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DOWN THE FINAL STRETCH: STATE SOCIETAL SETTLEMENTS' RES JUDICATA REPERCUSSIONS

ÁNGEL R. OQUENDO*

ABSTRACT

Like the chorus in Shakespeare's Henry the Fifth, those who proceed on behalf of society at large should have both the first and last word. They should possess the capacity to undertake this act of representation, whether in or out of court, with forcefulness and finality. Indeed, a genuine representative should not have to run the risk of others thereafter embarking upon the matter anew and standing in for whomever she is representing, as well as casting aside her effort as irrelevant, insufficient, or illegitimate.

Therefore, a societal settlement, particularly when negotiated by the authorities, may have not only contractual but also procedural (or preclusive) implications, which (partly independently of intent) shield the contractors from litigation as well as liability. To that end, it may or may not, depending on the jurisdiction, require the judiciary's endorsement in order to constitute the functional equivalent of a judgment. U.S. and civil-law principles of preclusion bar a subsequent suit insofar as it involves the same real party in interest (namely, the whole citizenry) and assertion (or cause and object) as its amicably averted antecedent counterpart.

Judges and lawmakers in the United States, as well as Latin America,

* George J. and Helen M. England Professor of Law, University of Connecticut; CAPES Visiting Professor from Abroad, Federal and State Universities of Rio de Janeiro; DAAD Visiting Professor, Free University of Berlin. Ph.D., M.A. (Philosophy), A.B. (Economics and Philosophy), Harvard University; J.D., Yale Law School. I would like to thank Emily Byrnes, Humberto Dalla, Chris Hyde, and Claudia Schubert for their invaluable contributions to the development of the ideas outlined in this paper. I have myself undertaken and vouch for the accuracy of the translation of the quoted non-English-language materials.

have invariably conceded these actions an erga omnes effect; in other words, against anyone with standing who might try to reignite the controversy. Settlers in these cases normally neither compromise on the underlying entitlements nor contract on the rights of someone else. In fact, they may and should vindicate these entitlements fully and facilitate the collective conciliation of claims based on collectivity's own rights. The government, for its part, enjoys plenty of legitimacy to play this role and to settle on, as well as prosecute, these entitlements.

In these disputes, the settling or suing actor steps into the shoes of the broader community. The latter, as the interested claimant, may not subsequently take another bite at the apple through a different spokesperson. Otherwise, it would unfairly and inefficiently burden, respectively, its opponents and the adjudicating tribunals in its quest for a windfall. Consequently, the trans-individual settlements and suits at stake should strengthen, rather than weaken, from a punctilious adherence to the requirements of res judicata. They should thereby further legitimate themselves and perhaps even solidify the political and social support from which they benefit.

O, pardon! since a crooked figure may
Attest in little place a million;
And let us, ciphers to this great accompt,
On your imaginary forces work.

WILLIAM SHAKESPEARE,
THE LIFE OF KING HENRY THE FIFTH,
act 1, prologue

INTRODUCTION

Like the chorus in Shakespeare's *Henry the Fifth*,[1] those who proceed on behalf of society at large should have both the first and last word. They should possess the capacity to undertake this act of representation, whether in or out of court, with forcefulness and finality. Indeed, a genuine representative should not have to run the risk of others thereafter embarking upon the matter anew and standing in for whomever she is representing, as well as casting aside her effort as irrelevant, insufficient, or illegitimate.

This Article will imagine the state as such a nominal claimant and specifically study the preclusive ramifications, in the United States and throughout the Western Hemisphere, of a judicially endorsed governmental conciliation of a societal claim. It will conclude that such an agreement, like the settled or averted action, precludes other, prospective plaintiffs from litigating the cause. Coincidentally, some civil-law jurisdictions do not require the judiciary to sign off to produce this outcome.

The overall conclusion at the heart of the preceding paragraph rests on the notion that the settler or suitor in these disputes steps into the shoes of the broader community. The latter, as the real party in interest, may not subsequently take another bite at the apple through a different spokesperson. Otherwise, it would unfairly and inefficiently burden, respectively, its opponents and the adjudicating tribunals in its quest for a windfall. As a result, such settlements or suits would lose much of their legitimacy and perhaps also their political and social support.

In any event, the conciliatory option plays a key role in the effort to vindicate environmental and other entitlements that pertain to the citizenry as a whole. Specifically, it allows such vindication in an abundant number

1 *See* WILLIAM SHAKESPEARE, THE LIFE OF KING HENRY THE FIFTH, act 1, prologue; *see also id.* act 5, epilogue.

of cases that could not realistically go through a potentially protracted and pricey adjudication. Of course, the law must not merely authorize parties to settle and to secure any necessary judicial endorsement. It must additionally guarantee a full res judicata effect thereupon. After all, alleged violators would have much less of an incentive to conciliate if they could not thereby attain protection against fundamentally identical complaints that other complainants might lodge.

Part I will (A) define the various types of rights at stake and (B) describe a hypothetical scenario to which the analysis will refer from start to finish. Next, Part II will explore the discussed agreements' contractual and procedural implications. Part III will then consider the latter. In particular, it will separately scrutinize how U.S. law and its civil-law counterpart should decide the question of res judicata under their respective standards.

Afterward, Part IV will examine how legal systems in the United States and throughout Latin America tackle the issue in practice. It will show that they recognize, mostly explicitly, an *erga omnes* impact; in other words, against anyone who might try to reignite the controversy. Finally, Parts V and VI will assess, in turn, the theoretical challenges confronting and the justifications underlying (V) an authorized litigant's endeavor to settle these collective claims and (VI) the government's defense of the public's well-being.

Beyond taking stock of the entire disquisition, the Conclusion will submit that, independently of who acts as nominal claimant, such suits and settlements operate more legitimately when they punctiliously stay within the limits set by the principles of preclusion. It will propose that they may thus better survive any generalized attempt to discard them as superfluous or frivolous. At the end of the day, the speaker for the people will have the chance to speak, both figuratively and literally, once and for all.

I. BACKGROUND

A. Nomenclature

This Section will explicate societal rights. It will contrast them with aggregated individual rights, as well as with individual rights. Further elaboration on this conceptual framework will take place in the course of the argumentation in full.

The law, the precedents, and the literature deploy different terms to

refer to these various entitlements.[2] Nonetheless, they largely agree on the underlying issues.[3] This Article relies on a terminology that brings to the fore, as clearly as possible, the difference between the distinct varieties of entitlements under examination. At any rate, it uses the words 'right' and 'entitlement' mostly interchangeably.

Individualized rights are the most basic element in this categorical scheme. They support claims that one person asserts against someone else. For instance, *P* may, under usual circumstances, rightfully insist on indemnification, on the basis of individual entitlements, when she endures personal injury as a consequence of *D*'s negligence.[4]

Two or more parties may sometimes combine their respective individual assertions in a single action, if they can show sufficient legal or factual commonality to warrant the combination.[5] The rights in question do not thereby lose their individualized character. For example, *P1* and *P2* may institute their complaints and vindicate their entitlements together whenever *D* injures both of them at once through her negligent conduct.[6] They should receive compensation commensurate with what they are individually entitled to.

As the number of right-holders increases, the denomination 'aggregated individual rights' becomes appropriate. Still, the numerous entitlements generally remain individual and amenable to apportionment. For instance, when a substantial set of stockholders sues the corporate board of directors for encroaching upon shareholder rights, each investor usually has a claim that corresponds to the quantity of shares that she owns.[7]

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2 *See infra* Part IV ("Different procedural mechanisms exist for the vindication of these group entitlements [throughout the Americas].").

3 *See infra* Part IV ("[The various] Western Hemisphere . . . jurisdictions that allow societal-rights litigation [exhibit a] convergence in approach.").

4 *See, e.g.*, Simmons v. Himmelreich, 136 S.Ct. 1843, 1846 n.2 (2016) (quoting 28 U.S.C. § 1346(b)) ("The precise claims at issue are 'claims against the United States, for money damages, . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.'").

5 *See, e.g.*, FED. R. CIV. P. 20(a)(1) ("Persons may join in one action as plaintiffs if: (A) they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and (B) any question of law or fact common to all plaintiffs will arise in the action.").

6 *See, e.g.*, United States v. Olson, 546 U.S. 43, 45 (2005) ("In this case, two injured mine workers (and a spouse) have sued the United States claiming that the negligence of federal mine inspectors helped bring about a serious accident at an Arizona mine.").

7 *See, e.g.*, Matrixx Initiatives, Inc. v. Siracusano, 563 U.S. 27, 30 (2011) ("Respondents, plaintiffs in a securities fraud class action, allege that petitioners, Matrixx Initiatives, Inc., and three of its executives (collectively Matrixx), failed to disclose reports of a possible link between its leading

These individually held entitlements, which allow division, stand out in sharp relief against societal rights, which are basically indivisible and concern society as a unit, or a sizeable community. This ampler category includes generalized entitlements that have attained national or international recognition, such as rights to ecological well-being, to the safeguard of public health or cultural heritage, to self-determination, or to economic development.[8] These particular entitlements have developed more recently than individual rights.[9] Furthermore, they often operate as positive rights, which compel the government (or private parties) positively to engage in, rather than negatively to refrain from, certain actions.[10]

Rights that belong indivisibly to several persons have, most likely, existed in all legal systems and at all times. When two individuals own a house, for example, they normally possess a relatively undividable right with respect to it. Likewise, entitlements that pertain to society at large have had an extremely extended history. The Roman *actio popularis*, for instance, enabled ordinary citizens to uphold the entitlements of the entire citizenry.[11] The novelty of the contemporary action of this sort consists in its general, as opposed to sporadic, availability, in its widespread deployment, and in its focus on modern concerns such as the environment.[12] The U.S. citizen suit and the civil-law action on so-called "diffuse" interests provide cases in point.[13]

For purposes of illustration, one may think of a privately-run prison

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product, a cold remedy, and loss of smell, rendering statements made by Matrixx misleading.").

8 *See, e.g.*, African (Banjul) Charter on Human and Peoples' Rights art. 16, *adopted on* June 27, 1981, O.A.U. Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 ("Right to Health"); *id.* art. 20 ("Right to Self-Determination"); *id.* art. 22 ("Right to Economic, Social and Cultural Development"); *id.* art. 24 ("Right to a General Satisfactory Environment").

9 *See, e.g.*, ÁNGEL R. OQUENDO, LATIN AMERICAN LAW 382 (2017) ("Since the attainment of independence in the nineteenth century, constitutions in Latin America have guaranteed negative rights. . . . Latin American nations have been incorporating positive rights into their constitutional charters since the beginning of the twentieth century.").

10 *See, e.g.*, African (Banjul) Charter on Human and People's Rights, *supra* note 8, art. 16(2) ("State Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick."); *id.* art. 20(3) ("All peoples shall have the right to the assistance of the State Parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural."); *id.* art. 22(2) ("States shall have the duty, individually or collectively, to ensure the exercise of the right to development.").

11 *See generally* DIG. 47.23.0-8 ("De popularibus actionibus").

12 *See infra* Part VI ("[M]any jurisdictions in the Western Hemisphere have been gravitating toward authorizing . . . not . . . narrowly tailored private-law actions but rather . . . broadly based public-law suits.").

13 *See infra* Sections IV.B.2 and IV.D.1.

that neglects security regulations and thus compromises the safety of the immediate vicinity. The neighbors who, as a result, see their home values drop might join their individualized claims against the institution and demand satisfaction for the reduction in the price of their homes. In addition to this joinder of individual assertions, the surrounding neighborhood might seek to enforce its right to a safe residential space and request a judicial order commanding incarceration officials to abide by the relevant rules.

In societal litigation, the entitlement at stake transcends any personal entitlement that the neighboring residents might enjoy. Indeed, it cannot be apportioned (or divided) among them in a straightforward fashion. An injunction issued against the responsible authorities, for the protection of this right, benefits the group but no person in particular.

In fact, the violation would occur even if none of the properties had depreciated. After all, the population, as a totality, has suffered a separate harm—beyond the financial loss that homeowners have individually borne—due to the overall diminution in quality of life. The individual entitlements relate to but also distinctly differ from their collective counterpart.

While both types of rights can be vindicated "collectively," there are two elemental dissimilarities between aggregated-individual and societal entitlements. First, the former are readily divisible, whereas the latter are not. Second, the two kinds of rights diverge in their range of application: typically, grouped individual entitlements concern a circumscribed, though potentially vast, number of persons, while societal entitlements pertain to the polity in its entirety.

In light of their divisibility, such aggregable individual rights permit individualized or collectivized enforcement; either by the interested parties themselves or through a representative, respectively. In contradistinction, societal entitlements necessitate joint vindication by means of representation. The members of the broader society could not enforce their "part" because the right would withstand no easy partition. The person representing them must vindicate the entitlement in the name of the collectivity, which constitutes the real party in interest.

The state performs a primordial part in the enforcement of these meta-individual entitlements.[14] It accordingly upholds rights that stand in opposition to its own contractual, proprietary, or pecuniary rights.[15] For example, the authorities may stake, on the one hand, a "public" claim

14 *See generally infra* Part VI.
15 *See infra* Part VI.

against a food-processing company for delivering unhealthy products to the population and, on the other hand, a "private" assertion for damages against a transportation business when one of its vehicles negligently crashes into a governmental building. In the first case, the government enforces entitlements that belong to the populace as a whole. In the second, it vindicates entitlements that it holds in its own right as a legal entity.

Consequently, the state predominates in this enforcement effort. Nevertheless, scores of jurisdictions in the Western Hemisphere have started empowering individuals and organizations to take on a comparable representative role.[16] In the United States, people have been filing class, as well as *qui tam*, actions for very long and citizen suits since somewhat more lately.[17] In Continental Europe and Latin America, the expression "diffuse rights" has emerged along with an equivalent empowerment to distinguish such entitlements from others that a person may enforce, namely, personal rights.[18]

In many countries, either the legislative or the judicial branch has defined the res judicata repercussions of the prosecution of an action by one representative on similar suits that others might subsequently lodge.[19] It has invariably determined or implied that a final decision on the merits in one case precludes other would-be representatives from initiating a new complaint.[20] This consensus undoubtedly rests on the idea that the initial judgment binds the citizenry itself, regardless of who may be acting on its behalf.[21]

Moreover, a number of legal regimes establish that a settlement, whether on collective or individual entitlements, itself produces the same preclusive effect as the action that it averted.[22] In contrast, others require parties to submit it to a tribunal for validation before it may forestall any future litigation.[23] In any event, when the government settles a societal suit and secures any necessary court endorsement, it bars subsequent suitors to

16 *See generally infra* Part IV.

17 *See infra* Sections IV.B.1-2; s*ee also infra* Section IV.A ("The U.S. legal order. . . empowers individuals to vindicate [societal rights] through citizen suits or *qui tam* actions [as well as] class actions . . . .").

18 *See infra* Sections IV.C-D; *see also infra* Section IV.A ("Brazil . . . has been considerably active in this area [and] Spanish America . . . has opened up, somewhat more freshly, to the enforcement of so-called diffuse entitlements.").

19 *See generally infra* Part IV.

20 *See generally infra* Part IV.

21 *See infra* Section III.D.

22 *See generally infra* Part II.

23 *See infra* Part II.

the same extent it would by prosecuting the action.[24]

The discussion will draw on the articulated nomenclature in assessing the impact of a qualifying conciliation on a later lawsuit on the same matter. It will conclude, inter alia, that preclusion will ensue so long as both controversies involve, on the claimant's side, the same genuinely interested party—to wit, the community which experienced the encroachment—as well as the same claim. Hence, individuals with standing will face dismissal if they launch an essentially identical complaint afterward. They may then only vindicate their own interconnected individual entitlements, if any.

B. Hypothetical

As already announced, this Article analyzes the res judicata consequences of a settlement on societal rights.[25] To that end, it will now hypothesize a controversy between a particular community and a violator of communal entitlements. The parties end up reaching an agreement that enables them to avoid litigation.

More concretely, the state, speaking in the name of its citizens, finds out that a paint manufacturer has contaminated a public lake nearby. It first threatens to sue, then negotiates, and ultimately settles in a comprehensive manner. Accordingly, both sides sign a contract that releases the wrongdoer from all public claims on the matter in exchange for a cleanup and monetary compensation. They do not address any harm that individuals might have suffered.

Furthermore, the conciliation precludes subsequent suits without any further formalities. In other words, it has benefited from any necessary judicial endorsement. As previously mentioned and explained in due course, some jurisdictions require such a court approval, but others do not.[26]

The next step in this exercise in imagination consists in envisaging someone subsequently lodging a complaint against the manufacturing company in pursuit of identical, additional, or alternative redress for the same injury. She would probably prosecute either a citizen suit in the United States or a diffuse-interests action in the civil-law universe.[27] In

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24 *See infra* Part VI ("In the [upcoming] hypothetical, the state specifically enforces the community's environmental right against any violations attributable to the manufacturer. Upon conciliating and procuring any requisite judicial endorsement, it legally and legitimately binds itself and anyone else trying to uphold the entitlement against the same encroachments.").

25 *See supra* Introduction and Section I.A.

26 *See supra* Section I.B and *infra* Part II.

27 *See infra* Sections IV.B.2, IV.C.1, and IV.D1-3.

any event, the defendant thereafter pleads for dismissal on grounds of preclusion.

The discussion will determine whether the judge should grant the motion. It will conclude that she should. After all, the two disputes coincide not only on their underlying claim but also on the real party in interest at the receiving end, namely, the society as a whole. The fact that they differ in the representative acting on behalf of the collectivity should not affect the analysis.

II. CONTRACTUAL AND PROCEDURAL IMPLICATIONS

The agreement conciliating the environmental conflict hypothetically at hand may have both contractual and procedural repercussions. First, it may contractually commit the polluter to a cleanup and compensation, while providing relief from responsibility in any action seeking remediation for the collective injury inflicted. Second, the instrument may procedurally produce, under the law, the same preclusive impact as the avoided lawsuit would upon a no-longer-appealable judgment.

In the United States, the judiciary generally treats these agreements as regular contracts. Hence, it regards them as obligating each contractor so long as they fulfill all formal and substantive requirements. "A settlement is a contract," according to the U.S. Court of Appeals for the Ninth Circuit, "and its enforceability is governed by familiar principles of contract law."[28]

Furthermore, if the settlers secure judicial approval, the document will lead to res judicata ramifications equivalent to those of a conclusive adjudication on substance. In the articulation of the Third Circuit: "Judicially approved settlement agreements are considered final judgments on the merits for the purposes of claim preclusion."[29] The First Circuit expounded this notion in *Langton v. Hogan*:

> When a dispute of law exists between parties to a case and they agree to a settlement of that dispute and entry of a judgment with prejudice based on that settlement, then the terms of that judgment in relation to that legal issue are subject to res judicata principles. A judgment that is entered with prejudice under the terms of a settlement, whether by stipulated dismissal, a consent judgment, or a confession of judgment, is not subject to collateral attack by a

28 Knudsen v. Comm'r, 793 F.3d 1030, 1035 (9th Cir. 2015).
29 Toscano v. Conn. Gen. Life Ins. Co., 288 F. App'x 36, 38 (3d Cir. 2008) (per curiam).

> party or a person in privity, and it bars a second suit on the same claim or cause of action.[30]

The panel went on to declare: "The resolution of the legal dispute by consent judgment is . . . binding on the parties to the case in which the consent judgment is entered."[31]

Likewise, Latin American and Continental European civil codes invariably recognize the contractual nature of an agreement that settles actual or possible litigation.[32] "A settlement," under Article 2044 of France's Civil Code, "is a contract through which the parties terminate or prevent a controversy by means of reciprocal concessions."[33] Presumably, it obliges one side to renounce the right to litigate in exchange for the opponent's fulfillment of an allegedly neglected obligation.

Interestingly, many civil-law jurisdictions additionally attribute direct adjective consequences to these agreements. Under the original formulation of Article 2052 of the French Civil Code, for example: "Settlements produce the effect, among the parties, of res judicata at a court of last resort."[34] Consequently, they do not necessitate adjudicative ratification to hinder later litigation on an essentially identical claim. Other countries within the tradition adopt an analogous approach.[35]

Still, some nations in Latin America and Continental Europe tackle the question differently, namely along the lines of the United States. For instance, Brazil's 2003 Civil Code omitted its predecessor's provision imparting an immediate preclusive impact to an agreement conciliating a

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30 Langton v. Hogan, 71 F.3d 930, 935 (1st Cir. 1995).

31 *Id.*

32 *See, e.g.*, CÓDIGO CIVIL [CD. CIV.] art. 2446 (Chile) ("La transacción es un contrato en que las partes terminan extrajudicialmente un litigio pendiente, o precaven un litigio eventual."); CD. CIV. art. 2348 (Ecuador) (same); CD. CIV. art. 2000 (Hond.) (same); CD. CIV. art. 2192 (El Sal.) (same); CD. CIV. art. 1709 (P.R.) ("La transacción es un contrato por el cual las partes, dando, prometiendo o reteniendo cada una alguna cosa, evitan la provocación de un pleito o ponen término al que había comenzado."); CD. CIV. art. 1809 (Spain) (same).

33 CODE CIVIL [CD. CIV.] art. 2044 (Fr.) ("La transaction est un contrat par lequel les parties, par des concessions réciproques, terminent une contestation née, ou préviennent une contestation à naître."); *see also* BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE] § 779(1) (Ger.) ("Begriff des Vergleichs. . .") (Ein Vergleich ist ein "Vertrag, durch den der Streit oder die Ungewißheit der Parteien über ein Rechtsverhältnis im Wege gegenseitigen Nachgebens beseitigt wird.").

34 CD. CIV. art. 2052 (Fr.) (1804) ("Les transactions ont, entre les parties, l'autorité de la chose jugée en dernier ressort."). The current rendering sounds somewhat similar: "A settlement constitutes an obstacle to the introduction or pursuit of an action, with the same object, between the parties." CD. CIV. art. 2052 (Fr.) ("La transaction fait obstacle à l'introduction ou à la poursuite entre les parties d'une action en justice ayant le même objet.").

35 *See, e.g.*, CD. CIV. art. 2460 (Chile) ("La transacción produce el efecto de cosa juzgada en última instancia. . . ."); CD. CIV. art. 2014 (Hond.) (same); CD. CIV. art. 2206 (El Sal.) (same); CD. CIV. art. 1715 (P.R.) ("La transacción tiene para las partes la autoridad de la cosa juzgada . . . ."); CD. CIV. art. 1816 (Spain) (same).

legal quarrel.[36] Pursuant to Article 515(III) of the 2015 Brazilian Code of Civil Procedure, such a contract becomes an "executable title" only if endorsed by the bench.[37] Germany approaches the matter comparably.[38]

Irrespective of whether this endorsement prerequisite applies, one must first examine the res judicata implications of (1) a firm ruling in the averted lawsuit in order to ascertain those of (2) a qualifying conciliation. If the former operates *erga omnes*—in other words, against anyone who might embark upon the same representation afterward—so does the latter. Therefore, the inquiry must focus on the ultimate resolution that would have issued from the litigation that the settlers set aside.

Of course, two mano-a-mano signatories to a settlement will normally pursue, respectively, the satisfaction and the protection that a final decision on the merits would have afforded them. In particular, they will typically accede to reparations and releases as wide-ranging as the recovery and prospective immunity they would attain upon judicial intervention. For this reason, the contractual and procedural consequences of the instrument will overlap considerably. Nonetheless, they will also diverge in some significant regards.

For example, the contractual effect rides primarily on the intent of the contractors. It boils down to the result or outcome that they were aiming at. In contrast, the formal impact does not strictly hinge on what the potential plaintiff and defendant who ultimately conciliated their dispute wanted or were striving for. In this respect, the conciliation resembles a tribunal's definitive determination, which may bind the litigants regardless of whether they ever contemplated this possibility.

More fundamentally, the contractual and the procedural consequences differ in kind. On the one hand, the settlers may invoke the agreement in any subsequent suit in order to prevail on the substance. On the other hand, they may rely on it as the functional equivalent of a judgment, plead res judicata, and spare themselves the trial altogether. Thus, the contractual upshot is a shield against liability; its adjective counterpart is a

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36 *Compare* CD. CIV. art. 1030 (Braz.) (1917) ("A transação produz entre as partes o efeito de coisa julgada."), *with* CD. CIV. arts. 840-50 (Braz.).

37 *See, e.g.*, CÓDIGO DE PROCESSO CIVIL [CD. PRO. CIV.] art. 515(III) (Braz.) ("São títulos executivos judiciais . . . a decisão homologatória de autocomposição extrajudicial de qualquer natureza.").

38 *See, e.g.*, ZIVILPROZEßORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE] § 794(1.1) (Ger.) ("Weitere Vollstreckungstitel") ("Die Zwangsvollstreckung findet ferner statt aus Vergleichen, die zwischen den Parteien oder zwischen einer Partei und einem Dritten zur Beilegung des Rechtsstreits seinem ganzen Umfang nach oder in Betreff eines Teiles des Streitgegenstandes vor einem deutschen Gericht . . . .").

safeguard against litigation in the first place.

Depending on whether she benefits from preclusion, someone who has conciliated may either exclusively oppose an attempt to hold her liable on the affair or actually refuse to litigate to begin with. In the first situation, she would have to respond substantively to an adversary challenging the deal reached as, say, unconscionable. In the second, she could maintain her refusal even against an allegation of error on the basis of the prior trier's failure to acknowledge that unconscionability. She could insist on the recognition of his substantive pronouncement insofar as he possessed jurisdiction and legitimacy. She could reject any request to revisit his findings on grounds of mistake however gross. In a legal system that does not require juridical intercession, she could arguably assume a similar stance by pointing out that the parties enjoyed full capacity, information, and autonomy when they amicably solved their disagreement.

In the hypothetical, the governmental conciliation will contractually forbid ensuing private actions solely to the extent that the signatories specifically so intended and contracted. It will procedurally preclude such suits if, partly independently of the contractors' intentions and the contractual text, the litigation that it ended or obviated would have done as much. Moreover, the judge adjudicating the complaint should pass on (1) the contract as part of, and (2) the preclusive effect prior to, the merits. Accordingly, she would ordinarily rule against the complainant further into the proceedings in the former scenario than in the latter.

III. PRECLUSIVE-IMPACT ANALYSIS

A. Overview

As just stressed, qualifying settlements produce the preclusive consequences of a final decision on the merits in the lawsuit that they help prevent.[39] In order to determine whether they preclude a subsequently instituted complaint, one must decide whether the potential action that the parties originally avoided would have itself constituted, upon a conclusive substantive adjudication, res judicata vis-à-vis its subsequent, actual counterparts. The discussion will now assess the latter issue from the perspective of the common- and civil-law traditions, particularly as developed in the United States and Latin America, respectively.

B. Under U.S. Law

39 *See supra* Part II.

In the United States, the judiciary has established that preclusion rides on a first and second litigation coinciding in their litigants and causes of action. The U.S. Court of Appeals for the Fourth Circuit has formulated the basic guidelines:

> For the doctrine of res judicata to be applicable, there must be: (1) a final judgment on the merits in a prior suit; (2) an identity of the cause of action in both the earlier and the later suit; and (3) an identity of parties or their privies in the two suits.[40]

Zeroing on the last two conditions, the Supreme Court has declared: "Under the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action."[41] It has expressly deployed these precepts in the context of collective litigation: "A judgment in favor of the plaintiff class extinguishes their claim, which merges into the judgment granting relief. A judgment in favor of the defendant extinguishes the claim, barring a subsequent action on that claim."[42]

In the hypothetical, the avoided lawsuit and its actually filed counterpart oppose the same defending and complaining parties in interest: to wit, the contaminator and the concerned community. The fact that the authorities undertook the representation of the latter the first time around and a citizen suitor subsequently does not matter. The analysis should concentrate on the represented collectivity rather than on the person playing the representative role.[43] Otherwise, it would allow the assertion of a claim over and over again by a formidable number of different claimants with standing to sue.[44]

Analogously, when a mother stands in at trial for her child, the final decision has a preclusive effect in relation to the latter, not the former. Hence, it precludes the father from similarly serving as spokesperson thereafter. In order to ascertain whether a single suitor brought the two suits, one would have to focus not on the parents but, instead, on the offspring on whose behalf they are speaking.[45] Regarding the hypothetical

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40 Pueschel v. United States, 369 F.3d 345, 354-55 (4th Cir. 2004).

41 Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.5 (1979).

42 Cooper v. Fed. Reserve Bank of Richmond, 467 U.S. 867, 874 (1984).

43 *See generally infra* Section III.D.

44 *See infra* Section III.D.

45 *See, e.g.*, Armstrong v. Armstrong, 544 P.2d 941, 946 (Cal. 1976) ("In the present case, plaintiffs' mother was entrusted with their care and custody and was a proper representative of their interests. [Moreover,] the record before us discloses no . . . circumstances [of subordination of the child's future interests to the present interests and advantages of a parent]. For this reason, we conclude that plaintiffs are bound by the judgment in the divorce action to which their mother was a

supra-individual complaint, the focus should correspondingly fall upon the ultimately interested society, not the nominal complainant.

As to the cause of action, tribunals have associated the concept with the relevant underlying facts or issues. For instance, the Ninth Circuit has stated that a substantively and conclusively adjudicated action impedes subsequent litigation if "[b]oth claims present[] the same parties, the same facts, and the same issues."[46] The Seventh Circuit has, in turn, employed the term "core of operative facts." It has held that "[r]es judicata" is "properly applied" when "two suits involve[] the same parties and core of operative facts."[47]

The Fifth Circuit has engaged in its own reflection on what the convergence in cause of action should amount to:

> Various tests have been advanced to determine whether the substance of two actions is the same for Res judicata purposes: Is the same right infringed by the same wrong? Would a different judgment obtained in the second action impair rights under the first judgment? Would the same evidence sustain both judgments? [T]he principal test for comparing causes of action is whether the primary right and duty or wrong are the same in each action.[48]

This approach would require a determination that the two lawsuits turn on identical rights, duties, and wrongs.

Afterward, this very court pivoted to an alternate take. It branded "the transactional test . . . enunciated by the Restatement [(Second) of Judgments]" the "modern view" and expressed preference for it.[49] From this outlook, the "claim . . . embrace[s] all the remedial rights of the plaintiff against the defendant growing out of the relevant transaction (or series of connected transactions)."[50]

The hypothesized controversies would meet any of these standards. They would both concern a single cause of action: a violation of a

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party."); Covington v. Anthony, 128 P.2d 1012, 1014-15 (Okla. 1942) ("[A previous] action by [the minor plaintiff] Pauline Covington [was prosecuted] by her father as next friend. Throughout the opinion reference is made to the plaintiff, plaintiff's injury, plaintiff's contributory negligence, etc. This alone is sufficient to destroy the force of the argument now made in the present case, [filed by the mother,] that the action was not by plaintiff, and that she was not the party in interest, and discloses that this court considered the matter, and held Pauline Covington to be the real party in interest. . . . The [prior] final judgment of this court was conclusive, not only as to the issues litigated, but likewise as to matters which were germane to the issues which might have been litigated therein.").

46 England v. Berryhill, 696 F. App'x. 288, 289 (9th Cir. 2017) (memorandum opinion).

47 Barr v. Bd. of Trs. of W. Ill. Univ., 796 F.3d 837, 838 (7th Cir. 2015).

48 Kemp v. Birmingham News Co., 608 F.2d 1049, 1052 (5th Cir. 1979).

49 Nilsen v. City of Moss Point, 701 F.2d 556, 560 n.4 (5th Cir. 1983) (citing RESTATEMENT (SECOND) OF JUDGMENTS § 24 cmt. a (AM. LAW INST. 1982)).

50 *Id.* (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 24 cmt. a (AM. LAW INST. 1982)).

communal entitlement calling for redress. The complaint lodged would specifically allege a "core of operative facts," "right," "duty," "wrong," and "series of connected transactions" indistinguishable from those at the basis of the antecedent conciliation. It would likewise rest on the factual allegation that the paint manufacturer contaminated a public lake, on the group entitlement to a clean environment, on the private sector's duty to prevent and clean up any contamination generated, and on the offense of illegally causing ecological damage. Under these circumstances, the original violator could use the judicially endorsed settlement to ward off litigation on the matter, as well as to escape liability.

C. In the Civil-Law World

1. Prelude

The civil-law world takes a more formal approach but ultimately arrives at a similar conclusion. Rather typically, the French Civil Code embraces the principle of preclusion and specifies the criteria of application. Article 1351 reads as follows: "Res judicata applies only to what has been the object of a judgment. The thing demanded must be the same. The demand must rest on the same cause, involve the same parties, and be formulated by them or against them on the same basis."[51] This provision sets forth the triad of requirements through which many jurisdictions in Latin America,[52] as well as Continental Europe,[53] decide the issue of the preclusive implications of one suit for another. It requires, in other words, an identification of (1) parties, (2) object, and (3) cause.

The discussion will now consider the three elements, which are "traditionally referred to as . . . the three identities."[54] It will conclude that the litigation that the hypothetical conciliation averted and the

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51 CD. CIV. art. 1355 (Fr.) ("L'autorité de la chose jugée n'a lieu qu'à l'égard de ce qui a fait l'objet du jugement. Il faut que la chose demandée soit la même; que la demande soit fondée sur la même cause; que la demande soit entre les mêmes parties, et formée par elles et contre elles en la même qualité.").

52 *See, e.g.*, CÓDIGO DE PROCEDIMIENTO CIVIL [CD. PRO. CIV.] art. 177 (Chile) ("La excepción de cosa juzgada puede alegarse . . . siempre que entre la nueva demanda y la anteriormente resuelta haya: 1. Identidad legal de personas; 2. Identidad de la cosa pedida; y 3. Identidad de la causa de pedir."); L. 15982 (1988), CÓDIGO GENERAL DEL PROCESO [CD. GEN. PRO.] art. 219 (Uru.) ("La cosa juzgada, obtenida en proceso contencioso, tendrá efecto en todo proceso entre las mismas partes siempre que versare sobre el mismo objeto y se fundare en la misma causa.").

53 *See, e.g.*, CÓDIGO DE PROCESSO CIVIL [CD. PRO. CIV.] art. 581(1) (Port.) ("Repete-se a causa quando se propõe uma ação idêntica a outra quanto aos sujeitos, ao pedido e à causa de pedir.").

54 EDUARDO J. COUTURE, FUNDAMENTOS DEL DERECHO PROCESAL CIVIL 414 (§ 270) (3d ed. 1958).

subsequently instituted action converge on their parties, object, and cause. Hence, the agreement should preclude the suit from this standpoint.

2. Parties

The two hypothesized controversies must involve the same violator for preclusion to apply in the civil-law realm,[55] as well as in its common-law counterpart.[56] Furthermore, they must likewise intersect with respect to the identity of the ultimate claimant,[57] that is, the community that suffered an encroachment upon its right to live in a wholesome environment. Of course, the litigants may trade places without affecting the assessment.[58] According to Eduardo J. Couture, even when "the plaintiff in the first action acts as defendant in the second and vice versa; the change in position makes no difference for purposes of res judicata."[59]

Once again, the fact that the representatives of the concerned collectivity differ in the two disputes bears no relevance to the issue under examination. "The requirement of identity between the parties," as Couture observes, "obviously refers not to physical but rather to legal identity."[60] Accordingly, one should zero in on the real party in interest, namely, the injured population, not on the individuals or entities that are representing it.

Couture explicates the underlying idea:

> The principle of representation holds . . . in all those cases in which the law confers upon a legal subject procedural standing to proceed at trial in the interest and defense of another. . . . In these cases, the judgment pronounced against the representative binds the represented party . . . .[61]

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55 *Id.* at 423 (§ 276) ("[L]a cosa juzgada alcanza a quienes han sido partes en el juicio . . . .").

56 *See generally supra* Section III.B.

57 *See generally* COUTURE, *supra* note 54, at 423 (§ 276) ("[L]a cosa juzgada alcanza a quienes han sido partes en el juicio . . . .").

58 For example, the hypothetical violator, now as plaintiff rather than as potential defendant, might sue the community, which the state represents, for a declaratory judgment invalidating the settlement. *Cf.* Covington v. Anthony, 128 P.2d 1012, 1015 (Okla. 1942) ("Assume [that] this court, in case No. 29213, had affirmed the judgment [for the plaintiff] and the defendant had refused to satisfy same, but had filed suit to enjoin levying of execution upon his property. . . . Could it be conscientiously urged that any court would have the jurisdiction to enjoin the execution? The answer is obvious.").

59 COUTURE, *supra* note 54, at 423 (§ 276).

60 *Id.* at 424-25 (§ 276) ("El problema de la identidad de partes no se refiere, como se ve, a la identidad física, sino a su identidad jurídica.").

61 *Id.* at 424 (§ 276) ("El principio de representación rige . . . en todos aquellos casos en que la ley confiere a un sujeto de derecho la legitimación procesal para actuar en juicio en interés y defensa de otro. . . . En esos casos, la cosa juzgada dada contra el representante alcanza al representado, sin

The representation under consideration may take place either by virtue of a specific authorization for the case at hand or generally by force of law.[62] As an instance of the first scenario, someone may, through a written instrument, explicitly entrust the assertion of her claim to another person.[63] As examples of the second scenario, a statute may empower parents to vindicate the entitlements of their children,[64] or (particularly pertinently) any citizen those of the citizenry as a whole.[65]

In sum, the identities of the representatives who led the original and the succeeding effort in the hypothetical do not matter for the present inquiry. Preclusion analysis must instead consider the represented party, which was one and the same in each: to wit, the society at large. Inasmuch as the government in the original settlement and the complainants in the subsequent suit were both acting in the name of that interested party against the same polluter, the two controversies meet the identity-of-parties criterion.

3. Object

According to Eduardo J. Couture, "'*object*' normally refers to the tangible or intangible good that the litigation pursues: the corpus, in actions that concern tangible goods; . . . in general, the good sought, in actions that involve rights to intangibles."[66] All in all, it means the "legal good"[67] or benefit that the complainants are demanding.

The object relates to, but does not boil down to,[68] the entitlement that supports the complaint. In an ordinary contractual dispute, for instance, the suitor exercises the right to have the agreement honored. She may pray for the defendant either to perform on the contract or to indemnify as two different, though equivalent, forms of the same bargained-for benefit,

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perjuicio de las acciones de responsabilidad que pudieran surgir entre ambos.").

62 *See, e.g.*, L. 15982 (1988), CD. GEN. PRO. art. 36.1 (Uru.).

63 *See, e.g.*, *id.* arts. 36.1, 40.

64 *See, e.g.*, CD. CIV. art. 162 (Spain) ("Los padres que ostenten la patria potestad tienen la representación legal de sus hijos menores no emancipados.").

65 *See generally infra* Part IV.

66 COUTURE, *supra* note 54, at 432 (§ 281) ("Por objeto se entiende, normalmente, el bien corporal o incorporal que se reclama en juicio: el corpus en las acciones que se refieren a bienes corporales; . . . en general el bien que se ansía, en las acciones que versan sobre derechos incorporales.").

67 *Id.* at 433 (§ 282) ("bien jurídico").

68 *See id.* ("No se trata, en nuestro concepto, del derecho que se reclama. . . . Dentro del concepto de identidad de objeto (*eadem res*) no es necesario hacer interferir el derecho que lo protege, porque cuando se trata de determinar cuál es el bien garantido por la ley, los elementos objetivos de la acción se desdoblan: el objeto por un lado y la causa por otro.").

which basically consists in his making good on his promise. Accordingly, a pair of suits upon a single breach for specific performance and for damages, respectively, would objectively overlap, so to speak.

In societal-rights cases, the object similarly depends on the entitlement at stake. The latter demarcates the former inasmuch as it defines the legal good that the representative may ask for on behalf of the collectivity. Multiple controversies of this sort objectively converge when the complaining member in each requests identical or comparable remedies for the group on the basis of the same right.

The litigation that the hypothetical governmental conciliation averted would have pressed for environmental reparation or compensation in an attempt to uphold the communal right to live in a healthy environment. The subsequent complaint has an indistinguishable object. Furthermore, it invokes, against the same factual background, the same entitlement. In the final analysis, the two claimants were and are trying, respectively, to vindicate a collective right against the inflicted ecological harm.

4. Cause

Eduardo J. Couture provides a definition of the third res-judicata requirement too. He declares that "'*cause*' refers to the immediate foundation of the right that the plaintiff is exercising. It denominates the reason underlying the prior litigation's claim."[69] "The case law," he explains, "has repeatedly embraced the scholarly idea that the *causa petendi* is the reason that supports the claim or the immediate foundation of the right invoked in the litigation."[70]

The Latin expression "*causa petendi*" simply means the cause for petitioning or the justification for the request. The concept encompasses the (1) facts of the case, as well as (2) the legal grounds that back up the claim. In this sense, two suits intersect in their cause when they coincide with respect to this duo of elements.

Thus, *causa petendi* squarely rests, through its second component, on the entitlement at stake in the dispute. It derives not "only from the factual antecedents" but also from "the right itself,"[71] according to José Alfonso

69 *Id.* at 432 (§ 281) ("Por causa se entiende el fundamento inmediato del derecho que se ejerce. Es la razón de la pretensión aducida en el juicio anterior.").

70 *Id.* at 435 (§ 283) ("La jurisprudencia ha acogido reiteradamente la idea de la doctrina de que la *causa petendi* es la razón de la pretensión o sea el fundamento inmediato del derecho deducido en juicio.").

71 JOSÉ ALFONSO TROYA CEVALLOS, ELEMENTOS DE DERECHO PROCESAL 555 (Quito: Centro de Publicaciones Pontificia U. Católica Ecuador) (2d ed. 1978) (on file with author) ("antecedentes de hecho") ("el mismo derecho").

Troya Cevallos. The cause of an action for contractual breach, for instance, hinges factually on the existence of a contract, as well as the occurrence of a violation, and legally on the corresponding entitlement to compel the defendant to repair, or compensate for, the inflicted harm. It sustains the object, namely, the requested reparation or compensation.

The causal element transcends the grounds focused on by the person filing the suit. It additionally comprises any other ones upon which she could or should have relied. Couture expounds this idea: "The foundation of the right adjudicated is not merely that invoked by the complainant. It is that of the right that applies to the matter and must be sought by the judge beyond the parties' allegations."[72] In terms of an equivalent example, the cause might include what the contract explicitly and implicitly entitled the suitor to, even if she concentrated solely on the former. She would ordinarily not be able to relitigate based on the latter after a definitive defeat on the merits the first time around.

As already ascertained, the lawsuit that the governmental settlement hypothetically prevented would have enforced the same group entitlement that the subsequent complaint purports to vindicate: the right to live in an environment free from contamination.[73] Moreover, it would have adduced the same facts, i.e., the ecological damage that took place as a result of the violator's activities. Consequently, both controversies converge in their *causa petendi*.

Interestingly, many scholars analyze the object and cause together. In the words of Couture, "it is always very difficult to speak about identity of object without considering the *causa petendi* that justified the demand in the previous adjudication."[74] "Therefore," he adds, "the principle of the *identity of objec*t can hardly be decoupled from that of *identity of cause*."[75] In combining the two, which in combination capture what the claimant is claiming, the civil-law tradition approximates its common-law counterpart, which tends to zero in solely on the claim, in addition to the parties.[76]

5. Coda

The application of these ordinary res judicata criteria, which many

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72 COUTURE, *supra* note 54, at 435 (§ 283); *see also id.* ("Por eso se admite sistemáticamente, que una variante en el planteamiento jurídico no excluye la excepción de cosa juzgada.").

73 *Id.*

74 COUTURE, *supra* note 54, at 434 (§ 282).

75 *Id.*

76 *See, e.g., supra* Section III.B.

civil-law jurisdictions share,[77] would establish that the action that the authorities hypothetically averted by conciliating precludes the complaint. The former and the latter coincide in their parties, object, and cause. In legal systems that do not require judicial endorsement, the conciliation itself would have the same preclusive impact as a judgment subject to no further appeal or collateral attack. In those that do impose such a requirement, it would depend on the court's blessing to become the functional equivalent of a final decision on the merits.

D. The Idea of Res Judicata

Throughout the Americas, the adjudication of a societal action binds the concerned community and thwarts any other person from herself proceeding on the controversy afterward.[78] In other words, it leads to res judicata *erga omnes*, i.e., with respect to all or anyone who might subsequently undertake the representation. Part IV will corroborate these contentions.[79]

In fact, to maintain that the ultimate resolution under these circumstances *does not* bring about such preclusion would amount to saying that, for all practical purposes, it does not have a preclusive effect at all. Upon the vindication of the collective entitlement by one representative, for instance, millions of other citizens could engage in the same representation and relitigate the cause all over again. Each bite at the apple would scarcely reduce the opportunities to bite anew: exactly by one out of the total number of the population. In the end, enforcement would unfold in a dysfunctional and iniquitous fashion.

This approach would thoroughly undermine the notion of res judicata precisely because it would defeat two crucial associated aspirations: efficiency and due process. Duly contextualized, the former necessitates that courts have the capacity to decide a case once and for all and to reject, ab initio, any iteration thereof. Correlatively, the latter calls on the judiciary to shield defendants from having to confront and perhaps satisfy a single claim repeatedly. The inability of a societal judgment to preclude subsequent suits on point would spell bad news on both fronts. Tribunals and defending parties would face not the possibility of a single suitor refiling her complaint but rather the Kafkaesque prospect of a succession of litigants reiterating the action.

In this scenario, the lawsuit lodged at the outset, just like its

77 *See supra* Section III.C.1.
78 *See generally infra* Part IV.
79 *See infra* Part IV.

supervening reincarnations, would hardly constitute an act of representation. In order to act as a genuine representative, one must possess the authority to bind, in a definitive manner, whomever one is representing, over against any future endeavor to stand in for her regarding identical issues. If another complainant, let alone a long array of candidates, may readily rehash the matter, no real representation ever takes place. The situation would resemble that of a multiplicity of agents pretending to speak for a movie star, each simultaneously negotiating different contracts on her behalf but ultimately lacking the power to commit her to anything.

Common-law adjudicators may invoke the doctrine of res judicata to forestall this predicament. They may accordingly dismiss any new litigation insofar as it involves the same principally interested party—irrespective of who might be assuming the representation—and cause of action.[80] Ordinary civil-law rules of preclusion, as formerly fleshed out, afford judges an analogous way out.[81] Concretely, the original vindication would bar another suit if both overlapped in their (1) real parties in interest, independently of who might be representing, (2) object, and (3) cause.[82]

As indicated before, jurisdictions in the Western Hemisphere with a completely developed societal-rights regime in place explicitly or implicitly recognize that the vindication of such entitlements produces an *erga omnes* preclusive impact.[83] This fact should not come as a surprise in light of the mentioned criteria, as well as ideals, of res judicata and in view of the concept of representation. One can barely envisage a legal system that would purposely resolve the issue differently.

In the hypothetical, the filer of the suit is seeking to advance a communal interest, to represent a group, to uphold a collective entitlement, and to stake a claim along the lines of the government's earlier effort. She should fail on grounds of res judicata. As a result of the settlement, the state only left her the right to sue on her personal losses.

Of course, the application of the principle of preclusion would deprive the plaintiff of no substantive entitlement. First and foremost, the public right at stake belongs not to her but rather to the public itself. Further, the authorities did not extinguish this entitlement. They actually vindicated it.

Juan Carlos Larrea Valencia articulates the primary position in

80 *See, e.g.*, *supra* Section III.B.
81 *See supra* Section III.C.
82 *See generally supra* Section III.C.
83 *See generally infra* Part IV.

reference to unconstitutionality actions, a special type of societal suit. He argues as follows:

> In unconstitutionality actions, there are no interested parties. No individual interests, which would demand protection in the context of similar claims in the future, exist. "These suits entail not an *individual* but rather a *general interest*, pertaining to civil society and to the state, in the preservation of the Constitution's supremacy."[84]

In collective environmental actions, the interest at issue likewise pertains to the society as a unit, not to any person in particular. Upon an initial suit and especially upon a vindication of the entitlement in question, anyone who tries to reignite the dispute cannot legitimately complain about the ensuing preclusive ban.

Such a claimant could not even validly protest about losing her right procedurally to stand in for the people. Procedural entitlements of representation are intimately intertwined with their substantive counterparts. The former in the absence of the latter are not merely empty; in reality, they evanesce completely.

Upon a mother's enforcement of a child's right in the previous example,[85] the father no longer possesses an entitlement to assert the claim. After all, he does not himself hold the underlying right. His daughter does, and she fully exercised it beforehand through her mother.

Analogously, societal representatives do not sue on their own entitlement but rather on that of the populace in its entirety. They simply have the right to speak in the name of the latter so long as nobody else has done so. If someone already has, however, the entitlement does not lie anymore.

Significantly, the adjective right of representation in this sort of litigation disappears due to the normal operation of the rules of procedure, not to any arbitrary governmental acts. It does not entitle the holder to represent, much less to re-represent, the polity despite any applicable

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84 Juan Carlos Larrea Valencia, *Cuestiones de Derecho Constitucional, Administrativo y Tributario*, 22 REVISTA JURÍDICA: FACULTAD DE JURISPRUDENCIA Y CIENCIAS SOCIALES Y POLÍTICAS DE LA UNIVERSIDAD CATÓLICA DE SANTIAGO DE GUAYAQUIL 19, 21 (July 26, 2007) (on file with author) (quoting Hernán Rivadeneira Játiva, *Acción de inconstitucionalidad de las normas jurídicas*, *in* LA JUSTICIA CONSTITUCIONAL EN LA ACTUALIDAD 229, 241 (Corporación Editora Nacional) (Luis López Guerra, ed., 2002)) ("En el ejercicio de la acción de inconstitucionalidad no hay partes interesadas, no existe, por consiguiente, un interés particular al que se deba proteger respecto de pretensiones futuras similares: 'Esta acción no implica un *interés particular*, sino uno *general*, de la sociedad civil y el Estado, para preservar la supremacía constitucional.' . . .").

85 *See supra* Sections III.B and III.C.2.

formal strictures. Obviously, the parameters of preclusion, along with the correlated commitment to efficiency and due process, continue to apply. And they require finality upon a prior decision on the merits.

IV. PRECLUSION IN PRACTICE

A. Warm-Up

For purposes of res judicata, two societal actions involve the same complaining party when their respective nominal plaintiff represents a single real party in interest—namely, the larger collectivity. The first may preclude the second if both converge on the matter in contention. Likewise, it may bar any subsequent such suit. Specifically, the state may, upon enforcing public entitlements, impede private persons or entities from reasserting the claim.

This Part will show that, in the Western Hemisphere, jurisdictions that allow societal litigation embrace these principles. It will start with the United States, whose legal system has had much experience in this kind of adjudication. The discussion will then turn to Brazil, which has been considerably active in this area in the last couple of decades. It will finally concentrate on Spanish America, which has opened up, somewhat more freshly, to the enforcement of so-called diffuse entitlements.

The convergence in approach should not come as a surprise. After all, the ancient Roman popular action already followed the pattern. Title 23 of Book 47 of the Justinian Code, Corpus Juris Civilis, which deals with such suit, proclaims: "If an action is repeatedly brought on the same cause and on the same fact, the ordinary exception of res judicata may be raised."[86] In other words, a preclusive ban will apply to any re-litigation attempt—in all likelihood regardless of who acts as complainant.

In any event, a thoroughly adjudicated societal complaint has an *erga omnes* effect throughout the Americas. Any other result would run counter to the rules of preclusion that prevail in the common-law and civil-law traditions.[87] In addition, it would undermine the very notion of representative litigation, lead to uncertainty and inefficiency, and visit

86 DIG. 47.23.3 (Ulpian, Ad Edictum 1) ("Sed si ex eadem causa saepius agatur [agetur], cum idem factum sit, exceptio vulgaris rei iudicatae opponitur.") "If a particular matter had been disposed of in a popular action, the respondent in a subsequent action based upon the same cause of action could plead *res judicata*." Johan D. van der Vyver, Actiones Populares *and the Problem of Standing in Roman, Roman-Dutch, South African and American Law*, 1978 ACTA JURIDICA 191, 192 (1978).

87 *See, e.g.*, *supra* Sections III.B-C.

fundamental unfairness upon the defendant.[88]

Different procedural mechanisms exist for the vindication of these group entitlements. The U.S. legal order, for instance, empowers individuals to vindicate the latter through citizen suits or *qui tam* actions. Latin American law, in turn, authorizes private persons or organizations to safeguard these rights through popular actions or diffuse-interests suits. Some procedures, such as the class action in the United States, the Spanish American collective writ of protection (*amparo colectivo*), and the Brazilian public civil action, serve to vindicate aggregated individual as well as societal rights.

Of course, the authorities may also uphold the latter entitlements through adjective devices other than administrative suits. In the United States, they may rely on *parens patriae* suits. In Brazil, the state may institute public civil actions. In Spanish America, it may prosecute diffuse-interests suits or popular actions. As previously suggested, all of these suits, like those lodged by individuals, produce an *erga omnes* preclusive impact.

B. The United States

1. Class Actions

In the United States, class suits may involve entitlements that indivisibly pertain to society at large or to an outsized subgroup. In particular, they may unfold under Federal Rule of Civil Procedure 23(b)(2) and pray for "injunctive relief or corresponding declaratory relief" against someone who "has acted or refused to act on grounds that apply generally to the class."[89] For example, the plaintiffs may proceed in the name of the citizenry against a real-estate developer whose activities endanger an important national monument.

A final decision on the merits has a preclusive effect upon re-litigation by other class members. In the words of the U.S. Supreme Court:

> There is of course no dispute that under elementary principles of prior adjudication a judgment in a properly entertained class action is binding on class members in any subsequent litigation . . . . Basic principles of res judicata (merger and bar or claim preclusion) and collateral estoppel (issue preclusion) apply.[90]

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88 *See generally supra* Section III.D.

89 FED. R. CIV. P. 23(b)(2).

90 Cooper v. Fed. Reserve Bank of Richmond, 467 U.S. 867, 874 (1984).

When the initial petition alleges a violation of rights that belong to an extensive group, such as through "a general pattern or practice of discrimination," a firm ruling precludes the class members from lodging another complaint on the basis of similar allegations, even though it does not stand in the way of prosecuting "individual claims."[91]

Significantly, class members ordinarily may not opt out in suits certified under Rule 23(b)(2); solely in those under Rule 23(b)(3) for the vindication of aggregated individualized entitlements. The latter provision, applicable to proceedings in which "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy,"[92] necessitates notification "to class members [informing them] that the court will exclude from the class any member who requests exclusion."[93] In contrast, Rule 23(b)(2) imposes no such requirement.[94] It merely invites "the court [to] direct [any] appropriate notice to the class."[95]

"A class action under Rule 23(b)(2)," according to the U.S. Court of Appeals for the Sixth Circuit, "is referred to as a 'mandatory' class action because class members do not have an automatic right to notice or a right to opt out of the class. . . . Because homogeneity is required, unitary adjudication of the claims is feasible without the devices of notice and opt-out."[96] In actuality, the adjudicator normally rules on a genuinely collective entitlement, binds the collectivity as a whole, and does not allow members to bail out with the option to litigate anew afterward.

Invariably, these suits not only include but also preclude everyone who might otherwise possess standing. Inasmuch as they concern a community as the real party in interest, they hinder all of its members from suing again. The larger the group at issue, the more one might tend to use a term such as '*erga omnes*' to describe the res judicata consequences.

2. Citizen Suits and Qui Tam Actions

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91 *Id.* at 880.

92 FED. R. CIV. P. 23(b)(3).

93 FED. R. CIV. P. 23(c)(2)(B)(v).

94 Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177 n.14 (1974) ("[T]he notice requirements of subdivision (c)(2) . . . are applicable to class actions maintained under subdivision (b)(3). By its terms, subdivision (c)(2) is inapplicable to class actions for injunctive or declaratory relief maintained under subdivision (b)(2).").

95 FED. R. CIV. P. 23(c)(2)(A).

96 Romberio v. UNUMProvident Corp., 385 F. App'x 423, 432 (6th Cir. 2009).

In the United States, some federal statutes authorize citizen suits, which enable personally affected complainants to advance the public's environmental and other interests through litigation.[97] Similarly, *qui tam* actions empower anybody to challenge conduct that injures the polity as a whole, such as the submission of "false claims."[98] Both procedures, in essence, allow the initiating petitioner to enforce a statutorily defined set of societal rights.

When someone lodges a citizen suit, she may bar other potential suitors from litigating the same matter later on. Harold Krent and Ethan Shenkman proffer the following justification for this outcome:

Citizen suits could have a res judicata effect under the theory that plaintiffs acting in the capacity of private attorneys general are in privity with other plaintiffs acting in the same capacity. Otherwise, defendants might be subject to an unlimited number of citizen suits for the same violations . . . .[99]

Perhaps the issue seldom crops up because the Supreme Court has compelled claimants to focus on their own "injury in fact" and thereby distinguish their complaint from that of any predecessor.[100] Naturally, they may altogether renounce all generalized assertions in order to avoid running against a preclusive ban.

Analogously, a final decision on the merits in a *qui tam* action constitutes res judicata vis-à-vis any subsequent attempt, even if undertaken by a different nominal litigant, to stake the same claim. The

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97 *See, e.g.*, Clean Air Act, 42 U.S.C. § 7604 (2018); Clean Water Act, 33 U.S.C. § 1365 (2018); Endangered Species Act, 16 U.S.C. § 1540(g) (2018); Clayton Antitrust Act, 15 U.S.C. § 15(a) (2018).

98 *See* False Claims Act, 31 U.S.C. §§ 3729-3733 (2018).

Qui tam is short for the Latin phrase *qui tam pro domino rege quam pro se ipso in hac parte sequitur,* which means "who pursues this action on our Lord the King's behalf as well as his own." The phrase dates from at least the time of Blackstone. *See* 3 W. Blackstone, Commentaries *160. Three other *qui tam* statutes, all also enacted over 100 years ago, remain on the books. *See* 25 U.S.C. § 81 (providing cause of action and share of recovery against a person contracting with Indians in an unlawful manner); § 201 (providing cause of action and share of recovery against a person violating Indian protection laws); 35 U.S.C. § 292(b) (providing cause of action and share of recovery against a person falsely marking patented articles); *cf.* 18 U.S.C. § 962 (providing for forfeiture to informer of share of vessels privately armed against friendly nations, but not expressly authorizing suit by informer); 46 U.S.C. § 723 (providing for forfeiture to informer of share of vessels removing undersea treasure from the Florida coast to foreign nations, but not expressly authorizing suit by informer).

Vermont Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 768 n.1 (2000).

99 Harold J. Krent & Ethan G. Shenkman, *Of Citizens Suits and Citizen Sunstein*, 91 MICH. L. REV. 1793, 1814 n.79 (1993).

100 Luján v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) ("[T]he plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest which is . . . concrete and particularized."); *see also id.*, at 560 n.1 ("By particularized, we mean that the injury must affect the plaintiff in a personal and individual way.").

U.S. District Court for the District of South Dakota has traced William Blackstone's explanation of this result:

> The res judicata effect of a *qui tam* action was explained by Mr. Blackstone who stated, "But if any one hath begun a *qui tam* or popular action, no other person can pursue it; and the verdict passed upon the defendant in the first suit is a bar to all others, and conclusive even to the king himself." [101]

Hence, the original, definitively adjudicated action precludes any other one prosecuted thereafter, whether by the authorities or anyone else.

These preclusion principles apply identically to these suits when the state launches the initial action. Upon suing someone under the False Claims Act for filing a fraudulent demand for payment,[102] the U.S. government legally prevents other complainants from concurrently proceeding on the same grounds.[103] Upon securing a definitive determination, it blocks private parties from subsequently restarting the dispute.[104]

3. Parens Patriae Suits

If authorities in the United States lodge a *parens patriae* suit to further the citizenry's entitlements, they bind anyone who might otherwise possess standing to sue to the same end. "When a state litigates common public rights," the U.S. Court of Appeals for the Tenth Circuit has enunciated, "the citizens of that state are represented in such litigation by the state and are bound by the judgment."[105] The tribunal explained that "plaintiffs are not barred on their private claims," which the governmental administration "could not have asserted . . . in its *parens patriae*

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101 *See* United States *ex rel.* Yankton Sioux Tribe v. Gambler's Supply, 925 F. Supp. 658, 667-68 (1996) (citing Miami Copper Co. v. State, 149 P. 758, 761 (Ariz. 1915)).

102 *See* False Claims Act, 31 U.S.C. § 3729-3733 (2018).

103 *Id.* § 3730(e)(3) ("In no event may a person bring an action . . . which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.").

104 Subsequent individual claims would be barred in virtue of res judicata principles, as well as of the statutory ban on actions "based upon the public disclosure of allegations . . . in a criminal, civil, or administrative hearing in which the Government or its agent is a party." *Id.* § 3730(e)(4)(A). A court will view the original governmental suit as the "public disclosure" and will dismiss, unless the plaintiff is "an original source of the information." *Id.*

105 Satsky v. Paramount Commc'ns, Inc., 7 F.3d 1464, 1470 (10th Cir. 1993). The Second Circuit quotes this language with approval in New York v. Reebok Int'l, 96 F.3d 44, 48 (2d Cir. 1996) ("*Satsky* correctly states the rule applicable in these cases").

capacity"[106] under the relevant statute, to wit, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[107]

> However, claims based on injuries to the natural resources held by the State . . . are barred by the [previous] consent decree. . . . If the claims are for injuries to interests which all citizens hold in common, and for which the State has already recovered, the judgment . . . acts as a bar.[108]

Presumably, the conclusion would not have changed if the President of the United States, who also may, pursuant to the statutory text, "act on behalf of the public as trustee of . . . natural resources,"[109] had instituted the original complaint.

Likewise, the Ninth Circuit's decision in *Alaska Sport Fishing Ass'n v. Exxon Corp.* reads: "State governments may act in their *parens patriae* capacity as representatives for all their citizens in a suit to recover damages for injury to a sovereign interest. . . . There is a presumption that the state will adequately represent the position of its citizens."[110] The panel, thereupon, concluded that "the United States and the state of Alaska . . . in their capacities as 'trustees for the public'" under CERCLA and the Clean Water Act (CWA) bound the entire population when they judicially settled collective-harm claims against the defendant for the 1989 Exxon Valdez oil massive leak.[111] It pointed out that "the [complainant] sportfishers . . . as members of the public, were 'parties' to the [initial] federal suit within the meaning of res judicata" and "were in privity with [the] . . . governments, as members of the public."[112]

This appellate opinion affirms the district court's dismissal on grounds of preclusion and, in particular, the determination that the recreational association and its associates "failed to allege private claims"[113] and that their public assertions were precluded by the authorities' court-approved

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106 *Satsky*, 7 F.3d at 1469. The U.S. Supreme Court has long recognized "the right of a State to sue as *parens patriae* to prevent or repair harm to its 'quasi-sovereign' interests." Hawaii v. Standard Oil Co., 405 U.S. 251, 258 (1972).

107 42 U.S.C. §§ 9601-9675 (2018). "The State could not have recovered under either CERCLA or the *parens patriae* doctrine for injuries to Plaintiffs' private interests." *Satsky*, 7 F.3d at 1470. "To the extent these claims involve injuries to purely private interests, which the State cannot raise, then the claims are not barred. By 'purely private interests,' we mean claims that the State has no standing to raise." *Id.*

108 *Satsky*, 7 F.3d at 1470. The judges note in their opinion that "the State has recovered for injuries to the natural resources." *Id.*

109 42 U.S.C. § 9607(f)(1) (2018).

110 34 F.3d 769, 773 (9th Cir. 1994) (*per curiam*).

111 *Id.* at 771.

112 *Id.* at 773-74.

113 *Id.* at 772.

conciliation. In addition, the trial judge had summarily ruled against the "National Wildlife Federation (NWF) and several other environmental groups . . . who, [like the fishermen,] sought to establish a conservation fund to remedy ecosystem damage caused by the spill."[114] Both sets of claimants confronted a preclusive ban because they purported to proceed on the same alleged breach of communal entitlements as the federal and state administrations had earlier, and because they otherwise declined to demand reparation for their own, individualized, personal losses.

Finally, the Eighth Circuit went even further in its pronouncements in *United States EPA v. Green Forest*.[115] "In this case," it declared, "we are faced squarely with the question whether citizens' claims brought prior to a government action are properly dismissed when a consent decree is entered in a later-filed EPA [Environmental Protection Agency] action."[116] The judges did not hesitate: "Recognizing the preeminent role that government actions must play in the CWA [Clean Water Act] enforcement scheme, we hold that they are."[117] Hence, the administration may foil citizen suits even when it launches its own complaint after their institution.

These controversies show how, in societal litigation, different nominal filers standing in for the same real party in interest—to wit, the broader community with its specific array of indivisible entitlements—share an identity for purposes of res judicata. In *parens patriae* actions, one litigant may generally ban others from subsequently prosecuting the cause again. These precedents specifically call to mind the hypothetical inasmuch as they present a situation in which the authorities hamper individuals from pressing comparable collective claims afterward, though not from staking individual assertions.

4. Summation

In the United States, a nominal suitor can preclude someone else subsequently purporting to assert the same societal claim—whether through a class action, citizen suit, *qui tam* action, or *parens patriae* action. Notwithstanding the fact that the two complainants differ, the main, real party in interest does not change from one suit to the next. Accordingly, res judicata holds. In particular, when the government enforces communal rights through a *parens patriae* or "False Claims"

114 *Id.* at 771.
115 921 F.2d 1394 (8th Cir. 1990).
116 *Id.* at 1403.
117 *Id.*

action, it bars private plaintiffs from refiling the cause.

C. Brazil

1. Popular Actions

Brazil, which has shown itself most receptive to group adjudication, also bans subsequent litigation by other representatives after the ultimate resolution of a dispute on a societal entitlement. This restriction applies, for instance, to popular actions, which enable "[a]ny citizen to annul either acts harmful to public property or state action that impinges upon the principle of administrative integrity, upon the environment, or upon historical or cultural goods."[118] Significantly, the authorities possess no standing. In any event, the 1965 law that introduces this procedural device declares: "The judgment shall constitute res judicata, *erga omnes*, except in cases of dismissal for insufficiency of proof."[119]

When judges dismiss upon determining that the plaintiff's evidence does not suffice because, for instance, it fails to include a key document, they do so without prejudice. The same person, or a different one, may sue anew and try to prove her complaint to the full extent.[120] This exception bears no relevance to the hypothetical, however, since the original controversy involved a fulfilled, rather than rejected, claim and raised no issue of evidentiary inadequacy.

Therefore, a final decision on the merits precludes anyone else from relitigating the cause. "In other words, if an individual subsequently institutes another popular action, she will face dismissal on the basis of res judicata."[121] This preclusive effect takes place irrespective of the sort of suit subsequently relied upon.

These Brazilian suits provide yet another example of one nominal party preventing another one from enforcing a collective right on the same facts later on. The absence of personal identity presents no problem. So long as both complainants act in representation of the society at large on the matter in contention, the first to proceed bars the second.

2. Public Civil Actions

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118 CONSTITUIÇÃO FEDERAL [CONST.] art. 5(LXXIII) (Braz.), *translated and reprinted in* OQUENDO, *supra* note 9, at 860 (italics omitted).

119 L. 4717 art. 18 (Braz.) (1965), *translated and reprinted in* OQUENDO, *supra* note 9, at 861.

120 *See id.* ("Whenever this exception applies, any citizen may file another action on the same grounds and introduce new evidence.").

121 OQUENDO, *supra* note 9, at 861-62 (italics omitted).

Brazil's Constitution empowers the Public Ministry, an autonomous state institution, to prosecute "public civil actions to protect public and social property, the environment, and other diffuse and collective interests."[122] The injuries at stake concern, to a great extent, societal entitlements. The relevant statute grants standing to governmental entities and private associations but not to individuals.[123]

The statutory preclusion principles reproduce those applicable to popular actions almost exactly. "The judgment," hence, "shall [generally] constitute res judicata, *erga omnes*."[124] It thus bars subsequent suits by any one of the parties who could otherwise sue.

Article 16 differs from its counterpart in the Popular Actions Act merely insofar as it restricts the preclusive impact to "the jurisdictional limits of the issuing court."[125] Consequently, if a state trial-judge in Bahia rules against a company for discriminating against Afro-Brazilians, the ruling would not bind the defendant elsewhere. In Minas Gerais, a plaintiff would have to launch a new complaint in order to stop the enterprise from engaging in comparable practices there. Of course, a tribunal with jurisdiction over the entire national territory—such as the Brazilian Supreme Court—could enter or affirm the original resolution, which might then effectively amount to res judicata throughout the country. Afterward, no one else could commence a public civil action or another type of suit, like a popular action, in the name of the same collectivity and on the same matter.

Article 103 of Brazil's Consumer Code—which addresses "diffuse interests or rights, which are trans-individual, as well as indivisible, and pertain to an indeterminate group of people linked by common issues of fact"[126]—adds a supplemental set of preclusion rules to those defined in the Public Civil Actions Act.[127] It establishes, once again, that a "judgment . . . shall have the following res judicata effect: *erga omnes* . . . ."[128] The provision clarifies, however, that the substantive rejection of a claim based on these entitlements does not "impair the individual interests and rights of

122 CONST. art. 129(III) (Braz.), *translated and reprinted in* OQUENDO, *supra* note 9, at 900.

123 L. 7347 art. 5 (Braz.) (1985), *translated and reprinted in* OQUENDO, *supra* note 9, at 901.

124 *Id.* art. 16 (italics omitted).

125 *Id.*

126 L. 8078 art. 81 (Braz.) (1990), *translated and reprinted in* OQUENDO, *supra* note 9, at 904.

127 *Compare translated and reprinted in* OQUENDO, *supra* note 9, at 901, *with* L. 8078, CÓDIGO DO CONSUMIDOR [CD. CONSUM.] art. 103 (Braz.) (1990), *translated and reprinted in* OQUENDO, *supra* note 9, at 918-19.

128 L. 8078, CD. CONSUM. art. 103(I) (Braz.) (1990), *translated and reprinted in* OQUENDO, *supra* note 9, at 918 (italics omitted).

the members of the collectivity . . . ."[129] As a result, an individually injured person may subsequently file a fresh complaint on her own behalf. Nonetheless, the final decision does preclude any future collective suit that authorized suitors might seek to institute.

3. Summation

Brazilian law takes two societal-rights suits to involve the same plaintiff, for purposes of res judicata, when the respective representatives represent the same real party in interest. In popular or public civil actions, a nominal suitor who enforces group entitlements thereby bars any other complainant who might try to embark upon the same representation later on. Significantly, a public civil action can give rise to a situation very similar to the hypothetical whenever the state originally sues on collective claims and thereby precludes any other potential litigant from staking them all over again. Of course, the authorities do not thus in any way prevent claimants from subsequently vindicating different, individual assertions.

D. Spanish America

1. Diffuse-Interests Suits in Peru and Uruguay

The Uruguayan legal system provides for a "diffuse-interests" suit, which resembles the Brazilian public civil action.[130] Article 42 of Uruguay's General Procedural Code defines this device:

> The Public Ministry and any interested individual, in addition to public-interest institutions or associations that, according to the law or to the court's appreciation, adequately represent the interests at stake, shall have standing in cases involving the defense of the environment, as well as cultural or historical values that are shared by an indeterminate group of people.[131]

This provision, as opposed to its Brazilian counterpart, empowers "interested individuals," along with the Public Ministry and associations, to take the initiative.[132] At any rate, it limits the category of actionable injurious acts. It focuses exclusively on safeguarding "the environment, as

129 *Id.* art. 103(1) (Braz.), *translated and reprinted in* OQUENDO, *supra* note 9, at 918.

130 L. 15982, CD. GEN. PRO. art. 42 (Uru.) (1988), *translated and reprinted in* OQUENDO, *supra* note 9, at 927.

131 *Id.*

132 *Id.*

well as cultural or historical values that are shared by an indeterminate group of people."[133]

Article 220 of the same codification specifies the applicable principles of preclusion: "In suits filed in defense of diffuse interests (Art. 42), the judgment shall have a general effect, except in the event of dismissal for lack of proof. When this exception applies, any other individual with standing may relitigate the matter."[134] A firm ruling on the merits, not amounting to "dismissal for lack of proof,"[135] keeps other litigants from suing again. As in the hypothetical, the authorities, upon pursuing the action to its ultimate consequences and upon presenting sufficient evidence, block individuals or organizations from prosecuting the dispute afterward.

In Peru, Article 82 of the Code of Civil Procedure also establishes a functional equivalent to the Brazilian public civil action.

> Interests are diffuse when they are held by an indeterminate number of people and attach to goods of incalculable [pecuniary] value, such as the environment, as well as cultural, historical, and consumer goods or values.
>
> The Public Ministry, as well as nonprofit associations or institutions that have standing by statute or by virtue of a duly grounded determination by the judge, may file or intervene in these actions.[136]

Hence, the lawsuit may concern collective "goods" of any sort so long as they possess "incalculable [pecuniary] value."[137]

The provision concludes with the following sentence: "A final judgment upholding the complaint shall additionally bind [those] who have not participated in the proceedings."[138] Oddly enough, the enactment does not spell out the res-judicata implications of a rejection of the cause. Still, it clearly endorses the notion that, upon securing a favorable ultimate resolution, the state forestalls subsequent litigation by any other statutorily authorized party.

Individuals may not commence a diffuse-interests suit in Peru.

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133 *Id.*

134 *Id.* art. 220.

135 *Id.* Once again, the lack-of-proof exception does not apply to the case at hand. *See supra* Section IV.C.1.

136 CÓDIGO PROCESAL CIVIL art. 82 (Peru), *translated and reprinted in* OQUENDO, *supra* note 9, at 928.

137 *Id.*

138 *Id.*

Nonetheless, they may proceed under Article 40 of the Code of Constitutional Procedure, if the entitlements at issue have "constitutional stature."[139] This provision states, specifically, that "any person may file for a writ of protection when a threat to or a violation of environmental or other diffuse rights that have constitutional stature is at stake; so may non-profit organizations whose purpose is the defense of the rights in question."[140] "The judgment," the Peruvian Constitutional Court has proclaimed, "will have an effect on '*all other members of the collectivity who find themselves in a situation identical to that of the person who brought the action in the first place*.' Consequently, the preclusive effect of the decision transcends the individual or group that filed the complaint."[141]

In a nutshell, the Uruguayan and the Peruvian diffuse-interests suits may preclude anyone who might subsequently institute any kind of complaint on the same claim. They thus bear a resemblance to U.S. class actions, citizen suits, *qui tam* actions, and *parens patriae* suits, as well as to Brazilian popular and public civil actions. In Uruguay and Peru, the state may enforce societal entitlements through the Public Ministry and thereby bar others seeking to litigate the controversy anew by whatever adjective means. Of course, such an outcome calls to mind that of the hypothesized case.

2. Colombian Popular Actions

Colombia's Law 472 of 1998 purports to carry out constitutional Article 88's mandate "to regulate popular actions,"[142] which afford a "procedural means for the protection of collective rights and interests."[143]

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139 L. 28237, CÓDIGO DE PROCESO CONSTITUCIONAL art. 40 (Peru) (2004).

140 *Id.* ("Asimismo, puede interponer demanda de amparo cualquier persona cuando se trate de amenaza o violación del derecho al medio ambiente u otros derechos difusos que gocen de reconocimiento constitucional, así como las entidades sin fines de lucro cuyo objeto sea la defensa de los referidos derechos.").

141 Tribunal Constitucional [Trib. Const.], Sept. 4, 2009, [Lovón Ruiz-Caro v. Minis. Rel. Ext.], Exp. No. 05287-2008-PA/TC (Peru) (on file with author), § 2.5.1(a) (quoting EDUARDO FERRER MAC-GREGOR, JUICIO DE AMPARO E INTERÉS LEGÍTIMO: LA TUTELA DE LOS DERECHOS DIFUSOS Y COLECTIVOS 16 (2003)) ("La sentencia respectiva surtirá efectos respecto de 'todos los demás integrantes de la colectividad que se encuentren en una posición idéntica al que ejercitó la acción correspondiente.' . . . Los efectos de la decisión, por lo tanto, van más allá de la persona o grupo que presentó la demanda."); *see also* Trib. Const., Mar. 20, 2009, [Viuda de Mariátegui v. S.U.N.A.T. & T.F., S.A.], Exp. No. 04878-2008-PA/TC (Trib. Const.) (Peru) (on file with author), § 2.5.1(a).

142 L. 472 art. 1 (Colom.) (1998) ("La presente ley tiene por objeto regular las acciones populares y las acciones de grupo de que trata el artículo 88 de la Constitución Política de Colombia.").

143 *Id.* art. 2 ("Son los medios procesales para la protección de los derechos e intereses colectivos.").

Pursuant to the statute, these suits "may be lodged to prevent potential harm, to stop a danger, threat, violation, or prejudice vis-à-vis collective rights and interests, or to reestablish the *status quo ante*."[144] Any person, legal entity, or organization, along with the Public Ministry and relevant state agencies and officials, possesses standing to proceed.[145]

Statutory Article 35 declares the following regarding the preclusive upshot: "The judgment shall constitute res judicata with respect to the parties and the public in general."[146] Colombia's Code of Civil Procedure reiterates the point: "The judgment upon popular actions shall constitute res judicata *erga omnes*."[147]

Of course, the ultimate resolution of the suit does not bar the initiation of individual litigation to advance an essentially different, non-societal claim. Nonetheless, it should head off any future attempt by any otherwise qualified suitor judicially to vindicate identical joint entitlements in the same dispute. In particular, the state may, through the Public Ministry or the responsible administrative authorities, preclude citizens and associations from subsequently revisiting the affair in court.

3. Argentina's Collective Writ of Protection

In 1957, the Argentine Supreme Court created a writ of protection for the "judicial enforcement of individual rights."[148] As amended in 1994, Argentina's Constitution embraces this mechanism and, significantly, authorizes plaintiffs to proceed collectively:

> The individual affected and the Public Defender may pursue this action against any kind of discrimination or in defense of rights concerning the environment, competition, or consumers, in addition to collective rights more generally. So may organizations dedicated to these matters. Nonetheless, they must be registered pursuant to a law establishing requirements for them and regulating their

144 *Id.* art. 2 ("Las acciones populares se ejercen para evitar el daño contingente, hacer cesar el peligro, la amenaza, la vulneración o agravio sobre los derechos e intereses colectivos, o restituir las cosas a su estado anterior cuando fuere posible.").

145 *Id.* art. 12.

146 *Id.* art. 35 ("La sentencia tendrá efectos de cosa juzgada respecto de las partes y del público en general.").

147 CD. PRO. CIV art. 332 (Colom.).

148 Corte Suprema de Justicia de la Nación [Ct. Sup.], Dec. 27, 1957, [Siri v. Police Commissioner], 239 F.C.S. 459 (Arg.), *translated and reprinted in* OQUENDO, *supra* note 9, at 341-45, 343.

operation.[149]

Like the already described Uruguayan diffuse-interests suit, the Argentine collective writ of protection allows, beyond the authorities and private associations, any "individual affected" to launch the complaint. It resembles the just reviewed Colombian actions in that it may target any type of infringement inflicted upon a collectivity.

In *Halabi v. the National Executive Branch*, Argentina's top tribunal defined the contours of this suit. It distinguished, on the one hand, "collective rights that relate to individual homogenous interests" from, on the other hand, those "that pertain to collective goods."[150] The former boil down to what this Article has been denominating 'aggregated individual entitlements,' while the latter constitute what it has been referring to and focusing on as 'societal entitlements.'[151]

Regarding the latter category, the Argentine justices noted that "the petition must aim at the safeguard of a collective good, which belongs to the entire community and admits neither division nor exclusion."[152] They added that the law "concedes extraordinary standing in order to facilitate such protection yet not a right of individual appropriation of the good."[153] In other words, the claimant speaks in the name of the society as a whole and its entitlements.

The majority declared that "an individually exercised procedural claim to prevent or to repair an injury to a collective good leads to a decision that has effects that attach to the object of the cause of action but that does not directly benefit the individual who filed the suit."[154] It thus suggested that a firm adjudicative ruling binds anyone who might otherwise litigate the same case. Nevertheless, the opinion also implies that the judgment does not preclude subsequent, or even simultaneous, individual litigation: "The defense of collective rights that pertain to collective goods . . . differs from the protection of individual goods, whether pecuniary or not, which call

149 CONSTITUCIÓN DE LA NACIÓN ARGENTINA art. 43 (Arg.).

150 Ct. Supr., Feb. 24, 2009, [Halabi v. the National Executive Branch], H. 270 XLII, ¶ 9 (Arg.) (hereinafter *Halabi*) (on file with author) ("derechos . . . de incidencia colectiva que tienen por objeto bienes colectivos, y de incidencia colectiva referentes a intereses individuales homogéneos").

151 *See generally supra* Section I.A.

152 *Halabi*, H. 270 XLII, ¶ 11 ("En primer lugar, la petición debe tener por objeto la tutela de un bien colectivo, lo que ocurre cuando éste pertenece a toda la comunidad, siendo indivisible y no admitiendo exclusión alguna.").

153 *Id.* ("[S]e concede una legitimación extraordinaria para reforzar su protección, pero en ningún caso existe un derecho de apropiación individual sobre el bien.").

154 *Id.* ("De tal manera, cuando se ejercita en forma individual una pretensión procesal para la prevención o reparación del perjuicio causado a un bien colectivo, se obtiene una decisión cuyos efectos repercuten sobre el objeto de la *causa petendi,* pero no hay beneficio directo para el individuo que ostenta la legitimación.").

for enforcement by the duly entitled holders."[155]

To recapitulate: In Argentina, a definitive determination on such entitlements presumably produces res judicata *erga omnes* and, accordingly, preempts renewed prosecution, even when undertaken by a different complainant. If the state, through the Public Defender, initially sues for a collective writ with respect to such rights, it bars any other nominal party who might subsequently seek to vindicate them in the face of the same alleged violation. Obviously, such a situation evokes that of the hypothetical.

4. Mexican Collective Actions on Diffuse Rights

Mexico's Federal Code of Civil Procedure, in Article 580(I), provides for "collective actions . . . to enforce diffuse . . . rights and interests, understood as those held by an indeterminate . . . collectivity of factually . . . similarly situated persons."[156] It announces that these suits, in which "the rights and interests belong to an indeterminate collectivity, . . . aim at legally compelling the defendant to repair the harm to the collectivity either by reestablishing the *status quo ante* or through an alternative reparation for the impairment of the collectivity's rights or interests."[157]

Article 585 entitles various state organs, such as the Federal Procurator's Office for Environmental Protection and the Procurator General, and specialized non-profit organizations to sue; but not ordinary citizens. In any event, a substantive adjudication should deprive all otherwise qualified complainants of their entitlement to litigate. For the concession of standing under Article 588(V), for instance, "[t]he matter may not have become res judicata as a result of prior litigation."[158] Likewise, Article 614 declares: "A judgment not subject to appeal shall

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155 *Id.* ("Puede afirmarse, pues, que la tutela de los derechos de incidencia colectiva sobre bienes colectivos corresponde al Defensor del Pueblo, a las asociaciones y a los afectados, y que ella debe ser diferenciada de la protección de los bienes individuales, sean patrimoniales o no, para los cuales hay una esfera de disponibilidad en cabeza de su titular.").

156 CÓDIGO FEDERAL DE PROCEDIMIENTOS CIVILES art. 580(I) (Mex.) ("[L]as acciones colectivas son procedentes para tutelar . . . . [d]erechos e intereses difusos y colectivos, entendidos como aquéllos de naturaleza indivisible cuya titularidad corresponde a una colectividad de personas, indeterminada o determinable, relacionadas por circunstancias de hecho o de derecho comunes.").

157 *Id.* art. 581(I) ("[De] los derechos e intereses [es] titular . . . una colectividad indeterminada" y la acción "tiene por objeto reclamar judicialmente del demandado la reparación del daño causado a la colectividad, consistente en la restitución de las cosas al estado que guardaren antes de la afectación, o en su caso al cumplimiento sustituto de acuerdo a la afectación de los derechos o intereses de la colectividad . . . .").

158 *Id.* art. 588(V) ("[R]equisito[] de procedencia de la legitimación en la causa . . . : Que la materia de la litis no haya sido objeto de cosa juzgada en procesos previos.").

have res judicata consequences."[159] Presumably, preclusion occurs even when a different suitor represents the group. Otherwise, the judiciary and the alleged violator would risk having to face a considerable number of identical complaints.[160]

In brief, certain Mexican public and private entities may vindicate these entitlements and thus bar re-litigation by any statutorily authorized litigant. Significantly, the authorities may bring about a similar outcome by originally proceeding through the Procurator General or the Federal Procurator's Office for Environmental Protection. In so doing, they would manifestly resemble their hypothesized counterparts.

5. Summation

Throughout Spanish America, nominal plaintiffs in two societal actions satisfy the identity-of-parties requirement for purposes of res judicata and may therefore preclude each other, if they represent the same real party in interest on a basically identical matter. Along parallel lines, the state may generally preempt litigants purporting to stand in for the same larger community on comparable claims. Specifically, it may initiate a diffuse-interests suit in Uruguay or Peru, a constitutional popular action in Colombia, a collective-protection petition in Argentina, or a collective action on diffuse rights in Mexico and, upon obtaining a judgment amenable to no further appeal or collateral attack, bar private suitors who may subsequently attempt to reignite the controversy.

E. Wrap-Up

In the United States, Brazil, and Spanish America, res judicata focuses on the real party in interest in societal-rights controversies. Consequently, one representative of the society at large in court may preclude another one. In particular, the state may, upon assuming such a representation, bar any otherwise qualified plaintiff from relitigating the case. While the denominations and details of the suits vary from one jurisdiction to the next, the general approach is fundamentally the same throughout.

V. LEGITIMATELY SETTLING SOCIETAL CLAIMS

A. Without Compromising

159 *Id.* art. 614 ("La sentencia no recurrida tendrá efectos de cosa juzgada.").
160 *See generally supra* Section III.D.

In controversies regarding ecological and other societally shared rights, perhaps more so than those relating to individual entitlements, the contenders seldom go to trial and very often conciliate. As to the United States, Courtney R. McVean and Justin R. Pidot declare: "Settlements . . . have come to dominate the resolution of legal disputes. . . . Based on the high volume of environmental litigation, it comes as no surprise that many cases in this context settle as well."[161] Indeed, all of the *parens patriae* adjudications mentioned in Subsection IV.B.3 unfolded in this area and wound up with a consent decree.[162] In general, Mario F. Valls observes that the "conciliation and the settlement of the interests of parties who seek to exercise rights over a common good such as the environment" characterize environmental law.[163] From Brazil, Sílvia Cappelli consistently reports that, due to the uncertainty, rigidness, slow pace, and elevated cost of litigation, the Public Ministry normally prefers out-of-court solutions on collectively endured injuries to the environment and actually embarks upon such a course 70% of the time.[164]

The community's representatives and, especially, its elected officials should have the authority to conciliate as part of their power to vindicate communal freedoms. Deprived of the option to settle, they would be unable to uphold the underlying entitlements in most cases, which could not feasibly or realistically come to an adjudication on substance. In the United States, some provisions that authorize societal complaints, such as in equitable class-actions or *parens patriae* suits under the 1914 Clayton Anti-Trust Act, themselves envisage the prospect of conciliation and call for judicial supervision thereof.[165] In Brazil and Colombia, the main statute on the entitlements at stake facilitates settlement through regulation of some of the procedural particulars.[166]

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161 Courtney R. McVean & Justin R. Pidot, *Environmental Settlements and Administrative Law*, 39 HARV. ENVTL. L. REV. 191, 201-02 (2015).

162 *See supra* Section IV.B.3.

163 MARIO F. VALLS, MANUAL DE DERECHO AMBIENTAL 107-08 (2001) (on file with author) ("El derecho ambiental [s]e caracteriza por ser . . . [c]onciliador y transaccional entre los intereses de las partes que pretenden ejercer derechos sobre un bien común como es el ambiente.").

164 Sílvia Cappelli, *El Ministerio Público Fiscal y la protección ambiental*, *in* QUINTO PROGRAMA REGIONAL DE CAPACITACIÓN EN DERECHO Y POLÍTICAS AMBIENTALES (Programa de las Naciones Unidas para el Medio Ambiente) 177, 190 (2010) (on file with author).

165 *See* FED. R. CIV. P. 23(e) ("The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval."); 15 U.S.C. § 15c(c) (2018) ("An action under subsection (a)(1) shall not be dismissed or compromised without the approval of the court, and notice of any proposed dismissal or compromise shall be given in such manner as the court directs.").

166 *See* L. 7347 art. 5, § 6 (Braz.) (1985), *amended by* L. 8078 (Braz.) (1990); L. 472 art. 61 (1998) (Colom.); *see also* CD. PRO. CIV. art. 174(III) (Braz.) ("A União, os Estados, o Distrito Federal

All the same, a conciliating approach may seem to devalue such collectively scoped rights and to condone their abridgement for a fee or quick fix. As a result, it may appear to run counter to their characterization as inalienable or non-disposable, particularly in Latin America.[167] Upon deeper inspection, however, this inalienability or non-disposability must merely mean that one may not renounce the right at issue or consent to an infringement. The government or any other nominal claimant may only seek vindication, whether by litigating or settling for suitable satisfaction—equivalent to the expected adjudicative relief discounted by the costs and risks of litigation.

Fernando Grella Vieira explains exactly how, under Brazilian law, the state or another litigant with standing may legitimately strive for a conciliation of controversies concerning these group entitlements. He points out that, by providing for a so-called "commitment on the adjustment of conduct," the Public Civil Action Act permits suits on these inalienable rights to settle.[168] The author elucidates that "the inalienability of the exercised entitlements" survives thus: "The commitment must contemplate and may, in no way, restrict the claim that the public civil action would have staked."[169] By conciliating, the community's representatives implement the right under consideration without retreating on or relinquishing it.

Convergently, Humberto Dalla avers "that a substantive right's inalienable nature . . . does not absolutely hamper procedural conciliation so long as a thorough vindication and guaranty remain feasible."[170] He adds that "even though those entitled to proceed may not compromise on an essentially communal right, they may give in on, say, an accessory or

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e os Municípios criarão câmaras de mediação e conciliação, com atribuições relacionadas à solução consensual de conflitos no âmbito administrativo, tais como . . . promover, quando couber, a celebração de termo de ajustamento de conduta.").

167 *See, e.g.*, CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR 2008 [CONST.] art. 11(6) (Ecuador) ("All of these principles and rights are inalienable, non-waivable, indivisible, interdependent, and equally ranked.") ("Todos los principios y los derechos son inalienables, irrenunciables, indivisibles, interdependientes y de igual jerarquía.").

168 Fernando Grella Vieira, *A Transação na Esfera da Tutela dos Interesses Difusos e Coletivos: Compromisso de Ajustamento de Conduta* 16 (originally published in A AÇÃO CIVIL PÚBLICA: LEI 7.347/85 - 15 ANOS 221-249 (Édis Milaré, ed., 2001)) (on file with author) ("O 'compromisso de ajustamento de conduta,' admitido pelo referido preceito, encerra transação, uma vez que se destina a evitar ou por fim ao litígio.").

169 *Id.* at 33-34 ("A mesma pretensão que seria objeto do pedido na ação civil pública, deverá estar contemplada no compromisso, não podendo, em nada, ser restringida.").

170 HUMBERTO DALLA, JURISDIÇÃO E PACIFICAÇÃO: LIMITES E POSSIBILIDADES DO USO DOS MEIOS CONSENSUAIS DE RESOLUÇÃO DE CONFLITOS NA TUTELA DOS DIREITOS TRANSINDIVIDUAIS E PLURI-INDIVIDUAIS 190 (2017) ("Deve-se notar, ademais, que o caráter indisponível de um direito substancial . . . não representará, por si, um óbice absoluto à convenção processual, desde que por meio dela não se produza prejuízo ao direito vindicado em juízo ou à sua tutela.").

even principal obligation unrelated to the nucleus of the central duty."[171] Embracing "the aspirations for an adequate collective system," this commentator argues in favor of "a minimal margin of negotiation necessary for effective settlement" and against "the maintenance of the omnipotent dogma pertaining to the utter inalienability of the materially joint right."[172]

In its opinion C-215-99, the Colombian Constitutional Court expressly endorsed the possibility of conciliation in these suits. It confronted an unconstitutionality action against the Law on Popular and Group Actions for, inter alia, countenancing a "compliance agreement." The justices concluded that "the compliance agreement's purpose comport[ed] with [the national] constitutional order and, in particular, advance[d] the principles of efficiency, economy, promptness. . . ."[173] They elaborated on their holding:

> In fact, the compliance agreement's objective consists in allowing the parties, upon the judge's convocation, to reach a voluntary agreement to bring about a timely restitution for and a reparation of the damage inflicted upon collective rights and interests. Therefore, an early termination of the litigation and resolution of the conflict come about, along with a reduction of the pressure on the judicial apparatus.[174]

Hence, the tribunal practically encouraged the settlement of these claims.

Colombia's Constitutional Court rejected the contention that by settling these suits, plaintiffs were "negotiating away the legal sanction" and foiling "the popular actions' efficacy":

> On the contrary, such a compliance agreement helps, on the basis of

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171 *Id.* at 178 ("A partir dessa ideia então, mesmo um legitimado não podendo abrir mão de um direito essencialmente coletivo, não haveria óbice à renúncia de, por exemplo, uma obrigação assessória ou até mesmo principal, se não se referir ao núcleo do dever central.").

172 *Id.* at 177 ("Assim sendo, entendemos que atualmente é prejudicial a manutenção do dogma onipotente sobre a indisponibilidade absoluta do direito material coletivo, afastando um mínimo de margem negocial necessário para a efetivação da avença. A superação dessa linha de pensamento, então, parece imprescindível para serem atendidos os anseios por um sistema coletivo adequado.").

173 Corte Constitucional de Colombia, Apr. 14, 1999, C-215-99 44 (Colom.) ("[L]a finalidad del pacto de cumplimiento encaja dentro del ordenamiento constitucional y, en particular, hace efectivos los principios de eficacia, economía y celeridad. . . .").

174 *Id.* ("En efecto, el objetivo que persigue ese pacto es, previa la convocatoria del juez, que las partes puedan llegar a un acuerdo de voluntades para obtener el oportuno restablecimiento y reparación de los perjuicios ocasionados a los derechos e intereses colectivos, dando con ello una terminación anticipada al proceso y solución de un conflicto y por ende, un menor desgaste para el aparato judicial.").

> consensus, to secure prompt redress of the inflicted damage. It accordingly reduces the time needed to end the suit and to arrive at a decision by the judge. . . . Similarly, the commitment undertaken by the parties and incorporated into the draft of the agreement seeks to foresee any possible violation of joint interests and to achieve effective protection and reparation.[175]

These arguments purport to dispose of the allegation that conciliatory litigants somehow impinge upon, or fail to do justice to, an inalienable entitlement.

Nonetheless, the majority added this somewhat confusing qualification:

> We cannot concede to the judgment that approves the compliance agreement an absolute res judicata effect. To do so would amount to disregarding . . . the rights of people who had no opportunity to intervene in the conciliation and who in the future . . . might face a new violation of the conciliatorily vindicated rights.[176]

The justices were apparently refusing to encumber another suit upon a fresh and dissimilar infringement. They subsequently took pains to make their meaning clear, supplying their own italics:

> The question raised refers specifically to the emergence within the *same* community of *new facts*. The new facts would imply an encroachment upon the group rights and interests dealt with in the compliance agreement. Further, they would relate to *causes different* from those formerly alleged and to the appearance of technical information not available to the judge or the parties during the compliance agreement.[177]

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175 *Id.* at 45 ("Por el contrario, ese acuerdo contribuye a obtener la pronta reparación de los perjuicios ocasionados por la vía de la concertación, reduciendo los términos del proceso y en consecuencia, de la decisión que debe adoptar el juez, todo ello, en desarrollo de los principios constitucionales ya enunciados. De igual forma, mediante el compromiso que suscriben las partes y que se consigna en el proyecto de pacto, se busca prever oportunamente la violación de los intereses colectivos, y por consiguiente, su efectiva protección y reparación.").

176 *Id.* at 46 ("No obstante, encuentra la Corte, que cuando se trata de la protección de derechos e intereses colectivos, no puede concederse a la sentencia que aprueba el pacto de cumplimiento el alcance de cosa juzgada absoluta, pues de ser así se desconocerían el debido proceso, el derecho de acceso a la justicia y la efectividad de los derechos de las personas que no tuvieron la oportunidad de intervenir en esa conciliación y que en un futuro como miembros de la misma comunidad, se vieran enfrentadas a una nueva vulneración de los derechos sobre cuya protección versó la conciliación.").

177 *Id.* ("El interrogante planteado, se refiere en particular, a la ocurrencia en la *misma* comunidad de *nuevos hechos* que atentan contra los derechos e intereses colectivos objeto del pacto de cumplimiento, que en esta ocasión obedecen a *causas distintas* a las alegadas entonces y a la aparición de informaciones de carácter técnicos de las cuales no dispusieron ni el juez ni las partes al momento de conciliar la controversia.").

All in all, this passage suggests that preclusion does apply if the second dispute involves identical facts and causes. It should have clarified that a subsequent suitor may escape a preclusive ban exclusively by bringing forward previously unavailable "technical information" that would enable her to press a hitherto unasserted claim.

Citing the Restatement of Judgments, the U.S. Supreme Court has pertinently noted "that development of new material facts can mean that a new case and an otherwise similar previous case do not present the same claim."[178] It has emphasized that when "new evidence presented by [a complainant] give[s] rise to a new claim. . . , [his or her newly articulated] challenges are not precluded."[179] When the claim, or the object and cause, do not change, however, the prior suit does entail a res judicata bar.

In short, a satisfactory settlement neither undercuts nor undermines societal entitlements. Instead, it vindicates them. In this scenario, representatives require less time and expense to move the violator to restitute or compensate upon an impingement. Consequently, they may yield some on the total value of the anticipated adjudicative recovery and still come out ahead.

B. On Behalf of the Citizenry

Correspondingly, societal settlements may seem to involve someone illegitimately contracting away someone else's entitlement. Nonetheless and as previously suggested, they actually enable a community to vindicate its own rights by means of representation.[180] U.S. and Latin American jurisdictions have embraced this perspective to the extent that they not merely allow the antecedent suit to conciliate but additionally facilitate the process.

As shown below, civil codes typically contain a detailed regulation of conciliation resembling that developed in U.S. case law. Although they expectedly focus on disputes in which an individual settles, they may apply, if appropriately construed, to those in which a population reaches a settlement through a representative. Such an appropriate construal would have to rest on the notion that the person or entity seeking to do justice to the allegedly infringed-upon entitlements is representing the group, which, in turn, constitutes the true party to the transaction.[181]

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178 Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2305 (2016).
179 *Id.* at 2306.
180 *See generally supra* Sections I.A and III.D.
181 *See generally supra* Part III.

Under this interpretation, the rules at issue would control the conciliating of any case, whether individual or collective. In addition, they would cohere with statutes that provide for the conciliation, as well as prosecution, of societal actions in countries such as the United States, Brazil, or Colombia.[182] For purposes of illustration, the discussion will now concentrate on the Chilean Civil Code's relevant Title XL,[183] which partly derives from its French precursor and has equivalents across Latin America.[184]

First, Article 2452 of this enactment may appear to prevent these meta-individual suits from settling.[185] After all, it resoundingly rejects "settlements of the rights of others."[186] In the concerned controversies, however, the society at large ultimately conciliates claims based on its own entitlements, though by way of representation.

The representatives, as such, are not and should not be acting on their own behalf. If they were, they would be illegally pursuing a conciliation of assertions grounded on another's entitlements. The rights at stake belong not to any citizen in particular, or to the government, but instead to the citizenry in its entirety. They differ from their individual counterparts.[187]

Article 2461 invites a reading along parallel lines, rather than through an individualistic prism.[188] It proclaims: "Settlements have no effect except between the contracting parties."[189] Once again, the collectivity plays the role of the contractor on the claimant's side. To be sure, it necessarily participates in the agreement through someone who represents it.[190] Nevertheless, the latter simply stands in for the former. She neither negotiates pro se nor enters herself into the contract. As a result, the contractually granted entitlements profit, and the correlatively imposed obligations bind, exclusively the group itself on its end of the deal.

Finally, Article 2447 declares: "Only the person who has the objects of settlement at his disposal may settle."[191] Under the submitted construction, it means juridical, as well as natural, persons and entitles them to exercise

182 *See supra* Section V.A.

183 *See* CD. CIV. (Chile) arts. 2446-2464 (Chile) ("Título XL: De la transacción").

184 *See* CD. CIV. arts. 2044-2058 (Fr.) ("Titre XV: Des transactions"); CD. CIV. arts. 840-850 (Braz.) ("Capítulo XIX: Da transação"); CD. CIV. arts. 2469-2487 (Colom.) ("Título XXXIX: De la transacción").

185 CD. CIV. art. 2452 (Chile).

186 *Id.* ("No vale la transacción sobre derechos ajenos o sobre derechos que no existen.").

187 *See generally supra* Section I.A.

188 *See* CD. CIV. art. 2461 (Chile).

189 *Id.* ("La transacción no surte efecto sino entre los contratantes.").

190 *See generally supra* Section I.A.

191 *See* CD. CIV. art. 2447 (Chile) ("No puede transigir sino la persona capaz de disponer de los objetos comprendidos en la transacción.").

control over such "objects" either (1) directly or (2) through someone else. In societal-rights cases, the second type of exercise takes place. In the ultimate analysis, the people as a whole own the damaged property and hold the entitlements encroached upon but must rely on representation throughout. They therefore procure a conciliation through public or private representatives in order to repair the damage and attain vindication.

When the nominal plaintiff speaking in the name of the populace conciliates properly, she comports with these civil-law norms, as well as their U.S. common-law equivalents. The latter similarly require any contract generally to affect no rights of third parties,[192] to benefit or burden solely the contractors,[193] and to deal with goods at the parties' disposal.[194] They call for a similar interpretative approach in the context at hand.

All in all, the conciliations under consideration empower, rather than disempower, the general public. They permit it to safeguard its entitlements extra-judicially. A representative may not undersell, let alone appropriate, the interests entrusted to her. Instead, she must uphold them throughout the negotiations up to the execution of the agreement and beyond.[195]

VI. GOVERNMENT FOR THE PEOPLE

The modern state purports to promote the public interest, i.e., the well-being of its subjects. Hence, the U.S. Constitution enunciates: "The Congress shall have Power To . . . provide for the . . . general Welfare of the United States . . . ."[196] To this end, the government must "formulate, execute, evaluate, and control public policy,"[197] in the articulation of

192 *See* United States v. Miami, 614 F.2d 1322, 1352 n.3 (5th Cir. 1980) (Gee, J., dissenting) ("In a head-to-head tort or contract case the rights of third parties are not implicated; the parties may bargain away their own rights for whatever reasons they may choose.").

193 *See* Pac. Gas & Elec. Co. *ex rel.* Brown v. United States, 838 F.3d 1341, 1357 (Fed. Cir. 2016) ("It is well-settled that a party cannot step into the shoes of another party to pursue a contract claim absent explicit assignment of the claim or assignment by operation of law under equitable subrogation.").

194 *See, e.g.*, Mitchell v. Hawley, 83 U.S. 544, 550 (1873) ("No one in general can sell personal property and convey a valid title to it unless he is the owner or lawfully represents the owner. *Nemo dat quod non habet*."); Washington v. Ogden, 66 U.S. 450, 456 (1862) ("The legal effect of a covenant to sell is, that the land shall be conveyed by a deed from one who has a good title, or full power to convey a good title.").

195 *See generally supra* Section V.A.

196 U.S. CONST. art. I, § 8, cl. 1.

197 CONST. art. 85(3) (Ecuador) ("formulación, ejecución, evaluación y control de las políticas

Ecuador's 2008 Constitution. The same charter charges the Executive Branch, expressly, with the "administration, planning, execution, and evaluation of national public policy."[198] It additionally states that "public policy must focus on advancing the well-being and enforcing the rights of all" and, more controversially, that "the general interest" must prevail "over individual interests."[199]

In their efforts on behalf of the common weal, the authorities often must, as one of their primary constitutional obligations, strive to conserve ecological and other amply shared goods for the benefit of the citizenry. They normally implement their policy through administrative action and through litigation.[200] In this manner, the government arguably assures societal priorities and entitlements, i.e., not those of some individuals but rather those of society as a whole.

The U.S. legal system deploys the previously quoted Latin phrase *parens patriae* to refer to this official engagement. The Supreme Court has declared: "*Parens patriae* means literally 'parent of the country.'"[201] It has held that this "concept does not involve the State's stepping in to represent the interests of particular citizens who, for whatever reason, cannot represent themselves."[202] The justices have insisted that the government advances, instead, its "[q]uasi-sovereign interests . . . in the well-being of its populace,"[203] as opposed to "sovereign interests, proprietary interests, or private interests pursued by the State as a nominal party."[204] In *Georgia v. Tenn. Copper Co.*, Oliver Wendell Holmes famously framed the quasi-sovereign interest in the environment: "[T]he state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air."[205]

Needless to say, this precise *parens patriae* doctrine, with its manifold details, applies solely in the United States. Nonetheless, it generally corresponds to the formerly discussed, recurrent determination to entrust

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públicas").

198 *Id.* art. 141 ("rectoría, planificación, ejecución y evaluación de las políticas públicas nacionales").

199 *Id.* art. 85(1) ("Las políticas públicas . . . se orientarán a hacer efectivos el buen vivir y todos los derechos."); *id.* art. 85(2) ("prevalencia del interés general sobre el interés particular").

200 *See, e.g.*, Sackett v. EPA, 566 U.S. 120, 123 (2012) ("If the EPA [Environmental Protection Agency] determines that any person is in violation of [the Clean Water Act's] restriction [on the pollution of navigable waters], the Act directs the Agency either to issue a compliance order or to initiate a civil enforcement action.").

201 Alfred L. Snapp & Son, Inc., v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 600 (1982).

202 *Id.*

203 *Id.* at 602.

204 *Id.*

205 Georgia v. Tenn. Copper Co., 206 U.S. 230, 237 (1907).

the government with the community's concerns and with the representation of the entire population. In this day and age, authorities all around may and must adopt measures and engage themselves, in and out of court, in favor not of a few persons but of the polity in itself.

In his plurality opinion in *Luján v. Defenders of Wildlife*, Antonin Scalia went so far as to insinuate that the political governmental branches possess the prerogative to look after the communal welfare. He wrote: "Vindicating the *public* interest (including the public interest in government observance of the Constitution and laws) is the function of Congress and the Chief Executive."[206] Accordingly, he announced a decision restricting citizen suits.[207]

All the same, suitors who demonstrate the required injury-in-fact can still champion what interests the public. The highest U.S. tribunal has proclaimed: "The test of injury in fact goes only to the question of standing to obtain judicial review. Once this standing is established, the party may assert the interests of the general public in support of his claims for equitable relief."[208] Similarly, *qui tam* and class actions have long enabled individuals to litigate in the name of the people at large.[209]

The civil-law realm has traditionally empowered the citizenry to play this role too.[210] Latin American codified popular actions present a case in point.[211] They stem from ancient Rome, i.e., from an era in which the population regularly participated, in very specific situations, in the safeguard of the public interest.[212] For instance, Chile's current Civil Code, originally drafted by Venezuelan Andrés Bello in 1855 and immensely influential throughout Latin America,[213] incorporates several such suits, respectively, (1) to protect the life of unborn children, (2) to safeguard the right of way on public roads, (3) to remove objects that may hang from buildings and may end up falling on passersby, and (4) to set aside an impending harm to which an indeterminate number of potential victims may be exposed.[214]

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206 Luján v. Defenders of Wildlife, 504 U.S. 555, 576 (1992).

207 *Id.* at 578 ("We hold that respondents lack standing to bring this [citizen suit under the 1973 Endangered Species Act against the exemption of actions undertaken in foreign nations from statutory protections].").

208 Sierra Club v. Morton, 405 U.S. 727, 740 n.15 (1972).

209 *See generally supra* Section IV.B.

210 *See generally supra* Sections IV.C-D.

211 *See generally supra* Parts IV.C.1 and IV.D.2.

212 *See generally supra* Section I.A.

213 *See generally* OQUENDO, *supra* note 9, at 453-530 (Ch. VII).

214 CD. CIV. arts. 75 (Chile) ("El juez . . . tomará, a petición de cualquiera persona o de oficio, todas las providencias que le parezcan convenientes para proteger la existencia del no nacido, siempre

Relatively recently, many jurisdictions in the Western Hemisphere have been gravitating toward authorizing anyone more widely to speak for the nation or a subunit thereof, especially through litigation.[215] They have opted, on this last front, not for narrowly tailored private-law actions but rather for broadly based public-law suits.[216] As a consequence, the challenge of how to achieve coherence when numerous different plaintiffs may stand in for the collectivity has emerged or, actually, intensified. Not surprisingly, it has driven lawmakers and judges to draw on the principle of res judicata as a key part of their response.[217]

While the state enjoys no monopoly over societal rights, it may certainly enforce them and thereupon preclude other individuals or entities with standing. When it prosecutes a group entitlement, citizens may no longer do the same on their own. After all, they may proceed merely insofar as no prior enforcement has taken place at the hands of another litigant eligible to lodge a complaint.[218]

Clearly, the authorities ought to stand up for the public interest, including that in the environment, and may speak for the citizenry. They may demand comprehensive compensation if necessary. Ordinarily, the government does not thereby stand in for concerned persons, who consequently preserve their right to indemnification for any damage that they might have personally undergone.[219]

To be sure, state officials everywhere must exert themselves to represent the populace effectively and fairly. In the process, they should wisely develop policies and conduct litigation so as to further, to the utmost, what interests the public. At any rate, as the U.S. Court of Appeals for the Ninth Circuit persuasively posited in closing a passage of *Alaska Sport Fishing Ass'n v. Exxon Corp.* reproduced earlier, "There is a

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que crea que de algún modo peligra."); *id.* art. 948 ("La municipalidad y cualquiera persona del pueblo tendrá, en favor de los caminos, plazas u otros lugares de uso público, y para la seguridad de los que transitan por ellos, los derechos concedidos a los dueños de heredades o edificios privados."); *id.* art. 2328 ("Si hubiere alguna cosa que, de la parte superior de un edificio o de otro paraje elevado, amenace caída y daño, podrá ser obligado a removerla el dueño del edificio o del sitio, o su inquilino, o la persona a quien perteneciere la cosa o que se sirviere de ella; y cualquiera del pueblo tendrá derecho para pedir la remoción."); *id.* art. 2333 ("Por regla general, se concede acción popular en todos los casos de daño contingente que por imprudencia o negligencia de alguien amenace a personas indeterminadas."); *see also* CD. CIV. arts. 91, 1005, 2355, 2359 (Colom.) (same, respectively); CD. CIV. arts. 61, 990, 2228, 2236 (Ecuador) (same, respectively). The Panamanian Civil Code, in turn, authorizes popular actions to enforce the ban on the exaction of compound interests and to remove or alter, as well as to recover damages caused by, a construction obstructing a public way. 625. CD. CIV. arts. 994-A, 625 (Pan.).

215 *See generally supra* Part IV.

216 *See generally supra* Part IV.

217 *See generally supra* Part IV.

218 *See generally supra* Part IV.

219 *See generally supra* Part IV.

presumption that the state will adequately represent the position of its citizens."[220]

The population, in turn, has every right to expect a vigorous governmental defense of its collective and environmental well-being. It may also utilize an ample assortment of mechanisms to monitor and to check its representatives, as well as to rebut the presumed representative adequacy. For instance, the U.S. Constitution invites anybody "to petition the Government for a redress of grievances."[221] It thus calls to mind its counterparts south of the border,[222] as well as the American Declaration of the Rights and Duties of Man.[223]

Furthermore, anyone immediately impacted by an administrative settlement throughout the Americas could presumably attack it before a tribunal. In the United States, for example, she might rely on Section 702 of the Administrative Procedure Act (APA), which reads: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."[224] In Colombia, Article 86 of the Code of Administrative Procedure might, likewise, show the way: "An interested person may directly sue for the reparation of a harm caused by an administrative action, omission, [or] operation . . . ."[225]

In addition, individuals may usually challenge any ensuing infringements upon their constitutional entitlements. In the United States, they may contest, pursuant to the top tribunal's holding in *Martin v. Wilks*, any consent decree that encroaches upon their rights under the Constitution.[226] In Latin America, they may file for a writ of protection

220 34 F.3d 769, 773 (9th Cir. 1994) (*per curiam*); *see supra* Section IV.B.3.

221 U.S. CONST. amend. I.

222 *See, e.g.*, CONST. art. 8 (Mex.) ("Los funcionarios y empleados públicos respetarán el ejercicio del derecho de petición, siempre que ésta se formule por escrito, de manera pacífica y respetuosa; pero en materia política sólo podrán hacer uso de ese derecho los ciudadanos de la República.").

223 *See* American Declaration of the Rights and Duties of Man, art. XXIV, May 2, 1948, O.A.S. Res. XXX, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Serv.L.V./II.82, doc. 6, rev. 1 (1992) ("Every person has the right to submit respectful petitions to any competent authority, for reasons of either general or private interest, and the right to obtain a prompt decision thereon.").

224 5 U.S.C. § 702 (2018).

225 DECR. 1, CD. CONTENCIOSO ADMINISTRATIVO art. 87 (Colom.) (1984) ("La persona interesada podrá demandar directamente la reparación del daño cuando la causa sea un hecho, una omisión, una operación administrativa . . . ."); *see also* L. 35 art. 1 (Ecuador) (1968) ("El recurso contencioso-administrativo puede interponerse por las personas naturales o jurídicas contra los reglamentos, actos y resoluciones de la Administración Pública o de las personas jurídicas semipúblicas, que causen estado, y vulneren un derecho o interés directo del demandante.").

226 Martin v. Wilks, 490 U.S. 755, 758 (1989) ("A group of white firefighters [may challenge]

against any official action that impinges upon their entitlements.[227] This special, summary procedural device serves to address the dispute at hand, without setting a precedent, and to secure fast and effective satisfaction.[228]

Finally, people with societal standing would have strong grounds for intervention before any forum in which the local administration were endeavoring to conciliate or to validate a conciliation for the profit of the society. In an analogous vein, they would probably face favorable odds if they sought some kind of a say in any governmental extra-judicial negotiations with an alleged violator. A threat to litigate could further improve the chances in this effort to exert influence.

As soon as the contract settling the controversy becomes final and attains any needed court-validation, however, citizens may no longer intervene or weigh in along these lines. Moreover, they then lose their right to institute a suit on the same group claim. A fortiori, a private litigant may not attempt the vindication all over again of the rights that the authorities have already completely vindicated on the matter.[229]

In sum, the government does not, when negotiating and signing such a settlement, purely propel its own particular commercial, contractual, financial, fiscal, pecuniary, or proprietary interests. Instead, it acts, as it frequently, prototypically, and principally does, in pursuit of the prosperity of its subjects. The moment the agreement amounts to res judicata, no one else may file or refile the cause.

In the hypothetical, the state specifically enforces the community's environmental right against any violations attributable to the manufacturer. Upon conciliating and procuring any requisite judicial endorsement, it legally and legitimately binds itself and anyone else trying to uphold the entitlement against the same encroachments. Thereafter, victims may exclusively exercise their own substantive individual right to compensation for any personal loss that they might have experienced. They may not launch the precedingly averted litigation.

CONCLUSION

Societal suits, particularly when lodged by a non-governmental litigant,

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promotion decisions on the basis of race in reliance on certain consent decrees, and [allege] that these decisions constituted impermissible racial discrimination in violation of the Constitution . . . ."); *see also id.* at 762 ("A judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings.").

227 *See supra* Sections IV.D.1 (Reference to Peru's Writ of Protection) and IV.D.3 (Reference to Argentina's Writ of Protection); *see generally* OQUENDO, *supra* note 9, at 307-380 (Ch. V).

228 *See generally* OQUENDO, *supra* note 9, at 307-380 (Ch. V).

229 *See generally supra* Part II.

may generate considerable controversy. They could even fall prey to wide-ranging campaigns against a perceived culture of excessive litigiousness. The United States sometimes seems to provide cases in point. It has occasionally seen citizen suitors and class-action complainants constrained by case law and legislation apparently in this spirit.[230] Interestingly, other countries in the hemisphere, or the world, appear not to confront this phenomenon as much. Maybe they eventually will, whether through U.S. influence or by growing in distrust of the legal establishment and of litigation on their own.

In any event, the failure to take res judicata seriously might fire up any pre-existing hostility against collective actions. It might lead to, or intensify, the temptation to view them as superfluous or frivolous. Indeed, superfluity and frivolity would seem to pervade any complaint on a previously staked claim, especially upon a favorable outcome the first time around.

Consequently, the supra-individual lawsuits at issue should strengthen, rather than weaken, from a punctilious adherence to the principle of preclusion. They should thereby end up reassuring the citizenry that they will not vouchsafe the claimant a windfall, unfold unfairly against the defendant, or spawn juridical inefficiency. Any potential plaintiff would, in turn, appreciate that she may truly have the first and last word.

This Article launched from these convictions. To guide the analysis, it initially (I) clarified the nomenclature and proffered a concrete hypothetical. The discussion then (II) distinguished the adjective implications of a societal settlement that has enjoyed any requisite judicial endorsement from their contractual counterparts. It thereupon (III) elucidated them from a common- and civil-law perspective, as well as from that of the overarching idea of res judicata.

Part IV examined how jurisdictions across the Americas have decided these matters in practice. Next, Part V showed that settlers need neither compromise on the undergirding entitlements nor contract on the rights of someone else. Finally, Part VI explored how the government might justify itself in prosecuting, or settling on, any such entitlement.

At the end of the day, the preclusive ramifications define and legitimate the vindication, whether private or public, of the right at stake. For starters, they not only circumscribe but also outline and illuminate it, delineating as well as delimiting in the manner of a circle's circumference.

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230 *See, e.g.*, Luján v. Defenders of Wildlife, 504 U.S. 555 (1992); Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified as amended in scattered sections of 28 U.S.C.).

After all, "[s]omething is what it is *within*, and *by virtue of*, its boundary."[231] More importantly, the underlying act of representation maintains, beyond its character as such, its very legitimacy by honoring these procedural parameters for its exercise.[232]

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231 GEORG W.F. HEGEL, ENZYKLOPÄDIE DER PHILOSOPHISCHEN WISSENSCHAFTEN I (1830), *reprinted in* 8 G.W.F. HEGEL WERKE 197 (§ 192 *Zusatz*) (1970) ("Etwas ist nur *in* seiner Grenze und *durch* seine Grenze das, was es ist.").