CIVIL PROCEDURE OUTLINE

I. Jurisdiction Over the Parties or Their Property

A. The Traditional Bases for Jurisdiction—Pennoyer v. Neff—
   i. RULE: Where the object of the action is to determine the personal rights and obligations of the parties, service by publication against nonresidents is ineffective to confer jurisdiction on the court.
   ii. First off, Mitchell sued Neff for unpaid attorney's fees. A default judgment was entered in favor of Mitchell. The property was sold to Mitchell, Mitchell sold it to Pennoyer. Neff is now saying that the court didn't have jurisdiction in Mitchell v. Neff.
   iii. Historical Basis for Jurisdiction
      a) Citizenship—you get benefits of being a citizen, so the state can extract obligations from you.
      b) Consent
      c) Presence in state
         • Person
         • Property
   iv. In Personam: court exercises its power to render a judgment for or against a person by virtue of his presence within the state's territory or his citizenship there
   v. Quasi in Rem: court renders a judgment for or against a person but recovery is limited to the value of property that is within the jurisdiction and thus subject to the court's authority. This is what Pennoyer v. Neff would have been now. If they would have attached the land, this is where we would be, and OR would have had jurisdiction over Neff.
   vi. In Rem: court exercises its power to determine the status of property located within its territory, and the determination of the court is binding with respect to all possible interest holders in that property.
   vii. The US Sup Ct takes this law from the Full Faith and Credit implementing statute. The second court only needs to take the first court's judgment into account if the first court had jurisdiction. Full faith and credit doesn't apply because there is no jurisdiction. We are told that there is no jurisdiction by public law. (international law). Due process would apply now, but it didn't then because the 14th amendment hadn't been passed yet.

B. Expanding the Bases of Personal Jurisdiction—Hess v. Pawloski—
   i. RULE: In advance of a nonresident's use of its highways, a state may require the nonresident to appoint one of the state's officials as his agent on whom process may be served in proceedings growing out of such highway use.
   ii. MA statutory law says that the registrar of motor vehicles becomes an agent for any nonresident driving on the state's roads. Thus service can be made to that agent.
   iii. The court says that this sort of implied agent isn't substantially different from explicitly providing an agent for service.
   iv. The court creates a preference for the citizen of the state where the action occurred. In terms of evidence this makes sense.

   i. RULE: For a state to subject a nonresident defendant to in personam jurisdiction, due process requires that he have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.
   ii. Due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he has certain minimum contacts with it such that the maintenance of the suit does not offend “traditional notions of fair play and substantial justice.”
   iii. General Jurisdiction: D must have Continuous and Systematic connections with the forum state and the cause of action must arise out of forum state activities
   iv. Specific Jurisdiction: D's connections with forum state arise from an isolated act, and the cause of action arises out of forum state activities
   v. If the service to the salesman is irrelevant, then its a huge step. There isn't a presence of person required. The test becomes minimum contacts. Service of process is irrelevant for due process reasons (might be relevant for other reasons)
   vi. “Minimum contacts...such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'” would support personal jurisdiction over a defendant.
      a) D, by choosing to engage in activities in a state, submitted to litigation there if claims arose out of those voluntary activities in the state.
      b) This is true even if D cannot be served in that state
      c) P may only assert claims against the D that arise from those voluntary contacts.
      d) The D who purposely avails herself of the opportunity to conduct activities in the forum state can expect to be sued there for claims that arise from that relationship.

D. Specific Jurisdiction and State Long-Arm Laws
   i. The Development of Long Arm Laws
a) **Gray v. American radiator & Standard Sanitary Corp.**
   - **RULE:** Whether a nonresident activity within a state is adequate to subject it to jurisdiction of the state depends upon the facts of each case, and the relevant inquiry is whether the defendant engaged in some act or conduct by which he invoked the benefits and protections of the forum.
   - *said if you manufacture products and put them in a stream of commerce you can be sued wherever they wind up. There is no such stream of commerce in the case of a retail seller.*

ii. **Hanson v. Denckla**—
   a) if one state has already entered a judgment in a case, then under full faith and credit other states must recognize that judgment.
   b) if there are defects in personal jurisdiction, then the other states might be able to avoid recognizing the judgment.
   c) It is essential in each case that there is some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.

iii. **World-Wide Volkswagen Corp. v. Woodson**—products liability case
   a) **RULE:** The sale of an auto by a corporate defendant is not a sufficient purposeful availment of the benefits and protection of the laws of a state where the auto is fortuitously driven there so as to constitute the requisite “minimum contacts” with that state for personal jurisdiction purposes.
   b) Due Process Clause “does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations.” Even if the D would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another state, even if the forum state has a strong interest in applying its law to the controversy, even if the forum state is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment.
   c) The Supreme Court distinguished between foreseeability that a product would go to a state and foreseeability that the D would be sued there based on deliberate contacts. The foreseeability that is relevant to personal jurisdiction is the foreseeability that “the D's conduct and connection with the Forum State are such that he should reasonably anticipate being haled into court there.”
   d) The burden of defending in a foreign state will be considered in light of other factors, including:
      - P's interest in obtaining a remedy
      - Forum state's interest in adjudicating the dispute
      - shared interests of the states in furthering substantive polices

iv. **Keeton v. Hustler Magazine**
   a) They sell magazines in New Hampshire. But most of the damages did not take place in NH.
   b) For defamation, you come into court for every state in the one court you go to.
   c) Court says its a choice of law problem, so they duck the personal jurisdiction.

v. **Kulko v. Superior Court**
   a) Mother sued for modification of child support agreement. Father bought plane ticket to send daughter to live with mother from NY to CA.
   b) Mother claimed jurisdiction under long-arm statute.
   c) CA Sup court says that by buying the ticket he caused an effect in California—mother incurred financial harm because she had increased child care costs
   d) There is no jurisdiction because:
      - Father did not purposefully avail himself of the benefit and protections of California laws—he just did what was right for his family
      - Father benefits from absence of kids from NY, not from presence of them in CA. Benefit comes from the leaving NY.
      - Mother left the domicile, so there's a notion that she should have to come back.

vi. **Burger King Corp. v. Rudzewicz**
   a) **RULE:** A part who establishes purposeful minimum contacts with a state is subject to that state’s exercise of personal jurisdiction over him.
   b) Contacts that Rudzewicz (in MI) had with Burger King in FL were purely on paper—Rudzewicz never went to FL
   c) Tactical use of personal jurisdiction to determine what law applies

vii. **Asahi Metal Industry Co. v. Superior Court**
   a) **RULE:** Minimum contacts sufficient to sustain jurisdiction are not satisfied simply by the placement of a product into the stream of commerce coupled with an awareness that its product would reach the forum state.
   b) Do you need a plus factor to the stream of commerce for minimum contacts? The conservative justices say yes, there needs to be a plus factor. They want to overturn Gray. This would apply to a stream of commerce anywhere.
   c) Even if Asahi had minimum contacts with California, it would be unreasonable to assert jurisdiction over Asahi
on the facts of the case.

d) In some cases, even if the defendant has established deliberate contacts in the state that gave rise to the P's claim, it will be unreasonable for the court to exercise jurisdiction over the D.

e) First, the D must establish deliberate contacts focused on the forum state. If she has, the interests of the P and the forum state become relevant on the second prong of the test, whether it would be fair and reasonable to exercise jurisdiction.

viii. *Hilicopteros Nacionales De Colombia SA v. Hall*

a) RULE: Purchases of equipment and training of personnel may be insufficient to confer personal jurisdiction.

E. New Bases of Jurisdiction—Technological Contacts

i. *Bellino v. Simon*

a) RULE: Personal jurisdiction cannot be based on one unsolicited telephone call from the forum state to a nonresident defendant.

b) What if there hadn't been a business relationship between the defamer and the customer, and the only economic impact was the customer not buying from the defamed party?

c) Does it make sense to differentiate between the one telephone call defendant and the multiple e-mail defendant?

ii. When the Internet first started, it was sufficient for jurisdiction, but recently we have moved away from that. The California Supreme court held that it wasn't enough for jurisdiction to advertise on the web for an illegal DVD copying software package, even though there is a harm in California.

iii. Australian courts allowed Australians to sue the owners of the Wall Street Journal in Australia for defamatory information on their website

F. Jurisdiction Based Upon Power Over Property

i. *Harris v. Balk—*

a) Harris owes Balk $180, Balk owes Epstein $344. Epstein institutes a garnishee proceeding against Harris for the $180, and Harris pays. Then Balk tries to recover the $180 from Harris

- E v. B
- B v. H

b) They garnish the debt instead of serving papers because the clinging debt is property. Wherever Harris goes, he takes with him Bulk's property—the right to be paid.

c) So presence of property within the state is used for jurisdiction.—quasi in rem jurisdiction

d) Protect due process by keeping the judgment in the first case open for one year

ii. *Shaffer v. Heitner—*

a) RULE: Jurisdiction cannot be founded on property within a state unless there are sufficient contacts within the meaning of the test developed in *International Shoe*.

b) Heitner, on behalf of the shareholders, sues Greyhound’s officers and directors in Delaware since that is where Greyhound is incorporated, even though the officers and directors weren't in Delaware.

c) 28 officers and directors being sued, only 21 own stock so DE only claims jurisdiction over those 21. Each of them has a choice. Either 1) don't show up and forfeit the stock to the state, or do show up and you have consented to in personam jurisdiction.

d) The Sup Ct applies the *International Shoe* test and holds that there are no minimum contacts, so DE can't have jurisdiction.

e) En rem cases aren't going to be changed, because the property will be enough to establish minimum contacts in these cases.

f) In quasi en rem minimum contacts are required. But *Mitchell v. Neff* is still okay, because the quasi en rem can still be used because they meet minimum contacts.

g) Why would you keep using quasi en rem instead of using the long arm to get in personam? Well, the long arm might not extend to all constitutional bounds. But if you can use in personam, you should, because it’s broader.

G. A Refrain: Jurisdiction Based Upon Physical Presence

i. *Burnham v. Superior Court*

a) RULE: The 14th Amendment does not deny a state jurisdiction over a person personally served with process while temporarily in a state, in a suit unrelated to his activities in the state.

b) Service of process within the forum state is enough to confer jurisdiction. That is, physical presence is enough.

c) Transient jurisdiction is still ok. *Pennoyer* is still alive here. Otherwise, though, minimum contacts are the rule.

d) If you look back to *International Shoe*, it specifically says that if you are in the forum state then it doesn't apply!

II. Providing Notice and an Opportunity to be Heard

A. The Requirement of Reasonable Notice

i. Rule 4

a) (e) If the lawsuit is in a district where a party is, that party can be served in that district.

b) (k)(1)(A) If you sue in federal court, you use the state's long arm statute to bring someone in from outside of the state. And that long harm has to be constitutional—therefore there have to be minimum contacts between the person to be served and the forum state. This is much more commonly used than (k)(1)(D) below.
(k)(1)(D) Some federal statutes have long-arms built into them, like in anti-trust cases. So congress has the power to create a nationwide long-arm. There aren't very many statutes that have these types of provisions.

(k)(2) If you have a foreign defendant who does not have minimum contacts with any one states, but who has minimum contacts with the nation, then under a claim under federal law then the fed can serve process.

ii. Rule 12

a) There is still a special appearance, but it’s not called a special appearance anymore.

b) Hypo
   - T-1 Complaint filed
   - T-2 D files an answer denying liability
   - T-3 D files motion re no personal jurisdiction
   - Rule 12 (b) and (h)(1) show that the motion re no personal jurisdiction is untimely. If we flipped what happens at T-2 and T-3 we would be ok. This is because the pleading touches the merits, and touching the merits bars any claim about jurisdiction. You could also include a defense of no personal jurisdiction in the answer denying liability.

c) Hypo:
   - T-1 Complaint Filed
   - T-2 D files motion for lack of venue and loses
   - T-3 D files an answer denying liability and defense of no personal jurisdiction
   - Under 12(g) this would be untimely, because the motions for the things like venue or personal jurisdiction have to be consolidated into one motion or you waive those claims.
   - Under 12(h) you don't waive the defense of no federal subject matter jurisdiction. Doesn't matter when this comes up.

iii. Mullane v. Central Hanover Bank & Trust Co.

a) RULE: In order to satisfy due process challenges, notice must be by means calculated to inform the desired parties, and, where they reside outside of the state and their names and addresses are available, notice by publication is insufficient.

b) About a bank that starts, under permission of a NY statute, putting its trusts together into a common trust. The lawsuit re: the rights of the principle beneficiaries and the income beneficiaries (Mullane).

c) International Shoe does not apply to adequacy of notice or adequacy of process

d) The bank posted notice in a local newspaper, despite the existence of out of state beneficiaries. Sure, the beneficiaries have an agent in the state, but that agent is the bank (D)!

B. The Mechanics of Giving Notice

i. Introduction

a) Process consists of a copy of the P's complaint, together with a summons directing the defendant to answer.

b) Service is made by personal delivery of the summons and complaint to the D.

c) In 1983 Congress decided that the summons and complaint could be sent by ordinary first class mail, together with a form for acknowledging receipt of service. If the acknowledgment form was not returned, P had to affect service through some other means authorized by the Rules. A D who didn't cooperate had to pay the costs.

d) In 1993, modified the rules. An action commences when the P sends a form entitled “Notice of Lawsuit and Request for Waiver of Service of Summons,” by mail or some other reliable means to D. Domestic defendants have 30 days from when the waiver is sent to return the waiver, otherwise they will be charged with the costs associated with providing formal service.

ii. Specific Applications of the Service Provisions

a) MSFA v. Chaves
   - RULE: Mere receipt of a request for waiver of service does not give rise to any obligation to answer the lawsuit and does not provide a basis for default judgment.
   - Sent by certified rather than first class mail, so it failed under the old law.
   - If you waive service, you are not waiving contesting jurisdiction.

b) National Equipment Rental, Ltd. v. Szukhent
   - RULE: A party to a private contract may appoint an agent to receive service of process where the agent is not personally known to the party and is not expressly required to transmit notice to the party but does promptly accept and transmit notice.
   - Cognovit note: you waive everything including process and jurisdiction.
   - People can sign away their own rights, so read what you sign!

iii. Return of Service

a) After the process-server has delivered the papers, she must file a return which should disclose enough facts to demonstrate that D actually has been served and given notice that he is required to appear in court.

b) A proper return ordinarily is necessary to enable the trial court to conclude it has jurisdiction.

c) In most American jurisdictions, the return of service is considered strong evidence of the facts stated, but it is not conclusive and may be controverted by proof that the return is inaccurate. D's own testimony will generally not be sufficient unless it is corroborated.
iv. **Service of Process and Statutes of Limitations**
   a) Rule 4(m) requires a federal court to dismiss without prejudice an action when the D has not been served within 120 days of the filing of the complaint, if the p fails to show “good cause” for not completing service within that time.
   b) In cases in which the P cannot hope to acquire jurisdiction over the D though proper service, keeping the action alive unnecessarily burdens the courts.
   c) When the P can make proper service quickly, the courts generally quash the faulty service w/out prejudice to the p to serve again.
   d) Let’s say there’s an auto accident. When this event happens, the SOL begins to run. Torts lets say have a 2 year SOL. So after two years, the SOL expires/runs out/ends. SOLs can “toll” for some time period. Let’s say the victim goes into a coma. Then the SOL tolls, which means the clock stops running for awhile.

C. **Immunity From Process and Etiquette of Service**
   i. **Immunity from Process**
      a) A court sometimes will immunize a party from service. This is normally done to help the court administer justice. The court doesn't want the potential of service to be a disincentive for lawyers, parties, and attorney's to come to court for other matters.
      b) This became a big deal before long arms were around, so in a sense they aren't as important anymore, because long arms can be used instead of service anyways.
      c) **State Ex Rel. Sivnkstv v. Duffield**
         • **RULE:** A person confined in jail on a criminal charge or imprisoned on conviction for such charge is subject to service of civil process, irrespective of the question of residence, if he was voluntarily in the jurisdiction at the time of the arrest and confinement.
         • A guy got served civilly while he was in jail, and that was ok.
      d) **Wyman v. Newhouse**
         • **RULE:** A judgment recovered in a sister state, through the fraud of the party procuring the appearance of another, is not binding on the latter when an attempt is made to enforce such judgment in another state.
         • Luring someone into the state will make service invalid

III. **Jurisdiction Over the Subject Matter of the Action—The Court’s Competency**

A. **The Authority of the Court to Proceed w/the Action**
   i. **Capron v. Van Noorden**
      a) **RULE:** Even where the parties to a suit brought in federal court appear and consent to the court’s diversity jurisdiction, if not actual diversity of citizenship exists between the parties, the court has no power to hear the case.
      b) Basis for subject matter jurisdiction was supposedly that Van Noorden was of North Carolina, and didn't allege where Capron was from.
      c) So although Capron picked the court, he argued no jurisdiction, and won.
      d) It’s the duty of the court to only rule on matters that they have subject matter jurisdiction over. The parties can't waive subject-matter jurisdiction.
      e) There could very well be jurisdiction here, but there is no evidence of it, because no one pled where Capron was from.

B. **Diversity of Citizenship**
   i. **Subject Matter Jurisdiction:** the court's power to hear a case because of the nature of the dispute.
   ii. **Diversity Jurisdiction**
      a) **Sec 1332**—no P may be a citizen of the same state as a D. If they do, then 28 USC 1332 says no jurisdiction for federal courts
      iii. Rule 12 (h)(3) whenever anyone raises that the court doesn't have subject matter jurisdiction, the court SHALL dismiss the action.
   iv. **Mas v. Perry**
      a) **RULE:** Mere residence in a state does not establish domicile for purposes of diversity jurisdiction.
      b) To be a citizen of a State within the meaning of section 1332, a natural person must be both a citizen of the US and a domiciliary of that state. For diversity purposes, citizenship means domicile, mere residence in the state is not sufficient.
      c) A person's domicile is the place of 'his true, fixed, and permanent home and principal establishment, and to which he has the intention of returning whenever he is absent there from. A change of domicile may be effected only by a combination of two elements:
         • (a) taking up residence in a different domicile with
         • (b) the intention to remain there
      d) It's also a question of what you are doing. The intent to remain here doesn't have to mean you need to live here forever.
      e) The question of whether or not there is diversity is based on the citizenship of the parties at the time the
   a) Kramer is in TX, and he becomes a debt collector for a Panamanian Corporation and sues a Haitian Corporation.
   b) **28 USC 1359** says any assignment that is improperly or collusively made will prevent the party from gaining jurisdiction. If jurisdiction were allowed, then any party could funnel itself into the federal courts.

vi. Under Sec 1332 (c) (1) a corporation is a citizen of:
   a) the state in which it is incorporated AND
   b) the state in which it has its principal place of business—there are 3 tests to determine principle place of business that are used in different circuits:
      - (1) “Nerve Center Test”—locus of corporate decision-making authority and overall control constitutes a corporations principal place of business for diversity purposes
      - (2) “Corporate Activities” or ‘Operating Assets” or “John Madden” test—greater weight is attached to the location of a corporation's production or service activities in determining the principal place of business under this test
      - (3) “Total Activity Test”—hybrid of the other two and considers the circumstances surrounding a corporation business to discern its principal place of business.

vii. Pete Rose (OH) v. Giamatti (NY)
   a) Major League Baseball is an unincorporated association. Unincorporated associations take the citizenship of every member.
   b) Cincinnati Reds are a citizen of Ohio.
   c) So of COURSE Rose brings in the Reds and MLB so that he can be in state court in Cincinnati where everyone loves him.
   d) But the court says the Reds are a nominal party, b/c of course the Reds want to keep Rose around. The judge also calls MLB a nominal party. But this is ridiculous, because Giamatti works for MLB! This decision is wrong from a doctrinal standpoint, but the judge probably did it b/c he thought it would be more fair.

viii. Section 1332 requires both diversity and a minimum amount in controversy, which is now $75,000.

C. Amount in Controversy
   i. A.F.A. Tours Inc. v. Whitchurch
      a) **RULE:** A court may not dismiss a diversity action for failure to meet the amount-in-controversy requirement without allowing a P to brief the issue.
      b) Where guy steals client list and they are afraid he's going to start his own tour company
      c) The court can only dismiss if it appears to a legal certainty that the claim is really for less than the jurisdictional amount to justify a dismissal
   ii. Sec 1332(b) says that if in hindsight the P does not recover $75,000 the district court may deny costs to the P, and in addition it may impose D's costs on the P.
   iii. In general, single Ps can aggregate claims against single defendants.
   iv. Two Ps may not aggregate if they have separate and distinct claims. If there is a single indivisible harm, P's may aggregate.

D. The Subject-Matter Jurisdiction of the Federal Courts—Federal Questions
   i. Amount in controversy no longer applies in federal questions
   ii. Sec 1331: The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States
   iii. Louisville & Nashville R. Co. v. Mottley
      a) **RULE:** Alleging an anticipated constitutional defense in the complaint does not give a federal court jurisdiction if there is no diversity of citizenship between the litigants.
      b) After an accident, the RR agrees to give Mottley lifetime free travel in exchange for not suing. 30 years later the RR says congress has banned free travel, so they refuse the passes. Mottley sues.
      c) Well Plead Complaint Rule: The well pleaded complaint for breach of contract did not include the federal law questions, so no jurisdiction. The well pleaded complaint only included offer/acceptance/consideration/breach/damages.
      d) The words of 1331 are the same as the constitution. So the court sees this as limiting, but says congress could expand the rule.
   iv. Skelly Oil v. Phillips Petroleum— Phillips wanted declaratory judgment to the effect that Skelly had federal permission to fulfill contract. But the court said nope, this is still a state contract case, so no federal subject matter jurisdiction.
   v. Sec 2201—Creation of Remedy—
      a) IF there is subject matter jurisdiction, THEN the case can be brought as declaratory judgment. But if it’s a state case, then 2201 isn't creating new federal jurisdiction for it.
      b) Creation of remedy--basically the whole "if the court has jurisdiction, then they can enter a declaratory judgment." Basically just pointing out that even though some artful pleadings try to use declaratory judgment
to get around the fact that there is no federal question, this won't work because 2201 says you have to have jurisdiction to enter declaratory judgment.

c) When you have a declaratory judgment, identify the coercive plaintiff. Put the lawsuit in the ordinary coercive way. If the answer is “no federal jurisdiction” for coercive suit, then there is no federal jurisdiction for the declaratory judgment. Except for in rare, statutory excepted instances, if in the coercive suit has fed jurisdiction then the declaratory judgment will have jurisdiction.

vi. T.B. Harms Co. v. Eliscu
a) RULE: The proper forum to hear a case is the one having control over the laws which created the cause of action.

b) Creation test—the government that creates a cause of action has jurisdiction over suits for that cause of action. Most federal rights can be brought in state court, but not all of them.

vii. Merrell Dow Pharmaceuticals Inc. v. Thompson
a) RULE: Incorporation of a federal standard in a state law private action, when that standard creates no federal right of action, does not confer federal question jurisdiction.

b) Thompson of Canada and McTavish of Scotland sue Merrell Dow of Delaware and Ohio.

c) They sued in state court, and Merrell Dow wants to remove. But the removal statute does not reach them as Ohio citizens unless it’s a 1331 case.

d) Forum non conveniens—this case belongs in Canada/Scotland, not Federal courts. But Ohio has a different rule.

e) Easy 1331 if there is a federal cause of action.

f) Majority says that some commentators try to reconcile the cases by looking at the nature of the federal interests. This comes into play below in Grable & Sons

g) What happens here is because of all of the statutes congress has passed that limit the jurisdiction of the court, and all of the court decisions that limit jurisdiction. It’s a federalism issue. The court is very mindful of opening the floodgates because of their respect for state courts.

viii. Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing
a) Statute says that IRS must affect personal service, not just send via certified mail, to seize and sell your land.

b) There is a greater federal interest in this case then there is in Merrill Dow, so that is one reason that this case was able to get federal jurisdiction and Merrill Dow wasn't.

c) You also have to be mindful of the impact on the state.

E. The Subject-Matter Jurisdiction of the Federal Courts—Supplemental Claims and Parties
i. United Mine Workers of America v. Gibbs
a) RULE: Under pendent jurisdiction, federal courts may decide state issues which are closely related to the federal issues being litigated.

b) Gibbs is a member of the company union. The members of the actual union threatened him. Gibbs lost his job, and was lost other jobs. A secondary boycott is an indirect boycott. Gibbs claims he was a victim of this. He sues under Federal Labor Law, which is 1331 jurisdiction. There is a state law claim that he sues under as well (tort claim). At trial the judge dismissed the federal claim and sustains the judgment on the state law claim.

c) When the lawsuit was filed, the federal claim was valid, so it was ok that the fed had jurisdiction of it.

d) Article III Sec 2—all cases of law arising under the law of the United States. So how is the state claim under this power? Both issues spring from the same CASE, so that's where jurisdiction comes from.

e) State and federal claims must spring from the common nucleus of operative fact, and be of such a character that the P would ordinarily try them in the same proceeding.

f) There is POWER for the courts to hear the whole, but the POWER need not be exercised in every case.

g) This is all called Pennant Jurisdiction

ii. Aldinger v. Howard
a) Aldinger files suit against Howard, the Treasurer of the County under section 1983 Civil Rights Act, which is permissible under Section 1331. She also sues the county. She claims she can sue the County in federal court under pendant jurisdiction even though there is no section 1331 or 1332 jurisdiction.

b) The court won't hear the county claim because of the Civil Rights Act's using the word “person.” The county is not a person. (Later on this is reinterpreted, and the county would now be allowed)

iii. Owen Equipment & Erection Co. v. Kroger
a) Mrs. Kroger (IA) sues OPPD (Neb) for the death of her husband. OPPD brings in Owen. Then Kroger decides to bring in Owen (Neb/IA)

b) There is no diversity between Kroger and Owen. So there is no 1332.

c) Kroger is the P, OPPD is the D and the TPP. Owen is the TPP

d) Rule 14: Third Party Practice: Let Kroger sue Owen. This is a joinder rule. According to Rule 82 this has nothing to do with subject matter jurisdiction. Joinder and subject matter jurisdiction are separate questions.

iv. Section 1367—codifies Kroger and overturns Finley
a) Except as provided in (b) and (c) or by federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so
related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III. Such Supplemental Jurisdiction shall include claims that involve the joinder or intervention of additional parties.

b) If jurisdiction is solely 1332 the courts will not have jurisdiction over claims by Ps against person made parties under rule 14, 19, 20, or 24 of the Federal Rules of Civil Pro, or over claims by person proposed to be joined as Ps under Rule 19, or seeking to intervene as Ps under 24, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of 1332.

c) (changes the aggregation rules)

d) Except (in subsection b + c) in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction...

v. Executive Software North America, Inc. v. US District Court for the Central District of CA--RULE: Absent extraordinary circumstances, 28 U.S.C. §1367(c)(1)-(c)(3) sets forth the exclusive circumstances under which a federal court may appropriately decline pendent jurisdiction.

vi. Borough of West Mifflin v. Lancaster—RULE: A district court may not remand to state court an action containing a §1983 claim on the grounds that the state law claims predominate.

F. The Subject-Matter Jurisdiction of the Federal Courts—Removal

i. Removal jurisdiction gives a defendant who has been sued in a state court the right to veto P’s forum choice by transferring the action to federal court, but generally “only if the federal court would have had jurisdiction to entertain the case if the P had chosen to go there originally.”

ii. Reasons for Removal

a) Protects nonresident D from local bias

b) Equalizes the ability of both parties to have a federal question litigated in its “natural” forum

c) Driven by strategic concerns like jury verdicts, trial rules and procedure, and availability/caseload/personality of federal judges

iii. Current removal statute is 28 USC §1441. 1442 deals with removal of actions by federal officers, 1443 is for removal of civil rights cases, 1453 is for removal of interstate class actions.

iv. Congress has also provided that certain claims may not be removed, like actions against railroads under the Federal Employer’s liability Act—in §1445

v. Shamrock Oil & Gas Corp v. Sheets

a) Whether a P could remove a state court action to the federal courts because D had interposed a counterclaim. The court held no.

b) Removal under §12 of the Judiciary Act of 1789 can only be effected by a D against whom the suit is brought by process served upon him. Consequently a non-citizen P in the state court, against whom the citizen-D had asserted in the suit a claim by way of counterclaim, was not entitled to remove the cause.

c) By §3 of the Act the practice on removal was greatly liberalized. It authorized “either party, or any one or more of the Ps or Ds entitled to remove any suit” form the state court to do so upon petition in such suit to the state court “before or at the term at which said cause could be first tried and before the trial thereof.

d) Can’t say that congress just made a mistake when they made the new statute, got rid of the section 3 language, and changed it to “defendant or defendants.”

e) Must be strict construction of this legislation.

vi. American Fire & Cas. Co. v. Finn

a) An insurance dispute involved the assertion of state law claims against multiple Ds. Some were diverse, some weren’t.

b) However, two of the diverse D’s were able to remove to federal court. One lost, and moved to vacate the judgment on the ground that the matter should not have been removed because original jurisdiction was lacking. The Supreme Court agreed.

c) The court found that the claim against the losing D was not “separate and independent.” The court thus concluded that the removal was improper.

d) “Where there is a single wrong to Ps, for which relief is sought, arising from an interlocked series of transaction, there is no separate and independent claim or cause of action under §1441(c)

vii. Borough of West Mifflin v. Lancaster

a) A federal court can only remand state court claims that it can decline to hear under §1367; this case applies §1441[c] and holds that a district court only has limited authority to remand a case; because IIs fed/state complaints in this case were not separate & independent, no removal allowed;

b) This case makes it clear that if a federal claim is “separate and independent” from a state claim, then it cannot possibly arise from a “common nucleus of operative fact” shared by the state claim. Likewise, claims arising from a common nucleus cannot be considered separate and independent. Therefore, if supplemental jurisdiction cannot be declined b/c fed and state claims arise from a common nucleus, then a fed court cannot remand any linked claims to state court and must hear the entire case.

c) This case also teaches the principle that removal from state to federal court is only permitted when the case involves a federal question, so complete diversity of parties is not a sufficient basis for removal.
G. Challenging the Subject-Matter Jurisdiction of the Court

i. Direct Attack on a Court’s lack of Subject-Matter Jurisdiction
   a) A lack of subject-matter jurisdiction may be asserted at any time by any interested party, either in the answer, or in the form of a suggestion to the court prior to final judgment, or on appeal, and may also be raised by the court sua sponte.
   b) Moreover, the parties may not create the jurisdiction by agreement of by consent.

ii. Collateral Attack on a Judgment for Lack of Subject-Matter Jurisdiction
   a) If both the parties and the court fail to notice the absence of subject-matter jurisdiction at any time during the original proceeding, then the judgment in those proceedings is void and a nullity. However, collateral attack is not always available
   b) Grounds for collateral attack
      • subject matter was so far beyond the court’s jurisdiction that entertaining the action was a manifest abuse of authority.
      • Allowing the judgment to stand would substantially infringe the authority of another tribunal or government agency
      • Judgment was rendered by a court lacking capability to make an adequately informed determination of a question concerning its own jurisdiction and as a matter of fairness, the party seeking to avoid the judgment should have a belated opportunity to attack the court’s SMJ.

IV. Venue, Transfer, and Forum Non Conveniens

A. Venue

i. General Principles
   a) Provisions for venue (applies anytime Π files suit in federal court-different from removal)
      • 1391(a): venue choices in diversity suits
      • 1391(b): venue choices in federal question suits
   b) 2 choices for venue choice:
      • Π may lay venue in any district where all Δs reside, but if all Δs reside in different districts of the same state, then the Π may lay venue in any one of those districts; for venue purposes, residence is usually the same as domicile; but under 1391[c], a corporation “resides” in all districts where it is subject to personal jurisdiction (different from SMJ citizenship)
      • Π can lay venue in any district where a substantial part of the claim arose
   c) 1391(a)(3) and 1391(b)(3) almost never come up; only if no district applies.
   d) Hypo: Π from NV wants to sue Δ from MO for a car crash in Cali; Π can lay venue in MO under 1391(a)(1); Π can lay venue in Cali. under 1391(b).

ii. Local and Transitory Actions
   • Reasor-Hill Corp v. Harrison—
      • RULE: If a local action cannot be brought at the site of the property because of lack of jurisdiction of the D, the action may be brought in the state where the D resides.
      • A state court can have jurisdiction over a case for injuries to land in a different state; MO landowner sued AR chemical company in AR court for damage to his crops from insecticide; one state court should be able to interpret the laws of another state-this is not as difficult as interpreting the laws of a foreign country; also the old notion of pursuing a remedy where the tort occurred does not apply to American citizens who are free to travel between states; finally state courts may be rightfully reluctant to subject their own citizens to suits by outsiders, but courts should not provide a sanctuary to those who wrongfully caused injury to a landowner in another state.
      • 28 U.S.C. § 1391

iii. Venue in the Federal Courts
   a) Bates v. C & S Adjusters, Inc.
      • RULE: Venue is proper under the Fair Debt Collection Practices Act in the district where an allegedly offending letter is received.
      • Venue is proper in the district where a debtor resides and where a collection notice was forwarded; Π had debts and moved from NY to PA; the debts were assigned to a collection agency who sent a notice to Π’s address in PA which was forwarded to NY; Π sued for a violation of Fair Debt Collection Practices Act (FDCPA); Δ filed to dismiss on the grounds that NY was an improper venue; court held that a district where a notice was forwarded and where Π resides has venue, regardless of collection agency’s lack of intent to forward the notice; having the notice forwarded was foreseeable by Δ since they did not mark “do not forward” on the envelope; also the FDCPA was enacted by Congress to prevent the harm of abusive debt practices on consumers which cannot possibly occur until receipt of a collection notice; this case contributes the rule that events giving rise to a claim to not have to be intentional (post office forwarding a collection notice).
B. Transfer of Venue in Federal Courts
i. The transferring party must be a proper venue and must have PJ over the Δ.
ii. 1404(a): When transferor court is an improper venue, the court may dismiss or transfer in the interest of justice.
iii. **Hoffman v. Blaski**
   a) **RULE:** Under 28 U.S.C. § 1404(a), a federal court can only transfer a case to a court where the P could have originally brought the case.
   b) P brings suit in TX. TX grants 1404 transfer to IL. P files petition for writ of mandamus from 5th Circuit. Trial judge in Chicago denies motion to send it back to TX with misgivings. 7th Circuit says it should go back to TX. So the Supremes have to deal with this.
   c) It’s improper to send it to IL. P didn’t have a right to bring it in IL because there is no personal jurisdiction for D in IL, so D shouldn’t be able to transfer to IL.
   d) §1391 (b) lays venue in Northern District of TX, and says you don’t have venue in IL.
   e) §1404 says you can transfer to where the action “might have been brought,” and this action couldn’t have initially been brought in IL.
   f) Couldn’t transfer to IL even if D were willing to waive personal jurisdiction and venue in IL on the day the law suit was filed.
   g) If dissent had gotten its way, would have been able to transfer to all 90 districts. BUT it has to be in the interests of convenience and justice. So why not go this way, since the justice/convenience thing would drop that number way below 90. But this would benefit the D and not the P. But the P already has a lot in their favor.
   h) The majority doesn’t trust trial judges—that’s what’s really going on here.
   i) Frankfurter and Harlan, who are for the dissent, were huge procedural scholars.
iv. 1391 (b) is what deals with venue in §1331 cases (federal question cases)
v. §1406 Cure or waiver of defects (a) The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.
v. **Goldlawr, Inc. v. Heiman**
   a) P’s original venue choice is improper, and there was no personal jurisdiction over D.
   b) Congress looks at state laws for personal jurisdiction.
   c) It’s a 1331 case, so it’s trying to carry out federal law.
   d) It’s not just to dismiss the case, even though personal jurisdiction doesn’t exist, because it’s unjust for her to lose her claim.
   e) If you make a mistake on venue but not personal jurisdiction, however, they will dismiss.
C. Forum Non Conveniens
i. Court dismisses when there is a far more convenient court somewhere else; Court will dismiss if it cannot transfer anywhere (if the best court is in another country); if a court dismisses under FNC, it will impose conditions on a Δ such as waiver of SOL or American discovery rules abroad.
ii. **Piper Aircraft Co. v. Reyno**
   a) **RULE:** A P may not defeat a motion to dismiss for forum non conveniens merely by showing that the substantive law that would be applied in the alternative forum is less favorable to him than that of the present forum.
   b) Plane crash in Scotland. Everyone involved in the crash was Scottish. Aircraft was manufactured in PA. Propellers were made in Ohio. Reyno was a legal secretary for the lawyer who filed the suit. The probate court in CA made her administratrix of the estates of the people killed in the crash.
   c) Lawsuit is filed in state court in California. It is then removed under 1441 to the federal court for the central district of CA. Then Piper moved for transfer to US District Court for Middle District of PA under 1404a. So you wind up in PA federal court.
   d) Rule is, when you have a transfer like this the law from the original federal court must be used by the district it’s transferred to. This is to prevent people from using 1404a for choice of law purposes.
   e) Piper is a defendant in CA. When it moves to PA, the CA choice of law rules apply. Because the case gets transferred under 1404 the PA court has to use CA choice of law rules. Under CA choice of law rules, PA tort rules would apply to Piper. There is personal jurisdiction over Hartzell in PA. Hartzell wasn’t part of the transfer, so PA choice of law rules apply to him when it gets served there. PA choice of law rules say that Scottish tort law applies.
   f) The court says it reviews the trial judge under the abuse of discretion standard.
iii. Not all states have forum non conveniens, and many of those that do have it don’t use it.
iv. In the federal system it is generally used in cases from foreign countries.
v. Can’t grant this unless you have another forum to go to.
vi. Trend has been to push cases overseas when US companies hurt people overseas
vii. Factors that apply to whether forum non conveniens should be granted.
   a) Private factors
      • Relative ease of access to sources of proof
      • Availability of compulsory process for attendance of unwilling and cost of obtaining attendance of willing witnesses
      • Possibility of view of premises if view would be appropriate to the action
      • All other practical problems that make trial of a case easy, expeditious, and inexpensive.
      • Enforceability of judgment if one is obtained.
      • Advantages and obstacles to fair trial
   b) Public factors
      • Administrative difficulties of crowding courts
      • Jury duty being imposed on community w/no relation to litigation
      • Holding trial in the view and reach of those involved
      • Local interest in having localized controversies decided at home
      • Appropriateness in having the trial of a diversity case in a forum that is at home with the state law that must govern the case

viii. A court can grant a forum non conveniens on the condition that the defendants promise not to raise certain defenses (statute of limitations, etc)

V. Ascertaining the Applicable Law
   A. State Law in the Federal Courts
      i. General Notes
         a) Rule: Federal Courts must apply state substantive law; if the issue is one of substance, state laws apply.
         b) Reasons to apply state substantive law:
            • Rules of Decision Act
            • 10th Amendment state powers
         c) “Substance” can be defined by the elements of a cause of action; the Supreme Court has given lousy factors and never fit them all together.
         d) If diverse Πs would benefit from applying a federal law that would be unfair to non-diverse plaintiffs required to apply the state law, the state law should also be applied to diverse Πs.
      ii. The Rule of Swift v. Tyson
         a) Section 34 of the Judiciary Act, was the so-called Rules of Decision Act. The modern version of this Act is found in 28 USC § 1652 and reads: The laws of the several states, except where the Constitution or treaties of the US or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.
         b) Swift v. Tyson
            • The Supreme Court didn’t use state law and used federal general common-law.
            • They based this decision on the Judiciary Act, and claimed that “the laws of the several states” just means statutes.
            • Why didn’t they think common-law was law? Well, the justices wanted uniformity in law, so they didn’t want to be applying different common-law theories all over the country. They wanted consistency in all federal courts.
            • Swift said there was a general federal commercial law. This allowed for a uniform law for negotiable instruments which was absolutely necessary for the country to survive at that time, because there was nothing like the UCC back then. The federal general common law was 100% necessary.
            • But this was a problem in other areas of law, like tort law.
            • Uniform statutes made Erie possible
            • You didn’t have uniformity between states and federal law, though, like the Swift court had hoped. THAT was sort of a pipe dream.
            • Federal General common law always favored big business, so one theory is that progressives like Brandeis wanted to get rid of it. So Erie was part of the progressive movement. But there is no hint of this in the opinion.
            • Federal courts must follow only state statutory laws (not state judge-made common law) in cases that state law applies; this was a narrow reading of the Rules of Decision Act “laws of several states” but was decided at a time when common law was rapidly developing; there was a legitimate interest in being able to consult all available authorities to make a decision; also this decision had policy motivations for promoting interstate commerce.
      iii. The Erie Doctrine: The Rules of Decision Act and The Rules Enabling Act
         a) Erie R. Co. v. Tompkins
            • RULE: Although the 1789 Rules of Decision Act left federal courts unfettered to apply their own rules of procedure in common law actions brought in federal court, state law governs substantive issues. State law includes not only statutory law, but case law as well.
• The court holds that the court has been acting unconstitutionally
• This decision was completely unexpected by the parties, but scholars new that the justices were just waiting for the opportunity to do this major overruling of *Swift*.
• There was diversity between the RR (NY) and Tompkins, who got his arm tore off in PA. Under PA common-law, the standard for negligence would have been MUCH higher than it would be under “general common law” in the federal courts.
• Nobody argued overturning *Swift*. So poor Tompkins got NOTHING even though he got his arm ripped off, and initially he got a huge jury verdict for the time. Poor Tompkins was a pawn in a federalism game.
• *Erie* did NOT abolish federal common-law. It abolished federal GENERAL common-law.
• The old interpretation of “laws” included local customs w/ Force of laws and rights and title to land.
• There is no transcendental law outside of the system
• What part of the Constitution was violated in *Swift*? The court never tells us. Article 3 says the judicial power extends to controversies between citizens of different states. So they specifically considered diversity jurisdiction. What the court is saying is unconstitutional is that *Swift* violated the 10th Amendment by taking away rights reserved to the states?
• Could Congress legislate on the duty of care owed to Ps like this? Well, maybe under the interstate congress commerce clause.
• 1938 procedure went from state procedure to the federal rules of civil procedure, and substantive law went from federal general common law to state law.
• Overrules *Swift*, requiring federal courts to apply the substantive common law of the state in which they sit; Π was injured by a train and sued for negligence under federal common law; PA state law gave Π no recourse b/c he was a trespasser; Π was awarded damages under fed common law, and jgmt was affirmed on appeal; U.S. Supreme Court reversed on grounds that fed courts are to apply state common law for 3 different reasons: (1) Rules of Decision Act requires federal courts to apply state common law as well as state statutes (*Swift* misinterpreted); (2) *Swift* permitted/encouraged forum shopping, b/c a Π could choose whether state or federal law applied to their claim by selecting a forum; (3) *Swift* allowed federal courts to create federal common law which gave them much more power than the Constitution allows.
• *Erie* affirms the concepts of state sovereignty and autonomy and also ensures the same law applies regardless of forum.

b) **Guaranty Trust Co. v. York**
• **RULE:** Where a state statute that would completely bar recovery in state court has significant effect on the outcome-determination of the action, even though the suit be brought in equity, the federal court is bound by the state law.
• This is an equity case with a holding that shrinks the power of the judges. You want the federal system to follow the state courts.
• A federal court with diversity jurisdiction must apply state procedural rules such as a state SOL if it is thought to have a substantial effect on the outcome of the litigation.
• **Outcome determination:** if looking at state law, case wouldn’t get into court b/c of statute of limitations; no federal rule on point; outcome should be dismissed in state court, so to allow a different outcome in federal court is wrong; SOL is thought to be substantive.
• *York* expanded the *Erie* Doctrine by requiring fed courts to apply state procedural rules when they have a substantial effect on the outcome; *Erie* only applied to state substantive rules-this helps to curb forum shopping.

c) **Byrd v. Blue Ridge**
• **RULE:** The *Erie* doctrine requires that federal courts in diversity cases must respect definitions of rights and obligations created by state courts, but state laws cannot alter the essential characteristics and function of the federal courts, and the jury function is such an essential function.
• In this case if the feds had to follow the state, then we would be taking power away from juries, which is a much bigger deal than taking power away from judges.
• *Byrd* doesn’t overturn *York*.
• The distribution of trial functions between juries and judges. The INFLUENCE of the seventh amendment tells us how important it is to let juries decide facts and not judges.
• Compare the fed interests in using the fed rule to the state interests in using the state rule. Fed interest is distribution of trial functions because of influence of 7th Amendment. State says its not a fact question, it’s a legal question and it should go to the judge
• SC assumes juries will come out different than judges, while fed feels differently about on the fed level, so they say it’s not outcome determinative.
• Federal courts may apply federal rules, even if state rules are outcome determinative if federal policy in enacting the rules outweighs state policy; when a state does not have substantive state policy goals to be advanced by applying state laws in a federal court, the balance shifts in favor of countervailing federal policies.
**d) Hanna v. Plumer**

- **RULE:** The *Erie* doctrine requires mandates that federal courts are to apply state substantive law and federal procedural law, but, where matters fall roughly between the tow and are rationally capable of classification as either, the Constitution grants the federal court system the power to regulate their practice and pleading (procedure).
- “The outcome-determination test therefore cannot be red without reference to the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws.”
- Rules enabling Act is §2072 (b): “Such rules shall not abridge, enlarge or modify any substantive right.”—If the rule follows this rule, then there is no *Erie* problem. Rules Advisory Committee creates these rules. The changes have to be approved by the US Sup Ct and Congress. So if something is in the rules, then it must not violate the Rules Enabling Act, right?
- There is a gray area between procedural and substantive, and the rules have drawn a bright line across that gray area. This eliminates the *Erie* problem where there is a rule on point. If you have a rule and that rule is procedural, use it. But there has to be a direct collision between the rule and the question, or else things might not work out so easily for you.
- Federal rules of civil procedure within the scope of the Rules Enabling Act (28 U.S.C. § 2072) control over state outcome determinative rules; 2072(a) allows the Supreme Court to establish FRCP; 2072(b) limits the powers so as not to abridge, enlarge or modify any state substantive right. (Courts disagree on what a substantive right is)
- Splits *Erie* into 2 doctrines; If there is a FRCP that directly conflicts with state law, the FRCP trumps, so long as it is valid (Supreme Court has never invalidated a FRCP); it must fit within the rules enabling act if it deals with procedure;
- *Hanna* addresses the supremacy clause; if there is a federal directive on point that governs the (procedural) issue, it is supreme law of the land so long as it is valid; therefore, if a federal directive is on point (FRCP) it wins.
- *Hanna* dictum since adopted: *twin aims of Erie*
  - (1) Avoid forum shopping
  - (2) Avoid inequitable administration of the law
- Inquiry: If a federal judge ignores state law, will it cause litigants to shop for federal court? A procedural rule on filing a complaint would not cause a litigant to shop for a forum and non-diverse litigants/atty’s would be familiar with local procedure rules; Rule 4(d)(1) does not have to bow to state-created procedures.

**e) Walker v. Armco Steel**

- **RULE:** *IN diversity actions, Rule 3 governs the date from which timing requirements of the federal rules begin to run but does not affect state statutes of limitations.*
- Followed the federal rule for service of process, not the OK rule. Under the federal rules an action is commenced when it is filed, while in OK it isn’t commenced until service is made. Service wasn’t made until after statute of limitations had run in OK. So if OK law applies instead of Rule 3, Walker is screwed.
- **RULE 3:** A civil action is commenced by filing a complaint with the court.
- So why doesn’t rule 3 apply. Because the court is being mindful of Erie’s outcome determinative test so they interpret rule 3 narrowly.
- *York* held that statutes of limitations are substantive.
- Statute of limitations is a forum shopping thing, while normally the details of how you serve process aren’t forum shopping grounds.
- So Rule 3 doesn’t apply to statute of limitations.
- After this case Rule 4 was amending for other reasons. Part (m) gives you a grace period of 120 days for service of the complaint after filing it. Suppose Rule 4(m) had been in place at the time of *Walker*. Does the Sup Ct say 4m doesn’t apply in the same way they say 3 doesn’t apply? Yup—same result—has nothing to do with statutes of limitations.
- If there’s a way that there isn’t a direct conflict, then the state law will apply.
- Harlan says stuff that deals with primary human conduct = state, other crap=fed. But court doesn’t agree with him.
- Note says: This is not to suggest that the FRCP are to be narrowly construed in order to avoid a “direct collision” with state law. The Federal Rules should be given their plain meaning. If a direct collision with state law arises from that plain meaning, then the analysis developed in *Hanna* applies.
- Rule 3 is not intended to toll the statute of limitations.
- Federal rules should not be construed broadly so as to place them in direct conflict with state rules, which would require a federal court to apply the federal rule; If filed complaint within 2 yr SOL, but Δ was not served until after SOL expired; fed law only requires filing of complaint within 2 yr SOL, but state (OK) law required service within 2 yr SOL; dist court dismissed as violating OK SOL, CA & Supreme Court affirmed; a federal rule should be read based...
on its plain meaning; a plain reading of federal SOL reveals no conflict with OK law and has no intent to
toll a state SOL or displace state tolling rules; also failing to apply state SOL here would result in an
inequitable administration of law to non-diverse cases.

f) *Stewart Organization, Inc. v. Ricoh Corp.*

- **RULE:** In a federal diversity suit, federal rules, not state rules, should govern questions of venue.
- A federal rule prevails over a conflicting state law if the federal rule is sufficiently broad to cover the issue;
  Π and Δ had a contract with a forum selection clause; Π sued Δ in Alabama; Δ moved to transfer to
  selected (NY) forum under §1404(a) and pursuant to the forum selection clause; dist court denied motion
  on the grounds that Alabama law controls and it looks down upon forum selection clauses; CA11 reversed
  on the grounds that venue is governed by federal law; Supreme Court held that federal rule prevails under a
  2 part analysis: (1) The federal rule is sufficiently broad to control the issue before the court (1404(a)
  allows district court to weigh factors to determine if a transfer is appropriate); (2) The federal rule must be
  applied if it represents a valid exercise of Congress authority under the Constitution (1404(a) passes const
  muster); therefore, the case was remanded to evaluate the forum selection clause on Δ’s 1404(a) motion.

g) *Gasperini v. Center for Humanities, Inc.*

- **RULE:** The 7th Amendment does not preclude appellate review of a trial judge’s denial of a motion
to set aside a jury verdict as excessive.
- Jury awards $450,000 for lost slides
- Before the NY statute the judge wouldn’t set aside a jury award unless it “shocks the conscious”
- Seventh Amendment governs the relationships between judges and juries in Federal court.
- Appellate courts cannot make factual findings unless no reasonable person could differ and it becomes a
  question of law.
- The NY statute is directed at the appellate courts, and so it gets sketchy for the federal appellate courts.  So
  get around it by saying the federal TRIAL judge has to use the standard directed at state appellate judges.
- The court is in disagreement as to what really matters for forum shopping.
- Interpret Rule 59 in a way to avoid a problem with *Erie*—Avoidance Cannon
- Seventh Amendment doesn’t apply to the states
- A state statute on re-examining jury awards can be given effect by federal appellate courts without
  violating the 7th Amendment reexamination clause; Π was awarded compensatory damages from Δ; Δ
  moved for a new trial arguing the verdict was excessive; dist court denied Δ’s MNT, but CA2 vacated the
  judgment and applied NY law using the “material deviation” standard for excessive judgments instead of
  the federal “shocked conscience” standard; CA2 set aside the verdict and ordered a new trial unless Π
  would accept a much lower judgment; Π contended that CA2 erred in applying NY law on 7th amendment
  reexamination clause grounds; U.S. Supreme Ct. held that a fed court applying NY law did not violate the
  7th; the “material deviation” standard is substantive and outcome-affective b/c failure to apply it would
  unfairly discriminate against non-diverse NY litigants or encourage forum shopping.
- An award is a fact that a federal appellate court cannot review under the 7th, but federal courts can review
  abuse of discretion standards, applying either state or federal standards.
- Involved 2 aspects of law: (1) Set a standard for a court to order a new trial for excessive damages; (2)
  allowed an appellate court to apply the standard de novo.
- Were these aspects substantive? (1) Yes, federal courts follow state laws on ordering new trials for
  excessive damages; (2) No, federal courts have an interest in allocating power to itself and state law has no
  business telling an appellate court its business.
- Problem with *Gasperini* is that it gives very little guidance.

B. The Problem of Ascertaining State Law—

i. *Klaxon v. Stentor*

- a) In order to promote uniform application of substantive law within a state, fed courts must apply the conflicts of
  law rules of states in which they sit, “the proper function of a federal court is to ascertain what the state law is,
  not what it ought to be.


- a) **RULE:** A state Supreme Court ruling on an issue need not be followed by a federal court sitting in
  diversity if that ruling has lost its vitality.
- b) Before *McPherson* lets say Ford makes a care that sells to MO Distribution who sells it to Bo Bros. Ford, who
  sells it to Joe Blow.  Joe can only sue Bo Bros., because no privity of contract between Ford and Joe.  Today
  however Joe could sue everybody.
- c) Mississippi has a case following the old rule, but the dicta in new cases seems to approve of the new way.
- d) One way to resolve the question in most cases would be to certify to the state supreme court—ask the Supreme
  Court to interpret state law for you.
- e) A federal court may apply recent trends in state law over outdated common law; Π (MS) was injured and sued a
  diverse Δ; dist court dismissed the complaint holding that it was required to follow an old MS rule that
  manufacturers were not liable for products negligence when there is no privity of contract between them and the

14
user (Δ manufactured a part on the machine that injured Π); CA1 reversed holding that a state law that has been undercut by subsequent decisions but not explicitly overruled does not necessarily have to be followed by federal courts. (This could be problematic if the trend was not as clear as it was in this case)

iii. McKenna v. Ortho
   a) When state rules conflict, federal courts may apply the rule that they predict the state supreme court would apply
   b) So you have the court using the majority rule…looks a lot like the federal general common law. You’re not getting there by not apply state law, you are getting there by saying state law is changing.

VI. Modern Pleading
   A. Pleadings are the conduit of the legal process. Historically they have four purposes.
      i. Provide Notice of dispute (purpose today)
      ii. Eliminate baseless claims (now done under rule 12(b)(6)
      iii. Disclose facts (now discovery)
      iv. Narrow issues (now discovery)
   B. The Complaint
      i. Detail Required Under the Federal Rules—Dioguardi v. Durning
         a) RULE: The Rules only require that a complaint contain a short and plain statement of the claim showing a right to relief.
         b) This is the case where the guy who can’t speak English refuses to get a lawyer and does his own complaint.
         c) Second dismissal was with prejudice. He could not sue again, period, ever if the trial judge’s ruling stands.
         d) Trial judge gets overturned for using the wrong standard.
         e) Rule 8(a)(1) says you need a short and plain statement of the claim showing the plaintiff is entitled to relief.
         f) Let people have their day in court, even if we know they’re going to lose.
         a) RULE: A complaint viewed in its most favorable light should not be dismissed if the P at trial could make out a case entitling him to relief form the allegations of the complaint. A conditional privilege isn’t grounds for a dismissal, while and absolute privilege is. When material allegations are insufficient, a motion for a more definite statement is proper.
         b) Garcia was fired by Hilton for allegedly procuring women for use as prostitutes in the hotel, and he claimed he was defamed by such allegations.
         c) Issue: Is a complaint that does not contain a material allegation necessarily subject to dismissal if the P could make out a case at trial entitling him to relief? No.
         d) Rule: A complaint viewed in its most favorable light should not be dismissed if the P at trial could make out a case entitling him to relief form the allegations of the complaint. A conditional privilege isn’t grounds for a dismissal, while an absolute privilege is. When material allegations are insufficient, a motion for a more definite statement is proper.
         e) A complaint sufficiently pleads a right to relief when it states enough facts to reasonably assume that the essential elements of the claim can be proven at trial; a complaint will be held valid if it is reasonable to assume from it that the P could make out a case at trial entitling him to relief, even if he did not explicitly allege every element of his claim (i.e. slander claim failing to explicitly allege publication); when a court senses that some cause of action can be made out from the pleadings, it is reluctant to dismiss a complaint b/c it doesn’t want to deprive a Π of his day in court; also if a Π cannot specifically plead an element, they might be calling Δ’s bluff if Δ wants to avoid the embarrassment of a public lawsuit, they may just settle.
      iii. Pleading Special Matters—Swiekiewicz v. Sorema N. A.
         a) RULE: An employment discrimination complaint need not contain specific facts establishing a prima facie case under the framework of McDonnell Douglas.
         b) Hungarian guy filed a discrimination complaint against his former employer which was dismissed b/c it was not found to contain specific facts establishing a prima facie case.
         c) Rule: An employment discrimination complaint need not contain specific facts establishing a prima facie case.
         d) Issue: Does an employment discrimination complaint need to contain specific facts establishing a prima facie case? No. It most only contain “a short and plain statement of the claim showing that the pleader is entitled to relief” as required by Rule 8(a)(2).
   C. Responding to the Complaint
      i. Motions to Dismiss
         a) American Nurses’ Assoc. v. Illinois—
            • RULE: A federal complaint should not be dismissed for failure to state a claim unless it appears that the P can prove no set of facts in support of his claim which would entitle him to relief.
            • P claimed its class action complaint presented a cause of action for discrimination rather than comparable worth and thus should have been upheld.
            • Issue: Should a federal complaint be summarily dismissed for failure to state a claim if it appears that the P can prove a set of facts in support of his claim based on the allegations therein? No.
• A multiple-charge complaint is neither dismissible nor invalid because it includes extraneous facts that do not state a claim in addition to stating a valid claim; a complaint does not fail for merely being confusing or including invalid claims with valid ones; the purpose of federal pleading rules is not to eliminate all imperfectly written complaints but only those which fail to state any valid claim at all.

b) Jones v. Clinton— Presidential immunity issues; led to Clinton’s impeachment by eventually denying 12(b)(6) protections to Clinton.

ii. Answering the Complaints

a) Denials—Zielinski v. Philadelphia Piers

• RULE: In the federal courts, a D who knowingly makes inaccurate statements may be estopped from denying those inaccurate statements at trial.
• D was estopped from denying ownership of a forklift and the agency of the operator.
• Issue: If a D makes an ineffective denial of part of the complaint and knowingly allows the P to continue to rely on the facts as stated in the complaint, may the D be estopped from denying the facts as they are contained in the complaint? Yes.
• Rule 8(b) requires that denials fairly meet the substance of the averments denied and that the party shall state in short and plain terms his defenses to each claim asserted against him. Rule 11 requires good faith in pleading.
• A general denial is not valid if any allegations being denied have previously been admitted by both parties as being true; P sued “Δ” for injuries; after being served, Δ answered that they were Δ; later it was revealed that “Δ” was not the defendant at the time of injury b/c forklift had been sold, but not rebadged; Δ later denied the allegations of Π’s complaint; court held that a general denial is ineffective when some of the claims denied are true and not at issue; in such a circumstance, Δ must make a more specific answer; a general denial implies that Π was not even injured; 2 policy reasons for this: (1) SOL will run on Π, depriving him of any opportunity for redress; (2) when a knowingly ineffective answer filed after Π’s SOL has run, an allegation of agency will be instructed to the jury as presumptively admitted by both parties for the purpose of litigation.
• Promissory estoppel issue—by purposely lying low, Π relies on this to their detriment
• Δ made a general denial when they should have made a specific denial under Rule 8—court used Rule 8 violation as a way of sanctioning
• 15(c)(3) would have resolved this nicely.

b) Affirmative Defenses—

• Ingrahm v. United States

• RULE: A statutory cap on damages is an affirmative defense that is waived if not raised in the pleadings.
• P (a group) sued the government for negligent treatment by military physicians.
• Issue: Is a statutory cap on damages an affirmative defense that is waived if not raised in the pleadings? Yes. Rule 8(c) requires that any matter constituting an affirmative defense be raised in the pleadings.
• Determine if it is an affirmative defense by looking at (1) whether a matter is intrinsic or extrinsic, (2) which party has better access to evidence, and (3) whether fairness mandates disclosure of the defense early in the proceedings.
• An affirmative defense will not be saved for appeal unless it is raised at some point during the pleading or trial stage before judgment is passed; 2 Ps were awarded $1.3 million and $4.2 million respectively for med mal by an Air Force surgeon; U.S. appealed both judgments on the grounds that they exceeded a $500K cap set by TX state legislature; CA5 held that an affirmative defense must be raised at some point before judgment is passed; affirmative defenses must be pleaded in a timely manner to prevent an unfair surprise to a Π by raising an unexpected defense; if Ps knew of the statutory cap in this case, they could have challenged the constitutionality of the cap or argued their injuries were not subject to the cap.
• Taylor v. United States (1988)—A Δ does not waive the right to raise a statutory limit of damages on appeal if not raised in the pleadings; tough to reconcile w/ Ingrahm; to hold otherwise would unrealistically require Δs to anticipate awards in excess of the statutory limitation even when they were not requested by the Π; even if Π does not ask for damages above the cap, Δ should be aware of the cap b/c the court may not be aware of the cap being on the books.

c) Owens Generator v. H. J. Heinz Co.—

• If you were suing in state court, what would you have to plead?
  • Time & Circumstances of Discovery
  • Reasonable to discover late
• If you were suing in Federal Court in Diversity, what would you have to plead?
  • State the Claim—Rule 8(a)(2)
  • Give general information that is “notice” of discovery
• This is the court’s attempt to carry out *Erie pre-Hanna* (pre-the idea that if there is a federal rule then you follow it)
• Today to bring the statute of limitations into the case the D would have to plead it in the post-*Hanna* era
• P has to prove the stuff listed under State Court at trial when they sue for fraud late according to CA law.
• So there is a mis-match between burden of pleading and burden of proof, because 8(c) is procedural.

D. Amendments

i. *Beeck v. Aquaslide*
   a) **RULE:** A motion to amend an answer should be granted unless the opposing party can show prejudice.
   b) In a personal injury action, D was allowed to amend its answer to deny manufacture of a slide that had allegedly injured P. P got injured on a slide and sued D because they thought D was the manufacturer. Three insurance companies confirmed this so D didn’t deny. Then the head of D inspected the slide and figured out they weren’t in fact the manufacturer. Statute of limitations ran out between admitting in that they made the slide and the motion to amend.
   c) So D moves for leave to amend their answer to the complaint under Rule 15(a) to deny that they made the slide. Trial court granted this motion.
   d) Rule 15(a) declares that leave to amend shall be freely given when justice so requires.”
   e) **RULE:** A motion to amend an answer should be granted unless the opposing party can show prejudice.
   f) When this case was all said and done, Beeck sued Aquaslide for reckless misrepresentation to constitute fraud under IA state tort law, and they succeeded to the tune of $3 million.
   g) 15(c)(3) wouldn’t have resolved this because no one knew it wasn’t Aquaslide until while after the 4(m) period. Unless the actual manufacturer had read about it in the paper during the 4(m) period or something.

ii. *Moore v. Moore*
   a) Rule 15(b)—Amendments to Conform to the evidence. This is ok if the parties explicitly agree to try something that wasn’t in the pleadings. It gets difficult when there is an implied agreement.
   b) In this case you have a father suing a mother for custody. Ordinarily there would be a counter claim under which the mother would seek custody, child support, attorney’s fees, and separate maintenance or alimony. She didn’t counter claim. All she did was a standard denial. But it’s expected that when they litigate custody, then they are also litigating the custody for her.
   c) Child support is closely related and the mother put evidence in related to finances that the father never objected to, so he gave implied consent.
   d) Attorney’s fees are awarded to parties naturally, so the father should have known.
   e) She doesn’t get the alimony, though, because the court isn’t comfortable saying that the lack of objection is implied consent, since alimony isn’t necessarily a standard part of a custody dispute.

iii. **Rule 15 (c)**
   a) Rule 15 (c) deals with Relation back of Amendments. Rule 15(c)(2)allows for it in the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set for in the original pleading.
   b) Rule 15(c)(3) allows for relation where “the amendment changes the party or the naming of the party against whom a claim is asserted if 15(c)(2) is satisfied and, within the period provided by Rule 4(m) (120 days after complaint filed) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.” —this is because there is no prejudice to the defendant. Doesn’t really matter how you find out, just matters that you know.

iv. *Worthington v. Wilson*—this is Only the Rule in the 7th Circuit.
   a) **RULE:** An amended complaint naming certain persons listed as “unknown” in the original complaint does not relate back to the time of the original complaint’s filing.
   b) Cops beat up P. P filed suit against city and “three unknown officers.” Then amended to name the officers and drop the claim against the city.
   c) Incident was on Feb 25, 1989, the complaint was filed Feb 25, 1991. Amended Complaint is filed June 17, 1991. New 15(c) went into effect December 1, 1991.
   d) If the original rule applies there is no chance they could relate back. Under new rule then under the timing of the rule they were ok, but the court doesn’t think going from “unnamed police officers” to the actual names isn’t a mistake under 15(c). There was no mistake as to the identity of the proper party.
   e) 7th Circuit judge actual suggests that if you just use random names you can avoid getting screwed by this “unknown doesn’t = mistake” rule. But that’s a violation of rule 11! And its awful!
   f) “but for a mistake concerning the identity of the proper party.”
   g) The 7th Circuit is so harsh because they want to force the plaintiff to do a little work.
   h) **RULE:** An amended complaint naming certain persons listed as “unknown” in the original complaint does not relate back to the time of the original complaints filing—**Only the rule in the 7th Circuit**.
   i) The rule really has a defendant’s focus, so it 3 unknown police officers is really no different from the wrong
names, because there is no prejudice.

j) This is a §1331 (arising under federal law) suit, so what is the relevance of the IL statute of limitations. Well, the Civil Rights Act that suit was brought under doesn’t have a statute of limitations, so the courts use the analogous state law. But because there is a 15(c)(3) then you don’t bring in the tolling provisions of state law since the US congress has given us a law to cover that. BUT Rule 15(c)(1) says that” if relation back is permitted by the law that provides the statute of limitations applicable to the action” then you can relate back. In this case that would be the state law. But (c)(1) wouldn’t apply because it wasn’t in effect when the complaint was filed. Today (c)(1) would save the day.

k) But the 7th Circuit COULD be saying that (c)(1) only applies to federal laws as they interpret it...BUT that’s crap. If that’s true, then what is the purpose of (c)(1)????

l) 15(c)(1) was written to solve the Erie problem. What if federal law would allow you to relate back under 15(c)(3), but state law wouldn’t let you relate back? The rules don’t clearly answer this.

E. Provisions to Deter Frivolous Pleadings

i. Surowitz v. Hilton Hotels Corp.
   a) RULE: The party verifying a complaint as required by Rule 23(b) is not required to verify the complaint on the basis of her own personal knowledge if she has been advised by a competent individual that the allegations in the complaint are true.
   b) P brought a derivative suit to recover money which D had fraudulently taken.
   c) Issue: Is a party verifying a complaint in a derivative action as required by Rule 23(b) required to totally understand the complaint? No.
   d) Rule 23.1 says that when a shareholder brings a derivative action then the P has to swear under oath that they know what the suit is about and that it’s legit so you aren’t just trying to force the company to settle.
   e) The court’s opinion here is beautiful. The modern rules are designed to get away from procedural booby traps and actually obtain justice. Even though P doesn’t really understand, they do the right thing. Harlan’s concurrence says that you have to depend on the lawyer, and in this case that worked out.

ii. Rule 11
   a) Pre 1983 as long as the lawyer didn’t act in bad faith we he was good to go. Ignorance was bliss. Subjective test. The law had no bite. Between 1938 when the rule was passed and 1976 there were 23 reported cases involving rule 11 and only 9 sanctions.
   b) 1983 -1991 was 73,000 reported Rule 11 cases. Lawyers were using Rule 11 to harass each other and to make a hell of a lot of money. Too much time was spent on it.
   c) 1993 added in the 21 day safe harbor. If P violates rule 11, D tells P and then has to give P 21 days to withdraw and fix the mistake before they can go to the judge. This rule also discouraged monetary sanctions. Shaming is the “in” thing now.
   d) (a) When you sign something that goes to court is one this applies. (b) you have to have done investigation reasonable under the circumstances and your not filing to needlessly increase costs or to harass, (b)(2) have to make a good faith argument for the extension or reversal of existing law or the establishment of new law.
   e) If a party has a lawyer then you aren’t going to get monetary sanctions under b2, but if you don’t have a lawyer, then b2 does apply to you.

iii. Hadges v. Yonkers Racing Corp.
   a) RULE: Pursuant to Rule 11, those facing sanctions must receive adequate notice and the opportunity to respond.
   b) After P and his attorney made incorrect statements in a Rule 60(b) motion to the court, they received sanctions with little notice and scant time to respond.
   c) Issue: Pursuant to Rule 11, must those facing sanctions receive adequate notice and the opportunity to respond? Yes.

   a) Business Guides puts 10 intentional mistakes in their guides. Tells lawyer that someone copies their guides, so they sue. Except the proofreader had fixed the 10 mistakes, so there was nothing really wrong. Should the law firm be sanctioned?
   b) Well, they found out that three of the mistakes were not there, and then didn’t check the other 7.
   c) They were sanctioned.

VII. Joinder of Claims and Parties: Expanding the Scope of the Civil Action

A. Joinder of Claims--Historical limitations on the Permissive Joinder of Claims—Harris v. Avery
   i. RULE: A P may unite causes of action where the have arisen from the same transaction or transactions connected with the same subject matter.
   ii. Joined no warrant false imprisonment/arrest claim and slander
   iii. Historically slander and false imprisonment were brought under the writ of case. However, if the false arrest was without a warrant it would be brought under the writ of trespass. This meant that under the common-law the “no warrant” false imprisonment claims couldn’t be joined.
   iv. Hypo: Under current rule could you join a negligence action from 2005, slander in 2004 and breach of K in 2005
together if they were factually unrelated?

a) **Rule 18(a):** Parties asserting a claim to relief….may join multiple causes of action. But, the rules of claim preclusion sometimes require joinder even when the joinder rules don’t.

b) **Rule 42:** Judge might order separate trials. If it’s a bench trial they probably won’t because you don’t have to worry about confusing the jury, so just be efficient and try them all together. But if it’s a jury trial you don’t want the jury to get confused

B. **Addition of Claims**

i. **Counter Claims—United States v. Heyward-Robinson Co.**

a) **RULE:** When a counterclaim is asserted on a contract in federal court, a claim based on another contract may be joined, if there is a logical relationship between the claims.

b) D’Agostino sues HR for the Navy contract. HR counter-claims on navy contract and on the Stelma contract. D’Agostino then counter-claims on the Stelma contract.

c) Under Rule 13(a) the Stelma contract is part of the same occurrence as the navy contract. They had an agreement that if one K was breached they were all breached.

d) Where is the subject matter jurisdiction over the Stelma claim?

- Rule 82: The rules have nothing to do with federal subject matter jurisdiction.
- §1367(a)—Supplemental Jurisdiction—Fed shall have supplemental jurisdiction over all claims so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the Constituion. –common nucleus of operative fact (Gibbs ancillary jurisdiction).
- Rule 13(a) requires that in order to be a compulsory counter-claim it must rise out of the same transaction or occurrence as the original claim.
- The court says that if counterclaims are compulsory counterclaims, they are ancillary to the claim asserted in the complaint and no independent basis of Federal jurisdiction is required. So the court is saying that if it meets the 13(a) test then it automatically passes the §1367(a) test.
- So the basis for this case being in federal court is §1367(a).

e) **The standards of 13(a) and §1367 are the same. But they answer different questions—one for joinder and one for subject matter jurisdiction.**

f) Claim preclusion bars splitting. So you can’t split your legal theory. Let’s say that you slip and fall at Schnucks. You can’t lose to them on a torts claim and then turn around and sue them on a contract theory.

g) HR first brought in Stelma and then claims that there is no jurisdiction for Stelma after they lost.

h) Friendly’s concurrence says that the similarities the court finds are not of legal significance. He’s saying that the Stelma claim is a permissive counter-claims. He argued that permissive counter-claims need not have an independent jurisdictional basis. But that was never the law, because of the codification of ancillary jurisdiction under §1367.

i) So if you are getting joinder via 13(b) (allows for joinder of permissive counter claims) then you aren’t going to get jurisdiction under §1367, so you better have subject matter jurisdiction under §1331 or §1332.

j) Hypothetical: P sues D in federal court. Then D turns around and sues P in state court. What happens to D’s suit? Well, you can’t use 13(a) because that doesn’t apply to state courts. Claim preclusion or collateral estoppel might work to get D’s suit dismissed.

k) Hypothetical: P sues D. SOL runs out. D counter-claims. Does the statute of limitations bar using the counter-claim as a defense? Yes, but he can’t collect any excess that he would have been entitled to had the SOL not run out. So then what if P’s action came out of a tort in 2005 and the counter-claim came out of a breach of contract in 1998? Then can’t raise the permissive counter-claim b/c it doesn’t arise out the same transaction or occurrence. The SOL running out doesn’t bar a compulsory counter-claim b/c the purpose of the SOL is already defeated by P bringing suit (repose and evidence collection).

ii. **Cross-Claims—Lasa v. Alexander**

a) **RULE:** Cross-claims, counterclaims, and 3rd party complaints arising from the same transaction or occurrence as the subject matter of the original complaint may be joined with the original complaint.

b) Facts:

- City hired Southern Builders (SB). SB hired Alexander (Alex) as a subcontractor. Alex hired Lasa to provide and install marble. Continental was the surety for SB’s performance.
- Lasa sues Alex, SB, Continental, and the City.
- Alex files a compulsory counter-claim against Lasa claiming the marble sucks.
- SB files a compulsory counter-claim against Lasa for the same reason.
- Alex files cross-claims against SB and the City.
- Alex brings in the architects as 3rd party defendants under 13(h). They are made party to Alex’s cross-claim against SB. This is allowed by Rule 20(a) regarding Permissive Joinder because the architects would be defendants arising out of the same transaction or occurrence and there is a common question of fact or law.

c) Side note: §1404 transfer statute can be used to get around personal jurisdiction problems.

d) The question is whether the cross-claims in question are sufficiently related to the same transaction and
Claims Involving Multiple Parties

i. Compulsory Joinder of Persons Needed for a Just Adjudication Under Federal Rule 19
   a) Once a person is a party who should be joined if feasible, and its not feasible, the question is whether or not we should dismiss the case w/out that party or let it continue without him/her. The test is one of equity and good conscience. (19(b))
   b) First wife keeps her married name, so she and second wife are both listed as Mrs. John Smith in phone book. Second wife sues Phone Company and court forces them to change 1st wife’s listing. First wife sues Phone Company and she wins. So there are inconsistent obligations for the phone company. See 19(a)(2)(ii)
   c) Provident Tradesmen’s Bank & Trust Co. v. Patterson
      • RULE: In the absence of a party who cannot feasibly be joined, a court should not dismiss the action if in “equity and good conscience” it could proceed without the party.
      • Estates of those who died in accident and an injured party sue the Insurance Company and the estate of the driver. The driver was driving with the owner’s permission.
      • Under 19(a)(1) The owner isn’t necessary for the parties to collect, b/c the insurance company will pay.
      • Under 19(a)(2) does the owner have an interest relating to the subject of the answer.
      • 19(b)(2)(i) May as a practical matter, can this impair or impede the owner’s ability to achieve his interest? If the Insurance Company has to pay the estates of those who died, then they won’t cover the owner in the state case against the estates.
      • 19(b)(2)(ii) Could any of the parties face inconsistent or double obligations? Yeah, the insurance company would have to pay on behalf of the driver and on behalf of the owner.
      • Under 19(b) should we dismiss the case and have it refilled in state court? The court should look at whether in equity and good conscience the case should be dismissed. Factors to be considered by the court are:
        • If there were/is a judgment, would dismissing it prejudice any of the parties or the non-party?
        • The extent to which relief can be shaped so that the prejudice can be lessened or avoided
        • Whether a judgment in the non-party’s absence will be adequate
        • Whether P will have an adequate remedy if the action is dismissed for nonjoinder.
      • This case should have been dismissed early on. What the wind up doing is resolving it by agreeing not to sue the owner after judgment against the insurance company is not dismissed.

D. Impleader

i. Rule 14: You can bring somebody in for indemnity if they are or may be liable
   a) Rule 14 is

      a) RULE: In a federal action, Impleader is permitted of a party who is or may be liable for indemnification to a party-defendant as long as the applicable state substantive law regarding indemnification is satisfied.
      b) Jeub gets sick and sues BG. BG brings in Swift (the ham manufacturer) under Rule 14(a).
      c) Under MN law Jeub would have to win, and then BG would have to sue Swift. But thanks to Hanna Rule 14 is a procedural rule, so in federal court we can get away with it. But any judgment against Swift may be stayed until any judgment against BG foods is paid. This takes care of MN law and Rule 14(a).

iii. Too, Inc. v. Kohl’s Department Stores, Inc
      a) RULE: A trial court should permit a 3rd party complaint if the allegations involve the same core of facts as those stated in the original complaint, but not if the 3rd party allegations are facially without merit.
      b) Too sues Windstar for copyright/trademark infringement. D brings in their designer and sales person as third party defendants under rule 14.
      c) D also sues for indemnification. But under NY law common-law indemnity is barred where the D is at fault at all. To get common-law indemnification you must be a passive defendant who was not a tortfeasor.

      a) GS sues ANCC for failure to pay. ANCC removed on 1332 grounds. ANCC files a compulsory counter-claim against GS for doing negligent work. GS then brings in HydroVac under 14(b) for 3rd party indemnity.
      b) The issue is that there was 1332 jurisdiction between GS and ANCC, but there is no diversity between GS and HydroVac. So, can GS bring in the non-diverse party as a third party defendant?
      c) §1367 prevents jurisdiction. This is so a P can’t use 14(b) as an end-run around the requirements of §1332 Diversity Jurisdiction.
E. Intervention
   i. Rule 24
      a) Unwelcome party—people who want to come in but no one wants them to. It’s the flip of Rule 19, where people who don’t want to come in get drug in.
   ii. Smuck v. Hobson
      a) RULE: The federal courts allow intervention when the party has an interest to be protected, denial of intervention would impair the party’s ability to protect the interest, and the party is not adequately represented by others.
      b) Suit to desegregate the Washington DC public schools. The school board loses and the district court comes up with a huge integration scheme. The superintendent resigned in anger b/c the school board wouldn’t appeal. A member of the board also wants to intervene, as do about 20 parents.
      c) The superintendent can’t intervene because he gave up his interest when he resigned.
      d) Smuck, the school board member has no interest because he had his chance to convince the rest of the school board to go forward and his interests have already been served. He has no personal interest. He tried to convince the board to appeal and he failed.
      e) What about the parents? Their concerns for their individual children’s educations are different from the concerns of the school board. The school board’s decision not to appeal does not adequately represent the parents interests. These parents want the new school board to be able to make their own decisions, rather than following the court order exactly—they are interested in the freedom of the board. The inadequacy of the representation does not become as clear until they refuse to appeal.
      f) In other jurisdictions (7th circuit) require gross negligence in not appealing.
      g) The interesting thing is that the opinion goes on for 20 more pages and the parents lose on all counts. But at least they got their day in court.
      h) Tension between the desires of the intervener and the parties to the case are pervasive. Under 24(b) if the intervener lacks an interest, but there is some issue in common, then its up to the judges’ discretion, rather than 24(a) that is mandatory.

VIII. Class Actions
   A. Operation of the Class Action Device
      i. General Notes
         a) Theories
            • Class action is the mother of all joinders, or
            • The class itself is a legal entity
         b) Numerosity—At one point 25 people was ok, at one point 350 was considered too small.
         c) The last revision of rule 23 added that you need a class. 23(c)(1)(B). It’s not a class action until the court certifies it as a class action. It used to be that this order was not appealable. A court may allow an appeal under 23(f) now.
         d) Hypothetical: Rose Bowl advertised putting the 7,500 unused tickets on sale. They only actually had 1,500. They gave away the rest to friends, etc. A lawyer brought a class action for the 6,000 people who were wrongfully excluded. CA said there was no class because we don’t know if there is commonality, we don’t know who would have been denied admission; we don’t know anything about these people.
         e) Hypo: all persons living or employed in certain FL counties who were exposed to a certain pesticide over a certain period of time.
         f) 23(b) An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
            • (1)Prosecution of separate actions by or against individual members of the class would create a risk of
              • (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (designed for where D might get inconsistent instructions in different trials)
              • (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests. (designed to deal with limited assets before the trial, not to deal with worries of uncertain things like bankruptcy)
            • (2) Deals with injunctions
            • (3) See book
      B. Certification
         i. General Telephone Co. v. Falcon
            a) Problem that Falcon is saying that they are discriminating in promotions in his case, and in hiring in other cases, and the two classes are not compatible.
         ii. Holland v. Steele
            a) This was the case about a detainee who wanted so start a class-action on behalf of detainees and sentencees who
Due Process Considerations

i. Hansberry v. Lee
   a) RULE: There must be adequate representation of the members of a class action or the judgment is not binding on the parties not adequately represented.
   b) First suit held that restrictive covenant was ok. Second case was between a black person that bought a house and the covenant holders who had already had the covenant upheld and said that Hansberry (the black person) should be bound by the earlier judgment and not be able to attack the covenant.
   c) The class in the original suit was on behalf of all property owners affected by the agreement. It would make sense if it was just of the homeowners who wanted to enforce the covenant. Hansberry wouldn’t be in that class b/c he is opposed to the covenant. So the original class was a violation of due process because Hansberry’s interests were not properly represented by the class.
   d) So if you were the class’s attorney in the first case, how would you get around this? Create a class on the defendant side of the action. Then Hansberry would have been included in the defendant class.

ii. Rule 23(c)(2)(A): For any class certified under Rule 23(b)(1) or (2), the court may direct appropriate notice to the class. The reason for this is because since the interests are so identical the system wouldn’t work if you had a class action and individual suits, then an opt out right would open the door to incompatible results.

iii. Options for client in a 23(b)(3) Class
   a) Opt-out
   b) Appear with own counsel
   c) Stay in class and do nothing

iv. Hybrid Classes: Say you had a 23(b)(2) employment discrimination case. Sue GM for prospective relief. Under Title VII you can also sue for back pay. Suppose the class representative and 4-5 other class members get back pay. The notice that was posted said you could get back pay. Some other class member, P, didn’t know that this included back pay. Latter they sue GM and claim they didn’t know that the original suit was for damages. Its not a due process violation because the rule only says the court MAY give notice. The rule is only phrased about injunctive relief. So the P would argue its more like a 23(b)(3) case and that this is a hybrid class. The Supreme Court has never ruled on this. The majority of cases follow the predominance test. Say you can’t take away right to sue for money damages.

D. Class Action and Jurisdiction

i. Subject Matter Jurisdiction—Diversity Jurisdiction
   a) If you have a class action against a D in California, 1,000 members of the class from California, and class representatives from NY, then the case can be brought with complete diversity
   b) Snyder—No aggregation rule barred diversity unless each person’s interest meets the amount in controversy.
   c) §1367—if you have one person who is diverse and has a claim that meets the amount in controversy, then you have jurisdiction so long as there are issues common in fact or law. §1367(b) doesn’t cover rule 23, so it doesn’t take away the subject matter jurisdiction. The court upholds this theory in Exxon Mobile. Overturns Snyder/Zahn. Funny thing is that the people who wrote §1367 didn’t intend for it to have anything to do with class action—it was written for regular joinder rules. The person who is diverse and satisfies amount in controversy doesn’t necessarily need to be a class representative. This substantiates the mother of all joinders theory, and shows that classes aren’t necessarily one entity.
   d) §1332(c) Normally any case over $5million you can get around aggregation. But 1332(c) lays out the exceptions. They depend on the percentage of diversity.
   e) Before the Exxon case and the Class Action Fairness Act of 2005 the Supreme Court and Congress have opened the federal court house doors to class actions

ii. Personal Jurisdiction
   a) “chose in action” is term for the property right that is the right to sue
   b) Phillips Petroleum v. Shutts
      • RULE: A state may exercise jurisdiction over a class action P even if the P’s contacts with the state would not confer jurisdiction over a D.
      • The burdens on class action plaintiffs are less than those on defendants.
      • With all of the procedural safeguards on class actions the decision not to opt-out acts as consent to be part
of the action, which grants personal jurisdiction even if the individual class members have no contacts with the forum state. The decision not to opt out manifests consent.

- Holding is limited to those class actions regarding wholly or predominantly monetary judgments when the class is on the plaintiff side.
- So how do you manifest consent in a 23(b)(1) class since there is no opt-out option? There is disagreement amongst the circuits, and the Supreme Court hasn’t spoken on it yet. You could say this is equitable monetary relief so it doesn’t fall under Shutts, but that has its problems.
- What about in 23(b)(2) cases? Shutts refused to answer this question. Some say that when it comes to injunctions courts just have that power and so personal jurisdiction is irrelevant.
- “Due process” comes from “law of the land” in the Magna Charta. There are two parts of Due Process: procedural (Mullane/notice; Rule 23/notice/adequate representation) and substantive (Roe v. Wade; Lochner Era cases). Personal jurisdiction LOOKS procedural, but it comes from federalism, so it falls under the substantive category.
- Real consent is less likely if you opt-out than if you opt-in, but it’s allowed because of other procedures. But it’s not true that the procedures do away with consent. It just allows for minimal consent.
- Opt-out has two purposes. One, it’s the vehicle of consent.
- (b)(2)—if its only for an injunction some courts say there is no Shutts problem because no money damages. But that doesn’t make any sense. One theory is that you can do this not because of Shutts, but because of the power judges have over injunctions.
- (b)(2)—injunction + incidental damages. Some courts say no Shutts problem. You can do this not because of Shutts, but because of the power judges have over injunctions. This is because of history and pragmatic concerns.
- (b)(1)—for equitable monetary relief. Some courts say Shutts excludes these, but that’s not what Shutts says. Some courts solve this by splitting into sub-classes. One for an injunction w/no opt out right, and one for $$$ with an opt-out right. This means that these courts are turning part of the (b)(1) class into a (b)(3) class. Other courts would just require it to be certified as a (b)(3) class.
- DROBAK likes this case.

E. Settlement Classes

i. Defendants have learned how to use class actions. Bring it under (b)(3) so you force the plaintiff to go through notice, or (b)(1) if you are going to win to prevent anyone else from every suing you.

ii. Amchem Products, Inc. v. Windsor
   a) RULE: Class certification must meet the requirements of Rule 23 even if certification is for settlement purposes only.
   b) Defendants are trying to use claim preclusion to protect themselves.
   c) Do you still use the standards of Rule 23 (a)&(b) when you have a settlement class? Yes. A settlement makes it easier to determine whether there is adequate representation, etc.
   d) In this case, no adequate representation b/c people who have asbestos sickness now have different interests than those who will be diagnosed w/it in the future.
   e) Breyer’s dissent is willing to bend the rules b/c it’s the only way to solve the asbestos problem.

iii. Ortiz v. Fiberboard Corp
   a) A suit where you have a fixed amount before hand then you can have a limited fund settlement.
   b) Here, however, Fiberboard was going to go bankrupt. But they didn’t want to give the Ps all of their money. Instead of paying in full worth of $235million, they put in $10million. That is a negotiated fund, not a fixed fund!
   c) This isn’t what 23(b)(1)(b) was meant to apply to.
   d) If fund were really limited the last people to sue wouldn’t get any money.

iv. Cigarette suit—
   a) Limited fund punitive damages.
   b) First circuit says the Ortiz conditions aren’t met. There is a limit on punitive damages, but it depends on the facts, so its not really a limited fund. So no (b)(1)
   c) You don’t usually award punitive damages w/out trial on compensatory damages. You need to determine someone is guilty before you punish them.
v. If congress won’t do anything about a problem and class actions won’t work, then what happens? The companies declare bankruptcy.

vi. Dalkon Shield Case
a) Bankruptcy judge set aside a huge fund, but it wasn’t enough to really pay off the women who were injured by the Dalkon shield.
b) Set maximums for women who had hysterectomies, who got PID, who were rendered infertile, and the settlements were WAY lower than they deserved.

F. Class Action Fairness Act of 2005
i. Passed b/c of politics
ii. All the rules are keeping out of the fed courts cases that belong in the federal courts
iii. Will make everyone happy because of increased innovation and lower prices—HA
iv. Changes §1332(d)—creates subject matter jurisdiction
v. §1453—removal of §1332(d)
vi. §1711—Coupon Settlements—READ ME
a) coupon settlement/attorney’s fees provision/notice to gov’t bodies of settlement
b) (a) If a proposed settlement in a class action provides for a recovery of coupons to a class member, the portion of any attorney’s fee award to class counsel that is attributable to the award of the coupons shall be based on the value to the class members of the coupons that are redeemed.
c) Always have to tell the government about settlements

G. The Preclusive Effect of a Class-Action Judgment
i. Cooper v. Federal Reserve Bank of Richmond
a) Class-action was about policies of discrimination, and was dismissed and the class decertified.
b) This does not mean that individuals cannot sue for discrimination on an individual basis.
c) Just because there is no class-wide discrimination does not mean that you can’t have individual acts of discrimination.
d) Under issue preclusion, the issue of Baxter being discriminated against individually was never decided. The original court did not make a determination as to whether or not the individuals were individually discriminated against.
e) Why doesn’t claim preclusion bar Baxter from suing? Claims are defined as being a part of the same transaction. The rule is: The class-action device was intended to establish a procedure for the adjudication of common questions of law or fact. If the bank’s theory that permitting petitioners to bring separate actions would frustrate the purposes of rule 23 were adopted, it would be tantamount to requiring that every member of the class be permitted to intervene to litigate the merits of his individual claim.

ii. Matsushita Electric Industrial Co. v. Epstein
a) Case gets settled and a judgment is entered in DE state court. Class promises not to sue anymore.
b) Another case with different class representatives is brought under federal law in a federal court. The corporation argues claim preclusion. Supreme Court says it depends on DE law b/c of full faith and credit.

H. Fraud requires reliance, so fraud cases are normally decertified.
I. Question of whether you should award punitive damages if you don’t have a trial on compensatory damages.

IX. Adjudication Without Trial or By Special Proceeding
A. Summary Judgment
i. In 1973 8.5% of cases went to trial in federal system. In 1993 it was 2.3%.

ii. Lundeen v. Cordner
a) RULE: Where no genuine issue as to any material fact remains, the court may grant summary judgment if the information presented would entitle one of the parties to a directed verdict.
b) First wife sues insurance company, and the second wife intervenes on the defendant’s side. First wife wants to show that her kids were the beneficiary of the husband’s insurance policy.
c) Prima Facie case would be that the insurance policy says that her kids are the beneficiaries.
d) The second wife claims that the husband tried to change the policy so she would be the beneficiary. Under insurance law the rule is that an insured’s attempt to change his beneficiary will be given effect if all that remains to be done is a ministerial duty on the part of the insurer.
e) Rule 56: Summary Judgment shall be entered if there is no genuine issue as to a material fact and the moving party is entitled to judgment as a matter of law.
f) P submitted her own affidavit that Joe would never have hurt the kids that way. But this isn’t enough to create a genuine issue of fact.

iii. Matsushita Electric Industrial Co. v. Zenith Radio Corp.
a) Two firms had a cartel. They overpriced in Japan and then under-priced in the U.S.
b) There is no proof of a plausible motive to do this. Firm A had a large share of US market and a small share of Japan, and firm B was visa versa. So A would get screwed and B would make out like a bandit.
c) So you get summary judgment b/c its not a factual problem.
B. Dismissal of Actions
   i. Voluntary Dismissal
      a) Hypo: P v. D for negligence in Federal Court.
         • Could P take a voluntary dismissal w/no problems? Yes, if it’s the first time, under 41(a).
         • If D had answered or moved for summary judgment then the P would need permission from the court under 41(a)(2).
      b) McCants v. Ford Motor Co.
         • Court grants a voluntary dismissal when P goes for one after D moves for summary judgment b/c the statute of limitations has run. P wants to sue again in a different state that doesn’t have as strict of statute of limitations.
         • Court allows the voluntary dismissal.
         • Does this make sense? Should the court say “you chose the court and you had a long time, statute of limitations have run, and you lose”? No. I mean, a significant portion of the work done in the first court by the D will be applicable to the adjudication in the second court.
   ii. Dismissal for Failure to Prosecute
      a) Rule 55: Default
         • (a) when a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party’s default.
         • (b)(1) When claim is for a sum certain the clerk can enter judgment for the amount and costs against the D, if the D has been defaulted for failure to appear and is not an infant or incompetent person.
         • (b)(2) There is no notice requirement for a default entered by a court unless the defendant has already appeared.
         • (c) For good cause shown, the judge may set aside an entry of default.
         • But if judgment enters then you have to go back to the court and ask them to go to rule 60 and undo the judgment.
      b) Coulas v. Smith
         • RULE: A default judgment may not be entered against a D who has filed an answer.
         • Defendant answered the complaint, but then didn’t show up for trial. He never made an inquiry as to when the trial was.
      c) Bass v. Hoagland
         • D’s lawyer withdrew and D didn’t know it. So no one appeared.
         • Since an answer had been filed D was not in default under rule 55.
         • The entry of judgment w/out trial by jury was a violation of due process.
   d) At the 55(b)(2) hearing it is up to the court’s discretion what shall be argued.
   e) TWA v. Howard Hughes
         • Anti-trust suit that goes to Sup. Ct. twice.
         • Sup Ct says on the second time that if as a matter of law you can’t be liable of something (a rule 12(b)(6) claim) then judgment can’t be entered against you.

X. Trial
   A. Trial by Jury
      i. Background Notes
         a) A trial is to resolve disputes. It doesn’t matter how you resolve disputes so long as it is socially accepted.
         b) Part of the problem we have is that we went through the Enlightenment and fell in love with reason. So we expect juries to get accurate facts from the trial and accurate law from the judge and use reason. And some times we expect too much
         c) 7th Amendment is where right to trial by jury comes from. It comes from the “In suits at common law” clause. The “shall be preserved” clause means that we go back to what the British did in 1791.
         d) Rule 2: Merged equity and law. This means that you go back and forth between the two in the court room.
         e) Seventh Amendment only applies to the Federal Government. The Sup. Ct. has never incorporated the 7th Amendment into the 14th Amendment. However, every state constitution creates a jury trial right. The state courts do not have the baggage of the “preservation” clause. Juries won’t go away in the federal system because of the 7th Amendment.
         f) Juries are being used by lawyers. You have to do your case on both levels—to the jury and to the court.
      ii. Beacon Theatres Inc. v. Westover
         a) RULE: Only under the most imperative circumstances can the right ot a jury trial of legal issues be lost thorough prior determination of equitable claims, and in view of the flexible procedures of the federal rules, the Supreme Court cannot anticipate such circumstances.
         b) Westover sues for injunction and declaration. Beacon had a compulsory counter claim for antitrust damages. If the injunction were determined first, then you have issue preclusion in the same trial, and it would make the
jury’s role meaningless and would deprive Beacon to right of trial by jury.

c) Before a judge can grant a remedy at equity you must show (1) irreparable harm and (2) no adequate remedy at law.

d) There is an adequate remedy at law for the declaration/injunction.

e) Merger of law & equity combined with compulsory counterclaims under Rule 13 means that equity need no longer intervene. Legal issue is dealt with first.

f) Used to decide equity first. Now decide legal issue first.

iii. Dairy Queen v. Wood

a) DQ sues the store owner seeking injunctions, an accounting of what is owed, and $. This really comes down to being a breach of contract suit. But they try to word it as equity (words like accounting) so they won’t have to have a jury trial.

b) Court says that this is BS. It doesn’t get any more common LAW then a breach of contract suit. And you shouldn’t be able to deprive people of their right to trial by jury based solely on the clever wording of the pleadings.

c) **RULE 53**: Allows the court to appoint a master—an expert who can advise the jury how to award damages so that the legal remedy will be adequate. Now that the master allows an adequate remedy at law, you don’t need an accounting.

d) Once again legal issues come before equity.

e) Equitable clean up doctrine—old theory that a judge can decide the little legal issues in a primarily equitable case. This case overturns the equitable clean up doctrine. If anything, now there is a legal clean-up doctrine.

iv. Side notes

a) There is a real concern about stealth jurors in tobacco cases.

b) How could you improve juries? Make sure more people should be awarded the opportunity to be on juries. Right now all you have are poor people, college students, and retirees.

v. Ross v. Bernhard

a) Hypo: If a Corporation is suing a CEO for fraud for damages, is there a right to trial by jury? In the case of both the fraud and the damages you have a legal remedy, so trial by jury. But the corporation won’t sue. So there will be a derivative suit on behalf of the corporation. Back in the day this was in equity. But now there is a jury trial right. Why?

b) Now there is an adequate remedy at law. The derivative suit, at its heart, is a common-law suit for fraud. Thanks Rule 2.

c) Stewart’s dissent talks about how a derivative suit has always been equity, so why change now?

d) Is this different from Beacon? Well, that case and Dairy Queen historically have law elements. Ross didn’t historically have a law element. So this case is pushing even further to create a right to trial by jury.

e) Consider 3 things to Determine the Legal Nature of a Case:

• Pre-merger custom
• Remedy sought⇒ THIS is most important
• The practical abilities and limitations of juries⇒ this has disappeared from Sup. Ct. opinions

vi. When can Congress replace a jury?

a) You have a choice. Either go to common law court, or go to congressional board that is faster and with expert?

b) Congressional regulations are not suits at common-law, so they might be able to get around 7th Amendment claims.

c) The corporation loses the protection of a jury.

vii. **Rule 48**: No fewer than 6 or more than 12 jurors. Unless the parties stipulate otherwise, have to have unanimous verdict.

a) This isn’t really “preserving” the common-law right to trial by jury.

viii. **Selection and Composition of the Jury**

a) Why?

• The 6th Amendment deals with jury trial in criminal trials
• The Sup Ct was willing to let the states experiment with 6-person juries
• 6th Amendment is incorporated by 14th, so the 6th Amendment is where the permission comes from. Therefore, you have to allow 6-person juries in the federal system.
• So if you can have 6-person juries in criminal trials, then you have to allow 6-person juries in civil trials. You can’t say that the 7th Amendment requires more than the 6th! Slippery slope crap.
• In criminal it’s easier to find 1 out of 12 hold outs than 1 out of 6. But in civil system its basically the same.
• Most district courts only require 6 jurors.
• You have to exercise your right to a jury trial w/in 10 days of the last pleading, or it’s waived. **Rule 38(b)**
B. Taking the Case from the Jury
   i. Standard for Directed Verdict or JNOV—must not be any substantial evidence supporting the verdict
   ii. Denman v. Spain
      a) RULE: If a jury verdict for P rests on conjecture rather than legally sufficient evidence, the D’s motion for JNOV will be granted.
      b) There was a head on accident. Two witnesses claim that the car was speeding. But there is no one who can say that the speeding caused the accident.
      c) Here there is no evident of causation.
   iii. Kircher v. Atchison
      a) Case where guy falls under rail road track and the only evidence is his own testimony. Denial of JNOV is upheld.

C. Challenging Errors: New Trial
   i. Incoherent Jury Verdicts
      a) Hypothetical. P v. D. Jury finds that P was 60% liable; D was 40% liable in a 50% rule state. They then award $250,000 to P. What do you do? Enter judgment notwithstanding the verdict for D. Why? Because we can tell that either the jury doesn’t understand the law or they aren’t applying it.
      b) Hypothetical: P v. D. Award P $250,000 but the jury says that the P shouldn’t get any money so it should be given to the Red Cross. What do you do? Enter award for $250,000 but don’t award to Red Cross.
      c) What’s wrong with quotient verdicts (Where all the jurors pick a number and then average them and live with the average) in the eyes of some courts? Well, it could lack any sort of deliberation as to what the award should be. But maybe if they discuss the average after they find it and all agree on it, then maybe its different. But quotient verdicts can lead to gamesmanship. Some states believe that a quotient verdict is ok so long as there is true deliberation afterward and it is a step in the process.
      d) Kramer v. Kister
         • Jury has a verdict and seals it. One juror changes his mind. Then they all come back with the original verdict.
         • Court says you need a new trial. Why? Because the court is worried that the juror is being coerced.
   ii. Jury Misconduct and the Integrity of the Verdict
      a) Hukle v. Kimble
         • RULE: It is jury misconduct for the jurors to decide the amount of damages to be awarded before deliberating and deciding the issue of liability.
      b) Mansfield Rule—juror’s testimony/affidavits are not admissible
      c) Iowa Rule—extrinsic evidence of juror misconduct is admissible but intrinsic evidence isn’t
         • Extrinsic—overt acts which may be corroborated or proved
         • Intrinsic—inhere to the verdict itself and are known only to the individual juror
      d) Federal Rule—Nothing that intrinsic or has to do with the process of reaching a verdict is admissible (so you can’t get evidence of a quotient verdict before the judge). But a juror can testify as to whether extraneous prejudicial information or any outside influence was brought to bear on the jury.
      e) Sometimes courts will uphold verdicts despite jury misconduct if the evidence is overwhelmingly on the side the jury decides for.
      f) Evidence of mental incompetence is not enough to overturn a jury verdict. Neither is evidence that a juror didn’t understand English. Neither is evidence of a hearing impediment. Neither is the fact that jurors are smoking weed, taking coke, and drinking heavily at lunch.
   iii. New Trial Because the Verdict is Against the Weight of the Evidence
      a) Basic notes
         • Standard for Granting a New Trial—To prevent a miscarriage of justice
         • Historically b/c you aren’t taking the case away from the jury you could keep on ordering a new trial. In a lot of jurisdictions the grant of a new trial isn’t appealable. So now a days you can really only grant a new trial once. The standard of appellate review of the decision to grant a new trial is “abuse of discretion”
         • Many times you can try to get a case dismissed
            • Seek 12(b)(6) dismissal
            • P’s Case
            • D seeks a directed verdict
            • D puts on case
            • Both party seeks a directed verdict
            • Jury Verdict
            • Losing party seeks JNOV an new trial
         • State Court
            • Close of all evidence Both parties move for directed verdict—denied
            • Jury verdict—losing party moves for JNOV and new trial.
      • Rule 50(b)—Under federal system the JNOV is a judgment as a matter of law (directed verdict). You can’t
overturn the jury verdict and have the JNOV because the Supreme Court has says the 7th amendment bans them in federal court. So if in a federal trial you forget to move for a directed verdict you can never move for a JNOV. But in state court you don’t have to do this because the seventh amendment doesn’t apply.

- Having it go to the jury before granting the JNOV requires the judge to take pause and rethink his reasoning if the jury disagrees with him. Not granting the directed verdict is also efficient. If a directed verdict gets appealed and gets overturned you have to have a new trial. But if you have a denial of the directed verdict motion, the jury finds for P, the court enters a JNOV for D, and it gets appealed and overturned on appeal, the appellate court can affirm the jury verdict and you don’t have to have a new trial.
- Yet today there are lots of directed verdicts. Why? Judges are thinking about efficiency in their own calendar/cases and they don’t think they’ll be overturned.
- The motions for new trial let the appellate court know if the trial judge thinks there should be a new trial.

b) Aetna v. Yeatts

- RULE: A federal trial judge may, in his sole discretion, set aside a jury verdict and grant a new trial where he finds the verdict is (1) contrary to the clear weight of the evidence, or (2) based on false evidence.

iv. The Power to Set Aside a Judgment on Grounds Discovered After it Was Rendered

a) Hypothetical: P v. Drug Co for causing her to be infertile. P wins final judgment for $1 Million. A month later she gets pregnant. Is there anything the drug company can do?

b) What about a workplace injury where someone wins $50 million dollars because they are permanently disabled and then two years later a new technique cures their problem. The new technique isn’t related to a fact in existence at the time of judgment, so it doesn’t count as newly discovered evidence.

c) Rule 60(b): Mistakes, Inadvertence, Excusable Neglect, Newly Discovered Evidence, Fraud.

- Sometimes for default judgments 60(b)(1) is used, but it has to be within 1 year of judgment.
- 60(b)(1)—mistake, inadvertence, surprise, or excusable neglect;
- 60(b)(2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)
- 60(b)(3) Fraud, misrepresentation, or other misconduct of adverse party
- 60(b)(4) Judgment is void
- 60(b)(5) Judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or vacated, or it is no longer equitable that the judgment should have prospective application,
- 60(b)(6) Any other reason justifying relief from the operation of the judgment

1-3 have to be brought within a year

d) Briones—Four Factors in determining if neglect is excusable

- (1) the danger of prejudice to the opposing party
- (2) the length of the delay and its impact on the judicial proceedings
- (3) the reason for the delay, and
- (4) whether the moving party acted in good faith

e) Patrick

- For any evidence to be considered newly discovered it must be related to facts that were in existence at the time of the trial.
- For new trial new evidence must
  - (1) mean you would probably get a different result at a new trial
  - (2) must have been discovered since the trial
  - (3) could not have been discovered before trial with due diligence
  - (4) must be material
  - (5) must not merely be cumulative or impeaching

f) Smith—in the old days you could only reopen based on extrinsic fraud, but Rule 60(b)(3) explicitly changes this now.

XI. The Binding Effect of Prior Decisions: Res Judicata and Collateral Estoppel

A. Terminology

   i. Res judicata/claim preclusion—
      a) a valid final adjudication of a claim precludes a second action that claim or any part of it
      b) Merger & bar—if the plaintiff in the first case one the case is merged into that victory, if the plaintiff lost the claim is barred because of that loss.
   ii. Collateral estoppel/issue preclusion—is of fact or law, actually litigated and resolved by a valid final judgment, binds the parties in a subsequent action, whether on the same or a different claim.
   iii. Sometimes both issue preclusion and claim preclusion are put under the blanket term res judicata, which means “a thing decided.”
   iv. This whole thing is often called the law of former adjudication
B. Claim and Defense Preclusion
i. Claim Preclusion
   a) **Rush v. City of Maple Heights**
      - RULE: Whether or not injuries to both person and property resulting from the same wrongful act are to be treated as injuries to separate rights or as separate items of damage, a P may maintain only one lawsuit to enforce his rights existing at the time such action is commenced.
      - Rush sued for property damages after motorcycle accident and won. Then she tried to sue for personal injury and claim collateral estoppel on the negligence.
      - Under *Vasu* she could have gotten away with this. However, the majority of jurisdictions wouldn’t allow her to split up the various claims on the single tort. Court says *Vasu* only applies in the case where there are indemnity issues with insurance companies. So the insurance company can sue and then have the injured party sue later.
      - A Π may maintain only one action to enforce his/her rights existing at the time such action is commenced; Π collected $100 in damages to her motorcycle in municipal court then received $12,000 for personal injuries in the court of common pleas which was affirmed on appeal; OH Supreme Court reversed, holding that the old rule of separating personal injury and property damage actions should not be followed b/c it conflicts with the great weight of authority in the U.S.; generally injuries to person and property amount to several effects of a single wrongful act.
      - After filing 1st suit, Π had no choice but to file the 2nd suit b/c the municipal court can’t decide higher amounts than $100; P’s lawyer was following the minority rule of bifurcating personal & property damages; even though it’s unfair to Π in this instant case, the court overturns in order to establish a precedent for judicial efficiency & “heads up” lawyering.
      - Claim preclusion would not bar the owner of the bike from suing for property damage after a non-owning rider had unsuccessfully sued for injuries BUT owner/operator cannot bring 2 separate suits for bike damage and bodily injury.
   b) The present test is the Transactional Test
   c) **Federated Department Stores, Inc. v. Moitie**
      - 7 cases were merged and the plaintiffs’ claims were dismissed for failure to allege an injury
      - 5 appealed, and 2 filed a new complaint.
      - The 5 won on appeal, but the 2 were not allowed to bring their claims because of claim preclusion
      - They couldn’t have brought a state claim, either, because it would have come from the same transaction.
   d) **Jones v. Morris Plan Bank of Portsmouth**
      - RULE: If a transaction is represented by a single and indivisible contract and the breach gives rise to a single cause of action, it cannot be split into distinct parts and separate actions.
      - Bank sued Jones for unpaid car payments. They win.
      - Bank sued Jones for another missed payment; Jones claims claim preclusion, the bank drops the suit.
      - They reposes the car and Bank sues for conversion. Jones wins because of claim preclusion.
   e) **Rinehart v. Locke**
      - Guy lost his claim because he screwed up his pleadings and the court denied leave to amend.
      - So the lawyer should have appealed the denial of leave to amend.
      - You can’t have two bites at the apple.
   f) **Anguiano v. Transcontinental Bus System, Inc.**
      - P sues D, D wins b/c P fails to post bond. P sues D again.
      - Rule 41(b): This case doesn’t meet any of the exceptions under 41(b) and it wasn’t dismissed w/out prejudice, so it is barred by claim preclusion.
      - In *Costello v. United States* the court held that the failure to attach an affidavit showing good cause was a lack of jurisdiction issue. When there is a threshold defect where the defendant wouldn’t be bothered by having to prepare a defense on the merits, then it isn’t barred. (But maybe they were doing this so they could still deport a mobster.) Shouldn’t this failure to post bond thing be the same? *Anguiano* came first. In *Costello* the complaint was never accepted, but in *Anguiano* it was.
      - Under *Costello* “jurisdiction” in 41(b) has a much broader definition than what we have learned it to be, because the court says it includes the threshold matters that don’t require a defendant to mount a defense.
   ii. Defense Preclusion
   a) **Mitchell v. Federal Intermediate Credit Bank**
      - RULE: A D may not split his cause of action against a P using part of it as a defense to the first action and saving the remainder for a separate affirmative suit.
      - The bank gives Mitchell a loan of $9,000. He gives them a note on his crops. The crops are sold with the proceeds going to the bank via the note. The Bank got $18,000 in proceeds. They never gave him the remaining $9,000.
      - The first lawsuit is for him to pay back the loan. He uses the defense that they have the proceeds from the potatoes. He then turns around and tries to sue for the remaining $9,000, but the court holds that when he
used that as a defense he should have filed a counter claim.
• The two cases should have been joined so that the executions could be set off. You can’t use the same claim as a shield (defense) and then as a sword (separate law suit).
• Compulsory counter claim rule comes from claim preclusion, not from rule 13(a). So the farmer winds up paying the bank $18,000 on a $9,000 debt, because he didn’t file a counter claim.
• Why is claim preclusion triggered by using a defense? Because if you don’t want to bring it up you don’t have to, that’s why.
• What obligation does a lawyer have to bring up the counter claim? Well, the lawyer was negligent, so the farmer should be able to sue the lawyer for malpractice.

b) *Linderman Machine Co. v. Hillenbrand Co*—didn’t raise the argument in the original trial as a defense, so they were able to bring a separate claim.

C. Issue Preclusion

i. *Cromwell v. County of Sac*
   a) **RULE:** A judgment estops further action not only as to every ground of recovery or defense actually presented in an action, but also as to every ground which might have been presented when the subsequent action involves the same demand or claim in controversy, but where that subsequent action between the same parties is instituted upon a different claim or demand, the prior judgment operates as an estoppel only as to matters actually controverted, the determination of which were essential to the final verdict.
   b) First coupon suit coupons are no good b/c he didn’t pay for the original bonds
   c) In the second suit he is suing over different coupons from different bonds.
   d) There is a special rule that means you can bring a case on each individual negotiable instrument and not be barred by claim preclusion.
   e) You cannot have issue preclusion on an issue that hasn’t been litigated

ii. *Russell v. Place*
   a) **RULE:** It is well settled that a judgment of a court of competent jurisdiction upon a question directly involved in one suit is conclusive as to that question in another suit between the same parties, where it can be established that the precise question was raised and determined in the prior suit.
   c) In the second case D pleads issue preclusion, but loses. In the first case D used want of novelty and prior use. He said that these issues had already been decided. But there was a general verdict, so we don’t know if they found for the P on claim 1, on claim 2, or on both.
   d) “It must appear, either upon the face of the record or be shown by extrinsic evidence that the precise question was raised and determined in the former suit...[Otherwise] the whole subject-matter of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined.”
   e) HYPO: A Æ B for interest, principle is not yet due. B argues (1) release of the interest (A promised B that B wouldn’t have to pay the interest) and (2) the entire transaction is void from the beginning because of fraud. Jury finds for B. Then in a new suit A Æ B for principle. Is the issue as to whether the entire transaction was void from the beginning precluded? No, because we don’t know what the jury found regarding this issue. This is one reason to have a special verdict. But people don’t like special verdicts because juries are inconsistent with their answers.
   f) HYPO: Suppose the hypo above was the same, except the first time the jury found for A. Can the issue of fraud be re-litigated? No, b/c the first jury had to find that the defense was invalid in the first suit in order for A to win.

iii. *Rios v. Davis*
   a) **RULE:** It is the judgment, and not the jury verdict or conclusions of fact, filed by a trial court which constitutes the collateral estoppel, and a finding of fact by a jury or a court which does not become the basis or one of the grounds of the judgment rendered is not conclusive against either party of the suit.
   b) PDG sues Davis. Davis sues Rios for indemnity and for damages. Jury found that everyone was negligent and they barred recovery on all accounts—Davis beat PDG and Rios beat Davis.
   c) So then in a second suit Rios sues Davis. There is estoppel of Davis’s negligence because the first jury found it in order for Davis to lose to Rios in the first case. But there is no estoppel of Rios’ negligence b/c Rios won b/c of Davis’ contributory negligence, so it’s irrelevant whether the jury in the first suit found Rios negligent.
   d) Rios was driving PDG’s truck. So PDG was negligent BECAUSE Rios was negligent. So the jury had to find Rios was negligent for Davis to beat PDG. So is the issue of Rios’ negligent estopped? Well, the court says no. This is because Rios couldn’t appeal the finding that PDG was negligent. He would have to rely on PDG appealing.
D. Persons Benefited & Bound by Preclusion—

i. **Patterson v. Saunders**
   a) Patterson estops both issues. The Restatement of judgments would establish neither.
   b) It was decided. The jury told us D was not negligent AND P was negligent, so D wins.
   c) Restatement doesn’t preclude because there might not be any way to appeal the second finding if the first finding is upheld on appeal.

ii. **Bernhard v. Bank of America**
   a) RULE: In CA and a minority of jurisdictions, a judgment in the first action may be asserted as a defense in a later action by one who was neither a privy with a party nor a party in the first suit, so long as the party against whom the judgment is raised was a party or privy with a party in the first suit.
   b) Issue preclusion used to have to be mutual. This case changes that.
   c) But you can never use issue preclusion against someone who was not a party to the lawsuit.
   d) HYPO
      - P v. Contractor; contractor wins
      - P v. City, P wins
      - City v. Contractor? What do you do? Well, non-mutuality so City can use claim preclusion against P
   e) FACTS: Beneficiaries sue Cook and the probate court says Cook wins. The estate then sues Bank of America who took over the estate.
   f) The court finds for the Bank b/c of non-mutual issue preclusion. Someone who was not party to the first lawsuit is using issue preclusion against someone who was.
   g) Three questions for Issue Preclusion
      1. Was the issue decided in the prior adjudication identical with the one presented in the action in question?
      2. Was there a final judgment on the merits?
      3. Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?

iii. HYPO for Defensive Issue Preclusion: A is B’s employer. B is A’s employee and the driver of A’s truck. C is the other driver. CÆB. Jury says B wasn’t negligent so B wins. CÆA. Would it make sense to use issue preclusion against C?

iv. HYPO for Offensive Issue Preclusion: CÆB. B wins because C was 100% negligent. AÆC. Should A be able to use the finding from the first case?

v. Offensive issue preclusion may discourage joinder. But at the same time you want to defend judgments that have already been rendered.

vi. **Parklane Hosiery Co. v. Shore**
   a) RULE: A litigant who was not a party to a prior judgment is not per se precluded from using that judgment “offensively” to prevent a D from relitigating issues resolved in that earlier equitable proceeding.
   b) The general rule should be in cases where a P could easily have joined in the earlier action a trial judge should not allow the use of non-mutual offensive collateral estoppel.
   c) SEC sues the company for a misleading proxy. Then a class of shareholders sues the corporation for the same thing. The Supreme Court holds that the issue of whether the proxy was precluded b/c the shareholders couldn’t have joined the government in the original suit.
   d) Once you have issue preclusion there is no jury that is going to decide if the proxy was misleading. So the corporation would lose its 7th Amendment jury trial right. The *Beacon* court said they couldn’t think of circumstances under which a right to jury trial could be taken away b/c of an equity judgment.
   e) Rehnquist’s dissent points out that other erosions of the jury trial were allowed at common-law in 1791, but this case of non-mutual issue preclusion was not allowed in 1791. He also points out that this isn’t that much more efficient b/c a jury will still have to decide damages. And that little bit of efficiency isn’t worth eroding the constitution.
   f) This decision leads to more consent orders and settlements because of the fear of lost litigation. This gives WAY more power to administrative agencies than the Congress was even prepared to give them.
   g) Can you use findings from fishy verdicts? Until the 1950s there was no non-mutual estoppel. So why now? Defensive claim preclusion is efficient. But why offensive?
   h) **Faucett v. AT&T**—we don’t use fishy verdicts in non-mutual offensive collateral estoppel.
   i) Shouldn’t allow non-mutual offensive collateral estoppel where it would be unfair to the defendant.
   j) When you go to court you have to be aware of the workings of all the potential judgments that could come out of the litigation.
   k) If you use issue preclusion then you won’t have inconsistencies.

vii. **Schwartz v. Public Administrators**
   a) Should we allow a system where juries can compensate plaintiffs even if they don’t think D is negligent? But if you find him negligent he would lose under contributory negligence.
b) But this case creates a sort of common-law mandatory joinder rule. It makes the otherwise permissive counterclaim mandatory. Common law changes joinder rules through claim-preclusion.

c) The Schwarz problem is eliminated w/comparative negligence.

viii. Martin v. Wilks

a) RULE: A consent decree mandating affirmative action does not have preclusive effect upon a subsequent challenge to those programs brought by persons not parties to the prior action.

b) Class of black firefighters sues the fire department over discriminatory practices. After black firefighters win, white firefighters who don’t like the plan bring a reverse discrimination suit. This is allowed because the city didn’t represent the interests of the white firefighters.

c) The Black firefighters should have created a defense class of the firefighters who liked the original plan so that the white firefighters would have gotten their day in court and wouldn’t have been able to challenge it.

d) Congress now has a law saying that if you know about an employment discrimination case then intervening is mandatory if you want to have your day in court.

E. Intersystem Preclusion

i. Hart v. American Airlines

a) RULE: Application of the doctrine of collateral estoppel requires: (1) an identity issue which has been decided in a prior action and is decisive of the present action; and (2) a full and fair opportunity to contest the decision now said to be controlling.

b) Full faith in credit applies to divorces but not to marriages. → Just a random side note.

c) What does it mean to give full faith in credit to a judgment?

d) TX at this time required mutuality; NY didn’t. Judgment is asserted for issue preclusion in NY. What full faith and credit requires is that you respect judgments. So it is ok to give them more power (thus to give them effect under issue preclusion in a non-mutuality state when the judgment was entered in a mutuality state.)

ii. Semtek International Inc. v. Lockheed Martin Corporation

a) RULE: Federal common law governs the claim-preclusive effect of a dismissal by a federal court sitting in diversity.

b) First case was dismissed “with prejudice on the merits” by the court because the California statute of limitations had run.

c) The filed a new suit in Maryland and it was moved to federal court. D asked CA federal court to enjoin the suit, but they refused. It wound up getting moved back down to state court b/c the only federal issue was a federal defense. The statute of limitations hadn’t run in MD.

d) The MD court granted a dismissal on claim preclusion grounds under 41(b) because the CA federal judge said that there was claim preclusion after the original suit.

e) Some states would bar this case under claim preclusion, and some wouldn’t.

f) The US Supreme Court says that 41(b) is not applicable in this case. 41(b) applies in the original court, not in other courts. So this rule only applies in the district where the initial action was brought? How can they reach this conclusion?

g) W/regard to the claim preclusion issues the traditional rule is that the expiration of the SOL bars the remedy but it doesn’t extinguish the right.

h) Don’t want rule 41(b) to violate Erie or the Rules Enabling Act.

i) 41(a) says you can re-file in that same district court, so 41(b) says you can’t re-file in that same court. You have to read (b) in the context of (a).

j) This case pulls 41(b) and claim preclusion apart.

k) Under Erie you want the federal rule to be the same as the state rule in diversity cases. UNLESS the state rule infringes on a federal interest, but that isn’t the case here. You use the state rules of claim preclusion in federal diversity cases. Since state, rather than federal, substantive law is at issue, there is no need to have a uniform federal rule for §1332 cases.

l) In §1331 cases the state courts must follow the federal rule.

XII. EXAM

A. 4 Questions (60/45/45/30); 3 hours

B. Use your judgment and focus on the issues that are in play in the questions.

C. Should easily have enough time for each question

D. Appendix w/rules (w/out commentary) and w/statutes and constitutional provisions we used. Left out stuff we didn’t study. But you won’t need it.

E. Will read outlines if on computer print out

F. Can keep your exam forever and a critique of the answer. 4-5 pages summarizing what he was looking for and what people did well/poorly on.

Matsushita v. Epstein—Supreme Ct. says if DE would give that broad of effect to a judgment then the Feds will do it too (re: claim preclusion) Although full-faith in credit doesn’t apply to the Fed, the Supreme Court basically de facto requires it.