Horizontal substance/procedure conflicts…

* When a state court is entertaining an action under another state’s law
* Trying to figure out if state that created cause of action would want a particular rule to be part of the cause of action and follow it into other court systems (sister state, fed, foreign)
* Problem is that it’s very difficult to figure out whether a state really wanted that or not (because of lack of relevant cases)
	+ Because states courts don’t talk about what other court systems should do with their law
	+ Only gets answered definitively through certification to the relevant state SCt
	+ Normally only indirect evidence – ex. statutes of limitations, if that state’s court applies rule to sister state (suggests it’s procedural, but might be both substantive and procedural)
* You can also look to the purposes of the rule to figure out if state thinks it’s subst or proc
	+ Statutes of limitations
		- Repose 🡪 kind of suggests that it’s substantive
		- stale evidence 🡪 kind of suggests that it’s procedural
* Substantive 🡪 might refer to rules that are not part of the cause of action but that the state that created it still wants to apply in other court systems
	+ Ex. attorney-client privilege
		- Not bound up with the cause of action, but state is still interested in it applying in other court systems
		- e.g. VA may want its atty-client privilege law to apply to all VA atty-client conversations, even when the conversations at issue are being litigated in a sister state or federal court
		- Some other interest besides one tied to the cause of action applies
* In addition to determining whether another jurisdiction’s rule is substantive there is the problem of a genuine conflict between a state’s substantive law and the forum’s procedure
	+ Substance is generally considered to trump procedure
	+ eg a sister state’s shorter substantive statute of limitations will trump the forum’s longer procedural statute of limitations
	+ But we do not know whether this is a constitutional obligation under the full faith and credit clause
	+ In addition one could imagine rules that are considered substantive by the state that created them that the forum would not have to respect, such as service rules bound up with a cause of action

Federal/state substance/procedure conflicts

* Something in addition to normal horizontal choice of law issue
* In connection with Federal common law of procedure, there is a policy of uniformity with forum state courts, whether or not the forum state thinks of its law as substantive – in effect forum state law is borrowed by the Federal Court or forum state standards are incorporated into Federal common law

But that is in connection with Federal common law (or judge made law) of procedure

Concerning Federal constitutional law (such is the Seventh Amendment) the governs procedure in Federal courts,

* No matter how much it might lead to forum shopping, federal constitutional law just applies in federal court – forum shopping is irrelevant
* Also irrelevant that Federal constitutional law is trumping state substantive law – the Constitution is supreme

OK now let us return to Federal procedural common law (judge-made law)

We’re going to discuss the law *historically* first showing how we got into the current situation, which is primarily articulated in Hanna

* Federal procedure common law cases –
* 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?
* NO - Palmer v. Hoffman (US 1943)

also Cities Service Oil Co. v. Dunlap (US 1939)
* this it is like the horizontal situation - sister state burdens of proof are a presumptively substantive and forum state procedural law should yield to them
* By analogy, courts can’t override substantive rights of states when they’re creating federal common law
* *But then… Guaranty Trust*
* A Federal Court in New York entertaining New York causes of action had to use New York’s statute of limitations, even though thatstatute of limitations probably wasn’t part of the state causes of actions
	+ Nevertheless, SCOTUS says NY statute of limitations has to be used anyway
	+ This is a policy of Vertical uniformity
	+ How it turns out in federal court has to be the same as forum state court (if outcome determinative)
* Same use a forum state law rather than Federal common law for tolling rules in Ragan
	+ - Once again about vertical uniformity
	+ 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

		- This is to ensure that there will be personal jurisdiction over the corporation its suit is brought against it in Mississippi State court in the future
		- 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?
* *Woods* 🡪 a federal court has to use the same rule
	+ This is true even though the fifth circuit had concluded that Mississippi did not care whether the rule to applied in Federal Court
	+ Not respect for state substantive law, but it still has to be used by federal court in the state
* Federal law the incorporates state law standards
* We’ve seen this before 🡪 Rule 4(e) incorporates state law standards – the reason is a federal purpose, not about state regulatory interests
	+ a New Jersey statute requires small shareholders bringing derivative actions to post a bond
		- I have such a rule? What’s the problem with derivative actions? (*Schaffer*)
			* They are brought on behalf of a corporation by a shareholder, with the recovery going to the corporation
			* They can often be frivolous
			* Requiring a small shareholder to post a bond can help ensure that they are not
	+ federal courts have no such requirement
	P, a small shareholder, brings a derivative action under Delaware law against D in federal court in New Jersey

	P has not posted a bond

	D moves to dismiss

	What result?
	+ Cohen v. Beneficial Indus. Loan Corp. (US 1949) – the Federal Court must use the New Jersey rule
	+ Again the reason is not that the New Jersey rule is part of the cause of action (indeed the cause of action is under Delaware law)
	+ The reason is a policy in favor of vertical uniformity
* Notice that the test at this time (Guar Trust, Ragan, Woods, Cohen) in determining whether vertical uniformity is necessary is the *outcome determinative test*
	+ Whether the difference between Federal and forum state procedure would make a difference to how the case turned out at the moment of choice
* *Byrd* changes things a little bit
* I will discuss the facts of the bird case but it introduces two new considerations in connection with the Federal procedural common law Erie cases
* 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 [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.
	+ In other words, Erie says it is unconstitutional for a federal court to create a common law rule that trumps state substance (when in a diversity case)
		- Green not sure if this is always true
	+ Which state’s definition of state-created rights and obligations is at issue 🡪 the state that created the cause of action
		- *Palmer* as an example 🡪 burden of proof following the cause of action
	+ Green: Not likely that every single substantive right that a state has to be applied by the federal court
		- At a certain point, federal procedural common law might trumps state substance
		- P sues D in federal court under California law for wrongful death

		California has rule about the maximum number of pages in a brief that it considers bound up with its wrongful death statute

		must federal procedural common law yield to it? Probably not
	+ But in general it makes sense that Federal procedural common law should yield to state law rules that are substantive in the sense that the state wants them to follow the state’s cause of action into Federal Court

But Byrd introduces another important consideration in connection with the policy of vertical uniformity

* 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.
* But there are ***affirmative countervailing considerations*** at work here....
* This means that even if there is of vertical uniformity, but there can be affirmative countervailing considerations that can recommend a uniform federal common law rule
	+ - Important!
* After *Byrd*:
	+ Vertical uniformity must be balanced against countervailing federal interests in favor of uniform federal common law rule in Federal Court, no matter what state it is brought in

Here we are talking about the Federal procedural common law track

* Examples:
	+ Claim/issue preclusion
	+ Rules of tolling of statute of limitations
	+ Laches
	+ Anything that federal courts simply don’t do that a state does (whether by state constitution, statute, or common law)
		- Track is determined by the federal law
		- Not by the state law

What about federal rules of civil procedure or federal statute regulating procedure?

Hanna finally deals with them, in addition to reinterpreting the policy of vertical uniformity for the Federal procedural common law track

* *Hanna*
	+ Suit under Massachusetts law in Federal Court in Massachusetts
	+ Summons and complaint left in accordance with Rule 4(e) with a person of suitable age and discretion at the home
	+ Mass. statute said it had to be in hand
	+ The US supreme court concluded that the Federal rule of civil procedure applies
	+ You don’t care about vertical uniformity if it comes to Federal Rules of Civil Procedure
		- Why? 🡪 Congress is the one that created the goal of vertical uniformity, and it can take away that goal; passing the Rules Enabling Act is the way they showed this concerning FRCPs
		- Policy is created by Congress, policy can be taken away by Congress (by REA)
	+ Vertical uniformity only matters with Federal procedural common law
	+ The only issue in connection with FRCPs is whether they are valid
	+ This encompasses two questions
	+ “Is it within Congress’s power? If yes, is it within other limitations of the Rules Enabling Act?”
	+ Where does policy in favor of vertical uniformity come from in Federal procedural common law cases? This is not a constitutional requirement, because a can be taken away by Congress by statute (for example in the rules enabling act)
	+ So what is the statutory source of this policy of vertical uniformity?
	+ Green: the source of the policy in connection with diversity cases is the diversity statute
		- Policy in favor of uniformity created to keep diversity statute continuing to prevent bias
		- We want people who are worried about bias to get protection of the federal court if there’s diversity; won’t be able to go to federal court if they’ll be disadvantaged by federal procedure
		- Likewise, we want people in diversity cases to choose Federal Court only if they are worried about bias, not in order to get favorable Federal procedure
		- So uniformity of procedure between Federal and forum state court aides in the purposes of the diversity statute
		- There’s also a comparable argument for a policy of vertical uniformity in connection with supplemental jurisdiction, that Green won’t give here

OK – so now we know that in connection with FRCPs the only questions are whether they are within Congress’s power and whether they satisfy the requirements of the REA

Let’s start with Congress’s power over the procedure in Federal courts
This will determine whether federal statutes regulating procedure are valid

* What is Congress’s power over federal procedure (including in diversity cases)? How intrusive can it get?
	+ Standard: federal court system can create rules that are rationally capable as classification as procedural or substantive
	+ It applies if it’s arguably procedural
		- No matter how much it trumps state rights or leads to forum shopping, Congress can do it as long as what it regulates is arguably procedural
		- Green (and Justice Harlan) questions whether this is always true
		- Congress passes a statute stating that the burden of proof for contributory negligence is on the defendant in federal court, including when the plaintiff brings state law actions
		- is the statute valid?
		- even if a state has a contrary rule bound up with its cause of action?
		- Under this standard articulated in Hanna it is valid
		- But this seems implausible
* Examples of federal statutes regulating procedure: 1441, 1331, 1332, etc.

Now FRCP track

* Here there are two questions
* 1st - Is the FRCP within Congress’s power? (Congress delegated its power to regulate procedure in Federal District courts to the Supreme Court in the REA and Congress cannot delegate power that it does not have
	+ This is the arguably procedural test
* 2nd – Is the FRCP within the limits that Congress imposed upon the supreme court in the REA - 28 U.S.C. 2072 🡪
* **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. . . .**
* This is the big question - how to read the substantive right limitation in the REA
* *Hanna* 🡪
	+ “The test must be whether a rule really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them.” Sibbach v. Wilson & Co. (U.S. 1939)
	+ If As long as it really regulates procedure, then it doesn’t abridge, enlarge, or modify a substantive right
* We shall return to the substantive right limitation in the REA in Shady Grove…

But Hanna also as new stuff to say about the Federal procedural common law track

* *Hanna* 🡪 Even if the Federal Service rule at issue were Federal procedural common law rather than a FRCP, it would still apply
* “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.”
* In effect, the outcome determinative test in Guar Trust is rejected
	+ The question is no longer whether the difference between Federal and forum state procedure would determine the outcome of the case at the time of the choice
	+ Now the question is whether the difference between the federal common law rule and the state’s rule leads to ex ante forum shopping or inequitable administration of laws
		- Think primarily of forum shopping
		- When you’re thinking about where to sue, would you (litigants generally) say “I want to sue here” because of the difference between federal common law rule and forum state rule?
* Hanna does not mention Byrd’s countervailing Federal interests, but they also come into play in later cases

**Erie flow chart -**

* Is there a state law action (or action of another nation’s law) or is it just a federal question action?
	+ If the latter, there are no *Erie* problems; just use federal procedure
		- There’s no policy of vertical uniformity with respect to federal common law procedure in a federal question case
	+ If the former, then Erie may apply
	+ But the answer depends on the nature of the Federal procedural law at issue
	+ Is it Federal constitutional law (e.g. 7th amendment)?
		- then it applies
		- It does not matter how much forum shopping is created or how much state substantive rights are overridden
	+ Is the relevant federal procedural law a federal statute?
		- 🡪 if yes, it applies if what it regulates is rationally capable of classification as procedural
		- It does not matter how much forum shopping is created or how much state substantive rights are overridden
		- although there are some Green/Harlan worries here
	+ Is the relevant federal procedure law a FRCP?
		- If yes, then two questions
		- 1st is what it regulates arguably procedural? That is, is it within Congress is power?
		- 2nd – is it within the substantive right limitation of the REA
			* Does it abridge, enlarge, or modify substantive rights?
			* What this means it is still an open question – it will be discussed further in Shady Grove\
	+ Is the relevant federal procedural law common law?
		- 1st Question is the Byrd bound-up test
			* Is the state rule bound up in the cause of action? If so, have to use state law
			* again Green questions whether this is always true
		- If state rule is not bound up with the cause of action, you still have a reason to use the forum state’s law if failure to do so would violate the twin aims of *Erie* (forum shopping and inequitable administration of law)
		- BUT even if the twin aims are implicated, there still may be a reason to use the Federal procedural common law rule, if there are countervailing Federal interests in favor of that rule

Let’s look back at old cases in light of Hanna’s rejection of the outcome determinative test...

* Could a federal court sitting in diversity create a common law limitations period different from that of the forum state? 🡪 No
	+ Why not?
		- It would lead to forum shopping
		- And there do not seem to be sufficient countervailing Federal interests in favor of a Federal common law limitations period
		- This is true even if the state statute of limitations is not bound up with the state’s cause of action
		- So the conclusion of Guar Trust is still good law after Hanna
* Should a federal court sitting in diversity use a forum state rule requiring any out of state corporation doing business in the state to appoint an agent for service of process before bringing suit? 🡪 YES
	+ Not bound up in the cause of action
	+ But if federal court didn’t would still lead to forum shopping
	+ *Woods* is still good law post-*Hanna*
* Tolling rules?
	+ *Ragan* is still good law
	+ Which track are we in? 🡪 Federal Rule of Civ Pro or common law?
		- If the former, don’t have to worry about Erie/twin aims
		- SCOTUS says common law track; Walker
		- FRCP doesn’t say anything about tolling
		- No direct collision with federal rule, so we’re not talking about FRCP track
	+ Therefore, have to take forum shopping into account
	+ *Ragan* rightly decided
* *Twombly* and *Iqbal* were both federal question case, so they didn’t talk about *Erie* problem of whether they apply in diversity
* Does *Twiqbal* apply in a diversity case? 🡪 Yes
	+ What track are we in? 🡪 FRCP
		- *Twiqbal* comes from “showing” in (Rule 8(a))
			* Rule 8(a) is valid in diversity cases
			* because Rule 8(a) regulates something arguably procedural; (pleading standards) and does not abridge enlarge or modify a substantive right
	+ If federal common law track, *Twiqbal* would probably be gone in diversity cases
* Work product covered by Rule 26 🡪 FRCP track
* Work product not covered by Rule 26 🡪 common law track (because covered by *Hickman*)…?
* Have to Erie-fy everything we learned about Federal procedure to ask if it’s applicable in a diversity case

*Klaxon*

* Rules about choice of law, in federal court, come from **common law**
	+ So we’re in the common law track
* Whether difference between federal choice of rules and state choice of rules would lead to forum shopping
	+ Yes
* *Klaxon* rightly decided
* Makes sense in diversity cases that you’d want vertical uniformity in choice of law