TABLE OF CONTENTS

I. INTRODUCTION: OVERVIEW OF A CIVIL ACTION

- Public power to enforce legal remedies (money, action)
- Parties' autonomy, judge's disinterest
- Justice vs. efficiency
- Procedure (court's control) vs. substance (parties' control): eg statute of limitations

II. CHOOSING A COURT: JURISDICTION OVER THE LITIGANTS

- Statutory authorization
- Due process: 5th (fed), 14th (states)

A. The Traditional Basis

Pennoyer v. Neff, 1877: jurisdiction justified by territory
- QIR action: constructive service statutorily invalid: failure to attach at start
- 14th Am: territorial theory based on int'l law – states as equal sovereigns
  - Exceptions: extra-terr'l effects of Ks, status relations, consent to agent
- Timeline: 1866 Mitchell v. Neff; 1868 14th Am; 1877 Pennoyer v. Neff
- Milliken v. Meyer, 1940: territoriality → domiciliaries residing/hiding out of state
  - Functional application of Pennoyer? Benefits from/oblig to home state
  - Formal exception to Pennoyer? Beyond state borders
- Adam v. Saenger, 1938: resident Δ may counterclaim non-res π for related cl

B. Expanding the Bases of Personal Jurisdiction

Kane v. NJ, 1916: appt of in-state agent for service (reasonable conditions)
Hess v. Pawloski, 1927: use of hwy = implied consent of in-state agent for service
- Ct allowed for "regs reasonably calculated" of inherently dangerous activities
- Formal or implied consent: unsubstantial difference

C. A New Theory of Jurisdiction

International Shoe Co. v. Washington, 1945: MO corp to pay WA unempl tax
- Modern conception of service of process → notice > jurisdiction
- NEW: minimum contacts inquiry: "trad'l notions of fair play and sbst'l justice"
  - Faithful to Pennoyer line? State sovereignty, in-state activities
  - Extension? Ignore "fiction" of phys presence
  - Additional guidance:

Activities / Cause of Action	Related	Unrelated
Continuous, systematic	*Specific Jur.*	*General Jur.*
Single, isolated	*Specific Jur.*	*No Jur.*

D. Specific Jurisdiction and State Long-Arm Laws

McGee v. Int'l Life Ins. Co., 1957	Hanson v. Denckla, 1958
- (Black) Single, iso K evidence of subst contacts TX Δ, CA π - CA's "manifest interest" in regulating (dangerous) ins mkt	- (divided Ct – Warren) cause of action DE creation, so FL apptmt unilateral - Unilateral actions by non-Δ ≠ purp availment - Dissent (Black) CoA FL apt = min contacts

- Δ's inconvenience < other factors	o State's regulatory interest; disproportionate burden on FL Δ

World-Wide Volkswagen v. Woodson (1980) (last majority opinion)
- (White) Two-part test:
  - Minimum contacts: "affiliating circumstances" (sovereignty, Δ's convenience)
    - Foreseeability: direct or indirect service of market
  - Reasonableness inquiry:
    - Δ's burden
    - Forum's interest
    - π's interest
    - Interstate efficiency interest
    - Substantive regulatory goals
- Dissent (Brennan): single, triangulated test: min. contacts parties-transactions-state
  - Min contacts ≠ threshold issue
  - "purposeful injection" into "stream of commerce" sufficient

Asahi Metal Industry Co. v. Superior Court (1987)
- Validity of 3d-party (foreign) impleader w/o context of orig (settled) suit?
- (O'Connor): "Foreseeability-PLUS"
  - No min contacts (plurality)
  - Unreasonable regardless (majority)
    - Foreign Δ's severe burdens
    - CA's slight interests (mkt forces)
    - Low shared state interests
    - High transnational interests (foreign policy)
- Concurrence (Stevens): min contacts by quality/quantity
- Concurrence (Brennan): min contacts by profit; "purposeful direction"
- Dissent (Scalia): min contacts threshold unmet (prevailing approach)

J. McIntyre Machinery Ltd. v. Nicastro (2011)
- (Kennedy): "O'Connor's foreseeability-plus": no direct targeting of NJ
  - o Δ's INTENT to consent to jx paramount (flips trad'l idea of sovereignty)
  - o Rejection of WW "indirect"; Brennan's reasonableness approach
- Concurrence (Breyer): No "regular flow", but worries about Internet sales
- Dissent (Ginsburg): "purp availmt" of "inevitable" NJ mkt = min contacts
  - o More faithful foreseeability-plus inquiry (indirect servicing via whole US)

Burger King Corp. v. Rudzewicz (1985)
- (Brennan) FL jx of K governed by FL law, despite Δ's MI residency and FL's lack of long-arm statute
  - o Min contacts: parties, choice of law, forum
  - o Exception: high reasonableness > weak contacts

E. General Jurisdiction and State Long-Arm Laws,

Goodyear Dunlop Tires v. Brown, 2011
- Precedents:

- Perkins (1952): de facto corp presence in OH → gen jx
- Helicopteros: "mere sales in forum" insufficient for gen jx

- (Unanimous) gen jx only in place "fairly regarded as home" (incorporated)
  - Relatively few gen jx cases – difficulty in transnat'l litigation, Internet
  - OPEN Q: reasonableness inquiry?
    - Usually min contacts + home analysis = reasonable
    - But important for registration statutes: consent to service

F. Jurisdiction Based upon Power over Property

Pennington v. Fourth National Bank, 1917
- QIR2 garnishment of wages for alimony: state's power over property w/in borders

Harris v. Balk, 1905: NC full faith and credit to ML QIR2 jx
- Debt located with person of debtor (attach debt, serve debtor)

Shaffer v. Heitner, 1977: Greyhound shareholder derivative lawsuit
- (Marshal) applied Int'l Shoe: "location" of stock ≠ min contacts w DE
  - Int'l Shoe test ubiquitous: in rem = in personam
- Concurrences
  - (Stevens) overbroad reach
  - (Powell) limit opinion to QIR2 jx over intangible prop
    - Retain trad'l in rem jx over real prop
- Dissent (Brennan): corp officers = min contacts (like McGee)
  - Policy costs to shareholder π's by splitting suits across for a
- QIR2 legacy: allow ½ loaf when statutory jx enumerated/limited

G. Refrain: Jurisdiction Based Upon Physical Presence

Burnham v. Superior Court, 1990
- (Scalia) "continuing tradition" of service in forum (per se fair/reas by pedigree)
  - Int'l Shoe limited to non-res Δ not present in forum
  - Shaffer limited to non-res Δ and QIR2 (only 3 votes, but 2 still sitting)
    - Trad'l practices per se reasonable (eg Powell)
    - State leg empowered to change laws
  - Rules > standards
- Concurrence (Brennan) Shaffer rejected trad'l practice in light of contemp circ
  - Dynamic interpretavism"
  - Scalia's mistaken historical reading: transient presence > post-Pennoyer
  - Int'l Shoe reasonableness threshold

H. Another Basis of Jurisdiction: Consent

1. *Consent by Appearance*

Ins. Corp. of Ireland v. Comp. des Bauxites de Guinee, 1982: jx by necessity
- Δ's sp appearance = consent to jx determination (alts: default, collateral)

2. *Consent by Registration*

Ratliff v. Cooper Labs Inc, 1971

- "Applying for privilege ≠ exercising privileges of state"
- Cir split re Consent by Registration (Knowlton (8th1990) vs. Wenche (5th 1992))
- Registration statutes argument: level playing field w domestic corps

3. Consent by Contract

M/S Bremen v. Zapata Off-Shore Co., 1972: fed common law via admiralty
- Forum-selection cl presumptively valid unless unreas
  - Freely negotiated
  - Global business/trade

Carnival Cruise Lines, Inc. v. Shute, 1991: Ouster cl trad'ly invalid as bad public policy
- Forum-selection presumptively reasonable, despite adhesion, no negotitation
  - Δ's special interest (centralized litigation)
  - Ex ante clarification (notice)
  - Reduced fares for consumers (though no evidence in record)

I. Jurisdictional Reach of the Federal District Courts

Federal Rule 4
- 4(k) personal jurisdiction
  - (1)(A) piggyback on state long-arms (limited by 14th Am)
  - (1)(C) federal claim under fed statute (limited by 5th Am)
    - If no fed long-arm, then revert to (1)(A)
    - Open Q: 5th Am reasonableness test?
- 4(n) in rem jx
  - (1) Fed law
  - (2) State law

III. PROVIDING NOTICE AND AN OPPORTUNITY TO BE HEARD

A. The Requirement of Reasonable Notice

Mullane v. Central Hanover Bank & Trust Co. (1950)

- NY law's insuff notice of jud'l settlement (≠ 14th)
  - Intang prop less distinction rem/personam for due process analysis
  - State reg'y interest in trust mgt
  - Indiv interests in due process protection
    - "notice reas'ly calc'd, under all circs, to apprise interested parties of pendency of action and afford them an opp'y to present their objections"
    - "means…such as one desirous of actually informing the absentee might reas'ly adopt to accomplish it" – perfect notice unnecessary
    - "rea'l effort…reas'ly certain to reach most"
- Publication usually unreliable
    - OK when unknown/missing Δ, unclear interests, aband prop
    - NO when known add/interests of benefs

- McDonald v. Mabee (1917) must use "most likely" means to reach Δ
- Wuchter v. Pizzutti (1928) struck down driving law similar to Hess but w/o notice
    - "duty of communication by mail or otherwise w Δ"
- Mennonite Bd of Missions v. Adams (1983) limited actual/mailed notice to persons whose name/add reas'ly ascertainable (how hard must π look?)
- Tulsa Prof Coll Serv Inc v. Pope (1988) π must directly inform Δ whose info reas'ly ascertainable
- Greene v. Lindsey (1982, divided) in pub housing, flyers on doors insufficient (unreliable; dignity?) so notice by mail preferable
    - Dissent (O'Connor): mail also subj to theft, so no better
- Dusenberry v. US (2002; Scalia) cert mail to prisoner suff under prison guidelines regardless of evidence of compliance – presumption of gov regularity (procedure = performance; applications: Title VII, IX)
    - Dissent (Ginsberg): prison sys too lax to ensure deliv; better alts
    - Consequences: Peace Corps, mil, dipl – anyone living on gov prop
        - 2003 Service Members Civil Relief Act, 50 USC § 501: postpones/suspends proceedings that could lead to eviction, forecl, default, sale for liens while serving (π's burden to prove Δ not in service)
            - 2013 DOJ report: failures – 319 forecl
- Jones v. Flowers (2006) under 2-step state-mandated notification sys, gov should have followed up w reg mail
    - But unreas'l for gov to have to look up Δ's new add
    - Dissent (Thomas): reas'lness defined ex ante (like Mullane)
        - Cert mail sufficient
        - Statutory language determines const'l std
    - Legacy: uncertainty in probate, title cases
        - Due process: higher for home loss; lower for fungible loss

        - Change req's for collateral chall to incl lack of due process
- Pagonis v. US (8th Cir 2009) since Δ suffered no prop loss, π IRS not req'd to take add'l steps when cert mail of delinquency returned
- Marion Cty Aud v. Sawmill Creek (Ind. 2012) declined add'l steps to notify Δ taxpayer of tax sale b/c 1000s of returned notices/year (circular logic?)
- Covey v. Town of Simeon (1956) notice by mail insuff if sent to known unguarded insane person
- Dobkin v. Chapman (NY 1968) notice by mail OK if "best π could do" in auto accident - Δ's own fault if gave wrong add
- Roller v. Holly (1900) 5 days insuff time btwn notice, hearing for VA Δ to defend action in TX
- War Eagle Village Apts v. Plummer (Iowa 2009) 7-day notice of action w possible eviction result unconst'l
    - Statute: cert mail notice complete upon mailing, w/o receipt req'mt
- Aguchuck v. Montgomery Ward Co. (Alaska 1974) small cl summons must give info of appearance req's, venue options
- Finberg v. Sullivan (3d Cir 1980) PA garnishment rule (w/o hearing) unconst'l b/c failed to inform Δ of exemption of SS funds
- DH Overmyer Co. v. Frick (1972) cognovit notes (debtor ack'g debt, waive hearing) must be assessed case by case for consideration, equality of leverage

B. The Mechanics of Giving Notice

- Federal Rule 4
    - Sources of personal jx:

a. statutory: 4(k)
b. const'l (5th or 14th)
    - E.g., Worldwide facts brought in fed ct?
        - Subj matter jx: diversity
        - Pers jx: state-law cl, so 4(k)(1) piggyback
            - 14th Am due process analysis of contacts w forum st
    - E.g., Worldwide facts, antitrust suit
        - Subj matter: fed Q
        - Pers jx: 4(k)(1)(c) fed statute w long-arm prov
            - 5th Am due process analysis of nat'l contacts
    - Constitutional tests
        - Min contacts similar (14th state only vs. 5th nat'l)
            - Problem: strategic avoidance of min contacts w any st
        - No SCOTUS ruling on reasonableness req'mt under 5th
    - Rule 4(k)(1)(b). BULGE: parties joined under Rules 14 or 19
        - Rule 14: impleading parties (e.g. Cheng Shin in Asahi)
        - Rule 19: joinder of indispensible parties (e.g. Denkla trustee)
        - Service in jud'l district no more than 100 mi from courthouse
        - Some regional ares ='ly imp as indiv states (exc AK, HI)
        - Questions (unresolved case law):
            - Which long-arm statute? Forum state? Bulge state?
            - Which const'l test?

- Rule 4(k)(2) Fed claims outside any state's jx
  - Substantive fed statute req'd
  - Jx not auth'd by any state statute
    - Foreign corp gap-fill
    - π's burden to prove jx (state-by-state anal?)
      - 7th, 1st Cir shift burden to Δ to declare st jx
  - 5th Am due process analysis (+reas'lness?)
- Rule 4(n) Power over property
  - 4(n)(1) Fed law: QIR
  - 4(n)(2) State law: QIR only if in personam jx cannot be obtained – reas'l effort to serve summons
  - Question: Allowance for limited appearance to chall jx? Since Rule adopted post-Shaffer, maybe, but ≠ airtight

- "Sewer" Service: US v. Brand Jewelers (SDNY 1970)
  - Easy credit door to door consumer products
  - Δ "systematically" used phony process servers who discarded process, signed false affidavits of service → default jdgmts agst low income Δs
  - Ct gave US standing to sue for injunction
    - burden on interstate comm
    - Δ "state action" depriving property w/o due process
  - 1972 settlement:
    - Vacated default jdgmts 1969-71
    - Procedures to notify consumers of trials on merits
    - Δ duty to ensure future fair/good faith service
  - NY reforms
    - Before: process servers' burden to locate Δs
    - 1970: OK to leave copy w someone @home + mail copy
    - 1973: req more detailed process server statements
    - 1986: AG investigation: continued fraud (~1/3 tainted defaults)
      - Req copy of summons w return service
    - 2009: NY AG suit agst American Legal Process for 100k pot'ly fraudulent service → default
    - 2010: GPS recording of all service of process

C. Opportunity to be Heard

1. *Sniadach/Di-Chem Line: Laundry List Factors*

Sniadach v. Family Financial Corp. of Bayview (1969)
- WI garnishment statute unconst'l: 1) auth'd π lawyer to summons, 2) pre-trial wage freeze, 3) no Δ opp to be heard
- Due process = hearing before deprivation of wages
- Dissent (Black): no due process limits on state authority
- Open Qs: Pre-jdgmt seizure of non-wages prop? Which extraordinary circs?

Fuentes v. Shevin (1972)
- Replevin (taking possession of seized prop) w/o pre-seizure hearing ≠ const'l

- FL law allowed for sheriff's forcible search of Δ's home @ time of notice
- Extraordinary circs: imp't gov/pub interest + need for prompt action
- Extends Sniadach from wages to consumer goods
- Dissent: externalities: higher prices, interest rates, K loopholes

Mitchell v. WT Grant Co. (1974)
- Upheld LA sequestration statute w/o notice or prior hearing
- 1) seller/creditor's interest in preserving wasting of prop, 2) judicial oversight, 3) immediate post-seizure hearing min'zed risk of wrongful taking

N. Ga. Finishing Inc. v. Di-Chem (1975)
- Struck down garnishment statute permitting conclusory allegations w/o safeguards for Δ

Laundry List Factors:
a. Who decides? (judge, clerk)
a. What type of property? (real estate)
b. What is complainant's interest in the property?
c. Why seize? (jx, security, extraordinary circs)
d. How to seize? (burden of proof, allegations, bond posting, etc)

2. *Matthews/Doehr Test: 3 Categories*

McAuliffe v. New Bedford (Mass 1892)
- Gov benefits not considered property until 1950s (gov no due proc req'mt to fire police offs for political reasons)

Goldberg v. Kelly (1970)
- Prior hearing req'd for termination of public benefits
- "brutal need" for services "to live" while awaiting judgment
- Not full trial, but tailored hearing "so as to be heard"

Matthews v. Eldridge (1976)
- No hearing req'd to terminate SS/disab benefits
- 3-part balancing test:
  i. DΔ's interest: degree of deprivation
  ii. Risk erroneous deprivation, value of add'l safeguards
  iii. π (gov) interest (functional, fiscal)

Connecticut v. Doehr (1991): applied Matthews to private action
- Δ sued for assault/battery after bar fight, attached π's home as security
- Dist Ct sum judg for Δ; 7th Cir reverse of π:
  - Sniadach: post-attch hearings only in extra circs w/ safeguards
  - Mitchell: jud'l prob cause determination req's simple facts
- Holding: pre-jdgmt attachment of real prop ≠ const'l w/o prior notice or hearing, w/o showing extraord circs
  - Matthews 1: sig interests in even temp deprivation of home
  - Matthews 2: high risk erroneous under "skeletal" affidavit
  - Matthews 3: min π interests in prop itself, no risk of prop waste, no gov interest
- Dicta: bond req'mt – "no good arguments" against

- Dissent (Rehnquist, Blackmun): ≠ Matthews (full deprivation by seizure); here only partial deprivation by value portion of home
- Shaumyan v. O'Neill (2d Cir 1993)
    - CT attachment statute applied in home contracting dispute
    - Dismissed const'l claim given Δ's "sweat equity", high documentary evid, low error rate
- Diaz v. Patterson (2d Cir 2008) Uheld NY lis pendens: π file "notice of pendency" to alert pot'l buyers of claim on prop – owner no opp to contest
- Bennis v. Michigan (1996) Upheld gov seizure (w notice, hearing) of jt-owned car for husband's sex w hookers
- Patterson v. Cronin (Colo. 1982) Upheld parking boot as long as post-deprivation hearing

IV. SUBJECT-MATTER JURISDICTION

A. State Court Jurisdiction

Lacks v. Lacks (NY 1976): wife moved to vacate divorce 10 years after judgment for husband's failure to meet residency requirement. Only vacate for lack of jx (jx elems must be clear in statute), not for failure on merits/elem of CoA (appellate review).

- Arbaugh v. Y&H Corp. (2006): Title VII harassment. 15+ req'mt = merits ≠ jx because "jx" omitted from relevant statutory language.
- Reed Elsevier v. Muchnick (2010): Copyright Act registration req'mt separate from jx language, so ≠ jx'l. Relevant factor, but ≠ dispositive
- Morrison v. Nat'l Australia Bank (2010): is statutory condition entitles π to relief, then merits issue and ≠ jx'l. Fed regulation foreign activity = marits b/c defines which conduct prohibited
- John R. Sand & Gravel v. U.S. (2008): statute of lim = jx'l (exception to rule of lims as aff def) b/c clear statutory language, systemic goals: claims admin, limiting sovereign immunity, promoting judicial efficiency. Maybe stat lim = jx'l when U.S. party?
- Factors to consider:
  - Clear statement rule: does statute use "jx"?
  - Does statutory condition affect real world activity or only courtroom?
  - How is req'mt usually treated in law?
  - Is the U.S. a party?

State courts in general:

- State courts general, plenary, inherent jx (unless divested by fed law):
  - Hughes v. Fetter (1951): WI court req'd to hear CoA under IL law because analogous WI law (Art. IV § 1 Full faith and credit)
  - States may apply own statutes of limitations (procedural)
- Dual sovereignty and concurrent jx may be waived by explicit fed statute granting exclusive jx to fed courts
- Howlett v. Rose (1990): FL court must hear fed civil rights law claim b/c analogous state law (may not discriminate agst fed law; Supremacy clause)
- Limits to state courts' plenary jx:
  - Art. IV Supremacy Clause (no affirmative duty to hear fed claims, but disallowed from discriminating against them)
  - Congressional granting exclusive jx fed courts (Hamiltonian theory (weak): fed law created after state law, so states not giving anything up)
  - 14th Am due process clause
    - Sniadach → Doehr limits on operations/remedies
    - Constrains pers jx, but not critical to subj jx
    - Challenge/debate: judicial elections, limits on funding
  - Article IV § 4 Republican government (Q: inclusive of court system?)
    - Non-justiciable in fed ct
    - Justiciable in state ct? (Lindy, OR gov and UOLaw Dean, thinks so)
    - § 1 full faith credit of valid judgments in other states (exception: Δ default judgment, collateral challenge for lack pers jx)

- HYPO: gay couple sues denial ins cvg in NJ under NY law; Δ MtD lack subj jx
  - State court jx general, plenary: can hear transitory CoAs
  - Insurance claim is transitory
  - Full faith credit unless valid state policy (Hughes)
  - Debatable whether NJ anti-gay policy "valid"

B. Federal Court Jurisdiction: Diversity of Citizenship

Analysis:
- Constitutional basis: Art III §2 "citizens of different states"
- Statutory basis: §1332
  - U.S. citizenship (Dred Scott)
    - Indiv §1332(a): domicile + intent to return (Mas v. Perry)
    - Corporation §1332(c): state incorp + nerve center (Hertz)
  - Complete diversity (Strawbridge)
  - Amount in Controversy §1332(b) >$75,000
    - 1π v. 1Δ: aggregate all claims
    - multiple parties: aggregate only common/indivisible claims

1. Background

Federal courts have limited jx
Constitutional basis: Art. III
- § 1: establishment SCOTUS, auth Congress to create lower courts
  - Judicial appt'mt by POTUS w/ Cong'l consent (Art. II)
  - Hold offices during "good behavior" – impeachable high crimes
  - 2013: 9% vacancies
- § 2: nine heads of jx, two categories
  - PARTIES: (1) Ambassadors, Ministers, Consuls; (2) U.S.A.; (3) Between/among states; (4) State v. non-res citizen; (5) Between citizens of different states; (6) Between citizens of same state w/ land grants in different states; (7) State/citizen v. foreign
  - CLAIMS: (8) Arising under Constitution, fed law, treaties (post-Civil War); (9) Admiralty, maritime law

Statutory basis: 28 U.S.C. §1332
- §1332(a) Diversity, Alienage: (1) diversity; (2) alienage ≠ same-state res alien vs. American; (3) diversity + add'l foreign parties; (4) foreign state π
- §1332(b) Amount in Controversy > $75,000
- §1332(c)(1) corporate citizenship; (2) legal rep = principal citizenship
- §1332(d) Class Actions
- Tracks Art. III language (except "civil actions" ≠ "cases")
- State law claims
- Changing attitudes over time: 1990s abolishment → 2000s expanding scope
- Strawbridge (1806): statutory requirement of complete diversity (§ 1332) (exceptions: interpleader actions)
- Justifications:

- Traditional (Bank of U.S. v. Deveaux (1809):
  - Protect Δ from judicial, legislative, jury biases
  - Uniformity necessary for economic growth
- Modern:
  - Cross-pollination
  - Neutral-law application in cross-border transactions
  - Uniformity of Fed Rules (advantage corps, disadvantage indivs)

2. *Determining Citizenship*

Mas v. Perry (5th Cir 1974): French husband, Kansan wife, voyeur landlord. Objective analysis § 1332(a) diversity = US citizen + state domicile (domicile: intent to return when absent). Marriage exception (outdated) when husband foreign.

- Dred Scott (1856): state citizenship requires U.S. citizenship (constitutional)
- Strawbridge (1806): statutory requirement of complete diversity (§ 1332) U.S. citizen domiciled abroad can't invoke diversity
- Zuckerberg (D. Mass. 2007): old domicile holds while in transit
- §1332(c)(1): Corp citizenship: State incorp + Hertz (2010) nerve center
  - Controversy: extending Goodyear "essentially at home" test to diversity?
- Wachovia v. Schmidt (2006): Nat'l banks, formed under fed law, citizens of main office state (§ 1348) – OPEN Q: PPB of nat'l banks? (Cir split)
- Unicorp'd ass'n citizenship based on members' citizeships
  - Special: §1332(d)(10) class action: state of org + PPB
- Insurers, if sued w/o reference to insured: incorp + PPB (§ 1332(c)(1)(B)-(C))
- Legal representatives (minors, incompetents, estates) = party rep'd
  - Problem: how can rep demonstrate principal's intent to move?
- Alienage: § 1332(a)(2)-(4)
  - (a)(2): American v. foreign (vice versa) – Strawbridge; res alien = state of domicile
  - (a)(3): American & foreign v. American v. foreign
    - OPEN Q: are foreign parties req on both sides?
  - (a)(4): Foreign state v. American
    - OPEN Q: what is a foreign "state" for §1332(a)(4) alienage? Prevailing view: Exec Branch decides (Asahi sep powers)
- JPMorgan Chase v. Traffic Stream (2002): use US law to determine foreign entity's citizenship w/o regard to foreign law
- Sadat v. Mertes (7th Cir. 1980): denied dual US/Egypt citizen's diversity claim b/c domiciled in Egypt, AND denied alienage b/c US citizenship "dominant" (b/c choice to naturalize)
  - Purpose alienage to promote int'l rel, avoid alien bias (Buchel)
- Blair Holdings Corp. v. Rubinstein (SDNY 1955): stateless person ≠ alienage

H.K. Huilin Int'l Trade Co. v. Kevin Multiline Polymer Inc (EDNY 2012): res alien cannot sue same-state US citizen in fed ct in light of 2011 §1332(a)(2) Clarification Act.

- Res alien v. res alien unconstitutional

- Kramer v. Caribbean Mills (1969): Panamanian corp assigned K interest w/ Haitian corp to Kramer, TX atty, for $1. No diversity jx b/c collusive creation barred by § 1359
  - Functional test: why was assignment made? How frequently has party assigned?
  - OPEN Q: whether § 1359 also bars collusive destruction (5th Cir yes)
- Rose v. Giamatti (SD Ohio 1989): denied Pete Rose's "nominal" Δs: same-state MLB, Cin. Reds to keep in state court. Granted diversity.

3. Amount in Controversy

- Codified 1789 ($500). Today §1332(b) >$75k w/o countercl, setoffs, costs
  - Calculated on day of filing
  - Injunctive relief counts; courts divided on which party's valuation to use
- Burden on party invoking diversity. Low bar: "legal certainty" to dismiss
- 1 π v. 1 Δ: aggregate value of all claims (related or not)
- 2+ πs v. 1 Δ (vice versa): only aggregate common/indivisible claims

Freeland v. Liberty Mut. Fire Ins. Co (6th Cir. 2011): π sought full $100k ins benefit. Δ offered only $25k since π's uninsured son driving. Denied AiC b/c "value of relief" = $75k (diff value) insufficient (a penny!) for diversity jx

4. Judicially Created Exceptions to Jurisdiction

Domestic: Ankenbrandt v. Richards (1992): sound policy/judicial tradition to refuse divorce, alimony, custody b/c deference to state expertise. Exception: intra-family tort

Probate: Marshall v. Marshall (2006): father died, leaving whole estate to son. Widow file bankruptcy while estate in probate. Son sued for defamation, widow pleaded tortious interference.

- Ginsburg: hearing intra-family tort ≠ interfere w/ bankruptcy ct.
- Stevens: OK, but eliminate probate exception altogether.

Justifications for domestic relations exceptions:

- Constitution: not enumerated, possibly b/c at drafting, domestic relations were heard in ecclesiastical courts
- Statute: Cong'l acquiescence to SCOTUS interp of §1332 as excluding domestic relations
- Abstention: deference to state courts' expertise/proximity

C. Federal Court Jurisdiction: Federal Questions

Analysis

- Constitutional basis: Art. III §2 "arising under"
- Osborn "federal ingredient" test
  - "Protective jx"
  - Statutory basis §1331

- Location of federal issue (Mottley "well-pleaded compl)
- Substantiality of federal issue (Grable-Empire-Gunn: CoA vs. rule of decision)
  - Necessary issue
  - Actually disputed
  - Substantial
  - Federalism

1. *The Constitutional Test (Art. III §2)*

   Congressional goals:
   - Sympathy to fed interests
   - Uniform interpretation of federal law
   - Institutional expertise

   Osborn v. Bank of the United States (1824): Ohio taxation to kill nat'l bank branches, since Ohio ≠ party McCulloch v. Maryland. "Federal ingredient" test: fed law gave bank right to sue (antecedent to Δ OH auditor's defenses), enter Ks.
   - "Ingredient" (foundational, but need not be in dispute, may be lurking)
   - Justifications: socioeconomic nat'l expansion; institutional SCOTUS power
   - Bank of U.S. v. Planters' Bank of Ga. (1824): companion case, based on state bank's refusal to honor notes purchased by nat'l bank. Same result.
   - Verlinden BV v. Central Bank of Nigeria (1983): Osborn = broad reading of arising under jx. Cong'l authority to confer fed jx over any case. Declined to ID boundaries of Art. III jx.
   - "Protective jx" – authority to hear state law claims w/o diversity or fed ingredient: eg post-9/11 plane crashes under state law
   - Reasons for broad "arising under" test: nationalist concerns, develop federal common law, >SCOTUS authority

2. *The Statutory Test (§1331)*

   Louisville &. Nashville R. Co. v. Mottley (1908): KY π sued KY RR for breach of K rescinding lifetime pass, but ct ≠ subj jx.
   - "Well-pleaded complaint" rule: fed issue must be substantial elem of CoA apportioned to π, so anticipation of fed law aff def insuff.
     - Under-inclusive of substantial federal issues apportioned to Δ
     - Over-inclusive of trivial federal issues
   - Respects federalism by allowing states to apportion pleading between parties
   - Narrowing of §1331 from Art. III §2
   - Post-Civil War docket management (appropriate use of jx rules?)
   - Later retried in KY state court, appealed to SCOTUS, where π lost on merits
   - Unsuccessful 1969 ALI reforms to allow aff def to confer §1331 jx

   Removal Jurisdiction
   - Δ's right to move from state to fed court (counterweight to fundamental principle: "π is the master of her claim")

- Statutory (≠ Const.) authorization since 1789. Modern §1441 codified 1875
- Specific parties/claims: §1442 (fed officers); §1443 (civil rights); §1453 (interstate class action); §1445 (RR under Fed. Empl. Liability Act)
- Justifications:
  - Litigant equality
  - Local bias in diversity
  - Strategic forum shopping: orig win rate 71%; after removal 34%

Approaches to §1331 jx:

- Holmes: per se test: fed jx only when fed right of action
- Shoshone (1900): federal right of action (over conflicting mining land grants) to be construed by state law ≠ §1331 jx b/c factual analysis independent of fed law construction.
- Smith (1921): state right of action (shareholder derivative suit) = §1331 jx b/c depended on further claim of unconstitutionality. (MO statute: investments under invalid laws enjoinable)
- Moore (1934): state right of action, intrastate commerce, encompassing fed law violation, in anticipation of aff def ≠ §1331 jx
- Merrell Dow (1986): state right of action (negligence) based on failure comply fed labeling stds ≠ §1331 jx b/c "too insubstantial to support jx." ≠ fed right of action → ≠ fed jx (Brennan dissented, since fed right of action "new phenomenon)

Grable & Sons Metal Prods. v. Darue Eng'g & Mfg. (2005): IRS seizure/sale to Δ of π's property for tax delinquency. Δ removed for fed tax law.

- Upheld jx over state quiet title action under arising under test:
  - (1) necessary federal issue: dispute over tax law;
  - (2) substantial federal issue: only issue in dispute;
  - (3) U.S. interest in resolving issue: tax collection;
  - (4) effect on federalism: rare implication of fed law in state quiet title actions. Prevent "horde" of "garden variety" state torts
- Concurrence (Thomas): fed right of action should be dispositive of §1331 jx

Empire Healthchoice v. McVeigh (2006, Ginsburg 5-4): π gov-K insurer sued Δ estate decedent fed empl to recoup (req by K) benefits after Δ3d-party settlement.

- Denied §1331 jx despite fed interests (gov K, fed empl, recoup fed $).
- Distinguished from Grable: US as party, pure law (≠fact specific) issue, federalism concerns
  - "Actually disputed" = legal, not just factual
  - "Substantial" = US action, not just private party
  - "Substantial" includes context, so omission of fed CoA ≠ dispositive
- Dissent (Breyer): US stake in outcome, uniform interp fed program, statutory silence b/c implicit §1331 coverage

Gunn v. Minton (2013, Roberts): π Minton sued Δ his atty for malpractice (state tort) in prior patent infringement case.

- Denied arising under (§1338 = §1331) jx b/c ≠ substantial to whole federal system: hypo case-in-case inquiry w/o bearing on IP law, "fact-bound and situation specific."
- "Substantial" = importance to federal system as a whole

Federal jx test:
- Federal issue apportioned to π?
- Federal issue necessary?
- Federal issue actually disputed? Legal or factual dispute?
- Federal issue substantial?
  - Considerations: Private right of action? US involvement or $? Constitutional Q? Intrastate activity?
- Federalism balance?
  - Avoid flood of fact-specific state law claims (may underestimate imp of fact-specific constitutional cases, eg 1st Am)
  - Regulatory authority of state, fed gov

Right of Action	Rule of Decision	§1331 JX?
Federal	Federal	Yes
Federal	State	Maybe, if fed law construction (Shoshone)
State		Usually no, unless Grable test

V. ASCERTAINING THE APPLICABLE LAW

A. The Rules of Decision Act (§1652)

28 U.S.C. §1652: state law applies, except where fed law does…

- Swift v. Tyson (1842): π Swift sued Tyson in NY fed ct for refusing to honor 3d-party check based on fraud land speculation transaction.
  - Fed courts free to disregard state common law b/c only "evidence of law" not law itself (law = ethereal Truth).
  - Fed courts must apply state statutes and "local usages" (property law).
  - "General federal common law" as bkgd principles (nullified by Erie)

Erie R. Co. v. Tompkins (1938, Brandeis): π (PA) Tompkins dismembered in PA along "notorious" footpath by Δ (NY) train. Sued in NY fed ct. PA law: recklessness vs. maj common law: negligence.

- SCOTUS overruled Swift b/c new leg history research, policy arguments. "Law" = state common law. Remanded for PA law application.
  - Early draft §1652 incl both statutory and common law
  - Expected Swift benefits (uniformity) were not accruing. Also, forum shopping, litigant inequality
  - Unconstitutional federal overreach into state sovereignty: ≠ Cong'l authority to create substantive com law rules in states
- Dissent (Butler): Swift gen'ly unquestioned 50 years. No constitutional issue at play in case, and if so req intervention of AG.
- Concurrence (Reed): Swift erroneous, but unnecessary to rule its legacy unconstitutional.
  - Sufficient to expand "law" to incl state common law
  - Cong may have power to declare substantive law in fed courts, given unquestioned power over procedure

Guaranty Trust Co. v. York (1945, Frankfurter): π York sued for breach of fiduciary duties: fraud, misrepresentation (equity). Claim time-barred?

- Statutes of limitations:
  - Procedural: control filings, encourage efficiency, improve accuracy, docket control
  - Substantive: limit rights/remedies, secure repose, stabilize transactions
- Extended Erie Doctrine to equity cases AND statutes of limitations to "avoid substantially different results" – federal power to apply trad'l equity procedures, but not to limit state rights
  - Outcome-determinative test: federal procedure yields to state law if its application could significantly affect the outcome"
- Fed courts in diversity = another state court
- Dissent (Rutledge): deference to state law would limit Cong'l authority over relief. In 7 years post-Erie, Congress hadn't acted re statutes of limitations.
  - Resisted view that fed courts diversity just another court of state
  - Congr'l authority broader than any state
  - Would put fed courts < state courts which apply their own statutes of lims

Byrd v. Blue Ridge Rural Elec. (1958, Brennan): Workmen's comp claim and employee classification: judge or jury Q?
- Shift: litigant equality/substantial similarity → unique federal forum
- Fed law prevailed under balancing test:
  - State substantive rules always apply
  - State procedural rules apply when not outcome-determinative
  - State procedural rules, if outcome-determinative, must be balanced against countervailing federal interests in federal courts as indep forums of justice

B. The Rules Enabling Act (§2072)

The Arrival of Modern Procedure
- 1934 Rules Enabling Act §2072: (b) "shall not abridge, enlarge, or modify any substantive right"
- 1935 Advisory Committee appointed by SCOTUS
- 1937 final report
- 1938 Congressional adoption Fed. R. Civ. P.
  - Goals: uniformity, simplicity, flexibility

Hanna v. Plumer (1965, Warren): OH π sued estate of MA Δ for pers injury from car accident, served process under Fed. R.
- HOLD: Fed R as controlling b/c pertinent, valid under REA
  - Sibbach procedural test: "really regulates procedure"
  - Outcome-determinative "in the relevant sense": Erie's twin aims:
    - forum shopping: certain procedures make no difference
    - litigant equality: whether ALL relief would be barred ex ante
- CONCUR (Harlan): because Erie primarily federalism concerns, better test whether chosen rule would affect powers reserved to states
- OPEN Qs:
  - Whether federal service process rule "abridges, enlarges, or modifies substantive state right" – assume majority believed no, since rule was held ≠ outcome-determinative
  - Whether test for other Fed Rules' validity determined ex ante or ex post? Probably ex ante by abstract/facial analysis
- Supremacy clause: valid, pertinent fed law applies
  - Pertinent: intended to govern issue at hand
    - Is there a Federal Rule on point?
    - Does the Fed R conflict w/ state rule that can't be accommodated?
  - Valid: conforms w/ legal norms/laws
    - Is the Fed R unconstitutional? (Cong'l authority to enact)
    - Is the Fed R w/in the statutory grant of §2072?
      - §2072(b): abridge/enlarge/modify substantive rights?
      - Sibbach: "really regulate procedure"?
      - Hanna: incidental effects tolerable unless Erie twin aims implicated

Shady Grove v. Allstate (2010, Scalia – fractured): whether NY anti-penalty class action law preempted by/reconcilable with Rule 23.
- HOLDING: Fed R Civ P, if valid, will displace conflicting state procedure
- DICTA: valid Fed Rules don't yield to state procedural rules bound up with substantive rights. In fact, Sibbach test ignores state rules. Forum-shopping inevitable feature of federalism
- CONCUR (Stevens): must analyze substantive rights bound up with procedural rules.
  - Clear statement analysis: location of rule in code, scope of rule (e.g. NY rule affects any class actions, even under diff state laws)
  - "High bar" for REA problems: presumption of Cong'l authority
- DISSENT (Ginsburg): must interpret Fed Rules w/ sensitivity to state interests
  - State procedural rule effectively substantive damages cap
  - Rules could be harmonized: Fed: class cert; NY: remedies
- OPEN Q: whether Scalia's ex ante abstract/facial analysis or Stevens's ex post/as applied analysis will govern (watch Sotomayor)

C. Ascertaining State Law

1. *Determining Which State's Law Governs (Klaxon)*

Klaxon Co. v. Stentor Electric Mfg. (1941): apply choice-of-law rule in state where fed court sits: "proper function of federal court in diversity is to ascertain what the law is, not what it should be."
- E.g., Fed R 4(k)(1)(a) piggyback on state long-arm statute
- Made more sense under trad'l pers jx doctrine, but 50+ years of forum shopping increased sense that fed cts should creat confl-law rules
- Role of fed court in diversity:
  - York (Frankfurter): another state court
  - Byrd (Brennan): independent forum
- Nature of law: positivist codification or dynamic/adaptive?
- Are interpretive rules procedural or substantive?

2. *Ascertaining the State Law (Mason)*

Mason v. American Emery Wheel Works (1st Cir. 1957): MS π personal injury from RI Δ's exploding emery wheel. HOLD: reinterpreted 30 yr-old MS law in light of "modern trend" and recent dicta
- CONCUR: inferring state courts' readiness to change based on dicta would confuse lower courts
- Legacy: 5th Cir later relied on 1st Cir interp of MS law; MS finally changed in line w/ "modern trend 10 years later, but w/o citing to Cir Ct decisions
- General view: federal courts in diversity = state court
  - McKenna (3d Cir 1980): examine all relevant sources: State S Ct on point, analogous cases, "considered" dicta
  - Pomerantz (D. Mass 1951): judge's task in diversity "to divine the views of state court judges"
  - Nolan (2d Cir 1960): "to determine what NY ct would think Cal ct would think on issue about which neither has thought"

- Meredith (1943): unless exceptional circs, ct shouldn't abstain merely b/c issue difficult or unanswered by State S Ct
  - Thibodaux (1959): exceptional circ: eminent domain – allowed dist ct to stay proceedings until State S Ct ruled on issue
- Certification: SCOTUS endorsed in 1960, though not required practice
  - Tunick v. Safir (2d Cir 2000): NY refused expedited cert for nude photos
    - Error risk of fact-denuded decisions
    - Busy docket
    - Prelim injunction stage ≠ finality of opinion
- Calabresi: fed judges often wrong on state law. Suggestion: fed ct draft prelim opinion, which State S Ct could certify, or fed ct provisional interp until State S Ct ruling
- Factors ETC (2d Cir 1981): NY fed ct applying TN law, so required to apply 6th Cir (incl TN) law
- Regina Coll. v. Russell (1991): Cir Ct shouldn't rely on Dist Ct interps of state law. Apply de novo review but only on decisional law, not policy implications
- Sloviter (1992): abolish diversity b/c inequitable effect on losing litigants (≠ appellate review); fed judges unaccountable to local constituencies

D. Federal "Common Law"

Common law-making inherent to judicial power

- Article I Theory: coterminous w/ Cong'l power → Osborn fed ingredient
- Enclave Theory: confined to special areas of high fed interest (E.g., foreign affairs, fed $) → Empire (Breyer dissent)
- Statutory Theory: permitted only where authorized by statute (most limited) → prevailing today

Clearfield Trust Co. v. United States (1943): π U.S. sought to recover forged 3d-party relief check payment collected by Δ for JC Penney. 8-month delay in notice of forgery. (PA law: unreasonable delay; fed law: OK)

- SCOTUS applied federal law for any "rights/duties of the U.S. on commercial paper which it issues" (Enclave Theory)
  - Like Grable (≠ Empire), U.S. direct party
  - Constitutional power/function performed under Cong'l Act
  - Fed interest in uniformity
  - Looked to Swift line for "convenient source of reference" for fed com law
- Fed cts often derive fed com law from law of majority of states
- U.S. v. Kimbell Foods (1979): two-step analysis
  - Federal com law for U.S. rights under fed programs
  - Content of law: consider uniformity, fed interests, disruption state commerce
- BofA v. Parnell (1956): declined to extend fed com law to priv-party suit
  - Dissent: fed com law wherever fed commercial paper involved

Boyle v. United Techs. Corp. (1988, Scalia): π's marine son killed in helicopter crash – product liability against Δ private military contractor. SCOTUS created "military contractor defense" (sov immunity unless expl waived)

- Unique federal interests:
  - U.S. rights under its Ks; pass-through costs
  - Discretionary function U.S. officials extends to K specs
- Significant/unresolvable conflict fed vs. state laws
- DISSENT (Brennan): Cong'l silence on military contractor defense" despite lobbying efforts (judicial overreach). Broad policy implications on non-military Ks. Tort system regulation.
- DISSENT (Stevens): Legislative prerogative to explicitly confer military contractor defense, esp balancing of massive gov programs and indiv rights

E. Federal Law in the State Courts

Dice v. Akron, Canton & Youngstown R. Co. (1952): π empl injured when Δ train jumped track, sued under Fed Empl Liability Act. Δ defense: waiver/release, which π claimed was induced by fraud

- SCOTUS: fed law governs
  - Uniformity of fed law interp (fraud inducement voids release)
  - Fed judge-jury roles "too substantial a part of the rights accorded by the Act" to be denied by state procedure
- DISSENT (Frankfurter): Act req only nondiscrim state system, and unfair to req state to apply hybrid state/fed practices for analogous claims
- "Reverse Erie" – assumption that fed law supreme

VI. VENUE, TRANSFER, AND FORUM NON CONVENIENS

A. General Principals

Constitution: "venue" only re criminal actions

§1390 (2011 Clarification Act)
- (a) venue = geographic specification of proper ct
- (b) exclusion of certain cases (§1333 maritime/admiralty)
- (c) n/a removal

§1391 (2011 Clarification Act)
- (a) applicability in (1) all Dist Cts (2) w/o regard to local or transitory nature
- (b) civil action may be brought in
  - (1) district of any Δ, if all Δs same state
  - (2) district where substantial events/property
  - (3) if ≠ (1) or (2), then any district with pers jx over any Δ (gen'ly transnat'l disputes)
- (c) Residency
  - (1) Natural persons (incl perm res aliens) = domicile
  - (2) Entities (incorp'd or not): if Δ = pers jx; if π = PPB
  - (3) Foreign = any district
- (d) In mult-district states, corps = min contacts w/ district alone
- (e) Δ U.S. officer/empl in official capacity; (f) Δ foreign states
- (g) multiparty, multiforum litigation under §1369

Venue fact patterns:
- Where the/part of subject of the action is located
- Where the/part of cause of action arose
- Where some fact is present or happened
- Where Δ resides or does business
- Where Δ has an office or place of business, agent, or agent resides
- Where π resides or does business
- Where Δ may be found or summoned/served
- Wherever π decides to file complaint
- Anywhere
- Where seat of government is located

Burlington N. R.R. Co. v. Ford (1992): unanimous upholding MT law limiting in-state corp venue to PPB, but allowing out-of-state corp venue in any county

Substantiality requirement: disagreement over test:
- Δ's actions alone, or
- Holistic approach incl π's actions, district's connection to transaction

Local action doctrine: Livingston v. Jefferson (1811): transitory actions mean transaction could have occurred anywhere – local cause = local action

- Disagreement: local actions based on pers jx (waivable) or subj jx (not)?

"Pendent venue": join improperly venued claim w/ properly venued claim arising out of "common nucleus of operative fact"

Special venue rules, e.g. Title VII: where discrimination occurred, where records maintained, where π would have worked but for discrimination – otherwise PPB

B. Venue and Transfer in the Federal System

Δ or π can move to transfer. Factors considered:
- access to witnesses
- access to forum
- docket congestion
- speed to trial
- relationship between community and dispute
- court's familiarity with applicable law
- π's forum choice
- π's residence
- forum-selection K clause

§1404 Change of Venue (2011 Clarification Act):
- (a) transfer for party/witness convenience
  - promotion of justice independent factor?
- Used when orig venue valid
- Van Dusen v. Barrack (1964): transferee court must apply same law as would transferor court (substantially similar results)
- Ferens v. John Deere Co. (1990): PA π missed PA statute lims, so filed in MS and transferred to PA. Transferee court must apply transferor's statute of limitations, even if π transfers
- Circuit split re conflict of law when transferring §1331 fed Q claims
- SCOTUS hearing case on relevant test (§1404 multifactor or Bremen reasonableness) for transfers based on forum-selection clause
- Win rates: 58% non-transferred cases; 29% transferred cases

§1406 Cure or Waiver of Defects
- (a) Dist ct may dismiss or transfer
- (b) Parties' obligation to object to venue, otherwise jx conferred
- Used when orig venue invalid
- §1406 transfers for defective original filing treated as though originally filed in transferee court
- Goldlawn (1962): court may transfer even if it lacks pers jx

§1407 consolidation by Panel on Multidistrict Litigation
- In re MF Global (2012): consolidation of actions following $1.6B bankruptcy despite different claims on different theories, b/c "common factual backdrop"

- Lexicon Inc. v. Milberg Weiss (1998): Panel must remand transferred action back to orig court for trial – end 30-year practice self-assignment
- In re Korean Air Lines Disaster (D.C. Cir 1987): law of transferor ct relevant, but not binding, on fed claims transferred under §1407. Assumption of unitary fed law, but independent analysis by each fed court

C. Forum non Conveniens

Gulf Oil Corp. v. Gilbert (1947): FNC = court's authority to refuse cases allowed under letter of statute to avoid excessive π strategizing. Extraordinary measure: only disturb π's forum choice if "vex," "harass," or "oppress" Δ.
Factors to consider:

- Litigants' private interests:
  - Availability of evidence, witnesses
  - View of the premises
  - Easy, expeditious, and inexpensive trial
  - Enforceability of judgment
- Public interests:
  - Docket congestion
  - Jury duty
  - Community's connection to dispute
  - Familiarity with applicable law

Piper Aircraft Co. v. Reyno (1981): π (CA law firm secy) probate rep estates of Scottish decedents killed in plane crash in Scotland. Δs PA and OH plane, propeller mfg. π filed in CA state court b/c strict liability tort law. Δ §1441 removal, then §1404 transfer to PA fed, MtD FNC.

- SCOTUS reversed 3d Cir to allow FNC dismissal:
  - Reinterpretation of Gilbert choice of law: change in substantive law unsubstantial unless total barring of relief
    - Accepted unquestioned Δ's characterization of foreign law
  - Foreign π < deference to forum choice, since already inconvenient
    - Conditional dismissal: Δ agree to submit to Scottish jx (but SCOTUS no authority to req Scottish court to hear case or waive statute lims, so allow refilling if blocked from Scottish ct)
- Sinochem (2007): upheld dismissal Chinese Δ despite ≠ jx (pers or subj) analysis – OPEN Q: binding effect on dismissal condition of waiving jx challenge in alt forum, if dismissing ct w/o jx?

VII. STATING THE CASE: PLEADING

A. The Development of Modern Pleading

Traditional functions of pleading:
- Provide notice of the nature of claims and defenses
- ID baseless claims
- Set each party's view of the facts
- Narrow the issues

King's writs/forms specific to actions: claim-specific procedures
- π stated claims in declaration
- Δ's substantive response: demur or plead
  - Demurrer: challenge legal sufficiency of π's claims
  - Dilatory plea: grant π's merits, challenge jx
  - Peremptory plea: challenge merits
- π's responses if Δ pleads:
  - Demur for lack of valid defense
  - Plead in replication: challenge facts
  - Plead in confession/avoidance: mistake of fact

1848 NY Field Code: req statement of facts meeting elements of each CoA

Gillespie v. Goodyear Serv. Stores (NC 1963): dismissed "conclusory" compl for insuff facts: when, what, where, who, relationships, circumstances, amount/cause/manner of debt. Ultimate vs. evidentiary facts. Factual statements vs. legal conclusions.

B. The Complaint and the Pre-Answer Motion

Pertinent Federal Rules:
- Rules 7-11: Pleading
  - Rule 8(a) Claim for Relief: (rejection of code pleading)
    - (1) short, plain statement of jx
    - (2) short, plain statement of entitlement to relief
    - (3) demand for relief
- Rule 12: Motion to Dismiss
- Rule 16: Case Management
- Discovery
- Summary Judgment

1. *Notice Pleading and "Conceivability"*

Dioguardi v. Durning (2d Cir 1944): Δ customs collector Port NY sold off π's unclaimed merch at unfavorable price, unfair procedure. HOLDING: "Notice pleading rule": reversed dismissal b/c π's pro se claim suff allegations that, if true, would entitle him to relief. Enough facts to proceed to discovery.

Conley v. Gibson (1957): π black workers sued union for discrimination. Rule 8(a) ≠ req detailed facts of claim. "No set of facts" rule: only dismiss if "beyond doubt the π could prove no set of facts that would entitle him to relief." Purpose = fair notice of claim and ground on which it rests. Notice pleading OK b/c discovery, pretrial procedures. Fed R Appx Forms give suff detail

- Today, pending Fed Rules Am to invalidate Rule 84 sufficiency of Forms
- Rule 12(b)(6) dismissal analysis:
  - Factual sufficiency: inclusion of all material elements
  - Legal sufficiency: recognized right to relief given sum of facts

Swierkowicz v. Sorema (2002): French Δ demoted/fired Hungarian π, replaced with younger French empl. HOLDING: prima facie case (+theory) ≠ req'd at pleading stage, only fair notice of claim and grounds. π gave events, dates, ages, nationalities.

- Leatherman v. Tarrant County Narco. Intell. & Coord. Unit (1993): unanimous holding of notice pleading under Rule 8 for civil rights complaints. SCOTUS admitted potentially different rule if rewritten today, but interp won't change w/o Cong'l amendment

2. *Twombly/Iqbal "Plausibility" Standard*

Bell Atl. Corp. v. Twombly (2007, Souter): Δ Baby Bells (regional monopolies) accused of collusive restraint of competition (≠ Sherman Act) based on parallel conduct, opportunities for collusion, officer's statement.

- HOLDING: dismissed complaint under increased pleading standard for failure to allege add'l facts beyond parallel conduct – boxed π into parallelism theory
  - RULE: "sufficient facts"
  - Expensive discovery, difficult case management
  - Discarded Conley "no set of facts" rule as outdated
  - Distinguished from Swierkowicz b/c met elems of CoA
- DISSENT (Stevens, only antitrust): πs did allege add'l facts
  - Federal Rules intended to keep litigants in fed court
  - 16 previous SCOTUS citations to Conley w/o challenge
  - Return to fact-specific Code pleading?
  - Careful case mgmt: should have req'd Δ to answer, allowed limited discovery (maj cited single, outdated Easterbrook L.R. article)
  - OPEN Q: is Swierkowicz dead?
  - Majority bias against class action πs, in favor of wealthy corps
- Erickson (2007): upheld pro se prisoner's 8th/14th Am violations compl, applying Conley impossibility std
  - DISSENT (Thomas): 8th Am protections only to actual injury, not risk
- Epstein: as discovery costs rise, stronger case for terminating litigation earlier, especially where πs rely on publicly avail facts rebuttable by other publicly avail facts

Ashcroft v. Iqbal (2009, Kennedy): π Pakistani Muslim "person of interest" after 9/11, 1st/5th discrimination suit for unlawful detention, abuse.

- HOLDING: dismissed complaint as factually insufficient under heightened "facial plausibility" standard
  - Analysis: discard legal conclusions, accept remaining facts as true, inquire whether they comprise a plausible claim for relief
  - "Plausible" = not otherwise explainable
  - Allegations in equipoise favor Δ (reversal of trad'l test)
  - Twombly applicable to all civil actions, not limited to antitrust
  - Reject careful case management approach, especially for gov official Δs
- DISSENT (Souter): π's compl sufficiently established Δs' knowledge of discrimination and creation of discriminatory policy
  - Given Δs' concession of Bivens liability std, π's compl = R 8(a)(2): knowledge + deliberate indifference
  - Twomly ≠ req allegations to be true at MtD stage; must assume truth, "no matter how skeptical" – relevant Q: grounds for relief
  - Conclusory/non-conclusory designations inconsistent
- DISSENT (Breyer): case management tools adequate, lower judges competent
- Legacy: on MtD
  - Accept as true all factual allegations
  - Discard legal conclusions
    - Iqbal guidance: "willfully", "know", bald assertions
    - OPEN Q: validity of Form 11 "negligently"?
  - As whether remaining facts, alone, plausibly state claim for relief
  - Context-specific approach
  - Inferences ≠ all drawn in π's favor
  - OPEN Q: Rule 8 (general pleadings) vs. 9 (special pleadings, high std)

3. *Pro Se Litigation*

Erickson v. Pardus (2007): month after Twombly, SCOTUS upheld prisoner π's pro se compl alleging 8th/14th violations for withholding of Hep-C meds
- Rule 8 requires only "short, plain statement"
- Specific facts unnecessary under Conley std

Swanson v. Citibank (7th Cir 2010): upheld pro se compl alleging FHA violation. Rule 8 still stands and Twombly, Iqbal, Erickson just interps of it. Ke Qs:
- What is required for fair notice?
- How much detail is required?
- How does π signal the type of claim?
- DISSENT (Posner): only way to square with Iqbal would be to exclude Iqbal from discrimination cases or limit Iqbal to qualified immunity cases – SCOTUS decisions trying to elim pro se discovery

Pro se = 25-37% of fed cases filed
- Is lack of counsel evidence of < merits of π's case?
- Trad'ly lower pleading std for pro se litigants, but post-Twombly > overall dismissal rate

4. Rule 12(e) Motion More Definite Statement:

Garcia v. Hilton Hotels Int'l (D.P.R. 1951): π fired for alleged pimping in Δ hotel. Δ testified before labor board, precluding π from severance pay.

- Denied Δ's 12(b)(6) MtD b/c π implied suff facts for claim for relief, and conditional privilege insuff for MtD
- Granted 12(e) Motion More Def Statement b/c 12(f) struck ¶s w/ Δ's privileged labor bd testimony, so remainder of compl insuff facts

C. The Answer

Hartford Acc. & Indemn. Co. v. Merrill Lynch (W.D.OK 1976): ct treated proximate cause as Q of fact: allegations insuff to show causal connection btwn bank's negl and loss of insured fidelity bond

Shaw v. Merritt-Chapman & Scott Corp. (6th Cir 1977): 12(b)(6) dismissal = ruling on merits – further action on same claims barred unless explicitly allowed

1. Rule 8(b) Denials

3 available responses: (1) admit, (2) deny, (3) plead insuff info ("DKI")

- Rules discourage general all-incl denials
- Unclear if Twombly/Iqbal "plausibility" std applies to denials – if so, then π would move 12(f) to strike for insuff defenses → cost, delay
  - Textual split: Rule 8 incl "show" w/ claims, but not w/ aff defs
  - Universal acceptance of plausibility std for R 13 counter- cross-claims

2. Rule 8(c) Affirmative Defenses

18 enumerated examples (not exhaustive):

- Affirmative defenses: admit allegation, ut challenge legal right to action
- Avoidance: pull in matters outside compl that can't be raised in denials

D. Rule 15 Amendments

Background principles:

- Permission "freely given" unless bad faith, undue prejudice on opposition
- 15(a)(1) as a matter of course w/in 21 days
  - (2) other am's w/ written consent or court's perm: justice vs. prejudice
- 15(b)(2) issues not raised by pleadings but tried by parties → implied consent: treated as if raised in pleadings (importance of objecting/amending to clarify record for appellate review)
- 15(c) Relation Back: outside statute lims. Rules: (1) use state rule; (2) use nature of transaction; (3) use Fed Rules
  - Schiavone v. Fortune (1986): characterized relation back as procedural (per π's concession), time-barred π's amendment to correct Δ "Fortune" as parent co "Time, Inc."
    - Rule 15(c) amended in direct repudiation to allow amendment at any time

Krupski v. Costa Crociere (2010): allowed amendment mistaken Δ party after statute lims. π's delay/knowledge of Δ's existence irrelevant to 15(c) inquiry; relevant factor Δ's knowledge, during lims period, of amenability to suit but for π's mistake
- OPEN Q: can "John Doe" Δ's qualify for Rule 15 mistake amendment?

E. Rule 11 Sanctions

1938-83: very seldom used (9 violations) b/c subjective bad faith std

1983 amendments:
- Req prefiling investigation that allegations supported by existing law or good-faith argument for overturning (Marshall would've sanctioned for Brown)
- Mandatory monetary → 7,000 Rule 11 decisions in 10 years

1993 amendments:
- Ongoing obligation beyond pleading
- Monetary sanctions discretionary
- 21-day safe harbor provision to correct mistakes
- 11(a) signature on every paper (OPEN Q: e-sigs?)
- Oral statements incorp'd into writings sanctionable (OPEN Q: letters to opp?)
- 11(b) certifications: proper purpose, reas'l legal/factual investigation
- Under Erie, indirect application of Rule 11 to removed cases: once filings repeated in open court

Hadges v. Yonkers Racing Corp. (2d Cir 1995): reversed sanctions for failing to allow safe harbor, chastised lower ct for personal attack agst atty
- Sussman (2d Cir 1995): mixed motives for filing OK as long as factually/legally warranted claim
- Golden Eagle (9th Cir 1986): reversed sanctions b/c OK to combine existing law claims and arguments to extend existing law

Inherent judicial authority to sanction
- Chambers v. Nasco, Inc. (1991): inherent power sanctioning OK for bad faith actions. DISSENT (Kennedy): inherent-power sanctioning subverts statutes
- Circuit split re pro se litigat sanctioning (sometimes avoided w/ inherent pwr)
- Wilson v. Citigroup (2d Cir 2012): reversed sanction for late filing that followed mutually agreed schedule – must est bad faith to impose sanctions

VIII. AGGREGATE LITIGATION

A. Joinder of Claims and Parties and Class Actions

Federal Rules

- Rule 13: Counterclaims and Crossclaims
  - (a) Compulsory
  - (b) Permissive
- Rule 14: Third-Party Practice
- Rule 18: Joinder of Claims
- Rule 19: Required Joinder of Parties
  - (a) if feasible: (1)(A) presence necessary for complete relief (e.g., Hanson v. Denckla); (1)(B) significant interest in subj of action
  - (b) if ≠ feasible, multifactor test to determine whether to dismiss
- Rule 20: Permissive Joinder of Parties: if common rights to relief or common Qs of law/fact
- Rule 21: Misjoinder and Nonjoinder of Parties
- Rule 22: Interpleader: join parties to avoid mult overlapping liabilities
- Rule 23: Class Actions
  - Concerns: whether named parties/π's lawyers fairly represent class
  - Benefits: adjudicate small claims by aggregation; social deterrence; regulation via tort litigation
- Rule 24: Intervention

28 U.S.C. § 1335 Interpleader: (a) owner of property > $500 in diversity dispute may interplead by depositing property value to court to await judgment; (b) regardless of relatedness of claims to property

B. Due Process

Hansberry v. Lee (1940): Black Δ Hansberry bought home agst racist covenant upheld in previous action. π homeowner class sought injunction and forced sale back to white owners.

- HOLDING: Δ not bound by res judicata effect of previous action b/c ≠ party, ≠ successor in interest, ≠ privity w/ party
  - Binding effect would violate 14th Am due process
  - Conflict of interest in homeowner class: segregationists vs. integrationists
  - Q: whether procedures adequately protect interests of parties to be bound by judgment (e.g., Mullane, Dusenberry, Flowers)
- Individual vs. class actions
  - Individual: ex ante structure in place w/o analyzing whether effectively applied (e.g., Dusenberry (Ginsburg dissent))
  - Class action: R 23 notice hearing to work out conflicts of interest

C. Joinder and Subject-Matter Jurisdiction

- "Pendent" jx: based on π's complaint
- "Ancillary" jx: anything joined after compl filed (e.g., impleader, countercl)

United Mine Workers of America v. Gibbs (1966, Brennan): π Gibbs hired as mine super after mining co reopened mine w/ new union. Local chapter of Δ int'l union struck, picketed, regained mine K. π laid off, couldn't get other work, sued under fed & state boycott laws.

- HOLDING: upheld pendent jx for state claim b/c "single constitutional case", "sufficiently substantial", "common nucleus operative fact" (events, evidence)
  - Fed Rules encourage "broadest possible scope of action"
  - Rejected more complicated Hurn test: "separate, parallel grounds for relief also sought in substantial fed claim"
  - Justifications: convenience, Qs of fed policy
  - Concerns: federal claims dismissed before trial, predominating state claims, jury confusion
- Constitutional test = Osborn
- Statutory test ≠ §1332 b/c ≠ diversity
  - §1331 = coterminous w/ Art III, despite often being interpreted more narrowly in interest of federalism – here, suppl jx important to fed interest in parity w/ state courts
- Limits on pendent jx when Gibbs formal structure (§1331 + state claim) lacking:
  - Owen Equip. v. Kroger (1978): §1332 diversity + state claim + add'l non-diverse parties
    - No pendent jx b/c complete diversity essential
  - Aldinger v. Howard (1976): §1343 civ rights + state claim + add'l party
    - No pendent jx despite "common nucleus operative fact" b/c fed law purposefully excluded party to be joined
  - Finley v. US (1989): §1346 (US Δ) + state law claim against San Diego
    - No pendent jx b/c add'l parties not included in statute
    - Reversal of default assumption allowing suppl jx unless explicitly denied
  - Immediate Cong'l repudiation: §1367 codification of pre-Finley world:
    - (a) claims so related to Art III orig jx claims, incl add'l parties (joinder, intervention) relating to same case/controversy
      - "So related" = transactional (narrow) or logical (broad) relationship?
    - (b) if only §1332 diversity jx, ≠ supplemental jx over parties added by R 14, 19, 20, 24 or claims added by R 19, 24, unless consistent w/ §1332
    - (c) court's discretion to disallow if (1) novel/complex state law Q; (2) suppl > orig claim; (3) orig claim dismissed before trial; (4) exceptional circs

Exxon Mobil Corp. v. Allapattah Servs., Inc. (2005, Kennedy): π class dealers alleged systemic overcharging by Δ Exxon, but some class members < AiC.

- HOLDING: upheld §1367 jx over add'l class members whose claims < AiC
  - Since §1367 overturned Finley, §1367(a) broad grant of orig jx over any single claim in complaint and §1367(b) only excludes claims by R 19, 24 parties, so R 23 parties' claims OK
  - Dismiss counterarguments:
    - Indivisibility theory inconsistent w/ suppl jx
    - AiC req ≠ diversity of citizenship
    - Cong'l "intent" overridden by plain meaning of statute
- DISSENT (Stevens): Legislative history to undo Finley but uphold Zahn
- DISSENT (Ginsburg):
  - Clark: AiC independent requirement of each party in suit
  - Zahn: AiC requirement applies to class members (water pollution)
  - §1367 written when §1332 established reading: background law of threshold AiC requirement
    - Narrow reading of §1367(a) "orig jx" to incl both AiC and complete diversity

- §1367(b) useful in preventing π from circumventing §1332 diversity by piggybacking on other π's claims

- Approaches to withholding suppl jx under §1367(c)
  - 9th Cir ≠ Gibbs factors, narrow discretion
  - 7th Cir = only Gibbs factors allowed
  - Middle ground: balance §1367 and Gibbs
- Supreme Tribe of Ben-Hur v. Cauble (1921): diversity on named parties only
- Snyder v. Harris (1969): shareholder suit – separate/distinct claims of different πs ≠ aggregate, but OK if (1) mult claims agst 1Δ or (2) mult πs for single title w/ common interests
- Zahn v. Int'l Paper Co. (1973): water pollution cases – every class member must meet AiC
- Exxon Mobil Corp. v. Allapattah Servs Inc. (2005): §1367 effectively overruled Zahn; 1+ claim satisfies AiC, then sup jx inquiry OK
- Class Action Fairness Act 2005 (CAFA)
  - AiC requirements: >$5M, aggregation allowed
  - Minimal diversity, fed jx if foreign v. American
  - Mandatory denial if 2/3 πs, 1+Δ, and principal injuries in same state
  - Discretionary denial: 6-factor balancing test
  - Removal easier, even if Δ in-state res
  - Evidentiary stds for AiC: legal certainty or preponderance of the evidence?
  - State court stipulations limiting damages < $5M nonbinding for removal jx (Knowles 2013)
  - CAFA has increased diversity class actions in fed courts

IX. CASE MANAGEMENT, DISCOVERY & SETTLEMENT

A. Rule 16: Pretrial Conference, Scheduling, Management

- Contrary to traditional adversarial system (party autonomy), but consistent w/ equity
- Original inclusion in 1938 Rules, but limited/discretionary
- 1960s push for expansion w/ increasingly complex civil rights, antitrust litigation
- Purposes: expedition, early control, discourage waste, improve quality, ***encourage settlement
- Features: increase judge's authority to override most other Fed Rules
- Scheduling Order:
  - MUST: limit time to join parties, amend pleadings, complete discovery, file motions
  - MAY: modify timing of req'd disclosures, extent of discovery, …
  - Written after parties' discovery report OR after consulting w/ parties – ASAP w/in shorter of 120d after service or 90d after Δ appearance
  - Strict rules on modification: only for good cause w/ judge's consent
    - In contrast to liberal Rule 15 Amendments
- Pretrial Conference:

- Lawyer must have authority to make stipulations/admissions (sanctionable)
- Party may be ordered to be present/available
- Pretrial order – it controls issues in play (both at trial and on appeal) – modifications only to prevent manifest injustice

B. The Scope of Discovery

- Gather evidence, frame issues for trial
- Facilitate summary judgment by eliminating non-genuine issues of fact
- Shorter trials, more settlements
- Most discovery only after filing suit
  - Limited exception: Rule 27 Perpetuation of Testimony
    - Requirements: evidence nec'y to file suit AND risks being lost
  - In re Petition of Sheila Robert Ford (M.D. Ala. 1997): petitioner requested R27 discovery to help discover how/who police officers killed her father. DISMISSED request b/c no imminent perpetuation issues, and noted effective barring of detailed facts necessary to surmount qualified immunity defense.
  - Post-Twombly proposals for "New Discovery" allowing limited pre-trial discovery to establish whether plausible claim can be brought, lower error costs
- Rule 26(a) Mandatory Disclosures
  - Docs/witnesses that may be used; damage calculations; insurance coverage; but NOT investigation of new claim
- Rule 26(b) Party-Initiated Disclosures
  - Relevance:
    - Nonprivileged and relevant to a claim or defense
    - Court may then order, for good cause, discovery relevant to entire subject matter of action
    - (ambiguity: claim/defense vs. subject matter)
      - Transactional or logical relevance?
    - Kelly v. Nationwide Mut. Ins. Co. (OH 1963): interrogs appropriate when (1) relevant to issue; (2) nonprivileged info; (3) would be admissible
    - WWF (SDNY 2001): refused interrogs "not really relevant"
    - But Coca-Cola (D. Conn. 2005): allow if any possibility of relevance
  - Admissibility: need not be directly admissible, as long as leading toward admissible evidence
  - Proportionality: relevant info may not be discoverable if costs > benefits, considering cumulative, duplicative, expensive production

C. The Mechanics of Discovery

- Rule 30
- Rule 33
- Rule 34
- Rule 35

X. SUMMARY JUDGMENT

7th Am right to civil jury trial when controversy > $20: preserved/guaranteed, not created (antecedent)

- de Tocqueville: jury importance to democracy: populist, egalitarian, anti-statist
- 1962: 11% fed civil cases to trial – 2009: 1.2% to trial (mostly btwn large corps)
- Mid-century Alabama courthouse sign: "No Spittin', No Cussin', No Summary Judgment"
- Langevine, Yale L.J. article (summer reading): SJ as monetization of legal risk, pressure on fed judges w/ case loads/vacancies, effect of sanctions discouraging litigants, correlative effect of Rule 12 dispositions

Rule 56. Summary Judgment

- Premise: no material issues in dispute, so trial unnecessary to resolve them/draw inferences
- Central issue: what is meant by material issue of fact (e.g. intent)
    - Any issue of fact the non-moving party must establish in order to prevail on its claim/def (Twombly plausibility std – which inferences to be made?)
    - Any fact for which the non-movant has the burden of proof
- If π moving for SJ: burden of proof for every element of CoA

History

- Federal use as early as 1789, but state adoption late 1800s – by 1920s granted ½ of motions
- Arnstein v. Porter (2d Cir 1946): (Frank) right to jury trial should only cautiously be limited by summary judgment, vs. (Clark) sum judg necessary in era of simple pleading to avoid unnecessary trials
    - Poller v. CBS (US 1962): "summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles."

Motion

- 2007 "restyling," 2009 adjusted timing, and 2010 substantial amendments "to close the gap between rule text and actual practice"
    - Biggest shift: when Dist Ct will draw inferences from allegations in compl
    - Codified Celotex burden-shifting approach (w/ engagement w/ discovery evidence)
- Convergence btwn Rule 12(b)(6) MtD and Rule 56 Summary Judgment
- May seek SJ on parts of claims
- Timing: ct may grant SJ sua sponte
- Materiality of facts depends on substantive law that governs – only disputes that affect outcome may preclude SJ

Adickes v. S.H. Kress & Co. (1970): 1964 civil rights complaint by white integrationist teacher for Δ's (1) refusal to serve her w/ 6 black children and (2) conspiracy to have her arrested for vagrancy. Δ motion SJ incl affidavit that ≠ service b/c fear of riot.

- SDNY granted SJ as to (2) conspiracy b/c no communication btwn arresting officer and owner. (affidavits from owner, officer, police chief) – inferences drawn by judge
- SCOTUS reversed for Δ's failure to show "absence of any disputed fact" to "foreclose the possibility" – "unexplained gap": whether any cop in store before arrest (prior agreement), no depo of waitress – inferences to be drawn by jury

    - Since Δ failed to meet burden, π free to leave R56 motion unanswered – OPEN Q: whether inadmissible evidence suff in non-movant's answer to R56 motion
- QUESTIONS:
    - What it means for movant to "foreclose the possibility" of the existence of critical issue of material fact
    - If the movant meets his burden, what does the non-movant have to show?

Celotex Corp. v. Catrett, (1986): product liability suit (15 Δs) for asbestos-related death of π's husband – essential element of CoA: exposure specifically to Celotex's asbestos (industry-wide exposure theory not yet available). Δ Rule 56 motion said π burden impossible b/c rog response to witnesses negative.

- π's options under Adickes:
    - Seek continuance for further discovery
    - Answer Δ's motion by arguing that Δ failed to foreclose possibility that genuine dispute exists re possibility of jury's inference of exposure to Δ's product
    - Offer add'l evidence
- π's actual response: argued Δ's failure and offered add'l evidence: 3 docs "tending to establish" exposure (ins letter that Δ had acquired asbestos mfg co; letter fr Δ manager that Δ had purchased asbestos; decedent husband's depo)
    - Δ objected as inadmissible hearsay b/c inadmissible at trial
- DDC granted SJ b/c π ≠ est exposure
- DC Cir reversed b/c Adickes: Δ's burden of foreclosing possibility
- HOLDING (Rehnquist): reversed b/c Δ met burden, and remanded to shift burden back to π
    - Burden-shifting frameworks difficult to apply, enforce
    - Trial burden of proof = SJ burden of production (w/ exception, e.g civil rights cases)
        - Moving party's burden of production: inform Dist Ct of the basis for its motion by identifying portions of the record that demonstrate absence of material fact
- On remand, the employer letter, to which Δ hadn't objected re admissibility/relevance, made π's response sufficient to overcome SJ → settlement
- Legacy: Rule 56 burden-shifting framework
    - Challenge: White's concurrence, which cited reasons from Brennan's dissent
        - Moving party cannot meet its burden merely through conclusory statements that π lacks evidence to prove her case
        - Must come forward w/ some showing, pointing to something in the discovery record, that claim is unsupported
        - Can't simply ignore proposed witnesses w/o deposing or ignore docs
        - Movant must engage w/ the discovery record
    - Does White's concurrence suggest that majority supported "prove-it" motions?
        - Effectively shift all costs of production onto π, disrupting cost-sharing structure of Fed Rules
    - 2/3 Cir Cts don't apply burden shift – "seat-of-the-pants," Twombly-esque approach based on common sense, experience (judges' taking over of jury function of inferences of credibility of testimony, similarly to Rule 12(b)(6) developments)
        - Loss of legal participation, interpretations via trial, decision

Bias v. Advantage Int'l (DC Cir 1990): π estate of Len Bias (coke OD) sued Δ agents for lying that he had taken out life ins policy. DDC granted SJ b/c no dispute that (1) Bias drug user, (2) as user, ineligible for jumbo policy. DC Cir affirmed b/c π estate offered only general doubt to Δ's specific assertions/evidence, but didn't try to impeach Δ's proffered depo testimony.

XI. CLAIM AND ISSUE PRECLUSION

Res judicata – claim preclusion
Collateral estoppel – issue preclusion

Raised as affirmative defenses under Rule 8(c)

Policy justifications: repose, efficiency, predictability

A valid, final judgment to recognition if it is on the merits and the same parties are involved in the lawsuit (e.g. recognition of Mitchell v. Neff default judgment in Pennoyer v. Neff)

A. Claim Preclusion

- Validity
  - Personal jx (Pennoyer)
  - Adequate notice in constitutional sense ≠ just service of process (Flowers, Mullane)
  - Subject-matter jx more complicated – may be invalid if (Restatement (2d) Judgments)
    - Rendered by default
    - Manifest abuse of authority (why not curable by appeal?)
    - Substantial infringement of other court's authority
    - Rendering ct lacked capacity to make informed decision
    - (SCOTUS rules unclear)

- Finality
  - Usually upon rendering by trial court, but judgments during appeal process?
    - Restatement (1st): yes
    - Modern courts: no
  - Interlocutory orders ≠ final
  - Preliminary injunctions ≠ final (but = immediately binding)
  - Denials of dismissal, SJ ≠ final (but preclusive w/in case)
  - Full hearing unnecessary – settlements "so ordered" sufficient

- Who is bound?
  - Parties to suit + their privies (legal equivalents)
  - Taylor v. Sturgell: sequential FOIA suits re F-45 by friends who collect vintage airplanes
    - Recognized de facto parties:
      - Contract to be bound by judgment
      - Substantive law relationships (e.g. assignor/ee, bailor/ee)
      - Representation by legal relationship (e.g. Hansberry, Mullane)
      - Control of litigation, fees
      - Collusion through proxy
      - Special statutes

- What is barred?
  - Sociological developments: increasing caseloads, insufficient staffing, inefficiencies
  - Doctrinal: preclusion changes in response to pleading changes
    - Easier joinder → stricter preclusion
    - Transactionally related claims must be brought together, or else barred

- "claim" – form of action (writs) → right (Hurn) → wrongful acts → transaction (Gibbs)
- Mathews v. NY Racing Ass'n: all rights of the π to remedies against the Δ w/ respect to all or any part of the transaction, or series of connected transaction, out of which the action arose"
  - Gibbs: common nucleus of operative fact
  - §1367(a): so related
    - Transactionally
    - Logically
  - Restatement (2d) Judgments: pragmatic approach (similar to "so related")
    - Related in time, space, origin, motivation
    - Convenient trial unit (e.g., same evidence)
    - Customary business usage
- Jones: conditional sale of car under installments – unitary whole or multiple events?
  - Other examples: ongoing abuse, discrimination, rent
  - Re-litigation sometimes barred even when subsequent facts unknown at time of filing
- Turns on how "claim" and pleading are defined
- Exceptions:
  - Jurisdictional problems in the rendering court
  - Infringe on state sovereignty

B. Issue Preclusion

- Broader reach than claim preclusion
- Tougher requirements than claim preclusion
  - Identical issue
  - Actually litigated
  - Actually decided
  - Necessary or essential to the judgment