Lect 31

Under Swift v. Tyson, if a state’s officials have chosen to adopt the general common law, a federal court will come to its own conclusion about what the general common law standard in the state is, without deferring to the state’s courts. Federal courts did not consider the state courts decisions as binding on them and did not consider their decisions as binding on the state’s courts

That was probably what the state’s courts themselves wanted at the time. After all, in general, they would not defer to what sister state courts said about the general common law in the sister state.

But over time state courts began understanding the common law standards applying in their state as whatever their state’s courts said they were. They wanted sister state and federal courts to be bound by their decisions. So both Swift and Erie made sense for their time. Under Erie, a federal court applying state law (e.g. when sitting in diversity or supplemental jurisdiction) should defer to the state’s courts concerning the content of the state’s law— this includes the state’s common law.

Brandeis in Erie said “There is no general federal common law.” This should not be taken to mean that there is no federal common law. In fact federal courts will come up with federal common law rules that are binding upon state courts, but only when there is an important federal interest involved and there is no federal enacted law on the matter.

But *how* should a federal court defer to a state’s courts concerning the state’s law? Should they act like a lower state court and follow all past decisions by the relevant state SCt? That would not work.

Imagine there is an old state SCt decision saying “X,” which the state SCt is likely to overrule. Since there is no appeal from the federal court system to the relevant state supreme court, there will be no opportunity in that case for state SCt to overrule itself. There is such an opportunity in the state court system itself.  
  
So instead federal courts predict what the relevant state SCt will say. This is also what state courts often do when entertaining action under sister-state law. (There is a possibility of certification of the question of state law to the relevant state SCt. Most state SCts allow certification, but it is a time-consuming process.)

Notice that when state courts entertain actions under federal law appeal to the USSCt is possible, so in that case the state courts, like lower federal courts, are bound by USSCt decisions, even old ones that the USSCt is likely to overrule.

But even with the predictive method in place in federal court, there is still an incentive to forum shop. Imagine that the last Pennsylvania Supreme Court opinion on point is an 80-year old case. You think they would decide otherwise now and the change in the law would be to your benefit. Your case is a diversity case. Where do you sue, in a Pennsylvania state trial court or in a federal district court? You would choose the federal district court because you will get its prediction of the PA SCt’s new decision right away. In PA state court they will follow the old decision and you will get the new decision only if the PA SCt decides to take the case on appeal.

You are a federal district judge in the E.D. Va. entertaining a question of Virginia law. The only cases on point are a 20-year-old decision by the 4th Circuit and conflicting 5-year-old decision by a Va. trial court. Is the 4th Circuit decision binding authority for you? No – it made a prediction of what the VA SCt would say and now there is a new data point (the 5-year-old decision by a Va. trial court) that makes that prediction outdated. The district court should make a new prediction of what the VA SCt would say.

So far we have been discussing interpretation of another jurisdiction’s law. But there is also the question of choosing between two jurisdiction’s laws. Let’s start with choice of *substantive* law in *state* court. A state court might choose between two states’ substantive laws (Nevada or California?), two countries’ laws (Germany or Brazil?), or a state’s law and a country’s law (Germany or California?)

Notice that choice between federal law and a state’s law is not an issue—the Supremacy Clause makes it clear that valid federal law wins.

Here is a choice of law problem. Two married Georgians get into an accident in California. The husband wishes to sue the wife for negligence. Ga. law has spousal immunity. Under Ca. law, spouses can sue one another for negligence. Which tort law should the court apply?

Assume the case is before a Virginia state court. It would use the old-fashioned principle of lex loci delicti—the tort law of the place of the harm applies. So the court would apply California law and allow the husband’s action to proceed. (A Ga. court would use that approach too and so would apply Ca. law.)

Assume the case is before a Pennsylvania state court. It would use a form of interest analysis. The jurisdiction with an interest in its law applying applies. Concerning spousal immunity, an interest analysis jurisdiction would apply the law of the place of the marital domicile—here Georgia. The purpose of spousal immunity is encouraging marital harmony and protecting against spouses staging accidents to defraud insurance companies. Georgia is interested in its law applying in this case because there is a GA married couple whose harmony is at issue and a suit that, if fraudulent, would have most of its effects in GA. So a PA court would apply GA law and bar the husband’s action. (A CA court, which would also use an interested analysis approach, would do the same thing.)  
  
OK now assume our case is before a federal court. Should it use its own choice of law rules? In Klaxon, the USSCt concluded no – it should use the choice of law rules (eg lex loci delicti or interest analysis) of the state where the federal court is located. Why it should do this is a matter we will return to.

OK – that was choice of substantive law. But what about horizontal (state-state) choice of “procedural” law. Assume a Virginia state court is entertaining a California wrongful death action. Should it use Virginia’s or California’s: statute of limitation? service rules? pleading standards? In addressing this question I will use an understanding of a rule’s being substantive or procedural by looking to the views of the officials of the state that created the rule. A rule is “substantive” if the officials of the state that created the rule consider it part of the state’s cause of action, following those actions into other court systems. A rule is “procedural” if the officials of the state that created the rule want it to apply only in the state’s own courts, including to causes of action under other states’ laws.

So should our VA state court entertaining a CA wrongful death action use CA’s wro9ngful death sttaute of limitations ort its own? How can you tell whether a California statute of limitations is substantive or procedural in the relevant sense? Will there be any California state court decisions on point? No-a CA state court has no occasion to talk about what other court systems should do with its statute of limitations. It only has occasion to talk about what it should do.

That said, we can get some indirect evidence. Imagine a California court applies its statute of limitations to actions under another state (or nation’s) law. That suggests that the rule is procedural. But it might be both substantive and procedural. CA officials may want it to apply in the state’s own courts, including to causes of action under other states’ laws, and to follow their wrongful death actions into other court systems.

Imagine that California’s wrongful death statute says “a plaintiff may not sue for wrongful death under this statute more than 2 years after the death occurs.” That is reason to think that California’s statute of limitations substantive in the relevant sense, because the limitation is in the statutory cause of action itself. On the other hand that is not dispositive.

One might also look to the purposes of CA’s statute of limitations. To the extent that it is about protecting the repose of defendants, it might be substantive. To the extent that it is about avoiding stale evidence, it might be procedural.

The point is that it is very hard to get any idea of whether a rule is substantive or procedural without certifying the question to the relevant state SCt.

OK now let us move on to conflicts of substance and procedure. Imagine P sues D in Virginia state court under California law for wrongful death 2.5 years after the death. Consider the following scenarios:  
  
Va’s WD time limitation 2-yr substantive & Ca’s WD time limitation 3-yr substantive? In this case the case proceeds—only CA’s rule applies.

Va’s WD time limitation 2-yr procedural & Ca’s WD time limitation 3-yr procedural? In this case the case is dismissed—only VA’s rule applies.

Va’s WD time limitation 2-yr procedural & Ca’s WD time limitation 3-yr substantive? In this case both apply. Is there really a conflict though? What would happen is that VA ct would dismiss the action but generally would do so without prejudice so it can be brought in a court system with a longer statute of limitations.   
   
Va’s WD time limitation 3-yr procedural & Ca’s WD time limitation 2-yr substantive? In this case both apply and there really is a conflict. To apply the VA rule would mean allowing the case to proceed, but that is contrary to CA’s substantive rule. In this case state courts generally allow substance to trump procedure. We do not know if that is their constitutional obligation though.

Va’s WD time limitation 2-yr substantive & Ca’s WD time limitation 3-yr procedural? In this neither applies. Huh? That would mean that the plaintiff could sue decades later. It is for this reason that all states have a catch all procedural limitations period to capture actions that would otherwise fall through the cracks.

Does forum procedure always yield to sister state substance…? Assume P sues D in Virginia state court under California law for wrongful death. California has a service rule that it considers bound up with its wrongful death statute. Must Virginia law procedural law yield to it? That seems unlikely. That helps explain why service rules are always considered procedural. Most statues consider them procedural and even if there were a state (like CA in our example) that considered its substantive, the forum would apply its own procedural service rules anyway.

Matters are different for statutes of limitations. They were generally considered presumptively procedural, but an examination of a state’s limitation period could lead one to conclude that it is substantive, in which case the forum’s procedural statute of limitations would yield to it in the event of a true conflict (namely when the substantive one is shorter that the forum’s procedural one).

How about this example? P sues D in state court in Virginia under New York negligence law. New York law puts the burden of proof on the plaintiff to show his lack of contributory negligence. Under Virginia law contributory negligence is an affirmative defense. Here you have to determine whether NY’s rule is substantive, following their negligence actions into other court systems. The reasons to think that NY officials would want their burden of proof to follow NY negligence actions into other court systems are strong. That is why burdens of proof are general considered presumptively substantive, although it is possible that evidence could show them to be procedural.

We have been speaking of a court applying a system state rule because it considers that rule to be substantive. That is about respect for the sister state’s officials’ views about their law. But sometimes a state court will use a standard from sister state law for its own purposes. It will incorporate a standard from another jurisdiction’s law into forum law. Assume 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. That would be an example of borrowing sister state law. There is no suggestion that the sister state statute of limitations is substantive.

OK, now what is *federal* power over procedure when a federal court is entertaining a state law cause of action?

If there is federal *constitutional* law governing procedure in federal court, the matter is easy. It applies, even if there is vertical disuniformity between federal and forum state courts and even if federal constitutional law is trumping state substantive rules. An example is the 7th Amendment right to a jury trial. Assume P sues D under Virginia law in federal court in Virginia. Under the 7th Amendment, a factual issue must be decided by a jury in federal court. Under Virginia law, it does not. Federal law applies.

OK now what about federal *common law* governing procedure in federal court? Here we ignore for the momentfederal statutes and FRCPs. Here is a simple case. P sues D in federal court in New York under New York negligence law. New York law puts the burden of proof on the plaintiff to show his lack of contributory negligence. Can the federal court use a federal common law rule making contributory negligence an affirmative defense instead? The answer is no (see Palmer v. Hoffman (US 1943) – and also Cities Service Oil Co. v. Dunlap (US 1939)). In this case conflict of federal procedure and state substance looks a lot like conflicts between state procedure and sister state substance. BUT…

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

This was a class action by noteholders of Van Sweringen Corp who sued their trustee (Guaranty Trust) for breach of trust/fraud. Ds move for summary judgment on the ground of NY statute of limitations. It was granted but the 2d Cir reversed: NY statute of limitations did not bar action because a federal judge-made doctrine (laches) should be applied instead. A NY state court would have applied NY statute of limitations.

The USSCt reversed. NY statute of limitations needed to be applied.

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. Assume that a Pennsylvania state court was entertaining the NY actions in *Guaranty Trust*. It would have probably applied Pa’s statute of limitations or Pa’s law of laches and NY would probably have been fine with that. But the US SCt didn’t care whether the NY rule was substantive or procedural in the horizontal choice of law sense. The federal rule would substantially affect the enforcement of the state law right – it was outcome determinative. The outcome of the case rode on whether one used the federal or state rule.

The outcome determinative test will be later abandoned but Guar Trust did establish policy of vertical uniformity between federal and forum state court that is still in place. Because whether the forum state wonted its rule to apply in federal court (that is whether it considered its rule substantive) is irrelevant to the analysis, this is really about bowing state law standards and incorporating them into federal law

Some more examples using the outcome determinative test. A federal court in Kansas is entertaining an action under Kansas law. It uses Kansas statute of limitations, according to *Guaranty Trust.* But, according to the federal law a statute of limitations is tolled upon filing (this is suggested by FRCP 3). Under Kansas law, it is tolled upon service. Which rule should the federal court use? Ragan v. Merchants Transfer & Warehouse (US 1949) – the state rule must be used, because the difference would be outcome determinative.

Another example. A Mississippi statute requires a corporation doing business within the state to designate an agent for the service of process before bringing suit in Mississippi state court. There is no such requirement under federal law. P (a Tennessee corporation doing business in Mississippi) is suing D in federal court in Mississippi under Mississippi law. P has designated no agent for service of process in Miss. D moves for summary judgment on this ground. what result? Notice that the 5th Circuit, in addressing the case, had concluded that Mississippi state officials thought that the statute applied only Mississippi state courts, not federal courts in Mississippi. But the USSCt concluded in Woods v. Interstate Realty (US 1949) that the Miss rule had to be used anyway. The reason is not respect for Miss officials’ views about their law but a policy of vertical uniformity, currently understood according to the outcome determinate test (though this will change).