

## ARTICLES

### ISSUE PRECLUSION OUT OF THE U.S. (?) THE EVOLUTION OF THE ITALIAN DOCTRINE OF *RES JUDICATA* IN COMPARATIVE CONTEXT

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#### ABSTRACT

Most scholarly works on *res judicata* rest on two long-established assumptions: (i) the scope for the preclusive effects of previously rendered judgments upon subsequent proceedings is rather narrow in civil law systems compared to the extensive approach that characterizes the common law tradition especially in its U.S. epiphany; (ii) the very idea of issue preclusion is generally said to be absent or rejected in the civil law world. Accordingly, this alleged divergence has over time discouraged the development of a meaningful dialogue between common lawyers and civil law scholars on *res judicata*.

This Article confronts these assumptions and aims to yield new critical insights into the topic by comparing Italian and U.S. law. This idea stems from a path-breaking line of decisions by the Italian Supreme Court that has significantly extended the scope of *res judicata* to gradually open to some form of issue preclusion. Indeed, irrespective of a long dogmatic tradition, these “grands arrêtes,” together with few critical scholarly voices, have prompted a reconceptualization of *res judicata*, pointing out a potential rapprochement between the Italian and American solutions. By placing this hermeneutic evolution within a wider comparative context, it is possible to challenge the traditional narrative propounding issue preclusion as a preserve of the common law world and to unveil new common grounds for discussion on *res judicata* within the Western legal tradition.

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## INTRODUCTION

At first glance, the very idea of a comparative investigation on the complex doctrine of issue preclusion may seem eccentric for many reasons. First and foremost, procedural law is traditionally portrayed and taught as an eminently domestic discipline.<sup>1</sup> Despite the presence of a significant body of literature on comparative civil procedure,<sup>2</sup> and the enduring attempt to attain procedural

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1. For insightful critiques, see, e.g., Helen Hershkoff, *Integrating Transnational Legal Perspectives into the First Year Civil Procedure Curriculum*, 56 J. LEGAL EDUC. 479 (2006); Antonio Gidi, *Teaching Comparative Civil Procedure*, 56 J. LEGAL EDUC. 502, 502 (2006); Kevin M. Clermont, *Integrating Transnational Perspectives into Civil Procedure: What Not to Teach*, 56 J. LEGAL EDUC. 524, 524-27 (2006).

2. See, e.g., CIVIL JUSTICE IN CRISIS: COMPARATIVE PERSPECTIVES OF CIVIL PROCEDURE (Adrian Zuckerman ed., 1999); ESSAYS ON TRANSNATIONAL AND COMPARATIVE CIVIL PROCEDURE 3 (Federico Carpi & Michele Angelo Lupoi eds., 2001); THE REFORMS OF CIVIL PROCEDURE IN COMPARATIVE PERSPECTIVE (Nicolò Trocker & Vincenzo Varano eds., 2005); C. H. van Rhee & Remmee Verkerk, *Civil Procedure*, in ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW 140, 144-45, 150, 152-53 (Jan M. Smits ed., 2nd ed. 2012); Oscar G. Chase & Vincenzo Varano, *Comparative Civil Justice*, in THE CAMBRIDGE COMPANION TO COMPARATIVE LAW 210 (Mauro Bussani & Ugo Mattei eds., 2012); CIVIL LITIGATION IN A GLOBALISING WORLD (Xandra E. Kramer & Cornelis H. van Rhee eds., 2012); THE DYNAMISM OF CIVIL PROCEDURE: GLOBAL TRENDS AND DEVELOPMENTS 3-4 (Colin B. Picker & Guy I. Seidman eds., 2016); APPROACHES TO PROCEDURAL

uniformity in transnational litigation settings,<sup>3</sup> it is almost commonplace amongst commentators to observe that comparison in this area of law still represents a challenge or a path that has not been thoroughly explored.<sup>4</sup>

The adoption of what cultural anthropologists define as an “emic” perspective i.e., an insider and insular view of the subject) still somewhat haunts the discipline’s conventional wisdom.<sup>5</sup> In turn, the tendency to look at one’s procedural system as an (incomparable) exception or as the yardstick to measure the *other* opens the way to Manichean distinctions, favors legal ethnocentrism, and fails to capture, in the end, the ongoing metamorphoses and hybridization of procedural models.<sup>6</sup> As a result, the intellectual frontiers of civil procedure remain to some extent national and semi-closed.

This intellectual isolationism is partly because procedural law is closely intertwined with the idea (and issue) of justice which is a culturally based concept. While there is no human society without conflicts, the actual ways in which conflicts are settled mark different ideals of justice<sup>7</sup> and disclose different images and goals of the legal order.<sup>8</sup> For instance, although in China several legal

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LAW: THE PLURALISM OF METHODS 9-10 (Loïc Cadet, Burkard Hess & Marta Requejo Isidro eds., 2017); CIVIL LITIGATION IN COMPARATIVE CONTEXT (Oscar G. Chase & Helen Hershkoff gen. eds., 2nd ed. 2017); Joachim Zekoll, *Comparative Civil Procedure*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 1306, 1307 (Mathias Reimann & Reinhard Zimmermann eds., 2nd ed. 2019).

3. Procedural uniformity is one of the major rationales behind the Recast Brussels Convention and the ELI- UNIDROIT Model Rules of European Civil Procedure in Europe, and the ALI/UNIDROIT Principles of Transnational Civil Procedure at a global level. See Regulation 1215/2012 of Dec. 12, 2012, 2012 O.J. (L 351); see also AM. LAW INST. & UNIDROIT, *Principles of Transnational Civil Procedure*, 9 UNIF. L. REV. 758 (2004).

4. See generally Scott Dodson, *The Challenge of Comparative Civil Procedure*, 60 ALA. L. REV. 133, 134 (2008). See also Zekoll, *supra* note 2, at 1307 (“comparative research in procedural areas is still at a relatively early stage.”).

5. On the notion of “emic” as opposed to “etic” perspective, see MARVIN HARRIS, CULTURAL MATERIALISM: THE STRUGGLE FOR A SCIENCE OF CULTURE 16-17 (1979); EMICS AND ETICS: THE INSIDER/OUTSIDER DEBATE (Thomas N. Headland, Kenneth Pike & Marvin Harris eds., 1990).

6. See John H. Langbein, *The Influence of Comparative Procedure in the United States*, 43 AM. J. COMP. L. 545, 545, 547, 551 (1995); Geoffrey C. Hazard, Jr., *From Whom No Secrets Are Hid*, 76 TEX. L. REV. 1665, 1667 (1998); Oscar C. Chase, *American “Exceptionalism” and Comparative Procedure*, 50 AM. J. COMP. L. 277, 277 (2002). On the notion of American exceptionalism, see generally SEYMOUR M. LIPSET, AMERICAN EXCEPTIONALISM: A DOUBLE-EDGED SWORD Ch. 1 (1996).

7. For a further discussion on the relationship between conflict resolution and ideals of justice, see generally LAURA NADER, THE LIFE OF THE LAW: ANTHROPOLOGICAL PROJECTS 168–211 *et passim* (2002).

8. For brilliant and inspiring discussions on the social aspects of civil procedure, see generally Mauro Cappelletti, *Social and Political Aspects of Civil Procedure: Reforms and Trends in Western and Eastern Europe*, 69 MICH. L. REV. 847 (1971); Michele Taruffo, *Transcultural Dimensions of Civil Justice*, 23 COMP. L. REV. 1 (2000); Oscar G. Chase, *Legal Processes and*

reforms opened the way to in-court litigation since the early 1980s, the bequest of the Confucian tradition with its emphasis on harmony and mediation are still partly visible in the tendency of Chinese judges to bend formal rules to promote out-of-court dispute settlements.<sup>9</sup>

Simply put, agreed-upon procedures are the actual methods by which rights are enforced, conflicts are structured, and social peace is legally restored within a specific institutional setting. In the words of Felix Frankfurter, one could even say that “[t]he history of liberty has largely been the history of observance of procedural safeguards.”<sup>10</sup> Therefore, the procedure performs a huge symbolic function because it mirrors and renders visible, by way of its rituals and ceremonies, the prevailing values (e.g., justice, social equality, efficiency, order, harmony, etc.) of a specific (legal) culture at a given historical moment.<sup>11</sup>

But the very fact of being culturally embedded is exactly what, according to an established narrative, would make civil procedural rules and models less intelligible outside of the specific context in which they arise. This phenomenon is evident in the “*langue*” of civil procedure, i.e., in its vocabulary of concepts and dogmatic categories.<sup>12</sup> It is no mystery that the procedural *langue* of a given system often appears puzzling to the foreign reader for it reflects its institutional and cultural context so that even basic notions like the substantive-procedural law dichotomy or the distinction between what is to fall under the ‘civil’ or the ‘criminal’ domains can become blurred categories very likely to vary from one jurisdiction to another.<sup>13</sup>

In this sense, procedural law, civil procedure, in particular, have been commonly associated with what Montesquieu referred to as the “political laws” (*lois politiques*) of a Nation, namely that body of rules which is so embedded in the customs of a country that could hardly be understood or circulated elsewhere

*National Culture*, 5 CARDOZO J. INT’L & COMP. L. 1 (1997); GOALS OF CIVIL JUSTICE AND CIVIL PROCEDURE IN CONTEMPORARY JUDICIAL SYSTEMS (Alan Uzelac ed., 2014).

9. See generally Fu Hualing & Richard Cullen, *From Mediatory to Adjudicatory Justice: The Limits of Civil Justice Reform in China*, in CHINESE JUSTICE: CIVIL DISPUTE RESOLUTION IN CONTEMPORARY CHINA 25 (Margaret Y. K. Woo & Mary E. Gallagher eds., 2011); PETER C.H. CHAN, MEDIATION IN CONTEMPORARY CHINESE CIVIL JUSTICE: A PROCEDURALIST DIACHRONIC PERSPECTIVE 14 (2017); Xin He & Kwai Hang Ng, “*It Must Be Rock Strong!*”: *Guanxi’s Impact on Judicial Decision Making in China*, 65 AM. J. COMP. L. 841 (2017).

10. *McNabb v. United States*, 318 U.S. 332, 347 (1943).

11. On the relevance of rituals and ceremonies in procedural law, see OSCAR G. CHASE, LAW, CULTURE AND RITUAL: DISPUTING SYSTEMS IN CROSS-CULTURAL CONTEXT 3-4, 8, 10, Ch. 3, Ch.7 (2005); Oscar G. Chase & Jonathan Tong, *Judging Judges: The Effect of Courtroom Ceremony on Participant Evaluation of Process Fairness-Related Factors*, 24 YALE J. L. & HUMAN. 221, 222 (2012).

12. On the notion of *langue* as the legal consciousness of a given time and a “vocabulary of concepts and typical arguments” underlying specific enacted rules (which, by contrast, the Author terms *parole*), see Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850–2000*, in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 19, 23 *et passim* (David M. Trubek & Alvaro Santos eds., 2006).

13. See JOHN A. JOLOWICZ, ON CIVIL PROCEDURE 11–22 (2000).

since it represents one of the manifold expressions of its unique *Volkgeist*.<sup>14</sup> Additionally, the foregoing problematic aspects grow exponentially with complex concepts like *res judicata* which, albeit often generally deployed across different jurisdictions to describe the preclusive effects of final judgments and the public interest to end litigation, is deeply conditional on the architecture of the judicial system under consideration.

In the light of the impediments mentioned above, then, why does this Article embark on a comparative analysis? The reasons are both methodological and pragmatic. First of all, the idea that no justice system exists in a cultural or institutional vacuum is an uncontested truth.<sup>15</sup> All contemporary legal systems are to some extent the result of their own history and the reflection of a given social, political, and institutional setting.<sup>16</sup> Nonetheless, the radicalization of this line of reasoning created the misleading idea that civil procedure is a *hortus conclusus*, an enclosed garden virtually impermeable, for cultural and institutional reasons, to foreign legal solutions, models, and styles.<sup>17</sup>

Were it not for the fact that this domestic approach has shaped procedural thinking for so long, it should be superfluous to remark how counterintuitive it is today. In the current globalized and globalizing era, whereby no system is thoroughly self-sufficient, procedural law cannot be exclusively deemed as something national or geographically localized. Procedural models are dynamic systems open to external influences. Thus, deriving *legal difference* – and therefrom the incomparability of procedures – exclusively from national *cultural difference* would be the anachronistic revival of the Romantic idea of national individuality introduced into the legal thought by Von Savigny and the Historical School.<sup>18</sup> An idea that was envisaged for and within the particularistic narrative of the nineteenth-century Nation-State, but that results nonsensical whether transferred in a completely different institutional and cultural setting like the current global age. Nowadays, the constant hybridization of legal systems thwarts any attempt to pigeonhole procedural models by deploying definitive taxonomies, categories, or legal labels of any sort.<sup>19</sup> Traditional distinctions like the *summa divisio* between adversarial and non-adversarial models or, at a macro level, even

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14. See Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MODERN L. REV. 1, 6-7 (1974).

15. See, e.g., MIRJAM R. DAMAŠKA, THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS 247 *et passim* (1986); WERNER F. MENSKI, COMPARATIVE LAW IN A GLOBAL CONTEXT: THE LEGAL SYSTEMS OF ASIA AND AFRICA (2006).

16. See generally ROGER COTTERRELL, LAW, CULTURE AND SOCIETY: LEGAL IDEAS IN THE MIRROR OF SOCIAL THEORY (2006); *Comparative Law and Legal Culture*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW, *supra* note 2, at 710.

17. See Dodson, *supra* note 4, 140-43.

18. See FRIEDRICH KARL VON SAVIGNY, SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS 14 (1840).

19. See Michele Taruffo, *Some Remarks about Procedural Models*, in COMMON LAW, CIVIL LAW AND THE FUTURE OF CATEGORIES 621 (Oscar G. Chase & Janet Walker eds., 2010).

the common–civil law divide, albeit still holding some “residual truth,”<sup>20</sup> today more than ever represent a distortive magnifying glass to look at procedural systems.<sup>21</sup>

In such a global scenario, any parochial and inward–looking perspective would lead to a formalistic *in vitro* analysis. Only through comparison is it possible to extend the intellectual frontiers of civil justice and anticipate its evolutionary trends. This methodological caveat also applies to the conventional understanding of issue preclusion. From a comparative perspective, it is true that civil law countries do not embrace a wide common law-like approach to preclusion. Rather, in civilian systems, only the claims and the issues formally raised by the parties in an earlier action and ruled upon by the competent court are barred from being relitigated in a subsequent proceeding. It follows that unlike the wider transactional view characterizing the United States (“U.S.”) rule, the civil-law version of *res judicata* does not regularly cover all the issues arising out of the same transaction that were considered essential to the decision in the original action. Yet, a recent tendency to broaden the scope of *res judicata* beyond its traditional boundaries for the sake of a more efficient administration of justice is visible in the civil law world. To confirm this point, it is enough to recall that the recent final draft of the ELI-UNIDROIT Model European Rules of Civil Procedure extends the positive effect of *res judicata* to issue preclusion providing that “*res judicata* also covers necessary and incidental legal issues that are explicitly decided in a judgment where parties to subsequent proceedings are the same as those in the proceedings determined by the prior judgment and where the court that gave that judgment could decide those legal issues.”<sup>22</sup>

For these reasons, a renewed inquiry on issue preclusion through the “eye of the comparatist”<sup>23</sup> seems promising and beneficial. Consequently, our aim in this Article is not to engage in a full-fledged comparative overview of issue preclusion. This would be a Sisyphean task that would probably result in what the doyen of comparatists defined as “descriptive comparative law,”<sup>24</sup> i.e., a mere cross-jurisdictional catalog of procedural norms. Rather by delimiting the research terrain to the comparison between the Italian and the U.S. systems, which are taken as two notable expressions of the civil law and common law traditions respectively, it is meant to disturb the conventional ideas according to

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20. Mirjam R. Damaška, *Residual Truth of a Misleading Distinction*, in COMMON LAW, CIVIL LAW AND THE FUTURE OF CATEGORIES 3 (Oscar G. Chase & Janet Walker eds., 2010).

21. See generally DAMAŠKA, *supra* note 15; John A. Jolowicz, *Adversarial and Inquisitorial Models of Civil Procedure*, 52 INT. & COMP. L.Q. 281 (2003).

22. See art. 149(2) ELI-UNIDROIT Model European Rules of Civil Procedure. Full information regarding the development of the project and the reports are available online at <https://www.unidroit.org/civil-procedure> [<https://perma.cc/8KST-9NRB>].

23. The evocative “eye” metaphor is drawn from Pier Giuseppe Monateri, *L'occhio del comparatista sul ruolo del precedente giudiziario in Italia*, in CONTRATTO & IMPRESA 192 (1988).

24. HAROLD C. GUTTERIDGE, *COMPARATIVE LAW: AN INTRODUCTION TO THE COMPARATIVE METHOD OF LEGAL STUDY AND RESEARCH* 8–10 (1946).

which “most civil law countries do not recognize the doctrine of *res judicata*”<sup>25</sup> and do not contemplate issue preclusion in any form.<sup>26</sup>

To pursue these objectives, this Article proceeds in two parts. Section I is methodological in nature. On the one hand, Section I seeks to make sense of the reasons why, in the face of the general recognition of the *res judicata* doctrine both inside and outside the Western legal tradition (*rectius* of the common policies pursued therewith), relatively scant attention is paid to the topic in comparative studies. On the other hand, Section I tries to display the methodological benefits, which a critical comparative analysis could bring to the investigation of the topic. Section II first provides a general overview of the Italian system’s traditional approach to preclusion. Then, it addresses the gradual reconceptualization of the subject matter operated by the Italian Supreme Court (*Corte di Cassazione*) by comparing the Italian and U.S. solutions. This places the Italian hermeneutic evolution within a wider comparative context by revealing how the *Corte di Cassazione* has extended the scope of *res judicata* to gradually open to some form of issue preclusion and unveiling unexpected commonalities between the two jurisdictions. These findings open a new common ground for discussion because they challenge the traditional narrative that apodictically locates common law systems on one extreme of the *res judicata* spectrum (*viz* the one representing a more extensive approach encompassing issue preclusion in addition to claim preclusion) and civil law systems on the opposite one (encompassing only a limited version of claim preclusion and lacking issue preclusion).

## I. ISSUE PRECLUSION BEYOND BOUNDARIES

### A. Claim and Issue Preclusion as General Principles

The doctrine of *res judicata* seems to have become part of the general legal common sense, being its theoretical underpinnings ubiquitous in almost every system of civil procedure.<sup>27</sup>

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25. Linda S. Mullenix, *Lessons from Abroad: Complexity and Convergence*, 46 VILL. L. REV. 1, 9 (2001) (also enumerating, besides *res judicata*, the conventionally accepted areas of difference between common law and civil law procedural systems).

26. For a general description, see UGO MATTEI, TEEMU RUSKOLA & ANTONIO GIDI, SCHLESINGER'S COMPARATIVE LAW 820 (7th ed. 2009).

27. For a general overview, see, e.g., Linda Silberman, *Finality and Preclusion*, in CIVIL LITIGATION, *supra* note 2, at 563-94; Kevin M. Clermont, *Res judicata as Requisite for Justice*, 68 RUTGERS UNIV. L. REV. 1067, 1078-79 (2016); PETER R. BARNETT, *RES JUDICATA, ESTOPPEL, AND FOREIGN JUDGMENTS: THE PRECLUSIVE EFFECTS OF FOREIGN JUDGMENTS IN PRIVATE INTERNATIONAL LAW* (2001); ROBERT C. CASAD & KEVIN M. CLERMONT, *RES JUDICATA: A HANDBOOK ON ITS THEORY, DOCTRINE, AND PRACTICE* (2001); SPENCER BOWER AND HANDLEY: *RES JUDICATA* (Keith R. Handley ed., 5th ed. 2019); Albrecht Zeuner & Harald Koch, *Effects of Judgments (Res Judicata)*, in XVI(9) INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW: CIVIL PROCEDURE (Mauro Cappelletti chief ed., 2012); SILJA SCHAFFSTEIN, *THE DOCTRINE OF RES JUDICATA BEFORE INTERNATIONAL COMMERCIAL ARBITRAL TRIBUNALS* 1.01-.02, 1.04, 1.87, 1.159

One of the main reasons behind the success of *res judicata* resides in the fact that it is policy-driven and has a hybrid public-private nature. Indeed, there are several objectives that, whether in a greater or lesser degree and for different reasons,<sup>28</sup> are generally recognized both nationally and internationally<sup>29</sup> as institutional needs and vital public values.<sup>30</sup> Such as (i) putting an end to disputes, (ii) reducing the excessive time and costs of legal proceedings, (iii) securing the stability of decisions and thereby safeguarding the certainty of rights by barring relitigation of entire claims (the so-called “claim preclusion” or “cause of action estoppel”) or of previously determined issues of fact or law (the so-called “issue preclusion” or “collateral estoppel.”)<sup>31</sup> Additionally, *res judicata* is of major “private benefit to individual litigants,”<sup>32</sup> protecting the rights of the parties against the vexatious repetition of lawsuits. This is true especially in highly litigious societies like Western ones where (i) law has been relied upon as an instrument of social organization and change; (ii) conflicts have been traditionally mediated through the excessive use of litigation, often resulting in an unbearable caseload for courts to deal with;<sup>33</sup> (iii) there has been a progressive

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(2016); JACOB B. VAN DE VELDEN, *FINALITY IN LITIGATION: THE LAW AND PRACTICE OF PRECLUSION – RES JUDICATA (MERGER AND ESTOPPEL), ABUSE OF PROCESS AND RECOGNITION OF FOREIGN JUDGMENTS* (2017).

28. This is not to say that *res judicata* is a universally accepted concept in all its tenets. There are some legal systems, *i.e.*, the ones belonging to the Talmudic tradition, that do not accord *res judicata* the status of general principle and adopt weak forms of the said doctrine. *See generally* Yuval Sinai, *Reconsidering Res Judicata: A Comparative Perspective*, 21 DUKE J. COMP. & INT'L L. 353 (2011). On the weak *versus* strong forms of *res judicata* adopted across different jurisdictions, see Clermont, *supra* note 27, at 1078-79.

29. On the relevance of *res judicata* as a general principle at the international level, see, e.g., *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 2007 I.C.J. 43, 90-91 (Feb. 26). *See also* Benjamin Salas Kantor & María Elisa Zavala Achurra, *The Principle of Res Judicata before the International Court of Justice: In the Midst of Comradeship and Divorce between International Tribunals*, 10 J. INT. DISPUTE SETTL. 288 (2018).

30. *See Hopkins v. Lee*, 19 U.S. 109, 112, 114 (1821) (“The rule has found its way into every system of jurisprudence, not only from its obvious fitness and propriety, but because without it an end could never be put to litigation.”).

31. As is well known, the doctrine of *res judicata* - herein intended in its broader meaning - encapsulates two different but closely interrelated principles: i) claim preclusion (or ‘cause of action estoppel’ as it is referred to in English law) which operates as a bar to relitigation of previously determined claims; and ii) issue preclusion (or ‘issue estoppel’ as it is named in English Courts apparently after it was coined by Higgins J in *Hoysted v. Federal Commissioner of Taxation* (1921) 29 CLR 537, 561 (Austl.)), which forecloses the relitigation of issues of fact or law or mixed issues of fact and law.

32. *Robert v. Moschzisker*, *Res Judicata*, 38 YALE L.J. 299, 299 (1929).

33. *See* JETHRO K. LIEBERMAN, *THE LITIGIOUS SOCIETY* (1981); JEROLD S. AUERBACH, *JUSTICE WITHOUT LAW: RESOLVING DISPUTES WITHOUT LAWYERS* (1984); *contra* DAVID M. ENGEL, *THE MYTH OF THE LITIGIOUS SOCIETY: WHY WE DON'T SUE* (2016) (discussing how the



“juridification” of social spheres which were previously under the realm of other forms of social control (*viz.* religion and tradition.)<sup>34</sup>

Issue preclusion is consistent with the foregoing theoretical scenario. Firstly, issue preclusion is based on the intuitive principle of not allowing issues, which have been previously litigated and decided, to be brought up in a subsequent controversy. Moreover, it operates regardless of whether the second action is on the same claim of the first one (direct estoppel) or on a different claim (collateral estoppel) provided that the previous determination was essential to a valid and final judgment.<sup>35</sup> In *Southern Pacific Railroad v. United States*, a landmark U.S. Supreme Court decision, the Court describes the essence of issue preclusion as a “general rule [that] is demanded by the very object for which civil courts have been established which is to secure the peace and repose of society by settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order.”<sup>36</sup>

Accordingly, issue preclusion seems to accord with the dictates of legal certainty, fairness, and judicial economy whose importance is unquestionably acknowledged within the Western legal tradition.<sup>37</sup> Indeed, the said doctrine, albeit its alleged different historical origins,<sup>38</sup> is based on a shared (or however intelligible) semantic domain common to the Roman roots of *res judicata*,<sup>39</sup> whose underlying philosophy is enshrined in two Latin maxims: (1) *interest rei publicae ut finis litium sit* (it is in the public interest that lawsuits should have an end); and (2) *nemo debet bis vexari pro una et eadem causa* (no person should be proceeded against twice for the same cause).<sup>40</sup> The rationales behind these

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litigious character of Western societies—with specific reference to the American society and tort law claims—would be a fabricated myth).

34. See generally JURIDIFICATION OF SOCIAL SPHERES: A COMPARATIVE ANALYSIS IN THE AREAS OF LABOR, CORPORATE, ANTITRUST, AND SOCIAL WELFARE LAW (Gunther Teubner ed., 1987).

35. See *Cromwell v. County of Sac*, 94 U.S. 351, 353 (1876).

36. *Southern Pacific Railroad v. United States*, 168 U.S. 1, 49 (1897) (Harlan, J.).

37. See PETER S. STEIN & JOHN SHAND, LEGAL VALUES IN WESTERN SOCIETY (1974).

38. The origins of issue preclusion are conventionally traced back to Germanic law whereby emphasis was placed on the solemn declarations of the litigants. More specifically, the doctrine is linked to the ancient institution of “estoppel”—in its form of ‘estoppel by record’—according to which, as magisterially expounded by Lord Denning, “when a man, by his word or conduct, has led another to believe in a particular state of affairs, he will not be allowed to go back on it when it would be unjust or inequitable for him to do so.” *Moorgate Mercantile Co. Ltd v. Twitchings* [1976] 1 QB 225, 241. Translated in procedural terms, it implies that once an issue has been adjudicated, the parties are estopped from reopening it in further proceedings to which they are also parties. See Robert Wyness Millar, *Historical Relation of Estoppel by Record to Res Judicata*, 35 ILL. L. REV. 41, 41-42, 45, 50, 53-54 (1940-1941); ELIZABETH COOKE, THE MODERN LAW OF ESTOPPEL 6-8, 10-12 (2000).

39. *GAIUS, Inst. IV*, 106-107. See Giovanni Pugliese, *Giudicato civile*, in 18 ENCICLOPEDIA DEL DIRITTO 785, 786-87 (1969).

40. On the different policies underlying the rules of *res judicata*, see 18 CHARLES ALAN

maxims are a common heritage within the Western legal tradition. Not only the reference to such policy justifications for the doctrine can be found in almost all the literature dealing with the subject,<sup>41</sup> but this similarity has also led jurists on several occasions to maintain the consistency of the common law doctrine of *res judicata* “with the rule of the Civil law”<sup>42</sup> thus crossing, in this respect, the proverbial (and outdated) common law civil law sharp dichotomy.<sup>43</sup>

Accordingly, if it is true, as Professor Frankenberg suggests that comparatists are travelers “invited to break away from daily routines, to meet the unexpected and perhaps to get to know the unknown,”<sup>44</sup> then in their scientific wandering amongst the various systems, they will come across our topic in different and sometimes misleading forms and languages (*cosa giudicata*, *res judicata*, *Rechtskraft*, *chose jugée*, *cosa juzgada*, *Kihanryoku*, etc.). In theory *res judicata*, in both its epiphanies of “claim” and “issue” preclusion, should thus be a classical *locus comparationis*. It represents a systemological constant, or however a common element that, despite its significant variations, crosses artificial disciplinary boundaries such as the one between substantive and procedural law. It also crosses narrow geographic borders, to the point of arousing the scientific interest of scholars belonging to distant and (apparently) irreconcilable conceptions of the legal order such as the Western legal tradition<sup>45</sup> and the Chinese legal culture.<sup>46</sup> Despite the foregoing encouraging premises, however, a relatively limited number of comparative studies are devoted to our subject.

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WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE §§ 4402-03 (3rd ed. 2007); CASAD & CLERMONT *supra* note 27, at 29-38.

41. The reference to the said rationales and maxims can be found in almost all the literature dealing with *res judicata*. See, e.g., for England, NEIL ANDREWS, THE THREE PATHS OF JUSTICE 126 (2nd ed. 2018); for Canada, DONALD J. LANGE, THE DOCTRINE OF RES JUDICATA IN CANADA 4-7 (3rd ed. 2010); for the U.S., JACK H. FRIEDENTHAL, MARY K. KANE & ARTHUR R. MILLER, CIVIL PROCEDURE 616 (5th ed. 2015); for Italy, MAURO CAPPELLETTI & JOSEPH M. PERILLO, CIVIL PROCEDURE IN ITALY 252 (1965); for France, PETER E. HERZOG, CIVIL PROCEDURE IN FRANCE 552 (1967); for Germany, PETER L. MURRAY & ROLF STÜRNER, GERMAN CIVIL JUSTICE 355 (2004); for Spain, Jaime Guasp, *Los límites temporales de la cosa juzgada*, 1 ANUARIO DE DERECHO CIVIL 435 (1948).

42. BARNETT, *supra* note 27, at 9 (citing *Nelson v. Couch* (1863) 15 CB NS 99, 108, 143 Eng. Rep. 721, 724 (Eng.)).

43. Issue preclusion has been recognized in the common law world at least since the *Duchess of Kingston's Case* (1776) 168 Eng. Rep. 175, 176-77 (Eng.). See Robert W. Millar, *The Premises of the Judgment as Res judicata in Continental and Anglo-American Law* (pt. II), 39 MICH. L. REV. 238, 242, 262 (1940); Moschzisker, *supra* note 32, at 325-26.

44. Günther Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, 26 HARV. INT'L L.J. 411, 411 (1985).

45. See Clermont, *supra* note 27, at 1076.

46. See JIE HUANG, INTERREGIONAL RECOGNITION AND ENFORCEMENT OF CIVIL AND COMMERCIAL JUDGMENTS: LESSONS FOR CHINA FROM THE US AND EU LAW (2014).

*B. Res Judicata in Comparative Context: Common Policies . . . Different Rules*

To a first approximation, one could say that the main reasons behind the paucity of comparative works on *res judicata* and issue preclusion pertain to the complexity of the subject matter.<sup>47</sup> While, indeed, it is true that the majority of domestic rules recognize some binding effect of prior judgments and apply the doctrine of *res judicata* to “a final judicial decision pronounced by a judicial tribunal having competent jurisdiction over the cause or matter in litigation, and over the parties thereto,”<sup>48</sup> beyond this convergent point there is no general consensus. In fact, in the face of common policies, the application, interpretation, and scope of *res judicata* vary across the common-civil law dichotomy, and within each of the two families. In a sentence, “the devil is in the detail.”<sup>49</sup>

To illustrate, it is generally assumed that for a judgment to have *res judicata* effects, it has to be final. Nonetheless, despite the current general acceptance of the need for finality in litigation, the time and the conditions upon which a judgment is to be considered final differ among jurisdictions. The relationship between finality and *res judicata* is then a *liaison dangereuse* which conceals major differences amongst systems traditionally deemed alike and reveal unexpected similarities amongst ostensibly distant jurisdictions.

For instance, in France, a judgment obtains *res judicata* effects—referred to as *autorité de chose jugée*—upon rendition<sup>50</sup> which provides it with a relative immutability (*immutabilité relative*).<sup>51</sup> Therefore, once a final judgment is rendered, it stays final and binding upon the parties and their privies unless or until it is overturned. In other words, the only way open to the parties willing to challenge (*remise en cause*) the obtained *autorité de chose jugée* is by lodging an appeal or bringing the prescribed ordinary means of review to attack the judgment.<sup>52</sup> Nonetheless, it must be noted that the suspensive effects of pending review proceedings do not properly affect its *res judicata* effects but rather its enforceability. Only once a judgment is no longer subject to ordinary appeal or review because no means of recourse have been lodged or because all attacks have been dismissed or are time-barred, it becomes enforceable, obtaining the so-

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47. See Clermont, *supra* note 27, at 1092 (authoritatively claiming that the paucity of comparative work on the topic does not entail its irrelevance, but rather just suggests that “comparative study of *res judicata*, properly done, is hard to do.”).

48. GEORGE SPENCER BOWER, *THE DOCTRINE OF RES JUDICATA* 1 (1924).

49. SCHAFFSTEIN, *supra* note 27, 1.01-.02, 1.04, 1.87, 1.159.

50. See Code De Procédure Civile [C.p.c.][Civil Procedure Code] art. 480 (Fr.), translated in Yves-Antoine Tsegaye, French Code of Civil Procedure, DATAGUIDANCE, [https://www.dataguidance.com/sites/default/files/code\\_39\\_3.pdf](https://www.dataguidance.com/sites/default/files/code_39_3.pdf) [<https://perma.cc/9PLV-44GM>]; (“The judgment which decides in its operative part the whole or part of the main issue, or one which rules upon the procedural plea, a plea seeking a plea of non-admissibility or any other interlocutory application, will, from the time of its pronouncement, become *res judicata* with regard to the dispute which it determines.” (emphasis added)).

51. LOÏC CADIET & EMMANUEL JEULAND, *DROIT JUDICIAIRE PRIVÉ* 624 (10th ed. 2017).

52. See Code Civil [C. civ.][Civil Code] arts. 500, 501 (Fr.).

called *force de chose jugée*.<sup>53</sup>

The situation appears different in Italy whereby, unlike in France, judgments do not have proper *res judicata* effects from the very moment they are rendered. Preclusive effects are, instead, linked to the appealability of judgments. To this extent, if we wished to deploy French categories we could approximately say that an Italian judgment has the *autorité de chose jugée* only after it has obtained the *force de chose jugée*.<sup>54</sup> This is because under Italian law the notion of finality and the entire *res judicata* mechanism is influenced by a German-derived dogmatic distinction between “formal *res judicata*” (*cosa giudicata formale*) and “substantive *res judicata*” (*cosa giudicata sostanziale*).<sup>55</sup> The former is a procedural notion pertaining to the judgment thereby considered as a formal act, irrespective of its specific (procedural or substantive) content.<sup>56</sup> In particular, article 324 of the Italian Code of Civil Procedure (hereinafter I-CCP) provides that any judgment—be it procedural or on the merits—may attain the status of formal *res judicata* insofar as it is no longer subject to attack by appeal or by the so-called ordinary means of review.<sup>57</sup> Thus, formal *res judicata* here refers to the formal irreversibility of judgments, but it is nevertheless poignant for our purposes. This is because if not all the judgments which are “*cosa giudicata formale*” have preclusive effects attached thereto,<sup>58</sup> only final judgments on the

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53. For a concise but effective description of the French doctrine of *res judicata*, see SCHAFFSTEIN, *supra* note 27, at 40-51. Albeit not adjourned to all the important recent legislative reforms, the classic reading remains HERZOG, *supra* note 41, at 551-86. For a more recent brief introduction in English, see Loïc Cadet, *Introduction to French Civil Justice System and Civil Procedural Law*, 28 RITSUMEIKAN L. REV. 331, 359-60 (2011).

54. Similar rules apply in Switzerland. See Schweizerisches Zivilgesetzbuch [ZGB], Code Civil [CC] Dec. 10, 1907, art. 59(2), 308 (Switz.); see also LORENZ DROESE, RES IUDICATA IUS FACIT: UNTERSUCHUNG ÜBER DIE OBJEKTIVEN UND ZEITLICHEN GRENZEN VON RECHTSKRAFT IM SCHWEIZERISCHEN ZIVILGESETZBUCH 101 (2015).

55. The difference between *cosa giudicata formale* and *cosa giudicata sostanziale* is built on the German categorical distinction between *formelle Rechtskraft* and *materielle Rechtskraft*. See MURRAY & STÜRNER, *supra* note 41, at 355. For the abovementioned distinction in Italy, see, e.g., CAPPELETTI & PERILLO, *supra* note 41, at 251-55 et *passim* (1965); MICHELE ANGELO LUPOI, CIVIL PROCEDURE IN ITALY 143-45 (3rd ed. 2018). For a brief introduction to the Italian system, see Michele Taruffo, *Civil Procedure and the Path of a Civil Case*, in INTRODUCTION TO ITALIAN LAW 159-80 (Jeffrey S. Lena & Ugo Mattei eds., 2002). See also MICHAEL A. LIVINGSTON, PIER GIUSEPPE MONATERI & FRANCESCO PARISI, THE ITALIAN LEGAL SYSTEM: AN INTRODUCTION 92-141 (2nd ed. 2015).

56. See ENRICO TULLIO LIEBMAN, MANUALE DI DIRITTO PROCESSUALE CIVILE II, 272 (4th ed. 1984). On how, albeit different, formal and substantive *res judicata* are two interrelated concepts, see Pugliese, *supra* note 39, at 802.

57. Under Italian law, the term “ordinary means of review” refers to those attacks on judgments that are available before judgments become formal *res judicata* (appeal, review before the Supreme Court and *revisione ordinaria*). Taruffo, *supra* note 55, at 175-77.

58. For instance, judgments on mere procedural issues, i.e., judgments defining the jurisdiction of a court, albeit formal *res judicata*, are unsuitable to become substantive *res judicata*.

merits which have previously become formal *res judicata* are suitable to be substantive *res judicata* pursuant to article 2909 of the Italian Civil Code [hereinafter I-CC].<sup>59</sup> This means that they can obtain *res judicata* effects in the ordinary meaning and so bar the reassertion in later arising proceedings of matters already decided in prior judgments. In sum, given the presence of other specific requirements, formal *res judicata* is a necessary precondition for a final judgment on the merits to have substantive *res judicata* effects.

Therefore, the distance between the two civil law countries, France and Italy, is clear. On the other hand, in the eye of the comparatist, the fact that the preclusive effects of French judgments are not strictly conditional on their appealability is extremely important. This is for, in these respects, France aligns more with the U.S. system than with other systems belonging to its own legal family. In the U.S., a judgment is ordinarily deemed final upon its rendering provided that it is not tentative,<sup>60</sup> and it “ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.”<sup>61</sup>

Besides specific examples, however, the very lack of perfect consistency amongst different jurisdictions can be better explained in terms of the historical, technical, and axiological implications of *res judicata*. This is true on several levels. In general terms, as eloquently argued by Justice Holmes, legal science is ontologically prevented from reaching perfect consistency since “it is forever adopting new principles from life at one end, and it always retains old ones from history at the other.”<sup>62</sup> *Res judicata* stands right in the middle of the dialectic tension described by Justice Holmes, between historical stability and necessity of synchronization with social changes.

On the one hand, *res judicata* is “forward-looking” in that it undergoes constant variations and developments to be in line with the evolution of litigation paradigms both at a national and transnational level. In this sense, the internationalization of litigation has made the recognition of (the authority of) foreign judgments a primary institutional need to turn *res judicata* into the outpost against inconsistent and conflicting decisions both in domestic and cross-

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See LUPOLI, *supra* note 55, at 144.

59. Art. 2909 of the C.c, entitled “Res Judicata,” reads: “The findings contained in a final judgment are conclusive for all purposes on the parties, their heirs, or successors in interest.” For the English translation of the article, see THE ITALIAN CIVIL CODE AND COMPLEMENTARY LEGISLATION (Mario Beltramo, Giovanni E. Longo & John H. Merryman trans., 1991).

60. See RESTATEMENT (SECOND) OF JUDGMENTS §13 (AM. LAW INST. 1982), Cmt. *b.* (explaining “When *res judicata* is in question a judgment will ordinarily be considered final in respect to a claim [...] if it is not tentative, provisional, contingent and represents the completion of all steps in the adjudication of the claim by the court, short of any steps by way of execution or enforcement that may be consequent”).

61. This general definition of final judgment is commonly accepted and is drawn from Catlin v. U.S., 324 U.S. 229, 233 (1945). See also *St. Louis, I.M. & S. R. Co. v. Southern Express Co.*, 108 U.S. 24, 24-25, 28-29 (1883). On the notion of final judgment and the “Final-Judgment Rule,” see FRIEDENTHAL, KANE & MILLER, *supra* note 41, at 585; see also Geoffrey C. Hazard Jr., *Reflections on the Substance of Finality*, 70 CORNELL L. REV. 642, 642-44, 648 (1985).

62. OLIVER WENDELL HOLMES JR., THE COMMON LAW 36 (1881).

border settings.<sup>63</sup> On the other hand, however, *res judicata* is “backward-looking.” This means that it inherently “retains” old principles “from history” because *res judicata* reflects some deep structural and ideological characteristics of the various legal systems considered. For example, the remedial and adversarial origin of the common law tradition explains the importance attributed to the stability of judgments. This aspect is linked to the historical faith in the adaptive character of the common law tradition,<sup>64</sup> and in the work of common lawyers conceived of as its “oracles”<sup>65</sup> and “ministerial officers,”<sup>66</sup> which is traditionally deemed absent in the civil law world.<sup>67</sup> To the contrary, the traditional civil law rights-based approach according to which the right precedes the remedy (and not *vice versa*) helps explain why—unlike in common law jurisdictions<sup>68</sup>—the Continental European experience tends to consider judgments, and correspondingly their *res judicata* effects, to be indissolubly connected with the substantial rights forming the basis of parties’ formal claims. This correspondence between judgments and claims elucidates (i) why *res judicata* effect only covers what the parties bring before the court in their formal claims; (ii) the resistance of the civilians to adopt the U.S. broad definition for cause of action, including for *res judicata* purposes, all questions that may arise from the same transaction;<sup>69</sup> and (iii) the reasons why civil law courts cannot grant the parties a relief different from the one sought by them – a rule that makes the civilian approach to *res judicata* less pragmatic.

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63. See Robert C. Casad, *Issue Preclusion and Foreign Country Judgments: Whose Law?*, 70 IOWA L. REV. 53, 55-57 (1984); see generally BARNETT & SCHAFFSTEIN, *supra* note 27; see also Renato Nazzini, *Enforcement of International Arbitral Awards: Res Judicata, Issue Estoppel and Abuse of Process in a Transnational Context*, 66 AM. J. COMP. L. 603, 604, 614-16 (2018).

64. “The common law works itself pure and adapts itself to the needs of a new day.” LON L. FULLER, *THE LAW IN QUEST OF ITSELF* 140 (1940). “[T]he work of a judge is in one sense enduring and in another ephemeral. What is good in it endures. What is erroneous is pretty sure to perish. The good remains the foundation on which new structures will be built. The bad will be rejected and cast off in the laboratory of the years.” BENJAMIN N. CARDOZO, *THE NATURE OF JUDICIAL PROCESS* 178 (1921).

65. See generally JOHN P. DAWSON, *THE ORACLES OF LAW* (1968).

66. See JOHN FORTESCUE, *DE LAUDIBUS LEGUM ANGLIAE* 9 (Andrew Amos ed., 1825).

67. See R. C. VAN CAENEGEM, *JUDGES, LEGISLATORS AND PROFESSORS: CHAPTERS IN EUROPEAN LEGAL HISTORY* (1987).

68. A notable exception to the now-prevailing pragmatic transactional approach in common law was the so-called primary-right theory advanced by Norton Pomeroy in the late XIX century. It was centered on the idea that a person has the primary right to be free from harm to her legal sphere. This theory established a stricter correspondence between the judgment and the relief sought by the pleader as a consequence of the violation of her substantial rights. See NORTON POMEROY, *REMEDIES AND REMEDIAL RIGHTS BY THE CIVIL ACTION* (1876).

69. See CASAD & CLERMONT, *supra* note 27.

*C. The Scope of Res Judicata and the Ostensible Incommunicability  
Between Common Law and Civil Law*

As to the difference in the scope of claim and issue preclusion across jurisdictions, general comparative accounts still quite rigidly revolve around a stereotyped model that locates common law systems on one extreme of the *res judicata* spectrum (*viz.* the one representing a more extensive approach encompassing issue preclusion in addition to claim preclusion) and civil law systems on the opposite end (more restrictive and encompassing only a limited version of claim preclusion and lacking the issue preclusion doctrine).

According to this model, with respect to *res judicata*, there would be “a mere acoustic agreement” among legal systems because “all of them utter identical or similar sounds, but they do not have the same meaning.”<sup>70</sup> Furthermore, the distance between common and civil law procedures seems to grow exponentially when the comparison shift from claim to issue preclusion. It is almost a commonplace that civil law countries do not have “a uniform rule regarding issue preclusion,” or even that issue preclusion “as a general proposition, does not exist” at all in the civil law world.<sup>71</sup>

As it will be shown in the ensuing section, this lack of communication within the Western legal tradition is because civil law countries are more inclined to give restrictive boundaries to *res judicata* in the form of claim preclusion and have been historically averse to the very idea of issue preclusion. By contrast, Anglo-American law, after the demise of the forms of action following the nineteenth century reforms, has gradually extended the opportunity to have one’s day in court by deformatizing pleading standards and favoring the joinder of claims and parties.<sup>72</sup> This liberal approach has contributed to a particular extension of *res judicata* because it has progressively narrowed the situations in which parties are given the opportunity to relitigate. Litigants, indeed, are expected to raise all the issues arising from the same transaction which are considered relevant for their case during the first proceeding. If they do not do so, they are ordinarily prevented from having “a second bite at the cherry.”<sup>73</sup>

These historical and structural factors coupled with differences in the style of judgments and some linguistic traps have long contributed to engendering a sort of “theoretical mist” around our topic that has prevented broad-based comparative studies. As a result, (case) law in several civilian countries like Italy and Spain is progressively extending the breadth and scope of *res judicata* in a way that in the future may bridge the gap between common and civil law.<sup>74</sup> Nevertheless, the legacy of dogmatic categories and a strong form of pre-comprehension hides the systemological relevance of these recent

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70. MATTEI, RUSKOLA & GIDI, *supra* note 26, at 818.

71. *Id.* at 820. See also Guy I. Seidman, *Comparative Civil Procedure, in THE DYNAMISM OF CIVIL PROCEDURE: GLOBAL TRENDS AND DEVELOPMENTS, supra* note 2, at 11.

72. See Robert Wyness Millar, *The Premises of the Judgment as Res judicata in Continental and Anglo-American Law* (pt. III), 39 MICH. L. REV. 238, 253 (1940).

73. Taylor & Anor v. Lawrence & Anor EWCA Civ 90, 6 (2002).

74. See *infra* section II.D.(ii).

transformations.<sup>75</sup> In short, “Liked or disliked, *res judicata* is certainly misunderstood.”<sup>76</sup>

What is required to reopen a critical comparative debate on the topic at hand is an analysis of systems’ approaches to preclusion that takes into due consideration the competing relations between all the “legal formants” (legislator, case law, legal doctrine) that coexist in jurisdictions and shape the operative rules governing the subject.<sup>77</sup> In particular, a sound comparative work on issue preclusion should premise on the potential conflict between the formal explanations of the body of preclusion law contained in statutory provisions, the traditional scholarly reconstructions, and their translation into living law by Courts.

The reason for this “structuralist” approach is simple. Since both claim and issue preclusion are closely interconnected with the decision-making process, particular attention should be paid to the “law in action.” The developments of *res judicata* are mainly the by-product of the operative rules formulated by courts in response to specific demands for justice, rather than the mere result of positive law. Indeed, the changes in the interpretation and application of *res judicata* usually receive a normative translation into legislative texts as a result of their consolidation in the courtrooms. In other words, the influence of “law in books”<sup>78</sup> comes later.

This is what occurred in Greece<sup>79</sup> and Spain.<sup>80</sup> In these countries the legislative redefinition of the scope of the doctrine as to include some weak form of issue preclusion occurred after the new hermeneutic positions on preclusive effects of prior judgments passed the bench test of courts. Even in other jurisdictions where no explicit legislative interventions have occurred, in the face

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75. *See generally* JOSEPH ESSER, VORVERSTÄNDNIS UND METHODENWAHL IN DER RECHTSFINDUNG: RATIONALITÄT GRUNDLAGEN RICHTERLICHER ENTSCHEIDUNGSPRAXIS (1972).

76. CASAD & CLERMONT, *supra* note 27, at 3.

77. The purpose of this statement is not to embrace comparative structuralism as a whole. Though, to our specific purposes, the operative rules/declamations divide opens up a space of critical inquiry which, once recognized, may lead to a better understanding of our topic. *See* Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law* (pts. 1 & 2), 39 AM. J. COMP. L. 1, 22, 30-31 (1991).

78. Roscoe Pound, *Law in Books and Law in Action*, 44 AMER. L. REV. 12 (1910).

79. Issue preclusion was codified under art. 331 of the KPOL. D as a result of a settled case law heading in the direction of barring the relitigation of some essential issues determined in prior actions. *See* Konstantinos D. Kerameus, *Res Judicata: A Foreign Lawyer's Impressions of Some Louisiana Problems*, 35 LA. L. REV. 1151, 1158 (1975).

80. Ley de Enjuiciamiento Civil [L.E. Civ.][Code of Civil Procedure] art. 222(4) (Spain) (“Matter resolved with force of ‘cosa juzgada’ in a final judgment that puts an end to an action will bind the court in a later action when the matter appears as a logical antecedent of the object of the later action if the litigants in both action are the same or if the law extends cosa juzgada effect to them.”). *See also* L.E. Civ. arts. 222, 400. On the limited scope of issue preclusion in Spain, see Robert C. Casad, *Issue Preclusion in the Law of Spain: Cosa Juzgada Positiva*, in LAW AND JUSTICE IN A MULTISTATE WORLD: ESSAYS IN HONOR OF ARTHUR T. VON MEHREN 595 (James A. R. Nafzinger & Simeon C. Symeonides eds., 2002).



of more restrictive formal provisions, a less visible process of transformation is currently taking place and the elected venue for this piecemeal change is usually the courtroom. This often entails an inconsistency between the way *res judicata* is currently interpreted and applied in case law and its traditional understanding according to black-letter rules and old scholarly reconstructions. This is true for France where, for example, the *Cour de Cassation*, after commissioning a comparative study from the *Institut de droit comparé Edouard Lambert* on the application of *res judicata* in Germany, Italy, England, and Spain,<sup>81</sup> extended *de facto* its scope in the famous *Cesareo* case by requiring litigants to submit and ‘concentrate’ all possible legal grounds for their claim in the course of the first action, under pain of being barred from doing so in subsequent proceedings (*principe de concentration des moyens*).<sup>82</sup> The situation is not dissimilar to the situation in Italy where rules of *res judicata* have undergone substantive changes through case law, while their strict letter remains unchanged.

Just from these scant premises, it is easy to understand how a *summa divisio* between common law and civil law regarding our topic is an oversimplification that needs to be reconsidered. If unchallenged, the said declamation is destined to remain an uncritical and misleading truism, or to say it *à la* Stuart Mill, a “dead dogma, not a living truth.”<sup>83</sup> In order to test and disprove this predicament, we will analyze the Italian system within a wider comparative context. This analysis is intended to shed some light on the reconceptualization of the doctrine of issue preclusion recently operated by the Italian Supreme Court (*Corte di Cassazione*) which seems to reveal a partial *rapprochement* between the U.S. solutions and the Italian ones as to the scope of *res judicata*.

## II. TRADITION AND DISCONTINUITY: THE “NEW MOOD” OF THE ITALIAN SUPREME COURT *V.* THE U.S. DOCTRINE OF ISSUE PRECLUSION

Plunged into the Italian solutions on issue preclusion, the foreign lawyer’s first impasse is one of orientation due to many factors such as linguistic traps, historical sediments, dogmatic categories, different styles of judgments, etc. Thus, before delving into the aforesaid tentative “restatement” of the subject, it is worth revisiting the doctrinal debate that has preceded this new line of thought together with a succinct overview of the Italian system’s traditional (restrictive) approach to preclusion.

### A. *The Traditional Italian Approach: The “Objective Limits of Res Judicata” and the Alleged Absence of Issue Preclusion*

The yardstick against which to measure the scope of *res judicata* in civil law

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81. See *L’étendue de l’autorité de chose jugée en droit comparé*, <https://www.courdecassation.fr/IMG/File/Plen-06-07-07-0410672-rapport-definitif-anonymise-annexe2.pdf> [<https://perma.cc/PT4Y-4WHP>].

82. Cass., July 7, 2006, n. 04-10.672 (Fr.). Although the extent of the principle of “concentration of legal arguments” stated in the *Cesareo* case has been mitigated in later decisions, it had a huge impact on the notion of “cause,” and it remains a landmark case.

83. JOHN STUART MILL, ON LIBERTY 20 (1867).

jurisdictions, and in Italy in particular, is traditionally represented by what European-Continental terminology refers to as the “limits of *res judicata*.”<sup>84</sup> To clear the way, one may say that the boundaries of the preclusive effects of judgments are defined by a “three-w rule:” the whom, the when, and the what of *res judicata* effects.<sup>85</sup> The *whom* effect refers to the subjective limits, or the subjects bound by the judgment. The *when* effect is the chronological extension of *res judicata*, that is the exact point in time up to which *res judicata* projects its binding effects onto the legal relationship between the parties (the so-called “temporal limits”).<sup>86</sup> The *what* effect refers to the objective limits which are the compass of the preclusive effects of prior judgments onto subsequent proceedings as to the subject-matter of the controversy.<sup>87</sup> For this Article’s purposes, these latter objective limits are the most relevant because they deal with what does and what does not fall within the bounds of a final conclusive judgment.

For the sake of clarity and with a momentaneous suspension of disbelief, it is convenient to commence the examination of the Italian system with a declaration of absence. As a general proposition,<sup>88</sup> Italian law acknowledges and implements just one of the two facets of *res judicata*: namely, claim preclusion. Accordingly, a final judgment on claims that were (or could have been) raised by the parties in the first proceeding precludes their relitigation in a subsequent action. By contrast, *res judicata* effects would not normally cover issues that have been conclusively determined in a prior proceeding. These would fall outside the objective limits of *res judicata* for the sub-doctrine of issue preclusion would be incompatible with the specific technical features of the Italian system and with most of the procedural history of the European Continental legal experience. It follows that it is not uncommon to find the alleged absence of issue preclusion clearly stated in authoritative texts on domestic procedural systems within the civil law world. An Italian judgment would thus not have collateral estoppel effect<sup>89</sup> as well as German law would not recognize issue preclusion short of entire claims.<sup>90</sup>

In order to understand the significance and question the hold of the foregoing contentions, a threefold intellectual operation is needed. In particular, it is necessary to (i) start from the letter of positive law; (ii) locate issue preclusion in

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84. See Robert Wyness Millar, *The Premises of the Judgment as Res Judicata in Continental and Anglo-American Law* (Pt. I), 39 MICH. L. REV. 1, 1 (1940).

85. For a general overview of the different ‘limits’ of *res judicata* under Italian law, see FRANCESCO P. LUIO, DIRITTO PROCESSUALE CIVILE: PRINCIPI GENERALI 153-93 (9th ed. 2017); CRISANTO MANDRIOLI & AUGUSTO CARRATTA, DIRITTO PROCESSUALE CIVILE I 158 (26th ed. 2017).

86. The temporal limits explores, for instance, the relation between *res judicata* effects and *ius superveniens*. See LUIO, *supra* note 85, at 182-93.

87. See SERGIO MENCHINI, I LIMITI OGGETTIVI DEL GIUDICATO CIVILE (1987); Claudio Consolo, *Oggetto del giudicato e principio dispositivo I*, in RIVISTA TRIMESTRALE DI DIRITTO E PROCEDURA CIVILE 215 (1991).

88. *But see infra* section II. D.

89. CAPPELLETTI & PERILLO, *supra* note 41, at 254.

90. MURRAY & STÜRNER, *supra* note 41, at 358.

time and space so to investigate the rationales behind a specific body of positive rules and their origins; and (iii) verify whether there is a consistency amongst legislators, courts and legal scholarship or, instead, a tension between the “law in the books” and “the law in action,” viz. an inconsistency between formal explanations of *res judicata* and their translation into living law as operated by the Courts and interpreted by legal scholarship. This approach will hopefully shed some light on the operative rules of *res judicata* and its current changes.

### B. The Letter of the Law

The fundamental provision on issue preclusion under Italian law is article 34 I-CCP. The said article deals with what, in Continental-European phraseology, is commonly known under the label of “prejudicial questions” or, alternatively, “prejudicial issues” (*questioni pregiudiziali di merito*)<sup>91</sup> and reads:

Where pursuant to the applicable law provisions or upon a specific request by a party, the judge should decide, by way of a judgment final and binding upon the parties, a *prejudicial issue* which belongs to the venue, over the subject matter or with reference to the value of the action of a superior judge; the judge remands the action to the latter, assigning to the parties a final time limit by which the parties should reinstate the action before that judge.<sup>92</sup>

From the mere exegesis of the rule three initial important indicia can be surmised. One, as to the style, the literal wording of the provision appears to be unnecessarily tortuous, not to mention that it assumes the complex notion of “prejudicial issue” without clarifying it, thus leaving some room to judicial (and scholarly) discretion in statutory interpretation. Two, article 34 seems to be a rule on jurisdiction (*competenza*) and its exceptions rather than one on the scope of *res judicata* since it postulates that if the prejudicial issue belongs to the jurisdiction of a superior judge, the seized judge should stay and transfer the proceedings so that the parties could reinstate the action before that second judge. Three, it is not true in absolute terms that the Italian system does not recognize any form of issue preclusion whatsoever. Rather, it should be observed more precisely that, as a default rule, prejudicial issues are *not* decided with *res*

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91. See Millar, *supra* note 84, at 2 (explaining, that the “Continental approach to any inquiry into the objective limits of *res judicata* is not quite the same as our own. At the threshold there stands the conception of *prejudicial questions* [ . . . ] the questions whose decision is a condition precedent to the decision in chief”). Hereinafter, we will use “prejudicial issues” and “prejudicial questions” interchangeably.

92. In the original translation of Codice di procedura civile [C.p.c.][Code of Civil Procedure] art. 34. (It.), the editors of the Commentary deployed the term “preliminary issues.” We prefer to use “prejudicial issues” or “prejudicial questions” for we deem that this linguistic choice, were it so just for mere assonance, is less confusing for national and international readers (f.i. prejudicial issues are known as *questioni pregiudiziali* in Italy, *questions préjudicielles* in France and as *cuestiones prejudiciales* in Spain). See SIMONA GROSSI & CRISTINA PAGNI, COMMENTARY ON THE ITALIAN CODE OF CIVIL PROCEDURE (2010).

*judicata* effects and thus can be relitigated in a subsequent action between the same parties. In order to bring them into the sphere of the final decision and so within the ambit (*viz.* the objective limits) of *res judicata*, one of the parties in the first action must advance a specific demand (the so-called *domanda di accertamento incidentale*) for an incidental assessment (a declaratory judgment) on the issues, or that a legal provision requires that the issues be decided with binding effects.<sup>93</sup>

From the literal interpretation of the norm, the Italian solutions seem to be, at least *prima facie*, at odds with the U.S. ones. More specifically, the rule-exceptions relation appears inverted in the two jurisdictions. In the U.S. at the federal level, the general rule is that “when an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties.”<sup>94</sup> Only in exceptional cases relitigation of such issues is allowed, *e.g.*, when the issue is one of law and the two actions involve substantially unrelated claims.<sup>95</sup> Conversely, in the Italian system the “fundamental principle” is that “prejudicial issues are, as a general rule, decided without *res judicata* effects.”<sup>96</sup> In the absence of specific legal provisions or of the will of the parties manifested in a formal claim and submitted by the parties for judicial determination, which thus represent exceptions to the default preclusion regime, the court can have cognizance and decide such issues only incidentally (*incidenter tantum*) with mere “endo-litigation” effects. This means that the binding force of the judgment, as to those issues, is limited to the specific suit in which it is pronounced with the result that they can be litigated again in a second action.<sup>97</sup> Furthermore, the very theoretical architecture of the finality principle is different in the two systems.<sup>98</sup>

In the U.S., for the specific purposes of issue preclusion, not only is a judgment final upon its rendering, but also the criteria for determining finality are laxer compared to the ones adopted in the context of claim preclusion. In the case

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93. An example of a legal provision requiring a prejudicial issue to be decided with binding effects is art. 124 of the Codice civile [C.c.][Code Civil] (It.). Pursuant to this provision, in a lawsuit brought to have one's marriage declared void because of the bigamy of the other spouse, the validity of the first marriage (prejudicial issue), whether contested, is to be decided with *res judicata* effects.

94. RESTATEMENT (SECOND) OF JUDGMENTS § 27 (AM. LAW INST. 1982). The Restatement of Judgments, as every other Restatement is not binding *per se*. Nonetheless, its persuasive authority is so influential to have had a huge impact both at a federal and at a State level. See Robert C. Casad, *Two Important Books on Res Judicata*, 80 MICH. L. REV. 664 (1982) (mentioning as the two most important authorities on *res judicata* the Restatement Second of Judgment and the volume 18 of the treatise ‘Federal Practice and Procedure’ by Professors Wright, Miller, and Cooper).

95. A list of exceptions is provided for in RESTATEMENT (SECOND) OF JUDGMENTS § 28 (AM. LAW INST. 1982).

96. GIUSEPPE CHIOVENDA, *ISTITUZIONI DI DIRITTO PROCESSUALE CIVILE* I 339 (1935).

97. See, *e.g.*, ERNST HEINITZ, *I LIMITI OGGETTIVI DELLA COSA GIUDICATA* (1937).

98. See *supra* section I.B.

of issue preclusion, the notion of finality does not require that the judgment puts an end to the litigation on the merits and “leaves nothing for the court to do but execute” it, but extensively considers sufficient “any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect.”<sup>99</sup> It follows that, as long as it is fully and fairly litigated, preclusive effects may be warranted to a previously determined single issue even in the absence of what is usually deemed a “final judgment” in the strict sense, or a judgment which defines all issues of the first action. This extensive approach is justified on policy grounds by the necessity to avoid “needless duplication of effort and expense in the second action to decide the same issue,”<sup>100</sup> above all in the current complex litigation scenario where lawsuits involve innumerable, lengthy and very complicated issues to rule upon within the same proceeding.<sup>101</sup>

In comparison, the Italian system under article 324 I-CCP read in conjunction with article 2909 I-CC delivers a stricter notion of finality more formalistically linked to the impossibility to further attack a decision on the merits by way of appeal or ordinary means of review (formal *res judicata*) with a resulting postponement in time of the production of preclusive effects. The decision will be binding upon the parties and their privies (substantial *res judicata*) only after it has become formal *res judicata*.

Are the U.S. and the Italian systems two irreconcilable opposites as it appears from the strict letter of the law? In order to give a plausible answer to that question, we need to take a step back and place the problem in time and space before taking a step forward and understand the most recent developments in this area of the law.

### *C. Behind the Letter: The Historical Origins of the Italian (Issue) Preclusion Regime*

Inverting a maxim by Maitland,<sup>102</sup> Gino Gorla famously claimed that “comparison involves history.”<sup>103</sup> Comparatists are never satisfied with positive law which just represents the superficial layer of a legal system. Like historians and archeologists, they always dig into the historical sediments encapsulated into the *jus positum* in search of traces of the rationales concealed behind formal rules. Thus, the question that necessarily follows from this premise is the one concerning the reasons why issues are ordinarily decided without *res judicata* effects under Italian law. In other words, since no rule is self-expressive nor it

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

100. *Id.* at cmt. G.

101. See CASAD & CLERMONT, *supra* note 27, at 53.

102. See Frederic William Maitland, *Why the History of English Law is not Written*, in 1 THE COLLECTED PAPERS OF FREDERIC WILLIAM MAITLAND 488 (Herbert A. L. Fisher ed., 1911).

103. Gino Gorla, *Diritto comparato*, in 12 ENCICLOPEDIA DEL DIRITTO 928, 930 (1964). On the need for a renewed dialogue between comparative law and legal history, see *Symposium Legal History and Comparative Law: A Dialogue in Times of the Transnationalization of Law and Legal Scholarship*, 66 AM. J. COMP. L. 727-830 (2018).

exists “apart from the narratives that locate it and give it meaning,”<sup>104</sup> it is necessary to investigate the origins and rationales of article 34 I-CCP.

Article 34 is a novelty of the current procedural code (1940) in that it has no corresponding provision in the codification previously in force in Italy (Code of Civil Procedure of 1865). This is for the said article is the normative translation of the doctrinal teachings of Giuseppe Chiovenda.<sup>105</sup> Chiovenda was one of the founding fathers of the modern Italian and European civil procedural law whose scientific contribution was central to the development of what German scholars have called *Prozessrechtswissenschaft* (the science of procedural law as differentiated from mere “procedure”).<sup>106</sup>

Roman law is the starting point of Chiovenda’s doctrinal position on *res judicata* and issue preclusion, as Roman law was distilled and systematized by the German legal thought of the late nineteenth century. This perspective is unsurprising, especially given the historical period and the surrounding academic environment. In the second half of the nineteenth century, Italian legal academia ceased to look at Paris and started to gravitate towards and borrow from Berlin.<sup>107</sup> Then, the Italian style of legal thought and its jargon started to be imbued with German Pandectism according to which Roman rules and principles were the surface manifestation of a latent theoretical structure that could be revealed through the juridical construction (*juristische Konstruktion*) of the “professors”<sup>108</sup> and deployed to build an abstract, perfectly logical and rational system of law aloof from the contingency of social and economic facts.<sup>109</sup> Such tenets could not but influence Chiovenda whose position focused on the structure and function of the Roman civil trial.

Chiovenda claimed that, as in Roman times, *res judicata* is but the contested object of a civil suit brought by litigants before a competent court (*res in iudicium deducta*) after it is adjudicated (*judicata*), that is after the Court has granted or denied the relief sought by the plaintiff.<sup>110</sup> Great emphasis is then placed on the court’s judgment. This is because, in the face of the then Italian civil procedural code (1865), which was suffused with classic liberalism and centered around the

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104. Robert M. Cover, *The Supreme Court, 1982 Term-Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

105. See CHIOVENDA, *supra* note 96, at 332-52; *Cosa Giudicata e Preclusione*, in RIVISTA ITALIANA PER LE SCIENZE GIURIDICHE 3 (1933); *contra* FRANCESCO MENESTRINA, LA PREGIUDICIALE NEL PROCESSO CIVILE (1904).

106. See Michele Taruffo, *Sistema e funzione del processo civile nel pensiero di Giuseppe Chiovenda*, in RIVISTA TRIMESTRALE DI DIRITTO E PROCEDURA CIVILE 1133 (1986); FRANCO CIPRIANI, STORIE DI PROCESSUALISTE DI OLIGARCHI: LA PROCEDURA CIVILE NEL REGNO D’ITALIA 1866-1936 (1991); FRANCO CIPRIANI, SCRITTI IN ONORE DEI PATRES 287 (2006).

107. See John Henry Merryman, *The Italian Style I: Doctrine*, 18 STANFORD L. REV. 39, 43-45 (1965); Pier Giuseppe Monateri, *The Weak Law: Contaminations and Legal Culture*, 13 TRANSNAT’L L.&CONTEMP. PROBS. 575, 588 (2003).

108. See VAN CAENEGEM, *supra* note 67, at 67-112.

109. See PAOLO GROSSI, A HISTORY OF EUROPEAN LAW 100-12 (Laurence Hooper trans., 2006); PETER STEIN, ROMAN LAW IN EUROPEAN HISTORY 119 (1999).

110. See CHIOVENDA, *supra* note 96, at 319.

will of the parties, Chiovenda propounded a model of a civil trial where both private interests and the role of the parties in the proceedings had to coexist with the public interest of the State and the figure of the judge.<sup>111</sup> The coexistence between these two dimensions (public and private) of the civil trial lies at the core of our problem.

On the one hand, the natural institutional end of civil proceedings was deemed to be the implementation of (the will of) the law as expressed in a formal judgment. From this perspective, *res judicata* embodies the interest of the State (*interest rei publicae*) that lawsuits should have an end and consists in the unquestionability of the judgment which “must be held in the future as the immutable norm of the case decided.”<sup>112</sup> This implies that (a) it is to be held final and binding for the parties and their privies and should be implemented (positive effect of *res judicata*), and (b) the matter adjudicated by the judgment cannot be relitigated and decided *ex novo* by another court (negative effect of *res judicata*). Accordingly, the binding effects of *res judicata* do not properly pertain to nor derive from the judicial reconstruction of the facts reported in the judgment rather to the will of the law expressed therein.<sup>113</sup>

This point is the first crucial step to understand why, according to the traditional reconstruction, prejudicial questions are not ordinarily decided with *res judicata* effects. Prejudicial questions are the questions which the court encounters in the course of reaching a judgment and whose determination represents the “logical antecedent of the final question.”<sup>114</sup> Hence, prejudicial questions refer the logical steps in the judicial chain of reasoning necessarily involved in the resolution of the parties’ claims. But it has to be noted that the judge “is not only a logician, he is a magistrate,”<sup>115</sup> and so he is empowered with a public function inasmuch as he represents the State. He does so in the part of the judgment which implements the will of the law, and not in the one where he reasons like a logician. This principle is reflected in the very traditional structure of judicial decisions that can be found in the Italian system and in the civil law style of judgments at large including those systems influenced by such tradition,<sup>116</sup> according to which *res judicata* effects attach only to the dispositive part of the judgment (known as *dispositivo*, *dispositif*, *Tenor* in Italian, French and German respectively), namely to the holding setting forth the relief granted or denied, but not to the motives (*motivazione*, *motifs*, *Entscheidungsgründe*), i.e.,

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111. See GIUSEPPE CHIOVENDA, *L’AZIONE NEL SISTEMA DEI DIRITTI* (1903); PAOLO GROSSI, *SCIENZA GIURIDICA ITALIANA: UN PROFILO STORICO, 1869-1950*, at 88 (2000).

112. GIUSEPPE CHIOVENDA, *PRINCIPII DI DIRITTO PROCESSUALE CIVILE* 907 (1923).

113. See CHIOVENDA, *supra* note 96, at 321.

114. *Id.* at 332.

115. *Id.* at 322.

116. An analogous style of judgment can be found, e.g., in Japan whereby traces of the German influence, dating back to the early twentieth century, are still visible. Art. 114 of the Japanese procedural code reads, “A judgment that has become final and binding has the effect of *res judicata* only with respect to the matters contained in the formal disposition” (the so-called *shubun*). See *CIVIL PROCEDURE IN JAPAN* 491 (Yasuhei Taniguchi, Pauline Reich & Hiroto Miyake eds., 3d ed. 2018).

the opinion developed by the court to support its final determination. Thus, *res judicata* shall not cover prejudicial questions since they are included in the motives. By contrast, it will be limited to the “ultimate conclusion of the court’s reasoning,” which is included in the dispositive part of the judgment. In other words, *res judicata* will cover “the last and immediate result of the decision and not the series of facts, of jural relations or of jural situations which in the mind of the court constitute the presuppositions of this result.”<sup>117</sup>

On the other hand, the objective limits of *res judicata* and its limited scope, are strictly defined by the parties’ claims.<sup>118</sup> Here the thought of Chiovenda, and the resulting text of article 34 I-CCP, were deeply influenced by foreign procedural models. According to §322(1) of the German ZPO judgments can attain *res judicata* effects only insofar as they rule upon the demands raised by the parties in their formal claims/counterclaims (so-called *Ansprüche*).<sup>119</sup> In this sense, the parties can be considered “the masters of the proceedings”<sup>120</sup> under Italian law and in the civil law tradition in general. According to an old French doctrine, which was subsequently developed and codified in Germany, and later implemented through the doctrinal formant in Italy, what *is* and what *is not* bindingly adjudicated depends upon the content of the parties’ formal claims.<sup>121</sup> Via their claims the parties have the power to set what we may call the ‘measure of litigation,’ that is to say, the subject-matter of the controversy and, consequently, somewhat the boundaries of adjudication.<sup>122</sup>

Here, the structural differences between common law and civil law procedural models seem to be more visible. The former jurisdictions are characterized by a lesser dose of formalism. The remedial origin of the common law and the proverbial trust in the work of the judiciary helps explain why courts are freer to grant justice and to mold the appropriate remedy. Accordingly, final judgments ordinarily grant the relief that the parties are entitled to notwithstanding the presence of a specific request.<sup>123</sup> By contrast, in the light of the aforementioned strict correspondence between the judgment and the claims actually raised by the parties in their pleadings, in many civilian jurisdictions, a

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117. CHIOVENDA, *supra* note 96, at 355.

118. *Id.* at 340.

119. See MURRAY & STÜRNER, *supra* note 41.

120. MATTEI, RUSKOLA & GIDI, *supra* note 26, at 820.

121. See Millar, *supra* note 84, at 11-21; CHIOVENDA, *supra* note 96, at 342.

122. This does not imply that the subject matter of the controversy is at the complete disposal of the parties. It means that the parties via their claims indicate to the court the legal relations upon which to rule. This is known as the “principle of the claim” codified under Italian law (“The party willing to claim a right in a proceeding shall file a complaint before the competent judge.”). CODICE DI PROCEDURA CIVILE [C.P.C.][CIVIL PROCEDURE CODE] art. 99 (It.). See, e.g., MENCHINI, *supra* note 87. See also AUGUSTO CERINO CANOVA, *La Domanda Giudiziale e il suo Contenuto*, in COMMENTARIO AL CODICE DI PROCEDURA CIVILE II (Enrico Allorio ed., 1980).

123. This is particularly evident in the U.S. system. FED. R. CIV. P. 54(c) (“A default judgment must not differ in kind from, or exceed in amount what is demanded in the pleadings. Every other final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings.”).



judgment cannot grant a relief that has not been requested.<sup>124</sup> It follows that, unlike what occurs in the common law tradition, the mere material fact that an issue has been contested, litigated, and is essential to judgment is not a sufficient condition for issue preclusion to be applied. Since the court shall rule upon the claims and within their limits, if the parties wish an issue to be decided with *res judicata* effects, the parties will have to extend the terrain of the controversy by advancing a specific incidental demand.<sup>125</sup> Only the will of the parties thus manifested or the presence of an applicable legal provision<sup>126</sup> will bring the contested issue within the ambit of the final decision turning it into a cause of action and thereby extending the subject-matter of the controversy and so the scope of *res judicata*.

*D. Beyond the Letter: The Role of Case law and Minority Scholarly Doctrine in Extending the Scope of Res Judicata*

The regulatory and theoretical framework summarized thus far seems *prima facie* to corroborate the proverbial common/civil law division chronicled in the traditional accounts. In particular, issue preclusion would be a peculiar juridical epiphany of *res judicata* that is found in the common law tradition, but of which there would be no correspondent trace in the Italian and, at large, in the Continental European legal experience. Nonetheless, although valid for a didactic sketch of the subject, this conventional narrative seems rather simplistic and unconvincing. It is enough not to take for granted the perfect concordance of all legal formants within a given legal system to find some disruptive voices in this self-assured chorus. From this critical perspective, for instance, it is possible to observe that in Italy both case law and a minority part of scholarly doctrine have devised theories and operative solutions aimed at mitigating the rigor of the “law in the books” and thus extending the scope of *res judicata* beyond the letter of the law.

*(i) The Disruptive Voice of the “Juristes Inquiets”*

As to the scholarly debate on issue preclusion, the study of the “*juristes*

124. This principle is widely codified in the civil law tradition. Compare C.P.C. art. 112 (It.) (“The judge shall decide upon all the claims and within its limits . . .”), with ZIVILPROZESSORDNUNG [ZPO][Code of Civil Procedure] art. 308 (Ger.) (“The court does not have authority to award anything to a party that has not been petitioned . . .”), and CODE DE PROCEDURE CIVILE [C.P.C.][Civil Procedure Code] art. 5 (Fr.) (“The judge must rule on everything that is requested and only what is requested.”), and *id.* art. 7 (“The judge cannot base his decision on facts which are not in the debate . . .”).

125. Compare ZIVILPROZESSORDNUNG [ZPO][Code of Civil Procedure] art. 256(2)(Ger.) with C.P.P. art. 34 (It.).

126. The incidental assessment *ex lege* (i.e., the fact that prejudicial questions are decided with *res judicata* effects according to an applicable legal provision) is present in the Italian but not in other civil law systems (e.g., Germany). See FRANCESCA LOCATELLI, L’ACCERTAMENTO INCIDENTALE *EX LEGE*: PROFILI 50 (2008).

*inquiets*,”<sup>127</sup> that is those jurists who dare to challenge the dominant views, is essential for our purposes. Along this line, it is important to highlight that in Italy the few scholars who have criticized the traditional reconstruction of *res judicata*<sup>128</sup> are comparatists or scholars intellectually sensitive to comparative arguments. It is even more revealing that the starting point for revisiting the alleged absence of issue preclusion in the Italian system has been the U.S. doctrine of collateral estoppel.<sup>129</sup>

The start of this counter narrative is the interpretation of article 34 I-CCP. Indeed, according to this minority doctrine, this provision does not set forth a general principle on the “objective limits” of *res judicata*. Rather, it would represent a rule on jurisdiction.<sup>130</sup> In short, borrowing from the U.S. experience, they argue that a court seized of the principal decision should also be empowered to decide the prejudicial questions with *res judicata* effect even in the absence of a specific request of the parties. This would preclude the relitigation of those issues in a second suit between the same parties (or their privies) provided that the following conditions are met: (i) the initial court seized of the main claim also had jurisdiction over the prejudicial questions; (ii) the parties had the legal standing to treat those issues; and (iii) from the behavior of the parties in the course of the lawsuit, the evidence produced, and the content of the final judgment, it could be reasonably surmised that the prejudicial questions were fully litigated and had a meaningful bearing on the outcome of the decision. Accordingly, the mechanism of article 34 I-CCP (the need for and incidental demand) would apply only when the initial court seized of the main claim lacked

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127. Marie Claire Belleau, *The Juristes Inquiets: Legal Classicism and Criticism in Early Twentieth-Century France*, 2 UTAH L. REV. 379 (1997).

128. See, e.g., ENRICO TULLIO LIEBMAN, MANUALE DI DIRITTO PROCESSUALE CIVILE 153 (1951), Vittorio Colesanti, *Eccezione (Diritto Processuale Civile)*, in 14 ENCICLOPEDIA DEL DIRITTO 172, 203(1965), Edoardo Garbagnati, *Questioni Pregiudiziali*, in 38 ENCICLOPEDIA DEL DIRITTO 69 (1987), Aldo Attardi, *In Tema Di Limiti Oggettivi Della Cosa Giudicata*, in RIVISTA TRIMESTRALE DI DIRITTO E PROCEDURA CIVILE 475 (1990), GIROLAMO MONTELEONE, DIRITTO PROCESSUALE CIVILE I 532 (17th ed. 2018).

129. This reference is to the landmark contributions of certain scholars, see Pugliese, *supra* note 39, at 867-68; see also, Michele Taruffo, *Collateral Estoppel e Giudicato sulle Questioni (II)*, RIVISTA DI DIRITTO PROCESSUALE 272 (1972). For a more recent authority, see DIEGO VOLPINO, L'OGGETTO DEL GIUDICATO NELL'ESPERIENZA AMERICANA (2007).

130. See Vittorio Denti, *Questioni pregiudiziali*, in 14 NOVISSIMO DIGESTO ITALIANO 657 (1967). It is worth noticing that the preliminary works of the current procedural code [art. 109(1) of the preliminary project] show that the first text of art. 34 I-CCP—later changed in the final version which was modeled on the position of Chiovenda—originally was a rule on jurisdiction dealing with the effect of the exceptions raised by the defendant on jurisdiction. See ANDREA LUGO & MARIO BERRI, CODICE DI PROCEDURA CIVILE ILLUSTRATO CON I LAVORI PREPARATORI E CON NOTE DI COMMENTO 73-75 (1942). Furthermore, even in French law, prejudicial questions have been traditionally examined in the broader context of jurisdiction. See, e.g., HENRY SOLUS & ROGER PERROT, DROIT JUDICIAIRE PRIVE II. 506 (1973); CADIET & JEULAND, *supra* note 51, at 204-19.

jurisdiction over the prejudicial question.<sup>131</sup>

The tenets of foregoing scholarly view cannot but recall the requirements for the application of issue preclusion in the U.S. as expressed in majority decisions and leading doctrine,<sup>132</sup> and provided for in the Restatement (Second) of Judgments. The Restatement provides that “[w]hen an issue of fact or law is litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.”<sup>133</sup>

(ii) *The Corrective Mechanisms of Case Law: Anatomy  
of a (Potential) Restatement*

Res judicata is strictly linked to the adjudication process and owes its developments mostly to case law. Courts are called to constantly erode small parts of *res judicata* doctrine and gradually replace them with new ones. And they do it “from below,” i.e., starting from the actual demands for justice contained in the cases brought to their attention. This is so in both common law and in civil law. For instance, if it is true in principle that in the civil law world *res judicata* effects apply only to the dispositive part of the judgment (and so not to the motives whereby prejudicial question are usually referred to),<sup>134</sup> this structural feature has been deconstructed over time by several corrective mechanisms introduced in the system by way of interpretation.

In Italy, according to the traditional view, only the relief granted or denied by the court in the holding becomes *res judicata* and not the motives which are deemed to perform a mere explicative function.<sup>135</sup> The majority of case law, however, has extended such effects to all those issues which are the logical and juridical antecedents of the final decision.<sup>136</sup> Moreover, it is generally recognized that the holding is to be interpreted with a view to the motives.<sup>137</sup>

A similar phenomenon can be observed in Spain and France. As to the former, the Spanish Supreme Court has extended *res judicata* effects to the motives when they represent “*la razón decisoria*,” i.e., the *ratio decidendi* of the judgment and not mere *obiter dicta*.<sup>138</sup> Similarly, in France, the courts have long extended the *autorité de la chose jugée* to the motives forming the so called *antécédent logique nécessaire de la décision*, that is to those issues that were the

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131. See Pugliese, *supra* note 39, at 866-69. See also Taruffo, *supra* note 129, at 282-92.

132. See CASAD & CLERMONT, *supra* note 27, at 113-48.

133. RESTATEMENT (SECOND) OF JUDGMENTS §27, cmts. d-j (AM. LAW INST. 1982).

134. See *supra* section II, C.

135. See CHIOVENDA, *supra* note 96; see also MONTELEONE, *supra* note 128, at 533-35.

136. See, e.g., Cass., Sept. 06, 1999, n.9401 (It.), Cass., Aug. 19, 2009, n.18381 (It.); Cass., May 16, 2014, n.10853 (It.) (pushing towards an extension of preclusive effects to motives also in consideration of a broader notion of *res judicata* at a European level); Sergio Menchini & Alessandro Motto, *art. 2909-cosa giudicata*, in COMMENTARIO DEL CODICE CIVILE: DELLA TUTELA DEI DIRITTI 57-74 (Enrico Gabrielli ed., 2016).

137. See Cass., May 28, 1984, n.3270 (It.).

138. S.T.S., Feb. 28, 2013 (R.O.J. 798) (Spain).

necessary steps to reach a final decision and support the holding (*motives decisifs*). Albeit the latest decisions seem to be heading in the opposite direction in accordance with a strict construction of the procedural rules,<sup>139</sup> the courts still make some concessions to obviate the shortcomings of a strict formalist approach.<sup>140</sup> Today, this trend finds major resistance in Germany. The idea to extend the effects to the motives is an older view famously advocated in Germany by Savigny, but it was challenged and later rejected by the compilers of the German procedural code.<sup>141</sup> Nonetheless, even in the German system we can find some disturbing voices. There is a general agreement that motives can be used to interpret the dispositive part;<sup>142</sup> plus, a minority scholarly view has advocated for a possible extension of the objective limits of *res judicata* via the enhancement of the motives.<sup>143</sup>

Along the same lines, even the idea that the objective limits of *res judicata* are inextricably linked to the demands of the parties advanced in their claims has undergone some mitigations. First, in accordance with a still-prevailing view commonly expressed in the judicial maxim “*il giudicato copre il dedotto e il deducibile*,” the majority of Italian decisions have extended *res judicata* effects not only to the claims raised by the parties in the first action (*dedotto*), but also to those matters arising out of the same transaction which might have been but were not pleaded (*deducibile*).<sup>144</sup> This recalls the requirements for the application of claim preclusion in the U.S. experience according to which, to favor the joinder of claims, a final judgment is conclusive “not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.”<sup>145</sup> And some extensions of the negative effect of *res judicata* can be

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139. Code De Procédure Civile [C.p.c.][Civil Procedure Code] art. 480 (Fr.); Code De Procedure Civile [C.p.c.][Civil Procedure Code] art. 455(2)(Fr.) (“The judgment pronounces the decision in the form of dispositive part.”).

140. See CADIET & JEULAND, *supra* note 51, at 623-24.

141. SAVIGNY, *supra* note 18, at Bd. 6, § 291 (criticized in CHIOVENDA, *supra* note 96, at 321); Millar, *supra* note 84, at 10; Zeuner & Koch, *supra* note 27, at 23.

142. See BUNDESGERICHTSHOF [BGH][Federal Court of Justice] Feb. 27, 1961, BGHZ 34 (339) (Ger.).

143. See ALBRECHT ZEUNER, DIE OBJEKTIVEN GRENZEN DER RECHTSKRAFT IM RAHMEN RECHTLICHER SINNZUSAMMENHÄNGE (1959) (claiming that prejudicial questions dealt with in a first lawsuit could be covered by *res judicata* and so precluded from being relitigated insofar as there is a teleological connection between them and the subject matter of the second suit).

144. See, e.g., Cass., sez. un., Apr. 21, 1989, n.1892, Mass Giur. it. 1989 (It.); Cass., Feb. 26, 2019, n.5486, CED Cassazione 2019 (It.); Pugliese, *supra* note 39, at 864-66.

145. *Cromwell v. County of Sac*, 94 U.S. 351, 352 (1876). See also RESTATEMENT (SECOND) OF JUDGMENTS §24(1) (AM. LAW INST. 1982). A similar idea was formulated in the English doctrine of abuse of process in the famous case *Henderson v. Henderson* (1843). 6 Q.B. 288 reprinted in 3 Hare 100, 115 (Eng.) (claiming, “The plea of *res judicata* applies . . . to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time”).

found in other European countries like France and Spain.<sup>146</sup>

Moreover, in the direction of removing *res judicata* from the strict control of the parties seems to move the settled case law that acknowledges that the court can have cognizance of *res judicata* and so, ascertain the preclusive effects of matters determined in a prior judgment onto a second suit, *sua sponte*. This orientation is motivated by the fact that *res judicata* cannot be deemed a private asset at the disposal of the parties. Rather, it serves a public interest and belongs to the normative elements of a judgment. Hence, it must be interpreted and ascertained accordingly.<sup>147</sup>

Finally, building on an influential scholarly position, a settled line of decisions claims that *res judicata* effects extend automatically to some kind of prejudicial questions—namely, the so-called “logical prejudicial questions.”<sup>148</sup> An example will clear the way more than abstract theorizations. If a previous judgment having *res judicata* effects has ordered the seller to deliver the goods sold, the buyer will be estopped from contesting its obligation to pay the price due for the goods on the grounds of the invalidity of the contract of sale in a subsequent lawsuit on the enforcement of the contract. This is because a final and conclusive decision on the single effects (in our example the obligation to deliver the goods) of a complex legal relation extends its *res judicata* authority to the existence and validity of the legal relationship from which those effects originate. This happens even in the absence of a specific incidental demand of the parties or legal provision asking for a ruling on that issue. The existence or validity of the legal relationship is a prejudicial question that represents the necessary logical premise of the decision on the main claim.<sup>149</sup> This approach is justified on policy grounds (it fosters judicial economy, ensures the certainty of rights, and avoids inconsistent judgments).

By contrast, the same case law contends that, unless the formal requirements provided for in Article 34 I-CCP are met, prejudicial questions are to be decided without *res judicata* effects in the case of the so-called “technical prejudicial questions.” To illustrate this notion through an example, a judgment in which a previous proceeding orders X to pay child maintenance (main question) to Y is not conclusive of the issue of paternity of X (prejudicial question). It follows that unless one of the parties has contested paternity in the course of the first proceeding and submitted an incidental demand to the court asking for a declaratory judgment on it, that issue will be open to relitigation in a subsequent action. It implies that the court seized of the same issue of paternity in a second action between the same parties (or their privies) will not be bound by the determination rendered by the initial court. This is because in the first proceeding the decision on the main question (child maintenance in our example) is legally conditioned by the cognizance of the prejudicial question (paternity). The latter,

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146. See Ley De Enjuiciamiento Civil [L.E. Civ.][Code of Civil Procedure] art. 400 (Spain).

147. Cass., sez. un., Jan. 18, 2016, n.691, *Urbanistica e appalti* 2016, 5, 549 (It.).

148. See MENCHINI, *supra* note 87, at 82-85 (building on the difference between “technical prejudicial questions” and “logical prejudicial questions” originally propounded by Salvatore Satta).

149. See, e.g., Cass., Jan. 19, 1999, n.462, *Mass. Giur. it.* 1999 (It.).

indeed, is one of the facts forming the basis of the claim (*fatti costitutivi*) of the former (*viz.* the right to maintenance is dependent on the status of paternity). Nonetheless, the prejudicial question and the main question, although technically connected, are *logically independent* to each other because the latter is not an effect of the former. Instead, they are two different legal relationships to the extent that the prejudicial question could be made an object of autonomous claims.<sup>150</sup>

(iii) *The Recent Revirement of the Italian Supreme Court on Issue Preclusion*

The voices of the *juristes inquiets*, together with the foregoing jurisprudential corrections, have paved the way for the poignant *revirement* recently operated by the Italian Supreme Court. With two landmark decisions dating back to 2014, the Full Board of the Italian Supreme Court has, to some extent and with reference to a specific case (nullity of contract), untied *res judicata* from the chains of the parties' claims with the result of extending its preclusive effects to prejudicial issues and thereby acknowledging some form of issue preclusion.<sup>151</sup>

The Italian Supreme Court addresses the subject commencing from the hoary problem of the judicial assessment of nullity: a vexed question that arises on the muddy borderline between substantive law and procedure. Under Article 1421 I-CC, nullity can be ascertained by the judge on its own motion (*ex officio*).<sup>152</sup> However, according to the majority opinion,<sup>153</sup> this rule is to be strictly coordinated with the two procedural provisions: the principle of claim (Article 99 I-CCP)<sup>154</sup> and the correspondence between claim and judgment (Article 112 I-CCP).<sup>155</sup> As seen before,<sup>156</sup> pursuant to the said principles, the court can decide solely based on the complaints filed by the parties. Therefore, in principle, it is forbidden from ruling on the nullity of a contract if the plaintiff has requested, for instance, a termination for non-performance or a rescission. This is because, in such cases, the nullity would not fall within the scope of the relief sought by the party (*petitum*); rather it would constitute a prejudicial issue. It follows that, in compliance with the letter of Article 34 I-CCP, in the absence of a request of a party for a declaratory judgment on that issue or a relevant legal provision on the point, it shall be decided without *res judicata* effects.

The 2014 the Italian Supreme Court's decisions challenged this traditional

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150. See MENCHINI, *supra* note 87, at 92.

151. See Cass., sez. un., Dec. 12, 2014, n.26242, 26243, Giur. it. 2015, I, 70 (It.). See also Cass., May 15, 2018, n.11754, Riv. Dir. Proc. 2020, I, 411 (It.).

152. For a concise discussion on the concept of nullity under Italian law, see GUIDO ALPA & VINCENZO ZENO-ZENCOVICH, ITALIAN PRIVATE LAW 182–184 (Sir Basil Markesinis & Dr. Jörg Fedtke eds., 2007).

153. See, e.g., Cass., Mar. 11, 1988, n.2398, Foro it.1989, I, 1936 (It.).

154. See C.P.C., *supra* note 122, at art. 99.

155. CODICE DI PROCEDURA CIVILE [C.P.C.][CIVIL PROCEDURE CODE] art. 112 (It.) (“The judge shall decide upon all the claims and within its limits; he shall not *sua sponte* decide upon exceptions which may be raised only by the parties.”).

156. See *supra* section II.C.

approach, prompting an interesting reconsideration of the subject and addressing the hiatus between case law and doctrine. First, in its decisions, the Supreme Court acknowledges the power/duty of the court to ascertain the validity of a contract on its own motion, regardless of the specific content of the party's main claim (*e.g.*, performance, annulment, termination, etc.). That is partly because the issue of nullity has a necessary connection to the main claim in that all the said complaints are filed to enforce a right (*e.g.*, the claimant's right to performance) or eliminate some effects (*e.g.*, termination, rescission) arising from a legal relation whose validity is, therefore, under discussion and to some extent presumed *a fortiori*. Moreover, it is held that since nullity is provided for in the law in the public interest,<sup>157</sup> the court is empowered to declare the (in)validity of contract with *res judicata* effects, even in the absence of an explicit demand from a party on that issue. It may well happen that the Court ascertains nullity and submits it to debate between the parties even though neither the plaintiff nor the defendant demand for a ruling on the question, instead of limiting themselves to request a decision on the merits on the original main claim (*e.g.*, performance, termination for non-performance). In the latter case, if the court acknowledges the presence of a vitiating factor that has the effect of making the contract void, it will have to reject the main claim, declaring the nullity in the motives but not in the holding, and this judgment on the issue of nullity will, however, produce *res judicata* effects to conclusively establish the nullity of the contract in any subsequent action between the same parties.

Up to this point, also in the light of the principles of the stability of decisions and judicial economy, the line of reasoning of the *Corte di Cassazione* is plain and highly sharable. However, the Italian Supreme Court goes further. With the overtly declared intent of avoiding the serial multiplication of trials,<sup>158</sup> the Supreme judges establish that even the lack of *ex officio* recognition of the nullity of a contract is functionally equivalent to an implied finding (covered by *res judicata* effects) as to its validity. It follows that even if the judge has not ascertained the nullity of the contract by its own motion, nor has the said issue been raised and litigated by the parties, a final decision in favor of the claimant's complaint on the main claim (for the fulfillment, termination, cancellation, etc.) may have the authority of implicit *res judicata* as to the 'non-nullity' (*i.e.*, validity) of the contract.

Quite surprisingly, in this respect, the Italian Supreme Court judges seem to adopt a more radical position on issue preclusion than their U.S. counterparts; we might say "more royal than the king." If we look generally at the mechanism of U.S. issue preclusion, we notice that, for its operation, the American Courts require not only that an issue in a prior proceeding is essential to the judgment,

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157. *See* Cass., sez. un., Sept. 4, 2012, n.14828, Foro it. 2013, I, 1238 (It.).

158. The need to avoid a continual retrial of claims and issues is linked with rationales underlying issue preclusion in all the jurisdictions. *See, e.g.*, for the U.S., *Montana v. United States*, 440 U.S. 147, 153-54 (1979) (claiming that issue preclusion protects litigants "from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions").

but also that it is *actually litigated* by the parties.<sup>159</sup> The requirement for actual litigation represents the most important benchmark in applying issue preclusion and marks a major distinction between claim preclusion (whereby all the claims that were brought or *could have been brought* by the parties in a prior proceeding may be barred in later litigation) and collateral estoppel (whereby just the issues raised by the parties and submitted for determination are covered by *res judicata* effects).<sup>160</sup> Therefore, in the U.S. the scope of *res judicata* is wider than elsewhere. The binding effects of prior decisions and the preference for the joinder of claims explain why litigants are ordinarily given just “one bite at the apple.”<sup>161</sup> The parties should use their day in court to litigate all relevant claims and issues in the first action. If they do not, they will not normally be given a second chance in later actions. Nonetheless, parties are prevented from contesting matters that were determined in a prior proceeding only insofar as “they have had a full and fair opportunity to litigate” them.<sup>162</sup> Litigants must have the opportunity to be heard and present their sides of the dispute. In other words, *res judicata* must be coordinated with the constitutional principle of due process as set out in the Fifth and Fourteenth Amendments of the U.S. Constitution.

The Italian Supreme Court, on the other hand, in equating the lack of *ex officio* assessment of nullity of a contract with its validity, has embarked on a slippery slope that may open a wound in the system of constitutional guarantees surrounding trials. If there is no judicial assessment when the court submits the issue of nullity to debate between the parties, and the parties do not request a declaratory judgment on the point, the risk is to facilitate a dangerous mechanism whereby silence (of the judgment) is construed as assent (of the parties) in the formation of *res judicata* effects on issues that *have never been litigated*. This mechanism entails a potential violation of the constitutional right of defense,<sup>163</sup> and of the right to be heard.<sup>164</sup> In this theoretical framework, it is clear that a deeper understanding of the American doctrine of issue preclusion and the long-time experience of its courts may be beneficial for civil law judges and legislatures to avoid its potential misapplication.

The tension between the right to a fair trial and the need for an expeditious machinery of justice lies at the very heart of the *res judicata* mechanism. Nonetheless, the search for an “efficient justice” should never be pursued at the

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

160. See, e.g., JACK FRIEDENTHAL ET AL., CIVIL PROCEDURE: CASES AND MATERIALS 1233-39 (12th ed. 2018); DAVID L. SHAPIRO, CIVIL PROCEDURE: PRECLUSION IN CIVIL ACTIONS 32, 46 (2001); FRIEDENTHAL ET AL., *supra* note 41, at 663-67.

161. Organization for a Better Austin v. Keefe, 402 U.S. 415, 423 (1971).

162. Montana v. United States, 440 U.S. 147, 153(1971).

163. See Art. 24 Costituzione [Cost.] (It.) (“Anyone may bring cases before a court of law in order to protect their rights under civil and administrative law. Defense is an inviolable right at every stage and instance of legal proceedings.”).

164. See Art. 111(1) and (2) Costituzione [Cost.] (It.) (“Jurisdiction is implemented through due process of law. All court trials are conducted with adversary proceedings and the parties are entitled to equal conditions before an impartial judge in third party position. The law provides for the reasonable duration of trials.”).



expense of a “fair justice.” Accordingly, the search for the right balance between the efficient and the just outcome of judgments should be always taken as the leading criterion to devise limitations to issue preclusion and avoid that a distorted use of such doctrine may create an injustice. This idea is enshrined in the *res judicata* doctrine and finds many national and international confirmations.<sup>165</sup> For instance, Article 28(3) of ALI/UNIDROIT Principles of Transnational Civil Procedure reads, “The concept of issue preclusion, as to an issue of fact or application of law to facts, should be applied only to prevent substantial injustice” because collateral estoppel should have a guarded application always enlightened by bedrock constitutional principles.<sup>166</sup>

#### CONCLUSION

A long time ago, a critical voice in the field claimed that procedural models are not and cannot be “closed worlds without mutual influences.”<sup>167</sup> This idea is even stronger in the current era whereby the constant hybridization of legal systems and the internationalization of civil litigation requires a look at procedural law across borders and beyond intellectual boundaries.

This study has attempted to pursue this route by exploiting the “subversive” potential of comparative law to challenge some deep-rooted stereotypes on the doctrine of issue preclusion and reduce the cultural gap between legal systems to help domestic proceduralists to dispense with outdated categories and read national rules and principles anew.<sup>168</sup>

According to the dominant narrative, the different morphology of *res judicata* in common law and civil law countries represents an almost unbridgeable systemological difference which precludes the possibility of a meaningful dialogue between common lawyers and civilians. Issue preclusion would be a preservation of the common law tradition, which is alien to the civil law legal culture. Our aim in this article was to subject this authoritative opinion and its

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165. The same criterion can be found in several jurisdictions. For instance, in *Penner v. Niagara (Regional Police Services Board)*, [2013] 2 S.C.R. 125, 8 (Can.), the Canadian Supreme Court established that “[t]he flexible approach to issue estoppel provides the court with the discretion to refuse to apply issue estoppel if it will work an injustice, even where the preconditions for its application have been met.” In a similar vein, in England, the House of Lords in *Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2)* [1967] 1 A.C. 853, 947 stated that “[a]ll estoppels are not odious but must be applied so as to work justice and not injustice and I think the principle of issue estoppel must be applied to the circumstances of the subsequent case with this overriding consideration in mind” (Lord Upjohn).

166. See *Allen v. McCurry* 449 U.S. 90, 95 (1980). This is also the reason why, for instance, in the U.S. courts call for a “guarded application of preclusion doctrine in criminal cases.” *Bravo-Fernandez v. United States*, 137 S.Ct. 352, 358 (2016).

167. Vittorio Denti, *L'Evoluzione del Diritto delle Prove nei Processi Civili Contemporanei*, in *RIVISTA DI DIRITTO PROCESSUALE* 31, 31-32 (1967).

168. See George P. Fletcher, *Comparative Law as a Subversive Discipline*, 46 *AM. J. COMP. L.* 683, 684, 695 (1998). See also Horatia Muir Watt, *La Fonction Subversive du Droit Comparé*, 52 *REVUE INTERNATIONALE DE DROIT COMPARÉ* 503 (2000).

corollaries to critical analysis by comparing the Italian system with the U.S. system.

The results of the comparative investigation have revealed some unexpected similarities between the two jurisdictions. As for now, it would be an overstatement to say that the recent Italian *revirement* represents a convergence with the U.S. model. However, the refreshing lack of orthodoxy demonstrated by the Italian Supreme Court, albeit objectionable in some respects, is further evidence of the visible tendency in civil-law jurisdictions to gradually extend the breadth of *res judicata* to encompass issue preclusion. Furthermore, the analysis reveals that (a) in both legal families, the body of operative rules governing *res judicata* and its evolutionary trends is mainly formulated by courts; and (b) the scope of *res judicata* in practice is wider than the letter of the formal provisions and the traditional dogmatic reconstructions seem to suggest in the first place.

Undoubtedly, this approximation between civil law and common law is a long and complex process of transformation in need of piecemeal changes and further confirmations whose results cannot be precisely foretold. However, besides suggesting the existence of fertile grounds for discussion on *res judicata* within the Western Legal Tradition, this visible trend may turn, for the time being, a “merely acoustic agreement”<sup>169</sup> into a potential common core of civil justice.

The future route of this journey depends on the intensification of the existing cultural dialogue between civil procedure and comparative law. The expansion of comparative civil justice would surely advantage both domestic proceduralists and comparatists. The former would benefit from more regular wanderings into the intricacies of comparative law by receiving an additional efficient tool of analysis from which to observe legal reality; the latter would be placed in an even better position to interact with the “law in action” and emerge from their proverbial condition of “loneliness.”<sup>170</sup>

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169. MATTEI, RUSKOLA & GIDI, *supra* note 26, at 818.

170. See JOHN HENRY MERRYMAN, *LONELINESS OF THE COMPARATIVE LAWYER & OTHER ESSAYS IN FOREIGN & COMPARATIVE LAW* (1999).