I. INTRO. TO CIVIL PROCEDURE

- **Procedure** – mechanism for applying substantive law to concrete disputes; how rights, duties, and obligations should be vindicated
  - Elements of substantive law are built into procedure – seemingly neutral rules of procedure are normatively loaded

- **Adversarial system** – conflict between parties are played out between the individuals; the state doesn’t have a hand in creating or resolving the dispute.

- Court made doctrine + Congress’ rules

- **Judge’s** behavior (Are meant to be neutral umpires – Not in Band’s Refuse or Kothe v. Smith)
  - **Band’s Refuse**
    - Called witnesses on his own – 24; Capassos weren’t given opportunity to prepare
    - Appointment of an amicus curiae – friend of the court – submit a brief explaining to the court the issues; advocate policy position, advocate for one party, etc.
      - Amicus here acts as a proxy for the judge.
    - Judges are typically unprepared and ignorant in our system, so when they get overly involved they often make mistakes.
    - Pg. 9 – fetishising process derogates from the task of fact finding
      - The very fact that our system is an adversarial one emphasizes fact finding.
    - Substantive justice v. procedural justice – fairness of process is important because the losing party will be more likely to accept the outcome.
  - **Kothe v. Smith**
    - Judge suggests pre-trial settlement of $20,000- $30,000 and if after trial the case settles for that amount, judge is going to sanction delaying party.
    - Rule 16 (f) = Sanctions for failure to participate “in good faith”; power to sanction party for failure to settle?
      - Bad faith to refuse settlement offer and then accept it?

- **Settlement** → First Step, if settlement can’t be reached, then go on to trial
  - Good things:
    - Trials are all or nothing instruments, but settlement offers the opportunity for both sides to benefit.
    - Trials are expensive for society – too many cases on the courts docket. Settlement allows more cases to go through the court system.
    - **Promoting substantive law** by placing a value on rights – provides a precedent for future values.
- Parties in the right might want to settle to save costs.
- **Being in the right is not always sufficient** to receive your due in the system. – What does truth mean in the legal process?
  - Not accuracy, but confidence in your ability to persuade others about your truth.
- **Bad things:**
  - People don’t feel the same sense of vindication because they have not been given their day in court.
  - Terms of settlement are rarely disclosed, so we actually don’t know what the price is for the right – takes out the public function of law b/c people don’t know what their rights cost.

**II. STAKES OF LITIGATION**

**a. Damages** = determine the course of litigation – will remedy be sufficient?

i. **Money Damages** = intended only to compensate for injury not to deter

- Issue: Whether or not students must prove injuries to receive substantial nonpunitive awards? → **Carey v. Piphus**
  - Strictly speaking, there is an injury simply by a deprivation of the rights and the injury needs to be compensated for.
  - Rights matter → People need to recognize that other’s rights matter

ii. **Compensatory damages**: Tort principles

1. Medical expenses, lost wages, pain and suffering (subjective, hard to quantify)
2. Value of lost property = FMV + or -; sentimental value? – can it be quantified
3. Deprivation of due process of law – how do we quantify? – court says damages are nominal
   a. Lost accuracy of the outcome
      i. After the fact predictions – wrongful death cases (calculating earning potential)
      ii. Missed days of school – per pupil expenditure, potential lost income, day care costs or lost earnings by parents for child care, alternative schooling
   b. Lost feeling that the government has dealt with them fairly (I or RISED)
      i. Faith in the system has been shaken.

C. Fee shifting provisions mean the lawyers receive compensation for fees in preparing the case.

iii. **Punitive Damages** = intended to over-deter – standard for granting punitive damages in a civil rights action = evil motive or
intent, or when it involves reckless or callous indifference to the rights.

1. Outrageousness of the conduct.
2. Wealth of the defendant.
3. How Punitive damages are limited:
   a. Limited by fairness.
   b. Subject to review by a judge – is it an arbitrary deprivation of property. Remittitur and Addittur of damages.

b. Equitable Remedies & Contempt
   o Permanent injunction (1st 2 in Missouri – rest are for all the US):
     ▪ No adequate remedy at law – Smith has not been injured yet by cigarette smoke in Smith v. Western Union
     ▪ Substantial risk of irreparable injury (imminence of harm)
     ▪ Whether P has succeeded on the merits
     ▪ Whether the balance of hardships weighs against issuance of an injunction
     ▪ Whether injunction serves public interest
     ▪ Whether court can administer injunction → judges aren’t always in the best position to grant equitable relief
   o Preliminary injunction:
     ▪ Strong likelihood of success on the merits
     ▪ The likelihood of irreparable harm should preliminary relief be denied
     ▪ Balance of the hardships
     ▪ Whether injunction serves public interest
   o Temporary Restraining Order, like preliminary injunction with these exceptions:
     ▪ Can be obtained ex parte (only one party needs to be there – D does not have opportunity to defend themselves before order)
     ▪ Duration – only good for 10 days
   o Justiciability = specific claim against someone who doesn’t agree with you and there is relief available.
     ▪ Ripeness = controversy exists now, has erupted, imminence
       • Imminence = Necessary
         o Society should not be reactionary, but should wait for harm to have occurred
         o Waiting for full-blown injury means you don’t have to engage in worst-case scenario prediction.
         o What if the harm you’re trying to prevent never happens?
     ▪ Standing = P is among the injured; P has a personal stake that separates P from the public at large
     ▪ Mootness = standing has to occur in a certain time frame (i.e. throughout the lawsuit)
Feigned or collusive cases = P must actually desire to assert interest; no test/hypothetical cases

- Contempt = punishment for violating a court order
  - Criminal = violation of court order violated as if it were a crime; violation must be proved beyond a reasonable doubt; D entitled to jury trial if sentence exceeds 6 months
  - Compensatory Civil = D pays P to compensate for violation of the decree; equitable relief requires no adequate remedy at law, yet P can be compensated?
  - Coercive Civil = impose punishment on D in order to force future compliance with decree
- Collateral Bar Rule = In a show cause hearing, the target of the hearing can’t challenge the validity of the underlying decree. The only issues that can be raised are 1) whether there was an order and 2) whether you knowingly violated it. Challenging the order should be done by motion to dissolve injunction before violation of the injunction.

c. Costs of Litigation → Attorney’s fees
  - Rule 54 – loser pays winner’s litigation costs under certain circumstances:
    - Transportation of witnesses; photocopying, filing-fees
    - § 1983 and Copyright law
    - English Rule = fee-shifting; encourages lavish spending; exonerated defendant shouldn’t be impoverished by the cost of mounting a successful defense; if P knows they are putting on frivolous suit, P won’t bring dubious claims; poor people are most deterred from bringing law suits
    - American Rule = parties bear their own costs of litigation and attorney fees; encourages conservative spending; encourages settlement; contingent fee structure allows poor people to bring suits.

III. PLEADING = defining and describing the nature of the dispute between the parties
  - Writs = Once complaint is made, you could deny technical sufficiency of the complaint (demur) or you could deny the substance of the complaint (traverse) – If you chose wrong under the old system, you lost.
    - Instead of deciding the case on the merits of the case, lawyers would make technical maneuvers until they won with a flourish. – this forced reform, b/c bad lawyers were winning cases just on technicalities
      - Single issue fetish
  - Facts = Field code pleading = Abolishes writ system; Abolishes distinction between law and equity
    - Parties are simply supposed to plead the facts
    - Problem = requires too much detail
Conclusory = just the facts, no law; court wants to know what happened, not just that you were assaulted. Why? – *Gillipsie v. Goodyear Service Stores*

- **P** has not stated the necessary facts that are tied to the substantive law – **P** has not given facts that establish the elements of the offense
- Can’t give everything away - No advantage in putting forward your best case in a complaint b/c you can’t win based on the pleading
- Court wants the who, what, when, why and how

**Notice** = Just provide short, concise statement that gives court and defendant fair notice of claims and grounds upon which they rest – minimal standards

- Rule 4, 7 (pleadings = complaint, answer and reply), 8 (basic rules of pleading), 10 (form of the pleadings)
  - Rule 10(b) – each paragraph should be numbered and contain a single set of circumstances.
- Remnant for single issue fetish = 12(b)(6) – single issue fetish

**PLAINTIFF**

- **Specificity** = **Rule 8** = short statement of claim and entitlement to relief → Gov. sues everyone who distributes oil near the harbor b/c there is oil in the harbor → *US v. Bd. of Harbor Commissioners*
  - **D** probably is trying to find out how much the government knows about their operations – **D** has undertaken some form of investigation.
    - Rule 11 – requires some sort of investigation
  - Rule 12(e) = Motion for More Definite Statement
    - Rule 8(b) says defendant has to admit or deny every allegation made by plaintiff – 12(e) says we need more definite statement so that we can prepare an admittal or denial
      - You have been dumping, but you don’t know if you’ve been caught doing it.
      - Suppose a tropical storm swept through the harbor causing you to accidentally dump oil – Act of God exception.
    - Shouldn’t allow routine granting of the Rule b/c it wastes time and resources and puts burden on plaintiff
    - However, they are filed all the time b/c it gives defendant more time, and it wastes plaintiff’s resources.
  - Specificity depends on the theory of the case – more specificity if the legal theory is in question. Generality b/c you may not know every legal argument that supports your case until you go through discovery. Generality leaves room for the case to grow – Discovery also encourages a less specific statement of the case
• Rule 9 = heightened specificity
  • 9(b) – Cases of fraud or mistake – pleading must be stated “with particularity”; → Ross v. AH Robbins Company (Dalcon Shield Stock) Why:
    o Fair Notice
    o Protect reputation = “once a liar, always a liar”; allegations of fraud deeply harm one’s reputation
      ▪ Fraud
      ▪ Civil Rights – racism is a nasty word
    o Limits in torrorem value of the lawsuit – P could force D to settle unfairly since D will want to avoid a fishing expedition (discovery) and to avoid damage to the reputation
    o Discourages “fishing expeditions”
    o Companies take risks all the time – research & development, testing, and marketing costs money = allowing notice pleading discourages innovation
    o Expending corporate resources to defend lawsuit and consequently to plaintiff’s lawyers – defendants lose and plaintiffs lose (b/c their stock will be reduced)
    o Plaintiff’s need to provide factual basis for their allegations of knowledge
  • Quasi-particularity standard – other courts say you have to plead that the defendants knew or had reason to know that they were committing fraud

• When you’re suing everyone, we want more specificity - Corporate officers in their individual capacities can not be sued for cleanup costs of an environmental disaster → Cash Energy v. Weiner
  • Keeton – Rules of pleading have become less generous over the years b/c
    o Rule 9(b)’s exception
    o Rule 8(f) = all pleadings must be construed to do substantial justice
    o Rule 12(e) = request for more particularity
  • Ps won’t know the rules of the game until they try to plead
  • Judges are shaping policy at the pleading stage – using procedure to shape substance
  • Rules are not supposed to be case specific – judges shouldn’t be allowed to make procedural decisions on the fly
- Municipalities are generally immune from liability when it comes to rogue actions by its agents, unless municipality establishes a policy = respondeat superior
  - Notice pleading is all that’s required to prove there was a custom or policy of abuse that lead to entitlement to relief → Leatherman v. Tarrant County Narcotics I and C Unit
  - Renquist says things are the same as they have always been
    - Rule 9(b) = narrow exception to notice pleading
    - Rule 8(f) = pleadings shouldn’t be seen in an overly technical manner
  - No tension in the Rules – 8(a)(2) with 9(b) as an exception
    - Expression of one thing marks the exclusion of another
    - One exception excludes all other exceptions
  - More cases are going to make it through initial pleading stages
    - Honesty and consistency in pleading – check to the minimal pleading requirements.
      - Pleading in the alternative – D, truck driver, is responsible b/c of negligence and D, tavern, is responsible for allowing P’s husband to drive home drunk → McCormick v. Kopmann
        - Can only plead in the alternative if you’re doing so in good faith.
        - Court allowed pleading in the alternative b/c plaintiff could not know where the truth was until there was a trial. – Trial process is supposed to determine the truth -
          - Truth = best possible outcome based on the presentations of the parties
        - Appropriateness of inconsistent pleadings turn on the uncertainty of trial
          - Can’t engage in inconsistent pleadings when the plaintiff has some certainty that one of the two allegations is false.
    - Rule 11 = authorizes sanctioning of party for bad faith in filing of pleadings or motions; signing the document signifies the attorney claiming that everything in the document is legitimate
      - Often filed against discrimination claims, but now is often brought up when a small party sues a larger party.
      - Current standard = reasonableness under the circumstances; signing means that the claims are reasonable under the circumstances.
        - Sanctions are discretionary instead of mandatory
Sanctions are to be tailored to the case so as not to deter a class of lawsuits.

Monetary sanctions are being discouraged; don’t want to financially cripple people who bring lawsuits.

(B)(3) = not doing a thorough factual investigation, for frivolous claims - Why isn’t client’s representation that the University was still renting out the videos sufficient? → Zuk v. Eastern Penn. Psych. Inst.

Albright v. Upjohn – P sues Upjohn not knowing if the tetracycline P received came from Upjohn = Violation of old 11, but new 11(B)(3)?

Is it reasonable to think that you will have evidence after discovery to support claims against Upjohn? – No speculative pleading – at what point does it become speculative?

(B)(2) = not grounding your claims in existing law

Legal research – copyright law problem = books are copyrighted, the books have transcripts of what happened in the films, therefore the films must be copyrighted → Zuk v. Eastern Penn. Psych. Inst.

(B)(2) and (B)(3) problems – it’s the lawyers fault b/c he’s the one who signs the documents

(B)(1) = harassing or causing unnecessary delay or needless increase in the cost of litigation – Did Zuk have an axe to grind?

Safe Harbor Requirements – You have 21 days to withdraw complaint without penalty

(C)(1)(a) Safe harbor only applies to sanctions brought by motion of one party. (C)(1)(b) There is no safe harbor for sanctions brought on the court’s own initiative.

Sanctions are always discretionary (limited by the nature of the remand – i.e. court can’t just reissue $15,000)

Non-monetary sanctions = referred to Bar’s committee for misconduct; banned from courtroom; Continuing Legal Education in Copyright law; very public reprimand in the opinion – reputation sanctions

28 USC § 1927 = Attorney receives sanctions whenever he multiplies the proceedings unreasonably and vexatiously = creating unreasonable delay by entering a lot of motions in bad faith

Legal Sufficiency = reference to some legal theory which plaintiff must supply

“on the premises” = legal conclusion concealing the fatal fact that P was across the street and not on the premises → Mitchell v. Archibald & Kendall, Inc. = delivery truck driver shot in the face with a shotgun waiting to unload his truck in Chicago
- Rule 11 sanctionable conduct by failing to specify what “on the premises” means, b/c plaintiff’s theory of the case rests on the term
- Rule 15 = amend complaint; don’t file appeal
  - Voluntary Dismissal – Nonsuit = Rule 41 = Limitations of plaintiff’s ability to withdraw its lawsuit
    - Unilateral right to withdraw is cut off when defendant answers or motions for summary judgment
      - 12(b)(6) cuts off plaintiff’s right to voluntary dismissal b/c if D files an affidavit with the 12(b)(6), it’s treated as a motion for summary judgment
        - No adequate notice = 12(b)(6) just challenges sufficiency of complaint, it is not a motion for summary judgment and it is not an answer, so P still thinks it has the right to voluntary dismissal
        - Attached affidavit does not automatically convert 12(b)(6) into a motion for summary judgment – affidavit could be technically insufficient
        - Defendant is not asking for summary judgment with a 12(b)(6)
    - P should be allowed to get out, unless the goal of the P is to flaunt the court’s proceedings
    - 41(a) requires plaintiffs to pay court costs and defendant’s attorney fees
      - Inconsistent with the idea that each party bears his own costs in litigation = American fee shifting rule
      - Discourages frivolous lawsuits.
- DEFENDANT
  - Pre-answer motions = 12(e) – more definite statement; 12(b) =
    - 1 = court lacks subject matter jurisdiction – court does not have power over that particular class of cases – doesn’t fit in any of the categories in Art. III, Sec. 2, Cl. 1
    - 2 = lack of jurisdiction over the person
    - 3 = improper venue – more appropriate geographic location for the lawsuit
    - 4 = insufficiency of process – technical violation
    - 5 = insufficiency of service of process – technical violation
    - 6 = failure to state a claim
    - 7 = failure to join a party under Rule 19 – necessary party must be joined in litigation
  - Claim can be kicked out of court, but plaintiff can re-file and the suit is brought up again → Defendants will often overlook technical blunders b/c if you have a solid case on the merits, might as well take it to the merits – an error shows that the other side is not very good and you have an advantage –
alerting them to technical deficiency allows them to investigate other aspects of their case

- 12(g) = allows consolidation of all 12s into one pre-answer motion; if you don’t then you can’t raise them again except:
  - 12(h)(1) = disfavored defenses will be waived unless raised in pre-answer motion = lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process
  - 12(h)(2) = favored defenses can be raised in any pleading allowed under 7(a) or by motion for judgment on the pleadings or at the trial = failure to state a claim, failure to join indispensable party, failure to state a legal defense to a claim
  - 12(h)(3) = most favored defense can be raised at any time = jurisdiction of subject matter

- Difference between 12(c) – Motion for judgment on the pleadings and 12(b)(6) – Motion to dismiss for failure to state a claim
  - 12(c) = only the complaint and the answer is looked at
    - Affirmative defense is asserted as a reason to not impose liability – being a police officer is not a license to assault and batter people and is insufficient to preclude liability
      - Insufficient affirmative defenses can be stricken under a 12(f) motion to strike
  - 12(b)(6) = only the complaint is looked at; affirmative defenses cannot be raised

- Default = Failure to answer = Rule 55
  - Default = forecloses further litigation about D’s liability, but leaves open how much liability
    - Uneasiness about granting actual relief in a non-adversarial setting.
    - System compensates by asking judge to take a more active role in scrutinizing the claim – judicial activism protects D → Aren’t judges supposed to be neutral?
  - D who has entered an appearance is entitled to 3 days notice before the hearing on a Default Judgment by the judge. At the hearing all that can be contested is whether or not you’re liable and for how much you’re liable – Did out of town attorney enter an appearance by asking for more time through his secretary? → Shepard Claims Service v. William Darrah

- Motions to set aside defaults based on the merits of the case; 3 factors considered – each given equal weight:
  - Prejudices the plaintiff (preparation prejudice – if plaintiff forgoes preparation b/c of delay, then it’s prejudice)
o Doesn’t it always prejudice the plaintiff? – Yes b/c now the plaintiff is going to have to work, but it’s only a couple of days, so the case is not prejudiced.

- **Meritorious defense for defendant**
  o Subjective: Are there facts to support the defense? Is the defense good at law?
  o What if the defense is denial of the accusations? – Ross v. A.H. Robins = more particularity in the fraud claim

- **Culpable conduct of the defendant** led to the default
  o *Culpable conduct* = intent to thwart judicial proceedings or a reckless disregard for the effect of its conduct on those proceedings
  o More than missing a deadline; more than carelessness and inexcusable

  o **Answer the Complaint** = admit or deny averments upon which the adverse party relies; Defendant should deny if he is uncertain; affirmative defenses; cross-claim, counter-claim or third-party claim
    1. Denial mode when answering = admit only what you cannot in good faith deny.
    2. Affords plaintiff more precise idea of what is in dispute in the case.

  - **General denial is fine subject to Rule 11(b)(4)** – evidence of factual contentions
    o Wheat v. Eakin = Defendant writes that plaintiff must have brown eye balls b/c he is full of bullshit – considered a denial, but would have been struck if plaintiff asked for it
  - Doesn’t facilitate just, speedy and inexpensive resolution of disputes.

  - **Ineffective denials** = admission of averment for purposes of the case
    1. Technical blunder – accidentally admitted a fact that they want to deny? → Ask to amend the answer
    2. Zielinski v. Philadelphia Piers → everyone knows the D is not the driver of the truck, but the case goes to the jury with the idea that D was driving the truck b/c D did not deny correctly
    3. Plaintiff’s sloppy drafting does not mitigate Defendant’s duty to answer
      o At first D claimed it was without sufficient knowledge to admit or deny allegation, now it wants to deny b/c D bought the company that sold the product after the liable company had sold the product – D bought the company
without assuming the liabilities → David v. Crompton & Knowles

- 8(b) – Defendant has to admit parts of the averment that are true and deny other parts
- **Affirmative defense** = 8(c) + exceptions built into the substantive law as the basis of recovery → must be included in the filing of the answer
- Cleary factors:
  - **Policy** = he who brought the claim bears the burden of pleading; avoids “fishing expeditions”
  - **Fairness** = the party that knows the facts better than the other should have the burden of proof
    - Police chief knows better whether Gomez was fired in good faith or not → Gomez v. Toledo (police man fired without a hearing for illegal wiretapping, sued chief under §1983 for violation of Due Process; dismissed b/c absence of good faith is an affirmative defense that must be plead)
  - **Probability** = burden on party benefited by a departure from the supposed norm
    - Affirmative defense will be waived if not raised in the answer – but the affirmative defense can be raised in an amended answer
- **Counterclaims** = 13(b) = defendant can assert any claim against an opposing party
  - **Compulsory** = counterclaims must be raised during the lawsuit or can never be brought even during a new trial; arising out of the same transaction or occurrence =
    - Similarity of events
    - Similarity of places and people
      - In Wigglesworth, the times, places and events are quite different → teamster sues Union for denying freedom of speech and holds press conference bad mouthing Union; they counterclaim for libel
    - Transaction = flexible; not immediateness of connection but logical relationship; liberal test
      - In Wigglesworth, press conference had no relationship, logical or otherwise, to the events that brought P’s suit? → but for the deprivation of his rights, there wouldn’t have been a press conference – cause and effect analysis doesn’t count
      - Same evidence standard = Bose v. Consumers
        - If same evidence would be used to prove both the claim and the counterclaim,
then the D must bring the counterclaim in the same suit to be more efficient

- Don’t want inconsistent outcomes using the same evidence

- **Permissive** = not arising out of the transaction or occurrence that is the subject matter of the opposing party’s claim
  - Require there own statement of jurisdiction

- **13(g)** - No such thing as a compulsory cross-claim = don’t want to put defendants in position of weakening each other’s cases for the benefit of the plaintiff

  - Indemnity = claim between an insured and an insurer; insured sues insurer for indemnification; only time a cross claim between insured and insurer occurs is when the plaintiff’s claim against the insured is going to succeed.

- Abuse of process = using the law wrongly; knowingly asserting a malicious claim with bad motives

  - Not whether underlying suit has merit, but whether process is used for some collateral purpose
  - Malicious prosecution relies on the same evidence

- **Set-off** = not seeking affirmative relief, but a reduction in plaintiff’s recovery; must be liquidated

  - Seems to lead to a more equitable result
  - Don’t want to create inconsistency systemically by allowing defendant to escape subject matter jurisdiction limitations

- **Amendment of Pleadings** = Rule 15 establishes the presumption that amendments should be allowed; Rule 15(a) requires permission when more than 20 days have passed since filing the answer

  - Prejudices the plaintiff unless permission is required – you can’t create an issue later at trial without notice

  - Reasons to deny:

    - Party seeking amendment is guilty of undue delay \( \rightarrow \) is there substantial delay here (1 year) \( \rightarrow \) **David v. Crompton Knowles?**
      - Jacobs v. McCloskey \( \rightarrow \) action filed before statute ran, but amendment was filed after statute ran

    - If there was no excuse at time of pleading to not plead accurately, then you can’t amend – punishment

    - Prejudice = more important issue
      - 15(a) allows opponent to stipulate to the amendment no matter how long the delay is
      - Defendant lulls plaintiffs into not filing suit against Hunter by delaying
Hunter could determine from face of complaint that plaintiff wanted to sue it → plaintiff should be allowed to make an amendment to relation back – 15(c)

- Arguments for prejudice that might be able to defeat motion to amend:
  - Other party can’t get to evidence that is now no longer available
  - If continuance is required right before trial, the party opposing the amendment may be able to argue that the delay itself constitutes prejudice by
    - Defendant has incurred substantial preparation costs for some issues, but not the ones that are brought up during the amendment → problem solved if Plaintiff offers to pay for the costs
    - Passage of time is prejudice per se – memories fail, recollection weakens with time → this argument will probably not succeed, but sometimes it will

- Relation back of amendments = Plaintiff can file complaint against John Doe (pseudonym) Defendants and then amend the pleading to determine the real name of the party being sued → Swartz v. Gold Dust Casino = one of the parties P sued as a John Doe when she slipped on stairs at the casino turned out to be the owner of the casino and property
  - Allowed only if the new claim arose under the same conduct, transaction or occurrence set forth or attempted to have been set forth in the original pleading
  - Emphasis is on the conduct, not a logical relationship
    - D → Is construction the same as maintenance? – No, complaint named maintenance, now the amendment wants to talk about construction
    - P → Whatever the conduct, it resulted in the same occurrence of injury.
    - Evidence test of 13(a) → Swartz should lose her right to amend b/c the evidence that goes to maintenance is not the same as the evidence that proves construction
      - Don’t apply the same evidence test.
      - Blair v. Durham → same right and same duty was breached even though it was breached in different ways – same injury required even if different duty is evoked
        - 15(c) = efficiency and judicial economy; get around the statute
of limitations through a legal fiction
  o Foster flexibility in pleading as long as it does not jeopardize the purpose of the statute of limitations
• Purpose of statute of limitations:
  o Notice = want parties to have fair notice of the nature of the suit/breach
  o Avoid prejudice that occurs b/c of destruction of time sensitive evidence
• More restrictive rules on relation back amendments:
  o 1 who knows the identity and something about the additional party is usually denied relation back
  o No mistake of identification, but deficit of actual knowledge = no relation back

IV. ESTABLISHING STRUCTURE AND SIZE OF DISPUTE

  a. Joinder of Claims = Rule 18 = As a plaintiff you can bring all sorts of unrelated claims against a single party
     - The catch = you can articulate as many claims as you want in a single suit, but the court retains the power to sever claims (Rule 42) – plaintiff is not guaranteed to have all the claims heard in the same suit.
      o Convenient to sever
      o Avoid undue prejudice to the defendant
      o The court thinks its more efficient to hold multiple proceedings
  
  b. Permissive Joinder of Parties = Rule 20 = same transaction, occurrence or series of them = if stuff is sufficiently related → question of fact or law common to all parties
     - Test whether joinder makes sense:
      o Ask whether plaintiff’s claims are relevant to each other
      o Same evidence test → Wigglesworth
      o Common question → Is there a common question to justify joinder of multiple plaintiff’s claims?
      o Convenience and fairness → qualitative judgment that may need to be reconsidered as more evidence comes to light
     - Kedra v. City of Philadelphia → § 1983 lawsuit – family is claiming that its members have been abused over a year and a half as part of a systematic pattern of abuse
      o 8 members of a family
      o Claims are reasonably related
- More convenient for the court to combine the claims into one suit; however, court has to credit the allegation of conspiracy.

**Insolia v. Philip Morris** -> Plaintiffs claim that there was an industry-wide conspiracy to defraud consumers about the addictiveness of cigarettes; allegations are well supported by the facts.

- Individual circumstances differentiate claims enough to not allow joinder:
  - Different brands of cigarettes, different injuries, different time periods – how is this different from Kedra?

- Trial management is the real concern:
  - **Sever** = instead of one lawsuit, there are now three.
  - Judicial resources would be wasted b/c of juror confusion.

- Why did defendant want to sever? -> divide and conquer + protective order (don’t allow parties to reveal the proceedings to the public) = isolate individual plaintiffs which make the conspiracy claims sound very suspicious.
  - Plaintiffs can’t combine resources – bankrupt plaintiffs sooner.

**c. Compulsory Joinder of Parties = Rule 19 =** when someone not a party to the suit should be joined:

- If missing party should be joined, but joinder is impossible, Rule 19 also helps determine whether the case should be dismissed completely or in piece meal.

- Line of inquiry in deciding whether compulsory joinder is necessary -> **Janey Montgomery Scott v. Shepard Niles**:
  - 19(a)(1) -> with the absence of a party, complete relief cannot be accorded among those already parties:
    - **Joint and several liability** = if Shepard Niles and Underwood can be held joint and severally liable, it doesn’t matter whether or not Underwood is in the lawsuit b/c judgment against one is as good as judgment against both.
    - Shepard Niles says one party is necessary, but Shepard Niles is the wrong party.

  - 19(a)(2) -> effect of suit on absent party:
    - 19(a)(2)(i) -> disposition of the action in parties’ absence may impair or impede the absent person’s ability to protect that interest:
      - Lower Court says that decision in the Fed court against Shepard Niles would impair Underwood’s ability to defend itself in the state case.
      - There may be a persuasive effect, but not a mandatory effect (no stare decisis) – there must be a more direct risk:
        - State judges don’t really care what goes on in the Federal sphere.
Pulitzer disagrees, but that case was a trust case that involved the construction of a key argument in both cases.

Marra distinguished → real estate fraud case; putative owner of real estate against the agent; court was going to decide who had valid title to the property and someone was going to own the property after the case – claims of misrepresentation as to title
- Decision against Shepard Niles would not decide any key issue? → suit could decide construction of the contract

Acton distinguished → party was obliged to perform under a K and sued to show that there was no K at all; risk of double liability forced court to dismiss case for not joining a necessary party

Collateral estoppel applies only to people that were parties to the prior action or shared the same interest as parties to the prior action = privity

Shepard Niles and Underwood are going to fight over the nature of their relationship, they are not in privity
- Underwood could seek to intervene in the Federal lawsuit under Rule 24 and argue that it wants to intervene to protect its interest – supplemental jurisdiction.

Fed. Ruling against Shepard Niles is not guaranteed, it’s just speculative.

19(a)(2)(ii) → disposition of the action in the parties’ absence may leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

- Lower court found that Shepard Niles would be held to double or inconsistent obligations b/c they could lose in the federal court and win in the State court.
- Rejected because Fed. decision is binding on all the parties → Shepard Niles could sue for contribution
- It’s possible that there won’t be perfect symmetry at the State and Federal level.
- The possibility that Shepard Niles could be held entirely liable does not mean it was doubly obligated.
- Inconsistent obligations does not mean being subject to multiple litigation where the outcomes are inconsistent.
o Bus hypothetical in Note 6 → if multiple plaintiffs in a bus accident are not joined then different results could stem from the same accident.

d. **Impleader = Rule 14 =** right of defendant to bring in a new party that may be responsible for plaintiff’s claims against it under 3rd party practice
- P → D → 3rd party who is responsible to P
- *Clark v. Associates Commercial* → plaintiff defaults on a loan with plaintiff’s tractor as collateral; plaintiff is injured in the process of defendant’s subcontractor repossessing plaintiff’s tractor; plaintiff sues original loan co. under torts and contract; defendant is trying to bring in the subcontractor who repossessed the truck.
  o Comparative fault regime means that fault has already been apportioned so no claim of implied indemnity can be made.
    ▪ Implied indemnity has been retained in agency actions.
    ▪ Indemnity is covered by Rule 14(a) – “defendant may seek recovery against a 3rd party defendant who is or may be liable to the third-party plaintiff for all or part of the plaintiff’s claim.”
  o Rule 14 is focused on the duty owed by the 3rd party defendant to the 1st party defendant not on the duty owed by the 3rd party defendant to the plaintiff
    ▪ **Derivative liability =** 3rd party defendant is responsible for the tortious conduct that gave rise to the original suit and the defendant is being held *vicariously liable* for actions of the 3rd party defendant
    ▪ Indemnity that defendant is liable from 3rd party is decided on special verdict → jury gets to say how much liability exists by way of indemnification
  o How tenuous can the relationship be between original action and 3rd party suit?
    ▪ *Augenti v. Cappellini* → D deprogrammed P after P was released from the Unification Church; D tried to implead Church
      • Original Action and 3rd party action should be close to the “original transaction or occurrence” test – similar to Rule 13 test
      • If events are too tenuously related, the proceedings may be too complicated and confuse the jury
      • Do claims make a convenient trial package?
    ▪ *Klotz v. Superior Electric Products* → plaintiff ate some bad pork and got trichinosis; P sues cooker manufacturer, D; D tries to implead P’s college for serving bad meat

e. **Interpleader = Rule 22 and 28 U.S.C. § 1335 =** mechanism through which a defendant can require all potential claimants
to join in a single action; pre-emptive strike requiring all potential Ps to join in a single suit

- Rule 22 requires interpleading party to show that there is a risk of multiple liability → State Farm has a suit with P1 from CA seeking $20,000 and a suit with P2 from OR seeking $20,000, so State Farm could have to pay twice? No b/c State Farm could just tell P2 that the money is gone if P1 gets there first. → State Farm Fire & Casualty v. Tashire

- § 1335 is about adverse claimants, not multiple liability → plaintiffs are adverse b/c the fund is too limited
  o If pool was 20 mil., then plaintiffs would not be considered adverse
  o About protecting the claimants right to a pro rata share.
    ▪ Rule 19 – should passengers be treated as necessary parties in the first successful lawsuit of a claimant? – too difficult in this case b/c Canadians aren’t held under American Federal Jurisdiction

- Second – what happens when there is no subject matter jurisdiction?
  o Case against D is dropped, sure D can’t interpleader, but that doesn’t matter
- Interpleader is something D does
- D wants to only pay once – D doesn’t care if all the Ps get their pro-rata share
- Not a bill of peace b/c it interferes with plaintiff’s ability to control the lawsuit it brings – small player like State Farm should not control the entire proceeding

f. Intervention = Rule 24 = device for an outsider who has an interest in a lawsuit to voluntarily join it as a party

- 24(a) = Intervention as of Right = if statute provides applicant with right to intervene or if applicant claims interest in the outcome of the suit
  o Interest = similar to joinder
    ▪ Joinder = should we continue with the case?
    ▪ Intervention = should we allow more parties into the case?
  o Kerr-McGee and American’s interest = potential licensees who are going to have to do environmental impact statements if the case goes against NRC → Natural Resources Defense Council v. US Regulatory Commission
    o A general interest of the public is not a protectable interest under Allard v. Frizzell which was about protecting endangered birds
      ▪ Profit motive = valid; Environmental concern = invalid
      ▪ Procedure determines substance
      ▪ Participation as intervenor = party to the proceedings
      ▪ Amicus curiae = can’t bring issues before the court; only speak when spoken to

g. Class Actions = Rule 23

- Class Action = most suitable device in Civil Rights litigation
- 23(b)(2) --> intended primarily to help Civil Rights cases
- Why do plaintiffs seek certification so often if defendants benefit from deciding only one case?
  o Habit – if plaintiff wants it, defendant doesn’t want it
  o Lawyer’s fee is larger if there is a class action
  o Staving off divide and conquer strategies – individual plaintiffs won’t bring their own claims if they aren’t allowed into the class

i. Concepts of Representation → Hansberry v. Lee – Racially restrictive covenants

- Burke v. Kleiman → defendants stipulated that the proper number of signatures had been received, but argued that changed circumstances made sale legal; Defendants = class to which Hansberrys belonged
  o Defendants = white landlord and black tenant
  o Plaintiff = white people who signed the covenant
  o Filed as a class action to establish res judicata affect
  o Litigation is binding only on the people who participated in the litigation → Class actions can foreclose and bind parties that do not participate in litigation
    ▪ Rule 19; 23(b)(1) and 23(b)(2) → litigants are too numerous for individual litigation to make sense

- Representation → how was the class in Burke sufficiently representative to cover the Hansberrys
  o White property owners do not adequately represent Hansberrys’ interest b/c the white guy just wants to rent whereas Hansberrys own the property
  o Black tenant doesn’t represent Hansberrys’ interest either b/c his interest is much more short term than Hansberry
  o Burke Defendants also mistakenly said that 95% of the owners in the area signed the covenant – Big Mistake -- is bad lawyering sufficient to disqualify representativeness of class?
    ▪ This objection can always be raised by future members of the class action -- therefore we must not allow mistakes to be the basis for disallowing representation b/c it undercuts the very purpose of class action litigation
    ▪ No mistake at all = maybe the lawyer wanted to say this was a valid racially restrictive covenant in order to undermine racially restrictive covenants in general
  o 23(e) → Courts should scrutinize all class action settlements to prevent unfairness
    ▪ Band’s Refuse – shouldn’t judges be detached umpires and not get into the business of forcing settlement or even making sure the settlement is fair?

ii. Certifying Class Actions → Holland v. Steele – class applied to detainees and sentences?

- 4 prerequisites for class certification
  o Does class structure make sense?
- **Numerosity** – efficiency = if all people could participate then a class should be developed
  - Minimum number? → arbitrary
  - Does it matter that class membership might change?
    Today you have sufficient #s, but tomorrow you won’t
- **Common questions of law and fact** → class action would prove economically efficient to prosecute a single defendant
  - Rule 20 – Kedra v. Philly police → like Kedra only applied to both sides
  - Does this particular class make sense?
    - **Typicality** = is individual plaintiff’s claim sufficiently typical of class
      - This person should run his case like any other member of the class would run their cases
      - Still want class action to look like a traditional lawsuit
      - Court can break the class up if claims within the class are different → sentencees v. detainees
- **Representativeness**

iii. Problems of Implementation → Eisen v. Carlisle & Jacquelin

- Plaintiff seeks to represent class of 6 mil. odd-lot traders on the NYSE; P’s personal loss is about $70, but the cost to take provide notice to all of the class members would be way over $225,000.
- Plaintiff must bear the cost of notice in a class action – conflicts with idea that one cannot be held liable without a full trial
  - Decision to grant preliminary injunction feels like an imposition of liability before liability but courts have no problem granting preliminary injunctions
- Court sees class action as a significant advantage to the plaintiff
- 23(e) – Court has opportunity to review settlement
  - Class representative can settle only with approval of the court and court is looking out for the class as a whole
  - Court can not over-rule lawyer’s decision to drop case
- Notice – valuable?
  - Provides potential claimants the opportunity to opt-out if they don’t want to be a part of the class
  - Class member may want to intervene in a lawsuit – may be hard to do.
    - Representation has already been found to be adequate cutting against the second factor of Rule 24 (Intervention)
      - Parties themselves do not adequately represent you
      - Judicial review does not sufficiently represent your claim

V. DISCOVERY

- What purpose does discovery serve?
Narrows and clarifies issues
Obtain pre-trial disclosure of evidence allowing parties to learn more about strengths and weaknesses of your side and the other side
- Surprises aren’t good? – makes it more of a sporting event and derogates from the seriousness of it
- Element of surprise forces attorneys and clients to tell the truth
Encourages settlement
- $E$ (Some expected value for which the parties will settle) = (Possible value of judgment $X$ Likelihood of Judgment) – Costs
  - $E = (P \times J) - C$
- Discovery allows for investigation of these variables
Preserves evidence that may be lost before trial
Embarrassing other side

Initial Disclosure – Rule 26
- Don’t have to turn over facts harmful to the case, but you have to disclose “relevant” material
- The party doing the disclosing decides what is relevant.
- Rule 37(c)(1) $\rightarrow$ failure to disclose in the initial disclosure prevents ability to use the evidence later
- Rule 26(e) $\rightarrow$ duty to supplement – have to constantly be giving stuff up
- Just get the ball rolling

Document Production
- Sets up depositions, foundation for going forward in the discovery
- Documents don’t lie and they don’t forget
- Documents can be destroyed – go for them as early as possible before they are destroyed
- Difficulty is describing with sufficient specificity what documents you want
  - You don’t know what you’re looking for
  - Categorical descriptions
    - Subject matter related – all documents that refer to or mentions a Jan. 1, meeting
    - Certain kinds of documents – reimbursement records in an Anti-Trust case, when parties are spending money, when they are staying at hotels; diaries; calendars
    - All documents that opponent contends supports any allegations in opponent’s pleas
      - If no documents, then file Rule 11
      - If you get documents, then you know their case
Proliferation of electronic documents
- Responding party needs to provide a written response of what will be provided and what will not be provided
- Objections
- Going back in time may be impossible – collapse the time frame
- Geographic restriction

- Assemble and review documents before they are distributed
  - **Document Review** – cull out privileged material (attorney work product) and what may not be responsive to the request

- **Responses to Interrogatories** – Rule 33
  - Questions of the other side
  - Not entirely helpful b/c they are written by lawyers and there is no opportunity to follow up

- **Depositions**
  - Speak directly to the client or the witness
  - Opportunity to follow up
  - “Answer only the question that is asked and offer no additional information”

- **Admissions** – Rule 36 (Not technically discovery b/c they are intended to clarify the issues before trial)
  - Not gathering new information, but testing already gathered info.
  - Unlike Rule 8, a party may only make claim of insufficient knowledge after a reasonable inquiry

- **Managing Scope and Burden**
  - **Davis v. Ross** → P filed motion to compel discovery of 3 docs:
    - D’s net worth and income – Document Production; Depositions; Interrogatories
      - Relevant = what are the facts of consequence to the determination of the action more probable or less probable than it would be without the evidence; common-sense approach
        - Not to compensatory damages
        - Relevant in punitive damages b/c D has to be able to pay damages but only after a punitive damage award has been granted by verdict – NY State law, but not Federal Law, Why?
          - Concerned about creating incentive for parties to make punitive damage claims – **collateral purpose** = sends signal that the other person is bad (prejudices the fact finder); strengthens complaint so you can produce settlement up front
        - Insurance coverage for a claim for defamation – Now required in initial disclosure
        - Wealthy people tend to disregard the rights of other people which is relevant to a claim of defamation
  - D’s lawyer’s bills
• Lawyer is going to be a witness for D and will probably say that P did not do a good job; information that he is biased or prejudiced seems relevant
  ▪ Names of other employees who complained about D
    • Why not just ask for names of people that she has fired in the past?
    • Other side determines what constitutes a complaint against D
  o D filed cross-motion to compel discovery of info. concerning P’s treatment by a psychiatrist
    ▪ Relevant b/c P is suing for mental anguish and P could be crazy; P was experiencing delusions or had a strange opinion of D; mental reasons could have contributed to her dismissal
      • Could be privileged
        o Privilege = as a matter of policy, some things are more important than simply gathering information at trial (eg. privacy)
      • No requirement that person alleging mental distress needs to see a psychiatrist.
      • Waiver theory – party may waive right of privilege by pleading and proving damages surrounding P’s mental condition
    ▪ D’s motives = Signal to other parties who have not yet filed defamation suits that they are going to be in trouble; D may be able to sue P for something in the psych reports; Once the privilege has been waived, the psych reports are public knowledge. D can make P’s life a living hell
    ▪ Protective Orders = other side signs an agreement that it will not use information outside of scope of litigation
  o Kozlowski v. Sears, Roebuck → flaming pajamas
    ▪ Default judgment is entered b/c of D’s failure to produce
    ▪ Interrogatory filed asking Sears to respond with records concerning complaints on the pajamas.
    ▪ Rule 33(d) = option to produce business records → Sears will want to produce all of their complaints
      • All they have to show is that the burden is comparable between P and D.
    ▪ Instead, Sears just stone walls → shifting burden of production makes sense under the “bear your own costs of litigation” theory
      • When the D is so large, shifting the burden is less likely to occur.
    ▪ Can D invoke 33(d) even if stuff is on computer? → Depends on where you are
    ▪ Sears Could have Made Objections
      • Time frame → give us a time frame
• Scope of products involved → narrow request to particular pajamas
• Complaint should be limited to people claiming serious injury
• Geographic → Sears is a multi-national, which Sears are we talking about
• Manufacturer is NOT Sears
  ▪ List of complaints = relevant b/c product liability, so P is looking for proof that the product in general is faulty
    • Would not work in negligence case – b/c negligence is concerned with one particular case, selling defective product to multiple people does not prove that the product sold to you was defective
  ▪ Collateral purpose problem = bootstrap punitive damages on compensatory damages in order to put pressure on the defendant
    • Discovery used not necessarily to find out more about the case, but to induce settlement (collateral purpose)
    • Flip side is Defendant trying to overburden the plaintiff by dumping all its records on the plaintiff
- Exemptions from Discovery = reasons other than probative value
  ▪ Work Product → Hickman v. Taylor → tugboat attorney goes to jail instead of answering interrogatories about his interviews with surviving crew members of a sunken tug boat
    • Disclosing the information means P’s attorney piggy-backing on the work of D’s counsel. It is demoralizing to have to give over the fruits of your labor if you are an attorney.
    • Might deter lawyers from doing an adequate job in preparation.
    • Might put lawyer in position that lying about extent of preparation is more probable.
    • Real concern = risk of discovery will prompt lawyers to do their investigation in a way that would keep pertinent information out of their files – outcome of litigation is less efficient and less accurate
  ▪ Can’t get lawyer’s opinions
  ▪ Work product rule will affect the form of the question → can’t ask for description of lawyer’s investigation techniques
    o Ask for names of witnesses → depose them
    o Ask the question that elicits the fact of the statements made to the attorney
  ▪ 26(b)(3) covers people other than lawyers and only covers documents and tangible things (would have
had no bearing on the deposition of the attorney in this case)
  o Disclosure of work product can be attained through the showing of need or prejudice in the absence of disclosure → not shown in this case
    ▪ Even when work product is ordered, opinion work product is still protected – Redact that shit
  • All work product is NOT the same
    o Ordinary Work Product
    o Opinion Work Product – very, very difficult to obtain
      ▪ Eg. Witness = not credible
  ▪ Attorney-Client Privilege
    • Upjohn v. US → General counsel interviews underlings about supposed bribing of international leaders – protected under attorney-client privilege
      o Client = Everyone who implements advice given by the counsel – down to the low level management
        ▪ Control Group Test = members of senior management that guide multiple operations are the client; CEO’s, members of the Board → too narrow according to court
      o How are we to judge when the privilege is triggered for low level employees?
        ▪ Information is necessary to supply proper legal advice
        ▪ Employees understand that communication is confidential
        ▪ Employee knows that interview is being conducted to get to proper legal advice
        ▪ Former employees may or may not be covered under the attorney-client privilege.
    • Privilege extends only to the communication and not the underlying facts. Underlying facts must be disclosed. Facts themselves are not insulated from discovery simply because the communication is privileged
    • Purpose = promote candor or protect attorney from having to testify against client?
  ▪ In house Experts
• **In Re: Shell Oil Refinery** → refinery blows up; experts working for Shell take pictures and test the part that explodes; P not allowed to discover interviews made of experts not testifying at the trial
  o Don’t want to encourage a system where the P builds its case off the diligence of the adversary
  o Costs alone are not sufficient to warrant discovery of non-testifying expert witness, P needs to pay for it
• **Rule 26(a)(2)** = Expert required to describe all exhibits, list his publications over the last 10 years, list all cases in which the expert has testified in the last 4 years
• **Rule 26(b)(4)(a)** = deposition of experts
• **Rule 26(b)(4)(b)** = applies to witnesses retained, but non-testifying
  o Retain a non-testifying expert b/c if an expert is going to testify against you, you want to retain them and make it harder on the other side since they won’t be able to use the expert
    ▪ Learn more about the case personally
    ▪ Hire them as non-testifying experts and then distinguish the ones you like as testifying experts
  o Courts sanction shopping of experts – juries should decide which expert to believe
  o Attorneys should be allowed the flexibility to change experts.
• **Unaffiliated experts** → **Rule 45**
  o Party may quash a subpoena of an expert working in the area if that expert does not want to be called as an expert
  o Being an expert does not give you immunity from testifying as a witness → if an accident reconstructionist sees an accident, she can be called as an ordinary witness, but she can’t be called as an expert witness.
  
  26(b)(5) - **Trial Preparation Material**
  - **Rule 26(b)(3) Informal Discovery** = Investigation – Fact Gathering without judicial assistance
    o **NO NOTICE REQUIRED**
    o Rule 11(b) requires investigation
    o **Corley v. Rosewood Care Center** → Ds are accused of bait-and-switch tactics in the nursing home industry; P was interviewing non-party witnesses to the case in a highly structured, but still informal interview; D wanted notice of deposition but didn’t have to get it
People are afraid of reprisal or of the formality of the proceedings – may prefer informal discovery

Don’t want to formalize discovery of your own witnesses b/c witnesses get “better” the more times they talk to a lawyer

If you want to nail down other side to a particular decision, formal discovery restricts the ability of a witness to change his testimony at trial.

Formal discovery has evidentiary staying power at trial – ensure that the testimony is admissible before it is changed by the witness

- **Rule 26(c) - Mandatory Disclosure and Protective Orders**
  - Rule 26(a)(1)(C) requires computation of damages up front in initial discovery
    - Current system puts great weight on disclosure of damages → may be a sleeping giant b/c case can be dismissed if you fail to disclose damages; Atypical b/c routine discovery violations do not warrant such harsh sanctions

- **Rule 37 = Sanctioning rule**
  - (c)(1) = Failure to disclose justifies sanctions without an order to disclose
  - (b) → When can an initial failure to disclose warrant these harshest sanctions? → (d) only where there is a complete and utter failure to respond b/c otherwise it violates Due Process
  - (a) → First step to secure sanctions against opposition = Motion for an Order to Compel Discovery
    - Evasive or incomplete responses constitute a failure to answer → doesn’t this lead to (d) which allows sanctions without an order to compel?
      - Designation of evasive answers as a failure to answer applies only to (a) not to (d)
  - (c) also requires meeting or attempted meeting before order to compel is granted → aver in motion to compel that you have met the Rule 37 meet and confer requirements
    - Gives counsel multiple bites at the apple before order to compel is granted

Why does the court allow P to get away with waiting 4 years?

- Court doesn’t like Discovery Motions b/c it wastes the courts time and resources → Courts are extremely hands off
- Pressure to settle cases

**Contrast with Default – less sympathy in Default**

- Party that doesn’t answer complaint in a timely manner is treated with less sympathy than party that doesn’t comply with discovery
- Why not to dismiss case b/c of technical inadequacies
  - One may not use a merits decision to punish a party that has been disobedient, no matter how willful.
  - If there is a link to the merits, Due Process requires some element of volition = Court’s reliance on the Societe Internationale Case → if the
reason for your disobedience is something beyond your control, you can’t be punished; Abiding by the discovery request means breaking Swiss law

- **Ultimate Sanctions are not warranted if the absence of compliance is due to something beyond the party’s control and not due to:**
  - Willfulness
  - Bad Faith
  - Fault

- **Reasons for sanctions**
  - Party will not profit from its own failure to comply
  - Specific deterrence = deter specific party from doing this again
  - General deterrence = National Hockey League v. Metropolitan Hockey Club
    - Inconsistent with Civil Dispute Resolution = Dispute resolution is usually between the parties and should not be used to solve public problems
    - Consistent with Civil Dispute Resolution = in order to assure that the courts are seen as a fair way to resolve conflict, procedures need to be stable.

### VI. SUMMARY JUDGMENT = Rule 56 = “no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”

- **Burden of proof**
  - Burden of persuasion = party must convince the trier of fact at trial of the accuracy of the factual assertions
    - Preponderance of the evidence = 51% certain = more likely factual assertion is correct than not correct
      - Qualitative assessment = When compared to the evidence opposed to it, the evidence asserted has more convincing force than the opposite evidence.
  - Burden of production = does party have sufficient evidence to go to trial in the first place
    - Enough evidence that a reasonable finder of fact could find for the moving party

- **Burden shifting** – affirmative defenses (Gomez) established, the defendant has the burden of pleading the defense and proving it at trial
  - Burden of production shift = Party with the burden of production presents enough evidence that a reasonable finder of fact must find for him – other party must produce enough evidence that would allow a reasonable finder of fact to find for him, but could produce enough evidence to shift the burden back
    - **Judgment as a matter of law** = when the non-movant fails to meet its burden of production

- **SJ v. JAMOL**
Both say party must meet burden of production, otherwise, there is no dispute and the party that has met the burden of production wins.

SJ
- Pretrial
- Movant must show absence of material issue of fact

JAMOL
- In the middle of the trial
- Movant need not show absence of material issue of fact, must simply point out deficiency in other party’s case

How to establish absence of genuine issue of fact
- Maximal = D must offer evidence so compelling that no reasonable jury could find for P on the issues involved = burden of proof shifts; get to what jury must do \( \rightarrow \) traditional approach
  - Kress is probably here b/c policeman had to simply be present in the store to show there was a conspiracy \( \rightarrow \) white teacher kicked out of shops with black students claims a conspiracy between shop owner and cops
    - Inference goes to state of mind, which is notoriously difficult to prove or disprove.
  - D has the burden of proof instead of P – D has to disprove conspiracy before P has even produced enough evidence to prove the conspiracy
- Medium = Meet burden of production or demonstrate absence of proof of other side’s case; enough evidence to support verdict in his favor; jury could find for you \( \rightarrow \) Louis’s approach
- Minimal = D does not have to do anything more than move for summary judgment compelling P to bring sufficient evidence to get to a jury \( \rightarrow \) Currie’s approach
  - SJ becomes a tool for harassment

Celotex Corp. v. Catrett \( \rightarrow \) P = wife of deceased who sues asbestos companies b/c of exposure to asbestos products; No showing that deceased was exposed to Celotex’s products
- Summary Judgment should not be a rare occurrence, but should be more accessible
- Lessen the burden on the moving party
- Moving party has to show something
- White: not enough for moving party to rely on conclusory statements that the P has no evidence to prove his case
- Dissent: 2 ways to meet burden of moving party by referring to the record – show that P’s husband was not exposed to any Celotex products
  - Affirmative evidence that negates essential element of other party’s claim
  - Non-moving party’s evidence = insufficient
- Assumes availability of evidence that may not exist in the real world
- Assumes existence of record with some content – not always the case
  - Subverts notice pleading standards

- **Rule 56(f)** = way to deal with MSJ when record is too thin = delay resolution of MSJ until discovery is made; discretion of the court
  - Different than ordinary discovery b/c this is not as broad as normal discovery and must be narrowly focused on the issues raised by MSJ
  - This must be justified in a stronger way than normal discovery
  - P has to tip his hand at the outset about everything the P has in his case – provides window into P’s case that D would not normally have

- Rule 11 = sufficient investigation to justify MSJ or sanctions are waged
- Moving party is entitled to judgment unless the non-moving party provides evidence that there is an issue of material fact. D does not have to do much to satisfy its burden.
  - In order to rebut MSJ, P must show that there will be sufficient evidence at trial to create trial issue – evidence does not have to be admissible to rebut MSJ.
  - Apply to Kress → D’s MSJ still fails, but for different reasons, b/c P has testimony that a policeman was in the store at the time (not admissible, but it doesn’t have to be)

- Burden shifting is not applicable in real world; MSJ retains its in terrorem effect.

- **Meeting Burden of Production**
  - Test = **slightest doubt test** = if there is no doubt that Porter did not have access to plaintiff’s composition, then summary judgment is proper. If there is the slightest doubt, then summary judgment is not proper
    - **Not good law anymore** → don’t need this test anyway b/c similarity between songs should go to the jury
    - **Arnstein v. Porter** → P = songwriter accused Cole Porter of copyright infringement may have had something to do with Porter’s stooges following him around; P’s proof = the similarity between his songs and Porter’s songs
  - **Demeanor evidence** is **not sufficient to base a SJ** on b/c it disappears with the witness and the reviewing court can’t access it so the appeal would go D’s way anyway
    - To allow P to get to the jury based on the argument that the jury will disbelieve all of D’s evidence would not be fair b/c it could happen in every case → disbelief evidence alone can NOT possible satisfy the burden of production; otherwise burden of production is no burden at all
  - **Less speculation than Arnstein** → Unless there is a reasonable basis for predicting that a witness’ story would provide sufficient evidence to get to a jury, just decide the case on SJ.
- **Dyer v. MacDougall** → P claims that D and D’s wife slandered him in statements made to 3 witnesses not in his presence; in depo, D’s denied making the statements and witnesses denied hearing the statements; P declined opportunity to depose the witnesses again and so SJ was granted
  - When issue = state of mind of D, should SJ be granted for D simply by him supplying an affidavit?
    - No – extrinsic evidence is necessary
      - Circumstantial evidence to create the inference that discrimination was present

- If SJ fails,
  - **Rule 16** → Court creates pre-trial conference schedule
    - Courts also have settlement devices
  - Otherwise it goes to the jury

VII. MOTIONS FOR JUDGMENT AS A MATTER OF LAW = Directed Verdict – mid-trial; Judgment not withstanding the verdict – after trial
  - Standard for taking case away from jury = **Mere speculation is not enough** to provide for JAMOL
    - Gap in evidence (time between 1922 – 1930) does not allow case to go to trial
      - Suspicion that evidence during this time is weak should not be relevant
      - Dr. testifies that the events of 1918 made P crazy and that insanity was permanent
  - Dissent’s standard = without weighing the credibility of the witnesses, there is **no room for difference of opinion** then the case can be decided before jury
  - **Speculation and conjecture should not do the work of probative facts**
    - **Galloway v. US** → P sent to fight WWI in France, when he returns, P is a changed man; from desertion in 1922 – 1930 when he claimed disability there is little evidence about what he was doing; Statute under which he claimed disability requires proof that the injury is permanent and prevents the person from gaining employment; P has to prove that his mental disability lasted from 1919 – 1930; Trial court granted Motion for Directed Verdict before it gets to jury
    - Probabilities don’t matter that much → just a **scintilla of evidence** is necessary to defeat a Motion of Directed Verdict
      - **Lavender v. Kurn** → train switchman dies was it a mail hook on the train or a hobo?
      - Jury’s inability to decide in theory should mean that D wins – what actually happens is that jury can ignore whatever evidence it wants to ignore
        - **Speculation and conjecture is not a problem** → Different from Galloway that says speculation and conjecture should not do the work of probative facts
Jury must accept that which it cannot reasonably disbelieve – if a reasonable jury cannot find in favor of Ps after look at the evidence in the light most favorable to the P, Directed verdict must go to D
- Juries are NOT reasonable
  - Guenther v. Armstrong Rubber Co. → P remembers the tire to be a 15” black wall tire but the defective tire was a 13” white wall tire; No proof that D had anything to do with black wall tires except that D was responsible for 75 – 80% of the tires that the shop sold
  - This matter should go to the jury – juries can believe the word of a scoundrel over forty bishops
- Problem with statistical evidence of probability = says nothing about the actual event – gets only to the generic likelihood of an event happening, but not to the specific

VIII. MOTIONS FOR A NEW TRIAL = Rule 59
- Court may actually weigh the evidence when determining a Motion for a New Trial, but not for JAMOL
- Abuse of discretion standard = overturn denial of motion for a new trial only when the verdict is against the clear weight of the evidence
- JAMOL v. New Trial → Don’t worry too much about this stuff
  - 50(b) = Motion for Directed Verdict after the trial and at that time, the party may also make a 59 Motion for New Trial
    - 50 motion standard = no rational finder of fact could find for the non-mover; more stringent than
    - 59 motion standard = verdict entered against the movant is against the clear weight of the evidence
    - Do both to get access to both standards
  - 60 = Relief from Judgment
    - Rare b/c system values finality
    - 60 = 59 where newly discovered evidence is the reason for the motion, the standard is against the clear weight of the evidence
      - Newly tendered evidence v. newly discovered evidence – not the same to discourage counsel from withholding evidence during the trial
      - New evidence = must be admissible, must be able to overturn the result, must have been discoverable but not discovered during the trial (must have good reason why evidence was not discovered earlier)

IX. PERSONAL JURISDICTION = circumstances under which court has the authority to make a binding determination to particular parties
- TRADITIONAL APPROACH: PRESENCE Pennoyer v. Neff →
  Mitchell = Neff’s lawyer who was owed money by Neff; Neff = CA resident who owned some property in OR; Mitchell sues for his legal fees in OR; Neff does not show up to the Mitchell court and loses his land in
OR; Mitchell sells Neff’s property to Pennoyer; Neff sues Pennoyer for ejectment to recover title to the land claiming that the OR judgment against Neff was invalid for lack of jurisdiction
- **Notice is not enough here** = process from the tribunals of one state does not apply to other states
- The law assumes that **property is always in possession of the owner or his agents, so constructive notice is assumed.**
  - Court is concerned with **Power not with Notice**
- 2 principles of public law, NOT Constitutional:
  - Every state possesses **independent and exclusive jurisdiction** over land and people within its territory
    - Does CA lose its exclusive jurisdiction over Neff if he is served in OR?  → No, both States can assert personal jurisdiction over Neff
    - Is CA forced to recognize judgment in OR?  → Yes, CA’s jurisdiction is dependant on OR’s jurisdiction
  - **No state can exercise direct jurisdiction over people or land outside of its territory**
    - If order in State A compels payment of property from State B, that is pretty direct.
    - If Neff shows up in OR, he consents to the jurisdiction of OR.  How can he give up right to exclusive jurisdiction of CA when he doesn’t have the right?
- **Categories of personal jurisdiction today:**
  - **In personam** = against persons actually present in the state; jurisdiction must be had by personal service or consent
    - **Transient jurisdiction** = game of tag; in order to sue someone in a particular jurisdiction, you must serve them when they are in that jurisdiction – think about serving someone in an air plane
      - **Burnham v. Superior Court** → Burnhams marry in WV, move to NJ. They separate and Mrs. moves to CA with the kids. Mr. is served with divorce papers while on business in CA and challenges jurisdiction b/c he had no contacts with the state.
  - **Pure In rem** = presence of property within the borders of the state; jurisdiction is over the property regardless of who claims possession of it; good against the entire world
    - State wants to build land over someone else’s property, but would not be able to condemn the land if the property owner did not live on the property – it can through in rem jurisdiction
• **Jurisdiction by way of necessity or custom** –
  language resembling justification for in rem = state
  must have right to clean up property rights in the state
  o Pure in rem jurisdiction of Pennoyer

  - **In the nature of rem** = concerned with property rights, but
    only as they relate to individual litigants who hold the property;
    Not good against the whole world
  - **Quasi in rem** = person’s property is within the state, but the
    claim runs against the person; dispute has no relation to the
    property, substance of the case is entirely in personam, but
    state does not have the basis to establish in personam
    jurisdiction, so the State attacks the property
  
  • 2 types:
    o Type 1 = P has pre-existing claim to the
      property; not about property, but about P’s right
      • Sue for specific performance of a K for
        land
    o 2 = claim arises out of rights and duties growing
      out of ownership of the property
      • Liability is based on maintaining
        property – your duty grows out of the
        property

• Real estate is not the only property than can be used;
  bank account, cars, IRAs = property
• Problems = **Harris v. Balk** → P = resident of NC who
  owes Balk $180; Balk = resident of NC who owes
  Epstein $300; Epstein = resident of MD; While P is in
  MD he is sued by Epstein for the debt Balk owed to
  Epstein; P pays the $180 to Epstein in MD; P is then
  sued for $180 by Balk in NC; Balk says MD’s
  judgment for garnishment against P does not control the
  NC court b/c there was no jurisdiction over P in MD
  o Problem is that quasi in rem is based on real
    property and it gets confused when a person is
    the embodiment of debt
  o Marriage exception = resolving status of individual in the jurisdiction
  o Explicit consent to jurisdiction when engaging in a business activity
    that the State has the power to forbid - Where State has power to
    forbid certain conduct, it can condition participation in the activity on
    power over personal jurisdiction

  - **MINIMUM CONTACTS** = minimum contacts with a State sufficient to
    make personal jurisdiction reasonable and just according to our
    traditional standards of fair play and substantial justice
Presence is too imprecise = presence symbolizes the activities of the corp. that make it liable to suit, but it says nothing of the activity that counts as presence

- **International Shoe v. Washington** → D = DE corp. with headquarters in STL; P = State of WA suing to impose unemployment payments on D b/c of D’s business activity in WA; D says we don’t do business in WA therefore WA can’t assert jurisdiction over the employees of D

  - **Reasonableness** = estimated by the inconveniences necessary to make a trial away from home unreasonable – Could D reasonably expect to be sued in forum state?
    - 4 factors of reasonableness for Due Process:
      - State interest in adjudicating dispute
        - Infringing on State sovereignty by granting jurisdiction to another state?
        - No OK interest in this lawsuit b/c Ds have no meaningful connection to OK
      - P’s interest in obtaining convenient and effective relief
      - Interstate judicial systems interest in efficiency
        - Not efficient for Ds to be liable in all jurisdictions just b/c cars move
        - Brennan says people who sell cars avail themselves of laws in all states
      - Interest of State in furthering substantive social policies
        - Brennan says State has strong interest in safe highways
    - **K designating choice of law alone is not a minimum contact**, but can be evidence of minimum contacts
      - K said that FL law would govern any suit = Choice of Law provision → little distinction between choice of law and choice of jurisdiction
      - D was familiar with Ks and expected to have the relationship with P for over 20 years
      - Tried to negotiate with office in MI, but MI office said everything goes through FL
    - Travel costs, infrastructure costs
    - Can’t defend suits in every single jurisdiction
    - Degree of entanglement argument – don’t know any lawyers in WA to defend yourself
    - Where are the witnesses and evidence located
    - Is the nature of the posting targeted in any way
    - What is the D’s benefit of operating in the State
    - Volume of contact

  - **Foreseeability** = **Purposeful Availment** = Did P direct their activities at the forum state?
• Foreseeability of car reaching OK
• Foreseeability of dealer being hauled into court
• **Common sense** limitations → would certain intentional conduct lead to liability in a certain state?
• **Seek to serve** = retailer should expect jurisdiction in those states in which it seeks to serve customers
• Ds have been given **fair warning** that they could be haled into court in forum state
  - **But/for Causation** = Claim arose out of D’s minimum contacts
  - **Proximate Causation** – in some jurisdictions
    - *McGee v. International Life Ins.* → CA resident has a life insurance policy with a CA insurance co. which is bought out by a TX co
      - Not the quantity of the contacts but the **quality of the contacts** that counts
        - Solicitation, delivery of the policy, etc. is what is important – meaningful contacts took place in CA
      - Balancing the conveniences favored P
    - *World-Wide Volkswagen Corp v. Woodson* → Ps = residents of NY, bought car in NY and on a trip across the country, they get in an accident in OK; Ps sue NY companies in OK; Ds = Regional dealers; No jurisdiction in OK
    - *Burger King Corp. v. Rudzewicz* → FL long arm statute; D = MI resident owning franchise in MI who failed to make franchise payments to P, a FL corp.; P brings suit in FL; Jurisdiction in FL b/c of purposeful availment and reasonableness
    - **Effects Test** = CA is the focal point of the injurious story; jurisdiction is based on the effects of FL conduct in CA; Ds aimed their actions at CA making it reasonable for them to be hauled into court in CA
      - *Burt v. Board of Regents* → Dr. sends bad letter of recommendation from NB to CO where P now is; Court says jurisdiction in CO is ok b/c the effects of the negative statements occur in CO
      - 3 prong test for business:
        - D committed an **intentional tort** – not always bomb in STL that injures CA resident in STL, CA resident wants to sue in CA
        - **Forum = focal point of the harm**; P felt brunt of harm in the forum
        - **Forum = focal point of the tortious conduct**; D aimed tortious conduct at the forum
      - *Calder v. Jones* → National Enquirer published uncomplimentary statements about CA actress, P; P sued FL residents/editor and writer of the articles in CA; CA has jurisdiction
    - **General Jurisdiction v. Specific Jurisdiction**
- **General jurisdiction** = when the cause of action does not arise out of or relate to the foreign corporation’s activities in the forum State, due process is not offended by a State’s subjecting the corporation to its in personam jurisdiction when there are sufficient contacts between the State and the foreign corporation; contacts are substantial but unrelated to the claim
  - Contacts have to be **systematic** and **continuous**
  - Contacts must be **substantial** = mere purchases are not enough and training was part of the purchasing
    - As imprecise as specific jurisdiction
  - Analogous to quasi in rem type 3 in which the land in the state is not related to the claim
  - **Home base approach** = Alternative forum to bring a lawsuit when there are questions about specific jurisdictions → you can always sue the Co. in the forum of its headquarters

- **Specific jurisdiction** = cause of action arises out of or relates to the foreign corporation’s activities in the forum State; contacts are substantial and related to the claim

- **Helicopteros Nacionales De Colombia v. Hall** → **P** = Americans killed in helicopter crash in Peru working for a TX oil company; **D** = Columbian helicopter co. who bought plains in TX and had pilots trained in TX; Court says no jurisdiction in TX; No jurisdiction in TX
  - **Stream of Commerce +?** = **D** must purposefully direct action toward the forum State
    - **Asahi Metal Industry v. Superior Court** → **CA** resident injured by tire that bursts on his motorcycle, sues Honda and innertube maker, Cheng Shin – Taiwanese Co., in CA; Cheng Shin counterclaims against Asahi, Japanese Co.; jurisdiction in CA denied b/c it is not reasonable
  - **Minimum Contacts on the Internet**
    - No effects test b/c no real harm directed at the forum state
    - Active, interactive and passive distinction
      - **Active** = website is reaching out to the reader/consumer
      - **Passive** = website is just a posting
        - Becomes a problem in defamation cases – just posting defamatory statements invite jurisdiction wherever the person being defamed is.
        - E-commerce = are new theories of jurisdiction necessary?
          - Where is a company like Amazon located? – Where does it have substantial contacts?
            - It’s present everywhere.
- **Long Arm Statutes** = encourages courts to push personal jurisdiction to boundaries of Due Process Clause
  - Cause of action **arising from the doing** any of said acts
  - **Gray v. American Radiator & Standard Sanitary Corp.** → water heater blows up in IL, Company that sells valves to OH company that makes the heaters can be sued in IL for strict products liability
  - **Stream of commerce** theory of jurisdiction
    - Location of tortious act = where the injury occurs

- **In rem – minimum contacts**
  - **Sequestration of property violates Due Process** b/c it infringes on rights of property owner where there are not sufficient procedural safeguards in place → not fair
    - Property rights have been infringed upon, but it is insignificant b/c the only reason we took your property is to get you to appear in court – once you are in court, you get your property back
    - Seizure of property without Notice? → you were given notice when you tried to do something with the property and were unable to do it
  - **Shaffer v. Heitner** → Plaintiff is a non-resident of DE who owns one share of Greyhound stock brings suit in DE b/c of activities that took place in OR; also filed an order of sequestration to get to the stocks in DE; Defendant is a DE corp.; Derivative lawsuit = individual shareholder believes the company is doing something wrong and brings suit to discipline company
    - Actual presence of personal property (i.e. stock certificates) doesn’t matter b/c it is intangible

- **Consent instead of Power**
  - Appointing an **agent for service of process** → **implied consent** = Hess v. Pawloski → P = resident of MA who sues D in MA for personal injuries suffered during a car accident in MA; D = PN resident; MA statute says that by driving in MA you appoint the registrar as your agent for purposes of service of process in the state of MA; Registrar mails you notice
  - Direct affirmative conduct that indicates consent
    - **Insurance Corp of Ireland v. Compagnie des Bauxites De Guinee** → P = DE corp owned by PA and Republic of Guinee where it operated mines and had a $10 mil. insurance policy with D an GB corp.; P sued on insurance policy in PA Fed.
Court; D filed answer in the case and then refused to allow some discovery but allows some discovery b/c it doesn’t think jurisdiction is right

- Consent theory = by D consenting to some discovery, they consented to jurisdiction
  - The manner in which you challenge personal jurisdiction can count as consent to jurisdiction.
  - Consenting in a \textbf{K} to the forum
    - \textit{Carnival Cruise Lines v. Shute} \rightarrow \textbf{Forum Selection Clause} =
      \begin{itemize}
        \item P = WA residents who take a cruise with D to Mexico; P is injured and wants to sue in WA; D wants to dismiss for lack of jurisdiction in WA b/c there was a forum selection clause on the ticket that said D could only be sued in FL; Court agrees with D, Ps must sue in FL
      \end{itemize}

- \textbf{Choice of law} \rightarrow Plaintiffs seek to sue in places where there is favorable law
  - \textbf{Hyper-fragmentation} = most jurisdictions apply a unique approach to Choice of law problems
  - Constitutional limitations on choice of law are unlikely to meaningfully affect issues in this area
  - Determination of personal jurisdiction and venue will determine which body of state law applies
  - \textbf{Governmental interest test}:
    - Which state has the greatest interest in resolving this litigation?
  - \textbf{Significant contacts test}

- \textbf{Notice Rules} 3-6 & 17 = 14\textsuperscript{th} Amendment = requires reasonable notice and right to be heard
  - NOT JURISDICTION REQUIREMENT – still very important
    - Additional Constitutional requirement
  - Notice requirements:
    - Reasonably calculated to apprise interested parties; if alternative way is less likely to provide notice, then use traditional notice
    - Publication ok where person cannot be identified
    - \textbf{Rule 4} = service of summons and complaint
    - \textbf{Rule 5} = once service of process has been achieved, all subsequent filings can be delivered through mailing

- \textbf{Venue} = determines where within a court system that already has power to decide the case the case can be brought
  - 28 USC 1391-1392
  - \textbf{Convenience and reasonableness} = where the evidence is, what gives rise to the lawsuit
  - Separate provisions that apply to corporations
  - Focus is on \textbf{what events give rise to the claim} under §1391(b)
    - Location where a substantial part of the events or omissions give rise to the claim \rightarrow events and omissions that give rise to
the claim = varies based on the substantive law underlying the nature of the claim

- §1391(b)(3) = fall back where no venue is proper = liability occurs outside of the country and no defendant is a resident of the district
- Bates v. C&S Adjusters → P entered into credit transaction while living in PA then moves to NY; Creditor employs C&S who mails collection notice to PA address then post office forwards to NY address; P wants venue in NY

Discretionary Decline of Personal Jurisdiction – when a court declines to extend personal jurisdiction = transfer of a case from one court to another

- Dismissal for forum non conveniens
- 28 USC §1404 = transfer of civil actions from one civil court to another
  - §1404 allows a court to transfer a case even if it doesn’t have personal jurisdiction!
- Courts should use transfer devices to preserve claims where it is possible to dismiss
  - Transfer is easier to obtain than a dismissal
- Forum non conveniens = case dismissed b/c there is a better court to hear the case
  - Standard of review = abuse of discretion
- Public and Private Factors analysis
  - Private Factors = substantial showing, but not too detailed, that the alternative forum is more appropriate – courts are skeptical b/c lawyers exaggerate the amount of witnesses and evidence
  - Public Factors = choice of law issue should be invoked to favor dismissal – having uniform law makes litigation more manageable; Scotland has a very strong interest in the litigation
    - Actually choice of law points toward PA law, but the court circumvents choice of law with a public factor analysis
- Piper Aircraft Co. v. Reyno → P = representative for family members killed in air crash in Scotland; brought suit in CA state court that was moved to Fed. Court in CA that was transferred to PA District Court; D = airplane co. whose plane was manufactured in PA and OH; D wants to move to Scotland; dismissed for forum non conveniens

X. SUBJECT MATTER JURISDICTION
- Diversity of Citizenship = 28 USC § 1332(a)
  - Complete diversity = none of the Ps or Ds can be from the same state
    - Romero exception to complete diversity rule = party can disregard non-diverse party if parties are before the court on federal question jurisdiction
  - Citizenship = domicile not just resident
    - Domicile =
• Taking up residence in a different domicile with
• The intention to remain there
  o Home town; bought property; jobs; driver’s licenses; where they register to vote
  ▪ Abuse of discretion
  o Claim has to be for more than $75,000 = Good faith test
    ▪ Amount awarded doesn’t matter – complaint is what is important
  o Mas v. Perry → Ps = Mr. Mas (France) + Mrs. Mas (MS) living in LA; D = LA resident who rented to Ps and watched them through a 2-way mirror; Ps win $20,000 altogether; diversity = ok

- **Federal Question = 28 USC § 1331 = Art. III, Sect. 2** – extending to all cases in law and equity arising under this Constitution, the Laws of the US and Treaties made or which shall be made under their Authority
  o If federal statute is raised as a defense instead of a part of the complaint, the case does not arise under the laws of the US; not a federal question
    ▪ Arise under = means something different when it appears in the Constitution (broad) and when it appears in the statute (narrow)
    ▪ Osborn v. Bank of the US; federal question is involved in any claim against a federal bank even if the claim is not raised by the bank itself
      • Exception = When defense is a serious federal question – eg. 1st Amendment defense to liable suit
  o Policy reasons for fed. question jurisdiction:
    ▪ Fed. judges are more competent in interpreting fed. law
    ▪ Fed. judges are more sympathetic to federal law
    ▪ Promotes uniform interpretation
  o Well-pleaded complaint rule = courts need to look closely at the complaint to make sure the P has made a federal claim
    ▪ Sometimes federal jurisdiction is proper if the state claim has a federal ingredient to it
  o Louisville & Nashville R&R v. Mottley → Ps = Citizens of KY injured on the RR and released Ds from liability in exchange for lifetime free passes; Ds repeal their free pass based on a statute that disallowed passes; No federal question b/c federal statute raised as a defense
  o Does the statute authorize a [private right of action](#)? – Private citizen would be able to file suit under the FDCA, but there is no private right of action therefore the case is not federal
    ▪ Implied private rights of action = courts are hesitant to do this b/c there are too many statutory provisions and there would be too many lawsuits filed; Courts = gatekeepers; Factors =
      • Plaintiffs are not part of the class for whose special benefit the statute was passed
• The indicia of legislative intent reveal no congressional purpose to provide a private cause of action
• Federal cause of action would not further the underlying purposes of the legislative scheme
• The respondents’ cause of action is a subject traditionally relegated to state law
• Ross v. AH Robins = Federal Insider Trading

○ **Federal Court has jurisdiction to determine whether it has jurisdiction**

○ Federal jurisdiction can be found if the vindication of a state right turns on Federal law → litigation provoking problem
  - Violation of the federal labeling standards would be evidence to establish state law claims of negligence
  - Smith v. Kansas City Title & Trust = still good law; talks about the state law claim being an ingredient of the federal question

○ **Merrell Dow Pharmaceuticals v. Thompson** → Ps = Canadian and Scottish residents filed suit against Merrell Dow in OH state court claiming that babies suffered birth defects b/c of mother’s ingestion of Bendectin; Ps claim drugs were mislabeled under Federal statute FDCA; no private cause of action under FDCA therefore no federal question

- **Supplemental Jurisdiction = 28 USC §1367**

  ○ **Pendent Jurisdiction** = power to decide state law issues raised by federal claims and state law issues sufficiently related to federal claims
    - **Pendant claim jurisdiction** to the COBRA claim gets all of the state claims filed by GA P against the Hospital into the case → all arising from the common nucleus of facts
    - **Pendant Plaintiff jurisdiction** to the COBRA claim gets all of the state claims filed by the AL P against the Hospital into the case
    - **Pendant Defendant jurisdiction** to the COBRA claim gets all of the state claims filed by the GA P against the Doctor b/c it arose from the common nucleus of facts
    - **Pendant Plaintiff + Pendant Defendant** to the COBRA claim gets all of the state claims filed by the AL P against the Doctor b/c it arose from the common nucleus of facts
      - Not favored, but permissible

  ○ **Ancillary Jurisdiction** = jurisdiction to decide claims raised by the defendant against the plaintiff or some third party that the court does not have original power over that are sufficiently related to the primary claims raised by the plaintiff

○ Constitutional limits = 2 step analysis to determine whether the penumbra of federal jurisdiction should extend to claims and parties that are related to the claims or parties that the court clearly has jurisdiction over:
Determine whether there is a **substantial federal question** involved in the litigation – Is the federal question colorable?:

- Federal law specifically creates a cause of action
- Implied private cause of action created by Federal Law

**Same transaction or occurrence** – State law claims have to arise from a common nucleus of operative fact

- Are the facts sufficiently related to justify lumping → is that fair to defendant.
- Facts don’t all have to be identical, but they must overlap
- Common sense balancing =
  - Judicial economy
  - Fairness – would confusion result?

1367:

- a = Supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Art. III
  - Constitutional limits = Statutory limits
- b = Court can NOT exercise jurisdiction in these cases
- c = Why jurisdiction may be declined:
  - claim raises a **novel or complex issue of State law**
  - claim substantially **predominates over the claim** or claims over which the district court has original **jurisdiction**
  - district court has dismissed all claims over which it has original **jurisdiction**
  - exceptional circumstances in which there are **other compelling reasons for declining jurisdiction**
    - Gibbs → juror confusion

**XI. ERIE DOCTRINE = Choosing between federal and state law**

- *Swift v. Tyson*
  - Federal General Common law = comes from the minds of judges; brooding omnipresence in the sky
    - They don’t know whether they got the law right – the only limit is the judge’s reason
    - State common law = the same thing on a State level; therefore Story says Federal Courts should not defer to State courts
  - Rules of Decision Act = the laws of several states, except where the constitution, treaties, or statutes of the US shall otherwise require or provide, shall be regarded as rules of decisions in trials at common law in the courts of the US
    - Federal courts should follow state positive law (statutes) but not state common law
Erie RR v. Tompkins

P was hit by a train part while walking near the court; under PA law, RR is liable for gross negligence; under Fed law, RR is liable for ordinary negligence; D = NY co.; P = PA resident sued under diversity

- Rejection of Swift – only authority for law is the State
- There is no federal general common law – Constitution commands federal judges to follow State common law and can’t develop laws on their own
  - Federalism Argument = Court was overreaching their Constitutionally mandated power
    - Congress never bestowed power to federal courts to make up their own law and the courts can only do what Congress says they can do
  - State Enclave Theory = there are areas of state power beyond the meddling of other powers; sphere of State autonomy within which Fed Courts can’t meddle
  - Rules of Decisions Act says nothing about creation of federal common law – only talks about application of State law

Federal Courts can make procedural rules on their own, but must follow State substantive rules

- Procedure v. substantive test = something that concerns merely the manner and means of enforcing a state right need not be done in the state way
  - Look to outcome = Fed. courts must apply state rules if applying the federal rule affects the outcome of the proceeding
- Policy of Erie
  - Uniformity in outcomes – dual system is hostile to the reign of law
  - Promotes fairness – Ps should not be able to circumvent state statutes of limitations by forum shopping
  - Accuracy
    - Problems – how much do federal courts have to emulate state courts = even down to paper size
      - Does it apply to federal question/supplemental jurisdiction? – probably
- Byrd Balance of interest – affirmative countervailing considerations
  - Federal interest in having its rule applied
    - 7th Amendment Rule – but does not require juries, just preserves right to jury trial = General preference for juries, but not requirement
    - Rule 39 = Use of advisory juries, not compulsory and not substitute for true jury
    - Federal system = independent so federal courts can do it their way if they think their way is better
      - Could obliterate State procedural law
  - Federal disruption
- State interest in having its rule applied
  - The difference between State and federal law should NOT promote **forum shopping** or **unfair discrimination**
    - Focuses on aims of Erie = makes sense to expect most litigants to play by the rules of the court system they choose
    - Purpose of Diversity Jurisdiction = forum shopping
      - Danger is that litigant can strategically bring the case in federal court to improve chances of prevailing
  - Abandons balancing test
    - Erie is largely intact – focus on the twin aims of **discouraging forum shopping and the harms to litigants b/c of discrimination**
      - Federal Courts are forbidden from creating substantive common law, but do allow for procedure
      - **Some balancing of countervailing interests**
    - Federal Rules of Civil Procedure are safe – Courts will apply them

**XII. PRECLUSIVE EFFECTS OF JUDGMENT**

- **Res Judicata** (Claim preclusion) = bars litigation of the same claim in a subsequent proceeding if there has been a previous judgment; can bar litigation of issues not even raised in the first case
  - **Traditional approach** = Only the same cause of action is barred; Claim is centered around rights and duties
    - **Rights and duties** = antitrust is a lot different from racial discrimination
  - **Same evidence standard (counterclaims)**
    - Probably would have been ok – first P would have had to establish racial animus, second P would have had to prove attempt at competition and conspiracy among groups to stifle competition
  - **Why claim preclusion?**
    - Judicial economy = don’t have to go through new lawsuit to resolve claims
    - Pressure on the parties to put all the claims in one suit to settle the matter once and for all – Rule 18 says you can join claims freely; no incentive to join claims necessary
      - Too many claims = confusion for the jurors
    - Avoids inconsistent outcomes = we want consistent outcomes between parties
    - Court can respond to threat of harassment – stops P from filing multiple lawsuits against same D
  - Claim foreclosed if it arises from the **same transaction or occurrence** = pragmatic and subjective test
    - Are facts related in time, space, origin, or motivation?
    - Whether they form a convenient trial unit?
    - Whether their treatment as a unit conforms to the parties’ expectations or business understanding or usage?
- Second judge, not 1st judge answers these questions – denial of ability to join claims in the first lawsuit cannot be used as a basis of filing second lawsuit (should have appealed)
  - No res judicata analog to the necessary party joinder
  - Manego v. Orleans Board of Trade → Manego = P who wants to open a disco next to a skating rink; Willard = owner of skating rink who tells the Board of Trade to not give Manego a license; In the meantime, the skating rink closes down and is sold to a new developer who turns the rink into a roller disco; P files suit against Board of Selectmen and Willard for racial discrimination – presents only 3 affidavits; not sufficient motive of intent established so court grants summary judgment against P
    - P files a new suit against Willard and Board of Trade for antitrust violations – conspiracy to stop him from competing; presents a lot more evidence
      - Court says this theory should have been raised in the first case
  - Collateral Estoppel (issue preclusion) = binding affects of a decision of a particular issue in a prior case; once a judgment has been made on a particular issue, no more litigation on that issue
    - If the first suit is resolved on the merits, then the party is collaterally estopped from relitigating
    - If the first suit is not resolved on the merits, but an issue is resolved, then a party is directly estopped from suing on the issue
    - Process for deciding what issues were resolved in the first case
      - Pleadings
      - Transcripts
      - Justice of the Peace’s opinion
      - Talk to the jurors? – no b/c they are not logical all the time
      - Reason our way to the conclusion
    - Little v. Blue Goose Motor Coach Co. → P = Dr. injured in a car accident with bus owned by D; D sued and won for damages to the bus on a negligence theory in justice of the peace proceeding; P sues in city court for negligence of the bus; During the case, P dies converting the case into a wrongful death action
      - Willful negligence claim is also barred – 1st case decided that the bus company was not negligent; if it had been it would not have recovered b/c that evidence would have barred recovery under the contributory negligence theory
      - Widow is bound to the justice of the peace proceeding even though she wasn’t a party to the proceeding
        - Privity = Court treats widow and P as the same party; successor in interest
        - No privity = if widow was in the same car as P; difference between privity and proximity/participant
    - Non-mutual offensive collateral estoppel
 Mutuality = bound by the outcome if it went the other way
  • Plane crash; if you’re on a plane that goes down, you’re
    injured but you don’t die; ½ of the passengers lose
    lawsuit and the airline is found not to be negligent; You
    want to file suit alleging negligence, but you can’t b/c
    you are bound by the previous decision

 Offensive = P is saying this issue was already decided and you
 (D) lost, therefore give me my $

 Class Actions are non-mutual offensive collateral estoppel =
 identify the class, subdivide the class and make sure the
 representatives of each subclass look exactly the same
  • Impose special verdicts
  • Rule 49 = general verdicts accompanied by
    interrogatories; to tie down the issues that have been
    decided

 o Even if issue preclusion is not used, a previous case can be used as
  stare decisis in deciding the new case