

# Washington Law Review

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Volume 90 | Number 1

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3-1-2015

## Revisiting Claim and Issue Preclusion in Washington

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### Recommended Citation

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# REVISITING CLAIM AND ISSUE PRECLUSION IN WASHINGTON

Kathleen M. McGinnis\*

*Abstract:* When it comes to the law of claim and issue preclusion, Washington courts and practitioners encounter rules and precedent that tend to be unnecessarily complicated, overly broad, and even—in some instances—simply wrong. Three decades ago, Professor Philip Trautman urged Washington courts to clarify and modernize the doctrine. A fresh look at the topic suggests that while courts have been receptive to the professor’s advice, the goal of a clear and usable body of preclusion law will require more work. Specifically, Washington courts should address three problems. First, they should simplify the test for claim preclusion, eliminating redundant and confusing elements to make the test more consistent with prevailing modern rules. Instead of clinging to a four-element test that includes a four-factor subtest, the courts should simply examine identity of parties and claims, and should use a transactional test to determine claim-identity. Second, Washington courts should abandon the discredited doctrine of virtual representation, which has bound nonparties to the results of actions in which they either testified or had an advisory role. This use of nonparty preclusion violates litigants’ due process rights, and wastes resources by encouraging litigants to argue the theory even though it is rarely a successful defense. While it might be defensible to preclude nonparties when the earlier action involved an assertion of public rights, courts should proceed with caution, and ensure that Washington’s current rule applies only in the most limited circumstances. Third, Washington courts need to consider Full Faith and Credit principles in every case that involves a judgment from another state or federal court. Ignoring these principles has led courts to apply the wrong preclusion law to judgments of other courts, a practice that harms litigants and undermines the legitimacy of the courts’ decisions.

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## INTRODUCTION

Thirty years ago, the Washington Law Review published *Claim and Issue Preclusion in Civil Litigation in Washington*,<sup>1</sup> an article by prolific scholar<sup>2</sup> and esteemed teacher<sup>3</sup> Philip A. Trautman. Professor Trautman chose to address this “age-old topic” in order to report on development of the doctrine in Washington State courts and then to “suggest what

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1. Philip A. Trautman, *Claim and Issue Preclusion in Civil Litigation in Washington*, 60 WASH. L. REV. 805 (1985).

2. Over a thirty-year period beginning in 1958, Professor Trautman published seventeen articles in the *Washington Law Review*, plus two more articles in the *Gonzaga Law Review* and the *Willamette Law Review*.

3. From 1956 to 2006, Professor Trautman taught generations of students at the University of Washington School of Law about Civil Procedure and Conflicts of Laws. He won the University of Washington Distinguished Teaching Award in 1987. In addition, students at the School of Law named him Teacher of the Year for 1982–1983, 1991–1992, and 1995–1996.

may be forthcoming.”<sup>4</sup> At its core, the article called for doctrinal clarity and a pragmatic approach to preclusion law—a position that would require courts to provide more guidance, and, ideally, to simplify some of the complex, multi-level tests they used for claim and issue preclusion. Washington practitioners and judges immediately turned to Professor Trautman’s commentary on the subject, and, even more notable, continue to rely on it well into the twenty-first century.<sup>5</sup> Although the article appears to have been a valuable reference—a sort of preclusion primer—for practitioners and courts in Washington, the courts have not fully responded to the specific changes that Professor Trautman advocated. Some of those problems remain unresolved. Moreover, other problems in Washington’s claim and issue preclusion doctrine have developed and become more significant since Professor Trautman’s canonical work was published.

This Article identifies three important problems that have remained unresolved or emerged since Professor Trautman’s article, and recommends ways Washington law should change to improve efficiency and clarity—both central values behind preclusion law—and to conform to the due process standards the United States Supreme Court has imposed on the federal law of preclusion. Solving these problems in Washington’s preclusion doctrine will require action by the Washington State Supreme Court. Instead of dealing with preclusion law mainly as a sidebar in cases that involve important substantive conflicts, the court should grant review in cases that present opportunities to focus on procedure and clarify the law.

First, the Washington State Supreme Court should restructure the four-element identity test for claim preclusion, which currently requires courts to address eight analytic steps. The Court should pare its identity test down to the two elements that actually matter: precluding relitigation of *identical claims* between *identical parties*, or those in privity. The Court should also evaluate *identity of claims* by using the simpler “transactional nucleus of facts” test, instead of the four factors Washington courts use now. A streamlined approach to claim preclusion would simplify the analysis required of practitioners and courts alike, making litigation more efficient and outcomes more predictable.

Second, the Court should abandon the discredited doctrine of virtual representation, which permits issue preclusion to bind some litigants

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4. Trautman, *supra* note 1, at 805.

5. *See, e.g.*, *Fluke Capital & Mgmt. Servs. Co. v. Richmond*, 106 Wash. 2d 614, 618, 724 P.2d 356, 360 (1986); *Brownfield v. City of Yakima*, 178 Wash. App. 850, 870, 316 P.3d 520, 531 (2014).

who were not parties to the original action. Rejecting the doctrine would protect litigants' legitimate expectations of a day in court that they control, and would satisfy due process concerns. The United States Supreme Court recognizes several categories of nonparty preclusion. If the Washington State Supreme Court elects to go beyond those recognized exceptions, it should do so only in cases that involve serial litigation over a public rather than private right, and patently adequate representation in the first proceeding. Before taking that step, however, the Court should examine how existing joinder mechanisms could help parties avoid repetitive litigation over matters of public concern. This would allow Washington courts to avoid controversial decisions on the scope of nonparty preclusion.

Third, the Court should insist that every Washington court engage in the proper analysis and give appropriate full faith and credit to judgments from federal courts and other state courts.

Part I of this Article will describe Professor Trautman's article, place it in context, and highlight his recommendations to Washington courts. Part II will address how those courts have used Professor Trautman's article.<sup>6</sup> The Article will conclude in Part III by analyzing some problematic areas of preclusion law that have developed since Professor Trautman's examination thirty years ago.

## I. THE ARTICLE

If citations to an article can represent influence,<sup>7</sup> it is easy to say that

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6. Although this Article presents an obvious opportunity to comprehensively update Professor Trautman's research, that is not its mission. A lawyer looking for treatise-style treatment of preclusion law in Washington already has an excellent resource in 14A KARL TEGLAND, WASHINGTON PRACTICE SERIES, CIVIL PROCEDURE §§ 35:20–35:52 (2d ed. 2013). Therefore, this Article will focus on the extent to which Professor Trautman's article may have influenced the development of Washington law, and on unresolved problems in preclusion doctrine.

7. This is a debatable proposition, to be sure. But citology is "a thing." The significance of the timing and frequency of citations to law review articles in other law review articles is a hot scholarly topic. See, e.g., Fred R. Shapiro & Michelle Pearse, *The Most-Cited Law Review Articles of All Time*, 110 MICH. L. REV. 1483 (2012); Ian Ayres & Fredrick E. Vars, *Determinants of Citations to Articles in Elite Law Reviews*, 29 J. LEGAL STUD. 427 (2000) (finding, inter alia, that "citations per year peak at 4 years after publication, and an article receives half of its expected total lifetime citations after 4.6 years"). Citation studies have also focused on oft-cited judges. See William M. Landes, Lawrence Lessig & Michael E. Solimine, *Judicial Influence: A Citation Analysis of Federal Courts of Appeals Judges*, 27 J. LEGAL STUD. 271 (1998). Most interesting for present purposes is the degree to which appellate courts cite law review articles. At least one study revealed that courts are far less liberal with citations to law review articles than are academics citing to each other's articles. See Deborah J. Merritt & Melanie Putnam, *Judges and Scholars: Do Courts and Scholarly Journals Cite the Same Law Review Articles?*, 71 CHI.-KENT L. REV. 871 (1996).

Professor Trautman's article helped shape the development of preclusion law in Washington. At least seventy-eight judicial decisions, including sixty-one Washington appellate court opinions, have cited the article in the past three decades, beginning shortly after publication<sup>8</sup> and continuing to the present.<sup>9</sup> To put that in context, the sixty-one citations in Washington appellate court opinions represent more than four percent of approximately 1441 decisions in which those courts cited to *any* law review or law journal article during the same thirty-year period.<sup>10</sup> At a more local level, the sixty-one citations represent over seventeen percent of the citations by Washington appellate courts to *any* writing published in the *Washington Law Review* since 1985.<sup>11</sup>

One can only speculate about the reasons for the article's popularity, but its elegant and understated clarity surely must be on the list. Significantly, Professor Trautman's writing was pitched to a receptive audience of practitioners and judges, in an era when the work product of the legal academy was criticized as out-of-touch with the needs and interests of the practicing bar.<sup>12</sup> In tandem with what was then Orland's

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8. See *Fluke Capital & Mgmt. Serv. Co.*, 106 Wash. 2d at 618, 724 P.2d at 360. According to WestlawNext "Citing References" tool, *Fluke* is the first of sixty-one Washington appellate court decisions to cite Professor Trautman's article.

9. See *Walker v. BAC Home Loans Servicing, L.P.*, No. C14-709JLR, 2015 WL 999920, at \*5 (W.D. Wash. Mar. 5, 2015) (most recent citation found in WestlawNext as of March 15, 2015).

10. Using WestlawNext, the author estimates that the Washington Supreme Court and Court of Appeals have cited to law review articles in 1441 opinions since January 1, 1986—shortly after publication of Professor Trautman's article. The estimate was reached by searching in Westlaw's Washington appellate courts database for decisions during the relevant period for terms that would normally be used to cite law reviews. These terms include "L.Rev.," "Law Review," "L.J.," "Law Journal," "J.L.," and "Journal of Law," and in addition, variants on those terms with different punctuation or spacing. Cases were then checked to screen out irrelevant hits. The sixty-one cites to the Trautman article represent 4.23% of the decisions in which Washington state appellate courts cited to *any* law review article after 1985. (Please note that the search methodology is somewhat rudimentary, and that results could vary if different research tools and search terms were employed. The intent is merely to suggest that Professor Trautman's single article occupies a noticeable amount of space in Washington appellate court decisions.)

11. *Id.* The estimated number of cites to the *Washington Law Review* (350) came from searching the WestlawNext database of Washington appellate court decisions after January 1, 1986, for "Wash. L. Rev." and variations on the term. The 61 Washington appellate court cites to the Trautman article were divided by the total number of citations to the *Washington Law Review* to yield 17.4%.

12. See Merritt & Putnam, *supra* note 7, at 871–72, and authorities collected therein. *E.g.*, Ellen A. Peters, *Reality and the Language of the Law*, 90 YALE L. J. 1193, 1193 (1981) (Connecticut Supreme Court Justice stating "there is an increasing divergence between the theoretical interests of the aspiring academic lawyer and the pragmatic interests of the successful practitioner."); Patricia M. Wald, *Teaching the Trade: An Appellate Judge's View of Practice Oriented Legal Education*, 36 J. LEGAL EDUC. 35, 42 (1986) (Former chief judge for the United States Court of Appeals for the District of Columbia Circuit asserting that "[t]oo few law review articles prove helpful in appellate

Washington Practice series,<sup>13</sup> the article gave Washington lawyers the essential tools they needed to diagnose the type of preclusion problem faced by a client, predict what a court might or should do, and develop an argument for the court. Professor Trautman used the Restatement (Second) of Judgments<sup>14</sup> to subtly advocate that the courts articulate a clear and pragmatic set of modern rules to govern preclusion decisions.<sup>15</sup>

Professor Trautman immediately signaled his fondness for the Restatement by nudging his readers to refer to the preclusive effect of judgments with modern terminology: claim preclusion and issue preclusion.<sup>16</sup> He described the confusion that sometimes resulted from the courts' tendency to use the term *res judicata* to mean either the entire subject of preclusion, or the narrower doctrine of merger and bar, modernly called claim preclusion.<sup>17</sup>

After sketching the policy considerations around the common law of preclusion—a basic conflict between principles that favor finality of judgments and those that tolerate relitigation in order to assure a correct result<sup>18</sup>—Professor Trautman asserted that “Washington courts have generally favored finality.”<sup>19</sup> He then explained related doctrines: *stare decisis*,<sup>20</sup> election of remedies,<sup>21</sup> preclusion of inconsistent positions,<sup>22</sup> law of the case,<sup>23</sup> and inconsistent judgments.<sup>24</sup>

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decision making. They tend to be too talky, too unselective in separating the relevant from the irrelevant, too exhaustive, too exhausting, too hedged, too cautious about reaching a definite conclusion.”).

13. Karl Tegland, current author of the series and also an authority on the law of procedure, said “[t]he Trautman article focuses primarily on Washington cases and is a highly respected authority, still cited by Washington’s courts.” 14A TEGLAND, *supra* note 6, § 35:32.

14. RESTATEMENT (SECOND) OF JUDGMENTS (1982).

15. Trautman, *supra* note 1, at 817, 821, 823–24, 833–35.

16. *Id.* at 805. In accord with the RESTATEMENT (SECOND) OF JUDGMENTS (1982), the United States Supreme Court at the time also employed the terms claim preclusion and issue preclusion. *See Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75 (1984). Claim preclusion replaces *res judicata* and issue preclusion substitutes for collateral estoppel.

17. Trautman, *supra* note 1, at 805.

18. *Id.* at 806.

19. *Id.*

20. *Id.* at 807.

21. *Id.*

22. *Id.* at 809.

23. *Id.* at 810.

24. *Id.* at 812.

### A. *Claim Preclusion*

Claim preclusion prevents relitigation of a claim or cause of action that was litigated between the same parties in a previous action.<sup>25</sup> This is an affirmative defense in Washington courts,<sup>26</sup> and the party raising the defense has the burden of proving that the claim should not be relitigated.<sup>27</sup>

Professor Trautman reported that the Washington State Supreme Court had used the same claim preclusion test for nearly seven decades.<sup>28</sup> A judgment has claim preclusive effect only if the proponent can show that two successive proceedings are identical in “(1) subject matter, (2) cause of action, (3) persons and parties, and (4) the quality of the persons for or against whom the claim is made.”<sup>29</sup> He noted a dearth of judicial guidance on two of the four elements: *identity of subject matter*<sup>30</sup> and *identity of quality of persons*.<sup>31</sup> On those relatively unexamined elements, Professor Trautman advocated that courts take a “pragmatic, functional approach.”<sup>32</sup> This approach, in the typical case, would have the effect of merging coordinate elements: subject matter with cause of action, and quality of persons with identical persons and parties.<sup>33</sup>

Even if the four identity elements are satisfied, the judgment must be final and on the merits in order to have preclusive effect.<sup>34</sup> Judgments from courts, administrative agencies, and arbitrators can all be preclusive.<sup>35</sup>

#### 1. *Identity of Subject Matter*

Professor Trautman observed that Washington courts seldom decided cases based on identity of subject matter, and that, typically, courts “simply state[d] in a conclusory fashion that there is or is not the same

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25. *Id.* at 805.

26. WASH. SUPER. CT. R. CIV. P. 8(c).

27. Trautman, *supra* note 1, at 812.

28. *Id.*

29. *Id.*

30. *Id.* at 812–13.

31. *Id.* at 820–21.

32. *Id.* at 820.

33. See *infra* notes 189–193, 210–213 and accompanying text.

34. Trautman, *supra* note 1, at 822.

35. *Id.* at 825–26.



subject matter.”<sup>36</sup> In addition, courts tended to list the two elements of identical subject matter and cause of action, but then merge the two in their analysis.<sup>37</sup> The clear implication was that it was more helpful for courts to analyze the “nature of the cause of action or claim.”<sup>38</sup>

## 2. *Identity of Claim or Cause of Action*

The element of identity of claim or cause of action was far more developed than the same subject matter element was in 1985, and Professor Trautman described it extensively. Claim preclusion applies “to what might, or should, have been litigated as well as to what was actually litigated, if all part of the same claim or cause of action.”<sup>39</sup> The obvious case for claim preclusion is when a claimant who won in the first action sues a second time on the very same claim. Her second claim is precluded, having been merged in the first action’s judgment.<sup>40</sup> The harder case is when a litigant splits his claims. Professor Trautman cited the example of a party to a contract successfully suing for specific performance, and later suing for damages for performance delays that accrued before the first lawsuit was filed.<sup>41</sup> Claim preclusion is justified in that situation because the litigant should have pursued both theories of relief in the first action.<sup>42</sup>

Professor Trautman explained two relatively clear points of doctrine. First, a litigant cannot justify successive actions by changing his theory of recovery, as in the example above.<sup>43</sup> Second, the mere availability of alternative remedies does not create separate claims.<sup>44</sup> Beyond that relatively solid doctrinal ground, Professor Trautman explained

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36. *Id.* at 813.

37. *Id.* See *infra* notes 165–193 and accompanying text.

38. Trautman, *supra* note 1, at 813.

39. *Id.* at 814. This is what distinguishes claim preclusion from issue preclusion, which is narrower in that it precludes only those issues actually litigated, but broader in that it applies in the context of a new claim or cause of action. See *id.* at 805, 813–14, 829.

40. See *id.* at 805 (explaining traditional “merger” and “bar” terminology: judgment for a successful plaintiff merges all rights to the same claim into that judgment, while judgment in favor of a defendant bars further claims).

41. *Id.* at 814–15.

42. *Id.* The claim-splitting example illustrates how claim preclusion advances efficiency while remaining fair to the litigant. The litigant controlled the first action, and had an opportunity to bring all theories of relief before the court in a single action. Preclusion gives him the incentive to litigate once instead of twice—a situation that allows courts to function more efficiently, and prevents harassment of the defendant through repetitious litigation.

43. *Id.* at 815.

44. *Id.*

Washington courts were not always consistent in how they evaluated what belonged in the same claim or cause of action.<sup>45</sup>

Indeed, the Washington State Supreme Court mentioned this imprecision<sup>46</sup> in a decision that went on to borrow from federal law four criteria courts could consider to evaluate the scope of a claim:

- (1) [W]hether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action;
- (2) whether substantially the same evidence is presented in the two actions;
- (3) whether the two suits involve infringement of the same right; and
- (4) whether the two suits arise out of the same transactional nucleus of facts.<sup>47</sup>

The problem with this test, according to Professor Trautman, was that one could not predict whether a Washington court would use a “same evidence” analysis, or a “same rights” analysis, or examine “whether a second proceeding would negate the first.”<sup>48</sup> The unpredictability and the multiplicity of tests made it difficult for practitioners to know which they could rely upon to provide advice.<sup>49</sup> The solution he proposed was to use the fourth factor laid out by the *Rains* court: “whether the two suits arise out of the same transactional nucleus of facts.”<sup>50</sup> This test better reflected what Professor Trautman suspected the courts actually wanted: “a commonsense, functional approach.”<sup>51</sup>

Professor Trautman had support for this suggestion in section 24 of the Second Restatement. This test would extend claim preclusion to “all rights . . . to remedies . . . with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.”<sup>52</sup> Under the Restatement, the transaction or series of transactions would be assessed “pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties’ expectations or business understanding or usage.”<sup>53</sup>

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45. *Id.* at 816.

46. *Rains v. State*, 100 Wash. 2d 660, 664, 674 P.2d 165, 169 (1983).

47. *Id.* at 664, 674 P.2d at 168 (quoting *Costantini v. Trans World Airlines*, 681 F.2d 1199, 1201–02 (9th Cir. 1982)); *see also* Trautman, *supra* note 1, at 816.

48. Trautman, *supra* note 1, at 816–17.

49. *Id.*

50. *Id.* at 817 (quoting *Rains*, 100 Wash. 2d at 664, 674 P.2d at 165).

51. *Id.*

52. *Id.* at 817–18 (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 24(1) (1982)).

53. *Id.* at 817 (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 24(2) (1982)).

Professor Trautman pointed out that this test would apply equally to claims of both plaintiffs and defendants from the first action. If a defendant failed to assert a compulsory counterclaim in the first action, claim preclusion would bar a second action on that counterclaim.<sup>54</sup> A compulsory counterclaim “arises out of the transaction or occurrence that is the subject matter of the opposing party’s claim,”<sup>55</sup> a rule with an obvious parallel to the Restatement’s transaction test for measuring identity of claims.<sup>56</sup>

### 3. *Identity of Persons and Parties*

The third element of Washington’s four-part test for claim preclusion makes a judgment binding on all parties to the litigation, as well as on all those in privity with the parties.<sup>57</sup> While party identity is relatively easy to ascertain, Professor Trautman noted, Washington courts have found the privity label more difficult to apply.<sup>58</sup> He found it most useful to identify categories in which Washington courts had found privity, which included successors in interest (e.g., land purchasers and assignees of contract rights);<sup>59</sup> those persons whose interests are represented by a party (e.g., corporation and stockholders, judgment creditor and debtor, bankruptcy trustee and creditors);<sup>60</sup> nonparties who control the prior litigation;<sup>61</sup> and nonparties who participate in the previous litigation, including, most expansively, a person who testified as a witness in the case.<sup>62</sup>

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54. Trautman, *supra* note 1, at 818.

55. WASH. SUPER. CT. R. CIV. P. 13(a).

56. Professor Trautman also explained that the same result would be reached with regard to transactionally-related counterclaims, whether through claim preclusion or through direct reliance on Rule 13(a) itself. “Regardless of the theory, preclusion should follow, as any other result would defeat the purpose of the compulsory provision.” Trautman, *supra* note 1, at 819.

57. *Id.* at 819 (citing Puget Sound Gillnetters Ass’n v. Moos, 92 Wash. 2d 939, 953, 603 P.2d 819, 826 (1979)).

58. *Id.* at 819.

59. *Id.*

60. *Id.* at 819–20.

61. *Id.* at 820 (citing Mut. of Enumclaw Ins. Co. v. State Farm Mut. Auto. Ins. Co., 37 Wash. App. 690, 693, 682 P.2d 317, 319 (1984) (precluding insurer that took over defense of its insured in prior case)).

62. *Id.* Professor Trautman noted that it was unclear whether these witnesses were actually found to be in *privity*, but they were bound by the prior judgment in several Washington cases. *Id.* at 820 n.100 (citing Bacon v. Gardner, 38 Wash. 2d 299, 229 P.2d 523 (1951); Briggs v. Madison, 195 Wash. 612, 82 P.2d 113 (1938); Am. Bonding Co. v. Loeb, 47 Wash. 447, 92 P. 282 (1907); and Shoemaker v. Finlayson, 22 Wash. 12, 60 P. 50 (1900)). Precluding witnesses or participants if they did not actually control the litigation had been criticized in 2 LEWIS H. ORLAND, WASHINGTON

#### 4. *Identity of Quality of Persons*

According to Professor Trautman, cases rarely turned on the fourth element in the claim preclusion test: that there must be identity of the quality of persons for or against whom the preclusion argument was made.<sup>63</sup> Instead, analysis of that element tended to be paired with the analysis of identity of parties, with both tests yielding the same result.<sup>64</sup> Consequently, there was scant guidance on this element in Washington law.<sup>65</sup>

This relatively useless, redundant element of the test<sup>66</sup> appears to have led Professor Trautman to endorse a pragmatic, functional approach to the quality of persons analysis,<sup>67</sup> just as he had recommended on the identity of claim element.<sup>68</sup> He invoked as an example of this approach the decision in *Rains v. State*.<sup>69</sup> Here, the Washington State Supreme Court permitted defendants to benefit from claim preclusion, even though the first suit was against named members of the state public disclosure commission, while the second suit was instead against the state and the commission.<sup>70</sup> The court decided that the suit against the individual commissioners was “in reality a suit against the state,” according to Professor Trautman.<sup>71</sup> He suggested that examining substance over form in this pragmatic manner “potentially has a broader application.”<sup>72</sup>

#### 5. *Final Judgment on the Merits*

To be given preclusive effect, a judgment must be both final and on the merits, in addition to satisfying the four identity elements.<sup>73</sup> Although it is generally clear when a judgment is final, Professor Trautman explained that Washington courts have been called upon to resolve some ambiguous situations. For example, a court’s denial of a

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PRACTICE SERIES, TRIAL PRACTICE § 373, at 415–16 (3d ed. 1972).

63. Trautman, *supra* note 1, at 821.

64. *Id.* at 820–21.

65. *Id.*

66. *See infra* notes 194–213 and accompanying text.

67. Trautman, *supra* note 1, at 821.

68. *Id.* at 817, 821.

69. *Id.* at 821 (citing *Rains v. State*, 100 Wash. 2d 660, 664, 674 P.2d 165, 169 (1983)).

70. *Id.* (citing *Rains*, 100 Wash. 2d at 664, 674 P.2d at 169).

71. *Id.*

72. *Id.*

73. *Id.* at 822.

defense motion for summary judgment did not amount to a final judgment when a plaintiff later voluntarily dismissed her claim and brought a new lawsuit.<sup>74</sup> And no preclusion attached to a trial court ruling that was intended to be interlocutory, such as an oral decision announced while findings and conclusions were still being prepared.<sup>75</sup> Additionally, a pending appeal did not defer or negate the finality of an otherwise final trial court decision—a difference between Washington preclusion law and that of some other jurisdictions.<sup>76</sup>

Preclusion requires a final decision that also reached the merits of the controversy, Professor Trautman observed.<sup>77</sup> For example, when an action is dismissed because it was prematurely brought, no court examines the merits and there is no preclusion of the claim when it is brought at an appropriate time.<sup>78</sup> In contrast, when a court enters judgment based on the parties' consent or on a settlement, that judgment is on the merits, and typically will preclude later actions on the claims that were or should have been raised in the case.<sup>79</sup> Even a default judgment is considered to be on the merits for claim preclusion purposes.<sup>80</sup>

Washington court rules can play a significant role in the “on the merits” inquiry. A judgment based on a voluntary dismissal without prejudice ordinarily does not have preclusive effect<sup>81</sup> unless the litigant has previously dismissed an action that includes the same claim—in which case it is considered an adjudication on the merits.<sup>82</sup> A judgment based on involuntary dismissal would generally be considered on the merits, unless the court specified to the contrary, or if the dismissal was based on lack of jurisdiction, improper venue, or failure to join a required party.<sup>83</sup> Professor Trautman noted that a judgment granting a

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74. *Id.*

75. *Id.* (citing *Westmoreland Co. v. Howell*, 62 Wash. 146, 113 P. 281 (1911)).

76. *Id.* at 824.

77. *Id.* at 822.

78. *Id.* at 822–23.

79. *Id.* at 824.

80. *Id.*

81. *Id.* at 823.

82. *Id.* at 824 (citing WASH. SUPER. CT. R. CIV. P. 41(a)(4), which reads: “Unless otherwise stated in the order of dismissal, the dismissal is without prejudice, except that an order of dismissal operates as an adjudication upon the merits when obtained by a plaintiff who has once dismissed an action based on or including the same claim in any court of the United States or of any state.”).

83. *Id.* at 824–25 (quoting WASH. SUPER. CT. R. CIV. P. 41(b)(3): “Unless the court in its order for dismissal otherwise specifies, a dismissal under this subsection and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to

demurrer historically had been considered on the merits, and a dismissal for failure to state a claim should likewise be considered on the merits.<sup>84</sup>

## 6. *Character of the Tribunal*

Professor Trautman explained that claim preclusion operates across all levels of trial courts, allowing a judgment from a justice court (or its modern descendent, a court of limited jurisdiction) to preclude a later action in superior court.<sup>85</sup> Preclusive effect could be limited by the court's jurisdiction, though, either as to subject matter or monetary limits.<sup>86</sup> Preclusion could also apply to judgments of administrative agencies and arbitrators, if the body acted in a judicial or quasi-judicial capacity.<sup>87</sup>

Concluding his discussion of claim preclusion, Professor Trautman described situations in which the “strong sentiment in favor of finality” yielded to a concern with reaching a just result.<sup>88</sup> For example, Washington courts have denied claim preclusion when the party to the prior judgment was unable to appeal it, was unable to fully recover because of an unripe claim, or was induced by fraud not to bring all possible claims in the original action.<sup>89</sup> Avoiding injustice was the common theme in the examples he cited, and he endorsed this application of the doctrine: “[T]his is as it should be. Even at the expense of some predictability, there will be instances when more important policies should prevail than those supporting the claim preclusion doctrine.”<sup>90</sup>

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join a party under rule 19, operates as an adjudication upon the merits.”).

84. *Id.* at 825 (citing WASH. SUPER. CT. R. CIV. P. 12(b)(6), which reads: “Every defense . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted . . .”).

85. *Id.* at 825.

86. *Id.* at 826. Professor Trautman gave two examples. First, the superior court in an unlawful detainer action has jurisdiction only over issues relating to the right to possession, so a later action concerning the property is not precluded. *Mead v. Park Place Props.*, 37 Wash. App. 403, 681 P.2d 256 (1984); *Phillips v. Hardwick*, 29 Wash. App. 382, 383, 628 P.2d 506, 507 (1981). Second, there was no preclusion of a counterclaim that exceeded the monetary jurisdiction of a justice court and could not be litigated in the first action. *Centennial Flouring Mills Co. v. Schneider*, 16 Wash. 2d 159, 167, 132 P.2d 995, 997 (1943).

87. Trautman, *supra* note 1, at 825–26.

88. *Id.* at 826–29.

89. *Id.* at 827.

90. *Id.* at 829.

## B. *Issue Preclusion*

The second preclusion doctrine that Professor Trautman examined was issue preclusion—the rule that prevents parties from relitigating issues already decided in a previous action.<sup>91</sup> Washington courts ask four questions when a party asserts issue preclusion:<sup>92</sup>

(1) Was the issue decided in the prior adjudication identical with the one presented in the action in question? (2) Was there a final judgment on the merits? (3) Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication? (4) Will the application of the doctrine not work an injustice on the party against whom the doctrine is to be applied?<sup>93</sup>

### 1. *Identical Issue*

Because issue preclusion applies only to actually litigated issues, not claims, the *identical issue* inquiry is central to most decisions, and Professor Trautman offered an array of examples in which it was clear that issues were the same or different.<sup>94</sup> The more cloudy instances arise when a verdict or judgment is ambiguous or indefinite, he said, and issue preclusion will not be available in those cases.<sup>95</sup>

An identical issue actually litigated is insufficient to justify issue preclusion, however.<sup>96</sup> Professor Trautman emphasized that preclusive effect should attach only to those issues that were “material and essential

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91. *Id.*

92. Professor Trautman explained that, like claim preclusion, issue preclusion can apply to decisions by administrative agencies acting in a judicial capacity, and to arbitrators' awards. *Id.* at 829–30. Issue preclusion can also arise when a criminal prosecution is followed by a civil suit. For example, a bank sued to recover money from defendants who had been convicted of embezzlement. The court held the defendants properly precluded from relitigating the issue of embezzlement, since they had been accorded the procedural protections of a criminal trial, including a burden of proof higher than that in a civil action. *Id.* at 830 (citing *Seattle-First Nat'l Bank v. Cannon*, 26 Wash. App. 922, 615 P.2d 1316 (1980)). Although he addressed the criminal-to-civil preclusion context, Professor Trautman excluded from his article the use of claim or issue preclusion in a criminal prosecution. *Id.* at 806, 830.

93. *Id.* at 831. Professor Trautman explained the relationship between claim and issue preclusion this way: Claim preclusion is broader since it “bars an entire claim and not just a particular issue.” *Id.* at 829. But issue preclusion has broader scope because it applies even when the two actions involve different claims, as long as the issues are identical. *Id.*

94. *Id.* at 831–32.

95. *Id.* at 833.

96. *Id.* at 832.

to the first controversy.”<sup>97</sup> An essential issue is likely to have received the parties’ and judge’s attention in the first case, justifying preclusion in the second.<sup>98</sup>

According to Professor Trautman, one problematic aspect of Washington cases on issue preclusion was the distinction drawn between ultimate facts and evidentiary facts.<sup>99</sup> The courts applied preclusion to ultimate facts—those directly at issue and upon which the claim rested in the first case. But they did not preclude relitigation of evidentiary facts—those that were contested and proven but were “merely collateral to the claim asserted.”<sup>100</sup> After describing several examples of courts applying the distinction, Professor Trautman observed that “the rationale is stated largely in conclusory terms with little additional explanation.”<sup>101</sup> The doctrine was flawed because it was difficult to distinguish ultimate from evidentiary facts, and because sometimes evidentiary facts indeed did receive the parties’ full attention, which would justify preclusion.<sup>102</sup>

Therefore, he advocated that courts abandon the ultimate fact limitation of the old Restatement of Judgments in favor of the new Restatement (Second) of Judgments.<sup>103</sup> This more modern take focused the inquiry on “whether the issue was actually recognized by the parties as important and by the judge as necessary to the first judgment[] . . . [and] whether the significance of the issue for purposes of the subsequent action was sufficiently foreseeable at the time of the first action.”<sup>104</sup> This approach, Professor Trautman said, was clearer and more meaningful, thus more useful for counsel in predicting results and advising clients.<sup>105</sup>

## 2. *Final Judgment*

Professor Trautman advocated a “pragmatic, flexible” approach to the

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97. *Id.* at 833 (citing *East v. Fields*, 42 Wash. 2d 924, 259 P.2d 639 (1953); *Fies v. Storey*, 37 Wash. 2d 105, 221 P.2d 1031 (1950)).

98. *Id.* (citing *Dixon v. Fiat-Roosevelt Motors*, 8 Wash. App. 689, 509 P.2d 86 (1973)).

99. *Id.* at 833–34.

100. *Id.* (noting that this approach was consistent with the Restatement of Judgments § 68 (1942)).

101. *Id.* at 834.

102. *Id.* at 835.

103. *Id.*

104. *Id.* (citing RESTATEMENT (SECOND) OF JUDGMENTS §§ 27 cmt. j, 28 (1982)).

105. *Id.*



question of *final judgment on the merits*.<sup>106</sup> If the other three questions are satisfied, he said, “a final adjudication of rights is more important than a final decree.”<sup>107</sup>

### 3. *Persons Bound*

The general rule is that issue preclusion will bind only a party to the previous action, or a person in privity with a party, regardless of whether the party was a plaintiff or defendant.<sup>108</sup> Occasionally, issue preclusion has been denied between persons who were parties to both proceedings, but were not adversaries in the first proceeding.<sup>109</sup> Professor Trautman explained and approved of a trend in Washington courts to move away from looking technically at adverseness, instead asking if the party to be bound had “the motivation and the opportunity to present the case fully and fairly in the first proceeding.”<sup>110</sup>

After describing typical privity situations, Professor Trautman examined some relatively rare situations in which a court bound a nonparty.<sup>111</sup> As with claim preclusion,<sup>112</sup> a witness in the prior case can be bound by the judgment.<sup>113</sup> In addition, Washington courts are willing to bind nonparties who could not be joined as third-party defendants in the first action, but were potentially liable for reimbursement or indemnity of the defendant.<sup>114</sup> If a defendant in the first case gave proper notice and tendered the third person the opportunity to defend, the third person would be bound by the judgment.<sup>115</sup>

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106. *Id.* at 831.

107. *Id.* (citing *Bull v. Venich*, 34 Wash. App. 435, 439, 661 P.2d 1012, 1014 (1983)).

108. *Id.* at 836.

109. *Id.* at 838.

110. *Id.* at 841 (citing *Simpson Timber Co. v. Aetna Casualty & Sur. Co.*, 19 Wash. App. 535, 576 P.2d 437 (1978)). Professor Trautman concluded that the adverseness requirement was unsustainable now that nonmutual preclusion was available in Washington courts. *Id.* at 839.

111. *Id.* at 836–37.

112. *See supra* notes 61–62 and accompanying text.

113. Trautman, *supra* note 1, at 837. Professor Trautman described *Hackler v. Hackler*, 37 Wash. App. 791, 683 P.2d 241 (1984), in which the court applied issue preclusion against a witness and his wife, stating:

[C]ollateral estoppel does not apply to [the Hacklers] by reason of privity, as that concept is usually understood. This, however, is not the end of the matter, because there is an exception to the requirement that one be a party or in privity with a party to the prior litigation.

One who was a witness in an action, fully acquainted with its character and object and interested in its results, is estopped by the judgment as fully as if he had been a party.

Trautman, *supra* note 1, at 837 n.208 (quoting *Hackler*, 37 Wash. App. at 795, 683 P.2d at 243).

114. Trautman, *supra* note 1, at 837.

115. *Id.* Professor Trautman explained that this “vouching in” doctrine was “somewhat out of the

Finally, Professor Trautman described the Court's very unusual approach to binding a nonparty in *Kyreacos v. Smith*.<sup>116</sup> A Seattle police detective was convicted of premeditated murder.<sup>117</sup> The victim's widow brought a wrongful death action against the detective and the City of Seattle, claiming the city was liable under *respondeat superior*.<sup>118</sup> The trial court granted summary judgment, dismissing the claim against the City.<sup>119</sup> Affirming summary judgment, the Supreme Court held that a conviction based on premeditated murder conclusively established that the detective was acting outside the scope of his employment, and not on behalf of his employer.<sup>120</sup> The court acknowledged the lack of privity between the widow and the parties in the first case, but decided preclusion would not work an injustice.<sup>121</sup> It stated that "allowing relitigation of the character of the act of murder would be an absurd result under the facts and pleadings of this case," when twelve jurors had already been convinced that the murder was premeditated, when the plaintiff had chosen to name the detective as a defendant in the civil case, and when the plaintiff's non-participation in the criminal trial could not be prejudicial.<sup>122</sup> Professor Trautman observed that the holding "cannot be explained by the ordinary principles of collateral estoppel, nor by recognized exceptions."<sup>123</sup> He agreed with the court's own assessment that this was "a most unique case which must be confined to its peculiar facts and to its procedural posture."<sup>124</sup>

#### 4. *Doing Justice*

The last question a court will ask is whether issue preclusion "will work an injustice on the party against whom the doctrine is invoked."<sup>125</sup> In this context, Professor Trautman explained the relatively recent

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ordinary." For additional detail, see 18A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD COOPER, FEDERAL PRACTICE AND PROCEDURE, JURISDICTION AND RELATED MATTERS § 4452 (2d ed. 2014) (noting doctrine's redundancy in light of modern interpleader rules).

116. Trautman, *supra* note 1, at 837–38 (citing *Kyreacos v. Smith*, 89 Wash. 2d 425, 428, 572 P.2d 723, 724 (1977)).

117. *Kyreacos*, 89 Wash. 2d at 426, 572 P.2d at 723.

118. Trautman, *supra* note 1, at 837–38 (citing *Kyreacos*, 89 Wash. 2d at 428, 572 P.2d at 724).

119. *Id.* at 838.

120. *Id.* (citing *Kyreacos*, 89 Wash. 2d at 427, 572 P.2d at 724).

121. *Id.* (citing *Kyreacos*, 89 Wash. 2d at 428, 572 P.2d at 724).

122. *Kyreacos*, 89 Wash. 2d at 428, 572 P.2d at 724–25.

123. Trautman, *supra* note 1, at 838.

124. *Id.* (quoting *Kyreacos*, 89 Wash. 2d at 428, 572 P.2d at 724).

125. *Id.* at 839.

erosion of the mutuality doctrine in Washington.<sup>126</sup> The old rule was that “just as a stranger was not bound by a judgment, likewise the stranger should not be permitted to benefit. The estoppel had to be mutual.”<sup>127</sup> But in the 1970s, Washington courts began to allow strangers to the first action to invoke issue preclusion for defensive purposes,<sup>128</sup> and later, allowed a stranger to benefit through offensive use of issue preclusion.<sup>129</sup> While there was ample authority rejecting the mutuality requirement, Professor Trautman pointed out that specific contours of nonmutual estoppel remained to be worked out in greater detail.<sup>130</sup> The “vital concern is whether the person who will be bound had the motivation and the opportunity to present the case fully and fairly in the first proceeding”—essentially, whether issue preclusion “in favor of a stranger [would] work an injustice.”<sup>131</sup>

Apart from mutuality, cases turning on the injustice element of the issue preclusion test involved diverse factors. Courts considered issues such as whether the first judgment could be appealed, factual changes since the first action, potential for confusing a jury, manifest error in the first determination of the issue, whether the issues had been fairly and fully litigated, and whether preclusion would work a “patent injustice.”<sup>132</sup> Professor Trautman concluded his article by endorsing the flexibility the injustice prong injected into the doctrine:

There is danger that in seeking to relieve the crowded dockets and backlog of litigation, courts will too readily turn to the rules of res judicata and collateral estoppel. It is critical to remember that the doctrines of claim and issue preclusion are court-created concepts. Accordingly, they can be adjusted to accommodate whatever considerations are necessary to achieve the final

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126. *Id.* at 839–41.

127. *Id.* at 839.

128. *Id.* at 840 (citing *Lucas v. Velikanje*, 2 Wash. App. 888, 471 P.2d 103 (1970) (following failed first suit to set aside trust for fraud, court precluded plaintiff’s malpractice suit against a new defendant, an attorney, for failing to discover the fraud)).

129. *Id.* at 841 (citing *Seattle-First Nat’l Bank v. Cannon*, 26 Wash. App. 922, 615 P.2d 1316 (1980) (bank in civil action allowed to benefit from preclusion based on conviction of defendant in prior criminal case)). A landmark federal case on non-mutual offensive issue preclusion had quite recently paved the way for this shift in Washington law that Professor Trautman described. In *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979), the Supreme Court allowed a “stranger” to rely on issue preclusion. After a successful SEC action against the defendant, plaintiffs were allowed to benefit from the SEC’s success when they brought a securities fraud stockholder’s class action suit against the same defendant. *See id.* at 332–33.

130. Trautman, *supra* note 1, at 841.

131. *Id.*

132. *Id.* at 841–42.

objective—doing justice.<sup>133</sup>

## II. PROFESSOR TRAUTMAN'S ARTICLE IN THE COURTS

The legacy of Professor Trautman's work on preclusion is impossible to assess with precision, but the fact that Washington courts and practitioners have been citing it for thirty years is significant in itself. Lawyers cite it frequently to Washington courts,<sup>134</sup> and courts often rely on it to lay out the basic tests for claim or issue preclusion.<sup>135</sup> Less frequently, courts have directly responded to Professor Trautman's suggestions, or acted in ways relevant to his core recommendations; Part II addresses those cases. In many ways, Washington law has developed consistently with Professor Trautman's vision of a pragmatic approach to preclusion law. Examples of these developments are examined in Section A, *infra*. However, some of the professor's innovative recommendations have not received the attention they deserve. The test for claim preclusion, for example, continues to be messy and inefficient, as will be discussed in Section B, *infra*. The current formulation of the test is not an effective screening tool for claim preclusion, and it should be revised. Professor Trautman's call for clear and usable rules of claim preclusion is just as important now as it was three decades ago, and a solution is still within reach.

### A. *Pragmatic Approach to Preclusion Law*

Thirty years of Washington case law suggest that many appellate judges agree with Professor Trautman's endorsement of a pragmatic approach to preclusion law. But as a threshold matter, courts in Washington continue to use the *res judicata* and collateral estoppel terminology, despite Professor Trautman's recommendation, and even though the terms continue to confuse.<sup>136</sup> Apparently the battle over

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133. *Id.* at 842.

134. As of February 27, 2015, Westlaw indicates that the article has been cited in at least 162 documents filed by litigants in state and federal trial courts (includes documents filed since 1997) and appellate courts (includes documents filed since 1990).

135. *E.g.*, *Mut. of Enumclaw Ins. Co. v. T&G Constr., Inc.*, 165 Wash. 2d 255, 263, 199 P.3d 376, 381 (2008); *Christensen v. Grant Cnty. Hosp. Dist. No. 1*, 152 Wash. 2d 299, 306, 96 P.3d 957, 961 (2004); *Lenzi v. Redland Ins. Co.*, 140 Wash. 2d 267, 280, 996 P.2d 603, 609 (2000).

136. *See, e.g.*, *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wash. 2d 853, 865 n.9, 93 P.3d 108, 114 n.9 (2004) (clarifying that defendant raised a *res judicata* defense, not collateral estoppel, and stating "[w]e must be vigilant in preserving the distinction between these two defenses"); *Lenzi*, 140 Wash. 2d at 280, 966 P.2d at 609 (reframing case to apply *res judicata*, not collateral estoppel as the defendant had argued); *Kelly-Hansen v. Kelly-Hansen*, 87 Wash. App. 320, 328, 941 P.2d 1108,

terminology is not over: usage can vary from judge to judge, and even within a single decision.<sup>137</sup>

During this period, though, Washington courts often have followed Professor Trautman's advice by emphasizing that the binding effect of a prior judgment should depend to a great extent on whether a party had the incentive and opportunity to litigate claims or issues in the first case. For example, as the courts continued to craft rules for claim and issue preclusion based on decisions of non-judicial tribunals, they have carefully examined features Professor Trautman highlighted.<sup>138</sup> Washington courts heed his advice by considering how procedural differences between administrative agencies and courts can affect fairness, incentive to litigate, and opportunity to litigate claims and issues.<sup>139</sup> Courts consider the same questions of fairness, incentive and opportunity when deciding whether to accord preclusive effect to decisions from judicial tribunals that have limited jurisdiction, or operate under less formal procedures. For example, these questions are important when the original judgment is from a small claims court,<sup>140</sup> or

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1112 (1997) (explaining dual meaning of term "res judicata").

137. For example, the majority analyzed *res judicata* and the dissent analyzed *claim preclusion* in *Hayes v. City of Seattle*, 131 Wash. 2d 706, 934 P.2d 1179, *opinion corrected*, 943 P.2d 265 (1997).

138. See Trautman, *supra* note 1, at 829–30.

139. *E.g.*, *Christensen*, 152 Wash. 2d at 313, 96 P.3d at 964 ("There is nothing inherently unfair about [issue preclusion based on administrative agency findings] provided the party has the full and fair opportunity to litigate, there is no significant disparity of relief, and all the other requirements of collateral estoppel are satisfied."); *Reninger v. State Dep't of Corr.*, 134 Wash. 2d 437, 454, 951 P.2d 782, 791 (1998) (finding no injustice in applying issue preclusion where parties "displayed no lack of incentive to litigate" in prior administrative forum); *Shoemaker v. City of Bremerton*, 109 Wash. 2d 504, 508–09, 745 P.2d 858, 861 (1987) (applying RESTATEMENT (SECOND) OF JUDGMENTS § 83 (1982) to evaluate procedural differences); see also *Carver v. State*, 147 Wash. App. 567, 574–75, 197 P.3d 678, 682 (2008) (finding that injustice element of issue preclusion includes both procedural and *substantive* unfairness).

140. *E.g.*, *State Farm Mut. Auto. Ins. Co. v. Avery*, 114 Wash. App. 299, 57 P.3d 300 (2002). In this case involving a small claims court judgment, the court laid out factors to consider in evaluating whether preclusion will serve the ends of justice: character of the court, scope of its jurisdiction, procedural informality, and procedural safeguards, including opportunity to appeal. *Id.* at 306–09, 57 P.3d at 304–06. The court cited Professor Trautman in support of its conclusion that the "judgment of *any court at any level* may preclude further litigation." *Id.* at 306, 57 P.3d 304 (emphasis in original) (citing Trautman, *supra* note 1, at 825). The court concluded that small claims courts have jurisdiction over contract disputes—including the issue decided in this case—and that the amount in controversy limit was met. *Id.* at 308, 57 P.3d at 305. Concerning procedural informality, the court rejected State Farm's argument that it did not receive a full and fair opportunity to litigate the issue because it was not allowed to be represented by counsel in the small claims court. *Id.* at 309, 57 P.3d at 305–06; see also WASH. REV. CODE § 12.40.080 (2014). Having received adequate notice of the action, State Farm should have been alerted to the implications of the claim, so the procedures satisfied due process. Ultimately, though, the court agreed with State Farm that preclusion would be unjust in this situation because there was no right to appeal unless

a district court that handles traffic infractions.<sup>141</sup>

The pragmatic approach is further illustrated by the courts' increasingly flexible view of finality, as advocated by Professor Trautman.<sup>142</sup> For example, when a litigant argued that partial summary judgment was not a final judgment for issue preclusion purposes, the Washington Court of Appeals responded:

We recently rejected a similar argument on the ground that such a rigorous finality requirement does not implement the purposes of collateral estoppel: to protect prevailing parties from relitigating issues already decided in their favor, and to promote judicial economy. *Chau* [*v. City of Seattle*], 60 Wash. App. 115, 120–21, 802 P.2d 822 (1991). With *Chau*, this court aligned itself with the majority of courts which employ a pragmatic approach to determine finality for purposes of collateral estoppel.<sup>143</sup>

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the amount in controversy exceeded \$250. *Avery*, 114 Wash App. at 309, 57 P.3d 306 (citing Trautman, *supra* note 1, at 827) (“[W]e will not deny a party the chance to litigate the issue if it was statutorily denied an opportunity to appeal.”); *see also* WASH. REV. CODE § 12.40.120.

141. *E.g.*, *Hadley v. Maxwell*, 144 Wash. 2d 306, 27 P.3d 600 (2001). A defendant who lost and did not appeal from a traffic citation later faced a negligence suit by the driver of the other vehicle involved in an auto accident. The trial court precluded her from arguing issues established in traffic court. On appeal, the Washington State Supreme Court emphasized that the party to be precluded must have had an incentive and opportunity to vigorously litigate in the first case, and “interests at stake that would call for a full litigational effort.” *Id.* at 312, 27 P.3d at 602 (quoting 14 LEWIS H. ORLAND & KARL B. TEGLAND, WASHINGTON PRACTICE SERIES, TRIAL PRACTICE, CIVIL § 373, at 763 (5th ed. 1996)). The driver’s incentive to litigate was low: ninety-five dollars was at risk. The court concluded that issue preclusion is “not generally appropriate when there is nothing more at stake than a nominal fine. There must be sufficient motivation for a full and vigorous litigation of the issue.” *Id.* at 314, 27 P.3d at 604. The court also acknowledged that differences in the two forums weighed against preclusion, and cautioned against shifting to traffic courts the job of carefully weighing evidence that will later be determinative in a negligence action. *Id.* at 314 n.2, 27 P.3d at 603 n.2.

142. Trautman, *supra* note 1, at 831 (advocating a pragmatic, flexible application of final judgment requirement).

143. *Cunningham v. State*, 61 Wash. App. 562, 566–67, 811 P.2d 225, 228 (1991) (citing 18 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD COOPER, FEDERAL PRACTICE & PROCEDURE, JURISDICTION AND RELATED MATTERS § 4434, at 321 (1981) (noting that the strict finality requirement has been relaxed in recent decisions in favor of a practical view of finality)); 1B JAMES MOORE, FEDERAL PRACTICE ¶ 0.441[4], at 745 (1983) (“[T]here has been an increasing judicial intolerance with efforts to avoid decisions made after fair consideration by shifting the scene to another courtroom.”). In *Chau*, cited in *Cunningham*, the court took an impressively pragmatic approach when a jury was deadlocked on liability but rendered a partial verdict on the amount of damages. This decision was final, for all practical purposes, according to the court:

If the City chooses not to appeal, the judgment would become final. Hence, the finality requirement of the damage award is satisfied. If the City appeals and prevails, it has not been prejudiced by the application of collateral estoppel since it would have the opportunity to relitigate damages. If the City loses the appeal, the judgment below is affirmed, and the finality requirement of the damage award is again satisfied.

Also as urged by Professor Trautman, Washington courts continued to move away from reliance on formal “adverseness” as a determinative factor in assessing which parties may be bound by preclusion.<sup>144</sup> Instead, the emphasis is on more pragmatic considerations, such as limiting preclusion between co-parties in order to avoid making cross-claims effectively compulsory.<sup>145</sup>

Another noteworthy development is the courts’ gradual move away from the distinction between ultimate facts and evidentiary facts, and between issues of fact and issues of law. As Professor Trautman explained, the less modern approach denied issue preclusive effect to evidentiary facts, and courts often found it difficult to sort ultimate and evidentiary facts.<sup>146</sup> The modern view—represented by Restatement (Second) of Judgments § 27—is to grant preclusive effect to issues of both law and fact (whether evidentiary or ultimate fact), but only if the parties recognized the issue’s importance in the prior litigation, and the

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Chau v. City of Seattle, 60 Wash. App. 115, 121, 802 P.2d 822, 825 (1991).

144. See, e.g., *Bunce Rental, Inc. v. Clark Equip. Co.*, 42 Wash. App. 644, 648 n.3, 713 P.2d 128, 131 n.3 (1986) (declining to require adverse relationship in prior action as long as precluded party had “opportunity to fully and fairly present its case and will not be deprived of due process of law by application of the doctrine”); see also RESTATEMENT (SECOND) OF JUDGMENTS § 38 cmt. a (1982) (explaining that “determination of issues is not full and fair unless a party has an opportunity to present proofs and argument specifically directed to the matters in controversy,” and that preclusion can apply when “between defendants who are parties to a cross-claim, between a defendant and an impleaded third-party defendant, and between parties who have been interpleaded”).

145. See *Krikava v. Webber*, 43 Wash. App. 217, 716 P.2d 916 (1986). Here, the court held that omitting a permissive cross-claim against a co-defendant would not trigger the rule against claim-splitting. A litigant asserted one cross-claim against a co-defendant, and preclusion would apply to that entire claim. But she was not required to assert every possible cross-claim at the same time. To hold otherwise would be inconsistent with Civil Rule 13(g), which makes cross-claims permissive. *Id.* at 220–21, 716 P.2d 918–19. In dicta concerning issue preclusion, the court observed that if the parties had litigated rather than settled the first case, issue preclusion would have been available against the plaintiff in case two. “Co-parties who are not adversaries under the pleadings may be considered adversaries with respect to issues *actually litigated* between them and the opposing party in which the co-parties represented interests adverse to each other.” *Id.* at 221–22, 716 P.2d at 919 (emphasis in original) (citing 2 LEWIS H. ORLAND, WASHINGTON PRACTICE SERIES, TRIAL PRACTICE § 373, at 417 (3d ed. 1972); RESTATEMENT (SECOND) OF JUDGMENTS § 38 cmt. a (1982)).

146. As described in the Restatement (Second) of Judgments (1982),

[the old] formulation causes great difficulty, and is at odds with the rationale on which the rule of issue preclusion is based. The line between ultimate and evidentiary facts is often impossible to draw. Moreover, even if a fact is categorized as evidentiary, great effort may have been expended by both parties in seeking to persuade the adjudicator of its existence or nonexistence and it may well have been regarded as the key issue in the dispute. In these circumstances the determination of the issue should be conclusive whether or not other links in the chain had to be forged before the question of liability could be determined in the first or second action.

RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. j (1982).

judge viewed it as necessary to the first judgment.<sup>147</sup> There has been no formal adoption of this Restatement section, as Professor Trautman urged,<sup>148</sup> and some cases continue to quote old language that includes the “ultimate fact” terminology.<sup>149</sup> But courts seem to be progressing in two ways on this point: first, by applying issue preclusion to issues both of fact and of law,<sup>150</sup> and second, by examining whether the issue was recognized as important—that its importance was foreseeable when the first case was litigated.<sup>151</sup>

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147. Trautman, *supra* note 1, at 834 (citing RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. j, § 28 (1982)). Section 27 states 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, whether on the same or a different claim.” See *Chau*, 60 Wash. App. at 119, 802 P.2d at 824 (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982), when analyzing finality of a partial verdict).

148. Trautman, *supra* note 1, at 835.

149. See, e.g., *Williams v. Leone & Keeble, Inc.*, 171 Wash. 2d 726, 731, 254 P.3d 818, 821 (2011) (stating “Collateral estoppel . . . bars relitigation of issues of ultimate fact that have been determined by a final judgment,” but not focusing on ultimate versus mediate fact distinction); *State v. Vasquez*, 148 Wash. 2d 303, 308, 59 P.3d 648, 649 (2002) (same).

150. A recent federal court decision carefully examined the fact versus law question, and predicted that Washington courts would likely endorse the use of issue preclusion on questions of law as well as fact, following Restatement (Second) of Judgments § 27 cmt. c. (1982). *Seymour v. PPG Indus., Inc.*, 891 F. Supp. 2d 721, 731–32 (W.D. Pa. 2012). The court described *Franklin v. Klundt*, 50 Wash. App. 10, 746 P.2d 1228, 1230–31 (1987), which noted that issue preclusion would apply to both issues of law and issues of fact, with a potential exception for “unmixed questions of law” arising in successive actions involving substantially unrelated claims.” The court then explained that *McDaniels v. Carlson*, 108 Wash. 2d 299, 738 P.2d 254, 259 (1987), limited issue preclusion to ultimate facts, not evidentiary facts that are collateral to the original claim, but did so under the Restatement (First) of Judgments. The court concluded:

Recent case law suggests, and this court predicts, that the Supreme Court of Washington would apply the RESTATEMENT (SECOND) OF JUDGMENTS. See, e.g., *Lemond v. State, Dept. of Licensing*, 143 Wash. App. 797, 180 P.3d 829, 833 (2008) (applying RESTATEMENT (SECOND) OF JUDGMENTS § 27); see also Phillip A. Trautman, *Claim and Issue Preclusion in Civil Litigation in Washington*, 60 WASH. L. REV. 805 (1985) (urging Washington courts to adopt the Second Restatement approach). Because section 27 of the Restatement (Second) of Judgments applies collateral estoppel to issues “of fact or law,” PPG’s second argument is without merit. Even if the Washington decision were made entirely on legal as opposed to factual grounds, the determination could still be preclusive in this court, if the elements of issue preclusion were met.

*Seymour*, 891 F. Supp. 2d at 731–32.

151. See *In re Eleanor Lewis*, No. H-614547, at 3 (Wash. Bd. Indus. Ins. App. July 2, 1990) (adopting Professor Trautman’s recommendation to instead examine whether importance of issue was foreseeable at time of earlier action); accord *In re Keith O. Browne*, No. W-929966, at 6–7 (Wash. Bd. Indus. Ins. App. June 4, 2007); see also *Nielson By & Through Nielson v. Spanaway Gen. Med. Clinic, Inc.*, 135 Wash. 2d 255, 262, 956 P.2d 312, 315 (1998) (providing section 27 as “general rule” of issue preclusion, but not focusing on fact versus law distinction or on foreseeability of issue’s importance); *Lemond v. State, Dep’t of Licensing*, 143 Wash. App. 797, 804, 180 P.3d 829, 833 (2008) (same).



B. *Claim Preclusion's Overly Complex Test*

In the decades since Professor Trautman's article, Washington courts have continued to use a test for claim preclusion that is more complex than the test under federal law and the law of many other states.<sup>152</sup> Recall that in Washington, a valid, final judgment on the merits precludes litigation only if two successive proceedings are identical in (1) subject matter, (2) cause of action, (3) persons and parties, and (4) quality of persons for or against whom the claim is made.<sup>153</sup> A more typical rule for claim preclusion outside of Washington is that a final judgment on the merits precludes a new action involving the same parties or their privies and "claims or defenses that were or could have been raised in a prior proceeding."<sup>154</sup>

Professor Trautman's article commented on the lack of judicial guidance on two of the four elements: identical subject matter and identical quality of persons for or against whom preclusion is asserted.<sup>155</sup> As Professor Trautman explained, these elements had not been of much use to Washington courts.<sup>156</sup> Because they so significantly overlap with identical cause of action and identical persons and parties, these elements might sensibly have been allowed to wither away. But the Washington State Supreme Court continues to emphasize that all four elements must be satisfied in every claim preclusion case.<sup>157</sup>

Accordingly, courts have dutifully marched through the four-element test, and have even tried to differentiate and provide guidance on the two redundant elements.<sup>158</sup> Despite these efforts, it is unclear whether any case's outcome has turned on one of these redundant elements in the last thirty years. What is clear, however, is that the four-element test is more cluttered than it needs to be, and that a simplified, two-part test would provide a better screening mechanism for claim preclusion. This Section will explain why.

The confusing picture is further complicated by the fact that the four-*element* test for claim preclusion has nested within it a four-*factor* test

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152. See GEOFFREY HAZARD, JOHN LEUBSDORF, & DEBRA BASSETT, CIVIL PROCEDURE § 14.3, at 609 (6th ed. 2011).

153. See, e.g., *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wash. 2d 853, 865–66, 93 P.3d 108, 114–15 (2004); see also discussion *supra* note 29 and accompanying text.

154. *In re PCH Assoc.*, 949 F.2d 585, 594 (2d Cir. 1991).

155. Trautman, *supra* note 1, at 812–13, 820–21.

156. See discussion *supra* notes 30 & 31 and accompanying text.

157. *Hisle*, 151 Wash. 2d at 866, 93 P.3d at 115 (“[T]he res judicata test is a conjunctive one requiring satisfaction of all four elements . . .”).

158. See *infra* notes 167–171, 198–209 and accompanying text.

through which courts evaluate element two: the requirement of an identical cause of action. Illustrating the confusion that comes with an eight-step analysis, the federal district courts lately have stumbled when applying this aspect of Washington's law of claim preclusion.

At least two recent federal district court decisions describe the four-element test as a factor test, rather than the conjunctive elements test mandated by Washington precedent.<sup>159</sup> The most recent decision said, "Washington courts have applied these four factors in 'a variety of ways,' and 'it is not necessary that all four factors favor preclusion to bar the claim.'"<sup>160</sup> This decision was based on an earlier decision that incorrectly read Washington law, losing in translation the distinction between the four-element test for claim preclusion and the four-factor subtest for assessing identity of cause of action.<sup>161</sup> The earlier district court decision mistook one test for the other when relying on a Ninth Circuit opinion that correctly laid out the tests for claim preclusion in Washington.<sup>162</sup> This line of cases illustrates a level of confusion that could be easily resolved if the Washington courts were to simply use the "transactional nucleus" test of the Restatement (Second) of Judgments § 24,<sup>163</sup> instead of the duplicative four-factor test.<sup>164</sup>

### 1. *Identical Subject Matter*

Professor Trautman expressed concern about the vague test for same subject matter,<sup>165</sup> and the extent to which it was already covered by the

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159. See *Zweber v. State Farm Mut. Auto. Ins. Co.*, 39 F. Supp. 3d 1161, 1166 (W.D. Wash. 2014); *Smith v. State Farm Mut. Auto. Ins. Co.*, No. C12-1505-JCC, 2013 WL 1499265, at \*4 n.1 (W.D. Wash. April 11, 2013).

160. *Zweber*, 39 F. Supp. 3d at 1166 (quoting *Smith*, 2013 WL 1499265, at \*4 n.1).

161. See *Smith*, 2013 WL 1499265.

162. *Smith* mischaracterized what the Ninth Circuit said in *Feminist Women's Health Center v. Codispoti*, 63 F.3d 863, 867 (9th Cir. 1995). Referring to the "cause of action" factors under Washington law, the Ninth Circuit stated:

Washington has applied the above criteria in a variety of ways, sometimes combining the elements into one analysis, sometimes addressing all four factors, and other times focusing on only one factor. See *Claim and Issue Preclusion in Civil Litigation in Washington*, Philip A. Trautman, 60 WASH. L. REV. 805, 816 (1985). It is not necessary that all four factors favor preclusion to bar the claim.

*Id.* The other four-part test—the one expressing the four identity elements for claim preclusion—was discussed earlier on the same page of the *Codispoti* opinion. *Id.*

163. RESTATEMENT (SECOND) OF JUDGMENTS § 24(1) (1982).

164. See *infra* notes 214–222 and accompanying text.

165. Courts and other commentators have expressed the same concern. See, e.g., *Zweber*, 39 F. Supp. 3d at 1168 (quoting 14A KARL B. TEGLAND, WASHINGTON PRACTICE, CIVIL PROCEDURE § 35:25, at 526 (2d ed. 2009) ("The 'same subject matter' inquiry is somewhat vague, and Washington courts have 'seldom had occasion to discuss the requirement and its implications.'").

test for identity of cause of action.<sup>166</sup> Although one Washington State Supreme Court opinion appeared to respond directly to the professor's concern, it did not remedy the problem of the duplicative test—a test that would be unlikely to matter in all but the rarest cases. In *Hayes v. City of Seattle*,<sup>167</sup> the Court decided that a prior action that sought to nullify a city council decision on a master use permit should not preclude a second action that sought damages for harm suffered as a result of the same decision by the city council.<sup>168</sup> The Court explained:

We are satisfied that the two lawsuits with which we are here concerned do not involve the same subject matter simply because they both arise out of the same set of facts. . . .<sup>169</sup>

While there is a dearth of case law defining when the subject matter of cases differs, one noted authority has observed that when courts examine subject matter “[t]he critical factors seem to be the nature of the claim or cause of action and the nature of the parties.” Philip A. Trautman, *Claim and Issue Preclusion in Civil Litigation in Washington*, 60 WASH.L.REV. 805, 812–13 (1985). Examining the two actions that were brought by Hayes in that light, we are satisfied that they do not deal with the same subject matter. We reach that conclusion because the nature of the two claims is entirely disparate.<sup>170</sup>

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166. Trautman, *supra* note 1, at 812–13.

167. 131 Wash. 2d 706, 712–13, 934 P.2d 1179, 1182 (1997).

168. *Id.*

169. *Id.* at 712, 934 P.2d at 1182. Justice Talmadge, dissenting, argued that the majority misused precedent to come up with this incorrect premise that suits arising from the same set of facts do not necessarily involve the same subject matter. *Id.* at 731, 934 P.2d at 1191 (Talmadge, J., dissenting). The majority relied for this point on *Mellor v. Chamberlin*, 100 Wash. 2d 643, 646, 673 P.2d 610, 612 (1983), which involved a sale of property. The first lawsuit claimed that the sellers misrepresented whether the property description included a parking lot. The second lawsuit alleged breach of the covenant of title based on a neighbor's encroachment. The court found both subject matter and causes of action in the two cases were distinct, having only the underlying sale transaction in common. The court also noted that “res judicata principles are less strictly adhered to in the case of covenants of title,” and that the second claim was not ripe until after the first case settled. *Id.* at 646, 673 P.2d at 612. Given the unusual circumstances in *Mellor*, it does appear that the court in *Hayes*, and later in *Hisle*, may have attached undue significance to the idea that claims “do not involve the same subject matter simply because they both arise out of the same set of facts.” *Hayes*, 131 Wash. 2d at 712, 934 P.2d at 1182; see also *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wash. 2d 853, 866, 93 P.3d 108, 115 (2004). In a more typical situation, two lawsuits with claims or causes of action that arise out of the same set of facts will qualify for claim preclusion between the same parties.

170. *Hayes*, 131 Wash. 2d at 712–13, 934 P.2d at 1182; see also *Marshall v. Thurston Cnty.*, 165 Wash. App. 346, 353, 267 P.3d 491, 495 (2011) (“Our Supreme Court has held that in determining the identity of subject matter, “[t]he critical factors seem to be the nature of the claim or cause of action and the nature of the parties.” (quoting *Hayes*, 131 Wash. 2d at 712, 934 P.2d at 1179;

The *Hayes* court went on to conclude that the two actions also involved different causes of action, so preclusion did not turn on the same subject matter element alone.<sup>171</sup>

Since Professor Trautman's article, the Washington State Supreme Court has issued three notable decisions that denied claim preclusion based on only the same subject matter element.<sup>172</sup> In each instance, the Court stopped its analysis before evaluating whether the two proceedings also involved different claims or causes of action.<sup>173</sup> This is logical, of course, because one missing element is fatal to the claim preclusion defense. Unfortunately, the truncated analysis in each case makes it impossible to know if the results would have been the same under a simpler test that requires identity of cause of action, instead of both cause of action and subject matter. But given the circumstances of each case, to be described, *infra*, it appears quite likely that failure of identity on the subject matter element would also result in failure of identity on the cause of action element. And if that is true, then the more streamlined test—the more commonly-used test that requires identity of parties and causes of action—would properly screen cases such as these. That streamlined test also would be simpler for litigants and courts, resulting in increased efficiency in the judicial process.

The Washington State Supreme Court most recently relied on the same subject matter element to reject a preclusion defense in a case involving two successive judicial foreclosure proceedings; these actions concerned the same property but different deeds of trust.<sup>174</sup> The first proceeding was a nonjudicial foreclosure, which was settled and dismissed when the landowner agreed to sign a new deed of trust. The stipulated order of dismissal included a statement that the property would not be agricultural—non-agricultural status being essential to the trustee's right to foreclose the deed of trust nonjudicially.<sup>175</sup> When the lender foreclosed on the new deed of trust, the landowner sued to challenge the foreclosure and associated lending practices. In this action,

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Trautman, *supra* note 1, at 812–13)).

171. *Id.*; see 14A TEGLAND, *supra* note 6, § 35:25 (describing *Hayes*).

172. *Schroeder v. Excelsior Mgmt. Grp., LLC*, 177 Wash. 2d 94, 297 P.3d 677 (2013); *Gold Star Resorts, Inc. v. Futurewise*, 167 Wash. 2d 723, 222 P.3d 791 (2009); *Hisle*, 151 Wash. 2d 853, 93 P.3d 108.

173. *Schroeder*, 177 Wash. 2d 94, 297 P.3d 677; *Gold Star Resorts, Inc.*, 167 Wash. 2d 723, 222 P.3d 791; *Hisle*, 151 Wash. 2d 853, 93 P.3d 108.

174. *Schroeder*, 177 Wash. 2d at 99–103, 108, 297 P.3d at 679–81, 684.

175. *Id.* at 100, 287 P.3d at 680. The Washington State Supreme Court found it “questionable whether the trial court had authority to enter an order declaring whether the land would be used for agricultural purposes at the time of a future sale.” *Id.* at 108, 287 P.3d at 684.

the lender defended by asserting claim and issue preclusion. Its core argument was that the landowner could not litigate the question whether the property was agricultural, a point included in the stipulated dismissal.<sup>176</sup>

The Court decided that claim preclusion was not appropriate because “[t]he subject matter of the 2009 litigation was the 2007 deed of trust. The subject matter of the 2010 litigation was the foreclosure of the 2009 deed of trust.”<sup>177</sup> The Court declined to reach the issue preclusion argument because the moving party had not analyzed the issue preclusion elements, but it did note that the “issues in the two cases do not appear to be identical.”<sup>178</sup> Once it had decided the subject matter of the two actions differed, the Court did not reach the identical cause of action element.<sup>179</sup> Because the two actions involved two different plaintiffs, it is unlikely the two cases involved the same cause of action: claim preclusion arose in the landowner’s suit against the lender, while the prior case was a lender’s foreclosure against the landowner.

In another decision, the Court compared two cases and concluded that the first “concerned the procedures used to adopt the new CBA [collective bargaining agreement] and sought to invalidate [it],” while the second action sought to apply the Minimum Wage Act to the CBA, which was presumed valid.<sup>180</sup> “Because we find that identity of subject matter does not exist, and because the res judicata test is a conjunctive one requiring satisfaction of all four elements, we do not analyze the other res judicata requirements.”<sup>181</sup> Given the nature of the two proceedings, the case would almost certainly have failed the test for identical cause of action—making the same subject matter test unnecessary.

In the third decision, *Gold Star Resorts, Inc. v. Futurewise*,<sup>182</sup> the two proceedings involved complex land use regulations: the second lawsuit challenged a county’s failure to review and revise a comprehensive plan

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176. *Id.* at 108, 297 P.3d at 684.

177. *Id.*

178. *Id.*

179. *See id.*

180. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wash. 2d 853, 866, 93 P.3d 108, 115 (2004).

181. *Id.* at 866, 93 P.3d at 115 (citing *Hayes v. City of Seattle*, 131 Wash. 2d 706, 712, 934 P.2d 1179, 1182, and citing *Mellor v. Chamberlin*, 100 Wash. 2d 643, 646, 673 P.2d 610 (1983), and describing the case as “finding different subject matter in cases involving the sale of property where the initial case sought to establish misrepresentation and the second case sought to establish a breach of the covenant of title”).

182. 167 Wash. 2d 723, 222 P.3d 791 (2009).

to bring it in compliance with the amended Growth Management Act.<sup>183</sup> In this lawsuit, the county asserted both claim and issue preclusion based on an earlier proceeding that addressed the comprehensive plan as it existed before the Growth Management Act was amended to provide for a seven-year review period.<sup>184</sup> The Court analyzed both preclusion defenses concurrently—examining the identical subject matter element of claim preclusion and the identical issues element of issue preclusion.<sup>185</sup> It found that because the earlier action “preceded the County’s seven-year review, it did not (and could not) involve the same subject matter and issues as the present case.”<sup>186</sup> On this basis, the Court denied both claim and issue preclusion, without further examining other elements.<sup>187</sup> Had it examined the identical cause of action element, it would likewise have found identity lacking, since the underlying legal framework had changed significantly after the first lawsuit.<sup>188</sup>

There is a scant authority in which the subject matter test is truly outcome-determinative to the question of claim preclusion.<sup>189</sup> Although

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183. *Id.* at 732, 222 P.3d at 796.

184. *Id.* at 732–33, 222 P.3d at 796.

185. *Id.* at 737–38, 222 P.3d at 798–99.

186. *Id.* at 738, 222 P.3d at 798.

187. *Id.* at 738, 222 P.3d at 799.

188. *See id.* at 738, 222 P.3d at 798–99.

189. Only one other recent published decision denied preclusion based on the subject matter test. *Hilltop Terrace Homeowner’s Ass’n v. Island Cnty.*, 126 Wash. 2d 22, 891 P.2d 29 (1995). Although this case seems, at first glance, to turn on the subject matter test, it ultimately represents the Washington State Supreme Court’s choice to graft preclusion law principles onto the writ process for challenging quasi-judicial decisions by county commissioners. In *Hilltop Terrace*, the Court reviewed the policies underlying preclusion, and then announced: “From these principles we conclude that *res judicata* is applicable to the present administrative context, and stands for the general proposition that there must be some limit to repeated submissions of applications involving the same subject matter.” *Id.* at 31, 891 P.2d at 34. When a party makes successive applications for conditional use permits (in this case, for cell-phone towers), these *res judicata* principles would bar a second permit application if “there is an identity of subject matter between the first and second applications.” *Id.* at 32, 891 P.2d at 35. More specifically, “a second application may be considered if there is a substantial change in circumstances or conditions relevant to the application or a substantial change in the application itself.” *Id.* at 33, 891 P.2d at 35; *accord* *Davidson v. Kitsap Cnty.*, 86 Wash. App. 673, 681–82, 937 P.2d 1309, 1314 (1997) (granting claim preclusion because court found no substantial difference in plat applications filed for the same property four years apart).

In effect, the Court in *Hilltop Terrace* used the “same subject matter” label as a way to implement what it called a “general proposition” of limits on re-submission of applications. *Hilltop Terrace*, 126 Wash. 2d at 31, 891 P.2d at 34. A close reading of the decision suggests that this new rule represents a departure from more traditional claim preclusion analysis—a decision to craft a variation on claim preclusion that is suitable to the unique situation of permitting decisions by a board of elected officials. Consequently, a more streamlined test for traditional claim preclusion cases should not affect future situations that fall within the realm of quasi-judicial permitting

it is not a dead letter, nor is the same subject matter test an especially effective screening tool for claim preclusion: it is simply redundant to the requirement that preclusion will apply only to the same claim or cause of action. Now, as when Professor Trautman wrote about the topic, most claim preclusion cases either turn on the identical cause of action test alone, or fail both that element and the same subject matter test.<sup>190</sup> Cases that satisfy all four elements of the claim preclusion test tend to offer perfunctory discussion of the subject matter prong, or simply collapse it into the cause of action test.<sup>191</sup> In the few cases that fail the claim preclusion test solely because of non-identical subject matter, the courts have not analyzed the identical cause of action element—making it impossible to know whether the identical cause of action test might have subsumed the same subject matter test.<sup>192</sup> In other words, there are no cases in which a court found two successive actions *satisfied* the same cause of action element but *failed* the same subject matter test.

Washington courts could easily restructure the claim preclusion test to merge the same subject matter requirement into the same cause of action requirement. Doing so would reflect the doctrinal reality of Washington case law—what most courts are doing already—and would simplify the analysis required of practitioners and courts alike. The change would entail essentially no cost, as it is highly unlikely that a merged test would fail to filter out instances in which a claim-preclusion defense should be unavailable.<sup>193</sup>

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decisions.

190. *See, e.g.*, *Storti v. Univ. of Wash.*, 181 Wash. 2d 28, 40, 330 P.3d 159, 165 (2014) (denying preclusion solely based on non-identical causes of action); *Norco Constr., Inc. v. King Cnty.*, 106 Wash. 2d 290, 294–95, 721 P.2d 511, 513 (1986) (same); *Hayes v. City of Seattle*, 131 Wash. 2d 706, 712, 934 P.2d 1179, 1182–83 (1997) (failing on both elements); *Richert v. Tacoma Power Util.*, 179 Wash. App. 694, 707, 319 P.3d 882, 889 (2014), *review denied sub nom.* *Richert v. City of Tacoma*, 337 P.3d 326 (Wash. Nov. 6, 2014) (failing on both elements).

191. *See, e.g.*, *Berschauer Phillips Constr. Co. v. Mut. of Enumclaw Ins. Co.*, 175 Wash. App. 222, 230, 308 P.3d 681, 685 (2013) (merging analysis of subject matter into cause of action analysis); *Karlberg v. Otten*, 167 Wash. App. 522, 540, 280 P.3d 1123, 1133 (2012) (same); *Ensley v. Pitcher*, 152 Wash. App. 891, 904–05, 222 P.3d 99, 105 (2009) (noting that court’s analysis of identity of parties and claims “demonstrates that the subject matter of the first and second suits is identical”); *Garner v. City of Fed. Way*, No. 65624–4–I, 2011 WL 2993287 (Wash. Ct. App. July 25, 2011) (unpublished).

192. *See, e.g.*, *Gold Star Resorts, Inc. v. Futurewise*, 167 Wash. 2d 723, 738, 222 P.3d 791, 798–99; *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wash. 2d 853, 866, 93 P.3d 108, 115 (2004).

193. This would not require courts to abandon the same subject matter test when considering successive land use permit applications, using the rule developed in *Hilltop Terrace*. *See supra* note 189.

## 2. “Quality of the Persons” Test

Courts have heeded Professor Trautman’s point that “[o]nly if there is identity of parties, including the privity concept, need one consider the fourth element, identity in the quality of the persons for or against whom the claim is made.”<sup>194</sup> But rarely have courts encountered situations that warranted serious analysis of the point, instead simply concluding that identity of parties satisfied the quality of persons element,<sup>195</sup> or collapsing the two elements into one test.<sup>196</sup> In practical terms, abandoning the quality of persons element would reflect how Washington courts tend to analyze claim preclusion. Any additional information to be gained by scrutinizing this element is minimal at best, and would be supplied in any event by carefully analyzing the elements requiring identical parties and claims.

Only a few decisions have applied the quality of persons test precisely, and have illuminated the requirement somewhat.<sup>197</sup> Yet even these decisions illustrate that Washington courts do not encounter serious arguments that make the quality of persons element meaningful.

In the most recent decision, a plaintiff conceded that both of its lawsuits involved identical parties, but argued it was “acting in a different capacity or ‘quality’ in the lawsuits.”<sup>198</sup> The plaintiff, a contractor, first obtained a default judgment against a subcontractor insured by the defendant.<sup>199</sup> The contractor then pursued collection of the judgment from the insurer through a “chose in action” theory in Thurston County.<sup>200</sup> Unsuccessful there, it filed a direct action lawsuit in King County, and the insurer asserted a claim preclusion defense based on the Thurston County action.<sup>201</sup> The court of appeals explained that

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194. See *Landry v. Luscher*, 95 Wash. App. 779, 785, 976 P.2d 1274, 1278 (1999) (quoting Trautman, *supra* note 1, at 820).

195. See, e.g., *Pederson v. Potter*, 103 Wash. App. 62, 73, 11 P.3d 833, 838 (2000) (“Because the parties are identical, the quality of the persons is also identical.”).

196. See, e.g., *Kuhlman v. Thomas*, 78 Wash. App. 115, 121–22, 897 P.2d 365, 368–69 (1995) (evaluating successive suits against employer and employee, finding privity, and concluding “parties must therefore be viewed as sufficiently the same, if not identical”); *Carlson v. Staley*, No. 62222–6–I, 2010 WL 703142 (Wash. Ct. App. Mar. 1, 2010) (unpublished) (merging identity and quality tests).

197. See, e.g., *Berschauer Phillips Constr. Co. v. Mut. of Enumclaw Ins. Co.*, 175 Wash. App. 222, 231, 308 P.3d 681, 685 (2013); *Ensley v. Pitcher*, 152 Wash. App. 891, 905–06, 222 P.3d 99, 106 (2009), *review denied*, 168 Wash. 2d 1028 (2010); *Landry*, 95 Wash. App. 779, 976 P.2d 1274.

198. *Berschauer Phillips*, 175 Wash. App. at 231, 308 P.3d at 685.

199. *Id.* at 224, 308 P.3d at 682.

200. *Id.* at 225–26, 308 P.3d at 682–83.

201. *Id.* at 225–27, 308 P.3d at 682–83. The “chose in action” suit sought to attach claims that the



“[t]he quality of persons or parties is relevant in situations where the parties to two lawsuits are the same, but one or the other acts in a different capacity in the two proceedings.”<sup>202</sup> The court concluded that the plaintiff’s “capacity” had not changed from one suit to the next: the contractor “acted in its own capacity against [the insurer] and sought to advance and protect its own interests in both lawsuits. These considerations support the application of res judicata in these circumstances.”<sup>203</sup>

In *Ensley v. Pitcher*,<sup>204</sup> the court rejected an argument that the defendants in two suits were qualitatively different.<sup>205</sup> A victim of a car crash caused by a drunk driver brought an “over-service” claim first against a bar, and later, the bartender who served the driver.<sup>206</sup> The court of appeals held that the subject matter and claim were identical in both suits, and that the employer (bar) and employee (bartender) were in privity, satisfying the identical parties element of claim preclusion.<sup>207</sup> The fourth element, the court said,

simply requires a determination of which parties in the second suit are bound by the judgment in the first suit. See 14A KARL B. TEGLAND, WASHINGTON PRACTICE: CIVIL PROCEDURE § 35.27, at 464 (1st ed. 2007) (explaining that the “identity and quality of parties” requirement is better understood as a determination of who is bound by the first judgment—all parties to the litigation plus all persons in privity with such parties).<sup>208</sup>

Applying this test, the court found that the employer would be bound because it was vicariously liable for the bartender’s actions; therefore, the court found the quality of persons identical.<sup>209</sup> In other words, the

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subcontractor might have had against the insurer, although the court pointed out that these claims were “anything but certain.” *Id.* at 226 n.4, 308 P.3d at 682 n.4.

202. *Id.* at 231, 308 P.3d at 685 (citing *Flessler v. Carstens Packing Co.*, 96 Wash. 505, 165 P. 397 (1917) (“[F]ather sued as guardian ad litem for his daughter based on injuries to her, and then later sued to recover expenses he incurred providing medical care of the child.”)).

203. *Id.* at 231, 308 P.3d at 685; see *Landry v. Luscher*, 95 Wash. App. 779, 785, 976 P.2d 1274, 1278 (1999) (concluding that identical parties were qualitatively the same because they were in adversarial posture in both actions).

204. 152 Wash. App. 891, 222 P.3d 99 (2009).

205. *Id.* at 905–06, 222 P.3d at 106.

206. *Id.* at 894, 222 P.3d at 100.

207. *Id.* at 906–07, 222 P.3d at 106.

208. *Id.* at 905, 222 P.3d at 106; *accord* *Martin v. Wilbert*, 162 Wash. App. 90, 97, 253 P.3d 108, 111 (2011) (adopting *Ensley*’s approach: “For the persons for or against whom the claim is made to be of the same quality, the parties in the collateral action must be bound by the judgment in the prior proceeding.”).

209. *Ensley*, 152 Wash. App. at 905–06, 222 P.3d at 106 (relying on RESTATEMENT (SECOND) OF

employer-employee relationship satisfied two elements: identity of parties and identical quality of persons.

It is nearly impossible to envision a situation in which the identical quality of persons element could change the outcome in a case.<sup>210</sup> Consider the two scenarios in which quality of persons might be argued. First, a defendant who raises a preclusion defense based on privity might face an argument that he is a qualitatively different person from the defendant in the prior case (as in *Ensley*). Second, like the contractor in *Berschauer Phillips*, a plaintiff bringing a second lawsuit against the same parties may argue against preclusion because it is acting in a qualitatively different posture in the second lawsuit.<sup>211</sup> In both scenarios, the quality of persons analysis is amply covered by the two key elements in the identity inquiry: identity of parties and identity of claims. The quality of persons element merely adds an extra step that is not essential to properly analyzing a claim preclusion defense.

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JUDGMENTS § 51 (1982) (“Parties and Other Persons Affected by Judgments”), which explains the preclusive effect of a judgment against a party in a vicarious liability situation); *accord* Pinney v. Belfore USA Grp., Inc., No. 71037-1-1, 2014 WL 5339542, at \*5 (Wash. Ct. App. Oct. 20, 2014) (unpublished) (“The final element of res judicata requires a determination of which parties in the second suit are bound by the judgment in the first suit.” (citing *Ensley*, 152 Wash. App. at 905, 222 P.3d at 106 (2009))).

210. There is limited value in the two examples courts cite as possibly turning on the quality of persons element. One is a 1917 case that appears completely unrelated to this element. In this case, a father sued as guardian ad litem for his injured daughter, and later sued to recover expenses he incurred taking care of her. *Flessher v. Carstens Packing Co.*, 96 Wash. 505, 165 P. 397 (1917), *cited by* *Berschauer Phillips Constr. Co. v. Mut. of Enumclaw Ins. Co.*, 175 Wash. App. 222, 231, 308 P.3d 681, 685 (2013). The court did not analyze either identity of parties or their quality; instead, it focused on whether the child and parent had separate causes of action, and concluded they did. *Flessher*, 96 Wash. at 509, 165 P. at 398-99 (“[W]hen a minor is injured, two causes of action arise, one in favor of the minor for pain and suffering and permanent injury, the other in favor of the parent for loss of services during minority and expenses of treatment. These actions may be joined or tried separately.”). The more modern case, *Mellor v. Chamberlin*, 100 Wash. 2d 643, 646, 673 P.2d 610, 612 (1983), involved a first action for a seller’s misrepresentation in a description of property being sold, and a second action for breach of covenant of title. The Court concluded that the parties were identical, but their “quality” differed when the plaintiff’s “causes of action changed from misrepresentation to breach of covenant of title.” *Id.* Because the situation also failed the requirement of identical cause of action and subject matter, the difference in *quality of persons* seemed to be a natural extension of the fact that there were distinct causes of action.

211. This scenario might also be illustrated by a case that briefly dealt with the quality of persons element, *Camer v. Seattle School District No. 1*, 52 Wash. App. 531, 762 P.2d 356 (1988). In its third suit against the Seattle School District, a family added a third child as plaintiff. The court approved claim preclusion and dismissed the family’s case, finding identical causes of action and evaluating simultaneously the identity of parties and quality of the persons elements. The court held “the quality of the plaintiff is the same in both cases. See *Rains v. State*, 100 Wash. 2d 660, 664, 674 P.2d 165 (1983) . . . Finally, the persons against whom the claim is made, the District, administrators, and teachers are qualitatively the same parties for purposes of applying the doctrine of res judicata.” *Id.* at 535, 762 P.2d at 359.

If the quality of persons question turns on who would be bound by the first action, as in *Ensley*, that consideration is covered already by the identity of parties element. The only nonparties who can be bound by claim preclusion are those in some sort of legal relationship with a true party, and courts must evaluate privity and agency theories when determining whether there is an identity of parties.<sup>212</sup> An affirmative answer to the identical parties element seems to also require an affirmative answer to the quality of persons element. In this context, the quality of persons test adds no value to the analysis, while making it needlessly complex.

In the case of a plaintiff arguably suing in a different capacity, like the contractor in *Berschauer Phillips*, its different capacity will hinge on the core inquiry in any claim preclusion case: whether the plaintiff's claims or causes of action in the two proceedings are identical. In a case like *Berschauer Phillips*, the court needed only to determine that the contractor was pursuing the same claim (collection of a judgment) against the same insurer in two different courts. By deciding that, it followed that the identical quality of persons test was satisfied. Conversely, a plaintiff bringing a distinct cause of action would also be acting in a different capacity. The quality of persons test adds no value to the analysis in either situation, yet increases complexity.

The core elements of claim preclusion—identical parties and identical causes of action—sufficiently capture any situation in which a difference in quality of persons would otherwise defeat preclusion. When given the opportunity, the Washington State Supreme Court should not shy away from reframing the test for claim preclusion by removing the redundant requirement of identical quality of persons. Preclusion doctrine will be clearer and easier to apply, with no cost in terms of fairness to parties.<sup>213</sup>

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212. See *Ensley*, 152 Wash. App. at 905–06, 222 P.3d at 106.

213. There is another possible solution to the redundant element, but it is perhaps too radical a proposition in light of the Washington courts' tenacious adherence to the *quality of persons* test. The quality of persons issue tends to arise when a nonparty to the first case is a defendant in the second, and wants to benefit from preclusion—such as when a related party has already defeated the same plaintiff on the same claim, as in *Ensley v. Pitcher*, see *supra* notes 204–209, and *Rains v. State*, see *supra* notes 69–71. This new party, a “stranger” to the first action, could perhaps rely on issue preclusion because Washington law allows nonmutual issue preclusion in a stranger's favor. But for claim preclusion, mutuality is still required. Washington could follow the lead of other jurisdictions that now allow nonmutual defensive claim preclusion in limited situations—those involving a close or significant relationship between defendants in the first action and defendants in the second action who are asserting claim preclusion against the same plaintiff.

There are well-developed standards for assessing whether nonmutual preclusion is appropriate, and this approach could replace the quality of persons test very effectively. See 47 AM. JUR. 2D *Judgments* § 577 and cases cited therein; *Silva v. City of New Bedford*, 660 F.3d 76, 80 (1st Cir.

### 3. *Testing Identity of Claim or Cause of Action*

Another aspect of the claim preclusion test merits attention but has been less problematic in Washington courts: how to evaluate the scope of a claim or cause of action. Professor Trautman advocated that the Washington courts adopt an important provision of the Restatement (Second) of Judgments: the “transactional nucleus of facts” test to determine the scope of a claim or cause of action for claim-splitting purposes.<sup>214</sup> This test would extend claim preclusion to all “rights . . . to remedies . . . with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.”<sup>215</sup> Although some courts appear open to this recommendation, there remains a problem of courts applying four factors to answer the same question<sup>216</sup> when only one is necessary. Clarity and efficiency would be improved if the Washington State Supreme Court were to simply adopt the transactional nucleus of facts test.

The Washington State Supreme Court has not formally adopted the transactional nucleus test from Restatement § 24, but has endorsed it as

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2011); *In re El San Juan Hotel Corp.*, 841 F.2d 6, 10 (1st Cir. 1988); *but see* 18A WRIGHT, MILLER, & COOPER, *supra* note 115, § 4464.1 (noting non-mutual claim preclusion is appropriate in only limited situations).

A Washington case that theoretically could have been analyzed under the nonmutual claim preclusion doctrine is *Feature Realty, Inc. v. Kirkpatrick & Lockhart Preston Gates Ellis, LLP*, 161 Wash. 2d 214, 164 P.3d 500 (2007). Here, a new defendant in a lawsuit was allowed to benefit from preclusion based on his law firm’s involvement in a previous suit by the same plaintiff. The court concluded that the lawyer and his firm were “substantially the same” party, and thus the newcomer could rely on the “two-dismissal rule” under Washington Civil Rule 41. *Id.* at 224, 164 P.3d at 505. In a situation like this, nonmutual claim preclusion would likewise have allowed the newcomer to benefit from his firm’s status, without requiring the court to analyze specifics of their relationship. Arguably, nonmutual defensive claim preclusion would involve a simpler analysis than requiring courts to scrutinize the privity issue in order to decide whether the parties and quality of persons were identical in both suits.

214. *See* Trautman, *supra* note 1, at 817–18.

215. *Id.*; *see supra* notes 50–53 and accompanying text.

216. This test examines:

(1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts.

*Rains v. State*, 100 Wash. 2d 660, 664, 674 P.2d 165, 168 (1983). Notably, when the Washington State Supreme Court in *Rains* borrowed this test from federal law, it omitted a crucial statement: “The last of these criteria is the most important.” *See Costantini v. Trans World Airlines*, 681 F.2d 1199, 1202 (9th Cir. 1982). Because Washington courts commonly rely on *Rains* for the four-factor test for identical cause of action, it would be sensible for courts to consider that the original source gave special status to the transactional test.

one way to determine the scope of a claim.<sup>217</sup> And Washington courts have used the transactional nucleus of facts test with some regularity<sup>218</sup>—most recently in *Storti v. University of Washington*,<sup>219</sup> in which the Supreme Court held that two lawsuits several years apart involved different claims based on separate facts and evidence.<sup>220</sup> One court of appeals decision illustrates well the influence of Professor Trautman’s recommendation to use Restatement § 24.<sup>221</sup> The court in *Hadley v. Cowan*<sup>222</sup> explained how the transactional test applied to its claim-splitting analysis:

The allegations of undue influence, abuse of confidence, fraud, and substitution of respondents’ will for the deceased’s will all are of a single “transactional nucleus of facts” that could and should have been determined in the probate challenge. The damages . . . are substantially the same and are intimately related in time, origin, and motivation, because they arise out of the same interactions between the deceased and the respondents. It is also obvious that the claims in the present proceedings would have constituted a convenient trial unit in the probate proceeding.<sup>223</sup>

Despite these bursts of enthusiasm for the transactional test, many courts continue to apply all four factors when evaluating the claim preclusion requirement of identical claim or cause of action, taking a

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217. *Fluke Capital & Mgmt. Servs. Co. v. Richmond*, 106 Wash. 2d 614, 620, 724 P.2d 356, 361 (1986). The court stated that:

A claim includes “all rights of the [claimant] to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose”, without regard to whether the issues actually were raised or litigated. Restatement, *supra*, § 24(1), at 196. See *Sanwick v. Puget Sound Title Ins. Co.*, 70 Wash. 2d 438, 423 P.2d 624 (1967). See also Trautman, 60 WASH. L. REV. at 813–19.

*Id.*

218. See *Sound Built Homes, Inc. v. Windermere Real Estate/S., Inc.*, 118 Wash. App. 617, 631, 72 P.3d 788, 795 (2003) (describing section 24 and stating that the “Washington Supreme Court has applied these principles for decades”).

219. 181 Wash. 2d 28, 40, 330 P.3d 159, 165 (2014) (noting that identity of claim “requires that the two cases involve substantially the same evidence and the same transactional nucleus of fact”).

220. *Id.* at 41, 330 P.3d at 166.

221. See *Hadley v. Cowan*, 60 Wash. App. 433, 442, 804 P.2d 1271, 1276 (1991). After reviewing the four possible tests of identity of claims, the court noted that “[c]onfronted with this variety of tests, one commentator has stated that courts may in fact be applying a commonsense functional approach to the question of identity, and ‘a better approach would simply be to state so. This would make clear to all what actually transpires.’” *Id.* at 442 n.12, 804 P.2d at 1276 n.12 (quoting Trautman, *supra* note 1, at 817).

222. *Id.* at 433, 804 P.2d 1271.

223. *Id.* at 442–43, 804 P.2d at 1276.

forced march through four distinct factors: (1) transactional nucleus, (2) same evidence, (3) same rights, and (4) whether a second action would impair the result of the first action.<sup>224</sup>

The transactional nucleus test could easily be the sole test for identity of claims because it is broad and flexible enough to include the essence of the inquiries advanced by the other tests.<sup>225</sup> It allows courts to thoughtfully consider how claims are related in time, origin, and motivation; this fosters fairness to parties on both sides of the litigation. The test also allows courts to examine whether combining the claims would form a convenient trial unit—a factor that would advance the core efficiency goal of preclusion law. Washington courts will likely continue to recognize the utility of the transactional nucleus test. But ideally, the Supreme Court’s own *use* of the transactional test—if not outright *adoption*—should embolden courts at all levels to rely less on the other variants. This simpler test would increase clarity, which in turn should allow courts to produce opinions that are clear,<sup>226</sup> and allow practitioners to focus on a single test that is malleable and easy to apply.

### III. EMERGING PROBLEMS IN WASHINGTON PRECLUSION LAW

Two of the most problematic aspects of preclusion law in Washington have developed relatively recently, and thus were not addressed in Professor Trautman’s article. These are the courts’ aggressive use of nonparty preclusion and their frequent failure to apply correct full faith and credit rules. This Part describes these problems and recommends corrective actions—solutions that would be consistent with Professor Trautman’s advocacy on behalf of doctrinal clarity, pragmatism, and doing justice.

#### A. *Nonparty Preclusion*

Washington courts have developed a variety of nonparty preclusion mechanisms, including the doctrine of “virtual representation.” Virtual representation can bind a nonparty to a prior judgment if a party with closely aligned interests adequately represented the nonparty in the prior

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224. See, e.g., *Knuth v. Beneficial Wash., Inc.*, 107 Wash. App. 727, 733, 31 P.3d 694, 697–98 (2001) (applying all four factors to analyze claims in class action).

225. See Trautman, *supra* note 1, at 816–17.

226. For an example of judicial confusion caused by the four-factor claim identity test nested within the four-element test for claim preclusion, see *supra* notes 159–163 and accompanying text.

action.<sup>227</sup> In effect, the doctrine allows courts to use *identity of interests* as a proxy for the *identity of parties* element of issue preclusion.<sup>228</sup> Unlike other forms of nonparty preclusion, this one does not require a preexisting legal relationship between the nonparty and the party in the prior case.<sup>229</sup>

Professor Trautman did not use the virtual representation terminology, probably because it had not yet gained a foothold in Washington courts. But he did describe several related situations, such as binding a nonparty witness who had an interest in the first case, and binding other nonparties who participated in the prior litigation.<sup>230</sup> The scope of nonparty preclusion in Washington has expanded far beyond the nascent form it had when Professor Trautman wrote about the witness preclusion cases—which even then were doctrinally suspect.<sup>231</sup> The expanded scope of nonparty preclusion triggers both practical and substantive concerns.

In practical terms, while only a handful of Washington cases have actually used virtual representation to deprive a litigant of his or her “day in court,” the mere existence of the doctrine has forced both litigants and courts to grapple with it in many other cases.<sup>232</sup> The potential to win through virtual representation, even if usually unrealized, motivates parties to litigate this theory, and courts must devote time to analyzing it.<sup>233</sup> Moreover, every published decision in which a court discusses virtual representation as a credible theory will likely result in more litigants arguing the theory.

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227. *Garcia v. Wilson*, 63 Wash. App. 516, 520, 820 P.2d 964, 966 (1991). The doctrine and its history in the federal courts are discussed in depth in 18A WRIGHT, MILLER, & COOPER, *supra* note 115, § 4457.

228. Federal courts have used virtual representation in both the claim preclusion and issue preclusion contexts. *See, e.g.*, *Taylor v. Sturgell*, 553 U.S. 880, 888 (2008). But Washington courts have confined it to issue preclusion situations—at least in recent years. *E.g.*, *Garcia*, 63 Wash. App. at 523 n.20, 820 P.2d at 968 n.20 (1991) (allowing collateral estoppel but noting “In order for an action to be barred by res judicata there must be identity of persons and parties. The trial court erred in ruling that Garcia’s action was barred by res judicata.”); *cf.* *Fahrenwald v. Spokane Sav. Bank*, 179 Wash. 61, 67, 35 P.2d 1117, 1119 (1934) (approving res judicata based on virtual representation theory).

229. Martin H. Redish & William J. Katt, *Taylor v. Sturgell, Procedural Due Process, and the Day-in-Court Ideal: Resolving the Virtual Representation Dilemma*, 84 NOTRE DAME L. REV. 1877, 1878 (2009).

230. *See* Trautman, *supra* note 1, at 819–20, 836–37.

231. *Id.* at 820; *see supra* note 62 and accompanying text.

232. *See infra* notes 324–325 and accompanying text.

233. *See, e.g.*, *Beres v. United States*, 92 Fed. Cl. 737, 758–59 (2010) (rejecting argument that virtual representation should bind fourteen plaintiffs who filed amicus brief in prior litigation).

Substantively, the doctrine is now out of line with a landmark United States Supreme Court decision that resoundingly rejected the doctrine in the federal law context: *Taylor v. Sturgell*.<sup>234</sup> Because the Court's disapproval of the doctrine was rooted in due process concerns,<sup>235</sup> Washington courts should examine the due process implications of nonparty preclusion under state law and either significantly limit it—or end it completely. While judicial efficiency is a laudable goal of preclusion doctrine, it should not be achieved at the high cost of depriving any litigant of a due process right to bring a claim in a forum he or she chooses, and to control the litigation of that claim.

In this Section, federal court developments and the due process problem will be discussed first, followed by a description of nonparty preclusion in Washington. Analysis of problems posed by nonparty preclusion will follow, along with recommendations.

### 1. *The Supreme Court's Due-Process-Based Rejection of Virtual Representation*

Virtual representation has had many critics,<sup>236</sup> including the justices of the United States Supreme Court. In *Taylor v. Sturgell*, the Court firmly rejected the doctrine as conflicting with the day-in-court ideal.<sup>237</sup> The Court grounded its decision on due process, building on two of its landmark decisions<sup>238</sup> that rejected state court efforts to preclude nonparties.<sup>239</sup> Therefore, although *Taylor* concerned federal preclusion law, its principles are equally relevant to state law.

The two proceedings in *Taylor* were federal district court suits seeking to compel the Federal Aviation Administration to produce documents in response to Freedom of Information Act (FOIA)

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

235. *Id.* at 891.

236. See, e.g., 18A WRIGHT, MILLER, & COOPER, *supra* note 115, § 4457.

237. 553 U.S. 880. For more on the day-in-court ideal, see Robert G. Bone, *The Puzzling Idea of Adjudicative Representation: Lessons for Aggregate Litigation and Class Actions*, 79 GEO. WASH. L. REV. 577, 586 (2011) (citing *Richards v. Jefferson County*, 517 U.S. 793, 798 (1996) for the proposition that “as a result of the historic day-in-court right, a judgment among parties does not generally bind strangers to the lawsuit,” and *Martin v. Wilks*, 490 U.S. 755, 761–62 (1989) for “recognizing that the day-in-court right is ingrained in the Court’s preclusion jurisprudence”); Robert G. Bone, *Rethinking the “Day in Court” Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193 (1992) (exploring the tension between the day-in-court right and the theory of virtual representation)).

238. *Richards*, 517 U.S. at 801–02; *Hansberry v. Lee*, 311 U.S. 32, 42–43 (1940).

239. *Taylor*, 553 U.S. at 898–902.



requests.<sup>240</sup> Herrick, an antique aircraft enthusiast, filed a FOIA request, followed by a suit that he lost in federal court in Wyoming.<sup>241</sup> The Tenth Circuit affirmed.<sup>242</sup> Within a month, Taylor, Herrick's friend, filed an identical FOIA request and sued in the Federal District Court for the District of Columbia.<sup>243</sup> This trial court concluded that claim preclusion barred Taylor's suit, based on the FAA's victory in Herrick's earlier suit.<sup>244</sup> Virtual representation was the basis for preclusion, because Taylor was neither a party nor in privity with a party to the first case.<sup>245</sup> The Court of Appeals for the District of Columbia affirmed, outlining a test for virtual representation<sup>246</sup> and concluding that Taylor's suit was precluded.<sup>247</sup>

The Supreme Court disapproved of the virtual representation theory<sup>248</sup> and found that Taylor was not adequately represented in Herrick's lawsuit.<sup>249</sup> The Court rejected the FAA's argument that courts should engage in a fact-driven inquiry to decide if a relationship between a party and nonparty is "close enough" to bind the second litigant to the judgment.<sup>250</sup> In doing so, the Court first emphasized "the fundamental nature of the general rule that a litigant is not bound by a judgment to which she was not a party."<sup>251</sup> Second, the Court refused to support a doctrine that would allow a quasi-class action without the due process protections that a true class action affords.<sup>252</sup> Third, the Court observed that a "diffuse balancing approach to nonparty preclusion would likely

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240. *Id.* at 885.

241. *Id.* at 885–87.

242. *Id.* at 887.

243. *Id.*

244. *Id.* at 888–89.

245. *Id.* at 888.

246. *Id.* at 889–90.

247. *Id.* at 890–91.

248. *Id.* at 904.

249. *Id.* at 905.

250. *Id.* at 898.

251. *Id.*

252. *Id.* at 900–01. The Court explained that "adequate" representation for preclusion purposes would require,

at a minimum: (1) The interests of the nonparty and her representative are aligned . . . and (2) either the party understood herself to be acting in a representative capacity or the original court took care to protect the interests of the nonparty. . . . In addition, adequate representation sometimes requires (3) notice of the original suit to the persons alleged to have been represented. . . . In the class-action context, these limitations are implemented by the procedural safeguards contained in Federal Rule of Civil Procedure 23.

*Id.* (citing *Hansberry v. Lee*, 311 U.S. 32, 43 (1940); *Richards v. Jefferson Cnty.*, 517 U.S. 793, 801–02 (1996)).

create more headaches than it relieves.”<sup>253</sup> Opaque standards would burden courts and litigants, inconsistent with preclusion doctrine’s intent “to reduce the burden of litigation on courts and parties,” the Court noted.<sup>254</sup>

Helpfully, the Court delineated six exceptions to the ban on nonparty preclusion—situations that do not conflict with a party’s right to a day in court.<sup>255</sup> Nonparty preclusion is permissible when:

1. a nonparty “agrees to be bound” by determination of issues in the first action;
2. there is a qualifying, pre-existing substantive legal relationship between the person to be bound and a party to the judgment (e.g., succeeding owners of property, bailor and bailee, assignor and assignee);
3. the prior case was a representative suit such as a properly-conducted class action, or a suit brought by a trustee, guardian or other fiduciary;
4. a nonparty controlled the litigation in which the judgment was rendered;
5. a party bound by a judgment tries to relitigate the case by using a proxy or agent;
6. a statutory scheme expressly precludes successive litigation by nonparties, such as bankruptcy or probate proceedings.<sup>256</sup>

When the Court evaluated Taylor’s case under these six grounds for nonparty preclusion, the FAA seriously contested only two grounds.<sup>257</sup> Regarding the third exception, the Court found no evidence that Taylor was adequately represented in Herrick’s suit, or even that he knew of the suit.<sup>258</sup> It was not apparent that “Herrick understood himself to be suing on Taylor’s behalf.”<sup>259</sup> Nor did the Wyoming District Court take “special care to protect Taylor’s interests.”<sup>260</sup>

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253. *Id.* at 901 (explaining likely burdens on district courts in applying a “standard that provides no firm guidance,” and burdens on the litigants of “wide-ranging, time-consuming, and expensive discovery tracking factors potentially relevant under [either the] seven- or five-prong tests”).

254. *Id.* at 901.

255. *Id.* at 893–95.

256. *Id.*

257. Taylor did not agree to be bound by Herrick’s litigation, did not control it, and did not have a legal relationship with Herrick. Nor was there any statute that limited relitigation of the issues. *Id.* at 904–05.

258. *Id.* at 905.

259. *Id.*

260. *Id.*

The Court stopped short of rejecting the FAA's remaining argument on the fifth exception: that preclusion is proper when the second suit is actually brought by a proxy on behalf of the person who lost the first suit.<sup>261</sup> Although Taylor was not Herrick's legal representative, he conceded that he could be precluded if he were acting as an "undisclosed agent" for Herrick, attempting to litigate Herrick's case a second time.<sup>262</sup> This relationship issue had been touched upon when the D.C. Circuit applied its virtual representation test, but the Supreme Court said that the court below had not treated the Taylor-Herrick relationship as one of agency.<sup>263</sup> (Instead, the court of appeals analyzed the second suit as evidence of tactical maneuvering to get around preclusion rules, which was a key part of the Circuit's test for virtual representation.)<sup>264</sup> The Supreme Court rejected the focus on tactical maneuvering, but remanded to allow the parties to develop the argument that Taylor was Herrick's actual agent, litigating as a proxy.<sup>265</sup>

## 2. *Nonparty Preclusion in Washington*

Beyond traditional privity relationships, Washington courts have allowed nonparty preclusion primarily in two types of cases. First, and most problematic, are the virtual representation cases, which preclude litigation by one who, though not a party, participated in some way in the first action.<sup>266</sup> Second is a group of cases involving issues of public concern, such as election challenges, in which serial litigants are precluded from suing the same entity (usually the government) to challenge the same conduct.<sup>267</sup> Because *Taylor v. Sturgell* definitively rejected virtual representation, the Washington Supreme Court should do the same. The Washington courts' preclusion of successive litigation on issues of public concern is slightly more defensible from a due process

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261. *Id.* at 905–06.

262. *Id.* at 905.

263. *Id.*

264. *Id.*

265. *Id.* The Court did not elaborate on the showing needed to establish one party as a litigating agent for another. It did note that courts should proceed cautiously: "A mere whiff of 'tactical maneuvering' will not suffice; instead, principles of agency law are suggestive." *Id.* at 906. And these principles would look to whether the party in the first case actually controls the agent's conduct in the second case. *Id.*

266. *E.g.*, *World Wide Video of Wash., Inc. v. City of Spokane*, 125 Wash. App. 289, 103 P.3d 1265, *review denied*, 155 Wash. 2d 1014, 122 P.3d 186 (2005); *Garcia v. Wilson*, 63 Wash. App. 516, 820 P.2d 964 (1991).

267. *E.g.*, *In re Coday*, 156 Wash. 2d 485, 501, 130 P.3d 809, 817 (2006) (applying claim preclusion).

standpoint. But it is nonetheless vulnerable to attack if *Taylor*'s reasoning is extended, and the serial litigation problem could be solved either through legislative action or through existing party joinder mechanisms. Therefore, the Washington State Supreme Court should strictly limit the potential for doctrinal sprawl in this category of cases too.

a. *Virtual Representation*

Modern virtual representation doctrine in this state began with *Hackler v. Hackler*,<sup>268</sup> discussed in Professor Trautman's article.<sup>269</sup> But *Garcia v. Wilson*,<sup>270</sup> which relied on *Hackler*, is the case that kick-started the expansion of virtual representation in the Washington trial courts and court of appeals.<sup>271</sup> The Washington Supreme Court has only once been asked to overturn a case that used virtual representation to deny a plaintiff the right to litigate his own claim, but the Court denied review.<sup>272</sup> This leaves extant a small but significant series of decisions that violate due process, as later articulated by *Taylor v. Sturgell*.

In *Garcia*, the court of appeals affirmed a preclusion-based summary judgment against the plaintiff in a personal injury action arising from a car crash.<sup>273</sup> Ms. Garcia was a passenger in Mr. Macias's car when it was involved in an accident with the Wilsons' car.<sup>274</sup> Macias sued the Wilsons first, and Garcia testified at the trial.<sup>275</sup> Macias lost, and four months later, Garcia brought her own suit against the Wilsons and Macias.<sup>276</sup> The court of appeals agreed with Garcia that her claim against the Wilsons was different from Macias' claim against them, and therefore did not examine the Wilsons' claim preclusion defense.<sup>277</sup> But it concluded the issue of Ms. Wilson's negligence was the same in both cases, opening the door to issue preclusion.<sup>278</sup>

When Garcia argued she was not in privity with Macias, the court

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268. 37 Wash. App. 791, 683 P.2d 241 (1984).

269. Trautman, *supra* note 1, at 837.

270. *Garcia*, 63 Wash. App. 516, 820 P.2d 964.

271. *See infra* notes 293–323 and accompanying text.

272. *World Wide Video of Wash., Inc. v. City of Spokane*, 125 Wash. App. 289, 103 P.3d 1265, *review denied*, 155 Wash. 2d 1014, 122 P.3d 186 (2005).

273. 63 Wash. App. at 517, 522–23, 820 P.2d at 965, 968.

274. *Id.*

275. *Id.* at 517, 820 P.2d at 965.

276. *Id.* at 517–18, 820 P.2d at 965.

277. *See id.* at 518–19, 820 P.2d at 965–66.

278. *Id.* at 518 & n.5, 820 P.2d at 965 & n.5.

found this argument “incorrect in view of the exception to the privity requirement announced in *Hackler v. Hackler*.”<sup>279</sup> The court acknowledged that the facts of *Hackler* were “clearly distinguishable.”<sup>280</sup> That case involved a witness who testified in his son’s dissolution proceeding, who described “deeding his house to his son without mentioning that the house was eventually deeded back to him.”<sup>281</sup> When the witness later sued to quiet title (after his daughter-in-law received the house in the divorce), the court of appeals bound the witness to the prior adjudication because he was “fully acquainted with its character and object,” and “interested in its results.”<sup>282</sup>

Extending the *Hackler* line, the court in *Garcia* enunciated several factors designed to help “insure that the nonparty has had a vicarious day in court.”<sup>283</sup> These included whether the former adjudication involved (1) nonparty participation, for example, as a witness; (2) full and fair litigation of the issue; and (3) evidence and testimony identical to that to

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279. *Id.* at 519–20; 820 P.2d at 966 (citing *Hackler v. Hackler*, 37 Wash. App. 791, 683 P.2d 241, review denied, 102 Wash. 2d 1021 (1984)).

280. *Id.* at 520, 820 P.2d at 966. One notable difference is that *Hackler* involved assignment of a property deed, which triggered an argument that there was true privity between the assignors (son and wife) and assignees (parents). Precedent excluded this situation from the realm of privity, but the pre-existing legal relationship seemed to encourage the court to expand preclusion with an exception for an interested witness. See *Hackler*, 37 Wash. App. at 794–95, 683 P.2d at 243.

281. *Garcia*, 63 Wash. App. at 520, 820 P.2d at 966.

282. *Id.* (quoting *Hackler*, 37 Wash. App. at 795, 683 P.2d 241). Authority for the court’s conclusion in *Garcia* was apparently scant. The court cited a case that precluded a union member from relitigating a factual issue his union had already litigated on his behalf. *Robinson v. Hamed*, 62 Wash. App. 92, 813 P.2d 171 (1991), cited by *Garcia*, 63 Wash. App. at 520 n.11, 820 P.2d at 966 n.11. Unremarkably, the court in *Robinson* concluded that the union member was the real party in interest in an arbitration in which his union challenged his termination from employment. *Id.* at 100, 813 P.2d at 175–76. The union membership situation was hardly comparable to *Garcia*’s situation. The *Garcia* court also invoked a case *Hackler* relied on: *Bacon v. Gardner*, 38 Wash. 2d 299, 312–13, 229 P.2d 523, 531 (1951), cited by *Garcia*, 63 Wash. App. at 520, 820 P.2d at 966. In *Bacon*, the court announced that a church was “estopped to deny” the agency authority of persons who sold church property. 38 Wash. 2d at 312–13, 229 P.2d at 531. Although the court mentioned that some church personnel had been witnesses in the case, and could have intervened, this was not a case of preclusion. There was a single lawsuit, so there was no possibility for a prior judgment to be binding on nonparties. Instead, the court used “estopped” in a more generic sense—perhaps hoping that its dicta would ward off a future lawsuit by those church officials. See *id.* at 312–13, 229 P.2d at 531. Although clearly not a solid basis for the development of the virtual representation doctrine, *Bacon* is a case that courts and litigants frequently cite as supporting the doctrine. See, e.g., *Beres v. United States*, 92 Fed. Cl. 737, 759 (2010); *Desimone v. Spence*, 51 Wash. 2d 412, 415 n.3, 318 P.2d 959, 961 n.2 (1957); *Schaible v. Pike Place Mkt. Pres. & Dev. Auth.*, No. 38243–8–I, 1997 WL 159385, at \*3 n.18 (Wash. Ct. App. Apr. 7, 1997) (unpublished); *Hackler*, 37 Wash. App. at 795, 683 P.2d at 243.

283. *Garcia*, 63 Wash. App. at 520–21, 820 P.2d at 967.

be presented in the new case.<sup>284</sup> Finally, the court said, “there must be some sense that the separation of the suits was the product of some manipulation or tactical maneuvering, such as when the nonparty knowingly declined the opportunity to intervene but presents no valid reason for doing so.”<sup>285</sup>

Applying these factors, the court decided “nothing would be accomplished by allowing the second action.”<sup>286</sup> Litigating Garcia’s claim would require substantially the same evidence as the first case, which was fully litigated. Garcia knew plenty about the first action because she was a witness, and was living with the plaintiff.<sup>287</sup> She was interested in the results because she already knew she was injured, and yet opted not to intervene in Macias’ case.<sup>288</sup>

The court explained that although there might be circumstances that would justify failure to intervene in the first case, Garcia had made no attempt to defend against summary judgment with an excuse of this sort (apparently convinced that preclusion would not apply to her as a nonparty).<sup>289</sup> Therefore, according to the court, the decision not to intervene must have been tactical, and issue preclusion was justified.<sup>290</sup>

Aside from the *Hackler* case, there was little Washington precedent supporting the *Garcia* decision.<sup>291</sup> Its result seems harsh, but to be fair to the court, virtual representation was gaining traction nationally among commentators and some courts.<sup>292</sup> Against a backdrop of momentum nationwide, the unfortunate legacy of the case is that it has encouraged preclusion to extend to other questionable situations.

For example, six years later, the court of appeals approved virtual representation-based issue preclusion in a case with striking parallels to *Taylor v. Sturgell*.<sup>293</sup> Each of the two actions involved Pike Place Market

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284. *Id.*

285. *Id.* at 521, 820 P.2d at 967 (citing *Hackler*, 37 Wash. App. at 795, 683 P.2d 241; *Bacon*, 38 Wash. 2d at 313, 229 P.2d 523).

286. *Id.*

287. *Id.*

288. *Id.* at 522, 820 P.2d at 967.

289. *Id.*

290. *Id.* Recall that the Supreme Court in *Taylor* refused to consider precluding a nonparty based on evidence of tactical maneuvering. See *supra* note 265 and accompanying text.

291. See *supra* note 282.

292. *Garcia*, 63 Wash. App. at 520–21, 820 P.2d at 966–67 (citing 18 WRIGHT, MILLER & COOPER, *supra* note 143, § 4457, at 494–502 (1981); *Aerojet-General Corp. v. Askew*, 511 F.2d 710, 719 (5th Cir.), *cert. denied*, 423 U.S. 908 96 S. Ct. 210, 46 L.Ed.2d 137 (1975); Note, *Collateral Estoppel of Nonparties*, 87 HARV. L. REV. 1485, 1499–1500 (1974)).

293. *Schaible v. Pike Place Mkt. Pres. & Dev. Auth.*, No. 38243–8–I, 1997 WL 159385 (Wash.

tenants who sought disclosure of documents concerning leases in the market.<sup>294</sup> Before he began his own public records case, Schaible was aware of a fellow tenant's dispute with the market's development authority.<sup>295</sup> He helped Franco, the fellow tenant, by testifying in a mandamus hearing, assisting him with legal research, providing documents, and discussing litigation strategy.<sup>296</sup> When Schaible later brought his own action, the court applied the *Garcia* factors and held that he could not pursue his case because he was virtually represented by Franco.<sup>297</sup> The court found his involvement in the previous case "far more extensive" than the participation that triggered preclusion in the *Garcia* case.<sup>298</sup> And despite the fact that Franco appeared *pro se*, the issue was fully and fairly litigated—in large part thanks to Schaible's help.<sup>299</sup>

The court also rejected Schaible's explanation for his decision not to intervene in Franco's case.<sup>300</sup> It reasoned that there could be no prejudice in associating in the first action with Franco, who had been a guest in Schaible's home, and who researched with him at a law library.<sup>301</sup> The court rejected the argument that Schaible had a right to control his own trial strategy, and also concluded that his desire to be represented by an attorney—in contrast to Franco's *pro se* approach—did not "militat[e] against applying the virtual representation doctrine."<sup>302</sup> The court concluded "[b]ecause these reasons are not convincing, we find that Schaible failed to intervene for tactical reasons."<sup>303</sup>

If Schaible's case were litigated today, he would be able to draw clear factual parallels to *Taylor v. Sturgell*. There, the FAA relied on similar acts to argue that Taylor should be precluded because he and Herrick worked together: Herrick asked for Taylor's help in restoring his plane, he supplied information and documents to help Taylor in his case, and

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Ct. App. Apr. 7, 1997) (unpublished).

294. *Id.* at \*1–2.

295. *Id.*

296. *Id.* at \*1.

297. *Id.* at \*4–5.

298. *Id.* at \*4.

299. *Id.*

300. Mr. Schaible relied on *Garcia v. Wilson* when he argued he should be excused from a duty to intervene. He cited reasons such as "the association with the other plaintiff may be prejudicial, differences in trial strategy, different witnesses to be called, or the desire to have independent counsel." *Id.* (citing *Garcia v. Wilson*, 63 Wash. App. 516, 522, 820 P.2d 964, 967 (1991)).

301. *Schaible*, 1997 WL 159385, at \*4.

302. *Id.*

303. *Id.*

the parties used the same lawyer in both cases.<sup>304</sup> The Court rejected virtual representation completely, making these facts irrelevant.<sup>305</sup> A modern court in Washington would also have to discount arguments based on litigants conferring with each other about their lawsuits. In addition, a post-*Taylor* analysis of adequate representation should not be so ready to punish a litigant for not intervening in another litigant's lawsuit just because they happened to have similar interests and know each other socially.

In another unpublished decision, the court of appeals approved issue preclusion against a party to an interpleader action in which her former husband's vacation benefits were being allocated.<sup>306</sup> Although not a party to a prior bankruptcy case, Cantu, the former wife, was bound by the bankruptcy court's unfavorable finding regarding ownership of the former husband's vacation benefits.<sup>307</sup> The court of appeals decided that Cantu was virtually represented in the bankruptcy case by Baker, her former husband, because they had "identical goals": they had both wanted the bankruptcy court to award the vacation benefits to Cantu, and both would have benefitted from that decision.<sup>308</sup> Therefore, the court concluded, Baker "made the same arguments that [the ex-wife] would have made had she been a party in the bankruptcy action."<sup>309</sup> This led the court to find they were "in privity," and that Cantu could not litigate the issue on her own behalf in the interpleader action.<sup>310</sup>

In this case, Cantu was shut out of the opportunity to pursue the interpleader stake, merely because her ex-husband had already made the arguments that she theoretically would have made, and those theoretical arguments would have been directed to the same goal. If this case were to be analyzed today, this kind of watered-down "representation" quite obviously would not satisfy any of the nonparty preclusion categories that *Taylor* left intact.

Only one *published* post-*Garcia* opinion allowed issue preclusion based on a virtual representation theory: *World Wide Video of*

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304. *Taylor v. Sturgell*, 553 U.S. 880, 889–90 (2008).

305. *Id.* at 904.

306. *Aerospace Machinists Indus. Dist. Lodge 751 v. Baker*, No. 38113–0–I, 1997 WL 206743, at \*1 (Wash. Ct. App. Apr. 28, 1997) (unpublished).

307. *Id.* at \*3.

308. *Id.*

309. *Id.*

310. *Id.* In this factually complex case, the ex-wife had been listed as an unsecured creditor in the bankruptcy proceeding, but the court did not appear to base its decision on that fact. There was no discussion of tactical maneuvering, as in *Garcia*. *Id.* at \*4.



*Washington, Inc. v. City of Spokane*.<sup>311</sup> The plaintiff in the first case operated three adult retail stores in buildings owned by Marco Barbanti.<sup>312</sup> The video store owner brought, and lost, a § 1983 claim against the City of Spokane in federal court, challenging under the First Amendment and the state constitution the City's limits on locations for adult entertainment facilities.<sup>313</sup> The federal district court granted the City's motion for summary judgment on the video store owner's constitutional claims.<sup>314</sup> In the federal case, Barbanti, a lawyer, testified in a deposition and by declaration about the plaintiff's leases,<sup>315</sup> and the local real estate market.<sup>316</sup>

Concurrently with the federal action, Barbanti and the video store owner were in state court to challenge a zoning decision regarding the same properties.<sup>317</sup> In that case, Barbanti argued a city ordinance was unconstitutional—an argument the trial court rejected because the same issue had been decided in the federal court action, and Barbanti was bound by that judgment.<sup>318</sup>

The court of appeals affirmed, holding that Barbanti fell within the interested-witness exception to the privity requirement, as outlined in *Garcia* and *Hackler*.<sup>319</sup> The court explained that preclusion was proper because

Mr. Barbanti testified in the federal action, was fully acquainted with its character and object, and was clearly interested in its results. Not only did he testify regarding the local real estate market and the leases with WWV, but he argued that the ordinances were unconstitutional. His decision not to intervene appears purely tactical.<sup>320</sup>

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311. *World Wide Video of Wash., Inc. v. City of Spokane*, 125 Wash. App. 289, 103 P.3d 1265, review denied, 155 Wash. 2d 1014, 122 P.3d 186 (2005). The court did not use the “virtual representation” label, instead referring to an “exception to the privity requirement” for “certain interested witnesses.” *Id.* at 306, 103 P.3d at 1274.

312. *Id.* at 298, 103 P.3d at 1270.

313. *Id.* at 299, 103 P.3d at 1270–71.

314. *World Wide Video of Wash., Inc. v. City of Spokane*, 227 F. Supp. 2d 1143, 1171 (E.D. Wash. 2002), *aff'd as amended on denial of reh'g and reh'g en banc*, 368 F.3d 1186 (9th Cir. 2004) (dismissing federal constitutional claims with prejudice and state constitutional claims without prejudice).

315. *See id.* at 1168.

316. *See World Wide Video of Wash. Inc.*, 125 Wash. App. at 299, 103 P.3d at 1270.

317. *Id.* at 300, 103 P. 3d at 1271.

318. *Id.* at 298–300, 103 P. 3d at 1270–71.

319. *Id.* at 306, 103 P.3d at 1274 (citing *Garcia v. Wilson*, 63 Wash. App. 516, 521–22, 820 P.2d 964 (1991); *Hackler v. Hackler*, 37 Wash. App. 791, 795, 683 P.2d 241 (1984)).

320. *Id.* at 306, 103 P.3d at 1274.

The opinion reveals no factual analysis of whether Barbanti made a tactical move.<sup>321</sup> But the court of appeals held preclusion justified.<sup>322</sup> The lack of analysis leaves the opinion weak, even under Washington's loose standard for nonparty preclusion. But under federal law at the time the case was decided—and especially now in light of *Taylor v. Sturgell*—the decision is unappealable.<sup>323</sup>

Of course, Washington courts only rarely find justification for virtual representation, heeding *Garcia's* warning that virtual representation “must be applied cautiously in order to insure that the nonparty is not unjustly deprived of her day in court.”<sup>324</sup> While that is encouraging from a doctrinal perspective, it is cold comfort to litigants embroiled in these fights (which must seem strange to one not versed in preclusion law). For even the winners have lost, having been forced to spend time and money defending their right to control litigation of their own claims. And of course the courts have devoted time and resources to the problem in many cases,<sup>325</sup> which largely defeats the efficiency values of preclusion law.

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321. From the facts in the case, one could infer that he cared enough about the issue to help his tenants by testifying in the case, and he understood the case because he was a lawyer. He might have been motivated by self-interest (hoping to ensure his tenants' business prospered) or by ideological zeal (to guard his First Amendment rights). Equally plausible, though, is speculation that he preferred to focus on litigating the permit and zoning issues in the state court action, and not get involved in a second lawsuit in federal court. Without actual evidence of strategic decision-making, the court's conclusion appears simply conclusory.

322. *World Wide Video of Wash. Inc.*, 125 Wash. App. at 306, 103 P.3d at 1274.

323. In fact, the Washington courts should have used federal law to determine the prior federal court judgment's preclusive effect. See *infra* notes 430–435 and accompanying text. At the time, federal preclusion law in the Ninth Circuit allowed nonparty preclusion in only the most limited circumstances. See, e.g., *Headwaters Inc. v. U.S. Forest Serv.*, 399 F.3d 1047 (9th Cir. 2005).

324. E.g., *Frese v. Snohomish Cnty.*, 129 Wash. App. 659, 665, 120 P.3d 89, 93 (2005) (quoting *Garcia*, 63 Wash. App. at 520, 820 P.2d) (rejecting virtual representation where a few plaintiffs filed declarations in a prior suit, and there was no evidence of tactical maneuvering).

325. E.g., *McDaniels v. Carlson*, 108 Wash. 2d 299, 304–05, 738 P.2d 254, 258 (1987) (rejecting argument that cohabitants were in privity regarding woman's dissolution proceeding when partner had different interests and did not participate in his partner's action); *Dillon v. Seattle Deposition Reporters, LLC*, 179 Wash. App. 41, 66, 316 P.3d 1119, 1131, *review granted*, 180 Wash. 2d 1009, 325 P.3d 913 (2014) (rejecting virtual representation because no evidence of tactical maneuvering); *Diversified Wood Recycling, Inc. v. Johnson*, 161 Wash. App. 891, 905–06, 251 P.3d 908, 916–17 (2011) (discussing virtual representation but concluding it would be premature to apply it, given procedural posture of the case); *Paradise Orchards Gen. P'ship v. Fearing*, 122 Wash. App. 507, 515, 94 P.3d 372, 376 (2004) (finding lawyer who testified on client's behalf in prior action had no opportunity to litigate issues, nor to intervene, so preclusion would be improper); *Ward v. Torjussen*, 52 Wash. App. 280, 286, 758 P.2d 1012, 1015 (1988) (reversing issue preclusion based on nonparty police officer's testimony at prior traffic court proceeding; noting “appellant did not have an opportunity to control the litigation or participate at a level commensurate with due process”).

*b. Nonparty Preclusion in Public Law Cases*

A second group of nonparty preclusion cases in Washington involves successive efforts to litigate an issue of public concern. These cases typically concern challenges to government conduct, such as land use decisions, conduct of elections, and implementation of regulations.<sup>326</sup> This type of nonparty preclusion responds to the obvious risk of allowing serial litigation on issues of public concern: inconsistent judgments could very easily create incompatible standards for government conduct.

As the Washington Supreme Court explained in *In re Coday*, “where ‘nominally different parties’ pursue causes of action as voters, on behalf of the body politic generally, such parties have been found to ‘have sufficiently identical interests to satisfy the “identity of parties” inquiry’ because they possess ‘the same legal interests as all citizens of the state.’”<sup>327</sup>

In *Coday*, the Court dismissed an election contest that challenged the results of the 2004 governor’s election, holding that the election contest was identical to a lawsuit adjudicated in another county, and therefore barred by *res judicata*.<sup>328</sup> Although the challenger did not participate in the earlier case, “she is [now] acting in the same capacity, and has the same legal interest, as the participants in that case.”<sup>329</sup> The Court characterized her interest in a fair and accurate election as identical to that of the prior parties—and indeed to that of all Washington citizens.<sup>330</sup> She was an “identical party” bringing a case that involved an identical cause of action and subject matter, so claim preclusion was proper.<sup>331</sup>

326. Perhaps the earliest Washington case of this sort is *Stallcup v. City of Tacoma*, 13 Wash. 141, 42 P. 541 (1895). There, the Washington State Supreme Court held a taxpayer precluded from bringing a suit when an earlier suit was “brought by a taxpayer, in behalf of himself and all others similarly situated, the city was the principal defendant there, as it is the sole defendant here, and there is identity in the subject matter of the litigation.” *Id.* at 147, 42 P. at 543.

327. *In re Coday*, 156 Wash. 2d 485, 501, 130 P.3d 809, 817 (2006) (quoting *In re Recall of Pearsall-Stipek*, 136 Wash. 2d 255, 261, 961 P.2d 343 (1998)); *accord Snyder v. Munro*, 106 Wash. 2d 380, 384, 721 P.2d 962, 964 (1986) (holding that “all citizens of Washington state were well represented in” a prior suit brought by the leaders of the state Democratic and Republican organizations and state government officials, and that therefore *res judicata* barred registered voters from raising the same claim in a subsequent action).

328. 156 Wash. 2d at 501–02, 130 P.3d at 817. In the same case, the court dismissed three other election contests for failure to state a cognizable claim. *Id.* at 498–500, 130 P.2d at 815–16.

329. *Id.* at 501, 130 P.2d at 817.

330. *Id.* at 502, 130 P.3d at 817.

331. *Id.* at 501–02, 130 P.3d at 817. Support for this holding is found in *In re Recall of Pearsall-Stipek*, 136 Wash. 2d 255, 262, 961 P.2d 343, 346–47 (1998), as amended (Oct. 17, 2000). Dealing with successive recall petitions, the court said the litigant’s interests were

Notably, the court in *Coday* did not rely on virtual representation. It treated the election challenger's interest as coextensive with the interest of anyone who might challenge the election.<sup>332</sup> And the court precluded an entire cause of action, not just an individual issue as in virtual representation cases.<sup>333</sup> In essence, the court treated the prior litigation as a class action that would bind any future party with the same claim and same interest.

The Washington Court of Appeals extended the *Coday* approach to sequential suits seeking to compel a county assessor to disclose audit documents.<sup>334</sup> In *Harley H. Hoppe & Associates, Inc. v. King County*,<sup>335</sup> the court found *Coday*'s reasoning applicable in the Public Records Act context, in that "any member of the public has standing to bring such a public records request."<sup>336</sup> The court held that both the claim preclusion and issue preclusion tests were satisfied, finding identity of parties because the plaintiffs in the first and second cases had both a father-daughter relationship and an employment relationship.<sup>337</sup> Although this decision came three years after *Taylor v. Sturgell*, there is no mention of the Supreme Court's landmark decision in the parties' briefs or in the court of appeals' opinion—despite both cases having involved sequential public records requests and ensuing litigation.

Although there are two older court of appeals decisions that have precluded nonparties in public issue cases,<sup>338</sup> other decisions have held

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no different from that of any other citizen: proceeding to the signature gathering stage of the recall process. To hold otherwise would permit repeated litigation of the same charge based on the same facts by merely substituting a different named party. . . . This would defeat the finality and conservation of judicial resources concerns that underlie the res judicata doctrine.

*Id.*

332. *In re Coday*, 156 Wash. 2d at 501, 130 P.3d at 817.

333. *Id.* at 500–02, 130 P.3d at 816–17 (using res judicata terminology and test).

334. *Harley H. Hoppe & Assocs., Inc. v. King Cnty.*, 162 Wash. App. 40, 255 P.3d 819, *review denied*, 172 Wash. 2d 1019, 262 P.3d 64 (2011).

335. *Id.*

336. *Id.* at 51–52, 255 P.3d at 824. Given the factual context of a public records request, it is difficult to understand how this case is materially different from the *Schaible* case, discussed *supra* note 294. *Schaible* was treated exclusively as a virtual representation case, while *Hoppe* was analyzed as part of the *Coday* public litigation branch of nonparty preclusion.

337. *Harley H. Hoppe & Assocs., Inc.*, 162 Wash. App. at 51, 255 P.3d at 824 (noting that both "were represented by the same legal counsel and relied on the same legal briefing and arguments," and that "Amy Hoppe is in privity with Hoppe, since she is both an employee and Harley Hoppe's daughter."). *But see Taylor v. Sturgell*, 553 U.S. 880, 897 (2008) (citing *S. Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160, 168 (1999) (observing that hiring the same lawyer "created no special representational relationship between the earlier and later plaintiffs" so as to justify preclusion)).

338. *See Camer v. Seattle Sch. Dist. No. 1*, 52 Wash. App. 531, 535, 762 P.2d 356, 359 (1988) (applying claim preclusion in an action by a school-child whose mother and siblings had sued the school district previously over similar issues, the court observed: "If we adopted the Camers'

the line in this type of case. In *Stevens County v. Futurewise*,<sup>339</sup> for example, the court rejected the county's arguments for claim and issue preclusion in the context of serial litigation over land use decisions. The county argued that it had to defend the same provision of its code in three separate legal actions, "while Futurewise had standing and notice but chose to advise another party rather than to participate in the two prior actions."<sup>340</sup> The court refused to bind the advocacy group to the outcome of the previous case by an individual citizen, finding lack of identity in parties, subject matter, and cause of action. It also rejected virtual representation, and confined the *Coday* rule to the election contest setting.<sup>341</sup>

### 3. *Why We Should Care About Nonparty Preclusion*

The scope of nonparty preclusion in Washington has expanded in ways unforeseen when Professor Trautman published his article in 1985. As mentioned above, this expanded scope triggers both practical and substantive concerns, which this Section will explain. Briefly, an overly broad definition of preclusion allows a prior judgment, litigated by someone else, to bind parties who should not be bound. This deprives these parties of their due process rights to litigate their claims. The broad definition also impedes efficiency in litigation, and even interferes with other mechanisms by which courts manage litigation—particularly the rules of civil procedure regarding intervention and necessary party joinder.

#### a. *The Resource Conservation Problem*

Virtual representation may look like a tiny blip on the radar of Washington courts, because few decisions actually preclude litigation under this theory. But in practical terms, if the doctrine exists, lawyers will (and arguably must) use it to pursue even the slight chance of gaining advantage in litigation. This forces both litigants and courts to

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reasoning on this issue, each time another Camer child entered the Seattle school system, they would have the right to bring exactly the same complaint and have it heard through the judicial system."); *Bergh v. State*, 21 Wash. App. 393, 585 P.2d 805 (1978) (allowing issue preclusion against nineteen plaintiffs, only fifteen of whom were members of gillnetters association that sued previously on same issues).

339. 146 Wash. App. 493, 192 P.3d 1 (2008).

340. *Id.* at 502, 192 P.3d at 6.

341. *Id.* at 505, 192 P.3d at 7 ("This exception is applied to actions brought by voters on behalf of the general body politic. . . . As explained in *Coday*, such parties have sufficiently identical interests because they have the same legal interests as all state citizens.").

grapple with it in many cases.<sup>342</sup> This reality is at odds with one of the primary policy reasons behind preclusion doctrine: to conserve judicial resources.<sup>343</sup>

Professor Trautman advocated a clear and pragmatic approach to claim and issue preclusion, and the same pragmatic advice is warranted thirty years later: Washington courts should seriously consider the practical benefits of a rule that precludes only true parties or those in traditional privity relationships. This would allow courts to use the same party-identity tests in both claim and issue preclusion analysis, instead of the divided tests used today.<sup>344</sup> Lawyers would be better able to predict outcomes and could avoid wasting their clients' money litigating the ambiguous and subjective doctrine of virtual representation. Courts would spend less time evaluating whether a second action could be pursued, and often would be able to use *stare decisis* to efficiently resolve the second case.<sup>345</sup>

*b. The Due Process Problem*

*Taylor's* clear and emphatic rejection of virtual representation is obviously useful to any court dealing with nonparty preclusion, but it raises the question: Does *Taylor* apply to states, which claim a high degree of autonomy in how they treat judgments of their own courts? The answer should be "yes—at least to some degree." The decision's due process underpinning is the key to this answer. Furthermore, while *Taylor* dealt with how *federal* courts use preclusion, two landmark Supreme Court cases have applied similar reasoning to *state* court decisions,<sup>346</sup> and *Taylor* explicitly built upon that foundation.

The Court in *Taylor* grounded its holding, in part, on *Richards v. Jefferson County*.<sup>347</sup> In this case, the United States Supreme Court reversed an Alabama Supreme Court decision<sup>348</sup> that allowed claim preclusion against taxpayers who were absent from an earlier class action challenging a county's occupational tax.<sup>349</sup> The Alabama

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342. See *supra* note 325 (decisions that consider but reject virtual representation).

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

344. See *Garcia v. Wilson*, 63 Wash. App. 516, 518 & n.20, 820 P.2d 964, 965, 968 & n.20 (1991).

345. See *Taylor v. Sturgell*, 553 U.S. 880, 903–04 (2008).

346. See *Richards v. Jefferson Cnty.*, 517 U.S. 793 (1996); *Hansberry v. Lee*, 311 U.S. 32 (1940).

347. 517 U.S. 793 (1996), cited in *Taylor*, 553 U.S. at 891–905.

348. *Jefferson Cnty. v. Richards*, 662 So. 2d 1127 (Ala. 1995), *rev'd*, 517 U.S. 793 (1996), *vacated*, 682 So. 2d 409 (Ala. 1996).

349. *Richards*, 517 U.S. at 797.

Supreme Court had concluded that the plaintiffs in a second case, although strangers to the first, were adequately represented by plaintiffs in the first lawsuit concerning essentially identical issues.<sup>350</sup> The Supreme Court in *Richards* concluded that the state court's expanded use of preclusion violated the newcomers' due process rights.<sup>351</sup>

The Court's opinions in both *Richards* and *Taylor* relied on the landmark decision in *Hansberry v. Lee*,<sup>352</sup> which also invalidated—on due process grounds—a state court's decision to bind nonparties to earlier litigation.<sup>353</sup> The *Richards* Court explained:

a prior proceeding, to have binding effect on absent parties, would at least have to be “so devised and applied as to insure that those present are of the same class as those absent and that the litigation is so conducted as to insure the full and fair consideration of the common issue.”<sup>354</sup>

In *Richards*, the Court noted, the taxpayers who brought the first suit did not sue on behalf of a class; their pleadings did not purport to assert any claim against or on behalf of any nonparties; and the judgment they received did not purport to bind any county taxpayers who were nonparties. . . . As a result, there is no reason to suppose that the [first] court took care to protect the interests of petitioners in the manner suggested in *Hansberry*. Nor is there any reason to suppose that the individual taxpayers in [the first case] understood their suit to be on behalf of absent county taxpayers. Thus, to contend that the plaintiffs in [the first case] somehow represented petitioners, let alone represented them in a constitutionally adequate manner, would be “to attribute to them a power that it cannot be said that they had assumed to exercise.”<sup>355</sup>

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350. *Id.* at 799 (citing *Richards*, 662 So. 2d at 1130).

351. The Court observed:

The limits on a state court's power to develop estoppel rules reflect the general consensus “in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.” *Hansberry v. Lee*, 311 U.S. 32, 40, 61 S. Ct. 115 [117], 85 L. Ed. 22 (1940). . . . This rule is part of our ‘deep-rooted historic tradition that everyone should have his own day in court.’ 18 C. Wright, A. Miller, & E. Cooper, FEDERAL PRACTICE AND PROCEDURE § 4449, p. 417 (1981).’ *Martin v. Wilks*, 490 U.S. 755, 761–762, 109 S. Ct. 2180, 2184, 104 L.Ed.2d 835 (1989).”

*Id.* at 798.

352. 311 U.S. 32 (1940), cited in *Taylor*, 553 U.S. at 884.

353. *Id.* at 41–44.

354. 517 U.S. at 801 (quoting *Hansberry*, 311 U.S. at 43).

355. *Id.* at 801–02 (quoting *Hansberry*, 311 U.S. at 46).

Few state appellate courts have had occasion to examine how *Taylor v. Sturgell* affects virtual representation in their own courts, but there is definite awareness of the decision's due process implications.<sup>356</sup> Moreover, scholarly discussion of virtual representation in the wake of *Taylor* focuses heavily on due process aspects of the decision.<sup>357</sup> Scholars have criticized the Court for having inadequately explained exactly *how* due process concerns compel the outcome,<sup>358</sup> but both the opinion's text and more extensive analysis of its underpinnings support a conclusion that it is truly grounded in due process—whether deeply or superficially.<sup>359</sup>

Assuming virtual representation fails because of due process protections, and not merely because of federal common law, the Supreme Court's reasoning must apply to nonparty preclusion in Washington courts. Further, it is difficult to conclude that the due process analysis would mandate rejecting virtual representation while preserving the nonparty claim preclusion cases involving issues of public concern.<sup>360</sup> Therefore, both categories of nonparty preclusion cases are likely at risk under a due process analysis.<sup>361</sup>

### c. *The Forced Intervention Problem*

Another significant problem with preclusion law in Washington is its sense of obligatory intervention: a nonparty who was aware of a prior

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356. See, e.g., *Franco v. District of Columbia*, 3 A.3d 300, 306 (D.C. Ct. App. 2010) (applying *Taylor* test and concluding nonparty was not adequately represented in prior case); *Pang Nhia Thao v. Cent. States Health & Life Co. of Omaha*, No. A09-0204, 2009 WL 3255883, at \*3–5 (Minn. Ct. App. Oct. 13, 2009) (noting *Taylor*'s due process holding, and concluding Minnesota law would compel same result); see also *Johnson v. GlaxoSmithKline, Inc.*, 83 Cal. Rptr. 3d 607, 618 n.8 (Cal. Ct. App. 2008), *as modified on denial of reh'g.* (Oct. 14, 2008) (discussing the potential effect of *Taylor* in the context of a state court class action).

357. See, e.g., Redish & Katt, *supra* note 229, at 1894 (“[A]lthough the Court in *Taylor* failed to explicate the theoretical underpinnings of the day-in-court ideal, it nevertheless relied on that ideal in rejecting virtual representation. The Court recognized that the value of a party's participation in litigation is a strong due process value that cannot be overcome simply because a litigant's interests are similar to those of a prior litigant.”); Victor Petrescu, *Crash and Burn: Taylor v. Sturgell's Radical Redefinition of the Virtual Representation Doctrine*, 64 U. MIAMI L. REV. 735 (2010).

358. E.g., Redish & Katt, *supra* note 229, at 1887, 1894–95; Petrescu, *supra* note 357, at 752–53.

359. It is beyond the scope of this Article to resolve the debate about whether *Taylor* is truly a foundational due process decision. But a well-reasoned and detailed explanation of the due process underpinnings is found in Redish & Katt, *supra* note 229, at 1888–95.

360. But see *infra* notes 369–409 and accompanying text.

361. “Although *Taylor* is about claim preclusion, some lower courts and scholars read the opinion to bar the use of virtual representation for both claim and issue preclusion.” Bone, *Puzzling Idea*, *supra* note 237, at 584 n.31 (citing *Lincoln-Dodge, Inc. v. Sullivan*, 588 F. Supp. 2d 224, 235 (D.R.I. 2008)); Redish & Katt, *supra* note 229, at 1878.



action but failed to join has been one of the prime targets of nonparty preclusion doctrine.<sup>362</sup> For this reason, Washington courts ought to consider another United States Supreme Court decision, *Martin v. Wilks*.<sup>363</sup> Here, the Court rejected an argument that new parties should not be permitted to litigate issues in a new action if they were aware of a prior case but passed up an opportunity to intervene.<sup>364</sup>

The Court explained that,

Joinder as a party, rather than knowledge of a lawsuit and an opportunity to intervene, is the method by which potential parties are subjected to the jurisdiction of the court and bound by a judgment or decree. The parties to a lawsuit presumably know better than anyone else the nature and scope of relief sought in the action, and at whose expense such relief might be granted. It makes sense, therefore, to place on them a burden of bringing in additional parties where such a step is indicated, rather than placing on potential additional parties a duty to intervene when they acquire knowledge of the lawsuit. The linchpin of the “impermissible collateral attack” doctrine—the attribution of preclusive effect to a failure to intervene—is therefore quite inconsistent with Rule 19 and Rule 24.<sup>365</sup>

For the same reasons, Washington courts should reject the forced-intervention aspect of Washington preclusion law. Unlike *Taylor*’s holding, the *Wilks* Court’s conclusion is not compelled by due process concerns, so it does not apply directly to state courts.<sup>366</sup> But it is based on a problem very relevant to Washington courts: that compelled intervention could interfere with other procedural rules, including joinder rules that mirror the federal rules to a great extent.<sup>367</sup> Abandoning forced intervention would avoid the trap outlined in *Wilks*, and would allow existing joinder rules to play their important role in

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362. *Supra* notes 269–292 and accompanying text.

363. *Martin v. Wilks*, 490 U.S. 755 (1989) (superseded by statute as stated in *Landgraf v. USI Film Products*, 511 U.S. 244, 251 (1994)).

364. *Id.* at 762.

365. *Id.* at 765.

366. The decision was instrumental in at least one Washington decision, but it applied federal law because it was determining the preclusive effect of a federal judgment. *Loveridge v. Fred Meyer, Inc.*, 72 Wash. App. 720, 726–27, 864 P.2d 417, 420 (1993), *aff’d*, 125 Wash. 2d 759, 887 P.2d 898 (1995) (refusing to bind employee to EEOC consent decree merely because she declined to intervene in the EEOC action).

367. *See generally* John B. Oakley, *A Fresh Look at the Federal Rules in State Courts*, 3 NEV. L.J. 354, 356–57, 373 (2002) (describing Washington’s transition from a “Federal Rules Replica” state to a more loosely conforming state after federal rules amendments in 1993 and 2000).

determining when a party is bound by a judgment.<sup>368</sup>

#### 4. *An Exception for Cases of Public Concern?*

Virtual representation in Washington courts is in trouble, for the reasons just discussed. But there is an argument for treating differently cases that allow nonparty preclusion when there is serial litigation over a public matter such as a statute, zoning decision or election. Line-drawing would be difficult, however, and there is a real possibility that nonparty preclusion even in these cases is impermissible in the post-*Taylor* era.

Scholars have begun to argue that nonparties can be precluded in cases like these, despite *Taylor*.<sup>369</sup> The arguments are based on the idea that even a day-in-court ideal (based on due process) is flexible enough to yield when it conflicts with important institutional values.<sup>370</sup> This balancing concept is not new; litigant autonomy has never been seen as absolute.<sup>371</sup> One scholar suggests that when the Court considered virtual representation in *Taylor*, it was an “easy case from a procedural due process standpoint” because there was no compelling reason to prevent Taylor from litigating his own case; little efficiency would have been gained.<sup>372</sup> But the Court did not confront the far more difficult case that involves “indivisible relief”—in which one suit grants relief that is inseparable from the relief sought in a second suit.<sup>373</sup>

Indivisible relief is illustrated perfectly by *In re Coday*:<sup>374</sup> if one case

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368. See 18A WRIGHT, MILLER, & COOPER, *supra* note 115, § 4452.

369. See, e.g., Bone, *Puzzling Idea*, *supra* note 237, at 601–24; Redish & Katt, *supra* note 229, at 1879–81. Although Redish and Katt do not argue for preclusion simply because a case involves an issue of public concern, their focus on cases that involve contradictory relief fits well within the line of Washington cases that have protected judgments relating to public issues.

370. Redish & Katt, *supra* note 229, at 1908. Professor Bone argues:

that the day-in-court right is best understood as a right to control litigation insofar as relevant institutional considerations support personal control. It is a right insofar as it resists or constrains reasons for limiting control that sound exclusively in improving aggregate welfare or achieving collective social goals. But it does not guarantee a zone of relatively unfettered freedom. Litigation is not a field where adversaries engage in unrestrained combat. Litigation is the way adjudication accomplishes its goals, and the public goals of adjudication shape the procedural rights litigants possess.

Bone, *Puzzling Idea*, *supra* note 237, at 624.

371. Redish & Katt, *supra* note 229, at 1880 (citing *Mathews v. Eldridge*, 424 U.S. 319, 347–49 (1976)).

372. *Id.* at 1895.

373. *Id.* The article divides indivisible relief into three categories: “double liability,” “contradictory liability,” and “inconsistent liability.” The authors contend that each category gives rise to distinct due process problems, and receives “differing weight[ ] in the due process balance.” *Id.* at 1901.

374. 156 Wash. 2d 485, 130 P.3d 809 (2006).

validates the results of an election, a second suit that reaches a different result (invalidation) would introduce contradictory liability on the part of a defendant election official. The official could not comply with both judgments.<sup>375</sup> If a court is satisfied that nonparties were in fact adequately represented and had aligned interests, then perhaps it would be justified in binding them to the original judgment.<sup>376</sup> In essence, this approach would extend privity to nonparties only when the first suit litigated important public issues in a way that represented the interests of all potential plaintiffs affected by the law or practice being challenged.

The United States Supreme Court may well disagree with this approach, however. The State of Alabama lost when it argued for this approach in its brief in *Richards*:

In its decision in this case, the Alabama Supreme Court followed well established precedent, both in Alabama and many other states, to the effect that, in the absence of fraud or collusion, a citizen can obtain a binding judgment on all other citizens in a case where no private interest is involved, the right sought to be enforced is a public right, and the people are regarded as the real party in interest. With respect to the vital question of how the first party in such litigation can bind a party who subsequently attempts to litigate the same public issue, the answer has been that the privity of the parties results from their identity of interest in the same public question. Whether called virtual representation or identity of interest, the privity between the parties for purposes of res judicata is pragmatically established by recognizing that no real due process interest is served by permitting a public issue, once adequately adjudicated through the competent efforts of bona fide adversaries, to be subsequently relitigated by other parties who have the same interest in the question and will be affected by the outcome in the same way.<sup>377</sup>

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375. Professors Redish and Katt state that “contradictory liability inherently violates due process and therefore must be avoided.” Redish & Katt, *supra* note 229, at 1904 (invoking Professor Henry Hart’s point: “People repeatedly subjected, like Pavlov’s dogs, to two or more inconsistent sets of directions, without means of resolving the inconsistencies, could not fail in the end to react as the dogs did. The society, collectively, would suffer a nervous breakdown.”).

376. Adequate representation should be evaluated by asking if the interests of the representative party and represented party are aligned and if the representative party had sufficient incentive and resources to litigate vigorously. *Id.* at 1908–12.

377. Brief for Respondent, *Richards v. Jefferson Cnty.*, 369 U.S. 1 (1961) (no. 95-386), 1996 WL 74178, at \*29 (citations omitted). The State’s brief cited decisions from many other states to demonstrate that a citizen suit can bind nonparties; included among the citations is *Stallcup v. City of Tacoma*, 13 Wash. 141, 42 P. 541 (1895). See *supra* note 326.

The Supreme Court rejected the argument,<sup>378</sup> with one important caveat. First, the Court concluded there was no evidence that the plaintiffs in the first proceeding “provided representation sufficient to make up for the fact that petitioners neither participated in . . . nor had the opportunity to participate in, the [first] action. Accordingly, due process prevents the former from being bound by the latter’s judgment.”<sup>379</sup> Next, the Court addressed the “citizen suit” part of the argument by dividing citizen suits into those alleging harm to an individual, and those challenging a public action that has only an indirect impact on an individual litigant’s interests.<sup>380</sup> The Court stated “As to this [latter] category of cases, we may assume that the States have wide latitude to establish procedures not only to limit the number of judicial proceedings that may be entertained but also to determine whether to accord a taxpayer any standing at all.”<sup>381</sup> Because the litigants in *Richards* brought “a federal constitutional challenge to a State’s attempt to levy personal funds,” they were protected by a due process right to their own day in court.<sup>382</sup>

In *Taylor*, the FAA similarly argued that “nonparty preclusion should apply more broadly in ‘public law’ litigation than in ‘private law’ controversies.”<sup>383</sup> The FAA asserted that the Court in *Richards* singled out a situation in which “the plaintiff [a taxpayer in that case] has a reduced interest in controlling the litigation ‘because of the public nature of the right at issue.’”<sup>384</sup> The FAA relied on the statement in *Richards* about the states’ wide latitude to limit the number of citizen suits on public issues.<sup>385</sup> In response, the *Taylor* Court clarified that with this statement the Court had envisioned a legislative solution—not a judicial one—to the problem of successive lawsuits on a public issue.<sup>386</sup>

The Court also rebuffed the FAA when it argued that public law litigation had the potential to be especially vexatious because there is a potentially unlimited supply of plaintiffs to challenge most government action.<sup>387</sup> The Court responded that “*stare decisis* will allow courts

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378. *Richards v. Jefferson Cnty.*, 517 U.S. 793, 802–04 (1996).

379. *Id.* at 802 (citations omitted).

380. *Id.* at 802–03.

381. *Id.* at 803.

382. *Id.*

383. *Taylor v. Sturgell*, 553 U.S. 880, 882 (2007).

384. *Id.* at 902.

385. *Id.* (quoting *Richards*, 517 U.S. at 803); see *supra* note 381 and accompanying text.

386. *Id.* at 903.

387. *Id.* at 903–04.

swiftly to dispose of repetitive suits brought in the same circuit. Second, even when *stare decisis* is not dispositive, ‘the human tendency not to waste money will deter the bringing of suits based on claims or issues that have already been adversely determined against others.’<sup>388</sup>

It remains to be seen whether the *Taylor* Court correctly assessed the deterrent effect of frugality, but its treatment of the issue appears overly simplistic. The “human tendency not to waste money”<sup>389</sup> seems most likely to deter duplicative suits by parties who are motivated primarily by money, such as businesses or individuals involved in contract disputes.<sup>390</sup> But one could argue that issues of public concern almost guarantee serial litigation, because parties are more likely to be motivated by politics, ideology or principles, with less regard to cost.<sup>391</sup> In addition, parties often choose to litigate in order to strategically set precedent,<sup>392</sup> and that seems a quite plausible motivator with regard to important public or political issues.

More concretely, the Court in *Taylor* relied on a *stare decisis* solution that is obviously limited. For example, a case might be vigorously litigated and result in a judgment. Without an appeal, this trial court judgment could lead to claim preclusion, but not to *stare decisis*.<sup>393</sup> A cause of action might be dismissed pursuant to settlement, and while this judgment qualifies for claim preclusive effect,<sup>394</sup> it would have no precedential value.<sup>395</sup> Without preclusion, and without binding

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388. *Id.*

389. *Id.* at 904 (quoting D. SHAPIRO, CIVIL PROCEDURE: PRECLUSION IN CIVIL ACTIONS 97 (2001)).

390. The Supreme Court’s statement seems to be based on the classic economic model of litigation, which “assumes that all parties are economically rational, in the sense that they seek to maximize only their economic wealth.” Frank B. Cross, *In Praise of Irrational Plaintiffs*, 86 CORNELL L. REV. 1, 15 (2000).

391. *See id.* at 15–25 (compiling extensive body of scholarship that describes non-economic motivations to begin or continue litigating); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 924 (1996) (observing human tendency to act differently when acting as a citizen rather than as a consumer).

392. Cross, *supra* note 390, at 6–8.

393. This was the situation in *In re Coday*, 156 Wash. 2d 485, 491, 130 P.3d 809, 811 (2006), where an un-appealed superior court decision provided the basis for claim preclusion. Some sort of comity among trial courts might be expected, but not *stare decisis* in a technical sense. Of course, the same judgment would qualify for claim preclusion, assuming identity of parties and claims.

394. *E.g.*, *Schoeman v. N.Y. Life Ins. Co.*, 106 Wash. 2d 855, 861, 726 P.2d 1, 4 (1986).

395. This type of situation resulted in a fascinating flurry of litigation in *Headwaters Inc. v. U.S. Forest Service*, 399 F.3d 1047 (9th Cir. 2005). The district court precluded two environmental organizations from litigating the validity of several timber sales because other advocacy organizations had challenged the sales and settled their case against the Forest Service a year earlier. *Id.* at 1050. The first time the Ninth Circuit decided the case, it affirmed the trial judge’s *sua sponte*

precedent, there is no clear way to prevent new litigants repeatedly filing the same claim in the same court.

Even if stare decisis is not a complete solution, however, existing joinder rules can be used to lower the risk of conflicting judgments in public law cases, and that risk of inconsistent judgments is one of the primary rationales for preventing successive suits. In any action involving a public right, Washington courts should encourage parties to identify and seek to join those who might claim an interest in the same right or issue. For example, if a defendant is concerned about serial litigation by indistinguishable plaintiffs, it could countersue for a declaratory judgment against the class of persons the plaintiff is thought to represent.<sup>396</sup> Interpleader can be useful in some situations involving a “stake” vulnerable to conflicting demands,<sup>397</sup> and existing parties can move for joinder of absentees who are “needed for just adjudication.”<sup>398</sup> An absent party could voluntarily intervene in order to protect her interests,<sup>399</sup> although making this intervention effectively mandatory

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dismissal of the case, clearly sympathetic to the trial court’s frustration with an overcrowded docket and repetitious litigation by what it saw as related parties. *Headwaters Inc. v. U.S. Forest Serv.*, 382 F.3d 1025, 1031–32 (9th Cir. 2004), *withdrawn, superseded on denial of reh’g en banc*, 399 F.3d 1047 (9th Cir. 2005). The court then replaced the opinion with one that reached the opposite conclusion, holding “the district court here applied the privity doctrine without establishing, among other prerequisites, that the present plaintiffs were adequately represented in the prior suit, and without giving plaintiffs an opportunity to demonstrate that they were not.” *Headwaters Inc.*, 399 F.3d at 1050. One commentator called this case a missed opportunity to create an alternative process for citizen suits that affect public interests. She proposed conducting the litigation as a quasi-class action, in which interested parties are notified and allowed to intervene, understanding that the litigation would be binding on them through an expanded version of adequate representation. See Laura Evans, Note, *Limiting Virtual Representation in Headwaters Inc. v. United States Forest Service: Lost (Opportunity) in the Oregon Woods?*, 33 *ECOLOGY L.Q.* 725, 749–51 (2006).

396. WASH. SUPER. CT. R. CIV. P. 23(b)(1)(A) (allowing class action where separate actions against defendant create risk of “inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class”); WASH. SUPER. CT. R. CIV. P. 23(b)(2) (allowing class action where defendant “has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole”); see, e.g., *Headwaters*, 382 F.3d at 1045 (Berzon, J., dissenting in the original, superseded decision). Judge Berzon pointed out that the Forest Service in *Headwaters* might have anticipated that multiple groups would challenge timber sales, and it could have made an effort to bring all those groups into the litigation before it settled the case.

397. WASH. SUPER. CT. R. CIV. P. 22(a) (“Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability.”)

398. WASH. SUPER. CT. R. CIV. P. 19. The necessary party joinder rule makes plaintiffs responsible for “pleading reasons for nonjoinder” when they fail to join any persons they know are potentially joinable under the rule. WASH. SUPER. CT. R. CIV. P. 19(c).

399. WASH. SUPER. CT. R. CIV. P. 24.

runs counter to *Martin v. Wilks*.<sup>400</sup>

One scholar summed up the situation that calls out for a public law exception to preclusion:

The specific problem involved in *Martin v. Wilks* is simply one illustration of the many problems encountered in litigation that seeks broad-gauged remedies that inevitably will affect many persons. Whether the subject involves employment discrimination, school practices, prison conditions, environmental control, or other pervasive problems, there is a deep-seated tension between the need to provide a hearing for all affected by the decree and the need to establish a workably final disposition. Mandatory joinder through Rule 19, class actions, or possibly other representation devices, does indeed seem a better answer than attempting to develop an administrable rule of mandatory intervention. None of these devices is particularly satisfying, however, and better solutions must be developed. These solutions will be intended to support the result that present procedures do not support—effectively final decrees in institutional reform litigation.<sup>401</sup>

The Supreme Court has opted not to create a public law exception to privity, in both *Taylor* and in *Richards*.<sup>402</sup> So despite the logical appeal of such an exception, it may be doomed to fail eventually in both the federal and state courts.<sup>403</sup>

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400. Professors Redish and Katt observe that *Martin v. Wilks*, 490 U.S. 755 (1989), makes it proper to place on the existing parties the duty to join outsiders or risk a second suit that threatens their judgment:

The argument breaks down, however, when it is only the absent party who realizes his relevance to the suit. In *Wilks*, the Court's reasoning is based on the assumption that parties will have superior knowledge about who should be in the case. Whether or not the absent person is the sole actor to have actual knowledge of the first case's relevance to her, however, is simply a question of fact. While making this factual determination may be difficult, as noted by the Court in *Wilks*, incurring this difficulty is a small price to pay for avoiding the danger of contradictory liability. Furthermore, although the reasoning of *Wilks* is generally instructive, Congress overruled its applicability to employment discrimination cases, essentially creating a legislatively dictated mandatory intervention scheme. This statute has not been successfully challenged on constitutional grounds, suggesting that although mandatory intervention is not ideal, it is at least constitutional.

Redish & Katt, *supra* note 229, at 1917 (footnotes omitted) (citing 42 U.S.C. § 2000e-2(n)(1)(2012)).

401. 18A WRIGHT, MILLER, & COOPER, *supra* note 115, § 4452.

402. See *supra* notes 377–386 and accompanying text.

403. A clear illustration of how federal courts are likely to interpret this argument for a public-law exception is found in *Rodriguez v. City of Albuquerque*, No. CIV 07-0901 JB/ACT, 2008 WL 5978925 (D.N.M. Dec. 22, 2008). Based on *Taylor v. Sturgell*, the district court rejected an argument that preclusion should bind city employees who declined to opt into a prior lawsuit brought by other city employees under the Fair Labor Standards Act. The court stated “If the Court

To be sure, Washington courts have more latitude on this question than do federal courts: pragmatically, it is relatively unlikely that a case like *In re Coday* would ever be scrutinized by the federal courts and fail the due process test. If challenged, the nonparty preclusion rules in Washington could be defensible if the courts deploy the doctrine only in those rare cases that involve a high risk of repeated litigation on a question of public interest, and in which serial litigation could lead to conflicting judgments that create incompatible demands on public officials. In that type of case, the high risk to institutional values might justify limiting individual litigant autonomy rights.

If the Washington Supreme Court chooses to retain the *Coday* rule, the courts should use the rule sparingly. Before binding nonparties, a court should explicitly articulate how the right asserted in the first proceeding is a right common to the public at large, which would satisfy the caveat in *Richards*.<sup>404</sup> In addition, the court should examine carefully the adequacy of representation in the initial suit,<sup>405</sup> and consider whether the parties to that suit did enough to join interested parties with a similar stake in the right being asserted.<sup>406</sup>

Alternatively, the Washington legislature could solve the problem through statute, based on the Supreme Court's statement in *Richards*, echoed in *Taylor*, about states having "wide latitude" to limit the number of judicial proceedings that challenge government actions that affect the public at large.<sup>407</sup>

The court should abandon virtual representation and nonparty preclusion in cases that involve only private disputes, such as *Garcia v. Wilson*<sup>408</sup> and *World Wide Video of Washington, Inc. v. City of Spokane*.<sup>409</sup> As Professor Trautman emphasized, preclusion is a court-

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were to adopt the City of Albuquerque's position on preclusion, those employees electing not to opt into the earlier case would find the judgment in that case nonetheless binding them, despite their choice and without their participation," effectively transforming the case into a "mandatory class-action[ ]." Observing that this would undermine Fed. R. Civ. P. 23(b)(3) (the opt-out class action rule), and that "due process requires clarity," the court concluded that preclusion would be "fundamentally unfair." 2008 WL 5978925, at \*2.

404. See *supra* note 381 and accompanying text.

405. See *supra* note 376.

406. See *supra* notes 396–400 and accompanying text.

407. See *supra* notes 378–388 and accompanying text.

408. *Garcia v. Wilson*, 63 Wash. App 516, 820 P.2d 964 (1991).

409. *World Wide Video of Wash., Inc.* may look like a case on a question of public interest because it involves a city ordinance regarding the location of adult entertainment facilities. But it is better characterized as a private dispute: the judgment to which the courts gave preclusive effect was an individual litigant's claim under the First Amendment. There was no risk that Spokane would be subject to inconsistent judgments if the courts permitted a new litigant to pursue the



created concept that can—and should—be adjusted to accommodate one of its primary objectives: fairness to litigants.<sup>410</sup> Allowing nonparty preclusion in private disputes can produce only meager savings in judicial efficiency. In fact, the savings may be non-existent, because the number of cases in which nonparties are forced to drop claims, and thus save the cost of litigation and trial, is very small in comparison to the number of cases in which parties and courts spend resources arguing and deciding the question whether non-party preclusion is appropriate.<sup>411</sup> Increased efficiency, if it exists at all, can hardly justify the very real risk that the doctrine will cast too wide a net and deprive litigants of an important due process right to a day in court.<sup>412</sup> In addition, containing nonparty preclusion to only the rarest cases will shift to litigating parties the responsibility for using existing rules of civil procedure to join other parties who may have an interest in the litigation—and that, as Professor Trautman would likely say, is as it should be.

#### B. *Full Faith and Credit Problems in Washington Courts*

Professor Trautman confined his article to the preclusive effects of judgments within Washington, not addressing how Washington courts assess the preclusive effect of judgments from federal or other state courts.<sup>413</sup> In recent years, however, some Washington courts have stumbled when asked to apply preclusive effect to judgments from federal courts.<sup>414</sup> The Washington State Supreme Court should systematize an approach that ensures all courts in Washington consider full faith and credit implications in all inter-jurisdictional preclusion situations. The courts' credibility will be bolstered if they make clear that they have considered whether the analysis should employ preclusion rules from Washington law, federal law, or the law of another state.

When a state court evaluates the preclusive effect of a judgment from another jurisdiction, it must look to the law of the court that rendered the

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second case regarding his own challenge to zoning for specific buildings. *See World Wide Video of Wash., Inc. v. City of Spokane*, 125 Wash. App. 289, 298–300, 103 P.3d 1265, 1270–71 (2005).

410. Trautman, *supra* note 1, at 842.

411. *See Cross*, *supra* note 390, at 4 (explaining that the economic value of close cases—those near the margin of a court's decision standard—is difficult to predict, making these cases more likely to proceed to trial); *supra* notes 324–325 and accompanying text.

412. *See supra* notes 346–361 and accompanying text.

413. Trautman, *supra* note 1, at 806.

414. This section focuses on federal-to-state preclusion and not state-to-state preclusion. While both situations present similar challenges, the federal-to-state problem arises more often and has created noticeable problems.

judgment.<sup>415</sup> That law should reveal what preclusive effect the judgment would have in the rendering jurisdiction.<sup>416</sup> This process ensures that the second jurisdiction gives the judgment the “full faith and credit” it deserves.<sup>417</sup> In many instances, what law applies is immaterial to the outcome because both jurisdictions apply the same law of preclusion. But when jurisdictions have varying standards, the applicable-law problem can move from merely academic to decisive.<sup>418</sup>

The United States Supreme Court clarified what law determines the preclusive effect of a federal court judgment in a later state court proceeding in *Semtek International Inc. v. Lockheed Martin Corp.*<sup>419</sup> The Court held that a federal judgment’s preclusive effect is governed by federal common law, whether the federal court’s jurisdiction was based on federal question or diversity.<sup>420</sup> But this federal common law can vary, depending on the basis of the court’s jurisdiction. In federal-question cases, federal common law aims for and applies uniform rules of preclusion.<sup>421</sup> “For judgments in diversity cases, federal law incorporates the rules of preclusion applied by the State in which the rendering court sits,”<sup>422</sup> unless the state law is “incompatible with federal interests.”<sup>423</sup>

Under this doctrine, a Washington court must take several steps when a litigant argues for claim or issue preclusion based on a federal court judgment. First, it needs to determine whether the case was heard under

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415. *Semtek Int’l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 506–07 (2001).

416. This method differs from the choice of law test for *substantive* law in Washington courts. “Washington uses the most significant relationship test as articulated by RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971).” *FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc.*, 180 Wash. 2d 954, 967, 331 P.3d 29, 36 (2014).

417. “Full faith and credit” is required—with varying degrees of specificity—by the Constitution, a federal statute, and precedent. U.S. CONST. art. IV, § 1; 28 U.S.C. § 1738 (2012); HAZARD, LEUBSDORF, & BASSETT, *supra* note 152, § 14.3, at 610. To qualify for full faith and credit, a judgment must have been final and actually on the merits, rather than decided on strictly procedural grounds. William L. Reynolds, *The Iron Law of Full Faith and Credit*, 53 MD. L. REV. 412, 418 (1994). In addition, it must be rendered by a court with jurisdiction over the subject matter and parties. *Id.* at 413, 424–30; *see* *Hanson v. Denckla*, 357 U.S. 235 (1958).

418. HAZARD, LEUBSDORF, & BASSETT, *supra* note 152, § 14.3, at 611.

419. 531 U.S. 497 (2001).

420. *Id.* at 506–07 (noting that neither the Constitution nor any other textual provision answers the question of the full faith and credit accorded to federal court judgments); *accord* *Taylor v. Sturgell*, 553 U.S. 880, 891 (2008) (“The preclusive effect of a federal-court judgment is determined by federal common law.”).

421. *Taylor*, 553 U.S. at 891.

422. *Id.* at 891 n.4 (citing *Semtek*, 531 U.S. at 508).

423. *Semtek*, 531 U.S. at 508, 509.

diversity or federal question jurisdiction.<sup>424</sup> If federal question, it must ascertain the federal common law of preclusion, and apply those rules instead of Washington's own rules. If the first case was a diversity case, the Washington court must determine where the federal court was sitting, and ascertain the preclusion law of that state.<sup>425</sup> Once the state rules are ascertained, the Washington court must look further, to see if any federal precedent has concluded that the state law is incompatible with federal interests. If it passes that test, state preclusion rules apply.<sup>426</sup>

What actually happens in state courts? Within a small sample of modern decisions, some courts do not acknowledge the issue at all, and apply the wrong law.<sup>427</sup> Some courts are presented with arguments about which are the proper preclusion rules to apply, but simply default to Washington law.<sup>428</sup> And some courts properly analyze the full faith and credit requirements.<sup>429</sup> Overall, Washington practitioners could do a better job arguing which rules should apply, and Washington courts should be more systematic in handling judgments from other jurisdictions.

The most noteworthy example of a Washington case that incorrectly

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424. If the basis for federal court jurisdiction is not apparent from the record, a court should seek additional information. *See, e.g.*, *Louie v. BFS Retail & Commercial Operations, LLC*, 178 Cal. App. 4th 1544, 1554 (2009). Here, the court requested and took judicial notice of the federal complaint, which the parties had not supplied. The court ascertained that it should apply federal law—even while recognizing that federal and state preclusion law were identical on the relevant point.

425. Notably, not all diversity cases will have involved courts sitting in Washington, so courts should not assume diversity jurisdiction means a default to Washington preclusion law. Courts may also encounter the issue of what law applies when the federal court had jurisdiction under both federal question and diversity jurisdiction, or both federal question and supplemental jurisdiction under 28 U.S.C. § 1367. There is no readily ascertainable answer to this question, and *Semtek* provided no answers. *See* GEOFFREY HAZARD, COLIN TAIT, WILLIAM FLETCHER, & STEPHEN BUNDY, *PLEADING AND PROCEDURE STATE AND FEDERAL* 560–61 (10th ed. 2009). But logic suggests that the court should look to the jurisdictional basis for the individual claims on which judgment was entered, and apply preclusion law accordingly.

426. *Semtek*, 531 U.S. at 508–09.

427. *See, e.g.*, *World Wide Video of Wash., Inc. v. City of Spokane*, 125 Wash. App. 289, 103 P.3d 1265, *review denied*, 155 Wash. 2d 1014, 122 P.3d 186 (2005) (applying Washington preclusion law to judgment of federal court on federal question case); *Nielson By & Through Nielson v. Spanaway Gen. Med. Clinic, Inc.*, 135 Wash. 2d 255, 259–62, 956 P.2d 312, 314–15 (1998) (applying Washington preclusion law to judgment of federal court on Federal Tort Claims Act case); *Cunningham v. State*, 61 Wash. App. 562, 564, 811 P.2d 225, 226–27 (1991) (same).

428. *See, e.g.*, *Thompson v. King Cnty.*, 163 Wash. App. 184, 190, 259 P.3d 1138, 1141 (2011); *Kuhlman v. Thomas*, 78 Wash. App. 115, 120 n.3, 897 P.2d 365, 368 n.3 (1995).

429. *See, e.g.*, *Loveridge v. Fred Meyer, Inc.*, 72 Wash. App. 720, 724, 864 P.2d 417, 419 (1993), *aff'd*, 125 Wash. 2d 759, 887 P.2d 898 (1995); *Kowalow v. Corr. Servs. Corp.*, 115 Wash. App. 1039, No. 49025–7–I, 2003 WL 352832 (Wash. Ct. App. 2003); *Déjà Vu-Everett-Fed. Way, Inc. v. City of Federal Way*, 96 Wash. App. 255, 261–63, 979 P.2d 464, 467–68 (1999).

applied Washington preclusion law to a prior federal court judgment is *World Wide Video of Washington, Inc.*<sup>430</sup> The underlying judgment dismissed a First Amendment claim in federal court.<sup>431</sup> Because the federal court had federal question jurisdiction over the claim, federal preclusion law should have applied to determine that judgment's preclusive effect.<sup>432</sup> Without discussing an alternative choice, the court instead applied Washington's liberal doctrine of nonparty preclusion.<sup>433</sup> Even in 2005 (pre-*Taylor v. Sturgell*), federal law and state law differed greatly with regard to nonparty preclusion.<sup>434</sup> Applying the correct preclusion rules would likely have preserved Mr. Barbanti's opportunity to pursue his litigation in state court.<sup>435</sup> In other words, applying the wrong preclusion law was outcome-determinative.

At least three other relatively recent Washington cases have applied state law to federal court judgments without discussing the full faith and credit issue.<sup>436</sup> In one, the court said that it was applying Washington law because the parties had not raised the issue.<sup>437</sup> Two other cases applied Washington law to federal court judgments under the Federal Tort Claims Act.<sup>438</sup> None of the parties in these FTCA cases argued whether state or federal law governed, but had they done so, there might

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430. 125 Wash. App. at 300, 103 P.3d at 1270–71 (discussed *supra* notes 311–322 and accompanying text).

431. *World Wide Video of Wash., Inc. v. City of Spokane*, 227 F. Supp. 2d 1143, 1170 (E.D. Wash. 2002).

432. See *supra* notes 419–423 and accompanying text.

433. *World Wide Video of Wash., Inc.*, 125 Wash. App. at 305–306, 103 P.3d at 1274. Although the court did not use the “virtual representation” terminology, the court used the basic concept when it held a nonparty witness bound because he testified and failed to intervene in the preceding case.

434. *Compare Headwaters Inc. v. U.S. Forest Serv.*, 399 F.3d 1047 (9th Cir. 2005) (reversing use of claim preclusion against new plaintiffs, an advocacy group that filed same complaint using same lawyers as similar advocacy group; discussed *supra* note 395), with *Garcia v. Wilson*, 63 Wash. App. 516, 820 P.2d 964 (1991) (allowing issue preclusion against plaintiff who had been witness in her friend's lawsuit; discussed *supra* notes 273–290).

435. In the Washington Court of Appeals, neither Mr. Barbanti nor the City of Spokane argued whether federal or state law should determine the preclusive effect of the federal judgment. Both parties relied on Washington preclusion law in their briefing, so it is unsurprising that the Court of Appeals did the same.

436. *Spahi v. Hughes-Nw., Inc.*, 107 Wash. App. 763, 27 P.3d 1233 (2001), *modified*, 33 P.3d 84 (2001); *Nielson By & Through Nielson v. Spanaway Gen. Med. Clinic, Inc.*, 135 Wash. 2d 255, 956 P.2d 312 (1998); *Cunningham v. State*, 61 Wash. App. 562, 566, 811 P.2d 225, 227 (1991).

437. *Spahi*, 107 Wash. App. at 769 n.4, 27 P.3d at 1235 n.4 (federal court judgment on civil forfeiture quiet title claims).

438. *Nielson*, 135 Wash. 2d at 259, 956 P.2d at 314 (allowing claim preclusion based on judgment in FTCA case); *Cunningham*, 61 Wash. App. at 564, 569–70, 811 P.2d at 227, 229 (allowing issue preclusion based on judgment in FTCA case).

have been an interesting debate about whether the federal common law would point the courts to state law or federal.<sup>439</sup> Still, the lack of discussion of either full faith and credit or applicable law suggests a blind spot in the Washington courts.

Two frequently-cited Washington cases applied the wrong preclusion law despite litigants' arguments that federal preclusion rules should apply.<sup>440</sup> In one case, the Washington Court of Appeals refused to apply federal law because "under either test, the result in this case would remain the same. Therefore, we simply apply the Washington test and do not reach the issue."<sup>441</sup> A recent court of appeals case relied on the same reasoning to avoid the full faith and credit analysis.<sup>442</sup>

Of course, many Washington judges adeptly handle the question. One of the best opinions explained that,

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439. This seems to be an open question. The Supreme Court has interpreted the FTCA to require that a federal district court apply the *whole* law—including choice-of-law rules—of the state where the negligent act or omission occurred. *Richards v. United States*, 369 U.S. 1, 10 (1962). An argument can be made that this choice of law reference should include both substantive and procedural rules, and should include choice of law as to the law of preclusion—just as the judgment of a court sitting in diversity is examined via state preclusion law. However, the few courts that have addressed the preclusion context specifically have concluded that the FTCA presents a unique situation in which state law governs substantive issues only. *See Johnson v. United States*, 576 F.2d 606, 611–12 (5th Cir. 1978) (applying federal common law of preclusion; many years before *Semtek*); *Donohue ex rel. Estate of Donohue v. United States*, No. 1:05-CV175, 2006 WL 2990387, at \*4 (S.D. Ohio Oct. 18, 2006) (agreeing with Fifth Circuit and applying federal law to determine the preclusive effect of a federal court's FTCA judgment; post-*Semtek* decision); *Gardner v. United States*, 443 F. App'x 70, 74 n.1 (6th Cir. 2011) (noting *Donohue* and *Johnson* used federal preclusion law, and assuming—absent a dispute by parties—that federal rather than state law controls).

440. *Thompson v. King Cnty.*, 163 Wash. App. 184, 259 P.3d 1138 (2011); *Kuhlman v. Thomas*, 78 Wash. App. 115, 897 P.2d 365 (1995).

441. *Kuhlman*, 78 Wash. App. at 120 n.3, 897 P.2d at 368 n.3. There is a plausible reason for avoiding the issue, and it is based in Washington's approach to conflict of laws analysis on substantive matters. When choice of law is disputed, "there must be an actual conflict between the laws or interests of Washington and the laws or interests of another state before Washington courts will engage in a conflict of laws analysis." *Seizer v. Sessions*, 132 Wash. 2d 642, 648, 940 P.2d 261, 264 (1997), *quoted in* *FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc.*, 180 Wash. 2d 954, 967, 331 P.3d 29, 36 (2014). It is possible that the *Kuhlman* court chose to extend this principle from the realm of substantive choice of law to the choice of preclusion law under full faith and credit principles, although it did not explain its rationale in this way.

442. *Thompson*, 163 Wash. App. at 190 n.1, 259 P.3d at 1141 n.1. It is a well-known principle of jurisprudence that courts should avoid deciding unnecessary issues, but that hardly seems to excuse the courts' failure to apply the correct law. Even if the result would be the same, the courts are creating sloppy precedent that is relied on by later cases—perpetuating an incorrect view of the law. For example, *World Wide Video of Washington, Inc.* involved hot-button issues of zoning and the First Amendment, as well as preclusion law. It is cited for all those points, lulling readers into a sense that it was proper to apply state law to determine the preclusive effect of a federal judgment. *See, e.g., Mansfield v. Pfaff*, No. C14–0948JLR, 2014 WL 4269508, at \*7 (W.D. Wash. Aug. 27, 2014).

Under principles of federal supremacy, a federal judgment must be given full faith and credit in the state courts, which includes recognition of the res judicata effect of the federal judgment. Moreover, “[f]ederal law determines the preclusive effect of federal orders on a question of federal law, regardless of whether the court applying the federal judgment is state or federal.”<sup>443</sup>

Other examples of properly-chosen preclusion law include *Déjà Vu-Everett-Fed. Way, Inc. v. City of Federal Way*,<sup>444</sup> and *Kowalow v. Correctional Services Corp.*<sup>445</sup> The latter case explicitly rejected an argument that it was an open question whether state or federal law applied to a federal court judgment on various federal law claims.<sup>446</sup> In addition, federal courts appear routinely to include this analysis in inter-jurisdictional preclusion situations.<sup>447</sup>

When entertaining a preclusion defense, the Washington courts should always consider the full faith and credit due to judgments from federal courts and other state courts. Admittedly, applying the wrong law does not often make a difference in outcome, given the inter-jurisdictional consistency on most points of preclusion law. But those litigants who lose an opportunity to bring a claim because of this sort of mistake have good reason to complain about the Draconian result, and the legitimacy of decision-making will be tarnished.

The Washington State Supreme Court should systematize a routine through which all Washington courts take full faith and credit principles into account whenever they assess the preclusive effect of a judgment from a federal or other state court. This kind of protocol will remove any

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443. *Loveridge v. Fred Meyer, Inc.*, 72 Wash. App. 720, 724, 864 P.2d 417, 419 (1993), *aff'd*, 125 Wash. 2d 759, 887 P.2d 898 (1995) (internal citations omitted) (quoting *Nutter v. Monongahela Power Co.*, 4 F.3d 319, 321 (4th Cir. 1993)). Significantly, the court recognized that full faith and credit for federal court judgments is grounded in the Supremacy Clause—not the Full Faith and Credit clause or statute, as some courts have stated. *See, e.g., Woodley v. Myers Capital Corp.*, 67 Wash. App. 328, 336, 835 P.2d 239, 243 (1992).

444. 96 Wash. App. 255, 262, 979 P.2d 464, 467–68 (1999) (applying federal law of claim preclusion based on a federal court first amendment challenge; also applying Washington issue preclusion law to judgment from a separate but related case litigated in state court).

445. 115 Wash. App. 1039, No. 49025–7–I, 2003 WL 352832 (Wash. Ct. App. 2003).

446. *Id.* at \*2 n.4. The court distinguished *Kuhlman*, 78 Wash. App. 115, 897 P.2d 365, noting that the “Kuhlman court simply stated that it did not need to reach the issue because the result would have been the same under federal or state law.” *Kowalow*, 2003 WL 352832, at \*2 n.4.

447. *See, e.g., Jones v. Grant Cnty., Wash.*, CV–12–0188–EFS, 2014 WL 2196508, at \*5 (E.D. Wash. May 27, 2014) (noting that “[a] federal court considering whether to apply issue preclusion based on a prior state court judgment must look to state preclusion law”); *Zweber v. State Farm Mut. Auto. Ins. Co.*, 39 F. Supp. 3d 1161, 1165 (W.D. Wash. 2014) (“The court looks to the law of the forum state—here Washington—to determine the preclusive effect of a state court judgment.”).

uncertainty about whether the court actually considered and applied the correct rules of preclusion—in keeping with the kind of clear and pragmatic approach that Professor Trautman urged three decades ago.

## CONCLUSION

Professor Trautman's commentary on claim and issue preclusion in Washington courts has proved a valuable resource for practitioners and courts alike. He advocated a retreat from complexity in the doctrine and a focus on process that is clear, usable, efficient, and fair. While Washington courts have moved in this direction in many aspects of preclusion law, work remains to be done—on problems that Professor Trautman identified and on problems later to surface.

The Washington Supreme Court should step in to resolve these problems; although the lower courts have some scope in working towards their own solutions, they lack clear guidance from the state's highest court. Most critically, the Court should grant review in a case that allows it to clarify the law concerning preclusion of nonparties, and ensure that its use conforms to due process. The Court should abandon the discredited doctrine of virtual representation, and adhere to the United States Supreme Court's guidance on when a court can preclude litigants who were not parties to the original action. If the Court retains the *Coday* rule, the Court should insist that the doctrine be used only in cases involving a public rather than private right, and insist on careful analysis of the adequacy of representation in the first proceeding. Better yet, the Court should encourage parties to the first action on an issue of public concern to explore the potential for joining all interested parties, using existing joinder rules. This would help the courts avoid controversial decisions on the scope of nonparty preclusion.

When given the opportunity, the Washington State Supreme Court should create a more streamlined test for claim preclusion. The core elements of claim preclusion—identical parties and identical causes of action—sufficiently capture any situation in which a difference in quality of persons would otherwise defeat preclusion. In contrast, the current four-element test is messy and inefficient, and is not an effective screening tool for claim preclusion. The Court should merge the *same subject matter* requirement into the *same cause of action* requirement. It should fold the *quality of persons* test into the existing test for *identical parties or persons*. And it should adopt the *transactional nucleus* test of the Restatement (Second) of Judgments, § 24, as the preferred test for analyzing identity of claims. The transactional test is malleable yet clear, and is a good replacement for the duplicative four-factor test courts currently feel compelled to use. Changing the test in these ways would

simplify the analysis required of practitioners and courts alike, making litigation more efficient and outcomes more predictable. Those were the primary goals Professor Trautman advanced in his article, and his call for clear and usable rules of claim preclusion is just as important now as it was three decades ago.

Finally, the Court should set the expectation that every Washington court must properly analyze full faith and credit rules when determining the preclusive effect of judgments from federal courts and other state courts. If Washington courts make it clear that they are applying the correct law, their preclusion decisions will be credible; if they are credible, they will provide optimal guidance to practitioners who must advise clients, and to future decision-makers.

These corrective actions would be consistent with Professor Trautman's advocacy of doctrinal clarity, pragmatism, and doing justice. They would help Washington courts function more efficiently and fairly, and would enhance the courts' legitimacy. And they would help Washington lawyers better advise clients on a somewhat arcane and rarely-examined but important doctrine.