**Recap**

Mutuality - the requirement that you would have to be a party bound by a determination of an issue in order to use that determination to bind another party. Ex: In a suit between P and D, about a transaction that also involved X, X could not use the earlier judgment to bind P or D because he was not a party to the earlier suit.

There were exceptions to this doctrine under the common law, i.e. the exception involving employees and employers.

The Bernhard case, an early case to recognize nonmutual issue preclusion, probably involves one of the common law exceptions- but the statement in Bernhard was much broader.

Defensive nonmutual issue preclusion - the person bound is the plaintiff in the second lawsuit.

Offensive nonmutual issue preclusion - the person bound is the defendant in the second lawsuit.

Offensive nonmutual issue preclusion is more problematic- consider a plane crash with 100 potential defendants. A series of defendants could sue and lose before one sues and wins- after the victory, the rest of the plaintiffs could take advantage of NMIP against the airline.

The Parkline Hosiery case discussed the factors that make nonmutual offensive issue preclusion less problematic.

(1) party invoking offensive nonmutual issue preclusion could not have easily intervened in the first lawsuit

(2) bound party had incentive to defend the issue vigorously in first lawsuit

(3) no inconsistent determination of issue in past lawsuits (as occurred plane crash example)

(4) Procedural opportunities in two cases are not substantially different

**One Sovereign’s Law in Another Sovereign’s Courts**

Someone might sue under German, Federal, or Kansas law in a California court. Someone also might sue under German or Kansas law in Federal courts. These actions bring up problems.

Consider sister state law in state court – which sister state’s law applies?

lex loci delecti - law of the place of the accident

interest analysis - self explanatory

There are several approaches to choice of law applied in the states.

There are problems in interpreting the other sovereign’s law. A California court is not the maker of Nevada law- it is in a subservient position in determining Nevada law.

If there is no sister state supreme court decision on point in a problematic area, then the court predicts what the sister state supreme court would do.

There is a process called certification, by which a court gives the facts over to the appropriate state supreme court and has them answer the question. This isn’t always a workable process.

*Swift v. Tyson -* The Supreme Court held that federal courts sitting in diversity did not need to apply a state’s common law opinions to common law questions arising in the state. This rule only applied to common law jurisdictions (not therefore Louisiana).

What exactly was the reason for the Swift?

Positivism - the existence and content of the law is solely a matter of facts. Therefore, if everyone started acting as if My word was law, my word Would be law.

Natural Law Theory - the existence and content of the law is not (or not solely) a matter of social facts.

Two interpretations of *Swift* - the common law is a brooding omnipresence that applies in New York whatever New York says (Natural Law); or the common law applies in New York because New York chooses to be a common law jurisdiction, therefore choosing to allow Federal Courts to come to their own conclusions about what the common law was in New York. (A state chooses to be a common law jurisdiction, but the content of that universal common law standard can be interpreted by the federal courts).

Green thinks that the positivist interpretation of Swift is right. Basically federal courts could come to their own interpretations about the common law prevailing in New York because New York officials said they could.

But Swift had practical problems – there as a choice of two interpretations of the common law prevailing in a state

If you prefer the way that Kentucky state courts have interpreted the law over the federal interpretation, then you file in Kentucky state ct - or vice versa, depending on your preference. Now you have a problem with vertical forum shopping (*Black and White Taxicab)*

*Erie RR v. Tompkins* - The issue was a common law question : what is the duty of care to trespassers? Under Swift, a federal court could have come to its own conclusion about duty of care. The Court in Erie said no - the federal court must defer to what the relevant state supreme court says. This case overruled years of different precedent. This ruling meant that the Court must look to the decisions of the state courts (Pennsylvania) in this case.

“There is no general federal common law” --- sometimes this is interpreted to mean that all federal law is that of a statute or regulation or constitution or treaty- but federal courts do create common law. They do make up rules out of whole cloth, without any form of interpretation.

Ex: *Boyle v United Tech. Corp -* The contractor in this case asserted a defense of immunity for federal military contractors. This rule was made up without interpretation of any enacted law - it becomes a federal tort law that overrides state tort law.

This is appropriate - there may be a federal interest giving a federal court common law making power, but diversity or supplemental jurisdiction does not create such an interest.

How does a federal court interpret state law?

Let’s begin with the role of state court decisions in the state’s own legal system

Imagine a new decision announced by a state trial court. This law is not binding anywhere - it is not even binding on the same court, if a strong argument for overruling stare decisis exists. It is merely a source of arguments for the appeals and supreme court in that state.

But a decision of the state’s supreme court or appeals court is binding on a lower state courts. Regardless of how old the decision is, all lower courts must decide on the basis of that decision.

This is true for federal law too. Imagine an old USSC on point that says X - a state court or lower federal court must also say X. Evene if they think that the USSCt would decide differently now.

Imagine that there is no USSC on point, but there is a fourth circuit court of appeals case that says X. Are virginia state courts also bound to say X? The Virginia courts must respect the Supreme Courts decisions, but there is a disagreement on this issue. Lots of states treat Fed. Appeals decisions (in their circuit) as binding, some do not. There is an argument that state and lower federal courts are co-equal in interpreting federal law- though this is problematic if there are differences in interpretation between the courts.

Imagine a case in federal court. There is a PA SCt case on point, though it is 80 years old. What if the federal court had to stick to the old decision? If this were the case, the issue could never be appealed to the state supreme court. The Federal Court instead must predict what the PA supreme court would do. There is still a disuniformity there, because people will be encouraged to bring cases in Federal Court - the chances of climbing to the supreme court in PA are slim.

Imagine that there is a 4th circuit decision and conflicting VA trial court decisions on point for an issue- is a VA federal district court bound by the 4th circuit decision? No. The 4th circuit made an educated decision 20 years ago about the VA Supreme Court would do. This does not indicate that the same decision must be made now- the circumstances that inform predictions have changed. The decision would be “binding” only if the decision was so recent that it could not be argued that the circumstances have changed.

What is the procedural power of a state court when it is entertaining a sister state law action? How much VA procedural law could Virginia apply when it is entertaining an action under Pennsylvania law? It could not, for example, use Virginia’s rule on duty of care, or Virginia’s rule for burden of proof. It could use its own rules on Statutes of Limitation - the general rule is that these statutes are procedural. Service Rules are also procedural. Pleading standards are also procedural.

But statutes of limitation can be either substantive or procedural. A legislature can want its limitation to follow its causes of action wherever they go- all the way into other court systems. This would be a substantive statute of limitation. If the state intends the rule to apply only to its own court system, it is procedural. Finding out whether it is substantive or procedural is problematic, because there will never be a Pa. state court decision on point about whether or not a rule is procedural or substantive (except through certification).

Imagine Virginia had a long statute of limitations period, but it only wanted it to apply to its own citizens. Perhaps it was tired of others coming to Virginia to sue. Virginia can enact a borrowing statute, borrowing the time limits imposed on other states when their citizens some to sue. This does not mean the sister state statute of limitations are substantive. VA is borrowing sister state standards for its own pruposes.

Now the bid question: What is the procedural power of a federal court entertaining a state law cause of action?

When is the federal court obligated to use state law over its *common law* procedural rule?

A federal court could not, for example, use its procedural common law to shift the burden of proof from what state law says.

Could a federal court use a common law procedural rule to ignore a state’s statute of limitations? No. See Guar. Trust v. York. A federal court in NY entertaining NY actions must use NY’s statute of limitations even when NY officials do not consider their statute of limitations to follow their cause of action into other court systems. Intuitions about interstate situations are ignored. The federal court must use the forum’s state’s rules. Why? The discussion revolved around ‘outcome determination’ - if things will turn out differently if a suit is brought in the state or in federal court, then the forum state’s rule should be applied. We want vertical uniformity to avoid vertical forum shopping.

It’s important to distinguish between federal common law procedural rules and rules of procedure mandated by a federal statute or a Fed R Civ P. We are talking about federal common law rules right now.

Examples:

According to Kansas law, the statute limitations tolls upon service. According to the federal rule (suggested by Fed R Civ P 3) it is tolled upon filing. Which rule would determine whether statute limitations was met in a case brought under Kansas law in federal court in Kansas?

Held (on basis of vertical uniformity) – Kansas law (Ragan case)

A Mississippi statute requires a corporation doing business within the state to designate an agent for the service of process before bringing suit.   
- There is no such requirement under federal law.   
- P (a Tennessee corporation doing business in Mississippi) is suing D in federal court in Mississippi.   
- P has designated no agent for service of process in Miss.   
- D moves for summary judgment on this ground.   
- What result?

Held (on the basis of vertical uniformity) Mississippi law (Woods case)

A New Jersey statute requires small shareholders bringing derivative actions to post a bond.   
  
Federal courts have no such requirement. P, a small shareholder, brings a derivative action against D in federal court in New Jersey.   
  
P has not posted a bond. D moves to dismiss.   
  
What result?

NJ law

When sitting in diversity, how far does this doctrine go?

First example of some push-back against vertical uniformity

Byrd

P (N.C.) sues D (S.C) for negligence  
- P was employed by a subcontractor of D  
- D claims P did work of same sort as that done by D’s own employees and thus is covered by S.C. workers compensation, not S.C. negligence law  
- under S.C. law this matter is decided by a judge  
- under federal common law (as decided in federal question cases) this is a matter for the jury

Court held that the federal rule should be used

First – does not look like the 7th Amendment demanded a jury determination

If it did then there would have to be a jury determination

Second, Brennan asks whether the SC judge role is bound up with the SC cause of action. If so, the SC rule would have to be used:

“It was decided in Erie R. Co. v. Tompkins that the federal courts in diversity cases must respect the definition of state-created rights and obligations by the state courts. We must, therefore, first examine the [S.C.] rule...to determine whether it is bound up with these rights and obligations in such a way that its application in the federal court is required.”

But was not bound up

Even then there is a policy of vertical uniformity arguing for using SC rule

* but there are countervailing federal interests in this case arguing for using the federal common law rule

“But there are affirmative countervailing considerations at work here....An essential characteristic of [the federal] system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury and, under the influence--if not the command--of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury. The policy of uniform enforcement of state-created rights and obligations, see, e.g., Guaranty Trust Co. of New York v. York, supra, cannot in every case exact compliance with a state rule --not bound up with rights and obligations--which disrupts the federal system of allocating functions between judge and jury.”

After Byrd:   
P sues D under SC law in SC federal court  
1) If US Constitution requires a procedural rule in federal court, it must be used (e.g. 7th Amendment)  
2) If SC rule is substantive in horizontal choice-of-law sense, federal court must use SC rule

If 1 and 2 npot so then must take into account  
3) policy of vertical uniformity with SC state courts  
 (outcome determinative test in York)  
4) BUT also countervailing federal interests in favor uniform federal common law rule