**FALL 2015 HERSHKOFF CIVIL PROCEDURE OUTLINE:**

**Grade: A**

**General Values of Civil Procedure:**

* **Participation:** important for **adversarial system** of courts; instrumental in court decision making
* **Accuracy:** rules structured to maximize chances of achieving legally correct outcome
* **Dignity:** concern for humiliation/loss of self-respect person may suffer if denied opportunity to litigate
* **Deterrence:** litigation as mechanism for influencing or constraining individual behavior
* **Effectuation:** way person is enabled to get or is assured of ability to get what’s rightfully theirs

**PERSONAL JURISDICTION:**

**STEP 1:** **Define Personal Jurisdiction**

**Personal Jurisdiction:** power of a court to enter judgment against person or thing

* **In Personam:**power to enter judgment that imposes a personal obligation on an upon defendant (damages or injunction)
* **In Rem:** power to enter judgment directed against property physically present in the forum (who owns deed/title)
  + Cause of action is the property
* **Quasi in Rem:**
  + **Quasi in Rem I:** same as in rem, but only determining title as to specific parties named in suit (vs. whole world like in rem)
    - Cause of action is the property
  + **Quasi in Rem II:** imposes personal obligation (in personam judgment) on individual based on presence of property attached in the forum
    - Cause of action is NOT related to property
      * + Judgment is capped at value of the property

**Note:** *Shaffer* says still must do min contacts + reasonableness analysis for in rem/quasi in rem jx (*see step 9*)

**STEP 2:** **What type of challenge (if any) is defendant bringing?**

* **Special Appearance:** procedure by which defendant presents a challenge over court’s exercise of personal jurisdiction without submitting to the court’s jurisdiction for any other purpose
  + must designate appearance as “special”
  + cannot raise issues other than jurisdiction
  + if you lose special appearance argument, then can go on to argue merits of the case
* **Collateral Challenge:** procedure by which if defendant never made appearance in court and got a default judgment, can go back and challenge that judgment on basis that court did not have personal jurisdiction
* **Limited Appearance:** in quasi in rem actions, defendant may appear for limited purpose of defending interest in the property, without submitting to full jurisdiction of the court
  + If lose, judgment still capped at value of property, whereas if submitted to full jurisdiction of court, judgment would no longer be capped

**STEP 3: Personal Jurisdiction must be authorized by (a) statute & (b) Constitution**

1. **Statute**: to exercise jurisdiction, there **must be a statute granting the power to do so** 
   * **Long-Arm Statutes:** authorize states to exercise jurisdiction over non-residents based on their activities in the state
2. **Constitution:** must make sure that exercising jurisdictional power based on statute is constitutional
   * Must comport with 14th (state) or 5th (federal) amendments so as to not violate Due Process
     + exercise of jurisdiction must “not upset traditional notions of fair play and substantial justice”

**STEP 4: Federal or State Court?**

**If federal court 🡪 apply FRCP 4(k)**

Federal court, like state, can only exercise jurisdiction if (1) authorized by statute and, (2) comports with Constitutional due process requirement

**Claim Arising Under State Law:**

**FRCP(4)(k)(1)(a):** If claim arises under *state law* and no specific federal long-arm statute authorizes jurisdiction, look to long-arm statute of state where district court sits (“piggyback”)

* + - If state statute doesn’t allow jurisdiction 🡪 no jurisdiction
    - If state statute allows jurisdiction 🡪 make sure jurisdiction complies with 14th Amendment (look to defendant’s contacts with state)

**Claim Arising Under Federal Law:**

**FRCP(4)(k)(1)(c)**: If claim arises under *federal law* and specific federal long-arm statue authorizes jurisdiction 🡪 make sure jurisdiction complies with 5th amendment

* Look at defendant’s minimum contacts with *nation*
  + open question: does 5th amendment analysis require reasonableness inquiry?
    - **on test:** do reasonableness, but note that whether or not it’s required hasn’t been resolved
* If claim arises under federal law, but there’s no federal statute authorizing jurisdiction 🡪 use **4(k)(1)(a)**

**FRCP(4)(k)(2):** If claim arises under *federal law*, jurisdiction is allowed if defendant is not subject to jurisdiction in any state (alien) and if jurisdiction is consistent with 5th amendment

* Look to contacts with nation
  + open question: does 5th amendment require reasonableness inquiry?
    - **on test:** do reasonableness, but note that whether or not it’s required hasn’t been resolved

**STEP 5:** **Look at Long-Arm Statute**

**Constitutional Max Statute:** authorize jurisdiction to full extent of Constitution

* check for traditional jurisdiction bases, then do minimum contacts analysis

**Enumerated Acts Statute:** authorize jurisdiction based on specific activities in the state

* look at facts of the suit to make sure activity falls within the statute’s categories, check for traditional bases of jurisdiction, then do minimum contacts analysis
  + **note:** if conduct doesn’t fit within enumerated act, check if there is a statute allowing jx based on property in forum (quasi in rem) & see if defendant has property in forum to base jx on (*see step 9)*
    - if basing jx on quasi in rem, still do min contacts + reasonableness (*Shaffer*)

**STEP 6:** **Traditional Basis for Jurisdiction?**

**Territoriality:** states are equal sovereigns w/ exclusive power over people & property within their territory

**In-State Service of Process?**

* If defendant is served process while in the state, state has personal jurisdiction over defendant
  + ***Pennoyer v. Neff:*** **presence in forum + service = personal jurisdiction**
    - *Facts:* N used services of lawyer (M) but didn’t pay; M obtained default judgment against N; waited until N bought land in state and then sought to writ of execution to get it to cover his judgment; sold land to P; N collaterally challenged original default judgment claiming court had no personal jx
      * Jurisdiction didn’t comply w/ state statute: statute gave jx over nonresidents with property in state (quasi in rem), but property had to be attached at onset of litigation (Mitchell attached *after* litigation started)
      * Jurisdiction wasn’t constitutional: constitutional basis for jx = territoriality

presence + personal service in forum = general personal jx over non-resident

* exceptions to territoriality: status relations (marriage); can appoint agent for personal service; extraterritorial effects of property & contract actions
* ***Burnham v. Superior Court:*** **transient presence in forum continues to be basis for personal jurisdiction, but why is unclear (plurality opinion w/ split reasoning)**
  + *Facts:* B lives in NJ, separated from wife who moved to Cali; while in Cali on unrelated business, was served divorce papers by wife; B claims Cali has no personal jx because doesn’t meet minimum contacts + reasonableness due process requirements
    - If *Shaffer* (see below in step 9) says quasi in rem requires contemporary due process analysis (min contacts + reasonableness), why shouldn’t territoriality theory?
  + Plurality (Scalia): traditional practices are presumed to be Constitutional and are immune to review; only new practices require Due Process review
    - *Int’l Shoe* and following cases deal with absent defendants & focused on new practices, this case deals with traditional practice of defendant’s presence in forum + personal service (*Pennoyer* established that this is enough for personal jx)
  + Concurrence (White): rule of allowing jx based on presence + service is so widely accepted that can’t be struck down for violating Due Process (everyone has notice of being amenable to suit this way)
  + Concurrence (Brennan): rule doesn’t automatically comport w/ Due Process bc it’s traditional
    - *Shaffer* said all rules, even traditional ones have to comport w/ Due Process
      * but in this case, jx is proper based on min contacts + reasonableness inquiry
  + Concurrence (Stevens): facts in this case combine to make jx proper
    - concerns w/ *Shaffer* & this case having too broad reach (wants to limit reasoning to facts of this case)
* **On Test:** if you get transient presence situation, still do min contacts + reasonableness bc of *Burnham* & *Shaffer* pointing to doing contemporary analysis even for traditional bases (and the fact that *Burnham* is plurality so unclear if personal jx is because or territoriality or bc of facts of case)

**Domicile?**

* If defendant is citizen (domicile) of state, doesn’t need to be present for state to exercise personal jx
  + ***Milliken v. Meyer:*** domiciliary status counts as presence for territoriality theory
    - service can be constructive in this case
    - assures that there is always one place where defendant can be sued (general jx)

**Consent:** state can exercise personal jurisdiction over a party when they consent by appearance, registration in state (via statute), or contract

**Appearance?**

* If didn’t designate appearance as “special” 🡪 waived right to personal jx (consented)

**Waiver via Sanction?**

* ***Insurance Corp. of Ireland v. Comagnie De Bauxites De Guinee:*** personal jx is a right that can be waived; court can issue preemptive finding of personal jx as sanction for not complying w/ court’s orders
* *Facts:* P filed suit in state against foreign insurance companies (D); D appeared specially claiming no personal jx; D refused to submit to discovery requests regarding whether or not D has min contacts w/ state
* Court issued sanctions consisting of preemptive finding that there are min contacts and personal jx is satisfied
  + - personal jx is a right that can be waived
    - when parties submit to court’s jurisdiction (even for limited purpose of figuring out whether or not court has jurisdiction), must comply with court’s orders
      * since D put personal jx issue at question, can’t block P’s reasonable attempts to show it
        + failure to comply w/ court’s orders supports finding that there is no merit to their defense

**Statute/Registration (Explicit/Implied)?**

14th amendment allows states to impose statutory conditions on activities of non-residents that are reasonable

* ***Kane v. NJ:*** explicit consent statute; must appoint agent for in-state service of process
  + NJ statute required non-resident motorists to file formal instrument appointing in-state agent for service of process as condition for using highway
* *Pennoyer* said can appoint agent for service of process
* 14th amendment allows states to impose reasonable regulations
  + - * + inherently dangerous activity 🡪 strong state regulatory interest

Ok for *specific jurisdiction* (suits arising from car accident)

* ***Hess v. Pawloski:*** implicit consent statute
  + state statute said that by using highway, non-resident motorists implicitly consent to appointment of in-state agent for service of process
    - no constitutional difference between implied and explicit consent statutes
      * same reasoning for allowing as in *Kane*
* note: distinction between these registration statutes (authorizing **specific jx based on inherently dangerous activities**), which the court finds reasonable vs. the **potentially *unreasonable* general jx registration statutes**, which leads to the open question of whether a reasonableness inquiry is needed for general jx

**Contractual?**

* **Forum Selection Clause:** contractual “ouster” clause
  + - * courts used to void forum-selection clauses bc considered against public policy (viewed as encroachment on state power), but not anymore
        + courts use “reasonableness” common-law analysis, not Due Process when deciding whether or not to enforce

***M/S Bremen v. Zapata Off-Shore Co.:*** parties must adhere to jx consented to in contract

*Facts:*two companies contracted to tow rig; contract stated that all disputes must be litigated in London. Rig was damaged in Florida and P sued in Florida

court said by signing contract, consented to terms so must adhere

reasonable because:

arms-length negotiation (similar bargaining power)

enforcement not unreasonable (both can go to London)

neutral forum

wouldn’t encourage global business expansion if required all suits to be litigated in US courts

* note: reasonableness is more of an issue in **consumer contracts**

***Carnival Cruise Lines, Inc. v. Shute:*** reasonable forum selection clauses must be adhered to

*Facts:* S purchased cruise tickets, ticket said all disputes must be litigated in Florida; S had accident while on cruise and tried to sue CC in home state of Washington based on min contacts

court said forum selection clause must be adhered to unless resisting party can show it’s unreasonable

reasonable because:

CC has interest in limiting where they are amenable to suit

limits confusion abt where suit can be brought

lower litigation costs = savings passed onto customers

note: there was no evidence in record to actually support this

* + - compare to **choice of law** provisions 🡪 consenting to law of specific state (but can bring suit in any forum)
      * choice of law provisions don’t consent to personal jurisdiction of any state, so must still do analysis
        + but choice of law provisions may have a bearing on **reasonableness inquiry**

**STEP 7: New Basis For Jurisdiction – Minimum Contacts (What Type of Contacts)?**

The modern basis for determining whether a court has a constitutional basis for exercising personal jurisdiction over a non-resident defendant is whether that defendant has **“certain minimum contacts with the state such that the maintenance of the suit does not offend traditional notions of fair play and substantive justice”**. This standard comes from *International Shoe Co. v. Washington*.

***International Shoe Co. v. Washington:*** minimum contacts = personal jx over non-resident defendant

* *Facts:* Int’l Shoe (Delaware corp w/ Missouri HQ) was sued by Washington over collection of employment tax; Int’l Shoe claimed no personal jx bc not “present” in forum
  + No office in Washington, no contracts made in Washington, no goods kept in Washington, etc.
  + Only had a few salespeople in Washington
* Majority (Stone): presence is a fiction (especially relating to corporations)
  + **Due Process analysis depends on “quality and nature of activity in relation to fair and orderly administration of law”**
    - Int’l Shoe’s contacts w/ Washington were “continuous and systematic” such that they would be amendable to suit based on obligations arising out of their salespeople’s activities within the state
  + Case-by-Case analysis, not mechanical or quantitative
  + **4 categories involving nature & quality of contacts + relation of cause of action to contacts and their potential effect on state’s power to exercise personal jx over non-resident defendant:**

1. **Single & Isolated Activity Related to Cause of Action 🡪 specific personal jx if activity is substantial/significant** (*Hess, McGee*)
2. **Single & Isolated Activity Not Related to Cause of Action 🡪 usually no personal jx** (*Hanson*)
3. **Continuous & Systematic Activity Related to Cause of Action 🡪 specific personal jx**
4. **Continuous & Systematic Activity Not Related to Cause of Action 🡪 may warrant general jx if activitiy is substantial/significant**

* Concurrence (Black): jx should be based on state regulatory interest; states have power to open doors of courts for citizens to sue corporations who do business in those states; power shouldn’t be conditioned on “traditional notions of fair play & substantive justice”
  + state needs to provide a forum for redress for it’s citizens

**STEP 8: General or Specific Jurisdiction?**

**General Jurisdiction:** state has power to enter judgment against defendant over *any* cause of action (whether or not it is related to the defendant’s contacts with the forum)

*International Shoe* recognized a category of contacts with a state that are so substantial such that the defendant is de facto “present” in the forum, and thus give rise to a state’s general jurisdiction over that defendant

* for **individual**: where they are domiciled (*Milliken*) or where they were present + served (*Pennoyer*)
* for **corporation:**
  + old rule: sufficiently substantial + systematic and continuous contacts w/ forum such that defendant is de facto “present” in forum (*Int’l Shoe* inquiry)
    - ***Perkins v. Benguet Consol. Mining Co:*** Philippine company w/ de-facto HQ in Ohio
      * contacts “sufficiently substantial & of such a nature” as to be present for general jx
    - ***Helicopteros v. Hall:*** mere purchases in forum is not sufficient for general jx
  + new rule: general jx = where defendant is “at home” ((a) where incorporated & (b) where principle place of business)
    - ***Goodyear Dunlop Tires Operations, SA v. Brown:*** general jx = where “at home”
      * *Facts:* bus accident in France killed to NC boys; family sued foreign subsidiaries of Goodyear USA in NC claiming general jx. Subsidiaries were not registered to do business in NC, no office/bank accounts/employees in NC, didn’t advertise/solicit business in NC
      * Court said general jx is usually where incorporated, plus **exceptional circumstances where activities continuous/systematic or substantial enough to be “at home” in state**
        + Goodyear is not incorporated in NC + activities of Goodyear not continuous/systematic or substantial enough to be “at home” in NC
    - ***Daimler AG v. Bauman:*** general jx = “at home” = incorporation or ppb
      * *Facts:*Argentinians sued Daimler (German company) for human rights violations in Argentina in CA via general jx based on Daimler subsidiary MB USA’s contacts w/ Cali
      * Majority (Ginsburg):MB USA’s systematic contacts w/ CA don’t render Daimler “at home” in CA
        + Contacts can’t be attributed based on agency theory

Even in MB USA is “at home” in CA, Daimler isn’t (not incorporated and no ppb)

but MB USA isn’t “at home” in CA because can’t be “at home” everywhere where company does a lot of business (not adequately on notice to foresee suit)

* + - * Concurrence (Sotomayor): should do reasonableness inquiry in determining general jx
        + Court said no general jx not because contacts with forum are so few, but because also have contacts w/ so many other forums (this was never how inquiry was done)

Daimler invoked benefits of CA (via MB USA) so if MB USA’s contacts w/ Cali are enough for general jx, so should Daimler’s

* + - * + But reasonableness shows there shouldn’t be general jx

no regulatory interests (foreign parties, foreign cause of action)

more appropriate forums available

**open questions for general jx:**

* **does reasonableness inquiry factor into analysis? (do it on exam)**

e.g. should there be a **reasonableness inquiry for registration statutes**?

*compare* with specific jx registration statutes in *Kane* & *Hess* which court found reasonable

* what is redress for American plaintiffs if foreign company not incorporated and no ppb in US?
* **exceptional circumstance?** (*Goodyear*)

would courts distinguish btwn *Goodyear* & *Daimler* in situation regarding US company not incorporated and no ppb in state (not at home), but has continuous and systematic contacts w/ forum and cause of action is in US

aka is court distinguishing these cases because they deal w/ foreign companies?

**on exam**: ask if this could be potential exceptional circumstances situation (even if state is not ppb or state of incorporation, still analyze if activities continuous & systematic enough)

* **what test for ppb?** (nerve center from *Hertz*?)

**\* try general jx first, then see if cause of action arises out of defendant’s activities in the state & try specific jx \***

**Specific Jurisdiction:** state has power to enter judgment against defendant only on issues specifically relating to or arising out of defendant’s contacts with the forum (based on *Int’l Shoe* categories of contacts 🡪 *Step 10*)

**STEP 9:** **Property in Forum?**

States have the power to exercise jurisdiction over property located within their boundaries via in rem and quasi in rem jurisdiction (*see top of outline for definitions*)

*Pennoyer* traditionally said that a state’s exercise of jurisdiction over a non-resident defendant can be based on the presence of property in the forum, **even if the property is unrelated to the cause of action** (general jx), as long as it is attached at the onset of the litigation (quasi in rem II). Judgment must be capped at the value of the property in the forum.

***Harris v. Balk:*** debt follows the debtor

* *Facts:* H owed $ to B, B owed $ to E; E attached H’s debt while he was in MD and obtained judgment requiring him to pay the money he owed B straight to E to satisfy B’s debt to E; B sued claiming MD judgment was invalid bc MD had no personal jx since debt originated in another state
* Court said the location of the debt is wherever the debtor is, so **quasi in rem II** jx over H was valid **up to amount of the debt** since the debt is located in whatever state H is located in at the time

***Shaffer v. Heitner:*** ***Int’l Shoe* min contacts test applies to all assertions of personal jx**

* *Facts:* H (non-resident) owned share of Greyhound stock (Delaware Corp.); filed shareholder’s derivative suit against corp & it’s officers + directors (not residents of Del, didn’t own homes in Del, didn’t conduct activities in Del); asserted quasi in rem II based on their stock ownership (attached stock via sequestration)
  + Del had statute that said stock is located where corporation is located
  + Del had statute that didn’t allow defendants to make limited appearance based on quasi in rem jx
    - had to either submit to court’s full in personam jx or risk default judgment & challenge collaterally
      * defendants argued that sequestration violated Due Process
* Majority (Marshall): no jx bc no min contacts + unreasonable
  + adjudicating rights to property is same thing as adjudicating rights of individual
    - thus, *Int’l Shoe* applies to all assertions of personal jx
      * in this case, no min contacts to support Delaware jx (don’t live there, cause of action isn’t there, no strong state regulatory interest (no long-arm statute abt corporate mismanagement)
* Concurrence (Powell): *Int’l Shoe* test shouldn’t apply to in rem cases **concerning tangible property**
  + traditional rules say jx based on real property in forum is constitutional w/ no need to look at min contacts or reasonableness (so *Int’l Shoe* test shouldn’t apply to all exercises of personal jx)
    - and regardless, in rem cases are *about* the property, so min contacts will always be satisfied anyway (cause of action)
* Concurrence (Stevens): no jx because Delaware no special appearance statute is unconstitutional on its face
  + denies defendant opportunity to defend merits of suit unless subjects to general jx of state
  + using ownership of stock shares as basis for jx doesn’t give defendant sufficient notice of possible suit
* Concurrence in part, Dissent in part (Brennan): no original inquiry into min contacts, so it’s irrelevant here
  + statute based quasi in rem jx on sequestration (P didn’t assert min contacts & D didn’t argue no min contacts)
  + but if you do look at min contacts, enough for jx:
    - D derive substantial benefit from corp relation (relationship to Del)
    - not unreasonably inconvenient for defendants to litigate in Del
    - shared state regulatory interest (should be a place where all defendants can be sued together)

**note:** since *Shaffer* says need to do min contacts inquiry for all personal jx assertions (at least definitely for quasi in rem), why is quasi in rem still important distinction?

* can be used as **a way to assert jx over D when D has min contacts w/ state but the state’s enumerated acts statutes doesn’t cover D’s actions in the state** (what cause of action is based on) so he can’t be brought in that way
  + look to see if D has property in state, and if state has a quasi in rem jx statute to use as basis for personal jx
    - * + **but still do min contacts analysis** (noting Powell tangible property caveat)
    - quasi in rem is also the only way to sequester property

**STEP 10: Minimum Contacts – “Purposeful Availment”**

***Hanson v. Denkla:* minimum contacts must be based on “purposeful availment” test**

* *Facts:* PA resident established trust in Delaware, appointed Delaware trustee, moved to FL; while in FL, changed trust beneficiary. After died, daughters brought action in FL challenging validity of trust; D argued FL has no personal jx over trustee (required party in litigation)
* Majority (Warren): for min contacts to be satisfied, contact w/ state must be some act by which **defendant purposefully avails itself of the privilege of conducting activities in the forum state, thus invoking the benefits and protections of its laws** (defendant must make deliberate, purposeful act to associate themselves w/ forum)
  + Del trustee didn’t purposefully avail himself to FL
    - * + connection to FL arose from unilateral activity of making trust appts in FL, not from act or transaction consummated by trustee in FL

**unilateral activity by 3rd party** (isolated action of her moving to FL) **≠ purposeful availment**

* + - Dissent (Black): emphasized strong state regulatory interest (like in *Int’l Shoe* & *McGee*) of FL in adjudicating disputes regarding trusts + estates (has specific long-arm statute about it); appt was made by FL domiciliary, primary beneficiaries are FL residents, will is being administered in FL
      * FL is reasonably convenient forum for all (no disproportionate burden for trustee to litigate in FL)

**note:** question becomes what does “purposeful availment” mean?

* especially regarding stream-of-commerce cases (*step 11(c))*

**STEP 11(a): Minimum Contacts based on Contract?**

If personal jx is based on one contract, see if: (1) specific long arm statue to show state regulatory interest (*McGee*), (2) “contract-plus” to show purposeful availment (*Burger King*), (3) reasonableness inquiry (*WWVW*)

***McGee v. Int’l Life Insurance Co.:*** minimum contacts can be based on single/isolated activity (**one contract**) when it’s of a **particular quality or nature** & **state has strong regulatory interest**

* *Facts:* Life Insurance (non-resident) had contract w/ one customer in CA (no other connection to CA); customer died & insurance refused to pay beneficiary; beneficiary sued in CA based on enumerated-acts statutes that subjects foreign corps to suits based on insurance contracts w/ state residents; insurance claimed no min contacts w/ Cali for personal jx
* Court (Black) said one contract (single/isolated activity) is enough for min contacts bc **contract had substantial connection to forum state** (particular quality/nature)
  + CA **specific long arm statute** shows strong state regulatory interest in insurance disputes of CA residents
  + not inconvenient for life insurance corp to litigate in CA (big company w/ resources)
  + **Three Prong Approach:** balance (1) state regulatory interest, (2) quality & nature of contract/contacts w/ state, (3) defendant’s convenience/burden

***Burger King v. Rudzewicz:*** “contract-plus” analysis for min contacts

* *Facts:* R (Michigan) entered into franchise agreement w/ BK (FL corp.); contract had FL choice-of-law provision; R did all business in Mich, but all $ was sent to FL & R was trained in FL; BK sued for breach of contract in FL (based on FL long-arm statute allowing personal jx over parties to contracts made in FL); R claim no min contacts w/ FL
* Majority (Brennan): even if based on single contract, can have min contacts
  + **adopted three-prong approach:**
    - (1) **“contract plus” analysis** = take into account **nature of contract, context, negotiations, expectations, etc.** to determine degree and nature of contacts that the contract creates w/ the state (not per-se rule, requires case-by-case analysis)
      * in this case: contract + other factors = enough for min contacts
        + factors: **terms of the contract** (FL choice of law provision indicated notice of being haled into court in FL); **anticipated long-term relationship** w/ BK (substantial); R was experienced business man

factors show that R **purposefully availed himself of benefits of forum by deliberately choosing to work w/ FL corporation**

* (2) dispute arose out of contract w/ substantial connection to state
* state long-arm statute shows state regulatory interest (*McGee*)
  + - (3) once minimum contacts established, burden shifts to defendant to show it’s fundamentally unfair:
      * R unable to show disproportionate inconvenience of litigating in FL
      * choice of law provision + association w/ FL corp = foreseeable to be haled into court in FL
  + **strong state regulatory interest can compensate for weak minimum contacts**
* Dissent (Stevens): unfair to require franchisee to defend in forum franchisor chooses
  + no min contacts bc business was all done in Mich (didn’t flip burgers in FL), main point of contact was w/ Mich branch
  + afraid of possibility of many default judgments against defendants if they are force to go to franchisor’s forum

**STEP 11(b): Minimum Contacts based on Intentional Tort?**

***Calder v. Jones:*** “Effects Test” for intentional torts

* *Facts:* Libel lawsuit in CA by CA actress against FL-based magazine writer; magazine had largest circulation in CA; writers claimed no min contacts w/ CA
* **intentionally targeting wrongful conduct toward a forum resident will support an assertion of jx in the victim’s state of residence if they suffer the brunt of the harm there (“effects test”)** 
  + targeted conduct toward defendant by writing article about her
  + phone calls to CA sources, published magazine for sale in CA
    - benefited from CA affiliation (purposeful availment)
  + reputational effects of the action was caused in CA (**most of the harm was suffered in CA**)

***Walden v. Fiore:*** min contacts = contacts w/ state, not people who reside in the state

* *Facts:* gamblers from Nevada detained in Georgia airport, cash seized in GA & officer swore false affidavit in GA; gamblers sued in Nevada based on *Calder* “effects test” that effects of officer’s tort (loss of $) was suffered in Nevada (their home state)
* Court said **min contacts must arise out of contacts the defendant *himself* creates w/ forum state** (not out of contacts btwn plaintiffs and forum state)
  + - * officer doesn’t have min contacts w/ Nevada
        + all related activity took place in GA
        + officer has no connection to Nevada other than the fact that plaintiffs reside there
      * jx can’t be based on indirect effect of defendant’s actions on plaintiffs in Nevada
    - Compare to *Calder*: “focal point” of libel was CA; contacts were created w/ state not just plaintiff (sold magazine in state, called sources in state)
      * conduct that creates injury is what matters (not injury itself)
        + in *Calder*, conduct causing injury was directed toward/related to CA, but in this case it wasn’t

**STEP 11(c): Minimum Contacts based on Stream-of-Commerce Tort?**

***Worldwide Volkswagen Corp. v. Woodson:*** two step test: (1) min contacts **(“affiliating circumstances”)** + (2) reasonableness

last majority opinion for stream of commerce

* *Facts:* customers purchased Audi in NY; crashed in Oklahoma; filed products liability suit against (among others) NY retailer and distributor; both had no contacts w/ OK besides this one car; claimed no min contacts w/ OK
* Majority (White): no min contacts w/ OK **(foreseeability +)**
  + to establish min contacts, purposeful availment = **“affiliating circumstances”** between defendants and forum
    - mere foreseeability that product will end up in forum is not enough for defendant to reasonably anticipate being haled into court there
      * need to put product into stream of commerce w/ the expectation that it will be purchased or used by people in that forum
        + **defendant must *themselves* take action that directly or indirectly attempts to serve forum**

one isolated contact not enough; unilateral activity not enough

* + - in this case: no sales in state, performed no services in state, didn’t solicit business in state, didn’t attempt to indirectly or directly serve market in any way
* Dissent (Brennan): min contacts **(stream of commerce/mere foreseeability test)**
  + VVWW **purposefully injected vehicle into stream of commerce**
    - deriving benefit from forum is **enough to foresee being haled into court**
* if min contacts is established 🡪 **reasonableness test** based on 5 factors (see *Step 12*)

***Asahi Metal Industry Co. v. Superior Court:*** **purposeful direction vs. foreseeability (*WWVW* dissent)**

* *Facts:* man is in motorcycle accident in CA; files product liability suit against foreign tire manufacturer; case was settled & tire manufacturer wants to indemnify Asahi (foreign component-part manufacturer of valve in tire); sues in CA; Asahi claims no min contacts w/ CA
* Plurality (O’Connor): no min contacts; **(purposeful direction)**
  + Purposeful availment/affiliating circumstances = **purposeful direction** toward forum state
    - **purposeful direction = advertising in forum, providing services to customers in forum, distribution system in forum, etc.**
      * one step up from White’s *directly or indirectly attempt to serve forum* test
  + foreseeability that product may end up being purchased in forum state is not enough (rejects *WWVW* stream of commerce theory)
* Concurrence (Brennan): stream of commerce theory (**mere foreseeability**)
  + purposeful availment is shown by stream of commerce theory (from *WWVW*)
    - knowingly released products into stream of commerce over long period of time, derived benefit from forum, enough to reasonably anticipate being haled into court there
* Concurrence (Stevens): quantity and quality of defendant’s contacts shows min contacts exist
  + continuous and systematic
  + sold products to manufacturer knowing many are sold in CA, benefited from those sales (purposeful availment)

***J. McIntyre Machinery, Ltd. v. Nicastro:*** **purposeful direction (*Asahi*) vs. foreseeability + (*WWVW*)**

* *Facts:* man injures his hand in NJ on shearing machine sold by manufacturer in England through independent Irish distributor (told distributor to market product everywhere throughout the US); files product liability suit in NJ against foreign manufacturer; manufacturer claims no min contacts
* Plurality (Kennedy): no min contacts bc no **“purposeful direction”** 
  + purposeful availment requires **purposeful direction (O’Connor *Asahi*)**
    - defendant didn’t specifically target NJ
      * using distributor doesn’t count as purposeful direction at forum
  + focuses on **sovereignty** and **submission to state authority**
* Concurrence (Breyer): no min contacts bc “single and isolated” sale in forum via third party
  + no prior precedent supports finding personal jx on these facts
    - even **stream of commerce theory** (*WWVW*) doesn’t support finding based on single & isolated sale
* Dissent (Ginsburg): finds min contacts
  + **foreseeability + (White *WWVW*)**
    - Associated themselves w/ distributor who aimed product at entire US
      * Selling product to entire US = **purposeful availment to every state (attempting to directly/indirectly serve every forum)**
  + Compare to *Asahi*: component-parts manufacturer w/ not control over where product ends up vs. defendant giving distributor specific directions to market to US and has control over distributor’s activities

***Ainsworth v. Moffett Engineering Ltd.:* uses stream of commerce from *WWVW***

* *Facts:* man killed in Mississippi by forklift manufactured by M (Ireland) & sold in US through US distributor; wife files products liability suit in Mississippi against M; M claims no min contacts
* Court of Appeals follows Breyer’s concurrence in *Nicastro* (since opinion was fractured, follow narrowest holding)
  + - * but here wasn’t single/isolated incident, so *Nicastro* doesn’t apply (distributor sold 200,000 M forklifts to Mississippi vs. one machine in *Nicastro*)
        + **reject purposeful direction** (O’Connor *Asahi* & Kennedy *Nicastro*) bc not binding precedent

**Overview – Possible Stream of Commerce Minimum Contacts Tests:**

1. **Stream of Commerce/Foreseeability:**
   * source: Brennan (*Asahi* & *World Wide*), Breyer (*Nicastro*) which *Ainsworth* follows
   * easiest to prove
   * defendant must have knowingly released products into stream of commerce over a long period of time, derived benefit from the forum
   * must be able to reasonably foresee being haled into court in forum aka foresee that product will end up in forum (*WWWW* – car is inherently mobile, purposely injected car into stream of commerce, *Asahi* – knowingly released product into stream of commerce over long period of time)
     + enough if you choose to participate in national sales of a product to make a profit
       - amendable to suit wherever profit happens along stream of commerce
   * exception: single sale of customer who takes product to forum is not sufficient (*Nicastro* – only 1 machine sold vs. *Ainsworth* – 200 sold in 4th largest state for industry)
     + but *McGee* & *Burger King* are both examples of single contact that were enough to show jx
2. **Affiliating Circumstances/Foreseeability +:**
   * source: White (*World Wide*), Ginsburg (*Nicastro*)
   * defendant must *themselves* “directly or indirectly attempt to serve the forum”
     + e.g. sell cars in state, perform services in state, solicit business in state
   * must put product into stream of commerce with expectation it will be purchased by people in the forum
   * one isolated contact is not enough, third party unilateral activity is not enough
   * Ginsburg: targeting US = attempting to serve every state, especially if have control over distributor’s activities (*Nicastro* vs. *Asahi*)
3. **Purposeful Direction:**
   * source: O’Connor (*Asahi*), Kennedy (*Nicastro*) (arguably)
   * hardest to prove
   * defendant must directly target the forum
     + e.g. advertise in forum themselves (not through agent), solicit business in forum, provide services in forum, distribution system in forum, goods particularly designed for forum, etc.
       - *Asahi* – if can’t predict where goods are going, not directly targeting forum
         * expectation that product will be purchased in forum not enough
   * Kennedy: targeting US is not same as targeting NJ directly
     + arguable if he was actually following O’Connor bc he focused more on state sovereignty
       - note: Black’s concern in *International Shoe* that corp may end up being immune from jx if does business in every state (Ginsburg agrees w/ concern and says if targeting US = targeting every state)
4. **Steven’s *Asahi* Concurrence:** quantity & quality of defendant’s contacts w/ state may make it inherently reasonable (continuous & systematic)

**Step 12: Reasonableness?**

***Worldwide Volkswagen Corp. v. Woodson:***

* Majority (White): established reasonableness test ((1) min contacts; (2) reasonableness)
  + - * **two step inquiry:** if find min contacts 🡪 look at the **“reasonableness”** of litigating in that forum (5 factors)
        1. **inconvenience to defendant**
        2. **state’s regulatory interest** (look at state’s long arm statute via *McGee*)
        3. **plaintiff’s interest in litigating in forum**
        4. **interstate interest in efficient resolution** (where does evidence exist, etc.)
        5. **shared interest of states in enforcing substantive norms** (is court infringing on another state’s right)
    - Dissent (Brennan): should all be one inquiry
      * min contacts + reasonableness should all be one inquiry based on a continuum where each factor can outweigh the other
        + majority put too much weight on min contacts & not enough on state’s regulatory interest, D’s burden, etc.

“significance of minimum contacts would diminish if some other consideration helped establish that jx would be fair and reasonable”

***Asahi Metal Industry Co. v. Superior Court:*** court split on min contacts, but most found no jx bc unreasonable

* **reasonableness inquiry:**
  1. defendant’s burden of litigating in US is severe (foreign manufacturer)
  2. state’s regulatory interest is low (CA citizen who was injured already settled his part of the suit)
  3. plaintiff’s interest is low (CA citizen already settled); new plaintiff is a foreign manufacturer too and his interest doesn’t outweigh defendant’s burden
  4. shared state interest: forcing two foreign parties to litigate in US would limit foreign trade
* Plurality (O’Connor): two step inquiry: (1) no min contacts + (2) unreasonable
* Concurrence (Brennan): found minimum contacts but said that **unreasonableness outweighs**
* Concurrence (Stevens): **unreasonableness alone is enough** 
  + - * + **min contacts inquiry is unnecessary once you find unreasonableness**
      * Scalia: doesn’t sign on to reasonableness inquiry (originalist approach)
        + **strictly follows *WWVW* and says that if don’t find min contacts, no need for reasonableness inquiry bc no personal jx no matter what**

doesn’t find min contacts, so doesn’t do reasonableness inquiry

**NOTICE**

For Due Process, need: (1) notice, (2) opportunity to be heard

**Questions to ask:**

Was the defendant alerted to the commencement of the lawsuit?

Was the type of notice constitutionally sufficient under due process?

**Notice:** being informed that you’re being sued

Notice of suit is given by service of process upon the defendant (summons & complaint)

* proper notice is a requirement of **Due Process**
  + note: due process only applies to **government activities** (not private activities) & **only protects property & liberty interests**
    - can only bring a due process challenge when a party is using **state power to deprive a person of their property or liberty**
* policy of notice requirement: protect property & individual liberty; proper functioning of adversarial system (person must know they’re being sued in order to be able to defend themselves)

**STATE ANALYSIS:** is state’s notice statute constitutional?

***Mullane v. Central Hanover Bank & Trust Co.:***

* *Facts:* beneficiaries of trust challenged the sufficiency of notice when bank only used constructive service (publishing in newspaper) to inform them that their accounts were settled (as was required by NY law), even though they had access to the names and addresses of all the present beneficiaries
* **constructive notice is insufficient (violates Due Process) when a person’s place of residence is known** 
  + had to give personal (mailed) notice to the beneficiaries whose addresses was known
  + constructive notice is OK when:
    1. court can’t reasonably or practically give more adequate warning
    2. party’s interests are remote or ephemeral
    3. party’s whereabouts with due diligence can’t be reasonably ascertained
    4. notice is reasonably certain to reach most of those interested in objecting (assumption is that the notified parties will safeguard the interests of all, if their interests are aligned)
* **Notice must be “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections”** 
  + must: **(1) convey the necessary info** + **(2) give adequate time to reply**
  + means employed must be **similar to those which one desirous of actually informing the person would adopt**

*Mullane*set a **standard, not a rule**, so a **case-by-case analysis based on facts** is always required:

***Mennonite Board of Missions v. Adams:*** court held that mortgagee of a property required actual notice of a proceeding to foreclose on the property, even though he should have reasonably known about the pendency of the action because of his delinquent payments and even though property was involved (constructive notice usually ok for in rem actions)

* mortgagee wasn’t living in the home at the time (was renting to tenants)

***Greene v. Lindsay:*** court held that **notices of eviction posted on doors of public housing apartments** is not sufficient because they could get taken down before they’re seen; required mailed notice

* court concerned with protecting **dignity/privacy interests** of the parties
* *Dissent*: questioned whether notice by mail vs. posting on apartment door is so superior that the difference is a constitutional question (reasoned that mail court be looted through also)
* note: case shows new constitutional reason for a collateral challenge
  + in this case, insufficiency of notice was challenged collaterally after default judgment was entered (parties actually didn’t get notice, which is why they didn’t appear in court)

***Dusenbery v. United States:*** FBI sent **prisoner** notice by certified mail to prison, address where he lived before arrest, address of step-mother, and posted constructive notice in newspaper. Prisoner claimed he never received notice

* court said “heroic efforts” not required by FBI to reach prisoner
* it was constitutionally sufficient that prison had system in place that was **reasonably calculated to ensure delivery of mail** to inmate (even if defendant didn’t actually receive the notice)
  + **in institutional context, court’s rely on institution’s procedures** (presumption of government regularity)
    - put burden on prisoner to show that notice was not received (all you have there is his say-so)
* compare court’s lax Due Process calculation in this case because person is prisoner (vs. stringent requirement in *Greene* when focus was on dignity interests of indigent person losing their home)
* *Dissent:* prison needs to tighten mail procedure system to be similar to one “actually desirous of informing prisoner” (it is too lax the way it is now to reasonably calculate notice), additional measure should’ve been taken

***Jones v. Flowers:*** govn’t sent foreclosure notice by certified mail twice, but took no further action when the mail was returned back to them unopened

* Court held that when mailed notice is returned unclaimed, government must take **“additional reasonable steps”** when it is practicable to do so to ensure notice is received (consider feasible alternatives)
  + reasonable examples: send by regular mail (no signature required), post notice
    - but don’t have to look through phone book or do internet search
* *Dissent:* what matters for sufficient notice is the **information available ex ante** (before the first notice is sent)
  + *plus* reporting change of address is statutory duty & property owners have incentive to guard their interests

**consider:** dignity interests (*Greene*); institutional procedure (*Dusenbery*); compare *Greene* to *Dusenbery*; what are “additional reasonable steps” in *Jones* (only gave standard and a few examples of what’s not required)

**Overview:**

* *Mullane:* facts & circumstances of situation
  + must be a method that one actually desirous of providing notice would use
* *Mullane, Mennonite, Greene:*if you know name & address 🡪 must send personal notice, even if would have learned about lawsuit through different means
* *Dusenbery:* assumption that government procedures are reasonably calculated to provide notice
  + don’t need to actually receive notice as long as procedure is designed properly
* *Jones:* may have to take reasonable alternatives
  + feasibility of alternatives?

**FEDERAL ANALYSIS: FRCP 4**

FRCP is presumed to be constitutional (meets *Mullane* requirements)

**FRCP(4)** implements uniform procedure for service of process to be used by all federal courts (state statutes have own rules governing correct methods of service)

* **service of process:** process of notifying defendant of the commencement of suit
* service = delivery
* process = document containing notice (summons + complaint)
  + **FRCP(4)(c)(1):** summons & complaint are required to be served in all federal proceedings

**FRCP(4)(a):** contents & amendments of summons

* what info summons must contain

**FRCP(4)(b):** issuance

* first step is to file complain w/ court
* must be looked over (not for substance, but for following correct procedure) and signed by clerk
* summons is needed for each defendant to be served

**FRCP(4)(c):** service

* plaintiff is responsible for service
* process must include summons + complaint
* service can be made by anyone who’s not a party and is at least 18 years old

**FRCP(4)(d):** waiver

* defendant subject to service has a duty to avoid unnecessary expenses of serving the summons
  + **plaintiff may request that defendant waive service of a summons**
    - request must include name of court where complaint filed
    - be accompanied by a copy of the complaint, 2 copies of the waiver form & a pre-paid means of returning the form
    - must give defendant reasonable time to return the waiver
      * waiver also gives defendant more time to answer the complaint
    - must inform the defendant of the **consequences of waiving or not waiving service**
      * defendant who **fails to waive without good cause** must bear the **expenses later incurred in making service**, and the reasonable expenses (including attorney’s fees) of **any motion required to collect those service expenses**
      * when a waiver is filed, **proof of service is not required** and the FRCP **applies as if a summons and complaint had been served at the time of filing the waiver**
    - **waiving service of summons does not waive any objection to personal jx or venue**
* *waiver is a cost-effective method of providing service which courts encourage* 
  + *plaintiff doesn’t have to bear cost of hiring someone to serve defendant* 
    - *incentives to defendant: more time to answer complain, if doesn’t agree to waiver for no good reason, must bear costs incurred in service of process*
* *problem: if you’re requesting a waiver just at the point where statute of limitations is about to lapse*
  + *issue in states that say suit is not commenced until defendant has been served (although most states say suit is commenced once complaint has been filed), and in states where requesting waiver won’t hold statute of limitations*

**FRCP(4)(e):** serving an individual within the US

* FRCP(4)(e)(1): service can be made by following state statute where the district court is located or where service is made
* FRCP(4)(e)(2): instead of following state statute, can also:
  + (a) personally deliver
    - can take into account new ways to serve someone
      * *Rio v. Rio* allowed service by email
      * *Flo Rida* & *Baidoo* cases allowed service by Facebook
    - must show that defendant evading service of process, that social media account is truly associated w/ defendant, and that defendant actually checks the account
  + (b) leave copy at dwelling or usual place of abode w/ someone of suitable age and discretion who resides there
  + (c) deliver a copy to an agent authorized by appointment
    - ***National Equipment Rental, Ltd. v. Szukhnet:*** one of the terms of lease was that defendant designates a NY person (who she never met) as agent for service of process within NY; lease agreement didn’t require agent to notify defendant (even though she actually did in this case)
      * because prompt notice had been given, this person was defendant’s “agent authorized by appointment” within meaning of FRCP(4)(e)(2)(c)

gave FRCP(4)(e)(2)(c) agent definition very permissive scope

* + - * note: court specifically said it wasn’t dealing w/ issue where agent didn’t provide notice, so said they are not addressing this issue here
      * *Dissent* (Black) questioned if party by contract could ever consent to jx in forum where they are not otherwise amenable to suit
      * *Dissent* (Brennan) questioned whether this is valid under contract terms because it was not freely negotiated (thus can’t be knowing waiver of process)
        + today, under *Carnival Cruise*, would be considered valid as long as reasonable

**FRCP(4)(f):** serving an individual in a foreign country

* authorizes alternative methods by which an individual can be served outside the US
  + international service must still comply w/ Due Process

**FRCP(4)(h):** serving a corporation, partnership or association

* authorizes service under same rules as (FRCP(4)(e)(1)), OR
  + in US: by delivering copy of summons to an agent authorized by appointment or law to receive service of process and – if agent is authorized by statute and statue so requires – mailing a copy of to the defendant
  + in foreign country: via FRCP(4)(f)

**Return of Service:** after process-server delivers papers, must file a return, which should disclose enough facts to demonstrate that defendant has been served and given notice

* return of service is assumed to be true, but can be disproven, but defendants own testimony usually not enough to disprove
  + **sewer service:** when process server disposes of papers and files false return
    - courts try to mitigate, but still persistent practice

**OPPORTUNITY TO BE HEARD**

Defendant has adequate opportunity to be heard when – in light of the interests at stake in the litigation – he is **able to develop the facts and legal issues in the case and present his position to the court**

* required for due process (along w/ notice)
  + note: still only applies to **government activities** and only protects **property & liberty interests**
* policy: essential for adversarial system that depends on parties presenting and arguing the facts of their case

Court has considered **whether Due Process always requires a hearing before the depravation of liberty or property, or whether a hearing after the fact sometimes suffices** in two types of cases:

1. cases implicating constitutionality of **provisional remedies** 
   * + - provisional remedies permit plaintiff to obtain forms of relief (seize or encumber defendant’s assets) before merits of a case are finally adjudicated
         * FRCP 64: federal court may apply the provisional remedies of the state in which it sits
         * examples of provisional remedies: sequestration, garnishment, attachment, replevin
     1. cases concerning procedures used to terminate or deny public benefits without a hearing (e.g. licenses, public assistance, tax refunds, etc.)

**Two Approaches:**

**Factor Approach** (Sniadach – Di-Chem)**:**

***Sniadach v. Family Finance Corp. of Bayview:*** statute allowed plaintiff to garnish debtor’s wages w/out notice or prior hearing, and clerk had authority to issue writ

* **wages = property** (and thus even their **temporary depravation implicates Due Process**)
* court said unconstitutional bc:
  + (a) loss of wages poses **tremendous hardship**
  + (b) **plaintiff has no individual interest** in the wages

***Fuentes v. Shevin:*** statute allowed for clerk to issue writ authorizing seizure of property (in this case, goods bought on credit) on basis of an application that set out conclusory allegations; didn’t require prior notice; defendant had to post a bond in order to be able to get the items back before a hearing (2x value of product)

* two property interests balanced here: consumer’s (goods were half paid off) & creditor (still owed half the $$)
* even when plaintiff has **pre-existing property interest**, still usually need hearing if statute is otherwise unconstitutional
  + court said statute is unconstitutional bc:
    - (a) post-seizure hearing application and bond to get items back before the hearing don’t substitute a pre-seizure hearing
    - (b) requirement of notice & opportunity to be heard doesn’t raise an impenetrable barrier for the creditor, but protects the defendant from arbitrary encroachment
  + **only “extraordinary situations” may justify postponing notice and hearing** 
    - when there is need for prompt action and when seizure is directly necessary to secure public interest (gov. participation, war, economic disaster, etc.)
  + *Dissent*: questioned subjecting a contractual provision to constitutional scrutiny
    - majority responded that the contractual language doesn’t amount to waive of procedural due process right (language waiving constitutional right must at least be clear)

***Mitchell v. WT Grant Co.:***statute allowing sequestration without prior hearing required plaintiff to make a “**clear showing” of the grounds for the action**, **post a bond** in case he lost, and application was **reviewed by a judge**

* court upheld statute for the above reasons
  + - * statute is consistent with due process because it **seeks to minimize error** and **protects both plaintiff and defendant’s interests**
      * there was showing that debtor may **waste or conceal property** if waited longer for hearing

***North Georgia Finishing Inc. v. Di-Chem:*** court found garnishment statute unconstitutional bc although it required plaintiff to post bond, it didn’t give an opportunity to prompt post-seizure hearing, was decided by a clerk, and application was based on conclusory statements

***Goldberg v. Kelly:***court held that recipient of government benefits is entitled to opportunity to evidentiary hearing prior to the termination of benefits **(note this is #2 (gov. benefits) type of case)**

* loss of government benefits would cause severe hardship for the plaintiff
* don’t need a full-scale judicial trial, but a hearing tailored to specific circumstances and capacities of those that need to be heard

**Three Factor Balancing Test:**

***Matthews v. Eldridge:*** case involved denial of government benefits to disabled individual

* court set out a three-factor balancing test to determine when an individual was entitled to additional procedures to challenge denial of government benefits:

1. private interests affected by the action
2. risk of erroneous depravation and probable value of additional or substitute safeguards
3. government’s interest (including financial implications of additional procedural requirements)

***Connecticut v. Doehr:*** petitioner sought pre-judgment attachment of defendant’s real estate as security for an assault & battery claim; attachment was based on plaintiff’s say-so (“skeletal affidavit”) and didn’t require plaintiff to post bond in case he lost

* court held that three-factor balancing test applied to government *and* private party due process cases
  + edited 3rd prong to include “plaintiff or government’s interest”
  + statute is unconstitutional because property interest of defendant is substantial, risk or erroneous depravation is substantial, interest of third party is minimal
* *Concurrence:* agreed with applying three-factor balancing test to private cases, but questioned whether attachment of property (which didn’t require defendant to move out of his home) counts as depravation of property as to trigger due process concerns

**Reconciling the Two Approaches:**

The dominant approach used by courts today is the three prong balancing test from *Matthews* (as modified by *Doeher* to apply to both government and private party cases) regarding the due process inquiry for an opportunity to be heard when it deals with government activities (the court) and affects property & liberty interests. The factors considered within these three prongs are the factors considered in the previous *Snidach-Di-Chem* line of cases.

1. **Private interest that will be affected by prejudgment action**
   * how strong is defendant’s interest in the property (*Sniadach* – wages; *Fuentes* – goods; *Goldberg* – loss of gov. benefits)
   * is the loss temporary or permanent (*Sniadach* – even temporary loss of wages not ok)
   * other interests (reputation, credit score, etc.)
2. **Risk of erroneous depravation and value of additional or substitute safeguards**
   * Does judge or clerk issue writ (*Sniadach, Fuentes, Di-Chem* – clerk; *Mitchell* – judge)
   * Does application require credibility determination, standards of proof, probable cause (*Di-Chem* – conclusory statements; *Mitchell* – required clear showing of grounds)
   * Is application based on verified documentary evidence or say-so (*Connecticut* – skeletal affidavit)
   * Does plaintiff have to post bond (*Connecticut* – didn’t require bond; *Di-Chem, Mitchell* – required bond)
   * Is there a prompt post-seizure hearing (*Mitchell* – immediate post-seizure hearing)
   * Exigency/Urgency (*Mitchell* – there was clear showing that defendant might conceal/waste property if not seized right away)
3. **Interest of plaintiff and government and fiscal implication of additional requirements:**
   * Does plaintiff have pre-existing interest in the property (*Sniadach* – plaintiff no interest in defendant’s wages; *Fuentes* – creditor has interest in defendant’s goods because still owed $ for them)
   * Does defendant have to post a bond to dissolve the writ (*Fuentes­ ­*– had to post bond but for 2x value, likely can’t afford that)
   * Cost to the government
   * Are there extra-ordinary circumstances (war, economic disaster, etc.)

**SUBJECT MATTER JURISDICTION:**

**STEP 1: Define Subject Matter Jurisdiction**

**Subject Matter Jurisdiction:** power of the court to decide a particular kind of dispute

* subject matter jurisdiction **cannot** be forfeited, waived, or created by consent (unlike personal jx)
* need subject matter jx over each party & claim
* ***Capron v. Van Noorden:***
  + defects in subject matter jx can be **raised or challenged anytime** during proceedings (even on appeal)
  + even plaintiff can challenge court’s subject matter jurisdiction

**STEP 2:** **Is Challenge (if any) Jurisdictional or Merit-Based?**

**merits:** cause of action or claim (what plaintiff needs to prove to win their case)

* important to distinguish **merits vs. subject matter jurisdiction** because:
  + subject matter jx defect 🡪 can raise at appeal or can be raised by the court anytime
  + merits defect 🡪 must object originally or forfeit & lose opportunity to challenge on appeal
* **Test: Clear Statement Rule**
  + look at face of statute to determine whether condition is jurisdictional or merit-based
    - if Congress intends a statutory condition to be jurisdictional, must explicitly say so in statute
      * ***Lacks v. Lacks:*** question of whether state residence was element of divorce cause of action or subject matter jurisdiction condition
        + **clear statement rule:** if legislature wanted residency requirement to be a jurisdictional aspect, would have explicitly said so in the statute (if silent 🡪 merits issue)
      * ***Arbaugh v. H Corp.:*** question of whether Title VII minimum 15 employees requirement is jurisdictional or merit-based
        + **clear statement rule:** statute must clearly state that a requirement/condition is a jurisdictional issue for it to be considered as such
* exception: courts may go beyond text of statute and look at legislative history, system-related goals, precedent to determine whether condition is jurisdictional or merits-based
  + ***John R. Sand & Gravel Co. v. United States:*** statute of limitations was not explicitly stated to be jurisdictional condition in statute, but could said it is anyway (note: US was party in this case)
    - **historically,** statute of limitations has been a jurisdictional issue
    - condition appeared in the **section of the statute discussing jurisdiction**
    - statute of limitations plays important part in **system-related goals**

**STEP 3: State Court?**

state courts are presumed to have **plenary power** to hear all types of claims

* states usually apportion jurisdiction among courts according to type of dispute & $$ (but there is always at least one court of general, plenary jurisdiction in every state)

state courts have **concurrent jurisdiction** over all federal law claims

* ***Taffin v. Levitt:*** when Congress passes a statute, it is presumed that both state and federal court have power to enforce it (system of dual sovereignty), unless (a) statute explicitly removes jx, (b) legislative history shows reason to remove jx, or (c) incompatibility btwn state & federal interests

**Federal Regulations over State Subject Matter Jurisdiction:**

* Full Faith & Credit Clause: states *must* hear transitory causes of actions from other states & respect judgments that have been entered by other states
  + exception: state can refuse to hear transitory cause of action only if it has a strong public policy that outweighs this national policy favoring availability of state forums (*Hughes v. Fetter*)
* Supremacy Clause: state courts can’t discriminate against federal causes of action
  + state must hear federal claim if has the power to hear an analogous state law claim (*Howlett v. Ross)*

**STEP 4: Federal Court?**

federal courts are courts of **limited jurisdiction** (unlike state courts)

* need Constitutional (Article III Section 2) & statutory power (Congress) to exercise subject matter jurisdiction
  + Constitution is **not self-executing** (Congress must pass statute granting power given by Constitution)

**STEP 5:** **How Did We Get to Federal Court (Removal)?**

Is plaintiff invoking federal court jx or is defendant removing from state to federal court?

* **28 USC 1441:** allows defendant to **remove case** from state 🡪 federal court
  + case will always be transferred from the state court to the district court physically closest to the federal court where action was originally filed (not determined by venue statute) (*see more below on VENUE)*
  + **28 USC 1441(a):** **action can only be removed if federal court would have had original jurisdiction over the claim** (based on either diversity or arising under jx)
    - once removed, then can move to transfer venue to different districts under 28 USC 1390
  + **28 USC 1441(b)(2):** in-state defendant can’t remove to federal court if removal is based on diversity
    - *compare to* 28 USC 1332(a) which allows plaintiff to invoke federal jx based on diversity even though defendant is in-state resident

**ARE WE IN FEDERAL COURT VIA “ARISING UNDER”?**

Policy Justifications of Arising Under Jx:

* sympathy: federal forum will be hospitable to federal interests
* uniformity: federal forum will develop uniform law
* expertise: federal forum will develop expertise with respect to federal issues

**STEP 1: Constitutional Authorization: Article III, § 2**

* permits Congress to authorize federal subject matter jurisdiction over cases “**arising under** this Constitution, the Laws of the United States, and treaties made or which shall be made under their authority”
  + ***Osborn v. Bank of the United States:*** Congress can vest “arising under” power if **federal issue is the foundation or is an ingredient** in the suit
    - very broad reading of Constitutional grant
      * jurisdiction exists as long as federal issue is lurking in the lawsuit (even if never disputed, even if only raised by defense)

**STEP 2: Statutory Authorization: 28 USC 1331** (note: a claim can also arise under another federal jx statute)

* tracks language of Constitution, but courts have narrowed its scope
* generally, a cases “arises under” federal law when federal law creates the cause of action and federal law provides the rule of decision, BUT **“arising under” jx may be present in “special and small category” of state law claims** 
  + ***Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing:*** IRS seized property of G & sold it to D; G sued D claiming IRS failed to give him proper notice; D removed to federal court based on “arising under” jx (claiming IRS notice requirement presented federal question)
    - arising under jurisdiction can be exercised even when federal issue cannot be independently enforced through a federal private right of action
      * overturned *Merrell-Dow*, which said if no federal private right of action, no jx
    - **Test for Arising Under Jurisdiction:** “state law claim must **necessarily raise** a stated federal issue, **actually disputed** and **substantial**, which a federal forum may entertain without disturbing any Congressionally approved **balance of federal and state judicial responsibilities**” (*see STEP 3*)

**STEP 3: Applying the Arising Under Statutory Test:**

1. **Necessarily Stated** (“no artful pleading”)
   * ***Louisville & Nashville RR Co. v. Mottley:*** tried to sue in federal court based on arising under jx for breach of contract action (railroad stopped giving them the free tickets they promised), asserted federal issue by claiming that railroad would raise it as an affirmative defense (new federal law prohibited them from giving free tickets)
     + **well-pleaded complaint rule:** federal issue must appear on the face of the complaint
       - cannot appear as part of defendant’s affirmative defense or counter-claim (must be alleged as part of plaintiff’s cause of action)
         * look at elements of the cause of action of statute statute and see if establishment of federal issue is an element of the cause of action
2. **Actually Disputed**
   * usually requires **legal dispute** (*Empire*)
     + ***Grable:*** whether G was given notice as defined by IRS statute is **actually disputed**
       - legal issue (meaning of notice requirement in statute) is being contested
         * **interpretation of federal law**
     + ***Empire Healthchoice Assurance, Inc. v. McVeigh:***whether insurance company contracted w/ federal government is eligible to receive reimbursements paid to federal employee was **“fact bound and situation specific”** dispute, not legal issue
       - applying facts to settled law is not enough
         * must interpret law/lead to doctrinal development to be actually disputed
     + ***Gunn v. Minton:*** state attorney malpractice suit; whether attorney raising ‘experimental use’ exception in patent infringement action would’ve made a difference in the case is **actually disputed**
       - patent law was the central point of the dispute
         * whether certain exemption would’ve made a difference in the case is an interpretation question of patent law
3. **Substantial** 
   * importance of issue to **federal system as a whole** (not importance of issue to the parties) (*Gunn*)
     + is dispute triggered by action of the United States?
       - ***Grable*** (IRS action) vs. ***Empire*** (private insurance company action)
     + is there a federal private right of action?
       - yes 🡪 probably substantial
       - no 🡪 not dispositive (***Grable*** had no private right of action but was still found substantial)
         * is there private right of action anywhere else within statutory scheme?

***Empire*** private right of action existed under some provisions of statute but not others, leading court to assume that Congress intentionally didn’t want to confer arising under jx over this particular provision

* + - * + is there a right of action, but not a private one (e.g. gov agency can enforce)

***Empire*** said this may suggest Congressional intent not to allow a federal forum for such a suit

* + - is there federal money involved?
      * ***Empire*** dissent argued that issue is substantial because federal $$ is involved
    - will adjudication of the issue lead to the development of federal law or upset uniformity of federal law?
      * ***Gunn*** patent issue is not substantial to federal interests because federal courts won’t look to this hypothetical analysis when interpreting patent law
        + effect of decision will be situation-specific (won’t have res judicata effects)
        + backward-looking nature of malpractice wont effect development of patent law
    - is it a Constitutional issue?
      * yes 🡪 always substantial
    - does issue concern activity traditionally within the domain of the states?
      * ***Gunn*** malpractice cases are traditionally regulated by states

1. **Balance of Congressionally Approved Federal & State Judicial Responsibilities** 
   * will it lead to a flood of fact-specific state-law claims in federal court?
     + don’t want to inundate federal system w/ suits traditionally left up to state courts (docket control)
       - is case unique/unusual enough?
         * ***Gunn***don’t want many malpractice claims coming into federal court (common)
         * ***Empire*** don’t want insurance contract claims coming into federal court (common)
         * ***Grable***title disputes rarely raise questions of federal law (unique enough)

**ARE WE IN FEDERAL COURT BASED ON DIVERSITY?**

**STEP 1: Diversity of Citizenship or Alienage?**

**Diversity of Citizenship Jurisdiction**

Policy Justifications of Diversity Jx:

* Historical: protect out-of-state parties from in-state bias (judicial, legislative & jury), encourage national commercial development
* Modern: cross-fertilization of ideas between state & federal systems, create federal forum for state claims that affect national markets & interests

**Constitutional Authorization: Article III, § 2**

* permits Congress to authorize federal subject matter jurisdiction over cases “between citizens of different states”
  + broader grant of power than statutory authorization
    - based on **minimal diversity** (vs. complete diversity)
    - no amount in controversy requirement

**Statutory Authorization: 28 USC 1332(a)(1)**

* tracks language of Art. III, § 2 but imposes more conditions (complete diversity + amount in controversy)
  + ***Strawbridge v. Curtiss:*** requirement of **complete diversity** (vs. Constitutional minimal diversity)
    - all defendants must be citizens of a different state than all the plaintiffs
      * way for court to limit the # of state law cases being removed to federal court
  + ***Dredd Scott v. Sandford:*** to be considered citizen of a state must also be **citizen of the United States**
    - non-US citizens cannot invoke diversity of citizenship jx (can only invoke alienage jx)
      * there must be a US citizen on each side for 28 USC 1332(a)(1)

party **invoking diversity jx** has **burden of proving it exists** (via clear & convincing evidence)

* if party **moves to dismiss** based on **lack of diversity jx** 🡪 **burden shifts** to that party

note: federal courts sitting in diversity **will not hear divorce cases or probate wills**

* neither constitution nor 28 USC 1332 explicitly exclude these type of cases, but via judicial discretion, courts have agreed not to hear them (*Akenbrandt*, *Marshall*)

**Alienage Jurisdiction**

**Constitutional Authorization: Article III, § 2**

* permits Congress to authorize federal subject matter jx over cases “between a state, or the citizens thereof, and foreign states, citizens or subjects”

**Statutory Authorization: 28 USC 1332(a)(2), (a)(3) & (a)(4)**

* provides for three permitted forms of alienage jx + requires amount in controversy

1. **28 USC 1332(a)(2):** US Citizen v. Non-US Citizen (including permanent resident alien (PRA))
   * **permanent resident alien** is deemed citizen of the state in which he is domiciled (Deemer Provision)
     + *Strawbridge* complete diversity rule applies (Congress’ Clarification Act)
     + note: two PRAs from different states still cannot sue each other in federal court
       - Constitution doesn’t grant power for one alien to sue another alien in federal court, so Congress can’t make statute granting it either
         * at least one of the parties must be a US citizen
2. **28 USC 1332(a)(3):** US citizen (state A) + Non-US v. US citizen (state B) + Non-US
   * based on **minimal diversity** theory (as long as US citizens are from different states, can add on other parties)
     + non-US citizens can be from same country
3. **28 USC 1332(a)(4):** foreign state (as plaintiff) v. US citizen
   * **foreign state** is any state recognized by Executive Branch

* **NOT 28 USC 1332(a)(1):** must have US citizen v. US citizen
* **on exam:** if situation doesn’t fit into (a)(1), (a)(2), (a)(3), (a)(4) 🡪 make arguments on how it’s similar/different
  + ex: what to do with US citizen + Non-US v. US citizen?
    - not quite like (a)(1), not quite like (a)(3)
      * policy rationale: does it look like foreign party is trying to take advantage of US court?
* state-less people (no foreign nationality) cannot invoke diversity or alienage jurisdiction (*Blair Holdings Corp. v. Rubenstein*)
  + policy concern: these people (refugees) may be to ones who need federal court protection the most

**STEP 2: Determine Citizenship**

**Natural Person:**

**Estate Executor or Guardian:**

**28 USC 1332(c)(2):** legal representative of the estate of a decedent shall be deemed to be a citizen only of the same state as the decedent and legal representative of infant/incompetent shall be deemed a citizen only of the state of the infant/incompetent, **when they are suing on behalf of the decedent** (not on behalf of themselves – e.g. emotional distress from death)

**Natural Person Appearing on Behalf of Themselves:**

**Citizenship of Natural Persons:** can only have **one** state of citizenship

* ***Dredd Scott v. Sandford:*** a natural person is considered to be a citizen of a state only if they are also **a citizen of the United States**
  + non-US citizens cannot invoke diversity of citizenship jx (can only invoke alienage jx)
* ***Mas v. Perry:*** a natural person’s citizenship for purposes of diversity jx is their **domicile**
  + domicile is established **when complaint is filed** (jx is unaffected by subsequent changes in citizenship)
  + **domicile = residence + intent to remain** 
    - it person is transient, citizenship remains same as original domicile (where born) until they establish new domicile (intent to remain)
      * ***Connectu LLC v. Zuckerberg:***intent to remain is established via **objective factors** 
        + local divers’ license
        + in-state lease
        + voter registration
        + paying state income tax
        + membership in locally-based organizations
* note: **28 USC 1332(a)** says plaintiff can still invoke diversity jx even if defendant is being sued in his own home state out-of-state plaintiff
  + BUT in-state defendant cannot remove action to federal court based on diversity jx (**28 USC 1441(b)(2))**

**Corporation:**

**Citizenship of a Corporation:** can have **multiple** states of citizenship

* citizenship is determined **at the time of filing**
* **28 USC 1332(c)(1):** a corporation is a citizen of every state and foreign state by which it has been incorporated AND of the state or foreign state where it has its principal place of business (up to 3 states of citizenship)
  + ***Hertz Corp. v. Friend:*** a corporation’s **principal place of business** = **nerve center**
    - **nerve center =** where corporate decision making & overall control takes place
      * usually HQ, but **watch out for sham HQ** only meant to create citizenship

**Citizenship of Dissolved Corporation:**

* determine what the corporation’s status was **at the time the complaint was filed**
  + if out of business and no more ppb 🡪 only citizenship is state of incorporation
    - note: some courts say look at ppb and see if they are still doing any business there at all (even if closing activities)
      * does company still have local presence there? employees there? paying bills there?

**Unincorporated Association:**

**Citizenship of Unincorporated Association:** (partnership, LLC, etc.)

* citizenship is determined by the **citizenship of each of it’s members** (not considered an entity, but aggregate of members)
  + makes it much harder to meet *Strawbridge* complete diversity rule
  + exceptions:
    - **28 USC 1332(d)(10):** for **class actions**, citizenship of an unincorporated association is ppb & state of incorporation
      * serves to expand diversity jx for big cases like class actions
        + note: don’t need complete diversity for class action if over $5,000,000
    - **28 USC 1331(c)(1)(C):** for **direct actions** (suing insurance company directly w/ out suing person) against **insurance companies**, insurance company is citizen of (a) state where the insured is a citizen, (b) ppb, and (c) state of incorporation

**STEP 2(a): If a party messes up complete diversity, is it a real or nominal party?**

***Rose v. Giamatti:*** in determining whether there is diversity of citizenship between parties, federal court must **disregard nominal or formal parties** in the action, and **determine jurisdiction based solely upon the citizenship of the real parties** to the controversy

* **real party =** party in interest
* **nominal/formal party =** party who has no actual interest or control over the subject matter of the litigation

**STEP 2(b): Any Collusion?**

**28 USC 1359:** federal court may refuse to hear a case in which diversity was improperly or collusively created

* issue comes up in **assignment of interests**
  + assignment must have a legitimate business justification
    - see if there is a reason for assignment other than creating/defeating diversity jx
    - see if this is a one-off assignment or if company often assigns interests
* **FRCP 21** allows severance of misjoined parties
* nominal misjoined parties can be ignored for diversity purposes (*Rose v. Giamatti)*

note: 1359 only talks about collusively *created* diversity, but can it be used for collusively *defeated* diversity?

* most courts analogize & say yes

**STEP 3:** **Amount in Controversy**

amount in controversy requirement is **purely statutory** (not mentioned in Constitution)

* **28 USC 1332(a):** amount in controversy must exceed $75,000 **the day the complaint is filed**
  + policy: protects litigants (shows that recovery may not be worth litigation costs), protects courts (want to only hear “important” cases)
  + amount claimed by plaintiff controls (**assumed to be alleged in good faith)**, unless
    - party seeking to dismissal has burden of demonstrating **to a legal certainty** that the other party can’t recover more than $75,000 (*St. Paul Mercury*)
      * post-filing developments are only considered if they raise an inference of bad faith
* **28 USC 1332(b):** if recovery ends up being less than $75,000, the court may deny relief or impose costs on the plaintiff, but retains jurisdiction

**What is injunctive relief worth?**

* SCOTUS has not given decision, lower courts can:
  + (a) value injunction from plaintiff’s perspective (how much would it cost P to secure the relief he wants)
  + (b) value injunction from defendant’s perspective (how much would it cost D to come into compliance w/ the injunction)
  + (c) view from both perspectives (difference between the amounts)
* note: whether amount of controversy is being valued as a matter of original or removal jx may have bearing on assessment used

**Aggregation of Claims:**

* **single plaintiff suing single defendant** can aggregate value of all claims against the defendant (even if unrelated)
* **multiple plaintiffs suing single defendant/single plaintiff suing multiple defendants** cannot aggregate value of the *unless* they are **single & indivisible** (seeking to enforce single title or right)
  + note: mass tort actions ARE NOT single & indivisible; class actions over $5,000,000 ARE single & indivisible

note: if claims can’t be aggregated, try to get them in via **supplemental jx** (*see below for SUPPLEMENTAL JURISDICTION)*

**SUPPLEMENTAL JURISDICTION:**

**STEP 1:** **Define Supplemental Jurisdiction**

**Supplemental Jurisdiction:** authority of the federal courts to hear additional claims related to the claims already within the original jurisdiction of the federal court that the court otherwise wouldn’t be able to hear due to lack of subject matter jurisdiction

* **FRCP** allows a plaintiff to join as many claims and parties as he wants in one lawsuit
  + but court must have personal jurisdiction, subject matter jurisdiction, and venue over all parties and claims joined
    - joinder does not confer jurisdiction

Policy Considerations of Supplemental Jurisdiction: responds to practical problem that lawsuits often involve multiple parties & claims; under many tests, a party is foreclosed from litigating a claim if they should have litigated it in a prior lawsuit (res judicata) & supplemental jx allows them to bring together claims in federal court

**STEP 2: Determine Anchor Claim**

Before court can exercise supplemental jurisdiction over a claim, you must have a claim over which the district court has **original jurisdiction** (either based on diversity or arising under) **(28 USC 1367(a))**

**STEP 3: How Are You Going to Join Your Supplemental Claim?**

must join claim/party based on a Federal Rule:

**FRCP 18:** allows joinder of claims (can join any type of claim, doesn’t have to be transactionally related)

**FRCP 13:** allows parties to assert counter-claims

* **FRCP 13(a):** compulsory (arises out of same transaction or occurrence as original claim)
  + must assert counter-claim in original answer or be barred from doing so later
* **FRCP 13(b):** permissive (unrelated to original claim)
* **FRCP 13(g):** cross-claim (claim asserted by one party against co-party)
  + must be transactionally related to original claim or counter-claim

**FRCP 20:** allows joinder of parties *if they assert claims arising out of the same transaction* and the claims *involve common question of law or fact*

* same rule for joinder of either plaintiffs or defendants
  + court must have personal jx over the party joined
* narrower than FRCP 18 claim joinder rule (which allows *any* claim)

**FRCP 14:** allows third party impleader/indemnification claims (defendant joins third party on the theory that the third party will be liable to the defendant if the defendant is liable to the plaintiff)

* requires joinder of both claim & party
* **FRCP 14(a)(3):** allows plaintiff to assert transactionally related claim against third party defendant

**FRCP 19:** required party (e.g. *Hanson v. Denkla*)

**FRCP 24:** intervention (someone who is not an original party can enter a lawsuit on the ground that their interest will not be adequately represented by the parties in the lawsuit)

**FRCP 23:** class actions (parties joined don’t have to be present in court, are represented by named representative)

**STEP 3:** **Does Federal Court Have Power to Hear the Supplemental Claim?**

**Constitutional Authorization:***Gibbs*

* ***United Mine Workers v. Gibbs:*** a district court has power to exercise supplemental jurisdiction if the non-federal claim arises out of a **common nucleus of operative fact** as the federal anchor claim such that the two constitute **one constitutional case**
  + claims must be related in such a way that they would ordinarily be expected to be tried together in one case
    - compulsory counter-claims automatically in, permissive counter-claims have to argue legal relation

**Statutory Authorization:** 28 USC 1367

* **28 USC 1367(a):** **except** as otherwise provided in (b) and (c) or **as expressly provided otherwise by federal statute**, in any civil action of which the district courts have **original jurisdiction**, the district courts shall have supplemental jurisdiction over all other claims that are **so related** to the claims in the action within such original jurisdiction **that they form part of the same case or controversy under Article III**. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties (*no distinction btwn claims or parties*).
  + “except … as expressly provided otherwise by federal statute”:
    - codifies default rule of ***Aldinger*** & ***Owen***: favors grant of supplemental jurisdiction unless Congress specifically withheld power in the statute (explicitly or implicitly)
      * look at statutory context to determine if jurisdictional grant has been specifically withheld
        + ***Aldinger v. Howard:*** plaintiff tried to bring county (non-diverse) as additional party in state tort action via supplemental jx

court read statute as intentionally leaving out grant of jurisdiction to counties because it conferred jurisdiction over particular types of claims and parties but not counties

* + - * + ***Owen Equipment & Erection Co. v. Kroger:*** plaintiff tried to assert supplemental claim over non-diverse third party defendant

court looked at statutory context and determined that violating complete diversity was against the intent of the legislature as the statute has been consistently re-enacted with complete diversity requirement

* + - overrules ***Finley***which tried to change default rule to stating: no supplemental jx over additional parties unless Congress specifically *confers* such power in a statute
  + “so related … that they form the same case or controversy under Article III”:
    - **Majority View:** “so related” = “common nucleus of operative fact”
      * ***United Mine Workers v. Gibbs:*** a district court has power to exercise supplemental jurisdiction if the non-federal claim arises out of a **common nucleus of operative fact** such that the two constitute **one constitutional case**
        + claims must be related in such a way that they would ordinarily be expected to be tried together in one case

compulsory counter-claims automatically in, permissive counter-claims have to argue legal relation

* + - **Minority View:** “so related” = “logically related”
      * broader than *Gibbs* test
        + includes permissive counter-claims (FRCP 13(b))

**STEP 4: Has Power Been Withheld?**

**STEP 4(a): If Anchor Claim is Based on Diversity Jurisdiction**

**FIRST QUESTION: what rule were the parties joined under?**

* **Exceptions to Supplemental Jx if Based Solely on 28 USC 1332 Jurisdiction:**
  + - * + **28 USC 1367(b)**

no supplemental jx if **plaintiff’s** **claims** **against** Rule 14 (third parties), 19 (required parties), 20 (permissive parties), 24 (intervening parties) parties would violate complete diversity or AIC

**special rules for defendants** (when defendant is asserting a claim against an additional party, don’t need complete diversity or AIC)

even though defendant is technically acting like a plaintiff in this case, defendant is involuntarily being brought into court so don’t want to constrain his procedural opportunities any further

no supplemental jx if **claims by** Rule 19 (required) or 24 (intervening) parties would violate complete diversity or AIC

**missing from this list** (allows supplemental jx even if violates complete diversity or AIC):

claims **by** Rule 20 parties

class action claims (Rule 23)

* + - * + ***Exxon Mobil Corp. v. Allapattah Services Inc.:*** when there are multiple **plaintiffs** and the additional plaintiffs are created via Rule 20 or 23, as long as one plaintiff satisfies the amount in controversy requirement and there is complete diversity, the court has power over the claims by the additional plaintiffs under 1367(a)

**STEP 4(b): If Anchor Claim is Based on Arising Under Jurisdiction**

Go the Step 5

**STEP 5:** **Discretionary Factors**

**28 USC 1367(c):** the district courts may decline to exercise supplemental jurisdiction if

* *Gibbs* factors + an extra one
  + (1) claim raises a novel or complex issue of state law (*Gibbs* leading to jury confusion factor)
  + (2) state law claim substantially predominates over the federal claim or claims over which the district court has original jurisdiction
  + (3) the district court has dismissed all the federal claims over which it has original jurisdiction
  + (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction
    - note: majority thinks that a district court can only rely on (4) if it identifies the circumstances and explains why they are exceptional and only after it has examined whether the balance of factors provides compelling reasons to decline the exercise of supplemental jurisdiction
      * policy: default presumption is *in favor* of exercising supplemental jurisdiction

note: court can always reconsider their exercise of supplemental jurisdiction at any time during the litigation (can remand state law claim to state court at any time)

* e.g. if court ends up dismissing federal claim mid-lawsuit, can remand supplemental state claim to state court

**Overview of Supplemental JX:**

1. 28 USC 1367(a)

* **anchor claim**: does the district court have original jx over at least one claim (via 1331, 1332, or other jx statute)?
  + is the supplemental claim you’re trying to add “so related” to the claim over which the district court has original jx?
    - *Gibbs* “common nucleus of operative fact”
    - minority “logically related”

1. what is your anchor claim based on?
   * + 28 USC 1331(arising under) or other jurisdictional statute
       - no exceptions 🡪 go to 3
     + 28 USC 1332 (diversity)
       - how were the parties added (which federal rule)?
         * do any 28 USC 1367(b) exceptions apply?
         * *Allapattah*
2. Discretionary Factors (28 USC 1367(c))

**CHOICE OF LAW:**

when a federal court is hearing a case based on “arising under” jurisdiction 🡪 applies federal law

when a federal court is sitting in diversity, which law does it apply?

**28 USC 1652 (Rules of Decision Act):** the **laws of the several states**, except where the Constitution or treaties of the United States or acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply

***Erie v. Tompkins:*** RDA requires court to follow state common law, as well as state statutes & state local usages; federal court sitting in diversity must follow state substantive law

* overruled *Swift v. Tyson* (which said “laws of several states” ≠ state common law)
  + policy justifications:
    - *Swift* encouraged forum shopping (litigant inequality)
    - *Swift* failed to promote uniformity (state judges didn’t follow federal judges’ decisions)
  + Constitutional justification:
    - permitted federal court to fashion common law rules to regulate activities that Constitution didn’t give Congress the power to regulate otherwise

**TEST:** when federal law we’re dealing with is federal common law

1. Identify state law that pertains to this dispute
2. Is the state rule **substantive** (governs rights and obligations; affects activity outside the courthouse)?
   * if yes 🡪 apply state law
     + *Erie* says federal court sitting in diversity must apply state substantive law (can’t create own laws to regulate state activities that Constitution doesn’t give federal court power to regulate)
3. Is the state rule **procedural** (governs activity *inside* the courthouse)?
   * Necessary & Proper Clause gives Congress power to make enact procedural rules for the federal court
     + But, *Byrd* says federal court may still have to follow state law even when it’s denominated as procedural
       - is the law **“bound up”** or merely **form & mode of enforcement**?
         * bound up with state-created rights and obligations?

if “bound up” 🡪 apply state law

one way to argue it’s “bound up” is if the law appears in the state’s substantive law code, not it’s procedural code

*Byrd* said right to a jury is not bound up with rights because doesn’t affect right to have complaint heard

* + - * + merely governs the form and modes of enforcement?

*Guaranty Trust* said that a federal court is required to follow a state procedural rule if it would significantly affect the outcome of the lawsuit (“outcome determinative”)

*Hana* modified this test, requiring only to ask whether that state rule is **outcome determinative in light of the twin aims of *Erie*** (otherwise everything would be “outcome determinative” and federal rule would never apply):

(i) would applying a different rule encourage forum shopping?

*Hana* said state service of process rule not significant enough to encourage forum shopping

*Shady Grove* 4 judges agreed that allowing class actions in federal court but barring them from state court would produce forum shopping

Ginsburg in *Shady Grove* said difference in amount of damage available would encourage forum shopping

(ii) would it lead to inequitable administration of the law?

*Hana* said state service of process rule doesn’t alter mode of enforcement enough to cause inequitable administration

*Walker* said that question of when lawsuit commences for tolling statute of limitations may lead to inequitable administration bc some cases that would be barred from state court would be allowed to proceed in federal court

* outcome determinative via twin aims of *Erie*? (*Hana*)
  + no 🡪 apply federal law
  + yes 🡪 *Byrd* balancing test
    - does a federal interest in applying the federal rule *outweigh* the RDA interest in applying the state rule to ensure litigant equality & uniform outcomes?
      * *Byrd* says Seventh Amendment right to jury trial in federal court outweighs
        + note: this is the only example we have so compare other federal interests to this one to determine if they are strong enough to outweigh

**28 USC 2072 (Rules Enabling Act):** delegates authority to the Supreme Court to establish procedural rules for the federal courts on the condition that they do not abridge, enlarge or modify substantive rights.

***Hana v. Plumber:*** *Erie* analysis doesn’t apply when there is a FRCP or codified procedural rule on point. There is Constitutional authority under Necessary & Proper Clause for Congress to create procedural rules for federal courts, so default changes from applying state law under RDA to applying federal law under REA, unless they “abridge, enlarge, or modify any substantive right”

**TEST:** when federal law we’re dealing with is FRCP or other codified federal procedural rule

1. Identify state rule that pertains to this dispute
2. Identify federal rue that pertains to this dispute
3. Is the federal rule “on point” (*Hana*)?
   * is it related to the issue?
     + yes 🡪 Step 4
     + no 🡪 *Erie* says RDA requires state rule to apply, unless some federal common law applies (then do RDA test)
       - *Walker* said FRCP 3 (which says that lawsuit commences when complaint is filed) doesn’t apply to determining when statute of limitations is tolled
         * used the state law bc no federal law applied
4. Can federal & state law “co-exist”?
   * narrow reading 🡪 co-exist 🡪 apply both
     + Ginsburg in *Shady Grove* read FRCP 23 (class action) narrowly as determining when plaintiff can bring an action, while the state governed remedies
       - FRCP & state rule can co-exist (each governs separate issue)
     + *Walker* warns against ignoring plain meaning of federal rule just to avoid a conflict
   * broad reading 🡪 **directly conflict** 🡪 Step 5
5. Is FRCP valid (*Hanna*)?
   * Constitutional Authority (Necessary & Proper Clause)
     + is the federal rule “arguably procedural” (*Hana*)?
       - very broad test (easy to meet)
   * Statutory Authority (Rules Enabling Act)
     + 28 USC 2072(a): is federal rule procedural?
       - does the FRCP “really regulate procedure” (*Sibbach*)?
         * “really regulates procedure” if determines activities that go on in the courthouse
         * Harlan in *Hana* says federal rule does not “really regulate procedure” if it affects primary activities of citizens and ensures predictability in their everyday lives
       - no 🡪 invalid 🡪 back to RDA (state law applies unless other conflicting federal law, and in that case do RDA test)
       - yes 🡪 ???
         * **Scalia in *Shady Grove* 🡪 stop analysis here & apply federal rule** (views 2027(b) as redundant)
         * **Other tests 🡪 go to 28 USC 2072(b) analysis** which loops us back to an *Erie* RDA analysis
     + 28 USC 2072(b): does the federal rule “abridge, enlarge or modify any substantive right”?
       - *Hana* says **incidental effects on substantive rights are OK**
         * federal service of process rule does not implicate a substantive right
       - Stevens in *Shady Grove* says loop back to **“bound up” RDA analysis**
         * determine if the state procedural rule that the federal rule is displacing is “bound up” with a state right and defines the scope of that right

**clear statement rule:** where is the state law codified (procedural or substantive part of the state law)?

* + - * Ginsburg in *Shady Grove* says loop back to **“outcome determinative” RDA analysis**
        + *Guaranty Trust* “outcome determinative” test via *Hana* “twin aims of *Erie*”

if not outcome determinative 🡪 federal rule

if outcome determinative 🡪 ???

*Guaranty Trust* 🡪 state law applies

Byrd 🡪 balancing test (federal interests)

**Ascertaining State Substantive Law in Federal Court:**

***Klaxon Co. v. Stentor Electric Mfg. Co.:*** in order to promote the uniform application of substantive law within a state, a **federal court sitting in diversity must apply the law of the state in which it sits** (including choice of law rules)

* ascertaining to content of state law:
  + look at **decision of highest state court** (note: this **may lead to forum shopping** if lower state courts are finding ways to distinguish and apply different rule because highest court decision is old & disfavored)
  + if no decision by highest state court:
    - look at all relevant sources
    - ask for **certification** (ask state court to decide this question of law)
      * state court can decline (*Tunik v. Safir*)
    - **abstention** (dismiss the case)
    - **stay of proceedings** (wait & retain jx until state court decides the issue)
      * tells litigant to go to state court, litigate it there, get decision, then come back to federal court
* note: ***Mason v. American Emery Wheel Works*** says federal court may follow different rule than the highest state court decision if the case law seems to be moving in different direction and the only reason that state court hasn’t reversed their older binding decision is because they haven’t been faced with the issue again yet in order to do so

**Federal Common Law:** federal courts have power to create federal common law that under the Supremacy Clause is binding on the states, but the scope of their power to create federal common law is debated

* **Scope of Federal Common Law:**
* **Coterminus/Article I Theory:** judicial lawmaking power is coterminous w/ Congress’ legislative power
  + if Congress has the power to enact federal law about issue, court has the power to make federal common law about issue
* **Enclave Theory:** judicial lawmaking power is confined to areas of significant federal interest
  + national security, federal $$, etc.
  + ***Clearfield Trust v. US:*** federal workers’ check stolen in the mail; does state or federal common law apply to determine rights & duties of US on commercial paper (who has to pay for the stolen check)?
    - federal common law applies to questions dealing with federal money (significant federal interest)
* **Statutory Theory:** judicial lawmaking power derives from Congress & needs statutory grant

**Applying Federal Procedural Law in State Court (“Reverse *Erie*”):** when state court is hearing federal law case under concurrent jx, does it have to apply federal procedural law or state procedural law?

* if federal procedural rule is just form & mode of enforcement 🡪 state court can apply state procedural law
* if federal procedural rule is bound up w/ federal rights & obligations 🡪 state court must apply federal procedural law
  + ***Dice v. Akron:*** is validity of contractual waiver under federal law to be determined by jury (federal procedure) or judge (state procedure)
    - Supremacy Clause says state must follow federal procedural rule when it’s a fundamental part of the right accorded by the federal statute (“bound up”)
    - Ask:
      * will use of state procedure burden or frustrate a federal right?
      * will use of state procedure be “outcome determinative”?
        + balance federal interest in procedural uniformity w/ state interest in using own procedures

**VENUE:**

**Venue:** place of trial (or more pre-trial motions & settlement)

venue rules are mainly concerned with **convenience** and **fairness**

**Venue in State Court:**

governed by state constitution, state statute, state procedural rules

* some states follow **local action doctrine** (actions involving property can be heard only in the county in which property is located)
* dispute as to whether local action doctrine is matter of **venue** (can waive requirement) or **subject matter jurisdiction** (can’t waive requirement)
  + check to see how the state you’re in treats it

**Venue in Federal Court:**

venue is a **statutory question** (not addressed in the Constitution)

* venue in federal system is queued to **district**

districts are (usually) whole states and don’t cross state lines, but not always

* important because district courts often look at the laws of the state in which they sit

**28 USC 1390:** applies to cases heard in federal court based on diversity & arising under jurisdiction (not admiralty or maritime cases)

* note: venue in a **removal action** (subject matter jx statute) is NOT covered by 28 USC 1390
  + **28 USC 1441:** venue of action removed by defendant from state to federal court under is the district court closest to the state court in which the action originated
    - once action is removed 🡪 ordinary venue & transfer rules apply to subsequent transfer motions

**28 USC 1391:**

* **28 USC 1391(a):** **unitary approach**
  + same rules for arising under & diversity cases
  + same rules for transitory & local actions (eliminates local action doctrine from federal court)
* Three options for where an action may be brought: (1) Residence, (2) Transaction, (3) Property
  + **Residence (28 USC 1391(b)(1)):** can lay venue in the **district where *any* defendant resides**, but **only if ALL the defendants reside in the same state** (e.g. can file in SDNY if all defendants live in NY) (if defendants *don’t* all reside in the same state, can’t lay venue based on residence)
    - **28 USC 1391(c): Residence Definitions**
      * **28 USC 1391(c)(1): Natural Person** (including PRA) is deemed to reside where they are domiciled
        + distinction is by *residence*, not citizenship (US citizen & PRA are treated the same for venue purposes)
      * **28 USC 1391(c)(2): Entity** (includes corporation & unincorporated associations) (must have capacity to sue)
        + **if defendant:** in any district in which they are subject to personal jx
        + **if plaintiff:** only in district where they have their ppb

open question: what is ppb – *Hertz* “nerve center” or something else?

* + - * **28 USC 1391(c)(3):** **non-resident defendant** can be sued in any judicial district(and residence is ignored w/ respect to all other defendants being from same state)
      * **28 USC 1391(d):** if defendant is a **corporation** (not unincorporated entity(?)) residing in a **multi-district state**, they are deemed to reside in any district in that state with which it’s contacts would be sufficient to subject it to **personal jurisdiction**
        + if no such district exists, defendant is deemed to reside in the district with which it has the most significant contacts
    - ***interpretive problems w/ residence provision:***
      * what is the venue of a case with a **foreign corporate defendant**?
        + 1391(b)(1) venue is appropriate in a district based on residence only if at least one defendant resides in the district and all the defendants reside in the state in which the district is located

1391(c)(2) deems corporate defendant to be a resident of a state only when it is subject to personal jx there

*compare to* 1391(c)(3) defendant not resident in US may be sued in *any* judicial district

open question: is 1391(c)(3) intended to embrace only natural persons or corporations as well?

note: even though 1391(c)(3) seems to broaden venue, will likely be narrowed back down when determining personal jx anyway

* + - * how to reconcile 1391(d) with 1391(c)(2)?
        + 1391(c)(2) venue is proper in *any judicial district* of state where corporation is subject to personal jx
        + 1391(d) venue is proper only in the *district* in which the defendant’s contacts would be sufficient for personal jx

if 1391(d) only applies to corporations in states w/ multiple districts, seems to narrow the venue choices 1391(c) gives for corporations

why are only corporations included here (and not unincorporated associations)?

* + **Transaction or Property (28 USC 1391(b)(2)):** can lay venue in a district where a **substantial part of the events** giving rise to the claim occurred or where a **substantial part of the property** that is the subject of the action is located
* **Default Rule (28 USC 1391(b)(3)):** if there is no proper venue based on residence, transaction or property 🡪 venue can be laid in *any* district that has personal jx over the defendant

**VENUE TRANSFER IN THE FEDERAL SYSTEM:**

plaintiff *or* defendant can move to transfer an action to a different venue

**28 USC 1404:** if venue in the original court was **proper** (meets requirements of 1391)

* **28 USC 1404(a):** for the *convenience of parties and witnesses*, in the *interest of justice*, a district court may transfer any civil action to: (1) any other district or division **where it might have been brought** or (2) to any district or division to which **all the parties have consented**
  + interpretation question: does “in the interest of justice” modify “convenience of parties and witnesses”, or is it a free-standing clause that needs to be considered on its own?
    - courts usually follow **broad reading** and *also consider*: docket congestion, speed of trial, court’s familiarity w/ governing law, existence of forum-selection clause, etc.
  + **diversity suit:** (court applies state law)
    - ***Van Dusen v. Barrak***: in a diversity suit,a change of venue under 1404(a) should be just a “change of courthouse”
      * **transferee court applies the state law of the transferor (original) court** 
        + this applies *regardless of who initiates the transfer* *motion* (defendant or plaintiff) (***Ferens***)

note: this encourages **strategic choices** on part of the plaintiff (will initiate suit in forum with more favorable choice of law, then move to transfer to forum in more convenient location while still retaining favorable choice of law)

* + **“arising under” suit:** (court applies federal law)
    - federal law is supposed to be the same everywhere (unitary), but until SCOTUS decides a law, different districts may have different interpretations
      * generally, districts don’t like to defer to other districts’ interpretation of the law, so transferee court’s law applies (although technically should be same outcome)
  + open question: can a court use 1404(a) when it has proper venue but lacks personal jx?

**28 USC 1406:** if venue in the original court was **improper** (didn’t meet requirements of 1391)

* defendant can file FRCP(12)(b)(3) motion to dismiss for improper venue
  + court can either dismiss or transfer to where venue would be proper (based on 1391 + jx)
    - **transferee choice of law applies** (since transferor court didn’t have power to decide case)
      * case starts over as if it was originally filed in the new, proper venue
    - ***Goldlawr, Inc. v. Heiman:*** authorizes transfer even if transferor court lacks personal jx over the defendant
      * **28 USC 1631:** if there is no jurisdiction, the court shall, if it’s in the interest of justice, transfer the case (instead of just dismissing)
        + open question: does “no jx” = personal jx, subject matter jx, or both?

**Transfer & Forum-Selection Clauses:** when companies designate forum, also indirectly designate body of law

***Stewart Organization v. Ricoh Corp.:*** dispute between Alabama & NJ corporations, their contract had a forum-selection clause stating that all disputes must be resolved in Manhattan; S sued in federal court in Alabama (strategically because Alabama disfavored forum-selection clauses, so thought they wouldn’t grant transfer based on it); R moved to transfer case to NY via 28 USC 1404(a)

* Majority (Ginsburg): 1404(a) applies
* question whether to apply federal or state procedural rule when deciding to transfer case (*Erie* issue)
  1. is 1404(a) sufficiently broad to cover this issue (on point)? 🡪 yes
     + 1404(a) is intended to place discretion in the district court to adjudicate transfer motions
       - discretion involves weighing a number of factors, including forum-selection clause
  2. is 1404(a) valid? 🡪 yes
     + does Congress have Constitutional power to enact it? 🡪 “arguably procedural” 🡪 yes
* 1404(a) applies based on Necessary & Proper Clause & forum-selection clause should be party of court’s consideration under 1404(a)
* Concurrence (Kennedy):courts should encourage forum-selection clauses bc: protect expectations of parties & further vital interests of justice system
  + *Bremen* says uphold forum-selection clauses unless unreasonable
* Dissent (Scalia): state procedural law applies
  + question whether to apply federal or state procedural rule when deciding to transfer case (*Erie* issue)
    1. is 1404(a) sufficiently broad to cover this issue (on point)? 🡪 no
       - factors mentioned in 1404(a) suggests forward-looking considerations (what is likely to be just in the future in light of the situation now)
         * forum-selection clause is backward looking (what was intention of the parties), so doesn’t apply to 1404(a) consideration
    2. since no federal statute on point 🡪 question is: (a) apply federal common law or (b) state procedural law? 🡪 RDA analysis
       - is state rule bound up? 🡪 yes
         * is state rule outcome determinative via twin aims of *Erie*? 🡪 yes

state procedural rule should apply

Alabama state law says not to consider forum-selection clause 🡪 don’t consider forum selection clause

***Atlantic Marine Construction Co. v. United States District Court:*** A entered into subcontract that included forum-selection clause; party filed suit in different venue; A moved to dismiss under 12(b)(3) for “improper venue”, transfer under 1406(a) for improper venue, or transfer to venue in forum-selection clause under 1404(a)

* 1404(a) is the exclusive mechanism for enforcing a forum selection clause
  + “improper” venue = only if venue doesn’t meet 1391 requirements (has nothing to do w/ forum selection clause)
* when doing 1404(a) analysis with forum selection clause 🡪 court **shall not** consider private convenience factors (parties negotiated them away when agreeing to forum selection clause)
  + only consider public interest factors (witnesses & evidence location)
* when 1404(a) transfer is granted based on forum selection clause 🡪 **law of transferee (new) court applies**
  + **exception** to general 1404(a) choice of law rule (to avoid manipulation)

**VENUE TRANSFER IN THE STATE SYSTEM:**

for purposes of venue, each state is a single sovereign

* one state cannot transfer an action to another state
  + if there is improper venue (based on state’s venue laws) 🡪 case is dismissed
  + if venue is proper, but party wants to change venue 🡪 forum non conveniens

**FORUM NON CONVENIENS:**

**common law principle** that a court may dismiss an action in favor of a more convenient forum, even if the court has proper jurisdiction and venue over the case

* **granting forum non conveniens results in dismissal of the case** (not transfer)
  + before dismissing, court must make sure there is an **adequate alternate forum available**
    - ***Sinochem International Co. Led. v. Malaysia International Shipping Corp.:***court can dispose of an action on ground of forum non conveniens before considering whether or not they have personal & subject matter jx
      * BUT many say court can’t enter **conditional dismissal** without first deciding whether it has personal & subject matter jx
        + **conditional dismissal** = court imposes conditions on parties before granting forum non conveneins motion (e.g. party has to waive objections to new forum)

wouldn’t make sense for court to tell parties to do something before figuring out whether or not they have power to do so (aka jx)

***Gulf Oil Corp. v. Gilbert:*** presumption thatforum non conveniens motion by the defendant should rarely be granted

* plaintiff’s choice of forum should be given deference, unless the forum will “vex”, “harass”, or “oppress” the defendant
  + factors to consider when deciding whether or not to grant forum non conveniens motion:
    - private factors:
      * access to proof
      * availability of witnesses
      * possibility of view of premises if needed
      * practical problems
      * enforceability of a judgment if one is obtained
    - public interest factors:
      * docket congestion
      * imposing jury duty on people with no relation to where cause of action took place
      * local interest in having local controversies heard at home

in **state court 🡪** forum non conveniens is used when a more convenient forum is in another state

* court can’t transfer between states, so will dismiss under forum non conveniens with the assumption that parties will re-file suit in the other, more convenient state instead

in **federal court** 🡪 forum non conveniens is used when more convenient forum is outside the US

* 1404 & 1406 only allow transfers to districts in the US, not to foreign courts
  + when there is a more convenient forum outside the US, court will dismiss based on forum non conveniens with the assumption that the parties will re-file suit in the foreign court instead
* ***Piper Aircraft Co. v. Reyno:*** plane crashed in Scotland, passengers were all Scottish & plane was operated by Scottish taxi service & subject to Scottish air control when it crashed, but aircraft was made in PA & propeller was made in Ohio
  + suit was filed in US state court against manufacturer & propeller maker, defendants removed to federal court, then filed forum non conveniens motion to dismiss, claiming Scotland was more convenient forum
    - updated *Gulf Oil* test:
      * when **plaintiff is foreign** 🡪 his choice of forum (US) should not be given much weight
      * possibility of the **change in substantive law** should not be given much weight, unless law where case will be transferred to is clearly inadequate such that there is no remedy available at all
        + policy: don’t want to make US court learn foreign law, BUT if have to assess adequacy of transfer forum, don’t they have to learn foreign law anyway?

note: in reality courts rarely give scrutiny to remedy available in foreign court before granting forum non conveniens motion

**PLEADING:**

**Pleading:** sets forth a claim or defense

* functions: (a) provides notice of the nature of a claim or defense to other parties & the court, (b) identifies baseless claims, (c) sets each party’s view of the facts, (d) narrows the issues

**Pleadings are governed by FRCP**:

* **FRCP 7:** defines the type of pleadings allowed

1. A complaint (P sues D)
2. An answer to a complaint (D responds to P)
3. An answer to a counterclaim designated as a counterclaim (P responds to D after D has sued P
4. An answer to a cross-claim (P2/D2 responding to P1/D1 after P1/D1 has sued P2/D2)
5. A third party complaint (Rule 14; claim for indemnification against a 3rd party)
6. Answer to third party complaint (3rd party responds to D after D has sued 3rd party)
7. If the court orders one, a reply (response to an answer)

* **FRCP 8(a):** a complaint must contain “**a short and plain statement of the grounds for the court’s jurisdiction**,” “**a short and plain statement of the claim showing that the pleader is entitled to relief**,” and “**a demand for the relief sought**.”
  + - * + designed to reject earlier regimes of code pleading & be more modern, realistic view of pleading

code pleading: required claimant to allege ultimate (*not evidentiary*) facts, not legal conclusions (but hard to distinguish)

* **FRCP 9(b):** in cases of **fraud or mistake**, party must **state with** **particularity** the circumstances constitution fraud or mistake (heightened pleading standard)

**Defendant’s Response to the Complaint:**

* + - * **Answer:** defendant must respond to each allegation in the complaint, can either:

admit truth of an allegation

deny truth of an allegation

claim lack of knowledge or information sufficient to form a belief (effectively a denial)

make general denial (denying name, address, etc.)

* + - * + note: an answer is a pleading, but ***Twombly* & *Iqbal* have not been extended to answers & affirmative defenses,** but they *do* apply to counter-claims & cross-claims
      * **Motion:** requests an order from a court (often challenges form or sufficiency of pleading)
        + **FRCP 12(e):** motion for a more definite statement
        + **FRCP 12(f):** motion to strike scandalous or impertinent allegations
        + **FRCP 12(b)(6):** motion to dismiss for failure to state a claim

**What does a plaintiff need to show to survive 12(b)(6) motion to dismiss?**

* Old Standard:
  + **notice pleading** (*Conley* – union discrimination suit): a complaint should not be dismissed for failure to state a claim unless it appears **beyond doubt** that the plaintiff can prove **no set of facts** in support of his claim which would entitle him to relief
    - **no need to state** **theory of case** at this point
      * must give **fair notice** of basis of claim & its grounds (simple standard)
        + cases should be decided on **merits** instead of dismissed for formal, technical reasons

*Dioguardi*: complaint in broken English upheld as sufficient because it revealed basic nature of dispute and incident

* + - * complaint may still be dismissed for **factual or legal insufficiency**:
        + factual insufficiency: alleged facts don’t satisfy requirements for relief, but facts do exist and could satisfy requirement if complaint is amended

ex: *Conley* allow workers to **amend complaint** to show they applied for union membership

other options: allow limited discovery, FRCP 12(e) motion, dismiss

* + - * + legal insufficiency:no set of facts exist that could permit relief or law doesn’t provide relief for alleged injury (nothing can save this complaint, have to **dismiss**)

ex: law requires you to be a woman to get relief but you’re a man

* + - * ***Swierkiewicz*** (applying notice pleading standard): plaintiff doesn’t need to plead prima facie case of discrimination under Title VII to survive motion to dismiss
        + plaintiff **does not need to commit to any particular legal theory** at this point, just have to give fair notice
  + New Standard:
    - **plausibility pleading:** stricter pleading standard (harder to survive motion to dismiss)
      * ***Bell Atlantic v. Twombly:*** plaintiffs alleged that telephone companies conspired in restraint of trade by stating that they engaged in parallel course of conduct, had opportunity to communicate through trade associations, and avoided competition in order to secure long term benefits
        + under *Conley* this would’ve been enough (defendants had notice of who, what, when, why), but SCOTUS reversed *Conley*

to survive a motion to dismiss, plaintiffs’ **allegations must provide plausible grounds**, not merely possible or conceivable ones (parallel conduct could be explained by independent interests of the companies)

a complaint doesn’t need detailed factual allegations but FRCP 8 requires more than the allegation of “labels and conclusions and a formulaic recitation of the elements of a cause of action”

**court must accept all factual allegations as true, but don’t have to accept legal conclusions couched as factual allegations as true** (stray statements suggesting conspiracy were legal conclusions couched as facts)

* + - * + *Stevens Dissent:* parallel conduct might be innocent, but it also might be elicit (so should be permitted to go to discovery to find out); courts have necessary tools to control discovery costs through case management; court relied on antiquated distinction between facts & legal conclusions
      * ***Erikson v. Pardus:*** court applied *Conley* standard to pro-se complaint
        + led to questions on scope of *Twombly* (only corporate defendants? only expensive discovery? only anti-trust cases?)
      * ***Ashcroft v. Iqbal:*** discrimination suit against FBI for holding Muslims in detention centers after 9/11
        + extended *Twombly’s* standard to all claims

to survive motion to dismiss, must be able to draw **plausible inference of illicit conduct** from complaint

plausibility depends on context, judicial experience, and common sense

**court must accept as true all factual allegations, but can ignore legal conclusions and conclusory statements**

no threadbare recitals of elements of cause of action

no words like “knew of, condoned, willfully agreed”, etc. (conclusory)

* + - * + *Souter Dissent:* except for “fantastic” allegations, plaintiff’s allegations are to be treated as true
        + *Breyer Dissent:* emphasized Stevens’ dissent in *Twombly* (courts have case management tools to limit discovery & control process)
      * policy: (+): efficiency rationale (docket congestion, limit expensive discovery); (-): limits access to courts, hard to distinguish between facts, conclusory statements & legal conclusions
      * ***Johson v. Shelby:*** allowed plaintiff to amend complaint to cite to particular statute that provided basis for relief
        + SCOTUS held that *Twombly* & *Iqbal* deal with factual insufficiencies, not legal insufficiencies

court cites to *Swierkiewicz* that no need to commit to legal theory at this point

open question: does *Swierkiewicz* survive under plausibility pleading?

* + Open Questions after *Iqbal*:
    - what makes a statement conclusory?
    - what is the degree of certainty meant by “plausible”?
      * more likely than not (51%)?
    - does FRCP 8(a) now incorporated 9(b)’s heightened pleading standard? (court claims no)

**PLEADING ANALYSIS:**

Main Question: assuming **factual** allegations are true, would reasonable fact-finder find that these claims are plausible?

1. State legal standard
   * Rule 8 requires a “short and plain statement of the claim showing that the pleader is entitled to relief”, which *Twombly* & *Iqbal* have interpreted as requiring
2. Determine cause of action & all its elements (what plaintiff is required to allege)
3. Excise all legal conclusions & conclusory allegations (we don’t have to assume these to be true)
   * excise any threadbare recitals of elements of a claim
   * excise any statements that start with “upon information and belief” 🡪 not factual allegation
   * excise any legal conclusions (e.g. “under NY Law”, “negligent”, etc.)
   * excise any statements suggesting causation (e.g. “as a result of”) 🡪 conclusory allegations
     + open question: what makes an allegation conclusory?
4. Make a list of what allegations remain & assume truth of remaining factual allegations
5. Based on the remaining factual allegations, is there a plausible claim for relief?
   * open question: what is the degree of certainty meant by “plausible”?
     + if not all elements of cause of action met 🡪 not plausible
     + if elements met 🡪 might still not be plausible
   * if facts in equipoise (just as likely as not) 🡪 dismiss complaint, grant motion to dismiss
   * if complaint does show plausible claim for relief 🡪 proceed to discovery
6. If complaint is dismissed, what’s the relief?
   * if dismissing based on factual insufficiency (can add fact that would make complaint plausible) 🡪 dismiss with leave to amend
   * if dismissing based on legal insufficiency (no fact in the world would make complaint plausible) 🡪 dismiss outright
7. Address policy considerations:
   * Discovery Costs
     + distinguish from *Twombly* – would discovery costs be as big as in an anti-trust case?
       - how expensive would discovery be in general (where is evidence located, where are the witnesses, etc.)
     + distinguish from *Iqbal* – would discovery require privileged government information?
   * District Court’s Case Management Role (Stevens & Breyer dissents)
     + *Twobly* & *Iqbal* deprive district court judges of their ability and responsibility to manage cases
       - can argue don’t have to dismiss claim because can rely on district court to manage discovery & oversee case development
     + floodgate concerns (docket congestion)
   * Access to Courts
     + plausibility standard seems to be kicking cases out earlier before they can even get to discovery
       - does this only allow cases to go forward where parties can afford to hire private investigator beforehand?
         * but compare *Erikson* where court used notice pleading standard
   * Summary Judgment
     + back-up so that if it’s determined during discovery that case is frivolous or can’t win it won’t go to trial (trial is most burdensome part of case)
8. How would the case have come out under *Conley* notice pleading standard?
   * *Conley* says court should only dismiss case if it’s shown beyond a reasonable doubt that no set of facts would grant the plaintiff relief
     + complaint is just meant to put the defendant on notice that they are being sued & what they’re being sued about
       - is there a possible set of facts that could grant plaintiff relief?
   * If facts in equipoise 🡪 allow case to go to discovery (unlike *Twombly* & *Iqbal*)

**Policing the Pleading Process:**

* **28 USC 1927:** an attorney or a party who “multiplied the proceedings in any case … so as to increase costs unreasonably and vexatiously” is liable for the costs incurred by the other side”
  + costs include attorneys’ fees
  + courts also have inherent authority to impose costs on parties that litigate in bad faith
    - can use 28 USC 1927 to impose sanctions even when sanctions are unavailable under FRCP 11
* **FRCP 11:** meant to curb abuse of litigation process; police pleadings and regulate behavior of parties & lawyers
  + FRCP 11(a): signature requirement applies to all papers submitted to court
  + FRCP 11(b): certification requirement relates to purpose, evidentiary support, and legal foundation
    - attorney certifies that to the best of his/her “knowledge, information, and belief, formed after an inquiry reasonable under the circumstances” that:
      * (1): all papers filed are not for improper purpose, such as to harass, cause unnecessary delay or cost
      * (2): the legal claims are warranted by existing law or a non-frivolous argument for the extension of law or the creation of new law
      * (3) factual allegations have evidentiary support, or, if flagged, are likely to have evidentiary support after reasonable discovery
        + allegations based on “information & belief” only permitted if inferences are reasonable (and likely only “plausible” within meaning of *Twombly* & *Iqbal*)
  + FRCP 11(c): a motion for sanctions must be separately made, and the offending party is given 21 days to cure the alleged violation (*Hadges* – lawyer sanctioned for relying on his client’s statements)
    - court will consider: time pressure, factual complexity, feasibility, accessibility to date, personal knowledge, exclusive reliance on client, exclusive reliance on other lawyers
    - note: Congress is considering a bill that would *mandate sanctions* (instead of discretionary like now) and eliminate 21 day safe harbor period

**Case Management:**

* **FRCP 16:** encourages judge to be active & engaged supervisor in resolution of dispute; enhances judge’s managerial authority
  + - **judge must issue a scheduling order** within 3 months unless it’s one of the exceptions under FRCP 16(b)(1)
      * scheduling order: sets a time limit for the parties at every step of the case
        + deadlines can supersede requirements set out elsewhere in FRCP
        + can only modify pre-trial scheduling order for good cause (high standard to meet)
    - judge must hold **pre-trial conference**
      * FRCP 16(c)(2) lists all matters that can be discussed at pre-trial conference (very long list)
        + lawyer must be very prepared for pre-trial conference
        + lawyer must have authority to make admissions & stipulations (can be sanctioned otherwise)
        + actual party must either be present or available
    - court has authority to enter sanctions
  + note: this is at odds with American adversarial court system notion of judge as disinterested overseer
    - policy: expedition, discourage waste, improve quality of litigation, **encourage settlement** (controversial because may create judicial bias)