* Issue preclusion: earlier determination must be essential to judgment
	+ Those that are not essential to the judgment are generally not preclusive
		- Hypo: P sues D for interest on note D alleged fraud in execution of note and release of obligation to pay interest. P wins. P then sues for principal. D brings up fraud in execution of note. Is D issue precluded?
			* Notice that the defense of release of an obligation to pay interest is not relevant in the second action: only fraud in the execution of the note is
			* P had to overcome both of the defenses to prevail in the first action, each was essential to the judgment, so D is issue precluded

**Cambria v. Jeffrey**

* Suit 1: Jeffrey sues Cambria for bodily injury
	+ Both determined to be negligent, Jeffrey’s contributory negligence leads to judgment for cambria
* Suit 2:Cambria sues Jeffrey, no compulsory counterclaim rule
	+ Jury finds for cambria, judge entered judgment for Jeffrey on the basis of issue preclusion – Cambria was determined to be negligent in the earlier suit, so he is contributorily negligent
	+ Reversed on appeal – the determination that Cambia was negligent was not essential to judgment for Cambria in the earlier suit
		- Previous case: only had to prove Jeffrey was contributorily negligent to get judgment for Cambria – a finding of Cambria’s negligence was not essential to the judgment
	+ Why have this rule?
		- The jury, having found Cambria’s to not be liable (because Jeffrey was contributorily negligent) might have thrown in a finding of Cambria’s negligence without really taking it seriously
	+ Essentiality is the rule in most jurisdictions
		- But in some jurisdictions nonessential issues decided in an earlier case can have subsequent issue preclusive effect, if you can show they were taken seriously by the finder of fact in the earlier case
* Hypo: P sues D for interest on note. D alleges fraud in execution of note and release of obligation to pay interest. D wins on both grounds, P sues for principal: was fraud essential?
	+ - * Notice that the defense of release of an obligation to pay interest is not relevant in the second action: only fraud in the execution of the note is
			* Now we have a problem: neither the finding of fraud in the execution of the note nor finding of a release of the obligation to pay interest was essential to the judgment because either would have been sufficient on its own
			* It is possible the jury didn’t take the finding of fraud in the execution of the note seriously, because they had already found for D on the basis of the release of the obligation to pay interest
				+ If so, it would be unfair to bind P by the finding of fraud in the execution of the note in this subsequent case
			* There is disagreement on such cases, but the majority view is to not allow issue preclusion

*Hypo:* P sues D for interest on note. D alleges fraud in execution of note and releases obligation to pay interest. D wins on both grounds. P then sues for subsequent interest. D alleges Fraud in execution of note and release of obligation to pay interest. Is P issue precluded?

* This is not like the earlier case, because both are issues available as defenses in second lawsuit
* As a result issue preclusion is allowed
* Even if only one defense was taken seriously in the earlier lawsuit, that one defense is available in the second lawsuit too

*Hypo:* P and D contract for D to deliver coal to P monthly. D breaches. P sues D in California. D argues that the contract is invalid, D loses on issue. D breaches again. P sues D in Nevada. D argues that the contract is invalid (P fails to mention issue preclusion), D wins on issue. D breaches again. P sues D in California. Which determination has issue preclusive effect?

 -inconsistent answers from courts?: would look to the last determination of the issue (incentivizes D to bring forward issue preclusion)

**Exceptions to Issue Preclusion**

**Restatement (Second) of Judgments §28

Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:**

**(1) The party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action; or
(2) The issue is one of law and (a) the two actions involve claims that are substantially unrelated, or (b) a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws; or
(3) A new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them; or**

**(4) The party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action; the burden has shifted to his adversary; or the adversary has a significantly heavier burden than he had in the first action; or
(5) There is a clear and convincing need for a new determination of the issue (a) because of the potential adverse impact of the determination on the public interest or the interests of persons not themselves parties in the initial action, (b) because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action, or (c) because the party sought to be precluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.**

* Hypo: D is acquitted of battery in connection with resisting arrest. Gov’t sues D civilly for battery to officer. Is gov’t issue precluded?
	+ OJ Simpson example, acquittal is not preclusive: exception 28(4) applies
	+ **(4) The party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action;**
* Hypo: D is convicted of battery in connection with resisting arrest. Gov’t sues D civilly for battery for damages to officer. Is D issue precluded?
	+ Yes, 28(4) does not apply here – the government satisfied a higher burden of proof in the earlier action
* Hypo: In Illinois, P suing for negligence has burden of production and persuasion concerning his own lack of contributory negligence. P sues D for negligence and loses on ground that he could not satisfy the burden concerning his own lack of contributory negligence. Subsequently X (another person in the accident) sues P for negligence. Can X issue preclude P from relitigating his negligence in the accident?
	+ **No – 28(4) applies because the burden has now shifted from P to X**
* - P sues D to recover for property damage in small claims ct with a jurisdictional maximum of $500 and which operates informally without pleadings, counsel, or rules of evidence

- there is no possibility of appeal

- D is found negligent

- in a subsequent action by D against P brought in NY state court for $10,000 for personal injuries arising out of the same accident, is D issue precluded concerning his own negligence?
* no -
	+ 28(3) - New determination of the issue is warranted by differences in quality or extensiveness of the procedures followed in the courts
	+ 28(1) The party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action;

Issue Preclusion

Remember that in general you can’t be bound by a determination of an issue unless you were a party in the earlier litigation or in privity with the party

If you admitted an issue in an earlier case, the admission does not have issue preclusive effect in subsequent litigation

Default judgments do not have issue preclusive effect (but they have claim preclusive effect)

Summary judgment and directed verdicts have issue preclusive effect

* No reasonable jury could decide in party’s favor; case was so rotten as far as evidence is concerned, so should have preclusive effect; can’t even get to jury!
* Remember, however, if you never brought it up (e.g. never introduced an affirmative defense), it will not have issue preclusive effect
	+ Affirmative defenses that were not raised were not actually litigated and decided so do not have issue preclusive effect

Hypo:

- P sues D for negligence
- P was also negligent
- It is held that P is barred due to contributory negligence (the doctrine of comparative fault is rejected)
- P and D get into another accident
- P sues D for negligence
- P was also negligent
- Is P precluded to relitigate whether P is barred by contributory negligence or comparative fault applies?

ANSWER: P is not issue precluded

* The issue is one of law and the two actions involve claims that are substantially unrelated;
* The pure issue of law has been actually litigated and decided, but seems unfair for you to be stuck with contributory negligence standard when rest of jurisdiction has changed to comparative negligence
* You also might say that P could not have foreseen that this issue would arise and subsequent litigation

Hypo:

- Business A sues gov’t
- the S.D.N.Y. determines that the widgets it imports do not have to have an import duty
- Business B sues gov’t
- the N.D. Ca. determines that the same type of widgets have an import duty
- subsequently the gov't sues A in the D. Del. to make it pay an import duty going forward
- is the government issue precluded?

ANSWER: this is an exception to issue precluded; not issue precluded here

* (2) The issue is one of law and... (b) a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws; or
* Why is there a problem about inequity here if there is issue preclusion?
	+ Unfair where one person is required to pay a duty and one isn’t; A will put B out of business!
	+ Inequitable administration of the laws; you can’t have businesses in competition with one another subject to different import duties

HYPO: US v. Moser (U.S. 1924)

- a federal court determined that Moser (who was a cadet the Naval Academy during the Civil War) “served in the Civil War” for the purposes of pension benefits
- Jasper then sued on the same question and lost by reference to another relevant statute
- U.S. refuses to give Moser his benefits and he sues
- is U.S. issue precluded?

ANSWER: U.S. is issue precluded; exception to issue preclusion did not apply; Moser won;

* Moser and jasper aren’t in business competition with each other, so no substantial inequitable administration of law problem here (although there is some inequity, it is not enough to prevent issue preclusion)

SEE RESTATEMENT FOR EXCEPTION TO ISSUE PRECLUSION

Now – the mutuality requirement, which used to exist, but now only exists for two jurisdictions –Ohio and Georgia

HYPO:

- P, D, and X got into an accident **-** P sues D for negligence
- it is determined that P was contributorily negligent **-** P then sues X for negligence
- can X issue preclude P concerning his contributory negligence?

ANSWER:

* If X could preclude P, X has an upside but no downside
* In mutuality states (now only Ohio and Georgia) the fact that X would not have been bound by the earlier litigation means he can’t take advantage of it
	+ You can’t take advantage of issue preclusion unless you were bound/in privity with the earlier litigation
	+ Mutuality states say you have to have been a party or in privity with the party in the earlier litigation to take advantage of issue preclusion; restricts issue preclusion substantially;