Civil Procedure I

Fall 2013
University of Georgia School of Law
Tuesdays, Wednesdays, Fridays 2:30-3:20 p.m., Classroom F
Professor Elizabeth Burch, Office 305, e-mail: eburch@uga.edu
Office Hours: Tuesdays, 11:30-12:15; Wednesdays and Fridays 3:30-4:00 p.m., or anytime by appointment

Course Description and Objectives:
This course will provide you with an overview of how civil (as opposed to criminal) legal disputes are resolved in United States courts. Unlike your other first-year courses that focus on substantive law, our primary focus will be on the process, structure, and practice of the federal (as opposed to state) courts. Even if you do not plan to become a trial lawyer, it is essential for every attorney to have a general working knowledge of how cases are resolved and of fundamental jurisdictional principles. For example, if you are a transactional attorney drafting a contract for your client, you must know the various implications of forum-selection clauses on jurisdiction. Unlike your other first-year courses, this class actually comes with a set of written “Rules.” Although we will be studying these rules in-depth (more so second semester than first semester), civil procedure is much more than just following the rules. It includes the rules’ Constitutional underpinnings and the cases that bring the rules to life. The rules’ drafters also had certain policy goals in mind. Consequently, part of our task will be to discern the policies behind the rules and to examine whether certain policies are antiquated as we make our way through the dispute resolution system.

This course has several goals that include values and skills. Specifically, students should be able to understand the multiple roles of a lawyer in civil dispute resolution; identify ethical issues involved in civil dispute resolution; begin to formulate his or her version of the moral lawyer; and demonstrate honesty, reliability, responsibility, judgment, self-motivation, hard work, and critical self-reflection. As to skills, students should master the following areas:

1. Case Analysis. Students will master the following skills:
   a. Identification of the elements of a reported opinion: procedural facts, issue, holding, rationale, legal rules, policy.
   b. Synthesis of a line of related opinions.

2. Statutory Analysis. Students will master the elements of statutory analysis:
   a. Close reading of the words of the statute.
   b. Identifying the purpose of the statute.
   c. Fitting the statute into the broader statutory scheme.
   d. Using legislative history.
   e. Using cases interpreting the statute.

3. Legal Problem Solving. Students will master these problem-solving skills:
   a. Identifying legal issues in simple and complex fact situations.
   b. Identifying the relevant legal authority and policy.
   c. Identifying potential alternatives to achieve the client's goals.

4. Legal Argument. Students will be able to make an effective legal argument by:
   a. Identifying the legal issues.
   b. Identifying the relevant facts, authority, and policy.
c. Supporting the client's position with facts, authority, and policy.

d. Distinguishing unfavorable facts, authority, and policy.

6. Critical Thinking. Students will:

a. Evaluate cases, statutes, arguments, documents, and attorneys' actions on their effects on (1) clients, (2) the civil litigation system, and (3) society.

b. Evaluate the strategy and ethics of civil litigation procedural devices.

c. Challenge assumptions made by judges, legislators, attorneys, students, professors, and themselves.

Stephen C. Yeazell, 2013 Federal Rules of Civil Procedure with Selected Statutes, Cases, and Other Materials (Required) (note that the supplement to the Civil Procedure case book is located in the back of the Federal Rules)

TWEN – course website

Suggested Reading: Joseph W. Glannon, Civil Procedure (Seventh Edition, Examples & Explanations Series, 2013). Many students find this particular supplement helpful; however, I will not assign any required readings from this text.

Calendar Notes:
There will be no class on Friday, September 27, 2013.

Course Website:
A TWEN website for our class is available for student access. It contains a wealth of invaluable information including podcasts, outlines, course materials, announcements, the syllabus, links to other relevant information, course problems for the “problem days” noted in the syllabus, and other information. You should check the website the day before each class for new announcements. The announcements may articulate questions that you should consider for class or may direct you to specific problems in the text.

Office Hours:
My office is located in room 305 of Hirsch Hall. Absent the need to meet an urgent deadline and the hour immediately before class (which I typically reserve for class preparation), I regard all hours that I’m in my office as time available to meet with students. If you’d like to reserve a specific time to meet with me, please feel free to e-mail me. This is, of course, for your convenience—so that you can be sure that I’ll be in my office when you stop by—not for mine. You certainly don’t need an appointment to drop in.

I welcome the opportunity to answer any questions you might have about Civil Procedure, your general legal studies, or your future career or classes. Feel free to see me in person or, if it’s easier for you, to send me an e-mail. During the school week, I make a concerted effort to answer student e-mails with reasonable speed, consistent with whatever other obligations might arise during the day.

Attendance & Participation:
Class attendance is required for this course. I will be taking attendance using an attendance sheet that will be circulated during class. In accordance with the Law School's accreditation requirements, if you miss more than 6 of the scheduled class meetings, you will not receive credit for the course.
**Be in class on time.** Students who fail to sign the attendance sheet before leaving class will be presumed to have been absent. Students who are tardy may be counted as absent. **Signing for another student is an honor code violation.** Before you come to class, be sure all cell phones and other disruptive electronic devices are silenced or off.

Prepare for class, participate thoughtfully, and conduct yourself professionally. **DO NOT COME TO CLASS UNPREPARED.** If you are in attendance, I will assume you have read the applicable assignment and are prepared to answer questions that I may ask you. If I call on you and you are unprepared, I will deduct two points from your final grade. If you are unable to prepare due to extraordinary circumstances, you should contact me before class.

**How do I prepare for class?** I recommend reading the materials, briefing the cases, and outlining the text first. In so doing, be sure to write down questions that you have and leave room to take class notes directly into your prepared materials. Then be sure to work through the questions and problems assigned in the syllabus. We will generally review these in class but this is no substitute for you thinking through them on your own first. After class, make sure that you are able to answer your questions and send me an e-mail or come by my office if not.

**What I expect in student participation.** Before class, I expect that you will have read the assignment carefully at least once, read any statute or Rule that I've assigned, attempted to answer the questions by yourself or with your study group, and attempted to analyze the problem or problems assigned in the syllabus by yourself or with your study group. In class, I'm looking for a good-faith effort to engage the material, answer the questions I ask, and play with the analysis. I don't expect that you will have fully understood everything about the material that you have read, especially at the beginning of the semester when you're still learning how to read cases. I also don't expect that you can read my mind every moment of the whole semester – please feel free to ask me to rephrase a question if you have no idea what I'm talking about. If you get something wrong, you get something wrong – as long as you're acting in good faith, it's no big deal.

Finally, if I ask you to make an argument, there's probably no one right way to do it. I'm looking for you to engage the facts and the law to your client’s advantage. I may well then turn around and ask someone else to argue the opposite side. **Bottom Line:** You're generally NOT looking for absolutely “right” answers when it comes to applying the law to new facts – you're looking for intelligent arguments that you can make in favor of one side or the other. A good lawyer always sees the strengths and weaknesses of both sides simultaneously.

During the course of the semester, we will have several “problem days,” which are clearly denoted in the syllabus as a “Problem Day.” I will post problems on TWEN several days before they are due. For these days, you should prepare two typewritten answers, one to turn in and one to review during class discussion. Your answers to the problem days are due at 2:30 p.m. on the day that we discuss them regardless of whether you attend class that day. I will not accept late problems unless you have contacted me in advance with a valid reason that you cannot turn them in on time. Although you will not receive an explicit grade on these problems, I do review them when deciding whether to raise or lower grades at the margin (see below).
Attendance and participation can affect final grades at my discretion and excessive absence will affect grades in accordance with school policy. I reserve the right to raise a grade at the margin for exemplary participation and to lower one for failing to adequately prepare for class.

**Grading & the Exam:**
Grades will be determined by a final exam administered at the end of the semester. **The examination will be a three-hour closed book, closed notes exam. You will be permitted to use your Rules supplement, which means that you may have with you during the examination your required Stephen C. Yeazell, *2013 Federal Rules of Civil Procedure with Selected Statutes, Cases, and Other Materials* supplement.** No substitutions will be allowed.

Your Rules supplement may be annotated with *handwritten* notes, but shall not have any attachments other than tabs to mark the location of specific material (the tabs may have on them numbers and the short titles of the referenced material and nothing more). Only handwriting may cover the blank spaces and the original printing on the supplement. The use of stick-on labels or paper, white-out or any other method to eliminate any of the original printing is prohibited. Other than the addition of handwritten notes and tabs, the supplements shall be in their original condition, no material may be added nor may any material be removed in any way. The supplements must be in their original bound form at the start of the examination. The UGA Honor Code applies throughout the course and during the exam. Cheating, plagiarism, or any dishonesty in your work is not tolerated at this University. Please refer to your student handbook for more information about UGA academic honor system.

Anything that I have assigned in the reading or that has been discussed in class is fair game for the exam. Although I reserve the right to modify the form and content of the exam, it will likely be a mix of short answer questions and essays. I reserve the right to adjust grades based on class attendance and participation, as described above. The Law School has established a grading curve for first-year courses, which is printed in your Student Handbook. I have NO discretion to deviate from that curve. We will be discussing the final exam toward the end of the semester and the “problem days” are designed to help prepare you for the exam. On the exam, I am looking for you to APPLY the relevant rules, case law, statutes, and constitutional provisions to the facts that I give you and reach a reasonable conclusion.

**Students with Disabilities:**
Students with disabilities needing academic accommodations should discuss those accommodations with, register with, and provide documentation to the Associate Dean for Academic Affairs, Lonnie Brown.

**Reading Assignments:**
We will generally spend **one class on each numbered assignment**, but in some cases we may spend additional time on the same assignment. These assignments are subject to change. If there is a change, I will try to let you know well in advance. Most of the specific problems in the syllabus come from Cross, Abramson, and Deason’s Civil Procedure casebook.

Abbreviations are as follows: “CB” = Yeazell casebook, “FR” = Federal Rules; “FR Forms” = the forms at the back of your Federal Rules of Civil Procedure.
I. A MINI OVERVIEW OF THE BIG PICTURE IN CIVIL PROCEDURE

This first section is a very basic introduction to what we will be covering during the entire year (not just this semester). As such, it is meant to give you a view of the proverbial forest before we dive into the trees. Think of it as a bus tour or a movie trailer—it’s not meant to give you a deep understanding, just a snapshot of what Civil Procedure is all about. Consequently, don’t worry if you’re confused by some of the concepts. We will be returning to each of them in great detail over the course of this semester and next semester.

A. Where Can the Suit be Brought?
(Introduction to personal jurisdiction, subject matter jurisdiction, and service of process)

1. CB (“case book” – Yeazell, Civil Procedure) 1-12 and United States ex rel. Mayo v. Satan and His Staff, 54 F.R.D. 282 (W.D. Pa. 1971) which is posted on TWEN (be sure to go ahead and register for our class on TWEN and read through the syllabus)
   - Hawkins v. Masters Farms, Inc.
   - Problem: Bonnie was born in Oregon to Oregon citizens and has lived in that state her entire 35-year life. However, for as long as she can remember she has hated Oregon’s gray and dreary climate. In fact, for the past thirty years Bonnie has intended to leave Oregon and relocate to Arizona. Unfortunately, she still hasn’t saved enough money to make the change. What is Bonnie’s domicile? Does she even have a domicile?
     - Rethink your answer in light of the following general principles of the law of domicile: (a) A person always has one – and only one – domicile; (b) An infant acquires a domicile at birth, which is almost always the domicile of her parents; (c) In order to change her domicile, a person must both establish residence in a new state and have the intent to remain in that state. The residence and the intent to remain must exist at the same time, even if only for a moment.
   - Questions: Where can suit be brought? (overview of subject matter jurisdiction, personal jurisdiction, venue, and service of process)
     - Read U.S. ex rel. Mayo v. Satan carefully. Part of your job as a lawyer is to advise your client regarding whether a lawsuit is worth the time and expense of bringing that lawsuit. If Mr. Mayo had walked into your law office, what advice would you have given him? (HINT: Why do you suppose that Mr. Mayo is proceeding without a lawyer?)
     - What is the Western District of Pennsylvania? Are we in federal court or state court? How can you tell?
     - What level of court is the Western District of Pennsylvania – trial court, court of appeals, or supreme court? How can you tell?
     - Which statutes are being cited? Are those federal statutes or state statutes? How can you tell?
     - This is your first (admittedly limited) encounter with 42 U.S.C. § 1983, which allows a private litigant to sue state and local governmental officials and municipalities for violations of the individual’s constitutional rights. If this case had been resolved on the merits, would you foresee a problem with Mr. Mayo’s choice of a cause of action?
What does Mr. Mayo most immediately want from the court – i.e., what motion is Judge Weber actually deciding in this opinion? What does Mr. Mayo ultimately want from the court?

How does Judge Weber use civil procedure to get rid of this case? Why would Judge Weber want to resolve this case early in the litigation process, rather than proceed to the merits?

B. Stating the Case
(Introduction to the pleading process—complaints, answers, and amendments to those documents)

2. CB 12-26, FR (“federal rules”) 11
   - Stating the case (overview of Rule 11, the Complaint, Motions, Answers, Discovery). Consider the following questions about Rule 11 as you read the rule and the cases for today: what is the duty of candor, when does the duty of candor apply, what happens when a litigant realizes the lack of merit in a position already taken in writing, are sanctions mandatory, how does the rule indicate that its primary purpose is to deter counsel from advocating meritless positions, are sanctions imposed automatically, what is a “safe harbor” position and how is it expressed in Rule 11? See if you can set up a timeline for the process of litigation. How is litigation initiated? When does the defendant respond? What happens next?
     - Bridges v. Diesel Service, Inc.
     - Bell v. Novick Transfer Co.

C. Pretrial Disposition (Summary Judgment) and Trial

3. CB 29-41; FR 26
   - Summary judgment, trial, and former adjudication
   - Norton v. Snapper Power Equipment

II. PERSONAL JURISDICTION

A. The Origins of Personal Jurisdiction

4. CB 59-76; U.S. Const. Art. IV, § 1, Amend. XIV, § 1
   - Pennoyer v. Neff
   - Questions: Personal jurisdiction is made up of a jurisdictional basis (what person or property is subject to court power) and service (notice to the defendant of the suit). What types of basis and service did the Oregon statutes allow? What did Pennoyer hold? Which type of jurisdiction (in rem, in personam, or quasi in rem) was being asserted? Why did the assertion of that jurisdiction not succeed? Based on the Pennoyer dicta, describe the two exceptions to the general rule that are available to invoke the jurisdiction of the court over the nonresident defendant.
   - Problems: Based on your reading of Pennoyer, check your understanding of the scope of its holding by answering the following problems:
     - If a Florida resident sues a North Carolina resident in a Florida state court, where does the defendant have to be served?
Can the North Carolina defendant be served while traveling through Florida?
- The North Carolina defendant owns property in Florida. What can the Florida plaintiff do to obtain jurisdiction?
- What if the defendant voluntarily appears in Florida to contest the merits of the plaintiff’s claim?

**B. The Modern Constitutional Formulation of the Court’s Power over Litigants**

(1) Redefining Constitutional Power

5. CB 76-89; FR 12
- The Mechanics of Jurisdiction – Challenge and Waiver (be sure to work through these problems)
- *International Shoe Co. v. Washington*
- **Questions:** After *International Shoe*, is *Pennoyer’s* holding about power or presence still sound? Is the minimum contacts standard relevant when a nonresident defendant is served in the forum state? What did the court hold? What was Justice Black’s concern in his dissent? Was it legitimate?
- **A little guidance:** Draw a square with four cells, identifying the nature of the nonresident’s activities in the forum state across the top, dividing them as either “continuous and systematic” activities or as “isolated” activity. Then, down the left side, divide the square into claims arising from the defendant’s activity in the forum state and claims that do not arise from the activity there. Cell 1 represents the situation when the defendant has continuous and systematic activities within the forum state and the plaintiff’s claim arises from those activities by the defendant. Within Cell 2, the defendant again has continuous and systematic activities, but this time the plaintiff’s claim does not arise from those activities. Cell 3 would involve only an isolated contact by the defendant in the forum state and the plaintiff’s claim does not arise from that activity. Cell 4 indicates isolated activity by the defendant, but this time the plaintiff’s claim arises from that activity. Into which cells/parts of the table does *International Shoe* belong?

6. CB 89-91
- Finish discussion of *International Shoe*
- *Hanson v. Denckla* – Were the bank’s activities in Florida regarding the trust sufficient for the Florida court to have jurisdiction over the nonresident trustee? Can you reconcile the Court’s finding here with that in *McGee*?

(2) Absorbing *In Rem* Jurisdiction

7. CB 91-103
- *Shaffer v. Heitner* – Where does the *Shaffer* decision leave *Pennoyer’s* principles? Is there anything left of *Pennoyer’s* rules about power? Do the principles about power over persons and property in the forum state survive *Shaffer*? After Shaffer, what, if
anything, remains of a meaningful distinction between in personam and quasi in rem jurisdiction?

(3) Specific Jurisdiction: The Modern Cases

8. CB 103-112

- *World Wide Volkswagen Corp. v. Woodson* – Take some time to sketch out the parties and the states of their various activities. Did the New York distributor and the retailer purposefully avail themselves of conducting activities in Oklahoma? Could (or should) they be able to foresee being subject to the jurisdiction over the Oklahoma Court? Why does foreseeability matter? Should a defendant be subject to suit anywhere a product malfunctions, even if it had nothing to do with the product’s location? How does the Court explain what it means by “fair play and substantial justice?”

9. CB 112-118 and Handout on *Asahí Metal Industry Co. v. Superior Court* (posted in Reading Assignments section of TWEN)

- *Asahí Metal Industry Co. v. Superior Court* – Figure out which justices and how many justices are on which side of which issues. In *Asahí*, watch how the results of your calculation change as the question moves from one of minimum contacts to a discussion of the fair play and substantial justice factors. What does a plurality decision mean for the lower courts and for us?

  - After reading *Asahí*, how would you argue that *World Wide Volkswagen* is not a stream-of-commerce case? Were the defendants present in Oklahoma? Did any of them use a sales or distribution scheme in which their vehicles would reach Oklahoma as products for sale? Was the chain of events leading to the arrival of the Robinson’s vehicle in Oklahoma commercial in nature? Was the vehicle’s arrival in Oklahoma entirely due to the Robinson’s unilateral activity? Is a stream-of-commerce analysis different in the case of a manufacturer of a finished product, as opposed to the manufacturer of a component product? What is the nature of the distinction? Can the manufacturer of a finished product structure its conduct to limit the geographic scope of its liability? Can a component part manufacturer do the same?

- *Burger King Corp. v. Rudzewicz* – What is a choice-of-law clause?


10. CB 118-124

- *Pavlovich v. Superior Court*

- Specific Jurisdiction, continued. Now we’re looking at the modern, Internet based cases.

- Problems:

  - A New Mexico software distributor posted on its Website and e-mailed to Arizona material that allegedly defamed the plaintiff there. The complaint
alleged that the defamatory information in the e-mail was sent to Arizona with both the intent to harm the plaintiff there and the effect of actually causing harm. Is personal jurisdiction over the New Mexico defendant proper in an Arizona federal court? Is a defamatory statement on a passive Website different from a printed periodical? See Edias Software Int'l, LLC v. BASIS Int'l Ltd., 947 F. Supp. 413 (D. Ariz. 1996).

- An Illinois defendant registered exclusive Internet domain names containing registered trademarks belonging to others. He demanded fees from well-known California corporation Panavision as his price for relinquishing rights to domain names that matched Panavision’s existing trademark registrations. Panavision sued the defendant in California. Is personal jurisdiction proper there? See Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316 (9th Cir. 1998).


11. CB 124-31

- J. McIntyre Machinery, Ltd. v. Nicastro
- The Supreme Court cites Asahi in an attempt to clear up the doctrinal ambiguity that opinion left. Does it work?

(4) General Jurisdiction

12. CB 132-138


13. CB 139-147

- Burnham v. Superior Court – Burnham confirms a fourth basis for the modern exercise of jurisdiction – what are the four bases? From a nonresident defendant’s point of view, how fair is it to be forced to defend in a place where you have no contacts apart from being served during a brief presence there?
- Problems: Evaluate the following problems from the perspective of due process contacts, for specific or general jurisdiction:
- Tater Computer Chips, Inc. is a Delaware corporation manufacturing its products in Delaware and selling computer and electronic components to Swell Computer Corporation (which is incorporated in Tennessee). Tater Computer has assembly facilities in Maryland, Delaware, and Pennsylvania. Swell Computers uses the components to manufacture computers that it advertises and sells in every state except Alaska and Hawaii. Because of Swell’s nationwide sales, Tater Computer Chips has become a very profitable company. Klausing lives in Delaware and delivers the components to Swell in all three states. On his way to make a delivery in Pennsylvania, his truck collides with Grossman who lives in Pennsylvania but has never ventured outside the Erie, Pennsylvania metropolitan area. A) As counsel for

- Fidelow, who lives in Colorado, receives a call from the Miami store promoting Swell’s new line of laptop computers. Fidelow orders two of the laptops for her children, but neither of them ever works as speedily as the store manager told her it would. When Fidelow calls the Miami store to complain, the only message is that the phone number has been disconnected. When Fidelow calls the Swell U.S. national service center, the Swell representative denies that Swell ever had a store in Miami Beach. A) As counsel for Fidelow, can she sue the Miami Beach store for fraud in a Colorado court? B) As counsel for Fidelow, can she sue Swell Computer Corporation for fraud in a court in Colorado? In Florida?

14. **No New Reading – You should outline what we’ve covered so far in class.** You don’t need to turn your outline in, but we will be discussing how to approach the concepts in this course, which should also help you approach our first problem day.

15. **PROBLEM DAY 1** (problems to be posted on TWEN before the previous class period, bring two written copies to class – one to hand in at the beginning of class and one to use while we review the problems)

C. Consent as A Substitute for Power

16. CB 148-154

- *Carnival Cruise Lines, Inc. v. Shute*

- **Problem:** Jaye Bizer was a cruise ship passenger who has brought suit in the U.S. District Court for the Western District of Washington against Schmooze Cruize Lines for damages sustained from a slip and fall while on a schmooze and booze cruise. Schmooze has filed a Rule 12(b)(2) motion to dismiss based on improper personal jurisdiction.

  - Schmooze Cruize Lines is a Colombian corporation with its principal place of business in Miami, Florida. Schmooze is not registered to do business in the state of Washington. It owns no property in the state of Washington, maintains no office or bank account in Washington, and pays no business taxes in Washington. It has never operated ships in Washington’s ports. It has no exclusive agent in Washington. Schmooze does, however, advertise its cruises in local Washington newspapers. It also provides brochures to travel agents in Washington, which in turn, are distributed to potential customers. Schmooze also holds seminars for travel agents in the State of Washington to inform them about, and encourage them to sell Schmooze cruises. Schmooze pays travel agencies a 10% commission on proceeds from tickets sold for Schmooze cruises.

  - Jaye Bizer is a Washington resident who purchased his ticket through the Travel Agency in Tacoma, Washington, for a seven-day schmooze and booze cruise on a Schmooze Cruize Lines ship called the Jack Sparrow. He embarked in Los Angeles, California, and sailed from there to Puerto Vallarta, Mexico. He purchased the tickets through the travel agent, who forwarded payment to Schmooze Cruize Lines in Miami. The tickets were
issued in Florida, and then forwarded to Jaye Bizer in Washington. Mr. Bizer suffered injuries when he slipped on a deck mat while on a guided tour of the ship’s wine cellar. The incident occurred in international waters off the coast of Mexico. Mr. Bizer alleges that the fall was due to the negligence of Schmooze and its employees, and he requests damages arising out of his personal injuries. Washington’s jurisdictional statute has been construed by the Washington Supreme Court to permit the assertion of jurisdiction to the extent permitted by the Due Process Clauses. You are the judge in this case. Would you grant or deny the defendant’s motion to dismiss? Why?

D. The Constitutional Requirement of Notice

17. CB 154-69 (be sure to work through the problems in #2, pages 166-167); FR 4
   - Service of Process (FRCP 4) Problems
     - Adams sues Bursen in federal court. Must or may the process server give the complaint and summons to Bursen personally?
     - Adams sues Bursen in federal court, and Adams personally takes the papers to Bursen’s home, leaving them with a 10-year-old girl who answers the door. Was service of process proper?
     - Adams sues Bursen in federal court for trespassing on his large estate, but the process server hands the papers to Bursen at his weekend lakefront cottage in a nearby county. Was service of process proper?
     - Adams sues Bursen in federal court, and Adams properly solicits Bursen to waive service of process. If Bursen fails to respond to Adams’s request, is Adams obligated to do anything further?
     - Adams sues Bursen, who does business as Bursen’s Bike Shop. The process server leaves the papers with Cohn at one of the three bike shops owned by Bursen. Cohn is the manager of the store where he receives the papers intended for Bursen. Was service of process proper?
     - Describe the difference between the defense of insufficiency of service of process under Rule 12(b)(5) and the defense of insufficiency of process under Rule 12(b)(4).

   - The Constitutional Requirement of Notice
     - Mullane v. Central Hanover Bank & Trust Co.

E. Self-Imposed Restraints on Jurisdictional Power: Long-Arm Statutes, Venue, and Discretionary Refusal of Jurisdiction

(1) Long-Arm Statutes as a Restraint on Jurisdiction

18. CB 154-58
   - Long-Arm Statutes as a Restraint on Jurisdiction
     - Gibbons v. Brown
   - Exercise: For the state where you intend to practice after graduation, go to that state's annotated statutes and research the long-arm statute typically used for
exercising specific jurisdiction over nonresident defendants. Based on your research, print the statutory portion of the statute and bring it to class for discussion. Answer the following questions:

- Identify whether the type of long-arm statute in your state is a laundry list or due process long-arm.
- If it is a due process long-arm statute: (a) Does the legislative history of the statute show that at one time there was a laundry list long-arm used in the state instead of a due process long-arm statute? (b) If the answer to part (a) is yes, was the adoption of a due process long-arm made in response to a judicial decision that the former laundry list long-arm should be construed as if it were a due process long-arm statute?
- If it is a laundry list long-arm statute: (a) note the types of statutory conduct available for a plaintiff’s counsel to try to fit with the nonresident defendant’s factual conduct; (b) Note the specificity or generality of some or all of the provisions (e.g., “transaction business” or “contracting for services”); (c) Note whether the list includes the possibility that jurisdiction can be exercised over a nonresident defendant whose conduct outside the state has caused some harm within the state; (d) Note when it was enacted as well as how many times the legislature has amended the long-arm statute since it was enacted; (e) Note how the federal and/or state courts have interpreted the laundry list statute, i.e., despite its laundry list specificity, have the courts nevertheless interpreted the long-arm statute as if it were a due process long-arm statute?

(2) Venue as a Further Localizing Principle: Selecting the Proper Court

19. CB 174-176 (through note 5), 179-80; Handout on Venue (Uffner v. La Reunion Francaise, S.A.) posted on TWEN; 28 U.S.C. § 1391
   - Uffner v. La Reunion Francaise, S.A.
   - Read § 1391 carefully and use it to work through problems 1-8 in the handout as well as problems 1-2 in the case book.

20. No new reading assignment – we will doing an in-class exercise to help prepare you for the problem day and exam.

(3) Declining Jurisdiction: Transfer and Forum Non Conveniens

   - Forum Non Conveniens
     - Piper Aircraft v. Reyno
     - Invoking forum non conveniens requires that there is an adequate and alternative court in which the lawsuit can be maintained. What is an “adequate” forum? Does less favorable substantive law make the alternative forum “inadequate?” What are the Gilbert factors? Which comes first, the consideration of public or private factors? Who has the burden of proof on transfer?
If a defendant forgets or neglects to file a timely Rule 12(b)(3) motion to dismiss for improper venue, can she nevertheless file a motion to dismiss based on forum non conveniens? One premise for seeking a dismissal under forum non conveniens is that venue is currently proper, validating dismissal on forum non conveniens in favor of an alternative court. (On the other hand, if venue is improper, a court can dismiss the case under a Rule 12(b)(3) motion or can transfer the case under §1406(a).) While a belated motion is likely to be denied, the fairness and convenience related to the forum non conveniens motion inquiry may suggest that a delay could be justified because of a need to investigate alternative jurisdictions, foreign and domestic, in which the case could be heard. See Jacobs v. Felix Bloch Erben Verlag fur Buhne Film, 160 F. Supp. 2d 722 (S.D.N.Y. 2001).

- Transfer under 28 U.S.C. §1404, 1406, and 1631

  A note on transfer: § 1406(a) transfer is an alternative change of venue statute to §1404(a). The primary difference between the two provisions is that the premise for using §1406(a) is that venue where the case currently sits is improper, e.g., it violates §1391. Another difference in the statutes is that the remedy available under §1406(a) is to either transfer the case or to dismiss it. Why the latter remedy? Because venue in the current district is improper. Both §1406(a) and Federal Rule 12(b)(3) provide for dismissal of a lawsuit in which the venue is improper. Is a motion to dismiss under §1406(a) permitted, even when the time for filing a motion under 12(b)(3) to dismiss the complaint has passed? Compare Steward v. Up No. Plastics, Inc., 177 F. Supp. 2d 953 (D. Minn. 2001) (finding that the passage of significant time and motion practice precludes §1406) with Ptaszyneki v. Ferrell, 277 F. Supp. 969 (E.D. Tenn. 1967) (holding that transfer was permitted even though objection to improper venue was waived).

22. Problem Day 2 (problems to be posted on TWEN before the previous class period, bring two written copies to class – one to hand in at the beginning of class and one to use while we review the problems)

III. SUBJECT MATTER JURISDICTION OF THE FEDERAL COURTS

A. Federal Question Jurisdiction


- Louisville & Nashville Railroad v. Mottley

Problems:

- When P learns that his employee D has been revealing certain sensitive company information, P sues D under state trade secret laws. P brings his action in federal court, seeking $50,000 in damages. D immediately files a $100,000 counterclaim. D’s counterclaim arises under the federal “whistleblower” statute, which provides a cause of action for employees who reveal information that shows that their employers are committing a crime. Does the court have subject matter jurisdiction?
P, a pharmaceutical company, produces a drug called Perk. P recently contracted to sell 10,000 lots of Perk to D, a pharmacy distribution company. However, after entering the contract, the federal government banned the production and sale of Perk based on evidence that it could cause brain damage. P obviously doesn’t want to go to the expense of producing the drug if there is no really market. Nevertheless, because D can sell the drug in other nations where it is still legal, P worries that D will sue it for breach of contract if it does not honor the terms of the contract. P therefore wants to bring a declaratory judgment action in which it will ask the court for a declaration that the contract is void because of illegality. May P bring the action in federal court, based on federal question jurisdiction?

P, a private person, sues the D Tribe of American Indians in federal court for breach of contract. Under federal law, Indian tribes enjoy immunity to most civil actions. In his complaint, however, P argues the immunity should not apply to “commercial activities” such as those that gave rise to the contract between P and D. D moves to dismiss for lack of subject matter jurisdiction under Rule 12(b). Will the court grant D’s motion?

24. Handout posted on TWEN in Reading Assignments section: Merrell Dow Pharmaceuticals, Inc. v. Thompson and Grable & Sons Metal Prods., Inc. v. Darue Engineering & Manufacturing (from Rowe, Sherry, and Tidmarsh, Civil Procedure, 3d ed.)
   - Today’s cases focus on “The Essential Element” requirement of federal question jurisdiction

B. Diversity Jurisdiction

25. CB 207-214; 28 U.S.C. § 1332; FR 12(b), (g), (h) (you may want to refer back to your notes from the first day of class on domicile)
   - Redner v. Sanders
   - Problems: Review §1332 and determine whether a federal court may hear the following disputes:
     - P1 (a citizen of Mississippi) and P2 (a citizen of France) sue D, a citizen of Louisiana.
     - P (a citizen of North Dakota) sues D1 (a citizen of Sweden) and D2 (a citizen of Brazil).
     - P (a citizen of Indonesia) sues D (a citizen of India)
     - P1 (a citizen of Indonesia) and P2 (a citizen of Indiana) sue D (a citizen of India)
     - P1 (a citizen of Finland) and P2 (a citizen of Florida) sue D1 (a citizen of Minnesota) and D2 (a citizen of Finland).

26. CB 214-221
   - Hertz Corp. v. Friend
   - Amount in controversy
C. Supplemental Jurisdiction  
(note that we will revisit this topic in even greater detail next semester)

27. CB 221-229; 28 U.S.C. § 1367

• In re Ameriquest Mortgage Co. Mortgage Co. Mortgage Lending Practices Litigation

• Szendrey-Ramos v. First Bancorp

• Problems: work through the hypotheticals on p. 228-229 and consider the following:
  - During the 1960s, the United States experienced a rash of incidents where library patrons kept books long beyond the due date. In response to this major issue, Congress enacted the Federal Overdue Book Act [“FOBA”]. FOBA gives librarians a federal cause of action against patrons who keep books beyond the due date. The statute provides statutory damages for overdue books. Marion is the librarian at State University School of Law. For years, Marion has had trouble with Professor Boring. Professor Boring checks out books but never returns them on time. Fed up, Marion sues Boring for $1,000 under FOBA, based on materials that Boring checked out on August 15. Marion is a citizen of Illinois, and Boring is a citizen of Missouri. In addition to the FOBA claim, Marion's complaint includes a second claim for $10, which arises out of a bet between her and Boring concerning the outcome of the Vanderbilt vs. Georgia game. Will the federal court have subject-matter jurisdiction over both claims?

28. Exxon Mobil Corp. v. Allapattab Services, Inc. handout posted on TWEN in Reading Assignments (p. 267-280 of John T. Cross et. al, Civil Procedure: Cases, Problems and Exercises (2011))

• In diversity cases, §1367(b) adds an additional wrinkle to the supplemental jurisdiction analysis. What is this wrinkle? Carefully re-read the language in §1367 and identify the language stating that §1367(b) applies only to diversity cases and not to federal question cases. What does that mean for our analysis of federal question cases?

• Problems: Would supplemental jurisdiction exist in the following cases? (Assume in every case that all claims arise from a common nucleus of operative fact. Note that these are the same problems as p. 276 of the Handout)
  - P1 and P2 sue D in federal court. P1 and P2 are both citizens of State Alpha, while D is a citizen of State Beta. P1’s claim is $60,000, but P2’s claim is only $30,000.
  - P1, from State Alpha, sues D1 and D2, both of whom are from State Beta, in federal court. P’s claim against D1 is for $100,000, while her claim against D2 is only for $50,000.
  - P1 and P2 sue D in federal court. P1 is from State Alpha, while P2 and D are both from State Beta. Each plaintiff claims over $100,000 in damages.
  - P, from State Alpha, sues D, from State Beta, in federal court. P seeks $100,000 in damages. D impleads (look up this term and remember it for later in the semester when we discuss impleader in detail) 3PD, a citizen of State Gamma, as authorized by Federal Rule 14. 3PD has signed a guaranty
under which it is liable for up to $50,000 of D’s liability. P accordingly adds a claim against 3PD for $50,000.

- P1 and P2, both from State Alpha, sue D, from State Beta, in federal court. P1 then files a $100,000 cross-claim (Rule 13) against P2.

29. No new reading, finish discussion of supplemental jurisdiction. Be sure to work through the problems on p. 279-280 of the Handout on Exxon Mobil from the previous class.

D. Removal

30. CB 229-238; 28 U.S.C. § 1441

- *Caterpillar, Inc. v. Lewis*

- Problems:
  - P, a citizen of Nebraska, sues D, a citizen of Kansas, in state court. P seeks $500,000 in damages from D for breach of contract and unjust enrichment. D files a timely notice of removal. P moves for a remand. What additional facts do you need before you can determine whether the court will remand the case to the state court?
  - Same facts. Would your analysis differ if P had brought both a federal question claim and a diversity claim against D?
  - P, a citizen of Indiana, sues D1, a citizen of South Dakota, and D2, a citizen of Indiana, in an Indiana state court. P seeks $200,000 in damages from the defendants for conspiring to commit an intentional tort against P. Two weeks after the case is commenced, P and D2 settle. P immediately amends her complaint to drop D2 from the case. May D1 now remove the case? If so, what must D1 do, and when?
  - Same as the problem above, except that P waits for over a year after the settlement before filing the papers dismissing D2 from the case. Would it matter if P’s tardiness was purposeful or merely an oversight?

31. No class – meet in groups (or on your own) to discuss and prepare for the problem day.

32. Problem Day 3 (problems to be posted on TWEN before the previous class period, bring two written copies to class – one to hand in at the beginning of class and one to use while we review the problems)

IV. THE ERIE PROBLEM

A. State Courts as Lawmakers in a Federal System

33. ERIE DAY!! CB 239-50; 28 U.S.C. § 1652

- State Courts as Lawmakers in a Federal System (the issue in historical context, constitutionalizing the issue)
- *Erie Railroad v. Tompkins* – this case started out as a routine application of federal common law. The plaintiff chose federal court in hopes that he would receive the benefit of the more favorable federal common law rule (when you read the case, make sure to identify the clash in governing law). Although the parties disagreed as
to the content of the state and federal rules, no one on appeal questioned whether \textit{Swift} ought to apply. And yet, as the first line of the Court’s opinion makes clear, the Court had a different agenda.

- If \textit{Erie} is a constitutional decision, which provision in the constitution is it based on?
- The \textit{Erie} opinion is painted with a broad brush. Read literally, it suggests that federal courts are completely powerless to enact rules of law. But a court, by its very nature, makes a number of binding proclamations that are not directly supported by a statute. Suppose, for example, that a judge wants to close a potentially sensitive trial to the media. State law, however, allows media into all trials. Would the federal court have to follow the state practice and allow the media into the courtroom? Wouldn’t a rule barring the media be a form of “federal common law?” We will look at this question after you read the next assignment.

**B. The Limits of State Power in Federal Courts**

(1) Interpreting the Constitutional Command of \textit{Erie}

34. CB 251-257

- \textit{Guaranty Trust Co. v. York} – consider the media hypothetical set out above. After this opinion, would a federal court be free to close a case to the media? Why or why not?
- \textit{Byrd v. Blue Ridge Rural Electric Cooperative} – Does this case modify the \textit{Guaranty Trust} test, or does it simply create an exception? Try to restate the rule of Byrd as a three-step exception.

(2) De-Constitutionalizing \textit{Erie}

35. CB 258-264

- \textit{Hanna v. Plumer} – like all \textit{Erie} cases, Hanna involves a clash between state and federal law. What is the federal law involved in the case? Did any of the earlier cases involve this type of federal law?
- Consider the following two hypothetical situations:
  - Situation One: A state legislature enacts a statute imposing a special $10,000 filing fee for complaints in malpractice cases. The filing fee for federal courts in that state is $150. The federal fee is set by the district clerk, not by the Federal Rules or any local rule. Must the federal court charge a $10,000 filing fee for federal diversity malpractice cases?
  - Situation Two: The judges in State X have proven to be extremely biased against out-of-state litigants, at least when those litigants are suing or being sued by citizens of State X. Plaintiff, from State Y, sues Defendant, from State X, in federal court in State X. Must the federal judge adopt a bias against Plaintiff?
- In both situations, won’t the difference in federal and state practice lead to forum shopping? Does that mean that the federal court should ape the state court? If so, does that make sense?
• Re-read the portion of *Hanna* dealing with judge made law. What is the Court trying to say when it talks about the “twin aims” of *Erie*? What is the “inequitable administration of the laws?” Does that second aim affect how one applies the likely to cause forum shopping test? Is all forum shopping equally objectionable?

(3) Determining the Scope of Federal Law: Avoiding and Accommodating *Erie*

36. CB 265-74

• *Semtek Int'l Inc. v. Lockheed Martin Corp.*- once the Court determines that Federal rule 41(b) does not apply, it still must determine whether the state law controls in federal court. How does the Court analyze this question? Given that the clash is now one between federal judge-made law and state law, is it surprising that the Court makes no mention of forum shopping in this portion of the opinion? Is the way the Court deals with the element of forum shopping – employing it in the Rules Enabling Act analysis, but omitting it from the federal judge-made law analysis – simply carelessness? Or is the Court suggesting that the Erie analysis is not as rigidly compartmentalized as the Hanna opinion might lead one to believe?

• **Problems:**
  - P sues D in federal court for medical malpractice. D prevails at trial. D asks the court to award her the attorneys’ fees she incurred in defending the case. Under a recently enacted “tort reform” law in the state, a doctor who is sued for medical malpractice is entitled to receive attorneys’ fees if she successfully defends the case. No such law exists at the federal level. Is D entitled to recover her attorneys’ fees?
  - P sues D for trespass in a federal court in State X. D argues that P’s claim is barred by the statute of limitations. Under the law of State X, the claim would be barred. However, the land upon which D allegedly trespassed is located in State Y. Under the law of State Y, P’s claim is not barred. Is P’s claim barred?

37. No new reading assignment – Finish discussion of post-*Erie* cases and do in class exercise.


39. **Problem Day 4** (problems to be posted on TWEN before the previous class period, bring two written copies to class – one to hand in at the beginning of class and one to use while we review the problems)

40. **No class** – meet in groups (or work on your own) to discuss and prepare the sample final exam.

41. **Sample Final Exam.** I will post a sample final exam on TWEN for you to work through before this class. Students tend to find this class the most helpful if they have taken the sample exam under timed conditions, written out a complete answer, and then taken the time to go back over it either alone or in their study groups before coming to class. You do not need to turn in your sample exam.
42. Review Session – Time and Date TBA