren City School District Board of Education* that “[t]he preclusive effects of former adjudication are discussed in

¹⁵ To the extent of my knowledge, only one opinion recognizes that issue and claim preclusion may have separate rationales. Judge Reinhardt of the Ninth Circuit wrote: “Vindication of this public interest is at its zenith in the realm of issue preclusion. . . . In contrast, the broader doctrine of claim preclusion, which bars the litigation of issues never before tried, has at its fundamental base the vindication of private litigants’ interest in repose.” *Clements v. Airport Auth. of Washoe Cty.*, 69 F.3d 321, 330 (9th Cir. 1995). This is all Reinhardt says on the subject; he does not cite to any preexisting authorities on this claim.

varying and, at times, seemingly conflicting terminology.”¹⁶ The Court’s recognition of the problem, however, provided little clarity. *Migra*, for example, was soon cited as authority for two inconsistent frameworks: first, that “‘claim preclusion’ [refers] to ‘res judicata’ in a narrow sense, *i.e.*, the preclusive effect of a judgment in foreclosing litigation of matters that should have been raised in an earlier suit,”¹⁷ and one year later, for the conflicting proposition that res judicata “encompass[es] both issue preclusion and claim preclusion.”¹⁸ The Supreme Court’s failure to consolidate preclusion terminology has resulted in widespread confusion. This Part begins with the terminological instability of “res judicata” and “collateral estoppel,” before turning to the precarious interaction of the two principles.

In broad strokes, our preclusion law breaks down into two main categories: claim preclusion, or res judicata, and issue preclusion, or collateral estoppel. Claim preclusion is traditionally considered the broader of the two forms:¹⁹ It bars relitigation of any issues that were or could have been raised in the initial action when (1) the second action is based on the same claim, (2) the two actions are between the same parties or their privies, and (3) the determination in the first action was a final judgment.²⁰ A claim typically includes the transaction or series of transactions from which the legal action arose.²¹ Under issue preclusion, by contrast, a party who (1) had a full and fair opportunity to actually litigate an issue may not relitigate (2) the same issue if it was (3) essential to a valid and final judgment.²² Unlike

¹⁶ 465 U.S. 75, 77 n.1 (1984).

¹⁷ *Marrese v. Am. Acad. of Orthopedic Surgeons*, 470 U.S. 373, 376 n.1 (1985) (defining claim and issue preclusion in determining whether a state common law suit claim precluded a federal antitrust suit based on the same events).

¹⁸ *Leal v. Krajewski*, 803 F.2d 332, 334 (7th Cir. 1986) (clarifying terminology before determining whether summary judgment in state court could preclude a federal suit).

¹⁹ See, e.g., *Brown v. R.J. Reynolds Tobacco Co.*, 611 F.3d 1324, 1332 (11th Cir. 2010) (noting that “issue preclusion . . . operates more narrowly” than claim preclusion). But see Michael D. Green, *The Inability of Offensive Collateral Estoppel to Fulfill Its Promise: An Examination of Estoppel in Asbestos Litigation*, 70 IOWA L. REV. 141, 148–49 (1984) (suggesting issue preclusion may be broader than claim preclusion because it does not require an identity of parties).

²⁰ See SAMUEL ISSACHAROFF, *CIVIL PROCEDURE* 159 (3d ed. 2012) (explaining a party is claim precluded when, “in a previous suit, the same parties or their privies were involved, the first suit arose from the same transaction or occurrence as the new suit, and the first suit had a final judgment entered on it by the court”).

²¹ See RESTATEMENT (SECOND) OF JUDGMENTS § 24(1) (AM. LAW INST. 1982) (“[T]he claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.”).

²² See RESTATEMENT (SECOND) OF JUDGMENTS § 27 (AM. LAW INST. 1982) (“When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a

claim preclusion, issue preclusion does not require the identity of parties in the first and second action.²³ As they are commonly understood, both forms of preclusion ultimately operate to offer finality.

But common understanding quickly dissipates when these preclusion doctrines are applied. When faced with a set of facts, parties and courts disagree about the scope of each doctrine's application. Parties, for their part, commonly conflate the prerequisites of claim preclusion with the preclusive effects of issue preclusion, and vice versa, when it comes time to employ them in a specific scenario.²⁴ Courts, too, slip from terminological to doctrinal error. For example, the Federal Circuit's use of the term "res judicata" when "in fact [it] applied collateral estoppel" so perplexed the parties that the court was petitioned to clarify its use of terms.²⁵

Commentators have long noted the "absence of a solid consensus" as to what "res judicata" really means.²⁶ The central obstacle to consensus is a disagreement of definitions,²⁷ and adherents fall into two main camps. First, some courts take a broad view of res judicata. The Seventh Circuit, for example, has stated that "[t]he term 'res judicata[]' . . . embraces two separate concepts: 'issue preclusion' and 'claim preclusion.' . . . To aid clarity, when we use the term res judicata

subsequent action between the parties, whether on the same or a different claim."); *accord* *New Hampshire v. Maine*, 532 U.S. 742, 748–49 (2001) (summarizing and adopting the Restatement's definition). Generally, issue preclusion is only invoked against a losing party; because "it is a principle of general application in Anglo-American jurisprudence" that everyone must get their day in court, *Hansberry v. Lee*, 311 U.S. 32, 40 (1940), new plaintiffs who have not yet had their day in court may litigate an issue a defendant has already won in a previous suit. *See* ISSACHAROFF, *supra* note 20, at 171 ("The modern focus is therefore best conceptualized by focusing on what issue was decided against whom [U]nder the contemporary rule, followed in most American jurisdictions, a party may be held to an adverse finding in a proceeding in which he participated").

²³ *See* *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331–33 (1979) (extending nonmutual estoppel to "offensive" use by plaintiffs); *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 349–50 (1971) (abandoning mutuality of estoppel).

²⁴ *See, e.g., Hamilton's Bogarts, Inc. v. Michigan*, 501 F.3d 644, 650 (6th Cir. 2007) ("[T]he state appears to confuse the doctrines of res judicata and collateral estoppel (issue preclusion)."); *Unger v. Consol. Foods Corp.*, 693 F.2d 703, 704 n.2 (7th Cir. 1982) ("There has been some confusion among the parties and courts involved over the terminology in this case, to wit, whether it is res judicata (claim preclusion) or collateral estoppel (issue preclusion) that might preclude [this] case."); *Taggart v. Rutledge*, 657 F. Supp. 1420, 1430 (D. Mont. 1987) (illustrating an argument by one party that specific issues hadn't been litigated—the basis of issue preclusion—and therefore concluding claim preclusion should not attach).

²⁵ *Int'l Air Response v. United States*, 324 F.3d 1376, 1378 (Fed. Cir. 2003).

²⁶ *See, e.g., SHAPIRO, supra* note 12, at 10.

²⁷ For an example of a court recognizing this definitional tension, see *Weaver Corp. v. Kidde, Inc.*, 701 F. Supp. 61, 63 (S.D.N.Y. 1988) ("One difficulty is that courts use 'res judicata' for two different concepts. Some use it to mean claim preclusion. Others employ res judicata in a general sense, to encompass both claim and issue preclusion.").

we use it only in its most general sense”²⁸ Second, a different set of courts, including the Ninth Circuit, contend that *res judicata* should be used “in its proper sense of claim preclusion, as distinct from the related doctrine of ‘collateral estoppel,’ or issue preclusion.”²⁹ In short, while some courts use *res judicata* as a synonym for claim preclusion, others use it as a broader term that encompasses both claim and issue preclusion.

Courts not only disagree about how to define *res judicata*, but moreover do so with conviction. The Ninth Circuit’s morally-charged description of its narrow definition as “proper” recognizes that other courts define the term differently, while the Seventh Circuit is sure enough of its conclusory claim that a broad definition is superior that it offers no rationale for why a broader definition would “aid clarity.” In spite of courts’ self-assured use of the term, their constant need to define *res judicata* at the start of each opinion demonstrates the term’s meaning is far from clear.

The “unhappily dubbed” estoppel has induced its fair share of frustration as well.³⁰ Though to Lord Coke in the seventeenth century estoppel was “an excellent and curious learning,”³¹ as a twentieth-century treatise notes, “[a]s to its curiosity there can be no question; but later lawyers have expressed doubt as to its excellence, and have spoken rather of its ‘absurd refinements.’”³² Explicit judicial discomfort with the doctrine is reflected in disclaimers like “[w]e now tread into the bramble bush of collateral estoppel.”³³ The doctrine, however, makes mischief even when unrecognized. Though it has not been subject to conflicting definitions in the same way *res judicata* has, its situation among a whole host of other estoppels—“the term estoppel encompasses myriad definitions which cut across a number of dif-

²⁸ *Leal v. Krajewski*, 803 F.2d 332, 334 (7th Cir. 1986); *see also Elliott v. Univ. of Tenn.*, 766 F.2d 982, 986 n.1 (6th Cir. 1985), *aff’d in part, rev’d in part*, 478 U.S. 788 (1986) (“Throughout this opinion, we will intend ‘res judicata’ and ‘rules of preclusion’ to refer to principles of both issue and claim preclusion.”); 18 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, *FEDERAL PRACTICE & PROCEDURE* § 4402 (2d ed. 2002) (collecting many more cases which define *res judicata* broadly to include both claim and issue preclusion).

²⁹ *Ross v. Int’l Bhd. of Elec. Workers*, 634 F.2d 453, 457 n.6 (9th Cir. 1980); *see also, e.g., Wool v. Md.-Nat’l Capital Park & Planning Comm’n*, 664 F. Supp. 225, 228 n.5 (D. Md. 1987) (making the same distinction).

³⁰ *United States v. Kramer*, 289 F.2d 909, 913 (2d Cir. 1961).

³¹ EDWARD COKE, *A READABLE EDITION OF COKE UPON LITTLETON* § 667 (Thomas Coventry ed., London, Saunders & Benning Law Booksellers 1830).

³² 9 W.S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 145 (1926) (discussing the development of modern forms of estoppel).

³³ *Quinn v. Monroe Cty.*, 330 F.3d 1320, 1328 (11th Cir. 2003).

ferent areas of the law”³⁴—has muddied its doctrinal boundaries. As with the broad use of *res judicata*, some courts, “[t]o avoid confusion . . . refer to the estoppel principles collectively as collateral estoppel,”³⁵ and yet, as with *res judicata*, such uses induce confusion in their own right.

The Fourth Circuit has addressed the linguistic confusion of preclusion law with unqualified frustration. Describing the “off-hand resort to *res judicata*, collateral estoppel (offensive collateral estoppel and defensive collateral estoppel) and issue preclusion,” it wrote:

The law follows (or perhaps leads) the practice of other professions in the affectionate use of recondite terms of little apparent sense, standing solely on their own. Regrettably, lawyers sometimes use legal terms possessed of technical meanings imprecisely, if not inaccurately, which leads to obfuscation and confusion. Unfortunately the result is frequently one of frustration amounting to helplessness on the part of laymen confronted by the incomprehensible phraseology.³⁶

Alien words with distant meanings confuse both courts and parties, which in turn confuse each other with their uses and misuses of these “recondite terms.” Not only are the terms inherently complicated, then, but they also accrue complication as they cycle through different senses. Terminological confusion has become such a tax on parties and courts that it threatens to subsume the time and resources preclusion is meant to protect.³⁷

Though there have been efforts to clarify these difficulties, they have enjoyed little success. The Supreme Court’s first significant attempt to address the problem came in 1984, with *Migra*:

The preclusive effects of former adjudication are discussed in varying and, at times, seemingly conflicting terminology, attributable to the evolution of preclusion concepts over the years. These effects are referred to collectively by most commentators as the doctrine of “*res judicata*.” . . .

This Court on more than one occasion has used the term “*res judicata*” in a narrow sense, so as to exclude issue preclusion or collateral estoppel. . . . When using that formulation, “*res judicata*”

³⁴ Nat’l Labor Relations Bd. v. Donna-Lee Sportswear Co., 836 F.2d 31, 33 (1st Cir. 1987).

³⁵ United States v. Shenberg, 89 F.3d 1461, 1478 (11th Cir. 1996) (discussing preclusion in the criminal context).

³⁶ Stall v. Bourne, 774 F.2d 657, 664–65 (4th Cir. 1985) (Murnaghan, J., dissenting), *opinion withdrawn on other grounds*, 783 F.2d 476 (4th Cir. 1986).

³⁷ David Shapiro has asked, “[a]fter all, how much do the parties and the system save if the question of preclusion is one so complex that it becomes time consuming and expensive to determine whether relitigation is indeed precluded, and if that determination is often made in favor of allowing relitigation to ensue?” SHAPIRO, *supra* note 12, at 17.

becomes virtually synonymous with “claim preclusion.” In order to avoid confusion resulting from the two uses of “res judicata,” this opinion utilizes the term “claim preclusion” to refer to the preclusive effect of a judgment in foreclosing relitigation of matters that should have been raised in an earlier suit.³⁸

As discussed above, however, courts relied on this note in *Migra* in support of both narrow and broad readings of res judicata.³⁹ More recently, in *Taylor v. Sturgell*, the Supreme Court cited this passage in *Migra* as authority for its claim that “[t]he preclusive effect of a judgment is defined by claim preclusion and issue preclusion, which are collectively referred to as ‘res judicata.’”⁴⁰ While the underlying authority in *Migra* adopts “claim preclusion” to the exclusion of “res judicata,” the *Taylor* Court adopts the modernized terminology without putting aside preexisting vocabulary. At the very least, the Supreme Court has sent mixed messages about how lower courts should conceive of the language and concepts of preclusion law.

The American Law Institute pioneered the terminological switch from the old terms to modern issue and claim preclusion with the Second Restatement of Judgments. “Using the same term for different sequences of litigation”—as for example the *Taylor* Court does with its broad conception of res judicata—“has a substantial potential for confusion, which is why the American Law Institute recommends the replacement of ‘res judicata’ (and ‘collateral estoppel’) by the more descriptive English phrases ‘claim preclusion’ and ‘issue preclusion.’”⁴¹ Many courts welcomed the linguistic switch.⁴² Still, preclusion law has yet to enjoy clarity and consolidation. In the immediate wake of the Restatement’s switch, the Supreme Court continued to use the language of res judicata and collateral estoppel.⁴³ *Taylor* ostensibly marked a modernizing shift, though one that created as much confusion as consolidation. Courts have even shown outright resistance to *Taylor*’s directive; the Third Circuit maintained that “[w]hile it has been suggested that ‘issue preclusion’ has replaced the term ‘collateral estoppel,’ [citing *Taylor*], the latter term is still very much in use We think it would be more confusing to work around

³⁸ *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 77 n.1 (1984).

³⁹ See *supra* notes 16–18 and accompanying text.

⁴⁰ *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008).

⁴¹ *Sterling v. United States*, 85 F.3d 1225, 1227 (7th Cir. 1996).

⁴² See, e.g., *Horwitz v. Alloy Auto. Co.*, 992 F.2d 100, 103 (7th Cir. 1993) (describing the ALI proposal as the preferable option for “thoughtful persons”).

⁴³ See, e.g., *McDonald v. City of West Branch*, 466 U.S. 284, 287 n.5 (1984) (noting the convenience of retaining terms used by the court of appeals).

so well-worn a phrase, so we use it too.”⁴⁴ Though the Restatement’s linguistic shift may have provided some order to the terminological chaos, the language and boundaries of these preclusion doctrines are still far from stabilized.

More importantly, the imperfect success of the Restatement’s linguistic shift demonstrates that this problem with preclusion law is more than linguistic: Changing the language has not been enough to provide doctrinal clarity. The terms “issue preclusion” and “claim preclusion” make the object of each doctrine clear, but they cannot define the contours of each or the boundaries between them. The policy concerns driving each doctrine remain unsettled, and because these concerns are distinct, collapsing them perpetuates confusion. The next Part turns to the development of these terms and the doctrines they bear to determine their underlying motivations.

II

TWO GENEALOGIES OF PRECLUSION

This Part makes the historical point that our modern claim and issue preclusion derive from two separate legal traditions—*res judicata*, from the Roman preclusion law of the same name, and collateral estoppel, from the Anglo-Norman principle that became estoppel by the record. “Although the distinctive name of ‘estoppel’ in the present connection does not emerge probably until about the middle of the 1300s,” Robert Millar writes, “the phenomenon of two distinct agencies of preclusion is manifest long before.”⁴⁵ Our vocabulary for these preclusion principles reflects the split in their origins—the Latinate *res judicata* and the French estoppel⁴⁶—and this Part surveys their distinct doctrinal developments.⁴⁷

⁴⁴ *Nationwide Mut. Fire Ins. Co. v. George V. Hamilton, Inc.*, 571 F.3d 299, 309 n.11 (3d Cir. 2009).

⁴⁵ Robert Wyness Millar, *The Historical Relation of Estoppel by Record to Res Judicata*, 35 ILL. L. REV. 41, 45 (1940).

⁴⁶ See *Estop*, OXFORD ENGLISH DICTIONARY (Mar. 2016), <http://www.oed.com/view/Entry/64598?rskey=q3Mdjq&result=2&isAdvanced=false#eid>.

⁴⁷ Professor Kevin M. Clermont has recently argued that the historic *res judicata* and collateral estoppel doctrines are “inspirational analogies” for modern doctrine, which “generate[d] internally its own *res judicata* law through the courts.” Kevin M. Clermont, *Res Judicata as Requisite for Justice 5* (Cornell Legal Studies Research Paper, No. 15-22, 2015). Rather than provide a comprehensive and direct account of historical origins, this Part aims to highlight an ongoing set of concerns that has vexed all court systems, but in importantly different ways.

A. *Private Closure & Roman Res Judicata*

By the sixth century, the Romans had codified a principle of preclusion to “protect” potential litigants from repeat litigation: “If an action real or personal has been brought against you, not the less because it has been so brought does the action endure, . . . but you are to be protected by the exception *rei judicatae*.”⁴⁸ Though private parties could bring their problems to court, they could not sue for the “same object” twice. In short, the Romans’ *res judicata* offered parties to a dispute the promise of closure.

As in modern preclusion law, *res judicata* only applied if certain prerequisites were met, and, for the most part, they follow the contours of our modern claim preclusion.⁴⁹ First, *res judicata* only barred actions that had previously been adjudicated.⁵⁰ Second, *res judicata* would only protect a defendant from the same claim—“*eadem quaestio*”—he had already defended against.⁵¹ Finally, Roman preclusion law demanded an identity of parties, exactly as does modern claim preclusion.⁵² These conditions accentuate the motivating principle of *res judicata*: private closure.

By insulating all the matters of a litigated claim from future dispute, *res judicata* could offer a broad sense of repose. A claim was defined expansively: “[O]nly he who does not pursue the same object at all will be rightly described as not bringing proceedings on the same” claim.⁵³ Further, a cause of action reached beyond the formal pleadings to the underlying issue between the parties.⁵⁴ In other words, a court would attach *res judicata* not to the specific formal pleading a plaintiff first made, but to the same matter—“*de ea re*”—as the first suit. If a party was forced to litigate its disputes in court, *res*

⁴⁸ J. INST. 4.13.5.

⁴⁹ Modern claim preclusion bars relitigation of any issues that were or could have been raised in an earlier action when (1) the second action is based on the same claim (2) between the same parties or their privies, and (3) the determination in the first action was a final judgment. *See supra* notes 20–21 (citing authorities).

⁵⁰ *See, e.g.*, GEORGE SPENCER BOWER & SIR ALEXANDER KINGCOME TURNER, THE DOCTRINE OF RES JUDICATA 412, 413 (2d ed. 1969) (noting the requirement that an issue actually have been decided).

⁵¹ *See* DIG. 44.2.3 (Ulpian, Edict 15) (“ . . . exceptionem rei iudicatae ob stare, quotiens eadem quaestio inter easdem personas reuocatur” [“[A] defense of *res judicata* will avail whenever the same issue is raised again between the same persons.”]).

⁵² *See, e.g.*, DIG. 44.2.22 (Paul, Edict 31) (“If an action on deposit has been brought against one heir, the action may nonetheless be brought against the remaining heirs too, and the defense of *res judicata* will not be available to them; for although the same issue is involved in all the actions, nevertheless, the change in persons against each of whom an action is brought in his own name makes the issue different for each of them.”).

⁵³ DIG. 44.2.5 (Ulpian, Edict 74).

⁵⁴ *Id.*

judicata ensured it would only have to engage the underlying problem once.

Though the breadth of preclusion was wide, its force could apply only to those party to the first bipolar dispute. One Roman example stipulates that even when two different parties are impacted by the same will, the status of that will in the first party's suit will have no effect on the status of that will in a second party's suit; *res judicata* would even tolerate contradictory rulings.⁵⁵ The right of *res judicata* is thus a nuclear, private right, limited only to the two parties of the first adjudication.

The policy rationale offered in Roman treatises also reflects the private nature of *res judicata*. *Res judicata* protected individuals from vexatious repeat litigation: "It has been accepted for good reason that in individual disputes a single action and one final judgment is sufficient, lest otherwise the ambit of suits be greatly increased and cause very great and insurmountable difficulty, especially if different judgments were pronounced."⁵⁶ As one maxim has it, *res judicata facit jus inter partes*⁵⁷—*res judicata* makes law between parties, giving force of law to resolution among private individuals.⁵⁸

Though finality undoubtedly also supports judicial and social interests, the Roman rule, on its own terms, prioritized private interest. Public interests seem directly represented in the maxim *interest rei publicae ut sit finis litium*—the state has an interest in an end to litigation—but even this maxim, which ostensibly puts the interest of the republic first, was originally understood as a variant on the private closure rationale. In his article *Rationale of Preclusion*, Allan Vestal notes, with surprise:

In one of the earliest cases . . . Lord Coke stated: "*interest reipub. ut sit finis litium.*" However, this learned judge then proceeded to talk in terms of harassment of the *litigants*. It would seem that, apart from the parties involved, *society* has a great interest in seeing that there is an end to litigation.⁵⁹

⁵⁵ DIG. 44.2.1 (Ulpian, Edict 2) (demonstrating that "cases decided between some persons cause no prejudice to third parties").

⁵⁶ DIG. 44.2.6 (Paul, Edict 70).

⁵⁷ See, e.g., Robert Wyness Millar, *The Premises of the Judgment as Res Judicata in Continental and Anglo-American Law*, 39 MICH. L. REV. 1, 6 (1940) (discussing this maxim).

⁵⁸ Even beyond reaching force of law, *res iudicata pro ueritate accipitur*—the resolution of adjudicated matters becomes truth for the parties involved. DIG. 50.17.207 (Ulpian, Lex Julia et Papia 1).

⁵⁹ Allan D. Vestal, *Rationale of Preclusion*, 9 ST. LOUIS U. L.J. 29, 31 (1964) (emphasis added) (citing *Ferrer's Case*, Mich. 40 & 41 Eliz. 7a, 9a).

No doubt Vestal is right that an end to litigation implicates social interests. He marvels that Coke, interpreting the Roman principle, sees the rationale of *res judicata* in so narrow a way as to be focused only on litigants. But on Coke's reading, the republic's interest in finality is really an aggregate interest in providing private closure to its citizens. Repose motivates even the interests of the republic.

As Coke's treatment of the Latin maxims shows, English jurists and treatise writers relied on these Roman rules. *Res judicata* had migrated to England no later than the early 1100s,⁶⁰ and both courts and treatise writers invoked the Roman origins of the rule.⁶¹ George Spencer Bower's *Doctrine of Res Judicata*, for example, recognizes the English received *res judicata* from the Romans, and moreover that the Roman rule wasn't exactly the same as twentieth-century English preclusion.⁶² As the English understood it, *res judicata* was originally a "general prohibition" on any "re-agitation."⁶³ *Res judicata*, that is, was a broad protection for litigants threatened by vexatious and repetitive suits, offering them the promise of closure.

B. *Legitimacy, Efficiency, & Anglo-Norman Estoppel*

By contrast, estoppel cared little about litigants and their private reprieve. As an impersonal doctrine which grew from "the notion of the inviolableness of the record,"⁶⁴ estoppel began as a tool of judicial legitimacy and became a means of achieving efficiency.

Estoppel originated in Anglo-Saxon and -Norman principles. In his *Institutes on the Laws of England*, Coke traces the word's etymology: Estoppel "[c]omes of the French word *estoupe*, from whence the English word 'stopped;' and it is called an estoppel or conclusion, because a man's own act or acceptance stops or closes his mouth to

⁶⁰ See Millar, *supra* note 45, at 44 ("[B]y the opening years of the 1100s, at latest, the Roman principle of *res judicata* had entered into the law of England.").

⁶¹ BOWER & TURNER, *supra* note 50, at 411 (noting that Latin maxims were "frequently cited in English judgments"). As for treatises, Bigelow's *Law of Estoppel*, for example, cites to the Institutes of Justinian, "published in the sixth century," and translates the Roman rule: "Again, if an action, real or personal, has been brought against you, the obligation still subsists, and in strict law an action might still be brought against you for the same object, but you are protected by the exception *rei judicata*." MELVILLE M. BIGELOW, A TREATISE ON THE LAW OF ESTOPPEL AND ITS APPLICATION IN PRACTICE 5 n.3 (2d ed., Boston, Little, Brown & Co. 1876), <https://archive.org/stream/atreatiseonlawe00bigegoog#page/n9/mode/2up>.

⁶² BOWER & TURNER, *supra* note 50, at 412 ("[T]he Roman rule recognizes no such distinction as is drawn in our law between the effect of a *res judicata* as a bar to any contradiction, and its effect as a bar to any repetition.").

⁶³ *Id.*

⁶⁴ Millar, *supra* note 45, at 45.

allege or plead the contrary.”⁶⁵ Avant la lettre, a Germanic doctrine “very like estoppel by record” also bound parties to the claims they made and the actions they took anterior to judgment:⁶⁶

[W]here the second suit is not merely a repetition of the former controversy, yet is so related that to allow a given allegation therein would be to permit a contradiction of some allegation, admission or finding in the first suit, it is not the judgment itself in the first suit but the particular record item which would be thus contradicted that stands as the barrier⁶⁷

In short, the earliest estoppel prevented any party from challenging issues resolved in the record.

The English first adopted a form of estoppel—“estoppel by record”—around the twelfth century, and from there the history of estoppel is one of continually expanding scope. “[E]stoppel by deed grew naturally out of estoppel by matter of record,” as producing a deed soon came to be seen as conclusive proof by virtue of recognition by the court.⁶⁸ Unlike the original estoppel by record, however, estoppel by deed began to accrue the more equitable rationale invoked by Coke—that “a man’s own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth.”⁶⁹ Estoppel by deed then led to estoppel *in pais*, where a party’s own conduct, rather than a legal judgment or deed, triggers the preclusive effect.⁷⁰

Early estoppel gave rise to issue preclusion, which today bars litigation of an issue already litigated and essential to a valid and final judgment.⁷¹ Some, but not all, of these doctrinal features were with estoppel from the beginning. First, estoppel has always attached to the individual issue, barring a second judicial treatment as it does today.⁷² Second, however, the importance of the issue has changed. While modern courts require that issues must have been essential to a valid and final judgment before assigning them preclusive effect, this prerequisite did not attach to earlier estoppels. Before the late thirteenth century, any issues resolved anterior to judgment enjoyed preclusive

⁶⁵ COKE, *supra* note 31, § 667.

⁶⁶ Millar, *supra* note 45, at 43.

⁶⁷ *Id.* at 46.

⁶⁸ HOLDSWORTH, *supra* note 32, at 154–55.

⁶⁹ *Id.* at 158.

⁷⁰ *Id.* at 145 (relying on Coke’s history, cited *supra* note 31).

⁷¹ See *supra* note 22 (collecting sources which outline the doctrinal features of issue preclusion).

⁷² Colin Hugh Buckley, *Issue Preclusion and Issues of Law: A Doctrinal Framework Based on Rules of Recognition, Jurisdiction and Legal History*, 24 HOUS. L. REV. 875, 877 (1987) (noting that early estoppel rules insisted “parties could not deny the matters in the record of a suit,” even if the second suit was under a different writ).

effect, even if a court never reached a final judgment.⁷³ Though judgment became a prerequisite to estoppel relatively early, the record—not judgment—was the basis of an estoppel into the eighteenth century.⁷⁴ Only then did preclusion attach to those issues essential to a final judgment, rather than “any matter which came collaterally in question.”⁷⁵ By implication, estoppel would only apply to issues that had actually been litigated.⁷⁶ Estoppel thus derives from the record and operates foremost on an individual issue.

Unlike *res judicata*, which tied the identity of a claim to the party who brought it, estoppel looked to the judicial record as the authoritative source of preclusion. In his history of English common law, for example, Holdsworth adds that “the production of the record was so conclusive that there was no need for a further trial.”⁷⁷ In other words, the predicate for preclusive effect was judicial recording, not party action or motion. While *res judicata* looked to the entire cause of action—which was in large part defined by the parties involved⁷⁸—estoppel looked to the issue, defined by the record.

The impersonal quality of estoppel corresponds with its institutional focus: Estoppel was first a tool of judicial legitimacy. In short, estoppel “sought to protect the integrity of the court.”⁷⁹ The sanctity of the record protected the court from contradiction, which could undermine the authority of its rule. As one commentator has explained, “the judicial institution has an interest in seeing that its decisions are well-regarded and not immediately subject to a ‘second opinion.’”⁸⁰ The Duchess of Kingston’s case illustrates this concern: In the case, the King’s Court refused to grant preclusive effect to a divorce decree issued by an ecclesiastical court.⁸¹ Only the rule of the

⁷³ See Millar, *supra* note 45, at 54 (describing the evolution of estoppel toward requiring a judgment).

⁷⁴ *Id.* at 54–56.

⁷⁵ The Duchess of Kingston’s Case (1776) 20 How. St. Tr. 355, 538 (cited in Note, *Collateral Estoppel by Judgment*, 52 COLUM. L. REV. 647, 660 (1952)).

⁷⁶ The late nineteenth-century case *Cromwell v. County of Sac* states the rule directly: “[W]here the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.” 94 U.S. 351, 353 (1876).

⁷⁷ HOLDSWORTH, *supra* note 32, at 148.

⁷⁸ See *supra* note 55 and accompanying text (demonstrating that Roman courts defined a cause of action by the parties which brought it, regardless of whether an earlier litigation disposed of a third party’s rights).

⁷⁹ Buckley, *supra* note 72, at 879.

⁸⁰ *Id.*

⁸¹ The Duchess of Kingston’s Case (1776) 168 Eng. Rep. 175, 176 (“[A] sentence of the Spiritual Court against a marriage, in a suit for jactitation of marriage, is not conclusive evidence, so as to stop the Counsel for the Crown from proving the said marriage in an

King's Court, not of ecclesiastical courts, could estop future litigation.⁸² If parties, or even resolution of a conflict, were the key concern of estoppel, the findings of any court with proper jurisdiction should have preclusive effect in order to allow the parties to move on. Instead, the institution issuing judgments was the lynchpin of estoppel's finality.

Even in its earlier forms, estoppel harbored a capacity to protect more systemic—indeed, public—interests. Initially estoppel could operate without a final judgment; even when final judgment came to be required, issues peripheral to the judgment enjoyed preclusive effect.⁸³ Each resolved issue had independent preclusive force that would allow for broader application. “Issues,” moreover, were as much issues of law as issues of fact. The distinction between issues of law and fact was not recognized until colonial America,⁸⁴ meaning that a court's or jury's determination of an issue could settle legal principles, which by their nature are more broadly applicable than issues of fact. Contrasting estoppel by record to *res judicata*, one twentieth-century treatise attests that “the record has conclusive effect upon all the world. It imports absolute verity, not only against the parties to it and those in privity with them, but against strangers also.”⁸⁵

The eventual reach of estoppel to “strangers” is likely the most significant feature of modern issue preclusion. When an identity of parties is no longer prerequisite to preclusive effect, estoppel can function across bipolar disputes to impact overall systemic efficiency. The abandonment came slowly and modestly, but the impersonal, institutional nature of estoppel made the expansion possible. Originally estoppel only applied to the parties of an initial suit: Estoppel by record carried a mutuality requirement.⁸⁶ Even with explicit mutuality

indictment for polygamy.”). The lower court had disagreed. It “[a]id[ed] it down as a general rule, that wherever a matter comes to be tried in a collateral way, the decree, sentence or judgment of any other Court, having competent jurisdiction, shall be received as conclusive evidence of the matter so determined.” *Meadows v. Kingston* (1775) 27 Eng. Rep. 487, 489–90.

⁸² *The Duchess of Kingston's Case* (1776) 168 Eng. Rep. 175, 176.

⁸³ See *supra* notes 73–75 and accompanying text.

⁸⁴ See Buckley, *supra* note 72, at 877–79 (“Estoppel by record . . . ignored any distinction between law and fact.”); see also Austin Wakeman Scott, *Trial by Jury and the Reform of Civil Procedure*, 31 HARV. L. REV. 669, 675–78 (1918) (describing the transition from a jury's power to find both law and fact to its role as only factfinder).

⁸⁵ MELVILLE M. BIGELOW, *A TREATISE ON THE LAW OF ESTOPPEL OR OF INCONTESTABLE RIGHTS* 8 (James N. Carter ed., 6th ed. rev. 1913). Bigelow also describes *res judicata* as arising from estoppel by record, but he means “estoppel by record” only as a synonym of preclusion broadly.

⁸⁶ For estoppel by deed, treatises also reflect that “[t]he estoppel must be mutual.” *Id.* at 364.

requirements, however, the record began to take on independent preclusive force. As one treatise put it, “[n]o one, whether party, privy, or stranger, is permitted to deny the fact that the proceedings narrated in the record took place . . . or that the parties there named as litigants actually or constructively participated in the cause, or that judgment was given as therein stated.”⁸⁷ Litigants who were not party to suit were barred only from contesting the fact *of* the record and judgment, rather than the facts *in* the record and judgment; though minor, the estoppel effect extended modestly to nonparties.

Courts began to tap the potential of nonmutual estoppel more fully with *in rem* actions.⁸⁸ The estoppel there moved from parties to privies, and “not only privies in blood” but also in estate and then law.⁸⁹ “But it soon became obvious that some judgments must have an even more extensive effect,” one treatise declares, and eventually became “binding as against all the world and not only *inter partes*.”⁹⁰

Though the mutuality of estoppel with *in personam* actions was far more common than the nonmutuality of *in rem* actions, the latter was far more popular among critics of estoppel law. Most famously, Jeremy Bentham declared the “rule of *mutuality* [was] destitute of even” [a] “semblance of reason.”⁹¹ Bentham compares trials to a dice game: Where a roll of the dice should only affect the player in the game, a trial has broader repercussions. Because earlier proceedings establish facts that exist after the trial ends, Bentham contends parties should be held accountable to those facts even as against nonparties. Many courts and scholars soon joined Bentham in his critique of mutuality.⁹²

Adopting Bentham’s logic almost exactly, the Court in *Blonder-Tongue Laboratories v. University of Illinois Foundation* extended issue preclusion beyond parties by abandoning mutuality of estoppel.⁹³ In earlier litigation, the Foundation had lost its patent infringement claim against another defendant after the court found the Foundation did not actually hold a valid patent. The Foundation then tried to enforce the same (invalid) patent against *Blonder-*

⁸⁷ *Id.* at 36.

⁸⁸ See HOLDSWORTH, *supra* note 32, at 150–51 (“[I]t soon became clear that a judgment in a real action, which decided a right to possession, must have a more extensive effect.”).

⁸⁹ *Id.*

⁹⁰ *Id.* at 151–52.

⁹¹ JEREMY BENTHAM, 3 RATIONALE OF JUDICIAL EVIDENCE 579 (London, Hunt & Clarke 1827).

⁹² See, e.g., *Zdanok v. Glidden Co.*, 327 F.2d 944, 954 (2d Cir. 1964) (citing Bentham to support nonmutual estoppel); *Bernhard v. Bank of Am. Nat’l Tr. & Sav. Ass’n*, 122 P.2d 892, 895 (Cal. 1942) (explicitly rejecting mutuality of estoppel).

⁹³ *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 350 (1971).

Tongue Laboratories.⁹⁴ Because the defendant had changed between suits, breaking mutuality, the parties hadn't raised any questions of preclusion until the Supreme Court requested they do so.⁹⁵ The Court then held that, at least in patent cases, collateral estoppel could be invoked by a first-time defendant if the plaintiff had already enjoyed a "full and fair opportunity to litigate."⁹⁶ That is, nonmutual estoppel could be applied "defensively," against a party which had already had its day in court.

Parklane Hosiery next extended nonmutual estoppel beyond patent cases and to so-called "offensive" uses.⁹⁷ As *Parklane Hosiery* was facing a shareholder suit for issuing a false and misleading proxy statement, the SEC initiated proceedings against *Parklane* on the same grounds; before the shareholder class action reached trial, the SEC had already won its suit.⁹⁸ The shareholders moved to estop defendant *Parklane* from relitigating any of the issues decided against it in the SEC action.⁹⁹ The Court asked "whether a litigant who was not a party to a prior judgment may nevertheless use that judgment 'offensively' to prevent a defendant from relitigating issues resolved in the earlier proceeding."¹⁰⁰ Unlike the plaintiff patent holder in *Blonder-Tongue*, the defendant in *Parklane* hadn't chosen to bring its problems to court; the defendant may also have had inadequate incentives to fully litigate the case or procedural disadvantages which may not have arisen in another forum.¹⁰¹ Noting, however, that "the mutuality requirement was criticized almost from its inception,"¹⁰² the Supreme Court concluded that "the preferable approach for dealing with these problems in the federal courts is not to preclude the use of offensive collateral estoppel, but to grant trial courts broad discretion to determine when it should be applied."¹⁰³ If the court suspects the party seeking preclusion is a "wait and see" plaintiff who could have joined the previous action, if the defendant opposing preclusion either had insufficient incentives to fully litigate the case or procedural disadvantages in the earlier litigation, or if the judgment from which the

⁹⁴ *Id.* at 314–17 (providing the factual background of the case).

⁹⁵ John Bernard Corr, *Supreme Court Doctrine in the Trenches: The Case of Collateral Estoppel*, 27 WM. & MARY L. REV. 35, 37–38 (1985).

⁹⁶ *Blonder-Tongue*, 402 U.S. at 329.

⁹⁷ *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331–33 (1979) (concluding trial courts should be given broad discretion to determine when "offensive" estoppel should apply).

⁹⁸ *Id.* at 324–25.

⁹⁹ *Id.* at 325.

¹⁰⁰ *Id.* at 326.

¹⁰¹ *Id.* at 329–31.

¹⁰² *Id.* at 327.

¹⁰³ *Id.* at 331.

issue-preclusive effect was drawn was itself inconsistent with other judgments, a court may in its discretion reject the application of estoppel.¹⁰⁴ But if these equitable concerns are satisfied, courts may apply issue preclusion even when the identity of parties has changed. With mutuality altogether abandoned, courts could apply issue preclusion across disputes to “maximiz[e] the benefit of the tremendous investment of societal resources,” realizing efficiency benefits.¹⁰⁵

C. *The Interests of Preclusion*

Preclusion law aims to offer finality in all its forms, but the split in Roman and Anglo-Norman doctrines reveals multiple interests bound up in finality. While the Roman rule looked inward to parties, Anglo-Norman estoppel looked continually outward. The doctrine began as a way to protect the court’s authority by elevating matters of record to truth, but then expanded to govern parties’ own acts independent of courts, and finally moved beyond parties altogether.

The Roman rule, and the American *res judicata* inherited from it, never moved beyond parties; while the rule is expansive in covering even those issues which were never litigated, it is categorically confined to the immediate bipolar dispute. The concern underlying *res judicata* was the parties to the suit—protecting them from vexatious litigation and delivering on the promise of finality.¹⁰⁶

English estoppel was both first and finally a doctrine of institutional interest. Constitutionally, it was built on the judicial record.¹⁰⁷ Anchored in the record, estoppel could protect the court from contradiction and eventually expand beyond the bipolar dispute from which it arose. In short, estoppel developed to protect the legitimacy of the courts and ultimately the efficiency of the judicial system.

Where there are different interests, there is a possibility these interests might disagree. Litigants’ interests in private closure and societal interests in systemic efficiency may often line up, but they are not inherently aligned. In *United States v. Stauffer Chemical Co.*, Justice White suggested that “[p]reclusion must be evaluated in light of the policy concerns underlying the doctrine.”¹⁰⁸ The distinguishable policy concerns of the Roman and Anglo-Norman traditions, the next

¹⁰⁴ See *id.* at 329–31.

¹⁰⁵ See ISSACHAROFF, *supra* note 20, at 164 (describing issue preclusion’s efficiency rationale).

¹⁰⁶ See *supra* notes 48–58 and accompanying text.

¹⁰⁷ See Millar, *supra* note 45, at 45 (noting that estoppel “did not rely upon the judgment *qua* judgment as its operative basis, but centered itself upon some part of the record-proceedings anterior to judgment”).

¹⁰⁸ 464 U.S. 165, 176 (1984) (White, J., concurring).

Part argues, should guide the evaluation of preclusion when public and private interests conflict.

III PRECLUSION'S POLICIES

This Part considers how the differing traditions which led to modern preclusion law might alleviate tensions within preclusion terminology and doctrine. It first examines those cases where public and private preclusion interests align. Because these are different constituent interests, however, the possibility of their misalignment remains. This Part next considers cases that deal with public rights to suggest that when interests do conflict, conflicts should be resolved by turning to the rationales motivating each form of preclusion.

A. *Aligned Interests*

The “enduring aim of achieving finality through dispute resolution” drives our judicial system: “Not only do courts provide a forum for argument and an impartial and well-reasoned adjudication of a dispute, courts attempt to provide closure”¹⁰⁹ It is no surprise, then, that the difference between the private closure rationale of res judicata and the institutional rationale of collateral estoppel typically goes unrealized. In short, often public and private interests alike are served by providing an end to dispute.

The long-lasting *Engle* tobacco litigation dramatizes both the obstacles posed by preclusion’s terminological instability and, more importantly, why that instability rarely leads courts to address the underlying theoretical divergence. In the *Engle* litigation, the Florida Supreme Court and Eleventh Circuit spent nearly half a decade trying to sort out what “res judicata effect” should entail.¹¹⁰ The litigation involved a class of Florida smokers who sued major tobacco companies for injuries they alleged resulted from smoking.¹¹¹ Since individual issues threatened class coherence, the Florida court broke the trial into phases. In Phase I, a jury considered the tobacco companies’ conduct and the “general health effects of smoking” and found against the tobacco companies on all counts.¹¹² The jury then addressed the individual compensatory damages for the named representatives of the class, considering their contributory liability, and the total amount

¹⁰⁹ ISSACHAROFF, *supra* note 20, at 156 (characterizing the goal of preclusion as finality).

¹¹⁰ *Engle v. Liggett Grp., Inc.*, 945 So. 2d 1246, 1254 (Fla. 2006); *Brown v. R.J. Reynolds Tobacco Co.*, 611 F.3d 1324, 1333 (11th Cir. 2010).

¹¹¹ See *Engle*, 945 So. 2d at 1254 (describing the history of the case).

¹¹² *Liggett Grp., Inc. v. Engle*, 853 So. 2d 434, 441 (Fla. Dist. Ct. App. 2003), *aff’d in part and rev’d in part*, 945 So. 2d 1246 (Fla. 2006).

of damages to be distributed among the rest of the class members. Finally, the third phase disaggregated the class, giving members an opportunity to prove their individual harms and damages in front of new juries.¹¹³ The Supreme Court of Florida stated that Phase I findings would have “res judicata effect” in the individual Phase III trials.¹¹⁴

When it came time to apply this “res judicata effect,” however, courts came into conflict. The Eleventh Circuit, resolving the meaning of “res judicata effect” on interlocutory appeal, began by noting the ambivalence of the Florida court’s directive: “The term ‘res judicata’ is translated from the Latin as ‘a thing adjudicated,’ but it has more than one meaning. . . . [T]he Florida Supreme Court’s direction that the Phase I approved findings were to have ‘res judicata effect’ could have referred to claim preclusion, to issue preclusion, or to both.”¹¹⁵ The Eleventh Circuit attempted to determine the appropriate doctrine and select the term that followed: “Because factual issues and not causes of action were decided in Phase I, the Florida Supreme Court’s direction that the approved findings were to have ‘res judicata effect’ in future trials involving former class members necessarily refers to issue preclusion.”¹¹⁶ At the core of the preclusive effect were individual issues—specific findings about the defendants’ conduct—that essentially made the plaintiffs fungible. The “issues,” not the plaintiffs’ “action[s],” were to organize future attempts at litigation. The Eleventh Circuit even went so far as to note definitively that it would have rejected any argument that glossed the “res judicata effect” as claim preclusive.¹¹⁷

The Florida Supreme Court disagreed: “[W]e used the correct term when we gave the Phase I findings ‘res judicata effect,’”¹¹⁸ the court insisted, reasoning that claim preclusion was appropriate because the individual plaintiffs’ claims involved “*the same causes of action between the same parties.*”¹¹⁹ The Florida Supreme Court’s emphasis picks up almost exactly the emphasis of Roman courts, which looked to “*eadem quaestio, inter eadem personas*”—the same question, between the same parties—as the basis of preclusive effect.¹²⁰ The majority seems to conceive of the ongoing litigation as

¹¹³ *Liggett*, 853 So. 2d at 441–42.

¹¹⁴ *Engle*, 945 So. 2d at 1254.

¹¹⁵ *Brown*, 611 F.3d at 1331–32. The court also surveys the confusion surrounding the term. *Id.*

¹¹⁶ *Id.* at 1333.

¹¹⁷ *Id.* at 1333 n.7.

¹¹⁸ *Philip Morris USA, Inc. v. Douglas*, 110 So. 3d 419, 433 (Fla. 2013).

¹¹⁹ *Id.* at 432.

¹²⁰ DIG. 44.2.3 (Ulpian, Edict 15).

one protracted bipolar dispute. (Only one dissenting justice on the Florida Supreme Court, Justice Canady, recognized that issues resolved within a single cause of action could have issue preclusive effect by virtue of direct estoppel.¹²¹) In light of the Florida court's insistence, the Eleventh Circuit revised its opinion. It deferred to Florida's determination after finding it consistent with due process, but not before describing the Florida Supreme Court's classification as "unorthodox."¹²²

The Eleventh Circuit concluded that "[w]hether the Supreme Court of Florida calls the relevant doctrine issue preclusion, claim preclusion, or something else, is no concern of ours,"¹²³ but the name of the doctrine could only be "no concern" because the private focus of the Florida Court and the public focus of the Eleventh Circuit pointed in the same direction. Under either standard, defendants could not relitigate Phase I findings in the Phase III individual trials of class members.

Many, and perhaps most, cases follow the mold of *Engle*, where terminological difference protracts litigation and encourages confusion without troubling an underlying substantive finding about whether or not a party should be prevented from relitigating a particular matter. For cases where all of the policy concerns motivating traditional estoppel and *res judicata* align, preclusion's history has only a modest role to play by encouraging precision and clarity. As the next section considers, however, this alignment of interests is neither necessary nor inevitable.

B. *Misaligned Interests*

Private repose and systemic efficiency often push toward the same result, but separate rationales for separate preclusion doctrines leave open the possibility of divergence. Through its reach to issues that were not but could have been litigated, its resistance to vexatious litigation, and, moreover, its applicability only to the parties of an original suit, *res judicata* is best suited to accommodate private interests; given its applicability beyond the parties to an original suit, ability to protect against contradictory decisions, and conservative effect on judicial resources, estoppel is best suited to protect public-

¹²¹ See *Douglas*, 110 So. 3d at 437–38 (Canady, J., dissenting) ("If the second action involves the same claim or cause of action as the first, issue preclusion may be called direct estoppel." (citation omitted)). The Second Restatement of Judgments provides strong support for Justice Canady's position. See RESTATEMENT (SECOND) OF JUDGMENTS § 13 cmt. g (AM. LAW INST. 1982).

¹²² *Walker v. R.J. Reynolds Tobacco Co.*, 734 F.3d 1278, 1289 (11th Cir. 2013).

¹²³ *Id.*

facing interests.¹²⁴ Res judicata and estoppel are not perfect substitutes for one another, neither functionally nor theoretically. The possibility remains, then, that they might disagree.

Public rights are a kind of limit case for the intersection of res judicata and collateral estoppel. Public rights are often aggregate rights, where “a doctrinal feature of what is ostensibly individual litigation . . . gives rise to demands for the suit to bind nonparties in some fashion.”¹²⁵ Unlike private rights, which belong to an individual, aggregate rights belong to groups of individuals, or the public at large. While, for example, an individual is harmed by a tortious punch or a breach of contract, the public is injured by blocking of a federal waterway¹²⁶ or vote dilution.¹²⁷ Abram Chayes has explained that in litigation of public rights, many of the features of traditional common-law disputes fall by the wayside: Among other differences, the “scope” of the suit is not predetermined but “shaped primarily by the court and parties.”¹²⁸ Relief is typically prospective, “often having important consequences for many persons including absentees.”¹²⁹ Most importantly, “[t]he subject matter of the lawsuit is not a dispute between private individuals about private rights, but a grievance about the operation of public policy.”¹³⁰ Public rights litigation seeks to redress a wrong with “the operation of public policy,” which affects not only the named plaintiff but also, almost by definition, the public. This potentially nationwide group of aggrieved and affected people means, as Chayes implies, that the bipolar dispute structure of common-law disputes cannot hold. When one individual or one group raises a public right, the adjudication of that right affects “absentees” much like in class litigation, but without the procedural protections of certification. Individual enforcement actions for aggregate rights pose a serious problem for preclusion: neither claim nor issue preclusion can currently prevent ad infinitum repeat litigation of public rights by

¹²⁴ See *supra* Part II (describing the original purposes and contemporary strengths of estoppel).

¹²⁵ Richard A. Nagareda, *Embedded Aggregation in Civil Litigation*, 95 CORNELL L. REV. 1105, 1108 (2010).

¹²⁶ See, e.g., *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. 421, 431 (1855) (recognizing that the “right of navigation [is] a public right common to all”).

¹²⁷ See Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1666–67 (2001) (“What makes dilution claims unusual is that the individual injury at issue cannot be proved without reference to the status of the group as a whole [I]ndividual injury arises from the aggregate treatment of group members—I call rights that share these characteristics ‘aggregate rights.’”).

¹²⁸ Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1302 (1976).

¹²⁹ *Id.*

¹³⁰ *Id.*

successive plaintiffs. While *res judicata* may prevent a single individual from enforcing a right twice, it cannot save a court from rehearing the same enforcement action from hundreds, or even thousands, of individuals. Collateral estoppel may prevent relitigation of the same issue, but it can only operate against parties which have had a fair day in court.

With *Taylor v. Sturgell* in 2008, the Supreme Court confronted the problem of public rights.¹³¹ The litigation began when the FAA denied Greg Herrick's Freedom of Information Act (FOIA) request to see the plans for a vintage F-45 aircraft. Herrick sued, but lost when the District of Wyoming upheld the airplane manufacturer's use of FOIA's trade secret exemption.¹³² Soon after the Tenth Circuit affirmed Herrick's loss,¹³³ Brent Taylor brought suit against the FAA in D.C. District Court, challenging denial of the same FOIA request for F-45 plans.¹³⁴ Taylor, it turned out, was a member of the same aviation club as Herrick,¹³⁵ and (as the Supreme Court was sure to note) Herrick's "friend."¹³⁶ In Professor Samuel Issacharoff's words, "Taylor sought to press the exact same claim for the same information based on the same legal theory pursued by the same lawyer in order to restore what may have been the same aircraft."¹³⁷

The similarity of Taylor's and Herrick's cases was not lost on the D.C. Circuit. The district court had dismissed Taylor's claim as barred by *res judicata*, and the circuit affirmed. Taylor argued he was not in privity with Herrick, and therefore not a "same party" in the sense *res judicata* allows, but the D.C. Circuit disagreed: "Courts now generally hold a nonparty's claim precluded by a prior suit based upon a particular form of privity known as 'virtual representation.'"¹³⁸ Identity of interests, adequacy of representation, and either a "close relationship" between the two litigants, "substantial participation" by the represented litigant in the first case, or "tactical maneuvering" to avoid preclusion would suffice to show "virtual representation"; virtual representation, in turn, meant all litigants' due process rights were satisfied.¹³⁹

¹³¹ 553 U.S. 880 (2008).

¹³² See *Herrick v. Garvey*, 200 F. Supp. 2d 1321 (D. Wyo. 2000), *aff'd*, 298 F.3d 1184 (10th Cir. 2002).

¹³³ See *Herrick v. Garvey*, 298 F.3d 1184 (10th Cir. 2002).

¹³⁴ See *Taylor v. Blakey*, 490 F.3d 965, 968 (D.C. Cir. 2007).

¹³⁵ *Id.* at 969.

¹³⁶ *Taylor*, 553 U.S. at 887.

¹³⁷ Samuel Issacharoff, *Private Claims, Aggregate Rights*, 2008 SUP. CT. REV. 183, 198.

¹³⁸ *Blakey*, 490 F.3d at 970.

¹³⁹ See *id.* at 971-72.

As the Supreme Court recognized, however, this use of *res judicata* by way of virtual representation “transform[ed] Herrick post facto into the representative for a class of potential claimants, each bound to the outcome of his litigation without notice or the ability to participate.”¹⁴⁰ The due process harms of virtual representation are undeniable; virtual representation essentially substitutes a subjective and unpredictable fact-specific inquiry about the relationship between successive parties for the procedural rigor of class certification and the adequacy and notice which come with it. Overruling the D.C. Circuit, the Supreme Court consequently remanded the case for a determination of whether Taylor was Herrick’s agent. Only then would preclusion be appropriate.¹⁴¹

Virtual representation was an unsatisfactory response to this repeat litigation, but remanding the case didn’t offer much resolution either. Rather than address the factual proximity between Taylor and Herrick—the metric of legal privity offered by the Supreme Court—the district court on remand largely considered whether the FAA was justified in keeping the airplane plans privileged.¹⁴² That is, the court heard *Herrick* all over again. In fact, *Herrick* was at the surface of the opinion. In addition to a section devoted exclusively to the case,¹⁴³ the D.C. District Court relied liberally on the Tenth Circuit’s opinion, quoting paragraphs at a time.¹⁴⁴ In this single case, district courts tried the general issue of whether the F-45 plans were subject to FOIA’s trade secrecy exemption three times, draining three times the resources typically devoted to a single legal issue. In a judicial system strapped for resources, time spent hearing the same case twice (or even thrice) reduces judicial time and resources available to hear other disputes, including those that haven’t yet been heard even once.¹⁴⁵

¹⁴⁰ Issacharoff, *supra* note 137, at 199; *see also* Nagareda, *supra* note 125, at 1117–18, 1121, 1123 (“[T]he Court ultimately limits what an individual lawsuit may do out of concern that the lawsuit would otherwise operate as a *de facto* class action.”).

¹⁴¹ *Taylor*, 553 U.S. at 905–06.

¹⁴² *See Taylor v. Babbitt*, 760 F. Supp. 2d 80 (D.D.C. 2011).

¹⁴³ *See id.* at 83.

¹⁴⁴ *See id.* at 86–87.

¹⁴⁵ Even before FOIA disputes get to court, the requests themselves can put pressure on the equity and efficiency of our court system. As the example of the Hawaii Department of Health discussed above shows, an influx of repetitive FOIA requests can overwhelm agencies and compromise their functioning. *See supra* note 6 and accompanying text. FOIA requests can also be deployed as a tool of harassment in their own right. *See* MICHAEL HALPERN, CTR. FOR SCI. & DEMOCRACY AT THE UNION OF CONCERNED SCIENTISTS, FREEDOM TO BULLY: HOW LAWS INTENDED TO FREE INFORMATION ARE USED TO HARASS RESEARCHERS 2 (2015), <http://www.ucsusa.org/sites/default/files/attach/2015/09/freedom-to-bully-ucs-2015-final.pdf> (noting that “individuals and well-heeled

By skirting the preclusion issue on remand, the district court allowed the parties in *Taylor* to relitigate the merits. Notably, the district court reached a different result in round three, holding that the FAA could not claim the trade secrecy exemption at issue. Even if the court reached a “better” result (however that may normatively be defined) the second or third time around, in a traditional bipolar dispute that improvement would be irrelevant: Once a party has had a full opportunity to litigate its claim, that party is claim precluded from asserting the same cause of action, regardless of whether the party has, for example, developed a better legal theory.¹⁴⁶ If Taylor should be allowed to bring his claim, then, it must be because he has his own claim to bring, not because he may reach a better result on Herrick’s.

The relationship between Taylor and Herrick’s claim is at the core of the public rights issue. In this case, Taylor won; once Taylor could access the airplane plans, however, Herrick could too. So could any other airplane enthusiast: Once the information became public, *any* interested party could access it. The right and remedy FOIA provides are assigned not to any particular person, but to the public at large. In Professor Richard Nagareda’s words:

FOIA confers an undifferentiated right upon “any person” to seek disclosure of records held by the federal government and, thereafter, to sue if disclosure is withheld. . . . As to any given record, then, the potential scope of litigation extends to the world, commensurate with the underlying nature of the wrong framed in FOIA—namely, an unwarranted lack of transparency vis-à-vis the public at large concerning the operations of the federal government.¹⁴⁷

Both the right and remedy extend to “the world”—any member of the public could make a request for records and enforce that request by suit, which means every member of the public shares the underlying right.¹⁴⁸ The narrow question of whether Taylor is or is not claim pre-

special interests are increasingly using broad open records requests to attack and harass scientists and other researchers”).

¹⁴⁶ See, e.g., *Manego v. Orleans Bd. of Trade*, 773 F.2d 1, 6 (1st Cir. 1985) (applying claim preclusion to prevent the losing plaintiff from asserting a discrimination claim on a new legal theory).

¹⁴⁷ Nagareda, *supra* note 125, at 1124 (citing 5 U.S.C. § 552(a)(3)(A)(ii), (4)(B) (2006)).

¹⁴⁸ In *Taylor*, the Supreme Court quibbled with this point, noting that “a successful FOIA action results in a grant of relief to the individual plaintiff, not a decree benefitting the public at large.” *Taylor v. Sturgell*, 553 U.S. 880, 903 (2008). Yet even the Court itself has “several times said that FOIA vindicates a ‘public’ interest.” *Id.* at 902. Whether the agency posts the sought-after information online itself or provides it to a citizen who the agency expects will do so seems to be more a technical matter than a lynchpin in determining whether the law vindicates a public right. As the Court notes, “[t]he opening sentence of FOIA, it is true, states that agencies ‘shall make [information] available to the

cluded as Herrick’s agent, then, is only symptomatic. The core question is whether our claim preclusion law, which is based in private closure to a bipolar dispute, can accommodate a claim that by its public nature reaches beyond the parties to “the entire citizenry.”¹⁴⁹

The Supreme Court is right that *res judicata* cannot extend so far; the doctrine only bars relitigation by parties or their privies (and even “privies,” on the surface, is private in its reach). But the Court, like the lower court on remand, avoided the real preclusion issue at play. Following Justice White’s submission that “[p]reclusion must be evaluated in light of the policy concerns underlying the doctrine,”¹⁵⁰ the policy of *res judicata* articulated in Part II—providing closure to private parties—does not counsel in favor of preclusion. If *res judicata* aims to provide closure to parties, application to *Taylor* is a pipe dream: Neither due process nor practical constraints would allow a court to finally determine the rights of “the entire citizenry.”

The Court’s opinion subsumed the possibility of a more fine-grained approach to preclusion and its policy concerns by collapsing claim preclusion and issue preclusion under a broad rubric of “*res judicata*.”¹⁵¹ By grouping the two distinct forms of preclusion “collectively” as *res judicata*,¹⁵² the Court effectively eclipsed the difference in rationales underlying each tradition of preclusion. Preclusion is important in the airplane enthusiast’s FOIA request not because he seeks repose, but because, as the FAA argued in its briefing,¹⁵³ the claim had such widespread applicability that it threatened systemic efficiency. With an aggregate right that belongs to all Americans, the policy concern must be broader efficiency, not private closure.

Taylor wasn’t the only case to expose these misaligned interests. As the Eighth Circuit noted in 1996, “virtual representation” was considered “particularly appropriate for public law issues” before the

public.” *Id.* (citing 5 U.S.C. § 552(a) (2006)) (latter alteration in original). FOIA, then, is about “the operation of public policy,” in Chayes’s formulation, not “a dispute between private individuals about private rights.” Chayes, *supra* note 129, at 1302.

¹⁴⁹ See Issacharoff, *supra* note 137, at 201 (explaining that “the core problem in *Taylor* remains unresolved” because of the “undifferentiated nature of the claim” *Taylor* and Herrick asserted against the FAA).

¹⁵⁰ *United States v. Stauffer Chem. Co.*, 464 U.S. 165, 176 (1984) (White, J., concurring).

¹⁵¹ *Taylor*, 553 U.S. at 892.

¹⁵² *Id.*

¹⁵³ See Brief for the Federal Respondent at 36–37, *Taylor*, 553 U.S. 880 (No. 07-371), 2008 WL 782551 at *36–37 (arguing that “[t]he public nature of the right under FOIA, together with its minimal standing requirement, creates particularly fertile ground for vexatious litigation . . . [because] Herrick could relitigate his FOIA loss endlessly” through proxies).

Supreme Court rejected the doctrine in *Taylor*.¹⁵⁴ *Tyus v. Schoemehl*, for example, concerned sequential vote dilution challenges. Five St. Louis aldermen first brought suit challenging new ward boundaries which they claimed violated the Fourteenth Amendment and § 2 of the Voting Rights Act by purposefully diluting the strength of black votes. After some difficulties with their attorney, the plaintiffs moved to voluntarily dismiss their claim without prejudice. They then raised these same challenges in a new suit, this time joined by three new named plaintiffs. The district court rejected the second suit on claim preclusion grounds, finding that the five original plaintiffs had already had their day in court, and acted as virtual representatives for the three new plaintiffs.¹⁵⁵ Though the Eighth Circuit agreed preclusion was appropriate, it turned away from the district court's reliance on claim preclusion. The court began its analysis with the pronouncement that "[p]reclusion is rooted in concerns of judicial economy."¹⁵⁶ It then turned its attention to virtual representation, emphasizing that for "public law issues" virtual representation was especially appropriate: "in public law cases, the number of plaintiffs with standing is potentially limitless. If parties were allowed to continually raise issues already decided, public law claims 'would assume immortality.'"¹⁵⁷ Further, no private, individual right had been violated.¹⁵⁸ Issue preclusion, the court then concluded, was the appropriate vehicle for managing repetitive litigation in the case. Though the court's determination that the issues had earlier been fully and fairly litigated on the merits is suspect, its procedural device of choice is apt. The concerns with legitimacy of judicial institutions and with "maximizing the benefit of the tremendous investment of societal resources" has plagued judicial systems for centuries,¹⁵⁹ and as Part II demonstrated, issue preclusion was conceived as a device to protect precisely these public-facing interests.¹⁶⁰

With its attention to systemic interest, issue preclusion is better suited to accommodate the sort of public right on display in *Taylor* and *Tyus*. First, the scope of issue preclusion already extends beyond

¹⁵⁴ *Tyus v. Schoemehl*, 93 F.3d 449, 456 (8th Cir. 1996), *abrogated by Taylor v. Sturgell*, 553 U.S. 880 (2008).

¹⁵⁵ *See id.* at 451–52 (describing the lawsuits and their outcomes).

¹⁵⁶ *Id.* at 453.

¹⁵⁷ *Id.* at 456 (citing *L.A. Branch NAACP v. L.A. Unified Sch. Dist.*, 750 F.2d 731, 741 (9th Cir. 1984)).

¹⁵⁸ *See id.* at 457 (noting that the plaintiffs did not assert "a different private right not shared in common with the public").

¹⁵⁹ ISSACHAROFF, *supra* note 20, at 164.

¹⁶⁰ *See supra* Part II.B (explaining that estoppel, which gave rise to issue preclusion, served the goal of ensuring judicial integrity and systemic efficiency).

a bipolar dispute. Courts have abandoned the mutuality requirement for issue preclusion, and on a rationale of systemic efficiency that has motivated estoppel for centuries. The rule of issue preclusion is also a more fact-sensitive one: Issue preclusion, more so than claim preclusion, is discretionary. *Parklane* makes clear that issue preclusive effect is only appropriate if the precluded party—functionally the public, in aggregate rights cases like *Taylor*—has already had a full and fair opportunity, with all reasonable procedural opportunities, to litigate. This discretion provides a check against overly broad preclusion that comes at the expense of adequate representation and other due process guarantees. In short, because systemic interests are implicated by the adjudication of public rights, estoppel is a better-suited device for managing preclusive effect.

Doctrinally, however, modern issue preclusion would not extend to preclude Taylor from relitigating Herrick's claim. Taylor had not yet had a full and fair opportunity to litigate the issue; even though the FAA had addressed the exact same issue and won a valid and final judgment on the merits, it could not preclude Taylor from trying his hand at the issue. Taylor had not yet had "his own day in court."¹⁶¹

This is as far as our inherited preclusion doctrine can take us. The incomplete merger of *res judicata* and estoppel has left a gap where repeated litigation of public rights—extending beyond the same parties, but over the same issues—would be accommodated. Taylor is allowed to have his day in court even though the day was never "his own" to begin with. But while the policy concerns that drive preclusion have persisted for centuries, the particular problems preclusion must address have not.¹⁶² A modern device is necessary to accommodate the "unprecedented" scope of preclusion for a public right.¹⁶³ The historic doctrines which gave rise to our modern preclusion law cannot offer such a device; they do, however, point us in a suggestive direction.

¹⁶¹ *Taylor v. Sturgell*, 553 U.S. 880, 892–93 (2008) (internal citation omitted) (describing the "deep-rooted historic tradition" that a non-party to the original suit was never given an opportunity to litigate its claim).

¹⁶² Public rights like the one Taylor attempted to exercise were nonexistent at common law. See MARTIN LOUGHLIN, *THE IDEA OF PUBLIC LAW* 116 (2003) (explaining that "classical natural law did not recognize the idea of subjective rights, of rights rooted in the individual and enforceable against the collectivity").

¹⁶³ See Nagareda, *supra* note 125, at 1125 (arguing that for FOIA litigation to use the class action mechanism to resolve an issue, the class would have to embrace the entire world).

C. *An Intervention-Based Framework*

The critical difference between *res judicata* and collateral estoppel is the interest each defends: *Res judicata* protects private closure, while collateral estoppel fosters systemic gains. Beginning in 1938, the Federal Rules of Civil Procedure gave courts a mechanism to protect the diverging interests of absent but implicated parties: intervention.¹⁶⁴ Intervention of Right allows a third party to enter a bipolar dispute, even if the original parties did not join that outside party and object to its participation. Federal Rule of Civil Procedure 24(a) stipulates the conditions for intervention:

[T]he court must permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.¹⁶⁵

The Rule's express attention to adequacy of representation marks its ability to accommodate aggregate litigation—it is built on a framework that assumes multiple parties could pursue the same claim or issues, as happens in public rights litigation. More important is the rule's attention to a party's "interest."

Perhaps predictably, courts have struggled to operationalize the "interest" inquiry required to determine whether intervention is appropriate.¹⁶⁶ To intervene, a party must have a sufficient "interest" in the underlying claim, and must show that the interest hasn't already been addressed by another party to litigation. Put otherwise, a party must show that the underlying claim pertains to it as much as to current parties—that the underlying claim is, in a sense, public—and that another party hasn't already represented that claim to the fullest.¹⁶⁷ To determine whether a present party has already represented the shared interest in the underlying claim, Professor Carl Tobias suggests:

The most significant consideration is the potential quality of the applicant's proposed participation. Is the applicant likely to provide expertise, information, or legal or policy perspectives that contribute to a court's understanding of questions already in issue?

¹⁶⁴ See Carl Tobias, *Standing to Intervene*, 1991 WIS. L. REV. 415, 428–29 (summarizing the historical development of the intervention rule and providing further citations).

¹⁶⁵ FED. R. CIV. P. 24(a)(2).

¹⁶⁶ See Tobias, *supra* note 164, at 432–35 (cataloging the difficulties that federal courts of all levels have faced in "defining the interest necessary to satisfy Rule 24(a)(2)").

¹⁶⁷ See, e.g., ISSACHAROFF, *supra* note 20, at 75 ("['I]nterest' became a mechanism for assessing the nature of the dispute and the claim of the original parties to the case to retain a private preserve against the outside world. This mechanism, in turn, requires that lines be drawn focusing on the private versus public quality of the dispute . . .").

Correspondingly, will the applicant raise, and help resolve, new questions that the judge should consider?¹⁶⁸

In short, a nonparty should be allowed to intervene on an issue of public right when it has new information or a new issue to add. Tobias concludes that a court “should permit intervention by an applicant that clearly will contribute to issue resolution, unless the involvement will impose undue costs on the judicial system or the original parties, and, even then, the judge should seriously consider allowing intervention and conditioning it.”¹⁶⁹ The standard for intervention is thus a fairly permissive one in the context of public rights, but is still attentive to the near-inevitable replication of interests in the vindication of such rights.

In determining whether a nonparty should be collaterally estopped from relitigating a public rights issue, courts should adopt the framework of intervention. Intervention functions as a mechanism for encouraging participation by litigants with new information and perspectives but discourages participation from those who can do nothing but repeat known data. This *ex ante* mechanism should be imported into the *ex post* world of preclusion: If a party would have been allowed to intervene in the initial suit, it should not be precluded from bringing a later suit; conversely, if a party would have been denied the right to intervene in an initial suit, it should be precluded from relitigating an issue in the second instance.

The intervention approach to public right preclusion has several advantages. First, it can be easily and effectively operationalized. If, for example, Taylor had attempted to intervene in Herrick’s initial FOIA suit against the FAA, a court would likely have rejected the intervention: Though the FOIA right is a public one, Taylor offered no new information, policy perspectives, or questions that Herrick failed to address. Because Taylor would not have been permitted to intervene, he should be precluded from bringing his own F-45 FOIA claim in the image of Herrick’s. The same logic would govern the Obama birthers addressed in the beginning of this Note. Like Taylor, they sought FOIA claims on the same grounds as their predecessors, and offered no new information or perspective. Since birther 2 would have had no valid claim for intervention in birther 1’s case, birther 2 should be precluded from bringing a second suit. By contrast, the *Taylor* Court mentions that Taylor attempted to raise two issues

¹⁶⁸ Tobias, *supra* note 164, at 447.

¹⁶⁹ *Id.* at 448.

Herrick had not raised.¹⁷⁰ If these issues had not been functionally addressed in Herrick's suit, a court should (as Tobias stipulates in the context of intervention) "seriously consider allowing" Taylor to bring the second suit, "conditioning it" on the new issues.¹⁷¹ As another example, if a commercial airplane manufacturer had wanted to pursue the same FOIA request as Herrick because the plane documents contained information once protected by a now-lapsed patent, a court would have recognized that Herrick could not adequately represent the manufacturer's interest and allowed intervention; preclusion thus should not apply. Or in the context of *Tyus*, if the second round of plaintiffs had different expertise or perspectives to contribute—perhaps, as state representatives rather than aldermen, they were privy to more information—they would have been allowed to intervene, and thus should not be precluded from bringing suit.

Second, the intervention analysis can be applied on an individual basis, allowing for a tailored preclusion paradigm. That is, just because one party has begun to pursue a public right does not imply that that party's suit will definitively settle the issue, but it does mean that not every individual with the same interest will be able to disrupt the issue's settlement. Intervention thus offers a way to sort between those interests which have adequately been represented and those which haven't, ensuring no preclusive bar prevents vindication of public rights. At the same time, tailored adjudication can ensure well-funded groups or individuals do not continue to litigate the same issues they have already lost on the merits. To be sure, individualized consideration comes at the expense of efficiency, and an intervention standard would not offer a blanket rule of preclusion. The discretion built into this approach, however, is itself desirable. The flexibility of the intervention-preclusion model provides a significant safeguard against the biggest risk of public rights preclusion: final but poor litigation by the first party to reach the issue. The intervention paradigm thus fosters the underlying preclusion interest in public rights cases—the estoppel interest of the judicial system—while maintaining the public's interest in reaching a fair resolution on the merits.

Of course, like most tools of judicial efficiency, this one would be prone to administrative abuse. Efficiency is only beneficial insofar as it facilitates fair adjudication on the merits; it would be no victory to dismiss important issues of public rights off hand, or in cases where fraud or collusion may bias the initial determination. Giving courts the

¹⁷⁰ See *Taylor v. Sturgell*, 553 U.S. 880, 888 (2008) (noting that "Taylor also sought to litigate the two issues concerning recapture of protected status that Harris had failed to raise in his appeal to the Tenth Circuit").

¹⁷¹ Tobias, *supra* note 164, at 448.

power to close out subsequent challenges certainly creates significant risk, but our judicial system already offers corrective tools to address that risk. Rule 60(b), for example, provides relief from a final judgment in cases of newly discovered evidence, fraud, or other reasons that justify relief.¹⁷² While an intervention-based framework may come with its own complications, it bears both internal and external safeguards that may enable a thoughtful balancing of individual and systemic interests.

CONCLUSION

The merger of *res judicata* and collateral estoppel in our modern preclusion law is incomplete. Though courts and scholars often imagine they can integrate claim and issue preclusion into a coherent and comprehensive law of preclusion, the law in fact consists of different preclusions, motivated by different rationales. *Res judicata* aimed to provide closure to private parties, while estoppel began as a defense of judicial interests and expanded to forward systemic ones. As the example of public rights disputes shows, the alignment of public and private interest is not necessary. When systemic interests eclipse private ones, a tailored preclusion framework based on the logic of intervention can mediate between the vindication of personal and public rights.

¹⁷² See FED. R. CIV. P. 60(b).