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Revisiting the Second *Restatement of Judgments*: Issue Preclusion and Related Problems

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COLLATERAL ATTACK ON SUBJECT MATTER JURISDICTION: A CRITIQUE OF THE RESTATEMENT (SECOND) OF JUDGMENTS

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A critical concern in the broad field of res judicata is the ability of litigants in subsequent litigation to challenge earlier judgments on the basis of lack of subject matter jurisdiction. Although traditional theory held that a judgment of a court lacking subject matter jurisdiction was void and always subject to collateral attack, modern cases have sharply revised this analysis. The thesis of this Article is that the general principles of res judicata apply to the question of subject matter jurisdiction: subject to narrow exceptions, subsequent litigation of a court's subject matter jurisdiction is not permitted. Moreover, as this Article demonstrates, departure from the general principles of res judicata is proper only when there are special circumstances involving policies that are extrinsic to the judicial system. Although the Restatement (Second) of Judgments substantially clarifies the issues, it fails, as did the first Restatement of Judgments, to depict subject matter jurisdiction as governed by general principles of res judicata. Further, it does not adequately analyze or delineate the narrow exceptions to general res judicata rules specially applicable to subsequent challenges to subject matter jurisdiction.

Courts, as well as both Restatements, seek to resolve the conflict between two important policies: insuring that judgments are rendered only by courts having the power to do so (the policy of validity) and enforcing a termination point for litigation after the opportunity for full and fair litigation (the policy of finality). The tension between these two policies is readily apparent. If litigants may freely challenge a court's subject matter jurisdiction through collateral proceedings, no judgment can ever be deemed truly final, but it may be more likely that improper assumptions of subject matter jurisdiction will be eliminated. Although there is no guarantee that a second court's review of the initial court's subject matter jurisdiction will be more correct than the initial determination, the second court may have less incentive to expand unduly

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the first court's jurisdiction. If, on the other hand, judgments are deemed final after the opportunity for direct appellate review terminates and are not subject to collateral attack on the basis of lack of subject matter jurisdiction, there will be an end to litigation. Subsequent courts and litigants will be able to rely upon judgments, even if rendered by courts without subject matter jurisdiction.

This fundamental tension between validity and finality is the basic concern of the doctrine of res judicata and much of the first and second Restatements. With the development and modernization of civil procedure, including merger of law and equity, the adoption of the Federal Rules of Civil Procedure and analogs in the state systems, and judicial elaboration of due process requirements, interests in finality have become dominant in civil cases, at least where litigants have been accorded an opportunity for full and fair litigation. This Article considers the issue of collateral attack upon a court's subject matter jurisdiction and concludes that the policy of finality dominant generally in res judicata should apply equally to the specific question of subject matter jurisdiction, except in cases involving important policies extrinsic to the judicial system.

Before undertaking a detailed treatment of the positions of the first and second Restatements and the alternative sketched in this Article, it is appropriate to explain what is meant by "collateral attack on subject matter jurisdiction." Subject matter jurisdiction refers to the power of a particular court to decide a particular type of case. Subject matter jurisdiction must be

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1 The Restatement Second focuses on the res judicata effects of judgments within a state court system. See Restatement (Second) of Judgments, ch. 1 Intro. at 2-3 (Tent. Draft No. 7, 1980). In this situation, however, there is less reason to believe that the second court will serve as an effective check against the first court's improper expansion of jurisdiction than where courts of different states are involved.


distinguished from personal jurisdiction, which relates to the relationship between a defendant or his property and the forum state. Collateral attack refers to challenging a judgment through subsequent independent proceedings.

State courts may have general jurisdiction or may be limited in subject matter jurisdiction by state constitutional and legislative provisions. For example, a state court's jurisdiction may be limited to certain kinds of disputes, such as divorce cases or traffic cases, or to cases not exceeding a certain amount in controversy.


5 Thus, collateral attack is distinguishable from appeal to a higher court or requesting a court to reopen its prior determination. With regard to subject matter jurisdiction, collateral attack may occur through an independent action to invalidate or avoid a prior judgment's effects or through an assertion in another action of a claim or defense based on a prior court's lack of jurisdiction. However, distinguishing between collateral and direct attack may be extraordinarily difficult in some cases. See Note, The Value of the Distinction Between Direct and Collateral Attacks on Judgments, 66 Yale L.J. 526 (1957) (characterizing the distinction as "one of the most obscure areas of procedural law"). The Restatement Second correctly notes that in some instances an independent action brought to set aside a judgment has been called a direct attack, and that a motion in the trial court for relief from judgment under a rule such as Fed. R. Civ. P. 60(b) can be considered both as direct and collateral attack. See Restatement (Second) of Judgments, Introductory Note to ch. 5, at 4-7 (Tent. Draft No. 6, 1979). See also Note, supra.

To eliminate the confusion in distinguishing direct from collateral attack, the Restatement Second drops the terminology and focuses on questions of standing to obtain relief, propriety of the forum in which relief is sought, and evidence that may be offered to attack the judgment. Restatement (Second) of Judgments, Introductory Note to ch. 5, at 7 (Tent. Draft No. 6, 1979). Thus, the Restatement Second differs substantially from the first Restatement, which had used the term "collateral attack" to refer to attacks on a judgment except by proceedings for modification in the trial court or on appeal or by proceedings in equity to prevent enforcement. Restatement of Judgments § 11, Comment a (1942). See also Restatement (Second) of Judgments § 128, Reporter's Note at 131-34 (Tent. Draft No. 6, 1979) [§ 80] [Throughout this Article, the corresponding section numbers that will appear in the final Restatement Second are given in brackets after citation to the tentative drafts.]. Instead, the Restatement Second establishes limits on relief from judgment based on substantive considerations. See Restatement (Second) of Judgments §§ 113-125 (Tent. Draft No. 6, 1979) [§§ 65-77]. It also outlines the priorities of procedural devices for raising substantive concerns. See Restatement (Second) of Judgments §§ 126-130 (Tent. Draft No. 6, 1979) [§§ 78-82].

Nonetheless, this Article continues to use the term "collateral attack" because it properly emphasizes that the attack is collateral to the initial judgment. Terminology is not the significant issue; the important concern is the distinction between attacks within the framework of a single case, whether at trial or on appeal, and attacks in subsequent litigation, possibly involving different claims, issues, or courts. See F. James & G. Hazard, Civil Procedure 684-85 (2d ed. 1977); Developments in the Law—Res Judicata, 65 HARV. L. REV. 818, 850 (1952); cf. Boskey & Braucher, Jurisdiction and Collateral Attack: October Term, 1939, 40 COLUM. L. REV. 1006 (1940).
I

TRADITIONAL THEORY AND MODERN JUDICIAL DEVELOPMENT

Traditional theory emphasized the policy of validity to the exclusion of concern for finality. As early as the seventeenth century, English cases held judgments or proceedings of a court lacking subject matter jurisdiction void or coram non judice.\(^6\) Although the doctrine was perhaps not followed slavishly in England,\(^7\) it was readily adopted in the United States.\(^8\) Moreover, the related concept that the parties to a lawsuit could not confer subject matter jurisdiction on a court by consent or acquiescence also became a central tenet in the United States. These two concepts became especially significant in our federal system, with its written constitutions delineating powers of the courts and with its complex relationships between state and national governments.\(^9\)

As applied in the United States, the traditional theory has a logical but simplistic appeal. Both federal and state courts are limited in their subject matter jurisdiction by constitutions and legislation. Courts that act beyond those constraints act without power; judgments of courts lacking subject matter jurisdiction are void—not deserving of respect by other judicial bodies or by the litigants. This is so even if the litigants want the court to exercise jurisdiction; parties cannot confer power upon a court if the legislature or constitution has denied it power.\(^10\) Thus the parties could collaterally attack a judgment at any time.

As the policy of finality gained in importance, the traditional theory, with its emphasis on validity, was ripe for reevaluation, and during the nineteenth century, courts carved out exceptions to the traditional voidness doctrine. One exception identified certain "quasi-jurisdictional" issues with respect to which error would not render a judgment void but simply incorrect: litigants could challenge errors concerning findings of diversity of citizenship or

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\(^{7}\) See, e.g., Dobbs, *supra* note 6, at 51, 75-77.

\(^{8}\) See, e.g., *id.* at 77-78.

\(^{9}\) See, e.g., *id.* at 77-78; Note, *supra* note 4, at 166-67.

\(^{10}\) See, e.g., Mitchell v. Maurer, 293 U.S. 237, 244 (1934); Mansfield, C. & L.M. Ry. v. Swan, 111 U.S. 379, 382 (1884).
amount in controversy—necessary elements of federal court jurisdiction—only on appeal, and not in collateral proceedings.\(^\text{11}\) These errors involved a "want of jurisdiction [which] does not go to the subject-matter or the parties, but to a preliminary fact necessary to be proven to authorize the court to act."\(^\text{12}\)

This quasi-jurisdictional exception marked a substantial rejection of the traditional voidness doctrine. The Supreme Court repeatedly held\(^\text{13}\) that a federal court judgment incorrectly based on an assertion of diversity jurisdiction was not "a nullity." On appeal, courts were to determine finally the correctness of a judgment with respect to jurisdiction; collateral attack was impermissible.\(^\text{14}\)

Another exception applied only when a court of general jurisdiction rendered a judgment. Other courts presumed the judgment to be valid, thus barring collateral attack, unless the record itself revealed a lack of subject matter jurisdiction.\(^\text{15}\) Courts did not permit litigants to introduce extrinsic evidence to impeach the record.

In the 1930s and 1940s, the Supreme Court began expressly to emphasize that finality concerns outweighed interests in validity. In *Baldwin v. Iowa State Traveling Men's Association*,\(^\text{16}\) the Court held that a defendant who had appeared to litigate the question of personal jurisdiction could not collaterally attack personal jurisdiction. Although *Baldwin* was a personal jurisdiction case, the Court's language is broadly applicable:

Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where

\(^{11}\) See *Noble v. Union River Logging R.R.*, 147 U.S. 165, 173 (1893). See also Note, supra note 4, at 169-70 and cases cited therein.


\(^{13}\) The watershed case was *Des Moines Navigation & R.R. v. Iowa Homestead Co.*, 123 U.S. 552 (1887).

\(^{14}\) Id. at 559. In *Des Moines* the Court did not permit collateral attack where the record showed that although there was no diversity jurisdiction that issue had not been raised during trial or appeal of the judgment in question, and the trial court proceeded as if it had had jurisdiction. Earlier cases had held that decisions were not "nullities" simply because the record failed to show jurisdiction. *Id.* at 558.

\(^{15}\) See 1 H. Black, *Judgments* §§ 270-278 (2d ed. 1902); 1 A. Freeman, *Judgments* §§ 375-83 (5th ed. 1925).

\(^{16}\) 283 U.S. 522 (1931).
one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause.\textsuperscript{17}

The Court noted that a defendant could collaterally attack personal jurisdiction in the case of a default judgment because he would not "have had [his] day in court."\textsuperscript{18}

The Court applied Baldwin's emphasis on finality to subject matter jurisdiction in \textit{Stoll v. Gottlieb}.\textsuperscript{19} Although the Court recognized that a court cannot extend its power beyond that granted by its jurisdictional instrument, the Court held that a court does have power to interpret its jurisdiction-granting instrument.\textsuperscript{20} Moreover, the Court held that this "jurisdiction to determine jurisdiction" applies to subject matter jurisdiction as well as to personal jurisdiction. Citing Baldwin, the Court concluded that a determination of subject matter jurisdiction by a court of general jurisdiction in a contested action was res judicata, and precluded reexamination.\textsuperscript{21} Again, the Court based its decision on the principle of finality underlying the res judicata doctrine: there must be an end to litigation, and there is no reason to expect subsequent

\textsuperscript{17} Id. at 525-26.

\textsuperscript{18} Id. at 525.

\textsuperscript{19} 305 U.S. 165 (1938). In this case a petition and plan for reorganization were filed by a debtor corporation in a U.S. district court. The plan for reorganization, which included the discharge of certain bonds and the cancellation of a guaranty endorsed thereon, was confirmed by the court over the objections of some creditors and purported to bind all creditors. Id. at 169. One bondholder creditor who had not appeared in the federal action filed an action in state court against the guarantors to recover on their guaranty. The creditor also filed a petition in the reorganization proceedings in federal court seeking to vacate or modify the decree on the ground that the federal court did not have the power or jurisdiction to cancel the guaranty. The federal court denied the petition to vacate, and no appeal was filed. The guarantor then defended the state court action on the ground that the federal court's confirmation of the reorganization plan, plus its denial of the petition to vacate the decree, were res judicata. While the state trial and supreme courts held for the bondholder creditor, the United States Supreme Court concluded that res judicata should apply. Id. at 177.

\textsuperscript{20} Id. at 171-72.

\textsuperscript{21} Id. at 172. The Court mentioned in a footnote that the district court was a court of general jurisdiction. Id. at 172 n.14. The Court excepted from its general rule cases involving allegations of fraud in obtaining the judgment, id. at 172, and did not determine whether the rule should apply in such areas as real estate or status of titles. Id. at 176.

The Court also referred to its earlier attempt to distinguish "strictly jurisdictional facts," the absence of which would render a judgment void, from "quasi-jurisdictional facts," see text accompanying note 11 \textit{supra}, which could not be collaterally attacked. The Court found this distinction immaterial: where there was an actual contest between the parties and determination by the court of subject matter jurisdiction, res judicata would apply and collateral attack would be precluded. Id. at 176-77.
consideration of an issue to be more correct than the initial
determination.\(^\text{22}\)

In *Treinies v. Sunshine Mining Co.*,\(^\text{23}\) the Court held that a
federal court could not reexamine an Idaho court's assumption of
subject matter jurisdiction. The Idaho court had rejected a
Washington state court's own assumption of subject matter juris-
diction. The Supreme Court indicated that had the Idaho court
erred in finding that the Washington court lacked jurisdiction, the
remedy was appellate review, not collateral attack. The Court
cited *Stoll* for the proposition that res judicata applies to jurisdic-
tional as well as to other questions.\(^\text{24}\) Left at that, *Treinies* seems
logical, and demonstrated that res judicata applies even when in-
consistent judgments have been rendered.\(^\text{25}\) However, the Court
also commented that the conclusions of a court of general juris-
diction are "unassailable collaterally except for fraud or lack of
jurisdiction,"\(^\text{26}\) and that the Idaho court clearly had the power to
examine the Washington court's jurisdiction.\(^\text{27}\) These comments
indicate the Court's reluctance to accept fully the *Stoll* and *Baldwin*
decisions, notwithstanding its favorable citations to the cases.

\(^{22}\) Justice Reed used broad language to explain the rationale:

> Courts to determine the rights of parties are an integral part of our system
> of government. It is just as important that there should be a place to end as
> that there should be a place to begin litigation. After a party has his day in
> court, with opportunity to present his evidence and his view of the law, a col-
> lateral attack upon the decision as to jurisdiction there rendered merely retries
> the issue previously determined. There is no reason to expect that the second
decision will be more satisfactory than the first.

*Id.* at 172.

\(^{23}\) 308 U.S. 66 (1939). In a complicated series of lawsuits, a Washington state court
awarded certain stock to one Pelkes after litigation and determination of the Washington
state court's jurisdiction. A subsequent judgment in Idaho state court, in which court the
Washington court's judgment had been pleaded as bar, determined that the Washington
court did not have jurisdiction, but that the Idaho court did, and awarded the stock to one
Mason. After another action was filed in Washington state court relying on the prior
Washington decree, the company whose stock was at issue filed an interpleader action in
the U.S. District Court for Idaho. In its review of the resulting federal court litigation, the
United States Supreme Court decided that the Idaho court's determination that the
Washington court lacked jurisdiction was binding and not subject to collateral attack in the
federal proceedings.

\(^{24}\) *Id.* at 78 n.26.

\(^{25}\) See also *Restatement (Second) of Conflict of Laws* § 97, Comment e (1971). It is
ironic that the Supreme Court used the doctrine of res judicata to protect the Idaho
court's judgment when that court had ignored the doctrine by reviewing the validity of the
prior Washington court's judgment. As the Court indicated, however, the proper proce-
dure for correcting the Idaho court's error was appellate review.

\(^{26}\) 308 U.S. 66, 78 (1939) (emphasis added).

\(^{27}\) *Id.*
Only two months later, however, the Court reemphasized that subject matter jurisdiction is governed by res judicata. In *Chicot County Drainage District v. Baxter State Bank*, the Court profoundly expanded the holding of *Stoll* to apply even when the parties had the opportunity to litigate subject matter jurisdiction in the initial suit but had failed to do so. Thus, after *Chicot*, a party's silence on a jurisdictional question in the initial suit would preclude him from raising the issue on collateral attack.

In *Kalb v. Feuerstein*, the Court characterized a state court's foreclosure judgment as "void" and a "nullity" relying on traditional voidness analysis. The state court had rendered judgment during the pendency of a petition filed in federal bankruptcy court. A federal statute provided that the filing of the federal action automatically deprived the state court of jurisdiction over the foreclosure proceedings. Although the defendant had not sought to stay the foreclosure, nor the subsequent enforcement proceeding, the Court permitted collateral attack.

The *Kalb* Court distinguished *Chicot* and *Stoll* on the ground that *Kalb* involved an explicit exercise by Congress of its exclusive and plenary power under the Constitution to regulate bankruptcy. That power included the authority to limit any court's jurisdiction and to render judgments made beyond those limits "nullities subject to collateral attack." The *Kalb* opinion emphasized Congress's plenary powers in the bankruptcy field, and Congress's intent in the Frazier-Lemke Act to deprive the courts of jurisdiction, thus insuring success of the bankruptcy proceedings.

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28 308 U.S. 371 (1940).
29 The issue in *Chicot* arose when a suit was brought in the U.S. District Court for Arkansas to recover on certain bonds. The defendant pleaded a judgment of the same court cancelling the bonds and effecting a plan for readjustment of indebtedness. Although the bondholders had notice of the initial litigation, were parties to it, and had full opportunity to litigate the fairness of the proposed plan and to contest the constitutionality of the federal statute authorizing the readjustment proceeding, they did not do so. Normal principles of res judicata would bind the parties under these circumstances. *Chicot*‘s holding is especially forceful in view of an intervening Supreme Court decision, *Ashton v. Cameron County Dist.*, 298 U.S. 513 (1936), which held that the statute under which the federal court had acted was unconstitutional. Nonetheless, the *Chicot* Court prohibited collateral attack.
30 308 U.S. 433 (1940).
31 *Id.* at 438-39.
33 308 U.S. at 438-40.
34 *Id.* at 439.
35 *Id.* at 438-44.

Moreover, the Court stressed that Congress did not intend to require the debtor to challenge the jurisdiction of the foreclosing court, and that any judgment of such a court was simply "without authority of law." Although Kalb may appear to support the traditional voidness theory, the Court's decision should be viewed as an exception to the modern rule of finality based on a policy extrinsic to the judicial system: the congressional mandate that federal bankruptcy petitions automatically deprive state courts of subject matter jurisdiction.

Like Kalb, the result in United States v. United States Fidelity & Guaranty Co., illustrates a special exception to the modern finality approach for subject matter jurisdiction when the collateral attack would serve an important policy extrinsic to the judicial system. Fidelity involved another special federal concern—sovereign immunity. The Court held that a judgment of a federal court awarding damages against the United States was "void" and could be challenged in a collateral proceeding despite the government's failure to raise a sovereign immunity defense in the initial proceeding. The Court reasoned that litigants could raise claims against the United States only in those courts specified by Congress. In this special area of sovereign immunity, Chicot was deemed inapplicable; indeed the Court attempted to limit Chicot to its facts and appeared to suggest a number of areas in which competing policies might be appropriately balanced.

Thus, at the Supreme Court level, this was the decisional framework that confronted the authors of the first Restatement of

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57 Id. at 443.
58 309 U.S. 506 (1940).
59 Id. at 512, 514.
60 The Court stated:

In the Chicot County case no inflexible rule as to collateral objection in general to judgments was declared. We explicitly limited our examination to the effect of a subsequent invalidation of the applicable jurisdictional statute upon an existing judgment in bankruptcy. To this extent the case definitely extended the area of adjudications that may not be the subject of collateral attack. No examination was made of the susceptibility to such objection of numerous groups of judgments concerning status, extra-territorial action of courts, or strictly jurisdictional and quasi-jurisdictional facts. No solution was attempted of the legal results of a collision between the desirable principle that rights may be adequately vindicated through a single trial of an issue and the sovereign right of immunity from suit. We are of the opinion, however, that without legislative action the doctrine of immunity should prevail.

Id. at 514-15 (citations omitted).
61 Of course, many of these Supreme Court opinions were expressing the federal law of res judicata. So long as they do not violate any federal constitutional or statutory provi-
Judgments. The Court had clearly established that courts have jurisdiction to determine their jurisdiction, and that determinations of jurisdiction, whether or not actually litigated, would be res judicata. However, the Court's cases had illustrated two instances in which the first court's determination of jurisdiction would not be res judicata: cases involving either the special federal interests of Congress's bankruptcy power or of federal sovereign immunity.

These Supreme Court cases indicate that subject matter jurisdiction should be treated like other issues for res judicata purposes. The *Kalb* and *Fidelity* exceptions to the general rule of res judicata involved significant policies extrinsic to the judicial branch, rather than intrinsic judicial concerns, such as the relationships among courts. Apart from such significant extrinsic concerns, there is no substantial reason to depart from the application of general res judicata principles to collateral attacks upon subject matter jurisdiction.

II

THE FIRST RESTATEMENT'S POSITION

The first Restatement sought to rationalize the cases and provide a coherent synthesis of the law. The position of the first Restatement was that a judgment was void if the rendering court lacked competency, i.e., jurisdiction over the subject matter. Such a judgment could be collaterally attacked in subsequent proceedings, the states are free to determine the res judicata effects of their own courts' prior judgments. For a valuable analysis of the applicability of federal versus state law of res judicata, see Degnan, *Federalized Res Judicata*, 85 Yale L.J. 741 (1976). See also *Restatement (Second) of Conflict of Laws* § 97 (1971).

Special intrinsic judicial branch concerns pertaining to subject matter jurisdiction issues might include the concern that a court might not be entirely objective in deciding questions of its own power. Moreover, subject matter jurisdiction involves the authority of courts, which depends on respect for the judiciary as a forum for principled decisionmaking. The Supreme Court has never suggested that resolution of these intrinsic judicial branch policies should differ when subject matter jurisdiction, rather than other issues, is involved.

The first Restatement sought to present "an orderly statement of those basic or especially important subjects of the general common law." *Restatement of Judgments*, Intro. at v (1942).

Id. § 7. The first Restatement also provided that a judgment was void if the rendering court lacked personal jurisdiction, *Restatement of Judgments* § 5 (1942), or if no reasonable method of notice and opportunity to be heard were afforded, id. § 6. A series of examples distinguished competency or subject matter jurisdiction from procedural problems such as improper venue, which rendered a judgment erroneous but not subject to collateral attack. *Id.* § 7, Comment b at 42-44.
ings in the same state or other states.\textsuperscript{45} Thus the general rule of the first \textit{Restatement} conformed to the traditional voidness theory.

However, the first \textit{Restatement} formulated a broad exception that nearly swallowed the rule. If a court with jurisdiction over the parties had determined that it had subject matter jurisdiction, reviewing courts would use a balancing test, weighing the policy behind res judicata against the policy against usurpation of subject matter jurisdiction.\textsuperscript{46} Only if the policy against usurpation of jurisdiction outweighed the policy behind res judicata would collateral attack be permitted. The first \textit{Restatement} identified five factors that favored allowing collateral attack: the clarity of the lack of subject matter jurisdiction; whether the jurisdictional issue hinged on a question of law or fact; the characterization of the court as one of limited instead of general jurisdiction; the failure to litigate the jurisdictional issue; and the strength of the policy against permitting the court to exceed its subject matter jurisdiction.\textsuperscript{47} Thus, although it continued to denominate as void a judgment of a court lacking subject matter jurisdiction and expressly recognized policy factors supporting collateral attack, the first \textit{Restatement} suggested the principles of res judicata should weigh heavily in determinations of subject matter jurisdiction.\textsuperscript{48} Res judicata did not apply, however, in the case of a default judgment.\textsuperscript{49}

Two illustrations in the first \textit{Restatement} supported its view that a court has jurisdiction to determine its jurisdiction and that such a determination is generally immune from collateral attack. First, where a lower federal court upheld a federal statute permitting exercise of certain judicial powers and the court exercised such powers, a subsequent determination by the Supreme Court that the statute is unconstitutional would not warrant collateral attack of the initial judgment.\textsuperscript{50} This example was patterned after the \textit{Chicot} case.\textsuperscript{51} Second, where a state court granted a divorce

\textsuperscript{45} Id. § 7, Comment a at 42; id. § 11. Under these provisions of the first \textit{Restatement}, the law of the rendering state determines the validity of a judgment. A void judgment that is subject to collateral attack in the rendering state is not entitled to full faith and credit in other states. The first \textit{Restatement} did not purport to delineate the effects of a judgment in states other than the rendering state, leaving those matters to the \textit{Restatement of Conflict of Laws}. \textit{Restatement of Judgments}, Intro. at 1-2 (1942).

\textsuperscript{46} Id. § 10(1).

\textsuperscript{47} Id. § 10(2).

\textsuperscript{48} Id. § 10, Comments a-b.

\textsuperscript{49} Id., Comment c.

\textsuperscript{50} Id., Comment a, Illustration 1.

\textsuperscript{51} See text accompanying note 28 \textit{supra}.
upon a determination that both parties were domiciled in the state, collateral attack would not be permitted in the same or any other state. 52

Despite the above illustrations, the first Restatement allowed collateral attacks in two analogous situations. First, the first Restatement permitted collateral attack where a justice of the peace court granted a divorce despite its lack of jurisdiction, even though the jurisdictional issue was actually litigated and determined. 53 Second, collateral attack was permitted where a state court asserted jurisdiction although prohibited from doing so by federal statute. 54

Perhaps the major innovation of the first Restatement was its explicit balancing of the competing policies of finality and validity. By specifying five factors that supported collateral attack, the first Restatement provided some guidance for later courts and litigants. But the first Restatement did not fully develop these factors. It did not attempt to indicate how courts were to balance competing factors beyond the conclusory description of certain examples.

Moreover, the usefulness of several of the five factors is doubtful. The first factor, the clarity of the lack of subject matter jurisdiction, arguably points in the opposite direction from that suggested by the first Restatement. For example, if it is clear that a justice of the peace court lacks jurisdiction to render a divorce, a party improperly suffering a divorce would have plain notice of the court's error and should appeal to obtain relief from the erroneous judgment. If the jurisdictional error is clear, there is no reason to provide the parties with limitless opportunity for challenge. Assuming a reasonably efficient appellate system, a strong public policy supports its use for direct attack. 55

The second factor, whether the jurisdictional determination depended on a question of law or fact, was not explained in the

52 Restatement of Judgments § 10, Comment a, Illustration 2 (1942). This example is similar to the rule in Des Moines Navigation & R.R. v. Iowa Homestead Co., 123 U.S. 552 (1887), that a judgment is not void because of the absence of diversity. See text accompanying note 13 supra.
53 Restatement of Judgments § 10, Comment b (1942).
54 Id. This last example illustrates the rule derived from Kalb v. Feuerstein, 308 U.S. 433 (1940). See text accompanying notes 30-37 supra.
55 To the extent there is a public interest in insuring that courts do not exceed their jurisdiction by blatant usurpations of power, or in avoiding collusive assertions of subject matter jurisdiction, there is perhaps a basis for considering the clarity of the lack of jurisdiction. However, these interests might be adequately protected by usual exceptions to res judicata doctrine. See text accompanying notes 129-31 infra.
first Restatement. One possible explanation is that jurisdictional facts, involving demeanor and credibility of witnesses, are particularly suited for evaluation by a rendering court; res judicata should be strictly applied because a subsequent court would be in an inferior position to determine jurisdiction. It is difficult to justify a different standard merely because a finding of jurisdiction vel non rests on a legal question. Perhaps the factor reflects a concern that jurisdictional errors of law should not be perpetuated because of their impact on other cases. This problem, however, can be mitigated by other means, such as by allowing freer reexamination of precedent and departure from stare decisis for cases where the initial court lacked subject matter jurisdiction. Moreover, because errors of law are typical fodder for appellate courts, parties should be required to correct errors through direct appeal.  

The third factor, whether the jurisdiction of the court was limited or general, has some merit. Courts of limited jurisdiction often may lack some of the procedural protections afforded by courts of general jurisdiction, and may determine jurisdiction in a summary or otherwise inadequate fashion. However, a more appropriate way to phrase these concerns is in terms of the procedural protections afforded by the forum, rather than by using the broad brush approach of looking simply at the type of jurisdiction possessed by the court.

The fourth factor, whether the question of jurisdiction had been actually litigated, reflects the general perception that actual litigation of an issue sharpens the decisionmaking process and is more likely to produce a correct result. Nonetheless, the Chicot Court had concluded that a court's assumption of subject matter jurisdiction was to be given res judicata effect even if the parties had not exercised the opportunity to litigate the issue. The first Restatement failed to explain how courts were to apply this factor without conflicting with Chicot. Further, the first Restatement appeared to be internally inconsistent. Although the black letter provision specified actual litigation as a factor, the explanatory comment indicated that lack of actual litigation was not significant.

56 The first Restatement distinguished the availability of collateral estoppel with respect to issues of fact and issues of law in more general terms. Compare Restatement of Judgments § 68 (1942) with id. § 70. The first Restatement specified no special concerns with respect to subject matter jurisdiction.

57 The provisions concerning issue preclusion demonstrate this general perception: collateral estoppel applies only to issues that have actually been litigated. Id. § 68.
where the court and the parties assumed the court had jurisdiction.\textsuperscript{58}

The first Restatement's fifth factor—where the policy against a court's exceeding its jurisdiction is "strong" collateral attack should be more available—was an ambiguous policy catchall.\textsuperscript{59} This factor may have reflected an effort to explain the Supreme Court's decisions in \textit{Kalb} and \textit{Fidelity} where strong interests conflicted with the policy of res judicata. But such an intent would have been better served by an effort to identify what some of those strong policy interests might be, and only then to provide for other policies that might later become apparent. Unfortunately, the commentary in the first Restatement does not elaborate on what might constitute "strong" competing policy interests.\textsuperscript{60}

In sum, the first Restatement adopted a position generally consistent with Supreme Court precedent, although framed in terms of the traditional voidness theory which these cases had largely rejected. Through a balancing approach, the first Restatement attempted to provide some flexibility. However, the first Restatement failed to recognize adequately the applicability of general principles of res judicata to subject matter jurisdiction. As a result, substantial weaknesses plagued the first Restatement's balancing approach.

\textbf{III}

\textbf{The Restatement Second's Position}

The deficiencies of the first Restatement, combined with opportunity throughout the next thirty-five years to reflect on the application of res judicata to subject matter jurisdiction, warranted a revised treatment. The Restatement Second's approach to collateral attack on subject matter jurisdiction demonstrates an effort to clarify and improve terminology, reconsider the expression of the modern view of res judicata, and reformulate the factors that permit exceptions to the principle of res judicata. Unfortunately, the Restatement Second fails to recognize as an organizing concept the general principles of res judicata, and does not

\textsuperscript{58} Compare id. § 10(2)(d), with id. § 10, Comment c.

\textsuperscript{59} Id. § 10(2).

\textsuperscript{60} The first Restatement did state that "it is important to consider the reasons why the court did not have jurisdiction," and followed this with an example based upon the facts of \textit{Kalb}. Restatement of Judgments § 10, Comment b (1942). Although the comment and example are useful, they fail to provide adequate guidance for courts and litigants.
depict adequately the very rare situations in which collateral attack on subject matter jurisdiction should be allowed.

During the period between the two Restatements, the Supreme Court only once addressed in depth the issue of collateral attack on subject matter jurisdiction. In *Durfee v. Duke*, a Nebraska state court determined that it had jurisdiction to quiet title to certain bottom land on the Missouri River, upon its determination after full litigation that the land was in Nebraska. The Supreme Court held this determination of jurisdiction binding on a state court in Missouri under the full faith and credit clause. Because the Nebraska courts would have given full res judicata effect to the Nebraska judgment, the Missouri courts were also required to do so. Although prior cases had not addressed whether res judicata applied to subject matter jurisdiction in real property cases, the *Durfee* Court could see no reason for departing from the general rule.

The *Durfee* Court endorsed the modern approach to subject matter jurisdiction. The Court approved of the "general rule that a judgment is entitled to full faith and credit—even as to questions of jurisdiction—when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment." Moreover, the Court distinguished *Kalb* and *Fidelity* by stating, "[t]o be sure, the general rule of finality of jurisdictional determinations is not without exceptions. Doctrines of federal pre-emption or sovereign immunity may in some contexts be controlling. But no such overriding considerations are present here." Thus *Durfee* continued the trend of full application of res judicata principles to determinations of subject matter jurisdiction.

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61 375 U.S. 106 (1963). In other cases, the Supreme Court had reiterated that a court has jurisdiction to determine its jurisdiction. See, e.g., United States v. UMW, 330 U.S. 258 (1947).

62 The Court stated that the full faith and credit clause "generally requires every state to give to a judgment at least the res judicata effect which the judgment would be accorded in the State which rendered it." 375 U.S. at 109.

63 *Id.* at 111. In *Durfee*, because the parties had actually litigated the jurisdiction issue in the initial court, the Supreme Court did not need to express the rule to encompass mere opportunities to litigate subject matter jurisdiction. See Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940).

64 375 U.S. at 114 (citations omitted). The *Durfee* Court noted that in *Kalb* and *Fidelity* the parties in the initial court had not actually litigated the jurisdiction issue. *Id.* n.12. The Court quoted the *Restatement of Conflict of Laws* § 451(2) (Supp. 1948), which adopted *Restatement of Judgments* § 10 (1942), specifying the policies to be considered in determining whether to permit collateral attack.
The Restatement Second adopted an appropriate change in terminology by substituting "subject matter jurisdiction" for the first Restatement's term "competency." The term "subject matter jurisdiction" comports with current usage and is less likely to be confused with other concepts.

A more fundamental change adopted by the Restatement Second is its elimination of the term "void", which the first Restatement had used to describe a judgment entered by a court lacking, inter alia, subject matter jurisdiction. Instead, the Restatement Second propounds, as its black letter proposition, that "a judgment may properly be rendered . . . only if the court has authority to adjudicate the type of controversy involved in the action." However, the Restatement Second recognizes that absence of subject matter jurisdiction will not always render a judgment legally ineffective.

The Restatement Second correctly eliminates the voidness terminology. The first Restatement's position—that a judgment of a court lacking subject matter jurisdiction was void, yet usually could not be collaterally attacked if the court had determined it had jurisdiction—made little sense semantically or functionally. Moreover, the first Restatement had become inconsistent with modern Supreme Court language. However, by continuing to use the term "validity", albeit as a general description rather than as a term of art, the Restatement Second may perpetuate many of the same difficulties. A far more preferable approach would have been to eliminate the focus on the requisites of a valid judgment and to recognize that normally res judicata applies to issues of subject matter jurisdiction. The Restatement Second might then have discussed the rare circumstances in which litigants could col-

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65 See Restatement (Second) of Judgments § 4, Reporter's Note at 21-22 (Tent. Draft No. 5, 1978) [§ 1]; id., Introductory Note to ch. 2 at 15; id. § 14, Comment b [§ 11]; notes 3, 4, and accompanying text supra.

66 See Restatement (Second) of Judgments § 14, Comment a (Tent. Draft No. 5, 1978) [§ 11]. "Competency" has a variety of meanings depending upon the context in which it is used. For example, in the field of evidence, "competency" describes the capability of a person to be a witness. See Fed. R. Evid. 601; McCormick's Handbook of the Law of Evidence 139-50 (2d ed. E. Cleary 1972).

67 Restatement (Second) of Judgments § 14 (Tent. Draft No. 5, 1978) [§ 11]. See also id. Reporter's Note at 119; id. Intro. Note to ch. 2 at 4-8; id. Reporter's Note at 17-18.


69 See, e.g., Restatement (Second) of Judgments ch. 2 (Tent. Draft No. 5, 1978); id. § 4 [§ 1].
laterally attack a judgment because of lack of subject matter jurisdiction.\textsuperscript{70}

Thus the \textit{Restatement Second}'s requirement of subject matter jurisdiction for the proper rendition of a judgment is substantially similar to the first \textit{Restatement}'s position.\textsuperscript{71} The commentary of the \textit{Restatement Second}, however, addresses more fully the sources of subject matter jurisdiction in both the state and federal court systems.\textsuperscript{72} In both state and federal systems, the relevant constitutions, supplemented by legislative directives, provide the boundaries for subject matter jurisdiction. However, more elaboration of the interaction between legislation and subsequent challenge to subject matter jurisdiction would have been appropriate in this context.\textsuperscript{73}

The \textit{Restatement Second} broadens the first \textit{Restatement}'s distinction between subject matter jurisdiction and "procedural defects."\textsuperscript{74} The new work distinguishes subject matter jurisdiction from "mere error" of a procedural or substantive nature.\textsuperscript{75} This expansion is appropriate; litigants might have been tempted to characterize errors of both procedure and substance as jurisdictional in order to afford a basis for collateral attack. The \textit{Restatement Second} properly emphasizes that a narrower definition of subject matter jurisdiction is appropriate "for purposes of according finality to a judgment. . . ."\textsuperscript{76} Moreover, the \textit{Restatement

\textsuperscript{70} See Part IV infra.

\textsuperscript{71} See \textit{RESTATEMENT (SECOND) OF JUDGMENTS} § 14, Reporter's Note at 119 (Tent. Draft No. 5, 1978) [§ 11].

\textsuperscript{72} \textit{Id.} § 14, Comments a-b (Tent. Draft No. 5, 1978) [§ 11].

\textsuperscript{73} Professor Dobbs's approach, emphasizing the legislative intent in restricting subject matter jurisdiction, contrasts with the \textit{Restatement Second}. See Dobbs, \textit{The Validation of Void Judgments: The Bootstrap Principle} (pts. 1-2), 53 Va. L. Rev. 1003, 1241 (1967). Professor Dobbs sets forth a two-step test for determining whether collateral attack of subject matter jurisdiction will be permitted. The first inquiry is whether the legislature or constitution intended to restrict the power of a court to determine its own jurisdiction. If the legislature has exhibited such a restrictive intent, a judgment may be collaterally attacked for lack of subject matter jurisdiction. If, however, no such restrictive legislative intent has been exhibited, a court's decision that it has subject matter jurisdiction may be attacked collaterally only after a second-stage inquiry. This inquiry focuses on whether any policy considerations warrant allowing collateral attack. Dobbs contends that this two-stage analysis adequately respects the legislative role, explains the Supreme Court cases, and allows necessary flexibility. Dobbs criticizes the failure of the first \textit{Restatement} to address the question of legislative intent and also criticizes many of the factors utilized in the first \textit{Restatement}. See, e.g., \textit{Id.} (pt.2) at 1247. Many of these criticisms are equally applicable to the \textit{Restatement Second}.

\textsuperscript{74} \textit{RESTATEMENT OF JUDGMENTS} § 7, Comment b (1942).

\textsuperscript{75} \textit{RESTATEMENT (SECOND) OF JUDGMENTS} § 14, Comment e (Tent. Draft No. 5, 1978) [§ 11].

\textsuperscript{76} \textit{Id.}
Second, unlike its predecessor, concedes that the distinctions between subject matter jurisdiction and mere error, even for collateral attack purposes, may not be easily drawn. Although this candor deserves applause, it is not particularly helpful. The Restatement Second concludes that the answer lies in "categorizing decisions into a pattern," but fails to provide any guidance or opinion as to the elements of the pattern. The Restatement Second merely recognizes that the pattern will be altered by the different contexts in which the distinction arises.

The Restatement Second's basic position that a court has jurisdiction to determine its jurisdiction and that such determination usually precludes collateral attack is generally consistent with the first Restatement. However, the Restatement Second's black letter law and commentary reflect the Reporter's efforts to improve the analysis and incorporate judicial and academic developments.

The Restatement Second's black letter provision, unlike that of the first, applies "[w]hen a court has rendered a judgment in a contested action," not only when a court "determines" that it has subject matter jurisdiction. The Restatement Second's major addition is substantial comment on the rationale for treating an assumption of jurisdiction more like a litigated determination of jurisdiction than a default judgment. This approach—limiting collateral attack when the litigant appears in the initial action, and adopting a more flexible treatment of collateral attacks on default judgments—runs throughout the Restatement Second.

In the context of subject matter jurisdiction, the balance struck by the Restatement Second favors limitation of collateral attack when a party appears but fails to litigate the issue of jurisdiction, except in certain specified circumstances. In such a

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77 Compare Restatement (Second) of Judgments § 14, Comment e (Tent. Draft No. 5, 1978) [§ 11], with Restatement of Judgments § 7, Comment b (1942).
78 Restatement (Second) of Judgments § 14, Comment e (Tent. Draft No. 5, 1978) [§ 11].
79 Id.
80 Id. § 14, Comment c [§ 11]; id. § 15 (Tent. Draft No. 6, 1979) [§ 12]; id. § 15, Reporter's Note at 161 [§ 12]; Restatement of Judgments § 10 (1942).
81 Restatement (Second) of Judgments § 15 (Tent. Draft No. 6, 1979) [§ 12].
82 Restatement of Judgments § 10(1) (1942). However, the first Restatement's commentary indicated that its black letter rule applied where the court and parties had assumed subject matter jurisdiction. Id. § 10, Comment c (1942).
83 See Restatement (Second) of Judgments § 15, Comment d (Tent. Draft No. 6, 1979) [§ 12].
84 See, e.g., id. §§ 113-122 [§§ 65-74].
85 Id. § 15, Comment d [§ 12].
case, the litigant had the opportunity to raise the jurisdictional issue in the initial litigation and slept on that opportunity. Although permitting collateral attack would further public interest in enforcing limitations on courts' subject matter jurisdiction, this could be achieved in other litigation involving other parties or by appeal in appropriate cases.86

The Restatement Second distinguishes default judgments from judgments in contested actions. In contrast to the restrictions imposed on collateral attack in contested cases, the Restatement Second generally permits collateral attack of subject matter jurisdiction, as well as of personal jurisdiction and inadequate notice, in default judgment situations.87 The rationale for permitting collateral attack lies in the asserted lack of public interest in protecting a judgment when no significant judicial resources were expended.88 If, however, there has been reliance on a judgment and the party seeking relief has shown an intent to treat the judgment as valid, the Restatement Second denies collateral relief.89

The Reporter's Comments in the Restatement Second recognize the dearth of modern cases explicitly addressing the limited question of collateral attack of subject matter jurisdiction in default judgments, in the absence of a procedural due process challenge.90 There is, however, one case in which the Supreme


87 RESTATEMENT (SECOND) OF JUDGMENTS § 113 (Tent. Draft No. 6, 1979) [§ 65]. The first Restatement did not draw such a sharp distinction between default judgments and judgments in contested actions. See, e.g., RESTATEMENT OF JUDGMENTS § 117 (1942). Because procedural due process and personal jurisdiction concerns may vary in the two situations, there are advantages to the approach of the Restatement Second. But see text accompanying notes 93-96 infra.

88 See RESTATEMENT (SECOND) OF JUDGMENTS § 113, Comment b (Tent. Draft No. 6, 1979) [§ 65]. The introductory note indicates that in the case of a default followed by a delayed appearance, there is the "lowest value of finality." Id., ch. 5, Introductory Note on "Default" judgments at 19. The Restatement Second may simply reflect the traditional disfavor of default judgments. See F. JAMES & G. HAZARD, CIVIL PROCEDURE 697 (2d ed. 1977).

89 RESTATEMENT (SECOND) OF JUDGMENTS § 114 (Tent. Draft No. 6, 1979) [§ 66].

90 Id. § 15, Comment f, Reporter's Note at 164 [§ 12]. Nonetheless, a number of respected commentators take the same position as the Restatement Second. See, e.g., A. VESTAL, RES JUDICATA/PRECLUSION v264-65 (1969).
Court precluded collateral attack of subject matter jurisdiction after a default. In *Chicot County Drainage District v. Baxter State Bank* the individual bondholders collaterally challenging the subject matter jurisdiction of the initial court had been parties but *had not appeared* in the initial action. The Supreme Court nevertheless barred collateral attack by these bondholders. *Chicot*, combined with a dearth of other cases, provided the drafters of the Restatement Second a perfect opportunity to eschew the traditional lenient approach. It is most unfortunate that this opportunity was missed.

As an alternative treatment of challenges to default judgments on the basis of lack of subject matter jurisdiction, the Restatement Second could have allowed collateral attack only when it would be permitted in contested actions, thus treating subject matter jurisdiction similar to defenses on the merits. Assuming personal jurisdiction and notice requirements have been satisfied, there is little reason to permit a subsequent challenge to subject matter jurisdiction if litigants had an opportunity to raise the issue in the initial case. The Restatement Second's rule encourages

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92 Chicot County Drainage Dist. v. Baxter State Bank, 103 F.2d 847, 848 (8th Cir. 1939). See also Boskey & Braucher, Jurisdiction and Collateral Attack: October Term, 1939, 40 Colum. L. Rev. 1006, 1008 (1940).
93 *Chicot* supports this suggestion that where a party has failed to appear the judgment should be res judicata even with respect to subject matter jurisdiction. Thus, contrary to Professor Hazard's suggestion, see Hazard, Revisiting the Second Restatement of Judgments: Issue Preclusion and Related Problems, 66 Cornell L. Rev. 564 (1981), there is Supreme Court support for the proposal articulated in this Article.
94 Of course, to the extent that res judicata is viewed primarily as a doctrine designed to avoid relitigation, there is less of a need to preclude collateral attack in a default judgment case. However, one commentator has suggested that courts could generally apply the concept of preclusion to all issues necessary for recovery by a plaintiff if there is reason to believe that the default constitutes an admission by the defendant. See Vestal, Preclusion/Res Judicata Variables: Nature of the Controversy, 1965 Wash. U.L.Q. 158, 166-69. Professor Vestal urges that factors such as the importance of the matter to the defendant, the cost of litigation, and the ease of raising the defense should be considered in determining whether the defendant had the opportunity and incentive to litigate fully. *Id.* at 167. These factors could apply to the question of subject matter jurisdiction in a default judgment case. Professor Vestal concludes, however, that the failure to participate may indicate a challenge to jurisdiction and suggests that there should be no issue preclusion. *Id.* at 184-85.
95 The rationale for allowing subsequent assertion of personal jurisdiction and procedural due process defenses is substantially stronger than the rationale for raising subject matter jurisdiction. If a defendant's minimum contacts with a state are not sufficient to permit a court to assert jurisdiction over him, then requiring his presence to litigate even the sole question of personal jurisdiction imposes inconvenience and expense, and violates the substantive due process protections that the minimum contacts test serves. Thus a default and subsequent challenge should be allowed. See Developments in the Law—Jurisdiction,
both delay in resolving the underlying dispute and disrespect for the rendering court. It would have been preferable to permit collateral attack in default judgment cases only for lack of personal jurisdiction or inadequate notice.\textsuperscript{96}

For contested actions, the \textit{Restatement Second} identifies three factors that will justify collateral attack of subject matter jurisdiction.\textsuperscript{97} These criteria constitute a substantial modification of the first \textit{Restatement}.\textsuperscript{98}

First, the \textit{Restatement Second} would permit collateral attack if the subject matter was "so plainly beyond the [initial] court's jurisdiction that its entertaining the action was a manifest abuse of authority."\textsuperscript{99} This factor appears simply to be a more elaborate, and also more stringent, version of a factor in the first \textit{Restatement}—whether "the lack of jurisdiction over the subject
matter was clear.” The Restatement Second wisely confines this exception to egregious cases; however, when there is an adequate appellate remedy there is no need for this exception at all.

The only comment in the Restatement Second discussing this provision, other than the general observation that there is a public interest in limiting courts to their jurisdictional boundaries, is a notation that “[c]ases involving plain excess of jurisdiction are rare.” The only case cited directly to support the principle, in which a probate court declared a city zoning ordinance unconstitutional, does not appear to warrant collateral attack.4

If the abuse of jurisdiction is plain enough to constitute a “manifest abuse of authority,” the error should be corrected through direct appeal. The Restatement Second does not explain convincingly the need for an exception for manifest abuse of authority. The Supreme Court cases do not require such a rule. In truly egregious cases, the normal appellate mechanism should be adequate. Furthermore, the Restatement Second does not adequately articulate what constitutes a manifest abuse of discretion. Consequently, litigants will be tempted to characterize any jurisdictional error as a manifest abuse of authority. Hence the exception is both unnecessary and unwise.

The second exception in the Restatement Second that permits collateral attack applies when “[a]llowing the judgment to stand

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100 Restatement of Judgments § 10(2)(a) (1942).
101 Restatement (Second) of Judgments § 15, Comments c, d (Tent. Draft No. 6, 1979) [§ 12].
102 Id., Reporter's Note at 163.
104 In State v. Bartunek, 12 Ohio App. 2d 141, 231 N.E.2d 326 (1967), the Ohio Court of Appeals issued a writ of prohibition to prevent a probate court judge from enforcing an order requiring a city to issue a building permit upon the court's invalidation of a zoning ordinance. The court held that the probate court lacked subject matter jurisdiction, and therefore its order was void and of no effect. The opinion does not explicitly allow "collateral attack." Arguably mandamus and prohibition generally are more analogous to direct attack. See Thermtron Prod., Inc. v. Hermansdorfer, 423 U.S. 336, 352 (1976) and cases cited therein. Indeed, the writ of prohibition was sought in Bartunek on the day the probate judge planned to hold a hearing on a motion to show cause why its order should not be enforced. 12 Ohio App. 2d at 142-43, 231 N.E.2d at 328.

The only other case cited to support § 15(1) [§ 12] involved a challenge to a Mexican judgment by an agency not a party to the judgment, in which the individual most directly affected was an unrepresented minor. Barry E. v. Ingraham, 43 N.Y.2d 87, 371 N.E.2d 492 (1977), 400 N.Y.S.2d 772. The case could be satisfactorily treated by other provisions concerning persons to be bound by a judgment, Restatement (Second) of Judgments §§ 78-111 (Tent. Draft Nos. 2-4, 1975-77) [§§ 34-62], and does not justify or require a provision such as § 15(1) [§ 12].
would substantially infringe the authority of another tribunal or agency of government.” 105 This provision has no specific counterpart in the first Restatement. 106 General comments in the Restatement Second indicate that this exception promotes the particularly strong public interest of ensuring validity over finality in such cases. 107 At one point the commentary expresses the concern as whether the excess of jurisdiction “has seriously disturbed the distribution of governmental powers;” 108 at another point the concern is with “the impact on the agency and its responsibilities.” 109 The Reporter’s Note indicates that this consideration reflects cases such as Kalb v. Feuerstein and United States v. United States Fidelity Guaranty Co. 110 This factor thus incorporates the exceptions made by these Supreme Court cases to the modern rule barring collateral attack.

The Restatement Second’s Commentary and the cases cited in the Reporter’s Note suggest that the most common example of this exception arises when a court assumes certain powers reserved to another tribunal or agency or powers which a superior authority such as the Constitution has denied to the court. 111 The Restatement Second’s position is basically consistent with the Supreme Court precedents of Kalb and Fidelity, and it also explains the results of the cases cited in the Reporter’s Note. However, by making collateral attack widely available whenever a court’s exercise of jurisdiction would substantially conflict with another governmental agency or tribunal, this provision may be unduly broad. It could be narrowed to permit collateral attack only when the judgment precludes the effective exercise of powers lodged exclusively in another tribunal or agency by the authority grant-
ing jurisdiction. This formulation would encompass both Kalb, where the Frazier-Lemke Act deprived all other courts of jurisdiction once proceedings were commenced in a federal bankruptcy court, and Fidelity, where only Congress, by explicit consent, could waive the sovereign immunity of the federal government.112

This proposed reformulation of the Restatement Second's provision would permit collateral attack only if a court's exercise of jurisdiction substantially infringes upon another governmental agency's authority and if it materially impairs significant underlying policies and if the opportunity for appellate review does not afford adequate protection. These conditions will be difficult to satisfy, but collateral attack should be the exception rather than the rule. This reformulation would permit collateral attack if, for example, a court impermissibly interferes with a legislative allocation of authority to an administrative agency, and the judicial interference will eviscerate the legislature's intended scheme.113

The third criterion outlined by the Restatement Second that would permit collateral attack applies where (1) the rendering court lacks the capability to make an adequately informed determination of its jurisdiction and (2) procedural fairness requires that the party be permitted to attack belatedly the court's subject matter jurisdiction.114 This two-step provision derives from, but

112 See notes 30-40 and accompanying text supra. The lower court decisions cited in this section of the Restatement Second characterize the challenged judgments as "void." The cases neither acknowledge modern Supreme Court developments nor utilize the competing governmental authority rationale to support their holdings. See, e.g., Berry v. Allen, 411 F.2d 1142, 1146 (6th Cir. 1969) (U.S. district court had no power to order Kentucky officials to issue a liquor license because Kentucky legislature had lodged this power in Kentucky officials; district court judgment to the contrary was "void"; "[a]ny individual . . . may challenge a void judgment when it is asserted against him."); In re Mattison, 120 Vt. 459, 463, 144 A.2d 778, 781 (1958) (order of selectmen altering highway was void because of state statute lodging jurisdiction in county court: "[a] judgment void for want of jurisdiction may be impeached by a party thereto in any way and at any time for it is no judgment in law."). Although the results of these cases are consistent with both the Restatement Second formulation and that proposed here, the language of the cases is overbroad and outmoded.

113 The facts of Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907) illustrate a possible basis for collateral attack. In Abilene, the Supreme Court concluded that a state court did not have the power to consider the reasonableness of a rate established by the Interstate Commerce Commission, because such power would be "wholly inconsistent with the administrative power conferred upon the Commission and with the duty, which the statute casts upon that body, of seeing to it that the statutory requirement as to uniformity and equality of rates is observed." Id. at 441. Although in Abilene the power of the court was challenged on appeal, the case illustrates a situation in which collateral attack might be warranted, if there were not adequate opportunity for appellate review.

114 The Restatement Second would permit collateral attack if "[t]he judgment was rendered by a court lacking capability to make an adequately informed determination of a question
substantially modifies, the first Restatement's focus on whether the rendering court was a court of limited or general jurisdiction.\textsuperscript{115} Rather than using overinclusive criteria as did the first Restatement, the new formulation specifies the factors that justify collateral attack. To take an extreme example, assume a court or tribunal limited in its powers to issuing building permits decides that a zoning ordinance is invalid. If the tribunal cannot determine its jurisdiction on an adequately informed basis, perhaps because it is composed of non-lawyers, and there is no appellate process in which the jurisdictional issue can be reviewed adequately, then collateral attack should be allowed. Similarly, if procedural rules of the tribunal impair the ability of the parties to raise jurisdictional issues, and there exists no opportunity for effective appellate review, collateral attack may be permitted.

Many of the cases cited by the Restatement Second to support this laudable reformulation are not, however, precisely on point. They reflect instead the first Restatement's distinction between courts of general and limited jurisdiction,\textsuperscript{116} or take the position that there has been merely irregularity or error in resolving a question rather than a jurisdictional error.\textsuperscript{117} One example, referred to in a case cited by the Restatement Second, offers a good illustration: a small claims court, operating without attorneys, pleadings, rules of evidence, juries, or formal findings, and with a very limited right of appeal, might not have the capability to

\textsuperscript{115}Restatement of Judgments § 10(2)(c) (1942). The first Restatement's formulation itself modified a distinction under the traditional theory between courts of record and courts not of record. See Restatement (Second) of Judgments § 15, Comment e (Tent. Draft No. 6, 1979) [§ 12].


The federal decisions cited in the Reporter's Note, particularly those involving administrative tribunals, illustrate that generally the jurisdictional determinations of administrative agencies (which are tribunals of limited jurisdiction) are reviewable only on direct attack. Callahan Road Co. v. United States, 345 U.S. 507 (1953); McCullough Interstate Gas Co. v. F.P.C., 536 F.2d 910 (10th Cir. 1976). These cases did not discuss explicitly, but apparently assumed, that the administrative agency was capable of making an informed determination reviewable upon appeal.

make an adequately informed determination of jurisdiction, and procedural fairness might warrant allowing collateral attack. Although these situations are rare, the Restatement Second wisely provides explicitly for this exception, in accordance with constitutional due process protections. The inherent inability of a court to consider properly an issue, however, is a concern not limited to the issue of subject matter jurisdiction. Thus the Restatement Second might have more profitably dealt with this problem as a general exception to res judicata, rather than limiting it to collateral attack on subject matter jurisdiction.

In the initial version of the Restatement Second an additional exception would have permitted collateral attack if allowing a judgment to stand would "[i]mpair a constitutional protection of sufficient importance, such as protection against illegal detention." The provision was eliminated from Tentative Draft Number Six without explanation. This change is salutary because constitutional rights can be protected adequately by the procedural protections at the trial court level and by access to direct appellate court review. Thus, a strict and limited approach to collateral attack suggests that the elimination of this criterion was appropriate.

The Restatement Second is a major improvement over its predecessor. It properly omits two of the five factors deemed relevant by the first Restatement. Under Supreme Court precedent neither the question of whether the determination of jurisdiction was law or fact, nor the question of whether the issue actually was litigated affect the availability of collateral attack. The narrowing of the

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118 See Gollner v. Cram, 258 Minn. 8, 12, 102 N.W.2d 521, 525 (1960) (discussing Sanderson v. Niemann, 17 Cal. 2d 563, 110 P.2d 1025 (1941)). Sanderson did not involve a collateral attack on subject matter jurisdiction, but rather the binding effect of a determination on the merits by a court of claims. Nonetheless, Sanderson involved the type of tribunal with limited capacity that might be covered by Restatement (Second) of Judgments § 15(3) (Tent. Draft No. 6, 1979) [§ 12], which allows collateral attack where the judgment was rendered by a court lacking adequate ability to determine its jurisdiction and where, as a matter of procedural fairness, belated attack should be permitted.


120 The elimination of this constitutional rights exception in Tent. Draft No. 6 may primarily reflect the decision by the drafters of the Restatement Second to refrain from discussing the problem of res judicata in criminal cases. Compare Hazard, supra note 93, with Vestal, The Restatement (Second) of Judgments: A Modest Dissent, 66 Cornell L. Rev. 464 (1981).

121 See discussion in text accompanying notes 56-58 supra. The Restatement Second commentary discusses at some length whether actual litigation of subject matter jurisdiction
other three factors of the first Restatement also marks a substantial clarification of the limits on collateral attack of subject matter jurisdiction.

IV

AN ALTERNATIVE PROPOSAL

While operating within the constraints of the Restatement Second's purpose to restate and clarify existing law, it is possible to achieve a better and clearer explanation of the current doctrine as expressed in Supreme Court and other authoritative cases. The principles of law regarding subsequent challenges to subject matter jurisdiction can be summarized as follows: generally, in a contested action a court's subject matter jurisdiction is res judicata and cannot be challenged through collateral attack on the judgment, whether or not the issue of subject matter jurisdiction was actually litigated. Although there are no Supreme Court decisions on point, this author believes that generally applicable intrinsic judicial branch exceptions to res judicata should also apply to subject matter jurisdiction where relevant. For example, where a judgment cannot be reviewed on appeal, or where a judgment has a significant adverse impact on third persons, or where the judgment was the product of bribery, fraud, or insanity, collateral attack may be permitted. In addition, where considerations extrinsic to the judicial branch militate against finality, collateral attack will be allowed. For example, a strong extrinsic factor implicating jurisdiction would permit collateral attack where the jurisdiction-granting authority (either the legislature or constitution) seeks to deprive the court of jurisdiction and the exercise of jurisdiction (indeed even the assumption of jurisdiction to deter-
mine jurisdiction) will impair the effectiveness of the underlying legislative or constitutional plan. Another strong extrinsic consideration that would justify an exception to the rule of res judicata emerges when the assertion of jurisdiction conflicts seriously with a power conferred on another branch or body of government. An example would be a lawsuit that violates sovereign immunity.

Because the modern doctrine should be viewed as effectively treating subject matter jurisdiction like other issues that are made final by res judicata, a modern Restatement should incorporate issues of subject matter jurisdiction in the general discussion of issue and claim preclusion. This would entail a reworking of much of Chapter Two of the Restatement Second.

A more modest alternative could still reflect the expanded ability of courts to determine their own jurisdiction without risk of subsequent collateral attack. This could be accomplished by eliminating the Restatement Second's section 14 [section 11] which is largely hortatory, and by substituting for section 15 [section 12] the following:

§ 15 Contesting Subject Matter Jurisdiction.

When a court has rendered a judgment in either a contested action or a non-contested action, the judgment precludes the parties from litigating the question of the court's subject matter jurisdiction in subsequent litigation except if one of the customary exceptions to the general rules of issue preclusion (see § 68.1 [§ 28]) or claim preclusion (see § 61.2 [§ 26]) are applicable. Moreover, where strong extrinsic factors implicating jurisdiction, such as substantial interference with the effective exercise of powers which have been lodged exclusively in another tribunal or agency, are present subsequent attack may be permitted. For provisions concerning relief from judgments, see §§ 113 [§§ 65] et seq.

128 As the Restatement Second indicates, the issue of subject matter jurisdiction has characteristics of both issue preclusion and claim preclusion. See Restatement (Second) of Judgments § 15, Comments c, d (Tent. Draft No. 6, 1979) [§ 12].
129 Restatement (Second) of Judgments § 14 (Tent. Draft No. 5, 1978) [§ 11], entitled "Subject Matter Jurisdiction," states: "A judgment may properly be rendered against a party only if the court has authority to adjudicate the type of controversy involved in the action."
130 The provision governing default judgments also should be modified to follow the general rules of res judicata. See generally text accompanying notes 87-96 supra.
This proposal is preferable to section 15 in Tentative Draft Number Six [section 12] for several reasons. First, it explicitly acknowledges that subject matter jurisdiction generally should be treated like other questions. Second, it eliminates the aspects of current section 15 [section 12] which are unnecessary and unwise. Third, it establishes an exception for policies on subject matter jurisdiction imposed on courts by extrinsic authorities such as legislatures and constitutions. Finally, it provides that default judgments should be treated the same as other actions for purposes of collateral attack on subject matter jurisdiction.

The modern cases limit severely the scope of exceptions to the general rule of res judicata if litigants have had the opportunity for appellate review. This is the proper approach: adequate appellate review generally insures that the interest in valid judgments will be furthered. Although collateral attack might occasionally correct an invalid judgment, the infrequency of this potential benefit does not outweigh the massive adverse impact on finality that would occur if collateral attack were widely available. The principle that precludes subsequent attack on judgments on the merits also applies to jurisdictional questions. In both instances the availability of adequate appellate review should bar subsequent collateral attacks.\(^\text{131}\)

**Conclusion**

Both Restatements emphasize that subject matter jurisdiction is a prerequisite of a proper or valid judgment. But both Restatements proceed to qualify this principle with substantial exceptions. The preferable approach would be to recognize fully the impact of the modern cases in order to acknowledge that subject matter jurisdiction generally should be treated like most other issues for res judicata purposes. To the extent that a different treatment of subject matter jurisdiction is desirable, narrow exceptions to the general rule of res judicata can be drawn.

Exceptions to the application of res judicata may involve either intrinsic judicial branch policies or extrinsic policies implicating the powers or policies of other branches of government or

\(^{131}\) To the extent that the more general res judicata provisions of the Restatement Second, such as § 68.1, simply refer to the availability of appellate review without considering the adequacy of appellate review, they should be modified. An opportunity for inadequate appellate review does not protect the interests in validity and should not preclude collateral attack.
the Constitution. Intrinsic judicial policies, involving balancing the goals of finality and validity, have been resolved largely in favor of finality where there is adequate opportunity for appellate review. This resolution is generally appropriate for the specific issue of subject matter jurisdiction. Extrinsic policies, exemplified by *Kalb* and *Fidelity*, are rare. The general rule is that courts should treat subject matter jurisdiction according to general principles of *res judicata*; this general rule and the very limited exceptions should be more clearly articulated in the *Restatement (Second) of Judgments*. 
REVISITING THE SECOND RESTATAMENT OF JUDGMENTS: ISSUE PRECLUSION AND RELATED PROBLEMS

Geoffrey C. Hazard, Jr.†

The event of this symposium on the Restatement (Second) of Judgments is welcome to the Reporter. It signifies that the work is done and the indenture fulfilled. Only those who have been involved in one of these long term enterprises can appreciate how much that means. Beyond that, it is deeply gratifying to have a signal that the project seems successful. During such a venture, the participants never know for sure that success will be achieved, for they are bent in a curious mixture of relentless self-criticism and continual self-congratulation, the latter reflecting partly genuine mutual esteem and partly a conscious effort to sustain purpose and morale. I take from what is said here, and what is not said, that the enterprise came out pretty well. If working conventional law is worth doing, and if a Restatement is a worthwhile way of working the law, then the verdict is that the Restatement (Second) of Judgments has been worthwhile.† There are not many things of which that can be said with real conviction.

On the whole I found the task very rewarding. A Restatement provides lawyers, judges, and law professors a chance to write the law, instead of merely talking about writing the law. Lawyers and law professors are, of course, frustrated judges. So are judges, because to a serious jurist, the judicial decision conference must be the ultimate frustration. By contrast, in the Restatement process nothing much depends on the outcome, except the legal merit of the product.

Writing a Restatement can occasion the best of all legal seminars. The rules of the forum are academic in the best sense. A premium is placed on neutrality in outlook, universality in responsibility, and providing opportunity to think. At the same time, the participants in the Restatement are lawyers in the best

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† Some will say that the American Law Institute would have been better employed at other things, such as trying to devise a means for implementing Brown v. Board of Educ., 347 U.S. 483 (1954), or the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4361 (1976). There is reason to doubt, however, that anyone would have employed the American Law Institute for such purposes.

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sense—smart, tough veterans of all forms of legal intercourse. *Paper Chase* \(^2\) with everyone a Kingsfield.

A Restatement is also the ultimately demanding challenge in legal craftsmanship. The law requires that cases be decided justly if possible. It also requires that, if possible, the decisions be reconciled on premises that are general and hence even-handed. Law requires both good judging and good legislating. A Restatement requires both at the same time, because it seeks to formulate general propositions that are compatible with prevailing sentiment as to how concrete cases ought to come out.

The reviewers say, however, that there were things we left undone. Professor Clermont points to the problem of interstate jurisdiction, and Professor Vestal to the problem of res judicata in criminal cases. The reviewers also say that some things we simply got wrong. Professor Vestal argues that we took too narrow a view of the principle of issue preclusion, Professor Martin says we kept some obsolete terminological baggage, and Professor Moore says that we kept some obsolete conceptual baggage. Finally, Professor Casad points to some discontinuities that will have to be ironed out in the future.

The reviewers have cited but a sample of instances of deficiency. I could give them many more. A project of this sort is always an accommodation between what the collective mind believes ought to be done and what the collective body can actually accomplish. Moreover, when the *Restatement Second* gets into the courts, more deficiencies will be revealed, because there are limits to what the collective mind can see at any given time.

What more can a player say about the reviews, if only to demonstrate that there is no end to discussion of what the law is or ought to be?

I

**INTERSTATE JURISDICTION**

The place of trial among the state courts for civil litigation involving multistate elements is determined by interpretation of the due process and full faith and credit clauses in a long line of ambiguous cases of which *Pennoyer v. Neff* \(^3\) and *International Shoe*

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\(^3\) 94 U.S. 714 (1877).
v. Washington are the most central. The place of trial among federal courts is generally determined by a federal statute that was not well thought out when enacted in 1887 and was not well reconsidered when amended in 1948. Moreover, as to most actions, federal courts incorporate state law on service of process, thereby incorporating the ambiguities of the Pennoyer-International Shoe line of decisions. Professor Clermont complains that the Restatement (Second) of Judgments merely refers to the Restatement (Second) of Conflict of Laws on the question of state court jurisdiction and does nothing about federal venue. He wonders why we did not work out a single framework of national venue, and offers a method of analysis by which we could have moved toward doing so.

This is a perfectly cogent criticism and deserves a response. In framing the project for the Restatement (Second) of Judgments, the American Law Institute decided not to rework the law of interstate place of trial in any fundamental way. The Institute had already considered the topic extensively in the Restatement (Second) of Conflict of Laws and in the Study of the Division of Jurisdiction Between State and Federal Courts. Both were major projects involving large intellectual efforts and substantial commitment of very limited financial resources. Other topics compete for the attention of the Institute and its intellectual and financial donors, such as tax law, securities regulation, corporate governance, torts, contracts, and property.

Professor Clermont might argue that the Conflicts and Federal Jurisdiction projects, considered separately or together, did not engage adequately the problem of multistate litigation. More specifically, he might say that the Conflicts project considered state court jurisdiction merely as an incident of the problem of choice of law and not as a question of fairness and convenience of trial in a

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4 326 U.S. 310 (1945).
6 Clermont, Restating Territorial Jurisdiction and Venue for State and Federal Courts, 66 Cornell L. Rev. 411 (1981). Restatement (Second) of Judgments § 7, Comment a (Tent. Draft No. 5, 1978) [§ 4] refers to Restatement (Second) of Conflict of Laws §§ 24, 56 (1971) on the issue of state court territorial jurisdiction. [Throughout this Article, the corresponding section numbers that will appear in the final Restatement Second are given in brackets after citation to the tentative drafts.]
7 Clermont, supra note 6, at 450, 462.
8 See Restatement (Second) of Conflict of Laws §§ 24, 56 (1971).
9 See ALI Study of the Division of Jurisdiction Between State and Federal Courts §§ 2371-2376 (1969); id. at 375-410.
federal legal system. By the same token, the *Federal Jurisdiction* project considered convenience of trial only in federal courts and treated the problem of state court territorial jurisdiction as outside its scope. This argument has force, but force that carries forward to an encounter with a further difficulty. If the problem of multistate venue should be considered comprehensively, as Professor Clermont urges, it would require either a project about forum that ignored choice of law—state-to-state and federal-to-state—or a project that encompassed both forum and choice of law in both state and federal courts. Trying to deal with forum choice without considering choice of law is possible but very unsatisfactory. Trying to deal with forum choice and choice of law for the American legal system as a whole, state and federal, is a sizeable task that Professor Clermont may relish, and someday may be drawn into, but one that I would like to leave for him or someone else.

At another level, the trouble with trying to deal in one package with interstate venue and venue of the federal district courts is that these subjects historically have been the provinces of different law-givers. Interstate venue has been the province of the judiciary—the state supreme courts and the United States Supreme Court interacting with each other. The dynamic in this body of law has been litigation, through participation of the random litigants who happen to get involved in cases involving these problems. In contrast, venue of the federal courts has been primarily the province of Congress, where the dynamic is the legislative process and the participation is by those who have a voice on matters of federal jurisdiction and the federal courts. There may be some way of coordinating these processes, but I do not know what it is.

Still another response is that we should not try to integrate federal venue and interstate venue until both of them separately are fairly straight in our minds. I agree with Professor Clermont that federal venue rules are evolving in the direction of rationality. I agree that interstate venue of state courts can be

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10 *See Restatement (Second) of Conflict of Laws §§ 24, 56 (1971).*
11 *See ALI Study of the Division of Jurisdiction Between State and Federal Courts 375-80 (1969).*
14 *See 28 U.S.C. § 1391 (1976).*
15 *See Clermont, supra note 6, at 431.*
moved in the same direction. However, I am not sure that his analysis will move us further forward, or that his interpretation of recent Supreme Court cases is a sound one.

Professor Clermont says that, in broad terms, the doctrine regarding state court jurisdiction has gone from "power" under Pennoyer, to "reasonableness" under International Shoe, to a combination of "power" and "reasonableness" in the recent cases of Shaffer v. Heitner,6 Kulko v. Superior Court,7 Rush v. Savchuk,8 and World-Wide Volkswagen Corp. v. Woodson.9 I think Professor Clermont is right in suggesting that both "power" and "reasonableness" are elements of state court jurisdiction, but I do not think the character of the elements, and their relationship to each other, is as he suggests.

To me the term "power" means the capability of exercising or threatening physical force to get someone to do something. Surely this is the definition Justice Holmes had in mind in his famous statement that the foundation of jurisdiction is physical power.20 This appears to be the definition that classical jurists and international lawyers have in mind when they talk of the power of a sovereign nation-state. "Power," in this ordinary sense of the term, is a necessary condition for the exercise of legal authority—as we are reminded by the fourteen-month internment of the American hostages in Iran. But questions of power in this sense are remote to the point of irrelevance in analysis of the problem of interstate jurisdiction.

It is true that the states may be analogized to independent sovereignties, an analogy the Supreme Court often makes in talking about interstate jurisdictional problems. But the analogy is imperfect and almost always misleading. The states of the American union do not have "power" in interstate matters. Connecticut cannot take New Yorkers as hostages to compel New York to stop sending it candidates for Senator or otherwise influencing its government; New York cannot impound Connecticut assets deposited in New York banks to enforce its claims that Connecticut citizens should pay more taxes for upkeep of the Big Apple. One can only imagine Larchmont Harbor becoming the subject of an armed struggle like that over Shatt al-Arab. Occasionally, to be

19 444 U.S. 286 (1980); see Clermont, supra note 6, at 414-29.
20 McDonald v. Mabee, 243 U.S. 90, 91 (1917).
sure, we encounter an opinion that brings to our minds a vision of such nonsense. The one I like best is *Grace v. McArthur*, where a district court judge had to decide whether service of process effectuated in a commercial airliner while over Arkansas was effectuated "in" Arkansas. In the course of his opinion the judge made elaborate reference to the scope of Arkansas's control over its airspace. In reading that case, I have always had the image of a company of Arkansas sheriff's deputies deployed in hunting blinds along the west bank of the Mississippi, waiting with poised shotguns for the first sight of aircraft from Memphis. But that picture fades out when I remember that in matters having to do with distribution of sovereign authority among governments of the United States, the federal government has a monopoly of power. That was settled by compact in the Constitution and ratified by force of arms in the Civil War.

So the question involved when states exercise interstate jurisdiction is not one of power but of authority. They have whatever authority they are bold enough to claim, subject to the limits that the Supreme Court feels obligated to impose. The attitude of states in this matter has varied over time and varies from state to state, sometimes being expansive and sometimes being self-restrictive. In formulating the authority of the states, there are two basic questions: what should be the relevant indicia or determinants of authority by which to test whether a state may exercise judicial jurisdiction in regard to a multistate transaction; and to what degree or extent must those determinants exist in order for jurisdiction to be sustained?

The basic determinants have been "presence" of a person or thing in a state, and connection of a "transaction" to a state. The required degree is relatively more or relatively less. Under classic doctrine as expounded in *Pennoyer*, which analogized the states to sovereign polities, the critical determinant of judicial authority was local presence of the person—in personam jurisdiction—or presence of the thing—in rem jurisdiction. Under *International Shoe* and *Shaffer v. Heitner*, the critical determinant has been the connection of the transaction to the state. Presence of a person or thing and connection of the transaction are both in some sense related to the idea of power. A state should have authority over

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22 95 U.S. at 733-34.
23 433 U.S. at 204.
persons and things that are locally situated, because geographical proximity is related to effectiveness of legal control. Similarly, a state should have authority over persons and things that are involved in local transactions because otherwise the state cannot subject the transaction to effective legal control.

Both pathways of analysis are reasonable—that is, cogent. Hence, both approaches are manifestations of a concept of "reasonableness." Furthermore, the concepts of "presence" and "connection of transaction" merge once we get beyond very simple transactions. In International Shoe, the Supreme Court held that the existence of local corporate transactions could be deemed the equivalent of local corporate presence, on the basis of which in personam jurisdiction could be exercised.\(^2\) In Mullane v. Central Hanover Bank and Trust Co.,\(^2\) a precedent that Professor Clermont seems to think is in jeopardy,\(^2\) the Court held that the existence of local transactions could be deemed the equivalent of presence of property, on the basis of which in rem jurisdiction could be exercised.\(^2\)

Thus, all interstate jurisdictional problems have a component of "power" as the basis upon which authority is allocated among the states. In allocating such authority the touchstone may be either "presence" or "transaction," or both. "Presence" and "transaction" both require some fictions to work across the board. Also, both require some common sense to keep them in bounds, that is, an element of reasonableness.

The limits of the "presence" theory are reached when there is local physical presence of a person or thing that has no transactional nexus to the forum, as, for example, where an airline passenger is served with process while the plane is over a state with which the transaction in suit has no connection whatever.\(^2\) The Pennoyer doctrine, however, ignored the matter of transactional nexus. It was the inattention to that nexus which so deeply concerned the late Albert Ehrenzweig and impelled his relentless attack on "transient" jurisdiction.\(^2\) The same point would arise if

\(^2\) 326 U.S. at 316-17.
\(^2\) See Clermont, supra note 6, at 429 n.90.
\(^2\) 339 U.S. at 313.
\(^2\) The transaction in Grace v. McArthur, 170 F. Supp. 442 (E.D. Ark. 1959), had a strong connection to Arkansas.
we considered attachment of the cargo of an airplane where there was no connection between the transaction in suit and the state seeking to establish attachment jurisdiction. The decision in Shaffer v. Heitner\(^\text{30}\) seems to provide adequate basis for supposing that attachment jurisdiction is ordinarily improper without a transactional nexus and that in personam jurisdiction is subject to the same limitation.\(^\text{31}\) Thus, ordinarily, "presence" is no longer enough.

The "transaction" approach also has its limits. These limits are reached when the definition of transaction is unreasonably attenuated to include even remote connections. For example, it is foreseeable that a child of mine may wind up penniless in Tobago, but it is stretching things to say that such an eventuality should result in my being subject to jurisdiction for a support action in Tobago. Yet that is about what the California Supreme Court held in Kulko.\(^\text{32}\) It is foreseeable that a victim of a Connecticut tort might suffer agony that persists in Tobago, but it is stretching things to say that such a consequence results in jurisdiction in Tobago for an action against the Connecticut tortfeasor. Nevertheless, that is about what the Minnesota Supreme Court held in Rush v. Savchuck.\(^\text{33}\) And why should a New York auto dealer be answerable in Oklahoma simply because the car broke down there, the situation involved in World-Wide Volkswagen?\(^\text{34}\)

The decisions of the Supreme Court in these cases are concretions that give meaning to the terms "reasonable" or "reasonably foreseeable." Concretions such as these are necessary epistemologically, for they convey a sense of proportion and dimension in the use of a concept that otherwise has no limits short of those of imagination. They are necessary as a practical matter to correct imperialist tendencies in lower echelons of our federal legal system. There should be nothing surprising or mysterious in the pronouncement of "arbitrary" corollaries to a general principle of "reasonableness."\(^\text{35}\) Such corollaries are found, for example, in the statutes of limitation that give specific meaning to the concept of unreasonable delay,\(^\text{36}\) the definite

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\(^{31}\) But see Donald Manter Co. v. Davis, 543 F.2d 419 (1st Cir. 1976) (action against Vermont partnership upholding in personam jurisdiction in New Hampshire over Vermont partner based on in-hand service of partner in New Hampshire).

\(^{32}\) 436 U.S. at 89.

\(^{33}\) 311 Minn. 480, 245 N.W. 2d 624 (1976); see 444 U.S. at 324.

\(^{34}\) 444 U.S. at 289-91.


speed limits that give specific meaning to the concept of unreasonable speed, and the use of the concept of “proximate” to modify “cause” as the basis of tort liability.

I therefore interpret the recent Supreme Court cases dealing with territorial jurisdiction in a much less complicated way than does Professor Clermont.7 The present doctrine seems to me something like this: the authority of the states to exercise judicial jurisdiction in litigation having multistate elements depends on the existence of a reasonable relationship between the state and the person, thing, or transaction involved in the litigation. Presence of the defendant is usually such a relationship and so is the occurrence of a transaction having significant connection with the state. However, “presence” without any local transactional connection ordinarily is an insufficient basis for exercising jurisdiction, and so is exercise of jurisdiction based on a hyperattenuated transactional connection. Where the state courts cannot discipline themselves to observe these limits, the Supreme Court will lay down some mechanical formulae to take care of salient cases and to provide general guidance. This is a less elegant approach than Professor Clermont’s, but probably yields about the same results.

One other thing about the treatment of state court jurisdiction in the Restatement (Second) of Judgments is that we adopted the term “territorial jurisdiction” to refer to the Pennoyer-International Shoe problem. This allowed us to clarify the different consequences that ensue when the question involved concerns territorial jurisdiction as distinct from subject matter jurisdiction.38 That usage is also a step in the direction of treating interstate jurisdiction as a question of venue, as Professor Clermont rightly urges us to do.39

II

Criminal Res Judicata

The other error of omission laid against the Restatement (Second) of Judgments, in this instance by Professor Vestal, concerns res judicata in criminal cases.40 I think the decision not to under-

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7 See Clermont, supra note 6, at 414-29.
8 See notes 86-99 and accompanying text infra.
9 See Clermont, supra note 6, at 462.
take this topic was clearly correct for practical and theoretical reasons. As a practical matter, taking on this subject would have required restructuring the project. As Reporter, I would have found myself in a field in which I am not expert, and the opportunity costs of my becoming such would have been high for me and for the Institute. Bringing aboard a co-Reporter would have entailed similar difficulties. The Advisory Committee would also have had to be reconstructed.

There were, however, more fundamental difficulties. The contemporary law of criminal res judicata is largely the creation of a single court, the Supreme Court of the United States. Moreover, the law on the subject is confused down to its roots. When both of these conditions exist, it is not easy to make a contribution through a Restatement, even if the law desperately needs clarification.

It is inappropriate for a Restatement to deal with a subject that is essentially the product of a single tribunal. Can one imagine a useful Restatement of United States Constitutional Law, or a Restatement of New York Contract Law? Most people who have considered that question reach a negative conclusion, but perhaps without having worked out exactly why they do. I share the conclusion and think that the reason is approximately as follows: A Restatement is a quasi-official exposition of the law. Although it is like a treatise in comprehensiveness and endeavors to be disinterested, it is the product of an organization constituted not simply on the basis of scholarly competence but also on the basis of standing in the legal profession. A Restatement therefore represents not only academic authority but a combination of academic and professional authority. The Institute is something like a sister-jurisdiction to every other common law jurisdiction. It can be regarded as an extra-territorial common law jurisdiction—to borrow from Holmes, a quasi-sovereign with an articulate voice giving forth a brooding omnipresence in the sky. As such, the Institute's expositions of "the law" provide a useful resource to courts encountering problems that have not recently been resolved in a specific jurisdiction. It would be fatuous, however, for the Institute to enter competition with the courts of a specific jurisdiction to restate its law.

A Restatement of res judicata in criminal cases would in any case be extremely difficult because of the fundamental confusion

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41 Southern Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).
of doctrine in the field. The law on the subject is mostly United States Supreme Court decisions interpreting the double jeopardy and due process clauses. These clauses provide only the vaguest premises for the detail required in the problems of criminal res judicata. Moreover, the law of res judicata is a mirror image of the law of procedure. The law of criminal res judicata as nurtured by the Supreme Court is essentially a set of federal specifications prescribing the consequences of decisional processes regulated primarily by state law. State criminal procedure varies widely with regard to the rules of pleading, joinder, discovery, nonsuit, and judge-jury functions. As a consequence, the federal law of res judicata does not mesh well with the state law of criminal procedure. The Supreme Court deals with the discrepancies as best it can in the certiorari process, serially and more or less randomly. In a Restatement, the Institute would have to resolve these discrepancies at once in a coherent text that is consistent with the Supreme Court's decisions. As I read a recent hornbook on the subject, it cannot be done.

III

ISSUE PRECLUSION

As for the things that were done wrong in the Restatement Second, there are many more than the reviewers mention. Some of the sentences, even full paragraphs, and a few blackletter provisions are really very good in my opinion. The rest is only the best we could do. Even so, we probably made some significant mistakes. Our treatment of issue preclusion with respect to an issue not actually litigated, however, is not one of them.

The position of the Restatement Second is that the principle of issue preclusion does not preclude a party from subsequently dis-

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43 U.S. Const. amend. V.

44 As we discovered in doing the civil Restatement Second, these elements of procedure often portend important differences in res judicata. A civil Restatement undertaking to express generally prevailing law is possible because the states have substantially identical civil procedural systems—systems based on the Federal Rules of Civil Procedure or closely similar systems, particularly those in California, Illinois, and New York. See Restatement (Second) of Judgments, Introduction at 6-15 (Tent. Draft No. 7, 1980).

45 See C. Whitebread, Criminal Procedure ch. 24 (1980).
puting, in litigation involving another claim or cause of action, a material proposition that he admitted or failed to deny in an earlier litigation. In this symposium Professor Vestal argues, as he has argued elsewhere, that the principle of res judicata should extend to such a situation.

Some care is required in stating precisely the point of difference between the two positions. The question is not whether in various circumstances a party may be estopped from contesting a proposition previously admitted. Nor is it whether a party may be conditionally estopped in that he might be required to show good reason why he should be allowed to controvert a previously admitted proposition. The question is whether a party should be categorically denied his day in court on an issue because he had the "opportunity to litigate" the issue in a prior action. It is agreed that there may be such an estoppel in many circumstances. It is also agreed that the estoppel should often have only limited effect in the subsequent litigation—the truth of the matter should be treated as presumptive rather than conclusive.

It is also agreed that there is some authority for Professor Vestal's position, although some cases he cites in this regard cannot fairly be construed as providing such support. For example, Professor Vestal attaches much significance to statements in Schwartz v. Public Administrator and Montana v. United States referring to the "opportunity to litigate." He asserts these references support the view that a party who has an opportunity to litigate an issue, but does not do so, is nevertheless bound as to the issue. However, Schwartz and Montana and many other decisions invoked by Professor Vestal involve a party who in fact actually litigated the issue in the prior action. The reference to "opportunity" in these decisions is to test whether, as to an issue the party did litigate, the opportunity was sufficient that he should not be allowed to litigate the issue again. To cite such language for the proposition that opportunity alone carries presumptive effects is to distort the syntax of these decisions.

46 See Restatement (Second) of Judgments § 68, Comment a (Tent. Draft No. 4, 1977) [§ 27].
47 See Vestal, supra note 40, at 472.
51 See Vestal, supra note 40, at 468-70.
52 See id.
There are, to be sure, cases saying that the principle of issue preclusion applies to propositions put in issue as well as propositions actually litigated. In many of the cases cited by Professor Vestal for this thesis, however, the statement is plainly obiter dictum because the issue in question actually had been litigated in the prior action. This is true, for example, of *Scott Paper Co. v. Fort Howard Paper Co.* and *Oldham v. Prichett.* Furthermore, many of the default judgment cases cited by Professor Vestal involved a judgment loser trying to abrogate the judgment through new litigation attacking a proposition upon which prior judgment depended. They do not involve a judgment winner trying to extend the effect of the prior judgment by using it to preclude litigation of an issue in a subsequent action involving a different claim. These cases involve attempts to avoid the claim preclusive effect of a prior default judgment, not attempts to attach issue preclusive effect to such a judgment. To say a default judgment loser may not overcome the judgment, because he had opportunity to litigate the issues therein, is not to say that he is also bound as to these issues in another action involving a different cause of action. It is not unfair to say that inattention to niceties such as these in the handling of authority diminished Professor Vestal's persuasiveness with the Institute.

Professor Vestal would have to concede that there are situations where a party plainly has had opportunity to litigate, did not do so, and is not held to an estoppel. The clearest situation is where a defendant in a criminal case enters a plea of nolo contendere and an issue involved in the criminal charge thereafter arises in a civil action. I am not entirely sure of Professor Vestal's position on this problem, but I gather he would say that a nolo contendere plea should not give rise to issue preclusion. But on his premise that opportunity to litigate is the equivalent of an admission, why not? The explanation presumably is that imposing collateral preclusive consequences would undesirably create extrinsic incentives to litigate in a criminal proceeding. But if this explanation applies to a criminal nolo plea, why doesn't it apply to failure

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53 343 F. Supp. 225, 228 (E.D. Wis. 1972).
54 599 F.2d 274, 281 (8th Cir. 1979).
56 Compare *Restatement (Second) of Judgments* § 56.1, Illustrations 9, 10 [§ 22], with id. § 68, Comment e (Tent. Draft No. 1, 1973) [§ 27].
to dispute allegations in a civil proceeding? Because symmetry of outcomes is more important in civil cases than criminal? Because the incentives to litigate are less (or more) in civil cases? One draws a blank.

Analysis of the _nolo contendere_ plea in a criminal case thus indicates that mere opportunity to litigate an issue on one occasion is not a sufficient reason for estopping a person from litigating that issue on some subsequent occasion. Otherwise, the plea of _nolo contendere_ would be the equivalent of an express admission—a guilty plea. Moreover, when an issue has been posed in a proceeding, the rendition of a judgment in the proceeding is not necessary in order to estop a party from disputing the issue in subsequent litigation. Imagine this situation: a defendant is charged with arson of his warehouse; he pleads guilty; he dies before judgment is entered; his estate then sues the insurer of the warehouse to recover the fire insurance. Surely the estate should be estopped to deny that the decedent burned down the warehouse. Given the plea of guilty—a solemn admission of the matter in question—the ensuing judgment is superfluous so far as estoppel is concerned. A judgment, as such, is not necessary to give rise to an estoppel if the party's admission or failure to deny is so plainly deliberate and unequivocal as to suggest that the subsequent disputation is simply frivolous. The same analysis holds in civil controversies. Hence, a judgment is neither sufficient nor necessary to generate an estoppel with regard to a matter that was in issue but not actually litigated.

A good case can be made for saying that if a matter is distinctly put in issue and formally admitted, the party making the admission should be bound by it in subsequent litigation. This was the old formulation of the rule of "judicial estoppel," as it was then called: "The former verdict is conclusive only as to facts directly and distinctly put in issue...." But how can a matter be "directly and distinctly put in issue"? Obviously, by actual litigation. Another way is through pleadings. In a pleading system where matters are "distinctly put in issue," it makes sense to say that if a proposition is clearly asserted, and if a party is called upon solemnly to admit or deny the proposition, and if the stakes are high enough to assure that the party is serious in dealing with the issue, and if the party then admits or fails to deny the proposition, then he ought to be estopped from controverting it on

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some other occasion, particularly if that other occasion involves essentially the same transaction. The clearest case for such an estoppel is where a defendant pleads guilty to a substantial criminal charge and then seeks in civil litigation concerning the same transaction to assert that he did not commit the criminal act. Particularly galling is the situation where a criminal convicted on his own guilty plea seeks as plaintiff in a subsequent civil action to claim redress based on a repudiation of the confession. The effrontery or, as some might say it, chutzpah, is too much to take. There certainly should be an estoppel in such a case.\(^5\)

The same principle could apply when an issue is put forward and admitted "distinctly"—that is, clearly and solemnly—in a civil case. It is therefore appropriate to impose an estoppel based on a formal admission in a civil case, and the law of evidence does so. A judicial admission is considered in subsequent litigations as prima facie evidence that the admitted matter is true.\(^5\)

The relation between judicial admissions and subsequent estoppel merits closer examination. In a procedural system that aims to put things "distinctly in issue" in the pre-trial stage, judicial admissions are elicited as a matter of course. This was the effect of the system of common law pleading, the Hillary Rules, and the classical form of code pleading. Admissions were an important by-product of a system of pleading designed to put things "distinctly in issue" as a preface to conducting a trial. The process of obtaining admissions in this way was so familiar that they were called "judicial admissions," treated as part of the law of judgments, and mentioned in books dealing with judgments. In a procedural system that focuses on pre-trial formulation of issues, it is appropriate to give estoppel effect to judicial admissions. If a party is confronted by a distinct allegation, is required by the procedural rules to admit or deny such assertions, has adequate incentive to litigate, and does not deny it, he should be estopped from later controverting the allegation. That apparently was the rule under the regime of code pleading.\(^6\)

But today we work under the Federal Rules of Civil Procedure and analogous systems. The federal rules reject issue formulation as the basis of adjudicative procedure. Pleadings under

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\(^{58}\) See Restatement (Second) of Judgments § 133, Reporter's Note at 69 (Tent. Draft No. 7, 1980) [§ 85].


\(^{60}\) See A. Freeman, supra note 57, at 274.
the federal rules merely give notice in broad terms that some sort of legal controversy is afoot. The federal rules' mechanism for identifying issues is not pleading, but interrogation and proof through discovery and summary judgment or trial. The technique for specifying the issues is direct immersion in evidence—actual litigation—and not issue formulation. Professor Vestal, for all his aspiration to modernity, is thus writing for the wrong century. What he sees as an imminent form of preclusion in modern procedure is a fading vestige of code pleading.

This is another instance where change in procedural rules requires modification of res judicata doctrine. Under modern civil procedure, a party is not required to put matters "distinctly in issue" before proof is formally marshalled and weighed. Moreover, in modern civil procedure a party has practically unlimited freedom, or "opportunity," to assert claims and issues. Even in a simple civil action, a plaintiff can open up any legal controversy between the parties within the subject matter jurisdiction of the court—law or equity, tort or contract, common law or statute, state or federal. In a strict sense, a plaintiff has an "opportunity" to raise every issue that could possibly be tendered in any claim the pleading and jurisdiction rules allow him to raise, regardless of the logical or evidentiary connections among them. A defendant has comparable latitude. A defendant has "opportunity" to raise every issue that would be involved in any defense, avoidance, or counterclaim that the procedural rules allow him to assert. Modern pleading allows a defendant to assert as a defense anything relevant to plaintiff's claim, and to assert as a counterclaim everything he may have against plaintiff, regardless of relevancy to plaintiff's claim.

This is the measure of "opportunity to litigate" under modern civil procedure. Does issue preclusion sweep this broad, so that "opportunity to litigate" an issue becomes the equivalent of necessity to litigate? No, of course it does not. Then how can boundaries be constructed on the scope of issue preclusion?

The Restatement Second specifies two different modes of issue preclusion. The first is the rule of issue preclusion or collateral estoppel: issues actually litigated may not be relitigated except under unusual circumstances. Everyone agrees to this basic...
idea, except the declining band who hold to the "mutuality" rule. The second mode of issue preclusion is the rule of claim preclusion encompassing "merger" and "bar." The merger rule is that a winning plaintiff may not, with respect to a claim previously litigated, assert new issues in hope of expanding the size or scope of his recovery. The critical variable in this formulation is the term "claim." In effect, under the rule of claim preclusion there is preclusion as to every issue that is within the plaintiff's original "claim," unless that issue is also within a separate and distinct claim. In the latter event, plaintiff may litigate the issue in his second action if he did not actually litigate it in the original action.

The rule of bar imposes similar preclusion on the defendant. A losing defendant may not, with respect to a claim previously litigated, assert new issues in hope of overcoming or reducing the recovery awarded in the prior judgment. There are two critical variables in this formulation. One is the "claim" of the plaintiff. The scope of the plaintiff's "claim" obviously defines the scope of the defendant's potential defenses; otherwise, any "claim" by a plaintiff would require a defendant to assert defenses to every conceivable claim the plaintiff could have. The other critical variable in defining the scope of claim preclusion imposed on a defendant is the boundary between "defense" and "counterclaim." The boundary here is, or at least should be, complementary to the definition of plaintiff's "claim." Every issue that would defeat the "claim" is a "defense" within the rule of bar. Such an issue therefore may not be subsequently asserted by the defendant un-

65 The "mutuality of estoppel" doctrine prevents a nonparty to a prior action from invoking issue preclusion against an opponent who previously litigated an issue against another party and lost. Because the party who previously litigated the issue would not be allowed to use issue preclusion against an opponent who was not a party to the first action, there is no "mutuality of estoppel" and neither should be allowed to invoke preclusion. See F. JAMES & G. HAZARD, CIVIL PROCEDURE § 11.24 at 577 (2d ed. 1977).


67 Analytically, the boundary between claim-and-defense, on one hand, and counterclaim, on the other, is clean. Operationally, however, the boundary is quite messy, because of the protean possibilities of "claim." But the Restatement Second takes account of the ambiguities and says that, at the margin, the party should be deemed to have litigated only those issues he should have litigated in the prior action, considering the course of that action. See RESTATEMENT (SECOND) OF JUDGMENTS § 56.1, Illustration 6 (Tent. Draft No. 1, 1973) § 22. In any case, the compulsory counterclaim rule that prevails in most jurisdictions, see, e.g., FED. R. CIV. P. 13(a), ordinarily makes this problem moot. See RESTATEMENT (SECOND) OF JUDGMENTS § 56.1, Illustration 9 (Tent. Draft No. 1, 1973) § 22.
less that issue also is within a separate and distinct counterclaim "claim." In the latter event, a defendant may litigate the issue in his second action if he did not actually litigate it in the original action. This is the point of Comment b to section 56.1 [section 22] of the Restatement Second, which states:

In the absence of a statute or rule of court otherwise providing, the defendant's failure to allege certain facts either as a defense or as a counterclaim does not normally preclude him from relying on those facts in an action subsequently brought by him against the plaintiff. . . . The failure to interpose a defense to the plaintiff's claim precludes the defendant from thereafter asserting the defense as a basis for attacking the judgment (see § 47 [§ 18]). But the defendant's claim against the plaintiff is not normally merged in the judgment given in that action, and issue preclusion does not apply to issues not actually litigated (see § 68 [§ 27]). The defendant, in short, is entitled to his day in court on his own claim.68

On the subject of issue preclusion, I believe Professor Vestal would reach most of the same outcomes as the Restatement Second when it gets down to cases. But when it comes to doctrine, he insists on his formulation, apparently untroubled by its literal meaning. Formulations make a difference. It may be true that general propositions do not decide concrete cases in the sense that major premises are not sufficient to generate outcomes. But a major premise sets in motion the train of analysis; if misdirected, it may foreclose an appropriate outcome. I submit that Professor Vestal's formulation—that opportunity to litigate an issue ordinarily results in preclusion as to the issue—is unsound. As a general proposition, it would be wrong to convert option to litigate into compulsion to litigate, and serious mischief results from such an approach. This is well illustrated in Palma v. Powers,69 a decision upon which Professor Vestal places much reliance, where an intelligent judge adopted Professor Vestal's analysis in deciding the very problem under consideration.

The facts of the case were as follows: Plaintiffs in the present action were Fred Palma and Frank and Ralph Mamolella. The Mamolella brothers were partners in, and Palma was an employee of, an establishment that the police thought was a bookie joint.

68 Restatement (Second) of Judgments § 56.1, Comment b (Tent. Draft No. 1, 1973) [§ 22].
The police obtained a search warrant and conducted a raid on the establishment, in the course of which they seized and removed the telephones. Palma and Frank Mamolella were charged with felony gambling. In due course the charges were reduced to the misdemeanor of wagering. Frank Mamolella was convicted and fined $50. Palma was acquitted. Meanwhile, on the afternoon of the raid the police called Illinois Telephone Company, described the warrant, raid, and seizure of the telephones, and asked that telephone service at the establishment be discontinued. The Company complied, relying on a company regulation filed with the Illinois Commerce Commission which provided:

> The service is furnished subject to the condition that it shall not be used for the purpose of making or accepting bets.... Upon complaint to the Commission by any ... subscriber who is affected by the ... discontinuance of service in accordance with this rule, such service shall be ... restored if the Commission shall determine that the service has not been used ... in violation of this rule.\(^7\)

The Mamolella brothers demanded restoration of service. However, they did not press their demand until after the criminal prosecution had terminated and did not file a complaint before the Commission. Instead, Palma and the Mamolellas sued the arresting officer and the telephone company under section 1983 of the Civil Rights Act.\(^7\) The essence of the section 1983 claim was that the police and the telephone company had conspired to deprive plaintiffs of their rights under the Constitution, because disconnecting the telephone was an invasion of personal or property rights and the raid constituted an illegal search and seizure. Defendants countered, among other things, that the establishment had in fact been a bookie joint, so that the termination of service was justified and the raid was legal. To prove the fact that wagering was conducted at the place, defendants quite appropriately invoked the prior conviction, which actually and necessarily had adjudicated that issue.\(^7\) As to the legality of the search, defen-

\(^{70}\) Id. at 931.
\(^{72}\) The court properly held that Frank Mamolella was bound by the finding in the criminal adjudication that wagering had occurred at the establishment, 295 F. Supp. at 934. However, it is impossible to see why Palma should have been similarly precluded, because he had been acquitted in the criminal case. Perhaps the court thought that a servant is bound by an adjudication against his master, a proposition that ceased to be
REVISITING THE SECOND RESTATEMENT

Dants argued that this issue could have been raised by a motion to suppress in the criminal proceeding and hence that plaintiffs were foreclosed from litigating the issue in a subsequent civil action.

Judge Will accepted the defendant's invocation of issue preclusion, citing Professor Vestal and saying:

[T]here are a number of well-considered cases which adopt the position that, in certain situations, preclusion can arise even though the issue was not contested in the first suit . . . . If any principle may be gleaned . . . it is that preclusion is appropriate in those situations where there is reason to believe that the failure to litigate the matter in fact was a recognition of the validity of the opposing claim.  

On this premise, the court proceeded to hold that:
(1) Frank Mamolella, who was convicted in the state criminal prosecution, was precluded from asserting that the police search was illegal because he could have raised that issue in the state court by a motion to suppress; and
(2) Palma, who was acquitted in the state criminal prosecution, was precluded from asserting the illegality of the search because he too could have raised that issue in the state court.

We should dispel any impulse to embrace these results based on the assumption that Palma and Mamolella were members of organized crime. This variable can be factored out by supposing, for example, that an apartment was raided, that the arrest was for possession of marijuana, and that Palma and Mamolella were just ordinary citizens. The question then is: should a person having a tort claim against the police for unlawful behavior in an arrest be precluded from showing the behavior was unlawful because he could have advanced that contention as a basis for suppression of evidence following the arrest? And if there is to be issue preclusion, why so?

tenable when servants were recognized as having legal identities separate from their masters. The court also applied issue preclusion against Ralph Mamolella. Justification for this result requires an analysis that is intricate but tenable, although the court did not provide it. While Ralph was not a party to the criminal prosecution, he was in partnership with Frank, who was convicted on a finding that the partnership enterprise involved illegal wagering. Because Frank is bound by that finding in his subsequent civil action and because the original criminal prosecution involved the partnership enterprise, it would be proper to hold Ralph precluded as to the issue by virtue of his partnership relationship with Frank. See Restatement (Second) of Judgments § 109 (Tent. Draft No. 4, 1977) [§ 60]; id. § 133(1)(b) (Tent. Draft No. 7, 1980) [§ 85].

60 Id. at 940-42.
Professor Vestal says there should be an estoppel because, where there is an incentive to deny, failure to deny constitutes an admission. This turns the notion of incentive to litigate on its head. The "incentive to litigate" formula, as used in most of the cases and in the *Restatement Second*, allows a party who did litigate an issue to relitigate it if the party can show that the original litigation was a side show rather than a struggle to the finish. The *Restatement Second* allows a party to rebut the inference naturally drawn from the fact that the issue was actually litigated—the inference that the party had treated the issue with entire seriousness in the first litigation. In Professor Vestal's system, however, "incentive to litigate" allows a court to conjecture that the party probably had reason to litigate the issue in the first action, and to conjecture further that the failure to litigate is an admission of a proposition not litigated. Professor Vestal's "opportunity" theory allows the court to infer that the issue was important to a party whose behavior indicates he thought the issue was unimportant, and, having done that, to convict the party by his silence. Does that make sense? In *Palma v. Powers*, after all, Mamolella was only fined $50. And Palma was acquitted. Why should a forfeiture of claim result from omitting to make a protest that events have proved to be superfluous?

I hope this analysis makes clear why the *Restatement Second* did not deal with issue preclusion in the way that Professor Vestal has urged. It also makes a point about the matter raised by Professor Martin. Professor Martin says that, in regard to claim preclusion, we should have distinguished between matters a party should have litigated and matters that he actually litigated.
However, the difficult problems in the law of res judicata do not involve the distinction between "should have" and "actually" litigated, but rather the connection between these concepts. The problem is that of working out the relationship between what was actually done in a litigation, what might have been done, and what a court will deem to have been done. This problem is very clear in the matter of claim preclusion. The law says that the litigation of a claim normally carries with it the opportunity to argue everything that could be urged for and against the claim. Therefore, a lawsuit ordinarily will be deemed to have considered all such things in relation to that claim. The critical variable is thus the scope of the term "claim."

The same problem presents itself in the matter of issue preclusion, although the relationship between "should have" and "actually" is not quite so obvious. The basic idea is that a party should not be able to relitigate an issue that he actually litigated. The critical variable is the scope of the term "issue." "Issue" might mean only a proposition necessarily implied from evidence actually offered. If this were the meaning assigned to "issue actually litigated," the scope of issue preclusion in subsequent litigation relating to the same general subject matter would be very narrow.\(^6\) It is clear that "issue" means something more than this. As stated in Comment c to section 68 [section 27] of the Restatement Second:

> When there is a lack of total identity between the particular matter presented in the second action and that presented in the first, there are several factors that should be considered in deciding whether for purposes of the rule of [issue preclusion] the "issue" in the two proceedings is the same, for example: Is

\(^6\) Indeed, logically no single proposition is necessarily implied from an item of evidence or chain of evidence. An item or chain of evidence could be a link to a nearly infinite array of propositions. Therefore, when we say that an issue has been "actually litigated," we do so by drawing an inference not from the evidence alone but from the conclusions that a tribunal properly may draw depend on what is in issue. Thus, examination of the evidence alone takes us on a circle. In the absence of pleadings, a pretrial order, or other specifications, the circle can be broken only by looking at the proceeding as a whole, particularly the parties' opening and closing arguments.
there a substantial overlap between the evidence or argument...? Does the new [action] involve application of the same rule of law...? Could pretrial preparation and discovery relating to... the first action reasonably be expected to have embraced the matter sought to be presented in the second? 81

Thus, the law of preclusion, whether issue preclusion or claim preclusion, combines an assessment of what was actually done with an assessment of what reasonably should have been done. For this reason, I believe Professor Martin offers incorrect reasons for dropping the terms "merger" and "bar." 82 However, I agree that the terms should have been dropped. They serve merely as vehicles for inquiring how far a winner or loser should be bound, and do not do much to carry that inquiry forward.

IV

SUBJECT MATTER JURISDICTION

Professor Moore's thesis, as I understand it, is that the issue of subject matter jurisdiction should be deemed resolved by a judgment, under the principle of res judicata, except in certain limited circumstances. 83 I agree with that proposition and so does the Restatement (Second) of Judgments. What, then, is its difference with Professor Moore?

One difference is in strategy and rhetoric in reforming the law. In substance all law reform is both radical and conservative. It is radical because it seeks purposively to change social institutions. It is conservative in that it uses the means of law and legal process to do so. In style and strategy, law reform enterprises can be conservative or radical. A conservative strategy seeks to accomplish as much in the way of needed change as the forces favoring the status quo will permit, while providing as much assurance about continuity as plausibility requires. A radical reform strategy seeks to advance the strongest case for change that plausibly can be maintained, while settling for as much actual change as the forces favoring the status quo will permit. A conservative strategy

81 Restatement (Second) of Judgments § 68, Comment c (Tent. Draft No. 1, 1973) [§ 27].
82 See Martin, supra note 79, at 407.
understates objectives, sometimes underachieves compared to what objectively is possible, and leaves the radicals muttering about sellout and lost opportunity. A radical strategy overstates objectives, sometimes overachieves compared to what objectively is possible, and leaves the conservatives muttering about shortfall and needless turmoil.

A Restatement should be strongly reformist,⁴ for otherwise it is difficult to see why such an endeavor would be worth the trouble. With regard to reform in the law of judgments concerning the problem of subject matter jurisdiction, the aim should be, as Professor Moore says, a rule that the issue of subject matter jurisdiction is ordinarily deemed resolved by a judgment. The questions, then, are whether this substantive objective was realized in the Restatement Second, particularly with regard to the scope of the exceptions subsumed under the term "ordinarily," and whether appropriate rhetoric was employed in doing so.

One way to formulate the basic rule that subject matter jurisdiction questions ordinarily are precluded is to say, "Subject matter jurisdiction questions are precluded by a judgment, except as follows..." and then construct the array of exceptions. Another is to say, "Subject matter jurisdiction questions remain open despite a judgment in the following circumstances..." and then construct the array of circumstances. Logically and positively the two approaches are equivalent, their content depending on the exceptions or qualifying circumstances, as the case may be. However, the first approach entails a sharp rhetorical departure from older law, while the second does not.

In the Restatement Second we took the second approach. To implement it, we adopted two distinctions that I think are critical, but one of which Professor Moore seems to think is unimportant.⁵ One is between default judgments and judgments in contested actions.⁶ The other is between that component of jurisdiction having to do with territorial jurisdiction among political sovereignties and that component having to do with the allocation of authority to the rendering court by the political

⁴ See Wechsler, Restatements and Legal Change: Problems of Policy in the Restatement Work of the American Law Institute, 13 St. Louis L. Rev. 185, 189 (1968).
⁵ See Moore, supra note 83, at 561. Professor Moore's article deals only with "subject matter jurisdiction" and does not discuss "territorial jurisdiction."
sovereignty that created it. The first component we called "territorial jurisdiction," the second we called "subject matter jurisdiction."\(^7\) Using these two distinctions, four different situations are involved:

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<tr>
<th>Territorial Jurisdiction</th>
<th>Contested Action</th>
<th>Default Judgment</th>
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<tr>
<td>Subject matter Jurisdiction</td>
<td>A</td>
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Situation A is where a party appears at the proceeding, either to assert only that the court lacks territorial jurisdiction, or to defend on other grounds as well. In this situation, under the *Restatement* (Second) of Judgments, the judgment is always preclusive.\(^{88}\) The law is quite clear on this point and Professor Moore does not disagree.

Situation B is where a party does not appear at the proceeding even though the issue of territorial jurisdiction is arguable. When this happens, default judgment may be entered. If nothing happens thereafter, the question of jurisdiction is moot; plaintiff has a judgment but defendant is not practically affected by it. However, if plaintiff seeks to enforce the judgment in the forum state or in another state, defendant may seek to resist the enforcement on the ground that the judgment was "void." This resistance may take the form of a motion in the original action to reopen the judgment, or a motion to quash the enforcement proceeding.\(^9\) In either case, relief may be denied if the applicant unduly delayed in seeking relief,\(^9\) if other equitable considera-

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\(^7\) See *Restatement* *(Second)* of Judgments, Introductory Note to ch. I at 8-13 (Tent. Draft No. 5, 1978).

\(^8\) See id. § 13 (Tent. Draft No. 5, 1978) [§ 10]. This rule is subject to exceptions regarding fraud, duress, or the like. See id. §§ 118-120 (Tent. Draft No. 6, 1979) [§§ 70-72].

\(^9\) The prevailing view, adopted in the *Restatement Second*, is that ordinarily the appropriate mode of relief for a local judgment is by motion in the original action. See id. § 126 (Tent. Draft No. 6, 1979) [§ 78].

\(^9\) See id. § 126, Comment c (Tent. Draft No. 6, 1979) [§ 78]; id. § 127, Comment c (Tent. Draft No. 6, 1979) [§ 79].
tions warrant denial of relief,\textsuperscript{91} or if substantial interests of reliance would be impaired by granting relief.\textsuperscript{92} On the other hand, if relief is timely sought and no interests of reliance have intervened, the defaulting party may be granted relief.

When a court grants relief in the instance last mentioned, in effect it allows the defaulting defendant an extension of time—from the date of the judgment to the date of the enforcement action—in which to object to territorial jurisdiction. The cases plainly hold that such an extension should be granted unless there are interfering equities.

The judges know that most of these default cases result from ignorance on the part of the defaulting party, or blundering or dilatoriness on the part of counsel. If the question of territorial jurisdiction is reasonably arguable, an adequately represented party will never allow judgment to be entered by default.\textsuperscript{93} On the other hand, if the question of territorial jurisdiction is open and shut in favor of the defaulting party, why shouldn't the judgment be regarded as void?

Consider a case to test the latter: Defendant lives in Alaska, and has done so all her life. She is involved in an automobile accident in Alaska with a car driven by a citizen of Florida. The Florida citizen returns home and commences an action for his injuries in a Florida court. Is the Alaska resident required to appear in Florida to object to jurisdiction, or can she wait until the person from Florida tries to enforce the judgment in Alaska? If the answer is that the Alaskan must appear in Florida, then a defendant must appear in an unreasonable forum to argue that the forum is unreasonable. This would undercut the purpose of having territorial limits on state court jurisdiction in the first place. In any event, under the law as it now stands, and as it has stood for

\textsuperscript{91} See id. § 122 (Tent. Draft No. 6, 1979) [§ 74].

\textsuperscript{92} See id. § 114 (Tent. Draft No. 6, 1979) [§ 66].

\textsuperscript{93} Given the choice between defaulting and making a special appearance to contest territorial jurisdiction, would any sane lawyer choose the former if the jurisdictional question was reasonably arguable? If the party defaults and tries to resist enforcement of the judgment by contesting territorial jurisdiction, he foregoes opportunity to contest the merits. There are some situations, particularly in international litigation, where it may be prudent to employ the strategy of suffering a default and then resisting enforcement of the judgment. This strategy may make sense when the defendant believes the original forum will be hostile in its approach to the merits or to the jurisdictional question. A defendant might also default when the judgment will have to be enforced in a jurisdiction that defendant believes will have a sympathetic attitude toward his position on the jurisdictional question. Relative cost of litigation in the two forums may also be a consideration. See, e.g., Conn v. Whitmore, 9 Utah 2d 250, 342 P.2d 871 (1959).
two hundred years, a defendant is not required to appear in order to avail himself of the jurisdictional defense. He can default, await the day when enforcement of the judgment is attempted, and then make a "collateral attack." Hence, in situation B the question of territorial jurisdiction is not necessarily foreclosed by the judgment, nor can I think of a reason why it should be.

We now come to situation C. Here, the action has been contested and the issue is subject matter jurisdiction, in the sense of allocation of authority among various tribunals in a state. As Professor Moore observes, it is now fairly well established that if the question of subject matter jurisdiction is actually litigated, the question is foreclosed in all circumstances except those falling into standard exceptions to the rules of preclusion. The cases that have caused difficulty are those in which the proceeding was contested but the matter of jurisdiction was not raised, i.e., the parties assumed the court had authority to adjudicate the matter. The Restatement Second says that the judgment in this situation is beyond attack unless there are no justifiable interests of reliance that must be protected, and:

(1) The subject matter of the action was so plainly beyond the court's jurisdiction that its entertaining the action was a manifest abuse of authority; or
(2) Allowing the judgment to stand would substantially infringe the authority of another tribunal or agency of government; or
(3) The judgment was rendered by a court lacking capability to make an adequately informed determination of a question concerning its own jurisdiction and as a matter of procedural fairness the party seeking to avoid the judgment should have opportunity belatedly to attack the court's subject matter jurisdiction.

As I read Professor Moore's formulation, it is in substance identical to this as applied to an action that was contested on the merits.97

94 See Moore, supra note 83, at 548; see, e.g., Durfee v. Duke, 375 U.S. 106 (1963); Restatement (Second) of Judgments § 15, Comment c (Tent. Draft No. 6, 1979) [§ 12].
95 Id. § 15 (Tent. Draft No. 6, 1979) [§ 12].
96 Professor Moore's formulation precludes collateral attack on subject matter jurisdiction where an appearance was made but the issue of jurisdiction was not raised, unless strong extrinsic factors implicating jurisdiction, such as substantial interference with the effective exercise of powers which have been lodged exclusively in another tribunal or agency, are present. Moore, supra note 83, at 561.
This brings us, finally, to Situation D, where the judgment was by default and the court lacked subject matter jurisdiction. Under the Restatement Second formulation, lack of subject matter jurisdiction means lack of authority to decide the "type of controversy involved in the action." Operationally, this is equivalent to sections 15(1) and 15(2) of the Restatement Second, quoted above. There are not many cases where the judgment was by default and subject matter jurisdiction was clearly lacking. The proverbial case involves a justice of the peace who has undertaken to grant a divorce. Professor Moore would require the respondent in such a case to appear before the justice under penalty that otherwise the divorce would be legally valid. I cannot believe any court would hold that.

V

Next on the Agenda

The task for lawyers interested in the law of judgments is now to make the best use possible of the new Restatement Second. Part of that task is to integrate it with other areas of the law, procedural and substantive. Professor Casad has made a nice beginning with his article dealing with the problem of the issue and claim preclusive effects of a judgment outside the state of rendition.

Conclusion

One of the main purposes of the Restatement process is to generate critical thought in important areas of the law. Much of this thought was actually brought to bear in the Institute during the drafting process, and contributed greatly to the quality of the finished product. However, the process does not stop when a final draft is approved by the Institute. On the contrary, it is hoped that approval of the Restatement (Second) of Judgments will encourage further scholarly and professional discourse on the law of judgments.

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99 See id., Reporter's Note to § 15 at 163 (Tent. Draft No. 5, 1979) [§ 12].
This *Symposium* is a welcome beginning to that discourse. It will be an important part of the materials at hand when a new Advisory Committee convenes to begin drafting the *Restatement (Third) of Judgments*. 