Civil Procedure Outline

Bobby Ragz, Fall 2015

Multiple choice

Jurisdictional policy (take position, argue it, say what the other side would say, case names don’t matter), short answer (give short, both sides, relevant cases), issue spotter (IRAC)

**Jurisdiction Over the Subject Matter**

* 1. An Overview:
     1. From Supplement:
        1. **Art III § 2**: extends judicial power of the US to controversies “between Citizens of different States and between a State, or the citizens thereof, and foreign states, citizens or subjects”
        2. **28 U.S.C. §1332 (p. 246)**: current scope of diversity jurisdiction that Congress has granted to the federal courts
        3. § 1359 (p. 256): no jurisdiction if any party has been collusively made or joined to invoke the jurisdiction
        4. § 1369 (p. 257): Jurisdiction involving minimal diversity between adverse parties that arises from a single accident where at least 75 person have died
        5. *Capron v. Van Noorden*
           1. Can a plaintiff, after having chosen the court, complain that there was a lack of subject matter jurisdiction?

Yes, because diversity of citizenship wasn’t required in the initial complaint, so his right to complain hadn’t been waived

* + - * 1. Set the precedent: must state diversity from the beginning and can’t challenge after that; this case was remanded to set that and to not infringe on state’s rights

The federal court cannot usurp the power of the state court

* + 1. Definitions
       1. **Diversity Jurisdiction**: allows the federal courts to hear cases in which the claims arise solely under state law, so long as **constitutional** ad **statutory** requirements are satisfied
       2. **Subject matter Jurisdiction**: refers to a court’s competence to hear and determine cases of the general class and subject to which the proceeding in question belong
          1. **For a federal court to hear and resolve an claim, must have subject matter jurisdiction (s**.m.j)
    2. Most congressional grants of s.m.j. include:
       1. Diversity jurisdiction
       2. Federal question jurisdiction
       3. Removal jurisdiction
       4. Supplemental jurisdiction
    3. **Rules**:
       1. S.m.j. **cannot** be waived or agreed to by the parties, UNLIKE PERSONAL JURISDICTION
       2. **Can** object to s.m.j at any state of the proceeding, including on appeal
       3. Court can raise issue *sua sponte* (of their own accord)
       4. If s.m.j is not contested, a judgment may not be challenged on that basis except under special circumstances of abuses of authority or substantial infringements of the authority of another govt.
  1. **Diversity Jurisdiction**
     1. **Complete diversity**: there is no diversity jurisdiction if any *plaintiff* is a citizen of the same state as any *defendant*
        1. Announced by C.J Marshall in *Strawbridge*
     2. **Policy goals**: want to avoid discrimination against out-of-state residents in state courts, secure financial environment n
     3. **To determine, must meet both requirements of 28 § 1332**:
        1. Must know the citizenship of the parties
        2. The amount in controversy ($75k)
           1. In general, when these pre req’s are met, federal court can hear regardless of the subject
     4. **~~Exceptions: minimal diversity~~**
        1. ~~§ 1335, when property in dispute, only need two adverse claimants (any defendant is diverse from any plaintiff)~~
        2. ~~§ 1332(d)(2)(A): class actions with more than $5 mil, if any P is diverse with any D~~
     5. Date of determining diversity:
        1. Determined at the time the case is filed, there is no requirement that diversity exist at the time the cause of action arose
           1. Change of citizenship won’t affect diversity that existed at time of filing
           2. A change of parties won’t affect it either
           3. Burden of proving diversity is on whoever files it
     6. **Determining Citizenship**
        1. **Domicile**: a person is a domiciliary of the state **in which they are present** and **intends to reside** for an indefinite period of time; defines residency as said in XIV amendment
           1. To help determine look at where they exercise rights, pay taxes, own property, and employed
           2. *Mass (P) v. Perry (D),* US CoA, 1974, p. 271

P raised a diversity of citizenship suit against D

Mr. Mass: France

Mrs. Mass: Mississippi

Perry: Louisiana

\*All of these people lived in LA at the time of the c.o.a, but were they all *domiciled* there?

Court said, no, P had no intent to stay in LA, so Mr. Mass was still domiciled in France, and Mrs. Mass was in Mississippi

At the time, P did not intent to make LA their residence, \*being in a state with intent to acquire residence makes it your domicile

* + - * 1. **Corporations (28 § 1332 c.1):**

Citizenship

State in which it is incorporated

State where it has principle place of business (where headquarters are)

Des Moines Navigation (D) v. Iowa Homestead (P), SCOTUS, 1887

* + - * 1. **Unincorporated (churches):**

Citizenship:

Every state of which members lives

* + - 1. **Aliens: citizens or subjects of foreign countries** 
         1. Found when there are one or more aliens on one side of the lawsuit, and one or more citizens of a state on the other
         2. No jurisdiction if both aliens, alien has residence and domicile in same state
         3. Aliens can only work if there are one or more citizens of a state on both sides of the action who act as co-parties to the aliens
         4. *H.K Huilin (P) v. Kevin Multiline (D), fed. District NY, 2012*

Zhen, because he was a Chinese citizen domiciled in NY would destroy diversity remaining as D

This case was at the turning point of the change of § 1332(a)(2), and once congress passed this in 2011 it removed cases between a citizen of a U.S. state and a permanent resident alien of that same U.S. state because they are essentially citizens of the same state

b/c this case filed before this, allowed P to bring forth more evidence for diversity

Policy: reduce what qualifies diversity

Before 2011, this would have been ok

There was some confusion though, because states thought they could admit nonresident aliens and resident aliens for diversity, but again, no diversity because of domicile which was in the Clarification Act to eliminate the hanging paragraph of 1988

* 1. **Amount in Controversy** 
     1. Rule: § 1332(a): the amount in controversy must exceed the sum or value of $75,000, exclusive of interest, costs, and collateral effects of a judgment
        1. Attorney’s fees can be included if apart of statute or contract as well as punitive damages
        2. EXAM NOTE: It must exceed $75,000, cannot be exact
     2. *A.F.A* (P) v*. Whitchurch* (D) US CoA NY, 1991 p. 282
        1. D took trade secrets from P, so P filed suit in federal court. D wanted to dismiss the suit for lack of s.m.j. with amount in controversy. P appealed because they never got the chance to prove the amount (at the time, in excess of $50,000).
        2. In the appellate court, decided that whatever money amount the plaintiff claims, in **good faith**, will maintain diversity as long as there is **legal certainty** that the damages will not be less than the threshold amount
           1. Burden is on party asserting jurisdiction to prove with legal certainty that amount will not be lower than required amount
        3. Diversity is not lost:
           1. Even if P wins less than what was initially claimed, and
           2. Even If events after the action reduce the amount in controversy below the statutory minimum (as long as filed initially with good faith)
        4. Abusing the court: Although technically, P here abused the court to get diversity, it doesn’t matter because they proved with good faith and legal certainty that amount was met.
           1. If someone does abuse the court, court can punish and reprimand
     3. Multiple Parties
        1. \*\*P can always add up all of the claims (even if they’re unrelated) when ONE P is suing ONE D\*\*
        2. When there are multiple parties involved, CANNOT add up money even if the claims are closely related
           1. Exceptions:

Two people that are making claims that are legally (not closely related) indivisible

Ex. Two people own a house jointly, and they both sue for arson, can add it up

Rules of supplemental jurisdiction

* + - 1. Single P against multiple D
         1. Cannot add up the claims against each D if the claims are separate and distinct.
         2. Exceptions:

If the D’s are jointly liable to P, then adding up claims to meet the amount is okay

* + - 1. Class Actions
         1. Claims aggregated and exceed $5 million are okay
         2. Abstention doctrine: (§ 1332 (d)(3)(F)) Even if the amount is met, court can refuse to hear if the matter has come up in the preceding 3 year period
  1. **Federal Question Jurisdiction**
     1. Basis:
        1. Article III § 2: federal judicial power shall extend to all cases “arising under this Constitution, the Laws of the US, and treaties made, or which shall be made, under their Authority.”
        2. 28 U.S.C § 1331: The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the US.”

\*\*Article III more broad than 1331\*\*

* + 1. Concurrent v. Exclusive Jurisdiction
       1. State courts are broad and have concurrent jurisdiction with federal claims EXCEPT
       2. § 1338: Federal courts exclusively hear actions arising under any Act of Congress relating to patents, plant variety protection, copyrights and trademarks & unfair competition when joined with any of the former
    2. Essential federal element:
       1. ***Legal standard****: Osborn v. Bank of the United States*:
          1. In order to have federal question jurisdiction, the claim must have a federal ingredient
          2. Art. 3 § II
       2. If a cause of action is neither expressly nor implicitly created by federal law, then the complain must involve a **real and substantial** issue of federal law, and its **determination must necessarily depend** on resolution of the federal issue (in order to satisfy Art. 3)
    3. “Well-Pleaded Complaint”
       - 1. Federal question jurisdiction exist only when the federal law issue is presented in the plaintiff’s complaint
       1. **Consider only the elements of the claim, not the defenses**
          1. *Louisville & Nashville R. Co. (D) v. Mottley (P), 1908*

P sued D for breach of contract for special performance in a KY district court (D stopped giving them their free train passes)

The Act of 1906 said they couldn’t give out free passes to P anymore

Ragazzo says this arose under federal law because it had a federal ingredient (Osborn—any potential federal ingredient is permissible)

Here, Act of 1906 & unconstitutional to take that away

BUT

This case is under § 1331 and the complain MUST include a federal question and it didn’t

Therefore, it didn’t ARISE under § 1331

The federal question must appear on the face of the complaint

An action that anticipates future action or infringement of rights cannot be brought under federal question unless it provides relief that is not available under state law *(Skelly Oil v. Phillip, 1950)*

**Policy**: Don’t want federal courts hearing cases that are mostly state questions

* + - 1. **How do you know when only looking at the plaintiff’s claim that it arises under federal law?**
         1. **Step one:** *Holmes test*: Whether or not the question arises under federal or state law

A suit arises under that law that creates the cause of action

* + - * 1. **Step two**: ask:

Is it substantial? (Shoshone)

Does a federal question need to be answered?

* + - * 1. **Step three:** if none of the above works,

*Merrel Dow:* Did federal law give you a private right of action? Yes: ☺ no: ☹

* + - * 1. *Harms (P) v. Eliscu (D) (NY, 1964)*

Copyrights case: P sought and equitable declaratory relief against D claiming 28 USC 1338

The parties were trying to determine who owned the copyrights, it didn’t involve the actual copyrights, so there was no federal question because the remedy came from NY law, not federal

* + 1. When State and Federal Claims Combine
       1. *Grable (P) v. Darue (D), 2005:* 
          1. Quiet title action to do with ownership

*Harms*: a claim determining ownership arises under state law (*Harms*)

* + - 1. How to determine if a state law claim that raises federal issues should be heard by federal court/ **Grable Test**:

\*\*a state created claim with a substantial federal question does arise under federal law (b/c of 1331)\*\*

* + - * 1. 1. Federal issue must be substantial

Actually disputed

Necessary to state law claim (i.e. only thing disputed) to resolved federal issue

Necessary to make federal law uniform

* + - * 1. 2. Can’t disrupt power between state and federal courts

Ex. Taking negligence cases out of state would violate that court’s right to hear the case

*Grable* is only about federal tax issues and once federal court hears it, it will set the standard for ALL future cases to be heard in state courts

* + - * 1. 3. Facts aren’t in dispute, only have a legal question

Once question is answered, sets standard everywhere to help resolve a lot of case

* + - 1. *Gunn (D, lawyer) v. Minton (P, client):* client sues lawyer in federal court with a state claim regarding a patent issue
         1. Patent issue doesn’t meet the Grable standard because it was an issue of fact (malpractice), not a legal question (like, patent law)
  1. **Supplemental Jurisdiction**
     1. Basis: a district court with jurisdiction may exercise “supplemental jurisdiction” over additional claims which the court would not independently have subject matter jurisdiction (usually state law claims against a non diverse defendant).
        1. The claims must arise from a common nucleus of operative fact *(Gibbs)*
        2. Essentially, one claim needs something to “piggy back” off of, but all the claims must be closely related (like a mama pig carrying her own piglet and not another’s ☺ )
     2. *UMW (D) v. Gibbs (P), 1966*
        1. P sued D with two claims, one federal (§ 303 of labor mgmt.), one not (illegal conspiracy)
        2. This case overruled the Hurn Test
           1. Hurn Test: number of injuries is equal to number of claims

Overruled because it can be inefficient

Ex. A gets into a car wreck and suffers injuries to body (state) and to car (fed). Under, Hurn, this would have to be heard in two cases

* + - 1. Gibbs Test:
         1. Whether two claims arise out of the same transaction/nucleus of operative fact

**\*\*\*\*Codified in\*\*\*\***

* + - 1. **28 U.S.C § 1367:** 
         1. Original jurisdiction for one claim;
         2. Claims that federal court doesn’t have jurisdiction over are closely enough related to the claim that it does have jurisdiction over; and

Under *Gibbs*, comes from the same transaction

* + 1. Exceptions:
       1. Diversity cases (§ 1332):
          1. If a defendant is joined by rules 14, 19, 20, or 24, no supplemental jurisdiction
          2. If plaintiff joined by rules 19 or 24, not okay
          3. Contamination theory: if the joining of a P upsets the complete diversity, the claim of the diverse party is “contaminated” by the non diverse party
       2. Federal question (§ 1331):
          1. As long as it meets the requirements of § 1367 (Gibbs test) and arises under article III, federal court can hear

TX #1 (federal claim)

TX

TX #2 (state claim)

* + - 1. Class Action R. 23
         1. Zahn is overruled because it is not an exception for rule 23 under 1367, and at least one person had amount in controversy
         2. Horton: if no P has amount in controversy, can’t be heard under 1367, no supplemental jurisdiction
         3. As long as one plaintiff’s claim satisfies the minimum amount-in-controversy requirement, the court may exercise jurisdiction over additional plaintiff’s case that fall short of the requirement, when all claims arise from the same case or controversy. (*Ortega*)
  1. **Removal Jurisdiction**
     1. 28 U.S.C § 1441(1): any civil action commenced in a state court that is within the original jurisdiction of a U.S. district court may generally be removed by the **defendant** to the district court for the district in which the state court action was commenced

\*\*not a substitute for federal question or diversity jurisdiction but it is simply a mechanism by which defendants in a state action over which a federal court normally has jurisdiction can get removed to fed court\*\*

**To remove, federal court must have original jurisdiction and D has to do it**

* + - 1. Once removed, state loses power
      2. if P wants it back in state court, has to remand it (usually under 12 b. 1 lack of subject matter jurisdiction)
         1. must go back to state court from which it came ( § 1447(c))
         2. can happen any time
      3. if remanded back to state court because of R. 12.b.1, that is FINAL and it cannot be removed again
         1. \*\*can remand on a discretionary basis and it is appealable\*\*
      4. **Abstention doctrine**: court can remand some matter that have jurisdiction but the court doesn’t want to hear (ex. A $75,001 divorce).
         1. Also appealable
      5. Notice
         1. 28 U.S.C § 1446: if a defendant wants to remove a state court action to federal court, must be done 30 days after receiving initial pleadings or summons

must be signed (Rule 11)

filed in district court in the same division where the state action is pending

accompanied by all other documents

If multiple defendants, all significant defendants must agree to remove, nominal don’t count (*Davis*)

* + 1. Federal Counterclaim
       1. *Shamrock Oil*: P cannot remove after D files a federal counter claim, § 1441 authorizes only defendants
    2. Nonremovable Actions
       1. 28 U.S.C §§ 1442- 1445: types of cases that can’t be removed
    3. Joinders
       1. If P filed a federal claim against D-1 and a state claim against D-2, D-1 can removed to federal court under 1441(c)
          1. Federal judged is required to sever state claims and remand to state court
       2. If claims aren’t related, P shouldn’t have joined in the first place, so D can remove
       3. What if state law joins too broadly?
          1. Must be removed because it’s unconstitutional for federal court to hear “unauthorized” state claims

**Jurisdiction over Persons and Property**

* 1. Basis:
     1. Personal jurisdiction is the power that a court has over an a person or a thing
     2. A court can assert personal jurisdiction only if
        1. The exercise of power is authorized by a statute AND
        2. Is consistent with the Due Process Clause of the Constitution: No state shall deprive any person of life, liberty, or property, without due process of law
  2. Four Types:

**Person or property MUST be seized at the beginning of the case for all the following:**

* + 1. Property:
       1. **True In Rem:** ask the court to declare you have the right to a piece of property anywhere in the world
       2. **Quasi in Rem I**: P asks the court to say his title is better than D’s
       3. **Quasi in Rem II**: D has done something to P, but P can’t serve D. So, P will seize D’s property and make a claim against that, even if it has nothing to do with the case, because that is the only way to file against D
          1. Damages limited to value of the property, unless D shows up to find out what the heck is going on with his property, then P can file against D too and win anything
    2. Person
       1. **In personam**: being served with process in a court’s territory brings you within the court’s jurisdiction
          1. This is personally binding on D and P can seize anything if they win
  1. **Exam note: WHEN ANALYZING THIS, FOCUS ON 1) the contacts the defendant has or had with the forum state and ii) whether the assertion of jurisdiction by the court would maintain fair play and substantial justice. Each case is different.**
  2. **Traditional Bases of Jurisdiction**

\*\*all in state court\*\*

* 1. *Pennoyer v. Neff, SCOTUS, 1877* 
     1. Neff never paid Mitchell, his attorney, for representing him, so Mitchell sued Neff
        1. Notice of the service was in the Oregon newspaper, and Neff didn’t live in Oregon, so he never saw the paper, and Mitchell won by default
        2. Mitchell declared his winnings to be Neff’s Oregon property (Quasi-in-rem II)
        3. Mitchell sold the property in a Sherriff’s sale to Pennoyer
     2. Neff shows back up in Oregon and finds Pennoyer on his land
        1. Sues Pennoyer with a Quasi-in-rem I: wanted to find who had the better title
           1. Sues in federal court

Diversity jurisdiction: as long as Neff didn’t plan to stay in Oregon

Federal question: doesn’t apply because of *Eliscu*: just because it’s about land doesn’t raise a federal question because they just want to determine ownership, just like *Eliscu*

Personal: quasi-in-rem I

* + - 1. Found for Neff (28 U.S.C § 1738)
         1. Bad quasi-rem II, bad deed
         2. Bad because property wasn’t seized until end of case, violated 14th amendment
    1. This case established that person or property must be properly seized at beginning of case (i.e. they should receive notice)
       1. If D gives adequate notices, court has power to proceed under the 14th amend.
    2. Ability of a state to authorize personal jurisdiction over non-residents who engage in some activity in the state or cause some action to occur within the state
       1. Some states exercise as much power as 14th amendment allows
       2. Others, like NY, are limited to where incident occurs
    3. *Millican v. Myer:*
       1. Every state has personal jurisdiction over it’s own citizens
          1. The citizens can be served anywhere if state has a statute that allows citizens to be served while out of state
  1. **Specific Long-Arm Jurisdiction** *(some connection with the forum)* 
     1. *International (D) v. Washington (P), SCOTUS, 1945*
        1. Intl. Shoe has salesmen who sell shoes in WA salesrooms, etc. Your offer goes back to MO and then your shoes are sent to you. The shoes are shipped f.o.b. (free on board which means that title to the shoes changes when they are placed on the train.) State feels that they have violated the statute that they must contribute to unemployment insurance fund because they conduct business there and have employees in the state.
        2. P properly sued D in WA state court
           1. P couldn’t remove because there was no federal question (§ 1331)

Claim was under WA state tax law

* + - * 1. No diversity under § 1332 because no citizens from “different states” because Int’l conducts business in WA
        2. Basically, D is stuck in WA court system, because WA couldn’t have originally filed in fed ct. according to § 1441
      1. D moves to dismiss for lack of personal jurisdiction (=12.b.2)

**before this case it didn’t matter if a corp. was served in a state, it only depended on “amount of business activities” in the state**

* + - 1. **Int’l Shoe Test:** Due process is satisfied if the non-resident D has certain **minimum contacts** with the forum state such that the maintenance of the action **does not offend traditional notions of fair play and substantial justic**e.
         1. **On exam ask this question first when questioning state’s long arm statutes**
    1. *Gray (P) v. American (D), SC Illinois, 1961*

\*\*Torts high water mark of the extension of long arm\*\*

* + - * 1. Broad view: once you put a product on the market, anywhere it malfunctions is where you must go to trial
        2. Narrow view: only matters where the product is sold
      1. P is an Illinois old lady who gets injured by a water heater, she brought suit against D and Titan in IL state court
         1. D claimed no personal jurisdiction, but did business in IL, so we go to 🡪
      2. Appling Int’l Shoe:
         1. Does the state have a sufficient statute?
         2. Were there minimum contacts?
         3. Does maintaining suit in IL offend fairplay and substantial justice?
         4. **Expanding Int’l Shoe/ Gray Rule: Court added the question, how much business occurs there?**

Said that the amount of money D makes affects being sued there

Placed product into “sea of commerce”

Court said that jurisdiction was proper because D made substantial money and placed product

* + 1. *McGee (P) v. International Life Insurance Co (D), 1957*
       1. \*\*high water mark for contracts\*\*
       2. P California resident who was the beneficiary of an Arizona life insurance policy. D didn’t want to pay P, so P brought suit. D moved to dismiss for lack of personal jurisdiction, so 🡪
          1. State long arm statute: CA uses 14th amendment
          2. Minimum contacts: court said one contact with one CA resident was enough to satisfy jurisdiction
    2. *World Wide Volkswagen (P) v. Woodsen (D), SCOTUS, 1980*
       1. Robinsons (from NY moving to AZ) got in horrific car accident in OK, Car was bought from P, Robinsons sue in OK court, P doesn’t sell or have any business in OK
          1. Robinsons sue Audi, Volkswagen, World Wide (tri stat distributor) and Seaway (car lot)

Did this to stay in state court, or Audi & Volkswagen would remove under 1441 b/c of 1332a

Diversity: destroyed in federal court because Robinsons are NY citizens and so are WWV and Seaway

* + - 1. Applying Int’l Shoe:
         1. State statute: Oklahoma statute says if a tort occurs in the state, can sue if regularly solicit business or get revenue in the state

\*\*OK made a mistake in hearing this case\*\*

* + - * 1. Minimum contacts: no WWV/Seaway don’t receive benefits of OK by doing business there and foreseeability of a car bought from them ending up there doesn’t count

Although OK seems like the most fair place because it isn’t inconvenient, the witnesses are there, and OK has an interest etc., the majority says that only the defendant has the right to due process and interest with anyone else doesn’t matter

Applying Gray: don’t want to defend product anywhere it might end up, only defend in places where there is substantial amount of business there

* + - 1. Consistent with Gray?
         1. Yes: sea of commerce theory—could reasonably see product ending up there
         2. No: have to ask how much business WWV makes in OK—like none.
      2. If this case came up today, could it be heard in federal court after NY defendants have been removed?
         1. Maybe? 1 year provision?, § 14469(c)
    1. *Burker King (P) v. Rudzewicz (D), SCOTUS, 1985*
       1. D made a contract with P to operate a franchise in MI, P is based in FL, D violated the terms of the contract by falling behind on monthly payments, P sued for breach of contract, and D moved to dismiss for lack of personal jurisdiction
       2. **Brennan: 2 parts to Int’l Shoe Test:**

\*\*how states hear out of state cases\*\*

* + - * 1. **BK Test**

Sovereignty branch: Does D have minimum contacts with forum state?

Has D purposefully availed himself to do business with forum state? (*Asahi*) (*3 views, eyre*)

**\*\*On exam, must evaluate ALL views\*\***

O’Connor: intent; did they advertise there, did they intend their presence to be there

Brennan: knowledge product was there, knowledge of money made

Fairness branch: If D has minimum contacts, then we ask about fair play and substantial justice

Look at interests of the plaintiff/defendant, forum state, judicial system

* + 1. *Ashahi v. Superior Court* 
       1. This case added two more prongs to the sovereignty branch
       2. Confirmed Gray?
          1. With knowledge of doing business: yes
          2. With intent: no
  1. “Resolving the BK Test”—but not really
     1. *McIntyre v. Nicastro, SCOTUS, 2011*
        1. P lives in NJ and operates a machine made by D, a scrap metal thingy manufacturer, and D had a “middle man” based out of Ohio who sold D’s products
           1. D wanted to make money and claimed to want to sell all over the US, D’s machine is sold to P’s employer in NJ, and D’s machine cuts off four of P’s fingers
           2. Procedure: P filed a products liability suit against D for the injury in NJ state court, D moved to dismiss for lack of jurisdiction (12.b.2)
     2. Adding to the Sovereignty Branch: Does D have minimum contacts with forum state?

**MCINTYRE SOVEREIGNTY BRANCH TEST**

* + - 1. **Kennedy/O’Connor (4):** Intend of purposeful availment
         1. Established by advertisement, etc.
      2. **Breyer**: Amount of business and substantial revenue
         1. Policy: worried about the little guy, so purposely made a different view to protect them: keep foreign companies out, but protects small American companies
      3. **Ginsburg**: (Dissent) sea of commerce
         1. Don’t have to target forum state specifically as long as they were aware of doing business there
         2. \*\*difference between Breyer and Ginsburg: quantity—B (a lot); G (at least one)\*\*
    1. Overruled Gray?
       1. Yes; 2. No; 3. Depends on the amount of revenue
  1. **General Long Arm Jurisdiction** *(no connection with forum)*
     1. If D’s connections with the forum are consistent, substantial, P can bring suit there even if cause of action occurred anywhere in the world
     2. Only three cases:
        1. *Perkins* (Philippines mining operating in Ohio during WWI)
           1. Ohio most convenient even though action occurred in Philippines because they had sufficient minimum contacts in Ohio
        2. *Helicopteros* (Colombian corp. crashed in Peru; everyone on board was American)
           1. *Heli.* had some contacts with Texas but not good enough because they were mere isolated sales or exchanges, which aren’t enough to establish general jurisdiction
     3. *Goodyear Dunlop Tires Operations (D) v. Brown (P), SCOTUS, 2011*
        1. D produces tire which ends up on a bus in France, P represents dead children who were killed in France because of a bus crash that was alleged to be from the tire malfunction, P is a resident of NC, D has some tires that end up in NC and is a foreign subsidiary of an American Company

This is general jurisdiction because no cause of action in NC\*\*

* + - 1. Does NC have general jurisdiction over this case?
         1. Perkins test: D had continuous, systematic activity, but it was not substantial, so NO
      2. Consistent with Perkins and *Helicopteros*?
         1. *Perkins*: Yes, Perkins had 100% activities in Ohio, Goodyear didn’t
         2. Heli: Yes, small amount of purchases/sales is not enough to subject one to general jurisdiction in forum
      3. Why isn’t being a subsidiary of a parent company enough to establish contacts?
         1. Can’t disregard ownership structure—have to respect the “owner” & “owned” (each is a separate legal entity)
         2. Look at proper relationship

Parent company makes big decision for sub, but sub runs their own business on a day-to-day basis

If parent decided everything, then would be liable as a whole

* + 1. Difference between specific and general
       1. Whether the action is connected with forum
       2. Specific: accident in the same place as where the injured is from, but D is not from that place, apply *International Shoe*
       3. General: the accident and where P is from are two different places, and to bring suit against D in P’s home state, D must have consistent, substantial contacts with the state, apply *Goodyear*
  1. **New Bases of Jurisdiction**
     1. *Community Trust Bancorp (P) v. Community Trust (D), KY 2011*
        1. P is a KY corporation, D is Community Trust Bank of Texas and Community Trust Financial, Corporation and Community Trust Bank (Louisiana), P sues D for trademark violations (i.e. their names are really similar and P thinks customers can be confused by it and they both operate website which adds to confusion). P sues D in federal court, D moves to dismiss for lack of personal jurisdiction
        2. Apply BK:
           1. Sovereignty (*McIntyre*):

Kennedy: not met

Breyer: not enough business

Ginsburg: Yes, D knew they could do business in KY

* + - * 1. Fairness
    1. Internet & Jurisdiction:
       1. Internet is an issue—can technically reach out anywhere
          1. Three options:

Ginsburg: broad

Kennedy: narrow

Breyer: in the middle

* 1. **In Rem Jurisdiction**
     1. *Shaffer (D) v. Heitner (P), SCOTUS 1977*
        1. P is a stockholder of Greyhound Corp, P is non-resident of Delaware, Greyhound Corp was incorporated in Delaware and has a main business place in Phoenix, AZ, Individual defendants had stock in DE, Incident from which suit arises occurred in Oregon, P brings suit in DE
        2. Shareholder derivative law suit brought by shareholder (P) on behalf of a corporation against a third party
           1. Money officers lost (for poor conduct) will be paid back and if P wins, attorney’s fees paid for
        3. P thinks he’s bringing a quasi-in-rem II (bringing property to have jurisdiction)
           1. Only thing is . . . the property he’s bringing into the case is stock and it’s hard to know where stock is located

Main business is in AZ, so probably where physical certificates are

* + - * 1. Why Delaware?

Delaware is where Greyhound is incorporated and DE code says all DE stock is located in DE

Court said this satisfied *Pennoyer* (to do this)

Must seize before suit

Motion for sequestration

Have to have property located in forum state

DE statute about stocks

Also is the best place for business suits b/c it is the most pro-business state an laws are friendly to it

* + - 1. Should Pennoyer be the standard?
         1. In favor: state should have jurisdiction over its property, is straightforward, has been law for long time
         2. Against: not fair to drag people to DE court merely b/c they have property there. . . 🡪🡪🡪
    1. **Quasi-in-Rem II MUST MEET STANDARD OF INT’L SHOE**
       1. Need to avoid violating the 14th amendment
       2. **Sovereignty branch**: met, D purposefully availed themselves
       3. **Fairness**: must evaluate interests of plaintiff, defendant, forum state, judicial system
          1. Unfair because (Marshall) merely owning stock in DE isn’t enough for quasi-in-rem II

Quasi-in-rem II alone doesn’t satisfy due process; must also meet minimum contacts test *(Int’l Shoe*)

Fairness is in the eye of the beholder

Court found that the minimum contacts for *Shaffer* weren’t met

* + 1. Limited Appearance:
       1. In a quasi-in-rem II, you come in, defend the case, and the most you can lose is the value of the property
       2. Delaware didn’t permit this, so--
          1. You can default and not lose more than the value of the property
          2. Come and defend and consent to full jurisdiction
       3. State court has to decide to have this or not
    2. Special Appearance
       1. Can come argue that jurisdiction doesn’t apply without consenting to jurisdiction
       2. Two types:
          1. Can come argue jurisdiction, and if you lose, consent to it
          2. Can come, litigate w/o consent, and argue jurisdiction later

Consistent with 12.b.2

* 1. **Jurisdiction based on Physical Presence** 
     1. *Burnham (P) v. Superior Court, SCOTUS 1990*
        1. Dennis Burnham (petitioner) married, and After some issues, his wife and kids moved to Cali (obviously for the sunshine and hot babes), P came to Cali for business and to visit kids (and hot babes). While there, his wife served him with divorce papers in Cali state court, P moved to quash for lack of personal jurisdiction-- He claimed to not meet the minimum contacts test
           1. Why does the court need personal jurisdiction over Mr. Burnham?

Divorce is an in rem action, happens wherever spouse is, BUT 🡪

To get alimony and custody, court has to have personal jurisdiction

* + - * 1. At time of Pennoyer, would have been okay because Mr. was served there (in CA), But, is it still okay?
        2. Statute: CA uses as much power as 14th amendment allows (**Never really a state law question, is federal because of this**)

Scalia and friends: 4 judges believe service in forum is enough (is efficient and historical, and is a rule, not a standard)

Brennan: 4 judges say service is not enough,

Thinks just like quasi-in-rem II needs minimum contacts, so does in personam

* + 1. \*\*is the ruling that minimum contacts not required consistent with *Int’l* *Shoe*?\*\*
       1. Is distinguished because in Shoe, person NOT in state, here, they are
       2. Scalia didn’t think *Int’l Shoe* overruled service in state that was found in *Pennoyer*
       3. Scalia says Int’l Shoe even “agrees” with his point: Contacts with state doesn’t offend traditional (i.e. historical) notions of fair play and justice, and Pennoyer can’t get anymore traditional (b/c it’s been law forever)
    2. \*\*\*Is this consistent with *Shaffer*?\*\*\*
       1. Says need **quasi in rem II + minimum contacts;** why doesn’t it apply here?
          1. Shaffer was quasi-in-rem, this case is in personam
          2. This case was also about suing people who weren’t in the state

Ragazzo’s problem with Shaffer: P. 173, first paragraph: “We therefore conclude, ALL assertions of state court jurisdiction. . . “

Doesn’t ALL include personal service?

For Scalia: he puts a lot of weight on “therefore,” saying this only applies to certain facts and standards

* + 1. \*\*Today, applying BK Test\*\*
       1. Sovereignty: about business. . . this case about a person, so we don’t know what intent and knowledge would be
          1. Assume this branch is satisfied
       2. Fairness:
          1. P’s interest: convenient, alimony
          2. D: no inconvenient for him to be there
          3. CA’s interest: interest in citizens, and if no alimony, CA has to pay for the kids
          4. Judicial system: ½ CA; ½ NJ: NJ has a say because of alimony, CA has interest in custody
    2. Brennan’s view of fairness (which Ragazzo thinks is dumb):
       1. Burnham availed himself to CA, so he benefitted from the police, hospital, etc. And anybody who voluntarily and knowingly in forum can be served there
       2. Disagrees with *Grace v. MacArthur* (served in state forum while in airplane, didn’t know was there
  1. So far, the court has decided
     1. In personam if fine without any minimum contacts
     2. Quasi-in-rem II needs minimum contacts
     3. Hasn’t decided
        1. In rem: having property in forum may be enough
        2. Quai-in-rem I
  2. *STOP ASSUMING JURISDICTION SAME FOR FEDERAL AND STATE COURT*
     1. *\*\*\****Most of the time, fed and state are the same anyway, but sometimes, federal is broader\*\*\***
  3. *DeJames v. Magnifcence*
     1. P worked on D’s boat and was injured while it was moored in NJ. The boat was constructed by Hitachi, a Japanese Company. Procedure: P filed for negligence and strict liability in tort against D and Hitachi in federal court. District Court dismissed claims against Hitachi. Had insufficient contact with the state to support in personam jurisdiction
     2. Has subject matter jurisdiction—admiralty law
     3. 28 USC § 1333 and Article III
        1. b/c it’s admiral, look at torts in federal court
     4. Hitachi was served in Tokyo
        1. Is there a federal statute that drags a foreign party to state—how long is the “**federal statute arm**?”
           1. Rule 4(k)(2)—federal long arm

4 Conditions for a federal court to have personal jurisdiction:

the plaintiff’s claim must be based on federal law

no state court could exercise jurisdiction over the defendants (today)

What if the foreigner has enough minimum contacts with the whole nation, but not enough with any individual state?

Under 4k2, any jurisdiction could hear it

If contact with ONE state, must go there (4k1)

the exercise of jurisdiction must be consistent with the laws of the U.S.;

the exercise of jurisdiction must be consistent with the U.S. Constitution (must have minimum contacts)

From class:

If a state (NJ) could assert personal jurisdiction, then a federal court can

**“100 mile bulge**” federal court has personal jurisdiction if joined under Rule 14/19, is served in judicial district, and is within 100 miles of where summons issued

Statute (congress issues a wider jurisdiction)

\*\*\***One of these must be met in order to have jurisdiction\*\*\***

* + - * 1. 2: doesn’t apply—Hitachi was served in Tokyo, not a judicial jurisdiction, and they were not joined under 14/19, they were joined under 20
        2. 3: doesn’t apply—no statute extending admiralty jurisdiction
        3. 1: Look at NJ long arm (limited to constitution)

Constitution tells us to look at the 14th amendment and ask, “is due process satisfied here?” **To tell, go to our favorite,🡪**

* + - * 1. **BK Test** (LEGAL STANDARD)

Sovereignty branch

McIntyre (3)

Kennedy: intent to served NJ market? Not met

Breyer: do a lot of business in NJ? No

Ginsburg: stream of commerce

No if we look at WWV, what consumer does with product doesn’t matter

Yes if we look at stream of commerce, placed into NJ market, could expect to go to trial there

\*\*But, ultimately, the state court couldn’t hear this case, so the federal court can’t either\*\*

* 1. **Distinguishing the 5th and 14th amendment**
     1. 14th: applies to state law and applies to federal law when the state adopts the 14th amendment as it’s long arm branch (part one of Rule 4k)
     2. 5th: if congress broadened, use 5th amendment, applies to federal
        1. Under it, the sovereignty branch changes
           1. Look at contacts with whole nation, not just the forum state
           2. However, in *Magnificence*, Congress didn’t pass a statute for entire nation contacts to go with the constitution, so it didn’t work
  2. **Procedural Due Process**
     1. *Mullane (D) v. Central (P):*
        1. P is a NY bank who wants a judicial settlement of the trust; D an attorney who was hired to defend people who's trusts were being consolidated; D claimed that P merely putting notice in the NY paper was not enough to satisfy Due Process
           1. Means they can never be challenged; no beneficiary can ever question them
           2. Trust: it is more efficient for the bank to manage the money as the trustee because they know what they are doing—want to give benefit to the “little people”
        2. Rule: the beneficiaries must get constitutionally adequate notice if an in rem question
           1. Court says this is in personam at it’s core b/c it is about the people’s rights (*Shaffer*)
        3. Mullane Balancing Test:
           1. Does the cost of providing personal notice outweigh the benefit?
           2. Balancing is in the eye of the beholder

For beneficiaries whose addresses are known, benefit outweighs the cost

For beneficiaries whose addresses are unknown, the cost would be too high for any investigation

Constitutional test is the weighing of costs and benefits

* + 1. Fuentes v. Shevin
       1. Florida has a prejudgment replevin statute that violates due process
       2. Rule: You must get a hearing prior to seizure: post-seizure hearing doesn’t satisfy due process
    2. *Mitchell v. W.T. Grant*
       1. A post seizure hearing is okay if the reasons were presented to a judge
          1. Procedure: full affidavit, neutral judge/decision maker
       2. 2 additional protections permitted a post-seizure hearing was good enough
          1. confirmed in Di-Chem
       3. In relation to *Fuentes* 
          1. Overrules if you think that there is an absolute right to a pre-seizure hearing
          2. Distinguished: LA statute had additional protections—a judge had to sign the form, an affidavit which has to explain why you are entitled to the property. Therefore Mitchell is different from Fuentes and does not overrule it.
    3. *Connecticut v. Doehr* 
       1. Has Connecticut v. Doer overruled Mitchell?
          1. Yes-Mitchell stands for due process being satisfied when judge is decision maker and there is an affadavit which explains why they have an interest in the property than Connecticut v. Doehr has overruled this.
          2. No-because here there is no interest in the property here. In Mitchell, there is an interest in the personal property. This is more similar to a Q-in-rem action. Suit here was about assault and battery. Greater latitude in seizing property of both parties have an interest in the property

**Choice of Law**

**State vs. Federal Law**

1. In general, when an action is commenced in U.S. district court, the court must determine the substantive law and rules of procedure that will govern the action
   1. **If federal question claim, federal substantive and procedural law will control**
   2. Questions to ask
      1. In a federal diversity case, how do you know when to apply federal or state law?
      2. Which state’s law applies?
      3. Once you decide which state law to use, how do you determine what state law is?
2. **Diversity Actions: Always use substantive state law of where the district court is located 🡪**
   1. Before Erie, *Tyson v. Swift* ruled, and it said that you could only use state statutes, not state common law.
   2. *Erie RR (P) v. Tompkins (D), SCOTUS 1938* 
      1. While P was walking next to RR tracks, D’s train had something protruding from the door which hit P and severed P’s right arm. Under PA common law, P would be considered a trespasser whom the RR owes a duty to avoid wanton negligence (No statute, just common law). Under the majority rule of most states, the RR would owe a duty of ordinary care to any traveler on the path next to the RR, P filed suit in federal court (2nd circuit, NY court) (P—Pennsylvania; D—NY) Did this to avoid PA’s harsh rule, P won with 30k, D appealed and was affirmed, **Swift rule**—can’t bring in state common law. **SCOTUS TOOK THIS AS THEIR OPPORTUNITY TO OVERRULE SWIFT**
         1. Why not in PA: b/c the NY court had an ordinary care, not wanton
         2. If in PA state: PA would apply b/c action/accident occurred there
         3. Why not NY state court: still would have applied PA law b/c that’s where the accident occurred
         4. Why not PA fed. Ct? judge there is likely to pick PA strict rule of duty of care
      2. Examining Swift & U.S.C 28 § 1652:
         1. Does “laws of several states” include general law as well as statutes?
            1. Language of 1652: “laws of several states”

Cuts both ways

Could obviously include common law, could obviously not

* + - * 1. Legislative History

Charles Warren: found draft of 1652 that included common & statutory law

SCOTUS says b/c of legislative history, obviously includes both, BUT 🡪

50/50

put it in here to begin with, so obviously there was a difference

thought “law” by definition meant only stuff passed by legislature

* + - * 1. Policy:

Is it a good idea that federal judges should follow state common and statute law

Brandeis: discriminatory to not include both

It limits D: What if Tompkins wanted to remove to NY state court? D couldn’t because of § 1441 b

Allowed forum shopping by P against D

Disrupts uniformity between federal and state courts

Creates even more forum shopping

Discriminates against D

In support of Tyson:

Required uniformity between federal jurisdiction courts; hoped that state court would follow federal

Erie—uniformity between federal and state more important than between federal courts

* + - * 1. Jurisprudence:

Do courts make laws or find them?

Find: implied from Constitution:

Make: legislatures make the law

Its what they are elected to do

Not about reasoning, it’s about values that representatives hold for their constituents

* + 1. **What Erie decided:** 
       1. **State substantive law must be used in diversity cases regardless if it common law or statute law**
  1. *Guarantee (D) v. York (P), SCOTUS 1945*
     1. D served as a trustee for noteholders of Van Sweringen, D loaned them money, but they couldn’t pay back, so D offered a plan to buy out the notes, P received 6k worth of notes from someone who hadn’t accepted D’s offer. Procedure: P sued D for breaching fiduciary duties in a diversity suit (i.e. acting in the best way possible for the beneficiary). equitable remedy was the relief sought, D moved for summary judgment because of NY statute of limitations, which was granted, P appealed, court reversed motion, saying that federal court did not have to follow NY statute
     2. Statute of limitations at issue
        1. It’s typically procedural, not substantive
           1. Substance: Frankfurt: **RULE:** anything that affects if you win or lose (outcome) is a substantive issue
     3. Consistent with Erie?
        1. Yes, avoid forum shopping
        2. Allowing a different statute of limitations than state would encourage forum shopping
           1. Doesn’t discriminate against anyone
     4. Problem:
        1. Leaves little room for any application of FRCP in a diversity case
  2. *Ragan*
     1. Another example of statute of limitations and commencement
        1. Rule 3 says time starts when you file, but if a state law differs (saying it is when action occurs), changes the outcome because the case couldn’t even be heard
  3. *Cohen*
     1. Derivative suit, bond posting
        1. Federal rule: 23.1—bond posting not required
        2. State: had to post bond (for security expenses)
           1. Win: opposing party pays your fees
           2. Lose: pay their fees
        3. Does posting a bond affect the outcome?
           1. No, but have statue for a reason for why people go forward with suit

There is no legal effect on the outcome, but there is a practical effect

Extra money at the end of case (§ 1652), this is substance

* 1. *Byrd (P) v. Blue Ridge (D)*
     1. Facts: P is a North Carolina resident who was injured working for one of D’s contractors; D is a South Carolina corp; Accident occurred in SC. Procedure: P sued D for damages of injuries in 4th circuit court with diversity, Jury found for P. On appeal, reversed and directed verdict for D; P appealed
        1. D’s defense: I don’t owe P money because there is a SC statute that covers injuries if P is statutory employee (aka worker’s comp)
        2. P says it doesn’t apply because he isn’t a statutory employee and is entitled to a trial by jury instead of workman’s compensation
        3. State law requires a judge, while federal law requires a jury
     2. Issue: who will be the decision maker on the issue of determining if P is a statutory employee?
        1. SC: judge; FRCP: jury
        2. York: would using a judge/jury affect the outcome?
           1. Perhaps, juries are typically pro-P; and judges for D

On this theory, it does affect outcome

* + - * 1. Brennan disagrees:

**Byrd question**: is it housekeeping? If yes, use FRCP, if no, use state

VII amendment requires right to a jury and that right is so powerful that it must be preserved

* + - * 1. Ragazzo: disagrees with Brennan

Thinks that S.C does have an interest in this because it affects workman’s comp by taking a right away from D

* + 1. **BYRD BALANCING** 
       1. Must balance federal policy against state
       2. If state law is just a housekeeping issue and it was passed with that intention, federal law will control
       3. If the federal law trumps state, federal law applies
          1. \*Doesn’t overrule York
       4. In the eye of the beholder
    2. Consistent with Erie?
       1. No, because it encourages forum shopping
          1. Anytime you allow the outcome to change, there is forum shopping
  1. *Hanna (P) v. Plumer (D) SCOTUS, 1965*
     1. Facts: P is a citizen of Ohio; D is the executor of an estate and is a Massachusetts citizen; Car accident in South Carolina caused by D’s deceased estate person. Procedure: P filed complain in MA federal court (diversity and $ amount); P served the wife of the executor on Feb 8, 1963; Sufficient service according to FRCP 4(d)(1) <NOW 4E>; D responded saying that the service was insufficient; This was according to a MA statute; D’s move for summary judgment granted (*Ragan & York*); P appealed: FRCP determines service in diversity actions
        1. Issue: service
           1. Fed: 4e: okay to serve someone of suitable age and discretion
           2. MA: personal delivery
        2. *York*:
           1. state law would apply b/c of outcome determinate test

Choice of law would affect outcome because the statute of limitations had run out, so it was too late to reserve under MA law

* + - * 1. (Court ruling) State law wouldn’t apply because

law didn’t affect forum shopping—P didn’t go MA federal court to avoid state court

**NEW YORK QUESTION**: isn’t “would it affect outcome;” instead, “**would it affect outcome in a way that would influence forum shopping**?”

* + - 1. *Byrd:*
         1. Why did MA pass state legislature? Was it housekeeping or not? (this case, yes, it was)🡪
         2. Would applying state law affect federal policy?

Balancing:

Federal interest: very great because of uniformity and FRCP

State: efficiency of probate court, want to get claims out of the way quickly and within a year

* + 1. THIS COURT DIDN’T USE YORK OR BYRD
       1. Said: if FRCP is broad enough to govern question & it applies, that’s it, that rule applies
          1. If it’s valid (§ 1652) and applies (supremacy clause), then it trumps everything
       2. Is Rule 4e validated by § 2072 (REA)?
          1. It’s a rule of procedure and as long as it’s fairly arguable that the rule is procedural then it is validated under REA

**anything that relates to claims or defenses on the merits can only be substantive**

* + 1. Consistent with Erie?
       1. Yes: because is procedural, not substantive
       2. No: because of forum shopping—FRCP has broader discovery
  1. **Process of determining state or federal law:**
     1. Erie: anything that is substantive, you must use state, and for procedure, you must use federal
     2. **How do I know what is substance and what is procedure?**
        1. Is there a conflict between state and federal laws?
           1. No: apply state and federal laws harmoniously
           2. Yes: proceed 🡪
        2. *Hanna:* Is there a valid federal statute that arguably regulates procedure?
           1. No, use state
           2. Yes, under § 2072 proceed🡪
        3. Is the federal statute broad enough to cover this issue?
           1. Yes, apply that rule

Rule must be validated by § 2072 (REA) & § 1652 (RDA)

* + - * 1. No, proceed 🡪
      1. *Hanna:* Will using the federal rule cause **forum shopping** or an **inequitable/discriminatory\*\*** administration of the laws? (§ 1652)

\*\*Twin aims of Erie\*\*

* + - * 1. No (to both): apply federal
        2. Yes, apply state laws unless there are federal interests. If there are, proceed 🡪
      1. *Byrd:* Is there a great policy at stake? Is it bound up in the rights or obligations?

**Look at legislature, why did state pass it? Look at federal policy, why did they pass it? Balance state and federal policy**

* + - * 1. (outcome determinative)🡪
      1. *York:* Will applying federal law lead to an outcome that influences forum shopping?
         1. No, apply federal law
         2. Yes, apply state law
  1. *Gasperini (P) v. Center for Humanity (D)*
     1. P was a NY photographer who lent slides to D, who lost them. P sued for the money lost in federal court and won by jury trial, but judge overruled (federal judge can’t do that so easily)
     2. Issue: use federal or state rules on new trial standard?
        1. NY: does the finding deviate materially?
        2. Fed: “shock the conscious” (is verdict against great weight of the evidence)
           1. Should the NY district judge use the NY or fed standard?
     3. Applying the test (start with the standard):
        1. *Hanna:* is there a fed rule/statue that reasonably applies to question?

Scalia:

Rule 59: can grant new trial for any reason granted in the past (Scalia thinks this is broad enough)

Hanna: is it valid:

Yes, REA, § 2072

Hanna: is it arguably procedural?

Yes, because not about claims

* + - * 1. ***Majority:***

Rule 59 isn’t broad enough because it doesn’t tell you how to measure evidence to grant new trial

Doesn’t specifically incorporate standard of evaluating evidence, so not broad enough

* + - 1. *Byrd:* if it’s not broad enough, is there a great state legislative reason for passing the statute?

Yes, tort reform to avoid frivolous claims

* + - 1. *York:* Does it encourage forum shopping?
         1. P chose federal court because it would be easier to keep larger damage if he won, so yes
  1. *Shady Grove (P) v. Allstate (D), 2010* ***no majority***
     1. P filed a class action in NY federal court to collect penalty charges from D
        1. Federal (R. 23): no problem for penalties; NY law: not allowed to file class actions to collect penalty
           1. NY policy: worried about suits being brought by attorneys trying to make money and abuse the system
     2. Should we use federal or state law to evaluate this penalty claim?
        1. **[Scalia]** 
           1. **Legal Standard**: *Hanna:* Is rule 23 broad enough to govern this issue?

All class actions appear to be governed because it is universal

* + - * 1. Is Rule 23 valid under the REA?

Not about claims or defenses on the merits, so it’s arguably procedural

*\*\*Consistent with Erie?\*\**

*No: Scalia knows this, he thinks that the policy of having uniform federal rule is greater than worrying about forum shopping*

* + - 1. **[Ginsburg]—Ragz thinks this is ridiculous**

*\*\*Consistent with Erie?\*\* Yes, for Ginsburg and Stevens*

* + - * 1. Hanna: Is rule 23 broad enough?

No, because it doesn’t explicitly say it governs class actions and penalty suits

Is NY rule a house keeping or substantive rule?

Was substantive to keep strike suits out

* + - * 1. “If I find that state law substantive with rights and obligations the state thought it was creating and doesn’t damages federal interest, I will say that the federal law is not **broad enough**”
      1. **[Stevens]**
         1. Is Rule 23 broad enough?

Agrees with Scalia on it’s face, it is broad enough

* + - * 1. “If I find that there is state substantive though, I will say that the rule is **invalid**”

**Choosing the Appropriate State’s Law**

**Ascertaining State Law**

1. *Mason (P) v. American Emery (D), US CoA, 1st, 1957*
   1. P brought claim in RI federal court for injuries sustained in Mississippi
      1. Why not Mississippi state court? Privity of contract law
      2. Why not RI state court? RI would apply law of where accident occurred
   2. Issue: what law to apply? When the highest court’s ruling is obviously outdated, what does the federal court do?
   3. Hanna: Should we apply federal or state law on whether or not you owe a duty of care to people with whom you don’t have a contract?
      1. Q: is there a federal rule or statute broad enough?
         1. A: there is no federal rule or statute 🡪
      2. Q: Byrd: is there a federal policy?
         1. A: No.
      3. **\*\*Clearly apply state law\*\***
         1. Now, Q: which state law applies in federal court in Rhode Island?
            1. A: federal court in Rhode Island must use their state court rule (which says to use the law where injury happened)—avoids forum shopping
         2. What is Mississippi law on issue of privity of contract?
            1. A: *Ford v. Myers*: there is no enforceable contract (outdated)
            2. **BUT, IT DOESN’T END HERE**

**RULE: \*\*It is the job of the district judge to predict what Miss. Sup. Ct. would decide TODAY.\*\***

* + - 1. How do we decide what highest court of the state would decide?
         1. Look at:

Other supreme court cases and their dicta

Other states decisions with the rule

Look at forum state’s lower courts

Look at legislature (comments, restatements)

* + - 1. **RULE: \*\*It is the job of the district judge to predict what Miss. Sup. Ct. would decide TODAY.\*\***
         1. Consistent with Erie?

Yes, with the policy of preventing forum shopping

Law is dynamic

Federal court must do the same thing Miss. Sup. Ct. would do in order to prevent forum shopping

No, if filed in Miss. State, would get dismissed at trial level because of precedent (*Ford*), on appeal, it would MAYBE go to Miss. Sup. Ct.

In R.I Fed. Ct, it is immediately reviewed according to forum’s supreme court

No, RI fed. judge more likely to predict that Miss. Ct. would overrule For than actual Miss. Ct. (making up common law again, *Swift v. Tyson*)

* 1. This case was a GOOD example of federal court making up forum supreme court’s decision, but there are DANGERS🡪
     1. *McKenna v. Ortho Pharm.*
        1. Would Ohio recognize exception of discovery to statue of limitations?
           1. Ohio Ct would obviously disagree, but the federal court wanted to overrule the “stupid rules” so they interpreted it as they wanted (issue in *Swift*)
     2. In guise of predicting what state supreme court would do, federal judge is creating own opinion which *Erie* wanted to get rid of
  2. Certification Procedure: process of sending a question from federal to state supreme court. Little used b/c:
     1. State court can certify, but doesn’t have to take it
     2. State court doesn’t have to answer question asked
     3. Federal proceedings must stop until answer comes back
     4. State court’s answer can be less than clear
        1. \*\*only used when there is a very significant/important policy question that federal court is uncomfortable answering for the state\*\*

**Federal Law in State Courts**

1. *Dice (P) v. Akron (D) SCOTUS, 1952*

*\*\*reverse Erie case: federal substance, state procedure\*\**

* 1. P worked for D and was injured while on the job, so sued D in state court under FELA. D moved to dismiss claiming P had released rights, but P says it was a fraudulent release
     1. § 1445: can’t remove a FELA case
        1. this protects P (they should have total choice of forum)
     2. In state court, hearing a federal claim, does state or federal substance law apply to govern whether a fraudulent release counts?
        1. **Federal Law**: defenses to federal acts (in this case, FELA), have to have federal nature
        2. But, to answer, must use federal common law (congress is pro-plaintiff)
           1. \*\*release doesn’t count if it’s fraudulent
     3. To determine whether fraudulent or not, do we use a judge (state) or a jury (federal)—procedural law
        1. \*\*FELA requires jury because of pro-plaintiff thing
        2. Would typically use state procedure in reverse Erie cases, but must ask same questions
           1. Is the policy of using a jury so bound up in rights and obligations?

Yes, because of pro-plaintiff

* 1. \*\*Consistent with Byrd?\*\*
     1. No—arguably decision maker is simply procedural, so should use state
     2. Yes—federal law gets more weight in state court as state gets more weight in federal
        1. Philosophical reason for how they’re consistent:
           1. Federal interest—supreme more sway in state court than federal court law in state courts
           2. Another reason
           3. And another

1. Federal Common Law
   1. No general\* common law, but there is common law

\*made up from whole cloth, out of thin air

* 1. Where common federal law applies/exists
     1. Obvious and necessary
        1. Matters of constitution and statutory interpretation
           1. Not general because uses background to interpret
           2. Necessity to be decide and isn’t general because not made up (ensured by precedent)
        2. When federal law decides rights of action
           1. Implied rights of actions: defense, claims, issue
           2. No state law can determine
           3. Not general because has precedent
        3. Interstitial Common Law
           1. When congress passes statute, doesn’t answer all questions that may come up, so common law decides to fill gaps
     2. Controversial Applications
        1. Article III admiralty: deals with foreign relations
           1. Labor management:

Occupied by congress that state law is preemptive

Admiralty: has no background, so must make up labor admiralty

* + - 1. Property
      2. FISC
         1. Some cases it’s okay to make general law because of interest in finances
      3. International Relations

**Venue**

**General Principles**

1. Concerns which court among the courts having personal and subject matter jurisdiction is the proper forum for hearing the matter
   1. Federal court: issue is determining the proper federal district court
      1. Venue requirements are statutory and are intended to ensure the parties a fair and convenient forum for litigating their dispute
2. Thirteen fact situations upon which venue statutes are predicated
   1. Where subject of action or part of it is situated
   2. Where the cause of action is
   3. Where some fact is present or happened
   4. Where the defendant resides
   5. Where the defendant is doing business
   6. Where defendant has an office or place of business or an agent or representative, or where an agent or officer of defendant resides
   7. Where the plaintiff resides
   8. Where the plaintiff is doing business
   9. Where the defendant may be found
   10. Where the defendant may be summoned or served
   11. In the county designated in the plaintiff’s complaint
   12. In any county
   13. Where the seat of government is located

**Federal Venue Standards**

1. *Bates (P) v. C & S (D), US. CoA, 1992*
   * 1. P was a Pennsylvania resident who owed a debt to D, D sent a debt collection letter to P in Pennsylvania, But, P had moved to New York. D had no regular business in New York, The letter was forwarded to P’s New York address
     2. Procedure: P filed FDCP claim to D in federal court, D moved to dismiss for lack of a proper venue, D had no business in NY, so probably thought couldn’t take trial there, Dismissal granted, P appeals saying it was proper
     3. Issue: whether venue exists in a district in which the debtor resides when the debt collection letter is forwarded to the debtor?
   1. S.m.j: § 1331: claim created under Congress, so legit federal question
   2. Diversity: Yes, if the amount in controversy is met (§ 1332)
   3. Personal Jurisdiction:
      1. Legal standard:
         1. Is there a rule or statute that covers?
            1. Yes, Rule 4(k)(1)(A): if state can hear, so can federal
            2. Assume there’s a state one too

BK Test: to see if state exceeds/deprives due process under 14th amendment:

Sovereignty (McIntyre)

Kennedy: intent: NO

Breyer: substantive bus. NO

Ginsburg: aware: NO

NO Personal jurisdiction

* + 1. Why didn’t NY dismiss for lack of personal jurisdiction?
       1. D didn’t object under 12(b)(2) in their response, so they waived their right to object, D only used 12(b)(3)—lack of venue
  1. Where is appropriate venue?
     1. Fed. Statute: § 1391(b)
        1. B(1): where D resides: C&S doesn’t reside in NY
        2. B(2): where a substantial part of events occurs
           1. Western Dis. NY is substantial because that’s where letter was received
           2. Receiving letter was an essential, therefore substantial part of events
        3. B(3): Garbage can provision \*\*corporation subject to venue anywhere they’re subject to personal jurisdiction\*\*
           1. \*shouldn’t have even gotten to this level
           2. doesn’t apply because case could be brought in Penn.

1. *Hoffman (D) v. Blaski (P), SCOTUS, 1960*
   1. **Rule: Federal Question Cases: transferee court will apply the federal law as interpreted by the court of appeals, not as by the transferor court**
      1. This is because federal law is “uniform”
         1. Federal law is uniform in theory but not in practice because every judge has a different opinion; Erie doesn’t apply because it is a federal, not state issue
   2. P filed a patent infringement claim against Howell in TX district court; D transferred to IL under 1404(a); P didn’t want the transfer so filed a writ of mandamus to remove
      1. § 1406: applies when original venue was improper
   3. Other federal reasons
      1. S.m.j: §§ 1331 & 1338: patent law exclusive to fed ct.
      2. Personal jurisdiction: yes, both from Texas
      3. Venue: § 1391(b)(1): both reside in TX
   4. Why did each side want to be in the other’s hometown?
      1. 7th(IL): pro D; 5th(TX): pro P
   5. **Primary issue & Rule**: § 1404—transfers can only go to places where the original case brought by P could be filed with P’s **ABSOLUTE RIGHT**
      1. Couldn’t have been in IL because there was no personal jurisdiction over D, though D would have waived their right by not objecting because they wanted to be there
         1. \*\*can transfer if both parties agree\*\*
         2. this policy is wrong, but has never been overruled
            1. creates forum shopping

Transfer

1. *Van Dussen (D) v. Barrack (P)*
   * 1. **Rule: Diversity Cases: Transferee court must apply the same law as a transferor court**
   1. Facts:
      1. An airplane was headed to Philadelphia, but crashed into Boston harbor. Some injured parties sued in a Massachusetts Federal Court, and some sued in Pennsylvania Federal Court against the airline, manufacturers, the U.S. and in some, the Mass. Port Authority
   2. Procedure:
      1. D was granted a motion to move to transfer all the cases to Mass. Court for convenience under § 1404(a). The defendants made the motion because the suits were for the tort of "wrongful death." The defendants knew that a lot of States put a damages cap on these suits. Massachusetts has a $10k cap, Pennsylvania had no cap, so they could be liable for unlimited damages.
   3. Issue:
      1. Who’s law should the court in Mass. Use?
         1. LS: *Klaxon*: The federal judge in Mass. Must apply the same choice of law rules as a Penn. State judge
   4. Relation to Erie
      1. Consistent: Should get the same results in a diversity transfer
         1. Whatever you can’t do in a state court, you shouldn’t be able to do in a federal court, so you shouldn’t be able to do it in a transfer
      2. Inconsistent: if moving federal courts made the outcome different, encourages forum shopping (P can lock rules in state; D can change remedies)
2. *Piper (D) v. Reyno (P)--* \*great lawyering\*
   1. P represents the people who died in a plane crash in Scotland, and P sues Piper (D) (Penn.) and Hartzell (Ohio) in Cali. State court; D transfers to Cali federal court (§ 1441), then transfers to Penn. Federal court; Hartzell dismissed for lack of personal jurisdiction; whole case eventually dismissed to be heard in Scotland
      1. Then, P’s citizenship was Cali., but now, 1332(c)(2), citizenship would be Scottish (estates are always the domicile of the deceased)
      2. Did the court have personal jurisdiction over Piper?
         1. What state rule applies (long-arm)
         2. Is it proper under the 14th amendment (due process\_
         3. Would BK/McIntyre test allow?
            1. \*\*if yes to all three, jurisdiction is proper\*\*
      3. Was Cali. Federal court proper venue?
         1. Piper: Yes, wherever there is personal jurisdiction, there is also venue; 1391 (b)(1)
         2. Hartzell: Yes, under § 1446
      4. In Penn. Federal court, should it stay or go to Scotland?
         1. **Standard: Gulf Oil factor test**
            1. Private factors: evidence of crash, witnesses

Split 50/50 between Scotland and Ohio/Penn

But more efficient to be in Scotland because there is already a case pending there

* + - * 1. Public factors:

Scotland: interest in people not being killed there

Penn: don’t want citizens distributing faulty planes

* + 1. D wanted to pitch forum non convienes Penn. Federal judge b/c:
       1. Home turf, and laws apply because product is there
       2. The judge is more attune to international relations, therefore, more likely to grant it
    2. Transfer to Scotland okay b/c
       1. York: taking away P’s substantive right to a better chance of winning, but
       2. SCOTUS: doesn’t matter if they go to Scotland because they still have some chance of winning, even if it’s minimal
          1. If P couldn’t have brought in Scotland, would have to stay in US
  1. IT IS IMPORTANT TO DECIDE WHOM TO ASK QUESTIONS
     1. If in Penn., the judge could dismiss if the trial judge was **badly wrong** for granting dismissal /keeping case in U.S.
  2. Normally, we try and respect the plaintiff’s choice of law, but here we didn’t. Why?
     1. They’re foreign
     2. And, SCOTUS doesn’t want U.S to be a magnet for foreigners seeking different tort law (i.e. forum shopping)

1. Forum Non Conveienes
   1. Forum non convienes assumes original jurisdiction was proper, like § 1404
   2. Gulf Oil factors the same to decide transfer/forum non convenes
   3. Courts more willing to grant transfer than forum non convenes because consequences are less severe
   4. Forum non convienes applies when transfer is impossible
      1. State to state: transfer
      2. State to foreign jurisdiction or state: forum non convienes
         1. If case came from state, remand it back
      3. Never make forum non convienes when there is another federal forum

Joinder

**Permissive Joinder**

Rule 18: a plaintiff can join any claims they want against D

In diversity/amount in controversy, can add up claims to meet requirements

Rule 20: permissive

Rule 19: compulsory

* Subject Matter Jurisdiction: any party joined still must met requirements of federal subject matter jurisdiction to be joined
* § 1367
  + if D joined under rule 20, § 1367 doesn’t apply, must have complete diversity and meet amount in controversy independently
  + if P joined under rule 20, § 1367, can add up claims to meet amount, but still must have complete diversity

1. *Ryder (P) v. Jefferson (D)*
   1. Married couple (P) cannot join together because
      1. Classical: one injury= one cause of action; two injuries= two actions
         1. Neat, but not efficient
      2. 2013: Gibbs test, as long as it’s the same transaction and the same question of law or fact, can have one claim
         1. efficient, but messy
   2. Rule 42: judge can sever trials at his discretion
      1. Can’t do it if rules of jurisdiction prohibit it or if in separate courts

**Necessary and Indispensible Parties**

1. *Provident v. Patterson*
   1. Dutcher is a party who is needed for the case to give all P the proper relief, but if joined, would destroy diversity in the federal court
   2. Issue: indispensible and dispensable parties
   3. Rule 19:
      1. If **necessary**, the party can be joined, must be joined within 30 days or else the case will be dismissed if
         1. Complete relief cannot be provided to existing parties in their absence
         2. Disposition in the absence of that person may impair the person’s ability to protect their interest; or
         3. The absence of that person would leave existing parties subject to a substantial risk of multiple or inconsistent obligations
            1. \*\*must meet requirements of federal subject matter jurisdiction, in personam, and venue\*\*
            2. \*\*joining cannot destroy diversity\*\*
      2. If **indispensible**, but cannot be joined and without them, court must determine if case should proceed or if in equity and good conscience it should be dismissed
         1. SCOTUS said Dutcher was not indispensible because they think he has nothing to worry about because the state claims are weak; they are all “maybe” possibilities
         2. The harm of litigating the case again is greater than Dutcher being included
   4. Why did the 12(b)(7) come up for the first time on appeal?
      1. Indispensible party (Dutcher) can’t bring the motion but court wants to protect his interests, so raised it sua sponte
      2. Today, Dutcher cannot intervene because of Rule 24 & no jurisdiction in § 1367
         1. Then, he could have joined under rule 24
   5. What law governs the question of Mr. Dutcher’s indispensability? (Penn. State or federal?)
      1. Hanna test
         1. Is there a federal rule or statute that applies? 19(a)
            1. Is it broad enough? Yes
            2. Is it valid? Yes, § 2072, RDA
   6. Any decision against Dutcher is not binding unless there is personal jurisdiction (Pennoyer)
   7. Way to restructure case without Dutcher (Ragazzo)
      1. Put a cap on what P wants, just the $50k, and explicitly tell judge they don’t want anything against Dutcher’s person, just the insurance

**Impleader—third party claims**

1. Definition: Claim made by a defendant against a non party for all or party of the liability on the original claim; Impleaded claim must relate to original claim
2. Requirements: Must have subject matter jurisdiction and personal jurisdiction (Rule 14: P’s claims against third party must meet diversity and federal question)
3. *Jeub (P) v. B/G Foods (D)*
   1. P files claim against D for bad ham, D got bad ham from Swift, so sought to implead them under Rule 14.
      1. This was so that anything D had to pay P, Swift would pay D for (impleader)
   2. Law governing whether or not D can sue Swift (diversity case)
      1. Minnesota State law b/c (Hanna)
         1. Is there is a federal rule/statute governing whether a restaurant can sue a seller? No.
         2. No federal issue, so no BYRD
         3. York: using state affects outcome, so apply it
   3. Law governing impleading Swift
      1. Minnesota: there is no rule, so would have to wait til the case against D is settled for D to bring claim against Swift; this is inefficient
      2. Federal: Rule 14, under Hanna, it is valid and broad and arguably procedural, so it applies
         1. Hanna: State: substance (indemnity); Federal: procedure (impleader)

**Interpleader**

1. Definition: allows a person holding property to force all potential claimants to the property into a single lawsuit to determine who has a right to the property
   1. purpose: to join parties together that may try to bring multiple claims against one party; to avoid inconsistent judgments
2. Common law pre-recs:
   1. All claimants had to seek to collect same debt (must both claim $800)
   2. All claimants must claim from same source
   3. Stakeholder required to be disinterested (I know I owe money, just tell me to who)
      1. Relaxed over time
   4. Stakeholder cannot have independent liability against claimant (if a land issue, and stakeholder is sued for damages and ownership, no interpleader)
3. Types (don’t mix and match)
   1. Rule 22: if all requirements are met, must have personal jurisdiction, subject matter jurisdiction, and venue
      1. Legit joinder mechanism
   2. 28 U.S.C. § 1335: NY life insurance, diversity met if any two parties are diverse, and amount in controversy met if exceed $500
   3. § 2361: easier for court to serve, nationwide personal jurisdiction
   4. § 1367: more expansive venue—proper where any claimant resides
4. *State Farm v. Tashire*
   1. State farm, the stake holder, tried to bring together potential claimants into one suit under Rule 22
      1. Met smj, personal, and venue, so look to pre recs
         1. Exposed to multiple liabilities: no, because of K, maybe, if in bad faith
            1. Pan Am: “maybe” is good enough, if any possibility, can maintain under Rule 22
            2. Doesn’t matter that claims are contingent
         2. Fourth element: courts split as to whether it is required or not
   2. Is State Farm entitle to an injunction?
      1. SF wants to make sure that Clark and no one else can bring this claim anywhere other than this case is Oregon
      2. Anti-injunction § 2283: when want to injunct a possible state claim
         1. When are state court injunctions allowed? (Rule 22)
            1. When expressly authorized by congress
            2. § 2361

doesn’t apply because specific to statute interpleader

* + - * 1. When judgment is possible in another place with collection that takes away from funds
        2. Collect from Clark personally?

Doesn’t apply because is $20,000 interpleader

* + 1. Part of injunction for suing for insurance money is okay under § 2073, but not being able to sue Mr. Clark is not okay because it is beyond protecting state’s interpleader
       1. Can only collect from Clark for insurance money in interpleader

**Statutory Interpleader § 1335 (applying to State Farm)**

1. Requirements:
   * 1. Two or more adverse claimants seeking same fund
        1. Can’t both get paid—can’t wholly pay one without injury the other
        2. Contingent claims ok?
           1. Yes, 22 (a)(1): “claiming or may claim”
   1. Subject matter jurisdiction
      1. Amount in controversy: $500 or more
      2. Diversity: minimal diversity among claimants
         1. Claimant can be someone saying not liable
2. Is § 1335 constitional for minimal diversity under Article III?
   1. Yes, case: State Farm
      1. Had minimal diversity
         1. At least 2 diverse claimants & $25,000 in controversy
   2. § 1332: Strawbridge—requires complete diversity
   3. Personal jurisdiction over U.S. citizens?
      1. Yes, § 2361—nationwide service
         1. Satisfies Rule 4, have a statute that offers broader jurisdiction
            1. Is this constitutional?

Yes, Burnham, congress using more of it’s constitutional power than allowed under Rule 4

* 1. Personal jurisdiction over Canadians?
     1. Can only do it if an Oregon state court could do it
  2. Venue?
     1. Yes, § 1397—where any claimant resides

1. Why is there a rule and a statutory interpleader?
   1. Statutory is so much more broad, so why would anyone bring a Rule 22?
      1. § 1335—has to post a bond
      2. subject matter reasons
         1. when federal question is the basis
      3. claimants aren’t all diverse (use Rule 22)
      4. Claimants are all diverse (§ 1335)

Class Actions

1. are either—
   1. a meritorious effort for little guys to add up claims
   2. bad P’s make strike suits to get from meritorious D’s
2. Rules:
   1. Have to meet all requirements in 23 (a)
      1. Numerosity, commonality, representative, adequate representation
   2. Be one of the kinds of class actions in 23(b)
   3. Sufficient notice 23(c)
      1. \*\*if all these are met, all people in class bound by decision\*\* (exception to Pennoyer)
3. Requirements (23a)
   1. Numerosity: less than 40, more than 22
      1. Qualitative: the bigger the claim, less people; the smaller claim, more people
   2. Common question: of law or fact common to class (issue in Walmart)
   3. Claim by named representative must be typical of unnamed people
      1. Just being about gender discrimination is not good enough
   4. Representative must be adequate representative
      1. Required by rule and constitution (due process)
      2. Look for (2)
         1. Conflict of interest (ex. Hiring v. promotion)
            1. A reason that the named plaintiff won’t be biased to various claims
         2. Did P hire a competent lawyer?
   5. Kinds of Class of Actions (23b)
      1. Prejudice class actions—prejudice to defendant
         1. To prevent inconsistent decision of how to ask (civil rights)
         2. Interpleader—limited fund, injured if not apart of the class
      2. Injuctive relief is appropriate (can get damages as well)
         1. Injunctive must be more important than damages
      3. Damages with common question of law and fact
         1. Common question must predominate over any other claims
         2. Class action must be best method of hearing case
            1. Ex. Mass tort claims
   6. Mandatory notice b(c)(2)(B)
      1. Under b(1) & (2), court can require notice
      2. Under b: reduces amount of people bringing notice because it can get costly and costs are on P’s shoulders
4. *Walmart (D) v. Dukes (P)*
   1. P was employed at one of D’s stores. P never received a promotion and her pay was lower than men’s, so she and five other women filed a class action against D for discrimination against women. The class was composed of over 1.5 million women employed by Walmart. Claimed that women did not get promoted as quickly as men and received lower pay than men when in similar positions thereby violating Title VII
      1. The claim ultimately failed because there was not enough “glue” holding all of the claims together
   2. Prior to this case, everyone though 23(a)(2) was easy to satisfy
   3. Seems like there was a legitimate question, but SCOTUS didn’t think so
      1. Court made it seem like it’s about individual discretion of store manages, which is not common
   4. This was a 23(b)(2, primarily injuction
   5. If 23(b), obviously met #, but hard time proving that class action is best way to fix (superiority) and individual questions might predominate
5. More information of class actions
   1. Can bring class action that is one type or all types
      1. Should they provide notice?
         1. Depends on relief granted
   2. Class Action Fairness Act § 1332
      1. If adding up $ = $5 million, can bring in federal court if there is minimal diversity
         1. Aggregation of claims is not allowed (Harris v. Snyder)
      2. Subject matter jurisdiction rules🡪
         1. Depends on who named parties are
            1. Must have complete diversity between named and defendants

Intervention

\*\*absent parties join law suit\*\*

1. *Smuck v. Hobson*
   1. Original case, Hobson v. Hansen, was a class action suit to protect the interests of “black and poor” children’s rights at school. The case was found in favor of Hobson, and the School Board, by vote, agreed not to appeal the case. However, some angry racist parents, Mr. Smuck, and Mr. Hansen, decided to intervene on the action.
   2. Whether the initiated litigation should be extended to include the parents?
      1. Holding: Yes, because the parent’s concern is for freedom from the school board to exercise the broadest discretion constitutionally permissible in deciding upon educational policies
   3. Why did the parents sue the individual school board members?
      1. Wanted them to be bound by the decision, individual members will be forced to vote in favor of bussing
   4. Parents entitled to intervene because 🡪
2. Intervention as a Right (3 requirements)
   1. 24(a)(1): a non-party has the right to intervene in which a federal statute confers the right AND the non party moves timely. Requirements (a)(2)
      1. non party has an interest in the property that is the subject matter of the action
         1. MET: interest in kids going to school with bussing
            1. Are they bound by the previous judgment against the school board though? No, Pennoyer
      2. the disposition of the action may, as a practical matter, impair the non-party’s interest and
         1. MET: Even if not bound by judgment, hurt as a practical matter b/c kids changed schools
      3. the non party’s interest is not adequately represented by existing parties
         1. MET: no one wants to appeal but them, different legal position
3. Permissive:
   1. 24(b)
      1. the movant has a conditional right under a statute OR
      2. the movant’s claim or defense and the original action share a common question of law or fact
      3. \*\*court must decide whether allowance will unduly delay or prejudice other parties

\*\*\*the claim of the intervenor must have it’s own subject matter jurisdiction unless the claim is closely related to a federal question claim already asserted\*\*\* authority § 1367(b)

Right to a Jury Trial

1. Is right to jury actually a good thing? “eh”
   1. People who are on juries aren’t smart enough to get out of it
   2. Juries are pro-plaintiff
   3. Awful at handling complex cases
   4. Inefficient
2. VII Amendment preserves right to a jury trial
   1. Applies to suits at common law
   2. Amount in controversy ($20) never changed because it’s hard to amend the constitution
   3. Right is “preserved”
      1. Doesn’t create right, preserves it as it WAS IN 1791
3. Defining “common law” of England in 1791
   1. King’s bench: trespass, writs rigid, relief rigid, didn’t allow extra joinders
      1. Common Pleas: damages for contracts
   2. Chancery Court: no limits, exercised right for the king, less rigid, allowed joinders, classic cases: injunctions, joinder, derivative
4. Why is it hard to tell if a case is entitled to a jury?
   1. Because American law takes a snapshot of English legal system at one day in time
      1. Courts have evolved since 1791
         1. Kings: ejection, replevin, unfair competition (get a jury in US today)
            1. Monetary relief
         2. Chancery: only for money/primarily equitable (injuction), clean up relief (23b2) benefit relief, joinders
            1. Legal relief
   2. Our FRCP is different than England’s 1791 rules
   3. A lot of claims didn’t exist in 1791, but
      1. Modern law can determine what an action at common law is
5. NOTE: JUST BECAUSE YOU HAVE A RIGHT TO A JURY, DOES NOT MEAN YOU HAVE A RIGHT TO A BENCH TRIAL
   1. Rule 38 is specific to preserving JURY trial
6. Beacon v. Westover
   1. Intertwined legal and equitable claims, so jury??
      1. Fox sued Beacon for declaratory judgment (§ 2201) to say exclusive rights don’t violate Sherman Anti Trust Act & for an injunction to stop future law suits and threats
      2. Beacon counterclaimed with anti trust violation
   2. Claims
      1. F 🡨 B
         1. Anti trust
            1. Beacon wants jury trial to say it’s illegal to be anti-competitive

Affects Beacon’s business

But, this claim didn’t exist in 1791

* + - 1. How do we decide if something is legal or equitable?
         1. *Ross v. Burnhardt* (3 elements)

Whats the claim most similar to?

Legal or equitable?

If nothing, what was the nature of the underlying claim? (Skelley Oil)

What’s the relief like?

Is jury suitable for jury determination?

* + - 1. So, anti trust is related to Kings, relief is treble, so monetary, so King’s
    1. F🡪B
       1. Underlying claim: tort
       2. Relief: injunction (chancery) and declaratory (neither🡪)
          1. If neither, look to the nature of the underlying claim (Skelley Oil)

So, F’s claim is in the chancery and B’s is in the King’s.

* 1. Doctrine of Collateral Estoppel
     1. Why does it matter what claim goes first:
        1. Whatever is decided first is estopped from being decided again and is bound by that decision
     2. When there are both types of claims, LEGAL CLAIMS GO FIRST
        1. Reasoning: let the jury decide (preserve the right) and let the judge decide the leftovers

1. Has Beacon changed the substantive right to a jury trial?
   1. Yes, get a jury today when in 1791, you wouldn’t
      1. Expands the right (Frankfurt—York, substance is what effects the outcome)
   2. BUT, court says this change is merely procedural (like Hanna)
2. *Dairy Queen (P) v. Wood (D):* P wanted money owed before K breached
   1. This case is an advance of Beacon. Whole case should have been in equity, but the nature of the claim is the breach of contract
      1. Masters can be appointed to help jury with numbers
3. *Ross (P) v. Bernhardt (D*): derivative suit
   1. This type didn’t exist in 1791
   2. Would have been wholly equitable
   3. Claim is more deserving of a jury—procedure

\*\*THESE CLAIMS EXTEND BEACON, BUT ARE CONSISTENT\*\*

1. *Curtis (P) v. Loether (D)*
   1. D wanted the jury because they would be composed of white men. Is D entitled to it?
      1. Three part test -- Ross
      2. What’s the claim like? New tort, inn keeper
      3. What the relief like? Actual and punitive (legal)
   2. Sort of did away with third part of the test: if the first two parts give you the right, the third won’t take it way
   3. P’s claim however, is statutory, and there is an exception for statutory claims🡪
      1. Statutory law creates new rights adopted by states, so not at common law, so not governed by VII
         1. So, no right to a jury
            1. Other examples: Bankruptcy and social security (Article I claims)
2. *Teamsters (D) v. Terry (P)*
   1. P sues union for breach of their duty of fair representation
      1. P= to win, needs to prove he would have won underlying K case and that D was negligent in not bringing suit
      2. P wants jury
         1. Collective bargaining was illegal in 1791, so didn’t file then, and didn’t exist
            1. Ross:

Most like? Breach of fiduciary duty (equitable)

Conservatives (3): case ends here because most like equity claim

Liberal: Brennan—forget the test, just ask for relief, history is no weight

Majority: history will count but will be devalued, analogies just have to be good (i.e. what’s the claim most like)

Deem it a tie and move on

Relief?

Clean-up relief, but not injunction because not suing company

Can’t sue union for money, can only sue for what he would have gotten if received seniority rights, so it is compensatory and legal

* + 1. Rule: if good legal analogies, go on to pt. 2 of the Ross test and deem part 1 a tie

Taking the Case Away from the Jury (4)

1. Ways to take the case away so the jury never hears:
   1. Summary judgment: before jury makes a decision, no trial
   2. Directed verdict: no jury decision, court rules as a matter of law
2. Ways to change what the jury decides
   1. J.N.O.V: find for P, but judge finds for D
   2. New Trial: instead of JNOV, judge orders new trial
3. Summary Judgment
   1. *Celotex (D) v. Catrett (P):* P is the wife of her dead husband; D is an asbestos manufacture whom the husband worked for; P alleged that death came from the products containing asbestos with negligence, breach of warranty, and strict liability.

**BEFORE THIS CASE, COULD GO TO JURY WITH ANY EVIDENCE, AFTER THIS CASE, CAN ONLY GO FORTH WITH EVIDENCE THAT MEETS STANDARD.**

* + 1. Factual cause is at issue: Did Celotex make the asbestos that killed P?
       1. P has the burden of proving D made those asbestos
          1. Must prove by preponderance of the evidence that D made asbestos that killed P
    2. D moved for summary judgment under Rule 56 because P couldn’t prove above
       1. Does not require AFFIRMATIVE proof, but does it make sense to require proof?
          1. No, why allow P to slide pass a summary judgment but when at trial, D would win with a directed verdict

Makes no sense to let her pass a summary judgment but to throw her out at trial with directed verdict

* + 1. D can’t just say “P has no evidence, so summary judgment” but if they did🡪
       1. P would waste resources and P would have to show their whole case
    2. So, D must demonstrate, not just assert
       1. Don’t need affirmative proof, but must do better than just saying “P has no proof” by
          1. Demonstrating that P has no evidence with an **interrogatory** asking for witnesses and documents that show D made the asbestos
    3. **Rule:** Party that makes summary judgment must be properly supported by proving that P cannot demonstrate some material fact of their case. If P does bring proof, court evaluates it according to **summary judgment standard**
  1. **Summary Judgment Standard (Celotex)**
     1. **Reasonable Jury**
     2. **Relative evidentiary standard that applies**
     3. **Substantive law that applies**

Applying to Celotex: Could a reasonable jury find by preponderance of the evidence that Celotex made the asbestos that killed P’s husband?

* 1. To count on summary judgment, your evidence must be admissible
     1. Exception: by affidavit, if witness were sitting on witness stand, what they would say is stated on affidavit
  2. Celotex changed the way courts viewed summary judgment by adding the reasonable jury standard.
     1. Is this more efficient?
        1. Yes: cases that get dismissed earlier than directed verdict are thrown out
        2. No: cases that get past summary judgment have to be re-tried (put all the evidence up front, then do it again for trial)
     2. Does it unfairly invade the province of the jury-judge?
        1. Yes: the judge is doing the weighing function of the jury
        2. No: the judge is no weighing it, the judge is seeing how it would be weighed
           1. Ex. The reasonable jury could see case either way, so the judge will let the case go forward
  3. Is the summary judgment standard procedural or substantive law?
     1. Substantive: changes amount of juries than before, affects outcome, therefore, affects substance (York)
     2. Procedure: housekeeping rule, this is just the mechanics of how summary judgment works, more efficient

1. Directed Verdict

Happens before or after the jury returns a verdict

* 1. *Galloway (P) v. U.S. (D):* P wants disability insurance for being insane as a result of the wars. *Observing how substance/procedure affects right to jury trial.*
     1. Standard for Directed Verdict
        1. Same as summary judgment:
           1. Could a reasonable jury find by a preponderance of the evidence that Galloway was insane on May 31, 1919?
     2. Is it a VII amendment violation to deny P his jury trial?
        1. Dicta: nothing turns on this b/c P did not have a VII right because it was a contract claim against the US and the US has sovereign immunity unless it is waived. But, the US placed condition: no right to jury when suing US
     3. If P was suing a private contractor, still no jury without violating VII because
        1. In 1791, could you have taken the case away from the jury?
           1. Yes, demurrer to a new trial
           2. Demurrer to evidence: D automatically wins

High risk though: jury dismissed and judge decides either for D or P (case never returns to jury) (under Rule 50, D can go back to jury)

In 1791, if there was a scintilla of evidence (standard) on the other side, demurrer to evidence failed,

* + - 1. So P would have gotten jury in 1791 b/c he had a scintilla of evidence, so how does denying P a jury NOT infringe on his rights? 🡪
         1. It doesn’t: VII amendment preserves a right to jury trial is SUBSTANCE, not procedure (Beacon, DQ)
         2. It does: York: if he would get a jury trial then that he wouldn’t get now, affects the outcome, so substance

1. JNOV: judgment as a matter of law
   1. Judge generally prefers JNOV over directed verdict b/c jury might rule the same way as a judge would have on directed verdict, so judge can wait and see what the outcome is
      1. Directed verdict reverses: new trial—send jury home
      2. JNOV: reinstate old verdict, no new trial—don’t send jury home
   2. Problem: Directed Verdict 🡪 Verdict 🡪 JNOV
      1. *Slocum* held that JNOV was unconstitutional because in 1791 there was no such thing as overruling jury verdict. There was only one way to dispose of jury: demurrer to the evidence
         1. *Dissent:* JNOV more efficient and it as procedural and VII only preserves substance, not procedure
   3. Is JNOV unconstitutional today?
      1. No, Slocum has been overruled in Redman
         1. In *Redman*, judge reserved legal questions, took a jury verdict pending legal questions, and depending on answer, would modify verdict
      2. In 2013, if directed verdict denied, the jury comes back for the other side, make JNOV, is it constitutional to grant it?
         1. Yes, Rule 50(b): motion isn’t denied, it is put on reserve unless it is granted.
            1. 99% of JNOV is constitutional but 1%, if you DON’T make directed verdict, then move for JNOV, you can only get new trial because there was nothing on reserve.
   4. RULE: have to make a directed verdict motion (to put something on reserve) in order to get JNOV later
      1. Also can’t get JNOV if you forget despite making directed verdict motion

New Trial

Done at common law, no constitutional problem

1. *Aetna (P) v. Yeatts (D)*
   1. P wants a declaratory judgment so they don’t have to cover D’s criminal act of abortion. D wants a jury for declaratory judgment. Does he have a right to the jury?
      1. Nothing in 1791 of this nature
         1. What’s the underlying claim? Breach of contract
      2. Why does D want a jury?
         1. Wants a jury of people say that anti-abortion is a stupid statute, thinks he can win on a jury saying that he wasn’t performing illegal abortion, was to preserve life of mother
   2. P moves for JNOV, denied because didn’t make directed verdict (Slocum), so tries for new trial
   3. **Rule: can only get new trial if verdict is against the great of the evidence and for any reason before approved**
      1. Gasperini: re-examination clause of VII amendment, unconstitutional to review any stricter than abuse of discretion
         1. Won’t review judge’s discretion of granting new trial
   4. This is a diversity case, so state or Rule 59 to grant new trial?
      1. Gasperini: state law (NY)
      2. Rule 59: in Gasperini, the law was substantive, so NY law applied could say Gasperini was limited to cases with rules of a substantive tinge
         1. If no substantive tinge, apply federal law

Remittitur & Additur

1. *Dimick (D) v. Scheidt (P):* can’t increase jury verdicts (additur), can only decrease (remittitur). Never been overruled, and been reaffirmed that substance prevails over procedure and logic
2. After a jury award for P, D moves for a new trial, which is denied, and judge goes to P and asks P to accept lower amount or grant a new trial limited to damages ultimatum.
   1. Remittitur is good, well liked, and efficient
   2. Majority rule: give P top number, but there is usually authority for both other numbers to help the judge justify by law what he should choose
3. P motions for new trial, judge grants because P wants more money, and judge can’t add money to the verdict 🡪
   1. Unconstitutional because in 1791, no additur, only remittitur is allowed by the courts
      1. Ragazzo—there is no difference between the two, the judge could have said it was procedural and cite *Beacon*

Preclusion

1. What it is: when something happens in the first case that affects the status in the second case
2. Three types
   1. Preclusion according to FRCP
   2. Preclusion according to the rules of res judicata—claim preclusion
      1. if already brought a claim, claims are merged or barred
      2. \*\*courts refer to preclusion generally as res judicata even when it’s not
   3. Rules of collateral estoppel
      1. Having lost judgment on fact issue, you can’t re-litigate the fact issue

Res Judicata—Claim Preclusion for Plaintiffs

1. General Policies:
   1. No person should be vexed twice by the same claim (private)
      1. Prevailing party has an interest in the stability of the judgment
      2. Judgments of little use if parties were free to ignore it and try again
      3. Don’t want inconsistent judgments
   2. It is the interest of the state that there be an end to litigation (public)
      1. Judicial resources are finite and number of cases to be heard is limited
   3. Problems
      1. Forces joinder, but there is a danger of salutary effect—what is presented is not always available during litigation
      2. Res judicata can preclude P from pursuing an otherwise meritorious claim that was never litigated because of a procedural error
      3. Forecloses relitigation of claims regardless of whether the original decision was correct
         1. But, decisions that are wrong and would be reversed on appeal, are valid judgments for res judicata purposes
            1. Don’t want P to argue original decision was wrong
2. What it is—
   1. Is an affirmative defense, court usually won’t raise by it’s own volition
3. Rules:
   1. Common law
      1. Define the cause of action
         1. How much did an earlier suit include the cause of action in the decision
      2. Those pertaining to the nature of the original decision
         1. Ensure the original action provided a fair and complete opportunity to litigate the claims
   2. Requirements—
      1. First judgment must be—
         1. Valid: hasn’t been overruled, has jurisdiction,e tc
         2. Final: final judgment in trial court
            1. Appeals doesn’t change binding force of trial court unless you get a stay, trial judgment can still be executed
         3. On the merits:
            1. 12(b)(6): federal
            2. case dismissed for lack of jurisdiction, no res judicata
            3. assume everything is on the merits unless the judge says otherwise
         4. parties must be the same
            1. or have privity (like insurance claims)
4. *United States v. Heyward-Robinson*
   1. D’Agostino sued Heyward-Robinson in District Court concerning a navy job under the Miller Act § 1331. HR cross claimed with navy/Stelma job, and D’Ag replied with the Stelma job.
      1. Issue: supplemental jx over Stelma job?
      2. S.m.j: federal question, Miller Act
      3. HR deserves liability and enters counterclaim
         1. Claims D’Ag breached K firsts
      4. D’Ag reply c/c—you owe us for Stelma
      5. On appeal
         1. HR claims no smj over Stelma Job
            1. Capron—anyone can challenge jx, even though HR introduced that claim first
   2. Examining the res judicata issue
      1. First Issue: whether there is supplemental jurisdiction
         1. Whether § 1367 permits supplemental jurisdiction over Stelma job § 1367a claim?
            1. First requirement: there must be a claim over which jurisdiction exists—yes—navy claim
            2. Second requirement: that claims are part of same Art III cases

Must be closely related—common nucleus of fact (Gibbs)

* + - 1. Big Question: is it more efficient to try this as one case or two?
         1. One
         2. § 1367b exception:

Rule 13: no

Diversity case; not here

1. Test for subject matter jurisdiction is the same as compulsory counterclaim
   1. Two things are true
      1. You are allowed to bring it by subject matter rules
      2. You are required by Rule 13 a
   2. Not universally held
      1. Concurring judge in Heywad said there should be broader scope for smj than compulsory counterclaim
   3. Same transaction = not only is there subject matter jx but c/c is compulsory
2. Exception
   1. For cases you couldn’t have brought in first case—no court is ever required to hear a claim on subject matter jx (point of § 1367c)
3. *Rush (P) v. City of Maple Heights (D):* P injured in motorcycle accident and received a judgment in first case for damage to personal property. Sued again for personal injury.

*\*\*In the book because establishes ways cases are binding—stare decisis (way older cases are binding on new cases, doesn’t have force of preclusion) and preclusion: res judicata, collateral estoppel\*\**

* 1. Lower court wanted to follow the old English rule (1 injury = 1 coa) and follow *Vasu v. Kohelers*, but court distinguished because in Vasu, the first case was for the insurance company recovering from the defendant for paying for P, and in the second case, P was suing D for damages
     1. Not binding on Rush because
        1. Insured not allowed to join case #1
           1. When insurance company brings subrogation, then insured can bring second claim for additional injuries
        2. But, common law—this is not splitting the causes f action
     2. Difference between dicta and holding;
        1. Holding: binding and necessary to decide current case
        2. Dicta: not binding—other stuff court says
           1. Not binding because nothing turns on ti
           2. When nothing turns on it, we don’t know if the court meant it or not

Judges writing opinion might say something that not all judges agreed on, but they agree on the outcome of the case, not what the judge actually wrote

* + - * 1. Galloway—dicta is still important

VII amendment consideration, though dicta from would apply to other case, so some things do turn on it

Can sometimes be as binding as holding

Still very persuasive

* + - * 1. Easier to abandon old cases if dicta and not holding, but

Cases are hardly ever overruled

* 1. So, was Vasu holding or dicta?
     1. Arguably both
        1. Can take 1a & 1b out of the case and it still stands
           1. No 1a: join
           2. No 1b: insurer can join 1a with personal injury claim
        2. Can arguably stand alone or together, so which one is which?
           1. The narrower ground is the holding (so, subrogation)
     2. Three theories
        1. Both holding,
        2. Neither holding,
        3. Narrower ground is holding, general dicta
     3. Court says 1b is not party of the holding (is dicta) and 1a is because it was narrower
        1. Deciding this forces courts to decide claims in Rush
           1. One transaction = one lawsuit
  2. Do Rush’s claims come from the same transaction?
     1. Yes, because of the accident
        1. Is this a good idea?
           1. More efficient; don’t want to have multiple cases asking same question

Why have 2 cases when so much from first case is similar to first?

* 1. Suppose 1b was holding, court compelled to follow it, and res judicata did not apply, so Rush can bring 2nd claim. What happens?
     1. Negligence claim (issue) is already decided
     2. So, decision in second case is already mostly decided by first
        1. This brings up collateral estoppel issue

1. *Jones (P) v. Morris Plan Bank of Portsmouth (D):* P defaulted on car payments and D sued to recover them. But, there was a clause in the K that said if default, all payments due. Bank only sued for a few months.

Case #1: Bank (may/june)🡪 Jones: default judgment for bank

Case #2: Bank (july) 🡪 Jones

* + 1. Could bank have put this in first case?
       1. Yes, acceleration clause in the K
    2. Why did bank wait for second case?
       1. Could collect interest but, bank thinks that Jones could pay July, though first case would be a wake up call
  1. Defenses
     1. Second case: res judicata because of first cases, so bank withdrew. What if bank didn’t withdraw? What would court have done?
        1. Standard of res judicata
           1. Does the second claim come out of the same transaction as the first?

1 K = 1 transaction

* + 1. after case #1, bank took a non suit (means they voluntarily dismissed their suit, not on the merits)
       1. can you do this in federal court?
          1. Yes, rule 41—before opposing party gives their answer, but here, Jones had already answered, so Bank couldn’t voluntarily dismiss unless he got permission from court

BUT, BANK COULDN’T HAVE DONE THIS IN FEDERAL COURT, BECAUSE IT’S UNLIKELY THAT COURT WOULD HAVE GRANTED AND TOO LATE BECAUSE JONES ALREADY ANSWERED

* + 1. After nonsuit, Bank repossesses the car
       1. Why does the bank think they have the right? (thought they had title)
       2. Case #3: Jones (conversion) 🡪 Bank
          1. Who owns the car?

Court says Jones because the Bank waived rights to sue for any more claims because of res judicata. So why should Jones have to pay?

Must determine if substance or procedure

* + 1. Does it extinguish a right (substance) or a remedy (procedure) PHILOSOPHICAL DIFFERENCE
       1. Rights and remedies NOT SEPARATED (no distinction)
          1. Frankfurt: no remedy, no right (York)

Doesn’t see difference between rights and remedies

No court would enforce it anyway, so no right

Bank can’t get court to enforce, so no right to car

* + - 1. Right and remedy ARE SEPARATED (distinction)
         1. *Hanna v. Plumer*

Res judicata is procedural—doesn’t go to claims or defenses on the merit

Would say that bank owns the car

Doctrine of Defense Preclusion: res judicata options for defendants

\*\*can’t use something once as a shield, then as sword, aka, can’t use it as a defense then as a claim\*\*

\*\*Compulsory counter claim bars EVERYTHING, preclusion bars AND MORE\*\*

1. *Mitchell (P) v. Federal Intermediate Bank*: P takes out loan and promises collateral from crop and pays $18,000, but bank officer closed on collateral & stole the money. Bank should have given $9,000 to P and paid $9,000 into bank
   1. Case #1: Bank ($9,000) 🡪 Mitchell
      1. Counter claim: Mitchell: I paid you—through foreclosure of crops
      2. Judgment for Mitchell
      3. Who’s money did the bank officer steal? Mitchell or Bank’s?
         1. If Mitchell, still owes bank $9,000
         2. If bank, and bank still owes Mitchel money ($8,000)
            1. Once it’s in his hands, bank has money
            2. If you decide the bank officer stole the money, decide that bank owes Mitchell money
   2. Case #2: Mitchell ($9,000) 🡪 Bank
      1. Why wasn’t this case compulsory counter claim in case #1?
         1. In 1932, S.C didn’t have compulsory counter claim yet
      2. When there is no compulsory counter claim, worry about defense preclusion, if compulsory, no defense preclusion
         1. These cases arose out of the same transaction so how is this claim barred?
            1. *Kirven & O’Connor*

Why was there preclusion in one but not the other?

Kirven: withdrew defense

O’Connor: used the same defenses

Compulsory counter claims any claims against P must be filed but in this cases, if defense withdrawn, can bring defense later

* + - 1. Why is there a stronger case for preclusion instead of counter claim?
         1. Counter claim does not make as big as a claim on efficiency because counter claims are not litigated, preclusion are things that are already litigated
      2. If no counterclaim, distinction between Kirven & O’Connor is crucial—
         1. Kirven withdrew defenses , so not previously litigated, so could be heard in second court
         2. O’Connor: already litigated, waste of time to do it again, so bar it
      3. If c/c, barred beause had to be heard in first case
    1. Res judicata is a defense in second case, so should bring all possible claims in first case
  1. State Court & Preclusion
     1. Preclusion doctrine has more sway than in federal court
     2. Some states recognize exception (minority)
        1. If you won first case, not barred
        2. Only barred if you lost

Collateral Estoppel--Issue Preclusion

1. Requirements
   1. Same issue
   2. Actually litigated (chief difference than res judicata)
   3. Full ad fair opportunity to litigate
      1. Incentive to litigate & procedural opportunity
   4. Issue necessary to judgment
      1. Valid, on the merits
   5. Mutuality of the parties
2. Cromwell (P) v. County of Sac (D): P filed an action to recover the worth of some bonds. Bonds had been used to try to construct a court house, but the court house was never constructed. In defense, D said that P couldn’t file this action because a prior action brought by Smith, with proof that P owned the bonds, to recover their value. D prevailed in case #1
   1. Case #1: agent for P ( pre 1868 coupons) 🡪 D; D (fraud) 🡪 P
      1. Were the bonds fraudulently obtained?
         1. Yes, judge took bonds for courthouse that was never built
         2. Judgment for county
   2. Case #2: P (interest on bonds from 1868-71) 🡪 D; D (fraud) 🡪 P; P (bona fide purchaser) 🡪 D
      1. Res judicata? No, because individual coupons, so individual transactions
      2. Should the fraud be able to be litigated again? No b/c fraud already established elements of collateral estoppel
      3. Is bona fide purchaser claim estopped by previous fraud?

*\*\*bona fide—didn’t know about fraud and paid for them, if bona fide, trumps fraud\*\**

* + - 1. Not same issue because pre 1868 bonds different from past 1868 bonds
      2. not actually litigated
  1. why do we have actual litigation requirement?
     1. Traditional: might not have had same incentive in first case to litigate; need full faith and fair incentive
     2. Law at the level of policy: issue might not come up again
     3. \*\*Rush, arguably collateral estoppel shouldn’t have applied because of incentive ($100 case v. $12,000 case)

1. *Russell (P) v. Place: Leather patent infringement case*
   1. Case #1: P sued D for process #1 & process #2; D (want of novelty) 🡪 P—judgment for P
   2. Case #2: P (same issues) 🡪 D; D (want of novelty) 🡪 P—injunction & money
      1. Res judicata: no, new infringing conduct; new infringements didn’t exist in case #1
         1. Unclear judgment in case #1—don’t know if verdict was for process #1, #2 or both
            1. To clear up confusion, look at extrinsic evidence (damages, proof/evidence)
         2. Case #2: unclear verdict & no extrinsic evidence, so collateral estoppel
            1. No because burden of estoppel is on party asserting it. That party is having a hard time proving element #4 (don’t know if decided on #1, #2, or both)
   3. In relation to R. 12(b)(6):
      1. Bring in answer OR extrinsic evidence—changes 12b6 to summary judgment (56b) (looking at something beyond complaint)
         1. Can dismiss with 12b6 or 56 if can prove all 6 elements of collateral estoppel
   4. Because it is unclear what was necessary to judgment, P NOT barred by collateral estoppel
2. Rios v. Davis—Popular dry goods car crash
   1. Case #1: PDG 🡪 Davis 🡪 Rios
      1. Judgment for Davis b/c PDG can’t recover
      2. Judgment for Rios b/c Davis can’t recover
      3. Jury found everyone negligent
   2. Case #2: Rios (P) 🡪 Davis (D)
      1. Why isn’t this barred by compulsory counterclaim rule?
         1. Rule 13(a)(1)(A): covers opposing parties in federal court but state might have statute
      2. Why not by defense preclusion?
         1. Because Davis won. Minority: if you win, not barred. Majority: if you win, you are barred by this preclusion
      3. Is P collaterally estopped to deny his prior negligence?
         1. No, wasn’t necessary/material to the judgment (if D was careful, doesn’t change outcome)
         2. **SOMETHING IS NECESSARY IF CHANGING IT CHANGES THE JUDGMENT**
            1. **Why do we have necessary rule?**

*Policy: not confident in a finding that is not necessary to the judgment so P can relitigate\*\**

Winning parties don’t get to appeal

Policy of truth over fairness, if you can’t test judgment on appeal, don’t want it to be binding forever

Incentive-- Rios didn’t have a good incentive to litigate in first case

Dicta—we don’t know how much the jury believed that nothing turned on decision

* + 1. Is D collaterally estopped to deny his prior negligence?
       1. Yes, because it changes the judgment. If D was found to be careful, then P would have lost—it’s necessary to judgment
       2. D had the opportunity to appeal and the jury is confident
  1. Hypo—
     1. Case #1: assume PDG was negligent and Davis is too, but Rios was careful
        1. Is Davis collaterally estopped from denying his negligence?
           1. Changing the finding of Davis is not necessary to judgment because it changes and the outcome is the same

1. Problem of Collateral Estoppel
   1. Neither finding is necessary to judgment because other stands on other judgment
      1. Conundrum: judgment, in theory, stands on nothing
   2. Both are necessary to judgment
   3. Courts split
      1. Majority: where a judgment rests on alternative, but independent findings, both are good for estoppel
         1. Exception: if losing appeals and court of appeals declines to reach the ground of that losing appeal, is not a good estoppel
      2. Minority: where a judgment rests on alternative but independent findings, neither are good for estoppel
         1. Exception: if losing appeals, any ground on which court of appeals affirms becomes a good estoppel

**Defining and Characterizing the Issue**

1. *U.S v. Moser:* Moser tries to get bigger pension because of serving in Naval Academy during the war & wins
   1. Another guy tried the same thing, and SCOTUS changed their mind and tells Moser they can’t pay him anymore
      1. Is that okay? Isn’t this a legal question?
      2. No, not facts, not law—hasn’t changed—it’s mixed fact and law
         1. What’s changed? 🡪 **how we apply law to the facts**
            1. No collateral estoppel on pure legal issue, there is and issue on how you apply law to facts
            2. ONCE A RIGHT IS ESTABLISHED, IT IS ESTABLISED FOREVER
2. *IRS v. Sunnen:* Sunnen pays some money from obligator to wife to avoid higher taxes—nothing changes, would have given money to wife anyway
   1. *Is the money still Sunnen’s income?*
      1. Case #1: IRS 🡪 Sunnen
      2. No, because Sunnen did receive money, Sunnen wins
   2. Case #2: SCOTUS has changes law—money is income if he controls where it goes, Sunnen loses
      1. The same agreement (1928) is being disputed, why #2 estopped?
         1. Case #2 issue isn’t the same as #1 but, it is actually the exact same issue, just involving different years
            1. Fairness—not fair to allow Sunnen to forgo paying taxes

Compared to *Moser:* Moser was only at Naval Academy once, here, Sunnen paid wife each year (taxes are a more universal issue)

1. **Evergreen Doctrine**
   1. Hypo:
      1. Able 🡪 Baker (in jx where P has burden of proof and A loses, both negligent)
      2. Baker 🡪 Able (negligence was established b/c of case #1, Baker now has burden of proof, different issue)
   2. Who has burden of proof is part of issue—have to prove who is right and if P fails to carry P’s burden, it doesn’t mean D has proved he wasn’t negligent.
   3. Hypo:
      1. CA (killed wife)🡪 OJ (OJ acquitted, criminal)
         1. **Burdens of proof:** 
            1. **Criminal:** burden by beyond reasonable doubt (HIGHER)
            2. **Civil:** burden by preponderance of the evidence (LOWER)
      2. CA (take children away) 🡪 OJ (civil)
   4. If beyond reasonable doubt is established, then clear and convincing is already established
      1. *Burden of proof affects collateral estoppel because the greater finding always includes the lesser*
2. Sixth Element: Parties have to be the same
   1. Building burns down, insured (P) covered by 2 insurance companies A & B, and each covers 50% of damages
      1. #1: P 🡪 A (P gets $50,000, found for A)
      2. #2: P (for other 50%) 🡪 B
         1. NOT violation of due process to bind P in 2 because P brought the suit
            1. This is not unfair because

Put forth best effort

chose forum

brought suit and picked the issues

* + - 1. IS a violation of due process to bind B because there was no personal jurisdiction (Pennoyer)
         1. Even though B isn’t bound, are they precluded from benefitting from case #1?

**No🡪**

* + 1. **Defensive use of collateral estoppel**: allowed to estop P in second case despite unmutual parties because P chose forum, tried as hard as he could, and lost
       1. In 2013, should bring A & B in one case because it’s risky to have one case. If you lose #2, would lose against everyone
  1. **Collateral Estoppel closes a loophole in res judicata**—collateral estoppel doesn’t want multiple suits because its practically doesn’t make sense
     1. This issue is what *Bernhard v. Bank of America* addresses, but in Bernhard, P didn’t pick anything, so unfair to bind her to case #1.

1. *Parklane Hosiery (D) v. Shore (P):* 
   1. Case #1: SEC 🡪 Parklane (judgment for SEC—SEC wanted the injunction to unwind the merger)
      1. Claim: declaratory judgment, injunction, and merger
      2. Parklane: lied about proxy statements
   2. Case #2: class action 🡪 Parklane
      1. Claim: same proxy statements and merge as #1
      2. No res judicata for P because not party in #1 and would violate due process to bind them (Pennoyer)
   3. If Supreme Court accepts Bernhard and that fraud from Parklane was established in Case #1, shouldn’t SCOTUS follow it?
      1. No, it is distinguished: Bernhard was a defensive use of collateral estoppel, this is offensive
   4. **Non Mutual Collateral Estoppel with Offensive Collateral Estoppel**
      1. Arguably unfair to bind D when they didn’t get to chose anything
      2. P would get a peculiar incentive to play “heads I win, tails you lose” (THE GAME)
         1. Gives P incentive to stay out of case #1 and wait and see
      3. Court could have followed the Bernhard precedent, but
         1. Said cours should evaluate discretionary case by case
            1. Was P playing THE GAME by not joining case #1?

No, because he couldn’t join the SEC

* + 1. Exceptions:
       1. Class actions—D loses, party chose to opt out of class action, but doesn’t get benefit of nonmutual collateral estoppel offensively from a D that previously lost
          1. Can relitigate if P won
  1. Was it unfair to D to use non mutual offensively?
     1. **Full & fair opportunity (3)**
        1. Did D have **strong incentive** in #1?
           1. Yes, put forth best effort because they didn’t want to lose and have class action suit
        2. Did D have same **procedural opportunities** in #1?
           1. Ex. Small claims court v. normal court (one is more limiting)
           2. No, because it was in equity court, there was no jury
           3. Yes, right to jury didn’t change anything, nothing turns on it (Byrd)

Had all procedural and evidentiary rules, no jury is not enough by itself to claim different opportunities

* + - 1. Were there prior inconsistent judgments?
         1. Normally, last judgment is preclusive, unless multiple inconsistent judgments, then unfair
  1. Because of offensive use of collateral estoppel, Parkland is, in case #2, proven fraud because of Case #1

1. Seventh Amendment
   1. Does Parklane have a right to jury?
      1. Case #1: No, SEC
      2. #2: security fraud at issue, so maybe
   2. security fraud didn’t exist in 1791
      1. Ross Test (3):
         1. What’s the claim like? *Fraud—tort of common law*
         2. What the relief like? *Legal*
         3. Is the jury suitable? *Eh, complicated financial matters, but SCOTUS doesn’t put a lot of pressure on #3, so it doesn’t outweigh 1 or 2*
   3. Because #1 is equity and #2 is legal, isn’t it a 7th amendment violation?
      1. Distinguished from Beacon because was same case/same transaction, this is not
      2. How does Beacon say that #1 is preclusive?
         1. Because findings by judge are equitable claims which are decided if judge goes first, no jury
   4. Would Parklane get a jury in 1791?
      1. Yes, because nonmutual collateral estoppel didn’t exist
      2. Why is this a problem now?
         1. Because the right here is procedrua, not substantive (Galloway, Redman)
      3. 7th amendment preserves substance
         1. Frankfurt: arguable substantive because it changes outcome (York)
   5. Substance:
      1. Dimmick: No additur because not done that way in 1791
      2. Slocum: no jnov because not done in 1791
   6. Procedure
      1. Galloway, Redman, Parklane: preserves substance, not procedure

Binding Non Parties

1. Non Parties Never Bound Except If
   1. Bound if in contract
   2. Bound if in privity
   3. Adequate representation binds you
      1. Class actions when member, adequately represented, others rules me, and haven’t opted out
      2. When guardian and trustees bring actions
   4. If you control litigation even though not in prvity
   5. Somebody brings litigation on your behalf as agent (like in Cromwell)
   6. Some statutory schemes say that whole word is bound
      1. Like bankruptcy findings
2. *Martin v. Wilks (*firefighter case to get African Americans involved and white firefighters got mad)
   1. Case #1: P = black firefighters 🡪 city (result: consent agreement)
   2. Case #2: P = white firefighters 🡪 city
      1. City: “you’re precluded by consent agreement”
      2. P: not party, not bound
      3. City: are bound, you could have intervened with R. 29
         1. **Intervention, Rule 24**
            1. Subject matter: federal question
            2. As a right (3)

Interest in litigation—yes

Judgment would affect rights

Not adequately represented by existing parties

Are white ff represented by city?

Yes/no: city represents everyone, so doesn’t have peculiar interests of white ff

* + - * 1. Permissively: yes, don’t’ want to try case again
  1. White ff knew of case but chose to sit on the sidelines
     1. Same issue as Provident Tradesman
     2. Issue: is it okay to bind someone who could have intervened, but didn’t?
        1. **Is Rule 24 mandatory or permissive? (2 prongs)**
           1. **Permissive, intervention is allowed, not required**
           2. **Pennoyer, violates due process to bind them**

**\*\*merely having an opportunity doesn’t bind you\*\***

* 1. In 2013, white ff bound because of the civil rights act of 1991 (2)
     1. *Good by itself (if either i or ii are met, can’t relitigate consent agreement)*
        1. *Actual notice*
        2. *Opportunity to intervene*
     2. *Good by itself*
        1. *Adequately represented*
     3. In 2013, would be bound unless the statute violate the constitution
  2. Does the civil rights act of 1991 violate the constitution (was on last year’s exam)
     1. Yes—violates due process of V amendment
        1. Pennoyer
        2. Martin v. Wilks—said same thing as Pennoyer
        3. As authority with these two cases, due process is violate without personal jurisdiction non withstanding actual notice or representation
     2. No—argue that Martin was dicta, court had 2 prongs
        1. Prongs: intervention not mandatory (R24, rules based) and personal jurisdiction is violated (Pennoyer)
        2. If the court found the Pennoyer prong to be the holding, then due process is violated, if they don’t, not due process violation

**Intersystem Preclusion**

***State-State Preclusion***

1. Article 4, § 1
2. *Fautleroy (P) v. Lum (D),* illegal gambling case
   1. Case: P 🡪 owed money for gambling K, illegal
      1. #1: P wins, arbitration, wasn’t told about illegality
      2. #2: Missouri, P seeks to enforce judgment, D served (Burnham), so jx is okay, and Missouri enforces the judgment
         1. did the Missouri court make a mistake hearing the case?
            1. No because arbitration was binding and court can’t fix the mistake

\*\*Assume arbitration was wrong, and Missouri court wrong to enforce\*\*

* + 1. #3: in Mississippi: P sought judgment again to take D’s Mississippi property
       1. court refused to enforce Missouri judgment because gambling K is illegal
          1. this was wrong because of Full Faith & Credit (Article 4, § 1)

\*\*Doesn’t matter that Missouri judgment was wrong, Mississippi still has to give it full faith and credit because of FFC

According to FFC, once you’ve won in one court, you’ve won everywhere

***State-Federal Preclusion***

1. 28 U.S.C § 1738: imposes federal court to accord full faith and credit to the judgments of state courts
2. *Allen (D) v. McCurry (P)*
   1. Case #1: state court, criminal case, P loses, goes to jail for officers finding drugs in his possession. P claims 4th amendment violation
   2. Case #2: federal court, civil rights case, P tries violation of 4th amendment, D says precluded by #1
      1. Why does a state judgment matter in federal court?
         1. § 1738: full faith and credit, requires federal court to give credit to state (congressional)
         2. Article 4 doesn’t apply because it’s between states (constitution)
      2. why congressional choice and not constitutional demand?
         1. Congress can change a statute and can get habeas corpus review
      3. **Would prior criminal decision give preclusive affect to civil rights case?**
         1. Must look at what state would do in this case (Article 4)
            1. At issue: full & fair opportunity to litigate—mutuality of parties
            2. What is the non mutual issue?

Defensive use, why is this different than Bernhard?

Against former D, (Bernhard was P)

Offensive use of collateral estoppel (Parklane)

Played games

Whether D had full and fair opportunity

Multiple and inconsistent judgments

When is there defensive use of collateral estoppel to preclude former D?

Can’t ask playing games q, because D didn’t chose forum or stay out of it

Multiple—not at issue

Whether D had opportunity is CRUCIAL

* 1. Did McCurry have a full and fair opportunity to litigate in Case #1?
     1. Incentive: didn’t want to go to jail
     2. Procedural: McCurry didn’t get jury in preclusion hearing

\*\*Parklane: not a good enough reason to deny nonmutual collateral estoppel\*\*

* + - 1. Discovery is different: Discovery was more limiting
      2. Context- narrow for criminal cases
         1. Flavor of exclusion hearing is done quickly
         2. Flavor of suppression is different than civil because D is a criminal. Judge knew if he exluded evidence, criminal would go free

If judge knows D guilty, takes a lot to exclude evidence

In civil case, get more fuller definition of 4th amendment rights because not fearing criminals on the streets

* + 1. Assume Missouri (state) says preclusion (civil) hearing was fair?
       1. If state will allow it, § 1738 says federal court must as well
  1. Non mutual collateral estoppel unheard of in 1871 because didn’t conceive it would be at issue because parties were different
     1. Changing procedure of collateral estoppel doesn’t change the substance
        1. Changed procedure of civil rights act, not substance of act
           1. Majority: procedure; minority/dissent: substance
  2. Why would there be an exception for civil rights?
     1. Congress passed this statute because could get a fair shot in state court
        1. *Inconsistent with civil rights act to let a sate court judgment be preclusive on federal case. Why did court reject this?*
           1. Things have changed since 1871
           2. Congress gave concurrent jurisdiction in 1983

Trusted states court

* 1. How/why did congress get this right?
     1. No exception to § 1738 for civil rights cases
     2. 30 years have passed since this case
     3. if congress thought it was a mistake, they’ve had a long time to change § 1738

1. ESSENTIALLY, UP TO THE STATE, IF STATE WOULD APPLY NON MUTUAL PRECLUSION OF COLLATERAL ESTOPPEL, FEDERAL COURT MUST DO THE SAME
   1. Does res judicata also get accordance from state court judgment?
      1. Later case, court decided § 1738 applied to res judicata
      2. If state holds that you can’t, then in federal court you can’t
   2. When claims are exclusive to federal court
      1. Maresse—if sate law would preclude your claim, then you are precluded (§ 1738)
         1. Up to the states—if they want to give broader exclusive impact, out of luck
   3. Administrative proceedings
      1. If sufficiently trial like, and try to bring decision to tribunal, previous case has preclusive impact if state would say the same

***Federal-State Preclusion***

1. *Semtek (P) v. Lockheed Martin*

***On merits: substantive***

***Not on merits: procedural***

* 1. Question: does a federal court sitting in diversity have preclusion over another federal court facing the same issue?
  2. Case #1: P 🡪 D in California state, was removed to federal CA court
     1. Outcome: dismissed because of 2 year statute of limitations with prejudice
  3. Case #2: P 🡪 D for same issues as #1 in Maryland state court, removed to MD federal court
     1. Why removed?
        1. § 1331, federal question: collateral estoppel: federal court bars claim, but not good enough reason because this a defense (Mottley)
        2. diversity: non because D is from MD
     2. so, remanded back to MD state court
        1. assume CA law says a limitations issue is not preclusive (not on the merits)
           1. **federal law is preclusive**
  4. P thinks he can get around this because MD statute of limitations is longer than CA
     1. Most states apply own statute of limitations regardless of subject matter because they view that statute of limitations is procedural
        1. Erie—is statute of limitations procedural?
           1. Procedural: prevents state evidence, so housekeeping
           2. Substantive: public policy, don’t want people having to constantly worry about being sued

Balances rights of potential P with potential D

* 1. Who’s law governs? MD or CA?
     1. Why does a MD state court have to care about what CA federal court said?
        1. There is no specific provision, but SCOTUS does say constitutional provision requires this
           1. Full faith and credit to prior federal judgments in state courts: Supremacy clause, Article 6
           2. Article 3 § 2—federal courts can hear enumerated lists of cases and controversies
     2. Up until now, the state law of the first case determines how much preclusive impact to give to first case (law of sovereign who determined first case)
     3. In federal question, federal law determines how much preclusive impact to apply
        1. **Preclusive effect = whether state thinks dismissal for statute of limitations is on the merits or not**
           1. CA: not on the merits, so MD must hear the case
     4. Federal common law governs in federal question cases, but 🡪
        1. Diversity cases, Semtek applies: the law in which the federal court sits (like Klaxton)
  2. What if Semtek was tried in CA state court? (never dismissed and second case in MD state)
     1. Res judicata would not be successful because of Article 4 § 1, full faith and credit, and must give as much preclusive effect as CA state court
        1. Would require MD court to entertain 2nd action
  3. Why does SCOTUS say that if the case is filed in federal court, the result is the same?
     1. Federal court is an extension of the state court
     2. ALWAYS APPLY THE DECIDING LAW OF THE COURT RENDERING THE JUDGMENT UNESS IF EFFECTS SOME FEDERAL INTEREST
  4. Why did D remove this case?
     1. In hopes D would get full benefit of federal rule of statute of limitations being on the merits
        1. Problem: don’t want D forum shopping
           1. How do we prevent D from forum shopping?

Say law doesn’t change when it goes to federal court

* + - 1. To be faithful to Erie RR, the state law applies when state law provide the rules of the decision
  1. How did Article 3 § 2 allow this case?
     1. Arises under law of US, Article III & VII, so is federal law because there is federal issue (*Osborn*)
     2. Since MD decline to hear this, because there was federal issue, SCOTUS heard (same as *DeMoines*)

1. Technicality
   1. This is not an exception to the rule
   2. Federal common law determines whether there is preclusion
      1. So technically, this a federal question
   3. Federal court not required to apply state law. Why it matters🡪
      1. Compelled: RDA: federal court required to follow state
      2. Adoption: when federal court adopts state law, not required to follow all state law when it conflicts with federal interest
         1. Can adopt as much of sate law that they want and decline it if conflicts with interest
   4. What if D had compulsory counter claim under R 13(a), but CA state didn’t compel?
      1. Federal law would apply
      2. So, technically, federal common law applies because federal court adopted CA state law
         1. What Articles 3 & 6 require is a federal common law question
2. **International Judgments**
   1. Full faith and credit when
      1. Reciprocity: if other court recognizes us, then we recognize their judgments
      2. Must think that sovereign of court that rendered judgments is civilized court
   2. When we do give full faith and credit, apply other countries law when it comes to preclusive effect
      1. Must bring in experts
      2. Question of fact that jury makes decision on
   3. It is generally the case that the law of the sovereign that decided the judgment decides second case
3. Overview
   1. State-state: Article 4 § 1
   2. State-Federal: § 1738
   3. Federal –state: Article 3 & 6
   4. Federal-federal: federal common law