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
  + 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;

Some states (including VA) only allow defensive nonmutual issue preclusion

* Nonmutual issue preclusion means we have given up mutuality requirement; you can use issue preclusion if you weren’t a party or in privity, but only defensively (only when you are using issue preclusion as a shield to protect yourself from liability)
  + Don’t necessarily have to be a defendant (could be a counterclaim or third party complaint) but must be used defensively
* Example: Blonder-Tongue Labs
  + Univ. of Illinois Foundation first sues Winegard Co. concerning patent infringement  
    - U. of Ill. lost (patent invalid)  
    - U. of Ill. then sues B-T concerning infringement of same patent
  + Defensive non-mutual issue preclusion allowed in this case
  + B-T could keep U. of Ill. From relitigating the validity of the patent
* What makes it defensive is that the party that is bound is a plaintiff (or more generally someone demanding relief) in the second action
* This seems to make good sense; P shouldn’t be able to litigate same issue over and over just by choosing different defendants

Some states also allow offensive non-mutual issue preclusive (it is also allowed under Federal law)

* This is the Modern approach; heavily limited, but available
* Plaintiff in second suit was not a party in the first suit and uses issue preclusion as a sword
* Why is this a problem, such that it needs to be heavily restricted?
* HYPO
  + P1 sues D Corp for damages from defective product – loses (product not defective)  
    P2 sues D Corp for damages from defective product – loses (product not defective)  
    P3 sues D Corp for damages from defective product – loses (product not defective)  
    P4 sues D Corp for damages from defective product – wins (product defective)  
    P5-1000 take advantage of offensive nonmutual issue preclusion against D Corp…?
  + ANSWER:
    - Last in time rule: last determination of issue is determinative going forward (which is why P5-1000 take advantage)
    - Imagine just P4 sued, and it was for $10, but next suit involves a class action for a lot of money; in this case, offensive non-mutual issue preclusion would be problematic
    - also Problems with inconsistent determinations; also ask why P5-1000 didn’t intervene earlier
* Parklane Hosiery
  + First filed action was a shareholder class action (Shore was the plaintiff); claimed that a proxy statement was materially misleading in connection with merger; action with damages
    - After the class action is filed, SEC brings action for injunctive relief on same issue
    - SEC action comes to judgment first (it is determined that the proxy statement was materially misleading); then, Shore (Plaintiff in first action) moves for issue preclusion on that issue
  + Big question (setting aside 7th amendment issues) should we allow offensive non-mutual issue preclusion?
    - Plaintiffs were using the issue preclusion as a sword
    - A lot of discussion why offensive non-mutual issue preclusion is more problematic than defensive
      * With offensive, there is an encouragement to plaintiff in second action to hold back and not join; if P joins it is bound; if not it can wait and see what happens – will not be bound if it’s an adverse determination, and if it is a favorable determination than P can take advantage of it
      * Offensive can encourage more lawsuits while the point of issue preclusion is to decrease amount of litigation
      * also Defendant in first action may have had little incentive to defend vigorously or may not have been able to foresee that the issue would arise in subsequent litigation
        + Actually these are possible problems with all issue preclusion, not just offensive non-mutual
  + As a matter of federal preclusion law (federal question case, not necessarily diversity), SCOTUS says we will accept offensive non-mutual issue preclusion, but will be very careful in how we apply it
  + Factors that recommend not allowing offensive non-mutual issue preclusion
    - Have there been inconsistent determinations of the same issue in multiple previous litigations?
      * Here, there was only determination of the issue: the proxy statement was held to be materially misleading
    - Could the plaintiff and the subsequent litigation have easily intervened in the earlier action?
      * Here the Plaintiffs weren’t hanging back and waiting to jump in if there was a favorable determination of the issue; Shore could not have intervened in SEC action, and regardless, Shore sued first, before the SEC
    - Could the precluded party in the second litigation not have reasonably foreseen that the same issue would arise in subsequent litigation?
      * Here not a problem, because the defendants already knew that the shareholder class action was proceeding and concerned the same issue
    - Did the precluded party have insufficient incentive to defend vigorously in the earlier action?
      * Here not a problem - Parklane had a big incentive to litigate the issue vigorously (everyone is terrified of the SEC and the injunctive relief it was asking for was serious)
* Parklane is a perfect example of when offensive non-mutual should be allowed

HYPO: (offensive non-mutual issue preclusion)

* accident involving A, B, and C  
  A sues B for negligence  
  A wins (B is found negligent)  
  C then sues B for negligence in connection with the same accident  
   – if offensive nonmutual issue preclusion is allowed, then B is precluded from litigating own negligence

DISTINGUISH! (the two scenarios are completely different!)

P sues D for negligence. P wins (D is negligent). X knew about the suit but refused to intervene. X sues D for negligence in connection with the same accident. X may not be able to issue preclude D concerning D’s negligence.

* Here X may not take advantage of offensive non-mutual issue preclusion because X could have easily intervened in the earlier action (this is the wait and see problem mentioned in Parklane); as a result ***D***is ***not*** precluded

P sues D to put up a dam. X’s property will be flooded, but he refuses to intervene in the suit. P wins. X may be precluded to sue D to take down dam.

* Here because X is a necessary party and failed to intervene, under the cutting edge preclusion law of some jurisdictions ***X*** is ***precluded*** – this is a rare example when someone who was not a party or in privity with a party in the earlier litigation is nevertheless precluded

**Choice of Law and Interpretation of Another Sovereign’s Law**

* When VA court interprets VA law they are making VA law
* BUT when CA or federal court interprets VA state law they aren’t

**OK – what about the duties of a federal court entertaining a state law action…**

**one might think that this is answered by the Rules of Decision 28 U.S.C. § 1652**

* The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as the rules of decision in civil actions in the courts of the United States, in cases where they apply.
* enacted with the creation of federal court system in 1787
* curious law
* not interpreted as saying federal courts don’t have power to create federal common law rules
  + as we shall see they can to some extent
* There is also no mention of law of other nations
  + what if it is something that happened in Germany🡪then Germany’s law cannot apply? RDA is not read to mean that state law should be used
* and with respect to state law, RDA seem to simply say what would be true even without the RDA, namely that if federal law does not apply to a US transaction than state law does
* Green has a theory about what the RDA was meant to do, but we will ignore it here
* just remember it is a bit of a mystery

**How to Interpret the Other Sovereign’s Law?**

* One would think that the following is *obvious* –if the question is the common law in California, California Courts are definitive deciders of what their state’s common law is
* but it is not obvious

**Swift v. Tyson**

* **Hypo:** P sues D in federal court in New York concerning commercial paper issued in New York. The Supreme Court held that in interpreting the general common law prevailing in New York, a federal court need not follow opinions of New York state courts.
  + however concerning local usages (e.g. real property) and New York’s statutes and constitution, the decisions of New York state courts are binding
* **What about the RDA**
  + **RDA** refers to law of several states are applicable when federal statutes don’t apply, wouldn’t that mean that state decisions would apply here ?
    - Well Story, J. says – “laws” in the RDA refers to state statutes and to common law rules that are local – not to the general common law

**Black and White Taxicab v. Brown and Yellow Taxicab under Swift v. Tyson**

* **Facts:** 
  + Brown and Yellow Taxicab reincorporated in TN to gain diversity jurisdiction. Sued Black and White and Louisville & Nashville Rail Company for breach of contract
    - they had contract with RR to exclusive right to pick up passengers at stations but wasn't being given exclusivity – the RR was allowing Black and White to pick up passengers too
  + Black and White responded arguing that Brown and Yellow fraudulently obtained diversity by reincorporating, but Court said there is diversity because you look at jurisdiction at time of filing and they obtained jurisdiction legally
    - This wouldn’t work as well now because PPB
  + Ky state courts had held such a contract invalid
  + but, using Swift v. Tyson approach, Federal District Courtsays contract is valid under general common law
  + rules for Brown and Yellow
  + CoA agrees
  + SCt affirms
* **Holmes Dissent:**
  + We should be following KY common law as it is decided by KY state courts
  + there is no general common law
* Holmes criticism of the general common law takes two forms
* first he claims that the general common law cannot exist because law only exists when an authority stands behind it and no authority stands behind the general common law
* in effect Holmes is saying that Swift confused law and morality
  + morality can exist and bind people independent of any authority or any social facts about a community
* Green: but Holmes is wrong – the general common law was not thought of as binding in a state independent of state authority
* assume that facts of the Brown & White Taxicab case had taken place in   
    
  Louisiana  
  the Cree Tribe  
  Turkey  
    
  what result?
  + the general common law would not be applied
  + why? because the officials in these jurisdictions had not adopted the general common law

**General Common Law is based upon adoption by officials in the jurisdiction and they could rid of the general common law tomorrow if they wanted.**

**in other word the general common law applies in KY because KY officials say so (by adopting a common law system)**

* Here is Holmes’s second argument against Swift: But isn’t it clear that Kentucky officials WANT the courts of other jurisdictions (federal, sister state, and foreign) to follow the decisions of Kentucky courts concerning general common law cases that arise in Kentucky…?
  + Holmes assumes it is obvious that when KY made State Supreme Court they wanted its decisions to be binding, not just on KY state courts, but also on federal and sister state courts when dealing with questions of common law in KY
  + **“If a State Constitution should declare that on all matters of general law the decisions of the highest Court should establish the law until modified by statute or by a later decision of the same Court, I do not perceive how it would be possible for a Court of the United States to refuse to follow what the State Court decided in that domain. But when the Constitution of a State establishes a Supreme Court it by implication does make that declaration as clearly as if it had said it in express words, so far as it is not interfered with by the superior power of the United States.”**
* Green: Holmes is **wrong.**
* First, how do we know when KY Courts want their decisions to be binding upon federal and sister state courts? 🡪
  + there will be no KY state court case saying so either way
  + KY state courts would never have occasion to talk about what federal and sister state courts should do – they only talk about what they should do since that is the only thing relevant to th case before them
* But to the extent that there was evidence from state courts, it was in favor of Swift
* **move the facts of the Black and White case to Tennessee (that is, it is a Tennessee contract is at issue) and a Kentucky state court is addressing the case  
  would it defer to the decisions of Tennessee courts…?**
  + For a long time, it would *not* defer to TN state courts concerning the general common law in TN
  + that suggests that KY state courts thought the general common law in KY is also independent of the decisions of KY state courts
  + the idea is that common law jurisdictions (KY, TN, NY, England, S Africa) each chose to adopt a standard that they thought was common to all common law jurisdictions and concerning which the court of any common law jurisdiction could get wrong.
* **In fact, states started moving from a Swift understanding of the general common law to an Erie understanding between Swift and Erie:**
  + **Connecticut: deferred to sister states courts concerning the content of the common law in the states pre-Swift**
  + **Pennsylvania: moved to deferring to sister state courts around 1880**
  + **Georgia: *still* does not defer** 
    - GA courts say the content of the common law is standard in all common law states is independent of what the courts in those states say it is
    - Georgia courts still will come to their own decision regarding content of the common law in a sister state
* Should federal courts adopt a State by State approach…?
  + use a Swift approach for GA, Erie for PA, CT?
* that is tough because it is so hard to figure out what a state’s views are – it makes sense that the SCt used a general approach
* but the general approach used in Swift was in keeping with what most common law states thought of the general common law at the time
  + - At time Swift v. Tyson was rightly decided
* Green says Erie is rightly decided **for its time**
  + most common law states have an Erie view of the common law now

**Even if Swift was right when decided it did cause Vertical Forum Shopping**

* but the fact that state courts had a Swiftian view too means that there would be horizontal forum shopping problem even if federal courts abandoned Swift v. Tyson