Adjudicatory Authority

I. Three types of jurisdiction recognized:
   a. **in personam (against a person present in territory or citizen of state),**
   b. **in rem (against property),**
   c. **quasi in rem (against a person, judgment limited to property in state;**
      i. **may be related (QIR1) or**
      ii. **unrelated (QIR2) to the controversy)**

II. Power to adjudicate ("power theory of adjudication"):
   a. authority to adjudicate based on force (within geographical limits);
   b. economic impacts;
   c. consent
   d. in personam **–** traditionally, assertion of a court's power over a Δ present within territorial boundaries of the State

III. Major premise: abstract principle/rule of law (morality, justice, etc.) → constitution → statutes → admin. Regulations → common law precedent
   a. Minor premise: facts
   b. "syllogism machine" model – syllogism: conclusion assumed from premises
   c. Judge as "discoverer" of the law
   d. Criticism of model:
      i. model assumes there to be a clear answer with a democratic backing (statutory, constitutional, etc.)
      ii. Textual interpretation (choices) – erodes validity of syllogism machine model
      iii. Assumes equal allocation of resources between adversaries arguing over a set of facts
   e. Model requires *adjudicatory authority*, over parties and subject matter

IV. Adjudicatory Jurisdiction:

V. **Pennoyer v. Neff (SC 1877)**
   a. Parties: Pennoyer (agent for Mitchell, attorney; appellant/defendant in Circ. Ct.) v. Neff (appellee/plaintiff in Circ. Ct.)
   b. Proc. Posture:
      i. SC granted appeal after error was alleged re: Circ. Ct's judgment seizing Neff's land to satisfy debts to Mitchell.
      ii. Circuit ct. challenged trial Ct's judgment to award Mitchell Neff's land after judgment against Neff (after Mitchell demanded legal fees);
      iii. Summary judgment issued against Neff (non-resident), who did not appear
      iv. Circ. Ct. reversed trial court's decision based on defects in affidavit
   c. Holding/Reasoning:
      v. State can attach property of absent non-residents in civil proceedings to satisfy judgment, in "in rem" proceeding (as long as notice has been properly served; if suit was related to property itself);
      vi. the instant case NOT in rem, since dispute does not involve the property
      vii. Publication of summons, rather than service
         1. Neff argued defects in service of summons; editor of paper signed affidavit, rather than "printer"
      viii. State has exclusive jurisdiction over persons and property within its territory (determination of *status;* ownership proceedings included).

ix. State's physical power over a defendant present in State (with in-state service of process).
x. SC found for Neff, since property had not been attached before the start of litigation (which would have satisfied quasi in rem jurisdiction).
1. Quasi in rem jurisdiction – allows for extension of in personam juris. (de facto in personam; *up to the value of the property attached*)
a. QIR 1: where property is INVOLVED in underlying lawsuit
b. QIR 2: where prop. is UNRELATED to underlying lawsuit

d. Notes:
i. Jurisdiction over property was not assumed until the judgment required that property be the method of payment
1. SC affirmed Circ. Ct's denial that land could be seized, on different rationale (unattached, not defective affidavit- held that defects in affidavit not sufficient to reject judgment
2. Implications: land attachment, pre-judgment wage garnishment; entails seizure of property *before* hearing (tremendous power given to creditors)
3. In Pennoyer, unequal distribution of assets (forced sale of land); see forced sale of black-owned land in South example
ii. Ex parte- judgment against an absent person
iii. 14th Amend.:
1. Full Faith and credit paid to other states' judgments, laws
2. Due Process clause required that FF&C be extended only when judgments satisfied due process of law (which requires that a forum has adjudicatory authority over person, property, SM)
iv. Notifying non-residents:
1. when property is not seized in a Ct. proceeding (if it was seized, property owner would be effectively notified by the seizure),
2. a non-resident can't be notified by publication;
v. State always has power to determine ***status*** of its residents or property (marriage, etc.)
1. Citizenship: Residence v. domicile

VI. Burnham v. Superior Court (SC 1990)

a. Parties: Burnham (husband, petitioner) v. Superior Court (respondent)
b. Procedural History:
i. trial Ct. served Burnham with summons while Burnham (NJ resident) traveling in CA;
ii. CA Ct. of Appeals (Sup. Ct.) affirmed, held summons to be valid exercise of in personam jurisdiction (party present in State personally served)
c. Holding:
d. Scalia opinion – jurisdiction valid;
i. Burnham present in State, irrelevant whether he had contacts w/ state;
ii. **contacts don't matter; power theory**
1. IS the person in the state?
2. Does ct. have relevant SM jurisd.
e. Brennan concurrence – jurisdiction is valid,
i. but Ct. should use reasonableness of contacts as test of "transient" jurisdiction;
ii. reasonableness; min. contacts analysis (***Int'l Shoe***);
iii. ("**ought" theory of fairness;** shift in *Int'l Shoe*)

1. Question addressed in shift:
    a. When out-of-state, State should be able to compel your appearance when you caused harm inside the State.

iv. Brennan: fairness means sometimes appropriate to extend juris. to parties out of state, sometimes not fair to extend juris. in state

f. Stevens' concurrence – Ct's holding in *Shaffer v. Heitner*, applied here in Burnham, is too broad

VII. Notes:

a. Facts of case:
    i. NJ marriage – initially "no fault" (irreconcilable differences);
    ii. Mr. Burnham then filed for desertion divorce in NJ but does not serve wife in NJ (moved to CA);
        1. had Burnham served wife in CA, NJ would not have jurisd. Over Ms. B.
    iii. Summons and complaint served to Mr. Burnham while traveling in CA
b. Questions:
    i. Does Ct. have appropriate adjudicatory authority?
    ii. Is this the right kind of court (subject matter jurisd.)?
    iii. Is there a theory of recovery in the facts of the complaint?
    iv. If not, the case is dismissed for failure to state a claim upon which relief can be granted
c. SC – fragmented decision
d. State always has power to determine the legal *status* of its citizens
    i. can apply to co-holder of status, i.e. marriage;
    ii. FF&C does not extend to *grounds* for divorce;
    iii. capacities; citizenship; can always sue a citizen of the State (domiciliary jurisdiction)

VIII. **Harris v. Balk (SC 1905)**

a. Parties: Harris (NC citizen; petitioner) v. Balk (NC citizen, respondent)
b. Procedural History:
    i. trial court rule on behalf of Balk after Harris invoked Full Faith and Credit,
    ii. NC SC affirmed (Maryland Ct. had no jurisdiction over Harris to attach Balk's debt to Epstein, since Harris was only temporarily in state, and situs of debt was in NC)
c. Holding: SC reversed;
    i. held that "debt followed the debtor",
    ii. and Harris was given notice of the attachment

IX. Notes:

a. Facts of case:
    i. Harris owed Balk $180; Balk owed Epstein $344; so, Epstein sued Harris for Balk's debt in Maryland
    ii. Harris properly notified while traveling in Maryland; Epstein sues to garnish the debt; Balk also notified, given an opportunity to defend in Maryland, Harris paid Epstein;
    iii. Balk sued Harris to recover $180 (in NC)
b. **Intangible property** –
    i. location unclear; bank account (bank acknowledges debt);
    ii. in ***Shaffer***, property is a shared stock ("where" is a shared stock?)
c. Balk forced to defend in Maryland –
d. weakness of power theory; difficulty in adjudicating over intangible property, intangible parties

e. Domiciliary jurisdiction- can extend to citizens' financial *status*

X. Hypos: Astor hats
   a. Trappers in Oregon; Astor buys furs, pays prior to shipment
      i. Furs spoiled –
         1. Astor must file suit in Oregon
         2. (if judgment passed in NY, impossible to seize trappers' assets)
      ii. Astor refuses payment:
         1. trappers must sue in NY
         2. (Astor has no assets in Oregon)
      iii. Astor's check bounces after shipment, trappers catch up to train in Kansas
         1. Trappers seize prop. In Kansas (quasi in rem)
      iv. Strawberry shipment, check bounces –
         1. sue in Oregon, seize strawberries
            a. (incentive to seize property that has worst effect on D)

XI. Hess v. Pawloski (SC 1927)

a. Procedural Post.:
   i. error to the Superior Ct. of MA
   ii. P made a "**special appearance**", only for purposes of contesting jurisdiction
b. Issue:
   i. injury caused by vehicle in MA, resident of PA
   ii. statutory provision that by driving in MA, state registrar appointed as agent for process of service (implied consent to jurisd.)
   iii. P argued 14th Amend. Violation- deprivation of prop. w/o due process of law
c. Holding:
   i. Statute valid exercise of state's police power, right to protect the public
   ii. Statute has no hostile discrimination against non-residents
   iii. Implied consent is limited to accidents
d. Notes on Hess v. Pawloski:
   i. Preceded by *Kane v. New Jersey (SC 1916)*, where NJ required motorists to file an instrument appointing in-state agent
   ii. **Consent**:
      1. Genuine, volitional
      2. Bargained consent (quid pro quo)
      3. Implied consent
   iii. Constitutional provisions:
      1. Privileges and Immunities clause;
      2. Commerce Clause
   iv. Provisions designed to create a unitary geographic jurisdiction
      1. Freedom to pass borders (economic and physical) of a State
      2. No threat of discrimination against non-residents in imposition of laws
      3. Precludes states from imposing genuine or bargained consent, must use *implied*

XII. General
   a. Initial themes: jurisdictional reach, power of the sovereign
      i. Harris v. Balk (in-state service)
      ii. In rem, quasi in rem

b. Technological, economic, social innovations have eroded the power theory of adjudicatory jurisdiction

XIII. International Shoe v. Washington (SC 1945)

a. Proc. Post:
    i. Deft. (Int'l shoe) made special appearance to contest jurisd. (so as not to admit to subjecting self to State's jurisdiction) imposed to force contributions to State unemployment fund;
        1. In quasi in rem proceeding, one can make a "limited" appearance (can argue seizure of property – up to the value of the property – w/o submitting self to in personam jurisdiction)
    ii. judgment against Int'l Shoe affirmed in Washington Ct's and SCOTUS
b. Facts:
    i. Delaware corp., deals finalized in St. Louis, Missouri, independent salesmen in Washington
        1. Employee as agent?
        2. Versus employee as independent contractor
            a. Independent legal entity
            b. Such as plumber, lawyer, etc.
    ii. does unemployment fund statute violate due process and interstate commerce clauses?
c. Holding/Rationale:
    i. Corp. must have "**minimum contacts**" in forum state, so as not to "offend traditional notions of fair play and substantive justice" (as in judgment without notice)
    ii. Corporations:
        1. State of origin can only be manifested through its activities
        2. Reasonableness test ("estimate of inconveniences")
        3. Activities' nature and quality, rather than quantity, should be standard
    iii. Applied to facts:
        1. **Contacts in state** not irregular or casual (lg. amts of bus.)
        2. Obligation sued upon (contributions to state unemploy. fund) **arose directly** out of activities in state
        3. **Service** appropriate, since agent served was directly related to contact w/ state
    iv. Judgment of Washington Sup. Ct. against Int'l Shoe Affirmed
    v. Black dissent
        1. State's power is not subject to notions of fair play (power to tax, protect its citizens)
        2. Judges now become arbiters of the Constitution

XIV. Notes:

a. Context of Nuremburg war crime trials
    i. Law from "is" (Nazi officers operating under German law)
    ii. To "ought" (international law as binding)
    iii. Movement seen in Int'l Shoe
b. Rules of preclusion, limited appearances
    i. Can't argue the same issue more than once
    ii. FF&C extends, de facto, to whole case, even though FF&C from a limited appearance is only extended to value of property

1. So, little functional difference between general and limited appearance for FF&C

iii. General appearance:
1. submitting client to full jurisdiction of State
2. Same as personal in-state service? Unresolved in SC

iv. Fourth option: default judgment

c. 14th Amend. Due Process Clause (1868)
i. No state shall…
ii. Shared purpose (with 5th Amend.) of procedural fairness; right to defend oneself
iii. Substantive limits on capacity of a sovereign to act
iv. Can be a form of cont'l limitation
v. Pennoyer

d. "Federalism" due process – 14th Amend. as mechanism to extend Bill of Rights to the States

e. **Int'l Shoe:**
i. "justice theory" – what a sovereign "ought" to do re: jurisd.
ii. "quantum" of activity + relationship between suit and activity
1. **Continuous/related**
a. Aka "specific jurisdiction"
b. Failure of *Pennoyer* model
c. No obstacle to in personam juris.
2. **Continuous/unrelated**
a. Aka "general jurisdiction"
b. Swiss banks and holocaust victims bank accounts case
i. Continuous activity, sued for events from '40's and '50's, in Europe
c. *Burnham* rationale – "power" theory
d. Forum for USA Ct.'s to adjudicate global human rights cases
3. **Sporadic/related**
a. *Gray v. Amer. Radiator*?
i. Or continuous/related
4. **Isolated/related**
5. **Sporadic/unrelated**
6. **Isolated/unrelated**

f. 3 different "tracks", modes of analysis in jurisdiction cases
i. Tax enforcement (Int'l Shoe)
ii. Negligent tort (Gray v. Amer. Rad.)
iii. Contracts (McGee); continuous voluntary relationship

XV. Gray v. American Radiator (Supreme Ct. of Illinois 1961)

a. <u>Proc. Posture</u>:
i. Illinois P, tort in Illinois
1. Victim – Illinois
2. Amer. Radiator – PA
3. Titan valve - Ohio

ii. Gray sues Titan valve in Ohio, using Illinois "long-arm" statute
1. Long-arm statute designed to address situation when out-of-state activities have a causal impact inside the State

iii. Titan and Amer. Rad. filed cross claims against each other
1. Amer. Rad. could have also used *impleader*, if Titan had not initially been named as D
2. P has interest in suing both, to maximize chances of recovering damages
3. But, activities of each are different in Illinois
a. Direct v. indirect relationship to tortious act
4. Amer. Rad. does not want to allow Titan to defend itself separately in any subsequent case
a. If both parties are named in Illinois case, the decision is binding on both
b. Guarantees *preclusion*

b. Facts:
i. Valve manufactured in Ohio by Titan, valves used in a variety of devices
ii. Valve sent to Amer. Rad. in PA, used to manufacture hot water heaters
iii. Water heater sold in Illinois, explodes

c. Ruling:
i. Tortious act is at place of injury, not place of manufacture
ii. Titan had no volitional relationship w/ Illinois
1. But "privity" has been abolished (where "primary wrongdoer" is only responsible party
2. Now, anyone in chain of manufacture can be held liable
3. Element of volition, causal linkage
a. Do corporations have intentions?
b. Causation test, rather than volition
i. Act that causes harm in jurisdiction confers responsibility on the actor, regardless of residency/presence in state
4. Plaintiff can sue wherever they were hurt
5. "stream of commerce"

XVI. Notes:
a. If before Int'l Shoe:
i. Sue in Ohio or PA, based on Pennoyer
ii. Find statute requiring Corp. to appoint an agent in State
iii. Find property to attach, such as debtors (Harris v. Balk)
b. Int'l Shoe shifts toward plaintiff-friendly system
c. After Int'l Shoe:
i. Sue in Illinois
ii. State must accept jurisd. w/ legislation (long-arm statute)

XVII. Swiss bank trial:
a. American fed. Pleading law allowed P to sue a *cluster* of banks, since it was unclear which had the relevant bank accounts
b. Gray – sues both Amer. Rad. and Titan, did not know which was liable
i. Amer. Rad. liable, must collect from Titan
ii. "bloated defendants"

XVIII. McGee v. International Life Insurance (SC 1957)

a. Facts:
i. Contracts case (volitionality) – both parties agreeing to presence in State
1. When Corp. buys another, it assumes its liabilities

ii. P (CA) buys policy from Empire (AZ)
    1. Empire bought by Int'l Life (TX)
iii. P files suit in CA, attempts to enforce in TX
    1. Discrepancy in states' laws re: defense of suicide in life insurance case
        a. CA: presumption against suicide
        b. TX: no such presumption
        c. "3 lug" law hypo

b. Proc. Post.:
    i. Texas Ct. refused to enforce judgment by CA ct. against Int'l Life
    ii. (argued service of process out-of-state not sufficient to extend CA jurisdiction over Int'l Life); 14th Amend.
    iii. McGee appealed, SCOTUS reversed

c. Holding/rationale:
    i. CA could extend jurisdiction to non-resident with out-of-state service, since Int'l Life had "min. contacts" with forum state
        1. Contract in CA, insured resident of CA, premiums mailed from CA
        2. No unfairness in subjecting Int'l Life to CA Ct.

XIX. Worldwide Volkswagen v. Woodson (SC 1980)

a. Proc. Post:
    i. WWVW moves to dismiss, argues no min. contacts in Oklahoma; rejected by Oklahoma SC
    ii. SCOTUS reversed

b. Facts:
    i. P (NY) sues:
        1. Seaway VW (NY)
        2. WWVW (regional)
        3. VW USA (DE)
        4. Audi (Germany)
    ii. Other driver: insolvent, no insurance
    iii. Gas tank manufacturing defect

c. Holding/rationale:
    i. SCOTUS reversed Ok. SC ruling that Okla. Jurisdiction could be conferred by state long-arm statute; WWVW did not have min. contacts with Okla., so their 14th Amend. rights were violated by exercise of in personam juris.

XX. Notes:

a. Shift away from pro-plaintiff theory (Brennan in Int'l Shoe)
b. VW USA and Audi
    i. Favor fed. Jurisd.
        1. Diversity jurisdiction: parties on each side from dif. States/countries
        2. D can remove a case to fed. Ct. if it could have been brought there originally
    ii. Interest in removing regional distrib. From case
        1. But not national distrib. Or European party, since case could then be heard in fed. Ct.
        2. P joined 2 D's in NY to block removal to fed. Ct.
    iii. No jury, favorable to P's in Oklahoma
c. Minimum contacts w/ state?

i. State conferred its benefits on Corp.
    1. Local distributor – isolated/related
    2. National distributor – continuous/unrelated
        a. Did not sell car in Okla.
        b. General jurisdiction (because continuous)

d. J. White holding:
    i. State must preserve notions of sovereignty and ct's must respect federalism
    ii. Vehicles' travel would impose universal jurisdiction and would prevent companies from restricting their contacts to certain states
        1. Foreseeability
        2. Predictability
    iii. Added *volitionality* to Int'l Shoe

e. Cause of action
    i. Set of facts sufficient to justify a right to sue
    ii. Legal theory forming the basis for a suit

f. Power theory of adjud. Auth.: still relevant
    i. In personam – Burnham
    ii. In rem?

g. Overruled *American Radiator*?
    i. No. In WWVW, sales were in NY, consumer brought product to Okla.
        1. In *American Radiator*, the Co. delivered the product into the forum state and sold it there (delivered into the "stream of commerce")
        2. So, distinguishable from *Am. Rad.*
            a. Foreseeability - "stream of commerce" position (objective)
            b. Predictability – subjective objective

XXI. Shaffer v. Heitner (SC 1977)

a. Proc. Posture:
    i. Shareholder (1 share) sues Greyhound (DE), Greyhound Lines (wholly-owned sub.), and 28 directors of Greyhound

b. Facts:
    i. DE sequestration procedure
        1. Stock in DE corp. is "located" in DE
        2. Recovery of stock requires directors to appear in DE ct's, thus subjecting themselves to in personam juris.
    ii. Rationale: DE's power to register stock in records (located in DE)
        1. Argument based on power theory
            a. *Pennoyer*: seize prop. First, adjudicate later
    iii. Deft. argued that due process hearing should occur before seizure of prop.
        1. DE Sup. Ct. rejected argument, since seizure could be recovered by appearing in forum court
            a. Unconstitutional condition?

c. Holding/reasoning:
    i. Deft. argued in SCOTUS:
        1. No seizure without hearing
        2. Under quasi in rem, dispute over "location" of stock
        3. Minimum contacts theory

ii. Holding:
    1. **Min. contacts test applies to quasi in rem jurisdiction, as well as in personam**
    2. Seized property did not have min. contacts with forum
    3. No "purposeful availment" of state, no foreseeability of suit in DE
iii. Brennan dissent:
    1. Uses same argument as in *Helicopteros*
    2. QIR 1.5?
        a. Prop. not related to liability, but "connected"
    3. Two approaches to analyzing statutes:
        a. Facial: used by Marshall in majority opinion
        b. As applied: actual results of case
    4. DE: no "long-arm" statute

XXII. Notes:
a. Justice Marshall (former NAACP counsel; argued *Brown v. Bd.*)
b. Background facts:
    i. "predatory pricing" by Greyhound, to combat competition from smaller competitors (ability of lg. corp. to lose money) → violation of anti-trust laws
    ii. US brought suit against Greyhound, won, imposed large fine
    iii. Led to suit by shareholders against directors/officers
        1. Shareholder derivative action
            a. Origin of class actions (19th Cent. Law)
                i. On behalf of all shareholders
                ii. Rationale: company should be suing its directors, but the directors exercise control over company activities
        2. Requests that company's treasury be restored, raising the share price
    iv. Lawyers front $ to bring suit on contingency fee (equitable restitution)
    v. Effective market mechanism for private indiv's to act as law enforcement
        1. Criticism: Also, allows parties w/ small interest in Co. to compel settlements
        2. Also, doesn't restore value to shareholders
    vi. "Knights errant" – party initiated suit on behalf of the class
        1. "letters of marque" – licensing a privateer;
            a. analogous to class certifications
        2. Paid in bounty – prize ct's to adjudicate claims
            a. Now, compensation mech. Has been inverted
                i. Now, incentive to bankrupt corp's
c. Implications:
    i. After Shaffer:
        1. Traditional in rem juris= unaffected
            a. Still exists, only issue is over Notice, "best efforts" to notify
        2. Quasi in rem
            a. Related v. unrelated to suit (QIR1 v. QIR2)
            b. QIR1 can, by itself, establish min. contacts
            c. QIR2= overturned; if unrelated, can't establish min. contacts
        3. When would QIR jurisdiction be used?
            a. To seize prop., min. contacts must exist; so, in personam must be used

b. Can only use as a "security attachment" (to address flight risk of Deft. and prop.)

XXIII. Hanson v. Denckla (SC 1958)

a. Parties:
   i. Hanson (appellant; executrix) v. Denckla et. Al. (respondents; K& D, daughters)
b. Facts:
   i. Donner- has trust w/ DE bank (power of appt.)
   ii. Names beneficiaries
      1. Initially Katherine and Dorothy, then changes to Elisabeth's grandchildren
   iii. Executed in Florida
c. Proc. Post.:
   i. K & D sue Elisabeth and grandchildren in FL ct.
      1. Argue power of appt. failed under FL law
         a. In PA, only 1 wit. Sig. required
            i. Argument over whether document was "inter vivos" or "testamentary" document
               1. Each required diff. no. of wit's
      2. Suit names DE trustee but P's do not serve (since they have in personam juris. Over Elis. And grandchildren in FL)
      3. FL SC rejects power of appt. (decided against Elis.)
   ii. Elis. Files suit in DE, against K&D, while FL case is pending (since wit sig's satisfied DE law)
      1. After deciding case, FL SC argued that FF&C precluded DE case
      2. But, always apply law of State where trust was established
      3. Also, DE bank was not made a party to FL suit
         a. So, FL decision can't bind DE bank
   iii. SC granted cert in both cases
      1. In personam juris. In FL, so power to decide which law governs (FL law)
         a. But, Ct. holds that DE bank is an "indispensable party"
      2. In rem juris. In DE (over trust)
         a. In rem over sisters in FL
      3. Held that DE bank did not have min. contacts w/ FL
         a. Disregarded flow of money from FL to DE bank
      4. Argued for in rem juris. In FL, rather than in personam
         a. Harris v. Balk; Pennington
            i. Debt travels on the back of the debtor
            ii. "Shadow" of property in FL
      5. Unilateral activities by parties who claim relationship with nonresident Deft. cannot establish min. contacts
   iv. Black dissent
      1. In personam juris. Over bank in FL
         a. So, entitled to FF&C in DE
   v. Result similar to Bush v. Gore
      1. Refusal of SC to defer to State SC judgment on question of State law
   vi. Compare to *McGee* ("substantial connection" to the State) & "purposeful availment" (*Hanson*)

XXIV. McIntyre v. Nicastro (SC 2011)

a. Facts: NJ worker injured hand while using metal cutting machine manufactured by McIntyre UK and distributed by McIntyre US; Nicastro sued in NJ court
b. Holding/Reasoning: no jurisdiction to sue McIntyre UK in NJ court; although McIntyre UK targeted the US national market, no evidence that it targeted NJ specifically
c. Notes:
    i. 4/2/3 decision
        1. Varying interpretation of "minimum contacts", "stream of commerce"
        2. Jurisdiction rule applied differently depending on economic size of deft's?
            a. Rule applies to large actors (corp's)
    ii. Kennedy plurality (+3):
        1. Size irrelevant, held to the same standard (also, no difference bet. Foreign and domestic corp.)
        2. Subjective activity
        3. Suggests a national federal statute to authorize fed. Ct's to adjudicate over foreign corp's targeting the *national* market
            a. But, targeting US is targeting every State (Ginsburg dissent)
                i. But, diff. states have different standards (see White in *WWVW*)
        4. State's power to regulate different than its power to adjudicate
            a. Calls into question the reach of *Int'l Shoe* (where regulation and adjudication seem to be treated as synonymous)
        5. Due Process/in personam jurisdiction rule as a "hurdle", preventing parties from having to defend in a State under a long-arm rule
            a. Unless there is subjective, purposeful availment
                i. No weight given to cost of defending in State/convenience
            b. To "police" choice of law
        6. Due Process should address whether a State has an interest in adjudicating
    iii. Breyer and Alito:
        1. no single rule
        2. depends on numbers of sales (a single sale is not sufficient)
    iv. Ginsburg dissent:
        1. 2 different rules (assign weight)
        2. Should use broad stream of commerce rule
    v. Holding is the narrowest grounds of agreement
        1. Bare minimum contact with State? If yes, does State have an interest in adjudicating over the case?
            a. Single sale is not sufficient to constitute purposeful availment under stream of commerce theory
            b. 100 sale is enough to confer jurisdiction
                i. Is this theory constitutionally permissible?
                ii. Nationwide service of process rule?
    vi. In personam jurisdiction could have been used in NJ, applying UK law
        1. Current law: State with adjudicatory authority has almost no restrictions on its ability to apply its own law
    vii. Errors (P's counsel and trial judge):
        1. P failed to establish a record of McIntyre's sales in NJ, USA

a. McIntyre had no record of sales, since its distributor went bankrupt
i. Distributor was created for McIntyre UK to avoid suit in US Ct's
b. McIntyre pled ignorance as to where its machines were sold
2. P made no effort to argue "negative inference" from absence of records
viii. With increasing flow in the stream of commerce
1. Jurisdiction: limited → specific → general

XXV. **Keeton v. Hustler Magazine (SC 1984)**

a. Proc. Post.
i. Suit in NH, because of statute of limitation (longer)
1. Essentially, NH overriding every other states' SOL's
2. NH is afforded disproportionate regulatory power (damages should have been limited to statewide damages)
ii. No *federal* long-arm statute
1. Fed. Rules direct to state long-arm statutes, for state in which the fed. Ct. sits
2. In diversity cases, fed. Judge applies state law
iii. Keeton seeking nat'l damages, where NH's interest is only local
b. Facts
i. Libel suit in fed. Ct.
c. Holding/Reasoning
i. Reversed lower court holding's that min. contacts did not exist bet. Hustler and NH
1. Regular monthly sales
2. NH long-arm statute
d. Notes
i. Diff. between Keeton and WWVW
1. No volitional relationship between local distributor (Seaway) and reg. distrib. (WWVW)
2. So, no subjective foreseeability
ii. Hustler could contract NH sales to indep. Contractor, invoke *Nicastro*

XXVI. **Kulko v. Superior Ct. (SC 1978)**

a. Proc. Post:
i. CA SC upheld exercise of jurisdiction, reversed by SCOTUS
b. Facts:
i. Mother sues for increase in child support after children move to CA
1. Sues father in NY, w/ CA's long arm statute
2. CA can determine marriage, custody, status
a. Pennoyer
c. Holding/Reasoning:
i. Mother argues that father purposely availed himself of benefits of CA law
1. But, Ct. rejected that jurisdictional rule ("effects test") should preclude domestic decisions
a. No such precaution in Burnham
d. Notes:
i. Kulko's shift from WWVW
1. Party as involuntarily dragged into forum state

XXVII. **Calder v. Jones (SC 1984)**

a. Proc. Post.:

i. Libel suit, names writer, editor, and magazine

b. Facts:
   i. Article published in CA (Nat'l Enquirer)

c. Holding/Reasoning
   i. Writers argue "no subjective overlay"
      1. No volition in articles' publication in CA
   ii. Chilling effect on free speech
      1. Ct. not persuaded, no special 1st Amend. protection
   iii. Unfairness argument
      1. Cites WWVW, Nicastro
      2. Third persons determined product's destination
      3. Argument overruled
         a. Article in question was specific to CA (foreseeability)

d. Notes
   i. "Int'l Tort Box" of *Keeton* and *Calder*
      1. As opposed to negligent tort box (WWVW, Nicastro)
      2. Int'l torts – if tort feasor can foresee causing an impact in the forum state, state can assert jurisdiction

XXVIII. Burger King v. Rudzewicz (SC 1985)

a. Proc. Post.:
   i. Diversity case:
      1. Mich. Franchise sued in Florida fed. Ct.

b. Facts:
   i. BK: FL company
   ii. Context: collapse of Mich. Auto industry
      1. Mich. Passes legislation prohibiting franchises from being shut down
         a. Equates missed payments to franchisor as a "loan" by the franchisor

c. Holding/Reasoning:
   i. Brennan opinion
   ii. Question left open in McGee:
      1. BK resembles Insurance Co.
         a. In bilateral contract, does each party have jurisdiction over each other?
   iii. Reasonably perceived state contact
      1. Franchisee's contacts with BK mostly in Mich.
   iv. Choice of law provision
      1. Regulatory authority different than adjudicatory authority
         a. But, can support argument that deliberate, volitional contact with forum was present
   v. Attempt to avoid Mich. Franchise protection statute
      1. Choice of law provision likely renders enforcement of Mich. Statute impossible

d. Notes:
   i. Contracts case
      1. Distinguishable from regulatory, torts cases
         a. Fundamental effects test
            i. Contracts, intentional torts
               1. automatic volitional effect

2. State is volitionally targeted
    a. *McGee*: single contact sufficient to justify suit (contracts create contact)
ii. No so in negligent tort cases

ii. Contracts: can cross state lines
1. State can establish *status* of party within state, even if it affects a party outside of the state's jurisd.
2. Necessity of negotiating/creating a contract necessitates contact with the forum
3. Had Deft. sued first, they likely could have argued in personam jurisd. In Mich., considering bilateral nature of contract

iii. Mere making of a contract is not a contact
1. "contracts-plus" theory
    a. To avoid Alito/Breyer concern (in *Nicastro*) that "single sale" could confer jurisdiction
        i. Every seller could sue every purchaser in seller's forum
2. Active versus passive participants in contractual relationship
    a. Passive act is not a minimum contact
    b. Active solicitation, or mutual relationship, can be a min. contact
        i. In mutual, sustained, bilateral relationships, first party to sue can confer jurisd.

XXIX. Asahi v. Superior Ct. (SC 1987)

a. Facts: Asahi (Japanese valve manufacturer), sold valves to Cheng Shin (Taiwanese tire co.) → motorcycle accident in CA; victim brings suit against Cheng Shin in CA fed. Ct. (diversity), Cheng Shin settled with victim and filed impleader seeking indemnification from Asahi
b. Holding: no in personam jurisdiction to subject Asahi to suit in CA
c. Rationale:
    i. Five factor test for fairness:
        1. Burden on D
        2. Forum state's interests in the litigation
        3. P's interests
        4. Efficiency?
        5. Policy interests?
    ii. 8 justices participating in decision:
        1. O'Connor majority: not reasonable in this case (not enough CA interest)
        2. O'Connor +3 =
            a. "foreseeability-plus"
                i. In "stream of commerce" cases, need "additional conduct" to establish that party intended to avail itself of benefits of forum state
        3. Brennan +3 =
            a. Stream of commerce = foreseeability
                i. Placing goods in the stream of commerce is synonymous with foreseeability, due to the economic benefits enjoyed
        4. Stevens +2 =
            a. Volume products in stream of commerce determinative
            b. Sufficient volume is sufficient to render jurisdiction fair

d. Notes:
    i. Choice of law
        1. Could adjudicate in CA, using laws of Taiwan, Japan, etc.
            a. Most convenient forum
    ii. Cheng Shin/Asahi relationship
        1. Had P sued both parties, Cheng Shin would file a Rule 13(g) cross-claim against its "coparty," Asahi
        2. If Asahi was brought into the suit later by Cheng Shin, Cheng Shin would join them under Rule 14 (Cheng Shin as a "third-party plaintiff", Asahi as a defendant)
        3. Either way, same result
    iii. Indemnification suit
        1. Cheng Shin has interest in obtaining judgment assigning liability to Asahi, binding in any future cases
        2. Does CA have an interest in providing Cheng Shin with a forum to recover from Asahi?
            a. CA's interest in controlling all stages of the suit

XXX. Perkins v. Benguet Mining (SC 1952)

a. Facts:
    i. Share Dispute
    ii. Ohio contact with Phillipine Corp.
    iii. Holding/Reasoning:
        1. Ohio appropriate forum for general jurisdiction over foreign corp., since B. Mining physically IN Ohio
            a. Burnham, applied to Corp. (in personam jurisdiction → general jurisdiction)
            b. Presence so intense, analogous to physical presence
        2. Where is a Corp?
            a. Corp's place of incorporation
            b. Place of corp. management
            c. Principle place of business

XXXI. Helicopteros Nacionales v. Hall (SC 1984)

a. Facts: oil pipeline in Peru, helicopter company in Colombia; helicopters were bought and serviced in Texas, contracts signed in Texas; helicopter crash in Peru (pilot error), leading to numerous deaths (1 US citizen); sued helicopter company in Texas
b. Holding: SCOTUS held that minimum contacts test was not satisfied, no jurisdiction
c. Rationale:
    i. In special jurisdiction cases, the "subjective" contact with the state overlaps with the act conferring liability (faulty part, breach of contract, etc.) → "affiliating fact"
    ii. P's could have argued (but didn't) → causation test was satisified
        1. Although contact with forum not "arising out of" the facts of the case, it was "related"
            a. Sustained commercial activity in the forum state created the situation, if not the liability
            b. P in WWVW could have also used the argument – use "related" contact to argue for general jurisdiction

d. Notes:

XXXII. Goodyear Dunlop v. Brown (SC 2011)

a. Facts: bus accident in France, defective tire manufactured in Turkey; P sues all three manufacturers in NC
b. Holding: foreign subsidiaries lack minimum contacts with forum state to subject them to in personam (general) jurisdiction
c. Rationale:
    i. P (NC) → sues:
        1. Goodyear USA (parent company)
        2. Goodyear Turkey (mfr)
        3. Goodyear Luxembourg (mfr)
        4. Goodyear France (mfr)
    ii. P joined all three mftr's, since it was unclear where the faulty tire originated
    iii. P argues:
        1. Goodyear affiliates distributed tires globally (brought tires manufactured in Europe to US market, sold for cement mixers in NC)
        2. Even if it was Goodyear's affiliates that had contact with USA, the parent company is responsible for the manufacture of the defective tire
            a. "piercing the corporate veil"
        3. Stream of commerce conferred jurisdiction
            a. But court collapsed specific and general jurisdiction, in error
        4. Can the commercial activities/contacts of one entity be attributed to another corporate entity?
            a. Argue that corp. structure is designed to insulate from tort liability in US Ct's
d. Notes:
    i. Most recent general jurisdiction case (decided in 2011 with *Nicastro* [specific jurisdiction])

XXXIII. Bauman v. Daimler AG (SC 2013)

a. Facts: P's sued D for human rights violation during Argentine Dirty War of 1970's (complicity in disappearances); Daimler AG has subsidiary, Mercedes Benz, that sells its products in US; P sued in CA
b. Holding: 9th Circuit held that Daimler had sufficient contacts with CA (under agency theory of subsidiary relationship) to confer general jurisdiction; pending in SCOTUS
c. Rationale:
    i. QP: Does it violate due process to exercise general personal jurisdiction over a foreign corp. based solely on the fact that a subsidiary conducts business on behalf of the corporation in the forum state?
    ii. 9th Circuit dissent:
        1. Daimler = no min. contacts; Mercedes (Daimler USA) = min. contacts
        2. Two tests for determining whether a subsidiary's activity can be imputed to the parent
            a. Alter ego test – no separate personalities
            b. Agency test – subsidiary's activities part of the parent's activities (sufficiently important that they would be performed regardless of the sub.)

3. Corporate separateness an accepted principle of corporate law

XXXIV. Subject Matter Jurisdiction

a. As opposed to personal jurisdiction (in personam/general, in rem, quasi in rem) → Subject Matter jurisdiction
    i. Personal jurisdiction – state power/territory theory; based on volitional contact, purposeful availment
    ii. SM juris – legislature designates which types of cases can be heard in which courts
        1. SM juris. Is raised by the judge, even if not argued by the parties (sua sponte)
b. "Horizontal federalism"
    i. In personam jurisdiction polices forum state in its subjecting non-citizens to adjudicatory authority
c. "Vertical federalism"
    i. fed. ct.'s have the same horizontal relationship (since all states have fed. ct.'s) but also oversee state courts
        1. Effect of federal long-arm statutes?
        2. Kennedy (*Nicastro*)
    ii. Due Process clause limits horizontal "reach" of both state and fed ct's
d. Federal courts:
    i. "forum of fair dealing" for disputes between parties of different states (diversity; no favoritism)
        1. At time of Founding, state judges were elected
    ii. cases where claim "arises under" the Constitution (Constitutional questions)
    iii. Human rights
        1. attributes of forum appropriate (politically-insulated; confluence of attractive procedural rules)

XXXV. Federal Question Jurisdiction (28 USC 1331):

XXXVI. Osborn v. Bank of US (SC 1824)

a. Facts: Osborn enforced an Ohio tax on the Bank of US, seized money; US sued Osborn in fed. ct.
b. Holding: fed. ct. had jurisdiction over the case (not in violation of 11th Amend.); Ohio violated prohibition on taxing fed. govt.
c. Rationale:
    i. contentious debate over control of fiscal policy
        1. No paper currency before Civil War
            a. So, banks issued "bank notes" (IOU's)
    ii. Hamilton – Bank of US would control fiscal policy
        1. "tight money" policy – no inflation; benefits creditors
            a. Flooding market with currency causes inflation
            b. Bank of US eventually killed by Jackson
    iii. Case 1:
        1. Ohio (many debtors) opposed to Bank of US (Ohio favors "loose money")
            a. Ohio auditor imposes a tax on Bank of US' issuing banknotes
                i. US argues that state cannot tax federal institution, just as fed. govt. cannot tax states (inter-governmental tax immunity)

ii. Ohio argues that Bank of US is essentially a private entity, not an instrumentality of the fed. govt.

b. US sues Ohio auditor in Fed. Ct. to prevent enforcement of tax
   i. judge agrees with US, files injunction
   ii. Ohio auditor (Osborn) forcibly takes money from vault to pay for tax
      1. US moves to hold auditor in contempt

iv. In sanction hearing, Osborn argues that Fed. ct. does not have jurisdiction over him
   1. at the time, no statutory authority (Reconstruction Amendments, 13th and 14th; enforcement clause of 14th Amend.)

v. Marshall opinion:
   1. Charter of Bank (authorized by Congress) authorizes any suit involving the Bank to be heard in ANY court
   2. Broad reading of opinion:
      a. holds that, if it is conceivable that a federal question could arise in a case, then case can be heard in fed. ct.
   3. Narrow reading:
      a. federal instrumentality must have a right to have disputes settled in fed. ct.

vi. Had auditor *sued* Bank, instead of forcibly recovering tax?
   1. no sovereign immunity (since Bank was engaging in commercial activities)

d. Hypos:
   i. "Osborn 1"
      1. Bank of US v. auditor
         a. suit arises under tax immunity clause (easy case)
         b. Marshall turns to Charter
   ii. Osborn 2: Bank of US issuing agricultural mortgages in Ohio
      1. Bank v. farmer (to recover mortgage)
         a. contract in Ohio (mortgage), secured by land
         b. Special status for US instrumentalities (even if enforcing a purely state-law claim?)
            i. Expertise rationale
   iii. Osborn 3:
      1. Auditor v. bank (if sued, instead of forcible recovery)
         a. Invokes Ohio statute
         b. Removal to fed. ct. must be based on the argument that the Ohio tax statute is unconstitutional (due to supervening federal law)
            i. cannot use diversity jurisdiction (corporations did not have legal status at the time) – so, must use citizenship of all shareholders (unlikely to have complete diversity)
               1. pre-Jacksonian democracy, where Corp's were allowed to be created by boilerplate statute
               2. now, citizenship = place of incorporation
                  a. pre-Jacksonian model still used for labor unions
         c. Defense is based on fed. question

i. *Mottley* rules that a defense anticipating a federal question is NOT sufficient to remove to fed. ct. (see below)

iv. Osborn 4:
1. Farmer v. Bank
a. sues bank based on fraudulent representations in mortgage loans
i. Source of complaint: state fraud statute
ii. no facial federal question (*Mottley*); no intergovernmental tax immunity defense
iii. cannot be heard in fed. ct.

XXXVII. Louisville & Nashville RR v. Mottley (SC 1908)

a. Facts: RR settles claim by issuing free passes; violation of Kentucky statute prohibiting charging differential rates
b. Holding: Circuit ct. holds that it does not have jurisdiction to hear case, since no facial federal question
c. Rationale:
i. RR's created vertical monopolies for RR owners, who could charge themselves lower rates to move their own goods
1. bill passed forbidding charging differential rates (also forbidding free passes)
ii. Suit in Kentucky fed. ct.
1. RR argues that statute violates 5th Amend. (depriving RR owners of property without due process)
2. Collusive case to challenge statute (Mottley's pro bono attorney was RR's chief counsel)
a. Did not argue that statute did not apply to existing contracts
iii. Circuit ct. (Holmes)
1. first duty of ct. is to determine whether the ct. is the proper forum
2. ct. holds that the case cannot be heard in fed. ct. ("Osborn 3" scenario)
a. In order to invoke federal jurisdiction, P must present a fed. question facially
iv. Defense of Mottley:
1. Article III as a prophylactic (saving decision for Congress); "arising under" Constitution
a. broad reading of Article III allows Congress to adapt policies to changing circumstances
i. Congressional statutes influencing the federal system (such as which cases may be removed to fed. ct.) should be read narrowly
ii. Mottley – limits federal removals, defends state's right to hear cases; codified in USC1331
2. USC 1331 – requirement that a federal question must be present on the FACE of P's claim
a. "pinning" certain cases in state ct.
v. Demurrer – historical predecessor to motion to dismiss (no claim upon which relief can be granted)
1. Under *Mottley* (USC1331; Article III), complaint must implicate federal law (a fed. question); pleading requirement (**well-pleaded complaint rule**)
a. In common law pleading, no way to know the defense

b. Modern procedure: planned defenses presented in an answer

vi. Federal jurisdiction:
1. Diversity
   a. complete diversity, jurisdictional amount
2. Federal question
   a. P must invoke fed. statute or constitutional question
3. Sue the federal government (fed. instrumentality)
   a. In *Mottley*, RR statute enforced by a fed. agency
      i. RR could have sought injunction against fed. agency, preventing them from enforcing the statute
      ii. Cite the unconstitutionality of the statute
4. Supplemental jurisdiction
   a. In *Mottley*, claim could have been brought against fed. agency, with state claim attached; to hear state claim in fed. ct.

vii. Function of law:
1. Norms
   a. Enforcement form (admin., social, church, etc.)
   b. Judicial (SM jurisdiction)
      i. democratic imprimatur?
2. Remedies (injunction, damages, etc.)
3. Enforcer
   a. public authority v. private authority (harmed party)
   b. Private enforcement: derivative suits (*Shaffer*)
4. Cause of action:
   a. Which law supports cause of action?
      i. State? Federal? grappling hook analogy
5. Rules of uncertainty (burden of proof; evidentiary rules)
6. Time limits (statutes of limitations; "latches" in common law)

XXXVIII. Bivens v. Six Unknown Agents (SC 1971)

a. Facts: agents illegally searched home of Bivens; Bivens sought damages against agents for violating 4th Amend. rights
b. Holding (Brennan): general right to remedy allows fed. agents acting under color of fed. govt. authority to be sued for damages
c. Rationale:
   i. Violation of 4th Amend.
      1. What forum enforces the norm?
      2. What cause of action is raised?
         a. Claims that 4th Amend. allows right to recover damages
   ii. Govt. argument:
      1. claim arises under state tort law
      2. 4th Amend. does not provide individuals with a cause of action to sue for damages
   iii. Marshall (*Osborn*)
      1. fed. ct. decides whether certain acts are in accordance with Constitution
   iv. Civil Rights Act of 1871:
      1. Congress created cause of action against state officials

a. No parallel statute for federal officials, acting "under color" of federal govt.
    i. Cited by dissent in *Bivens*
        1. "invented" federal cause of action
b. But, Ct. still recognizes *Bivens* as applied to 4th Amend., 1st Amend., and 8th Amend., as well as applied to "equality" cases

v. "arising under"
1. *Mottley/Bivens*
    a. existence of federal law? norm?
    b. aspect of statute allowing for enforcement? private?
2. P's claim must present a fed. question; defense invoking fed. question/Constitution is insufficient to confer SM jurisdiction

XXXIX. <u>"Arising under" v. private cause of action:</u>

XL. Skelly Oil v. Phelps Petroleum (SC 1950)

a. Facts: oil company sued oil producers to enforce contracts, sought declaratory judgment
b. Holding: no jurisdiction to hear case in fed. ct. (no fed. question on face); Declaratory Judgment Act extended range of remedies available in fed. ct. but did not extend fed. ct's jurisdiction
c. Rationale:
    i. War-related (WW2) energy rationing rules
        1. exploration, emergency exceptions
    ii. federal contracts pit explorer against refiner
        1. fed. contracts emergency exception, implied to end at the conclusion of the emergency
        2. Defense (federal): expiration of wartime conditions
    iii. Holding: claim that merely anticipates that a federal law will be used as a defense is not sufficient to constitute invocation of a federal question ("artful pleading"); must be heard in fed. ct.
        1. Different result if D had sued first
    iv. P invokes Declaratory Judgment Act

XLI. Shoshone Mining v. Rutter (SC 1900)

a. Facts: suits to determine ownership of mining land
b. Holding: no fed. jurisdiction, right of possession determined by local custom
c. Rationale:
    i. Mining claims on fed. owned land; fed. statute maintains that right to possession "by local custom"
    ii. Since claim involves determination of local custom, it does not question the fed. statute's constitutionality
        1. *Mottley* test – which law is challenged? grappling hook

XLII. Smith v. Kansas City Title (SC 1921)

a. Facts: P sued to enjoin local bank from buying fed. bonds (argued that fed. govt. did not have authority to issue bonds)
b. Holding: federal question jurisdiction was implicated, even though cause of action arose under state law
c. Rationale:

i. Agricultural depression in wartime (WWI)
ii. Fed. govt. issued bonds, given to farmers, increasing food prices
iii. Federalism argument:
    1. Government's role in the economy?
        a. Regulation v. Market
iv. P = shareholder of local bank (bank buying the fed. bonds)
    1. argues that fed. govt. did not have authority to issue the bonds
        a. collusive litigation? effort to cast doubt on legitimacy of bonds?
        b. Missouri law prohibits banks from investing in unauthorized securities
    2. Did not sue a fed. instrumentality (bond-issuing agencies)
        a. this would have invoked special jurisdiction of *Bivens*, etc.
    3. But, Missouri law incorporates a federal issue of law
        a. So, federal question is necessarily implicated in P's claim invoking Missouri law (cannot be decided without referring to the federal law)
        b. As opposed to in *Mottley*, where P invoked contract, anticipating that defense would invoke Constitution

XLIII. Moore v. Chesapeake & Ohio RR (SC 1934)

a. Facts: decedent's estate brought action against RR for negligence
b. Holding: federal safety statute is read into the state law, so no fed. question jurisdiction
c. Rationale:
    i. P's work-related tort claims failed for contributory negligence and "last clear chance"
    ii. Suit was brought under state statute
        1. Statue barred defense of contributory negligence where P had complied with federal safety requirements (to induce compliance with fed. statute)
        2. No fed. SM jurisdiction (no incorporation, as in *Smith*)
            a. Practical concerns – "one-off" argument
            b. Precedent for federal safety standards based on Kentucky law
            c. Preserves state's control over their tort law
        3. Can *Smith* be harmonized with *Moore*?

XLIV. Merrell Dow Pharmaceuticals v. Thompson (SC 1986)

a. Facts: P sued D for failure to comply with federal labeling requirements (FDCA), causing birth defects; Ohio statute creates a cause of action for failure to comply with the federal statute; D removed to fed. ct., case was dismissed on forum non-conveniens
b. Holding (Stevens): no federal question SM jurisdiction; Congress did not intend a private cause of action for violation of FDCA
c. Rationale:
    i. State court borrowing federal norm to determine whether state statute was violated (*Moore*)
    ii. P's argued federal interest in enforcing uniform legal standards (invoking leg. intent)
        1. but, neither side alleged a fed. cause of action (benefits neither party)

XLV. Grable & Sons v. Darue (SC 2005)

a. Facts: IRS seized Grable's property, sold to Darue; notice dispute (mail v. personal service); P did not exercise right to reclaim property, due to failure to receive notice; D removed to federal court under fed. question SM jurisdiction (interpretation of fed. notice statute)

b. Holding (Souter): fed. ct. may hear claim arising under state law if relief depends on application of fed. law; IRS failed to comply with its own statutes re: notice
c. Rationale:
    i. quitclaim deeds –
        1. does not transfer title but transfers interests/claims to property
        2. no implied rights re: property, validity of title, etc.
    ii. quiet title action –
        1. proceeding to establish ownership of land
        2. in personam/in rem? or both?
            a. usually one in the same, since notice requires that owner is served AT property
    iii. property seizure (tax delinquency)
        1. personal service required; registered letter mailed instead
    iv. P argued that IRS did not pass an adequate title to Darue, so land still belonged to Grable
        1. no cause of action against fed. govt. (since none specified in statutes)
        2. so, P sues Darue; D wants federal judge
        3. Does claim "arise under" USC1331?
            a. notice rules in question
            b. Holmes' dissent in *Smith*/majority opinion in *Mottley*
                i. Which law does claim arise under? If state law, not sufficient that an ancillary federal law exists (not sufficient to confer fed. jurisdiction)
    v. Distinguished from *Merrell Dow*?
        1. Souter: distinguishable from *Merrell Dow* (no wholesale shift)
            a. no "mixed question" of law and fact
            b. paramount interest of federal govt.
                i. When "financial lifeblood" of fed. govt. (taxation power) is at stake, hear case in fed. ct.
                ii. harmonizes *Smith* and *Grable*

XLVI. Empire Healthchoice v. McVeigh (SC 2006)

a. Facts: federal employee sustained injury, received insurance benefits from P; wife of employee recovered $3.2 million in separate lawsuit; P sued wife for reimbursement of benefits (fed. statute compelled suit to recoup benefits)
b. Holding (Ginsburg): Empire's suit does not satisfy USC1331's requirement that claim "arise under" federal law
c. Rationale:
    i. Insurance plan offered to fed. employees by Office of Personnel Mgt., premiums vary by plan
        1. employee can file claim under rules of specific plan
            a. State law is preempted by fed. law
            b. Also declares federal jurisdiction if US govt. is party to claim
        2. OPM authorizes insurance company to recoup money awarded to employee in lawsuits
            a. employee is hurt, collects benefits, dies
                i. estate sues third party who caused injury, receives settlement

ii. Empire (under contract with OPM) sues to recoup
    1. Dist. Court dismisses on no fed. question jurisdiction
        a. Since statute itself was not implicated in claim, just the contract
        b. state cause of action (under contract), with antecedent federal question (how to accomplish recoupment)
            i. Distinctly federal interest (importance of recoupment to fed. health statute's existence)
            ii. Upheld by SCOTUS
iii. distinguishable from *Grable*?
    1. In *Grable* = IRS implicated, although not a party
        a. *Grable* test: private cause of action? if not, importance to fed. govt.?
        b. Ginsburg adds another aspect to test in *Empire*:
            i. State courts' ability to fairly adjudicate the question?
    2. In *Empire*, state tort action
iv. Ginsburg:
    1. How to account for attorney's fees in tort action?
        a. "pure question of law", not necessary to submit to fed. jurisdiction
        b. Non-statutory
    2. Congress specified fed. jurisdiction for other issues, so absence must be intentional (implying no fed. jurisdiction)
        a. inclusion e unos (inclusion of one thing entails the exclusion of another)
v. Breyer dissent:
    1. claim was based on federal contract interpretation; Congress intended federal jurisdiction
    2. absence of explicit conferral of jurisdiction means Congress thorught that such claims would fall under USC1331

d. Rules Enabling Act (1934) – New Deal legislation
    i. as opposed to common law rules
    ii. authorized SCOTUS to promulgate rules
e. Rule 4(e) – service of process
f. Rule 14 – interpleader rule (*Asahi; Gray Radiator*)
    i. everyone in the same case
    ii. "100 mile bulge"
        1. to serve process, even if crossing state lines (no minimum contacts nec'y)
g. Rule 19 – indispensible parties (see below)
h. "aggregated US contacts" with all states
    i. Kennedy: federal jurisdiction over foreign D's, based on aggregate contacts
        1. But, what law applies?
    ii. Has not been implemented
i. Rule 4(k)(2)(a):
    i. if federal question is present ("arising under" SM juris.), in personam juris. will be conferred even if NO state would have due process power
    ii. but must be consistent with US Const.

XLVII. Human Rights Jurisdiction:

a. Federal courts as human rights tribunals:
    i. lifetime appointments

ii. tradition of enforcing norms against the majority
iii. broad discovery rules (forces D to reveal information)
iv. aggregate litigation (class actions)

XLVIII. **Bivens v. Six Unknown Agents**

a. see above
b. Notes on human rights jurisdiction:
    i. closing the cause of action gap
    ii. affirmative statement by democratic body v. judicial interpretation of constitutional norm
        1. cause of action for injunctive relief v. cause of action for monetary damages
        2. No federal cause of action; "implied" damages against fed. officials

XLIX. **Monroe v. Pape**

a. Facts:
b. Holding:
c. Rationale:
    i. US Const. as norm: use of 14th Amend. against state officials
    ii. Cause of action against state and local officials under USC1983 (when acting "under color" of law)
        1. narrow reading: action must be authorized by state law (so, unauthorized actions by state and local officials are not "under color" of law)
            a. But, *Monroe* overturns this reading
        2. Exhaustion rule: all other remedies must be exhausted

L. **Medellin v. Texas**

a. Facts: ICC holds that US is in systematic violation of treaty, directs compliance
b. Holding:
c. Rationale:
    i. meaning of consular treaties; consular representation issue
    ii. Texas refuses to reexamine cases to determine whether treaty would have affected convictions (since this issue was not raised on appeal)
        1. Medellin obtains federal writ of habeas corpus, directing Texas to reexamine conviction
            a. What enforcement mechanism to supplant Texas law? (cause of action and remedy)
            b. treaty norms enforceable against state officials?
        2. Does the treaty create a private cause of action in the absence of democratic direction?
            a. like *Bivens*, but applied to 14th Amend. (does 14th Amend. imply a private cause of action?)
            b. No, must be statutorily enforced by Congress (democratic deficit argument)

LI. **Kiobel v. Royal Dutch Petroleum**

a. Facts: Nigerians suing Nigerian Corp. under ATS
b. Holding: no extra-territorial effect of the ATS; only applies to torts in USA
c. Rationale:
    i. What norm creation? Democratic?
        1. "Customary international law"

a. "World common law"; Initially developed to deal with piracy
b. no obvious democratic foundation
c. Nuremburg tribunals example
    i. ex post facto (applying law retroactively) defense: Nazi officers acted in accordance with German law (which mandated their actions)
    ii. Response: treaties? Hague conventions on war?
        1. but, treaties were renounced by Germany
    iii. Customary international law invoked
        1. displaces German law
        2. 1971 2nd Circuit case, recognizing customary int'l law in claim against Paraguay secret police
        3. By mid-90's, Ct's recognize customary int'l law IF backed by statute (creating a cause of action)
            a. Alien Tort Statute (ATS) (1789)
                i. cause of action for when an alien sues another alien for tort, in violation of the "law of nations"
        4. Sosa (1996):
            a. customary int'l law and ATS only applies to violations analogous to piracy (so abhorrent, disruptive to the international community)

2. Natural law theory
    a. limits on law (but, no fixed substantive base, can argue either way)
3. *Kiobel*:
    a. once decided, *Bauman* could not use ATS (no extra-territorial effect; only applies to torts occurring inside USA)

LII. Diversity Jurisdiction

a. When a case may be heard in federal court:
    i. Subject-Matter Jurisdiction
    ii. Federal Question Jurisdiction (28 USC §1331)
    iii. Human Rights jurisdiction
    iv. Diversity jurisdiction (28 USC 1332)
    v. Also:
        1. Removal jurisdiction
        2. Supplemental jurisdiction
b. Diversity jurisdiction:
    i. Article III diversity jurisdiction
    ii. parties of different states/nations can sue in fed. ct. (alienage)
        1. ATS addresses hole in providing for aliens suing each other in USA
            a. for instance, shiphands docking in USA in a dispute over the ship's safety
    iii. creates fed. cause of action
c. Jurisdictional amount requirement:
    i. in excess of $75,000
    ii. must be in good faith, even if the claim is later found to be worth less

iii. no jurisdictional amount requirement in federal question claims

d. Test for diversity is on the DATE that the case is FILED in court

e. Citizenship:

i. currently, domiciliary requirement (*Mas*); overturned inhabitant requirement (*Dred Scott*)

ii. college students' domicile?

1. mostly subjective, with an objective minimum
2. principle place of abode/habitation

iii. voting

1. Americans' domicile abroad? fed. statute created to allow for voting in federal elections, but not state

iv. diversity

1. objective criteria (voting, taxes, etc.) used in "domiciliary discovery"
2. formerly, wife had domicile of husband (*Mas*); no longer constitutional

v. corporate domicile?

1. Corp. as citizen of state of incorporation
2. can have multiple citizenships (usually 2; for tax purposes)
    a. *See Bank of US v. Deveaux*
3. Principal place of business?
    a. multiple
    b. minimum contacts (where is Corp. essentially 'at home'; *Helicopteros*)
    c. used to defeat complete diversity
4. "nerve center" (HQ) v. "operational center" (factories) v. place of incorporation

vi. inmates?

1. domiciled in prison

LIII. Strawbridge v. Curtis (SC 1806)

a. Facts: complaint dismissed for lack of jurisdiction

b. Holding: need complete diversity for fed. jurisdiction

c. Rationale:

i. before federal question jurisdiction

ii. "complete diversity"

1. when none of the parties on one side have a common citizenship with any parties on the other side
2. amount in controversy requirement

iii. Exceptions to complete diversity rule, where minimum diversity is used:

1. bank interpleaders
2. liability "holes" (class actions)

iv. Diversity:

1. allows for an elite commercial court
2. but, importance reduced after *Erie* (see below)
    a. Brandeis: no "river of law"; law is man-made
    b. So, federal court should apply the law of the state in which it sits

LIV. Mas v. Perry

a. Facts: P's sue landlord for spying on them

b. Holding: case could be heard in fed. ct. under diversity jurisdiction

c. Rationale:

i. Held that Mas did not change place of domicile (still MISS resident); so, complete diversity maintained

LV. Dred Scott v. Sandford (SC 1857)

a. Facts: P (slave) taken to Minnesota (free state), sold back in Missouri (slave state); P sued for freedom, claiming citizenship of Missouri
b. Holding (Tawney): slaves cannot be considered citizens under USC
c. Rationale:
    i. Parallel case:
        1. Sommerset (slave) taken to London (no slavery in UK) (1719)
            a. writ of habeas corpus filed by Quakers on behalf of Sommerset
                i. argues choice of law: UK law does not recognize slavery
                ii. Justice Cook: upheld use of British law; once slave brought to UK, he is free
        2. implications in USA: choice of law in northern states for runaway slaves
            a. Fugitive Slave clause passed in response to Sommerset case
                i. first state statute struck down as unconstitutional by SCOTUS: PA kidnapping statute for fugitive slaves
    ii. Dred Scott:
        1. owned by army surgeon, sent to work in other states, some of which were free states
        2. master dies, wife sells to another owner in Missouri
        3. Scott sues in Missouri, invoking choice of law of Michigan, Minnesota, or territories (where he had previously traveled)
            a. Diversity jurisdiction
    iii. Tawney holding:
        1. Article III must be read under original construction of Const., which was deeply racist
            a. Case dismissed for lack of diversity jurisdiction, since Scott had NO citizenship
            b. Also struck down Missouri compromise as deprivation of property without due process
    iv. Scott decision overturned by 13th and 14th Amendments

LVI. Bank of US v. Deveaux (SC 1809)

a. Marshall: Corp. is citizen of all states of shareholders
    i. but, this rule means that Corp. can never achieve complete diversity
    ii. defeats intention to have fed. ct's as production-friendly ("elite") courts
b. Line of cases: *Deveaux* → *Hertz*
    i. Historical development of corporate diversity jurisdiction
    ii. shift from "transparent corp." (looking to owners for citizenship) to "opaque" corp.
    iii. What implications for other entities?
        1. partnerships (limited)
            a. sports teams, etc. (general and limited partnerships)
            b. currently treated as collections of individual owners ("transparent"; Marshall in *Deveaux*)
        2. unincorporated associations (labor unions)
            a. made up of all members; citizenship of each member is domicile test

3. P classes
    a. *Ben Hur*:
        i. citizenship of named P's, not all members of class
        ii. as opposed to with trade unions, partnerships
    b. implication in Swiss bank case:
        i. rotate named P's
    c. $5 mil. minimum amount in controversy requirement for class actions

LVII. **Louisville, C. & C.R. Co. v. Letson (SC 1844)**
- a. Plaintiff (NY) sues Corp. (members citizens of SC)
- b. Legal fiction of Corp. as inhabitant of state (members of Corp. not D's in suit)

LVIII. **Marshall v. Balt & O.R. Co. (SC 1854)**
- a. Respondent corp. hired Marshall (petitioner) to influence VA legislature into passing favorable statute
- b. SC held Circ. Ct's diversity jurisdiction
- c. Corp. is resident of state where it was incorporated

LIX. **Hertz. Corp. v. Friend (SC 2002)**
- a. "principle place of business" interpreted by Ct. to be a Corp.'s "nerve center" (HQ) for purposes of citizenship
- b. Based on interpretation of USC §1332 (legislative intent)

LX. **Supreme Tribe of Ben-Hur v. Cauble (SC 1921)**
- a. SC held that diversity of citizenship in class actions is based on citizenship of named parties only
    i. lawyers can choose which P's are named, to ensure diversity (or, ATS, with "named aliens")
    ii. SCOTUS: as long as one named P satisfies amount in controversy requirement, other P's can "piggyback" using supplemental jurisdiction
    iii. Class = similar to a Corporation (label describing the coordinating activities of participating citizens)
        1. Or, is a Corp. (and a class) a distinct entity (distinguished from a partnership)?

LXI. <u>Jurisdictional Amount:</u>

LXII. **St. Paul Mercury Indemnity Co. v. Red Cab Co. (SC 1938)**
- a. Amount-in-controversy requirement
- b. Burden of proving that req. is met falls to party invoking diversity jurisdiction
    i. Exceptions: domestic relations and probate
        1. Ginsburg: domestic relations exception: federal ct's refusing to deal with women's issues (all male judges)
            a. contrary to *Pennoyer*'s language re: importance of state to be able to determine the *status* of its citizens
                i. State jurisdiction – ensures predictability, uniformity re: status

LXIII. <u>Diversity exceptions – Domestic Relations and Probate</u>

LXIV. **Ankenbrandt v. Richards (SC 1992)**
- a. Facts: child abused by father and girlfriend; suit by mother
- b. Holding:
    i. domestic relations exception for divorce, custody, alimony (must be litigated in state ct., regardless of diversity)

ii. State courts more suited to address cases of divorce, alimony, child custody
    1. Exception would not apply to an intra-family tort

LXV. **Marshall v. Marshall (SC 2006)**

a. Facts: Marshall leaves estate to his son, nothing to his widow (Anna Nicole Smith); widow files for bankruptcy (fed. ct.); son files defamation claim against widow, widow files cross-claim against son for tortious interference in will
b. Holding: tort case should have been brought in probate court, due to probate exception for diversity; but, SCOTUS upheld that, since tort claim did not interfere w/ state probate proceeding, was within SM juris. Of Bankruptcy Ct.
c. Rationale:
    i. Anna Nicole Smith case
    ii. limitation on probate exception:
        1. does not cover ordinary tort
        2. both probate and domestic relations exceptions are narrow
    iii. 9th Circ. Held that fed. Ct. could not take SM juris. Over estate planning instrument (probate exception)
        1. SC reversed; claim did not interfere w/ state probate proceeding, was within SM juris. Of Bankruptcy Ct.

LXVI. <u>Removal jurisdiction (28 USC 1441)</u>

a. Plaintiff can choose in which court to litigate
    i. If plaintiff chose state court, but could have chosen fed. Ct., defendant can remove the case to fed. Ct. (cannot remove to state ct., if in fed.)
    ii. Removal depends on fed. Jurisdiction (canvas all possible sources of fed. Jur.)
        1. If based on diversity, when do you test for diversity?
            a. Normally, tested on date of filing case
            b. In removal, tested on date of removal
b. Home-state defendant cannot remove
c. Compulsory counter-claims:
    i. if a counter-claim arises out of the same set of circumstances as the base claim, many ct's dictate that the counter-claim must be brought in the first case, or cannot be brought at a later date (Rule 13(a))
    ii. So, P can pin a D into state court, since D would lose right to argue counter-claim

LXVII. **Shamrock Oil v. Sheets (SC 1941)**

a. Facts:
    i. Union labor fund to pay for vacations for truckers; nobody counted money paid to truckers for free vacations, so income tax not paid; CA tax board targets money in budget crisis, issues levy on fund
    ii. ERISA – fed. Statute governing employee benefits; arguably prevents the CA levy (prevents states from levying pension funds)
    iii. Removes case to fed. Ct.; filing of removal petition stops state case
    iv. Motion to remand – fed. Judge decides motion before case proceeds; but, is the motion to remand appealable; in fed. Ct., final order jurisdiction means that decision has to be made against you to appeal (have to wait for appellate review)
        1. NY State – serial reviews (delays cases, but prevents trying entire case when an error has been made at some point)
    v. Remand order – appealable?

1. Before *Grabel* – allows removal
    a. CA tax board = equivalent of state court in *Grabel*; state income tax = equivalent to state judges
    b. *Mottley* (Holmes): "well-pleaded complaint"

vi. P sues D, D files counter-claim, P moves to remove to fed. court

b. Holding (Brennan): only D's can remove to fed. ct.
c. Rationale:
    i. Removal jurisdiction- 28 USC §1441
    ii. Right of removal only available to D; must be filed at the time that D is required to submit to a Ct.
    iii. Exception: doctrine of complete preemption (when claims is so essentially federal as to remove state cause of action)

LXVIII. Supplemental jurisdiction (28 USC 1367)

a. when do fed. ct's have constitutional power to adjudicate claims falling outside Article III?
b. supplemental/pendant/ancillary jurisdiction:
    i. change in definition came when Congress codified under USC 1367, no longer a judge-dictated rule; same thing, diff. source of power

LXIX. United Mine Workers of America v. Gibbs (SC 1966)

a. Facts:
    i. wartime labor demands deferred during war-time, resulting in disputes after war (alleging that companies took advantage of labor during war)
    ii. coal – mined by UMW (militant, eastern labor union) and SLU (Southern Labor Union);
        1. SLU viewed by UMW as phony, employer-owned mine
    iii. Consolidated operating mine at a seam in a coal vein- has another mine, operated by WOS, Grundy;
        1. closes main mine, opens Grundy and employs SLU
        2. UMW sets up picket line at Grundy mine;
    iv. Gibbs had haulage contract, physically prevented from working at mine;
        1. claims that he was "blacklisted", lost all subsequent work
    v. Primary boycott; secondary boycott (closed SLU mine with intention to re-open original mine; illegal)
    vi. Gibbs seeks damages for loss of employment contract and loss of future contracts
        1. 2 theories
            a. Diversity: Gibbs (Tenn.) v. UMW (NY, DC); but, if 1 member of UMW is a citizen of Tenn., case cannot be heard in fed. Ct. (no complete diversity)
                i. Unless UMW conceptualized as a "thing"
            b. Case arises under fed. Law (*Mottley*)
                i. Face of complaint based on fed. Boycott language
                ii. Pendent state claim – hang state claim from federal claim
                    1. State claim is pendent to fed. Claim, since it comes out of the same fact pattern
                    2. same fact pattern can often yield claims under both fed. And state theories

a. If pendent jurisdiction, judge will decide both (efficiency purposes)

b. Holding:
    i. SC: cause of action, violation of one right by one action (so should be heard at same time);
        1. "common nucleus of operative fact"
    ii. Article III: "cases or controversies";
        1. gives power to hear the whole case or controversy (base claim that satisfies fed. Juris. – pendent the rest of the case or controversy, if arising under same common nucleus of operative fact)
    iii. *Gibbs*: federal claim is eventually dismissed; boycott determined to be a "primary" boycott, not in violation of fed. Statute
        1. Haulage contract dispute is set aside
        2. Jurisdiction sustained for jury verdict in favor of Gibbs re: employment contract, damages awarded

c. Rationale:
    i. Supplemental jurisdiction (28 USC §1367)
    ii. Invoking pendent jurisdiction –
        1. judicial discretion
            a. is federal question substantial enough;
            b. did Ct. expend significant energy deciding fed. claim
    iii. In *Gibbs*, if judge had heard argument on motion to dismiss, case would have been heard in state ct. (if boycott issue was decided immediately)
    iv. Pendent jurisdiction only requires a "colorable federal claim"
    v. Article III:
        1. cases and controversies (usually used as a hurdle to get into Ct.)
        2. In *Gibbs*, used as a "door-opening" device;
            a. common nucleus of operative facts that creates a case or controversy
            b. Case or controversy – generates legal claims; legal theories for recovery
                i. "hooks" onto constitution, fed. Statutes, state statutes, common law
        3. Does the law give a cause of action?
            a. If case "hooks" into piece of federal law = fed. Question juris.
                i. AND, other legal claims in set of facts can be heard "pendent" to "colorable" fed. Ques. Juris. (***Gibbs***)
                ii. Colorable req. – can even use to get supplemental jurisd. Over state claim in fed. Ct., by dismissing fed. Claim during proceedings
                    1. in Gibbs, fed. Claim drops out of the case, case on state claim still heard in fed. Ct. – controversial use of fed. Jud. power
    vi. w/ no *Gibbs* rule, state court only court capable of hearing both fed. and state claims in same case – in fed. ct., 2 lawsuits (econ. burden)
    vii. criticism: judge-made adjudicatory authority w/ no legislative authorization; pendent/supplemental jurisdiction legitimate?

1. Rift between Brennan/liberal/open court advocates and conservatives (so, operating in some hostile environments, but precedent always the same)

viii.

LXX. Owen Equipment v. Kroger

a. Facts:
   i. Wrongful death claim – electrocution while working on crane
   ii. P brought claim against D (OPPD), D filed claim against 3rd party Deft. –
      1. P then amended complaint to include direct claim against TPD (as co-defendant)
b. Holding:
   i. principal place of TPD's business found to be in Iowa, breaks complete diversity
c. Rationale:
   i.

LXXI. Finley v. United States

a. Facts:
   i. San Francisco airport accident; sued in fed. Ct. under *Osborn* (FAA, fed. Instrumentality in commission of its duties)
b. Holding:
c. Rationale:
   i. If fed. Instrumentality sued in fed. Ct., state claims had to be adjudicated in state ct. (inefficient)
   ii. Led to USC 1367 (needed to codify where pendent jurisd. Could be used)

LXXII. Exxon Mobil v. Allapattah

a. Facts:
   i. Dealers treated unfairly under contract law, sues D under diversity (complete diversity under *Ben Hur*; named P's)
b. Holding:
   i. *Allapattah* – interpreting Congressional failure to mention rules 20 and 23 in 1367(b); decided case based on interpretation
   ii. Look at named plaintiffs for diversity AND jur. amt.
c. Rationale:
   i. Cites ***Zahn*** – every member of the class must satisfy jurisdictional amount (but, P's in case were joined under rule 23, not rule 20)
      1. Rule 20 P's – do not satisfy jur. Amt. (although named plaintiffs satisfy both req's)
         a. But, can use ancillary jurisdiction to include these P's
      2. Rightly decided? Citizenship case? Or just jur. Amt. case?
   ii. USC 1367 – Congressional attempt to bring coherence, settle question re: court's power to determine diversity/jur. Amt.
      1. All causes of action that come out of "case or controversy" – if Ct. can take any part of the case, it can take all
      2. 1367- takes power argument out; statute itself has to determine which cases
         a. Overturn only *Finley*?
         b. Codifies *Gibbs* power - effective?
         c. Prevents erosion of complete diversity

iii. Supplemental jurisdiction over all cases arising out of case or controversy, where 1367(b) does not name an exception
    1. Second half of sentence in 1367(b) leaves out parties joined by certain rules
        a. Founded solely on 1332 (diversity)
    2. Diversity – can't use 1367(a) power to assert supp. Jur. For any party joined as a deft. under **rules 14, 19, 20, 23, 24** (impleading a 3rd party deft.; join, intervene), if the additions would break complete diversity
    3. Does this change judicial rule that deft. can assert claim against a 3rd party deft., even though they have same citizenship?
        a. But plaintiff cannot? *Kroger*
        b. 1367(b) – under claims *by plaintiffs* under persons named party; correctly codifying *Kroger* (still allows for deft's to join 3rd parties)
            i. Shall not have supplemental jur. under 1367(a) under claims *by plaintiffs* against persons joined under Rule 14 (*Kroger*)
    4. Rule 19/20 – joinder rules
        a. Parties who MUST be joined and parties who CANNOT be joined
        b. Persons made parties under rules 19 or 20 (artful pleading, names only parties who he has complete diversity over, then adds add'l deft's under rules 19 or 20) –
            i. no supp. Jur.
    5. Rule 24 – can't use supplemental jur. if joined under rule 24
        a. under rule 24 (deft's "busting in" w/ no complete diversity); if party turns out to be indespensible, he is a rule 19 deft. and case must be dismissed for lack of diversity
        b. Plaintiff Intervening under rule 24, no supp. Jurisdiction
iv. All exceptions apply to cases where additional parties break complete diversity
    1. Plaintiffs populated: rules 19 and 24 (no mention of rules 20, 23)
        a. Mention of rules 20 and 23 would overturn *Ben Hur*
    2. Intended to codify *Ben Hur* while overturning *Zahn*?
    3. Defts: rules 19, 20, 23, 24 included
        a. Effect: easier to "dangle" rule 20 plaintiffs than rule 19 plaintiffs, who are REQUIRED to be joined (under SCOTUS statutory interpretation of 1367);
        b. easiest to join rule 23 plaintiffs
v. *Ortega* (rule 20 case in Puerto Rico) – do rule 20 plaintiffs "get a free ride"?
    1. As long as 1 of the plaintiffs satisfies complete diversity, all add'l plaintiffs joined under rule 20 must also satisfy complete diversity,
        a. but not jur. amt.
    2. *Ortega* – family members' jur. amt's not sufficient; but rule 20 is not mentioned in 1367(b) for populating the plaintiff class
    3. 1367(c) – under Gibbs, supp. Jur. was discretionary, depending on how much energy had been spent on the case;
        a. attempt to codify the discretion
vi. Rule 19: two categories: necessary (expansion of lawsuit); indispensible (nec'y but can't be joined – leads to dismissal)

LXXIII. Kokkonen v. Guardian Life Ins. Co.

a. Facts:
    i. Settlement dispute in fed. Ct.
b. Holding: see below
c. Rationale:
    i. Does a judge retain sup. Juris. Over enforcing a settlement agreement?
        1. No. If an order is issued dismissing the case in fed. Ct., sup. Jur. Cannot be used to subsequently enforce agreement
            a. Facts to be determined are not common
            b. Language of settlement must contain a "retain jurisdiction" clause; or, restrain judge from issuing dismissal order until after settlement is enacted
        2. No fed. Question (no "arising under"); no diversity
d. Hypos:
    i. P sues D on fed. Question (1331) jurisdiction
        1. D wants to sue P w/ counterclaim based on a *state* cause of action
            a. No fed. Quest. Jurisdiction (if no diversity juris.) – need an indep. Cause of action
        2. 13(a) counterclaim – compulsory counterclaim (must assert or lose the opportunity);
            a. arises out of the same transaction/occurrence of suit (common nucleus of operative fact);
            b. ancillary jurisdiction
        3. 13(b) counterclaim – permissive counterclaim;
            a. not arising out of same facts;
            b. requires an independent cause of action, source of jurisdiction
    ii. P sues D
        1. D brings in 3rd party, asserts fed. Question counterclaim (*Gray v. Amer. Rad.*)
            a. Often 3rd party is insurance co.
        2. If 3rd party is from same state, no fed. Question, can use pendent jurisdiction (since countersuit is related to same facts as orig. suit)
            a. But, if P makes a direct claim against the 3rd party D, the direct claim must have indep. Juris. Basis (*Kroger*)
    iii. P (NY) sues D (WI)
        1. Rule 19 (parties who *must* be joined as D's- necessary/indispensible parties)
            a. No ancillary jurisdiction over indispensible parties; must have complete diversity
        2. Rule 20
        3. Rule 24 –
            a. intervention as a right; party can join itself to suit as D if interests are implicated in case;
            b. No ancillary jurisdiction

LXXIV. Venue (28 USC 1390, 1391)

a. Geographical version of in personam jurisdiction; not about a sovereign's power, simply an effort to predict which location is most convenient for litigation
    i. 1992, 1998, 2011 reform statute
b. 3 places where venue can happen:

i. Deft's venue (any judicial district in which Deft. resides)
    1. If a multi-party case, it must be where ALL deft's reside (not used often)
ii. Place where some substantial event in the lawsuit happened (factual venue)
    1. As opposed to outdated "technical test," which stated, "where the cause of action arose"
iii. Catch-all venue statute
    1. Any district in which the deft. can be served (in personam)

LXXV. **Bates v. C&S Adjusters**

LXXVI. Transfer of Venue (28 USC 1404, 1406, 1407)

LXXVII. **Hoffman v. Blaski**

a. Facts:
    i. Patent infringement case, brought in TX fed. Ct.
    ii. Deft. moves to transfer case to Illinois;
        1. P argues that he couldn't have sued Deft. there
b. Holding:
    i. Transferred between 5th and 7th Circuits until SCOTUS granted cert. and decided case had to be heard in TX
c. Rationale:
    i. Rule 1404(a) –
        1. can transfer to venue where case MIGHT have been brought
        2. When case is filed? Or when case is transferred? Can D move to transfer case to ANY venue and waive in personam jurisd.?
        3. 1404(a) transfer –
            a. can be transferred where it would have satisfied in personam jurisdiction and venue rules; unless all parties agree to transfer
    ii. Rule drafted for convenience, justice for parties
        1. Remedial statute – should be interpreted as meaning original place where suit could have been brought
d. Rule 1406 transfer:
    i. P brought case in the wrong venue *(lack of in personam juris.)*-
        1. controversial transfer
    ii. Transfer, as opposed to dismissal (SOL stops when suit initiated);
        1. what power does a judge who does not have in personam juris. have to transfer case?
            a. *Goldlawn* – Dist. Judge has the power to save a case that was filed in the wrong place
    iii. As case is transferred between venues, what law applies?
        1. *Van Dusen*
        2. *John Deere*
e. If making a 1404(a) transfer, the P got in personam, SM jur., venue correct
    i. Best interest for all parties to transfer to venue where the case might have been brought;
    ii. carries the law of the transferor court "on its back";
        1. otherwise, P would be penalized

2. Change of venue shouldn't change the law in such circumstances, should only change the venue
3. Under 1406 transfer, law of transferee forum applied

LXXVIII. Van Dusen v. Barrack

LXXIX. Ferens v. John Deere

a. Facts:
   i. Case 1: P (PA) v. D (DE) → brings both contracts claims in PA, since tort SOL has expired in PA
      1. 3 causes of action:
         a. breach of contract
         b. breach of warranty
         c. tort claim
   ii. To address tort claim, Case 2: P (PA) v. D (DE) → sues in Mississippi (in personam jurisdiction over John Deere in Miss.)
      1. Moves to transfer Mississippi case to PA, to consolidate for efficiency purposes
      2. 1404(a) – Miss. Law would follow case for tort claim (preserving longer tort SOL's)
      3. Must be transferred only in the interest in justice
         a. judge felt sorry for P b/c he knew P would lose on contracts claims – incorrectly decided?
b. Holding:
c. Rationale:
   i. Panel on Multi-District Litigation
      1. Enforce transfer system when multiple cases exist –
      2. to concentrate cases in one venue, *for purposes of pre-trial proceedings*
   ii. 1407 transferee forum – which law does forum apply?

LXXX. Goldlawr, Inc. v. Heiman

LXXXI. In re IMF Global Holdings Litigation

LXXXII. Lexecon Inv. v. Miberg Weiss

LXXXIII. Forum Non Conveniens Dismissal

a. Forum non conveniens - after satisfying in personam power requirement
   i. Modern usage – across state/national borders
b. Can't force requested forum to take the case (only entails dismissal)
   i. Judicial discretion
c. No equivalent of 1406 in forum non conveniens (can't "rescue" case brought in the wrong forum)
d. New venue decides which statute of limitations to apply (although choice of law provisions require that previous forum's law be applied);
   i. diff. requirements between applying procedural and substantive law

LXXXIV. Gulf Oil v. Gilbert

LXXXV. Piper Aircraft v. Reyno

a. Facts:
   i. Scotland plane crash:

1. Scottish pilot, Scottish decedents, plane register in GB, owned and operated by GB Corp's,
2. constructed in PA (Piper),
3. with propellers from Ohio (Hartzell)

ii. Pilot error v. propeller malfunction
iii. Administratrix – CA resident, head of class
1. (old rule: ignore citizenship of the rest of class)
2. Now, statutory requirement that citizenship of class members be used
iv. Sues Piper (PA) and Halzell (Ohio) in CA State Ct.
1. sPiper and Hartzell move to remove case to fed. Ct.

b. Holding:
c. Rationale:
i. District Ct: Piper's sales in CA subject it to general jurisdiction in CA
ii. Transferred case: different laws must be used (law of transferee court v. law of transferor court)
iii. Can't join pilot in US case (Piper and Halzell argue that crash due to pilot error)
1. Would invoke rule 14 (impleader) or rule 19 (nec'y or indispensible party)
2. Otherwise, risk incompatible verdicts in two findings in two cases
iv. Complete diversity would be violated (pursuant to *Kroger* and Rule 14) if Scottish pilot was joined (since class was composed of Scottish citizens);
1. also, no in personam jurisd. over Scottish pilot
2. Only "100 mile bulge"
v. 3rd Circuit rule: Can't use forum non conveniens if law in transferee forum is less favorable to plaintiffs than in transferor forum → because plaintiff has already met requirements for first forum
1. SCOTUS reverses, no such requirement; transferee forum only must present reasonable chance for plaintiff to prevail
2. Standard rule – accept plaintiff's choice of forum (assuming all other juris. requirements are met)

LXXXVI. Commencing the Action:

a. Due Process Clause: repeated in the 5th and 14th Amend. → no STATE shall deprive…
b. Three functions of DP clause:
1. Minimum standards for procedural fairness (when power of govt. applied against an individual) –
a. procedural due process
b. Diff. standards for life, property, etc.?
c. Liberty? What falls under liberty? Property?
2. Substantive restrictions on governmental power (distinct from procedural fairness)
a. Substantive due process
b. Market setting: Including action against governmental regulation
i. Used to strike down minimum wage laws, etc.
c. Social setting: Also including liberal norms of personhood
i. Privacy
ii. Gender identity, etc.
iii. Right to die
3. Federalism due process

a. Applies prohibitions against fed. govt. power to States (14th Amend. as verbal "bridge")
b. Carries fundamental rights in Bill of Rights over to apply to States (cuts both ways- 14th and 5th Amend's)
c. Contrary to intentions of Framers, but serves as a "gap-filler"
d. Legitimacy of incorporation (of Bill of Rights)

i. Grand jury clause of 6th Amend. and Civil jury clause of 7th Amend. not incorporated

c. Procedural due process: fundamental aspects of a fair hearing (minimum requirements of fair notice, hearing)

LXXXVII. Rule 4 FRCP

LXXXVIII. Fair Notice

LXXXIX. Mullane v. Central Hanover

a. Facts:
   i. common trust fund – to reduce fees, increase availability for investment vehicle
      1. settlor – creator of trust
      2. income beneficiaries – receive distribution of the percentage of the common fund (remainder principle)
   ii. disagreements arise when settlors have different intentions for their investments (interest, dividends, long/short terms, etc.)
      1. risk of lawsuits
   iii. solution: routine review of accounts in Probate Ct., invite any suit and settle all disputes at same hearing
      1. can notify beneficiaries, some settlors of hearing (since correspondence is mailed) –
         a. but, some beneficiaries are unknown
         b. contingent remainderment – don't know who they are, or whether they will eventually be beneficiaries
         c. invested remainderment
   iv. Judicial release – rights extinguished
      1. depriving of property rights
   v. Notice:
      1. publication? must make reasonable efforts (go beyond publication, if possible)
   vi. Adjudicatory authority?
      1. In rem- proceeding involves money located at NY bank
      2. Or QIR1 – attaching ownership interest in property to exert in personam jurisd., up to the value of the property (not mentioned in *Mullane*)
   vii. Volitionality of contacts
   viii. Jurisdiction by necessity
   ix. Domiciliary jurisdiction – before *Mullane*, reduced requirements to take reasonable steps to notify
      1. Appointment of state agent for service of process
      2. Does not by itself satisfy notice requirements
   x. extent of Mullane – if it is reasonable to know that secondary interests are involved, must send personal notice to both primary and secondary interested parties (publication not sufficient)

1. publication as a "backstop" – not a "frontline" notice mechanism

b. Holding:
c. Rationale:
    i. similar to *Hanson v. Dencla* – bank trust

XC. Dusenberry v. US

a. Facts:
    i. forfeiture case
        1. balance desire to reach the individual with the associated costs
    ii. prison mailroom log – worth the cost?
b. Holding:
c. Rationale:
    i.

XCI. Jones v. Flowers

a. Facts:
    i. property owner's land forfeited
    ii. Notice returned as undeliverable, then published
b. Holding: SCOTUS – must take add'l reasonable steps to located prop. owner
c. Rationale:

XCII. D.H. Overmeye v. Frick

XCIII. Opportunity to be Heard:

a. Notice → Hearing
    i. When? Before the deprivation? Or post-deprivation (of liberty, property, etc.)?
    ii. What does it look like?
        1. creditor – seize asset, then hold hearing
    iii. requires submission to in personam jurisd., get property back immediately
        1. Shaffer – QIR still good law, but SCOTUS holds that *wages* can't be seized without a pre-seizure hearing

XCIV. Sniadach v. Family Finance Corp.

a. Facts:
b. Holding: wages cannot be seized in an in rem hearing without a pre-seizure hearing

XCV. Fuentes v. Shevin

a. Facts:
    i. Stopped making payments on consumer goods (TV)
    ii. Seller – complaint in Ct., claiming that seller retained title, item in buyer's possession while payments made
        1. writ of replevin – authorizes seizure of TV, while ct. proceedings are pending
b. Holding:
    i. 4-3 SCOTUS ruling (7 person ct.)
        1. Pres. Johnson unable to nominate successor to Warren
    ii. TV set – not crucial to livelihood; shared ownership
        1. Still, 4 justices rejected seizure
c. Rationale:

XCVI. Mitchell v. W.T. Grant

a. Facts:

i.

b. Holding:
    i. upheld seizure statute – differences from Fuentes and Sniadach?
        1. not an automatic writ of replevin – judicial review in LA
    ii. allows for immediate post-seizure hearing (with good notice)
c. Rationale:

XCVII. North Ga. Finishing v. Di-Chem

a. Facts:
    i. commercial case; judge-issued writ of replevin
b. Holding:
c. Rationale:
    i. rationale behind seizure
        1. abusing property/misusing/causing injury to prop./risk of flight with prop.
        2. need QIR
            a. judge argues that QIR not nec'y, can just use in personam (so no reason to seize prop.)

XCVIII. Goldberg v. Kelly

XCIX. Matthews v. Eldridge

C. Connecticut v. Doehr

a. Facts:
    i. neighbor dispute, altercation
        1. in personam jurisdiction
b. Holding: SCOTUS: hold that proceeding is unconstitutional; mandates pre-seizure hearing
c. Rationale:
    i. lien can be placed on real property, without judicial review
    ii. pending state proceeding - const'l question raised before fed. judge
        1. argued: interference w/ property right was minimal; post-seizure hearing possibility
    iii. mandates pre-seizure hearing
        1. pre-seizure hearing = hearing on the merits?
        2. must convince judge that other party will be unable to pay for loss in lawsuit (hearing entails review of assets)
        3. mechanic's lien – increases the value of the asset by the value of the labor; entitled to security in asset, up to value of labor
    iv. unconstitutional? – without other parties' knowledge; based only on allegations that work is true
        1. Circ. Ct's split, SCOTUS pending
    v. Statute – allows forfeiture of property deemed to be product of criminal activity
        1. forfeiture performed on date of indictment

CI. <u>Due process hearings:</u>

a. ie, pre-seizure hearing
b. What should a hearing look like?
    i. "gold standard" – 6th Amend. (only applies to crim. hearings)
c. What should hearing achieve?
    i. facts? recover relationship?

ii. who has burden of proof?
iii. how good is the hearing?
iv. what redress for uncertainty?

d. What evidence can be used?
   i. hearsay?
   ii. witnesses? oral v. written?
   iii. what impact on future relationship?
e. Involve lawyers?
   i. free lawyers?
   ii. no right to counsel in civil cases
f. accuracy; protection of the institution; transaction costs
g. Types of hearings:
   i. school suspension claims
   ii. driver's license revocation
   iii. civil commitment
   iv. termination of parental rights
   v. parole revocation/denial
   vi. civil rights era "racist lists"

CII. Pleading Requirements:

CIII. Civil Probable Cause?

a. civil pleading:
   i. the complaint
   ii. notice requirement
b. Complaint:
   i. Introductory statement
      1. describes case in 1 or 2 sentences
      2. source of law + jurisdiction
   ii. Parties
      1. P's – describe each, w/ allegations re: citizenship
         a. if class action, describe commonality
      2. name D's
   iii. Incidents at issue
      1. series of paragraphs setting out allegations (use "flat" tone)
   iv. causes of action
      1. link facts in section III to law ("hook")
      2. supplemental/pendant jurisdiction
      3. various theories of recovery
   v. "wherefore" clause
      1. redress requested
   vi. signature
      1. recognizes lawyer's responsibility
      2. sanctions under Rule 11
c. Rule 8: pleadings
d. Rule 9: heightened pleadings
e. Rule 8(a)(2): adopted in 1937
   i. short and plain statement (simple, concise, direct)

ii. overcame English common law system of purchasing writs (res judicata; field code)
    1. writ pleading (res judicata)
    2. fact pleading (Field code)
    3. Notice pleading (Rule 8)
        a. enabled by creation of elaborate discovery procedure

f. Procedure:
    i. Summons (assertion of jurisdiction); complaint (notice of allegations)
    ii. answer
    iii. motion practice
    iv. discovery
    v. summary judgment
    vi. trial

g. Answer:
    i. file general denial
    ii. or admit to certain elements
    iii. counter-claims, filing of defenses
    iv. Answer gives away as little as possible
        1. But, must admit if known to be true (can deny knowledge based on "information or belief"

h. Rule 12: motions
    i. challenge jurisdiction, venue, res judicata, SOL's
    ii. 12(b)(1): SM juris.
    iii. 12(b)(2): in personam jurisdiction
    iv. 12(b)(6): even if facts accepted as true, D wins (inadequate pleading; motion to dismiss)
        1. modern equivalent of demurrer
    v. motion practice: before discovery

i. Discovery:
    i. lenient fed rules for discovery
    ii. judge can enforce discovery rules by imposing sanctions

j. summary judgement:
    i. agreed-upon facts, argument that legal rules require win/loss
    ii. not uncommon to have SJ improperly brought
    iii. cannot be used to decide a disputed issue of fact

k. trial:
    i. judge (injunctions)/jury (money damages)
    ii. see examination of characteristics of proper hearings above

l. Probability scale (certainty):
    i. who has responsibility for producing enough evidence to establish probability?
        1. burden of proof:
        2. burden of production:
            a. how high does probability have to rise to satisfy burden of production?
            b. making out a prima facie case
            c. reasonable person COULD find X (fact)
        3. shifting production burden
            a. reasonable person MUST find X

b. then, D has opportunity to produce conflicting evidence re: X
i. to prove that reasonable people differ on X

4. burden of persuasion
a. how sure? who finds?
i. jury v. judge (if injunction)
ii. in mixed cases (injunction + damages), jury controls
iii. lowest burden:
1. more likely than not (51%)
2. preponderance of the evidence (standard default burden)
iv. then, "clear and convincing" (75%)
1. used in civil committment
v. then, beyond a reasonable doubt (90-95%)
1. criminal standard

m. when pleading:
i. look forward at 12(b)(6) motion:
1. if all facts assumed to be true, do the facts satisfy production burden? persuasion burden?

CIV. Conley v. Gibson

a. Facts:
b. Holding:
c. Rationale:
i. segregated labor unions (white leadership)
1. Ct. held that National Labor Relations Act required that members of union be represented equally
a. black employees allege that they were disproportionately laid off
i. implication that leaders were not defending their interests as vehemently
b. defense:
i. black laborers happen to disproportionally hold those jobs made redundant by technology
2. Ct. asked: where is discrimination?
a. No set of facts can be proved by P in support of the claim
b. Did not allow discovery
ii. Conley: good law?
1. w/ *Sweirkiewicz,* sui generis for civil rights cases

CV. Sweirkiewicz v. Sorema SA

a. Facts:
b. Holding:
c. Rationale:
i. company run by French citizens; Hungarian worker alleges discrimination based on age, ethnicity
1. lower ct:
a. where is evidence of purposefulness?
2. burden?
a. not at pleading stage

CVI. Bell Atlantic v. Twombly

a. Facts: P files suit alleging conspiracy to restrict trade (anti-trust violation)
b. Holding: SCOTUS rejects claim: if two possible explanations for a fact, complaint is dismissed unless P shows evidence tending to discredit alternative explanation, or affirm his own explanation
c. Rationale:
    i. anti-trust case (AT&T broken into regional companies→ Bell Atlantic)
        1. No prohibition on various Bell companies from infringing on each other
            a. But, no competition results (de facto monopoly)
        2. defense: Bell co's are reasonable entrepreneurs, made a conscious decision not to compete, based on business interest (common reaction to stimuli)
    ii. X fact: conspiracy in restrictive trade?
        1. need to find communication between regional competitors to prove
    iii. P drafts extensive complaint showing failure to compete, alleging conspiracy
        1. Cites *Conley*:
            a. conceivable that facts might be proven in discovery, trial → jury's decision
    iv. SCOTUS rejects P's argument:
        1. rejects *Conley* model
        2. two explanations → must show extra evidence (discrediting one or affirming the other)
            a. criticism of decision:
                i. preponderance of the evidence test (51% test) should be left to summary judgment (not at the pleading stage)
                ii. No discovery allowed (SCOTUS cites expense concerns)
                iii. asymmetric information problem
            b. but:
                i. case brought to extort a settlement from Bell?
                    1. cost of discovery for Bell
                    2. *Conley* model enabling attorney extortion?
            c. potential compromise?
                i. limited discovery; allows amended complaints
                ii. but, SCOTUS denies that the compromise would work in *Twombly*

CVII. Erickson v. Pardus

a. Facts:
b. Holding:
c. Rationale:
    i. With *Conley* and *Sweirkiewicz*, 3rd case in line of liberal decisions
    ii. Hep. C prison case
        1. prisoner taken off Hep. C protocol for drug use
    iii. lower ct. decision affirmed on basis that P did not allege an injury
    iv. SCOTUS reversed (after *Twombly*):
        1. holds that pleading was adequate (possible exceptions in civil rights cases)
            a. "constitutionalized" medical malpractice in prisons using 8th Amend. (cruel and unusual punishment)

b. facts in complaint must be sufficient to state a conceivable claim in discovery

CVIII. Ashcroft v. Iqbal

a. Facts: P sues FBI (Ashcroft), alleging solitary confinement due to govt. discrimination against Muslims after 9/11
b. Holding: as in Twombly, SCOTUS rejects claim, as fact pattern explicable by two alternative explanations
c. Rationale:
    i. qualified immunity → govt. officials cannot be sued for damages if they think that they are acting lawfully (in good faith)
        1. but, can be enjoined
    ii. solitary confinement, post 9/11
    iii. Iqbal sues FBI, Ashcroft
        1. discrimination against Muslims, Pakistanis after 9/11
        2. complaint sustained against lower-level officials
            a. What pleading can survive a motion to dismiss based on qualified immunity?
                i. must prove that officials KNEW that they were acting unlawfully (in this case, by detaining P in solitary)
                    1. requires an evaluation of officials' mental state
    iv. SCOTUS holding:
        1. denies P discovery
            a. purpose of qualified immunity is to protect high-ranking public officials
            b. so, pleading must allege MORE than plausibility (some plus factor)
                i. rolls discovery into pleading stage?
                ii. requires P to include burden of persuasion at pleading stage
    v. *Twombly* and *Iqbal*:
        1. inextricably tied to the specific law allegedly violated?
        2. substantive understanding of laws directs procedural due process pleading rules?

CIX. Notes on Pleading:

a. After Twombly/Iqbal
    i. Now, more difficult to plead anti-trust case, sue high officials; but, little empirical impact on general pleading
b. Choose cause of action, select facts nec'y to assert cause of action
    i. Information symmetric – information in public record or involving a public event
    ii. Must satisfy a certain level of specificity (Conley v. Twombly)
    iii. Difficulty handling "internal fact" cases – where case revolves around what was going on inside mind of D (asymmetric information)
        1. Must infer internal facts from external facts
c. Requirement of Twombly/Iqbal
    i. How to sufficiently plead under Ct's rule, when information gathering may be impossible
    ii. If facts create "smoke" of illegality, then D should have burden of proving that activity is innocuous (disprove the bad purpose) → but court holds that P must present a "plus factor"

iii. asymmetric information – plus factor is often in sole possession of D

CX. Tellabs v. Makor Issues

a. Facts:
    i. Rule 9 case – alleging securities fraud
        1. inference of fraud and innocuous explanations both available
b. Holding:
    i. Opinion (Ginsburg) – inference of fraud must be greater than possibility of innocent explanation
        1. Incoherent with previous precedent-
            a. Plus factor needed for securities fraud, not for other cases (such as civil rights), which fall under Rule 8
        2. Liberal justices weakening the notion that a plus factor is required (inference is sufficient, if "more likely" than inference of innocence)
    ii. Dissent: If possible explanations are balanced, "plus-factor" required to be plead (in Rule 9, as in Rule 8)
c. Rationale:
    i. *Tellabs* – Rule 8 (pleading), Rule 9 (heightened pleading)
        1. acknowledges subjective states of mind
            a. Rule 9 – mistake and fraud re: heightened pleading
            b. Accounts for Thomas' *Swierkiewicz* opinion
    ii. Iqbal rationale – character of the actor (or group) also taken into account (govt. officials assumed not to engage in illegality);
        1. labor union leaders in *Conley*
        2. Can't incorporate into pleading rules, since no consensus on trustworthiness of certain groups
    iii. Probable cause – information hurdle before govt. can use coercive processes against private citizens
        1. Should there be a parallel civil probable cause? Purpose of the pleading req's?

CXI. Ascertaining the Governing Law:

a. vertical and horizontal choice of law: (fed. v. state; state v. state)
    i. 3 major sources of guidance for deciding:
        1. supremacy clause
            a. except preemption
    ii. USC 1362 – created with lower fed. ct. system (see *Swift v. Tyson*)
        1. laws of the several states shall govern
        2. Question: state statutes only, or state common law decisions?
    iii. Due Process clause

CXII. The Erie Doctrine: The Governing Law in Federal Diversity Cases

CXIII. Swift v. Tyson

a. Facts:
    i. Maine land speculators sell land to NY investors (but don't yet have the land)
        1. Tyson gives 6 month IOU to Maine land speculators
b. Holding:
c. Rationale:
    i. Negotiability – enables laundering, fraud

ii. Discharge of a pre-existing debt does not constitute consideration, under New York law
iii. attempts to establish uniform commercial law throughout the country, using fed. common law
iv. Home-state defendant can't remove to federal court –
    1. gives out-of-stater ability to choose between state and federal court.
    2. Normally not such a big deal, but if the courts apply different laws (as they could do under *Swift*), then this pins the defendant under plaintiff's choice of court and choice of law.
        a. Could be resolved if we allowed defendants to remove actions brought in-state to state court by foreign defendants, but we haven't gone down that road – as of now, defendants in that situation still pinned down.
v. *Swift*: intention to create uniform rule, did not work
    1. Still significant horizontal differences, which create vertical unfairness
    2. Consequences that nobody intended
    3. What statute? – Rules of Decision Act
        a. construction of statute in *Swift v. Tyson*, creates unconstitutional effects; no matter that statute has been in effect for many years
        b. unfairly favors out of state parties (who can choose between state or fed. ct., shop for favorable laws)
            i. in-state parties do not have same ability (can't remove based on diversity)
            ii. could address problem by allowing home-state deft's to remove?
        c. fixes statute, rather than abolishing statute
            i. contrary arg: wait for Congress to fix statute
vi. Federalism violated by *Swift* – authorized fed. judges to create rules in situations where they are not authorized to do so by the Const'n
    1. Dealing with state causes of action
    2. But, supremacy clause? but still allows fed. judges to dictate state law

CXIV. Erie RR v. Tompkins

a. Facts:
    i. Guy walking along track hit by train, lost an arm. Accident took place in Pennsylvania, plaintiff from PA, railroad is NY and Delaware corporation, suit took place in NY.
    ii. PA state law used wanton standard but federal courts used ordinary negligence standard.
    iii. There were no witnesses to the accident, but plaintiff's account of what he remembered of the accident indicated that it must have been a door to the train that hit him –
        1. P's lawyer argued that this indicates that the door was open so railroad failed to latch it. Jury was asked to determine whether it could infer that the P was in fact hit by a door that the railroad had failed to latch, and jury answered yes, judgment for P for $30,000.
    iv. Question before SCOTUS – was ordinary negligence rule (rule of federal court and 30 states) properly submitted to the jury?
b. Holding:
c. Rationale:

i. Background discussion of case discussed in *Erie R. Co. – Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co. –*
    1. Louisville & Nashville Railroad was a Kentucky corporation wanted to form a contract that would give one taxicab company (Brown & Yellow) a monopoly agreement, but knew that they'd be sued by a rival taxicab company (Black & White) and the contract would be void under Kentucky law.
    2. To get around this, Brown & Yellow reincorporated in Tennessee.
        a. →This would mean that they could remove to federal court if sued in Kentucky state court.
        b. →Simple manipulation could alter the law that company had to abide by.
        c. →This is also where principal place of business approach came from –
            i. reaction to Black & White v. Brown & Yellow –
            ii. under statute, Brown & Yellow would have been a citizen of both Kentucky and Tennessee, and suit would have been able to move forward in Kentucky state court.
ii. *Swift v. Tyson* gave federal judges great power –
    1. they were allowed to create federal law all by themselves – Brandeis observed as federal district courts forged "extraordinary tradition" of federal due process.
iii. Factual background of *Erie*: At the time, roads ran directly across railroad, but also parallel – railroad rights-of-way always had space along horizontal track, so rails itself were narrower than right-of-way. Roads were poorly developed, so it was a lot easier for people to walk along space (technically railroads' rights-of-way) running directly parallel to rails than along poorly developed roads.
    1. So it was common for people to walk along these paths. This raised major questions about railroads' duty of care, since technically the people were trespassers.
        a. (Some argued that because the pedestrians were trespassers, railroads only owed duty to refrain from willful/wanton conduct; others argued that railroads owed ordinary standard of care.)
        b. Federal standard was latter (ordinary negligence standard); many states' standard was former (trespasser so only duty was to refrain from willful/wanton conduct).
iv. Issue: uniform standard of care requirement for inter-state railroads
    1. power of fed. govt. to create fed. common law – if power is exercised in inappropriate settings, power is unconstit'l
    2. Brandeis in Erie, Marshall in Shaffer
        a. Facial v. as-applied
        b. Erie: facial case
    3. construction of Rules of Decision Act is unconst'l – don't want judges to make law where they are not authorized to do so, leave task to Congress
        a. even though law is made in federal sphere
        b. *Erie*- also a separation of powers case
v. paradox: Brandeis – at the federal level, legislature can make rules that the courts cannot (uniform standard of duty of care for inter-state railways)

1. requires Brandeis to hold that, at the state level, *Swift* (which held that state legislatures can make rules that the state judges cannot), must be wrong, since fed. treats decisions of both state legislatures and state judges equally
2. Why should state and federal judges be conceived of so differently?
    a. Theory: where does the law come from? Is anything immutable in law? No (rejected *Swift*, and "river of law" theory)
    b. immutability concept gave way in context of science, reliance on man-made institutions, global conflict – post-war desire to retreat to immutable principles (Nuremburg trials; theory that law must be based on something more than sheer power)

vi. Fed/State substantive common law (unwritten) →
1. in collision of unwritten rules, State wins

CXV. Guaranty Trust v. York

a. Facts:
i. issue series of corporate bonds – Van Sweringen
1. lent Van Sweringen Corp. money for bonds, which generate interest
ii. Guarantee Trust collects the interest, distributes to bondholders – bank as enforcement agent
1. Depression in '27
iii. 1930 – Guarantee loans Van Sweringen money to keep it afloat
1. bank as bondholder's enforcement agent AND independent creditor of Van Sweringen
2. Not publicized
iv. 1931 – Van Sweringen unable to continue bond payments
1. Guarantee writes to bondholders, informs that VS cannot fulfill obligations
2. Instead of bankruptcy, negotiated deal with bondholders for .50/$1.00, plus 22 shares of (then-worthless) Van Sweringen stock
    a. But, didn't tell bondholders that bank was independent creditor and that it was the bank's interest to keep Van Sweringen out of bankruptcy (conflict of interest)
v. 1934 – Van Sweringen fails (survived long enough for Guarantee Trust to extract enough money to pay debt)
1. D – dissenting bondholder (did not agree to buy-out deal), holding $6000, gave his bonds to York
vi. York sues bank after learning of conflict of interest
1. sues in fed. ct. under diversity jurisdiction
vii. But, in NY, 2 year statute of limitations for violation of bank's fiduciary duties
1. Fed. Ct. had special SOL for equity cases
    a. Law in equity – derives from British law
    b. Judge made law: common law courts (culminating in King's Bench); and equity courts (culminating in Court of chancery)
    c. Equity ct. – direct ct. of King
        i. more flexible (do the just thing); equity as rule-bending place
        ii. generated disputes similar to those of federalism (diff. ct's produced diff. results)

iii. Equity judges – apply reasonableness test for SOL's (laches); reasonable promptness

viii. D – 1930 loan was not made public, not disclosed in negotiation of bond buy-out, D's client did not agree to deal
1. argued that suit was filed as soon as public suspicion suggested that Guarantee Trust had violated its duties – as soon as possible
2. under fed. equity rules, must be reasonable under traditional rule of laches
a. otherwise, NY SOL began running as soon as D acquired the bonds (two and a half years previous)

b. Holding (Frankfurter):
i. Erie compels adoption of NY SOL's, given discrepancies in outcome test
1. adds SOL's to substantive rules, amongst state rules applied by fed. ct's under Erie rule
ii. Not equal in all respects – such as ability to issue injunctions (available to state ct's not to federal)

c. Rationale:
i. Written State rule (SOL's) v. unwritten fed. rule
1. written (state) rule trumps fed. common law

CXVI. Klaxon v. Stentor

a. Facts:
i. NY resident sues NY resident for accident in Ontario
ii. NY State court has to decide which law to apply – place of accident? or some other test?
1. Ontario – no damages for emotional loss, damages capped in tort cases
2. Which state has most important interest in case?

b. Holding:
i. Apply the law of the state where the tort occurred or the state in which the contract was signed (rigid rule)

c. Rationale:
i. Fed/state conflict over unwritten common law choice of law rules
1. As in *Erie*, local majorities decide law in own courts
2. Localities retain authority for defining own substantive law

d. Hypos:
i. NY resident hits Ontario resident; another Ontario resident hits NY resident
1. In fed. ct., Ontario law would apply
2. In NY State court, rejects place of accident test, creates "center of gravity" test which balances interests of all parties
a. damage cap would force NY State to support injured victims, undesirable outcome for court
ii. NY resident sues Ontario resident in NY State court, Ontario resident removes to fed. Ct.
1. Under Erie, fed. ct. must apply state's substantive law (statutes and common law)
2. Fed. ct. applies NY state law – fed. ct. wants uniformity, no significant difference in outcome
a. This includes choice of law

CXVII. Ragan v. Merchants Transfer and Warehouse Co.

a. two ways to serve summons – by mail v. by hand (NY – plaintiff service state)
    i. SOL's – tolls until summons is SERVED, rather than issued (under some state laws)
    ii. fed. ct's, on the other hand, are "filing" jurisdictions (summons stops SOL at filing)
b. In diversity cases, what if fed. ct. is in state with service jurisdiction
    i. Marshall took 6 months to serve summons, after it had been filed
c. Service v. filing
    i. The type of difference that should trigger Erie rule?
    ii. Is SOL closer to Frankfurter's "remedial" definition (remedies) or articulation of rights?
        1. For uniformity, must use State's SOL's
            a. *Ragan* and *York*

CXVIII. Byrd v. Blue Ridge

a. Facts:
    i. industrial reforms
        1. industrial accidents are no-fault
        2. turns on whether P is an "employee";
        3. dictated by South Carolina statute identifying "statutory employees" (creates statutory employee for worker's comp purposes, who cannot sue under respondent superior)
    ii. fed. ct. (diversity) acknowledges that S. Car. statute is used (substantive law, statute, must be used)
        1. Who decides whether the P falls within the S. Car. definition of a statutory employee?
            a. Law equity issue – who is the fact finder?
            b. Jury v. judge (in law ct's of England, jury as fact-finder)
                i. Law question, for judge; fact question, for jury; or mixed-question, for which?
b. Holding:
    i. Important value for fed. govt., not for states (since S. Car. legislature would have compelled ruling, rather than S. Car. courts);
    ii. federal interest outweighs state interest, apply state test
c. Rationale:
    i. **Frankfurter test (*Guaranty Trust*): outcome determinative**
        1. same outcome should result regardless of whether suit is brought in federal or state court
        2. emphasis on how rule affecting large number of cases (as opposed to summer courthouse closing early example) – wholesale effect
        3. avoid unfairness to residents of forum (where non-residents who can invoke diversity jur. can achieve better result, simply from ability to invoke fed. ct's)
    ii. **Byrd test: balancing test**
        1. relative importance to two norms to two sovereigns (state and fed.)
        2. In Byrd, jury as fact-finder so important that it was codified in US Const., 7th Amend.
            a. not outcome-determinative, but outcome-relevant

i. 7th Amendment has value overtones, favored as compared to narrow state interest (outcome 'relevant')

b. not willing to simply hold that 7th Amend. outweighed S. Car. legislation re: jury trials
   i. fear that if jury trials were used for other cases in S. Car. (such as civil rights cases), jury would not be sympathetic
   ii. for example, seek injunctions, rather than damages (no jury trial)

c. incoherent argument? what metric for deciding which interests are more important?
   i. again, based on wholesale effects (in some cases, fed or state interest is clearly more important)

iii. *Ragan* and *Guaranty Trust*– statute of limitations (filing v. receipt rule)
   1. state court rule for SOL's is required by *Erie*
   2. different approach than in horizontal disputes re: choice of law

CXIX. Hanna v. Plumer

a. Facts:
   i. automobile accident – executor of estate
   ii. service of process issue (state rule v. fed rule; personal service v. mail)

b. Holding (Warren):
   i. use state rule (procedural; does not significantly affect the outcome)
   ii. written rules trumps unwritten (democratic imprimatur rationale)
      1. Fed. trumps state
      2. Imagining if *Erie* involved a fed. statute

c. Rationale:
   i. Rational procedural explanation – then justified under 1934 Act (presumptively procedural test – 3rd test);
   ii. requires written federal norm (w/ supremacy clause power), including Fed. R. of Civ. P.
      1. indefensible position?
   iii. Rules Enabling Act – 2072 – can't modify substantive rights, but can adopt uniform rules of procedure
      1. Supremacy clause test
         a. federal rule? properly enacted? if so, use fed rule
   iv. 4th test – post-event; significant effect on forum shopping?
   v. Harlan concurrence
      1. 5th test – pre-event; behavior modification (deterrence, incentives, etc.)
   vi. *Hanna* → overrules *Ragan*?
      1. SOL's

CXX. Walker v. Armco Steel

a. Facts:
   i. tort case – sues Steel Co. for defect in nail
   ii. 2 year SOL – expired when Marshall effected service (Okla. SOL statute provided that filing afforded 60 days additional to SOL)

b. Holding (Marshall):
   i. cites Warren's holding in *Hanna*

1. collision between state rule and fed. rule = use fed. rule, unless it violates substantive rights (none found to date)

ii. in *Walker*, Rule 3
1. facially conflicts with state SOL law

iii. Marshall:
1. Rule 3 does not apply to state SOL's, only applies to fed. rules for SOL's
2. Applies to claims re: federal questions, not diversity
    a. Risks judicial interpretation, with no explanation
3. Test: does balance enhance or retard principle of *Erie*?

c. Rationale:
i. collision between text of Rule 3 and state SOL & service requirement?
1. written state rule (SOL's/tolling rules) v. fed. rule (as broadly construed, unwritten)
2. Dependent on construction of Rule 3 (so that fed. rule is not interpreted to cover tolling rules, not in conflict with state rules; no "collision")
    a. In determining, assess importance of fed interest
    b. Similar to *Byrd* test; balancing of interests test
    c. Refer to intentions of *Erie* (uniformity across fed. and state courts; forum shopping; inequitable administration of justice; interfering with sovereign's ex ante regulation of activity in state)

CXXI. Burlington Northern

a. Facts:
i. Alabama statute deters challenges to jury verdicts – automatic surcharge (10%)
ii. comparable federal statute entails liberal review of frivolity of challenge, with huge fines for frivolous challenges (Rule 38 motion)

b. Holding:

c. Rationale:
i. *Walker* defense of use of state statute – argue that there is no conflict between state and fed. rules
1. construe the federal rule to avoid the *Erie* problem (argue that the two are not in direct conflict)

ii. insurance company argument:
1. *Hanna*, procedural rule creating uniformity across states, two different rules create substantive differences in administration of appeals of jury verdicts

iii. Fed. written rule (sanctions on appeal) v. state written rule (10% penalty)
1. construe Fed. rule broadly, to create direct collision

CXXII. Stewart Org. v. RICOH Corp.

a. Facts:
i. forum selection clause, standard form contract
ii. manufacturer-distributor dispute
1. distributor sues in Alabama court, D removes
2. D moves for change of venue – 1406 transfer to NY; alternatively, 1404 transfer

iii. conflict between federal and state statutes (re: venue)
1. plaintiff argument: no direct collision under Warren test
2. if not, state law applies under any of the tests of *Erie*

iv. Alabama district court holds:
    1. Alabama forum selection clause governs (no collision)
v. circ ct. reverses –
    1. direct collision; under *Burlington Northern*, fed. law governs

b. Holding:
    i. SCOTUS: 1404(a) trumps Alabama rule, allows a piece to be considered by fed. judge (general discretionary judicial judgment re: transfer decision)
    ii. But, since 1406 is not used, Alabama law travels with the transfer of venue (even if heard in NY, Alabama law applies under 1404(a))

c. Rationale:
    i. Fed. written rule (venue/forum shopping) v. state unwritten common law
        1. Only 1404 trumps? Or also 1406?
            a. Differences in which law applies

CXXIII. Gasperini v. Center for the Humanities

a. Facts:
    i. damage action for the loss of photographs, jury verdict for photographer re: value of negatives (450K)
    ii. 7th Amend. – under fed. rules, judge can set aside a jury verdict if it "shocks the conscience"
        1. judges are not allowed to reexamine jury decisions – prevents appeals court from setting aside a jury verdict on questions of fact (can still set aside based on questions of law)
        2. NY State rule: identical until mid-1980's; edited as part of tort reform movement
            a. revision in NY Civil Practice Rules – judges can set aside jury verdicts if they appear to be "excessive"
            b. Excessive: not comparable with other jury verdicts in comparable situations
            c. Different ability to evaluate excessiveness in trial court and appeals court
        3. Under *Erie* tests, which rule is used?

b. Holding:

c. Rationale:
    i. Conflict between Fed. rule (7th Amend.; power of Appeals ct. to examine jury verdicts) and State rule ("excessive" standard for review of jury verdicts)
    ii. 2 manifestations of 7th Amend.
        1. Can't overturn a jury verdict, unless using methods available to judges at common law (British); if the verdict "shocks the conscience" (civil jury)
        2. Cannot review a jury verdict in any other forum (trial judge; appellate court not empowered to decide whether jury verdict "shocks the conscience")
    iii. Erie case – forum shop? inequitable for residents?
    iv. Pre-event case? interfering with state's power to regulate norm in sovereign (Harlan test)
        1. As a "deep *Erie*" case, state law would win
    v. 3rd possibility (Ginsburg)

1. cooperative relationship between 2 systems (adopt as much of state law as possible without colliding with fed. law);
    a. first case avoiding either/or on collision question
2. Difficult to administer/preserves a degree of uncertainty
3. Rationale: can't use the state rule intact (2nd Circuit is not allowed to reexamine jury verdicts under 7th Amend., so there is a direct collision, preventing state apparatus from going into effect)
    a. But, no collision as applied to trial judges; so, trial judges CAN apply state standard (reexamination clause of 7th Amend. does not apply to trial judges)
    b. Excessiveness test does not violate 7th Amend. (since excessiveness test was also "at common law")
4. Abuse of discretion reexamination; avoids collision with fed. norm (common law test allows for abuse of discretion reexamination)
    a. Practical difficulty – trial judges must reexamine, but may not have knowledge of all similar verdicts (as opposed to appellate, which sees all verdicts)

CXXIV. Shady Grove v. Allstate

a. Facts:
    i. failure to pay claims in due course
        1. Judgments carry interest, debts do not; difficult to institute a second lawsuit to recover unpaid interest
        2. Litigating both cases in aggregate
    ii. NY rule: statutory penalty imposed, but can't be enforced in aggregate
        1. As opposed to Fed. Rule 23, which allows cases to be enforced together
        2. Rule 23(b)(3) class – many people with small claims can form class, since each have small loss, not worth litigating
        3. Vehicle to aggregate small claims to make litigation economically viable
    iii. How to address discrepancy under *Erie*?
        1. Rule 23, enacted under Rules Enabling Act
            a. Norm with democratic imprimatur
        2. If rule collides with State rule, fed. trumps, as long as it is a legitimate expression of democratic will
b. Holding:
c. Rationale:
    i. Conflict between Fed. (Rule 23)/State (no aggregate litigation of penalties)
    ii. Three kinds of remedies (equitable relief); no jury:
        1. Injunctions (negative and positive)
            a. Positive (restructure prison to avoid cruel and unusual punishment; force desegregation; monitor stop & frisk; restructure company in monopoly
                i. Writ of mandamus
                    1. Issued to judges/executive officials
            b. Legal relief
        2. Compensatory relief
        3. Punitive/penalty relief (punishment)

iii. Harlan:
    1. importance of state interest
        a. if NY interest was important, NY would allow class actions for aggregate enforcement (to enforce its penalty statute)
        b. NY- intermediate position on penalty
iv. Marshall (Hanna):
    1. read statute to avoid collision
v. Ginsburg:
    1. construe both fed/state norms to avoid collision
        a. distinction between eligibility and certification
        b. focuses on the nature of the underlying violation
            i. can't have class actions about this particular violation
        c. Eligibility v. certification
            i. Rule 23 demands that claim be eligible
        d. preserves state statute, even in face of written federal statute, if state interest is sufficiently important (to do so, construe statute to avoid collision- by making somewhat artificial distinction between eligibility and certification); argues challenges of distinction is worth the gain
vi. White's hypo (3 lug):
    1. Interfering with legal command of forum with right to give command (sovereign's right to regulate state law)
    2. Analogous to Harlan's test
vii. 3rd possibility between Ginsburg and Scalia?
    1. divide case between compensatory remedies and statutory claims
        a. class action confined to compensatory cases

CXXV. Resolving Conflicts of Law

a. *Erie*: vertical choice of law
b. Horizontal choice of law: between states or countries

CXXVI. Klaxon v. Stentor

a. in diversity case, use law of state in which forum sits

CXXVII. Van Dusen v. Barrack

a. Van Dusen – in 1404 transfer, carry the law of the transferor state
    i. In 1406 transfer, nothing carries over; apply law of state of new venue

CXXVIII. Allstate v. Hague

a. Facts:
    i. motorcycle accident
        1. insurance law – stacking states v. non-stacking states
            a. if injured by uninsured motorist, coverage comes in two varieties
                i. stacking states – total recovery is total of all wheeled vehicles (coverage on each vehicle is "stacked", aggregated)
                ii. non-stacking states – total recovery based on coverage on one vehicle
    ii. Minnesota (stacking state) v. Wisconsin (non-stacking state) law
        1. resident of Wisconsin, commuting to Minnesota for work
            a. Accident in Wisconsin, using same vehicle used in commute

2. decedent's administratrix moves to Minnesota, sues in Wisconsin
    a. difference in size of verdicts
3. Minnesota applies own law
    a. based on widow's current residence and decedent's commute
        i. argues significant state interest
        ii. judge's sympathy for widow
    b. clear in personam jurisdiction over Allstate

b. Holding:
    i. As long as state can articulate a substantial interest in applying own law, it can do so
        1. Does not have to do so, does not always do so
        2. Bauman discussion

c. Rationale:

CXXIX. Phillips Petroleum v. Shutts

a. Facts:
    i. multiple states, natural gas extraction (under private property; w/ royalty payments)
    ii. class of landowners sue for royalty payments
        1. Notice – w/ opt-out provision
        2. Deft. has interest in capturing all potential plaintiffs in class (res judicata)
            a. Deft: opting in – consent to submit to Kansas in personam juris.; volitionality

b. Holding:
    i. court holds that opting-in is sufficient (presumed consent) for classes; functional imperative; burden to the plaintiff in submitting to jurisdiction is miniscule
        1. imposed consent

c. Rationale:
    i. choice of law:
        1. use of Kansas law, without P's contacts with state (aggregation of contacts w/ class), based on fictitious consent, violates due process (have in personam, but can't use state's law under FF&C)
        2. only case where due process requirement for jurisdiction is lesser than requirement for choice of law
    ii. Kansas court must apply each state's law for each plaintiff (sub-classes); same jury decides settlement for each sub-class (possible, since settlements determined by mathematical formula;
        1. otherwise, procedural impossibility of having same jury make numerous judgments on same set of facts, applying different laws)
        2. possible solution: create subclasses based on legal theories used by groups of states, rather than individual states' laws
            a. Swiss bank case – subclasses for plaintiffs differently situated

CXXX. Customary International Law

CXXXI. Sosa v. Alvarez-Machain

a. Facts:
    i. only case in which SCOTUS has recognized jurisdiction over customary international law claim
    ii. P kidnapped in Mexico, tried in US (acquitted, sued for damages)

iii.

b. Holding:
    i. SCOTUS: Souter – ATS intended to extend jurisdiction in small variety of cases, not including P's
        1. refuses to allow ATS to cover kidnapping
        2. not meant to apply to acts out of US (*Kiobel*)
c. Rationale:
    i. Alien Tort statute
        1. alien suing govt. agents for acts in Mexico
    ii. customary int'l law – low democratic imprimatur; can CIL be imported into US law? countries can codify CIL by treaty; US did not import CIL re: relevant provisions via treaty
        1. but, used alien tort statute to import small aspect of CIL, analogous to piracy
        2. statue created so that norms "like piracy" can be enforced in fed. ct.
        3. is alien tort statute jurisdictional, or does it create a cause of action? or both?
    iii. if treaty is not explicitly self-enforcing, Congress must create separate statute to enforce treaty

CXXXII. Claim Preclusion

a. Preclusion:
    i. absolute rule
b. Issue preclusion (collateral estoppel)
    i. efficiency/fairness dictate that all aspects of a claim must be brought at the same time
    ii. A plaintiff must raise all causes of action arising from a single wrong in one lawsuit.
c. Claim preclusion (res judicata)
    i. if anything is left out, cannot bring later

CXXXIII. Rush v. City of Maple Heights

a. Facts:
    i. scooter accident, alleges City was negligent in maintaining roads (pothole)
        1. small claims court
        2. city alleges contributory negligence
            a. city's incentive to contest small claim – under res judicata, judgment could also apply in subsequent personal injury case
    ii. Issue preclusion: facts are set as they were decided in small claims court
b. Holding:
    i. Ohio Supreme Court –
        1. claim preclusion; separate claims for property damage and personal injury
    ii. signaled that jurisdiction had theory-based claim preclusion rule (in dicta of past cases, such as *Vasu*)
        1. theory-based claim preclusion (no preclusion if claims involve different theories; conceived of as two different claims)
            a. versus all claims arising under "common nucleus of operative fact" (*Gibbs*);
                i. arising from same event (fact-based, versus theory-based)
    iii. unfair to change stare decisis, relied upon by the P?
        1. "prospective overruling"

2. would allow P to succeed in her claim, while signaling that case would be overruled after
    a. based on unfairness that P relied on precedent to be overruled

c. Rationale:
    i. The court held that a single tort such as this one can only be the basis of one action.
    ii. The prime concern under code pleading is to prevent multiplicity of suits, burdensome expenses, delays to plaintiffs, and vexatious litigation.
        1. P's second action should not have been permitted to proceed.
    iii. Claim preclusion is also known as "res judicata" and issue preclusion is also known as "collateral estoppel".
    iv. Prior adjudications affect future cases by merger, res judicata, and estoppel by judgment.
        1. claim preclusion – binds P and D to prior judgment, on same set of facts
    v. Claim preclusion is tied to the event and not the legal theories of injury or recovery.
    vi. The general rule is that if a person suffers both personal injuries and property damage from the same accident both must be tried in one suit.
        1. However, some states still allow a party to litigate personal and property damages separately, and such cases may be tried separately in some cases where insurance companies are involved.
    vii. English common law writ pleading system –
        1. writs issued for theory of case (trespass, intentional tort, etc.);
        2. allowed to buy new writ if theory was wrong → precursor to theory-based preclusion
            a. modern analogue: cause of action
                i. cause of action – can bring as many as you want (analogous to being allowed to buy multiple writs);
                    1. so, transition to issue-based preclusion (*Rush*)
    viii. *Vasu* – relied upon by majority
        1. but, distinguishable?
            a. insurance company's property damage claim precluded individual's personal injury claim
                i. unfair, unless both are treated as a single party (privity)
                    1. but, includes responsibility for insurance company to be a faithful agent and include all claims
        2. P points to *Vasu's* holding that personal injury and property damage are different claims;
            a. court holds that past distinction was dicta, not holding
                i. identifying dicta: maintain that the holding was based on the narrowest nec'y facts
    ix. alternative argument (not made):
        1. small claims court awarded opportunity to seek redress for property damage claim, but capped damages (unable to raise personal injury claim in small claims court) –
            a. so, unfair to preclude the rest of the claim
        2. counterargument – did not have to raise claim in small claims court, could have availed forum capable of adjudicating both claims

x. claim preclusion operates on both claims under state and federal law, if arising from same nucleus of operative facts
    1. must establish different facts (in fact-based claim preclusion, such as in Ohio)
    2. facts used to prove liability? or entire relationship?
        a. but, is this a theory-based claim argument?
    3. can also use pendant jurisdiction to bring both claims in fed. ct.

xi. social consequences/fairness argument
    1. impose claim preclusion on defendants? compulsory counterclaims?
    2. preclusion demands that every possible claim be brought in every suit
        a. defeats efficiency argument

xii. In assessing claim/issue preclusion:
    1. Case 1/Case 2
    2. commonality of parties (must be a party to case 1 to be precluded in case 2)
    3. preclusion?

CXXXIV. Federated Dept. Stores v. Moitie

a. Facts:
    i. Case 1: P's 1-8 bring anti-trust case against D in fed. ct.
        1. dismissed
        2. (anti-trust claim "disappeared" into judgment)
    ii. Case 2: P's 1-6 appeal in fed. ct., on error of District judge
        1. (argue anti-trust laws can be invoked by consumers, not just competitors)
    iii. Case 3: P's 7 and 8: do not appeal judgment in Case 1; file suit in CA ct's, invoking state anti-trust law
        1. D removes case to fed. ct. (diversity jurisdiction, fed. question)
        2. while removal proceedings are pending, Case 2 is decided, reversed in favor of P's 1-6
    iv. P's 7-8 claim is precluded (claim was split into state and fed. claims) (bar preclusion)
        1. on appeal, P's 7-8 argue for "equitable exception" – similarly situated P's should be treated equally
b. Holding:
    i. P 7 & 8's appeal rejected by SCOTUS –
        1. claim is precluded, if based on same liability facts
c. Rationale:
    i. to raise all claims in first case: in personam jurisdiction?
        1. if fed. ct., SM jurisdiction?
        2. if judge rejects claims on jurisdictional grounds, claim is preserved

CXXXV. Jones v. Morris Plan Bank

a. Facts:
    i. contract for car purchase: monthly payments (with acceleration clause) while seller retains title
        1. P misses third payment, balance becomes due
    ii. Case 1: Bank sues consumer for third installment
        1. Judgment for bank; installment is paid
        2. Makes next payment, misses subsequent two payments
    iii. Case 2: Bank sues consumer for next two installments

1. Claim is precluded by judgment in Case 1 (merger preclusion); Case 2 is discontinued
2. Bank repossesses car

iv. Case 3: consumer sues bank for conversion
1. argues that Bank did not retain title to car after judgment in Case 1
2. Bank argues that claim for repossession is separate from claim for notes (installments) precluded in Case 2

b. Holding:
i. jurisdiction, like most, has fact-based preclusion rules, not theory-based
1. so, both claims are precluded, since arose from same set of facts
2. to avoid claim preclusion, bank can make acceleration clause optional

c. Rationale:

CXXXVI. Defendants and Claim/Issue Preclusion

CXXXVII. **Mitchell v. Federal Int. Credit Bank**

a. Facts:
i. bank lends farmer $9,000
ii. farmer sells potatoes to Grower's Assoc., worth $18,000
1. head of grower's assoc. embezzles money from Assoc.
iii. Case 1: bank sues farmer for $9,000 IOU
1. farmer – bank told farmer to sell to GA agent, who embezzled money
a. so, bank is responsible for action of GA agent (farmer's defense against bank)
2. legal issue: whether relationship between bank and GA is sufficiently close for actions of latter to be applied to former
a. court holds for the farmer (negates $9,000 IOU but farmer still out remaining $9,000)
iv. Case 2: farmer sues bank for remaining $9,000
1. bank argues not liable for GA, argues GA is not their agent

b. Holding:
i. bank is precluded from raising issue of GA's agency; issue precluded, judgment from previous case ruled that GA is bank's agent
1. bank argues farmer was required to file counter-claim in first case
a. claim preclusion (merged in first case) –
i. D split claim that was based on common liability of facts

c. Rationale:
i. evolution of compulsory counter-claims
ii. *Kirven* (cited in *Mitchell*)
1. Fertilizer sale
2. Case 1– P sued D for payment for fertilizer;
a. defense that fertilizer was toxic, destroyed crops (raised, then dropped)
iii. obliged to raise defense as a counter-claim in Case 1, or can claim be brought as a defense in Case 2?
1. different liability facts (one for contract, another for tort)
2. 1st case about payment of $2,000; 2nd case for quality of fertilizer
iv. O'Connor v. Varney
1. Case 1: contractor sues homeowner for payment –

a. homeowner's defense, work was not performed to quality expected
2. Case 2: homeowner sues contractor –
a. work specifications were inaccurate
3. defense not raised in case 1
a. **defendant** claim preclusion cases construe claims more narrowly than **plaintiff** claim preclusion cases
i. (since D's in a different position re: volitionality, etc.) –
ii. but, same rule for both currently

CXXXVIII. Linderman Machine v. Hillenbrand

a. Facts:
i. Case 1: P v. D
1. assuming, no statute re: compulsory counter-claim
a. unlike fed. court; *Erie* issue in the making?
b. does fed. court apply its own compulsory counter-claim rule if state does not have one?
b. Holding:
i. In Case 1, D must raise defense against P (counter-claim)
ii. *Linderman* – narrow rule for when counter-claim must be raised
c. Rationale:
i. Test: would Case 2 automatically result from result in case 1? if so, allow case 1 to preclude case 2 (since issues can all be decided in 1 case)
1. Test entails that case 1 be broken into its analytical components, decide what is needed to win the case
ii. Example 2:
1. Case 1: P v. D1 and D2
2. Case 2: D1 v. D2
a. Issue and claim preclusion implications?
b. Policy concern: D1 and D2 should primarily concentrate on case with P (common defense, etc.)
i. threat of issue preclusion (where any claims D's may have against each other must be raised in case 1 or will be precluded) creates suspicion between D's, compromises cooperation between D's
c. so, many jurisdiction recognize an exception to preclusion between parties on the same side of a case
iii. Example 3: *Rios*
1. Case 1: P v. D and TPD (third-party deft., joined by D)
2. Case 2a: D v. TPD
3. Case 2b: TPD v. D
a. Is TPD just an indemnitor? Such as an insurance company, no fault in case. Or, TPD as a contributor
b. Many Courts recognize that there is an inherent adversity between D and TPD, so same concern as with co-parties does not apply;
i. most jurisdictions do not recognize this exception to issue preclusion
c. *Rios* test: was TPD necessary to decide the case?

i. TPD often does not invest enough to become precluded by the case (not at risk)
ii. if de facto co-defendants, then maybe an exception should be recognized

iv. Example 4: *Bernhard*
1. Case 1: P v. D → verdict for P
2. Case 2: D v. new party
    a. new party can't be bound by anything in first case (no preclusion if party has not had "day in court")
    b. party did not risk anything in first case, cannot benefit from anything in first case
        i. doctrine of mutuality – begins to crumble in the 40's (*Bernhard*)
    c. new party can raise defensive non-mutual collateral estoppel
        i. invoke defense that D has already raised issue in case 1, precluded from litigated the issue again in case 2 (mutuality doctrine "dented")

v. Example 5: *Blonder Tongue*
1. mutuality doctrine overturned
2. P as a repeat player (huge company owning patents): patent trolls (speculating on large numbers of patents to extract settlements/damages); serial litigation
3. Case 1: P v. D1
    a. P v. D2
    b. P v. D3….D10
4. Case 1 → verdict for P
    a. In case 2, P finds another violator of patent, sues D2
    b. cannot preclude the claim, since D2 was not a party in case 1
    c. no matter how many times P wins, issue is not precluded in subsequent cases
5. If Case 1 → verdict for D1
    a. In case 2, under doctrine of mutuality, D2 could not invoke issue preclusion (allows P to keep suing, even with a weak patent case; could put multiple D's out of business, extract settlements, etc.)

vi. *Blonder Tongue* – invokes *Bernhard*'s erosion of mutuality;
1. where P has had its day in court and lost, D in Case 2 can use preclusion as a shield (defensive non-mutual collateral estoppel)
    a. Problem with this rule: P wins cases 1-9, loses case 10 (or wins cases 1-60, loses case 61); P does not nec'y have a weak case, but is now precluded from raising the claim
2. No district judge would apply the rule in this situation (where loss appears to be aberrational)
    a. But, what if aberration is in case 1? Then case 2 is precluded, no way of establishing whether case 1 was an aberration
        i. Possible solution: do not allow D to invoke defensive non-mutual collateral estoppel until a pattern has been established

vii. Example 6:

1. class actions as a way to avoid the problems of mutuality; class actions eliminate case 2
2. also, Rule 11 fee shifting structure as deterrent (but inadequate)
3. Case 1: *Parklane Hosiery v. Shore*

CXXXIX. Issue Preclusion

a. preliminary judgments (injunctions, etc.) do not have preclusive effects (preliminary rulings are not "swallowed" into final judgment
b. claim preclusion:
    i. deprives parties of the right to have claim heard ("day in court", in favor of judicial efficiency
c. issue preclusion:
    i. parties already had day in court, but did not litigate precluded issue
    ii. only one chance to adjudicate an issue
    iii. requires that issue is:
        1. **actually adjudicated**
            a. difficult to determine in many cases
            b. led to "special verdicts"
            c. judicial control over jury verdicts
            d. presents problem: complicated, long verdicts
                i. 1%/RICO example
        2. **necessarily adjudicated**
            a. to be precluded, decision of issue must have been necessary to the verdict
            b. analogous to dictum/holding

CXL. Cromwell v. County of Sac

a. Facts:
    i. 1870-1885 = courthouses memorializing soldiers
        1. County of Sac, voters approve $10,000 bond issuance to construct courthouse
        2. elected probate judge, carries out county's executive orders
            a. judge gives $10k IOU to contractor
            b. contractor bribes probate with 10 bonds ($1,000), absconds with the rest
                i. would be unable to enforce bonds against County of Sac, since contract was fraudulent
                ii. so, contractor seeks unwitting buyers for bonds (negotiable instrument, allows unwitting buyer to sue County of Sac for fulfillment of bond, since buyer was bona fide purchaser for value, not party to fraud)
                iii. bonds come due in staggered increments
                iv. each bond has "coupons" attached, representing interest (coupons as separate negotiable instruments)
    ii. Case 1:
        1. Cromwell v. County of Sac → suing on coupons from several bonds
        2. court held that, since Cromwell's agent refused to disclose how he obtained bonds, implying that he had obtained them fraudulently, he could not recover
            a. court rules against Cromwell on coupons
    iii. Case 2:

1. Cromwell v. County of Sac → Cromwell brings 4 new bonds, sues for payment

b. Holding:
   i. SCOTUS: Cromwell not estopped from suing on new bonds, since he was not given a chance to prove that the new bonds were obtained legally
      1. nothing about giving of value for new bonds was actually adjudicated
      2. no claim preclusion, since each bond represented a separate contract, each emerging from different transactions (as in *Vasu*)
   ii. alternative argument would invoke *Rush*, since contracts are all held by same person
      1. (in *Rush*, prop. damage and personal injury determined to be same claim, since same parties involved in each, w same set of operative facts)

c. Rationale:
   i. common liability facts
      1. claim as elastic
   ii. holding: must have actual adjudication to assert issue preclusion
   iii. analysis: Case 1, Case 2, etc.
      1. identify common parties
      2. identify parties' status
      3. claim preclusion v. issue preclusion?
         a. currently courts hold that claim preclusion is based on fact-based claim
   iv. settlements cannot preclude subsequent claims (not actually adjudicated)
      1. unless a judge endorses the settlement and changes it to a consent decree – courts divides
   v. default judgment?
      1. claim preclusive, since final judgment swallows claim
         a. but not issue precluded, since not actually adjudicated
   vi. Hypos:
      1. Case 1: guilty plea for arson, criminal conviction
      2. Case 2: P sues insurance company for arson damage
         a. jury gives full effect to prior guilty plea as admission
         b. if switched (civil case prior to crim case):
            i. not actually adjudicated, since different standards of proof
            ii. also, no jury trial (can 7th Amend. guarantee of jury trial overcome issue preclusion?)
      3. Case 1: SEC v. SAC
         a. private settlement, no admission of guilt w/ criminal conviction
         b. actual adjudication - judgment precludes class action against SAC for damages
         c. must ensure that plea includes issues that could be litigated in the future
         d. also allows SEC to process many regulatory cases without cost of full trials (uses incentive to settle, guilty plea with no admission of guilt)
            i. nolo contender – not contesting, no admission of guilt
            ii. current shift to forcing D to include admission of fault in private settlements

CXLI. **Russell v. Place**

a. Facts:
   i. Case 1: P sues D for patent infringement;

1. (lack of) novelty defense defeated

ii. Case 2: D pays judgment from Case 1 but continues using method (continues infringing on patent)
1. P sues D for a second time, for all damages occurring between Case 1 and Case 2; asks for injunction, for D to stop using process
a. D raises lack of novelty defense again;
b. P argues that novelty defense was already adjudicated, asks for summary judgment that issue was precluded (same parties)

b. Holding:
i. Court holds for D:
1. judgment from Case 1 did not specify which of various alternative defenses in Case 1 was dispositive –
a. can't determine which defense was "actually adjudicated"
b. can't decide which issue was decided in first case, so no issue preclusions in second case (neither of the defenses in Case 1 were precluded in Case 2)
2. Special verdict could have specified which defenses were necessarily decided

c. Rationale:
i. If the judgment rested on multiple grounds, then none of the multiple grounds are precluded (since judgment is a "black box")
1. Criticism: prior defense logically led to judgment in first case, so must lead to same outcome in second case
a. (but may not, since issue is NOT precluded)
2. Special verdicts used to overcome this problem
a. Special verdict: A? B? In patent law, either A OR B leads to judgment, but jury may find for BOTH A AND B
b. If finding BOTH A and B, then neither A nor B is precluded, since it cannot be known which issue was **NECESSARILY** decided (necessary to verdict)
c. Similar to rationale that stare decisis is not applied to dicta

CXLII. Rios v. Davis

a. Facts:
i. car accident: Popular Dry Goods, Rios, Davis
ii. Case 1: Popular sues Davis
1. Popular alleged negligence by Davis; Davis defense: contributory negligence by Popular
2. Davis joined Rios as 3rd party D
a. Court holds: P and both D's are negligent
iii. Case 2: Rios sues Davis
1. Rios alleges negligence by Davis;
2. Davis defense: Rios' suit precluded by Case 1, where Court held that Rios was contributorily negligent
a. In modern tort system, courts would likely use comparative negligence (would complicate case)
3. Rios: argues that Davis' defense of Rios' contrib. negligence is precluded by first case

b. Holding:
    i. Case 1's holding re: Rios' negligence was unnecessary, since same judgment would have resulted had they not decided the issue (since Popular and Davis had already been found contrib. negligent)
        1. So, issue cannot be precluded, since it was not necessarily decided
        2. (otherwise would be unfair to Rios, since he would be **unable to appeal** Case 1)
            a. Winning party cannot appeal
    ii. preclusion: issue must have necessarily been adjudicated
c. Rationale:
    i. Who is entitled to invoke issue preclusion?
        1. mutuality of estoppel – both parties should be entitled to preclusion
        2. if one party was not under any risk in first case, unfair to allow for party to use preclusion in second case
    ii. party asserting preclusion – must have been "at risk" in first case
        1. when parties are the same in both cases, can use preclusion
        2. to claim issue preclusion, party must have risked being bound by judgment in prior case

CXLIII. Bernhard v. Bank of America

a. Facts:
    i. Cook's care for Ms. Stadler
    ii. Stadler transfers $4,000 from her old bank to new bank in Cook's town
        1. account to be used for her care; account immediately emptied, credited to Cook's account
        2. Cook's argue transfer was innocuous (money was still used for her care)
            a. Stadler deceased, Cook's named as administrators
    iii. Case 1: Cook (executor) filing an account (like *Mullane*) to seek judicial determination (with probate court) that he was legally released from his fiduciary duties to Stadler
        1. daughter (Bernhard) files an objection, arguing that account of money was insufficient
        2. Cook's argue that $4,000 was a gift from Stadler, so not part of her estate
            a. Court rules for Cooks – money was a gift, no duty to account for money in probate proceedings
    iv. Case 2: Bernhard v. Bank of America
        1. P sued bank instead of Cook's, since her suit was issue precluded
        2. P sued Bank for failure to investigate Cook's when they moved Stadler's money and drained her account (alleges that bank was complicit in fraud)
b. Holding:
    i. Court holds that court in Case 1 held that money was gift
        1. Assuming rule of mutuality of estoppel:
            a. Bernhard argues that Bank was not party to first case, so issue can't be precluded
            b. Had the court in case 1 held that Cook's perpetrated fraud, assisted by the Bank, the Bank would not be held to the judgment (their defense would not be precluded) in Case 2, since they were not a party to Case 1

2. Party AGAINST whom claim of res judicata is asserted must have been party to prior case;
    a. not so with party asserting res judicata (so, Bank can use res judicata to defeat Bernhard's claim)

ii. Non-mutual collateral estoppel

c. Rationale:

i.

CXLIV. Blonder Tongue v. U. Illinois

a. Facts:
    i. patent holder sues infringer 1
        1. infringer 1 wins (not a novel patent)
    ii. patent holder sues infringer 2
        1. under mutuality, no issue preclusion → infringer 2 was not party to Case 1
b. Holding:
    i. Court sees problem of serial cases, since no preclusion
        1. since large entity is able to compel "infringers" to pay royalties (cheaper than litigation)
    ii. No "unjust Case 3", as would result above (*Bank of America v. Cook*)
c. Holding:
d. Rationale:
    i.

CXLV. Parklane Hosiery v. Shore

a. Facts:
    i. Case 1: *Parklane Hosiery v. Shore*
        1. SEC alleging that Park Lane's prospectus was misleading (securities fraud);
            a. seeking injunction enjoining Park Lane from making further misleading statements (no other damages sought)
            b. injunction – tried before a judge
                i. 1789 – Courts of Westminister (interpretation of Constitution as intending to replicate common law; claims for monetary relief tried before jury, otherwise tried before judge)
                ii. if both monetary and injunctive relief is sought, de facto jury trial
                iii. so, SEC often only seeks injunctions, so as not to need a jury trial
        2. D agrees to stop issuing misleading statements, but requests a decision that they were not at fault – to preclude future lawsuits by shareholders
            a. (rationale: if D does not need to argue merits of misleading accusation, the issue is not actually adjudicated in Case 1, not precluded in future cases)
            b. otherwise, future shareholder cases would already be binding against Park Lane, only issue would be to decide damages
                i. Problem: Seventh Amendment provides for a jury trial, unfair to deny opportunity to shareholders in future suits
        3. offensive non-mutual collateral estoppel – can be invoked to prevent a P from bringing another suit against a D who has already lost

a. collateral estoppel as a sword (by the shareholder in case 2)
    i. encourages "fence-sitting" – P waits to see result of case 1 before suing

b. Holding:
    i. Court holds: offensive non-mutual collateral estoppel should not be used if P could have joined in case 1 (see Rule 19, etc.); and if preclusion would be unfair to the D
    ii. unfair to D – for instance, when Case 1 is not defended vigorously (because of small amount in contest, etc.)
        1. Fed. Rules of Civ. Pro. – drafted in response to preclusion rules (for example, Rule 19 for necessary parties)

c. Rationale:
    i. doctrine of mutuality overturned
        1. mutuality = parties from precluding case must be the same, or privy

CXLVI. Montana v. US

a. Facts:
    i. Case 1: private litigation re: state's rights → P's case paid for by US govt.; state's rights D wins
    ii. Case 2: US sues Montana
        1. claim preclusion against fed. govt? since govt. paid for P's case in case 1
        2. parties/issues essentially the same in case 1 and case 2

b. Holding:

c. Rationale:
    i. Hypo: Filipino citizenship example
    ii. Case 1: P's 1-250 sue D (USA)
        1. Case 1 is settled → actual adjudication against US Govt. re: whether sufficient opportunity was given to apply for citizenship; US declines to appeal
            a. New president – Reagan Justice Dept.
    iii. Case 2: P's 251-500 sue D (USA)
        1. P invokes offensive non-mutual collateral estoppel (D's had chance to litigate in first case, "day in court", and lost)
        2. US Govt. – argues that preclusion is unfair in this case, since parties who argued case 1, and did not appeal, were outgoing political party (Carter Administration)
            a. argues that decision not to appeal was a political decision
            b. if allowing collateral estoppel against govt.:
                i. every case would need to be appealed to the supreme court (or party loses case forever due to preclusion)
                ii. supreme court would not be permitted to use discretionary jurisdiction (unfair to preclude issue without ultimate appeal);
                    1. would demand obligatory jurisdiction
    iv. *Mendoza* – cannot invoke non-mutual collateral estoppel against the US govt.

CXLVII. Taylor v Sturgell

a. Facts:
    i. FOIA request
    ii. Case 1: P1 loses case re: FOIA request
        1. P1 v. US → US wins

iii. Case 2: P2 (P1's agent) brings identical FOIA request
    1. P2 v. US → P2 can't be precluded by Case 1 (since not a party)
    2. "traditional" preclusion rule: not common parties, so no preclusion
        a. but, stare decisis means that Case 2 will likely be similarly decided (but, not precluded)
        b. distinction – preclusion is forever, stare decisis is mutable

b. Holding:
    i. virtual representation – as if P2 was in court with P1
        1. court bases determination of virtual representation on several factors
        2. class actions: allow parties to opt-out of representative suit
            a. policed virtual representation relationship
        3. in virtual representation – no notice, etc.

c. Rationale:
    i. with *Wilks*, strongest SCOTUS opinions that party should have "one bite"; due process demands that party have an opportunity to have his case heard in court
        1. for preclusion analyses, determine who is in the case (not formally, but functionally)
            a. what if the same entity (ACLU for instance) funds many cases? are other cases funded by ACLU "in privity"? this concept is already used for the fed. govt., when funding cases
    ii. **cross-forum preclusion**
        1. Case 1: United States
        2. Case 2: Brazil
            a. What should judge in case 2 do re: decision in case 1?
            b. comity: but, no treaty re: Full Faith and Credit for judgments between countries
                i. country-specific analysis
        3. Parallel inside US, across sovereignties (state-state; state-fed)
            a. suspension clause of USC – cannot suspend habeas corpus (an exception to preclusion)
            b. protection of liberty – anyone wrongfully detained can file a writ of habeas corpus, requiring jailer to bring prisoner before a judge
            c. still, can be useless, due to stare decisis (but, not precluded); so, still preserves the opportunity to argue the case
        4. traditional British context: separation of powers habeas; check on unilateral determinations of the executive (who jailed the party)
            a. internal mechanism to check executive power
        5. federalism habeas corpus: judge has already passed on the issue (conviction in state court); mechanism to deal with suspicion that state judges may be reluctant to enforce federal norms (constitutional)
            a. common use: state judges' enforcement of 4th Amend. in suppression motions (habeas to examine their decisions)
            b. exception to preclusion
            c. Should federal judges have supervisory capacity over state judges?
    iii. Warren Court's revision of rules of criminal procedure

1. Congress has systematically limited habeas corpus (beginning with removing search and seizure habeas corpus)
2. what role for the suspension clause?

CXLVIII. Allen v. McCurry

a. Facts:
   i. Case 1: state criminal prosecution; deft. moves to suppress the evidence of against him (alleging evidence was illegally-seized, in violation of 4th Amend.)
      1. Deft. sues the people
      2. judge holds for the people; evidence was not illegally seized, since it was in plain view (no 4th Amend. argument)
      3. Deft. is convicted
   ii. Case 2: Deft. sues police for damages, alleging violation of 4th Amend. rights
      1. seeks damages, since he did not seek to overturn his conviction
         a. (otherwise, would have to use habeas corpus; but, habeas was excluded from 4th Amend. cases)
      2. preclusion argument:
         a. case 1 actually (and necessarily) adjudicated the legality of the seizure, so that issue is preclusive in case 2
         b. under the (now defunct) doctrine of mutuality:
            i. cops would have to be in privity with the District Attorney;
            ii. so, Case 2 would not be issue precluded unless an argument could be made that both parties were representatives of the govt.
         c. virtual representation
            i. police were "virtually represented" in Case 1; both parties had their day in court in Case 1
            ii. so, police can invoke defensive non-mutual collateral estoppel in case 2
            iii. use case 1 as a shield

b. Holding:
   i. Majority:
      1. fed. ct. should not have allowed deft. to re-litigate his case in fed. ct.
   ii. Dissent:
      1. if precluding federal civil rights claim, then allowing state criminal proceedings to operate as fed. constitutional rights hearings (fear that state courts may be hostile to fed. norms)
         a. when USC1983 was passed, doctrine of mutuality was in place, so Congress did not contemplate that fed. civil rights claim would be precluded by state crim. proceeding
         b. This situation does not arise between States (only state-fed.) due to FF&C (no need for preclusion)

CXLIX. Kremer v. Chemical

a. Facts:
   i. employment discrimination claim; which forum? fed. ct. v. state administrative proceeding
      1. NYHRD – no employment discrimination
      2. after losing, P takes case to fed. ct. →

b. Holding:
    i. issue precluded; administrative proceeding is treated as a state adjudication (similar to suppression hearing)
    ii. the more a state proceeding resembles a judicial decision (formality), the more likely its decision is to be preclusive

CL. Semtek Int'l v. Lockheed

a. Facts:
    i. contract dispute over terms of payment from general (Lockheed) to subcontractor (Semtek)
    ii. Case 1:
        1. Semtek (CA Co.) sues Lockheed (MA/DE Corp.) in CA State Ct.
        2. Lockheed removes to CA fed. Dist. Ct. (on diversity of citizenship)
            a. easily satisfies jurisdictional amount ($75k)
            b. D could not remove if it was a CA corp. (due to home-state rule)
        3. D's lawyers argue: CA SOL should be used, under *Erie* rule
            a. fed. SOL?
                i. *Guaranty Trust* – in fed. ct., use SOL of state in which fed. ct. sits;
                ii. *Erie* factors re: forum shopping, procedural uniformity, outcome determinative, etc.
        4. claim is brought outside of SOL's → fed. judge dismisses, issues order "on the merits"
            a. issue disappears into the judgment/ "final judgment on the merits" swallows the claim
            b. dismissal on the merits
                i. Federal Rule 41(b) – three exceptions for when decision is not an "adjudication on the merits"
    iii. Case 2:
        1. Semtek (CA) sues Lockheed (MA) in MA state court
        2. Lockheed tries to remove to fed. ct. but cannot, since their principal place of business is in MA
            a. Lockheed then argues fed. question jurisdiction
        3. Is federal dismissal on state SOL grounds claim preclusive? (fed. question)
            a. But, cannot raise fed. question as a defense (*Mottley*)
            b. fed. question must be pleaded in the claim (cannot be invoked by P as an anticipated defense either)
        4. Lockheed files injunction, does not succeed
            a. then, argues that MA case is precluded by CA fed. case
            b. argues that issue was actually adjudicated in Case 1 (on the merits)
                i. *Hanna* – written federal rule? within power of Congress to enact? If so, Supremacy Clause trumps state rule

b. Holding:
    i. SCOTUS rejects argument that MA case is precluded by CA fed. case:
        1. interprets federal rule to avoid the collision between Rule 41 and the MA SOL's
        2. parallel to Marshall's logic re: Rule 3 in *Walker*

a. Federal rule (41b) points one way (create ambiguity) →
i. since wording of rule is contrary to usual deference to state law under *Erie*
ii. Read literally, both rules "run over" state rules
3. P argues: read 41(b) narrowly as a rule internal to the federal court; as opposed to colliding with a contrary state policy
a. claim preclusive effect of a judgment in a diversity case should be measured by the effect it would have in the state in which the court sits

ii. Scalia:
1. overturns *Dupasseur* (always use state procedural rule);
a. case was decided under defunct Uniformity Act
2. invokes federal common law – preclusive effect of federal dismissal
a. interprets federal common law as adopting state rules (under *Erie*)
b. replicates *Dupasseur* outcome
3. since CA does not treat dismissal as "on the merits" (despite judge's language), and does not use Rule 41(b), case 1 is not preclusive
4. refutes P's argument that SCOTUS is obliged to apply rule of state in which fed. ct. sits (as it would be under *Dupasseur*) →
a. asserts that fed. ct.'s retain power to decide the preclusive effect of its judgments (judicial discretion),
i. depending on importance of federal interest in the case
b. choice, rather than requirement, to apply state law
i. this holding opens up all prior *Erie* cases for examination→
1. was application of state law an obligation, or a choice?
2. *Guaranty Trust*?

c. Rationale:
i. aside: parallel defense to preclusion – preemption
1. state law has been preempted by fed. law (in this case, case CAN be removed to fed. ct. as a defense; only circumstance)

CLI. Joinder of Claims (Rules 18, 13(a), (b), and (e))

a. Rule 18 – Joinder of claims
i. overthrows theory-based claim preclusion (common law writ pleading system)
1. but, still have to comply with in personam jurisdiction, SM jurisdiction, jurisdictional amount
ii. and, gives rise to fact-based claim preclusion (all possible claims must be raised at the same time, or they cannot be raised in the future) →
1. forces pleading of issues that may not be otherwise pleaded
iii. demands robust ancillary jurisdiction (removes doubt re: which court to proceed in)
1. P can join any claim (subject to the above restrictions)

b. Rules 13(a) and 13(b) – compulsory counterclaim rule; permissive counter-claim rule
i. applies to D
ii. requires D to defend with every possible claim arising from same facts of P's base claim
iii. wording in FRCP: "transaction or occurrence" → same as common nucleus of operative facts? logical relationship?
1. efficiency purposes, preclusion concerns

iv. how to determine what is a compulsory counter-claim?
    1. if it is not a compulsory counter-claim, it is a permissive counter-claim
    2. but, state rules re: compulsory counterclaims could affect this distinction (and then preclude any other counter-claims)
    3. don't have to worry about SM jurisdiction – falls under supplemental jurisdiction of 1367
        a. for example, can raise a state defense to a federal claim (where D would not have been able to bring the claim if he was the P)

CLII. MK v. Tenet

CLIII. US v. Heywood Robinson

a. Facts:
    i. D – construction company w/ 2 Connecticut contracts (1 for submarine yard [govt.], 1 for a factory [private])
    ii. Heywood Robinson (NY) hired D'Agostino (NY) as his excavator
        1. sub demands continuous payments, general fears that sub's work is subpar, and that sub no longer has insurance
        2. D'Ag sues HR on the Navy yard claim, asking for damages
            a. HR counterclaims that D'Ag did not perform the job on the Navy Yard or on the factory –
                i. files 13(a) compulsory counterclaim re: both jobs, demanding damages
            b. D'Ag files its own 13(a) compulsory counterclaim, adding factory damages
        3. initially only sued on Navy yard job, due to Miller Act (federal contracts – can be heard in fed. ct.)
            a. must argue that second counterclaim (re: factory job) arose out of the same nucleus of operative fact –
            b. so, not only permitted to file counterclaim, but required to do so
                i. "logical relationship" between Navy job and Stelma job
                ii. results in P filing claim that could not have been filed initially (no jurisdiction to hear factory case – Stelma, CT - in fed. ct.)
        4. jury decides – when was money cut off from sub.?
            a. to decide fault on lapse of insurance question (without payments, sub can't be responsible for not being able to pay for the insurance)
            b. so, lapse of insurance question is crucial to both jobs → common nucleus of operative fact/ "logical relationship"
        5. court may have taken a different approach if counterclaim re: Stelma job was not filed, and D'Ag attempted to raise the claim later
            a. door-opening v. door-closing effect of "logical relationship" test
b. Holding:
    i. Rule 13 (counterclaims) subject to Rule 19 (required joinder of parties) and Rule 20 (permissive joinder of parties)
        1. 13(a) Compulsory counterclaims = need no independent basis of jurisdiction (court acquires ancillary jurisdiction over them)
    ii. Friendly dissent: 13(b) permissive counterclaims also need not have an independent jurisdictional basis

1. USC 1367 (supplemental jurisdiction):
    a. No mention of compulsory counterclaims, just require that claims be "so related" that they form "part of the same case or controversy"

c. Rationale:

CLIV. LASA per Industria v. Alexander

a. Facts:
    i. courthouse construction, dispute re: marble
        1. City of Memphis → Century Casualty (insurance) → Southern (prime contractor) → Alexander Marble (sub) → LASA (marble quarry) → architects
    ii. 1.) LASA (Italy) sues Memphis (Tenn), Century Casualty (Tenn/DE), Southern (Tenn/DE), and Alexander (Tenn)
        1. Series of Rule 20 joinder claims for breach of contract → can choose D's, as long as there is in personam jurisdiction
        2. LASA joins multiple D's, in case one can't pay judgment
            a. Is there a Rule 19 concern? re: necessary/indispensible parties
    iii. 2.) Alexander files answer, defends that marble was late, substandard, with different contract price → files counterclaim under Rule 13(a)
        1. counterclaim arises under same transaction or occurrence as LASA's claim
    iv. 3.) Southern files answer, defends that marble was substandard → files counterclaim under Rule 13(a)
        1. if claims stopped here, lawsuit would just evaluate contract claims and issue a judgment
    v. 4.) Alexander files 13(g) cross-claim against Southern
        1. cross-claim must arise out of same transaction or occurrence as the base claim
            a. not compulsory, as with 13(a) →
                i. since court wants to allow D's to cooperate in their defense without worrying about preclusive effect
        2. claim that Southern has not been paying
    vi. 5.) Southern files 13(a) counterclaim against Alexander
        1. once a cross-claim is filed, defenses are then compulsory (subject to preclusive effect) →
            a. since any notion of cooperative defense is obsolete
        2. claim that Alexander's work is substandard
    vii. 6.) Alexander joins architect Aydellot under Rule 14 (joining nonparties), names as 3rd party D
        1. Rule 14 – may join a 3rd party if that party will be liable to you, if you are liable to someone else (often used to join insurance companies);
            a. binding an indemnitor
        2. Court's interest in litigating both parties (and binding them) in one case
    viii. QP: do the claims between Alexander and Southern, and between Alexander and architect, arise under the same transaction or occurrence as the base claim (LASA v. Memphis et al.)?
        1. If not, Rule 14 cannot be used; Rule 14 cannot be used to join any party, just an indemnitor
        2. delay/complexity – pressures to settle

b. Holding:

i. Appeals Court test for same transaction/occurrence:
    1. logical relationship test – everything that involved the marble used in the construction of the courthouse was related (what outer limit?)
        a. includes supervision, slander, quality, price, etc.
ii. Dissent: common liability of facts test
    1. facts nec'y to adjudicate whether marble was of sufficient quality different than facts nec'y do decide other questions of liability
        a. Rule 42(b) allows trial court judge to sever case into separate cases
            i. but, creates serial multiple suits; and preclusion problems, from artificial timing of suits
iii. currently no consensus on appropriate test (no SCOTUS ruling)
    1. so, what theoretical justifications for each?

c. Rationale:
    i. If counterclaims/cross-claims do not arise under same transaction/occurrence, then they cannot be raised in the same case
        1. *Gibbs* → USC 1367 (supplemental jurisdiction)
        2. no independent basis of jurisdiction needed for Rule 14 cross-claim, since base claim extends supplemental jurisdiction
    ii. Rule 19 – required joinder of parties; "indispensible" v. "necessary"

CLV. Joinder of Parties (Rules 20, 19, 14, 22; 28 USC 1335)

CLVI. **Bank of California v. Superior Court**

a. Facts:
    i. Boyd → makes specific bequests (to named beneficiaries), leaves the rest to St. Luke's Hospital
        1. Smedley alleges that she agreed to take care of Boyd in return for her entire estate
    ii. Smedley sues Bank (in possession of the state) and St. Luke's
        1. Does not try to sue, name, or serve the specific legatees (who are all over the country, and abroad)

b. Holding:
    i. parties are not necessary to decide validity of contract between Smedly and Boyd
        1. difficulty in joining parties, due to jurisdiction
        2. so, parties are not precluded by any judgment in Case 1
            a. still unfairness from stare decisis
            b. but, since jurisdiction renders parties "necessary" rather than "indispensible", the case can proceed without them
    ii. Bank argues that a judgment against it for Smedly renders it vulnerable to further suits by the specific legatees, since they are not precluded by prior judgment;
        1. argues that 3rd parties should be considered indispensible
        2. But, if parties are considered indispensible, Smedley would not have her case heard, since she would not be able to find the parties
    iii. So, judge limits adjudication to only the residual money from the estate that was bequested to St. Luke's (St. Luke's was present in case)
        1. money bequest to 3rd parties (named legatees), not at issue in case
        2. novel solution/precedent

a. Bank could have filed an interpleader to generate an in rem proceeding (USC 1335 v. Rule 22);
b. Bank did not file interpleader because it was attempting to compel dismissal of the case

c. Rationale:
    i. Rule 19 – usually a defendant's defense

CLVII. Provident Tradesment v. Patterson

a. Facts:
    i. car accident, multiple fatalities
    ii. Dutcher – lends car to his employee (Cionci)
        1. Cionci detours from route with 2 passengers (Lynch and Harris) collides with truck driven by Smith
        2. Dutcher – $100,000 insurance policy
    iii. two theories of liability against Dutcher –
        1. agency theory (vicarious liability; respondeat superior; principal/agent); and
        2. permission theory
    iv. if Dutcher is liable, insurance company is liable
    v. Case 1:
        1. Lynch v. Cionci in fed. ct. (diversity) → damages
            a. Cionci's estate is bankrupt but settles for $50k
        2. Smith v. Cionci in PA ct.
        3. Harris v. Cionci in PA ct.
            a. coordinate settlements in state court, write letter to insurance company requesting payment
                i. Lynch disputes payment to Smith and Harris
                ii. insurance company responds with defense that Dutcher was not liable under either theory of recovery
    vi. Case 2:
        1. Lynch, Smith, Harris v. Cionci, insurance co. → action for a declaratory judgment that the insurance company is liable (so damages would be shared between P's) in fed. ct.
        2. Dutcher not present in case, since he would break complete diversity
        3. Appealed the 3rd Circuit → insurance company invokes rule 19(b), claims that Dutcher's absence is unfair, so case must be dismissed
            a. theory: Dutcher could be bound by judgment in any future cases; but claim preclusion renders future claims "highly unlikely"
        4. Harlan's four-part test (*Hanna)* re: indispensible parties (prediction of future litigation)
            a. P's interest in having a forum
            b. inside parties' interests
            c. outside parties' interests
            d. public's interests
                i. test does not provide much guidance → "roadmap with no street address"

b. Holding:
c. Rationale:

i. Cites *Shields v. Barrow*:
    1. sale of a rice plantation → Barrow (LA) sells Shields (MISS) the plantation, paid with IOU's, with 6 endorsers (2 from MISS, 4 from LA)
        a. Shields can't pay IOU's, runs business into the ground
        b. Shields asks Barrow to take the plantation back and keep payments already made, Barrow agrees (contract to cancel sale, return property, keep payments, endorsers to pay extra $32k)
    2. Barrow finds that plantation is no longer a valuable asset ("hell on earth")
        a. alleges that Shield induced him by fraud to undue sale
        b. intends to enforce judgment against endorsers
    3. Barrow (LA) v. Shields (MISS) in LA fed. ct. → names MISS endorsers (does not name LA endorsers because he wants to be in fed. ct. and diversity would otherwise be broken)
        a. Court holds that LA endorsers are indispensible parties
        b. but, LA endorsers would not be precluded if they were not joined in Case 1
            i. endorsers are joint and severally liable
            ii. so, if MISS endorsers are held liable in Case 1, they will have to pay 100% unless they initiate a separate suit against LA endorsers
    4. genesis of the indispensible party rule;
        a. will party in the courthouse have to pay twice?
        b. or in this case, will party in courthouse be able to recoup his share of liability from party outside courthouse?
ii. 19(a) – necessary, case can go forward
iii. 19(b) – indispensible, must include or dismiss case
    1. judge evaluates the risk of a second case actually being filed to determine whether to classify as 19(a) or 19(b)

CLVIII. Republic of Phillipines v. Pimentel

a. Facts:
    i. President Marcos – alleged to have stolen $35 mil. from Republic, deposited in NY bank
    ii. numerous parties (including Pimentel class action) sues Marcos for human rights violation
        1. bank interpleads, since numerous parties were initiating suit and it did not want to pay money to the first party
        2. argument for Rule 19 – limited assets before court could be distributed before outside party had a chance to adjudicate its interests;
            a. also a principle of bankruptcy
        3. interplead the assets, decide equitably how to distribute (create in rem proceeding)
            a. problem: one of the potential creditors is the Republic of the Phillipines
            b. subject matter jurisdictional problem: foreign sovereign immunity
                i. only waived with cases involving commercial transactions
        4. so, Bank defends that Republic of Phillipines is an indispensible Rule 19(b) party –

a. should be dismissed;

b. Holding:
   i. lower Court holds that Republic's claim is so weak that case should proceed without it
   ii. reversed by SCOTUS:
      1. Phillipines was an indispensible (19b) party, case should be dismissed if they cannot be joined

CLIX. Martin v. Wilks

a. Facts:
   i. affirmative action case, discriminatory hiring/promotions by fire dept.
   ii. city's concerns about its back pay liability; city signs "consent decree" agreeing to promote/hire black firefighters
      1. after agreement, can white firefighters challenge their authority to settle?
      2.

b. Holding:
   i. Majority:
      1. white firefighters did not have opportunity to have their case heard re: affirmative action, so they should be allowed to appeal the decision re: constitutionality of the decree (no preclusion)
   ii. Dissent:
      1. Right of appeal should be limited

c. Rationale:
   i. firefighters union was not joined as a defendant by P or D, did not seek to participate in case (did not want to subject themselves to preclusion; avoiding being bound by judgment)
      1. if these parties filed amicus briefs, spoke to press, are they considered parties to case? should there be compulsory intervention? failure to intervene
      2. Congress subsequently passed a statute – if you have knowledge of a case, and do not intervene, you are preclusively barred, as if you were a party (compulsory intervention)
         a. Constitutional?
   ii. judge: could have determined that the union was an "indispensible party" (since case concerned members' rights); did not invoke Rule 19
   iii. parallel with stop and frisk case:
      1. PBA as a necessary or indispensible party? any right to intervene?
   iv. Rule 24:
      1. intervention as a right and permissive intervention
         a. spectrum – how intense is party's need to be in the lawsuit
            i. not so intense that party is a Rule 19 party
            ii. "rule 19 light"
            iii. permissive intervention:
               1. judicial discretion, as opposed to intervention as a right
                  a. Denial of intervention under 24(b) is not appealable
                     i. so, couch motion as a 24(a) motion
      2. no compulsory intervention
         a. if not joined under Rule 20

b. but, fence-sitting cannot get benefit of offensive non-mutual collateral estoppel (not at risk in Case 1)

3. supplemental jurisdiction does not apply to Rule 24(a) or (b)
    a. drafting error? why no supplemental jurisdiction for 24(a) parties?
    b. also no supplemental jurisdiction for Rule 19 parties

CLX. Jeub v. B/G Foods

a. Facts:
    i. tinned ham (packaged in Chicago); food poisoning
        1. Case 1:
            a. P sues restaurant, verdict for P
        2. Case 2: D brings in TPD (third-party defendant) as Rule 14 indemnitor
            a. D runs risk of an inconsistent verdict
                i. since TPD cannot be precluded by any judgment from Case 1, since he was not a party

b. Holding:
    i. indemnity –
        1. bring TPD into case 1, so that there is no inconsistent verdict
        2. Indemnity happens in same proceeding

c. Rationale:
    i. making case 1 "bigger"
        1. actually gets rids of Case 2, that nobody wants
            a. so rules favor ease of bringing in TPD
                i. "hundred mile bulge" rule
                    1. reform efforts to expand hundred mile bulge to nationwide service of process
                ii. supplemental jurisdiction
                    1. no independent basis of jurisdiction (citizenship does not matter, etc.)
    ii. Rule 14
        1. (a)(1): D (called a TPP – third-party-plaintiff) MAY add a TPD who may be liable to it for the claim against it
            a. TPD – could be an indemnitor (like an insurance company) or could be a co-defendant (liable for contribution)
                i. but, this can create an *Erie* problem, with states that do not recognize claims for contribution from joint tort-feasors
                    1. in this case, D could not use Rule 14 to bring in a TPD who is really a joint tort feasor
                        a. for exam purposes, assume the state allows contribution
                            i. so, TPD can be added if he is really a co-defendant (but was not initially named, due to complete diversity jurisdiction)
        2. TPD MUST assert all claims against D under Rule 12 (Rule 12 defenses)
            a. in personam jurisdiction, SM jurisdiction, venue, legal sufficiency
        3. and MUST assert all counterclaims against D under Rule 13(a)
            a. or precluded in the future

4. MAY a ssert counterclaims under Rule 13(b)
    a. 13(b) claims must have an independent basis of jurisdiction
5. MAY assert claims against other TPD's
6. MAY assert claims against P, if arising out of the same transaction or occurrence from the original case
    a. supplemental jurisdiction = no independent basis of jurisdiction needed

iii. P MAY assert any claim arising out of transaction or occurrence against TPD
iv. Rule allows claims to be brought in case where they could not have been brought initially (because no need for independent basis of jurisdiction)
1. See *Kroger*, contrary logic; rules cannot create jurisdiction

CLXI. New York Life v. Dunlevy (SC 1916)

a. Facts:
i. Gould buys tontine (insurance policy, matures at 21) for daughter, payable to him;
ii. daughter (Mrs. Dunlevy) alleges that Gould assigned the policy to her;
1. daughter runs up huge bill at Boggs
2. Boggs sues Dunlevy (moves to CA but served in PA)
    a. judgment in favor of Boggs (but no way to satisfy judgment, since Dunlevy has no assets in PA)

iii. Case 1:
1. Boggs serves summons on Gould and insurance company
2. Boggs attaches debt owed by insurance company to either Dunlevy or Gould
3. Dunlevy ignores notice of hearing
    a. court finds that Gould never assigned the insurance policy to Dunlevy
        i. insurance company pays Gould

iv. Case 2:
1. Dunlevy sues insurance company in CA (in personam jurisdiction over insurance co., since they do business in CA)
2. insurance co. argues that they already paid Gould
    a. argues that FF&C or preclusion should apply

b. Holding:
i. Dunlevy's arguments:
1. Dunlevy subjected herself to in personam jurisdiction at beginning of case, in PA, so this applies to all stages of case
2. SCOTUS rejects this argument:
    a. holds that original action was separate from second (collateral) action
        i. second action must be analyzed for jurisdiction as if it was a new case
    b. Dunlevy wins Case 2, insurance company has to pay twice

c. Rationale:
i. interpleader:
1. court's right to settle dispute re: property
    a. always in rem, in a sense
    b. court has held that property (including intangible, such as debt) must be in party's possession to attach it; not under dispute (so, does not apply to contingent debt)
        i. *Shaffer* argument

ii. Dunlevy – failure of interpleader
    1. must have independent basis of jurisdiction
    2. cannot attach property
iii. Congressional statute passed in response:
    1. Statutory interpleader: Federal Interpleader Act (28 USC 1335)
        a. nationwide service of process in fed. interpleader cases
            i. $500 jurisdictional amount
            ii. minimum diversity (between any two claimants; need only 1 diverse party)
                1. other than in class actions, least restrictive diversity requirement
    2. Rule 22 interpleader:
        a. when all claimants are from same state, but stakeholder is from different state
            i. stakeholder as P, claimants as D's
        b. traditional diversity requirements apply

CLXII. Pan American v. Revere (E.D. La. 1960)

a. Facts:
    i. car accident, school bus
    ii. P (insurance company) files interpleader to determine disbursement of $100,000 policy
        1. using statutory interpleader (28 USC 1335)
b. Holding:
    i. LA court allows interpleader action
        1. rare potential of Rule 22 interpleader
    ii. decide whether or not fund in question is large enough to be the center of litigation
        1. since this could be exposed to multiple liability
            a. if not, abuse of discretion to require all parties to participate in interpleader action (using statutory nationwide service rule)
c. Rationale:
    i. long and continued reliance on *Dunlevy*
        1. can't interplead contingent assets (abstractions)
    ii. interpleader has not fulfilled potential, growth has been in class actions (P-driven, rather than D-driven)

CLXIII. State Farm v. Tashire (SC 1967)

a. Facts:
    i. car accident with Greyhound bus
b. Holding:
    i. SCOTUS:
        1. *Strawbridge*'s complete diversity requirement is an interpretation of USC 1331, not Article III
        2. so, can use minimum diversity in interpleader
c. Rationale:
    i. constitutionality of nationwide service of process?
        1. allow nationwide service of process in diversity cases = any District Court can apply its laws, compel submission to its forum, nationwide
            a. allows one state to regulate the country

2. no problem in federal question jurisdiction, since federal law applies

ii. Kennedy in *Nicastro*

1. suggested nationwide service of process for diversity cases; risk of Federalism problem (under *Erie*)

CLXIV. Class Actions (Rule 23)

a. legal fiction

i. consolidating litigation that could otherwise be litigated piecemeal

1. designed to avoid preclusion problems (Case 2 unnecessary)

ii. depends on relationship between party in court and parties out of court

1. class action = can preclude out-of-court parties (so, assumes that all related P's are present in court)

a. virtual representation

b. Rule 23 class action

i. 1966- rule promulgated

1. after Brown, southern states were mounting massive resistance—schools only admitting individual black students to white schools if there was a specific court order for him

a. case 1 = court order for 1 black student to enter a white school

b. case 2 = second black student tried to enter white school and get court order but could not use offensive non-mutual collateral estoppel against the school b/c you can't do that against the internet (*Mendoza)*

i. without IP, new plaintiffs winning quickly on stare decisis

ii. BUT this would require separate lawyer for every black child

2. Class actions were <u>invented</u> to deal w/ this—> creation of artificial class that encompasses everyone, and first court order governs all.

a. Violation = contempt of court

c. class requires:

i. representative P sufficiently like all class members who is sufficiently representative to bring the claim on behalf of everyone

1. 23(b)(1) – see FRCP

2. 23(b)(2) class action – when D is violating rights belonging to everyone — gets injunction

3. 23(b)(3)- massive tort claims – if there's a plane crash and everyone is hurt, they can all join together to sue — gets damages

ii. 1966, with the collapse of mutuality, D could lose the first case, successive Ps could come in and continue to slam the D —

1. class action allows D to bind everyone in the mass tort in case 1, so that they're all subject to the same risk at first

2. winds up working great for plaintiffs

iii. translucent concept:

1. "Rule 20 on steroids"

2. metaphor for all the individual participants

a. analogous to Marshall's conception of a corporation as comprised of its shareholders

i. shift to opaque conception – as in conception of a class

1. mass joinder device v. freestanding entity?

a. unresolved conception
b. differences for testing citizenship
i. *Ben Hur* – citizenship of named representatives (opaque)

2. aggregation of claims?
a. translucent
3. *Allapattah*
a. construe ambiguous statute to conceive of class as opaque (named plaintiffs must satisfy jurisdictional amount)

3. class conception affects diversity testing; jurisdictional amount testing; due process (right to a hearing)

d. Class Action Fairness Act:
i. D's act (P's were pinning D's into sympathetic state courts)
1. D's couldn't remove under diversity
2. Congress relaxed jurisdictional requirements
a. aggregate amount of all possible claims must exceed $5 million
b. minimal diversity requirements for removal

ii. applies only to nationwide class actions

e. Settlement:
i. grant/denial of certification is directly appealable (due to expense of discovery)
ii. huge pressures on D to settle
1. discovery/legal costs
2. implications of a losing judgment (invites subsequent claims)
3. can be settled before the case is filed (so judge receives complaints and settlement agreement on day 1; judge certifies class for purposes of settlement)
a. class still must be certified, so that claim preclusion applies (otherwise, no preclusion due to no actual adjudication)
i. *Cooper* exception

iii. "nuisance" class action v. "pittance" class action
1. unfairness can result on the margins

f. Rule 23(e) fairness hearings
g. asbestos settlements

CLXV. Hansberry v. Lee

a. Facts:
i. in 1960s, 95% of land-owners in a development signing racially restrictive covenants saying developers would not sell land to "others" (blacks, Jews, etc.)
1. developer only gets 54% of people to sign
a. case 1: owner 2 sues developer and other owners, seeking declaration that 95% had signed the covenant —> bring convenant into effect —> case 1 court says 95% has signed
b. case 2: owner 1 sues seller who sells to black family. Claims he is violating the covenant, which binds everyone.
i. Problem: buyer was not an indispensable party in case 1 (Rule 19). **Remember**: should anyone be a rule 19 party?

b. Holding:

i. SC says: if only 54% of people signed, there's no unanimity —>
    1. then, when owner in case 1 claims to be suing on behalf of everyone else, he can't represent the part of the community that now wants to sell, in violation of the covenant
    2. Clear conflict of interest between the representative owner and the class
    3. powerful demand for no conflict of interest between named P and class
    4. 23(A) codifies Hansberry

c. Rationale:

CLXVI. Wal-Mart Stores v. Dukes

a. Facts:
    i. *Walmart:* female employees challenging disparate pay because discretion/no-rule on local managers to decide on salaries/hiring empowers them to be discriminatory
        1. Brought as B(3) —> damages (encourages lawyer to take the case)
        2. If brought as B(2), asking for injunction for Walmart to change its behavior/policy —> would have been easier to say commonality bc would affect legal rights of the class (they all run the risk that they will be discriminated against)
    ii. Tries to certify class as all female employees —>
        1. is there sufficient commonality that allows all women as being linked by common thread represented by their champion?
b. Holding:
    i. Scalia says that this case doesn't satisfy (A) because doesn't satisfy commonality and typicality —> does not certify it
        1. Ginsburg: should look at B first (which would give time for discovery), rather than A
        2. *Walmart* raises the question of whether we should look at A or B first in certifying a class
c. Rationale:

CLXVII. Comcast v. Behrend

a. Facts:
b. Holding:
c. Rationale:
d. for subclasses, need separate rep and probably separate lawyers for each subclass because there could be conflicts among the groups
e. anti-trust action
    i. court says that theory of damages must flow from liability, and if no liability, then can't say there's a common group
        1. hard to know which homeowner suffered how much damage from what event
            a. can't certify unless you can tell a story of damages in which those damages are linked to liability
        2. *Ginsburg:* this case could have been certified on the basis of liability, w/ individualized actions for damages; on liability alone, could have easily determined it violates any-trust laws
    ii. Class action allows you to certify re. particular issue or subclass —> majority refused to discuss this possibility

1. Lower courts not reading this to say that there must be combined liability and damages certification
2. if you can't certify on damages, does it make sense to certify re. liability?
    a. There will be hugely expensive/time consuming damages case after
    b. P bar argues that certification for liability is important because it encourages people to bring claims
        i. D bar argues that time and energy in subsequent damage claims is so great that you don't save anything by certifying liability
            1. should have everyone litigate damages and liability together
    c. claim preclusion operates; if you bring a b(2) and don't bring a b(3), you split your claim for whole class and can't come back later for b(3)

iii. At some point, Ds typically decide to settle
1. before settlement can be adopted, need fairness hearing before judge
    a. is a judge, only hearing what parties say, to make a judgment about whether the settlement could have gone better?
        i. **But** during fairness hearing, any member can be heard
        ii. After P lawyers have done work on the class, and they get an attractive offer, who makes sure that the attorneys don't fold at too low a number for settlement?
2. Rule 23(e) settlement class — fairness hearing— tries to solve this problem
    a. but can it succeed?

iv. APPEAL
1. Because class certification is so important, **only** final order is appealable in federal court
    a. grant of class certification was previously thought *not* to be appealable because not a final order —> but end of case rarely came, because they settled
    b. **but** plaintffs could appeal a denial
        i. unfair situation bc P could appeal denials but D could not appeal grants
        ii. NOW, grants/denials are ALL appealable as long as w/in 14 days
        iii. this is important bc once grant is issued, D's must settle regardless bc the potential liability is so huge

f. FUNDING CLASS ACTIONS — how do you fund them?
i. B(2) and b(3) are very expensive
ii. b(2) — tend to be funded by attorneys fees statutes
1. **fee-shifting statute**: if D wins, P obliged to pay reasonable fee to attorneys
    a. **reasonable fee =** according to attorneys fee awards systems
    b. attorneys fee awards systems = hourly fee based upon amount of time you begin; within the realm of ordinary market fees; attempts to mimic the market
2. B(3) — compensation completely different
    a. Rarely statutes dealing with attorney fees
    b. With mass torts, contract issues, anti-trust, etc. —>

i. if P wins and creates a situation where money is showered on members of class, court recognizes an **equitable obligation** on class members to kick into the fee —>
    1. tax imposed on all members of the class to compensate the lawyers
    2. This can be HUGE in large case
    3. Amounts are keyed to the amounts you require
ii. Creates terrible incentives for P lawyers to invent things that look good:
    1. **coupon settlements:** eg suing a company for doing a bad thing, company pays off class by giving them a coupon for next purchase w/ company

CLXVIII. **Snyder v. Harris**

a. jurisdictional amount (w/ *Zahn*) – P's in class can't aggregate separate and distinct claims

CLXIX. **Zahn v. International Paper**

a. all members of class must satisfy jurisdictional amount
b. but, supplemental (ancillary) jurisdiction? some courts have used to overrule *Zahn*

CLXX. **Ben Hur v. Cauble**

CLXXI. **Exxon Mobil v. Allapattah**

a. type of supplemental jurisdiction:
    i. if named plaintiffs satisfy jurisdictional amount, supplemental jurisdiction over the rest of the class
    ii. *Gibbs* is still good law re: federal question with antecedent state claim

CLXXII. **Phillips Petroleum v. Shutts**

a. only named P's need minimum contacts for forum to exercise personal jurisdiction

CLXXIII. **Cooper v. Federal Reserve Bank**

a. Facts:
    i. Case 1: employment class action (pattern or practice of discrimination)
        1. court held for employer
    ii. Case 2: 1 member of class files personal discrimination suit
b. Holding:
    i. SCOTUS: member was not precluded by case 1
        1. pattern or practice claim was different than personal discrimination claim
        2. claim in case 2 was not actually adjudicated in case 1
            a. different legal theories (should issue preclusion be theory-based?)
            b. what effect if issue preclusion is fact-based?
                i. any overlap? sufficient?
                ii. this is significant, since there is no opt-out option in 23(b)(1) and 23(b)(2)
c. Rationale:
    i. preclusive effect of class actions
        1. greater preclusive effect with collapse of mutuality
    ii. internet as a mechanism for genuine participation in class actions?

CLXXIV. **Ortiz v. Fibreboard**

a. Facts:
    i. 23(b)(1)(b) class (limited fund) – no opt-out option
b. Holding:
    i. SCOTUS refuses to certify class
        1. limited fund cannot be an artificially limited fund by D's
            a. must be physically limited (by circumstances beyond the parties' control)
        2. still has conflict of interests within the class (*Amchem* problem)
            a. creates adversarial relationship between subclasses
c. Rationale:

CLXXV. Amchem Products v. Windsor

a. Facts:
    i. asbestos class action (23(b)(3) class action, with opt-out option)
        1. subclasses of individuals with different levels of exposure
        2. settlement capped
    ii. separate individual claims, represented by same attorneys
b. Holding:
    i. SCOTUS rejects:
        1. single individual cannot represent class with divergent categories
            a. different objectives for subclasses
                i. presently affected: need funds instantly
                ii. exposed group: needs funds later if they develop health conditions
                iii. individual claims: left out of class settlement
        2. court does not discuss, but possible solution if different subclasses were represented independently
            a. not classified as "subclasses" in *Amchem*