**Civil Procedure Fall 2015 Outline**

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**Civil Procedure, Fall 2015**

**Burt Neuborne, Outline**

# Adjudicatory Jurisdiction

## I. There are THREE types of adjudicatory jurisdiction:

1. **In Personam** **(IP):** against a person who is present in the territory at the time of service.
   1. **Physical** (even if transient, e.g. ***Burnham)***
   2. **Domicile/Citizenship of Individual**
   3. **Agency Representation**
   4. **Consent (**express, implied or coerced)
2. **In Rem (IR):** against property of a person when the controversy directly relates to who owns the property. (“To whom does this horse belong? Let’s seize it to find out.”)
   1. **Types of Property:**
      1. Real property: real estate and buildings connected to it.
      2. Personal property: belongings you carry with you
      3. Intangible property: subset of personal property (***Harris)***
3. **Quasi In Rem (QIR):** against a person, but the seizure of property gives the state authority to render judgment up to the value of the property. (“You might owe me money for assaulting me. I’ll seize your horse in advance of the judgment.”)
   1. **QIR 1:** property is in some way related to the dispute, though the question is not about ownership (*Pennoyer*, *Harris v. Balk).*
   2. **QIR 2:** property is unrelated to the dispute, and is simply coincidentally present in the forum (e.g. seize the race horse for a totally unrelated judgment).
      1. **Post *Shaffer v. Heitner:*** Absent other ties among the D, state, and litigation, statutory presence of unrelated stocks does not confer PJ.
         1. Must now meet International Shoe minimum contacts/fairness standards.

## II. General Rules for Personal Jurisdiction

1. **Due Process Considerations**: **14th amendment** of the Constitution guarantees **due process of law**, including being subject to suit only in places that have personal jurisdiction over you.
   1. **Due Process clause**: Imposes limits on power of state courts to exercise jurisdiction, defines outer bounds of permissible jurisdictional authority.
   2. **Long Arm Statute:** Does a long arm statute exist in that state? Does it entitle the state to exercise power in this situation?
      1. *International Shoe* created two-part test: (1) is there long arm? (2) is there minimum contacts?
   3. **Power of State/Federal Court:** Federal courts only have the personal jurisdiction of the state in which they sit (Rule 4). Kennedy suggests that Congress could change this and expand personal jurisdiction as a result.
      1. **4(k)(1)(a):** fed court uses long arm statute of state in which it sits.
   4. **Choice of Law Issues:** 
      1. Once a state gets personal jurisdiction over you, it has full rights to decide what law governs: due process clause becomes less meaningful once we identify the **forum**.
      2. **BN:** Maybe what we are so concerned about with personal jurisdiction is better considered at the time of law choice. Hurdle height is backwards.
         1. **Consider *All State Insurance Company v. Hague:*** court had a lot of discretion in choosing law, could have easily chosen Wisconsin law but instead chose Minnesota law.

* P prevailed on first major hurdle of getting the case heard in MN, then MN court decided to use MN law. But this was all the MN court’s decision.
* Important distinction here based on different insurance policies in each state.
* Very limited rules about which law should govern, major leeway afforded to MN.

1. **Personal Jurisdiction Procedures**
   1. **Rule 12b(2)**: During 12b(2) motions, defendants can bring up challenges to personal jurisdiction. If you don’t bring it up, you’ve waived right to object.
   2. **Full faith and credit clause**: states have to exercise the judgment of the first state that decided a case.
   3. **International Commity**: same as full faith and credit but on an international basis.
   4. **Special Appearance**: appear in a state for a direct challenge while simultaneously contesting jurisdiction there; limited ability to avoid service.
      1. **Limited Appearance**: same as above, but in cases of quasi in rem/property disputes.
   5. **Collateral Attack:** Defendant can not show up, and risk the chance that a judgment will be entered on his behalf; at the time that the plaintiff tries to exercise the judgment in defendants’ home state, the home state may determine that the original state had no jurisdiction, and full faith and credit will not require it to enforce it.
      1. **Risks:** Lose the opportunities to defend on the merits of the case, so only use this method if you are sure PJ is not valid.

III. Traditional Power Theory of Jurisdiction**:** states have the power to adjudicate things that they can touch/grab. Jurisdiction=Power! **(1877-1945) “Might Makes Right”**

1. **Establishing Power Theory**: “The power to adjudicate a dispute is coterminous with the power of people and things located within that territory.”
   1. **Jurisdiction=Power:** *Pennoyer v. Neff*, U.S. Supreme Court, 1877
      1. **Background:** Neff works with Mitchell (his lawyer) to purchase land through the Land Donation Act in Oregon.
      2. Neff leaves the state, and Mitchell sues to get payment for his services.
      3. The court seizes the land after the hearing, instead of before, then, because Pennoyer doesn’t come to court, eventually auctions it off to satisfy the judgment (and more—Mitchell makes out BIG).
         1. **Direct Appeal:** Neff appeals to a higher state court and argues affidavit isn’t effective.
         2. **Collateral Attack:** When Direct Appeal doesn’t work, Neff tries collateral attack to get the case heard by a federal judge.
      4. This is a form of QIR 1: the land is related in some way to the dispute (since Mitchell helped Pennoyer acquire the land), and it is seized in order to give the state power.
      5. **Due Process:** BN wants an alternative to attaching before litigation. But in ***Pennoyer***, you must seize the property first to establish jurisdiction.
      6. **Holding:** A state can only exercise authority over an individual outside of the state only if they seize the property prior to a hearing. The only way to get power over Neff was to seize his property prior to the hearing.
         1. **Sub-Holding:** States have the power to adjudicate the status over anyone in their power (e.g. divorce and competency).
         2. **Status Power:** Outgrowth of *Pennoyer:* state has the power to adjudicate the status over any individual as it pertains to marriage, insanity, and citizenship
      7. **BN:** This case forecasts a challenge between sovereignty of the state (Pennoyer) vs. the fairness to an individual.
2. **Physical Presence:** General jurisdiction over individuals present in the state: *Burnham v. Superior Court*, U.S. Supreme Court, 1990, Justice Scalia
   1. **Background:** Wife served husband with a divorce summons in California, while husband was present in the state to visit children.
   2. Previously, couple had lived in New Jersey, and Burnham still lives there.
   3. Despite status considerations, wife filed in California (and served Burnham there) because of money issues/custody issues: marriage could have been dissolved without power over Burnham, but financial consequences require additional authority.
   4. **Holding:** As long as an individual is present in the state (including airspace), pure general jurisdiction exists over any claim, regardless of relevance to the state.
      * 1. **BN** likes **Brennan’s concurrence** based on minimum contacts: Brennan thinks that this decision should be based instead on Burnham’s contacts with California🡪 fairness, not simply presence (*Pennoyer)*.

**3. Power over intangible property**: *Harris v. Balk,* U.S. Supreme Court, 1905

* **Background:** Harris owed money to Balk, and Balk owed money to Epstein.
* While Harris was in Maryland, Epstein served him with the goal of seizing the debt owed to Balk as partial payment for his own loss.
* No one contested the existence of the debt, but if they had, there would have been a limited appearance (Quasi in Rem version of special appearance) that would have led to a peripheral power.
* **Holding:** Quasi in rem jurisdiction exists over intangible property (debt), and your debt follows you wherever you go; it travels on your back.
  + 1. **Types of Property:** intangible, tangible, land
    2. **Peripheral Power:** the court has power to decide if power exists because it has the power to conduct a limited discovery—like a minimum discovery to decide if limited contacts exist.

**4. Domiciliary Power**: power over any individual domiciled within the state.

* Most states argue that there is power over any individual domiciled in that state (e.g. present for an indefinite period of time). See ***Mas v. Perry*** (domicile=where you intend to stay for an indefinite period of time or where you intend to return, even if you are currently living elsewhere temporarily).

**5. Extending Power Theory:** **Consent:** attempts to stretch the territorial power theory further without breaking it.

* **Four types of consent theories** (alternative to power theory, invites some element of involvement and volition):
  + **Express** Consent: consent is freely given; unquestionably present.
    - ***Kane v. New Jersey:*** first real consent case; you sign a waiver upon entering New Jersey’s highways that authorize you to be sued if you cause an accident. Appoint agent for accidents.
  + **Coerced** Consent: not real volitional consent.
  + **Implied** Consent: if you do A, then we’ll imply that you have consented to B.
    - ***Hess v. Polawski,***U.S. Supreme Court, 1927
      * If you enter Massachusetts, then it is **implied that you consent** to appointing the registrar as your agent for the purposes of notice if you cause an accident.
      * Hess is also a form of **Agency Representation:** blend between the Territorial Power and Consent Power theory. You authorize an individual to be served in your absence.
  + **Imputed** Consent: if you do A, you have done B even if you don’t want to.

## IV. Specific Jurisdiction: Ought Makes Right

**1. Creating a new paradigm:** ***International Shoe Co. v. Washington***, U.S. Supreme Court, 1945

* 1. **Background:** Second largest shoe company in America was based out of Missouri, but hired agents to sell shoes around the country, including Washington.
  2. Washington sues because IS is not paying employment tax in Washington; IS claims that the agents are not real employees, so they are not required to pay.
  3. Washington says that IS is subject to suit in Washington because they do business in the state.
  4. **Holding:** Instead of being sue-able where you ARE, you are subject to suit where you SHOULD be subject to suit. Focus on **“traditional notions of fair play and substantial justice.”**
     1. **Consequences:** Federalism Concerns: 3 Lug 4 Lug (making a company cowtow to the state that has the most stringent laws).
     2. **Precursor to the Uber Problem:** Question of employee v. independent contractor.

**2. Specific Jurisdiction:** Facts of liability overlap with facts of jurisdiction.

* 1. **Post *International Shoe* Basic Test:** If Defendant (1) is not present in the state; (2) is not a domicile; or (3) has not consented to jurisdiction, there is jurisdiction if you satisfy a three-step test:
     1. Is there a long-arm statute and does the State’s long-arm statute cover this situation?
     2. Has the defendant consented to jurisdiction here?
     3. Minimum Contacts: determine by analyzing the **quality**, not **quantity** of contacts, as assessed by:
        1. Effects test
        2. Stream of commerce
        3. Volitional activity
        4. Foreseeability (specific—clear that state will be effected—or general—could go to large number of places without targeting any singular state)
        5. Type of Suit (intentional tort, unintentional tort, contracts)
     4. Forum Justification (*Asahi* trap door): “traditional notions of fair play and substantial justice”
        1. Inconvenience to the parties
        2. State’s interest
        3. Plaintiff’s interest
        4. International impact

**3. Minimum Contacts:** first established in *International Shoe:* corp. volitionally and purposefully took advantage of the forum state and introduced agents to that market.

|  |  |  |  |
| --- | --- | --- | --- |
| **Contacts of D** | **Nature of Suit** | **Jurisdiction? (Type)** | **Relevant Cases** |
| Isolated | Related to contacts | Maybe: easier for intentional torts and contracts (specific) | McGee, Calder, Hess, Pennoyer, McIntyre, Hanson, Gray, Worldwide, Asahi |
| Isolated | Unrelated to contacts | No (general), probably not but might depend on amount (except if D is individual who is present) | Goodyear, Helicopteros, Kulko, Burnham |
| Continuous | Related to contacts | Yes (specific) | Int’l Shoe, Keeton, Burger King |
| Continuous | Unrelated to contacts | Yes/No (general) depends on amount, and “at home.” | Perkins, Daimler, Shaffer |

## V. Ways to Establish Minimum Contacts:

**A. Effects Test**: Necessary, but not sufficient test: Was the effect felt in that forum state? Usually involves intentional/unintentional torts.

1. *Gray v. American Radiator,* Supreme Court of Illinois, 1961
   1. **Background:** Titan (Ohio corporation) makes valves that are then used by American Radiator in the radiators they make in Pennsylvania.
   2. A radiator sold by American Radiator injures plaintiff in Illinois.
   3. Titan claims that they did not avail themselves of Illinois, and merely sold the product to Titan.
   4. **Holding:** Titan IS subject to suit because the effect of their product was felt in Illinois, and it was foreseeable that the product could end up there:
      1. Knowledge that the product could end up in Illinois
      * Positive Economic Benefit Derived from the state
      * Benefit Derived from laws there
   5. ***Calder/Keeton*** (intentional tort that causes effect and adds specific foreseeability component).
   6. **Limiting Principles of Effects Test**: on it’s own, not enough to establish jurisdiction
      * Limited by *Walden*
      * Limited by *Volkswagen*
      * Limited by *Kulko*: public policy consideration—not applied to domestic wrong, meant instead for commercial activity.
        + Kulko establishes a public policy reasonableness backdoor: somewhat like the Asahi argument.

**B. Stream of Commerce:** Did product end up in the state volitionally, through another person’s action, in completed state?

1. ***World-Wide Volkswagen Corp. v. Woodson***, Justice White, U.S. Supreme Court, 1980
   1. **Background:** Family purchases car in New York, and then a year later they move to Arizona for husband’s new job.
   2. When driving through Oklahoma, the car catches on fire and severely burns wife and kids.
   3. Family sues: Audi (German manufacturer), Volkswagen USA (American distributor/Delaware corporation), World-Wide Volkswagen (regional distributor throughout tri-state area), and Seway (retail dealer in New York)—all in Oklahoma.
   4. Only WWV and Seaway contest jurisdiction (consider this today—if others contested, would there be jurisdiction??)
   5. **Holding:** Neither WWV or Seaway purposefully availed themselves of Oklahoma, and all economic benefit was limited to New York. Since car only entered Oklahoma through the stream of commerce, it was not part of their volitional decision to place it in Oklahoma.
      1. Moving force was the customers, not the company.
      2. **Distinction between general foreseeability and specific foreseeability.**
      3. Creates a bright line distinction between manufacturing and consumption, but is complicated by the fact that cars are mobile by their very nature.
2. ***Gray v. American Radiator:*** Comes out the other way; court rules that the product ended up in that place through stream of commerce, effect was in that state and sufficient (see ongoing debate in McIntyre/Asahi).
3. ***J. McIntyre Machinery v. Nicastro,***Supreme Court of the United States, 2011—stream of commerce deeply contested. (See ***Asahi****).* 
   1. British manufacturer of dangerous metal cutting machines sells to an American distributor that distributes around the country.
   2. One machine severely injures plaintiff
   3. Opinion reformulates Asahi in numerous ways:
      1. Stream of commerce is not enough—volitional contact needed too (Kennedy: 4 votes)
      2. Stream of commerce is exactly enough (Ginsburg Dissent: 3 votes)
      3. Volume test (Breyer/Alito) (lots to suggest that there WAS sufficient volume here, but not enough of these facts came to light in trial).
   4. Federalism argument contemplated by Kennedy: McIntyre didn’t avail itself of any one state, but did avail itself of the country as a whole. A change to Rule 4 would change this—your turn, Congress.
4. **State of Stream of Commerce Today:** 
   1. **Insufficient:** Exemplified by O’Connor in *Asahi;* Kennedy in *McIntyre*: placing a product into a stream of commerce is not enough, volitional activity with that state is needed too.
   2. **Sufficient:** Exemplified by Brennan in *Asahi;* Ginsburg in *McIntyre*: stream of commerce is sufficient because of foreseeability and economic gain.
5. **Pro-plaintiff and pro-defendant policy reasons exist on both sides**
   1. Tension between state’s interest in regulating impactful conduct in its territory vs. defendant’s interest in tailoring its exposure to potential lawsuits
      1. 3 lug/4 lug problem
6. **Relationship between manufacturer and distributor** (arms-length vs. wholly owned) and **volume** of commerce are factors to be considered
   1. If manufacturer influences distribution channels or distributor sells a large quantity of products to forum state, this presents a stronger argument for minimum contacts
      1. If distributor is under ultimate control and performs an essential function of corp., could be considered an “agent” and lead to attribution of contacts.
      2. Consider the Uber problem; at what point is non-full-time employee an agent/contractor.
      3. **In general:** if corp sells products to wholesalers outside of the US and they end up in the US, likely no specific jurisdiction; however, if corp developed a relationship with a US distributor purposefully, it will be subject to jurisdiction in the state where the distributor is located; maybe, though not clearly, elsewhere too.
   2. Disagreement about how “volume” should be measured (units or amount of $$) and whether it should influence minimum contacts determination
      1. Lack of volume was relevant in court’s decision that there were no minimum contactsin *McIntyre* (“trickle” of commerce vs. “stream”); see Stevens in *Asahi*; Breyer/Alito in *McIntyre* (Ginsberg/Sotomayor say $$ is volume).

**C. Volitional Contact/Purposeful Availment**: Did defendant have volitional contact/outreach with that state? Contracts cases and intentional torts.

1. ***Hanson v. Denckla***, U.S. Supreme Court, 1958
   1. D must have availed himself “of the privilege of conducting activities with in the forum state, thus invoking the benefits and protections of its laws” so D can reasonably be haled into court.
   2. Contacts can’t be random or fortuitous, must be **deliberate*.*** (***Burnham*** is outlier for individual).
2. ***McGee v. International Life Insurance***, U.S. Supreme Court, 1957
   1. **Background:** Texas company took over the contracts and policies of Arizona insurance company after it went under.
   2. Franklin, a California resident, dies, and his beneficiary seeks to collect payment, but insurance company refuses.
   3. She sues in California and gets a judgment, but Texas courts would not allow her to enforce judgment since they held that there was no jurisdiction in California.
   4. **Holding:** In a contract case like this, there was volitional activity between the insurance company and policy holder in California that authorized jurisdiction in BOTH states:
      1. **Economic Benefit** (McGee received payments from Cali)
      2. **Effect** (felt in Cali)
      3. **Foreseeability** (by engaging in Cali contract)
      4. **CONTRACTS case (as opposed to Tort case in Gray, Calder, Keeton):** Contracts imply a higher degree of volitionality, history of a relationship with the other party.
   5. **Sub-holding:** *McGee* was an easy case (all three: economic benefit, effect, and foreseeability) were relevant here; but under alternate facts, if there was no opportunity for International Life Insurance to disengage, if economic benefit ceased, etc., there could be a different outcome.
3. ***Burger King v. Rudzewicz,*** U.S. Supreme Court, 1985
   1. **Background:** Franchisee in Michigan contracts with Burger King (headquartered in Miami).
   2. Franchisee misses payments, so Burger King sues to terminate contract in Miami.
   3. There was sufficient evidence of volitional activity in the forum state (Florida): contract PLUS payments, exchanges pre and post contract relationship.
   4. ALSO, the terms of the contract listed Florida as the choice of law.
   5. **Holding:** By itself, a contract is not enough, but the additional events/activities before and after signing of contract can amount to minimum contacts/volitionality.
4. **Limit on Volitionality:** *Kulko v. Superior Court,* United States Supreme Court, 1978
   1. **Background:** After a divorce in NJ, both kids stay with dad in NY.
   2. Dad sends older sister to live with mother in California, and then younger brother goes without father’s knowledge.
   3. **Holding:** Sending the kids there is not enough to imply volitionality; for policy and family reasons, we don’t want children to be moved around like chess pieces for jurisdictional purposes.
5. **Intentional Torts** (implies a degree of volitionality; effects test + foreseeability):
   1. ***Keeton v. Hustler,***U.S. Supreme Court, 1984
      1. **Background:** Hustler published naked pictures of a well-known business woman who had previously been a model.
      2. Keeton missed the statute of limitations for libel cases in all states except for New Hampshire (which has a 6-year statute of limitation).
      3. She sued in NH on the grounds that Hustler distributed the article within that state—10k-15k copies per month, to be exact.
      4. **Holding:** This was an intentional tort, the harm was explicitly felt in New Hampshire, and that state was sought out by Hustler; jurisdiction is proper.
         1. Consider, though, impact if Hustler had not been the distributor (instead, worked with a distribution agency). This is an open question regarding McIntyre/Asahi analysis.
   2. ***Calder v. Jones,*** United States Supreme Court, 1984
      1. **Background:** National Enquirer allegedly published libelous article about Calder; Jones sued the writer and editor (both residents of Florida) in California.
      2. Effect was felt in California (harm felt), foreseeable that publication would be distributed in CA, and volitional action.
      3. **Holding:** Writer and editor are subject to jurisdiction in FL because they knew the magazine would be sold in California, interviewed people based in California, and caused substantial harm in the state.
   3. ***Walden v. Fiore,*** U.S. Supreme Court, 2014, Justice Thomas
      1. **Background:** Professional gamblers have money confiscated by defendant, a DEA agent, in Atlanta, Georgia.
      2. Agent allegedly files phony affidavit regarding drugs, even though it’s found out later that the plaintiffs are professional gamblers (legal in Nevada) and not drug dealers.
      3. They sue in Nevada: the harm was felt in that state, even though the events took place in Georgia.
      4. **Holding:** Having an impact/causing harm (even allegedly intentional harm) is not enough without more volitional contact with state.
         1. Defendants’ only contact with the state can’t be that the plaintiff happens to live there, there must also be contacts with the state (not just the state’s residents).
         2. Intentional Tort Limitation: not enough without additional volitional activity.
         3. BN: thinks this might be wrong—holding had a lot to do with the fact that the plaintiffs were gamblers.

**D. Foreseeability**

1. **Specific foreseeability**: there is a high likelihood that a product will end up in a specific place, either because you have done something that made it likely, or the fact pattern makes it likely.
   1. ***Gray v. American Radiator*** (maybe, especially if Titan knows that American Radiator has a huge volume of sales in Illinois).
   2. ***McIntyre*** *(*if there had been evidence about huge volume of sales in NJ).
   3. ***Calder*** and ***Keeton***
2. **General foreseeability**: it is generally foreseeable that a product might be used in various places.
   1. ***Volkswagen****:* classic example. Car can travel anywhere.

**E. Types of Suits:**

1. **Contracts:** Race to the courthouse problem—both parties have minimum contacts in each other’s state, as long as there is Contract + Additional Contacts (*Burger King* Test).
   1. Easier to get jurisdiction but contracts alone are not sufficient (contracts-plus: *Burger King).*
      1. Look to K, but also Pre K and Post K
   2. Choice of law issues: if both parties to a contract have minimum contacts in each other’s state, who sues first is important
2. **Intentional Torts:** D knowingly caused harm in a state.
   1. Easier to get jurisdiction than Unintentional torts, but not as easy as contracts.
   2. Effects test and foreseeability, but not always enough (see *Walden).*
3. **Unintentional Torts:** Products liability issues (*Asahi, McIntyre, Volkswagen, Gray).* 
   1. **Agency Theory:** A subsidiary is acting on your behalf—can attribute contacts if specific and wholly owned; not for general (*Daimler)*
      1. **Importance of Corporate Veil:** Even wholly owned and not separately run agents maintain a certain level of distance.

VI. Fair Play and Justice: Asahi trap door (simple question: is jurisdiction fair and will it advance justice?)

1. *Asahi Metal v. Superior Court*, United States Supreme Court, 1987
   1. **Background:** Motorcycle accident in California led to death of wife and major injury to driver.
   2. Tire blew up, and rider blames accident on defective tire tube.
   3. Sues Cheng Shin Rubber (Taiwanese manufacturer of tire tube) and Asahi metal.
      1. Under Rule 14 (impleader), Cheng Shin says that Asahi will be liable to pay if Cheng Shin deemed liable.
      2. Cheng Shin settles, so the indemnity claim between Cheng Shin and Asahi is all that remains (plaintiff now gone).
   4. **Holding**: Plurality Opinion:
      1. Not enough minimum contacts/volitionality. **D must have had volitional control.** (O’Connor: 4 votes)
      2. Fair play and substantial justice issues simply do not lean towards adjudicating here (8 votes)
      3. There was foreseeable/stream of commerce here: **Exploiting the market via stream of commerce constitutes purposeful availment.** (Brennan: 4 votes)
      4. Volume test (look to the stream of commerce, not just trickle of commerce) (Stevens: 1 vote).
   5. **Fairness Factors contemplated by Asahi:**
      1. Burden/convenience on defendant
      2. Interests of the plaintiff
      3. Interests of forum state in protecting citizens
      4. Interests of forum state in enforcing its law
      5. Other nations’ interest and intersection with international countries

VII. GENERAL JURISDICTION: The Ever-Shrinking Illusion

* Where connection to the state is so systematic and continuous that D is subject to suit for any claim, even unrelated to in-state activities.
* BN calls for a similar process to specific jurisdiction: (1) minimum contacts; (2) Asahi trap door. But court rejects this and doesn’t impose an Asahi Trap Door for general jurisdiction for individuals, and for corporations, general jurisdictional authority is shrinking.

**Rules:**

* Post ***Daimler***, General Jurisdiction over a Corporation is limited to where a corporation is “at home.”
  + “At Home” is where a corporation is incorporated (could be multiple places). We don’t yet know if it also means principal place of business, but it might.
  + **Note:** This may be a different test than the ***Hertz Corp*** “nerve center” test, which is the principal place of business for *diversity purposes* under 1332c(1).
* Post ***Burnham***, General Jurisdiction over Individuals is still an open game: if you are present there, you can be tagged and sued for just about anything.
  + Holdover from the *Pennoyer* model for individuals.

**Two types of general jurisdiction:**

1. **Over Individuals**
   1. *Burnham* shows this is alive and well, despite Brennan’s attempt to hinge the case on minimum contacts.
2. **Over Corporations**
   1. What does it mean for corporation to be **“at home”**? (analogizing corporation to an individual; jurisdiction of last resort).
      1. *Perkins v. Benguet*, U.S. Supreme Court, 1951
         1. **Background:** Corporation in the Philippines leaves during the war and is run out of president’s basement in Ohio.
         2. Perkins sues Benguet in Ohio, even though relevant events took place in Manila.
         3. **Holding:** At the time, Benguet was essentially at home in Ohio—every tangible element of the corporation was in Ohio.
            1. **Sub-Holding:** Jurisdiction of last resort (jurisdiction by necessity).
      2. ***Daimler AG v. Bauman****,* U.S. Supreme Court, 2014
         1. **Background:** Daimler is based out of Argentina, and subsidiary Mercedes Benz USA is a Delaware corporation, and MBUSA in California has large presence in state.
         2. Plaintiffs allege that MB was responsible for disappearances during the Argentinian Dirty War.
         3. Because contacts of Daimler are not sufficient on their own, plaintiffs bring in MBUSA, which has huge presence in California: this is akin to agency theory (you can attribute vast activity of MBUSA back to parent, Daimler).
         4. **Holding:** Significant limitation/reduction of “general jurisdiction”: for all intensive purposes, a corporation can only be subject to general jurisdiction where they are “at home.”
      3. Meaning of “At Home” is contested, but definitely place of incorporation; we don’t know if it’s anywhere else. Maybe where you have your principal place of business.
   2. **Minimum Contacts on Steroids**: the way to get general jurisdiction over a corporation at the time of *International Shoe* was to demonstrate a flood of contacts, rather than “minimum contacts.”
      1. ***Helicopteros Nacionales v. Hall***, U.S. Supreme Court, 1984
         1. **Background:** Helicopteros, a Colombian corporation, contracted to provide helicopters for a pipeline project to take place in Peru.
         2. The corporation gets paid through Texas bank, and all training of helicopter operators is conducted in Texas.
         3. Four people die in Peru and a jury trial rejects the claim against Bell, which was that they had negligently built and serviced the helicopter, leaving only Helicopteros in the suit.
         4. Plaintiffs attempt to assert general jurisdiction over Helicopteros, on the grounds that they negotiated the deal in TX, payment was draw on TX bank checks, and pilots were sent to TX for training. (Only General, not specific, jurisdiction was asserted).
         5. There was a choice of forum clause (like *Burger King* K+ theory), but that doesn’t govern because this was a tort case, not one arising out of the contract.
         6. **Holding:** The contacts between the Colombian corporation and Texas did not rise to the “quantum of contacts” needed to prove the “continuous and systematic” activity that is necessary for general jurisdiction.
            1. **Sub-holding:** The lawyers did not assert specific jurisdiction so the court did not consider it, but Brennan raises it in his dissent, asserting that there was “related specific” jurisdiction.

**Specific Related:** Not that the were a core overlap between the liability and jurisdictional facts, but rather that there is a connection and relationship between the facts. **(**BN is a big fan).

* + 1. ***Goodyear Dunlop v. Brown***, U.S. Supreme Court, 2011
       1. **Background:** Goodyear USA has national subsidiaries across the world, including Luxembourg, Turkey, and France.
       2. A bus blows up in France, killing children from NC, and the parents blame the tire.
       3. The tire in question was manufactured in Turkey, sold by Luxembourg distribution entity, and used in France.
       4. Plaintiffs allege that because the subsidiaries have each sold some tires in NC, they should be subject to suit there. Goodyear USA maintains jurisdiction.
       5. **Holding:** Just not enough to get jurisdiction. Contacts of parent corp (Goodyear USA) can not be attributed to other subsidiaries, and there’s no evidence that the same tire used on the bus was sold in the U.S.
          1. **Goodyear test:** first provides the test of where the corporation is “at home”: Place of Incorporation and Principal place of business.

## VII. Specific Related

**General Rules**:

* Neuborne’s test: not actually decided or determined by the Supreme Court, but potentially will involve an analysis closer to Specific Jurisdiction.

**“Specific Related:”** No direct overlap between liability and jurisdictional facts, but a natural relationship.

* 1. *Helicopteros* (Brennan dissent)
     1. BN predicts: this is where the court will go next; as general jurisdiction shrinks, all that’s left is specific related.

## VIII. MODERN IN REM/QUASI IN REM

After fall of territorial system, not much left of QIR/IR (just long-arm holes & security).

**General Rules:**

* Post **Shaffer**, Quasi In Rem jurisdiction (seizure of property) requires minimum contacts—presence of property is not sufficient. In effect, this:
  + Guts QIR2 (no more in use)
  + Makes QIR1 virtually unnecessary, except:
    - If there is a security risk or fear that something will happen to render the property tampered with.
    - If there is a whole in the long-arm statute and property in the forum state authorizes power over the owner.
* In Rem: Modern use in Interpleader Proceedings (Rule 22).

1. Two types of Quasi in Rem:

1. **QIR 1:** Suit is about the property/related to property. There’s a good chance that there are minimum contacts anyway.
   1. Pennoyer
   2. Pennington v. Fourth National Bank, U.S. Supreme Court, 1917
      1. Seizure of bank account in the state to pay alimony is constitutional quasi in rem proceeding.
   3. If QIR1 will satisfy minimum contacts, then there’s no reason to seize property unless there is a hole in the long arm statute.
2. **QIR 2**: Suit is not about the property at all; property is coincidental. **This barely exists anymore.**
   1. *Shaffer v. Heitner,* U.S. Supreme Court, 1977 (arguably falls here)
      1. **Background:** Allegations that Greyhound was engaging in predatory pricing in the Pacific Northwest.
      2. Shareholder sues the board of directors in Delaware alleging mismanagement for allowing company to engage in this illegal activity.
      3. Greyhound is incorporated in Delaware, principal place of business in Arizona.
      4. To assert jurisdiction, plaintiff seized stocks in Delaware.
      5. **Holding:** Having property in state is not sufficient, there must also be minimum contacts in that state (even in cases of QIR).
         1. **Sub-Holding:** DE had a long arm statute that was not limited to directors of corporations; instead, anyone who owns stock in a DE corp is subject to seizure. Court concerned about impact on this, and wanted to strip the ability for anyone to do that.
         2. BN: This is crazy because there are minimum contacts here (if you are director of corp., you have contacts with place of incorporation; but this case made broader point).
   2. Remaining types of QIR:
      1. Security attachment (attach property so that the owner doesn’t run away with it).
      2. Holes in Long-Arm Statute (if long arm statute doesn’t give full power, QIR 1 could fill hole---**a BN hypothesis**).

**B. In Rem:** exercise power over property; determine who owns the property (major contention).

1. *Hanson v. Denckla,* U.S. Supreme Court, 1958
   1. Grandmother lives in PA and pays money to a DE bank for her trust.
   2. After she dies, money is going to be split between two daughters, with trust assets left to two grandchildren.
   3. Daughters and grandchildren live in FL, PA lawyer goes to FL to arrange deal with grandchildren and doesn’t get full signatures for FL law.
   4. Bank in DE is an **indispensable** party; bank seizes money in in rem proceeding to exercise judgment.
      1. In FL, all the other parties were there. The bank may not have been an indispensable party actually, since there was no Rule 19 “scary story.”
   5. Compare to *McGee* and *Burger King:* less volitional contact between DE bank and the state of FL—not enough to subject DE to jurisdiction in FL.
      1. Bank couldn’t leave volitionally (in *McGee*, insurance co. could have).
   6. **Holding:** An individual’s unilateral movement to another state does not necessarily bind the contracting party (bank) to jurisdiction there without other contacts.
   7. **Full Faith and Credit:** There were two judgments; because the Florida one was first, if that were valid, it would have prevailed.

## IX. Personal Jurisdiction and the Internet

## An ongoing open-ended question. The Supreme Court has not taken on a website jurisdiction case.

1. Neuborne’s Take

* Passive vs. Active Website: websites that incorporate communication between the parties give in personam jurisdiction; otherwise, no.
* Jurisdiction of last resort: where the server is located.

# Subject Matter Jurisdiction

**Two types of SMJ:**

1. Federal Question Jurisdiction **(1865)**
2. Diversity Jurisdiction (oldest; created form of fair dealing)

Answers the question: which court within the forum has the power to decide this suit?

**General Rules:**

1. Federal courts must have original diversity or FQJ in addition to PJ over parties involved.
2. SMJ: cannot be waived (PJ can). And can be brought up at any point in litigation and on appeal.
3. Source and Limits of SMJ:
   1. Article III § 2 creates outer boundaries of what types of cases federal courts can here.
   2. Congress then decides what powers are given by the Constitution to confer to courts by statute:
      1. 28 U.S.C. § 1331: Federal Question
      2. 28 U.S.C. § 1332: Diversity

## I. Federal Question Jurisdiction

If the suit implicates a federal law, then federal courts MAY have the power to hear it.

**Personal Jurisdiction:** Must be raised by defendant or else it will be waived.

**Subject Matter Jurisdiction:** Can be raised by the court; often is. Not waiveable.

**State Courts:** Courts of general Jurisdiction

* State courts have concurrent jurisdiction with federal courts, unless Congress has made federal court jurisdiction exclusive.

**Federal Courts:** Courts of limited Jurisdiction

**Importance of Federal Courts:**

* Goal is to separate judges from political influence
* Federal courts typically have less allegiance to the state
* Insulation from political pressure, not elected.

**Supremacy Clause:** Federal law is the supreme law of the land; when there is a conflict between federal and state law, federal law trumps.

**Rules:**

1. If the suit directly implicates a federal law, there is easy FQJ.
2. If the suit potentially implicates a federal law (e.g. through a state law that invites in a federal law, or through another process of borrowing), then there may be FQJ if:
   1. The federal law raised is a substantial issue (contested, controversial, important)
   2. Legislative intent authorizes this use
   3. Federalism concerns are met (e.g. not a huge number of cases that could be shifted as a result.

**Article III, § 2 of the U.S. Constitution:** Interpretations of the power authorized under Article III has changed.

* Sets up Supreme Court
* Sets up any lower courts that Congress can establish
* Limits federal judicial power to claims:
  + Arising under the Constitution, laws, or treatises of the United States (1331)
  + Cases affecting ambassadors, public ministers, and consuls
  + Cases of admiralty and maritime jurisdiction
  + Cases where the United States is a party
  + Cases where one state sues another state
  + Cases between citizens of different states (1332)
  + Cases where citizens of the same state sue each other with claims based on land grants from different states
  + Cases between states or citizens against foreign states or foreign citizens.
  + Loophole: Two International Citizens (Alien v. Alien)
    - ***Daimler:*** Lawyers sued in federal court under two federal statutes (Federal Question) but would not have had Alien v. Alien diversity jurisdiction.

**“Arising Under” Standard”: History of What it Means**

1. **Pre-Federal Question Jurisdiction Statute**: *Osborn v. Bank of the United States*, U.S. Supreme Court, 1824, Justice Marshall
   1. Previously, small private banks issued their own currencies, and no paper money.
   2. Bank of U.S. was controversial idea, and Ohio (Jacksonian stronghold\_ believe that the Bank has an unfair advantage over other banks, and should be taxed.
      1. This is problematic, because federal organizations have **intergovernmental tax immunity**.
      2. But, Bank of U.S. is technically privately owned.
   3. Bank gets an injunction against the tax from a federal judge, but Ohio collects the tax anyway, and says that the case was not in front of the federal judge lawfully: no subject matter jurisdiction.
   4. Bank Charter contained a provision that the Bank of the United States has the power to “sue or be sued” in federal court.
   5. **Holding:** As long as you can imagine that a question of federal law will be raised throughout the life of a lawsuit, the suit is properly placed in federal court.
      1. **Based on the “Federal Ingredient” argument.**
      2. **Argument:** As the charter states, any suit involving the bank **necessarily** has the potential to raise a question of federal law, since the charter was federally issued.
   6. **Complications:** This makes sense here (the collection of the tax is a federal issue, involving the power of the country to raise money), but what about in situations regarding mortgage foreclosure?
      1. **This interpretation of Article III:** does not limit to the likelihood of a federal question arising, but states that because the bank is chartered by the federal government, there is NO situation in which a federal question couldn’t come up.
2. **Limitations of Federal Question:** *Louisville & Nashville Railroad v. Mottley,* U.S. Supreme Court, 1908, Justice Holmes
   1. Mottleys are involved in a railroad accident, and instead of a cash settlement, they receive free train passes.
   2. In 1907, Congress passed a law forbidding railroads from charging differential rates, which includes free passes.
   3. Mottleys sue in federal court (**BN:** with the help of the railroad, which wanted to strike down the differential rate law), saying that the statute is illegal, and their free pass contract is legitimate.
   4. **Federal Question History:** Briefly created in 1801 with the Judiciary Act, then repealed in 1802, then restored in 1875; now in **28 U.S.C. § 1331.** 
      1. Uses the same language as Article III § 2: “arising under.”
   5. **Holding:** The complaint itself is a Contract Issue (State Law), not itself about the federal law. The federal issue is raised in the context of the likely defense, not in the actual complaint.
      1. **Takeaway:** Court says that “arising under” has a different meaning in **28 U.S.C. § 1331 and in Article III § 2:** 
         1. **Article III:** *Osborn* approach: it is possible for a federal question to arise?
         2. **28 U.S.C. § 1331:** *Louisville* approach: Federal question must come up in the context of the claim, not in the defense.
            1. **Reinforced by *Skelly:*** Artful pleading is not enough, the federal law must be the natural law arising under.
            2. Even if the defendants are OBVIOUSLY going to raise a federal question (*Louisville),* it doesn’t matter: must be part of the plaintiff’s claim alone.
            3. This was not raised by either party: just by SCOTUS.
      2. *Louisville* is a **Four Corners** case.
      3. **BN:** This raises really challenging questions about the meaning/consistency of language. How can the same words mean different things?
         1. If language is that malleable, what kind of meaning do we get from words?
         2. Establishes major uncertainty in the law: how do you communicate your desire to take full power without using the same language?
      4. **Other Historical Rationales:** SCOTUS did not want to take out this law; universal feeling that this law was important and should not be removed.

**Two-Step Test in Federal Question Jurisdiction:**

1. What does Article III, § 2 say?
   1. Constitution is not self executed. There has to be some form of Congressional action (similar to the relationship between Due Process Clause and Long Arm statutes)
   2. Constitution tells us the Limits of Congressional Power.
      1. *Osborn* standard: if a federal question could conceivably be raised, it is well placed there.
   3. **Article III** is the Invitation to Congress.
2. What does the text say?
   1. In *Osborn*, pre-federal question statute: what does the **charter of the bank** say?
      1. Can “sue or be sued” in federal court. That is sufficient.
      2. Broadest reading possible of “arising under.” Demonstrates the limits of Article III.
   2. In *Louisville*, **28 U.S.C. § 1331:** what does the statute require?
      1. The federal question must be raised in the plaintiff’s complaint. It must be central to the complaint.
         1. Look to the **Source** of the claim: what is your theory of why you should win?
      2. **28 U.S.C. § 1331** is the acceptance, which is a limited acceptance.

**Two Approaches to 28 U.S.C. § 1331:**

1. **Mechanical (Holmes):** The claim has to be hooked onto a federal law.
   1. *Louisville*
   2. **BN Rationale:** It makes sense to construe the Constitution as broadly as possible. Allow Congress to tailor its actions to the needs of the time, provide maximum flexibility to Congressional power.
      1. **Statutes:** Narrower reading of the amount of power that Congress is actually using (out of all of the possible power they can use).
   3. Dominant Interpretation (until very recently).
2. **Functional (Marshall):** What law is actually going to control the outcome of the litigation? Doesn’t matter what the original face of the complaint is.
   1. *Osborn*
   2. All later cases where the federal law necessarily barges in.

**Frameworks for Considering FQJ:** When analyzing if there is FQJ, consider the following:

1. Does it pass the Holmes Mechanical test (e.g. you are suing under a federal law itself; easy FQJ)
2. Is this issue important to the government? (Substantial and Contested)
3. Does the federal law necessarily barge in to the state law? Is that how we determine if there’s a claim at all? (Structure of the Law itself)
4. Is it a four corners case?
   1. *Louisville:* Four Corners: the entire claim is based on the contract claim alone.
   2. *Smith:*Law is invited in in—corners are permeable out of necessity
5. Frequency of case? How many of these types of claims will come up, and how many will be shifted to federal courts?
6. Relationship of State Law to Federal Law:
   1. Antagonistic: *Louisville*
   2. Small Bleeding, but not based on an invitation: *American Well Works, Moore*
   3. Allies and Borrowing: *Smith*

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| Case | FQJ? | Issue | Structure of Law | Four Corners Case? | Frequency of Type of Case? |
| Smith | Yes | Federal government’s ability to raise money: **Super Important** | State law barring “illegal” bonds: necessary to look to federal law to determine status. | **No**: language of law mandates that you look to federal law.  --mandatory interference through language of claim. | Once a century: very few |
| American Well Works | No | Libel: Not Super Important | Libel law (state law): one of the allegedly libelous claims related to patent (federal law). | **Yes**: claim is based on State Law.  --Federal law barges in Coincidentally (based on circumstances), not based on language of law itself. | Super frequent |
| Moore | No | Garden variety torts claim: **Not Super Important** | Claim itself is a torts claim (negligence—state law); available defenses are determined by federal law. | **Yes:** Torts claim does not mandate interference from federal law.  --Coincidental, not mandatory, interference. | Super frequent |
| Shoshone | No | Land Patents: Not super important | Federal statute is meaningless on its own: requires looking to state law to develop meaning. | **No, but in an inverse way:** Federal law mandates state law to barge in. | Potentially frequent. |
| Merrell Dow | No | Labeling laws: Not Super Important | Federal law does NOT have a private cause of action. | **N/A:** based on Congressional desire/intent | Super frequent. |
| Bivens | Yes | Civil Rights: Super Important | Federal law does NOT have a private cause of action (and there is indication that that is intentional), but court reads it in. | Yes: Federal Law | Not very frequent (hopefully). |
| Grable | Yes | Lifeblood of Gov: Taxation. Super Important | No private cause of action in Federal Law, but also no Congressional statement to the contrary. | **No:** Grable’s claim is brought under State law (Title of Land), but the validity of the State Law Claim depends on the federal IRS land notification law. | Not very frequent. |
| Empire | No | Medical insurance issue: Not Super Important | Federal law does not have a private cause of action. | Federal law, but no ability for private citizens to sue under it. | Possibly frequent. |

* ***American Well Works v. Layne,*** U.S. Supreme Court, 1916
  + Pump manufacturer claims that his competitor is saying bad things about him, including that he violated a patent.
  + **Federal Judge:** Is this a patent claim (federal law) or a libel claim (state law)?
  + **Holding:** Ultimately, this is about state libel law, not actually about patent law.
    - Patent Law would be the counterclaim (competitor says you violated a patent), but the original claim is based on libel law.
  + **Modification of Mottley:** It’s all about who sues first.
    - If the competitor had sued first on patent violation, it would have been properly in federal court.
    - If railroad had sued first saying the federal law relieved them of their obligation to provide free passes, it would have been fine in federal court.
  + **BN:** This is particularly crazy today, given new pleading rules: the defenses come out immediately.
* ***Smith v. Kansas City Title & Trust,*** U.S. Supreme Court, 1921
  + Congress issued bonds allowing the U.S. to borrow money to cushion the loss in the agricultural industry.
  + A shareholder of a Kansas City Bank believes that this is an unconstitutional action, sues the Bank in state court, but bank tries to remove to federal court.
    - Missouri State Law: says that banks can only invest in bonds authorized by law. Shareholder says these bonds are **NOT** authorized by law.
  + **Smith:** Source is a state law.
  + **Bank:** To determine whether the bonds are authorized, we need to look at federal law.
  + **Holding: There is FQJ:** In order to know if there is a state claim at all, we have to answer a federal question (is the bond authorized?)
    - Federal question is necessarily embedded in the state law, not actually separate.
    - The state claim itself depends on a federal issue.
      * If Mottley law had been “You can enforce any contracts that don’t violate federal law,” then theoretically the case would have been the same as Smith and there would have been FQJ.
    - **BN:** Really, this is all about the country’s ability to decide this issue in federal court: it’s about money and the country’s ability to raise it.
      * Driven by Federal Interest/Subjective Standard.
    - **Razor thin distinction with *American Wells:*** the law in *Wells* does not reach out and borrow the federal law; the language of the state law in *Smith* requires us to look to federal law.
* ***Moore v. Chesapeake & Ohio Railway***, U.S. Supreme Court, 1934
  + Employee says he has been hurt at work, and that employer violated federal safety law.
  + Under state law, no employer can use an affirmative defense (including that the employee assumed the risk or knew the work was hazardous) if they are violating a federal or state safety requirement.
  + Moore tries to sue in federal court, because railroad’s defenses are limited by federal safety law.
  + **Holding: No FQJ:** The claim itself arises under state law (negligence). The issue of which defenses the defendant can bring depends on federal law, but the freestanding claim is a state law claim.
    - **Again, BN:** Based mostly on importance of the claim to the federal government: money vs. garden variety torts case.
  + Federal Law is invited in not to determine if there IS a claim (*Smith)*, but to determine how the claim will unfold—the degree to which there are defenses.
    - **FQJ:** Borrowing to know if you have a claim: *Smith*
    - **No FQJ:** Borrowing to know how powerful your claim is: *Moore*
* ***Shoshone Mining Co. v. Rutter***, U.S. Supreme Court, 1900
  + Federal statute creates a system allowing miners to resolve land patent claims by the rules in local districts.
  + Federal law: **Template** that looks to local and state laws to fill itself in.
    - Codification of local practices, as long as they don’t contradict federal law.
  + **Holding: No FQJ:** This is an inverse of Smith: hook is on a federal statute, but in order to fill itself in and give it meaning, you have to look to state laws.
    - **Inverse of *Smith:*** Not a four-corners case, but in the reverse sense: State Law is necessary to meaning of Federal Law.
    - Look to the law that’s been invited in to control the case; that’s the law that the case arises under.
* ***Merrell Dow Pharmaceuticals v. Thompson***, U.S. Supreme Court, 1986
  + Canadian plaintiffs sue pharmaceutical company for a drug that had horrible effects on pregnant women.
  + They want to be in state court, so they avoid diversity, but defendant tries to remove to federal court.
  + One of the claims states that MD violated federal drug labeling law by not having adequate warnings on the drug: don’t sue under this, but say that Ohio law borrows the federal law.
  + Federal law: did not have a private cause of action.
  + **Holding: No FQJ:** Court looks to Congressional intentions: was there a desire to have this sort of claim in federal court? Since there was no cause of action, court holds that there was no desire to put this in federal court.
* ***Skelly Oil Co. v. Phillips Petroleum Co***., U.S. Supreme Court, 1950
  + **Holding: No FQJ:** You have to take the complaint apart and look at:
    1. Why you should win.
    2. Why your defendant’s defenses are insufficient.
  + **Confirmation of Mottley:** you can’t anticipate the federal defense through anticipatory pleading.

**Significance of Private Cause of Action:** Are private people authorized to enforce the law?

Determines whether private people can be the enforcement agent as well as the government.

* **Default Rules:** Criminal statutes are presumed NOT to create private causes of action unless otherwise specified by statute.
* **Civil Norms:** depends on court.
  + **Democrats (**Warren court): implied cause of action unless stated otherwise.
    - This is the rule when *Bivens* is decided: unless they say no, the answer is yes.
  + **Republicans:** Presumed NOT to be there. Unless you say yes, the answer is no.
* Presence of a Cause of Action Matters, but is not the ultimate decider:
  + *Merrell Dow:* No cause🡪 no FQJ, BUT
  + *Bivens:* No cause 🡪 court reads it in so there is FQJ.

***Bivens v. Six Unknown Federal Agents***, U.S. Supreme Court, 1999, Justice Brennan

* Bivens’ home was searched by Federal Bureau of Narcotics agents without a warrant.
* Requests damages under 4th Amendment.
  + Since 1875, a law grants private causes of action under the Bill of Rights against state and local officials.
  + Problem: there is no corollary against federal officials. Statues had been introduced creating private cause of actions against federal officials, but they had been struck down.
    - 4th Amendment: U.S. Attorney’s Office can sue, but not privately enforceable (pre-Bivens).
* **Holding: There is FQJ:** Court reads private cause of action into the 4th amendment: there is a judgment made that the writers of the amendment wanted private enforcement against federal officials.
  + **BN:** *Bivens* would lose today with current court.

***Grable & Sons v. Darue Engineering,*** U.S. Supreme Court, 2005

* Grable’s land is seized and sold to Darue.
* Grable claims the IRS did not inform him in person (as required), and thus the land deed is void—sues in state court about the land deed, but D removes to federal court because the validity of the deed depends on federal tax law.
* There is no private cause of action for enforcement of these claims.
* **Holding: There is FQJ:** Even when there is no private cause of action, as long as there is no contradictory Congressional intent, if the federal interest is HUGE, then there doesn’t need to be a private cause of action.
  + **Compare to *Bivens:*** Negative Congressional statement: consciously chose not to put this in federal court.
  + **Emergence of the Federalism Shifting Consideration:** How many cases will this shift from state to federal court?
    - **Moore:** would have shifted every employee liability case.
    - **Smith:** just one case a decade
    - **Grable:** rare, not too frequent.
  + This was an issue of law that needed to be decided; once it’s decided, there is precedent.
    - Compare to *Merrell Dow:* these are questions of fact that will need to be decided afresh with each case.
  + **BN:** This is like *Mottley*: the claim itself is a state land claim, but the federal legal issue (IRS land transfer), arises in notice.
    - Transcendental nature of the importance of the issue trumps Mottley too.

***Empire Health Choice v. McVeigh***, U.S. Supreme Court, 2006

* McVeigh is killed on the job at his federal job.
* Insurance gives him money for medical care, but his estate also gets a large monetary settlement from the tort feasor. Question: does he have to pay it to insurance company?
* Federal contractual issue: requires you to reimburse the insurance company if you get a large settlement.
* **Holding: No FQJ:** This is not a large enough federal interest.
  + **BN:** This is an interpretation of what “large federal interest” means, and since it involves people and not money, the court doesn’t care.

**GRABLE TEST FOR FQJ:**

1. **Substance:** How Substantive is the Federal Issue? Is it contested?
2. **Legislative Intent:** Did the legislature intend to establish a private cause of action?
3. **Federalism:** Federalism concerns: will this shift a ton of cases from state to federal court?

|  |  |
| --- | --- |
| **Federal Interest** | **State Interest** |
| 1. Uniformity   * Uniform national rule and enforcement. * Once decided, the decision will have an effect across state lines. | 1. Uniformity   * Unnecessary for national uniformity * One-off case: will decide this case and no others. |
| 2. Fact v. Law   * This is a matter of pure law to be determined—will not be necessary to constantly re-decide it based on factual circumstances. | Fact v. Law   * Fact-based or mix of law and fact. |
| 3. Division of Labor (Federalism)   * Only federalize a low volume of state cases. * Efficiency and division of state-fed labor. | 3. Division of Labor   * State law adopts federal standard. * Don’t want to take jurisdiction away from states. * Would allow a landslide of future cases (***Moore, American Well Works)*** |
| 4. Relative Weight of Issue   * Antecedent federal question: turns on constitutionality of decision of federal issue * Substantial issue of federal interest (***Grable, Smith, Bivens)*** | 4. Relative Weight   * State issue is overwhelmingly dominant (***Merrell Dow)*.** * If state judge will be better suited to deal with entire care or just as good (***Empire)*** |

## II. Diversity Jurisdiction

As opposed to **FQJ:** not based on the substantive nature of what’s being litigated, but rather on the parties involved.

* Accounts for about 25% of the federal court docket.
* Elitism issues: corporate bar wants an elite bench of judges.
* Plaintiffs’ bar wants choices.
* Developed in 1850
* Plaintiffs can invoke diversity jurisdiction in their own home state, but defendants can’t remove if suit brought in their home state.

**General Rules:**

1. **Maximum Diversity** (no overlap between citizenship on either side of the versus).
2. **Amount in controversy** (based on plaintiffs’ good faith belief) must exceed $75,000.
   1. To justify dismissal, it must appear to a legal certainty that it won’t meet jurisdictional amount (***St. Paul Mercury)***
3. Plaintiffs can invoke diversity in their home state, but **defendants can’t remove to federal court even if there’s diversity if the suit was brought in their home state** (no Bias—but there’s a bias inconsistency).
4. Test for citizenship on the **date that the complaint is filed**
5. **Citizenship:** 
   1. People: Place you are domiciled (permanent residence + intent to stay indefinitely) (***Mas v. Perry)***
   2. Corporations: Could be multiple: Place(s) of incorporation & Nerve Center (principal place of business, e.g. corporate headquarters) (***Hertz Corp)***
   3. Class Action: Citizenship of the named plaintiff (***Ben Hur v. Cauble)***
      1. **Note:** CAFA 1332(d)(2) requires only minimum diversity when any P is diverse from any D (large class actions).
   4. Partnerships (like law firms and unions—every individual’s citizenship)
   5. Representative Parties (beneficiary’s citizenship).
6. **Exceptions to Complete Diversity:**
   1. 28 U.S.C. 1335: **Statutory Interpleader:** minimum diversity for disputed claims of at least $500.
   2. CAFA (at least 100 members of a class and over $5 million aggregated amount in controversy)

**1. Why does it matter?**

* Creating a forum of fair dealing: federal judges are relatively immune from political pressures, not like elected state judges.
* Eliminate home court advantage: if you have parties from different states, bringing a case in one state could lead to preferential treatment from the judge.
  + Not a perfect reason: federal judges are still citizens of states.
  + Still necessary? Is our state identity that strong as to create bias?
* Creation of a national commercial forum
  + Federal judges are more likely to have conservative rather than populist point of view.

**2. Establishing Diversity Jurisdiction**

1. Analogous to Federal Question Jurisdiction:
   1. Exists under **Article III § 2**: “between citizens of different states.”
   2. **§ 1332:** same language “between citizens of different states.”
2. Interpretation of § 1332: **Strawbridge v. Curtis***,* U.S. Supreme Court, 1806
   1. Holding: § 1332 requires Maximum Diversity.
      1. There can’t be any state citizenship commonality on either side of the versus.
   2. Like *Louisville:* **§ 1332**defines Congress’s use of power. Article III **§ 2:** only requires minimal diversity (at least one person of a different citizenship)
      1. Not held and officially decided until ***State Farm v. Tashire***

**3. Logistical Issues for Diversity:**

1. Who?
   1. Under nearly every situation (save Federal Interpleader Act), everyone needs to be diverse from everyone else on the other side of the versus.
2. When?
   1. Test for citizenship on the date that the plaintiff’s complaint is filed.
3. How?
   1. You are a citizen of the state in which you are domiciled. ***Mas v. Perry***
      1. Flesh and blood people: where are you permanently residing without plans to leave? **(Permanent Residence + Intent to Stay Indefinitely).**
      2. Doesn’t have to be where you are currently living: based more on fact determination.
      3. To be considered a citizen of a state, you must be a domicile AND a U.S. citizen.

**4. Who is a Citizen?**

* ***Mas v. Perry,*** United States Court of Appeals, Fifth Circuit, 1974
  + Citizenship for the purposes of diversity is based on where you are domiciled, and that is where you intend to stay for awhile.
  + Problematic: Americans domiciled abroad can’t be sued or sue in diversity jurisdiction unless there is a statute stating otherwise.
* ***Dred Scott v. Sandford***, U.S. Supreme Court, 1856
  + Somerset case: Before Dred Scott, court held that if a slave is voluntarily brought to a free state, he is a free man.
  + In Dred Scott, owner died after taking Dred Scott multiple times to free states.
  + Dred Scott argues that since he has been in a free state, he deserves to be free.
  + **Holding:** A black person, even if free, is not legally a citizen of any state, so can’t sue under diversity jurisdiction.
    - Overturned by 14th Amendment.

**5. Citizenship of Corporations: From Every person 🡪 Place of Incorporation**

**§ 1332 (c)(1) :** Establishes principal place of business standard: you can have two places for diversity purposes as a corporation. A corporation is a citizen of (1) where they are incorporated (can be several places); and (2) where their principal place of business is. **You need to look at every place where the corporation is a citizen.**

* ***Bank of U.S. v. Deveaux,*** U.S. Supreme Court, 1809, Justice Marshall
  + Devaux (GA citizen) sues Bank (all shareholders from PA). (this was pre *Osborn*: so no federal question).
  + **Holding:** A corporation is just a bunch of people. **Test citizenship based on the citizenship of each shareholder.**
    - Obviously, created enormous problems when shareholders move across the country and in light of maximum diversity requirement.
* ***Louisville v. Letson***, U.S. Supreme Court, 1844
  + Letson (NY) sues railroad (SC). Railroad has shareholders from SC, NC, and corporations that have shareholders in NY.
  + Court chooses not to pierce second veil of the shareholder corporations’ citizenship.
  + **Holding:** We care both about the place of incorporation (corporation’s have their own citizenship) and the shareholders’ citizenship. Both might matter.
    - Influential because it establishes the idea that a corporation has it’s own citizenship.
* ***Mashall v. Baltimore & Ohio Railroad***, U.S. Supreme Court, 1853
  + VA plaintiff sues MD railroad.
  + **Holding:** We will presume that every shareholder as the same citizenship as the corporation. The shareholders are irrelevant.
    - Establishes Place of Incorporation as the site of Citizenship & Principal Place of Business.
    - Becomes challenging the future, since some corporations are incorporated in multiple states.
    - 1332c: Explicitly states that corporation’s citizenship is where it is incorporated and its principal place of business.
* ***Hertz Corp. v. Friend,***U.S. Supreme Court, 2010
  + **Holding:** Defines **“Principal Place of Business”** as **Nerve Center.** Corporations can be sued in their nerve center.
    - **Nerve Center is Corporate Headquarters.**
    - Outcome:
      * Corporations: Multiple Citizenships
      * Individuals: Single Citizenship
* **Other types of citizenship:**
  + **Partnerships** (law firms): look to citizenship of each party. (this is Devaux reincarnated).
  + **Labor Unions:** look to citizenship of each party.
  + **Representative Parties:** people fulfilling a responsibility to someone else.
    - Old Rule: executor of the will’s citizenship.
    - Current Rule: citizenship of the beneficiary (*Hanson v. Denckla).*
  + Class Actions: Citizenship of the Named Plaintiff
    - ***Ben Hur v. Cauble***
      * Establishes Class Action Holding: citizenship is based only on the citizenship of the Named Plaintiff.
      * Leads to major game playing. You can easily get a Class Action in federal court.
      * **BN:** This is a historical anomaly, given the Representative Parties rule.
      * Under Big Class Action (CAFA), greater than $5 million, we can use minimum diversity so defendant can remove to federal court: **§ 1332 (d)(2).**

**6. Jurisdictional Amount (Amount-in-Controversy)**

Only applies to **Diversity Jurisdiction:** your claim must exceed a certain limit to make it into federal court on a diversity jurisdiction suit.

* Old Rule: $500
* Current Rule: Must be in excess of $75,000 (at least $75,001).
* **BN:** This is very complicated. Is money the only way to test the significance of a claim? Think about welfare claims for small amounts.
  + **Nixon Tapes:** Amount-in Controversy used to apply to FQJ too. Tapes themselves were worth very little. That case changed it!
* Test for Jurisdictional Amount on the day the complaint is filed.

***St. Paul Mercury Indemnity Co. v. Red Cab Co***., U.S. Supreme Court, 1938

* **Holding:** The jurisdictional amount is based on the good-faith allegations in the plaintiff’s complaint.
  + It is up to the plaintiff to be honest about if the claim could theoretically bring in more than $75,000.
  + It’s tough to guess what a juror will actually do.
  + If you have a good faith belief that’s wrong, that’s okay. But if you were reckless or your claim was in bad faith, there may be penalties.

**7. Diversity Exceptions**

* There is a historic exception to diversity jurisdiction cases for **probate** and **domestic relations** claims.
  + *Pennoyer:* states have pure power to adjudicate status of those in their boundaries.
    - Continuing idea that these types of decisions should be localized, not federalized.
* But now there are shifts to change this: Shrinking categories of exceptions.
  + Spurred by RBG. Argument that there is an assumption that women’s issues are not important enough for federal court.
* Domestic Relations: ***Ankenbrandt v. Richards****,* U.S. Supreme Court, 1992
  + Woman sues husband for abusing her child, sues in federal court based on diversity.
  + **Holding:** This is a torts claim, not a status (divorce or custody) dispute. As long as the case is not based on adjudication of status, a case that arises out of a family situation can be in federal court.
* Probate Exception: ***Marshall v. Marshall***, U.S. Supreme Court, 2006
  + Historically, suits arising out of transfer of property had to be brought in state court.
  + Widow brings suit against estate of deceased husband and son, arguing that there was tortious interference with a promise to leave her money in the will.
  + **Holding:** Like *Ankenbrandt*, when issue is about a tort, it’s an exception to the exception.
* **Violence Against Women Act:** Attempt to create a federal cause of action when there is gender-motivated violence, to avoid requirement of diversity in these cases (even post-*Ankenbrandt).* 
  + Declared unconstitutional: there needs to be a justification for creating a federal cause of action.

## III. Removal Jurisdiction

**Rules:**

1. **Based on § 12 of Judiciary Act of 1787 (only D can remove)**
2. If the case could have been brought in federal court originally, the defendant can remove from state to federal court IF:
   1. The state court is not in the defendants’ home state (if the rationale is diversity—if it’s FQJ, fair game).
   2. The defendant files removal petition with 30 days of receipt of the complaint.

Exclusively based on one question: Could plaintiff have brought the claim in federal court originally under either Diversity or Federal Question?

* **Statute: U.S.C. §1441**
  + (a): “original jurisdiction”
    - goes to the federal court in that district
  + (b): Home state defendant cannot remove – this part is **solely on diversity**
    - Need maximum diversity for this!
    - All defendants must consent to removal – but only those who have been served need to consent (1446(b)(2))
      * If one defendant is served later and wants to remand, they can grant this. §1448.
  + (c): joinder – if no supplemental jurisdiction on original, then it stays
  + (d): foreign state can remove
  + (f): no preclusion just because state court couldn’t hear it
    - This means that if original court did not have jurisdiction, federal court can here the case on removal
* **Only Defendant can remove and only based on the original claim—not based on counterclaim.**
  + ***California Franchise Board v. Labor Union Trust***
    - California Franchise Board tries to tax Labor Union Trust, but Trust says it is exempt under the federal statute regulating employment.
    - CFB sues in state court (enforcing a state tax law); Trust tries to remove to federal court (based on federal tax assessment statute).
    - **Holding:** No Removal Allowed: claim for federal court is based only on the defense.
    - You can’t play a game though and say that a case is only based on state law if it actually isn’t.
    - If plaintiff misrepresents the facts (income tax legality squib) and claims that only a state law is implicated when that’s not true, removal is allowed.
  + ***Shamrock Oil v. Sheets, U.S. Supreme Court, 1941***
    - Plaintiff tried to remove based on the federal counterclaim imposed by the defendant.
    - **Holding:** Only defendants can use removal jurisdiction, and only based on original claim
* **28 U.S.C. §1446** – removal procedure: 30 days from when you could have reasonably known of the citizenship
  + State court loses control so you have to file with the federal court if you’re the plaintiff
  + 30 days from when last defendant was served
  + subject matter can be raised whenever
* **28 U.S.C. §1447(e):** if plaintiff amends and adds a defendant who destroys diversity, court has discretion to remand or not based on whether the amendment was in “good faith.”

**Plaintiffs:** Have the power to decide where to place a case based on choice of law issues (state court) and bias issues (federal court).

* Horizontal power (state to state)
* Neuborne thinks this “chip” is now more powerful for plaintiffs since *International Shoe*.

**Defendants:** Have the power to choose federal court if the suit could have been brought there in the first place.

* Vertical power (state to federal: single direction)
* If basis is diversity, can only be used by a defendant if you are sued in state court in a different state from where you live.
* Since it’s based entirely on avoiding bias, a home state defendant can’t remove based on a fear of bias if the state court is their own state.
  + Compare to Diversity: a plaintiff CAN invoke diversity jurisdiction even if the home state plaintiff doesn’t have fear of bias.

Basics of Removal Jurisdiction:

* Citizenship is tested on date that the petition for removal is filed in federal court, not on the date the complaint is filed.
* There is room for game playing: a plaintiff could change citizenship between initial filing and removal filing.
* Same “arising under” and diversity rules as regular Subject Matter Jurisdiction: you can’t remove based on the federal defense (*Louisville).* 
  + You can’t remove on the basis of a federal counterclaim. Must be based on the initial claim –either arising under or diversity.
* All defendants have to want to remove: you can’t have one in a multi-defendant case who wants to remove.

**Removal Jurisdictional Amount Questions:**

1. ***Standard Fire Insurance Co. v. Greg Knowles,*** Supreme Court of the U.S., 2013

* CAFA (Class Action Fairness Act) puts all class actions in federal court if they exceed $5 million.
* Knowles, as class representatives, attempted to keep the damages below $5 million to keep the claim in state court.
* **Holding:** You can only limit damages for purposes of avoiding jurisdictional amount if you are actually a representative and can speak for the other plaintiffs.

**2.** If Plaintiff does not state amount-in-controversy or says it is below $75,000 to avoid removal, the defendant **CAN** contest that for removal purposes.

## IV. Supplemental Jurisdiction

**Rules: 1367 authorizes Supplemental Jurisdiction when:**

1. If SMJ of original claim is based on federal question **(§ 1331),** the federal court can exercise supplemental jurisdiction over **ALL** state claims that arise from the same “common nucleus of operative facts,” regardless of diversity of the parties.
   1. *Gibbs*
2. If SMJ of original claim is based on diversity (§ 1332), the federal court can exercise supplemental jurisdiction over **SOME** state claims:
   1. Mandatory counter-claims (13a), cross-claims (13g), and third-party claims (14): **easy ancillary jurisdiction** (regardless of diversity and without a required independent basis of jurisdiction).
   2. Claims by plaintiffs against defendants joined under Rules 14, 19, 20, 24: **NO** **supplemental jurisdiction** (require an independent basis of jurisdiction)
      1. Kroger
   3. Claims by plaintiffs joined under Rule 19 and 24: **NO supplemental jurisdiction** (require an independent basis of jurisdiction)
   4. Claims by plaintiffs joined under Rule 20 and 23: supplemental jurisdiction over claims that lack jurisdictional amount **IF they do not destroy diversity.**
      1. This is all we know for sure from *Exxon Mobil* and *Star-Kist*.
3. In all of these cases, even where an independent basis of jurisdiction is **NOT** necessary, there still must be **Personal Jurisdiction** over the parties.

**28 U.S.C. § 1367:**

**(a)** Except as provided in subsections (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 claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

**(b)**In any civil action of which the district courts have original jurisdiction founded solely on [section 1332 of this title](https://www.law.cornell.edu/uscode/text/28/1332), the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

**(c)**The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—

**(1)** the claim raises a novel or complex issue of State law,

**(2)** the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

**(3)** the district court has dismissed all claims over which it has original jurisdiction, or

**(4)**in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

Can you hang additional claims or parties on an existing claim and get both into federal court?

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| Case | Type of Jurisdiction | SMJ? | Rationale | Congressional Intent | Takeaway |
| United Mine Workers v. Gibbs | Ancillary: add a new claim | Yes | Common nucleus of operative facts | Look to Article III and define “case”; Some suggestion of Congressional tailwind (Congress wants labor claims in fed court). | Adding a claim is okay (and under court’s discretion) as long as it emerges from same “common nucleus of operative facts.” Claims are **fact-based.** |
| Aldinger v. Howard | Combo: add a new party and a state claim against the new party | No | Civil Rights Act | Congressional headwind: Congress doesn’t want this type of claim in federal court | You can’t add parties and stay in federal court by working around Congressional intent—must satisfy Congressional intent. |
| Owen v. Kroger | Pendent: add a new party | No | New party breaks complete diversity | Congressional headwind: Congress only wants Complete Diversity cases in federal court | If you add a new party under Rule 14 and they break complete diversity, there is no supplemental jurisdiction. |
| Finley v. US | Combo: new claim and new party | No (but would be overturned by 1367) | Congress was silent on adding new parties in this situation | Congressional silence: court reads silence as closer to a headwind. | This was wrong🡪 led to 1367. |

1. Jurisdictional Aggregation Math. Can you Combine?
   1. **YES**:
      1. 1 Plaintiff, 1 Defendant, Two Claims (each below $75k, but combined they exceed $75k)
      2. Class Action against 1 Defendant (as long as at least 1 member exceeds $75k, that’s fine): ***Exxon Mobil v. Allapatah***
      3. If one plaintiff satisfies the amount, other plaintiffs can hook on under Rule 23 and Rule 20 (*Allapatah* and *Star-Kist).*
   2. **NO**:
      1. One Plaintiff, Two Defendants, each claim under 75k.
      2. Many Plaintiffs, 1 Defendant, Multiple Claims (each below $75k, together exceed $75k) (unless part of a Class Action).
      3. One Plaintiff, Two Defendants, One claim above 75k, one claim below.
      4. You can’t combine claims against different defendants
2. **Pre-§ 1367 Supplemental Jurisdiction:**
   1. **Pendent:** Aggregating Claims
      1. ***United Mine Workers v. Gibbs***, U.S. Supreme Court, 1966, Justice Brennan
         1. **Background:** Coal Company closed Grundy Mine and laid off 100 UMW workers.
         2. Coal Company opens new mine (Gray’s Creek), and hires workers from another rival union to run it.
         3. Gibbs is hired, and UMW gets angry: on the day that the mine is scheduled to open, they organize an armed picket line.
         4. The protesting eventually becomes non-violent, but it makes it hard to operate, and Gray’s Creek is shut down.
         5. Gibbs is fired and says he lost other contracts as a result.
         6. **Suit:** Gibbs sues UMW national (in an effort to create diversity—misguided given the rule about labor unions for diversity) with two claims:
            1. National Labor Act: UMW encouraged secondary boycott, which is illegal.
            2. State Tort claim: unlawfully put pressure on his contract.
         7. Judge hears both claims, but then determines that this wasn’t a secondary boycott: just a primary boycott.
            1. All that’s left is the state Tort claim.
         8. **Holding: Article 3(2)** provides for “cases” and “controversies,” and that means the “common nucleus of operative facts” in the case, not the legal theory.
            1. Gibbs authorizes a two-part test:

Does the pendent claim arise from the same common nucleus of operative facts?

Does the judge want to use the discretionary power?

Based on:

(1) whether the state law claim predominates

(2) whether the court would need to decide novel issues of state law

(3) jury confusion

(4) if the federal issue is resolved early, leaving only the state law claim.

* + - * 1. The idea of a Case is now based on the facts and events that give rise to it—not theory-based, but fact-based instead.
        2. As long as you have a plausible, colorable federal claim that gives you jurisdiction, the other claims that arise out of the same fact pattern are within the reach of federal courts, even if there was no basis of subject matter jurisdiction on those claims independently.

**BUT**: this is discretionary: federal courts can decide if they want to keep claims together.

* + - * 1. **BN**: Gibbs had minimum diversity: this would have been different without minimum diversity. But courts have said that this power exists even if there’s no minimum diversity.
        2. **BN**: Highly controversial: this was action without Congressional authorization. Self created by courts. Gave rise to the need for **§ 1367 to legitimize the idea of Supplemental Jurisdiction.**
  1. **Pendent Party Jurisdiction: New Parties and Claims**
     1. ***Aldinger v. Howard***, U.S. Supreme Court, 1976
        1. Plaintiff sues two cops under the Civil Rights Act saying that he was the victim of police brutality.
        2. Also sues the city since they have money.
        3. But this is **problematic:** Civil Rights Act is traditionally only for suits against people, not city (not longer true today, but that was true at the time).
        4. **Holding:** You can’t add new parties and stay in federal court if it will violate Congressional intent.
           1. Congressional headwind.
     2. ***Owen Equipment v. Kroger***, U.S. Supreme Court, 1978
        1. Iowa plaintiff sues Nebraska electric company.
        2. Omaha impleads Owen. Owen used to be in Nebraska, but is now in Iowa (Missouri River moved) under **Rule 14, and then Kroger asserted a Rule 14(a)(3) claim against that party directly.**
        3. As a result of the shifting river, there is no longer complete diversity.
        4. **Holding:** There must be an independent basis of jurisdiction for a claim made by a plaintiff against a third party defendant if the new party breaks diversity under Rule 14. HOWEVER, there is jurisdiction over a party brought in by a defendant under a true Rule 14.
           1. **Court sees Congressional Headwind (just like in *Aldinger):*** 1332 requires maximum diversity, and minimum diversity will not suffice.
           2. **Fear of abuse:** If we allowed this cause to function in minimum diversity, people would bring in an initial maximally diverse defendant, then bring in a non-diverse defendant later.
           3. **BN:** If you care about maximum diversity, then ***Kroger***has to be right. If it’s wrong, it would be because the lawyers waited really late to bring it up (game-playing).
     3. ***Finley v. United States***, U.S. Supreme Court, 1989
        1. This is the case that triggers 1367: courts get it badly wrong.
        2. Passengers on an airplane were killed when plane struck a power line.
        3. Surviving mother sues two parties under two separate claims/laws:
           1. First, against the FAA—under 1346(b), this belongs in federal court.
           2. Second, state tort claim against the city of San Diego.
        4. **Holding:** Congress decided to put the FAA in court, but said nothing about adding another party: Congressional silence🡪 about adding other parties.
           1. Unless Congress explicitly authorizes adding another party, the courts can’t create jurisdiction just for efficiency purposes.
           2. In the absence of affirmative Congressional intent, we will overrule this.
           3. **Finley:** essentially saying that you can’t add new parties unless there is a statute saying that you can; here’s the statute.

1. **§ 1367: Developed for the purpose of overruling Finley. Codifying everything else, but overruling Finley.**
   1. **Three Part Law:**
      1. **1367(a):** Literally codifies *Gibbs:* Fed courts have supplemental jurisdiction over other **claims** that are so related that they form the same part of the “Case”
         1. Case defined as “common nucleus of operative facts.”
         2. HOWEVER, no “discretionary” aspect that existed in Gibbs. Courts **“shall have”** not **“may have.”** **1367(c) may give this back, but it’s not clear.**
         3. Second sentence overturns *Finley*: This right includes the joinder of claims AND the joinder of parties.
            1. *Finley* court had previously barred the joinder of parties as part of supplemental jurisdiction—this would now be allowed.
            2. Same “Case or Controversy” is the same thing as “Common Nucleus of Operative Facts.”
      2. **1367(b):** If the basis of the original jurisdiction is Diversity Jurisdiction, there is **No Supplemental Jurisdiction IF** the new party breaks maximum diversity in the following ways:
         1. **Claims by plaintiffs against persons made parties under:** 
            1. **Rule 14**: Impleading

**This is a codification of *Kroger:*** party added under Rule 14 broke diversity and the plaintiff asserted a Rule 13 claim against them.

* + - * 1. **Rule 19:** Compulsory Joinder
        2. **Rule 20:** Permissive Joinder
        3. **Rule 24:** Intervention
      1. Claims by plaintiffs who are joined under:
         1. **Rule 19:** Compulsory Joinder
         2. **Rule 24:** Intervention
    1. **1367(c):** District courts can decline to exercise jurisdiction if:
       1. the case raises a novel or complex issue of state law
       2. the state claim is much more significant than the slight federal claim
       3. the district court dismissed claims that gave the federal court jurisdiction.
          1. This is *Gibbs*: still discretionary power.
       4. There are other exceptional circumstances (economic, convenience, fairness issues)
       5. **Note:** This is not strict discretion—it still needs to fit into 1367c. Many judges read it narrowly, given the mandate in 1367a.
  1. **What does 1367 Mean?** 
     1. ***Exxon Mobil v. Allapatah,*** U.S. Supreme Court, 2005, Kennedy
        1. Two cases in one:
           1. **StarKist Tuna:** child cuts herself on tuna can, sues the company, and her family comes in as plaintiffs under Rule 20. She meets jurisdictional amount, but her family doesn’t.

**Holding:** 1367(b) **DOES NOT** have a provision for parties made plaintiffs under Rule 20, so this is fine; the jurisdictional amount doesn’t matter.

There is still complete diversity, just not all parties meet jurisdictional amount.

**BN:** This is weird. If you are brought in as a plaintiff under Rule 19 (indispensable), wouldn’t we want to keep you in?

But perhaps we don’t want to encourage workarounds.

* + - * 1. **Exxon Mobil:** Gas station franchise owners sue Exxon and say they were overcharged; most plaintiffs are under the jurisdictional amount, some are above.

**Holding:** 1367(b) doesn’t name 23 anywhere: we don’t care about jurisdictional amount. This overturns the previous ***Zahn v. International Paper.***

BUT, this case is only about jurisdictional amount. Not about lack of diversity.

The class members do not break diversity, only jurisdictional amount. Leaves an open question for the court.

**Remember Lake and Cabin Case:** Every member of the class had to satisfy the jurisdictional amount then; defendants were a big fan of this.

**BN:** But it created weird tension—for diversity, we look at only the named rep; for jurisdictional amount, we look at each individual’s amount.

Exxon Mobil overturns this.

* + - 1. Kokkonen v. Guardian Life Insurance, U.S. Supreme Court, 1994
         1. **Holding:** Once a case is resolved and judge signs settlement for a diversity or alienage case, federal courts don’t retain jurisdiction—it’s left to state courts to ensure settlement is completed.
         2. **BN:** Good lawyers solve the problem: add provision in the settlement retaining jurisdiction, and get federal judge to sign off on it.

That way, if the settlement is not completed, the judge retains supplemental jurisdiction over its terms.

Make sure we include this at the end of a hypo: add a provision to a settlement!

1. Importance of Supplemental Jurisdiction:
   1. **Efficiency**: we want to bring as many claims together at one time.
   2. **Consistency**: we don’t want state courts and federal courts to come to totally different conclusion, creating real problems with full faith and credit.
   3. If you have one question of fact in multiple court: whoever decides first, wins.

# Venue and Forum Non Conveniens

**General Rules:**

1. Like PJ, venue may be waived by defendant.
2. Venue can be brought in:
   1. Any district where one defendant resides, as long as all defendants reside in the state.
   2. Any district in which a bulk of the facts took place there.
   3. Only if the first two fail, any district in which the defendant is subject to personal jurisdiction.
      1. This only applies if all the defendants are from different state and it’s hard to know where the event occurred.
   4. NOTE: This is a hierarchy.
3. **Special Rule for Removal:** When you remove from state to federal court, venue is **always** proper in the district court directly above that state court.
4. **Venue** allows for a transfer mechanism without disruption to the case; **Forum Non Conveniens** does not allow for transfer; the case is dismissed and must be refiled instead.
5. Venue is less important than it used to be.
6. Venue can be transferred under:
   1. **1404:** Based on efficiency/convenience. Law of original district court travels.
   2. **1406:** Based on error—the original venue was not proper. Law does not transfer from original district court.

## I. Venue and Venue Transfer

**Adjudicatory Jurisdiction** is the power of the entity to adjudicate the case.

* Does the state get to hear this case in the first place?
* Can be waived by the parties: a matter of power. A **Muscular Idea.**

**Venue** is a wholesale judgment about where it’s most efficient and convenient to litigate cases.

* Once you are in the state, where can you skate the case?
* Can also be waived: a soft, presumed set of conveniences

1. **Venue is Governed by § 1390 and § 1391**
   1. **§ 1390:** Venue is defined generally: Venue refers to the appropriate venue for all civil actions in United States District Courts.
   2. **§ 1391:** The Rules of Venue
      1. Venue is proper:
         1. In any district where a defendant resides, as long as all defendants reside in the same state.
            1. E.g.: if all the defendants live in New York, you can sue in any one of the districts in which they live.
            2. Residency = Domicile
            3. For a corporation, Residency = same standards as citizenship for diversity: place of incorporation and principal place of business.
         2. A judicial district in which a substantial part of the claim arose (some of the facts of the case took place there).
         3. If neither 1 or 2 creates a proper venue (e.g. if all the defendants live in different states and it’s hard to know where the facts took place, the final catch-all venue is **anywhere a defendant could be served. (**This is essentially just deferring Venue to a question of Adjudicatory Jurisdiction).
2. A Substantial Part of the Facts of a Case = Effects Test (Interpretation of Provision #2)
   1. ***Bates v. C&S Adjusters, Inc.,*** United States Court of Appeals, Second Circuit, 1992
      1. C&S Adjustors sends an aggressive debt collection notice to Bates.
      2. Bates used to live in Pennsylvania, but recently moved to New York, and the letter is forwarded to him in NY.
      3. Bates sues C&S in New York, and C&S contests venue but not jurisdiction.
         1. **BN:** This is crazy! Should have contested jurisdiction instead. There may not have been jurisdiction.
      4. **Holding:** Venue was proper here because the effect of the letter was felt in New York. The test used to determine Venue Rule 2 (where a substantial part of the facts in a case arose, can be in multiple places), is essentially the **Effects Test**: Was there an impact in that district? If there was, venue is proper.
         1. **Sub-Holding:** The venue facts test is much more liberal than personal jurisdiction test.

**Venue Transfer: What happens if there is a mistake in Venue?**

1. **There are two Statutes that Govern Venue Transfer:**

Either party can file a motion to transfer, but it can only be transferred to a place where it could have originally been brought: jurisdiction + venue.

* 1. **§ 1404:** Venue is proper and meets all the tests, but it is not the most convenient place.
     1. Based on efficiency, not error.
     2. In this case, the case is the same: the case is just put on **roller skates** and glided over to a new district court.
     3. **Law:** The law of the original district is used by the new district. The case is transferred for efficiency, but the law and everything else will stay the same.
        1. Burden on Judge to try as hard as possible to imagine that she is operating in the original district.
  2. **§ 1406:** Venue was **Not Proper** in the original court.
     1. Based on error: the plaintiff made a mistake and brought the case in the wrong district.
     2. **Law:** No transfer of law; judge in the new district will use the law of that district.

1. Under 1404: Venue can only be transferred where the case could have been brought originally
   1. ***Hoffman v. Blaski***, U.S. Supreme Court, 1960
      1. Plaintiff, a resident of Illinois, brought a patent infringement case in Northern Texas (based on personal jurisdiction issues).
      2. The defendants maintained their business in Texas, but seek to transfer to Northern Illinois.
      3. Defendants claim that TX was the right place to bring it, but since evidence on patent legality is in IL, it should be transferred there.
      4. **Holding:** Transfer is not okay to IL because, in a 1404 transfer, venue can **ONLY** be transferred to a place where the case could have been brought originally at the time in which it was filed. That includes if a defendant tries to transfer and waives all objections (as they did there).
      5. The judge’s desire/interests doesn’t matter: a case can’t be transferred unless that court would have had in personam jurisdiction over the case in the first place.
         1. **BN:** Subsequently, Congress tried to change this by saying that you can transfer anywhere as long as everyone (P, D, court, judge, etc.) agrees, but that did nothing—just codified.
2. Law Transfer Rules: 1404 (Original Law) v. 1406 (Law of Transferee Court)
   1. ***Van Dusen v. Barrack***, U.S. Supreme Court, 1964
      1. **Holding:** In a 1404 transfer (even if done by a defendant), the law of the original court applies in the new court.
         1. In a 1406 transfer, the law of the new place controls.
   2. ***Ferens v. John Deere,*** U.S. Supreme Court, 1990
      1. PA Plaintiff uses John Deere (DE corp) equipment and loses his hand.
      2. PA has a short statute of limitations on tort claims, but a longer statute of limitations on contract claims:
         1. Generally,
            1. Intentional Tort: 1 year
            2. Negligent Tort: 2 years
            3. Contracts: 6 years
      3. Plaintiff brings two claims:
         1. Contract claim in PA against John Deere
         2. Tort claim in MS (which has a longer statute of limitations)
      4. Then, he moves to transfer venue from MS to PA under 1404 for convenience.
      5. **Holding:** Because this was a 1404 transfer, the venue transfer was proper, and the law of MS needed to be applied by PA (the longer statute of limitations). Transferor law governs regardless of who initiates transfer.
         1. **BN:** This is really problematic: this may not have satisfied Hoffman (transfer needs to be to a place where you could have originally brought the claim) AND there may not have been in personam jurisdiction over John Deere in MS.
            1. Plaintiff used a General Jurisdiction theory to sue John Deere in MS, but that wouldn’t work today.
            2. You could possibly make a related specific jurisdiction claim though.
         2. **BN:** But this is crucial: If venue was not proper in MS (no in personam), then the claim would have been transferred under 1406 instead, which would have required PA to apply its own law, thus dismissing the claim immediately.
            1. This is going to be a major battleground for “related specific” jurisdiction.
3. 1406 Judge has the power to transfer
   1. ***Goldlawr, Inc. v. Heiman***, U.S. Supreme Court, 1962
      1. **Holding:** If a case is in a court erroneously and it turns out that venue is improper, a judge does have the power to transfer the case under 1406.
      2. This is a gift to plaintiff: rather than having to dismiss and force the claim to be rebrought, a 1406 transfer allows the case to to be transferred without the statute of limitations running out.

## II. Forum Non Conveniens

**Forum Non Conveniens** applies to situations where the most convenient court for adjudication is outside the polity: outside the country, or in rare cases, outside the state.

* Is this the best country (or state) to hear this case?

As opposed to **Venue**, if it is determined that this is not the appropriate forum for a case under Forum Non Conveniens, it will be dismissed altogether and will have to be refiled: it can’t be transferred on roller skates.

* Court may exercise FNC by declining to exercise jurisdiction.

**Forum Non Conveniens** stops the suit altogether.

A defendant who files a motion for forum non conveniens also must identify a place that is preferable to bring the case.

1. Forum Non Conveniens Test:

* ***Gulf Oil v. Gilberg***, U.S. Supreme Court, 1947
  + Laid out a set of factors that should be considered in deciding a motion based upon a principle of forum non conveniens:
    - Adequate alternative forum?
    - Private Interest of the Litigant
    - Ease of Access to Proof and Witnesses
    - Local Interests in having local decisions decided
    - Availability of Compulsory Process for Attendance of the Unwilling
    - Cost of Obtaining Attendance for Willing Witnesses
    - Any other Practical Issues that will make a case easy and inexpensive
    - Public Interest Factors
      * Administrative difficulties if litigation is piled up in congested centers
      * Jury Duty should be forced only upon people who have a relationship to the litigation
      * Public should be able to witness issues that touch on them/matter to them

2. Differences in Law is not a Definitive Matter in Forum Non Conveniens Motions

* ***Piper Aircraft v. Reyno***, U.S. Supreme Court, 1981
  + A plane manufactured by Piper in PA and owned and operated by two UK corporations crashes and kills several Scottish victims.
  + A tort lawyer’s secretary becomes the representative of the victims in California, and sues Piper (PA) and Harzell (the propeller manufacturer, based in OH) in CA.
  + A British investigation initially said the crash was caused by propeller failure, and later by pilot error—the pilot was Scottish.
  + This is a general jurisdiction stream of commerce argument (Piper sells products in CA, and Harzell sells only to Piper in PA).
  + Both Piper and Harzell contest personal jurisdiction in California federal court; jurisdiction is found to be proper for Piper, but improper in Harzell.
  + Both seek to transfer to Pennyslvania: Piper under 1404 (convenience) and Harzell under 1406 (improper venue).
  + Then, both move to dismiss for forum non conveniens.
  + The difference in law transfer issues would have created a huge nightmare in PA court:
    - For Piper, Scottish law would be applied (CA was going to apply Scottish law); for Harzell, PA law.
  + **Holding:** Dismissed for forum non conveniens using the following arguments:
    - These are not American citizens
    - They are only coming here because they think they will get better results
    - Scotland has a much stronger interest in this.
    - The plaintiff argues that because Scottish law is so limited for this situation, the plaintiffs will not be able to get damages nearly at the level they would in CA.
    - Court says that that doesn’t matter: the difference in law is relevant, but not definitive. Even if the law in the other forum will be worse, it will not be considered unless there is literally no law that would allow a plaintiff to recover in that forum.
    - **BN:** Swiss banks wanted to send case back on forum non conveniens to Switzerland, but it would have been DOOMED.
      * Piper distinguishes between a DOOMED law and a less good law.

# Commencing the Action

## I. Order of a Case

1. **Rule 3: Beginning of the Action.** You commence an action by filing a complaint.
   1. **Federal**: File a complaint, clerk stamps summons, gives you summons, and you go out and serve it.
   2. **State**: Some states say that a case begins with summons, and you can file the complaint after the fact. There is some tension between the two approaches.
2. **Rule 4: Summons.** Mechanics of how you serve the summons.
   1. Determines that the geographical reach of the federal court is coterminous with the state in which it sits.
   2. Federal courts soak up the long-arm statute of the state.
3. **Rule 18: Joinder of Claims.** Determines what you will be suing about.
   1. You can join as many claims as you have against the defendant.
   2. Based on a “fact” definition of “case” (*Gibbs)*
   3. Requires **subject matter and in personam jurisdiction.**
4. **Rule 14, 19, 20, 24, 24: Population of the Case**
   1. **Rule 14:** Third Party Defendant (Impleading)
   2. **Rule 19:** Necessary and Indispensable Parties
   3. **Rule 20:** Like Rule 18, but for parties. You can join other defendants or plaintiffs.
   4. **Rule 23:** Class Action
   5. **Rule 24:** Intervention
5. **Rule 7 and 8: Drafting of the Complaint**
   1. Governs what must be included in a complaint, what facts you must allege, and the standards of pleading.
6. **Rule 12: Dispositive Motions**
   1. Not required, but almost always used by defendants to challenge the case:
      1. Challenges can be based on:
         1. Lack of SMJ (b)(1)
         2. Lack of PJ (b)(2)
         3. Improper venue (b)(3)
         4. Improper service (b)(5)
      2. 12b6 motions: motion to dismiss, assuming that everything the plaintiff says is true, but failures to state a claim upon which relief can be granted
      3. 12b7: failure to join party under Rule 19 (can be cured).
   2. If not brought up in first response to the complaint, four defenses are waived:
      1. Lack of PJ
      2. Lack of venue
      3. Form of process
      4. Method of service
7. **Rule 65: Urgent Motions, Simultaneous to 12b Motions**
   1. Application for preliminary injunction: mini hearing prior to full adjudication of the case.
8. **Rule 26: Discovery Phase**
   1. As discovery goes on and is monitored by judges, there is often ongoing litigation about the scope of the discovery.
9. **Rule 56: Summary Judgment**
   1. If there is no dispute about the facts, each party can file for summary judgment based on the facts as each party has developed them.
10. **Rule 38 and 39: Fact Finding Phase**
    1. In federal court: judges or juries can do the fact finding
11. **Rule 39: Jury Verdict**
12. **Rule 59: Attacking the Jury Verdict**
    1. Parties can state that there was a mistake in the jury’s verdict.
13. **Rule 54:** Judgment is rendered.

## II. Fair Notice

Mandated as a **Procedural** element of the Due Process Clause: defendant must be notified in a process of fairness if they are being sued.

**FRCP Rule 4: Summons**

* Governs notice procedures.
* Follows a complaint: first complaint, then summons.
* Rule 12(b)(5): challenging service of promise, motion to dismiss based on insufficiency of service.

**Fair Notice Rules:**

* Personal Service (actual notice) is always best: gold standard.
* Substituted service (constrictive notice)
  + Notice must be pragmatic, the result of reasonable investigative effort, and publication should only be used as a last resort. (***Mullane****)*
  + This same standard applies to domiciles of a state: publication is not sufficient unless the last resort. (***Mabee****)*
  + If the suit could result in individual losing property, notice must be given by personal service or mail. (***Mennonite****)*
  + In cases involving the distribution of funds from a will, you must give people enough time to be found. (***Tulsa Professionals***)
  + Consider neighborhood conditions and culture when providing notice (e.g. postage vs. mail, regular vs. certified) (***Greene***)
  + It’s not necessary to go to “heroic” efforts; mailing a letter to inmate in prison is enough, even if the recipient doesn’t actually get it. (***Dusenberry***)
  + When it is practicable, sender must take additional steps if it is clear that notice has not been received, but not exceed the *Mullane* standard (***Jones***)
  + As long as terms of negotiation are fair, an individual can voluntarily give up right to notice (***Overmyer)***

**Due Process Procedures for Suit**

* The Constitution has two Due Process Clauses: 5th Amendment and 14th Amendment.
  + 5th: aimed at the federal government
  + 14th: aimed at the states
* The Due Process clause can be interpreted through three frameworks: Procedural, Substantive, and Incorporation:
  + **Procedural:** This is the assumed, most popularly understood meaning of the clause. What kinds of procedures should be used to assure fair process?
    - Emerges from an adversarial system: creating protections inherent to a system that is adversarial.
    - Minimum standards for fairness.
  + **Substantive:** Goes beyond the fair process of state control. Based on the idea that there are some things that the state **simply can’t do**, regardless of how fairly or well-procedurally it does them.
    - Much more controversial vision of the due process clause.
    - **In personam cases:** considered by many to be a function of **Procedural Due Process**, but **BN argues:** Substantive.
    - **Two Historical Phases:**
      * First Generation: Conservative movement to keep government from regulating free markets
      * Second Generation (modern era): Left-based idea for civil liberties: gay marriage, reproductive justice, assisted suicide.
  + **Incorporation:** Due Process idea incorporates provisions of the Bill of Rights.
    - **Theory of State Compulsion:** States are subject to Bill of Rights as a result of the incorporation of the Bill of Rights in the Due Process Clause of the 14th amendment.
      * Actually a very tenuous basis for asserting the Bill of Rights against the states.

**Procedural Due Process: Notice Requirements**

Invalidates the terms of *Pennoyer:* now, publication in a local paper to inform someone of a suit is **inadequate**, and seizing property nearly always mandates a **hearing before seizure.**

* ***Mullane v. Central Hanover***, U.S. Supreme Court, 1950
  + **Establishes the modern rule for proper notice.**
  + **Background:** Common Trust Fund movement emerged to allow modest people to pool their money into a large fund, then hire banks to oversee funds.
  + Banks establish a notice mechanism: 12 months after fund is set up, there is a hearing for all people with an interest to come and hear the investment philooophy; every 19 months, same type of hearing occurs.
    - **Goal:** Reduce change of lawsuits based on inadequate management of funds, create regular periods for individuals to learn about investment process.
    - **Challenge:** Who must be notified? Anyone with an interest. (potential future beneficiaries, current beneficiaries while original holders are still livng, etc).
  + **Holding:** The plaintiff must provide the **best possible, pragmatic notice** available.
    - Use reasonable investigative efforts to find people.
    - Make an effort, but only to a point: if it proves too difficult or impossible, the line can be drawn.
    - **Back up method of notice:** publication. But, only after trying to find other ways first. If reverting to publication, choose the one that is most likely to be seen based on any information that is already known.
  + **BN:** This is also a personal jurisdiction issue: where is the authority to bind people living outside of state? This may just be an issue of jurisdiction of last resort: if you can’t sue in New York, there’s nowhere else.
    - **This is a Quasi in Rem proceeding:** the issue is not who owns the property, but if it’s being well taken care of.
    - **It’s possible that *Shaffer* inadvertently overturned this aspect of *Mullane:*** there may not have been enough contacts here to justify jurisdiction even though the property existed there.
    - **But, according to BN:** this may just be about **residual jurisdiction** (***Perkins).***
* ***McDonald v. Mabee***, U.S. Supreme Court, 1917
  + **Holding:** Even if defendant is a domicile of state, publication is not sufficient; you must still make an effort to find an address for the individual.
    - If you have some idea of where the person is, you have to provide actual notice, even if the individual is a domicile.
* ***Mennonite v. Adams***, U.S. Supreme Court, 1983
  + **Holding:** Personal service or mail service is required for a suit if the individual is in danger of losing property.
* ***Tulsa Professionals***
  + **Holding:** There must be a reasonable period of time between notice and judgment, especially involving the distribution of money from a will. You must give people a reasonable period of time to be found.
* ***Green v. Lindsay,*** U.S. Supreme Court, 1982
  + Service was posted on the door of public housing apartments.
  + **Holding:** The government must consider neighborhood conditions when giving notice; consider certified vs. registered mail and take this into account.
* ***Dusenberry v. United States***, U.S. Supreme Court, 2002
  + Government served an inmate in federal prison by mail, but the notice never reached the inmate.
  + **Holding:** This meets the *Mullane* requirement: doing more here would be an additional “heroic effort.”
    - **Dissent (Ginsburg):** Prison must have a greater duty to keep records to ensure service is delivered.
* ***Jones v. Flowers***, U.S. Supreme Court, 2006
  + Government sent notice through certified mail, and it was sent back and marked “Adressee Unknown.”
  + **Holding:** When it is practicable to do so, the government must take additional steps if a notice is mailed back to ensure that the recipient is actually notified.
    - **Note:** This doesn’t require poring through tax rolls or phone books; just sending by regular mail instead.
    - **Dissent:** Consider reasonableness *ex ante*, not after the fact.
* ***D.H. Overmyer v. Frick***, U.S. Supreme Court, 1972
  + **Holding:** A cognovit note (waiver that gives up right to notice in a suit) is allowable as long as the process is equal.
    - There’s a mutually beneficial exchange here: corporation signs note, and gets a lower interest rate in response.
    - **But,** if it’s the result of an unequal exchange, then it may not be enforced.
      * Compare: arbitration clauses, waivers to class aggregation, the limits of “consent” in *Kane* and *Hess*.

**Additional Considerations:**

* **Registered v. Certified Mail:** As per *Green* and *Mullane*, consider these issues in relation to
* **Anonymous People:** Hypothetical heirs (in *Mullane* hypo and Arrested Development hypo: you look for who you can, but if you can’t find anyone, you don’t need to be heroic).
* **Different Standards Based on Ability of Each Party:** Not a doctrinal requirement, but perhaps our conception of “reasonableness” is based in some ways on the abilities and resources of the party giving notice.
* **Timing:**In *Mullane*, four weeks is enough time between sending notice and actual suit. But if it returns, perhaps time should be extended. Additional consideration.
* **Incentive and Policy Issues:** We don’t want to incentivize people to not learn about others or to be scared about doing research if a higher burden will be placed on them as a result.

## III. Right to be Heard

Procedural Due Process requires a Hearing prior to seizure of property.

**General Rules:**

1. **Types of Seizures:**
   1. Writ of Attachment: court seizes/encumbers property and P gets a lien.
   2. Garnishment: attachment of intangibles (wages, bank accounts)
   3. Writ of Replevin (attachment of property claimed by P: *Fuentes).*
2. Seizure of property is governed by the ***Mathews* or Modified *Mathews (Connecticut)*** test:
3. **Private interest of the party who will be affected by seizure**.
4. **Risk of erroneous deprivation** of interests through current procedures, and the value of additional or substitute safeguards.
5. Interest of defendant:
   1. If government is seizing: consider the **government’s interest** in the seizure.
   2. If private individual is seizing (***Connecticut):* interest to the plaintiff** AND to the government in seizing before a hearing.

**2.** To analyze each prong of the ***Mathews*** test, consider the following:

* **Private Interest**
  + A possessory right CAN be a large enough right that notice is required (***Fuentes)***
  + Give greater care and require pre-seizure hearing when the goods being seized are a fundamental to a family/corp’s existence (***Snaidach* and *North Georgia)***
    - This includes government-funded public assistance (***Goldberg)***
* **Risk of Erroneous Deprivation Through Current Procedures**
  + The person authorizing the seizure plays an important role in determining if pre-seizure hearing is required (e.g. clerk rather than judge in ***Fuentes*** and the judge in ***Grant****).*
  + At the very least, there must be a guarantee of a post-seizure hearing (***Fuentes)***
  + Purely conclusory statements are not sufficient (***Fuentes)***, but expression of concern about the security of the property may be sufficient for seizure before a hearing (***Grant).***
  + Putting down a bond on property (that says you will pay back or pay double if you are wrong) helps, but is not necessarily sufficient to remove harm or need for hearing (***Connecticut)***
* **Interest of Government or Plaintiff**
  + Shared interests may make the requirements for pre-seizure hearing more lax.
  + Post-*Shaffer:* you are not required to seize before starting the lawsuit, and you still need minimum contacts. So, if you are seizing, you must show:
    - Concern about abuse to property
    - Concern about the security of the property
    - Possibly, shared ownership

**BN’s Factors to Consider in Hearing Requirement:**

1. Is there shared ownership of the property? (Fuentes)
2. How intense would the loss be to the person whose property is being taken? (North Georgia, Snaidach)
3. How rich is the factual narrative required before a court will do this?
4. How soon will the post-judgment hearing come?
5. Who makes the decision about whether or not to do the seizure?

**Why is this necessary?**

* **Challenges:** Expensive, uncertain, law changes.
* **Values:** Accuracy, protects against abuses and mistakes, minimizes loss associated with inaccuracy, **dignity.** 
  + This is important even outside of money damages: sometimes, compensation (even overcompensation) for damages does not fully address wrongs caused by error.
* **Different Rationales Determine Outcome:**
  + **Accuracy:** If it’s all about accuracy and preventing error, then you might be willing to accept a post-seizure hearing along with money damages in the event of error.
  + **Dignity:** If, however, you believe it’s about dignity and the protection of individuals, then hearings are necessary to ensure that property is not seized without good reason.

**Shaffer: Revolutionary in QIR Proceedings:**

* Delaware Supreme Court upheld seizure of stocks since it was short-lived: DE board members would get it back as soon as they appeared.
* But SCOTUS says it’s blackmail, and not okay.
* Now, seizure is used less and less, and requires minimum contacts.

**Cases:**

* ***Snaidach v. Family Finance Corp.,*** U.S. Supreme Court, 1969
  + Wisconsin statute authorizes debtors’ wages to be seized at the request of a creditor without a prior hearing.
  + **Holding:** Statute is unconstitutional since wages can be seized without a hearing.
    - **Wages are the life-blood of a family. Requires great care.**
* ***Connecticut v. Doehr,*** U.S. Supreme Court, 1991
  + Plaintiff and neighbor get into fist fit.
  + Plaintiff puts a lien on house so he can get a judgment if he wins.
  + **No shared property interest, no real security reason for seizure, and also virtually no cost to the seizure (he can still live in the house).**
  + **Holding:** Court uses the factors, and determines that it is unconstitutional to do this without a hearing.
    - **BN:**Often held to prove that *Fuentes* is the law and *Grant* did not overturn that, but BN not so convinced:
      * This was a weighing of the factors, may have been different if there was a shared interest in the property itself.
    - **Mechanics Lien:** Typically, mechanic doing work on house will get a lien on the house for the property of the work to ensure he gets paid. If plaintiff had an interest in the house, things might have been different here.
* ***Fuentes v. Shevin***, U.S. Supreme Court, 1972
  + Oven and stereo are seized by a defendant who bought them on credit and paid in installments.
  + Before the goods are fully paid off, seller maintains ownership and gives to consumer a possessory right.
  + The dealer (seller) assigns debt to a finance company, who operates under a **negotiability** doctrine: finance company is not responsible for any flaws in the product that might have led to non-payment, but is just liable to collect debt.
  + **Holding:** The Florida statute was unconstitutional for several reasons:
    - **Right of Possession:** Yes, this is a possessory right and not ownership, but deprivation of a possessory interest is sufficient to interfere with due process clause. Oven and stereo are necessary household items.
    - **No Guarantee of a Hearing at All:** Also, the statute does not even mandate a post-seizure hearing.
    - **Who authorizes:**In Florida, a clerk (and not the judge) can authorize the seizure, without additional safeguards, as soon as you provide a conclusory statement.
    - **Conclusory Information:**Plaintiff is not required to provide facts to get seizure processed; conclusions are enough.
  + **BN:** Remember, this was a 4-3 decision (only 7 judges at the time); it may not be as powerful as a full majority.
    - **Negotiability:**The court does not consider this as a basis.
* ***Goldberg v. Kelly***, U.S. Supreme Court, 1970
  + **Holding:** A defendant receiving government-funded public assistance is entitled to a hearing prior to the termination of those benefits.
* ***Mitchell v. W.T. Grant Co.*,** U.S. Supreme Court, 1974
  + Plaintiff required to give sworn statement to the **judge** expressing concern about the property.
  + Statute also mandated an immediate post-seizure hearing.
  + **Holding:** When rationale for seizure is based on security of property and the judge signs off on the seizure, pre-hearing seizure is okay.
    - Distinguishable from ***Fuentes***: affidavit is different, immediate post-seizure hearing, judge approval.
* ***North Georgia Finishing v. Dichem***, U.S. Supreme Court, 1975
  + A corporation’s bank accounts were seized without hearing.
  + Unlike Fuentes, no shared possessory interests.
  + Plaintiff expresses concern about the property disappearing, but does not say why.
  + **Holding:** Like the wages in ***Snaidach***, bank account is the **lifeblood** of the corporation. The risk to a corporation is huge if you take their bank account, just like taking a family’s wages.
* ***Mathews v. Eldridge,*** U.S. Supreme Court, 1976
  + **Holding:** Unlike with public assistance, an individual receiving Social Secuirty disability benefits does not need a hearing before seizure.
    - **Establishes a Test to be Used:**
      * The private interest that will be affected by the seizure
      * The risk of erroneous deprivation of interests through the procedures used, and the value of additional or substitute safeguards.
      * The government’s interest in seizure.

**Hearing Open Question:**

* If there is a shared interest in the property, when if ever is seizure without a prior hearing okay?

## III. Pleading

* Functions of Pleading:
  + Puts parties on notice of claims/defenses
  + States provable facts
  + Narrows scope and number of issues
  + Quick method of resolution for warrantless or frivolous claims (Rule 11).

**Federal Rules:**

1. **Rule 8:** Notice Pleading Requirements
   1. (a)(1): Short plain statement establishing jurisdiction
   2. (a)(2): Short, plain statement of the claim showing entitlement to relief
      1. Plead facts that, if true, would entitle relief
   3. a(3): Demand for relief sought
2. **Rule 9:** Heightened requirement if alleging fraud or mistake, must make specific allegations

**Rules (according to BN):**

1. **Consider facts and type of cases:**
   1. Information asymmetry between plaintiff and defendant
      1. Asymmetry: *Erickson, Swierkewicz, Conley*
   2. Policy rationales for what type of evidence is sufficient
      1. In anti-trust cases: you must plead enough facts for a reasonable jury to find that you have satisfied your burden.
         1. *Twombley*
      2. Civil rights cases: we want to vigorously investigate (*Swierkewicz)*
      3. Qualified Immunity: important to us, so higher standard (*Iqbal)*
   3. Facts of case: anti-trust vs. civil rights
   4. Is the plaintiff representing himself (pro se) or represented by a lawyer?
2. **Judges can authorize limited discovery period:**
   1. Distinguish between symmetric and asymmetric cases.
      1. In symmetric cases: throw the case out if it doesn’t meet the *Twombly* standard
      2. But, in asymmetric cases: allow for a limited controlled discovery period to allow plaintiff to search for a small category of documents (not everything) that will allow them to file an amended complaint.
   2. This is not the law: depends on the nature of the judge.

When filing a complaint, you must provide information about your claim:

1. **Fulfills requirement of Due Process Clause:** Provides defendant with notice of your claim to help them defend.
2. **Has also been used for a winnowing out purpose:** Courts may use pleading requirements to winnow out claims that don’t meet the cut.
   1. In that case, pleading requirements act as a filter which takes out certain claims before they get into the system.
   2. **This is a more recent phenomenon.**
   3. **Civil Analog to Probable Cause:** 20 years ago, you invoked the process based on a good faith belief in your position; today, the court house is being closed to people, even if they have a good faith belief that they can win.

**Two Kinds of Cases:**

1. **Symmetric:** When both sides in a case have equal access to the facts from which we can infer the existence of the subjective state of the defendant (what the plaintiff alleges).
2. **Asymmetric:** Defendant has privileged access to those facts, and the plaintiff doesn’t have an easy way to gain access before discovery.

**Cost-Sharing in Lawsuits:** We are concerned about allowing frivolous lawsuits in because of our cost-allocation in lawsuits:

1. **European System:** Winner imposes costs on loser.
   1. **Pro:** deters frivolous litigation
   2. **Con:** deters people from bringing lawsuits at all
2. **United States System:** Each side bears their own casts except in very few fee-shifting statutes (civil rights settings).

**Basics of Civil Complaints:**

* Plaintiff provides facts that prove bad intent on the other side, or show agreement and conspiracy if an anti-trust case.
* Plaintiff bears burden of proof:
  + Preponderance of the facts (above 50%)
  + Clear and convincing (above 75%)
  + Beyond a reasonable doubt (95%)

**Cases:**

* ***Conley v. Gibson***, U.S. Supreme Court, 1957
  + Black railroad workers bring suit against white union officials, alleging that they were not advocating for their interests.
  + **Classic asymmetrical case🡪 strong policy reason for letting the weak guys get into court.**
    - Based on a belief in the power of discovery: more fats may come out after that process.
  + **Holding:** A plaintiff is only required to give a short and plain statement of the claim that allows the defendant to know what’s coming.
    - **A claim should only be dismissed if there is NO set of facts that could be proven to support the claim.**
  + **BN:** Judge simply needs to see if he can ***imagine*** a set of facts that would demonstrate this is right. If so, no dismissal.
    - **Problem:** This was treated as trans-substantive: treated to apply to all claims, when actually this is a unique situation based on a civil rights issue.
* ***Swierkiewicz v. Sorema***, U.S. Supreme Court, 2002
  + Plaintiff alleges that he was discriminated against on basis of national origin.
  + Second circuit stated that Title VII cases require higher pleading burden: plaintiffs must show the facts that would demonstrate discrimination.
  + **Holding:** Rule 12 motions should not be used as filters at the beginning of the case: treat the facts as true and don’t shut off too early.
    - **BN:** This is ***Conley*** all over again: classic asymmetry, discrimination case.
      * **Still, doesn’t mean this standard applies to every claim, maybe just cases like this.**
* ***Erickson v. Pardus***, U.S. Supreme Court, 2007
  + Prisoner alleged that he was denied medical treatment that jeopardized his life.
  + **Holding:** Plaintiff need only display a “short and plain statement of the claim showing that the pleader is entitled to relief.”
    - **This is all about fair notice, not winnowing**
    - **This IS the Conley standard: proof that it is alive and well.**
* ***Bell Atlantic v. Twombly,*** U.S. Supreme Court, 2007
  + Phone company subscribers allege that phone companies are violating anti-trust laws by engaging in conspiracy.
  + The only proof they have is allegations of parallel behavior: tough question about what point parallel behavior demonstrates agreement.
  + **Holding:** Evidence of parallel behavior is not enough to imply violation of Sherman Act. You must instead prove enough facts for a reasonably jury to find that you have satisfied your burden.
    - **Policy Concerns:** We don’t want to discourage parallel behavior because it is sometimes actually good for economic reasons.
  + **BN’s Take:** The decision in ***Twombly*** is fact specific:
    - **Policy judgment that we want to protect parallel behavior.**
    - **This is not a civil rights complaint like *Swierkewicz.***
  + **Courts treat Twombly as trans-substantive, despite BN’s take.**
* ***Ashcroft v. Iqbal***, U.S. Supreme Court, 2009
  + Plaintiff alleges discrimination of Muslims and torture in detention camps after 9/11.
  + U.S. government has sovereign immunity, so he sues government officials instead.
    - You can sue an individual who is severed from the government as an official
    - Government officials: Qualified Immunity—if all you did was respond to orders in a reasonable way, you are immune.
      * Two levels of Qualified Immunity:
        + Cop on the street
        + Boss at the highest level
      * Major debates about Qualified Immunity: should boss at the top be held to higher standards if they should have known people on the ground would do something illegal? Standard for lower level—would a reasonable person have known the behavior was illegal?
  + **Holding:** If the high-level government official didn’t **intend** for the acts to occur, he is not responsible, even if he knew that they would happen if he didn’t prevent it.
    - **Case against high level officials dismissed**🡪 not enough factual evidence.
    - **Case against lower-level officials 🡪** ongoing today.
  + **BN:** This is not a trans-substantive decision; it is deeply linked to the underlying substantive policy judgments about Qualified Immunity.
* ***Tellabs v. Makor***, U.S. Supreme Court, 2007
  + Specific to the Private Securities Litigation Reform Act.
    - Act requires a heightened pleading standard: facts must “give rise to a strong inference that the defendant acted with the required state of mind.”
  + **Holding:** In this type of complaint, you must look at BOTH the defendants’ and plaintiffs’ allegations together. The case should only go on if it is at least as likely as not that there was bad intent alleged.
    - **Scalia’s Dissent:** If this is a heightened pleading standard, it must be MORE likely than not that the plaintiff is correct.

**FRCP Rules:**

* **Rule 7:** Ordinary Pleading Standard
  + Should be for *Twombley, Iqbal, Swierkewicz*: but the irony (BN says), is that court uses heightened standard for *Twombley* and *Iqbal.* 
    - **BN:** Court applies “more likely than not” standard to *Twombley and Iqbal*, when that’s actually supposed to be the heightened standard.
* **Rule 8:** General Rules of Pleading
  + Requires a short and plain statement (*Conley/Swierkewicz)* demonstrating that plaintiff is entitled to relief.
* **Rule 9:** Pleading Special Matters, including fraud or mistake.
  + Demands a higher standard in the complaint than for other types of claims.
    - See *Tellabs*

# Populating the Case

## I. Joinder Rules

1. **Claims**
   1. **Rule 13: Counterclaims and crossclaims**
      1. 13a: Compulsory counterclaim
         1. Must arise out of the same **transaction and occurrence**.
         2. **No need for an independent basis of SMJ (*Heywood)***
         3. If not exercised in the original action, then the party loses this counterclaim.
      2. 13b: Permissive counterclaim
         1. NOT out of the same transaction and occurrence: will involve different events, and completely unrelated.
         2. **Requires an independent basis of jurisdiction? Yes**
         3. The reason it’s permissive is because there’s a different T&O.
         4. Rule 42(b): allows the court to order separate trial for permissive counterclaims if it will be easier for jury.
      3. 13g: Permissive Cross Claim
         1. Parties on the same side of the versus can assert claims against each other.
         2. Same transaction and occurrence
         3. We don’t make it mandatory since we don’t want to force co-defendants to become antagonists with each other.
         4. **Independent basis of jurisdiction? No.**
         5. Once a party crossclaims, the receiving party can counterclaim (either compulsory or permissive) against the other defendant who crossclaimed.
      4. **13h:** Additional parties can be added to a counterclaim or cross-claim.
   2. **Rule 18:** 
      1. **18(a):** A party seeking relief from an opposing party can join with his original claim any additional claims he has against that opposing party.
         1. Claims can be for the same transaction and occurrence, or for anything else—no T&O requirement. (***Tenet)***
         2. Authorizes as many claims as the party has against the opponent: no limit.
         3. Also applies post-cross claim. Once a party crossclaims against another party on the same side of the versus, that party can assert 18a claims about unrelated or related issues.
            1. 13g: opens the door.
2. **Parties**
   1. **Rule 14: Third Party Defendant (Impleader)**
      1. (a)(1): D can implead new party within 14 days of answering the complaint.
         1. 100 mile bulge for PJ: If the rule 14 defendant can be sued within 100 miles of the courthouse, there is PJ for impleader.
      2. The defendant can bring in a person not yet a party to the suit who may be liable to her for all or part of any recovery the plaintiff obtains on the main claim.
         1. Contribution
         2. Insurer
      3. Not meant to allow defendants to suggest new targets for the plaintiff: it is only if the defendant seeks to pass on liability for a claim. NOT just because they say that the other person is actually at fault.
      4. This turns the defendant into a third party plaintiff for the purposes of making the third party impleader claim.
      5. Third Party Defendant:
         1. Has same Rule 12 abilities to file counterclaims against the third-party plaintiffs, and can implead further parties.
      6. Sometimes the facts are slightly different, but if based on a true Rule 14 interpleader theory, then there is automatic SMJ, though there still must be independent **Personal Jurisdiction.**
      7. It is within the court’s discretion to refuse to entertain an impleader claim.
      8. **Impact on Diversity:** If the impleader breaks complete diversity, it’s okay as long as the defendant and third party defendant are from different states and jurisdictional amount is met. If not, 1367a will usually allow it.
         1. **Kroger Circle:** P sues D; D Rule 14’s D2, D2 asserts counterclaim against P. P can then bring counterclaim against D2, even without diversity.
            1. **Usually allowed by courts.**
      9. **Impact on Venue:** Disregard the third party defendant.
   2. **Rule 19: Compulsory Joinder: Necessary and Indispensable Parties**
      1. **19(a):** A person not originally sued must be added to the lawsuit if feasible and there is **subject matter jurisdiction** if:
         1. Court cannot accord complete relief without the party
         2. Person has an interest in the subject matter of the action, and her ability to protect that interest will be impaired if she does not participate.
         3. Adjudicating the case without her might leave one of the existing parties exposed to multiple or inconsistent obligations.
      2. **19b:** If a party cannot be added even though it should be, judges can:
         1. Go on without the absentee in good conscience (***Bank of California)***
         2. Dismiss the case: party was INDISPENSABLE.
         3. Craft the judgment to provide appropriate relief to the parties that is also fair to the absentee party.
      3. **Rule 19 never has automatic SMJ: must have an independent basis.**
   3. **Rule 20: Permissive Joinder of Plaintiffs and Defendants**
      1. 20(a)(1): authorizes plaintiffs to sue together if they assert claims arising out of the same transaction and occurrence.
      2. 20(a)(2): allows plaintiff to sue multiple defendants in a single action if arising out of the same transaction and occurrence.
      3. New Plaintiffs don’t need to independently meet amount in controversy (***Allapatah)***
      4. We don’t know if Rule 20 Plaintiffs can be added even if they break diversity🡪 we only know that jurisdictional amount can be dangled.
      5. BUT, if Plaintiff chooses to sue multiple defendants, there is no automatic SMJ: each D has to satisfy complete diversity if base claim is diversity. (***codictication of Kroger).***
   4. **Rule 22: Interpleader**
      1. **(1)** If Plaintiff is exposed to double/multiple liability, can join D’s and require to interplead. This is proper even when claims are not common and the plaintiff denies liability.
      2. **(2)** D make seek through cross-claim or counterlcim.
         1. **In Rem Proceeding:** If all Ds are residents of same state (***Dunlevy)***
   5. **Rule 24: Intervention**
      1. A party who learns of an action can become a party to the litigation through intervention.
         1. 24a: Party has a right to become a party
            1. Statute authorizes intervention (both state and federal).
            2. The person claims an interest in the property; the interest may be impaired if not allowed in; the interest is not adequately represented by those in the action already.

Similar to the standard under 19a.

* + - 1. 24b: Permissive intervention, in the court’s discretion
         1. Parties can intervene in an action if they have a claim or defense “that shares with the main action a common question of law or fact.”
         2. Parties can’t be forced to intervene (***Wilks)***

## II. Joinder of Claims

**Claims:** Lawyer’s theory about why you should win. You can have as many claims as you have a lawyer with a feverish imagination.

* Claims require three things:
  + In personam jurisdiction over the people you want to sue
  + Subject matter jurisdiction over the claim
  + Enough facts to make the claim serious and plausible

A Lawsuit requires a **Base Claim with:**

1. Subject matter jurisdiction
2. Personal jurisdiction
3. Within Congressionally authorized use of power

**Additional claims can be dangled from the base claim if they satisfy 1367b.**

**General Rules:**

1. When analyzing, consider two dual questions:
   1. Does the rule permit or mandate joinder of claim or party?
   2. If the rule allows it, what are the subject matter and in personam jurisdiction implications?
2. Joinders can be simultaneously door-opening and door-closing:
   1. Compulsory claims:
      1. Door opening: bring more things in
      2. Door closing: if you don’t bring it in, you can’t do it later.
   2. Based on door opening or closing function, different interpretations of transaction and occurrence:
      1. If opening the door: broadly construe “T&O”
      2. If closing the door, skeptically consider “T&O”

There are two main reasons to authorize claim joinders:

1. **Efficiency:** The judicial system is underfunded, so the bigger an individual case gets, the more economically efficient it is to process.
   1. **Safety Valve for Monster Cases:** Rule 42 authorizes the judge to slice up large case into little cases if it’s not working.
   2. **There are fewer than 1100 judges to staff an entire federal judicial system.**
      1. Governed by two major presumptions:
         1. Bigger is better
         2. Safety valve gives an exit route if necessary
2. **Preclusion Argument:** 
   1. Lawsuit decides:
      1. Issues: Issue preclusion means that the issue can’t be decided again.
      2. Claims: You can’t litigate another part of your claim separately
   2. But there are limits on Preclusion imposed by the **Due Process Clause:**
      1. You can’t impose issue or claim preclusion on someone who is outside of the case. They may be disadvantaged by first case, but they can’t be utterly precluded.
      2. Efficiency both for this case and for future preclusion purposes.

**Rules Governing Joinder of Claims:**

* **Rule 18:** Opens the door very wide, and allows parties to bring any claim they want, limited by three things:
  + PJ is still necessary over the defendant.
  + SMJ for each claim is still necessary🡪 can be either supplemental or independent basis.
  + Consider issues of preclusion as well.
* **Rule 13:** Governs what kinds of claims the lawsuit will look at.
  + **13a:** Compulsory counterclaim. Requires defendant to file a counterclaim against the plaintiff for anything arising out of the same **transaction and occurrence.** 
    - **If you don’t bring it now, you lose it. Rule Preclusion**
    - **Exceptions to Compulsory Counterclaim:**
      * If the 13a claim involves other people, you must bring it unless you can’t get PJ over all of them.
      * If the base claim is not in personam (e.g. if it’s based on in rem), then there is no compulsory counterclaim required.
    - No need for independent basis of SMJ with compulsory counterclaims.
  + **13b:** Permissive Counterclaim.
    - **You must have an independent basis of jurisdiction, even though one is not needed for a compulsory counterclaim.**
    - The only thing distinguishing compulsory and permissive: does it arise out of the same transaction and occurrence?

**Transaction and Occurrence v. Common Nucleus of Operative Facts:**

* Both fact-based, not theory based
* Both about the relationship between the parties that has given rise to litigation.
* **Two tests for T&O:**
  + **BN’s preferred method**: Take the claim apart and identify the key issues of fact and law.
    - If there’s an overlap, then it’s part of the same legal dispute.
      * Satisfies both door-opening and door-closing arguments:
        + Open the door: If the second case would be just a formality, allow the case in so everyone knows what’s at stake.
        + Close the door: If you don’t raise it, you will be issue precluded.
    - **Double Criteria:**
      * Would the second case be a formality?
      * Would there be preclusion for the second case?
  + Other judges use the **Logical Relationship test** (*Heywood)*
    - It’s not about fact/law overlap, but instead about a logical relationship between the claims.

**Cases:**

* ***M.K. v. Tenet,*** U.S. District Court, District of Columbia, 2002 (**Definition of Rule 18 Claim Joinder)**
  + 6 former employees filed suit against CIA alleging that it violated their right to counsel.
  + Later, they tried to add 9 named plaintiffs and provide additional information about existing claims (add new claims under Rule 18 and add new parties under Rule 20), and defendants tried to sever new claims.
  + **Holding:** Claims can be joined under Rule 18 as long as they arise out of same transaction and occurrence.
* ***United States v. Heyward Robinson***, United States Court of Appeals, Second Circuit, 1970 
  + HR hires D’Agostino to do excavation work on two jobs: one on marine base, and one factory, then relationship goes south.
  + D sues HR in CT fed court just on the navy job (one of the two jobs), then **HR counterclaims under 13a, saying that D actually did a terrible job on both jobs.**
  + D files a 13a counterclaim back regarding the non-navy factory (the second job that HR counterclaimed on.
  + When HR loses, it says that the claims did not arise out of same T&O.
  + **Holding:** Court finds that jurisdiction was proper here by reading T&O broadly: logical relationship test between the two job sites.
    - **Ways to analyze if it’s part of the same T&O:**
      * Is efficiency advanced?
      * Does the same question of fact and law come out of both cases?
      * Consider phantom second case: is it possible the outcome could be different in each case otherwise?
        + If the second case would have a foregone conclusion through preclusion (just a formality), let’s fold it into the first case).
* ***LASA v. Alexander***, U.S. Court of Appeals, Sixth Circuit, 1969
  + Memphis hires contractors to build city hall:
    - Memphis hires Southern Builders (TN: largest general contractor in south)
    - SB hires Continental Casualty (insurance company)
    - SB hires Alexander Marble (TN and TX) to install marble
    - Alexander hires LASA (Italian marble supplier)
  + LASA sues Alexander under diversity jurisdiction for contract claim (payment), then adds Southern and Memphis under Rule 20.
  + Alexander 13a counterclaims against LASA.
  + Southern 13a counterclaims against LASA.
  + Memphis 13a counterclaims against LASA.
    - All of the above: classic 13a counterclaims.
  + Then, Alexander brings 13g cross claim against Southern and Memphis, Southern files claim back, and Alexander brings architect in under Rule 14.
  + **Holding:** All of these claims should be allowed since they all arise out of the same transaction and occurrence using a logical relationship test.
    - **BN:** This wasn’t a real Rule 14 claim. Judges sometimes fudge the requirements.
    - **Why is this important:** The 13g cross claims lacked independent basis of federal jurisdiction (Southern and Alexander: no diversity), but 13a and 13g don’t require independent SMJ.
    - **Logical Relationship Test:** Holding is based on this idea. At this stage of the litigation, it’s unfair to know what facts or questions of law will drive this set of cases, so we have to rest on the fact that the issues are interrelated.
      * **BN:** If you are a logical relationship judge, you set off the mouse trap: raise issues that may but may not overlap.
  + **Dissent:** This is not all the same T&O (especially Rule 14): BN agrees.
  + **Movement from HR to LASA:** HR is a clear T&O case; LASA is a situation where the issues may have overlap in fact and law, but may not.
    - **Things get so confusing that we lose the poor guy who started the whole thing🡪 major impact on the initial person who started the suit and expected it to be quick and painless.**

## III. Joinder of Parties

After the client comes to you and identifies legal claims, you must think about **how to populate the cse with parties.**

* **Rule 19:** Who you MUST bring. Obligatory parties to the suit.
  + **Necessary:** you have to bring them in if you can. You may be able to go forward without them if you have tried everything to bring them in and can’t, but you must tru.
  + **Indispensable:** you can’t go forward without them.
* **Rule 20:** Permissive parties. You can pick and choose.
* **Rule 23:** Class Action. You can throw a big party and bring in lots of people.
  + **As opposed to Rule 20, the class becomes a thing without independent personality.** So you test for citizenship based only on named plaintiff (**Ben Hur).**

**Laws Governing Rule 19 Parties**

* **BN:** From a philosophical standpoint, everyone is necessary or indispensable, since, as a result of stare decisis, everyone will be affected by a suit.
  + **People outside of the suit are not actually bound by issue or claim preclusion.** They still might be hurt by stare decisis, but this doesn’t keep them from getting into the court and trying the same case.
* Determing Rule 19 parties requires an analysis of the risks and benefits to both **in-house** and **out-house** people.

***Bank of California v. Superior Court***, California Supreme Court, 1940

* Smedley is caretaker for Boyd and is promised a large portion of estate when Boyd dies.
* When she dies though, will includes a series of small requests to servants and others, and 75% to charity—nothing to Smedley.
  + Specific Legatees: 25% of will goes to large number of individuals across the country.
  + Residuary Legatee: 75% goes to St. Luke’s Hospital.
* She sues the Bank of California (will is in their name) and names St. Luke’s as other defendant, but does not bring in other legatees.
* **Bank:** Concerned that they will be sued by specific legatees if money goes to Smedley and they will be left wide open—very risky.
  + **Risk to in-house party:** Bank is wide open to future liability.
    - Could be majorly problematic: the result could be different in another state without direct precedent, and they might have to pay double.
    - **The bulk of Rule 19 arguments turn on showing of a plausible risk to the in house parties if the out-house parties are not forced to participate.** 
      * Often, in-house parties will reframe the narrative to discuss risk or injury to the out-house parties, but it is often a selfish worry.
  + **Risks to out-house parties:** 
    - Never based on a story about preclusion, since outhouse people will **never be bound.**
    - **Better arguments for risk (don’t only base on adverse effect, since that is universal):**
      * Limited funds/resources (most common story, but also consider other irreversible decisions like environmental resources).
      * Can be hurt by stare decisis
      * Efficiency reasons.
      * Can’t be based just on harm: tell a story that is based essentially on the inability to preclude the out-house person, or the inability to protect that person.
* **Smedley:** Concerned about bringing all of the out-house people in because of in personam jurisdiction: they live across the country, so no good venue.
  + **Before this decision, the case could not go forward:** if there’s no forum where there could be in personam jurisdiction, then there’s no justice in this case.
* **Holding:** BOC solves this problem (though it continues to be a tool that defendants will use to block litigation) by limiting the amount that Smedley can sue for:
  + **She can only get up to 75% of the total pot, wince that’s as much as the people in the case can give her.**

**Post Bank of California Rule 19 Process:**

1. **Decide if the party is necessary or indispensable:**
   1. This is a **soft idea that varies from judge to judge.** Based on the story of injustice and the intensity of the likelihood.
   2. If there is potential injustice but it’s not enormously troubling, necessary. If not, indispensable.
2. If you determine that the party is **indispensable**, BOC tells you that you don’t just stop and walk away:
   1. First, explore whether the litigation can be tailored in a way that minimizes the story. (**BOC approach)**
      1. Based on a concept of **Constructive Trust:** each beneficiary is the constructive trustee of all the money it is entitled to get. Bank is not a constructive trustee, requires the presence of the beneficiaries.

***Provident Tradesmen v. Patterson***, U.S. Supreme Court, 1968, Justice Harlan

* Car accident leads to death and severe injury.
* Suit involving insurance company—turns on technicality of Pennsylvania law.
* **Holding:** Sets out considerations to look at to determine whether party is indispensable and if the party can’t be joined because of diversity:
  + Plaintiff’s interest in forum
  + Defendant’s interest in avoiding multiple/inconsistent litigation
  + Interest of absentee
  + Judicial/public interest in complete, consistent, and efficient trials.
  + **Harlan argues that you should try to cure the indispensability like BOC.**

***Republic of the Philippines v. Pimentel***, U.S. Supreme Court, 2008

* Marcos has large bank account in New York.
* Sued in California for human rights violations (Pimentel class) and they win, and then tries to exercise judgment in New York against bank account.
* Simultaneous suit: Government of Philippines gets settlement to recover looted assets of the nation and sues bank to recover.
* Bank interpleads the money in New York courts and tries to bring in both parties to determine who owns it.
  + Interpleader was a way to change this from in personam to in rem to get jurisdiction over Filipino government: there were no minimum contacts.
  + If there were minimum contacts and in personam was possible, Bank could sue for declaratory judgment to figure out who owns the money.
* Philippines government resists on grounds of sovereign immunity, so there is no power bcause they are an indispensable party.
* **Holding:** There is no way to cure this issue, and if the suit went forward, there would be great risk to the outside and in house party: bank would have to pay twice. So it must be dismissed since Rule 19 party can’t be brought in.
  + **BN:** It’s possible Citibank was actually behind this decision🡪 good outcome for them!
    - **Circuits were right and SCOTUS was wrong. They allowed themselves to use sovereign immunity to in effect take this away from the U.S. courts.**

**Rule 24: Intervention**

* ***Martin v. Wilks,*** U.S. Supreme Court, 1989
  + Systematic discrimination in the south segregated among city job holders: there were white firefighters, black sanitation workers, etc.
  + Lawyers (including BN): filed Title VII claim against city in federal court, then settled with a process of integration of hiring and the workforce:
    - Class waives its right to back pay, and instead receives **prospective relief that ensures workplace integration and hiring for promotion and new jobs.**
  + **The major problem:** This impacts the rights of the work force and prospective whites in the community.
    - **Senior white officials who lose seniority, and**
    - **Future prospective employees.**
  + The union representing white workers Collaterally Attacked the earlier judgment and settlement. They sat on sidelines, so were not precluded, were not joined, and did not exercise Rule 24 Intervention right.
  + **Holding:** Rule 24 is **always** permissive; there is no such thing as mandatory intervention. The white workers are entitled to challenge the judgment since they were not part of the settlement.
    - **But, Congress passes a statute a year later: in title VII cases, you are bound if you know about the proceeding but elect to stay out.**
    - **BN:** The better solution would have been if District Court named white firefighters Rule 19 parties.
* **Rule 24 Basics:**
  + Let’s someone bust into a case as either a plaintiff or a defendant.
    - 24a: Intervention as a right. Your interests are so strong that it would be a great denial of justice to leave you out.
      * Mirror image to Rule 19—not letting me in would create Rule 19 problems.
    - 24b: Permissive intervention. Intervener does not qualify as someone who has to be let in, but as a matter of discretion, a judge might allow it.
  + **1367b:** Requires an independent basis of jurisdiction whether you come in as a 24 defendant OR plaintiff, and even if you come in through 24a.

**Rule 14: Impleader:**

* ***Jeub v. B/G Foods***, U.S. District Court, District of Minnesota, 1942
  + Plaintiff orders ham at restaurant and gets sick.
  + B/G Foods impleads Swift and Company, where the ham came from.
  + Plaintiff: Illinois; Restaurant: Mass; Swift: Illinois (breaks diversity).
  + Swift says that it is premature: until you know that B/G is liable, they should not be brought in.
  + **Holding:** Rule 14 claims allow you to bring in a third-party before you know if there will be any liability.
    - **Bringing potential indemnity into the original proceeding creates efficiency:**
      * Previously, preclusion issues: if part of a separate suite, third party not bound by initial suit.
      * No risk of inconsistent findings
      * Same facts and same findings for liability and indemnification claim.
    - **BN:** Sometimes Rule 14 is bent out of shape (LASA: should have really been a Rule 20+Rule 13G situation), but this is the basic way to use it: straight up impleading.
  + **There’s a second important reason for allowing impleader early on:** 
    - If the original defendant is sure that he has a complete indemnity, he may not spend money defending the case since he will be able to recoup the expenses.
    - It’s risky to do so, but a confident defendant with scarce resources might take the gamble.
    - **Bringing the Third Party Defendant in earlier: allows the defendant to actually join in the defense, preventing the indemnification claim from every happening.**
  + **Compare to *Kroger:*** Plaintiff can’t assert a direct claim against third party defendant for fear of ruining complete diversity, but a Rule 14 defendant can always be brought in by defendant.

**Impleader and Crossclaims:**

* Impleaded parties can file a 13g cross claim against the original defendants.
  + E.g. if they don’t believe that they should be liable for the full amount.
* This is why district judges are sometimes confused about Rule 14 vs. Rule 13g (LASA situation):
  + 13g: Contribution claim.
  + 14: True indemnification claim.
* Party with full liability will implead an insurance company to pay for damages.
  + Insurance companies: hate this because juries allow more money if insurance companies are a party.
  + As a result, many states block insurance companies from being brought in until there is already a ruling on the party’s liability (a direct reversal of ***Jeub).***

**Rule 22 and Statutory Interpleader Requirements:**

**There are two types of Interpleader:**

* **Rule Based: Rule 22:** Requires a jurisdictional amount, complete diversity.
  + All claimants must be from the same state and the stakeholders must be **maximally diverse.**
  + **$10,000 jurisdictional amount.**
  + **Rule-based interpleader is in personam in nature.**
  + Suit by the stakeholder against the complainants, and the stakeholder must have SMJ and PJ.
  + Use Rule Interpleader when all of the claimants are co-citizens but the stakeholder is diverse, otherwise use Statutory because it is easier.
* **Statutory Interpleader:** 28 U.S.C. § 1335
  + Tailor-made procedure stating that stakeholder should pay money into court.
  + Designed as a solution for the Dunlevy problem: 1917.
  + **Statutory interpleader is based on in rem proceeding.**
  + Lawsuit is about the complainants: ignore the stakeholder.
  + $500 jurisdictional amount
  + **Minimum**, not maximum diversity
  + Nationwide service of process
  + No SMJ requirements: you test for minimum diversity by the claimants (not the stakeholder, since the stakeholder is not a party) and at least one complaint must be diverse from another.
* **Major open question of statutory interpleader:** Can it be used in a contingent case? It can be used for tangible property, but less certain for intangible and contingent property.

**Rule 22: General Rules:**

* Removing the property from the sovereign’s control, then allowing the forum state to determine who owns the property.
  + This is a ***Post Shaffer*** remnant of Pennoyer power: In Rem Power.
* **Complications:**
  + Things are generally clear with tangible property that is clearly present within the jurisdiction.
  + Intangible property that is contingent: existence is intellectual and not truly there.
  + The presence of the property itself depends on who owns it.
  + **Two primary problems:**
    - **This is all problematic: if you expand the idea of interpleader too much, you expand in personam jurisdiction beyond its limits.** 
      * Gives great power to a defendant who can interplead something that requires the plaintiff to come to the forum and identify if it exists or not.
      * This is related to ***Shaffer:*** the existence of property is capable of significant manipulation depending on the imagination of lawyers.
    - **Proportionality:** Tail wagging the dog problem.
      * If you interplead property, we don’t want it to be much smaller than the related controversy.

***New York Life Insurance Co. v. Dunlevy***, U.S. Supreme Court, 1916

* Dunlevy buys a hat at a store, but doesn’t pay for it.
* Hat store sues her in PA for the price of the hat: easy in personam jurisdiction, and judgment was issued for the hat providers.
* But, there is no property to enforce it, and then she moves to California.
* Then, the hat company sees that Dunlevy is the recipient of a tontine (lottery involving death), but there is dispute about if the tontine shares belong to Dunlevy or her father.
* Insurance company tells the hat company that the money is owed to Gould, not Dunlevy.
* Hat company: sues insurance company for the debt owed to them, but insurance company contests it and says it is not actually owed to Dunlevy.
* Insurance company interpleads Gould and Dunlevy under Rule 22 and pays the debt in ocourt to see who owns it, but there is no in personam jurisdiction over Dunlevy.
* Meanwhile, Dunlevy sues insurance company and father in California and claims the money is hers.
* The insurance company ultimately pays both Gould and Dunlevy, and the hat people never get their money.
* **Holding:** If you can’t characterize the interpleader as in rem and instead it’s an in personam issue, you still need minimum contacts.
  + **Rule 19 would prevent this situation:** Dunlevy would be an indispensable party.
  + ***Dunlevy***: cited for the proposition that in the absence of clear in rem jurisdiction (whent there is a contingent debt), we think about a situation as in personam, and then interpleader loses its value.

***Pan-American Fire & Casualty Co. v. Revere***, U.S. District Court, Eastern District of Louisiana, 1960

* Mass tort killed 4 and injured 23.
* The tractor that collided and started the crashes has three suits against it, and instituted an interpleader action, citing all potential claimants, for the full amount of policy limits.
* **Holding:** When a party has limited insurance funds and the claims against it exceed the total, interpleading is proper.

***State Farm v. Tashire,*** U.S. Supreme Court, 1967

* Mass tort involving 37 people, and 2 killed.
* There are four claims against the bus drier, Greyhound, truck driver, and truck owner who was a passenger.
* All plaintiffs from California, and several defendants from California.
* State Farm tries to implead on the 20k insurance policy covering the truck driver: very small amount out of the total.
  + Rule 19 situation: concerns about first come first serve situation.
* **Holding:** First, SCOTUS officially holds here for the first time that Article III only requires minimum diversity.
  + **Generally,** a defendant may be able to interplead property and then determine where the litigation takes place (defendant’s choice of forum), **but only if the property is a significant element of the whole controversy.**
* **Tashire Takeaway:** You can do this, but only if it is a huge amount of money: of significant proportion to the amount of the total controversy so that everyone else is justified in being pinned to a single place.
* **Alternative solution:** Use Rule 23 to bring a class together against a single defendant. This is a plaintiff solution to the problem of interpleader and mass tort liability.

**Rule 23: Class Actions:**

* Consists of two classes of people:
  + Named representatives who are in the case.
  + Lots of people who are outside of the case.
* Expands the forum to get people who are outside conceptually within the walls of the courthouse.
* Named representative becomes the virtual representative of the outside party.
* **Due Process Implications:**
  + We treat you as though you were in the court house, even though you actually weren’t.
  + Requires the people inside to be morally qualified to represent the rights of the outside people.
    - There must be procedures designed to protect the outside people.

**Legitimate Theory of Virtual Representation:**

1. Exit: the ability to leave the class
2. Loyalty
3. Voice (the ability to influence the representative in some way)

**Structure of Rule 23:**

* **23a:** Sets out the criteria that you must have before you can even think of having a class:
  + **Numerosity/Size:** Needs to be big enough that you are justified not just using 20 (13 is the smallest BN has seen).
  + **Common Questions of Law and Fact:** Commonality between the representative and the others.
  + **Typicality:** Similar to loyalty: The claim of the named plaintiff must be typical of the claims of everyone on the outside.
  + **Adequate Representation:** Assets, ability, and incentives for the representative to do a good job being a representative.
* **23b:** Identifies the types of class actions and settings where this makes sense.
  + **23b1:** Based on Rule 19 issues.
    - **23b1a:**
      * If the litigation goes forward, the parties might be hurt by outside lawsuits in the future.
      * Bring everyone in to save money and avoid inconsistencies and issue preclusion problems.
    - **23b1b:** 
      * Consider the perspective from the outside party: how could they be hurt by Rule 19 issues?
      * This is never a preclusion concern: instead, it’s based on limited funds and inconsistencies.
    - **23b1 classes are entitled to injunctive and declarative relief (damages).**
    - **And, there is no notice required and no opt-out permitted.** 
      * This means that, while we still need loyalty, there is no **Exit or Voice.**
    - **Lawyer’s fees:** Can come from settlement. But it’s often a fiction of re-tooling the story.
  + **23b2:** Relatively powerless people sitting in a class without access to legal representation usually because of economic and social factors.
    - Meant for those who are unlikely to be in a position to be able to represent their own interests through the Rule 20 process.
    - Designed to enforce civil rights initially, and the least controversial across all political lines.
    - **23b2 classes: get ONLY injunctive relief, not damages.**
    - **Injunctive is prospective.**
    - **No notice or opt out: based on a (maybe paternalistic) fear that there will be pressure by powerful groups to force others to opt out.**
    - **23b2:** Can also be defendant classes (BN’s jail hypo).
    - **Lawyer’s fees:** Tough issue: usually based on cause organizations.
  + **23b3:** the hardest cases, and the most controversial ones.
    - Based on an idea of efficiency and good sense: not about rule 19 or civil rights, but simply about collective litigation.
    - **Asks the same questions as 23a: but in a more substantial and strict way: commonality must PREDOMINATE.**
    - All class members have been subjected to a common wrong, so it’s a good idea to link these people together.
    - **23b3 classes: get retrospective damages.** 
      * Most important for claims when the individual damage is small, but collectively it’s a lot and justifies litigation.
    - **Lawyer’s fees typically come from final settlement.**

**23b3 Classes:**

* **Rationales for Forming Them:**
  + Mass Tort/Mass Wrong cases: no single person had a large enough injury.
    - ***Tashire*:** claims are large enough, but it’s an argument for efficiency.
      * System can’t process every claim separately without breaking.
  + But sometimes you want a B1 class when you can get a B3 class:
    - **BN’s Nassau County story**.
    - Issues of notice and opt-out.
  + Walmart and Comcast cases: motivated by a desire to keep the B3 case alive to be able to get retrospective damages.
  + **Requires a preponderance of common questions of law and fact: takes 23a a step further.**

**Philosophical Ideas Behind Rule 23:**

* Moving someone outside of the case and conceptualizing them as if they are inside.
* Based on the idea of virtual representation: the person inside is just like you.
  + Based on a confluence of interests.
  + Named plaintiff represents everyone else.
* Moving from treating parties as individuals (Rule 20 parties retain individual chracteristscs) to a single unit.
* **Rule 23:** Giant Rule 20 Pyramid, with two ways to think about it:
  + **Thing:** ephemeral entity.
  + **Combination of people**: just like Rule 20.

**Process:**

1. A single individual must meet the standards of Rule 23a: numerosity, common questions of law and fact, typicality, and loyalty of motives (adequacy of representation).
   1. Both an upside and a potential downside to this: named plaintiff could win and help those on the outside or could lose, and risk hurting the outside people.
2. In 23b3 classes where there is opt-out: there must be notice (the same standard as regular notice procedures) and then class members can opt-out from it.
3. As class representative, you open yourself up to counterclaims (rule 13a): all of the procedural rules apply.
4. Often, the class representative is a puppet: doesn’t actually pay himself, so the lawyer has a lot of the power.
5. **Political and Ideological Splits:** In 23b2 classes, there may be an ideological theory that the lawyer is pushing, and the rep is just a puppet.

**Cases:**

* ***Hansberry v. Lee,*** U.S. Supreme Court, 1940
  + Previous case (Buchanan): SCOTUS struck down an ordinance maing it illegal to sell land to black people in a community.
  + In response, racially restrictive covenants emerged: if a certain percentage of land owners signed, the restriction was part of the land (not just the people).
  + **Case 1: Class Action case.** People sign the covenant and court says that 95% signed so it is binding (even though that’s not true—actually just 54% did, but court says it’s not fraudulent).
  + **Case 2:** White landowner tries to sell land to black man, but he is sued to stop because of the covenant.
  + **Holding:** The original plaintiff lacked loyalty to the class since not all land owners agreed: there were actually 46% who did NOT sign. So the original case is not binding.
    - **Consider this:** is there actually a built in conflict of interest with the named plaintiff and the other class members?
    - **SCOTUS says:** The inside people may be precluded, but the outside people can’t be since they were not actually represented.
* ***Walmart v. Duke***, Supreme Court of the U.S., 2011, **Justice Scalia**
  + 1.5 million women working for Walmart allege that Walmart’s practice of delegating discretion on hiring and promotion to managers is discriminatory.
  + Title VII class action case with three named representatives asked for a **23b3 class.**
  + **Holding:** This class does not satisfy the Hansberry standard since the named representative does not meet the typicality/commonality/adequacy standard.
    - **Scalia bases this off of 23a alone.**
    - **Dissent (Ginsberg):** They don’t meet the 23b3 standards, but they do meet 23a: they could be certified as a different form of class.
      * **Result here:** Would allow this class to be certified as a 23b2 class, but Scalia wouldn’t.
* ***Comcast v. Behrend,*** U.S. Supreme Court, 2013, **Justice Scalia**
  + **Holding:** There is not enough commonality for 23b3 class.
    - **Based partially on the fact that there would be no formula for calculating damages for each person’s individual injuries.**
* ***Cooper v. Federal Reserve Bank***, U.S. Supreme Court, 1984
  + Class loses initial class action on employment discrimination, but court says that there may be a claim that individual members of class can bring.
  + **Holding:** You have a chance to bring in your individual claim even if the class claim is already decided.
    - **Issue preclusion may hurt you though.**
    - **Claim Preclusion:** Doesn’t apply here, since the claim (individual claim\_ is not precluded.
* ***Phillips Petroleum v. Shutts***, U.S. Supreme Court, 1985
  + Members of class informed that they would be part of class action unless they opted out, and they live across the country. Suit was in Kansas.
  + Oil and gas case about calculation of roylaties from oil wells.
  + **Holding:** Opt out is sufficient—there doesn’t need to be an opt-in agreement. That establishes **In Personam Jurisdiction over class members.** 
    - This is based on an idea that this are different involving plaintiffs rather than defendants.
    - **Open Question:** Does due process clause require notice in B1 or B2 classes where there is no opt-out? If there is in personam jurisdiction being asserted, is it required that you provide notice? **SCOTUS HAS NOT RULED ON THIS.**
    - **Additional element to Phillips: choice of law:**
      * SCOTUS says that Kansas can’t apply it’s own law, since there are people across the country and the only rationale for Kansas to use their law is efficiency.
      * **BN:** Does this limit the class certification process altogether? Can this case possibly be tried at once if there will be several different laws governing?

**Procedural Issues in Class Actions:**

* Test citizenship by the named plaintiff (*Ben Hur)*
* No aggregation: you can’t add up little damages to get to 75k if no individual plaintiff meets the cap.
  + However, as long as one plaintiff meets the 75k requirement, others can hang on (*Allapatah)*
  + It’s still unknown whether or not this works if the other people DESTROY diversity.
    - This isn’t a Class Action issue (post-*Ben Hur)*
    - But it is an open-ended question about Rule 20 plaintiffs.

**CAFA: Class Action Fairness Act:**

* In response to the issue of plaintiff forum selection enabled by the diversity rules in class actions, Congress passed CAFA:
  + If you have a national class action (at least 60% come from out of state) and there are more than $5 million at stake, then there is a minimum diversity test for federal jurisdiction.
  + **Minimum Diversity:** just one class member must be of a different citizenship.

**Settlements and Motivations:** Problems arise in the interaction between settlements and lawyer’s motivations sometimes.

* Settlements: first thing the judge sees is a prepackaged agreement, including class certification, amount of money, and mechanism for distribution.
* **Rule 23e:** Governs settlements
  + Settlement must be approved by the judge as fair.
  + Can only come after a public hearing, during which members of class and public can comment on fairness.

**Asbestos Cases:** Huge number of cases brought each year, so there are always proposals for legislation for an administration agency to deal with mass resolution of claims. In the absence of that, class actions are another options.

* ***Anchem Products v. Windsor***
  + Attempt to use Rule 23 to achieve an administration solution.
  + Proposed a pre-negotiated administrative mechanism for resolution of claims.
  + **Holding:** The attempt to create a 23b3 class fails as a class action because there is no ideal representative:
    - **There are two separate categories of people:**
      * People who are sick: already manifested a symptom.
      * People who are exposed but not yet sick.
    - No single person can represent both groups because of conflict of interest.
  + **Dissent:** This is the only way we could possibly solve this issue, and it’s being destroyed.
* ***Ortiz v. Fibreboard***
  + 23b1 class instead of 23b3: attempt to create a settlement but just for those who have been exposed.
  + Create a pot of money that will be there for current and future class members, but exempt the people who have already collected, and the people with currently pending claims.
  + **Holding:** No class for two major reasons:
    - No distinction made between pre and post 1959 claims, which was a major issue because of the insurance policy.
    - Lawyer conflict of interest with the people who have already sued.
  + **Also: they claimed a limited fund situation ($2 billion) but then made an arbitrary decision about how much of Fibreboard’s equity should go into the pot.**
    - **This case:** You can’t have a 23b limited fund situation if the limitations are decided by the parties.

**Arbitration Clause Cases:** FAA declared that an arbitration clause on its own is not an issue of unconscionability. **BN suggests this can all be thought of in relation to “consent” or tlack thereof, and reflects a weird disconnect with how troubled we are about volitionality and in personam jurisdiction.**

* There are many types of clauses that are not necessarily bargained for directly in a contract:
  + Forum Selection Clauses: will be enforced by the courts.
  + Choice of Law: will be enforced.
  + Waiver of Class Actions: waive judicial enforcement and accept arbitration, as well as waiver of aggregate arbitration.
* ***AT&T v. Concepcion***
  + Phone company promises a free product, but actually charges tax, each injury is $30 but the total liability would be $30 million.
  + **Holding:** The arbitration clause is binding.
* ***Italian Colors***
  + Restaurants claim they are being overcharged by American Express and seek to aggregate claims for collective arbitration, but they have waived this right.
  + **Holding:** The arbitration clause is binding.
    - Hugely problematic because it is economically impossible for single restaurant to process claim, and there would be a net negative result.

# Preclusion

## I. Overview

There are three major doctrines of stability in our legal system:

1. Statutes of limitation
2. Stare decisis: once decision is decided, subsequent courts are bound.
   1. But this is not absolute: you as a judge can always argue there is a problem, and the lawyer can do the same.
   2. **Three Levels:**
      1. Constitutional: weakest point of stare decisis. There is no Supreme Court way to amend the constitution.
      2. Construction of Statutes: tighter and tougher stare decisis: Congress can change SCOTUS’s decision if they don’t like it.
      3. Common Law: if you don’t like it, the legislature can trump it tomorrow.
3. **Preclusion: Absolute.** 
   1. Can be attacked in two ways:
      1. Original decision was not honest: was collusive. But this is hard to do based on Hansberry.
      2. Another side to this: fraud was involved in the decision: not based on new evidence or changed circumstances though.
   2. **Two kinds of Preclusion:**
      1. **Claim (Molecules):** You only get to litigate a claim once. If you split it up into component parts and litigate just a piece of the claim, you lose the rest.
         1. The theory or argument about why you should win.
         2. The cluster of issues that come together to make a claim.
      2. **Issue (Atoms):** Once you’ve adjudicated an issue, you are stuck with it.
         1. Legal or factual questions that court has to decide (when does SOL run out, how fast was car going?)
         2. You only get a single shot at deciding an issue.
         3. Must be based on a decision on the merits: not a dismissal for other reasons.
   3. **Basics of Preclusion:** Triggered only by a final judgment (not preliminary injunction, or a decision to keep evidence in our out).
      1. **Outsiders can’t be bound by preclusion:** fundamental principle of the due process clause.
         1. Stare Decisis can hurt an outsider, but you can still argue that the first decision was wrong.
         2. Stare Decisis applies only to the law, not to the facts.
      2. Preclusion kicks in at the final judgment in the trial stage, but if it is reversed on appeal, preclusion is taken away. If not, it has preclusive effect.

**Process for Exam:**

1. Is it claim precluded?
2. If not, is it issue precluded?
   1. Was the first case:
      1. Actually adjudicated?
      2. Fair?
      3. Necessarily adjudicated
         1. **General Rule:** If a prior verdict could have rested on alternative grounds, and you don’t know which one it actually rests on, neither is preclusive.
      4. Finally adjudicated?

## II. Claim Preclusion (Res Judicata)

***Rush v. City of Maple Heights,*** Supreme Court of Ohio, 1958

* P hits a pothole and both causes damage to herself physically and to her motor scooter.
* **Case 1:** Sues city for the motorcycle and receives damages.
* **Case 2:** Tries to collect on a second case for personal injury and asks for damages because the issue of liability was already settled. (Lawyer tries to use issue preclusion on the liability issue).
* **Holding:** She split her claim up and should have brought both theories at the same time00she is now precluded.
  + **Previously, in Vasu:** same court held that there are two different claims: property damages and physical injury, but the court now changes its mind.
  + **Rationale:** All parties should see the full stakes of the issue. They can do that by putting the whole claim together at once.
  + **Signals a Major Shift:** Move from a theory based definition of a claim to a fact-based definition.
    - **At common law**: There was a writ for each issue (trespass, etc.) and limited each plaintiff to talk about a single thing in front of judge. Created a **theory based** definition of claim.
      * But the shift started when the rules of procedure were drafted: becomes inevitable for claim to be based on the underlying facts instead.
    - **Today**:Fact-based definition of claim.
  + **BN:** This may have been seriously unjust though for this particular plaintiff.
    - **Legislation can’t be retrospective, only prospective.**
    - Court could have applied this as a prospective ruling without the legislature, or overrule the Vasu case but only in the future—not to this specific plaintiff. S
  + **Judges Rationalize this Decision:** the Vasu holding was actually **DICTA:** the real holding was that when the property claim is owned and controlled by someone else, they will be treated separately.
* ***Jones v. Morris,*** 1937
  + Borrower buys a car, and Lender says he will owe money that can be paid off in monthly payments.
  + There is an Acceleration Clause in the contract: if Borrower misses payment, everything is due.
  + **Case 1:** Lender sues Borrower for two missing month payments.
  + **Case 2:** Lender sues Borrower to get the remaining payments under Acceleration Clause.
  + **Holding:** By suing at two different times, he split his claim, and lost the Acceleration Clause.
    - **A discretionary acceleration clause would have avoided this.**
    - **This creates a de facto mandatory Rule 18.**
    - BUT: this only applies if you have a place where you can bring all claims: if there is no jurisdiction over one, then you don’t have to bring it there.
* ***Mitchell***
  + Defendant rather than plaintiff issue. Bank lends farmer 9k for a potato crop, but he has to use a coop to store the potatoes as a condition.
  + Manager of the coop runs away with all the money.
  + **Case 1:** Bank v. Farmer in federal court for 9k, and bank won.
  + **Case 2:** Farmer v. Bank requesting the remaining 9k owed.
  + **Holding:** Defendants are held to the same preclusion rules as plaintiffs: they have to shoot back with their entire claim.
    - **These are 13a claims:** you must bring all claims that you have arising out of the same T&O—this is mandatory.
      * **At common law, you had to raise the full claim together, but if you were silent, you could argue that you didn’t raise anything.**
      * Rule 13a requires you to raise these claims though.
* ***Lindermann***
  + Plaintiff sues for purchase price of machine, and defendant wins.
  + Then, second case, defendant sues for damages from faulty operation of the machine.
  + **Holding:** Court says that D can bring a separate case since the first case was not about damages.
    - **BN:** This is out of step with decisions today: there is now a fairly broad idea of what claim preclusion is and what a defendant must bring.
* ***Federal Department Stores v. Motie***
  + 7 plaintiffs sue department store for fixing prices: antitrust case in federal court. D wins, since you need to be a direct dealer with company to bring an antitrust case.
  + Plaintiffs 1-5 appeal to ninth circuit.
  + Plaintiffs 6 and 7 file in state court.
  + Later, ninth circuit reverses for Plaintiffs 1-5, but 6 and 7 are told they are barred since they didn’t appeal and lost the right to appeal.
  + **Holding:** Claim preclusion is claim preclusion and is final, this is not an equitable exception to claim preclusion.
    - **The court REALLY believes in claim preclusion.**
    - **Removal Issue:** Plaintiffs 6-7 remove up to federal court on the basis of the prior federal judgment—preclusive rather than a Motley violation.
    - **Typically, removal is allowed under those circumstances.**

**Defining a Claim: Depends on the Jurisdiction**

* **Rush:** Both claims required you to determine if the city is negligent.
* **School Board/Teacher Hypo**:One claim turned on date of notification, one about wy ehse was fired.
* Reminiscent of Transaction and Occurrence and Common Nucleus of Operative Facts:
  + Two ways to define T&O:
    - Common liability facts
    - Logical connection (This is the LASA definition of claim).
* **Courts will reach different conclusions here.**
  + **BN won the School Board case:** SCOTUS said that it is based on Ohio’s definition, and Ohio says the liability facts define the claim; Indiana applies a logical relationship test.
  + **BN hates logical relationship test.**
    - It’s a trap
    - Door opening and door closing doctrine.
      * When logical relationship opens the door, it’s okay.
      * When it closes the door, it is very unjust.
* Possible that the same definition of “common nucleus,” “transaction and occurrence,” and “claim” works everywhere, but we don’t know for sure:
  + The definition might be different depending on the consequences of the litigation.
  + Similar to the Article III and 1331 issue.
  + “Common Nucleus of Operative Facts”: the consequence is to open the court room doors through supplemental jurisdiction.
    - Makes sense to read it broadly when it is door-opening.
  + “Claim”: consequence is to slam the door: maybe it makes sense to read narrowly.
  + “Transaction and Occurrence”: can be both opening and closing based on preclusion and 13a/13g.
* The result: uncertainty, but possibly a great deal of justice is gained.

**How to Chart the Case in Issue Preclusion:**

1. Ask yourself: does Case 2 resolve facts that should have been raised at the time that Case 1 was decided?
2. Do new things come up in Case 2?
3. **Ultimately:** Is it worth keeping Case 2 alive? Does Case 2 have an independent life of its own, or is it so controlled by Case 1 that Case 2 is a shell?
   1. **Isolate the legal and factual issues that must be decided to decide Case 1.**
   2. **Then, question:** Is there anything left for Case 2?
      1. **If not much is left, you are within analytic parameters to say that case 2 is the same claim as case 1.**

## III. Issue Preclusion (Collateral Estoppel)

In **Claim Preclusion**, something is dismissed that you never had a chance to present.

In **Issue Preclusion,** only dismissed if that exact issue has already been resolved.

**Requirements for Issue Preclusion:**

1. You have to some faith in the **fairness** of the first adjudication: the adjudication must have been fair.
   1. Can be based on judge or jury decisions.
   2. Open question: should it be given to administrative hearings as well?
2. The issue must **actually** have been adjudicated.
   1. Does **NOT** apply to settlements, unless expressly contracted for within the settlement.
   2. Does **NOT** apply to default judgments.
   3. Does **NOT** apply to nolo contender: no contest but not admitting to the issue.
3. Must be **necessarily** adjudicated.
   1. Can’t be based on factual dictum, instead it must be based on the narrowest legal explanation for the court’s holding.

**Cases:**

* ***Cromwell v. County of SAC:*** Actually adjudicated
  + County issues bonds to build a court house, and they are payable over a 10 year period.
  + Each bond has coupons which can be rendered negotiable.
  + The bonds turn out to be totally fraudulent.

##### **Case I**: P sues D on one $10 coupon now due; D defends itself with evidence of fraud 🡪 court holds that bonds are void as to those with knowledge of fraud, P does not offer up proof of his being a bona fide purchaser, so default judgment for P.

##### **Case II**: P sues D on 4 $1,000 bonds + 4 coupons, and D asserts the earlier judgment as conclusive on the general validity of the bonds by CE

* + **Holding:** Plaintiff gets away with it because the issue of whether he was a bona fide purchaser was not **actually adjudicated** in Case 1.
    - **This had a lot to do with the fact that we really care a lot about negotiability as an issue and protecting it.**
* ***Russell v. Place:*** Necessarily Adjudicated
  + Patent holder sues infringer claiming violation of patent.
  + Claims that the infringer is violating patent which consists of two things: (1) chemical process; (2) mechanical process.
  + Plaintiff wins first case.
  + **Case 2:** D is still infringing, so P sues D.
    - These are by definition **two claims (not claim precluded)** since they are different in time and there was no way to know about it at the time.
  + **Holding:** But, since there are two separate things at stake here: we don’t know what was actually decided in the first case, so there is no preclusion.
    - **General Rule:** If a prior verdict could have rested on alternative grounds, and you don’t know which one it actually rests on, neither is preclusive.
    - Difference between general verdict and specific verdict:
      * General: person put a series of theories in for relief, but we don’t know which the case was decided on.
      * **Majority Rule:** If that’s the case, then NEITHER IS PRECLUSIVE.
        + **Emerging minority rule:** If that’s the case, then BOTH ARE PRECLUSIVE.
      * **BN:** This case puts pressure on the standard assumption that the second case will only touch on one of the two possible issues that were raised.
        + **If the new case is identical to the first (touches on both issues), then logically it shouldn’t matter what the holding was actually based on.**
* ***Rios v. Davis***
  + **Based on a theory of contributory negligence (no longer the rule)**
  + **Case 1:** Truck driver sues Davis for injuries in crash; Davis shoots back and says that Truck driver was negligent. Davis brings in Rios for his damages.
    - **Jury holds that all were negligent: no one wins.**
  + **Case 2:** Rios sues Davis, since he didn’t assert a claim the first time. Davis says Rios was already held negligent.
  + **Holding:** Rios can bring the claim since we are not sure which issue was the main issue decided in Case 1.
    - Actually decided.
    - But, not necessary for the decision. Since there was no way Davis would get a settlement (he was negligent), the holding made no difference.

**Doctrine of Necessarily Adjudicated: Illogical (BN’s Theories):**

1. Assumption of Jury Sophistication
   1. But juries are not this sophisticated, and don’t assume that only one of the issues holds.
2. If second case is identical, it should be precluded

**Mutuality Issues in Preclusion:**

* Ordinary lawsuits are a closed box between parties.
* D can always use issue preclusion against P if D wins.
  + **There has been an assumption of equal risk between the parties at the time the initial case is decided.**
  + **At common law:** Estoppel was based on mutuality of risk. It was deemed fair to nail someone with preclusion only if that person was willing to take the risk of being the person present originally.
  + **Even in all of this, the outside party cannot be precluded.**
* **Today, post common law:** preclusion can be available to people outside of the box. They are not precluded themselves, but they can use preclusion to estop other parties who were in the box.
  + **New phenomenon:** raises the stakes of losing.
  + **Not relevant for winning though:** once you have won, you can’t preclude others who are outside the box. You may frighten them with stare decisis, but they aren’t precluded.

**Mutuality Cases:**

* ***Bernhard v. Bank of America***
  + Sather dies, and Cook says that she gave a gift to him before she died.
  + **Case 1:** Bernhard (Sather’s daughter) v. Cook. Court finds for Cook, that the money was actually a gift.
  + **Case 2:** Bernhard v. Bank: Bernhard tries to say that bank was negligent in letting Sather make these transfers to Cook without investigating if they were fraudulent.
  + Bank raises **Defensive Issue Preclusion:** The defendant tries to use issue preclusion against a party who was in the first suit and lost.
  + **Holding:** Defendant can use **Defensive Non-Mutual Issue Preclusion (Collateral Estoppel).**
* ***Blonder Tongue***
  + Patent litigation case: P claims to own patent, and says smaller people are violating it.
  + **Case 1:** P sues D, but D wins.
  + **Case 2:** P sues D2, but D2 shoots back with collateral estoppel.
  + **Holding:** Plaintiff can be precluded by D2, even though D2 was not part of the first case.
    - **In mismatched cases, where one very powerful litigant can keep litigating over and over again, the only way to stop is to preclude him.**
    - **Result**: Overthrows mutuality all together.

**Policy Rationales for Non-Mutuality:**

* **Consider Mythical Case Three:** If it had gone forward and Bernhard won, bank would be forced to pay her, but then would bring Case three and sue Cook.
  + **There is no just way to decide Case Three:**
    - If Cook loses, he loses his original victory.
    - If Bank loses, they are treated as the primary, instead of secondary, tort feasor.
  + **This is the problem of the Indemnity Circle**
* **Blonder Tongue Problem:** Nonmutual collateral estoppel provides an end to serial litigation.
  + **This is not a Case 3/Indemnity Circle situation.** But it would be a never-ending sequence of cases otherwise.

**Policy Opposition to Blonder Tongue:**

* The first case could have been a fluke: what if that was the only case that P could have lost in, and now he is estopped forever?
  + **Illustration:** 
    - Case 1: p wins
    - Case 2: p wins
    - Case 3: d wins
      * Just because d won in case three, d4 probably would not be able to impose collateral estoppel.
    - BUT, if d3 was actually d1, then there would be estoppel.
* There’s a certain randomness to this issue.

**Test for Mutuality:**

1. Was party asserting estoppel at risk in the first case?
2. Consider the opposite hypothetical: if the first case had been decided differently, would the new party not be bound?
3. **If you answer yes to both questions: it is non-mutual.**

**Types of Non-Mutual Collateral Estoppel:**

1. Defensive:
   1. Used by a defendant against a plaintiff who was a party in the first case.
   2. Nonmutual: if you flipped it, there would be no preclusion because the party was not a party, and could not be precluded.
   3. Issue, not claim preclusion: the case could go forward, but that issue is gone.
2. Offensive
   1. Plaintiff asserting affirmative offensive non mutual issue preclusion against a defendant.
   2. **Standard Rule:** Courts have the discretion to do it.

Role of Class Actions: Response to Estoppel:

* **Defendants**: fed up because they don’t get to use collateral estoppel, and have to keep fighting against new plaintiffs.
* **Plaintiffs:** want to create estoppel in mass situations.

**Offensive Non-Mutual Collateral Estoppel:**

* ***Parklane Hosiery***
  + Allegations that Parklane is making false statements about the company.
  + **Case 1:** SEC v. Parklane, and SEC wins (Parklane did issue false statements).
  + **Case 2:** Class of plaintiffs (investors) v. Parklane.
    - **Class tries to use estoppel to enforce judgment from Case 1.**
  + Two additional issues here:
    - The SEC action was an injunction only, and the investors are seeking damages.
      * In an injunction, there is no jury. Parklane lost its right to a jury.
      * There was no way that the plaintiffs could have been fence sitting, since they weren’t allowed in to Case 1.
      * **Park Lane lawyers made a big mistake: should have sought a nolo or settlement, and then would not be estopped.**
  + **Holding:** Plaintiff can use offensive non mutual collateral estoppel in this case:
    - **The fact that there is no jury doesn’t matter:** it’s not about the institution, but whether or not the institution was fair.