

Preclusion as to Issues of Law: The Legal System's Interest

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The rules of claim and issue preclusion bar litigants from relitigating claims and issues, except under narrowly defined circumstances. The parties' alignment of interest in application of the rules of preclusion is generally simple and direct, even brutal. The winner in the former litigation does not want to permit the claim or issue to be relitigated. The loser wants the matters in question to be considered anew. But there are exceptions to this alignment. One notable example is where a judgment winner has won less than he sought and wants what has been inelegantly but expressively called "two bites at the cherry."¹ In general, however, the prior winner wants the door closed and the loser wants it open.

There is also a third participant in the controversy. This is the court, or more inclusively, the judicial system, and still more inclusively, the legal system. The judicial system has a strong although not unequivocal interest in seeing that things judicially decided—*res judicata*—stay decided. The immediate interest underlying this position is often said to be efficiency—that redoing that which has been done is a waste of time and effort.² No doubt efficiency considerations are vitally important in the rules of *res judicata*. However, it might well be more expedient to try most types of cases by a "quick and dirty" procedure and then liberally permit motions for retrial on the basis of surprise, newly obtained evidence, or serious doubt as to veracity of key witnesses. In fact, procedure in trial courts of limited jurisdiction previously followed such a model. In those courts, trial was brief and informal but a new trial was available of right by appeal to the trial court of general jurisdiction.³ Essentially the same mechanism has emerged in the form of the "mini-trial" and similar streamlined techniques of dispute resolution.⁴ Moreover, even when a full

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1. The general rule is that such a winner is not entitled to two bites. RESTATEMENT (SECOND) OF JUDGMENTS § 18 (1982) ("When a valid and final personal judgment is rendered in favor of the plaintiff: (1) The plaintiff cannot thereafter maintain an action on the original claim or any part thereof . . .").

2. See *id.* introduction at 6-12.

3. See generally LAW ENFORCEMENT ASSISTANCE ADMIN., U.S. DEP'T OF JUSTICE, NATIONAL SURVEY OF COURT ORGANIZATION 4-5, table at 43 (1973).

4. See generally, *e.g.*, L. FARMER, APPEALS EXPEDITING SYSTEMS: AN EVALUATION OF SECOND AND EIGHTH CIRCUIT PROCEDURES (Federal Judicial Center 1981); M. JACOUBOVITCH & C. MOORE, SUMMARY JURY TRIALS IN THE NORTHERN DISTRICT OF OHIO (Federal Judicial Center 1982); A. LIND & J. SHAPARD, EVALUATION OF COURT-ANNEXED ARBITRATION IN THREE FEDERAL DISTRICT COURTS (Federal Judicial Center 1981).

and costly trial has been held, the law of *res judicata* has always had room for a motion to set aside where the showing is strong and the apparent injustice great.

Hence, efficiency is not an exhaustive justification for the rules of claim and issue preclusion. Indeed, it probably is not the fundamental justification. The fundamental justifications for the preclusion rules are epistemological and institutional in nature.

As a matter of epistemology, a court cannot decide what the disputed facts "are," nor can it finally fix what the law "is." The facts in a legal dispute usually are past events that, having occurred in their own time and circumstance, now are eclipsed by succeeding events and exist only in partial and partisan memories. When an injunction is under consideration, the relevant events are prospective and in a strict sense wholly imaginary. A court therefore does not "find" facts. It postulates them by an official process—a trial, in which the legal system pronounces on the basis of imperfect evidence what will be considered perfect truth. The transformation from indeterminacy to certainty is presented as empirical inquiry and discovery, and indeed, a trial involves both inquiry and discovery. But the transformation into certainty also entails an unavoidable element of official fiat and thus an institutional and political element. The facts are as the *court* says they are. The ultimate reason why the court's *ipse dixit* prevails is because the pronouncement is *ex officio* and the political sovereign has said through organic law that judicial pronouncements shall prevail.

As for issues of law, judicial pronouncements also are conclusive because by a second order rule they are pronounced to be conclusive.⁵ In a sense, to which Holmes adverted,⁶ rules of law do not "exist" but are only forecasts of the terms in which the power of the state will be brought to bear if push comes to shove. In a strict chronological or existential sense, the law that "is" when a transaction occurs is not the same law that "is" when the transaction is sued on, or the same law that "is" when the suit goes to judgment. For many reasons, however, it is useful, indeed institutionally vital, to ignore these discontinuities. It is morally intolerable that the incidence of the state's authority appears to depend simply on the date at which it is exercised. Therefore, the social order undertakes to say that rules of law exist intertemporally—that the law has been, is, and shall continue to be—and that the rules will be consistently applied regardless of the temporal sequence of events. The considerations underlying this policy are maintenance of equality before the law and the social stability that such equality promotes.

5. See H. HART, *THE CONCEPT OF LAW* 138-39 (1961).

6. See Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897) ("The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.").

The legal system has a complex apparatus to carry out this ultimately political purpose of maintaining consistency in what the law "is." The purpose is reflected in the very idea of a statute.⁷ The doctrine of stare decisis also is part of the apparatus. So is the technique of "harmonizing" decisional authorities and reconciling statutory provisions whose literal meanings are inconsistent.⁸ The law of the case doctrine is another subsidiary.⁹

Another important part of the apparatus is found in the rules of res judicata. As we often have been reminded by our highest court, the rules of res judicata express strong public policy in favor of stability of decisions.¹⁰ But there are exceptions to these rules and therefore qualifications to the policy that supports them. The present inquiry examines one of these exceptions from a special viewpoint. The viewpoint is that of the judicial system as an institution, rather than the viewpoint either of the litigants or of a court confronting whether relitigation of a particular claim or a particular issue should be allowed. The proposition is that concern for equality and stability external to the specific controversy may justify the courts in sometimes sacrificing equality and stability as between the immediate parties. That is, larger institutional concerns may prevail over narrower ones.

I. EXCEPTIONS TO THE RULE OF CLAIM PRECLUSION

The general rule of claim preclusion prohibits a plaintiff who has gone to final judgment from further seeking relief against the defendant.¹¹ But this rule is subject to exceptions. Some of these exceptions estop litigants from invoking claim preclusion;¹² others arise where procedural limitations made it impossible or impractical to litigate the whole transaction in one instance.¹³

Two other exceptions should be considered. These are defined in *Restatement (Second) of Judgments* § 26(1)(d): "The judgment in the first action was plainly inconsistent with the fair and equitable implementation of a

7. See G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 74-75 (1982).

8. Cf. K. LLEWELLYN, *THE COMMON LAW TRADITION—DECIDING APPEALS* 522-28 app. C (1960) (listing "canons" of statutory construction).

9. See Vestal, *Law of the Case: Single-Suit Preclusion*, 1967 UTAH L. REV. 1, 1.

10. E.g., *Federated Dep't Stores v. Moitie*, 452 U.S. 394, 401 (1981); *Cromwell v. County of Sac*, 94 U.S. 351, 370-71 (1877) (Clifford, J., dissenting).

11. See *RESTATEMENT (SECOND) OF JUDGMENTS* § 18 (1982); see also *id.* § 24(1) ("When a valid and final judgment rendered in an action extinguishes the plaintiff's claim . . . , the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction . . . out of which the action arose.").

12. See *id.* § 26(1)(a) (agreement between the parties to split the action); *id.* § 26(1)(b) (action split by court order).

13. See *id.* § 26(1)(c) (procedural limitations in first action); *id.* § 26(1)(e) (continuing wrong treated as multiple wrongs that are subject to successive actions).

statutory or constitutional scheme, or it is the sense of the scheme that the plaintiff should be permitted to split his claim."¹⁴

The exception embodied in the last clause of section 26(1)(d) refers to established procedural policy, originating from a specific statutory scheme. But the first clause—"inconsistent with the fair and equitable implementation of a statutory or constitutional scheme"—is something else again. This exception is best exemplified in the *Restatement* by illustration 6 to section 26.

In illustration 6, black students and parents sue the board of education to invalidate and enjoin the operation of a state tuition grant law. The court rejects the claim that the law fosters racial discrimination and holds it constitutional as applied. The state of the law does not warrant an appeal and one is not taken. In a separate and subsequent case the United States Supreme Court invalidates as unconstitutional a similar tuition grant law of another state. A second action by the black students and parents will be allowed. The justification provided by the *Restatement* is that "[i]n a matter of such public importance the policy of nationwide adherence to the authoritative constitutional interpretation overcomes the policies supporting the law of res judicata."¹⁵

A crucial theme is reflected in this illustration. It involves, first of all, an inequality of legal treatment among similarly situated persons. This inequality is evident because we refuse to regard the adjudication in the first action as conclusive of the legal position of the parties. If we assumed that the adjudication was conclusive, we would have to say that the inequality was a simple blunder in the administration of justice or that there were some latent distinguishing characteristics of the parties to the first litigation that justified their being treated differently from those in the second litigation. But we "know" that neither of these explanations is correct. We know this because we can stand outside the system of adjudication, free from the proposition that things adjudicated must be as the court has said them to be. When we stand in that position, we realize that something is involved other than a simple blunder or a rational difference between the parties. We realize that the different treatment accorded the parties was a result of the organization of the adjudicative system.

The parties received different treatment because (1) the first action was a part of a larger social controversy, only a fragment of which was drawn into litigation and adjudged in the first action, (2) another part of the larger controversy was drawn into litigation at a subsequent point in time and in a different court, specifically a court of superior hierarchical authority in the judicial system, and (3) the court of superior hierarchical authority "found" the law to be different from the finding made by the court in the first action. This difference in legal premises is the best ex-

14. *Id.* § 26(1)(d).

15. *Id.* § 26 comment e, illustration 6.

planation for the fact that the litigants in the subsequent litigation were treated differently from those in the first action.

Given this realization, it becomes clear that the rules of *res judicata* are themselves implicated in the different treatment accorded similarly situated persons. If the ruling in the second action had the effect of setting aside the determination in the first action, then there would have been no difference in treatment. The first action would simply have been set aside and a new judgment entered on the basis of the more authoritative legal premise that emanated from the second adjudication. Moreover, if the temporal order of the two actions had been reversed, that same result would have been reached through operation of the rule of *stare decisis*.

Putting it another way, the first case was decided as it was because the court did not at the time have access to the more authoritative formulation of the applicable law. The second court did not adopt the rule formulated in the first case because the second court was not bound to defer to a formulation that, although earlier in time, emanated from a court of lesser authority. Nevertheless, although the decision of the first court is now "wrong," under the basic rule of *res judicata* that decision cannot be revised. Such an anomaly in turn invites consideration whether a decision that is "wrong" for this kind of reason—a reason having to do with the way the system of adjudication is organized—ought to be denied the usual finality.

In this connection, it is worth noting that the "error" in the first decision involved an issue of law. This aspect of the problem is considered below.

II. EXCEPTIONS TO THE RULE OF ISSUE PRECLUSION

The general rule of issue preclusion prohibits a party who has litigated an issue from relitigating it.¹⁶ Often the context for attempting relitigation is another cause of action between the same parties. However, the context can also be a subsequent aspect of litigation over the same cause of action,¹⁷ or litigation between the former litigant and a new adversary.¹⁸

16. *See id.* § 27.

17. *See id.* § 27 comment b. Illustration 3 of comment b provides a good example:

A brings an action against B for personal injuries Jurisdiction is asserted over B, a nonresident, on the basis that the automobile involved in the accident was being operated in the state by or on his behalf. After trial of this issue, the action is dismissed for lack of jurisdiction. In a subsequent action by A against B for the same injuries, brought in the state of B's residence, the prior determination that the automobile was not being operated by or on behalf of B is conclusive.

Id. § 27 comment b, illustration 3.

18. *See id.* § 29. That is, the old "mutuality" rule no longer confines the effect of issue preclusion to relitigation against the same antagonist. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326-33 (1979).

In all of these contexts, the initial proposition is that a party may not relitigate an issue that he has litigated previously.

Like the rule of claim preclusion, the rule of issue preclusion is subject to exceptions.¹⁹ Most of the exceptions are based on inadequacy of the opportunity or incentive to have fully litigated the issue in the first action.²⁰ There is another set of exceptions, however. As formulated in *Restatement (Second) of Judgments* § 28, in relitigation between the same parties an exception to the rule of preclusion operates when “[t]he issue is one of law and (a) the two actions involve claims that are substantially unrelated, or (b) a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws.”²¹

This exception is expressly limited to issues of law. It operates primarily when there is some sort of disjunction between the first determination and the second. For example, a disjunction exists when the transactions have no connection with each other. As to this situation, the *Restatement’s* comment provides that “the more flexible principle of stare decisis is sufficient to protect the parties and the court from unnecessary burdens.”²² The other disjunction is that of time—the intervention of events between the two adjudications such that the “applicable legal context” has undergone change.

Section 28 also allows relitigation to prevent “inequitable administration of the laws,” but it gives this phrase narrow meaning through example. The example is illustration 2:

A brings an action against the municipality of B for tortious injury. The court sustains B’s defense of sovereign immunity and dismisses the action. Several years later A brings a second action against B for an unrelated tortious injury The judgment in the first action is not conclusive on the question whether the defense of sovereign immunity is available to B.²³

Unstated but implied in illustration 2 is the premise that the doctrine of sovereign immunity was well established at the time of the first litigation but that, by the time of the second action, there was reason to suppose the highest court of the jurisdiction might overrule the doctrine.

When the second litigation involves different parties, a more liberal set of exceptions to the rule of issue preclusion is recognized. Again, some

19. See RESTATEMENT (SECOND) OF JUDGMENTS §§ 28, 29 (1982).

20. See *id.* § 28(1) (inability to have obtained appellate review in the first action); *id.* § 28(3) (differences in the procedural opportunities for developing the case); *id.* § 28(4) (difference in the burden of proof); *id.* § 28(5)(a) (problems arising from representative actions); *id.* § 28(5)(b), (c) (lack of incentive to litigate fully); *id.* § 29(2) (differences in procedural opportunities).

21. *Id.* § 28(2).

22. *Id.* § 28 comment b.

23. *Id.* § 28 comment b, illustration 2.

of these exceptions involve the opportunity or incentive to litigate in the first action²⁴ or estoppel to invoke preclusion.²⁵ An additional exception to preclusion rules echoes the theme we have been developing: "The issue is one of law and treating it as conclusively determined would inappropriately foreclose opportunity for obtaining reconsideration of the legal rule upon which it was based."²⁶ Again, this exception reflects the broader institutional concerns of the legal system—equality and stability between the individual litigants may be sacrificed in order to preserve the equality and stability of the legal system as a whole.

III. INVALID JUDGMENTS

A last exception to the rules of preclusion arises where the judgment is treated as a nullity. The rules of preclusion are premised on the rendition of a *valid* judgment. As the *Restatement* puts it: "A *valid* and final personal judgment is conclusive between the parties . . ."²⁷ Judgments that are invalid don't preclude anything, except when reinforced by something like estoppel in pais.²⁸ In effect, therefore, anything that makes a judgment invalid also constitutes an exception to the rules of preclusion.

Putting aside default judgments, which involve special problems of their own,²⁹ it thus becomes pertinent to consider what makes a judgment invalid. Again using the *Restatement's* formulation, circumstances having this effect include those in which "(1) [t]he subject matter of the action was so plainly beyond the court's jurisdiction that its entertaining the action was a manifest abuse of authority; or (2) [a]llowing the judgment to stand would substantially infringe the authority of another tribunal or agency of government."³⁰

It will be observed that both of these exceptions involve issues of law, that is, the law defining the authority of the tribunal rendering the judgment. Even so, the rules of issue preclusion normally apply if the question of subject matter jurisdiction has been actually litigated.³¹ When the

24. *See id.* § 29(1) (applicable scheme for administering remedies contrary to allowing issue preclusion); *id.* § 29(2) (inadequate procedural opportunities); *id.* § 29(5), (6) (relationships among the parties different in the two litigations).

25. *See id.* § 29(3). Another exception withholds preclusion when "the determination relied on as preclusive was itself inconsistent with another determination of the same issue." *Id.* § 29(4). Thus, the adjudicative system's claim to infallibility will not be recognized in cases where that claim has been refuted by the system itself.

26. *Id.* § 29(7).

27. *Id.* § 17 (emphasis added).

28. *See id.* § 74 (equitable considerations in determining relief from judgments).

29. *See id.* § 10 comment b; *id.* §§ 65-68; *id.* introductory note to ch. 5, pt. a.

30. *Id.* § 12. *But see id.* § 69 (exception to invalid judgment rule when necessary to protect "justifiable interest of reliance" on judgment).

31. *Id.* § 12 comment c. Comment c provides in part:

The force of the considerations supporting preclusion is at least as great concerning determinations of the issue of jurisdiction as it is with respect to other issues Beyond this, there is virtually always available a procedure by which

issue of jurisdiction has not been directly litigated, the problem of the validity of the judgment and its effect on preclusion takes on additional dimensions. As stated in comment d to section 12: "The interests primarily at stake . . . are governmental and societal, not those of the parties. . . . The question therefore is whether . . . the tribunal's excess of authority . . . seriously disturbed the distribution of governmental powers . . ." ³² Comment d again illustrates a situation in which societal and institutional concerns achieve prominence over individual interests.

IV. EPISTEMOLOGY IN ADJUDICATION OF LEGAL ISSUES

The epistemological grounds for preclusion as to issues of law are stronger than those for preclusion as to issues of fact. In resolving issues of fact, the court endeavors to portray for itself a historical transaction in the outside world of events. Its method is to infer an image of reality—a scenario—from conflicting evidence. (If the evidence were not in conflict, there would not be an issue to decide.³³) In deciding fact questions the court necessarily works through the medium of extrajudicial resources, for example, evidence from witnesses. That dependency on outside resources entails a possible discrepancy between what the court believes was the fact and what actually was the fact. By contrast, in the resolution of issues of law the court constructs a verbal formulation from materials of which the court has direct knowledge. These materials include the relevant legal documentary sources, such as precedents and statutes. They also include the general view of reality in which those verbal materials take on meaning. Epistemologically, that general view of reality can be considered an envelope of judicially noticed legislative facts. That reality is seen and understood through direct judicial perception, not by perception through the medium of informants, which is how a court apprehends the facts of a case.³⁴ Of course, different judges have different world views, which is why they often disagree on what the law is. But these differences are necessarily dissolved or composed in deciding an issue of law.

When a court retries an issue of fact, it makes the new determination on a different evidentiary predicate. When it retries an issue of law, however, it proceeds on the same verbal and circumstantial predicates

to obtain review of the original tribunal's determination of the issue, either by appeal or by injunction or extraordinary writ.

Id.

32. *Id.* § 12 comment d.

33. *See id.*

34. The court's understanding of legal issues is arrived at in part by consideration of arguments submitted by the lawyers for the parties. In this sense, the court is dependent on the parties for its sources of law as well as its sources of fact. However, the court stands in a position of parity with the lawyers in its ability to examine the sources of law upon which the lawyers' arguments are based. It does not have such a parity of position with regard to the facts. Indeed, if the court has significant information about the facts independent of the evidence that will be presented, that is a ground for disqualification.

that were involved in the first instance.³⁵ Purely epistemological considerations offer considerable justification for a judicial change of mind regarding the decision of an issue of fact. They offer none regarding the decision of an issue of law. Moreover, institutional considerations militate more strongly against a judicial change of mind about the law as compared to a change of mind about the facts. In redeciding an issue of fact, the court can say that its previous decision had been ill-informed. In redeciding an issue of law, the court must say that its previous decision had been ill-considered. Yet paradoxically, once determined, an issue of law may be more easily reopened than an issue of fact.

V. HISTORICAL PERSPECTIVE

In this connection it is instructive to consider the historical evolution of the rules of issue preclusion. The first *Restatement of Judgments* made no provision for res judicata as to issues of law.³⁶ Issues of law necessarily resolved in a judgment were of course given preclusive effect in the particular cause of action in which they were adjudicated.³⁷ However, that conclusiveness resulted from the rule of res judicata as to the cause of action—claim preclusion as it is now called.

The first *Restatement* did not recognize issue preclusion as to issues of law because there was little or no decisional basis for doing so. Looking farther back in history, it is possible to surmise why that should have been so. The original conception of issue preclusion was not res judicata as to the litigation of an issue; it was estoppel by record.³⁸ A party to a judicial proceeding was estopped to controvert the matters in the “record.”³⁹ The matters in the record were those averred by the witnesses or attested by the jury in its verdict. Estoppel therefore was predicated on what was averred by the lay participants, not what the court decided. Hence, there was no legal material that could serve as a predicate for an estoppel.

In addition to this technical barrier, other significant aspects of this early procedural system inhibited preclusion as to legal issues. For instance, issues of law and issues of fact were not clearly differentiated in common-law procedure;⁴⁰ a form of action or cause of action was indeed a synthesis of fact and law. The conception of stare decisis that prevailed until modern times was another barrier to the preclusion of legal issues. The rule of precedent bound “the world” for the indefinite future as to legal issues

35. Issues not actually contested do not result in preclusion. RESTATEMENT (SECOND) OF JUDGMENTS § 27 comment e (1982).

36. See RESTATEMENT OF JUDGMENTS § 68 (1942).

37. Cf. *id.* § 50 (when personal judgment rendered on ground that complaint is insufficient as matter of law, that judgment is conclusive as to matters determined).

38. Millar, *The Historical Relation of Estoppel by Record to Res Judicata*, 35 ILL. L. REV. 41, 51-53 (1940).

39. *Id.* at 55-56.

40. See generally S. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* (1969).

decided.⁴¹ Such a rule of precedent would make it redundant to hold that a losing party was also bound by the decision of an issue of law. The old doctrine of *stare decisis* did all the work that a preclusion rule could do.

Still another factor was the structure of the adjudicative system itself prior to the nineteenth century. In that era a given common-law jurisdiction, English or American, had a small number of judges of courts of record. In the judicial structure generally prevailing before 1800, or even 1825, all judges shared *nisi prius* responsibilities and together formed the appellate bench. The standard procedure for resolving important issues of law arising at *nisi prius* was to reserve them for later resolution *en banc*.⁴² That procedure involved the whole judiciary of a jurisdiction in the resolution of such issues. Moreover, if a previously decided legal issue were to be reopened, the procedure would require the very bench that had decided an issue to redetermine it. A group of judges is not easily persuaded to do that, nor should it be. This practical psychological obstacle to redetermination of legal issues obviated the question whether there should be a *rule* precluding such redeterminations.

VI. MODERN INSTITUTIONAL IMPERATIVES

This historical perspective suggests a framework from which to contemplate preclusion of issues of law in modern context. It seems fair to suppose that any single modern judge and any single modern appellate panel would be no readier than their professional predecessors to redetermine legal issues they recently determined. It therefore may be surmised that if the judicial system were still organized the way it was two centuries ago, there would be no occasion for a rule precluding relitigation of legal issues. The normal inclinations of judges would adequately assure stability of legal decisions.

But the modern judicial system is differently organized. In any given jurisdiction there are many more judges than there were previously. The judges are specialized as between trial judges and appellate judges and, in most jurisdictions, as between judges of a highest court and judges of intermediate appellate courts.⁴³ The procedural system provides, because it must do so as a practical matter, that issues of law normally are to be adjudicated by the trial judge rather than being referred upward.⁴⁴ A legal

41. See generally Shapiro, *Toward a Theory of Stare Decisis*, 1 J. LEGAL STUDIES 125 (1972) (doctrine of *stare decisis* analyzed under a modern communications theory). But see generally G. CALABRESI, *supra* note 7, at 4 (citing Wise, *The Doctrine of Stare Decisis*, 21 WAYNE L. REV. 1043 (1975)).

42. See R. POUND, *APPELLATE PROCEDURE IN CIVIL CASES* 38-44 (1941); see also S. MILSOM, *supra* note 40, at 70-73.

43. See generally AMERICAN JUDICATURE SOC'Y, *INTERMEDIATE APPELLATE COURTS*, REPORT NO. 20 (1968); LAW ENFORCEMENT ASSISTANCE ADMIN., *supra* note 3, table 1, at 11 (1973).

44. Cf. 28 U.S.C. § 1292(b) (1982) (providing for interlocutory appeal of legal issues in limited circumstances).

issue normally reaches an appellate court only by appeal or similar review of a trial court determination, and normally reaches a supreme court only by review of a decision by an intermediate appellate court. Thus, under modern procedure, legal issues usually are adjudicated, subject to the eventuality of an appeal, by courts having subordinate positions in the judicial hierarchy. Indeed, the vast majority of legal issues are decided by such subordinate courts.

This allocation of authority is justified by compelling reasons of administrative expediency. Related reasons of expediency make it desirable that lower court decisions of law be taken on appeal only when necessary. Thus, a modern court system needs not only to have legal issues finally adjudicated by subordinate courts, subject only to appeal, but needs also to minimize incentives to appeal. If the instant litigation does not justify an appeal, it follows that a party should not be compelled to appeal simply in anticipation that the issue may reappear in subsequent litigation in which the issue will be of greater practical importance.⁴⁵ Correlatively, an appellate court should not feel impelled to hear an appeal in order to forestall unjust consequences in possible subsequent litigation, when the issue is of de minimis importance in the instant litigation or is otherwise unfit for decision.

A wider perspective of our modern judicial system reveals additional dimensions of the problem of relitigation or preclusion of legal issues. A legal issue finally adjudicated in one judicial system may again arise between the parties in another judicial system. For example, a question of state law adjudicated in a federal court exercising diversity jurisdiction can subsequently arise in a separate cause of action in state court. By the same token, a question of federal law adjudicated in a state court can subsequently arise in a separate cause of action in federal court. A question adjudicated in one state can subsequently arise in another state. A question arising in an administrative agency can subsequently arise in a proceeding in the courts of the same jurisdiction, or indeed, some other jurisdiction. And too, in all these cases the tribunal that has final case-adjudicating authority does not have final law-pronouncing authority.

Another dimension of this multiple forum difficulty is presented where a legal issue has been resolved by one division of an intermediate appellate court system and then arises in a subsequent case between the parties in another division of the system.⁴⁶ The second bench may allow the losing party to relitigate; if not, its authority would be preempted by the earlier decision of a court of coordinate authority.

Indeed, under the logic of an unqualified issue preclusion rule, the decision of a legal issue at any level of an adjudicative system would preempt reconsideration of that issue by any other tribunal in litigation by either

45. See generally 1B J. MOORE, J. LUCAS & T. CURRIER, *MOORE'S FEDERAL PRACTICE* ¶¶ 0.402[1]-[3] (2d ed. 1983).

46. See *Divine v. Commissioner*, 500 F.2d 1041, 1045-50 (2d Cir. 1974).

of the parties. Such a restriction on the authority of higher courts in development of the law is a serious matter of institutional arrangement. It is especially serious with regard to legal issues of general public importance.

This brings into view the situation in which the rule of issue preclusion is likely to have its greatest practical importance: litigation involving a public agency. Under the mutuality rule, preclusion applied only where both parties were involved in the prior litigation. With the rejection of the mutuality rule, however, a party who has lost an issue against an adversary in a prior litigation ordinarily is also bound as against other adversaries. With certain qualifications, this is a proper rule for issues of fact. With certain further qualifications, it is a proper rule for issues of law as between private parties. That is, no untoward consequences befall the administration of the law when preclusion is applied in such circumstances, and gains of equality and stability are realized. But when the party involved is a frequent litigant, and the litigation frequently involves legal questions of general public importance, other considerations become more significant.

A public agency is quintessentially if not uniquely such a party.⁴⁷ Decisions of law in cases involving such frequent litigants generally have significance beyond their immediate impact. Indeed, the chief significance of such decisions is their effect beyond the immediate parties. Therefore, the refusal to reconsider such issues can result in "inequitable administration of the laws," to use the *Restatement's* phrase.⁴⁸ Hence, it would seem that the rule of issue preclusion prima facie should be inapplicable in such cases. A "repeat" litigant, particularly the government, ordinarily should be free to relitigate a legal issue in subsequent litigation that could result in an appeal to a higher level of authority in the legal system.

The first of recent Supreme Court cases dealing with whether issue preclusion should bar relitigation of legal issues of such "general public importance" did not take the above approach. *Montana v. United States*⁴⁹ held that the government could not relitigate a legal issue unless it could show that "the factual and legal context . . . has . . . materially altered."⁵⁰ Nonetheless, the result in the *Montana* case surely was correct. In *Montana* the government had brought the second action in the same controversy solely for the purpose of clearing a path for relitigation of the legal issue. That kind of gaming clearly ought not to be permitted.⁵¹ However, the ground of estoppel in *Montana* should have been the illegitimacy of the attempted litigation stratagem. But for the fact that the government had

47. It should be noted that a public utility company may be another example of a frequent litigant whose contested issues are of considerable public importance.

48. RESTATEMENT (SECOND) OF JUDGMENTS § 28(2) (1982).

49. 440 U.S. 147 (1979).

50. *Id.* at 162.

51. *Cf. Federated Dep't Stores v. Moitie*, 452 U.S. 394, 400-01 (1981) (court found "no injustice" in applying res judicata because of party's questionable motives).

been gaming, the legal question at issue should have been open for decision by a higher court even though it had already been decided below in a previous case in which the government had been involved. After all, considering the interests of those other than the immediate litigants, higher courts exist essentially for that purpose of review.

In an interesting pair of decisions, the Supreme Court considered the vitality of issue preclusion in cases involving the government. In *United States v. Mendoza*⁵² the Court took one step along the line of analysis that would permit relitigation of such legal issues. It refused, however, to take a further step in *United States v. Stauffer Chemical Company*.⁵³ In *Mendoza* the Court allowed the government to relitigate an issue of law which it had lost in an earlier, factually separate case. However, the Court limited the opportunity for relitigating to situations in which offensive use of preclusion had been invoked against the government: "We hold, therefore, that nonmutual offensive collateral estoppel simply does not apply against the government in such a way as to preclude relitigation of issues such as those involved in this case."⁵⁴

On the other hand, in *Stauffer* the Court held that defensive preclusion applied in favor of the identical private party who had prevailed against the government in a prior suit based on essentially similar facts.⁵⁵ The Court noted, however, that applying the preclusion rule in the particular context would not significantly embarrass the government's ability to relitigate the legal issue against some other party:

[T]he government itself asserts that "thousands of businesses are affected each year by the question of contractor participation in Section 114 inspections." . . . It is thus unrealistic to assume that the government would be driven to pursue an unwarranted appeal here because of fear of being unable to relitigate the § 114 issue in the future with a different one of those thousands of affected parties.⁵⁶

VII. CONCLUSION

The decision in *Stauffer* thus does not much restrict the government's autonomy to relitigate legal issues of general public importance. Indeed, the factual connection between the two actions in *Stauffer* was so substantial that the two litigations could have been regarded as involving the same cause of action; based on that analysis, the problem is one of claim preclusion rather than issue preclusion. Surely the government should not be allowed to relitigate a legal issue against the same opponent in substantially contemporaneous litigation involving closely related facts. That situa-

52. 104 S. Ct. 568 (1984).

53. 104 S. Ct. 575 (1984).

54. 104 S. Ct. at 574.

55. 104 S. Ct. at 578.

56. *Id.* at 580 n.6.

tion aside, it would seem that, as a general proposition, the government now is not precluded from relitigating issues of law. Given the larger institutional interests at stake—the concern for equality and stability as viewed from the perspective of the legal system as a whole rather than from the viewpoint of the individual participants—that position seems correct.