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# Introduction

* There are two categories of law: substantive and procedural.
* Procedural rules supply guidelines about which information is received by the decision-maker, how it is presented, and what standards of proof apply.
* Adversary system—the moving party takes initiative and there is minimal judicial interference.
* We instinctively seek to insure that the decision rendered is closest to the common need.
* The judge acts only on what is before him. Otherwise he would be making decisions about things he isn’t informed of.
* A judge’s participation in our system can sometimes skew the result of the case because the jury is likely to discern hints from this. We shouldn’t allow this.
* Public law litigation frequently does involve multiple parties and sprawling structure, so the judge takes a more active role.
* In Hobbes’s *Leviathan*, the state exists to solve the “tragedy of the commons” which describes our inability to maximize our use of resources without coordination. The Leviathan can end the state of nature through force.
* There is a paradox in that we traded the brute force of our neighbors for the brute force of the state.
	+ We are willing to do this because the state has elements of basic fairness (due process) and regularity (procedure).
* Disputes have the following characteristics: (1) bipolar, (2) retrospective), (3) right and remedy are interdependent, (4) self-contained, and (5) party-driven.
	+ Nothing is really self-contained because interpreting the law will apply to all others who act similarly.

# Due Process

The law of remedies exists uneasily between procedural and substantive because we allow for some procedural remedies before the case is tried on the merits (restraining orders, injunctions, prejudgment seizure)

## Fuentes v. Shevin, 407 U.S. 67 (1972).

**Facts:** Firestone obtained a writ of replevin under Florida law (Firestone v. Fuentes) on a stove and stereo (worth about $500 plus $100 in financing) after a dispute about installment payments led Margarita Fuentes to discontinue her installments. Mrs. Fuentes sues in federal court to challenge the constitutionality of the statute (Shevin in Florida’s Attorney General).

**Holding:** The Florida and Pennsylvania replevin laws deny due process.

**Rationale:** This is a denial of due process because all that is required is that a form be filled out. There is no notice or hearing (these are basic due process protections). That process does not test the strength of either party’s claims.

**Other:** The court cites five elements of due process that should be satisfied: notice, hearing, timely, counsel, and a judge.

* + This is not our lived experience.
	+ There are exceptions (court lists criminal context, high government need, money for taxes, misbranded drugs/food, bank failure). But what *really* distinguishes these circumstances from *Fuentes*?

**Dissent:** Justice White claims that mistakes are not likely in this situation because Firestone has no reason to file a mistaken claim. Claiming that people will contract around the due process requirements, White says that when it is not economical, there is no reason to go through this process.

### Instrumentalist View of Due Process

* We look at the likelihood that the court will get it wrong without a trial. We can conceive that this is more likely without certain safeguards.
* Due process should protect against *arbitrary* decisions. Requirement of notice and a hearing is not an impenetrable barrier.
* The state’s process must minimize the risk of error through safeguards.
* We must balance that risk against the cost of additional process.
* Majority in *Fuentes* rejects the cost argument (dissent does not). This is not entirely true because we must stop adjudicating at some point.

## Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974).

**Facts:**  Defendant Mitchell bought a fridge, range, stereo and washing machine on credit. Plaintiff Grant Co. sues in LA state court claiming $574 was unpaid and receives sequestration of the goods.

**Holding:** The Louisiana statute is constitutional because it provides for a judge’s involvement, an immediate hearing, damages, a bond, and documentary proof.

**Notes:** Provisions for the recovery of attorney’s fees in damages provide a disincentive to fraudulent claims. The involvement of a judge instead of a clerk *might* provide more protection but it is likely the judge just stamps it the same way a clerk would. Documentary evidence doesn’t really make much difference either. Judges and clerks both just run through a checklist.

**Dissent:** Justice White says that the provision of a judge doesn’t provide meaningful difference.

## North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975)

**Facts:** Plaintiff North Georgia Finishing is suing for $51,000 for goods it sold to defendant Di-Chem, Inc. Plaintiff obtains a writ of garnishment based on an affidavit, which froze the defendant’s bank account.

**Holding:** The Georgia statute does not adequately protect due process.

**Rationale:** The statute only requires that the plaintiff make an allegation before the property is seized. This is not adequate under the previous decisions. There is no provision for an early hearing and requires a bond from the defendant.

**Notes:** While allegations are required, they are not *specific* as required in Louisiana.

* The constitutional test seems to be whether the risk of error is sufficiently reduced. In *Fuentes* and *Mitchell*, there was no incentive to act improperly. These two companies are competitors and there is a great incentive to freeze a competitor’s bank account.
* Unlike in Mitchell, the plaintiff has no prior interest in the property in question.
* White is clearly considering some elements that he doesn’t mention in the decision: nature of the interest at stake and the risk of error.

|  |  |  |  |
| --- | --- | --- | --- |
|  | FL | LA | GA |
| Specific Allegations | No | Yes | No |
| Bond | Yes | Yes | No |
| Appearance before Judge | No | Yes | No |
| Post-Deprivation Remedies | No | Yes | No |

## Connecticut v. Doehr, **501 U.S. 1 (1991).**

**Facts:** DiGiovanni brought a civil action against Doehr for assault and battery in Connecticut court. He also applies for an attachment of $75,000 on Doehr’s home to cover the damages in the tort case.

**Holding:** The CT statute violates due process rights.

**Rationale:** In torts, there are very unclear factual disputes. In prejudgment seizure, we should consider the private party interest, the risk of erroneous deprivation and the government interest.

**Notes:** There is no bond required to be posted and the application is determined based on the largely undefined notion of probable cause.

* The plaintiff’s interest is relatively low and the effect on the defendant is very high. There would be no substantial extra cost to the government to supply additional process.
* There is no joint possessory interest in this property (one of the saving graces in Mitchell).

## Goldberg v. Kelley

**Facts:** A case similar to *Fuentes*, in which social workers went into houses to see if someone was actually employed to ferret out welfare fraud. When poor people wrongly receive state benefits, the state has little recourse (they are judgment-proof). NYC shuts off welfare benefits if they find a man in the house or if someone is working. You get a hearing within a month.

**Holding:** The city’s statute is a denial of due process rights because you are entitled to notice and a full hearing, including the right to cross-examine witnesses.

**Notes:** This makes state action almost impossible but the heightened standard comes as a result of the fact that these benefits are the last level of the social safety net.

## Mathews v. Eldridge

**Facts:** Plaintiff was denied disability benefits under Social Security. Due to the suspicion of fraud in this area, a new system required that doctors examine the patient to determine if the benefits should continue.

**Holding:** It’s okay to stop the benefits temporarily.

**Rationale:** The court creates a three-prong balancing test of:

1. Private interest: the interest of the defendant. This allows us to distinguish between a lien on a home and execution.
2. State interest (plaintiff): we give the state the most latitude when it acts on its own behalf.
3. Risk of error: is it high or low. Contrast with requirements deemed sufficient in other cases—are there sufficient safeguards for this level of risk?
4. Value of additional process

### Application of the Mathews Test:

* Private interest in this case is the disability benefits—not as serious as welfare because it’s not the bottom rung. Probably more serious than *Fuentes* because it’s likely the only source of income.
* State’s interest is significant—it is pecuniary. The interest is greatest when there is no remediation (as in Goldberg). We are more likely to find that the state has a high interest when it acts on its own behalf rather than on the application of others.
* Risk of error is lower than in Goldberg because we’re relying on a doctor, rather than a determination that shoes are under the bed.
* The benefit of additional process is probably low (another doctor will have the same findings).
* When applying this test, we should bring in other cases not to serve as a checklist, but to serve as comparison of the components.

## Van Harken v. City of Chicago, 103 F.3d 1346 (7th Cir. 1997).

**Facts:** Chicago begins a new system of civil procedures for parking violations which can be challenged before a part-time lawyer without the parking officer’s attendance.

**Holding:** The procedure is sufficient to protect due process due to the small amount of property at stake.

**Rationale:** Posner calculates that the average savings to an appellant would be approximately $1.38. The benefits of requiring a police officer to appear are greatly outweighed by the costs. The plaintiff’s best argument is that the mayor is adjudicating and trying to balance a budget simultaneously. This falls short—the maximum penalty is $100 and using the hearing officer is saving money.

**Notes:** The risk of error is low because only 57,000 out of 5,000,000 appeal annually and only one-third of those appeals win (is this reasoning a Type II error? You are using today’s statistics to predict the future under a different system). Most of those who win only win because the officer doesn’t appear to contest the defense.

* + - If nothing else, the mayor is still accountable to the people and wouldn’t want to design a system that is bad for them.
		- The only due process issue in question here is the appropriateness of who can be a judge. Can the prosecutor serve as a judge also?
		- The value of additional process is low and the risk of error is fairly minimal (documentary evidence is used).
		- S.I.: there is nothing in the *Mathews* analysis that requires some process in every case. Posner says that there should always be some process (fundamental notion of our justice system).
		- The take-home: *Mathews* is a cost/benefit analysis. When there is low cost, low error, low interests, only minimal process is required.

# Pleading

* Background: Code Pleading begins in 1830s with the Field Code and mandates that there be “but one form of action.”
* Guiding principal is for cases to be resolved in their merits
* Rule 8 requires a “short and plain statement of the claim showing that the pleader is entitled to relief.”
* Conley v. Gibson—the court strongly reaffirms liberal pleading. Complaints may only be dismissed when it is beyond a doubt that the plaintiff can prove **no set of facts** to support his claim.
* Also called “Notice Pleading” because its primary purpose is to put the defendant on notice of what the claim is and the grounds upon which it rests.
* Claims must state three things:
	1. Jurisdiction
	2. Nature of Harm
	3. Damages Sought
* Background/Theory
	1. We assume lawsuits are bipolar and retrospective, the remedy flows from the right, they are self-contained, and the activity is party-initiated
* We assume: Plaintiff has more information about damages, Defendant has more information about facts.
* We require defendants to admit or deny every specific paragraph, making litigation more efficient. Rule 10.
* It is also easy to amend complaints under Rule 15.
	1. Even add a new defendant after the statute of limitations has run *if* there was functional notice to that defendant.
* More facts are required in certain instances—Rule 9(b). See *Tellabs*.
	1. For fraud, the plaintiff has information about what statements he or she relied on; not information about the state of mind of the defendant.
	2. There is an incentive for misuse when there can be a threat to reputation or when there is incentive to settle even nonmeritorious claims.
* Plaintiffs risk pleading too many facts which would make them vulnerable to a 12(b)(6) motion if the facts show they do not deserve relief.
* Complaints must have *some* info, otherwise they are vulnerable to Rule 12(e) for a more specific statement.
* 95% of cases settle because:
	1. Litigation process clarifies the law.
	2. More information is acquired in the process.
	3. There are economic incentives for settlement.
* Rule 12(b) allows defendant to test legal sufficiency of cases before the factual merits are addressed.
	1. Technical defenses (waived if not brought up): jurisdiction, failure to provide service.
	2. On the merits—failure to state a claim, failure to join. These are not waived—may be raised as independent defenses at trial.
	3. Lack of subject matter jurisdiction—may be raised at any point.
* Rule 12(b)(6) is the most important. It asserts that even if all facts alleged are true, there is still no legal claim.
	1. We want to get to the merits of the claim, so there is a strong disfavor toward 12(b)(6) motions.
	2. A decision on the motion is not fatal to either party; the complaint can be amended.
	3. Serves to eliminate frivolous claims

## U.S. v. Board of Harbor Commissioner**s**, 1977

**Facts:** United States sues several defendant oil companies and municipal governments in relation to an oil spill, without alleging which company caused the spill.

**Holding:** Want of detail is not a valid basis for a 12(e) motion.

**Rationale:** Pleading serves the purpose of informing the defendants of the legal claims. The pleading need not be more specific than that.

**Notes:** 12(e) is supposed to be a narrow vehicle to prevent completely unintelligible complaints. If any more information were requested of the plaintiffs at this point in litigation, the barrier to entry in the legal system would be enormous. We err on the side of general pleading because the plaintiff almost always has less knowledge (and is the lowest cost provider).

Plaintiff has more information about damages.

Defendant has more information about facts.

## McCormick v. Kopmann

**Facts:** Plaintiff alleged that both the beer served at the Huls’ tavern *and* Kopmann’s negligent driving caused her husband’s death.

**Holding:** Pleading in the alternative is fine, even when logically impossible.

**Rationale:** We assume that plaintiffs have more limited knowledge than defendants so we allow flexibility in pleading, which gets us pleading in the alternative. This results in an outcome change in the litigation because she has no incentive to gather evidence (through an autopsy) because she’ll likely win either way.

Pleading in the alternative allows more plaintiffs to get into the system without having to have their case totally figured out.

## Mitchell v. Archibald & Kendall, Inc., 1978

**Facts:** Truck driver is told to park across the street to wait to deliver his load and is robbed at gunpoint and shot in the face while waiting.

**Holding:** The case was properly dismissed for failure to state a claim upon which relief could be granted.

**Rationale:** The complaint was legally insufficient (did not allege breach of a duty); plaintiff chose not to amend the complaint. All elements of duty in this case involve the definition of “premises” under IL law and the contingency-fee lawyer has an incentive to cut the case short if there is no tenable claim so he gets a ruling on the case as an off-premises case.

## Tellabs, Inc. v. Makor Issues & Rights, Ltd.

This is a case which involves *heightened* *pleading*. Rule 9(b) requires that circumstances must be stated with particularity in cases of fraud or mistake.

This protects defendants from the harm that comes to their reputations when they are charged with serious wrongdoing.

**Facts:** Shareholders allege CEO Notebaert made false reassurances about Tellabs company and sue for damages resulting from securities fraud.

**Holding:** An inference of scienter must be more than merely plausible—it must be at least as compelling as any opposing inference.

**Rationale:** PSLRA requires a strong inference of scienter. Intent is to curb abusive lawsuits.

**Notes:** We can require heightened pleading for fraud on the basis that plaintiffs know what statements they relied upon. The balance of information is different.

This case was our first introduction to the *Priest/Klein Hypothesis*:

$$EV\_{Π}=P\left(win\_{Π}\right)×\left(award\right)-cost\_{Π}$$

$$EV\_{Δ}=P\left(win\_{Π}\right)×\left(-award\right)-cost\_{Δ}$$

$$Zone of Settlement=\left\{EV\_{Δ},EV\_{Π}\right\}$$

* Under this hypothesis, why would anyone go to trial? (A) Mistake or (B) Expectations for trial have not converged. Other behavior is explained by strategic decisions (insurance companies want a reputation of going to trial often).
* If our justice system is accurate, we should see a roughly 50% win rate for plaintiffs/defendants. Empirical studies show that this is indeed true, which says a lot about the fairness of the system.
* *Shadow of the law* concept: the law gives positive guidance to citizens on how to order their lives. This eases everyday disputes because we know which ones are efficient to take to court.
* *Tellabs* tells us that some cases are distinct: they are *frivolous*. Frivolousness can be determined by the *ex-ante* probability of success. But that can’t be the only factor; we also base it on cases which are poorly motivated.
* In securities cases, costΔ is much higher due to the potential loss in company value.
* *Coase Theorem:* in the absence of transaction costs, parties will negotiate to optimize social resources.
* In reality, there is pushback on the *Conley* standards by (1) judges who can determine (2) frivolous suits (e.g. cases that look weak, like prisoner lawsuits about toothpaste) and the (3) probability of extrinsic harm.
* In the *Leatherman* case, there is a challenge to specific heightened pleading. A family was barged in on and hogtied because the police smelled a suspicious smell. 5th Circuit says they must show state of mind or specific facts about the TX police. SCOTUS reverses and upholds Rule 8’s liberal pleading standard.

## Swierkiewicz v. Sorema, N.A.

**Facts:** Plaintiff alleges discrimination under Title VII for being old and Hungarian at a young, French firm.

**Holding:** Plaintiff need not prove a prima facie case in the complaint—a short and plain statement is enough.

**Rationale:** The prima facie standard is an evidentiary one. Plaintiff is being asked to prove his case in the complaint. The exception for fraud does not apply to discrimination (*expresio unis*).

# The Defendant’s Answer

* In default judgment, a plaintiff may collect a sum certain by waiting the requisite number of days and going to the clerk (if there has been no appearance before the court.
* Default is a status which makes the defendant liable for default judgment.
* Default judgment allows plaintiff to collect.

## Shepard Claims

**Facts:** Defendant does not file an answer by the deadline but files a “notice of retention” before entry of default judgment.

**Holding:** The client’s case should not be harmed by the malpractice of the attorney in this situation.

**Rationale:** Factors to determine the outcome of a motion to set aside entry of default:

1. Whether the plaintiff will be prejudiced
	1. That is, will the plaintiff be less able to go forward on the merits of the case (e.g. SOL expires, witness dies)
2. Whether the defendant has a meritorious defense
	1. This is a very low standard—do you intend to engage the legal merits of the dispute going forward?
3. Whether culpable conduct led to the default.
	1. We can say no culpable conduct because there was no prejudice.

Darrah’s “notice of retention” counts as an appearance before the court, so the plaintiff could not simply get default judgment right away.

Courts are more lenient in setting aside a default because the courts want to avoid prejudice (plaintiffs justifiably rely on default judgment)

## Zielinski v. Philadelphia Piers, Inc., 1956

**Facts:** Plaintiff is requesting a ruling that the fork lift operated by Sandy Johnson was owned by PPI. PPI sent the complaint from Plaintiff to their insurer. Johnson mistakenly testifies that he still works for Carload Contractors and now the SOL has run.

**Holding:** Equitable estoppel prevents parties from taking advantage of the statute of limitations where the plaintiff has been misled by the defendant’s conduct.

**Rationale:** When the defendant’s conduct creates prejudice, we assume that there was culpable conduct.

This was a *motion in limine*, which is a motion to request that certain evidence not be introduced to the jury.

 This was a double-breasted corporation who had no incentive to inform plaintiff that he was suing the wrong part of the corporation.

**Rule:** If you act badly and there’s prejudice, we will punish you and make it very difficult to win your case!

## David v. Crompton & Knowles

**Facts:** Defendant acquired the assets of Hunter Corp. but claims it did not acquire the liabilities. Δ stated in its answer that it did not have sufficient information to admit or deny the allegations in the complaint.

**Holding:** Crompton will not be allowed to amend the answer to deny the allegation.

**Rationale:** Defendant has peculiar control over the information; they cannot just state that they don’t have enough information. Though there is no indication of malevolent intent, defendant did not deny the allegation.

## Wigglesworth v. Teamsters Local No. 592, 1975

**Facts:** Plaintiff sued in federal court with SMJ for labor related claims. Defendant filed a counterclaim, alleging libel and slander. Plaintiff moved to dismiss the counterclaims for lack of SMJ.

**Holding:** The counterclaims are permissive so there is no subject matter jurisdiction.

**Rationale:** The court is not required to hear claims over which it does not have SMJ when those claims are permissive (could be brought without prejudice in state court).

**Test for permissive/compulsory:** whether the same evidence would support or refute the opposing claims. (“The *Bose* Standard”).

* There is an issue because the later court (state court) will be deciding whether the claim was compulsory or not in *this* court.

**Arthur Miller’s 4 tests:**

1. Are the issues of fact and law the same?
2. Would res judicata bar a subsequent suit?
3. Would substantially the same evidence support or refute the claims?
4. Is there any logical relationship between the claims?

# Preclusion Doctrines (Res Judicata)

* Underlying concept: if something is resolved between parties, it should be resolved completely and permanently.
* Res judicata/claim preclusion: prohibition on relitigating a claim that has already been litigated (does not depend on which issues were decided).
* Parties may not bring a claim arising from the same transaction more than once (related in “time, space, origin, or motivation” is a vague standard but clear for most cases).
	+ “Logical relationship” more than immediacy.
	+ Defendants will plead more than they should, reducing efficiency
	+ Also, worry about the equity concern of lulling the defendant into a low-value lawsuit and then using that for issue preclusion.
* Rule 13 Counterclaims
	+ Compulsory (those that would be forever lost to res judicata if not brought now)
	+ Permissive
* Exceptions
	+ Change in the intervening law (and the alleged misconduct is continuous).
	+ Change in the facts (a patent gets approved and the alleged misconduct is continuous).
	+ These exceptions do not affect the original judgment.
* In order to apply this doctrine, we need to find out what was decided in the first case (do alternative claims not pleaded count? etc.)
* It appears that the only justification for claim preclusion is efficiency gain.
	+ SI: it isn’t clear that there is an efficiency gain because the scope of litigation is expanded due to new issues being litigated.
* Issue Preclusion (collateral estopel) forecloses the relitigation of issues that were actually litigated and that were decided by the court.
	+ There must be a trial and finding of fact.
		- Party must have had a full and fair opportunity to assert its claim.
	+ There must be dispositive resolution of the entire matter.
* Big purpose for issue preclusion: allow parties to rely on a final judgment to order their affairs
* Issue Preclusion exceptions:
	+ Pre-existing legal relationship
	+ Adequate representation
		- Trustee of an estate of which the person is a beneficiary
		- Invested by the person with authority to represent him
		- Executor or other fiduciary manager of an interest in which the person is a beneficiary.
		- Official invested by law with authority to represent
		- Representative of the class with the approval of a court
	+ Control or substantial participation in the case
	+ The party is a designated representative of another.
	+ Statutory foreclosure of subsequent litigation by non-parties (probate and bankruptcy)
* Parties may seek dismissal based on “another action pending” when they do not want to be subjected to multiple suits in different courts for the same claims.
	+ To apply this, courts look at claim preclusion tests; asking what the effect the disposition of the first case will have on the second one.
* When defendants fail to raise a defense available to them, they cannot use them to attack the judgment.
* All aspects of counterclaims are subject to claim preclusion.
	+ However, alleging the same in a defense and suing later is allowed (when the counterclaim is not compulsory).
* We are concerned about “wait and see” plaintiffs who wait for a judgment on the issue in another case and then sue.
	+ Defendants may want to go into full litigation on a case that does not merit such attention.
* Traditional rule: claim and issue preclusion only apply to parties and those in privity with them.
* However, *Blonder-Tongue* rule is dead: When a party has decided to put an issue at risk and has lost, a subsequent defendant can defensively invoke collateral estoppel even when there is no mutuality of obligation.

Issue preclusion chart:

Case 1: Jones v. Smith

Case 2: Jones v. Brown

Case 3: Brown v. Smith

|  |  |
| --- | --- |
| IF: Jones wins Case 1 | IF: Jones loses Case 1 |
| No effect on Case 2 (Brown has not had his day in court yet). | Jones is issue precluded from bringing the case if the court in Case 1 found that Smith owned the patent.  |
| In Case 3, Brown can say that Smith cannot defend on the grounds that he owns a patent because he lost that case; he had his day in court. | No effect on Case 3 (Brown has not has his day in Court). |

* Concern about fairness for Brown v. Smith if Jones win Case 1 because what if Smith didn’t put enough effort into the first lawsuit?
* **Law of the case**: an issue of law decided at one stage of the case is not to be decided again.

## Rush v. Maple Heights, 1958

**Facts:** Plaintiff was awarded judgment in 1954 from personal injuries resulting from failure to maintain a roadway and she filed a separate complaint alleging property damage.

**Holding:** The majority rule is that one single wrongful/negligent act gives rise to one cause of action.

**Rationale:** The defendant’s act is one tort; all injuries and property damage resulting from that act, so there should only be a single cause of action.

## Manego v. Orleans Board of Trade, 1985

**Facts:** Plaintiff was attempting to build a disco near a skating rink but the town board voted him down after it was opposed by the Orleans Board of Trade. Plaintiff sued, alleging anti-trust violations. He lost and brought this second suit.

**Holding:** The suit is not allowed due to the doctrine of res judicata.

**Rationale:** The issues in the second suit arise from the same facts of the first case. No new case can be brought against the same defendants from the first case.

**Problem presented:** this is a case where both lawsuits were about the same fundamental issue: keeping Manego out. However, it’s pushing the rule to require him to determine all other related claims when he brings a civil rights claim in the first one. Are we really achieving efficiency goals?

## Taylor v. Sturgell

**Facts:** D.C. Circuit holds that Taylor was virtually represented by his friend, Herrick in suing the FAA under FOIA for airplane manufacturing plans.

**Holding:** The virtual representation theory was inappropriate.

**Rationale:** Taylor was not a party so he never had his day in court; he cannot be bound by that judgment.

**Exceptions to the Pollock Rule:** adequate representation, identity of interest, and class actions.

* FOIA is public law which provides a right to the public.
* **SI Rule: in order to treat the first case a representative action, there must be a determination that it will be representative ex ante. Cannot create a class action without the procedural rules of 23.**
* If this case were about privately-held interests, it would be an easy res judicata case.

## Parklane Hosiery Co. v. Shore

**Facts:** A case of securities fraud brought by shareholders after an SEC case was prosecuted against the company. Plaintiffs attempted to use past judgment as issue preclusion.

**Holding:** Mutuality of obligations is *not* required and it is appropriate to apply issue preclusion.

**Rationale:** Though there is a risk of a “wait and see” plaintiff, that is not an issue in this case because the plaintiff could not have joined the SEC case. The defendants had a full and fair opportunity to litigate their claims once.

**Dissent:** Rehnquist argues that in 1791, mutuality of obligations was required so it should be required for the seventh amendment today.

**Rule:** Preclusion may hold against a losing defendant (did away with mutuality of obligations requirement).

# Parties to a case

* Rule 17 requires that the action be prosecuted in the name of the “real party in interest”
	+ Allows executors, administrators, guardians, bailees, trustees, etc. to bring action on behalf of another.
	+ Serves to protect defendant’s right to defend itself against the real party.
* Rule 17 is derided heavily.
	+ 17(a) does not provide much beyond what the law of standing has already recognized.
	+ 17(b) allows a claim to be brought by anyone who has a substantive law claim sufficient enough to withstand a 12(b)(6) motion.
* Rule 19 allows the defendant to make sure that claims are properly presented by the claimholders and by all who are required to guarantee complete adjudication.
* Rule 19 is cumbersome and confusing.
	+ 19(a) only identifies the parties of concern to the court
	+ 19(b) provides a balancing test to determine the amount of prejudice
* Rule 20 allows parties to be joined when:
	+ Their claims arise out of the same transaction, and
	+ Any question of law or fact common to all plaintiffs will arise in the action
* Subrogation is the substitution of one person in the place of another (usually insurance)
	+ Insured no longer has interest if the insurer pays the losses.
* Federal courts can consolidate many of the cases they have on their OWN docket for pretrial efficiency. Multidistrict Litigation can be used to combine suits in different districts into one place for pretrial proceedings.

## SMU Assoc. of Women Law Students v. Wunne and Jaffee, 1979

**Facts:** Anonymous female law students allege discrimination against women by Dallas law firms. Defendant asks for true disclosure of the names.

**Holding:** The case may proceed on the associational representation of the SMU Assoc. of Women Law Students but if these women want to be parties, they must share their name.

**Rationale:** There is no general right to proceed anonymously but the courts have allowed exceptions for abortion, birth control, homosexuality, or welfare. Here, there is no need to reveal highly personal facts.

* Factors for anonymous cases from Doe v. Shakur:
	+ Whether the plaintiff is challenging government activity
	+ Whether the plaintiff would be required to disclose information of utmost intimacy
	+ Whether the plaintiff would be compelled to admit intention to engage in illegal conduct
	+ Whether the plaintiff would risk suffering injury if identified
	+ Whether the party defending would be prejudiced

## Kedra v. City of Philadelphia

**Facts:** Kedra family alleges a series of police brutality actions against their family member. Defendants claim joinder is improper.

**Holding:** The rules have very liberal joinder provisions, leaning toward the broadest possible scope of action to be more convenient and less time-consuming. We can make a better determination after discovery.

**Rationale:** If there is any issue of prejudice, court can split up the claims as necessary.

**Notes:** There is a concern here about the equity of a jury being presented with a conspiracy claim against all police officers at one time (guilt by association). Waiting until the eve of trial to sever gets all of the efficiency gains without risking the equity losses.

## Insolia v. Phillip Morris, 1999

**Facts:** Three former smokers bring a suit alleging an industry-wide tobacco conspiracy.

**Holding:** The transactions in question are not sufficiently related and may not be joined.

**Rationale:** Risk of prejudice that the courts will make a non-merits-based determination. Defense will be based on individual autonomous actions. This decision is likely fatal to the plaintiffs, who cannot pursue the action individually due to transaction costs.

**Important:** The court in this case had facts! It could make the determination at the threshold stage, unlike in *Kedra*.

## Pulitzer-Polster v. Pulitzer,

**Facts:** Carol Pul.-Pol. sues Samuel Pulitzer in federal court court after being frustrated with her progress in state court. SMJ from diversity. Question is whether her sister and niece, Lillian and Susan are persons required to be joined (destroying diversity jurisdiction).

**Holding:** Lillian and Susan are persons required to be joined.

**Rationale:** Rule 19 militates toward practical, fact-based joinder and

**Notes:**

* Rule 19(a) is not met (there is no reason to assume the state court jury will have to be informed of the federal decision).
* 19(b) considerations:
	+ Plaintiff’s interest (low), defendant’s interest (low), third party’s interest (none), systemic interest (none).
* Courts don’t like 19(a) because it so narrow so they like to skip it and go to the balancing test in 19(b)
* 19(b) analysis in this case is proper and the case should be brought in state court

## VEPCO v. Westinghouse

**Facts:** Failure allegedly due to a defective part manufactured by defendant cost over $2 million. VEPCO seeks to recover $200,000 for the gap in its insurance coverage. Insurer INA seeks $1.9 million in damages but adding INA would destroy diversity. Removing VEPCO would destroy diversity.

**Holding:** This action may go forward with the insurer as a named party.

**Rationale:** Westinghouse would be issue precluded in INA v. Westinghouse if they lose the first judgment—this is prejudice. But since INA has agreed to be bound by VEPCO’s litigation in their contract.

Westinghouse wants to be sued by INA because otherwise the question before the jury in Virginia would be whether the ratepayers should suffer from increased prices.

# Impleader

* Impleader seeks both efficiency and equity.
* It is more efficient to try the cases together.
* It would be unequal to fore one plaintiff to pay immediately but not be able to be indemnified until later

## Clark v. Associates

**Facts:** Clark v. Associates for damages that occurred during repossession of property. Associates impleads Clark Inc., who actually causes the damage.

**Holding:** Associates has stated a valid claim for indemnity against the third-party defendants

**Rule: Impleader should only be denied when it would result in prejudice.**

# Interpleader

* Interpleader plaintiff can require that all possible claimants of a property appear in court and make their case for the return of the cow.
* Two types of interpleader
	+ Rule 22
		- Subject matter jurisdiction required (diversity and amount in controversy)
	+ 28 U.S.C. §1335 (statutory interpleader)
		- At least two defendants must be from different states and the property must be worth more than $500.

## State Farm v. Tashire, 1697

**Facts:** Following a bus crash in California, the negligent pickup truck driver’s insurance company filed for interpleader in Oregon.

**Holding:** District Court exceeded its powers to grant interpleader when it allowed Greyhound to join.

**Rationale:** Interpleader serves to protect a stakeholder from multiple litigation. One defendant having an insurance policy in Oregon is not enough to mean all future claimants must go to Oregon.

**Cost Issue:** it wouldn’t be worth anyone’s while to drive up to Oregon to claim a small part of the $20,000 pie.

**Notes:** Passengers are insignificant. All should be compensated according to his injury. (“Keanu Reeves Problem.”)

Rule: Interpleader must be limited to a clear fixed pot or defined asset that is incapable of satisfying all claimants.

# Intervention

* Rule 24 allows parties to join a lawsuit even over the objections of the original party.
* Intervention of Right: Rule 24(a)(2) says you must show:
	+ Sufficient interest in the litigation
	+ Risk of impairment of that interest without intervention
	+ Inability of the original parties to adequately represent that interest
* Permissive Intervention: Rule 24(b):
	+ There is some gain from that participation and no prejudice to the original parties.
* What is interest?
	+ Must draw lines focusing on private/public nature of the dispute.
	+ The more private the dispute, the less claim there is for an outsider to participate.
	+ *Donaldson* case: you don’t have an interest in a case you are not collateral to.
	+ *Trbovich* case: even though you don’t have a direct cause of action, you might still have right to participate if you’re affected enough.
	+ *Cascade* case: CA wanted to intervene in a case between two private companies.
	+ Go back to the public/private distinction.
		- We interpret interest liberally for public concerns.
* Permissive intervention is a question of fact for a jury. Intervention of right is a matter of law which can be appealed.

## NRDC v. NRC, 1978

**Facts:** A mining company and an organization representing mining interests wanted to intervene on a case being litigated by the NRDC regarding uranium mines.

**Holding:** Kerr-McGee and AMC are allowed to intervene.

**Rationale:** This decision would affect other mining companies and both of the two represent different interests. They can each bring new information to the table and this is a matter of public law.

# Class Actions

* Types of class actions:
	+ Limited Fund Class Actions: (b)(1) actions involve close identity of interests (situations like those calling for compulsory joinder under Rule 19)
		- (b)(1)(B) is for fixed pots—effectively the plaintiff’s interpleader
		- Purpose is to avoid a run on the bank
		- Must encompass all possible claimants.
	+ Injunctive Classes: (b)(2) is a suit for declaratory or injunctive relief (civil rights suits).
		- Relief cannot be granted to one without being granted to all.
		- Therefore, no opt-out, no notice.
		- May not be used when “primarily money damages” are sought.
	+ Damages Classes: (b)(3) is used when questions of law or fact common to class member predominate. This is a rule of efficiency
		- This is the only class for which *notice is required and there is a right to opt out!*
		- This category is a catch-all for class actions
		- All about the efficiency.
* Rule 23(a)General requirements
	+ Numerosity: Joinder would be impracticable
		- Is there an efficiency gain which justifies a class?
	+ Commonality: Common questions of law or fact. Not so much about common questions as common answers (New *Wal-Mart* case)
		- Would the efficiency gain be realized?
	+ Typicality: Representative parties are typical of the claims or defenses of the class
	+ Adequacy of Representation: Rep. parties will fairly and adequately protect the interests of the class
* General question is whether there are general questions that cover everyone (are the individuals pretty much bystanders?)

## Hansberry v. Lee, 1940—Adequate Representation

**Facts:** Hansberrys bought and moved into a home covered by a racially-restrictive covenant. Neighbors sue and the Hansberrys attempt to defend on the grounds that the covenant is void. A previous case found the covenant enforceable.

**Holding:** The Hansberrys are not bound by a case in which they were not adequately represented.

**Rationale:** A white family could not have possibly represented the interests of this black family! The class in the previous case sought enforcement of the covenant; this party seeks it to be overturned.

There was not enough rigor in the class determination.

**Test:** Does the procedure adequately protect the interests of absent parties who are to be bound by it? Tremendous amounts of process are due.

## Mullane v. Central Hanover Bank & Trust Co. —Notice Requirements

**Facts:** Bank notified by mail all for whom it had an address that it was establishing a common trust fund. Mullane was appointed as a special guardian for all persons who might have had interest in the income of the fund. Apellant objects that the notice provisions were inadequate under the 14th amendment (the property interest at stake here is the right to go to court).

**Holding:** This proceeding deprives the right to respond to an impairment in their interest. Process must provide information within a reasonable time.

**Rationale:** Publication in a newspaper is not enough. However, for unknown beneficiaries, there is no objection.

**Rule:**  Known parties must be notified personally. Creates presumption that mailed notice is necessary.

SI: this case is ridiculous. The NY statute protects the individuals more because it allows the trusts to be pooled, making them more profitable. The Due Process decision is correct but it is applied too mechanically.

## Holland v. Steele, 1981

**Facts:** Prisoner seeks to overturn prison policy on behalf of himself and all future prisoners.

**Holding:** Plaintiff adequately represents the class.

**Rationale:** This case meets the prerequisites for a class action and the plaintiff has the exact same interest as the future members of the class (though nonexistent).

**Notes:** The defendant would really benefit from class certification (because everyone would be bound by it in the future) but they fight it because they’d rather be able to settle with one prisoner.

## In the matter of Rhone-Poulenc Roer, Inc., et al.

**Facts:** Drug company allegedly was negligent in allowing hemophilia blood solids to not be tested for HIV. District Court intended to use a special verdict to result in collateral estoppels for other cases.

**Holding:** District Court judge exceeded the permissible bounds.

**Rationale:** The defendants would stake their entire companies on the outcome of a single jury trial. There is no common negligence standard among the 50 states, and specific causation would need to be established in each individual case. Multiple juries cannot reexamine the same issue.

* Under the District Court view, the cases would all eventually be appealed anyway, so there is no efficiency gain.
* Though they won 12/13 times, the defendants rightfully do not want to risk $10 billion. In one-shot litigation, you care about variance, not the mean.
* We must be able to carve at the joints (get a clean separation of issues from the first case to the subsequent application)

## Amchem v. Windsor, 1997

**Facts:** Plaintiffs and Defendants come to a settlement in asbestos litigation and seek for it to be approved by the court.

**Holding:** The class is not properly certified under Rule 23.

**Rationale:** Fairness cannot be the only inquiry; we must meet predominance tests.

**Rule:** If we’re going to bind people in absentia, we must include structural fairness in the way the class is made up.

## Martin v. Wilks, 1989

**Facts:** Birmingham white firefighters sue the city alleging they were being denied promotions in favor of black firefighters following a suit with injunctive relief by the NAACP which set up a system for the promotion of black firefighters (only way to make them whole was at cost of white firefighters).

**Question:** Can the city stand in as a virtual representative for the white firefighters?

**Holding:** The BFA (white firefighters) are not precluded from bringing their case because they were not joined.

**Rationale:** Taylor was not a party so he never had his day in court; he cannot be bound by that judgment. City is judicially estopped from claiming both “you’re not necessary and can’t intervene” and “you should be precluded.”

**Rule:** If you want to preclude someone, join them!

# Discovery

* Discovery is not to be used to determine whether a cause of action exists.
* Initial Disclosure: Rule 26(a)(1)
	+ Requires disclose of individuals who might have relevant information, copies of documents, computations of damages *when it will be used to support its claim or defenses*.
	+ There is no directive to hand over harmful information.
	+ Rule 37(c)(1) forbids the use of evidence which should have been disclosed but was not, unless the court changes its mind.
* Document Inspection: Rule 34
	+ Permits parties to request documents that are possessed by other parties.
	+ Lawyer sends a “request for production,” which must be described with “reasonable particularity.”
	+ Also authorizes entry onto property for purposes of testing or measuring.
	+ To review documents of a nonparty, a subpoena may be granted under Rule 45(a)(1)(C)
* Interrogatories: Rule 33
	+ These are written questions to another party that must be answered under oath.
	+ SI: “single most efficient way”
	+ This establishes fact for the litigation—it is binding in trial.
	+ This is cheap for one side but leads to lots of disputes
		- Questions can be easy to write but burdensome to answer.
	+ Rule 33(a) now limits the number to 25.
	+ Can be particularly useful to a party confronted by a large organizational opponent.
* Depositions: Rule 30
	+ Compels a witness to answer questions spontaneously with follow-up questions.
	+ This is the most expensive form of discovery.
	+ Limited to 10 depositions, each limited to one day of seven hours.
	+ Lawyers may have a duty to prepare a witness
	+ The parties are generally allowed to attend.
	+ Witness’s attorney can object when the questions are improper. Testimony is still taken.
* Request for admission: Rule 36
	+ Once admitted, it may not be considered.
* Pretrial Conference: Rule 16
	+ States the facts in dispute or not.
	+ Puts relevant discovery onto the court record on the eve of trial
* Physical or Mental Examination: Rule 35(a)
	+ Good cause is required and the mental or physical condition must be in controversy.
	+ Counsel may not attend the examination.
* Discovery can have collateral costs that are significant; they must be considered by the court. See *Davis v. Ross* or *Coca-Cola Bottling Co. v. Coca-Cola Co. (*the secret recipe was at risk)
* Sanctions under Rule 37
	+ Addressed to the parties and/or the attorneys themselves.

## Hickman v. Taylor, 1947 (p.344)

**Facts:** Unknown.

**Holding:** The goal of discovery is mutual knowledge.

**Rationale:** The purposes of discovery are to narrow and clarify basic issues between the parties and ascertain facts. Either party may compel the other to disgorge whatever facts he has.

**Rule:** There is a strong presumption against disclosure due to attorney-client privilege except where the opposing party has substantial need for the materials.

## In Re Convergent Technologies Securities Litigation, 1985 (p.347)

**Facts:** Defendants filed motions to compel and requested monetary damages.

**Holding:** Discovery is expensive; parties should tailor their questions to the actual issues.

**Rationale:** Courts do not have the resources to closely monitor the discovery processes.

## Davis v. Ross, 1985 (p.368)

**Facts:** Plaintiff moved to obtain information regarding the defendant’s net worth and income, etc. Defendant refused and moved for a mental examination of the plaintiff.

**Holding:** Plaintiff’s motion denied. Defendant’s granted.

**Rationale:** Plaintiff is not entitled to the defendant’s information because it is not relevant unless a special verdict is needed. Defendant is entitled to a mental examination of plaintiff because the she sought damages based on emotional injury.

**Notes:** There is a big potential embarrassment for Ross due to her ongoing litigation with the 2 Supremes.

## Kozlowski v. Sears, 1976

**Facts:** Plaintiff was injured after pajamas ignited. Π filed a Request to Produce seeking records of all other complaints regarding children’s nightwear. Defendant opposes saying that its filing system would make that too burdensome. Refusing, the court entered default judgment.

**Holding:** Motion to set aside entry of default judgment is denied.

**Rationale:** Being costly is not sufficient reason to deny discovery; you created your own filing system.

**Real reason:** U.S. law regulates after-the-fact (deterrence feature of tort law). If we don’t impose this cost, Sears will never be held accountable. Sears must internalize the costs of being a mass distributor.

## McPeek v. Ashcroft, 2001

**Facts:** Discrimination complaint in DOJ. During discovery, defendant had not yet searched its backup data, which Π believes will have relevant information. It will be very expensive to search.

**Holding:** DOJ should do a test run of the back data to see if it can find anything and report back to the court.

**Rationale:** We can’t evaluate the thing’s effectiveness unless we have a good idea of what will come out of it.

**Notes:** SI: this is very smart! Sampling gives us a cost-effective way to know whether it’s worth the expense.

# Summary Judgment

* Types of burden:
	+ Burden of proof/persuasion: ultimate burden in the case
	+ Burden of production/going forward: the intermediate burden.
* Burden of proof is on the party seeking to change the status quo (default position: plaintiff loses).
* Burden of production is what evidence is required from a particular party at a given point in the litigation
* No need to wait for a judgment n.o.v.: we can test factual sufficiency at the end of trial with Rule 50: motion for directed verdict at the conclusion of the plaintiff’s case.
	+ Is a claim that the plaintiff has presented so little evidence to support her claim that a jury could not possibly find for the plaintiff.
* Buffer between Rules 12 and 50: Rule 56 Summary Judgment
* Movant must show that there is no genuine issue of fact and that the legal claim is deficient.
* Defendants only have one shot at summary judgment and so they are unlikely to “blow their shot” at the wrong time.
* See Summary Judgment Trilogy below for big changes.
* As a result, plaintiffs bear the burden of production after the defendant moves for summary judgment.
* Judges can use summary judgment when the plaintiff’s case makes no economic sense or when there are institutional concerns such as free speech.
* 1993 decision: no judge-managed discovery (SI thinks this is irresponsible).
	+ All expenses today are in the judge-free zone.
* *Twomby* and *Iqbal* represent the court struggling to balance having an early filter with allowing things to proceed.
	+ Epstein view: *Twombly* was right because it was antitrust and most of the information is public record.
	+ A. Miller view: this is destabilizing the entire system. Discovery is the core of the civil liability system for our ex post, private enforcement mechanisms.

## Adickes v. S.H. Kress & Co., 1970

**Facts:** Freedom School teacher and six black students were arrested for vagrancy in a Kress store. She sued under § 1983 alleging conspiracy between Kress and the police.

**Holding:** In summary judgment, the burden of proof is on the movant (defendant) to prove the *absence* of evidence.

**Rationale:** Defendant can’t just point at the plaintiff and claim not enough evidence has been presented. It must be *shown*.

**Rule:** We don’t require plaintiffs to give up their entire trial package at a summary judgment stage.

## Celotex Corp. v. Catrett, 1986

**Facts:** Asbestos claim. Plaintiff failed to introduce any evidence of proximate cause (no evidence of exposure). Defendant moved for summary judgment.

**Holding:** Defendant is only required to “point out” the absence of evidence to support the nonmoving party’s cause.

**Rationale:** This is the 0% standard. It is a ridiculously high burden to ask the defendant to prove that plaintiff was *never* exposed to asbestos.

The burden for summary judgment motion is condition on the ultimate burden at trial.

**Dissent:** Brennan, J. wants the defendant to affirmatively show that there is no basis for the plaintiff’s claim.

## 1986 Summary Judgment Trilogy

* SI thinks that summary judgment can shift the value of the case because plaintiffs will do all the work of the trial package and have paid out all trial expenses before the trial begins.
* He had tunnel-vision.
* *Matsushita v. Zenith*
	+ About price-fixing among Japanese television manufacturers.
	+ Court grants Summary Judgment because it could find that the plaintiff Zenith’s claim made no economic sense.
	+ This was in spite of an impressive array of evidence presented by Zenith.
	+ There is a great inducement to present the court with ample record to support your summary judgment and securing it then, before trial.
* *Anderson v. Liberty Lobby*
	+ Defamation action against institutional press
	+ Court says that it must consider the effects of continued litigation on freedom of the press.
* Now you can get into the system cheaply, but lots can be decided at summary judgment.

## Markman v. Westview Instruments, Inc., 1996

**Facts:** Patent dispute over the definition of “inventory” for dry cleaning. Defendant moved for summary judgment.

**Holding:** The court, trained in exegesis, is best suited to decide patent claims.

**Rationale:** Summary judgment is a test of functionality: who is more likely to get the decision right? In this case, Justice Souter says the courts are more likely.

**Problem:** Why patents? Where does this stop? What about chicken?

This is the first breach of the general seventh-amendment rule. There is a national interest in uniformity over patent interpretation but we must ask: is a judge really more likely to interpret dry cleaning better than a jury?

## Bell v. Twombly, 2007

**Facts:** Plaintiffs allege conspiracy among the Baby Bells to prevent the competition Congress was trying to allow of CLECs.

**Holding:** *Conley* pleading is reversed. Plaintiffs are required to state a claim which is plausible.

**Rationale:** *Conley* allows claims which are wholly conclusory to go forward without asserting a single supporting act and this cannot be allowed.

**Notes:** The only way to get plausible facts in this case would be a public indictment or a whistleblower.

SI: this is an expansion of *Markman*. Decision in 1993 to forbid judges from doing managed discovery is coming back to haunt us.

## Ashcroft v. Iqbal, 2009

**Facts:** Iqbal, arrested on charges related to 9/11, brings a *Bivens* action with regard to his treatment while confined at a federal prison.

**Holding:** Plaintiff did not nudge his complaint over the line from “conceivable” to “plausible,” so summary judgment is appropriate.

**Rationale:** More direct evidence is needed to involve Ashcroft through *respondeat superior.* *Twombly* controls because that was a Rule 8 interpretation, not an antitrust individual standard.

**Dissent:** Souter, Stevens, Ginsburg, and Breyer dissent saying that *Twombly* does not require the court to determine if the allegations are true. Taken together, these facts are not merely conclusory.

# Personal Jurisdiction

* State courts are assumed to have general subject matter jurisdiction.
* Congress granted the federal courts limited subject matter jurisdiction. The court must point to the specific statute that gives them jurisdiction
	+ Two types are federal question and diversity.
	+ Other statutes also grant limited jurisdiction: copyright act
* Personal jurisdiction involves the ability of a court to exercise power over the litigants.
	+ General Personal Jurisdiction
		- When an entity is so much imbued with the character of the state that it doesn’t make sense to ask if the court has power over that person (GM in Michigan, for example).
	+ Specific Personal Jurisdiction
		- In personam
			* Court has the right to enforce judgment on this particular type of defendant
		- In rem
			* Associated with property interests. Courts may adjudicate matters that involve title when individuals aren’t being sued.
		- Quasi in rem
			* I sue property to stand in place for the defendant who may have fled, so that I can satisfy the judgment I seek against that person.
	+ Concept is derived from single-sovereign monarchies, where everyone was someone’s subject.
	+ Lowest federal court in a state has the same personal jurisdiction as the highest state court in that state.
* In response to problems of personal jurisdiction, states begin to experiment with long-arm statutes, which eventually just say that they will hold to the constitutional standard.
* The law is trying to catch up with the notion that Germany can regulate Google Maps by making some of its content illegal there; does that mean Google should have to change its behavior in the U.S.? This is the *Hustler* problem.
* The problem with the Asahi line of cases is that there is a great deal of uncertainty for folks who want to order their lives.
* The defendant-focused conduct in WWVW is helpful because it’s very stable and predictable.
	+ Under this standard, it is much easier to show minimum contacts when the product is still in the stream of commerce.
* Unpredictability is a huge problem for internet-based jurisdiction. For foreign defendants, how do we offer them protection?

## Pennoyer v. Neff

**Facts:** Debt dispute (Mitchell (OR) v. Neff(CA)) ends in default judgment. Mitchell (OR) sells the land to Pennoyer (OR, who gets sued by Neff (CA), challenging the jurisdiction of the first case.

**Holding:** Service must be in the state for an *in personam* action but it is not required for actions *in rem*.

**Rationale:** Each state is sovereign. Oregon would lose sovereignty if it could not enforce the contract. California would lose sovereignty if its citizens are subject to Oregon’s powers.

**Pennoyer test:**

Specific Personal Jurisdiction can be granted if:

* Neff is a domiciliary
* Neff is served with legal process while physically in the state
* Neff consents to personal jurisdiction

## Hess v. Pawloski, 1927

**Facts:** Hess was sued for personal injuries that resulted from an accident he caused in Massachusetts. MA allows for service of process to a registrar, saying that driving in the state is effectively consent to that service.

**Holding:** The jurisdiction of MA court is upheld.

**Rationale:** The plaintiff was required to mail a copy to the defendant if possible. We must allow MA to enforce its laws within its borders. Mailed notice *is* due process, regardless of *Pennoyer*.

SI: this is fair. It’s the best we can do and we have both consent (though fictional) and service. The mailing makes it seem much more fair.

**Note:** This case is framed in terms of due process. It leads to long-arm statutes.

## International Shoe Co. v. Washington, 1945

**Facts:** International Shoe had itinerant salesmen in Washington and didn’t want to pay Worker’s Compensation taxes to that state.

**Holding:** The company has “minimum contacts” in the state so jurisdiction is upheld.

**International Shoe test:** If the company has minimum contacts with the forum and it would uphold common notions of fair play and substantial justice, then jurisdiction is proper.

* We know that FPSJ must be a placeholder.
* Int’l Shoe test is transactional: we ask whether the activity is tied to the purported reason for jurisdiction. Is it the transaction itself that gives rise to litigation?
* FPSJ: is there purposeful availment? Is the conduct continuous and systematic? Is it inconvenient to hale the party into the state for suits?

## McGee v. International Life Ins. Co., 1957

**Facts:** California resident sues and defendant is serviced with process in Texas. A state statute subjects foreign corporations to suit in California. Tries to recover in Texas but the CA decision was not recognized in TX.

**Holding:** Due Process did not preclude the CA court from exercising jurisdiction.

**Rationale:** The contract had substantial connection to the state. California has a manifest interest in providing means of redress when insurers refuse to pay.

**All that’s really at issue is whether there was a transactional relationship between the conduct and the forum.**

In this case, just one contract is enough to get personal jurisdiction in California.

## World-Wide Volkswagen Corp. v. Woodson, 1980

**Facts:** New York family, moving to Arizona is involved in an accident in Oklahoma and wants to sue Volkswagen dealer and importer for damages. Defendants contend that there is no personal jurisdiction in the Oklahoma court.

Defendant needs to eliminate “fraudulent joinder” of Seaway (dealer) and WWVW (importer), who are both from NY in order to get diversity and remove to federal court.

**Holding:** The sale of an automobile in New York is not enough to grant personal jurisdiction in Oklahoma.

**Rationale:** Foreseeability that the car would travel is not enough because personal jurisdiction cannot move with the chattels. If you intend to sell your products in a jurisdiction, you may be subject to suit there but these defendants only sold in NY/NJ/CT.

1. Look at target forum,
2. contacts in that forum,
3. reciprocity (do you benefit from their laws), and
4. whether the product was designed for use specifically in that forum.
* *Burger King v. Rudzewicz*: Burger King sued two small franchisees in Florida. Court applied only the purposeful availment test, holding that there was jurisdiction.

## Calder v. Jones

**Facts:** National Enquirer published an article about Shirley Jones, a CA resident. She sues for defamation. The paper is published in Florida but research for this story occurred through CA and the paper is sold in CA.

**Holding:** There is a strong relationship to California in this case. Plaintiff need not travel to Florida for harm knowingly caused in California.

**Rationale:** Intentional torts expressly aimed at California result in jurisdiction in California.

**Compare to** *Keeton v. Hustler*, where the magazine was sued in NH because it has the longest statute of limitations. Do we want NH to determine defamation standards for the entire nation?

## Asahi Metal Industry Co. v. Superior Court, 1987

**Facts:** Zurcher (CA) sues Cheng Shin (Taiwan) for damages after a tire blowout. Cheng Shin interpleads Asahi (Taiwan) who made the valve. Zurcher settles, so Cheng Shin v. Asahi remains. Asahi challenges jurisdiction.

**Holding:** California has no personal jurisdiction over Asahi.

**Rationale:** Minimum contacts? No. O’Connor raises the standard for purposeful availment to mean that overt acts taken toward the forum are needed (5 justices disagree and say that ongoing sales are sufficient). Majority finds that there are minimum contacts but no FPSJ.

 **The court must consider the burden on the defendant AND the plaintiff’s interest in obtaining relief AND the state’s interest AND the interest of the overall legal system in an efficient resolution.**

**Gibsurg purposeful availment. Brennan stream of commerce.**

**Defendant’s burden includes traditional Int’l Shoe minimum contacts analysis.**

**Applying the test:**

1. Defendant’s burden is extremely high (always is for foreign entities)
2. Plaintiff’s interest in the forum is low (Cheng Shin can litigate this elsewhere)
3. State interest is low (not subject to CA law)
4. Overall interest to the legal system is low.

SI: this is as close as the court gets to correct—a smart balancing test. It looks to all interests and is sensitive to their needs.

## Pavlovich v. Superior Court, 2002

**Facts:** Pavlovich founded a company in Indiana and posted a code online while living in TX about decrypting DVDs. He is sued by the DVD Copy Control Assoc. in CA.

**Holding:** California does not have personal jurisdiction over Pavlovich.

**Rationale:** He has no minimum contacts with the state. He should be subjected to jurisdiction where he posted it (SI hates this!).

**Zippo Test (the way courts are most comfortable with the internet):**

1. Is the website interactive or passive? Interactive websites are analogous to catalogs.
2. If there is a passive website which simply posts information but has no response from the consumer, there is no jurisdiction.
3. For the middle ground, courts examine the nature and extent of the exchange.
* The Zippo test makes a lot of sense but only applies to contracts.
* In *Shaffer v. Heitner* (a quasi in rem case), the plaintiff tried to sue in DE where the paper copies of the shares were located. Court rejected it saying that due process applies to all in personam, quasi in rem, and inrem jurisdiction.

## Burnham v. Superior Court, 1990

**Facts:** Plaintiff was served with a summons for divorce in CA during a brief visit there to spend time with his children.

**Holding:** The in-state process service rules are constitutional.

**Rationale:** Personal service by in-state service is so rooted in tradition that we presume its fairness (constitution gives CL guarantees at the time of the constitutional compact).

This case gives us no new doctrine; it upholds in-state service during even the smallest of visits.

* It’s possible that this is really about *Roe v. Wade*. This is a conflict between a balancing test and a historical fixed-in-time test.
* If they allowed an Asahi test,
* This is mischievous because it results in crazy conduct like being afraid to go to a state for fear you will be served there.

**Important take-home: Int’l Shoe line of cases only serves to enrich or extend Pennoyer in areas that the common law could not have anticipated. If it is covered by the common law, that is the end of the inquiry.**

## Carnival Cruise Lines v. Shute, 1991

**Facts:** Contract of Adhesion which had a forum selection clause stating that all claims must be filed in Florida.

**Holding:** The plaintiff’s suit in Washington must be dismissed.

**Rationale:** The forum selection clause is not fundamentally unfair and it allows Carnival to protect its “special interest.” It benefits both parties (by lowering the price of the tickets)

**This is a notion of implied consent—**troubling formalism!

## J. McIntyre v. Nicastro, 2011

**Facts:** Plaintiff was injured by a metal shredder in New Jersey, manufactured in Britain, and distributed through Ohio.

**Holding:** No jurisdiction over J. McIntyre, the British company.

**Rationale (Breyer):** Purposeful availment before FPSJ. There is no consent. The defendant’s conduct has made it open to jurisdiction generally in the U.S. but there is no federal tort law.

**Got rid of Asahi test.** TALK ABOUT FORESEEABILITY. Stream of commerce is not a proxy for foreseeability.

**Ginsburg:** They introduced the product into stream of commerce, it ended up in NJ, they should be accountable there. They knew most scrap metal processing happens in New Jersey. (there is jurisdiction everywhere). She wants to say that until the product is put into its ordinary use, the stream of commerce is still active.

**SI says:** I have no idea what the controlling opinion means. Under Asahi, there would definitely be jurisdiction. Any rule would be good, please! This will cost litigants billions to litigate the unsettled nature of this case.

## Goodyear v. Brown, 2011

**Facts:** Plaintiff children injured in a bus accident in France with tires that were made in Turkey by a Goodyear subsidiary.

**Holding:** There is no general personal jurisdiction nor specific.

**Rationale:** General jurisdiction is similar to a domicile but for corporations (need a headquarters or at least a place of business with employees, etc.). Specific jurisdiction would require an affiliation between the forum and the underlying controversy. There are no minimum contacts in this case because the tires were not intended for U.S. sale.

**Ginsburg:** purposeful availment first (then go to Brennan stream of commerce)

**Pennoyer/Burnham test:** no service in state, no domiciliary, no consent.

**Int’l Shoe/Asahi analysis:** no minimum contacts

**ON THE EXAM, run through all of these steps: Pennoyer/Burnham plus Int’l Shoe/Asahi.**

* Last year in a case involving Hertz, the S. Ct. said that for purposes of this analysis, you will be deemed only a domicilary of your state of incorporation and principal place of business.

# Subject Matter Jurisdiction

* Three types: Diversity and Federal Question, Federal Ingredient
* Not created by parties and cannot be waived (as personal jurisdiction can)
* §1331: Diversity
	+ Strawbridge—perfect diversity and domiciliary rule.
	+ Requires that no plaintiff share a state with any defendant.
		- Domicile: “true fixed and permanent home and principal establishment and to which he intends to return whenever he is absent.”
		- We can look to things like voter registration, payroll taxes, driver’s license, telephone number, church/associational memberships.
	+ Requires a $75,000 amount in controversy minimum
		- Must not actually be awarded; must be pleaded in good faith.
		- This protects defendants because if it were about the award, plaintiffs would bring the case again in federal court.
	+ It is permissible to join a party to defeat diversity jurisdiction, not to add it.
* § 1332: Federal question (arises from the reconstruction amendments which allow for actions against state officials)
	+ Must “arise under federal law
		- Express right of action created by Congress (Holmes Test)
		- **Merrell Dow Test for** Implied right of action created by Congress
			* Plaintiff must be the intentional beneficiary
			* There was legislative intent to create a right of action
			* It would serve the legislative purpose to allow the case
			* It is not a matter traditionally reserved to state law
	+ The complaint must be well-pleaded (*Mottley Rule*)
		- Federal question must appear on the face of the complaint.
* **Grable** Federal Ingredient—the state law claim turns indispensably on interpretation of a federal law claim
	+ Do we have to construe federal law?
	+ Is the federal claim colorable (can you possibly win)?
	+ Did Congress intend to preclude private action?
* Pendant Jurisdiction
	+ When state law claims are connected to cases properly arising under federal question jurisdiction.
	+ Five-factor test:
		- All transactions must arise from a common nucleus of operative fact
		- There must be sufficient substance to the federal claims (not just thrown in to create pendant jurisdiction)
		- State issues do not predominate.
		- Must make up one constitutional “case.”
		- This power to exert pendant jurisdiction must be permissive
* Ancillary jurisdiction
	+ State law claims connected to cases with proper diversity jurisdiction.
	+ *Zahn* case: in a class action all of the named plaintiffs must be diverse from the defendant and each named *and* unnamed plaintiff must meet the amount in controversy rule.
* These types of supplemental jurisdiction were problematic because they were the courts creating their own jurisdiction and because there would be different rules (diversity cases versus federal question)
* The big risks we’re worried about: denying federal claim access to federal courts and encouraging federal intrusion into state law.
* Supplemental Jurisdiction § 1367
	+ 1367(a): “so related to” essentially codifies *Gibbs*
		- Federal jurisdiction over transactionally-related claims
		- As long as federal issues predominate.
	+ 1367(b) codifies *Kroger* (this section does not apply to diversity jurisdiction) wrt Rule 14 and goes beyond.
		- Rule 24 sounds like *Pulitzer.* The sisters could have intervened in Carol’s case
		- This statute overrules *Zahn*. One plaintiff must satisfy the diversity requirement, then you can add all the rest of the plaintiffs without worrying about diversity.
	+ 1367(c) is the “permissive” factor of Gibbs
		- Allows courts to decline to exercise supplemental jurisdiction
* Congress passed Class Action Fairness Act
	+ Expands diversity jurisdiction so when there is a national class action it can be brought directly into federal court.
	+ When more than $5 million in controversy or more than 100 people in the class.
	+ One plaintiff must be over the amount in controversy requirement (no bundling).

## Mas v. Perry, 1974

**Facts:** Plaintiffs from France and Mississippi sue for damages incurred from a two-way mirror installed by their Louisiana landlord.

**Holding:** The case is properly in federal court.

**Rationale:** There must be complete diversity and $75,000 in controversy. Both are met; the $75,000 was pleaded in good faith even if it was not awarded.

## Louisville & Nashville R.R. v. Mottley

**Facts:** Plaintiffs were injured as a result of a train crash and they settled in exchange for lifetime passes. Congress passed a law prohibiting free passes on railroads and they stopped honoring the agreement. They brought suit in feeral court

**Holding:** There is no subject-matter jurisdiction because the federal issue is not on the face of the complaint.

**Rationale:** No diversity so it must be that this arises under federal law. The complaint does not show this.

## Merrell-Dow Pharmaceuticals, Inc. v. Thompson, 1986

**Facts:** Canadian and Scottish plaintiffs file suit in Ohio regarding Bendectine, which caused birth defects. Plaintiffs want state tort action using federal law to establish negligence per se.

**Problem:** We don’t want the lowest level court in Ohio determining whether federal law was violated. We also don’t want every tort case is potentially a federal claim!

**Holding:** An implied right of action can be found.

**Rationale:** Apply the implied right of action test (see above) and it fails because we know Congress did not intend to create a private right of action. On federal ingredient test, the “Congress did not intend to preclude” test is just like “congress intended to create.” State courts should mostly do state law; federal courts federal law.

**Note:** Required evidence that the statutory scheme was being advanced (this collapsed federal ingredient into implied right of action).

## Grable v. Darue

**Facts:** IRS seized property in Michigan and Grab brought a quiet title action claiming he was not notified according to the statute.

**Problem:** Under Merrell-Dow, this would come out in state court. But we don’t want local courts ruling on how the IRS gives notice.

**Holding:** Jurisdiction is warranted because there is a national interest.

**Rationale:** The presence of a federal issue is not dispositive. By creating the IRS, Congress intended to preclude private tax actions. But, interpretation of federal tax law is certainly a federal issue. This is a compromise and softens Merrell-Dow.

**Rule:** If there is a strong national interest, we will read the construction of federal law more expansively.

## United Mine Workers v. Gibbs

**Facts:** Picket-line violence from a case in Tennessee.

**Problem:** State law tort claims in addition to the federal labor law claims (which are specifically granted to federal courts). We presume federal courts are specialized in federal law.

**Holding:** The state claim must attach to the federal claim.

**Rationale:** It is more efficient to try cases together and federal courts have better ability to adjudicate federal law.

**Rule:** There is a five-factor test to determine pendant jurisdiction:

1. All transactions must arise from a common nucleus of operative fact
2. There must be sufficient substance to the federal claims (not just thrown in to create pendant jurisdiction)
3. State issues do not predominate.
4. Must make up one constitutional “case.”
5. This power to exert pendant jurisdiction must be permissive

## Owen Equipment Co. v. Kroger, 1978

**Facts:** Iowan dies working on equipment. He sues OPPD (NE) who impleads Owen (IA). Kroger amended complaint to include claims directly against Owen but the trial court retained jurisdiction.

**Problem:** OPPD needs a jurisdictional doctrine to bring Owen into court.

**Holding:** Ancillary jurisdiction allows OPPD to bring Owen into court but diversity was destroyed when Kroger brought claims directly against Owen.

**Rationale:** Plaintiff made entirely new claims against Owen, which is like a new complaint. Plaintiff chose federal court—should have gone to state court if he had claims against an in-state party. We want federal courts to decide federal law so 2/3 of the case will be in federal court while the other third will be in state court.

**Rule:** Apply the Gibbs Test. Kroger cannot sue Owen in federal court.

# Erie Doctrine

* Derived from a historical tension between localism (purpose of higher levels it to resolve problems of lower levels) and centralization.
* Justice Story is all about centralization and decides Swift on this basis.
* Justice Holmes viewed law as a series of experiments—we should be willing to try things. He was deeply pessimistic
* 1938 Congress passes the Rules Enabling Act which allows courts to have rules of procedure
* Justice Brandeis was focused on achieving progressive change through the law
* The Erie problem is diminishing as more law comes up through federal question.
* Fundamental question: does the law help me to order my life? That’s what Harlan gets at in his concurring opinion in *Hanna*.

## Swift v. Tyson, 1842

**Facts:** Run-of-the-mill contract dispute. Common law would differ based on general or NY common law.

**Holding:** Federal courts are to apply a “general common law.”

**Rationale:** The Rules of Decision Act requires that federal courts apply state “law.” This only includes statutes.

**Notes:** This is a result of Justice Story’s view that a national economy requires a national law. He wanted to create a “higher order common law.”

* This results in problems for 2-court decisions (multiple lawgivers).
* Black and White Taxi v. Brown and Yellow Taxi—plaintiff would have lost in state court so it disbands and reincorporates in a nother state so it can go to federal court. This is *not* national uniformity and not a good system.

## Erie Railroad Co. v. Tompkins

**Facts:** Tompkins is hit by a train door walking on a “well-beaten path” in Pennsylvania. Sues in federal court in New York. NY or PA common law? They will have different outcomes.

**Holding:** State substantive law is to be applied but federal courts are entitled to create procedural law.

**Rationale:** Substantive law decisions have been reserved to the court by the Constitution and there is no general common law!

**Rule:** Apply federal procedural law; state substantive law.

**SI says:** Constitutional argument is irrational: if courts can’t create law, that means Congress couldn’t, either (and most post-1938 jurisprudence would be out the window)! Rules of Decision Act argument: are we really going to repudiate federal common law based on a law review article? Effects of Swift were not beneficial: Brandeis cites the taxicab.

**SI’s preferred answer:** To the extent that you need federal law for a national market, regulation should come from Congress. They do in fact create the ICC almost immediately after.

## Guaranty Trust Co. v. York

**Facts:** Action to enforce the rights of shareholders on diversity SMJ. Question is whether local statute of limitations should apply. Is it procedural or substantive?

**Holding:** Federal courts cannot overrule state substantive rights.

**Rationale:** Congress never gave federal courts the power to deny states’ rights. When the outcome would be different, that would be changing the rights of states’ citizens. Otherwise those cases with diversity would get different rules on that basis alone (not the intent of diversity).

But this effectively guts federal court rules whenever there is a conflict.

**Test to apply:** Outcome-determinative test.

**Similar cases:**

1. *Cohen v. Beneficial Industrial Loan Corp*: when there is no federal rule on point, the state law can be applied (no outcome change).
2. *Ragan v. Merchants Transfer*: The Kansas statute of limitations applies, no question. Cases can’t be brought merely because of diversity.
3. *Woods v*. *Interstate Realty:* for purposes of diversity, the federal court is really only another state court.

## Hanna v. Plumer

**Facts:** MA law requires service in hand to estate executors but federal rules do not.

**Holding:** Application of the federal rule did not exceed the mandate allowed in the Rules Enabling Act, so it is constitutional.

**Rationale:** Federal rules are presumed to be constitutional if they are enacted by the Advisory Committee, S.Ct. and Congress so when they conflict with a state rule, it is constitutional to apply the federal one.

**Test:** If there is a federal rule on point, apply it (we can presume its constitutionality). If there is no, look to *Erie*’s twin policy aims: preventing forum shopping an inequitable distribution of law.

**Harlan’s dissent:** “Inequitable distribution of law” means whether it will affect human behavior. Will it affect ex ante behavior?

**SI says:** Harlan got it as right as anyone ever will.

## Gasperini v. Center for Humanities, Inc., 1996

**Facts:** Plaintiff photographer’s slides were lost by the defendant and he sought to recover under NYS law in a federal court. NYS has a statute allowing for greater appellate review of jury awards than federal courts do. Which standard should be used?

**Holding:** New York’s appellate review fits into the FRCP and the 7th amendment.

**Rationale:** Ginsburg goes to an “outcome-affective” test, which seems to really just be *York* all over again!

**Test:** Outcome-affective. We don’t know how that’s different from *York*. Highly deferential to state decisions on procedure.

# Management of Cases

* 1983 rules changes shift toward more judge control in shaping the dispute through pre-trial conferences (optional).
	+ Judges may demand pre-trial schedules, etc. to manage how the litigation will proceed.