I. Personal Jurisdiction

a. **DEF**: The power of the court to render a binding judgment over a specific defendant
   i. A court may decline to exercise pj even if it has it (fairness, etc. ex *Tickle*)

b. **Traditional bases**
   i. **in personam** – presence w/n state territory or citizenship there
      1) statutory – appoint gov't official to be your agent while driving in state, etc.
   ii. **in rem** – property w/n state, ct. exercising power to determine the status of the property
   iii. **quasi-in-rem** – render in personam jment, but limited to value of property – prop doesn't have to be related
      1) must attach at beginning – Pennoyer

c. **Minimum contacts**
   i. **Satisfy DP**
      1) if D has certain minimum contacts w/ forum such that maintenance of suit doesn't offend traditional notions of fair play and substantial justice (*Shoe*)
         a) **Fair play and substantial justice**
            i) Burden on D
               1- Defending in foreign system should have significant weight (*Asahi*)
            ii) Forum State's interest in adjudicating dispute
            iii) P's interest in getting convenient and effective relief
            iv) Interstate judicial system's interest in most efficient resolution
               1- Procedural
               2- Saying, we might have enough PJ, but assume there's another court that has more PJ, so asking whether this is the best forum to hear the case - like venue idea
            v) Shared interest of several States in furthering fundamental substantive social policies
               1- Ex Japan not recognizing punitive damages, states not recognizing same-sex marriage
         b) After Asahi, 2 part test - min contacts, then FPSJ- Brennan says FPSJ can make up for very few contacts
      2) Exercising privilege to conduct activities in a state gives rise to obligations
   ii. **Specific v. general jurisdiction** (*Helicol*)
      1) Specific: Cause of action arise out of or are connected to the few contacts D has
      2) General: Contacts w/ forum are systematic and continuous
   iii. State MUST have long-arm statute!
      1) Facts fit the long-arm statute?
      2) If facts fit, do they violate const?
      3) Fed ct uses **R4(k)(1)(a)** to piggyback on state long-arm statute
   iv. Quality of contacts (*WWVW*)
      1) D must have purposefully availed itself of the privilege of conducting activities in forum state
      2) Connection w/ forum must be such that D should reasonably anticipate being haled into court there
      3) State has to show minimum contacts, then presumption of fair & reasonable. Burden shifts to D to show not F & R
      4) FPSJ can sometimes compensate for a lesser showing of minimum contacts (*Burger*)
      5) If a contract, must have substantial connection w/ state
   v. Stream of commerce
      1) Substantial connection must come from D's purposefully directed actions
      2) Placement of product in stream of com w/o more is not sufficient (*Asahi* O'Connor)
         a) "More" may be designing product for forum state market, advertising there, etc.
         b) (*Asahi* Brennan) no additional conduct required b/c you know where it goes and you benefit from forum's laws
      3) Awareness that product will go into stream of com not enough (*Asahi* O'Connor)

d. Property
   i. Quasi-in-rem has been expanded to include "property" such as debt (*Harris*) and stocks (*Shaffer*)
   ii. Quasi-in-rem must still meet the standards of *Shoe* - property w/o more doesn't meet min contacts (*Shaffer*)
      1) Why attach?
         a) Secure the property
         b) State's long-arm too limited
         c) Vindictive
   iii. In rem cases provide min contacts by themselves

e. Physical presence
   i. Courts have jurisdiction over nonresident D if served while physically in the state (*Burnham*)
      1) Scalia based on tradition, Brennan based on fairness (note: neither had 5 votes, so opinion not binding)

f. Consent
   i. Consent is implied if D does anything in special appearance other than contest PJ (*Bauxites*)
   ii. Reasonable forum selection clause in contract b/w domestic and foreign corp must be honored (*Zapata*)

iii. Forum selection clause, if reasonable, should be enforced (*Carnival Cruise Lines*)
1) Question is whether to enforce contract, not whether it should be able to have forum selection clause
2) Policy reasons
a) Clears up confusion
b) Save money on good/service P buys b/c limit fora where D can be sued

g. Procured by Fraud
i. Court can decline PJ if procured by fraud (*Tickle*)

II. Procedural Due Process

a. **Notice**
i. To satisfy DP, notice must be reasonably calculated to notify interested parties (ex ante standard) (*Mullane*)
1) Doesn't actually have to reach them or even be the best notice available
2) Standard is of one who is desirous to actually inform the absentee
ii. **Possible methods of notice**
1) Personal service
2) Attachment (quasi in rem)
3) Publication
4) Mail
iii. If you know the notice didn't get there, must take additional reasonable steps (*Flowers*)

b. Opportunity to be heard
i. **DEF**: in light of interests at stake in the litigation, the D is able to develop the facts and legal issues in the case
ii. D has 20 days to prepare defense (**R12(a)**)
iii. OTBH must be tailored to the capacities and circumstances of those to be heard (*Goldberg*)
iv. Welfare benefits considered property for DP purposes (*Goldberg*)
v. If important issues turn on facts, DP generally requires opp to confront/cross-examine adverse witnesses
vi. Policy: have to weigh the interests of the parties with the interests of the gov't (*Goldberg*)
vii. **3-factor test for OTBH that satisfies DP:** (*Mathews* - disability benefits case)
1) Private interest that will be affected by the official action (in part, how essential is the property to life?)
2) Risk of erroneous deprivation of such interest through the procedure used and probable value (if any) of additional or substitute procedural safeguards (this is a new factor that *Goldberg* didn't have)
3) Gov't interest, including function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail
viii. **Situations requiring OTBH considerations**
1) Quasi-in-rem: grabbing property at the beginning
2) Cutting off benefits (gov't) w/o prior hearing
3) Repo cases - gov't official grabs property before hearing
a) Constitutionally, must have hearing while deprivation of property can still be prevented (*Fuentes*)
i) However, if facts not really in dispute, may be constitutional (*Mitchell* was)
ii) However, can still grab property pre-judgment (quasi in rem) in extraordinary circumstances
1- Depends on how much we trust D/are scared sth will happen to property
4) Grabbing property as security for judgment
5) **Cases:**
a) *Mitchell* – LA law allowing sequestration by judicial order if 1) affidavit showing specific facts that defendant can conceal, dispose, of, or waste, & 2) complaint where D can have an early hearing at which P has to prove grounds for sequestration = constitutional
i) - difference = judge, specific facts rather than conclusory allegations, & possibility of early hearing
ii) - alternatively: a) reversal of Fuentes, b) distinguish from Goldberg b/c 2 private parties and Sniadach b/c garnisher of wages had no property interest
b) *Di-Chem* – GA law allowing garnishing of bank account if 1) affidavit (conclusory statements) and 2) double bond = unconstitutional
i) GA law = as bad as Fuentes, no saving graces as in Mitchell either
c) Doehr – CT pre-trial attachment of property where property has nothing to do with cause of action = unconstitutional
i) applies Mathews 3 part test & distinguish from Mitchell

ix. Summary
1) Opportunity to be heard – core concept to protect in due process (notice = means of getting there)
2) Instrumental and normative reasons for
a) 1) (Mashaw article - system based on values would be different, but values make the concept very important)
b) opportunity to be heard is a means to get the correct outcome in adversarial system
c) in dealing with human beings, we should protect certain values (i.e. fairness) that are reinforced by giving opp. To be heard (participatory, dignitary values)

d) Sense of equality
e) Tradition

3) Definition of opportunity to be heard
   a) not a rigid rule, but a flexible standard
   b) Mathews 3 part test = most concrete means of assessment
   c) Brennan in Goldberg goes through various aspects, but this is not repeated
4) When can we do away with opportunity to be heard?
   a) when assets may be destroyed (i.e. criminal possession of drugs & warrants)
   b) jurisdictional reasons (Pennoyer) – quasi in rem jurisdiction requires attachment
   c) costs may be too high (Goldberg vs. Mathews)
   d) Fuentes line of cases – reasons not exactly clear
      i) fear of depletion of resource
      ii) property under shared ownership
      iii) something to do with court's jurisdiction
         1) preliminary injunction to make sure object of litigation exists at end of lawsuit (e.g. historical preservation)
         2) similarly with temporary restraining order
5) Relationship of wealth & procedure
   a) people with fewer resources are in a more vulnerable position
      i) adversarial system falls apart with disparities in resources (much different than civil law system
      ii) Goldberg = high water mark
      iii) not giving people a lawyer (time or money to get one) gives process without means to utilize them
      iv) rules developed by people with power to develop them (like corporations) b/c they have the resources to pursue litigation opportunities

III. Subject Matter Jurisdiction

a. **DEF:** competency of court to hear the type of case

b. Default positions
   i. State courts can hear "any" kind of case (very few exceptions)
   ii. Fed courts don't have SMJ unless Congress gives authority within Article III

c. Subject matter jurisdiction cannot be waived

d. Sources of SMJ
   i. **US Constitution, Article III, § 2** – authorizes creation of federal court system (only set up SCOTUS itself) & authorizes the federal courts to hear certain types of cases if Congress uses statutes to confer that jurisdiction
   ii. **28 U.S.C. § 1331** – federal question cases (those "arising under" federal law)
   iii. **28 U.S.C. § 1332** – diversity cases (narrower than USCons, art. III, § 2)
      1) amount in controversy: "matter in controversy **exceeds** . . . $75,000"
      2) complete diversity: "and is between (1) citizens of different States"
   iv. **28 U.S. C. § 1367** – cases over which federal courts have supplemental jurisdiction
   v. **28 U.S. C. § 1441** – cases which can be removed to federal courts

e. Why might want a fed ct over a state ct?
   i. Federal courts have a wider jury pool (though from same state)
   ii. Judge could be more fair (not locally elected, but federally appointed)
   iii. Federal court may have lower caseload
   iv. Theory that out-of-staters don't have the opportunity to improve the state court (through tax etc.)

f. **Diversity of Citizenship** (diversity debate pg 272)
   i. Must be **complete diversity** - can't have same state on both sides of the "v."
      1) Statutory, not constitutional requirement
   ii. For **natural persons**, citizenship for diversity purposes = domicile
      1) **Domicile** is the place where the person
         a) Has taken up residence; and
         b) Has intent to stay indefinitely
            i) Can be met even though person thinks he'll leave at some point, as long as no definite plans to leave at a certain time or after a certain event
   iii. For **corporations**, citizenship for diversity is (1332(c))
      1) Where **incorporated**,
      2) **Principal place of business**
         a) Possible tests
            i) "bulk of corporate activity"
            ii) "nerve center"
            iii) "total activity" (looks at everything, including bulk of activity and nerve center)

iv. For **unincorporated associations** (partnership, labor union, etc.), citizenship is
1) Where any member of the association is a citizen

v. Amount in Controversy
1) Must **be at least $75,000.01**
2) Based on **plaintiff's good faith** unless it appears **to a legal certainty** that the claim is for less *(Whitchurch* - NZ tours)
3) Can **add claims together** to get up to amount requirement, but **must meet amount against each D**
4) Can't add 2 or more plaintiffs against one D unless **seek to enforce a single title or right, in which they have a common and undivided interest** (ex if 1 doesn't collect, the others collect more)
5) In joinder, if one plaintiff meets amount, another plaintiff can join and have **supplemental jurisdiction**, but **only against a single D** (*Exxon*)
6) If injunction, look at **value of injunction** - what will it cost D? How much is activity hurting P?

g. Removal (§1441)
i. **D** (NOT P) can remove if district court has original jurisdiction to the district court embracing where the action is pending (**1441(a)**)
ii. **D in diversity case** CANNOT remove if any D is citizen of the state where claim was brought (**1441(b)**)
iii. **P can't remove on a counterclaim**
iv. **All Ds must join** petition for removal unless removal is on basis of a separate and independent claim
v. District court has **supplemental jurisdiction** over previously non-removable claims (**1441(c)**)
vi. Plaintiff can avoid removal by pleading only state law claims or joining non-diverse parties EXCEPT
1) P can't fraudently join a non-diverse party against whom he has no cause of action
2) P can't disguise a federal cause of action
3) Certain causes of action are so exclusively federal that they will preempt any state cause of action P pursues

h. Challenging SMJ
i. Can directly attack w/ motion to dismiss (**12(b)(1)**)
ii. Collateral attack is limited, but can raise on appeal

i. Federal Question (§1331)
i. *Osborn* - federal Q comes from "federal ingredient" - only for constitution; statute is narrower
ii. *Mottley* - look at the face of the complaint (P's complaint) - well-pleaded claim rule
1) Can't hide true nature of complaint through artful pleading
iii. *Harms* - looks like a fed claim (copyright), but isn't - it's a state law contract claim
1) Followed Holmes creation test
iv. *Smith* - if must decide a fed Q, then valid fed Q jurisdiction - Holmes dissented
v. *Moore* - breach of duty imposed by fed law not sufficient for fed Q - contradicts *Smith*
vi. *Merrell Dow* - state law claim uses violation of fed statue as proof, but fed statute doesn't create cause of action - no smj b/c, *Grable* says, no "welcome mat" from Congress
vii. ***Grable*** - reaffirms *Smith* exception; says *Merrell Dow* was a decision within the space that *Smith* allows
1) **3 part test**
a) **Necessarily** raises a **stated** federal issue?
b) Is the federal issue **actually disputed** and **substantial**?
c) Can fed ct **entertain w/o disturbing** any congressionally approved **balance** of fed and state judicial responsibilities?
2) Still looking at face of P's complaint
viii. If US is a party, likely to be fed Q b/c usually under a statute
ix. Justification (text, p. 269)
1) allows Supreme Court to confine itself to new problems rather than policing old solutions
2) greater similarities in interpretation of national law
3) promotes more uniform, correct application of federal law (even in state courts b/c second forum
4) generally shared with state courts

j. Supplemental Jurisdiction (§1367)
i. History
1) *Gibbs* - if make a claim that has smj and then assert one that doesn't, can exercise smj over the new claim b/c part of the same "case" (language from Art III)
a) If claims derived from "common nucleus of operative fact"
i) Can decide not to exercise supplemental juris if
1) Fed claims dismissed before trial
2) State issues substantially predominate
3) Have to decide sensitive/novel issues of state law
4) Hearing claims together might confuse jury
2) *Aldinger* (wanted to sue county) - can't use supp juris to bring in a party that Congress has not allowed to be sued in fed ct

3) *Kroger* - can't bring in a non-diverse party to a diversity suit based on supp juris (NE-Iowa case)
4) *Finley* - no pendent party jurisdiction when Congress didn't expressly or implicitly say anything

ii. Modern - §1367 - replaced those cases - Congress granted statutory authority

1) **Decision process**
   a) Arises out of same case or controversy?
   b) If yes, precluded by 1367(b)?
2) **1367(a)** - in any civil action where dist cts have original juris, have supp juris over all claims related to the same case or controversy under Art III (*Gibbs* definition), including joinder or intervention of parties
   a) Limited by (b)
3) **1367(b)** - limits (a) in diversity cases
   a) No supp juris over claims by plaintiffs against persons made parties under **Rule 14, 19, 20, or 24** or persons proposed to be joined as plaintiffs under **Rule 19**, or seeking to intervene under **Rule 24,** if destroys juris under **1332** (diversity)
4) **1367(c)** - ct may decline to exercise juris if
   a) novel or complex issue of state law
   b) state claim substantially predominates over the federal claim
   c) the district court has dismissed all the federal claims
   d) there are other compelling reasons

iii. *Exxon* - if some parties meet $ in controversy and others don't, can bring in those that don't on supp juris
1) But can't do it if destroys diversity

k. Venue

i. **1391(a) (diversity); 1391(b) (non-diversity - fed Q)**
1) (1): judicial district where **any D resides**, if all reside in same state
2) (2): substantial part of the events or omissions giving rise to claim, or where substantial part of property that is subject of action is situated
3) (3): EXTREME FALLBACK: where **any D is subject to PJ** (**1391(a)**) or where **any D may be found** (**1391(b)**), **if no district anywhere in the United States where claim can be brought** under (a) or (b)
   a) Ex diverse defendants, and accident happened in Canada
4) Reside usually = **domicile** for natural persons

ii. **Where corporate defendants (not plaintiffs) reside** for purposes of **1391(a)(1)** and **1391(b)(1)**
1) 1391(c)
   a) Corporations reside in any judicial district where subject to PJ when action commenced
      i) Can reside in many different places, not just 2 like in PJ
   b) If state has multiple districts, D resides in any district where would be subject to PJ if the district were a state

iii. Venue is waived if D doesn't raise it in answer to complaint (under **12(b)(3)**)
iv. Parties may agree to venue in advance/in a contract - *Carnival Cruise*
v. **1392** - civil action of local nature involving property located in different districts in same state may be brought in any of such districts

vi. Venue Transfer

1) **1404** - district court (where venue was proper) may transfer to any other district where it might have been brought for convenience of parties and witnesses, in the interest of justice (SMJ, PJ, and venue)
2) **1406** - if venue is wrong shall dismiss, or if in the interest of justice, transfer to any district where it could have been brought (SMJ, PJ, and venue)
3) 1404 and 1406 replaced FNC only for **intrasystem** transfers
4) When transferred, law applicable in transferor forum follows the transfer under 1404 (*Van Dusen*), when transferred under 1406, law applicable in transferee court applies (*Van Dusen*)

l. **Forum Non Conveniens**

i. Principle: ct may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute
ii. Because FNC results in dismissal, it requires a much stronger showing than is required for transfer.
iii. Judicial doctrine (no statute). Usually used in state courts b/c federal courts have §§ **1404** and **1406** (only comes up in federal court when the alternative is a foreign country.
   1) EX: A (CA) sues B (CA, with contacts in MD) in MD state court for a car crash in CA. Court might have PJ over B, but even so, the case obviously should be heard in CA, but no transfer because MD and CA state court systems are different. So B would request that the case be dismissed on FNC grounds, under FRCP **12(b)(3)**.
iv. *Piper Aircraft* – sets forth basics of doctrine
   1) Initial premise = there is an alternative forum available
   2) Use a balancing test to determine if the alternative forum is more convenient
      a) Private interests of the litigants (convenience of the litigants, witnesses, evidence)
      b) Enforceability of the judgment

c) Factors of the public interest (convenience of forum, choice of law issues, having dispute settled at home)

3) Requirements
   a) alternative forum
   b) P's choice of forum rules in first instance
   c) public interest
   d) private interest of parties
   e) need to see if (c) and (d) allow you to overlook (b)

m. Ascertaining the Applicable Law

i. *Swift v. Tyson* - interprets § 34 of 1789 Judiciary Act as only requiring federal courts to follow state statutory laws.

ii. *Erie* - overturns *Swift* - Federal courts must follow state law (statutory & case law) in the absence of controlling federal law.

iii. 28 U.S.C. § 1652 – laws of the states shall be regarded of rules of decision in federal courts if there is no federal statutory law.

1) modern version of § 34 of 1789 Judiciary Act - Erie interpretation = precedent

iv.

	Pre-Erie (pre-1938)	**Post-Erie (post-1938)**
Procedure	State Rules of Civ Pro (Conformity Act)	Federal Rules of Civ Pro
Substantive law	"Federal common law" (Swift)	State law (Erie)

v. Choice of law directs federal courts to defer to state court system in 2 related ways

1) Use the same substantive law as state courts would use (substantive law provisions), and
2) Use the same system for determining which state's substantive law the state courts would actually apply (choice of law provisions)
   a) Ex: In Erie, this means the D. Ct. in NY would first use the NY state court system for determining which law to use, and then apply that law. In fact, NY state courts would have used PA law, so D. Ct. in NY would have to apply PA law.
   b) Ex 2: In Piper, the CA state court would use the CA choice of law rules. Removing the case to federal court wouldn't change the substantive law. D. Ct. in PA normally uses PA choice of law rules (Klaxon), but Van Dusen says transferee court has to follow the original court's choice of law rules - so, CA choice of law rules.
   c) Result = defendant can't change substantive law (except with forum non conveniens)
      i) Illustrations:
         1) Four Cases:
            (1) P(CA) v. D(NY) in NY federal court
            (2) P(CA) v. D(NY) in CA federal court
            (3) P(NY) v. D(NY) in NY state court
            (4) P(CA) v. D(CA) in CA state court

            *consistent = courts in both cases apply the same substantive law; inconsistent = nope.
         2) (1) & (2) consistent under Swift, inconsistent under Erie
         3) (2) & (4) inconsistent under Swift, consistent under Erie
      ii) less forum shopping under Erie? NO - different forum shopping
         1) disincentive to remove to federal court
         2) discourages D's forum shopping, but encourages P's forum shopping
         3) takes removal down to a procedural level (to shop for…)
         4) consider different judges, different juries, procedural rules (FRCP vs. state rules), speedier docket, etc.

IV. Stages of a Civil Lawsuit

a. Pleading

i. Documents (The Complaint and Answer)

1) Rules
   a) **FRCP 7** = pleadings allowed è only 3 kinds à Complaint, Answer, Reply (replies to counter claims, cross-claims, etc.)
   b) **FRCP 8(a) = Complaint**
      i) (1) = short and plain statement of grounds of SMJ
      ii) (2) = short and plain statement of claim showing pleader is entitled to relief (facts)
      iii) (3) = demand for judgment
   c) **FRCP 8(b) = Reply** = (i) short and plain defense to each claim & (ii) admit or deny (or lack of information) the averments
   d) **FRCP 8(c)** = affirmative defenses must be claimed in pleading or can't be raised

e) **FRCP 9** = how to plead specific things
i) (e) – don't need to show jurisdiction of prior judgment. D must plead lack of jurisdiction
f) **FRCP 10** = structure of pleadings
g) **FRCP 11** = signing requirement & "good faith" provisions

ii. Pleading is enough if it puts the party on notice (*Dioguardi*) and it's plausible (*Iqbal, Twombly*)
1) Must nudge the complaint across the line from conceivable to plausible

iii. Kinds of **12(b)(6)** cases
1) "Looked at me funny" - claims that don't exist or must fail
2) Claims of ppl w/ mental illness - if facts are true, you'd have a claim, but facts too fanciful to be true
3) Articulated real legal claim w/ plausible facts, but it's a total lie (can get pretty far w/ this claim)
4) Poorly-pleaded case - can't win on cause of action, and it was the only cause of action - poorly written
a) Usually allowed to amend (*Pruitt*) (*Case* - not allowed)
5) Run-of-the-mill case
a) Form 11 pleading requirements, but might need more (*Twombly, Iqbal*)
6) Hard cases - *Twombly, Iqbal, BCD*

iv. Balance: weeding out frivolous suits but not deterring meritorious suits

v. Motions to dismiss
1) **FRCP 12**(b)
(1) no SMJ (can be brought at any time)
(2) no PJ
(3) improper venue
(4) insufficiency of process
(5) insufficiency of service of process
(6) failure to state a claim upon which relief can be granted (bring any time)
(7) failure to join a party under FRCP 19 (can be brought at any time)

vi. FRCP 11
1) Not just for pleading, but for everything (except discovery requests, responses, objections, motions)
2) **11(a)** - every paper must be signed by attorney or pro se party - address, email, phone #
3) **11(b)** - by presenting paper, certify that to the best of person's knowledge and after inquiry reasonable under the circumstances, that
a) **11(b)(1)** not for improper purpose
b) **11(b)(2)** claims, defenses warranted by existing law or nonfrivolous arg for extending law
c) **11(b)(3)** - factual contentions have evidentiary support or likely will after opp for investigation/discovery
d) **11(b)(4)** - denials warranted on the evidence or reasonably based on belief or lack of info
4) **11(c)(2)** - have to give notice that you'll Rule 11 other side, and other side gets 21 days to withdraw or amend the paper
5) Can be raised sua sponte
6) Goal is to deter, not to compensate
7) Not applicable to discovery

b. Joinder

i. **Checklist**
1) Correct **nomenclature**
2) **Is there a Rule that allows it?**
3) **Have jurisdiction over claim/party?**
a) Party - need SMJ, PJ, venue
b) Claim - need SMJ, PJ, venue
c) For SMJ
i) Fed Q? if no,
ii) Diversity? If no,
iii) Supplemental?
1- 1367(a)? If yes,
2- 1367(b)?
4) **Preclusive effect** of joining claims and parties
5) Understand policy
a) usually efficiency reasons (i.e. "arising from the same transaction or occurrence")
i) - at some point, efficiency cuts the other way b/c inefficiency in terms of inadequate representation of the interests of all parties involved

ii. **Joinder of Claims**
1) **Permissive Claim Joinder**
a) FRCP 18
i) **18(a)** - **party (not just Ps)** asserting a claim, counterclaim, crossclaim, or third-party claim **may** join, as independent or alternative claims, as many claims as it has against an opposing

party
(1) **May** becomes **should** or **must** because of **claim preclusion** - if same transaction and occurrence
(2) Doesn't have to be related, but if it is, can be precluded later

ii) **18(b)** - If one claim needs to concluded before another can be cognizable (i.e. indemnification), the two claims may be joined, but the court will grant relief according to how everything is resolved.

iii) **Applies to parties, not just Ps or Ds**

iv) **SMJ**
(1) Need SMJ (independent or through supp juris)

v) **PJ**
(1) There must be PJ with respect to each cause of action joined under R. 18(a).
(1) Why? If didn't need PJ, would invite manipulation by plaintiffs. A plaintiff would concoct an insignificant claim where there was PJ over the defendant in a forum the plaintiff wanted and then would join the unrelated genuine claims he had against the defendant without having to satisfy PJ.

vi) Venue
(1) There must be Venue with respect to each cause of action joined under R. 18(a).
(1) Why? Same worries about manipulation by plaintiffs .

2) Crossclaims and Counterclaims

a) FRCP 13

i) Applies to parties, not just Ps or Ds

ii) **13(a)** - **Compulsory Counterclaim** against an opposing **party** if arises out of same T/O and doesn't require adding a party over whom court can't get juris
(1) If don't raise, precluded from bringing later
(2) SMJ
(1) If same T/O, have supp juris through 1367
(3) PJ
(a) The counterclaim defendant **cannot challenge** the compulsory counterclaim on **PJ** grounds.
1. Why? It would not violate due process to consider the counterclaim defendant subject to PJ. See Adam v. Saenger (F&K 510-11).
2. the counterclaim defendant chose to sue in that forum on that T/O, so how can he complain about being sued in that same forum concerning the very same T/O?
(4) Venue
(a) The counterclaim defendant **cannot challenge Venue** on the compulsory counterclaim Why? It makes sense on V grounds to litigate all causes of action concerning the same T/O in the same forum. After all, the witnesses will overlap. So if original claim had V, it makes sense to say that the compulsory counterclaim has V.

iii) **13(b)** - **Permissive Counterclaim** (have to ask if have PJ - usually yes b/c P already in court)
(1) SMJ
(a) Need SMJ over new claims! (independent or supp)
(2) PJ
(a) The majority view is that the counterclaim defendant **cannot challenge** the permissive counterclaim on **PJ** grounds.
1. Why? It does not appear that it would not violate due process to consider the counterclaim defendant subject to PJ.
2. the counterclaim defendant chose to sue in that forum, so it is plausible that he should not be allowed to object to that forum as the site for an unrelated suit. Argument is not as strong as for compulsory counterclaim
(3) **Venue**
(a) The majority view is that the counterclaim defendant **cannot challenge** the permissive counterclaim on **Venue** grounds.
1. Why? forum cannot be that inconvenient for the counterclaim defendant or he would not have chosen it as the place for his own suit.
2. efficiencies gained from litigating all the differences between the two parties in the same forum, even if they are unrelated. Once again, this is not as strong an argument as it is in a compulsory counterclaim context.

iv) **13(g)** - **Permissive Crossclaim** allowed if comes from same T/O
(1) SMJ

(a) Will have SMJ b/c comes from same T/O

(2) PJ

(a) The cross-claim defendant **cannot challenge** the cross-claim on **PJ** grounds.

1. Why? Would not violate due process to consider the counterclaim defendant subject to PJ.
2. cross-claims between co-defendants: if PJ over the defendants for the plaintiff's claim against them, should be PJ for the cross-claims anyway
3.]cross-claims between co-plaintiffs: the plaintiffs chose the forum for litigating that T/O, so they can't object to litigating a cross-claim concerning the same T/O there.

(3) Venue

(a) The cross-claim defendant **cannot challenge** the cross-claim on **Venue** grounds.

1. Why? It makes sense on V grounds to litigate all causes of action concerning the same T/O in the same forum.
2. If the original claim had V, it makes sense to say that the cross-claim has V.
3. cross-claims between co-defendants: if there was V for the plaintiff's claim against them, there should be V for the cross-claim anyway.

v) 13(h) - can **join a new party** w/ a counterclaim or crossclaim using rules **19 and 20**

(1) Would need **SMJ, PJ,** and **Venue** (see **R19** and **20**)

iii. Joinder of Parties

1) Impleader

a) FRCP 14

i) **14(a)** - D may bring in a new party to indemnify him for his liability to P

ii) **14(b)** -P may bring in a new party to indemnify him for liability arising from a counterclaim made against him

iii) Neither is required. Either party can pursue an indemnification action after judgment

iv) **3rd party defendant** (person impleaded) can:

(1) **14(a)(2)(A)** assert defense against 3rd party P under **R12**

(2) **14(a)(2)(B) counterclaim** against 3rd party plaintiff under **13(a)** or **13(b)** or **crossclaim** another 3rd party defendant under **13(g)**

(3) **14(a)(2)(C) Assert a defense** against the (original) plaintiff

(4) **14(a)(2)(D) Assert against P any claim** arising out of the T/O that is subject matter of P's claim against the 3rd party P

v) **P** can:

(1) **14(a)(3)** Assert a claim against 3rd party D arising out of same T/O that is subject matter of P's claim against the 3rd party P

vi) SMJ

(1) Court will usually have **SMJ** under **1367(a)** (not precluded by **1367(b)** b/c not a claim by original plaintiff - if original plaintiff makes claim against impleaded party, need independent **SMJ**)

vii) PJ

(1) An impleaded party **can challenge the impleader on PJ** grounds.

(a) Why? Anyone dragged before a forum has a right to challenge that court's asserting power over her.

viii) **Venue**

(1) Impleaded party disregarded in determining whether **venue** is proper

2) Required Party Joinder

a) FRCP 19

i) 19(a) - must be joined if (1) no complete relief in absence or (2) they have an interest and in their absence it will be (A) impaired or impeded or (B) create a possible inconsistent obligation

ii) 19(b) - if can't be joined, can go on w/o them?

(1) Consider factors under 19(b)

iii) Applies to potential Ps and Ds

b) SMJ

i) Need SMJ! (indep or supp)

c) **PJ**

i) There must be PJ! over each defendant joined.

(1) Why? Anything else would violate the due process clause. The court is asserting power over each defendant and why the court has such power must be justified with respect to each defendant.

d) **Venue**
   i) **All of the defendants joined are counted** when determining whether there is **Venue**.
      (1) Why? Follows from the language of the venue statute **1391**.
e) Preclusion gets us out of calling ppl necessary parties - can use **R20**+preclusion

3) Permissive Party Joinder

a) FRCP 20(a)
   i) All persons (20(a)(1))may join in one action as Ps, and all persons (20(a)(2))may be joined in one action as Ds, if they assert (or if there is asserted against them) (A) any right to relief in respect to or arising out of the same transaction or occurrence **AND** if (B) any question of law or fact common to all of them will arise in the action. They don't have to obtain or defend against all relief demanded.
   ii) Might have preclusion if could have joined parties but didn't

b) SMJ
   i) Need SMJ! (indep or supp)

c) PJ
   i) There must be PJ! over each defendant joined.
      (1) Why? Anything else would violate the due process clause. The court is asserting power over each defendant and why the court has such power must be justified with respect to each defendant.

d) Venue
   i) All of the defendants joined are counted when determining whether there is **Venue**.
      (1) Why? Follows from the language of the venue statute **1391**.

4) Misjoinder

a) **FRCP 21 -** not a ground for dismissal; ct can add or drop a party, or sever a claim

5) Interpleader

a) FRCP 22 - put a pot of money at the court and tell everyone to come get it (for limited funds - ex. Insurance co, bankruptcy, etc.)

6) Intervening party

a) FRCP 24

(a) Intervention of Right à anyone shall be permitted to intervene . . . (mandatory)
   (1) when a federal statute confers an **unconditional** right to do so, OR
   (2) when the applicant claims an interest relating to the subject of the action and is so situated that the disposition may harm that interest **and** her interest is not adequately represented by the existing parties

(b) Permissive Intervention - anyone may be permitted to intervene . . . (discretionary – delay or prejudice)
   (1) when a federal statute confers a **conditional** right to do so, OR
   (2) when an applicant's claim or defense has a question of law or fact in common with the main action

iv. Organization

1) FRCP 42

a) Can **consolidate** claims that involve a common question of law or fact
b) Can **sever** claims for convenience, to avoid prejudice, or to expedite and economize - **the knife**

c. Class Actions

i. **FRCP 23**
ii. Representative, not group, litigation
   1) Class rep aggregates claim
   2) Future class members' claims precluded - "global peace"
iii. **23(a)** - must have **all** of the following features
   1) **Numerosity** (25 too few, 40 probably enough)
   2) **Commonality** - common questions of law or fact
   3) **Typicality** - claims/defenses of rep parties are typical of the claims/defenses of class
   4) **Adequacy** - reps will fairly and adequately protect the interests of the class
iv. **23(b)** - types of class actions
   1) **23(b)(1)** - Separate actions would create risk of (A) inconsistent standards of conduct or (B) limited fund
      a) Notice not essential, but court may direct it
   2) 23(b)(2) - Injunction/declaratory relief - notice not essential
   3) **23(b)(3)** - Damages class action
      a) Common question of law or fact must **predominate** over any questions affecting only individuals, and class action must be **superior** of other methods of for fairly and efficiently adjudicating controversy, considering:
         i) Class members' interest in individually controlling prosecution/defense of separate actions

ii) Extent and nature of any litigation already started concerning controversy already
iii) Desirability/undesirability of concentrating litigation in the particular forum
iv) Likely difficulties in managing a class action
b) If small claims, class action is always superior
c) Requires best practicable notice and opt-out

v. **23(e)** - judge must approve settlement

vi. **23(g)** Class Counsel
(1) Appointing
(A) Court must appoint counsel (unless statute provides otherwise)
(B) Attorney must fairly and adequately represent the interests of the class
(C) Court
(i) Must consider
1) lawyer's work in identifying or investigating potential claims
2) lawyer's experience in class actions & claims like present one
3) lawyer's knowledge of the applicable law
4) resources the lawyer will commit to representing

vii. **Cases and CAFA**
1) *Falcon* – Mexican worker who wasn't promoted didn't present common question of fact & wasn't typical representative of some class members (who were discriminated in hiring practices)
a) **FRCP 23(b)(3)**
i) *Castano* (cig) – inadequate determination of predominance and superiority in mass tort
b) **FRCP 24(a)(4)**
i) *Hansberry* – party not bound if interests not adequately represented → adequate representation = constitutional concern
2) **Subject Matter Jurisdiction**
a) determination of citizenship based on named parties only (*Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 1921)
b) claims that don't meet the jurisdictional requirement cannot be aggregated to meet the jurisdictional amount (*Snyder*)
i) - each plaintiff must meet the jurisdictional amount (*Zahn*)
c) 28 U.S.C. § 1367 → circuits split on whether supplemental jurisdiction covers class claim that meets the relatedness requirement of **§ 1367(a)**
i) *Exxon* ➔ **§ 1367** overrules *Zahn* → only need one plaintiff to exceed jurisdictional amount.
d) **CAFA** - 2005 – new federal statute →
i) "minimal diversity"
(1) federal courts have jurisdiction over class action in which a single D is a citizen of a different state than a single P; AND
(2) amount in controversy exceeds $5,000,000 (**28 U.S.C. § 1332(d)**)
(3) Any D can remove
(4) Consent of all Ds not required to remove
(5) Exceptions for local controversies (more than 2/3 of class members from same state, and primary D from that state, or significant D from that state, see more)
3) **Personal Jurisdiction**
a) *Shutts* – KS oil case - need lower standard to establish over class action plaintiffs than over defendants (a la I*nternational Shoe*)
i) reference the requirements of **FRCP 23(b)(3)**
ii) primary protection not territorial but adequate representation requirements
iii) Venue = similar to PJ rules. Only look at representatives, not absent class members

d. Discovery
i. General
1) Purposes
a) Preservation of relevant information that might not be available at trial
b) To ascertain and isolate those issues that are actually in dispute
c) To find out what testimony and other evidence is available on each of the disputed factual issues
d) To legitimate notice pleading
e) To promote public interests (establishing private attorneys general)
f) Elimination of surprise = poker with an open hand
2) History
a) didn't become a vital part of litigation process until FRCP in 1938
b) discovery rules (26-37) have been most widely copied by states
3) Scope
a) **FRCP 26(b)** - applies to things that are
i) **Relevant**

(1) Doesn't need to be admissible as long as may lead to admissible evidence

ii) **Not privileged**

(1) Certain **privileges** - lawyer-client, husband-wife, doctor-patient, priest-penitent, etc.

(2) Testimonial limitations - self-incrimination, one spouse testifying against another, etc.

(3) **Attorney work product**

(1) Ordinarily can't get materials prepared for litigation by another party, but can get them if they are

1. Otherwise discoverable
2. Party shows substantial need and can't get w/o undue hardship
3. **CANNOT** discover mental impressions, conclusions, opinions, or legal theories of a party's attorney

ii.

	Device	**Rule**	**Addressed to**	**What it does**
1	Initial Disclosures	**26(a)**	Parties	Exchange basics - who you know, documents
2	Depositions	**30(a)/31**	Anyone	Oral (or written) questions - under oath, att'y present, recorded by reporter (w/ written, att'y usually not present; rarely used)
3	Interrogatories	**33**	Parties	Written question to be answered under oath by specific time - consult w/ att'y
4	Document Requests	**34/45**	Parties/anyone	Things - documents, property
5	Physical Exams	**35(a)**	Parties X Court Order	Injuries - have to be major issue in controversy - party examined can get copy of report
6	Admissions	**36**	Parties	Re-pleading - ask to admit sth, other party admits or denies
7	Subpoena	**45**	Anyone	People/things
8	Protective Order/Compel	**26(c)/37(a)**	Anyone	Triggers judicial oversight - responding party has to have willfully avoided proper discovery
9	Signings/Sanctions	**26(g)/37**	Anyone	Polices discovery - prevents abuse

e. Summary Judgment

i. Should we have a trial? -> are there facts in dispute?

1) 4 sets of circumstances

a) (easy) legal case, not factual case - no facts in dispute

i) Do I win as a matter of law? Both sides want sum j - Ex *Pruitt*

b) (easy) facts in dispute, and we'll for sure have a trial b/c no side has clear advantage

c) party w/ burden of proof (P) has most of the evidence and moves for SJ

i) *Lundeen* - "neutral" 3rd party witness hard to get at, so SJ granted

ii) *Cross* - no SJ where gov't hadn't yet deposed the professor; afraid he's less neutral

d) party w/ burden of proof (P) has very little evidence and other side moves for SJ

i) *Adickes* - D has to negate all P's evidence

ii) *Celotex* - Overturns *Adickes* - now have to walk the court through the evidence to show that there's nothing to support P's claim; then burden shifts to P

2) Burden is on moving party; burden shifts at some point

3) *Anderson v. Liberty Lobby* - Have to take burden of proving initial claim into account - clear and convincing = higher standard for "no genuine issue" (if P; lower standard for D)

4) *Matsushita* -where competing inferences are equally plausible (price-fixing v. parallel conduct) have to show that one "tends to exclude" the other

f. Other Dispositions before Trial

i. **FRCP 41** - Voluntary dismissal; involuntary dismissal

ii. **FRCP 55** - Default

g. Adjudication by Jury: Federal Constitutional Right to a Jury Trial

i. Trial rarely happens, but parties bargain in the shadow of a trial

ii. **7th Am** - In Suits at common law, [w/ > $20 in cont], 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. (only fed ct)

1) Test: (*Terry* (union misrep case))Would have had trial in 1791? >
   a) Would this have been a case in law or in equity?
      i) Then look at remedies:
         (1) Law: damages or get off land (go here first)
         (2) Equity: some other remedy: injunction, declaratory, etc.

2) Beacon Theatres - if ask for both legal and equitable remedies, do legal first (very narrow discretion) so equitable can't later preclude legal and deny jury trial (kind of overruled in *Parklane*)

iii. Rules

1) FRCP 38 - Right to jury trial; how to demand; waived unless demand is properly served and filed

2) FRCP 39 - Must have jury trial on all issues demanded unless parties stipulate to nonjury trial or court finds that on some/all issues there's no fed right to jury trial. If no jury demanded, try before judge. Court can order jury trial on any issue that could have been demanded. Can have advisory jury.

3) FRCP 47 - Examining jurors - court or parties can do it - has to let att'ys ask questions, either by themselves or through the ct - has to allow 3 preempt challenges

4) FRCP 48 - Must have 6-12 jurors; must be unanimous verdict by at least 6 unless parties stipulate otherwise

5) FRCP 49 - Special verdict - written finding on each issue of fact; general verdict w/ answers to questions

6) FRCP 51 - Jury instructions - ct can request from parties; must inform parties of proposed instructions and give parties opp to object on the record and out of jury's hearing before instructions/args delivered - can assign as error if properly objected

7) FRCP 52 - Findings and conclusions by the court; jment on partial findings

iv. **Burden of Proof**

1) **Burden of Production** = usually on plaintiff → responsible for "producing" a certain threshold amount of evidence to raise a claim = minimum amount needed to satisfy standard of proof = enough evidence for reasonable jury to decide in favor
   a) meeting doesn't ensure victory (need to persuade), but failing to meet it ensures defeat
   b) must be met to go beyond summary judgment

2) **Burden of persuasion** = what you need to win (convince fact finder of case)
   a) Standards
      i) preponderance of the evidence = >50%
      ii) clear and convincing evidence = between
      iii) beyond a reasonable doubt = ~90%

3) **Shifting Burdens**
   a) usually 2 burdens on one person
   b) sometimes it shifts (EX = Title VII → P must make prima facie case (production), & D must disprove (persuasion))

h. **Directed Verdict**

i. Judgment as a Matter of Law

1) FRCP 50 - 50(a) if party fully heard on an issue during jury trial and ct finds that reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, can grant a motion for jment as a matter of law (JAMOL)
   a) Usually holds in abeyance until after sent to jury (must make motion before sent to jury)
   b) **50(b)** After jury verdict, party may make a renewed motion for JAMOL and ct may allow jment on verdict (if verdict returned), order a new trial, or direct entry of JAMOL
   c) **50(c)** Once judge enters a JAMOL, it's a final decision and can go up on appeal. Appeals court asks judge to give his opinion about whether there should be a new trial, if appeals court reverses judge's decision. (**Non-binding**.)

	JAMOL YES	JAMOL NO
New Trial YES	Final (50c)	Not final
New Trial NO	Final	Final

   d) (**50(e)**) Can appeal JAMOL if not granted
   e) Compared to Summary Judgment
      i) SJ after discovery, DV after trial
      ii) standard is essentially the same for both
      iii) SJ – judgment not entered yet; DV = judgment
   f) JNOV
      i) counterintuitive b/c it seems judge is saying no reasonable jury could have reached a conclusion a jury just reached
      ii) instead, court saying it erred by sending the case to the jury

ii. Judgments

1) FRCP 54 - 54(a) a decree and any order form which an appeal lies

a) **54(b)** if have multiple issues, can enter jment on as to one or more but fewer than all claims or parties only if ct expressly determines there's no just reason for delay

iii. New Trial

1) FRCP 59 - May grant new trial after entry of jment if evidence is "against the weight of the evidence"

a) "against the weight of the evidence" has more leeway than JAMOL, where evidence must be near 0% or 100%

i. Appeal

i. Final jment rule - can only appeal from final jment (w/ exceptions)

ii. **Rules and exceptions**

1) **§1291** - COA has jurisdiction of appeals from final jments of Dist Courts
2) **§1292** - Interlocutory decisions (including exceptions to final jment rule)
3) **Exceptions to final jment rule**
   a) **1292(a)(1)** exception to final jment rule for **injunctions**
   b) **1292(b)** exception if controlling question of law as to which there is substantial ground for difference of opinion, as long as appeal may materially advance end of litigation
      i) Ex find liability and appeal before deciding damages (only reason *Liberty Mutual* didn't allow was technicality of 10 days)
   c) **FRCP 54(b)** if have multiple issues, can enter jment on as to one or more but fewer than all claims or parties only if ct expressly determines there's no just reason for delay
   d) **1651** - SCOTUS and COA can issue **writs of mandamus** (*LaBuy* - Judge says ct too crowded for anti-trust case and assigns to magistrate)
      i) 3 part test (*Cheney* (as in Dick Cheney))
         (1) No other adequate means to attain relief sought
         (2) Movant must show that right to relief is clear and indisputable
         (3) Court satisfied that writ is appropriate under the circumstances

iii. Limits on scope of review

1) Alleged errors must appear in the trial-court record
2) Aggrieved party must have promptly objected to the trial court regarding rules or events that could have been corrected
3) Alleged error must not constitute "harmless error" → must have affected substantial rights
   a) - don't care about jurisdiction as much b/c intra-system, not inter-system; mechanical, not federal
   b) - law/fact decision still in play

j. Preclusion

i. **Background principles**

1) Judge-made law, but has rule-like structure
2) Can only run against ppl who have been parties to a lawsuit
   a) Can't run against ppl who haven't had their day in ct
3) By definition, there's an earlier lawsuit and a later lawsuit
   a) Judge in 1st lawsuit can't determine preclusive effect - so he can't promise that an issue can be relitigated
      i) Can try to shape the claim to give preclusive/non-preclusive effect
4) Preclusion is an **affirmative defense** - if don't raise, it's waived (FRCP 8(c))

ii. Claim Preclusion

1) **Rules**
   a) Must be **final jment - but can have been appealed**
   b) Mutuality - must have been same parties
   c) Must be **same transaction and occurrence (T/O)**
2) Types
   a) **"Groundhog Day"** - same parties, same claim - won't let them do it
      i) Worried abt inefficiency, inconsistent jments (hard to replicate exact conditions of 1st trial)
   b) **Split claims - merger and bar** won't allow you to split claims against the same party when you could have done them together (if different parties, knock yourself out) (*Rush*)
   c) **Offensive** - Used claim as a shield, now want to use as a sword - effect of compulsory counterclaim rule **(13(a))**doesn't allow it
      i) Mitchell - farmer settled debt by overpaying bank, used that as a defense to bank's suit for money, then tries to sue to get the excess - not allowed

iii. Issue Preclusion

1) Imagines a 2nd case where some issues won't be able to be litigated
2) **Rules**
   a) Must be **identical issue**
      i) If not identical, can't run issue preclusion (*Levy v. KOA* - Kosher marks w/ Polaroid test)
   b) Must have been **actually litigated - full and fair opportunity**

i) Procedure in 1st case must be sufficiently formal and offer sufficient procedural safeguards that the proceeding approximates a judicial proceeding (*Jacobs* - CBS case)

c) Must have been **necessary to final jment - but can have been appealed**

d) **Same parties? See below**

3) Mutuality (or lack thereof)

a) **Nonmutual defensive issue preclusion (NDIP)** - D invokes issue preclusion to stop P from establishing an issue that P had been unable to establish in the first suit w/ another party

i) *Bernhard* (bank case w/ old lady's estate) - landmark case that first allows NDIP

ii) *Blonder-Tongue* - SCOTUS allows NDIP in patent case; courts have read broadly

iii) Issue: could Ps have joined Ds in previous case? If yes, cuts toward allowing NDIP

b) **Nonmutual offensive issue preclusion (NOIP)** - P invokes issue preclusion to foreclose D from litigating an issue D previously litigated unsuccessfully in an action w/ another party

i) *Parklane* - SEC sues Parklane and finds proxy statement was false, then class action plaintiffs use the finding against Parklane in their own suit - allowed

ii) Courts exercise caution when allowing this b/c

(1) D in 2nd suit was D in 1st suit and **didn't choose forum**

(2) Leads Ps to hold back and **wait and see**

(3) If stakes were small/forum inconvenient, D might have **lacked incentive** to defend

(4) D maybe couldn't litigate effectively in 1st suit if **procedural rules** in 1st case were stricter than in 2nd

(1) Breadth of discovery, PJ issues in bringing in other Ds, rules of evidence, etc.

(5) If **inconsistent jments** from litigating issue more than once, unfair to give preclusive effect to any one of them

(6) Could Ps have joined in 1st case (cuts against NOIP)? Probably not in *Parklane*

(7) **No jury in 1st case? Didn't matter** in *Parklane* (kind of overrules *Beacon Theatres*)

iii) These principles also apply to NDIP

iv) Puts lots of pressure on 1st case, and lots of pressure to do global settlement

v) Encourages sideline-sitting, but can be good

(1) Helps enforcement

(2) Raises cost of doing bad things (as D)

iv. Preclusion in Complex Litigation

1) **Class actions**

a) *Cooper v. Fed Reserve* - held finding of no pattern and practice of discrimination in class action was not preclusive against Ps who had intervened in 1st suit and were trying to litigate individual claims of discrimination in 2nd suit

i) Pro:

(1) logically, group claims are different than individual claims

(2) If make preclusive, would require that every member of class be allowed to intervene to litigate individual claim

ii) Con:

(1) they intervened in 1st suit but didn't try their individual claims

(2) Individual claims would have to have been proven to show pattern

(3) If not preclusive, frustrates purpose of class action - "global peace"

(4) Was same T/O

2) **Binding nonparties**

a) *Montana v. US* - When nonparties assume control over litigation in which they have a direct financial or pecuniary interest, they may be precluded from relitigating issues the 1st suit resolved

b) *Martin v. Wilks* - held parties who had tried to intervene but couldn't in 1st suit could not be precluded from relitigating issue in 2nd suit even though interests represented

i) Should have joined in 1st case if wanted to preclude

ii) Not fair that they couldn't appeal from the jment adverse to their interests

iii) Specific holding - that Title VII consent decrees didn't bind parties like the white FF, was overturned legislatively

c) *Taylor v. Sturgell* - airplane friends case

i) representative litigation is adequate if

(1) Court uses "special procedures" to protect nonparties' interests, or

(2) Concerned parties understand that 1st suit was brought in a representative capacity

ii) Virtual representation factors (representative here means "alleged representative")

(1) Party agreed to be bound by rep's litigation

(2) Party has legal relationship w/ rep

(3) Party exercised control (*Montana* style) over 1st suit

(4) Suit implicates a special statutory scheme limiting relitigation

(5) Party was adequately represented in 1st suit
(6) Rep brought suit as party's agent

V. Reviewing and Assessing Civil Adjudication

a. Settlement

i. "All" cases settle (means very few actually get a jment)

ii. **Substantive law of settlements**

1) Can normally happen at any time
   a) Before suit - settle not to sue
   b) In the middle of the suit (like BCD)
      i) P withdraws case from the ct using **Rule 41**
      ii) Judge has no idea of the terms/conditions of settlement (except class action)
   c) On appeal - can settle after the jment
      i) Can settle for withdrawal of jment - go back to ct and seal/depublish it
         (1) Shouldn't the public have a say in what happens? Privatizing the jment

2) Simple Settlement
   a) Settlement agreement is a contract - I won't sue if you give me X
   b) Preclusive if court enforces the contract

3) Class Action Settlement
   a) NOT a private contract, but public jment rendered by ct
   b) Named Ps sign on
   c) Have a fairness hearing - send notice to class members and give OTBH
   d) If judge says fair, reasonable, adequate, then jment entered
   e) Preclusive on future suits

4) **Aggregate settlement**
   a) In theory, each client has to approve
      i) Lawyer has to say settlement amount, contingency fee, and what each person gets
   b) In practice, lawyer gets a lump sum and then divides it up (BCD situation)
   c) Another option: clients agree beforehand to let att'y negotiate the settlement
      i) Can set conditions, like settlement binding if majority of ppl agree - shifts consent to democratic idea
   d) Can opt out of settlement - then not preclusive
   e) Sometimes agree that P's lawyer won't represent anyone in the future against D

iii. Evaluating settlements

1) P's point of view - what would you have got compared to what you did get?
   a) Less time? Guaranteed money?
2) D's point of view - what would you have had to pay versus what you did pay?
   a) Avoided a potentially harmful public trial?
3) Social value - did this make the world better? Deter bad behavior? Compensate victims?
   a) Shouldn't public have a say b/c used the public $ and courts?

b. **Alternative Dispute Resolution**

i. "alternative" means litigation is primary

ii. Legal system has started to direct things into ADR

1) Neutral reasons
   a) More efficient, less costly
   b) Adversarial system harms relationships b/w ongoing parties
      i) Ex divorce where children are involved

2) Less-neutral reasons
   a) One side might be advantaged by ADR (*Hooters*)
   b) Ongoing debate about mediation's effect on women
      i) Original seen as "less masculine" than litigation, but might hurt women's chances at fairness

3) Hooters
   a) Court refuses to enforce arbitration provision in contract b/c unconscionably lop-sided
      i) Pleading - P has to plead everything, D doesn't have to answer
      ii) Discovery - P has to file initial disclosure, D doesn't have to
      iii) Trial - P can't record, D can record
      iv) Appeal - P can't, D can
      v) Joinder - P can't join claims after original petition, D can raise any matter
      vi) Choice of forum - P has to choose from D's list of arbiters (most egregious)

4) Circuit City
   a) Court says arbitration provision OK b/c doesn't treat P and D differently
      i) But all the limitations were on P-friendly things (stat of limitations, discovery, punitive dam)
      ii) Not neutral b/c CC will just fire employees, will never initiate a claim

5) 2 types of equality
   a) Equality of proceeding itself (*Hooters*)
   b) Equality of adversaries (*Circuit City*)
6) Use FRCP as the baseline, correct model of adjudication
   a) What if FRCP are unfair?
7) Standard for ADR in these cases - need an effective means of challenging discrimination
8) Possible that by bringing costs of litigation down, encourage more claims

VI. READINGS - POLICY

a. On the Neutrality of Procedural Rules and Systems – Marc Galanter, "Why the 'Haves' Come Out Ahead" (1979)

i. Thesis repeat player parties in the litigation process have advantages derived from a seemingly neutral system, by playing the rules. The most dramatic and effective method of reforming the imbalance comes from the attorney's role in the system, by propagating change and restructuring the profession to provide better legal services to occasional litigants. R 245-258 Galanter

1) Terminology – the players:
   a) ***RPs*** = ***repeat players***, engaged in many similar litigations over time; usually larger organizations and corporations, insurance companies, etc.; stakes in the game are usually small
   b) ***OSs*** = ***one-shotters***, claimants with occasional recourse to the courts; smaller units; stakes represented are high relative to total worth
   c) Two ends of spectrum rather than dichotomous pair. For simplicity, assume otherwise
2) RPs' advantages
   a) Advance intelligence – can build a record and structure the next transaction
   b) Develop expertise and have ready access to specialists
   c) Develop relationships with institutional incumbents (judges, etc.)
   d) Can bargain better because of established reputation
   e) RPs can play the odds – maximizing gains in the long run by making small sacrifices here and there (tobacco companies)
   f) RPs play for rules as well as gains: help to develop new rules, since statutes come from legislators lobbied by big interests
   g) RPs play for rules within the litigation (the ACLU searching for the "right" case to help establish a new legal rule) – and can concentrate on rules that will make a tangible difference
   h) Larger resources available to invest in the process
   i) E*ssentially RPs are able, through these devices and advantages, to work a facially and formally neutral judicial system* ***to their own advantage***.
3) Types of litigation
   a) Most often, P/RP vs. D/OS (with the notable exceptions of personal injury cases, and divorce cases). Almost always favor the RP.
   b) Even OS v. RP tend to favor RP, simply because RP watches the law applied – sacrifice now = gain later
   c) RP v. RP – usually avoided by bilateral contracts
4) Other aspects of the system (besides the parties)
   a) Introducing ***lawyers*** into the playing field may seem initially to even things out a bit, but for many reasons lawyers are attracted to RPs, further enhancing their advantageous positions.
   b) ***Institutional facilities*** are reactive rather than active; so often don't take a crucial role in ameliorating the imbalance. Moreover, case overload in courts pressures claimants to settle rather than to litigate.
   c) The ***rules*** in play – typically thought of to be traditional, but even so, RPs get to know how to use them, and even change them.
5) ***Strategies for reform*** – improving the strategic position of Oss
   a) *Aggregation into groups*, which may become RPs, in terms of unions or interest-group sponsors (like the ACLU)
      i) Can enhance to weight of suits by aggregating claims
      ii) Greater ability to change rules, but also to see rule changes implemented
      iii) "Public-interest" law: class action suits, community organization, test-case strategies
6) The role of ***lawyers*** – since changing the rules and reliance on the insulated court system will likely not change much between the parties who litigate, the legal profession can (and should):
   a) Lawyers can *help change rules* relating to organization, increasing the supply and availability of legal services, and increasing the costs to opponents (in terms of awards of legal fees and costs, and provisional remedies)
   b) Dependent upon the ***organization and culture of the legal profession***. Focus should not be as courtroom advocates, but rather as client advocates and ensuring an equal system for all comers. Ironically though, legal professions aligning themselves with the "haves" are more likely to be able to become agents of change, because there's more license for identification with clients and their

causes, and a less strict definition of "what lawyers do."

b. On the Judging Process – Jerome N. Frank, "The Judging Process and The Judge's Personality"

i. judges make conclusions first, then support them with structured statements of facts & principles & focused reasoning
   1) conclusions influenced by rules and principles of law but also idiosyncratic biases
      a) =legal realism

c. Reviewing and Assessing the Adjudicatory System – Owen M. Fiss, "Against Settlement" (R217-228)

i. Adjudication = public vs. private dispute resolution
ii. not just dispute resolution
   1) public system
   2) settlement deprives public of judgment (of law)
   3) shouldn't clamor to get to trial, but shouldn't celebrate settlement
      a) alternative = settlement, then judgment → bargain for judgment's publication
      b) key question = should private parties control the public store of law?
      c) "Peace is not necessarily Justice"

d. Discovery in the German System – Langbein, "The German Advantage in Civil Procedure"

i. Class Notes:
   1) depends less on quality of lawyers
   2) judge = fact finder AND law decider
   3) great dependence on judges → efforts to ensure quality → judges have separate training for a separate profession
   4) no juries
   5) "more like a business meeting than courtroom theatrics"
   6) efficiency/accuracy vs. other value (i.e. control, autonomy, participation, jury)
   7) public vs. private system
   8) in American adversarial system, plausible to assume everybody has the facts & the only influence on the case = presentation
      a) everything turns on lawyer (OR judge) → who do you trust more?
      b) summary judgment in Germany loses distinction of question of law vs. question of fact

ii. Thesis: two fundamental differences between German and Anglo-American civil procedure that render the former advantageous:
   1) Court, rather than parties' lawyers, takes the main responsibility for gathering and sifting evidence (although the lawyers keep a watchful eye on the proceedings)
   2) No distinction between pretrial and trial, between discovering evidence and presenting it.

iii. Other Differences
   1) Initiation: like in American system, lawsuit is commenced with a complaint. However, German document proposes means of proof for factual contentions: documents are scheduled and/or appended, witnesses are identified. The answer is similar. But no factual research has been done.
   2) Judicial preparation: judge examines pleadings, schedules a hearing when he has an idea of the case – judge may summon witnesses as well.
   3) Hearing: circumstances dictate the course – sometimes can be resolved; otherwise the judge sets a sequence for examination of witnesses.
   4) Examining and recording: judge examines witnesses, and then either party may pose additional questions. Testimony is seldom verbatim; judge will pause to dictate summaries – these summaries form the building blocks from which the court will fashion findings of fact for judgment. In civil litigation judges sit without juries, and the rules of evidence (if there are any at all) and incredibly liberal.
   5) Expertise: judge may resolve technical matters by consulting with the parties and selecting an expert.
   6) Further contributions of counsel: after witness testimony, counsel get to comment orally or in writing, to advance theories or suggest proofs. Many hearings are therefore necessary.

iv. Advantages
   1) Economy of time and truthfulness: witnesses are usually interviewed once, as opposed to direct, cross, and re-direct, during which the witness may guess what the party is going after and either hide it or mold his story accordingly.
   2) German lawyers suggest witnesses and have no out-of-court contact with them.
   3) Relaxed sequence rules; concepts of P's case and D's case are unknown
   4) In American system we have to discover entire case before it goes to trial – and once it does, no more discovery.
   5) Episodic nature of German system lessens theatrics and tension, and encourages settlement.
   6) Perverse incentives: the more likely an expert witness will be measured and impartial, the less likely he is to be used in American system.
   7) German system is expert prone: court-selected and court-instructed, and prepares a written opinion in advance, to which parties may address questions

8) Litigants may produce their own experts but their testimony is sensibly discounted

v. Adversary nature
   1) Apart from fact-gathering, German system is still adversarial in terms of identification of legal issues and analysis … question is not whether to have lawyers but how to use them.
   2) But defect is inequality of counsel
   3) Disadvantage to nonadversarial fact-gathering is the tendency for prejudgment, and the danger that the German judge will not do the job "well" by not digging deeply enough.
   4) German answer is straightforward – judges make a career out of being judges; are trained to be – not like American judges, who are ex-lawyers
   5) Further, German judges are specialized in certain areas or inquiry