

Civil Procedure Outline

Res judicata, claim preclusion: prohibits claim splitting because “a claim is barred by *res judicata* if it arises out of the same nucleus of operative facts as the prior claim.” (see, e.g., *Lane v. Peterson*, 1990)

I. PUNITIVE DAMAGES

- FRCP Rule 1: The Rules shall be “construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.”
 - A. Purpose of punitive damages
 - i. Tort law- deterrence of wrongful conduct; punish particularly egregious behavior (gross negligence or “wanton” misconduct).
 - ii. Goal of PD is NOT to compensate P, who will receive compensatory damages
 - B. Due Process
 - i. Main defense that Ds invoke when fighting against PD, “no State shall “deprive any person of life, liberty, or property, without due process of law” (14th Amendment).”
 - C. **Jury discretion in awarding punitive damages does not violate the procedural due process rights of Ds as long as the jury’s discretion is exercised within reasonable constraints** (see, e.g., *Pacific Mutual v. Haslip*, agent of insurance co. was found to have committed fraud against company’s client, jury awarded PDs within reasonable constraints [review by trial cts and appellate cts]).
 - Result: SCOTUS allowed PD award to stand.
 - Analysis: 1. Common law method for assessing PD is constitutional per se. 2. It is not possible to draw clear lines btwn un/constitutional awards, must rely on jury’s reasonableness and adequate guidance from ct. 3. PD do not violate DPC of 14th A; jury instructions and trial/appellate reviews allowed jury’s discretion to be exercised within reasonable constraints.
 - O’Connor dissent: jury instructions vague, give no criteria on which to use discretion, judicial review inadequate.
 - D. **Awarding PD for potential for harm, even when harm that has actually occurred is relatively small: Is there a reasonable relationship between punitive damages and the harm likely to result from D’s conduct** (see, e.g., *TXO v. Alliance Corp.*, slander case involving effort to swindle P out of substantial sums, gave \$19k CD, \$10M PD).
 - SCOTUS allowed PD award to stand since CD were so low, and the D’s scheme would have stolen substantial sums of money from lots of people if it had worked.
 - E. **Denying judicial review of PD awards is a violation of the DP rights of D** (see, e.g., *Honda Motor v. Oberg*, OR statute only allowing judges to order new trial in case of fundamental error; could not reduce PD award).
 - SCOTUS reverses PD award.
 - Historical English system had judicial review as important part of process
 - F. **Excessive awards of PDs are characterized by: degree of reprehensibility, ratio, and sanctions for comparable misconduct** (see, e.g., *BMW of North America v. Gore*, BMW’s conduct was not reprehensible enough, the ratio was excessive, and the sanctions for comparable misconduct were much lower than the PD amount, therefore PD award was violation of BMW’s DP rights).
 - Result: SCOTUS reverses PD award.
 - Reprehensibility (most important factor)
 - Some wrongs are more blameworthy than others: nonviolent less than violent, negligence less than trickery/deceit, first time offenders less than recidivists— “high degree of culpability that warrants a substantial punitive damages award.”
 - Ratio
 - Ratio of PD award to actual harm inflicted on P: “reasonable relationship”
 - Higher ratio may be justified if compensatory damages are low—egregious act has small economic consequences, etc. “Suspicious judicial eyebrow.”
 - Sanctions for comparable misconduct
 - Compare PD award and civil/criminal penalties that could be imposed

G. “Conduct in other jurisdictions may be probative when it demonstrates the deliberateness and culpability of D’s action in the state where it is tortious, but that conduct must have a nexus to the specific harm suffered by P,” “PD awards following a single digit ration will, in general, satisfy DP” (see, e.g., *State Farm Mutual v. Campbell*, due process doesn’t allow judgment of merits of 3rd parties hypothetical claims under reprehensibility analysis because it creates possibility that multiple PD awards will be granted; major reinterpretation of *BMW v. Gore*).

- Result: SCOTUS reverses PD award.

H. The use of a PD award to punish a D for injury that it inflicts upon nonparties violates DPC of Constitution; State courts can’t authorize procedures that create an unreasonable/unnecessary risk of confusion happening in a jury when tasked with separating reprehensibility of D from punishing D for harm done to others (see, e.g. *Philip Morris USA v. Mayola Williams*, harm done to nonparties can be taken into consideration in evaluating reprehensibility, but cannot punish with PD awards on this basis. Must ensure that jury will ask correct question.)

- Result: SCOTUS vacates PD and remands.

II. SUBJECT MATTER JURISDICTION

A. Diversity of citizenship jurisdiction

- Art. III, s.2 of Constitution: creates fed jurisdiction over diversity cases
- Congress limits grant of diversity jurisdiction; minimum amount in controversy: \$75,000
 - i. State citizenship of individuals: domicile test
 - **Test for domicile for a person: citizenship at time of filing suit with intent to remain “indefinitely”—cts. have accepted diversity as long as parties are diverse at time of filing, even if they were not at time of events in question or later in litigation** (see, e.g., *Gordon v. Steele*, young woman was given wrongful diagnosis in PA, she is going to school in ID, court found that diversity jurisdiction was present).** **
 - NB: *Mas v. Perry*, a woman doesn’t have her domicile changed by virtue of marrying an alien;**
 - *St. Paul Mercury Indemnity v. Red Cab Corp.*, requisite jurisdictional amount is satisfied if the amount claimed by P “in good faith” is more than minimum amount in controversy—inability of P to recover \$75k or more does not demonstrate bad faith.
 - A person does not lose her old domicile until he acquires a new one
 - ii. Complete diversity rule
 - Diversity statute (s.1332) has been interpreted to require complete diversity between all Ps and all D. **No P can be a citizen of the same state as any D** (see, e.g., *Strawbridge v. Curtiss*).
 - NB: Domestic relations exception to DJ—s.1332 has been read to exclude matters of family/probate court (not universal rule, some exceptions involving trusts).
 - iii. State citizenship of corporations and other entities
 - Congress codified test of PPB in 1958: **corporations had dual citizenship both in the state of incorporation and in the state of PPB.**
 - A corp’s “principle place of business” determines citizenship: “referring to the place where a corporation’s officers direct, control, and coordinate the corporation’s activities...in practice it should normally be the place where the corporation maintains its HQ—provided that HQ is the actual center of direction, control, and coordination” (see, e.g., *Hertz Corp v. Friend*, 2010, Hertz found to be a citizen of NJ because its HQ was there, despite majority of

** ***Mas v. Perry* and *Gordon v. Steele* are fairly inconsistent, cases of judges filling in the blanks with what they need to achieve the right outcome

business being in CA, and therefore diversity jurisdiction existed for the two parties bc P was citizen of CA).

- NB: before this case, there was NO uniform test for PPB among the CoA system. Test mainly chosen for uniformity and simplicity.
- Labor unions: treated as group of individual litigants, not as corp.; each member's citizenship is considered in determining whether there is diversity.
- Partnerships: treated as group of individual litigants, not as corp.—each member's citizenship is considered in whether there is DJ.
 - NB: if a law firm (partnership) sues a union (unincorporated association) there is diversity only if each partner @ firm is from a different state as any member of union.

iv. Amount in controversy requirement

- Amount in controversy requirement is **\$75k**, used to be \$10k (set by Congress).
- P's claim for more than required amount will generally be accepted, if it appears to be made in good faith, unless it "appears to a legal certainty that the claim is really less for the jurisdictional amount" (see, e.g. *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 1938, set this precedent, affirmed in *Diefenthal*).
 - Judge decides (using *St. Paul* standard) whether the evidence of P's injuries could possibly support a jury verdict over the required amount.
- **Claims for damages must be supported by legal and factual bases in order to satisfy diversity jurisdiction** (see, e.g., *Diefenthal v. CAB*, 1982, P's ridiculous claims of extreme humiliation and emotional distress were unfounded on legal and factual bases, although they claimed that their damages claim was made "in good faith" the court found that unsupported allegations won't satisfy diversity jurisdiction requirement.)

v. Aggregating claims to meet amount requirement

- Single P may aggregate separate claims she has against a single D to meet amount in controversy requirement, even if claims are unrelated.
- Co-Ps can't add claims together to reach amount requirement, and amounts claimed from different Ds can't be added together.
- NB: 28 USC s. 1367: supplemental jurisdiction statute, if P1's claim meets the amount requirement but P2's claim does not, P2 may aggregate with P1 (*Exxon Mobil Corp. v. Allapattah Servs. Inc.*, 2005).

vi. Constitutional scope of diversity jurisdiction compared to the statutory grant of diversity

- Constitutional scope under Art. III, s. 2 much greater than under 28 USC 1332; e.g., amount in controversy requirement, interpretation under *Strawbridge* to have complete diversity requirement.
- NB: Class Action Fairness Act- allows nationwide class actions to be brought in fed ct or removed to fed ct if any member of the P class is diverse from any D, and if amount in controversy (for entire class) exceeds \$5 million. 28 USC s.1332(d)(2)(a).

B. Federal question jurisdiction—concurrent jurisdiction w/state courts (except admiralty, antitrust, patents, and securities).

- 28 USC s. 1331 grants jurisdiction to fed district ct over all cases "arising under the constitution, laws or treaties of the US."
- NB: amount in controversy limit does NOT apply to FQJ
- i. Constitutional scope of FQJ
- Constitutional grant for arising-under jurisdiction is broad, but statutory grant has been interpreted much more narrowly.
- *Osborn v. Bank of the US*- Chief Justice Marshall gave expansive interpretation of scope of FQJ under Art. III s. 2: as long as the "original cause" (basic suit) involves a question of federal law, the case arises under federal law. "Ingredient" test.
 - Ex: A sues B for libel (state law claim) but B invokes defense of 1st amendment right to free speech → federal question jurisdiction.

ii. Statutory scope of FQJ: well-pleaded complaint rule

- Congress has given FQJ to fed district cts in 28 USC s. 1331—authorizes jurisdiction over “cases arising under” federal law—Courts have interpreted this grant much more narrowly.
- **Well pleaded complaint rule: A suit arises under the Constitution and laws of the US only when the P’s original cause of action shows that it is based upon those laws or that constitution—not enough that P anticipates D’s answer to original complaint is invalidated by some provision of constitution** (see, e.g., *Louisville & Nashville RR Co v. Mottley*, 1908, P’s cause of action was really BoC, they anticipated that D’s defense for not issuing them their lifetime RR passes was due to a federal statute, but this was insufficient).
 - Well-pleaded complaint rule serves administrative convenience more than intellectual elegance; serves as rough sorting mechanism for cases.
 - NB: furthers sensible judicial administration; no having to wait for D’s answer.
 - Declaratory judgments: still have to ask whether case would arise under fed law if brought by party who would ordinarily be P, so this still wouldn’t work for the Mottleys.

iii. Applying *Mottley*: Justice Holmes’ creation test

- **“A suit arises under the law that creates the cause of action.”** (Holmes’ Creation Test, *American Well Works v. Layne*, 1916, P sued D because D said that P had infringed its patent “you’re saying bad things about my patent”—although patents solely under fed law, claim was a tort (slander), therefore SCOTUS held NO FQJ).
 - NB: In *Mottley* the law that created P’s original cause of action was K law—therefore arising under K law—state law, does not satisfy Holmes test.
 - NB: SCOTUS has also held that **FQJ may not be based on a counterclaim** (it’s part of D’s answer, not P’s original claim) (*Holmes Group Inc. v. Vornado Air Circulations Systems*).
 - Exception to Holmes test: *Shoshone Mining Co. v. Rutter*, 1900, suit to settle mining claim; fed statute authorized parties to bring suits, but provided they should be decided under local mining customs and statutes—fed law provided governing standard, but no right to sue because governing substantive standard for deciding the claims was state law. SCOTUS held that this case didn’t arise under fed law because governing substantive rules were state/local
 - Also makes good sense, mechanically applying Holmes test would bring these into fed ct w/o any good reason.

iv. Beyond the Holmes test: state law claims involving substantial questions of federal law

- Whether federal courts can exercise FQJ in a case with state law claims in which potentially important federal issues are “embedded” in those claims.
 - **Where it appears that relief requested depends on the construction or application of the Constitution or laws of the US, there sometimes can be fed jurisdiction** (see, e.g., *Smith v. Kansas City Title & Trust*, 1921, P could only win by establishing that federal act authorizing issuance of bonds was unconstitutional, therefore could only win by establishing this proposition of fed law; SCOTUS held that FQJ was present).
- SCOTUS has held that a case that asserts a state law claim may satisfy s. 1331 if the court will have to resolve a substantial issue of federal law in order to decide state claim (*Franchise Tax Board of CA v. Construction Laborers Vacation Trust*, 1983).
- **There is no FQJ when the federal statute does not create a private right of action** (see, e.g., *Merrell Dow Pharmaceuticals v. Thompson*, 1986, P sued D

for negligent marketing and alleged that D was negligent in failing to comply with Federal Food, Drug, and Cosmetic Act standards in labeling product; because FDCA did not create private right to sue SCOTUS found no FQJ—allowing P to get into fed ct would allow fed. suits for many fed. regulations, even though Congress had declined to create right to sue for violating them).

- SCOTUS saying to Congress, if you want people to be able to sue under a statute, put it explicitly in your statute—moving away from implied cause of action).
- Much broader implications from this precedent than from *Grable*—here it's Food and Drug regulation as opposed to activity by IRS. Fed Ct. says there's federal issue embedded, but not enough; doesn't want to create a boatload of new litigation.
- **To examine whether or not state law claims arise under FQJ, the following factors must be considered: 1) Is the federal issue clearly raised? 2) Is it clearly contested? 3) Is it substantial? 4) Is the issue one that reasonably belongs in federal court (impact on state court/federal court allocation)?** (see, e.g., *Grable & Sons Metal Products, Inc. v. Darue Engineering and Manufacturing*, 2005, P sues under state law but to prove its substantive right, must establish a point of federal law).
 - NB: SCOTUS reconciles *Grable* outcome with *Merrell Dow* outcome—in *Merrell Dow* the federal issue wasn't the key issue out of the 6 counts, but in *Grable* it was, it was the **ONLY** issue; *Merrell Dow* was tort case and would have opened the door for tons of new tort cases; in *Grable* the procedure of gov't is on trial (federal tax code) and therefore the gov't had interest in defending it.
 - Clearly a state law claim, arguing that gov't didn't take it in the right way. Federal issue was part of the state law claim. Constitutionally that is enough. But SCOTUS has been more restrictive—*Grable* is exception, is unusual case. Not going to come up very often; involves the IRS. Clean issue, important because IRS is involved—**this is going to be extremely restricted in terms of its applicability to other cases.**
 - **VERY DIFFERENT DYNAMIC FROM MERRELL DOW.** Very focused, federal issue is the only and main issue here, as opposed to being 1 out of 6 counts in *Merrell*.

v. Article III and SCOTUS jurisdiction: *Mottley*, Round II

- Art. III s. 2 of Constitution plus congressional authorization for SCOTUS to review state judgments when validity of treaty or statute of US is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the US.
- Art. III allows FQJ for cases as long as they involve a fed. issue, whether issue is raised by P or by D.
- NB: final holding in *Mottley*—Ct. concluded that the statute was intended to bar passes granted before its enactment and that the statute was constitutional. Mottleys lost.

C. Removal of cases to federal court

i. Standard for removal

- NB: statutory creation only, **NO CONSTITUTIONAL REQUIREMENT** that removal process exist
 - If removed improperly, fed ct remands case back to state ct.
- 28 USC s. 1441(a)- basic removal provision; D should only be entitled to remove a case if the case (as pleaded by P) could have been filed in fed ct initially.
 - Rationale: D should have same option as P to choose a fed ct to hear a case that is within federal SMJ—result is that if either party wants a

case within fed jurisdiction to be heard in fed ct., the case will be heard there.

- *Mottley*'s well pleaded complaint rule and *Strawbridge*'s complete diversity rule still apply.
 - Removal and Diversity: 28 USC s.1441(b), removal in diversity cases possible only if "none of Ds is a citizen of the State in which the action is brought;" this rule does NOT apply to FQJ (so resident D can remove FQJ case)
 - **Jurisdiction upon removal turns on original federal jurisdiction, which turns on whether P sought relief under federal law** (see, e.g., *Avitts v. Amoco*, 1995, Ps didn't have federal cause of action at all, just state cause of action with vague reference to fed. law, SCOTUS vacates judgment for P and remands back to state ct from where it was removed).
- ii. Procedure for removal and remand
- NB: Ps can prevent D from removing case by structuring suit to do so—not unethical and is considered an acceptable tactical choice
 - REMOVAL: Who, when, where and how of removal:
 - Who may remove?
 - Only D
 - If multiple Ds, SCOTUS says all Ds must agree to remove, if any refuse it remains in state ct. (*Chicago, Rock Island & Pacific Railway Co. v. Martin*, 1900).
 - When must case be removed?
 - 28 USC s. 1446(b): must remove to fed ct within 30 days of receiving initial pleading/being served w/ process in the action; after 30 days you waive right to remove
 - Removal later in the case
 - Sometimes case may be removed after 30 days; s.1446(b) para 2 gives D 30 days to remove after receiving amended pleading that contains fed claim where previously none existed.
 - Applies to FQJ and DJ cases
 - Where is case removed to?
 - 28 USC s. 1441(a): must remove it to "the district ct of the US for the district and division embracing the place where such action is pending"—aka depends on where original complaint was filed.
 - Process of removal
 - 28 USC s. 1446(a): D files notice of removal in fed ct and notifies P and state ct she has done so.
 - Specify ground on which case is removable, include copy of state ct complaint and summons
 - Filing notice automatically transfers case to fed ct, regardless of if it's properly within its jurisdiction—filing notice triggers state ct.'s loss of power in proceeding with case while it's pending in fed ct.
 - REMAND: P takes no part in removal and may not know about it until notice of removal has been filed; if P thinks case is not removable/D didn't use proper procedure, she should move in fed ct. to remand action to state ct.

III. PERSONAL JURISDICTION

A. Evolution of personal jurisdiction- historical origins

i. Early history

- Personal jurisdiction- a court must have the authority to require D to appear in forum and defend action there
- Constitution imposes important restrictions on a court's authority over Ds—14th A provides that a state may not deprive a person of property without due process of law.
- *Pennoyer*: Early case in which SCOTUS tried to define appropriate limits of courts to exercise personal jurisdiction over out of state defendants.

- **A court may enter a judgment against a non-resident only if the party 1) is personally served with process while within the state, or 2) has property within the state, and that property is attached before litigation begins to establish in rem jurisdiction** (see, e.g. *Pennoyer v. Neff*, a state court cannot exercise personal jurisdiction over a non-resident unless he voluntarily submits to that jurisdiction; because state ct never acquired jurisdiction over Neff or his property, original judgment which took his property (*Mitchell v. Neff*) and subsequent sheriff's sale of land were invalid).
 - Historical context: New 14th A allows for questioning validity of proceedings in regards to whether or not DP rights are violated by court's assertion of jurisdiction.
 - Commandments of *Pennoyer*:
 - 1. States have power over **their** people
 - 2. States have power over **their** property
 - 3. All assertions of jurisdictional power must be consistent with 1 and 2
 - **PROBLEM:** *Pennoyer* framework underinclusive and inadequate to protect rights of citizens in suing noncitizens.
 - Mitigating principles (NB: 2 & 3 became especially manipulated):
 - 1. Quasi-in-rem jurisdiction ("quasi" bc property might not have anything to do with lawsuit, only using property bc person isn't available) to permit assertion of claims against non residents by grabbing property
 - 2. Physical presence—if in kingdom, grab them!
 - 3. Consent—can be express or implied
 - 4. Status relationship—such as marriage
 - *Harris v. Balk*: Balk (NC) owed Epstein (MD) \$, Harris (NC) owed Balk \$, Harris went to MD on a trip; Epstein sued Balk by "seizing" Harris; Harris paid Epstein what he owed Balk, SCOTUS said this was ok!
- ii. Social change and doctrinal rigidity: problems with *Pennoyer* doctrine
- Courts came to realize that *Pennoyer's* rules were not good for an economy increasingly conducted across state lines.
 - Advent of the car and modern nature of business made cts less comfortable w/ *Pennoyer* framework
 - *Hess v. Pawloski*, 1927
 - Hess, PA citizen drove into MA and injured Pawloski, MA citizen. After Hess returned to PA, Pawloski sued Hess in MA state court, asserting personal jurisdiction under MA statute (operating motor vehicle in MA constitutes assent of non resident, which constitutes the appointment of the registrar to be nonresident's lawful attorney—attorney may be served in lieu of nonresident with same legal force as if nonresident had been served personally). SCOTUS upheld assertion of PJ over Hess.
 - Twisting idea of consent to reach desired outcome; driver didn't have *real* consent: didn't know, never had opportunity to know.
 - Court essentially expanded *Pennoyer's* in-state doctrine to reach an acceptable result for the automobile age, and Court admitted as much in a later decision.
- B. The modern framework
- i. Modern era begins- "Legal realist" view of law; increasingly skeptical that the law has body of "natural principles;" began to believe that law has to be interpreted/developed in light of other considerations (public policy)—parallel with *Erie*
- **To establish in personam jurisdiction, if D is not within territory of forum, he must have certain *minimum contacts* with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice** (see, e.g., *International Shoe Co. v. Washington*, 1945, Int'l Shoe was subject to proceedings in WA because of their sufficient contacts in WA's jurisdiction. WA can enforce their state procedure of collecting unemployment funds from employers, which is not in conflict w/ DPC of 14th A).

- **Specific in personam jurisdiction- creates in personam jurisdiction if the claim arises out of D's deliberate contact w/ the state**
- **General in personam jurisdiction-creates in personam jurisdiction as long as D (typically corporate) has "continuous and systematic" contacts w/ state.**
- NB: quid pro quo in new analysis- privileges of working there opens corp up to liability (allow potential Ds to predict/limit exposure to liability); reconceptualized PJ as related to fairness/reasonableness
- Notable quotables:
 - Make it "reasonable, in the context of our federal system, to require the corporation to defend" (p. 165)
 - "Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the law which it was the purpose of DP clause to insure."
 - Inquiry is NOT "mechanical or quantitative" (p.166)
 - Int'l Shoe "received the benefits and protection of the laws of the state." (166)
- In some respects *International Shoe* overrules *Pennoyer*
 - *International Shoe*: ct can exercise PJ over a D even if he wasn't served within the state, was not domiciled or present in the state, and did not otherwise consent to be sued in the state—"minimum contacts" is new basis.
 - *Pennoyer*: territorial authority of ct is still important; personal service on an individual D while the D is within the state still supports PJ in most cases
- NB: State ct can only exercise PJ if it has the constitutional authority AND relevant statute (usually a long arm statute) that authorizes it.
 - Long arm statute—specify contacts with state that allow cts to assert jurisdiction over D.
- Collateral challenge to PJ
 - Ds can raise PJ in collateral hearing; must first fail to appear in ct where P filed original suit. This eventually results in default judgment entered against D by that ct. D appears in enforcing ct (state of D's assets) and argues that original ct's judgment is invalid for lack of PJ and shouldn't be enforced.
 - VERY RISKY- D waives any opportunity to contest P's claims on merits, if collateral challenge fails the enforcing ct can order D's assets to be sold.
 - Only makes sense if D has no/very weak defense against P's claims on the merits, amount at issue is small relative to costs of trial, or argument against PJ is strong.

C. Contemporary problems and the concept of specific jurisdiction

i. Refining the test for specific jurisdiction—defining "minimum contacts"

- **D's deliberate in state contact is not the only factor to consider in assessing PJ: must also consider factors specific to P and D in their individual circumstances** (see, e.g., *McGee v. International Life Insurance Company*, 1957, CA citizen sues TX insurance company to make them pay life insurance claim, SCOTUS finds minimum contact established bc **D entered into K knowingly w/ CA citizen, CA has "manifest interest" in providing "effective means of redress" for citizens—no hard and fast test coming from this opinion**).
- **NB: Significance of case comes from overall take on where law was heading:**
 - Expanding scope of state PJ, transformation of nat'l economy, less burdensome given "modern transportation and communication."
 - SCOTUS' most liberal approach to PJ.

- **“It is essential in each case that there be some act by which the D purposefully availed itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws”** (see, e.g. *Hanson v. Denckla*, 1958, D’s trust executor based in DE but D moved to FL and signed new will there, SCOTUS found no personal jurisdiction bc there were no deliberate acts by D connecting her to FL).
 - UNILATERAL ACTS of someone else don’t establish a minimum contact that hooks you.
 - Clarifies scope of *McGee*, Hanson made clear that an overall consideration of forum’s connection to dispute is not a *substitute* for existence of MCs. Defendant MUST have initiated a contact in the forum state.
- **Specific jurisdiction is constitutional only when 1. The defendant has had contacts with the forum state, 2. The plaintiff’s claim arose out of those contacts, and 3. Personal jurisdiction is reasonable based on a consideration of additional factors: burden on D, forum state’s interest in adjudicating dispute, P’s interest in getting convenient forum, most efficient resolution of disputes, shared interest of states in furthering fundamental substantive social policies (Federalism concerns)** (see, e.g., *World-Wide Volkswagen v. Woodson*, 1980, state court could not exercise SPJ over nonresident retailer and its wholesale distributor when Ds’ only connection to state is that one of their products sold in NY to NY residents was involved in an accident in OK, because allowing SPJ would violate DPC of 14th A).
 - P argued “foreseeability” of mobility of car, SCOTUS rejects this, says it’s not enough: “every seller of chattels would in effect appoint the chattel his agent for service of process.”
 - Take away: SPJ can’t be established by unilateral activities of someone else, D must have made choice to serve market in OK (affirms *Hanson v. Denckla*).
 - Notable quoteable: this doctrine “acts to ensure that the States through their courts do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.” (p.186).
 - Brennan’s dissent: cites *Ohio v. Wyandotte Chemical Corp.*, corp having no “direct contact” with Ohio could constitutionally be brought to trial in Ohio bc they dumped pollutants into streams outside of Ohio’s limits, water carried these to Lake Erie and affected Ohio—no corporate acts, just consequences.

ii. Post *Worldwide Volkswagen* cases

- *Keeton v. Hustler Magazine, Inc.* (1984)- Court decided Keeton could sue for nationwide damages in NH—if libel P couldn’t sue for all damages in one state, there would be a serious potential for draining judicial resources. Also protects defendants from harassment arising from multiple suits. Selling thousands of magazines monthly in NH was sufficient to establish PJ for Hustler.
- *Calder v. Jones* (1984)- writer and editor wrote libelous article in FL about CA resident. Published by National Enquirer, including in CA. Jones sued the National Enquirer, writer and editor in CA. National Enquirer conceded PJ in CA but the writer and editor contested it. Court held that CA’s exercise of PJ over reporter and editor was constitutional. “CA is the focal point of both the story and of the harm suffered. Jurisdiction over petitioners is therefore proper in CA based on the “effects” of their Florida conduct in CA.” Ds knowingly caused injury in CA, would not be fair to make P go to FL to seek relief. Their status as employees does not insulate them from jurisdiction.
 - NB: Ct rejected any 1st A considerations; would “needlessly complicate an already imprecise inquiry.”

iii. Contracts as contacts: *Burger King v. Rudzewicz*

- **PJ test: 1) must have meaningful connection between Ds and forum state, D must have “purposefully availed” itself of forum state; 2) litigation results from injuries that “arise out of or are related” to the activities in the state; 3) look overall to “fair play and substantial justice” based upon several factors** (see, e.g. *Burger King v. Rudzewicz*, 1985, FL ct had PJ over MI franchisee, while existence of K is insufficient to establish contact per se. D had 20 year contractual relationship, deliberate affiliation w/ FL and reasonable foreseeability of litigation there b/c of terms in his K and FL’s long arm statute)
 - **Factors that weigh on “fair play and substantial justice:**
 - **burden on D**
 - **P’s interest in convenient forum**
 - **Forum’s interest in adjudicating dispute**
 - **Interstate justice system’s interest in obtaining efficient resolutions**
 - **“Shared interest of the several states in furthering substantive social policies.”**
 - D received fair notice from contract documents and course of dealing that he might be subject to suit in FL, failed to demonstrate how jurisdiction in that forum would be fundamentally unfair.
- Key concept: purposeful availment: whether D can reasonably anticipate being haled into court.

iv. PJ and federal courts

- In most cases, a fed ct can exercise PJ over a D only if the courts of the state in which the fed ct sits could do so under state’s long arm statute and the DPC of the 14th A—fed cts have to analyze PJ the same way that state courts do.

D. The stream of commerce problem

i. Component part manufacturer is subject to PJ in a state where its component is ultimately sold, even though component part manufacturer did not sell the component directly into that state (see, e.g., *Gray v. American Radiator and Standard Sanitary Corp.*, 1961, woman who was injured by water heater using a defective component part manufactured by D was able to sue D in her home state).

- Most liberal interpretation of SoC

ii. **Stream of commerce by itself is insufficient to establish “purposeful” contacts with the forum state—need SoC PLUS** (advertising in forum state, product support in forum state, etc.)(see, e.g., *Asahi Metal v. Superior Court*, 1987, CA ct did not have PJ over Japanese component part manufacturer because there was no “purposeful availment” of the forum state’s market, must show that D must have directed some activity to forum state beyond its component part being used in the product that was sold there).

- Other factors weighed against PJ over D: P had settled, D was from foreign country, no real interest of state remaining, countervailing international interest in not imposing US jurisdiction.
 - First case shown to be an “unreasonable” exercise of PJ: unreasonable b/c of totality of its circumstances

iii. 1) **PJ requires a forum-by-forum analysis: need to demonstrate D’s actions directed at the economy existing within the jurisdiction of a given sovereign; 2) because the US is a distinct sovereign, D may be subject to jurisdiction of the courts of the US but not of any particular state** (see, e.g., *J. McIntyre Machinery, Ltd., v. Nicastro*, 2011, D (manufacturer of shearing machine) was not subject to PJ in NJ (where P filed suit) because D had not purposefully availed itself of doing business in NJ, nor did it place goods in the SoC in the expectation that they would be purchased in NJ).

- 4-2-3 split decision, replaces *Asahi*

- Plurality states that SoC is a metaphor, not a test, and analysis needs to consider whether D had purposeful contacts directed at or w/ forum **state**, not US in general, as a whole to establish PJ.
- Strong policy reasons are insufficient
- NB: replaces Asahi

E. The “arises out of” concept

i. Determining when a claim arises out of a contact

- SCOTUS not clear on issue, lower courts develop different approaches
 - Evidence test- claim arises out of D’s in state contacts only if “D’s forum contact provides evidence of one or more elements of the underlying claim.”
 - “But for” test- claim arises out of contact if claim would not have arisen **but for** D’s contact with the state
 - NB: “But for” test is more expansive in regards to jurisdiction than evidence test.
 - Use more flexible standard, decide whether claim is sufficiently related to contact—may capture what cts actually do, esp those who haven’t chosen btwn evidence and “but for” tests

ii. Focus on claims, not cases

- In general, ct cannot establish PJ over all claims in a case that stem from a single claim arising out of D’s contact with forum; normally you have to establish that each claim arises out of D’s contacts.

iii. “Effects test” and the internet

- Restatement (2d) of Conflicts of Law: “A state has power to exercise judicial jurisdiction over an individual who causes effects in the state by an act done elsewhere with respect to any cause of action arising from these effects” (unless the nature of the effects and the individual’s relationship would make exercise of jurisdiction unreasonable.
 - Must have causal relationship: purposeful action→effect in state; activities must be targeted.
 - Plus “unreasonable” standard
 - NB: Effects test DOES NOT EQUAL foreseeability!
- **A court within a state can assert personal jurisdiction over the author and editor of a national magazine which published an allegedly libelous article about a resident of that state, and where the magazine had wide circulation in that state** (see, e.g., *Calder v. Jones*, 1984, combination of libelous article and National Enquirer’s large circulation in CA would harm career of P in CA (her home state) and were enough to establish D’s minimum contacts with the state).
 - NB: SCOTUS said Ds could use 1st A argument against claim itself, but not against PJ of court to hear the claim.
- **A court within a state can assert PJ over a magazine when party injured by libelous assertion is not a resident of the forum state** (see, e.g., *Keeton v. Hustler Magazine*, 1984, D’s relatively small (10k-15k/year) sales of magazine in NH were enough to establish minimum contacts there, so that NH could assert PJ over D without violating DPC).
- **Sending defamatory information into many states via the internet (not directing information specifically to one/several states) is not enough to establish PJ over the author of such information** (see, e.g., *Revell v. Lidov*, 2002, US CoA for 5th Circuit rejected PJ over owner of website and author of allegedly defamatory article, because neither D knew that P lived in TX, website wasn’t directed at TX, while website had TX subscribers the article wasn’t

written using TX sources, article didn't have anything indicating it would be of particular interest to TX readers).

- **Disseminating information over the internet neither creates GJ nor PJ, must have targeted forum state with information and known that impact of action would be in forum state** (see, e.g., *Jackson v. California Newspapers Partnership*, 2005, D's website's publication of allegedly slanderous article about P was not specifically targeted at P's home/forum state, P's allegedly harmed reputation is national, not limited to IL (therefore weaker than *Calder*), and asserting PJ over D would offend "traditional notions of fair play and substantial justice."
 - NB: *Zippo* test for determining extent to which a website is "interactive" for PJ purposes—mainly obsolete today, and in any event no real need for new test, just apply *International Shoe*: whether or not there was directed activity, is content directed to specific audience?
 - Whether the owner of the website intentionally directed electronic towards forum state and whether the cause of action in case arose from that activity.

F. General jurisdiction and other bases for personal jurisdiction

i. Definition of GJ

- General jurisdiction- can be exercised only if the defendant has "continuous and systematic" contacts with the forum.
- If this standard is met, a **court can hear any claim that the plaintiff may have against the defendant, even if the claims arose out of defendant's contacts in a different state.**

ii. If corp. has continuous and systematic contacts w/ state, then it won't experience much of a burden by defending claims there—concept of taking advantage of benefits of doing business in state, must accept exposure to liability.

iii. **"Mere purchases, even if occurring at regular intervals, are not enough to warrant a State's assertion of in personam jurisdiction over a non resident corp in a cause of action not related to those purchase transactions"** (see, e.g., *Helicopteros Nacionales de Colombia, SA v. Hall*, 1984, foreign company's contacts with state of TX were insufficient to establish general jurisdiction in TX for purposes of wrongful death cause of action, because nature of D's contacts were not continuous and systematic—one trip by D's CEO to negotiate K does not meet that standard, neither do purchases/related trips).

- Majority did not explain what kinds of contacts are "continuous and systematic"—lower courts have had difficulty determining what *Helicopteros* means. Most courts have found general jurisdiction where an entity has either its place of incorporation or its PPB. Some courts have held it exists in states where the defendant has a continuing physical presence, such as an office (especially when that presence includes employees).
 - NB: Majority relies on *Rosenberg Bros. & Co. v. Curtis Brown Co.*, 1923, - defendant was small retail company in OK that was sued in NY—only NY connection was that it bought a large portion of the merchandise sold in its Tulsa store from NY wholesalers. Court concluded that this did not establish general jurisdiction.
 - Brennan's dissent points out that *Rosenberg* might not be relevant anymore in the modern economy, was decided in 1923 before "fundamental transformation of our national economy." Brennan also points out "related to" part of establishing PJ, and wonders why it isn't allowed to be applied here given TX's interest in adjudicating suit.

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 - *Reyes v. Marine Mgmt & Consulting, Ltd* (1991)- accident occurred off the coast of OR, plaintiff sued in LA. Louisiana Supreme Court held that general jurisdiction applied because Hong Kong company had a corporate office in Louisiana from which it conducted a significant amount of corporate business.
 - *Robbins v. Yutopian Enterprises* (2002)- claim against CA company in MD. Alleged infringement occurred in CA, but defendant had conducted almost 50 transactions with MD customers in the year prior, and had engaged in heavy marketing in MD. Court did not find general jurisdiction: regular contacts are not necessarily continuous and systematic contacts.

iv. **“A court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so “continuous and systematic” as to render them essentially at home in the forum state.”** (see, e.g. *Goodyear Dunlop Tires v. Brown*, 2010, D was not subject to GJ nor PJ in forum state of NC in wrongful death suit, because the fact that D’s products are in the SoC in NC (only contacts with state) is insufficient to establish PJ, let alone GJ).

- NB: SoC is for establishing PJ ONLY, and strengthening PJ assertion does not = GJ.
 - Ruling otherwise would leave any manufacturer open to suit on any claims of relief, wherever goods are distributed (would go against *WWV* precedent).
- v. *Helicopteros* court did not say whether general jurisdiction applies to individual defendants; later on Scalia suggested that general jurisdiction (based on continuous and systematic contacts) might be limited to entity defendants, such as corporations.
- Analogous doctrine to general jurisdiction for individual defendants is domicile-individuals are subject to personal jurisdiction wherever they are domiciled (*Milliken v. Meyer*- Court held that domicile in state is sufficient alone to bring an absent defendant within reach of state’s jurisdiction for the purpose of personal jurisdiction).
 - Main difference: a person only has one domicile for purposes of PJ, but a company may have continuous and systematic contacts in several different states systematically.

IV. REQUIREMENT OF NOTICE AND OPPORTUNITY TO BE HEARD

A. Constitutional requirement of notice

- DPC in 5th A (applicable to fed. cts) and DPC in 14th A (applicable to state cts) put constitutional restraints on methods of service of process).
 - Ct must act in accordance w/ DP of law bc when ct enters judgment against D, it interferes with his liberty/property.
- i. **For service to be constitutionally inadequate, it must be sufficiently unlikely to reach the parties, and there must be a means of providing more effective service; “When notice is a person’s due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.”** (see, e.g., *Mullane v Central Hanover Bank and Trust Co.*, 1950, notice via newspaper publication of settling first account of a trust deprived some of the beneficiaries of their due process rights under the 14th A, because the publication was inadequate notice—for beneficiaries with known interests in trust and/or addresses, mail must be used).

- NB: Personal service is **always** constitutional
- Have to weigh costs/convenience of notification v. constitutional rights, must have relationship to potential deprivation
- NB: *Mullane* establishes broad constitutional standard rather than a mechanical answer; was the first time SCOTUS has discussed notice
- Metzloff's quote: "**notice reasonably calculated, under all the circumstances, to apprise interested parties** of the pendency of the action and afford them an opportunity to present their objections."
- When absolutely nothing else works, "substituted service" is ok but it must be last resort, must ask court to grant order allowing publication.

B. Service of process (see pgs. 335 for rules for natural persons/corporations other entities)

- NB: 4(e): individual defendant; 4(h): "corporation, partnership or association"; 4(j): municipalities; 4(f): foreign Ds
 - i. *Greene v. Lindsey*, 1982—service of process in an eviction action
 - KY statute authorized sheriff to deliver notice to tenant
 - If no one was home, post papers on tenant's door
 - Tenants argued statutory method didn't satisfy minimum standards as described in *Mullane*—SCOTUS agreed, many such notices didn't reach Ds via that method, and another inexpensive and reliable method was available (the mail).
 - ii. *Jones v. Flowers*, 2006—notice of tax sale proceeding
 - AK statute authorized notice in a tax sale proceeding by certified mail to the owner of property, followed by property if letter was returned unclaimed.
 - SCOTUS held this was inadequate (closely divided opinion)
 - Majority: consequence of deprivation involved (sale of D's real estate), more steps needed to give actual notice.
 - iii. Rule 4(c)(1): complaint and summons must be served on D
 - Rule 4(c)(1): "plaintiff is responsible for having summons and complaint served" on D.
 - Rule 4(c)(2): "[any] person who is at least 18 years old and not a party may serve summons and complaint."
 - iv. Fed. Rule 4(e)(2)(B) allows service by leaving summons and complaint (if D is a person) at D's dwelling with a person of suitable age and discretion residing therein.
 - 4(d): waiving formal service; mailing complaint and asking potential D to "waive" service—if you say no, marshal/sheriff will do it, you foot the bill, and they might turn up at your office.
 - Some states (like MA) allow for service at "last and usual place of abode" without requirement of leaving it with a person—seems like approach that was rejected in *Greene*. Smarter to just use fed standard to avoid constitutional challenge.
 - v. Service and SoL
 - Rule 4(m): SoL: 120 days to serve service and complaint (after it is filed in ct.), otherwise ct must dismiss action
 - If P shows good cause for failure to make service, ct must grant extension of time to make service "for an appropriate period." If no good cause shown, ct can still extend time but it's at its discretion. Dismissal for failure to make timely service doesn't bar P from filing new action
 - Approach 1: filing suit is enough for SoL
 - Approach 2: serving complaint is required to meet SoL
 - SoL varies depending on claim—no one universal SoL

- Some longer than others (medical malpractice much longer than libel, bc exception is needed for things you couldn't have possibly known about until later)
- Some events “toll” SoL: postpone its expiration or “keep the clock running,”
 - fraudulent concealment
 - discovery provisions (e.g., medical malpractice foreign body cases)
 - tolling agreement—potential D agreeing to waive SoL to permit time for potential P to investigate claim; if you allow them more time, might decide not to file, if you say no, might file immediately.

V. THE AMERICAN APPROACH TO PLEADING

-FRCP 2: “There is one form of action—the civil action;” merger of law and equity

A. Basic pleading principles

- Rule 7: complaint must state grounds for federal SMJ, short and plain statement of claim showing entitlement to relief and a demand for relief.
- Rule 7: answer responds to factual allegations of P, asserts defenses and sometimes claims (can include counterclaim or cross claim)
- Ds often challenge sufficiency of pleadings: motion to dismiss complaint for failure to state a claim (can file before even having to answer)
- “Notice pleading” adopted in FRCP in 1938 under Rule 8(a): “a short and plain **statement of the claim** showing that the pleader is entitled to relief,” made notice the primary function of pleading
 - Intentionally avoided use of terms “facts” or “cause of action”
 - Even though minimalist complaint, Rule 11 states that when a lawyer signs a complaint, she certifies that there is a reasonable basis “formed after reasonable inquiry” that the claims are warranted by existing law (or a non frivolous argument for extending the law) and that there is a factual basis for claims that have evidentiary support).
 - NB: most common instance of P pleading herself out of court is P who alleges dates in complaint that show claims to be time-barred by SoL.
- **Liberal system of notice pleading: under reform of FRCP, the sole requirement for pleading is that there is a “short and plain statement of the claim showing that the pleader is entitled to relief”** (see, e.g., *Dioguardi v. Durning*, 1944, although P’s complaint identified no theory of law or substantive legal argument (just alleged facts), CoA reversed 12(b)(6) motion because the ct could identify the theories from the facts; a pleading containing no issues of substantive law can be considered sufficient by the ct).
 - To survive 12(b)(6) motion: if the facts in the complaint were true, would they entitle the pleader to relief under the substantive law? Must have “evidentiary” support for factual assertions.
 - Bare statement of claim suffices under the rules, should be construed generously in favor of surviving a motion to dismiss.
- **Ps don’t have to do any more than “narrate a grievance simply and directly” to satisfy Rule 8(a)** (see, e.g., *Doe v. Smith*, 2005, P’s complaint is acceptable under Rule 8(a) and *Conley* although it doesn’t allege anything relating to a key word in the statute under which her claim is filed).
 - Don’t need to plead facts or law; just plead “claims for relief,” no magic words.

Standard needed to allow a pleading to survive motion to dismiss

- **“The accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief”** (see, e.g., *Conley v. Gibson*, 1957, extremely favorable standard for Ps).
 - **“plaintiffs need not plead facts.”**

- *Hishon v. King & Spalding*- dismiss case “only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.”—**Prof. Metzloff worked on this case*******
- Common for courts to deny motions to dismiss saying “it cannot be said that there are no set of facts...”
- Now a “retired” case, replaced by *Twombly/Iqbal*

B. Special pleading situations- Rule 9(b) paradigm

-Rule 9(b) provides that “the circumstances constituting fraud or mistake shall be **stated with a particularity.**”

- Theories behind the rule: higher stakes (PD, etc) so D deserves protection; avoiding *in terrorem* settlements given higher stakes and reputation
 - i. **Rule 9 is interpreted by *expressio unius est exclusio alterius*, meaning that the express mention of one thing excludes all others—only subjects that may have heightened pleading standards are listed in Rule 9, and the list is exhaustive** (see, e.g., *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 1993, 5th Circuit’s heightened pleading standard for civil rights cases alleging municipal liability violated Federal Rules’ standard—only requirement (except for cases falling under 9(b)) is “short and plain statement of the claim showing that the pleader is entitled to relief.”).
 - authority to require heightened pleadings
 - Decision written by Rehnquist, not normally a civil rights-friendly guy
 - Plain meaning doctrine (don’t look at the purpose behind the rule, stick to the text of the rule and apply it), if it’s a problem, solve it by changing FRCP and not by a clever interpretation of an existing rule

C. Current controversy in pleading- *Twombly/Iqbal* revolution

- *Conley* was standard for pleading for 50 years—in 2007, SCOTUS seemed to end its reign
 - i. Parallel conduct alone, absent some evidence of agreement to engage in anti-competitive behavior, is not sufficient to prove a violation of § 1 of the Sherman Act. **A complaint must allege facts with sufficient specificity to state a claim for relief that is plausible, not merely conceivable, on its face** (see, e.g., *Bell Atlantic Corp. v. Twombly*, 2007, parallel business conduct is admissible as circumstantial evidence from which an illegal agreement could be inferred, but it is **not** conclusive evidence or itself unlawful).
 - **“We do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face.”**
 - Has not “nudged their claims across the line from conceivable to plausible”—therefore dismiss it!
 - *Twombly*: the court adopted a stricter “plausibility” standard, requiring in this case **“enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of illegal agreement”**.
 - NB: evidence of SCOTUS’ antagonism toward discovery process, but how does SCOTUS know there is abuse of discovery? They cite 1 law review article.
 - NOT overruling *Conley*, but saying it’s overstated; also created confusion as to whether or not this was limited to antitrust cases—clarified in *Iqbal*.
 - ii. **Two pronged approach for all civil complaints:**
 - 1) **While a court must accept as true all of the factual allegations in a complaint, this does not include legal conclusions;**
 - 2) **Only a complaint that states a plausible claim for relief survives a motion to dismiss; (for this specific case: for establishing discriminatory intent, it does not suffice to make conclusory allegations when “generally alleging” the intent)**
(see, e.g., *Ashcroft v. Iqbal*, 2009, P’s pleading was dismissed because they pled the elements of their claim without enough facts to support those elements, and in the well-pleaded parts,

the behavior was consistent with unlawful conduct but did not **plausibly** suggest one because it was compatible with (and more likely to be) lawful behavior. P did not “nudge his claims of invidious discrimination across the line from conceivable to plausible.”).

- Factual allegations in complaint are insufficient because there are other explanations that are “more plausible”—an “obvious alternative explanation.”
- Standard is now the standard in ALL civil actions and proceedings.
- Interpretation of Rule 9(b): “alleging generally” does not entitle P to make conclusory allegations.
- Noteable quotables:
 - Pleadings can’t be “threadbare recitals of the elements of the cause of action.”
 - After identification and assumption as true the complaint’s well pleaded allegations, ct must “determine whether they plausibly give rise to an entitlement of relief.”
- Departs from *Conley* precedent in 2 ways: 1) Dueling inferences seem to cancel each other out, unless one is more plausible than the other. 2) Ct insists on “more by way of factual content;” in *Conley*, “plaintiffs need not plead facts.”
- NB: Unclear whether *Iqbal* is consistent with *Leatherman*—Ct dodges question, “generally” is a relative term. Rule 9(b) excuses pleader from pleading discriminatory intent under an elevated pleading standard, but not from less rigid (though still operative) standard of Rule 8—even general pleading must not be entirely conclusory, and it must be **plausible**.
- TAKE AWAY: if you’re a liberal judge, pretty easy to keep claim in ct—find “plausibility” in everything. If you’re a conservative judge, now you have a new tool to throw things out. Majority of American judges, esp. **state ct. judges, still ok w/ liberal paradigm**. We have NOT seen the states really change their practice in line with SCOTUS. Overall, if you’re a moderate judge, you will be more inclined to go along with *Iqbal*/*Twombly*.

D. Care and candor in pleading

- Rule 11: sets standard for care and candor in pleading, and the sanctions for violating the standard.
- Certification by lawyer that to the best of her knowledge “formed after reasonable inquiry” that is “well grounded in fact” AND “warranted by existing law or a good faith argument for the extension, modification or reversal of existing law.” Sanctions are not mandatory, and no cost shifting—just limited to what suffices to deter repetition (result of 1993 revision, Rule 11 Motions significantly down since the revision).
 - Best of person’s knowledge, information, and belief; reasonable inquiry; complaint not presented for improper purpose (e.g., unnecessary delay); legal contentions warranted by existing law or non frivolous argument for reversing/establishing new law; alleged facts have evidentiary support or will likely have it after further investigation/discovery; denials of alleged facts are warranted on evidence or are reasonably based on belief or lack of information.
 - Rule 11 motion must be served on offender 21 days before it is filed with ct—gives offender time to reconsider and withdraw/correct offending paper; creates safe harbor.
 - Sanction must be limited to what suffices to deter repetition of the conduct/comparable conduct by others. Objective is deterrence, not compensation/punishment.
- **Reasonable inquiry**
 - All Rule 11 certifications must be based on pre-filing “inquiry reasonable under the circumstances”—fact-bound question.
 - **Rule 11 imposes negligence standard—failure to use reasonable care in conducting pre-complaint inquiry** (see, e.g., *Hays v. Sony Corp. of America*, 1988, attorney’s conduct was insufficient to establish the “reasonable inquiry”

standard of his pleading, therefore Rule 11 sanctions against attorney were affirmed).

- NB: Rule 11 victims are adversaries, other litigants in court's docket, and ct itself, rather than atty's own client (in which case would be malpractice).
 - Inexperience of lawyer in area of law wasn't an excuse for deficiency in legal research, because it's an objective standard—question is whether ANY reasonable lawyer would have made a reasonable inquiry to familiarize himself before filing complaint.
 - No need to find bad faith for a Rule 11 violation, but if you find out at any point your claim has no merit, you have to stop pursuing case.
- **Good faith arguments for changes in the law**
 - Can't just abandon clients—even when law is against them you have to find best argument you possibly can.
 - Rule 11(b)(2) recognizes this possibility by tolerating “non frivolous arguments for extending, modifying, or reversing existing law or for establishing new law.”
 - P lawyers most often face Rule 11 motions when they make arguments for changes in the law in civil rights cases—advocating for new civil rights, extension of existing civil rights to new classes.
 - **Asserting a losing legal position (even if it does not survive summary judgment) is not inherently sanctionable conduct** (see, e.g., *Hunter v. Earthgrains Bakery*, 2002, P's attorney's creative claims (even with ambiguous/inconsequential facts) may warrant dismissal, but do not reach level for punishment—to be sanctionable, the argument must have “absolutely no chance of success under the existing precedent.”
 - NB: Ct acted *sua sponte* to sanction attorney, when this happens she can't withdraw offending paper to avoid being sanctioned.
 - **Proper purpose**
 - **Impropriety of one of multiple purposes in seeking relief is insufficient for Rule 11 sanction** (see, e.g., *Sussman v. Bank of Israel*, 2005, attorney's filing of lawsuit was not sanctionable because, although the purpose of filing lawsuit may have been unsavory, as long as there is a reasonably clear legal justification for the paper in question, there is no improper purpose).
 - Complaints that initiate actions are not filed for an improper purpose if they are not frivolous, and one or more improper purposes out of many do not automatically warrant sanction.
 - If complaint is **objectively** reasonable, should not consider its objective intent—would chill advocacy and waste time and resources of the court.
 - Ex: successive filings (judged by frequency and timing of filings), filings containing scandalous matters to harass/embarrass adversary (judged by outrageous nature of characterizations), orchestrating media event in connection with filing to embarrass D and get personal recognition (judged by planning and conduct of media event).

E. Defendant responses

- Doing nothing (now you're in default), Rule 12(b) motions (prior to filing answer), and/or filing an answer (w/ or w/o Rule 12(b) motion), asserting affirmative defenses (created by substantive law, e.g., contributory negligence, NB if affirmative defenses aren't asserted they are usually assumed to be waived), asserting counterclaims, bringing in new parties.
- Most answers are nothing more than D denials; if you don't know the answer, you can say you're “without sufficient knowledge or information to form a belief as to the truth or falsity” of the allegation, which serves as a denial—Rule 8(b).

- Rule 12- provides structure and sequence for response
 - Rule 12's trap—creates hierarchy establishing some defenses that have to be raised first or else they can't be brought up later.
 - Motions to dismiss based on lack of PJ, improper venue, insufficient process of service
 - NOT for lack of SMJ—can be brought up at any time

Default judgments: Rule 55 are potential consequences of D's failing to file an answer (response required in 20 days after being served, but can be extended once).

- Rule 55: provides for entry of default and default judgment where a D "has failed to plead or otherwise defend as provided by these rules."
- Upon P's notification to clerk of court that answer wasn't filed, potential for a default to be entered by clerk.
- Rule 11: default may be set aside for "good cause," pretty easy to do so because it's heavily disfavored.
- Courts are generally inclined to be liberal in opening defaults, but must consider other factors (e.g., may inquire whether D has a viable defense—why open the case up if there is really nothing for D to argue on the merits)
- In some cases (disputes w/ "sum certain" and D hasn't appeared), clerk of court can enter a default judgment.
 - Rule 55(b)(2): if a party "has appeared" they get at least 3 days notice before a default judgment can be entered by ct.
 - Many lawyers file a "notice of appearance" immediately when they are retained to avoid the issue altogether.
- **Default judgments are not automatic, Court must still consider facts alleged in the complaint and go through the procedure** (see, e.g., *Virgin Records v. Lacey*, 2007, D's failure to appear and Clerk's subsequent entry of default against her do not *automatically* entitle Ps to default judgment—it's taken as admission of facts cited in complaint, which may or may not be sufficient).
 - NB: remedies are not automatic, Ct. has to decide what and how much.
 - Ct considers whether default was willful, whether setting it aside would prejudice plaintiff, and whether D has any meritorious defenses.
- **Defenses in an answer must also comply with the rules that apply to allegations in a complaint—evaluate sufficiency of defense pursuant to standard identical to FRCP 12(b)(6)**(see, e.g., *Reis Robotics v. Concept Industries*, 2006, judge struck most of affirmative defenses and several responses in D's answer under motion 12(f), which allows court to strike any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter).
 - NB: difference between affirmative defense (shield, relate to legal assertions that bar liability and involve new factual information) vs. counterclaims (sword, claims D has against P and will result in \$\$ if D prevails).
 - NB: 12(f) motion is P's equivalent of D's 12(b)(6) motion to dismiss and is identical in its standards: whether allegations state a claim or defense under any applicable law.
- **Affirmative defenses must be raised in a timely manner, during trial at the latest (it appears)** (see, e.g., *Ingraham v. US*, 1987, D challenged amount of multimillion \$ settlement on appeal citing a \$500k cap under TX law, but since they hadn't raised it as an affirmative defense in the answer (statutory defense constitutes affirmative defense under Rule 8(c) it was equivalent of a waiver of the defense and cannot be raised).
 - **Metzloff does not like this case because the law is the law—why would it be unfair for P to challenge that law at that point? If it's the law and it's constitutional, then you should be able to bring it up. Question was whether or not that was really an affirmative defense.**
 - NB: wasn't *really* an affirmative defense, more that judges are reaching for a way to get rid of damages cap.

- Prevention of unfair surprise essential to requiring pleading of aff. Defenses—even raising it at trial could be ok as long as it's not unfair surprise.
- **Every allegation responded to in an answer must be responded to in conformity with Rule 8(b)** (see, e.g., *State Farm v. Riley*, 2001, answer to complaint was stricken in its entirety *sua sponte* with leave granted to amend, mainly because Ct was fed up with basic pleading errors—issues attached appendix laying out how to avoid most common errors).

NB: District Cts are divided as to whether Twombly/Iqbal plausibility pleading standard is applicable to defenses in answers—on the one hand, unfair to require one standard of P and another of D; on the other hand, may be reasonable to impose stricter pleading requirements on P who has significant/unlimited time to develop factual support for their claims, as opposed to D who has 21 days to answer.

VI. JOINDER AND SUPPLEMENTAL JURISDICTION

A. Basic principles of joinder

- Joinder of multiple claims under the federal rules
 - 18(a): P can assert any claims she has against an opponent, related or unrelated—liberal approach
 - Claims can be asserted as different counts in a single complaint, promotes efficiency throughout litigation
 - Joinder of unrelated claims may facilitate settlement of all the claims—avoids bureaucratic hassle of filing multiple suits
 - 42(b): judge can order separate trials for convenience, to avoid prejudice, or expedite/economize
 - Claim preclusion/*res judicata*: can't sue on same set of facts multiple times; if claims could have been joined first time around, can't try facts a second time if you lose on the other ones. Want to avoid inconsistent verdicts on same facts.
- Joinder of parties to the original action
 - 20(a): establishes some limits on P's choices
 - 20(a)(1) allow Ps to sue together if they assert claims that arise out of the same transaction, occurrence, or series of transactions or occurrences, and if their claims involve any question of law or fact common to all Ps.
 - 20(a)(2) allows Ds to be sued together if the same criteria are met.
 - NB: we don't have compulsory joinder rule bc it would put Ps in a difficult position, optional joinder ok in most cases (exception: joinder required of certain parties if a case can't be fully adjudicated without their participation).
 - To survive severing claims, two questions to ask (significant overlap of facts is sufficient, liberally interpreted to allow joinder):
 - Did the claims arise out of the same transaction, occurrence, or series of transactions or occurrences?
 - Is there a question of law or fact in common to all Ps?
 - See, e.g., *Holbein v. Heritage*, **4 Ps joined together with common causes of action: false/reckless misrepresentation, fraud, and breach of promise, Ct denied D's motion to sever pursuant to 20(a) and 21 because D's actions were demonstrative of a continuing pattern, and burden imposed on D greatly outweighed by practical benefits of continuing case with joined parties.**
- Fed Rules differentiate btwn compulsory and permissive counterclaims; factual distinction
 - Compulsory: Rule 13(a), arise out of same transaction or occurrence, Cts have referred to them as those that are "logically related"
 - Permissive: do not arise out of same transaction or occurrence
- Cross-claims

- Rule 13(g) authorizes claims among parties on D side
- Must be transactionally related to existing claims
- There are **no** compulsory cross-claims—allow Ds to file suits later, gives parties time to figure it out, ultimately party choice trumps efficiency considerations
- Impleader
 - Rule 14: process for a D to “implead” a new D
 - Key concept: 3rd party D must be someone “who is or may be liable” to the original D who is bringing them into the case—joint liability
 - Conceptually, first D is now acting as D
 - First D = 3rd party P; new D = 3rd party D

B. Supplemental jurisdiction

- Inherent tension btwn joining all claims in single action and SMJ over each claim—rules of joinder don’t address issue of jurisdiction
- Doctrine of SJ: you can add state law claims to fed law claims if they arise out of the same facts.
- NB: if case w/ state law claim and fed law claim is filed in fed ct and judge wants to decline SJ over state law claim bc it is a novel issue of state law, he can’t remand the entire thing to state ct (because it was never filed in state ct, can’t impose cases on state ct.). Shouldn’t dismiss entire thing bc he should still hear fed claim. Therefore judge should dismiss state law claim and retain jurisdiction over fed claim, might cause P to voluntarily dismiss fed claim and bring fed and state claims together in state ct (pg. 725).
- **A federal ct can properly entertain jurisdiction of a state law claim that would not, on its own, have federal subject matter jurisdiction if the state and federal claims derive from a common nucleus of operative fact and if P would ordinarily be expected to try them all in one judicial proceeding; Art. III, s. 2 of Constitution implicitly authorizes SJ** (see, e.g., *United Mine Workers v. Gibbs*, 1966, in determining whether SJ was appropriate, SCOTUS considered judicial economy, convenience, and fairness to the litigants, and held that SJ is not a right of Ps and is up to Ct’s discretion)
 - Reasons for declining SJ over related state law claims, even if Ct has power to hear them (Brennan)
 - If fed claim in case is dismissed relatively early in litigation (Ct can choose to retain SJ after fed claim drops out if case has been through substantial pretrial litigation, *Rosado v. Wyman*, 1970).
 - State issues predominate (if case is fundamentally state law, and fed claim is minor or dubious, “Recognition of a federal court’s wide latitude to decide ancillary questions of state law does not imply that it must tolerate a litigant’s effort to impose upon it what is in effect only a state law case,” *Bostic v. AT&T of the Virgin Islands*, 2001).
 - State law claims present novel/complex issues of state law (*Erie* doctrine; if parties litigate unsettled issue of state law in fed ct., fed judge’s ruling will not establish state law, since she can only predict how issue would be resolved by state’s highest ct).
 - If exercising SJ would likely confuse a jury (as in *Gibbs*, elements of liability for state v. fed claim were subtly different, judge might have decided to try them separately to avoid jury confusion).
- **In determining federal jurisdiction over nonfederal claims, the first test is whether the federal and nonfederal claims arise from “a common nucleus of operative fact.” The second test is of congressional intent: whether Congress has “expressly or by implication negated” the exercise of jurisdiction over the particular federal claim** (see, e.g., *Owen Equipment & Erection Co. v. Kroger*, 1978, issue was not fed question, but state torts against diverse Ds; state claim here is not ancillary to fed one (only state claims asserted); **when fed jurisdiction is based on diversity of citizenship, P may not assert a claim against 3rd party D when there is no independent basis for fed jurisdiction over that claim**).
 - Whenever a fed ct exercises jurisdiction over a claim, case must not only be within Art. III s. 2 grant, but Ct must also have authority under fed statute to hear the claim

- (here, fed statute is 28 U.S.C. § 1332, authorizing diversity jurisdiction and it has been interpreted to require complete diversity). Pg. 733-734.
 - Bars jurisdiction over claims by Ps against non-diverse 3rd party Ds in diversity cases.
 - NB: this decision raised serious doubts about when fed cts had statutory authority to hear related state law claims
 - Worsened by *Finley v. US*, 1989, held that district ct could not exercise SJ over a related state law claim against private party in case against US under fed. tort act, because there was no evidence in the act that Congress intended to authorize jurisdiction over such additional claims.
- **Confusion led Congress to enact 28 U.S.C. §1367, supplemental jurisdiction statute; first subsection gives broad authority to fed ct that has original jurisdiction over a case to hear related state law claims, not intended to expand scope of SJ, just codify it (Pg. 736)**
 - 1367(b) makes exceptions to broad grant of jurisdiction for certain claims in **diversity cases**
 - Still bars jurisdiction over claims made by Ps against non-diverse 3rd party Ds in diversity cases (exceptions under (b) include certain claims by Ps—“person made a party under Rule 14”)
 - 1367(c) affirms discretionary factors from *Gibbs* and adds a catchall provision in subsection (4): “in exceptional circumstances, [if] there are other compelling reasons for declining jurisdiction.”
 - NB: “case or controversy” term in 1367(a) is intended to have the same meaning that it does in *UMW v. Gibbs* (based on structure of statute and legislative history)—authorizes ct to hear all other claims in the action that arise out of the same nucleus of operative facts as the original claim that confers original jurisdiction on the federal court.

VII. THE DISCOVERY PROCESS: CONTROLLING ABUSE AND MISUSE

A. Scope of discovery

Overview

- Rules 26-37 govern scope of information that is subject to discovery and the methods that parties can use to get information
- Rule 26(b)(1) is generous for defining scope of discovery:
 - Any non privileged matter
 - Relevant to any party’s claim or defense
 - Even if it would be inadmissible at trial
 - As long as it appears reasonably calculated to lead to the discovery of admissible evidence.

Informal investigation

- **Alleged violations of Rules of Professional Conduct cannot be used in determining admissibility of evidence** (see, e.g., *Gaylard v. Homemakers of Montgomery, Inc.*, AL 1996, Court found that a statement taken of a witness by P’s attorney was admissible at trial, even if it would have been a violation of the RPC—they’re “self-imposed internal regulations” and do not play a role in determining admissibility of evidence).

Scope of discovery

- **Rule 26(b)(1): “Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.”**
 - NB: Rule 26 amended in 2000 from stating that parties could obtain discovery of “any matter, not privileged, that is relevant to the subject matter involved in the pending action”—now it is “relevant to any party’s claim or defense”
 - Thought to be a potentially huge narrowing of scope of discovery, but in actuality it has made little real world difference.

- Parties can obtain documents whether or not it would be admissible at trial, as long as it is not protected by one of a few evidentiary privileges, relevant to any party's claim or defense, and is reasonably calculated to lead to admissible evidence.
- Rule 26(b)(5) requires a party resisting discovery on privilege grounds that it make the claim expressly and describe nature of the things that it doesn't want to disclosed—enough to allow others to assess the claim without revealing information.
- Neither party can refuse discovery on the ground that the evidence sought would be inadmissible at trial—**information can form chain linking elements of discovery that could lead to admissible evidence**
- NB- simply putting “privileged and confidential” at the bottom of every email will not automatically privilege that email—neither sufficient nor necessary

B. Protecting the adversarial process: privilege and work-product doctrine

- Rule 26(b)(1): “parties may obtain discovery regarding any **nonprivileged** matter”
 - Rule 26(b)(5): If a party decides not to turn over information bc it is privileged (or bc it's work-product) that party must “expressly make the claim” AND describe nature of documents not produced that will enable other party “to assess the claim”
 - **The “work products of the lawyer” generally fall outside the scope of FRCP, and burden is placed on the party requesting the information to justify production through a subpoena or court order** (see, e.g., *Hickman v. Taylor*, 1947, attorney's thoughts, opinions, etc are outside scope of discovery).
 - What is protected by work product doctrine is the compilation and selection of information, not the underlying facts themselves.
 - After *Hickman* decided, FRCP amended to reflect protection of work product (1970): Rule 26(b)(3) now reflects this by targeting only “documents and tangible things” prepared in **anticipation of litigation**. Not a “privilege” but a doctrine.
 - Requesting party must show “substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means” (ex: witness is dead)
 - WP must be prepared in reasonable anticipation of litigation-- not if work done in “ordinary course of business” or because required by some law (disclosing information to the government)
 - Court must protect against disclosure of “mental impressions, conclusions, opinions, or legal theories” of atty or other representative concerning litigation.
 - NB: Common law protection that *Hickman* recognized is broader than literal protection afforded by Rule 26(b)(3)(A) and most courts still apply it to intangible work product.
 - “Anticipation”—3 different approaches to this used by cts.
 - Specific claim approach: some courts require that person invoking work product show that the “documents must have been prepared with a specific claim supported by concrete facts which would likely lead to litigation in mind.”
 - “articulable claim,” “an identifiable resolve to litigate,” “a substantial probability that litigation will occur and that commencement of such litigation is imminent.”
 - Ad hoc approach: other courts have rejected “specific claim” as too narrow because of advisory role that lawyers take in daily business with clients—specific claim approach would discourage lawyers from writing, note taking, and communications that are essential to effective legal advice.
 - These courts see specific claim as only one factor to be considered.
 - Primary purpose approach: primary motivation for preparing the putative work product must be to assist in preparing for possible litigation
 - How is document labeled?
 - Did a lawyer participate in its preparation?
 - Does the document comment on litigation?

- Does it have an ordinary business purpose?
- Therefore documents prepared for ordinary business purpose or to fulfill regulatory requirements don't usually qualify as work product.

C. Making discovery work: tools of discovery

Mandatory discovery

- Rule 26(a)- both parties are required to make required disclosures—any info that they would use to support claims/defenses. Basic info that they need to prepare for trial and make informed decisions about settlement.

Discretionary discovery

- Depositions (oral/written examinations of live witnesses under oath before a court reporter)
- Interrogatories (written questions that must be answered)
- Document production requests
- Physical/mental examinations (esp in personal injury cases)
- Requests for admissions
- NB: also includes mandatory disclosure of insurance policy, even though it's not admissible at trial, bc we want to know how much the policy is for bc it can lead to faster settlement.
 - See, e.g., *Flores v. Southern Peru Copper*, D has filed a Rule 12(b) motion, P agreed that most of the mandatory disclosure items could wait, but wanted insurance info (R.26(a)(1)(D)); Court agrees with D because it might be more complicated than it initially seems
 - Court indicates it has authority— importance of case specific control by courts even if rule seems clear.
 - Ct moving away from automatic disclosure to evaluating need/reasons for discovery—if we wait for other info, it's ok to wait for insurance too; judge is in charge and can apply rules creatively.
 - MAJOR TREND: increase in judicial supervision of the process, combined with clearer obligations for lawyers to cooperate—Rule 26(f) requires “meet & confer” obligations to “develop a proposed discovery plan,” then plan is submitted for ct. approval, lawyers must “participate in good faith.”
 - Rule 26(f) requires meet-and-confer to discuss a discovery plan at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b).
 - Scheduling order is due within 90 days after the appearance of a defendant or 120 days after the complaint has been served on a defendant.
 - Disclosures are due within 14 days after the meet and confer, unless a party asserts that required initial disclosures are inappropriate in the circumstances of the case.
 - THEREFORE required initial disclosures must be made no more than 83 days after appearance of a D or 113 days after service of complaint—NB: rules unclear about how the presence of multiple defendants might affect this.
 - Timeline of initial discovery events: filing—service—26(f) meet and confer—26(a)(1) required disclosures & 26(f) proposed plan—16(b) scheduling conference and order
 - Rule 26(a)(2): timely disclosure of expert trial witnesses and their reports at least 90 days before trial.
 - Rule 26(a)(3): at least 30 days before trial, parties make mutual pretrial disclosures by exchanging lists of witnesses they expect to call and exhibits they intend to introduce at trial—mainly uncontroversial.

Interrogatories

- Define terms very broadly
- Now limited to 25 interrogatories unless parties and ct agree on more
- 6 hours max for deposition
- lots of objections/evasions—more general the question, more likely it is that the other party will object to it.
- Answers are written under oath by the party (signs them)
- Objections made in writing by party's lawyer.
- Rule 26(g): Lawyer must sign discovery response certifying that she has made "reasonable inquiry" before submitting response.
- Procedure makes interrogatories relatively inexpensive (as opposed to other forms of discovery tools) but also less effective because answers are usually as bare and unhelpful as possible (without running afoul of rule).

Duty to supplement

- Has been a problem—what is duty if something new comes to attention? Discovery can go for months/years
- Rule 26(e)(1) was added in 1993 to clarify duty to make supplemental disclosures: Must supplement if you learn that your disclosure or response was "incomplete or incorrect" in a "material respect" if the information has not been otherwise made known to your adversary
 - if new information comes out during a deposition, no need to supplement prior interrogatory answer – opposing party knows it now
- Rule 33(b)(1)(B): Party's duty is to "furnish such information as is available to the party"—this means if the party is a corporation, if a singular employee doesn't know the answer is has to be found somewhere else. Other party can access facts contained in work products because of this, as for corps this includes in house counsel.

Document requests

- Lots of negotiating over what will/won't be produced
- Concern with whether parties comply in good faith with their obligations
- Huge potential expense

E-discovery

- Rules were written in era of physical files
- 90% of info is not on a piece of paper anymore, creates potential for millions of docs with exponential increase in costs
- we still don't know how to handle this—so expensive that it can lead to in terroram or nuisance settlements
- **Marginal utility test: the more likely it is that the backup tape contains information that is relevant to claim/defense, the fairer it is that the agency search it at its own expense. Less likely it is, more unjust it would be** (see, e.g., *McPeck v. Ashcroft*, 2001, judge was looking for a legitimate metric because new paradigm needed for discovery in electronic age, producing backup tapes is a normal COB in business age, marginal utility test is pertinent for court to maintain responsibility to prevent "undue burden or expense" under Rule 26(c).
 - Court ordered test run – focus on P's supervisor during critical period; see what's there and then continue from there.
- **Moving party must make affirmative showing that other party's medical condition is in genuine controversy and that good cause exists for ordering a particular examination—physical examinations should be ordered only under a discriminating application of limitations of the Rule** (see, e.g., *Sacramona v. Bridgestone/Firestone Inc.*, 1993, D's motion to compel P to take a blood test to determine HIV status was denied because relevance of results were too attenuated from P's life expectancy—future damages in P's underlying cause of action, Rule 35: physical condition must be "in controversy" and D must show "good cause").

- NB: also important that the info Ds sought was not yet in existence, and that P is not claiming that tire accident caused him to acquire HIV; good cause is not shown because precedent was for HIV information already in existence and therefore produceable—this present case would be extraordinary relief and Ct chooses to exercise its discretion.
- NB: *Schlagenhauf*, issue: does Rule 35 apply to Ds? Yes, doesn't matter than Schlagenhauf was 3rd party (Ct. allowed 11 exams performed on 3rd party D); SCOTUS says lower ct needed to determine good cause before signing off on exams, threw out all of them and remanded case
 - SCOTUS wants judges to dig deep into facts of case: not just mechanical formula (as in, traffic accident→eye exam).
 - “Good cause” also relates to invasiveness of procedure

D. Discovery control and abuse

- **Prevention of abuse that can come with the discovery process is sufficient justification for authorizing protective orders; When a protective order is entered on a showing of good cause (as required by Rule 26(c)), is limited to context of pretrial civil discovery, and does not restrict the dissemination of information gained from other sources, it does not violate 1st Amendment; Litigant has no 1st Amendment right of access to information made available only for purposes of trying suit** (see, e.g., *Seattle Times Co. v. Rhinehart*, libel suit against D based on series of articles, newspaper wanted to be able to publish info produced through discovery, ct. says that discovery must go forward but that protective orders will be put on info).
 - Pretrial discovery is not a component of public trial—TC has authority to issue protective order, doesn't require 1st A analysis at all
 - Judge applied standard under Rule 26(c): the judge “may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.”
- Protective orders
 - Rule 26(c): movant must certify that it has made a good faith effort to resolve dispute without court action, and then show that protective order is necessary to protect it from “annoyance, embarrassment, oppression, or undue burden and expense.”
 - Requires judge to compare the hardship to the party against whom discovery is sought (if discovery is allowed) to the hardship to the party seeking discovery (if discovery is denied)—nature of hardship, magnitude, give more weight to interests that have “distinctively social value” rather than “purely private interests.”
 - Protecting trade secrets
 - Ct balances need for info v. injury to party who has info
 - Info requested about trade secret must be directly relevant to the case
 - D must show that disclosure would be harmful—given that protective orders are possible, rare to exclude access to information. “Nothing is sacred in civil litigation.”
- **Facial challenges to the legal sufficiency of a claim or defense (like motion to dismiss based on failure to state a claim for relief) should be resolved before discovery begins. A claim that significantly increases the scope of discovery should be ruled on before entering discovery orders, if possible, especially if the claim is dubious** (see, e.g., *Chudasama v. Mazda Motor Corp.*, 1997, DC abused its discretion in its oversight of the discovery process).
 - Rule 37—authorizing sanctions for inappropriate behavior during discovery; ct has broad authority to sanction lawyers and parties for non-compliance
 - Prior to filing motion to compel, parties must show there was a good faith effort to resolve the issue outside of the court by conferring.
 - Norm of cost shifting including attorney's fees (see Rule 37(a)(5) (must include award of attorney's fees for the efforts undertaken on a motion to compel that is granted))

- Under Rule 37 the Ct has broad discretion to decide the sanction that is “just” in the circumstances, but Ct should reserve the most severe sanction (entry of default judgment) for bad faith discovery misconduct.
- NB: Rule 37 sanctions are triggered by motion of a party, while Rule 26(g) sanctions may be imposed by the court by its own prerogative (except for failure to participate in a discovery planning meeting)—most courts ignore 26(b) and punish discovery abuse in framework of Rule 37

E. Challenge of the adversarial expert

- Expert- someone qualified by knowledge, skill, experience, training, or education to give an opinion or offer an explanation that we would not normally permit from a law person
- Rules 26(a)(2) and 26(b)(4) distinguish btwn experts who will testify at trial, and those who will not; also establish discovery rules for these experts.
 - 26(b)(4): experts who may testify at trial v. experts who are employed only to help a party prepare for trial
 - 26 permits discovery of testifying expert, while conditionally denying discovery of the non-testifying expert who is retained/specially employed in anticipation of litigation
 - Rule now requires parties to disclose identity of each testifying expert, provide written report of her opinions and their bases, qualifications, and list of other cases she has testified for in last 4 years—now part of automatic discovery
 - Prohibition on discovery of non-testifying experts relies on assumption that party can hire its own expert, unless there is literally NO other expert w/ comparable knowledge
 - Can't use discovery
- **“Under the Rules, the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable”** (see, e.g., *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 1993, issue was whether or not the “generally accepted technique” standard from *Frye* was consistent with FRE §702, SCOTUS found that now there is a two prong test: relevance and reliability).
 - Factors to evaluate reliability: 1) whether a theory or technique can be (has been) tested; 2) whether it has been subjected to peer review and publication (relevant but not dispositive); 3) for particular technique, should consider known/potential rate of error; 4) “general” acceptance can have bearing as well—meant to be overall flexible inquiry.
 - *Frye* has been superseded by FRE §702—liberal standard
 - *Daubert* applies to ALL experts, scientific or otherwise (*Kumho*)
 - Gatekeeping role by judge, now they need to look at methodology, essentially making judges act as amateur statisticians and scientists
 - Judges must get much more into science than before, question of reliability compels this
 - NB: *Daubert* has not been fully accepted by state cts.
- ***Daubert's* general principles apply to expert matters described in Rule 702, and a trial judge may consider several more specific factors that *Daubert* said might “bear on” a judge's gate-keeping determination—the factors do not constitute a definitive checklist or test** (see, e.g., *Kumho Tire Company v. Carmichael*, 1999, expert on tire safety was included under *Daubert*).
 - NB: FRE has been amended to bring it in line w/ *Daubert*—Ok to give expert opinion if: 1) testimony is based upon sufficient facts or data; 2) testimony is product of reliable principles and methods; and 3) the witness has applied the principles and methods reliably to the facts of the case
- *Johnson v. Arkema*, 2012, expert testimony to support P's claims was all thrown out except for the claims regarding P's claims regarding acute injuries (expert testimony not needed because of proximate cause)—bullshit decision, how could Ct expect there to be more

“reliable” and “relevant” evidence when it would be unethical to test effects of HCl on human subjects? Why would government agencies have restrictions on occupational exposure if it wasn’t a hazard?

VIII. SUMMARY JUDGMENT

- 56: A judgment sought shall be rendered if the information available shows that “there is no genuine dispute as to any **material** fact.”
 - Materiality refers to applicable legal standards controlling the claim—applicable law
- Might file for other reasons than to dismiss: make P get an expert, make sure judge knows what substantive law applies to case, “smoking out other side”
- Motion for SJ previews evidence that parties would put on trial to see if it would establish any dispute that requires trial—possible to file motion for SJ up to 30 days after close of discovery
 - As practical matter, judge will usually not entertain the motion until parties have had a reasonable chance to conduct discovery (56(d)).
 - No longer assuming allegations are true—discovery allows actual facts to be considered
 - SJ has very different relationship now in post *Twombly/Iqbal* bc it’s much harder for cases to get to discovery
- If D’s motion is properly made and supported, then burden would shift to P who would have to show that there is a genuine dispute of material fact (citing the record)
 - NB: if evidence is inadmissible @ trial, it shouldn’t be considered at SJ either (56 is designed to avoid unnecessary trial, therefore cts can’t consider evidence that couldn’t be admitted at trial) **EXCEPT** under Rule 56(c)(4), makes narrow exception for affidavits and declarations (certain statements by witnesses) and permits presentation of such evidence even though it would not be admissible in that form at trial (witness would actually have to testify).
 - “Narrow” exception bc it requires that affidavit/declaration “must be made on personal knowledge and set out facts that would be inadmissible in evidence.”

A. Fundamental purpose of SJ

- Basic purpose: Is there genuine dispute of material fact? If not, is moving party entitled to judgment as matter of law
- “Only disputes which might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.” *Anderson v. Liberty Lobby, Inc.* 1986.
- SJ distinguishes allegations of pleadings in complaint from actual **evidence** of the allegations.
- SJ extremely important in relation to settlement—don’t have to settle if you can get judge to dismiss
- Dismissals w/ or w/o prejudice (to refiling)
 - w/ prejudice: acts as bar to litigating the same claims again, against the same parties—dismissal w/ prejudice is given *res judicata*
 - typical disposition for a settlement—as part of settlement agreement, P required by D to dismiss its case w/prejudice
- Voluntary dismissals possible (non-liberal approach under federal rules)—some Ps realize they don’t have a case when they are surprised by certain developments (new facts emerge, expert testimony doesn’t hold up); can avoid Rule 11 sanctions by voluntarily dismissing
 - Automatic drop and able to refile, **ONLY** if done BEFORE D files answer; after answer is filed there is no automatic right, can do it if all parties agree
 - NB: Can only be done once; 2nd voluntary dismissal will necessarily be w/prejudice

B. Standard of proof for SJ

- **PREPONDERANCE OF EVIDENCE:** P carries burden of convincing the finder of fact at trial that the evidence on each element of his claim preponderates in his favor—more likely than not that facts exist that establish each element of claim.

- Whether or not there is a genuine dispute must be guided by standard of proof applicable to issue in case
 - Ct must draw any reasonable inferences **against** the movant
 - **Evidence of nonmovant is to be believed and all justifiable inferences are to be drawn in nonmovant's favor** (see, e.g., *Slaven v. City of Salem*, 1982, to survive motion for SJ, P had to show breach of duty of city and then proximate causation—P had to show that there were material facts at issue relating to city's duty and breach thereof).
 - Hard part for judge: what is a justifiable inference?
 - Here P didn't build any kind of inference chain; that's what she needed to do, had to get police officers to say something about brother that was "unusual" for behavior of prisoners, anything you can grab onto in order to make inference chain.
 - Do not want to change the "threshold SJ inquiry from a search for a minimum of facts supporting P to an evaluation of the weight of those facts." *Anderson v. Liberty Lobby, Inc.* 1986.
 - **Responsibility of production is on P b/c they will have it at trial. Responsibility of persuasion is on D bc they are the moving party. D has to demonstrate that P's evidence is insufficient to establish an essential element of its claim, and/or submit affirmative evidence that negates essential element of P's claim.** (see, e.g., *Celotex Corporation v. Catrett*, 1986, P's wrongful death claim was thrown out on summary judgment because 56(c) "mandates the entry of summary judgment...against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.")
 - **Marks a BIG change in interpretation of 56: before D had to prove that something didn't happen, and now D just has to say "P can't prove that it did happen."**
 - Rule 56 should be interpreted to allow it to achieve one of principal purposes of SJ: isolate and throw out factually unsupported claims or defenses.
 - NB: see dissent for analysis of burdens of persuasion.
- C. "Genuine disputes" under Rule 56
- Look for genuine disputes of "material fact," not of law
 - Dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.* 1986.
 - Standard: whether or not a reasonable jury **could** find for P
 - "The mere existence of a scintilla of evidence in support of the P's position will be insufficient; there must be evidence on which a jury could reasonably find for the [non-moving party]." *Anderson v. Liberty Lobby, Inc.* 1986.
- D. Difference between SJ (Rule 56) and other motions seeking judgment as matter of law
- SJ (Rule 56) and Motion to dismiss for failure to state a claim (12(b)(6))
 - Record for decision is different
 - 12(b)(6) motion decided on factual allegations in complaint—presumed to be true for purposes of motion
 - 56 motion is decided on record of facts contained in all supporting and opposing materials that would be admissible at trial
 - SJ (Rule 56) and Motions seeking judgment as matter of law (directed verdict at trial) (Rule 50(a))
 - SCOTUS has said that standard for SJ and standard for directed verdict at trial are essentially the same: "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.* 1986
 - Difference is mainly timing and record for decision
 - Motion for SJ usually made before trial and decided on documentary evidence

- Motion for judgment as matter of law made at trial and decided on evidence that has been admitted.

E. Relationship btwn movant's burden in SJ and burden of proof at trial

- Moving party has burden of showing that there is no genuine dispute of material fact and is entitled to judgment as matter of law
- Proof-of-the-elements motion for SJ
 - If movant would have burden of proof on claim/defense at trial (either P or D with affirmative defense), must present undisputed facts supporting each and every element of claim/defense to obtain SJ
- Disproof-of-an-element motion for SJ
 - If movant would not have burden of proof at trial (typically D), present undisputed facts negating essential element of nonmovant's claim
 - Burden of "negating the opponent's claim," *Celotex Corp. v. Catrett* (1986)
- Absence-of-evidence motion for SJ
 - If movant would not have burden of proof at trial (typically D), demonstrate that there is no evidence whatsoever in the record by which the nonmovant could establish the existence of an essential element of his claim

IX. THE TRIAL PROCESS

A. The constitutional right to trial by jury

- Bill of Rights (1791) added 7th A to Constitution: "In suits at common law, where the value in controversy shall exceed 20 dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."
 - Amendment "preserves" right to trial by jury in common law actions—creates major interpretation problems (NB: 7th A never been incorporated to states)
 - SCOTUS has held that "the right of trial by jury this preserved is the right which existed under the English common law when the amendment was adopted." *Baltimore & Carolina Line v. Redman*, 1935.
 - Still used today, ct must consider practice in courts of law and equity in England in 1791 to determine whether claim goes to a jury—getting awkward as fed procedure evolves.
 - English procedure diverged in two different court systems: actions at law→jury trials, equity→judge trial.
 - Most US jurisdictions have merged law and equity cts into single system of judicial administration—fed cts must decide whether case gets judge or jury under 7th A.
 - FRCP 2 "There shall be one form of action—a civil action"
 - **Trial by jury should be favored in an action that asserts legal and equitable claims together—party has constitutional right** (see, e.g., *Dairy Queen v. Wood*, 1962, because complaint requested money judgment, it presented claim that is "wholly legal" under English system, that combined with BoC claim between parties created legal and equitable claim and gets jury trial).
 - Issues in legal claim were the ones upon which the claim to equitable relief was based—therefore legal claims in action must be determined prior to any final court determination of equitable claims.
 - Jury will decide common issue of whether D breached K and infringed TM, judge can then apply that finding in deciding equitable claims as well. Judge must accept findings of jury: if jury finds no fault on common issue, judge can't address secondary issue.
 - *Beacon Theatres v. Westover*, 1959- dispute btwn 2 movie producers (Fox and Beacon). Fox brought action for declaratory judgment against Beacon and injunction preventing Beacon from threatening suit under antitrust laws

- SCOTUS held that Beacon was entitled to jury trial on its antitrust claim (even though it would have been in equity in English system), because issue common to both remedies (violation of antitrust laws) had to be decided by jury
- A court should not deny a party's request for a jury trial unless there are extraordinary circumstances; in cases where both issues must be resolved, legal issues should be decided first by the jury before equitable issues are decided by the judge.
- Order in which claims asserted not critical; court will look at the totality of the claim
- Focus is on factual issues and not legal claims with some preconceived notion of what type of legal claims do or don't get a jury
- Courts will consider evolution of legal system
- Any factual issue to which you'd be entitled to a jury issues must be tried first prior to the equitable issues (assuming any overlap of factual issues).
- Renunciation of the equitable "clean-up" doctrine ("clean up" doctrine in equity court said that if claim is predominantly equitable with secondary legal claims, the legal claims will be decided at the same time as the equitable claim by the judge).
- NB: *Beacon Theatres* and *Dairy Queen* arguably create a presumption in favor of juries
- **Applying 7th A to new statutory rights**
 - **7th A applies to actions enforcing statutory rights and requires jury trial on demand, 2 part test to determine whether there is a right to jury trial for a newly created statutory claim:**
 - 1. Is the claim analogous to one that would have been brought in equity or at law under traditional practice?**
 - 2. Does P seek relief that was traditionally available at law or in equity?** (see, e.g., *Curtis v. Loether*, 1974, issue was whether the Civil Rights Act or 7th A requires a jury trial upon demand by one of the parties in an action for damages and injunctive relief, SCOTUS found that 7th A applies to actions enforcing statutory rights and requires jury trial on demand).
 - NB: right to jury trial can't be pushed aside by characterizing legal claim as incidental to equitable relief sought
 - NB: Justice Marshall takes longer view in this case, probably agrees that many juries would be racist but didn't want to restrict Ps' access to jury trials; 7th A concerns more important in long run.
 - If Congress created a new claim and expressly afforded a jury trial (even if historically a pure equitable claim), then you'd get a jury. But what if Congress says nothing? Or if places the process in an administrative tribunal?
 - If a claim involves a public right, courts would probably respect the alternative approach
 - Worker's compensation for example is a new regime for compensating certain types of claims where there is no jury (quid pro quo concept)
 - But if a clear legal claim involving private rights, courts would probably still require a jury
 - Example: Future health care reform creates new administrative "Medical Malpractice Courts" where all medical malpractice claims are resolved without a jury. Probably would not be constitutional.

B. Selecting the jury and other issues

- Jury selection is a key part of civil trials—frequently trade on stereotypes and sociological profiles
- Lawyers don't pick jurors, they de-pick the ones they don't want

- Selection process
 - Developing pool: driving records, voting records, phone records
 - Automatic exclusions: felons and often lawyers
 - Voir dire
 - Challenges for cause (judicial determination): infinite # of challenges for cause possible
 - Party choice (peremptory challenges): usually given 3 each in civil cases
- **If juror doesn't disclose something during voir dire, no grounds for new trial unless: (1) answer was clearly dishonest; and (2) would have constituted a basis for a cause exclusion** (see, e.g., *McDonough Power v. Greenwood*, 1984, P's lawyer asked "have you ever had any serious injury in your family?" and a juror doesn't disclose that his son's arm was broken when a tire exploded; P's atty would have wanted to know this but SCOTUS said no new trial).
 - If you ask bad questions, then it's not the jury's or the court's fault
 - Even if info would have led lawyer to use peremptory challenge, doesn't matter, has to be clearly dishonest and basis for cause exclusion
- Peremptory challenges (42 USC § 1870)
 - Used for weirdo jurors, ultimate goal is a non biased jury, **providing direct input to procedure—deciding who will judge you**, results might be better accepted if you have direct input.
- Mechanics of jury selection
 - P and D get 3 peremptory challenges each in civil cases in fed ct.
 - Most state cts allow lawyers to do voir dire
 - FRCP 47(a) provides the judge in federal court may let the lawyers to examine the potential jurors or may conduct the examination herself
- **Jurors cannot be struck in a peremptory challenge on the basis of their gender, expanding *Batson* precedent (no discrimination on race) under EPC of the 14th A to women, forbidding intentional discrimination on the basis of gender** (see, e.g., *JEB v. Alabama*, 1994, discrimination invites cynicism toward jury neutrality, esp. in gender-related issues).
 - State actor issue: gov't lawyer can't use discrimination in peremptory challenges
 - Clearly "state action" in *JEB* because lawyers are acting in ct, judge has to approve—constitutes state action bc ct empowers private attys to use gov't power
 - *Batson v. Kentucky*, 1986, EPC in 14th A limits attorney's ability to use race as basis for making peremptory challenges.
- ***Batson* test: allegations of discriminatory peremptory challenges are evaluated in 3 part mini hearing:**
 - 1. Opponent of strike must make prima facie showing that striking party made challenge bc of discriminatory reason**
 - 2. Striking party must articulate gender neutral reason for challenge**
 - 3. Ct must decide whether opponent of strike met burden of proving purposeful discrimination**

(see, e.g., *Alveria v. Sam's Warehouse Club, Inc.*, 2001, striking all 3 females from jury in sexual harassment suit was not discriminatory, Alverio's assertion that sexual harassment trials must necessarily include female jurors is discriminatory in itself bc it implies that one gender is better suited than another).

 - More or less a pretext: becomes easy for lawyers to justify exclusion on basically any other grounds; lawyers will tolerate business as usual and judges will accept any reason.

X. THE SUPREME COURT AND THE BATTLE OVER ARBITRATION

- Arbitration is contractual litigation—basically can do it however you want
- Arbitration examples
 - Sign or not sign before medical procedure (pre dispute agreement)? NO keep all options open—maybe use it later as bargaining chip

- Ask questions: where, who pays, who arbitrates, who gets to pick arbitrators
- Post v. Pre-dispute arbitration
 - sometimes agree to A when case is already in litigation
 - post dispute A agreements ok, can be whatever you want it to be bc you can negotiate terms and procedures
 - pre dispute A agreements are more iffy bc you can limit options and put risk on potential P
- Essential attributes of A
 - Adjudicative process—results in an answer
 - Private (outside of gov't legal system)
 - NB: ct system cooperates w/ arbitration process, enforce arbitration clauses, enforce arbitration agreements, general trend of facilitating arbitration agreements
 - Binding
 - Arbitrator to decide—not jury
 - Limited appeals process and rights (if you can prove arbitrator took a bribe, manifest disregard for law, due process violation—then you can get an appeal)
 - Flexible procedures
 - Potential for cost efficiencies and quicker resolutions BUT also large potential to pay more: pay for arbitrators' time, plus usual costs (like discovery)
- Risks v. Benefits
 - Only in US is arbitration extremely controversial, bc jury v. arbitrator
 - Opportunity for decision making expertise—risk of biased arbitrator
 - Knows norms and customs of trade, but isn't bound as much by the law
 - Arbitration more private than public trial—good or bad thing?
- *Green Tree Financial Corp. v. Randolph* 2000
 - Mortgage loan requiring \$15 fee, K requires arbitration and prohibits class actions, 11th Circuit said contract failed to provide “minimum guarantees required to ensure P's ability to vindicate her rights”
 - CA claim; \$15 claim, truth in lending act violation (more penalties)
 - **Issue: whether or not case can proceed as CA**
 - Basic P's argument: don't make me arbitrate bc no lawyer will ever take my \$15 case
 - NB: P has to demonstrate why her claim wouldn't be vindicated
 - NO info about A process: \$ filing, \$ A, \$ awarded by arbitrator
 - Majority decision:
 - Federal Arbitration Act is clearly in support of arbitration; no generalized attacks on A ok, as long as P can vindicate claims A should be accepted; nothing in Truth in Lending Act that suggests Congress wanted to preclude A for claims arising from this act
 - “...prior holding that the party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration...a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs.”
 - Dissent
 - Why is burden on P? Repeat player is D—should have burden to show that A will work
 - No info about how much consumer will have to pay under A; case should be remanded to get more info about how much A will cost
 - Disappointing/stunning that SCOTUS is willing to opine about A's propriety and usefulness w/o any info about how the A process works!
 - To make more compelling case for A, need more info about costs/procedure
- *Mitsubishi Motor Corp. v. Soler Chrysler-Plymouth*, 1985

- True turning point in arbitration in US
 - Previous precedent: *American Safety Equipment Corp. v. J.P. Maguire & Co.*, 1968, "...the doctrine comprises four ingredients. **First, private parties play a pivotal role in aiding governmental enforcement of the antitrust laws by means of the private action for treble damages.** Second, "the strong possibility that contracts which generate antitrust disputes may be contracts of adhesion militates against automatic forum determination by contract." Third, antitrust issues, prone to complication, require sophisticated legal and economic analysis, and thus are "ill-adapted to strengths of the arbitral process"... Finally, just as "issues of war and peace are too important to be vested in the generals,... decisions as to antitrust regulation of business are too important to be lodged in arbitrators chosen from the business community—particularly those from a foreign community that has had no experience with or exposure to our law and values."
 - Core of doctrine: "fundamental importance to American democratic capitalism of the regime of the antitrust laws."
 - *Mitsubishi* court finds second concern "unjustified." Next, "potential complexity should not suffice to ward off arbitration." Third, parties and arbitral body should not be presumed to be "unable or unwilling to retain competent, conscientious, and impartial arbitrators." 4th concern (core of doctrine) is unwarranted bc international arbitrators are bound to settle dispute in accordance w/ national law giving rise to claim, in this way "the statute will continue to serve both its remedial and deterrent function."
- Construing FAA in this case—s. 2 of FAA
 - "A written provision in any contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract. . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."
- **Issue: how effective will A in Japan be in vindicating US antitrust law?**
- Majority: rest of the world uses arbitration, have to play fair and not impose US jury system
 - **"By agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than judicial forum. It trades the procedures and opportunity for review of the courtrooms for the simplicity, informality, and expedition of arbitration. Having made the bargain to arbitrate, the party should be held to it."**
 - NB: this precedent has not shown to be limited to international context; maybe could be applied in domestic areas.
- *Doctor's Associates, Inc. v. Casarotto* (1996)
 - Montana statute stating that you can't hide A clauses—must be bold and conspicuous
 - Protecting consumers—some states specify font and color, prohibit A in certain cases, forbid A as condition for service (NC), make A agreements voidable (e.g., within 60 days A applies if you don't affirmatively void it), require K to give detailed info about A process and procedures
 - SCOTUS says in unanimous decision that MT law violated FAA bc it placed A agreements in class apart from "any K," and FAA preempts MT law.
 - Interpreting §2 of FAA
 - **"What states may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal footing, directly contrary to the [FAA's] language and Congress' intent."**

- **RULE:** “Courts may not invalidate arbitration agreements under state laws applicable only to arbitration provisions.”
- Suggestion in footnote that state cts could apply general rules of K law such as unconscionability doctrine—only way to regulate, can do it if you apply it to everything and not just A provisions
 - Courts now finding specific A agreements unconscionable under both procedural and substantive unconscionability standards
 - More than ½ of unconscionability cases in the last 10 years have arisen out of arbitration clauses
- Justice Triewiler—critique of SCOTUS’ decision, giving finger to the ct.
- *AT&T v. Concepcion*, 2011
 - 5-4 split along partisan lines
 - K required A and required claim to be brought only by the customer and NOT as a class action
 - A clause seemed reasonable *prima facie*, lots of “consumer friendly” clauses (AT&T has to pay costs of A if it isn’t a frivolous claim)
 - HOWEVER it takes away nuclear option of CA
 - *Discover Bank v. Superior Court*, 2005: CA Sup Ct held that contracts that excluded class actions were in some cases “unconscionable”
 - CA said if a “contract of adhesion” involving small amounts of money and were part of a scheme to cheat many people, such waivers were impermissible
 - Would apply to both contracts that required arbitration and those that didn’t – just excluded class actions
 - Decision
 - Rationale: arbitration and class action don’t go together
 - Class actions much slower and indecisive, class action requires procedural formality, and increases risk to Ds
 - **Disproportionate impact of CA rule on A agreements**
 - “Our cases place it beyond dispute that the FAA was designed to **promote** arbitration...*Discover Bank* rule ...interferes with arbitration.”
 - Forces D to make in terrorem settlements
 - Dissent
 - Wants to know why we can’t regulate A more—FAA doesn’t say we have to unconditionally love A in all of its forms
 - SCOTUS denigrating ability of states to adjudicate A clauses in their states—really giving the finger to federalism
 - NB: still room for use of unconscionability in invalidating Ks with A clauses—just have to be applying it to all Ks. Courts are still looking at specific agreements and saying they’re over the line. This is really only applicable on a case by case basis—having a state statute targeting arbitration is not going to be ok.

XI. CHOICE OF LAW ISSUES IN AMERICAN COURTS

A. STATE LAW IN FEDERAL COURTS: THE ERIE DOCTRINE

1. Era of *Swift v. Tyson*

- Basic principle that fed cts are allowed to hear cases that apply state law—Rules of Decision Act (RDA) 1789, §34, fed cts should apply state law in cases that do not involve fed law.
 - “The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as the rules of decision in civil actions in the courts of the United States, in cases where they apply.”
- *Swift v. Tyson* (1842): RDA requires federal cts to apply relevant state statutes to a case, but not bound to follow common law rulings of state judges—not required to apply any one

state's common law, but to **look at all common law cases to divine the “true” common law rule on the issue before it.**

- Adherence to “natural law” philosophy
- *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.* (1928): applies *Swift* standard, even in acknowledging that law of state would have achieved the opposite result. Blatantly allows P to reincorporate in another state to get into fed ct, bc under state law he would have lost.
 - More notable for Justice Holmes' dissent
 - Natural law is a fallacy—no corpus of American law, law is a man made institution (created by those who have been given authority to make it) and there is no “one true law”
 - Why should common law (writings by judges as state actors) have less value than writings by state legislators?
 - Says that Justice Story was wrong on the intent of the framers in interpreting §34 of Judiciary Act—not meant to only invoke statutes.
- Extremely low predictability under *Swift*
- Majority operates from natural law premise: need to ascertain the proper rules from the true rules of law.

Erie RR Co. v. Tompkins

- Justice Brandeis smacks down *Swift* once and for all
- Came out in the same year as FRCP
- **“Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the laws of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law”** (see, e.g., *Erie Railroad Co. v. Tompkins*, 1938, strikes *Swift* down as unconstitutional, affirms Holmes' dissent in *Swift* by acknowledging no “transcendental body of law”—law cannot exist without the force of the state behind it, ascension of Legal Realism.)
 - *Swift* induced discrimination against citizens of states by non citizens, undermined equal protection under the law
 - Prevented uniformity in administration of law of state
 - Allowed corporate citizens to game the system by moving, at expense of citizens' rights.
 - Invaded states' rights by allowing fed cts to ignore their statutes and common law.
 - **Most obvious constitutional violation of *Swift* is the 10th Amendment: powers not delegated to US by the Constitution, nor prohibited by it to the states, are reserved to the States respectively, or to the people—therefore fed judges pronouncing substantive issues of law where neither fed cts nor Congress is given law making authority is unconstitutional.**
- Difficulties arise when content of state law is unclear—novel issues
 - Can get state's highest ct to certify questions of state law (relatively rare, exception rather than rule)
 - Erie guess: try to figure out how state's highest ct would rule
 - NB: state trial ct judges are NOT bound by federal cts' Erie guesses—bound by state supreme ct decisions
- Hanging question left unresolved by *Erie*: in diversity cases, which state's substantive law should be used?
 - All states have developed “choice of law” rules to determine which body of substantive law to apply in cases w/more than 1 state citizenship, they vary a lot between states.
- **In diversity actions, fed ct applies the law that the state in which it sits would apply to the case; aka, *Erie* applies to choice of law questions** (see, e.g., *Klaxon Co. v. Stentor Electric MFG Co.*, 1941, conflict of law rules to be applied in fed ct must conform to those applied in state cts, otherwise diversity jurisdiction would constantly mess up equal administration of justice in fed/state cts that sit across the street from each other).

- Under *Erie*, independent determinations by fed cts extend to field of conflict of laws. Can't violate uniformity of application of law within states.
- *Klaxon* mandates vertical uniformity between state and federal cts in the same state—leads to application of different legal rules in fed cts between states.
 - NB: SCOTUS reaffirmed *Klaxon* in *Day & Zimmerman, Inc. v. Challoner* (1975).

B. SUBSTANCE AND PROCEDURE UNDER THE ERIE DOCTRINE

- Unresolved question after *Erie*: do fed cts have to apply state procedural law as well as substantive law? Have to draw line btwn matters that are substantive for *Erie* purposes, and those that are procedural (in which case fed ct doesn't have to defer).
- *Cities Service Oil v. Dunlap*, 1939 (year after *Erie*), SCOTUS held that issue of burden of proof relates to a substantive right, and required fed ct to apply state burden rule.
 - Outcome suggested that fed ct in diversity case would be required to defer to state law on some procedural issues, in order to adhere to *Erie*'s intent of uniformity of results in state and fed ct.
- **Outcome-determinative test: if applying a federal procedural rule instead of a state rule would affect the outcome of the case, the federal court should use the state rule** (see, e.g., *Guaranty Trust Co. of NY v. York*, 1945, fed ct had to adhere to state statute of limitations rule because outcome would have been different if fed rule was used).
 - Metzloff slide, cornerstone of the case: **"The outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court."**
 - NB: here SCOTUS relied on **retrospective** outcome-determinative test, which was revised to a prospective test under *Hanna*
 - Ct says that *Erie*'s essence is to assure the same outcomes in state and federal courts in diversity jurisdiction cases.
 - Fundamental point: diversity jurisdiction is about giving litigants another tribunal, not another body of law.
 - In a sense *York* expanded *Erie* standard, because it suggested that fed cts should sometimes follow state law to support uniformity, even if there is constitutional authority for fed ct to follow its own rules
- **Federal courts should ordinarily defer to state law even in matters of form and mode if ignoring state law would affect the outcome. HOWEVER in some cases, policy of uniform outcomes may need to yield to "affirmative countervailing considerations" (i.e. importance of jury trial in fed system) if deferring to state law would interfere with other policies important to the administration of the federal courts** (see, e.g., *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 1958, P was entitled to jury determination of factual issues because fed ct has strong interest in determining its relationship btwn judge and jury; also not clear that jury would give the case a different outcome).
 - Issue in case was whether judge or jury should decide whether P was an "employee" covered by the compensation statute—in SC decided by judge, in fed ct decided by jury
 - Guy gets electrocuted, wants damages from Blue Ridge, but the problem in SC is that you can't get damages as a "statutory employee"; you can only get worker's comp. Question is whether or not P was statutory employee.
 - TAKE AWAY: SCOTUS backs away from slavish adherence to outcome-determinative test, pendulum swinging back toward federal cts
 - SCOTUS acknowledges that *York* is the presumptive test for deferring to state law, but that since *York* test is based on a **policy** (uniformity btwn state and fed outcomes) it can be weighed against other policies (jury trials important to fed system).
 - Factors to consider in weighing policy
 - importance of state interest (here not that important, deprecates it, this is state distribution of functions of judicial machinery)
 - importance of federal issue (here jury trial right)
 - extent of outcome determinativeness

C. THE TWO TRACKS OF THE ERIE DOCTRINE

- *York* and *Byrd* involved conflicts btwn fed judicial practice and state law—didn't address question whether fed diversity ct should follow state practice that conflicted w/ one of the FRCO

1. ***Hanna v. Plumer, 1965*** (Diversity case filed in MA, P used liberal Fed Rules for service of process (leave copies at house w/ someone of suitable age and discretion), MA statute required personal service by hand delivery on executors; lower courts used "outcome determination" test and concluded under *Guaranty Trust* that MA rule had to be applied).

- Warren's analysis: first considers issue of conflict btwn state law and judge-made fed rule (not mandated by fed statute or FRCP), this part is dicta. Second part considers conflict btwn state law and FRCP.
- Concludes that because Congress delegated to SCOTUS the authority to adopt the Rules in REA (which has Constitutional authority under Art. III), Rules apply unless they exceed authority granted in REA to write the Rules.

Hanna Part I: In a conflict between a state law and a judge-made procedural rule: **twin aims test:** (1) would the difference be substantial enough to lead a P to choose the federal court over the state court; (2) does the difference provide a significant litigation advantage that makes it "inequitable" to ignore state practice?

Hanna Part II: In a conflict between state law and FRCP, if Congress has authorized SCOTUS to write the Rule and Rule is "arguably procedural" it is valid federal law that applies under the Supremacy Clause. Therefore overrules state law.

Two part analysis:

(1) Did Congress have the authority to enact (and therefore delegate to SCOTUS the power to adopt) the Federal Rule in question?

(2) Whether Congress has delegated the power to write the Rule to SCOTUS in the REA—"whether a rule really regulates procedure—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard of infraction of them."

- ***Substantive rights proviso in REA- "Such rules shall not abridge, enlarge or modify any substantive right;" therefore a Rule may be within Congress' power to enact (because it is "arguably procedural") but not within its delegation of rulemaking authority to SCOTUS in the REA (because it affects substantive rights). SCOTUS has never clarified when a Rule impermissibly infringes on substantive rights, but this is a narrow path to challenging the validity of a Fed. Rule even though it governs procedural matter.

Additional notes on *Hanna*

- *Hanna* refines *York* outcome determinative test by changing its outlook to prospective rather than retrospective—whether difference btwn fed rule and state law would lead a lawyer to choose one ct system over another.
- Warren holds that conflicts btwn FRCP and state law require distinct analysis from normal *Erie* choice
- **Bottom line: if Congress has authorized SCOTUS to write the Rule, and the Rule is "arguably procedural," it is valid federal law that applies under the Supremacy Clause of the Constitution, and trumps conflicting state law.**
 - Statute is valid if it "regulates matter which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either."

2. *Walker v. Armco Steel, 1980*

- **If there is no direct conflict between FRCP and state law, then there is no need to apply a *Hanna II* analysis (question is "whether the scope of the Federal Rule in fact is sufficiently broad to control the issue before the Court;" if yes, then *Hanna II* applies).**

- **If the answer is no, as it is here, then *Hanna I* applies: whether ignoring state rule would lead to forum shopping or inequitable administration of laws.**
 - SCOTUS held that the difference btwn fed and state law here would lead to “inequitable administration” of the law, therefore fed ct should follow state law.
 - Revisits identical situation from *Ragan v. Merchants Transfer & Warehouse Co.*, 1949, SCOTUS held that federal courts sitting in diversity should begin the running of the statute of limitations for a claim according to state law instead of according to the federal rules of civil procedure. The court reasoned that a claim could not be given longer life in federal court than it would have had in a state court while being consistent with *Erie*.
- NB: SCOTUS finds there is no direct conflict and applies *Hanna I*, but uses a retrospective analysis—strange because *Hanna* relied on prospective analysis; **this inconsistency has never been resolved.**
- By categorizing conflict as *Hanna I* and resolving it under twin aims test, SCOTUS avoids tough question: if a federal rule is arguably procedural (therefore authorized by REA), when will it be invalid under the 2nd section of REA because it “abridges, enlarges or modifies” a substantive right?—question that is supposed to be addressed in *Shady Grove*

3. *Gasperini v. Center for Humanities* 1996

- **Issue: what standard of review should be used by a federal court in measuring the excessiveness of a jury verdict.** The standard typically applied by federal courts was that a verdict was excessive if it “shocked the conscience of the court.” New York had recently enacted legislation changing the standard as a part of a tort reform initiative, codifying in CPLR §5501(c) the standard that an award was excessive if it “deviates materially from what would be reasonable compensation.” The question arose as to whether the standard was substantive or procedural.
 - Although an actual damages cap would be substantive, appellate review of a damages cap is procedural.
- Justice Ginsburg delivered the majority opinion of the Court, which held that the federal district court should apply the New York standard for excessiveness.

D. THE MODERN ERIE DILEMMA

Shady Grove Orthopedic Associates, PA v. Allstate Insurance Co. 2010

- **If apparent conflict between state law and federal statute/rule, first determine whether the state rule is clearly substantive. If it is, state law applies under *Erie*. If not, *Hanna* Part II analysis applies (for conflict w/ federal rule/statute): whether there is a direct conflict between the federal rule and state law and whether the federal rule “abridges, enlarges, or modifies any substantive right (as established by Congressional grant of authority under REA).**
 - Scalia says that Rule 23 “leaves the parties’ rights and duties intact and the rules of decision unchanged.”
- Ginsburg’s dissent argues that the scope of the Fed Rule should be construed w/ sensitivity to state interests, NY sought to achieve substantive purpose via law, and Rule 23 can be construed to avoid conflict with it—therefore apply *Hanna I*, find that ignoring it would be improper under *Erie* twin aims test.
- Stevens’ concurrence concludes that Rule 23 “squarely governs” question of class certification, goes on to consider whether applying Rule 23 will abridge/enlarge/modify substantive right, concludes that there is little evidence that NY law was enacted to restrict substantive rights—casts vote w/ plurality.
- **Take away: *Erie* and *Hanna* establish road map for argument**
 - Court must determine whether a state rule is clearly substantive
 - If it is, state law applies under *Erie*
 - If not, court invokes *Hanna I* analysis (judge-made procedure, twin aims test) or *Hanna II* analysis (fed statute or rule)

- Arguments in federal rules case will focus on hardest part of *Hanna II* analysis
 - Whether there is a direct conflict between Fed Rule and state law
 - Whether federal rule “abridges, enlarges, or modifies any substantive right.” 28 USC 2072(a)

XII. THE CLASS ACTION DEVICE

A. CONSTITUTIONAL DIMENSIONS OF THE CLASS ACTION

- Basic functions
 - 1 or more parties serve as representative (named Ps) suing on behalf of similarly situated persons too numerous to join, makes small claims financially viable.
 - Class not automatically there, must be certified by ct.
 - Action proceeds to resolution to determine legal rights of the class: win or lose the members are bound under res judicata—essence of class action
 - Justified by judicial efficiency
 - CA can only work if the result counts and binds everyone—can’t allow multiple suits stemming from the same set of facts
 - NB: Ct has to sign off on all settlements behind class actions
- **Parties with conflicting interests cannot be regarded as being in the same class. To justify CA (and therefore make judgments binding on class members):**
 1. **“The interests of those not joined” (absent class members) must be “of the same class as the interests of those who are” joined (class representatives).**
 2. **Absentees’ interests must “in fact [be] adequately represented by parties who are present.**
 3. **(Implied) Courts must adopt and employ procedures so “as to insure” that the common interest and adequate representation requirements are satisfied and that litigation is “so conducted as to insure full and fair consideration of common issue.”** (see, e.g., *Hansberry v. Lee*, 1940, Ds had been deprived of DP of law under 14th A by the IL Sup Ct’s adjudication bc they were not bound by judgment from earlier litigation (due to their improper incorporation into the “class,” therefore not parties to suit.)
- In criticizing *Burke*, SCOTUS emphasized it wasn’t laying down specific procedure, but designated a few necessary ones: designation as a class, express identification of the class in the pleadings and ultimate judgment, and (maybe) approval of designation by a court.
- Personal jurisdiction question: does court have PJ over absent class members who didn’t necessarily choose to sue in that forum?
 - See, e.g., *Philips Petroleum Co. v. Shutts* (1985): SCOTUS found that out of state class members are entitled to DP protections; also found that protections are different from those given to Ds under PJ doctrine
 - CA P doesn’t have to defend for himself (like D in civil suit does); Ct and named P protect its interests
 - Absent CA Ps aren’t subject to other burdens imposed on Ds: don’t have to hire counsel, appear, never subject to counter/cross claims, no liability for fees/costs, adverse judgment won’t usually bind absent P for damages (but may extinguish claim)→bottom line is that absent P isn’t **required** to do anything
 - In most CAs absent P is allowed to opt out, and if he does, he is removed from litigation entirely.
 - NB: *Philips* was Rule 23(b)(3) damages CA—each class member receives notification and opportunity to opt out; SCOTUS hasn’t clarified whether DP is satisfied for Rule 23(b)(1) or (2) classes, which don’t have opt out opportunity and are therefore mandatory.

B. REQUIREMENTS FOR FILING CLASS ACTION

- Rule 23(a)’s answer to *Hansberry*

- Rule 23(a)(1) requires party to “certify” lawsuit as class action, provided that party seeking CA certification shows that joinder of all parties is “impracticable”
 - Rule 23(a)(2-3) require that representative parties share interests of absent class members (share common questions and “typical” claims/defenses).
 - Rule 23(a)(4) requires representatives fairly and adequately represent the class
 - Rule 23(b) describes additional requirements for some kinds of classes—primarily for efficiency of CA.
- Diversity jurisdiction: look to named parties only
- Court had previously held that each class member had to meet amt in controversy requirement—MAJOR impediment to use of class actions, decreases their utility.
- *Exxon v. Allapattah*, 2005, Ct overruled 2 prior cases and held that **as long as one of the named Ps met amount-in-controversy requirement, jurisdiction is OK**. Supplemental jurisdiction statute exists now, uses supplemental jurisdiction for the other Ps to join in action.
- Class Action Fairness Act (CAFA) in 2005 to deal with perceived problems (good example of judicial regulating):
 - made it easier to file CA in federal ct
 - state cts had become aggressive in accepting class actions—many abuses perceived.
 - Use of “minimal” diversity (if any P class member is a citizen of a state different from any D, or if any P class member is a foreign state/subject and D is a citizen of a state, or the reverse), if 100 or more class members, federal jurisdiction ok if minimal diversity btwn opposing parties and \$5 million or more in dispute.
- Removal also made easier (although complicated!)
- **Mechanics of Class Certification**
 - Class filed as putative class action
 - Discovery relating to class issues often required (really long process)
 - Party seeking class status has burden of showing Rule 23 requisites met
 - Court must issue certification order (immediate appeal sometimes possible)
 - Because it’s important to economic viability of the case, allowed to appeal immediately after Court says no.
 - If certified, class counsel appointed and notice required
 - Court responsible for supervising settlement of case (more active case management of class actions).
 - Like trustee of class, judge is responsible for notice, that case proceeds effectively
- **The mechanics of Rule 23**
 - Rule 23: complex rule establishing 4 prerequisites for class action treatment (Rule 23(a)):
 - **Numerosity**—if only 5 people, just do joinder, no need for CA. Usually ok if it’s over 40.
 - **Commonality**—this one is really in play after *Wal Mart* and Scalia’s interpretation.
 - Used to be easy: is there an issue of law or fact? Is there one issue of law or fact that is common (not even “nucleus” of fact needed)? Supposed to be brief and easy decision
 - **Typicality**—are the claims and defenses of representatives the same/similar to those of the class? Slight differences in fact won’t defeat certification. “Cohesiveness” quality to claims and defenses.
 - **Adequacy of representative**—are the lawyers for the class up to the job (one of the few times ct looks at adequacy of counsel, usually asks if they’ve done class actions before and if they’ve been successful),
 - **Implicit factors**: really an ascertainable “class” here?—no rule that talks about this explicitly, kind of asks “does this feel like a class?”
- **Second part of Rule 23**
 - If 23(a) prerequisites met, case must satisfy one of the three categories of 23(b)(3)
 - Common questions of law or fact “predominate” over individual issues

- Class action approach is “superior” to other approaches
 - The “manageability” of the class actions
- NB: Final type is most common for “damage” class actions.
- Requires “opt-out” option—FRCP chose not to require “opt in” but constitutionally has to allow opt out.
 - More efficient because it bundles claims together, better for Ps because it agglomerates claims and increases leverage
- ***In re Teflon Products Liability Litigation, 2008***
 - Doesn’t seem to be a frivolous case, seems to be at least a somewhat dangerous product, but nobody is sure about medical implications/damages that might come up later on. Don’t want to assert tort claims because medical problems haven’t manifested themselves yet.
 - Long list of claims: contracts and torts.
 - Multidistrict litigation: filed in many district courts, they’re combined and sent to one district court judge who handles all of the initial stuff, sends it back to separate districts
 - What could you use? Registered purchasers of Teflon coated pans maybe, ad campaigns maybe—judge is doing some review of the merits.
- **Global picture: Need for Subclasses**
 - *Amchem* decision was important—CA for global settlement of asbestos claims, huge problem in American litigation. Trying to deal with asbestos claims once and for all. Ds wanted it to be settled—two classes, one of people who had been injured, other of people who weren’t injured yet.
 - On appeal SCOTUS reversed finding of class because there were **inherent conflicts between those who had been injured and those who hadn’t been injured yet—how could you even put a value on the settlement later.**
- **Wal Mart**
 - **Holding: The certification of the nationwide class of female employees was not consistent with Federal Rule of Civil Procedure 23(a), which requires the party seeking class certification to prove that the class has common questions of law or fact; moreover, the plaintiffs’ claims for backpay were improperly certified under Federal Rule of Civil Procedure 23(b)(2), because claims for monetary relief cannot be certified under that provision when the monetary relief is not incidental to the requested injunctive or declaratory relief.**
 - Most significant class action case in years
 - Class consisted of all women employees of Wal Mart since 1998—waiting on decision from Court of Appeals for 10 years, en banc decision, badly split.
 - Wal Mart had policy of local discretion, each store manager does what he (usually) thinks best on pay/promotion within some guidelines. No other parameters. Result of this (statistically) is widespread pay and job disparities nationwide.
 - Lots of statistical proof about pay variations; anecdotal reports of discrimination and sociologist expert on “social framework analysis”
 - Claims: NOT seeking individual damages
 - When does this motion come about? After pleading stage, after some amount of discovery—looking at the merits of the case. Scalia says you can never really win this case based on the class’ amorphousness.
 - District Ct. certifies under 23(b)(2) because it’s an injunction case—but they’re asking for damages. Good move on lawyer to try and get it under 23(b)(2) because you don’t have to show predominance of issues over disparities in fact.
 - Even Ginsburg says this is under (b)(3)—wants to send it back and look at it under regular damages class action
 - Worried about where else this focus on strong common issues will go in the future for other class actions.
 - **Scalia’s majority decision**
 - Starting point: class actions are “exceptions”

- Crux of issue is “commonality”
- Citation to Nagareda article – talking about real commonality. Anybody can allege common facts.
- Must show common injury AND a common contention capable of classwide resolution
 - **“Commonality requires the P to demonstrate that the class members have suffered the same injury. This does not mean merely that they have all suffered a violation of the same provision of law.”**
 - **“That common contention, moreover, must be of such a nature that it is capable of classwide resolution.”**—has to have the capacity to produce common answers
 - **Need some “glue holding the alleged *reasons* for all those decisions together.”**
- Could be a class action if there was something real to examine (like a test that all employees took)
- Here, the policy is discretion (“Very common and presumptively reasonable way of doing business”)
 - Even if outcome is discriminatory, it’s not good enough—have to show that mode of decision making was discriminatory too.
- Might be OK if real proof of discrimination – lacking here. (Scalia doesn’t have nice things to say about Dr. Bielby and his social framework analysis)