Lect 37

* in a horizontal context (that is, when a state court takes a sister state cause of action) we can say the following:
* Substantive = state that created the rule wants it to follow the state’s causes of action into other court systems  
    
  Procedural = state that created the rule wants it to apply only in the state’s own courts

Forum entertaining a sister state cause of action has a duty only to respect the sister state’s substantive law (including sister state procedural rules bound up with the sister state cause of action)

NOTE: a state court might use the sister state’s statute of limitations not because it thinks the sister state’s officials want it to use their limitations period, but for its own reasons. EG

Virginia state courts have a generous 3 year statute of limitations for tort. Too many people are coming to Va. state court to sue under sister state causes of action.  
  
So Virginia enacts a borrowing statute  
The Va. statute of limitations for tort incorporates the time period of the state that provides the cause of action.

OK, now what is the procedural power of a *federal* court entertaining a state law cause of action?

At first, things start looking much like the horizontal inquiry

P sues D in federal court in New York under New York law.   
New York law puts the burden of persuasion concerning lack of contributory negligence on the plaintiff.  
Can the federal court use a federal common law rule putting the burden on the defendant to prove the contributory negligence of the plaintiff instead?

No – must use NY law - Palmer v. Hoffman (US 1943)

But then, things start turning out differently

Guaranty Trust v. York (U.S. 1945)

1) - class action by noteholders of Van Sweringen Corp sued their trustee (Guaranty Trust) for breach of trust/fraud

- Ds move for sum judgment

- granted on the ground of NY statute of limitations

- 2d Cir reversed

- NY statute of lims did not bar action because a federal judge-made doctrine (laches) should be applied instead

- USSCt reversed

Was New York’s statute of limitations substantive in a horizontal sense? Did NY officials think the statute of limitations followed NY actions into other court systems

Probably NO-

But the SCt didn’t care

- federal rule would substantially affect the enforcement of the state law right

It is therefore immaterial whether statutes of limitation are characterized either as "substantive" or "procedural" in State court opinions in any use of those terms unrelated to the specific issue before us. *Erie R. Co. v. Tompkins*...expressed a policy that touches vitally the proper distribution of judicial power between State and federal courts. In essence, the intent of that decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court.

York introduces a policy of vertical uniformity between federal and forum state court  
 (if outcome determinative)

- this is not about respect for state lawmaking power

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?

Ragan v. Merchants Transfer & Warehouse (US 1949)- must use Kansas’s tolling rule

Think of how different this is from the horizontal context

Imagine instead that the Kansas cause of action was brought in state court in Nebraska.  
Which tolling rule would be used – Kansas’s or Nebraska’s? Nebraska’s.

- 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?

Granted – federal court in Mississippi must use the forum state rule

Woods v. Interstate Realty (US 1949)

Again – see how different this is from the horizontal inquiry. Would the Mississippi statute had applied had the action been brought in state court in Alabama? Clearly not

The 5th Circuit had concluded that Mississippi state officials thought that the statute applied only Mississippi state courts, not federal courts in Mississippi.  
Does that matter? No – use the Miss rule to avoid vertical disuniformity even if Miss officials don’t care if it is used

* This is not about respect for state lawmaking power

outcome determinative = if you switch rules from federal to forum state law it will make a difference to how the case will turn out

Some pushback against York’s outcome determinative test

**Byrd** v. Blue Ridge Rural Electric Corp.

SCt 1958

- Negligence action by a lineman employed by a subcontractor – his suit is against the primary contractor

- diversity case in South Carolina

- D said that So Carolina workman’s compensation law applied because work P did was of same sort as that done by D’s own employees

- so the question was: was P a “statutory” employee and so governed by SC workman’s comp or could he sue under SC tort law?

- under SC law the issue of whether he was a statutory employee was decided by a judge

Federal common law rule is jury would decide this question

Holding: issue for jury (federal common law rule should be used)

Brennan divides his Erie inquiry into two parts –

- is using SC law constitutionally required under Erie

- is this bound up with state rights and obligations such that employment of fed law would be unconstitutional?

First. 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 rule in Adams v. Davison-Paxon Co. 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.

- answer?

- no

what is an example that was given of a procedural rule that was bound up with state-created rights and obligations ?

Dunlap- burden of proof for contributory negligence

2) 2nd consideration?

Second. But cases following Erie have evinced a broader policy to the effect that the federal courts should conform as near as may be--in the absence of other considerations--to state rules even of form and mode where the state rules may bear substantially on the question whether the litigation would come out one way in the federal court and another way in the state court if the federal court failed to apply a particular local rule. E.g., Guaranty Trust Co. of New York v. York.

- broader policy in diversity

- conformity to state procedural rules important if outcome determinative

Notice that bound up test and policy of vertical uniformity can pull in different directions

P sues D is federal court in New York under Pennsylvania law  
Pennsylvania’s two year statute of limitations is bound up with the Pennsylvania cause of action  
New York has a three year statute of limitations.

Bound up test says respect Pa law

Policy of vertical uniformity says do what a NY state court does

- is difference between SC judge and federal common law jury rules outcome determinative?

- maybe

- but policy of vertical uniformity is not the only question

- also relevant is countervailing federal policies in favor of uniform federal common law rule

But there are affirmative countervailing considerations at work here. The federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction. An essential characteristic of that 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. Thus the inquiry here is whether the federal policy favoring jury decisions of disputed fact questions should yield to the state rule in the interest of furthering the objective that the litigation should not come out one way in the federal court and another way in the state court.

- Did 7th A mandate a jury in fed ct?

- not answered, assumed not

- what if it had?

- would have to apply

After Byrd:   
P sues D under SC law in federal court in SC.  
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 instead of federal common law rule  
3) but there is also a policy of vertical uniformity with SC state courts  
 (if difference is outcome determinative)  
4) BUT there may also be countervailing federal interests in favor uniform federal common law rule

Now, what about FRCP?

Hanna

- Hanna sued Plumer, Osgood’s executor, for Osgood’s negligence in auto accident.

- left summons and complaint with Osgood’s executor’s wife at place of residence in accordance with 4(e) (4(d) at the time)

- Mass statute required in hand delivery to an executor or administrator

- DCt granted motion for sum j

- Ct App aff’d

- saying it was substantive rather than procedural

- outcome determinative

- SCt reversed

Policy of vertical uniformity is not an issue for FRCPs (or federal statutes)

“When a situation is covered by one of the Federal Rules, the question facing the court is a far cry from the typical, relatively unguided *Erie* choice: the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions.”

Why no concern about vertical uniformity when a FRCP is at issue? Why does vertical uniformity matter only when federal courts are creating federal procedural common law?

Green: The idea is that the policy of vertical uniformity is a congressional command to federal courts when making federal procedural common law

It is tied to the purposes of diversity jurisdiction

Congress gave federal courts jurisdiction over diversity cases to solve a problem with state courts, namely bias

It would frustrate that purpose if federal courts created procedural common law that differed substantially from forum state law – e.g.

P(NY) sues D(Cal.) in state court in NY under NY law 2 ½ years after an accident.  
D is worried about state-court bias against him.  
NY has a 3-year statute of limitations.  
What would happen if federal courts had a common law 2 year limitation period?

The D would not remove despite being worried about state court bias – diversity jurisdiction would not be working

Or…

P(NY) sues D(Cal.) in state court in NY under NY law 2 ½ years after an accident.  
D is *not* worried about state-court bias against him.  
NY has a 2-year statute of limitations.  
What would happen if federal courts had a common law 3 year limitation period?

D would remove solely to get the longer limitations period – federal resources would be wasted on a case unrelated to the purpose of diversity

On the other hand, assume

P(NY) sues D(Cal.) in state court in NY under NY law 2 ½ years after an accident.  
D is worried about state-court bias against him.  
NY has a 3-year statute of limitations.  
What would happen if Congress passed a statutory 2 year limitation period for all diversity actions in state court?

The D would not remove and the original purposes of diversity would be frustrated, but since the original purposes of diversity had their source in Congress anyway, Congress can choose to frustrate them through subsequent legislation

OK, so in Hanna we are in the FRCP track – how do we solve that?

What gives SCt the power to create FRCPs? The Rules Enabling Act

**28 U.S.C. § 2072. - Rules of procedure and evidence; power to prescribe**   
(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.   
(b) Such rules shall not abridge, enlarge or modify any substantive right. . . .

1st Question – is the FRCP within Congress’s power (since Congress cannot delegate to the SCt power it doesn’t have)

What is Congress’s power over federal procedure?

[T]he constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either.

- Congress has power to regulate what is arguably procedural

- whether federal statute causes vertical forum shopping in diversity cases does not matter

- Congress passes a uniform statute of limitations applicable for all actions in federal court, including state law actions  
- is the statute valid?  
- even if a shorter state statute of limitations is bound up with the state cause of action?

Apparently Yes

Green is a bit skeptical – this appears to give Congress greater power over federal procedure for state law actions than state courts have over their own procedure when entertaining sister state actions

EG A New York state court is entertaining a Pennsylvania action with a 2-year statute of limitation bound up with it.   
May the NY legislature command the NY court to use a NY 3-year statute of limitation for the action?

We said no (although maybe NY has the constitutional power to do so and simply chooses not to – the USSCt has not answered this question)

2nd Q is whether the FRCP is within the limit in the Rules Enabling Act

Such rules shall not abridge, enlarge or modify any substantive right

* we will discuss this later

But 4(e) clearly satisfies both tests so it applies, not Mass law

Now – assume that the federal service rule had been common law

Hanna ct reinterprets the outcome determinative rule in York

The [Erie] decision was also in part a reaction to the practice of 'forum-shopping' which had grown up in response to the rule of Swift v. Tyson. That the York test was an attempt to effectuate these policies is demonstrated by the fact that the opinion framed the inquiry in terms of 'substantial' variations between state and federal litigation. Not only are nonsubstantial, or trivial, variations not likely to raise the sort of equal protection problems which troubled the Court in Erie; they are also unlikely to influence the choice of a forum. The 'outcome-determination' test therefore cannot be read without reference to the twin aims of the Erie rule: **discouragement of forum-shopping and avoidance of inequitable administration of the laws.**

- question is whether difference would influence choice of forum ex ante (not whether it would determine outcome in context of actual litigation)

Erie flow chart...

is the federal court sitting in diversity/alienage (or is there a cause of action with supplemental jurisdiction)?  
 if no – no *Erie* problem  
  
- just use federal procedure  
  
- Example: P sues D in federal court in New York under federal securities law

Assume now that a federal court entertains a state law action (or an action under the law of another nation) – diversity/alienage/supplemental jurisdiction

1) is the relevant federal procedural law mandated by the U.S. Constitution? E.g. 7th A  
  
 if yes it applies

2) Is the relevant federal procedural law a federal statute?  
  
 if yes it applies if it is arguably procedural  
  
 - Green wonders about the power of Congress to preempt state rules bound up with the state’s cause of action...

3) Is the relevant federal procedural law a Fed. R. Civ. P.?  
  
if yes only questions are   
  
- is it arguably procedural (since Congress cannot delegate power it does not have) and   
- does it abridge enlarge or modify substantive rights (will discuss later)

4) is the relevant federal procedural law federal procedural common law?  
 - remember, includes cases in which the federal court simply doesn’t have anything  
  
if so first determine if  
1) state rule is bound up with the cause of action (Byrd) – if so, use state law

- Green wonders whether a state can bind up trivial procedural law with its cause of action – he thinks that in such a case a federal court could ignore the bound up rule and use federal procedural common law…

2) if not look to  
 twin aims of Erie  
 difference leads to forum shopping and ineq. admin. of laws?  
 plus countervailing federal interests in favor of a federal rule that is uniform among federal courts