Conflict of Laws classnotes, Spring 2006. Russell Miller.

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Monday, January 9

The exam: a single essay question; two hours; about eight typed pages.

Introduction to conflict of laws

- These conflicts occur when there's more than one entity that may be interested in having its law applied.
    - So, they occur in multistate litigation, basically.
- Conflict of Laws: disputes and transactions that have legal implications involving more than one sovereign.
    - The core questions that arise from this definition are:
        - Jurisdiction
        - Which body of law ought to apply?
        - Can you get enforcement of the judgment?

    This course will treat these questions, but in this order:

        1. Choice of law
            - Traditional theories
            - New theories
            - Constitutional limitations
        2. Recognition and enforcement of judgments
        3. Jurisdiction
        4. International conflicts

Choice of law

- *Dred Scott* (1856) (h/o)
    - The jurisdiction question is settled itc.--Missouri state and the federal courts have jurisdiction.
    - And, there won't be an enforcement question itc., because Scott is already being held by his master.
    - So, all we have is a choice of law question—what is the effect of taking Scott into free territory (Illinois and Wisconsin)?
        - The dissenters ask: why doesn't Illinois or Wisconsin law apply to this question?
    - What broad legal concerns do the dissenters raise?
        - The will of the people and their lawmakers in free territory versus those wills in slave territory. That is, *sovereignty*.
        - *Comity*, which, roughly, means deference.
- History of choice of law (see Brilmayer h/o)
    - Egyptians: forum law applies
    - Roman: mesh together laws
    - Statutists: look at the statute to determine whether it's “personal” (stays in the territory) or “real” (follows the person)

- Savigny: a multilateral approach, which seeks to examine contending laws in turn and asks whether one or both have pretensions at being the deciding rule. If both have those pretensions, then use a (universal) rule to decide between the two.
- Beale: a radical multilateralist

- Choice of law questions
  - Multilateralism versus unilateralism
  - Forum law versus foreign law
    - Why wouldn't forum law always govern?
      - Comity
      - Domicile, viz., it's meaningfulness
      - Forum-shopping, viz., avoiding it

      But, note the argument that a forum can never apply foreign law—that by applying it, the foreign law becomes forum law.
  - Domicile versus territory
- The traditional approach
  - Now, most jurisdictions apply the modern approach; but there are still some states that follow the traditional approach, including Wyoming.
  - Beale: he strives for a neutral and mechanical answer to choice of law questions.
    - To do this, he divines a "real" law with respect to each field of law—the "general common law." This way, you can determine if states have explicitly—by statute—departed from that general common law; then, you just determine *where* the events occurred and apply that jurisdiction's law.
      - But, how do we know where this place is?
      - And how do we know whether the event is a tort or a contract?

Torts

- The First Restatement (see p12)
  - § 378: the law of the place of the wrong determines whether there was an injury.
  - § 377: the place of the wrong is wherever the "last even necessary" occurs.

N.b.: case reading for choice of law problems:

1. What's the forum?
2. What other interested jurisdictions are there?
3. What outcomes?

Carroll (Ala. 1892) (p1)

- Choice of law questions:
  - Forum? Alabama
  - Interested jurisdictions? Alabama, Mississippi, and Tennessee

- Outcomes?
    - Well, first of all, itc. could involve a tort or a contract—this illustrates the first problem with the Bealean approach.
    - So, if it's a tort:
        - Alabama: Π loses
        - Mississippi: Π loses
    - IF it's a contract:
        - Alabama: Π wins
        - Mississippi: Π loses
- Why does the Alabama court apply Mississippi law?
    - Because the "place of the wrong" occurred in Mississippi (and the court here adopts the Bealean system).
- Are there good reasons to apply Alabama law instead?
    - It's the forum state
    - The contract was entered in Alabama
    - Everyone in the case is from Alabama
    - The actual negligence occurred in Alabama

  So, the only reason to apply Mississippi law is that the "place of the wrong," a neutral rule, was there. (The "place of the wrong" is Mississippi because the "last act" occurred there.)

Monday, January 23

Recall:

- Beale: wants uniformity
    - (By the way, what's so wrong about forum-shopping?)
    - How to achieve uniformity?
        - Look at events
        - that occur in a territory
        - and ask who governs that territory
        - and then ask what that sovereign says
- Torts
    - § 378: the law of the "place of wrong" determines what law to apply.
        - § 377: the "place of wrong" is the state where the last event necessary to make an actor liable for an alleged tort takes place.
    - Unintentional torts: see *Carroll* (Ala. 1892) (p1): why would the Alabama court apply Mississippi law despite all of the Alabama contacts? Because of place of wrong *only*.
        - Note how place of wrong gives the same rule no matter what the forum is—this is the Bealean promise.
            - And, uniformity means predictability and therefore justice (i.e., less discretion for a court to possibly choose law for evil (e.g. *Dred Scott*)).

- Intentional torts
    - *Marra* (D. Vt. 1970) (p16)
        - Choice of law questions:
            - Forum? Vermont federal district court
            - Interested jurisdictions? Vermont and New York
            - Outcomes?
                - Vermont: Π wins
                - New York: Π loses (because New York does not recognize interference torts)
        - Beale would ask: where's the last event necessary for liability? That is, Beale would say, Where did the right to not have affections alienated vest? In New York.
        - This court, though, says:
            - The place of injury is Vermont, because that's where the husband got with the new woman; and consortium follows the Δ.
            - And, anyhow, intentional torts are different. The purpose, with them, is punitive, not just compensatory as with negligent torts. And so the point is to control *conduct*, and so the place of *conduct* should determine the law.
                - That is, the place of conduct allows the court to address the intent on which the tort is based.
                    - And itc. the conduct was in Vermont because the conduct at issue its the luring/enticing/etc.
        - The court foreshadows the modern approach—a reaction against Beale.
        - And, n.b. that the court itc. deviates from Beale.

Contracts

- Beale: three things are argued about in contract:
    1. Does a contract exist?
        - Here, the law of the place of contracting applies (!!), says § 311.
            - The forum gets to decide where the contract *would have been* formed if there *was* a contract.
    2. If so, is it valid?
        - Here, the law of the place of contracting also applies, says § 332.
    3. If valid, what performance is due?
        - Here, the law of the place of performance applies, says § 355. The "last act" idea applies here, too.

Poole (Va. 1919) (p29)

- Choice of law questions:
    - Forum? Virginia
    - Interested jurisdictions? Tennessee and Virginia
    - Outcomes?

        - Virginia: Π wins
        - Tennessee: Π loses, because the Δ wife has no capacity to contract
    - What's the dispute about?
        - About performance, the court says (not formation, as it appears). That is, the court here chooses to "characterize" the dispute as a performance dispute, because it wants to enforce the contract.
        - The court makes this choice based on the intentions of the parties. Beale would hate that, of course.
    - Thus, the court applies § 355, making the law of the place of performance (Virginia) apply. Otherwise, Tennessee law would apply.

Linn (Pa. 1958) (p33) (not discussed in class, but may appear on quizzes and the exam).

Domicile

- This is not a genuine choice of law rule—it's just a helper for other choice of law rules (e.g., other rules will says "enforce the law of the place of domicile).
- Domicile is *not*:
    - residence
    - citizenship
- Rather, it is the place where you have a "settled connection." A "home" and an intent to remain there indefinitely.
    - (N.b., does anyone intend to remain anywhere indefinitely anymore?)
    - § 15: domicile of choice:
        - physical presence
        - intent to make a home

White (W.Va. 1988) (p43)

- Choice of law questions:
    - Forum? West Virginia
    - Interested jurisdictions? West Virginia and Pennsylvania
    - Outcomes:
        - West Virginia: estate goes to the wife
        - Pennsylvania: estate goes half to the wife, half to the siblings
- § 11: you can have one and only one domicile
- Court says that decedent's actual presence (by putting good and turning stock loose in Pennsylvania, and returning there to manage the property) and intent (which is clear, here), put his domicile in Pennsylvania.

Monday, January 30

[Quiz #1]

Marriage

- Marriage, like domicile, is often a choice of law *mechanism* (rather than a choice of law problem).
- However, unlike domicile, marriage can be a choice of law *problem*, too (and more than just rarely).
- So, again, Beale has codified the general common law of marriage in the First Restatement.
    - § 121: a marriage is valid everywhere if the requirements of the celebration state are satisfied.
        - For some reason, this traditional approach has held ground, whereas in other choice of law areas, the traditional approach has been abandoned.
        - How is this like the other Beale choice of law rules?
            - Well, it follows the last act idea (i.e., it looks to where the right vested).
            - And, more importantly, it focuses on territory—the essence of Beale's system.
        - How it this not like the other Beale rules?
            - There is an immediate provision of *exceptions*:
                - A marriage is void if the law of the domicile of either party is violated by the marriage, says § 132.
                - A marriage is void if violative of the forum's public policy, says § 134.
                    - Note that § 134 is *not* unique, because a public policy exception applies to all of Beale's choice of law rules.

Note how this does not promote uniformity. There's a possibility of 50 different approaches to marriage—and Beale is helping to actualize this possibility.

And, § 132 elevates domicile over territory—eliminating the simplicity of the territorial approach.

Why would this be?

- Because marriage is an ongoing relationship?
- Because the *performance* of the marriage is in the domiciliary's jurisdiction? (Like with the contract rules.)
- Because marriage is a *status*?
- Because people care a lot more about marriage than about other contracts?
    - Should they?

Lanham (Wis. 1908) (p65)

- Choice of law questions:
    - Forum? Wisconsin
    - Interested jurisdictions? Wisconsin and Michigan
    - Outcomes?
        - Wisconsin: the marriage is not valid, and the wife can't get support
        - Michigan: the marriage is valid and the wife gets support
- The court states and applies Beale's rules and exceptions.
    - And the court, in it's first exception, says a marriage isn't valid if contrary to the law of nature—it could be saying that even domicile law isn't important, only natural law.
- So, can Wisconsin law have extraterritorial force? I.e., can it render void Michigan marriages?
    - Yes, the court says. Because otherwise Wisconsin law would be a "practical imbecility" if people in Wisconsin could evade it simply by going to another state and coming back.
        - But, the court limits this by saying that legislation must evidence clear intention to apply extraterritorially.
            - And here, the court says, the legislative intent is clear because that legislation doesn't say it's limited to Wisconsin (!!!!!!!!!!!).
                - Why did the court do this ridiculous thing?
                    - Because of the importance of marriage?
                    - Because of the absurdity, artificialness, or arbitrariness of the Bealean narrow-minded focus on boundaries?
                    - Because Mr. Lanham is 84!!!?
                        - This illustrates the problem with the Bealean system—courts are constantly stretching the rules to avoid them, in order to do what's *fair*.

- Same-sex marriage
    - Does Beale's rule say anything about this?
        - § 132(d): statute in the domicile governs
        - § 134: public policy exception (if the policy is "sufficiently offended")
    - What about DOMA?
        - Even if choice of law rules break down and can't keep same-sex marriages from being recognized, DOMA would will permit nonrecognition of them.
    - What's the role of the courts in shaping values?
        - The court in *Burns* (Ga.) (h/o) says it is just following the statute.
            - Should the court have felt able to decide otherwise?
            - If not, is it true that the Court in *Dred Scott* couldn't have done

otherwise, too?

- Fruehwald article:
  - This author would focus on domicile.
  - And he's not satisfied that § 134 would solve the problems, because of the "sufficiently offensive" clause.
    - He also believes this clause would allow too much discretion.

Monday, February 6

Recall: we've gone, so far, through Beale's rules about:

- Torts
- Contracts
- Domicile
- Marriage
  - Why are these different than the rules for contracts? Because marriage is all about performance?

Property

- Real property
  - The traditional approach is a lot like the traditional approach to marriage in that it is still viable (unlike the traditional approach in other areas).
  - The rule: the law of the situs of real property will govern.
    - Why is this Beale's rule?
      - Territory: which provides uniformity and clarity.
        - This is also the base idea of sovereignty—territory seems obviously a part of the sovereign's power.
      - Avoid forum shopping
      - Commerce
    - The tricky part: mortagages
      - Note the difference, generally, between:
        - A *contract* to transfer title
        - Actual *conveyance* of title
      - The rule: mortgages get situs rule treatment—but contracts to transfer get contract rule treatment.
        - What does a mortgage do? It's a conditional *conveyance*.

Burr (Ill. 1914) (p76)

- Choice of law questions:
  - Forum? Illinois
  - Interested jurisdictions?
    - Illinois: the forum, the situs, the residence of the person, and the place where the note was dated.
    - Florida: the place where the note was executed, the trust

was created, and the note was put in the mail.
- Outcomes? (See below—it depends on characterization.)

- How to choose the law to apply?
  - You'll want to characterize the dispute to decide what to focus on.
    - If it's a contract (the note, that is), then the law of the place of contracting applies. Itc., this means that the wife has no capacity, in Florida.
    - It it's a conveyance, then the law of the situs applies. And the wife does have capacity itc., in Illinois.
  - The court says this is a contract dispute. So, we go to § 314 (p24), which says that the place of contracting is where the document is put in the mail. Here, this is Florida.

Thomson (Fla. 1897) (p77)
- Here, we've got the same characterization issue as in *Burr*, but the court here reaches the opposite conclusion—and focuses on the conveyance aspects.
  - So, we see then how characterization inserts discretion into choice of law.

- The end result is that we must realize that both contract and conveyance rules can be at play in real property cases.

- Trust property
  - The Beale rules here look a little like the contract rules, because a dispute can be about validity, or interpretation, or administration.
    - Within each of these categories, Beale breaks trusts up into inter vivos and testamentary.
  - Validity
    - Inter vivos: law of the state where the property is located at creation.
    - Testamentary: law of the state of the testator's domicile at death.
  - Interpretation (of the trust instrument)
    - Inter vivos and testamentary: the usage of terms is governed by the domicile of the trustor (the grantor of the trust) at the time of execution of the trust-creating instrument.
  - Administration
    - Inter vivos: law of the state where the instrument creating the trust locates administration.
    - Testamentary: law of the state of the testator's domicile at death.

Wilmington Trust (Del. 1942) (p103)
- Choice of law questions:
  - Forum? Delaware
  - Interested jurisdictions?

- Delaware: home of the new trustee and the trust principal.
- New York: the donor's domicile, and where the will is located, where the original trust instrument was executed, and where the trust assets were originally located.

- Here, the trust says the beneficiaries can change the trustee—by dissolving the old trustee and creating a new one.
  - And here, the beneficiaries do this, moving the trustee and principal to Delaware.
  - But, the donor is upset with this, and uses his appointment power to put the trust in New York forever.
    - But New York law—the rule against perpetuities—doesn't permit this "forever" arrangement.
- So, New York or Delaware? The court looks at:
  - The donor's domicile
  - The situs of the principal
  - ** The place of trust instrument execution
  - ** Where the trust is to be administered
  - ** The domicile of the trustee
  - The domicile of the beneficiaries
  - ** The intent of the donor

  Thus, the court is trying to determine what jurisdiction is most interested—that is, it's not exactly following Beale's mechanical rules.
    - It focuses primarily on the donor's intent. What does this do to territoriality? It rejects it. (Why??)

Monday, February 13

- Recall: the property rules:
  - Real property
    - Situs: where the property is
    - But, characterization: is the dispute about the property itself or is it about the *agreement* to convey the property
  - Trust property
    - Three main concerns:
      1. Is the trust instrument valid?
         - Inter vivos: law where the property was located when the trust was created.
         - Testamentary: law of the trustor's domicile.
      2. Which jurisdiction governs the interpretation of the instrument?
         - The law of the trustor's domicile at the time of the

execution of the instrument.

3. Which jurisdiction governs administration?
    - Inter vivos: the law where the property is located.
    - Testamentary: the law of the trustor's domicile.

- Personal property
    - Questions here:
        - Conveyance: the law of the state where the chattels are found.
        - Recently moved property: the law of the state where the chattel was located when the interest in the property was created.

Corporations

- Questions here:
    - Formation: where the corporation *would* be formed.
    - Actions:
        - External actions: where the act was done.
        - Internal actions: where the corporation was incorporated.

Flaws in the Bealean system

- Characterization
    - The ability to find a territory is dependent on agreement about the character of the dispute.
    - One innovation of the modern approach is to actually tackle the characterization problem—Beale simply ignored it.
    - *Humschild* (Wis. 1959) (p115)
        - Tort, or family law?
            - If tort, then California law applies because that's where the last act occurred—and Π can't sue her spouse in California.
            - But, if this is about the spouse's capacity to sue, then Wisconsin law applies because that is the domicile—and the spouse can sue in Wisconsin.
        - The court here takes the latter approach. Why?
            - Because of the policy behind the rule—i.e., *Wisconsin* policy, recognized by a Wisconsin court, incidentally.
            - And because there's not much guidance for the court from Beale. We're seeing a gap in the Bealean system.
- Renvoi
    - Doe the "whole" law of the governing jurisdiction apply—including it's choice of law rules?! This can get you trapped in a circle.
        - Beale's answer is to say that you only apply the *substantive* law of the governing jurisdiction; and the choice of law rules come always from the forum's law.
            - What does this say about territoriality? Doesn't it show Beale

not caring completely about sovereignty??

- *University of Chicago* (1936) (p122): here we see a court struggling with renvoi where there's no prohibition against it in place.

- Substance versus procedure
  - This is kind of a subset of the characterization problem.
  - The basic rule:
    - Forum law controls with respect to procedure.
    - Substantive law is chosen under the Restatement's analysis.

    Why is this the rule? Interest analysis. The forum has an interest in managing the process by rules of procedure. "Territory," on the other hand, has an interest in substantive rules.
  - What's what?
    - Pleading form is procedural.
    - Mode of trial is procedural (!!!).
    - Proof of facts is procedural.
    - Evidence is procedural.
  - *Sampson* (1st Cir. 1940) (p131)
    - A car wreck in Maine turns into a suit in Massachusetts federal court, as a diversity action.
      - Massachusetts law says that burden of proving contributory negligence is on the Δ.
      - Main law says that that burden is on the Π.
    - First, the court must determine whether this is a federal or a state question (the *Erie* analysis). This, like the horizontal choice of law question, depends on whether the law is substantive or procedural.
      - The court concludes that the law is substantive, under the *Erie* analysis, and so Massachusetts state law applies.
    - Next, the court must determine the horizontal choice of law question. This question is whether Massachusetts law would apply the Massachusetts or the Maine rule—and this also depends on whether the law is substantive or procedural.
      - The court concludes, under Massachusetts law analysis, that the law is procedural (!!) and so Massachusetts law applies.
- Statutes of limitations
  - Beale says, in essence, that SOLs are procedural—the forum SOL therefore applies (§§ 603–604 (p146)).
    - § 605 draws the distinction between SOLs and internally self-destructing rights (e.g., perhaps, leases for a term).
  - *Flowers* (9th Cir. 2002) (h/o)
  - *Duke* (Wyo. 1979) (p146)
    - Why was this filed in Wyoming anyhow?
      - Δ is a resident
      - Wyoming has a four-year SOL
        - But, it also has a borrowing statute!! (Idaho has one,

too, n.b.)

Monday, February 27

[Sharon McGowan: guest lecture on same-sex marriage]

[Quiz #2]

Monday, March 6

- Public policy exceptions
  - Remember that there's a *specific* public policy exception with respect to marriage.
  - But there's also the general § 612 public policy exception
    - This is a significant concession by Beale in his formulaic, mechanical system.
    - What are we talking about, here? I.e., what is "strong public policy"?
      - Policies implicating *fundamental* notions of fairness and justice.
      - Prevalent conceptions of good morals.
      - Deeply rooted traditions of the common weal.

      This is from *Loucks* (n1p163).
    - N.b. the exception to the exception for assertion of a defense:
      - You can't force a state to recognize an offensive cause of action, but you *can* force it to recognize an offensive defense.
        - Why this distinction? Does this have to do with territoriality??
    - *Holzer* (N.Y. 1938) (p162)
      - Choice of law questions:
        - Forum: New York
        - Interested jurisdictions? New York and (Nazi) Germany
          - Everything points to Germany here—why even consider NY law? Because the public policy in Germany is awful.
            - The court says that NY law won't apply, though, saying that the public policy implicated here is NY's policy to hold foreign nationals to their foreign-made contracts (see ¶0p163).
          - But there's also a defense asserted itc.: that that law required the employer to discharge the Π. Beale would say that objectionable defenses must be permitted.

So, the problems with Beale:

- Public policy exception
- Characterization (which is unaddressed)
- Did Beale successfully address forum shopping? Maybe—it appears so.

Modern approaches

- Currie's "interest analysis"
  - N.b. that no state follows this with respect to contracts.
  - This is built on criticisms of Beale:
    - That Beale selects law without considering the content of the law—and so is too arbitrary.
    - That Beale never considers what policies will be advanced by a choice of law (or what policies will be undermined).
    - That characterization, choice of law rules, last act determinations, and public policy invocations would have to be uniform for Beale to work.
  - Currie's response—have no choice of law rules at all. Just use the existing system of jurisprudence to resolve "conflicts." That is:
    - Construe and interpret the law to divine the policies at stake.
    - And determine whether the state is interested in enforcing its policies.

    But:
      - What does Currie mean by "policy"?
      - Or "interests"?
      - And what is interpretation and construction, anyhow?

      - "Policy" means a sovereign's position on how things ought to be run—what's the domestic purpose that underlies a state's rule?
        - Use classic interpretation and construction methods to answer this.
      - "Interest" means whether it's reasonable for a state to desire to have its law apply, in light of the facts at issue.
      - Interpretation and construction means figuring out what the legislature's actual intention was (as opposed to its motivation).
        - How does this apply to common law?

    Note that Currie doesn't ask about "macro" policies, like being a good neighbor, Miller says.
  - All of this points Currie toward preferring the forum. Currie's rules:
    1. Forum: forum law applies unless someone asserts that foreign law should apply.
    2. Interests: the state that is most interested in enforcing its policies should get its law applied (this would be a "false" conflict).
    3. Apparent conflicts: if more than one state appears interested, try harder to identify the state that's actually most interested (if you can

identify one, then you only had an "apparent conflict.")
4. True conflicts: if both states are truly interested, apply forum law.
5. Unprovided-for cases: if nobody's interested, or if the forum isn't interested, then apply forum law anyway.
6. (Or, just wait for Congress to solve all of this.)

- True conflicts
  - *Lilienthal* (Or. 1964) (p219)
    - Under Beale, the contracts here were made in California, so California law would apply.
    - The court here says, though, that it doesn't make sense to ask *only* where the contract was made.
      - California's policies:
        - Creditor's right to be paid
        - Contracts are generally to be enforced
      - California's interests (Beale things):
        - The contract was made there
        - The contract was to be performed there
      - Oregon's policies:
        - Debtor's right to be protected
        - Contracts to be enforced (so, no conflict here with California)
        - Keep debtors off welfare
        - Encourage people from other states to do business in Oregon
      - Oregon's interests:
        - It's the forum
        - And the domicile of the parties

      Is it clear from this list that one state is more interested?
        - No, not here—this is a true conflict.
        - But, the court, at ¶3p223, seems to think that Oregon's policies trump California's (so, is this a false conflict??)
  - *Bernkrant* (Cal. 1961) (p223): an apparent conflict.
  - N.b. the Leflar "better rule" approach.

Monday, March 20

[Missed class]

The Second Restatement

Monday, March 27

- Review of the Second Restatement

- Presumptive rules are set out for each cause of action—just like Beale, really.
- *But*, there are "unless" clauses—unless another state has a more significant interests, apply the presumptive rules.

So, this is a hodgepodge.

You only go to §§ 6 and 145 if you're trying to determine if there's another state with more significant interests.

Constitutional limitations

- Some constitutional provisions could limit a state's approach to choice of law
  - ** The Due Process Clause of the am14
  - ** The Full Faith and Credit Clause (A4§1)
  - The Privileges and Immunities Clause of A4§2
  - The Equal Protection Clause (am14)
  - The Commerce Clause (A1§8), and especially the dormant Commerce Clause

Due Process and Full Faith and Credit

- The text:
  - Due Process Clause: what's life, liberty, and property in one jurisdiction might not be in another. E.g., an approach to choice of law could have an impact on someone's property in a civil suit.
  - Full Faith and Credit Clause: this recognizes that there are competing jurisdictions.
- Both the DPC and the FFC have come to be analyzed under a single standard by the Court.
  - Our overarching focus will be to determine whether the Court favors a particular approach to choice of law.
  - But we must still try to distinguish DPC from FFC in their effects on choice of law:
    - DPC is primarily concerned with individuals.
    - FFC is primarily concerned with states.
- Due Process Clause
  - *Dick* (1930) (p343)
    - Conflict: Texas has a two-year SOL; Mexico has a one-year SOL that is captured in the express terms of the contract itc.
    - The DPC challenge: can Texas really choose its own law here?
      - Π argues that:
        - The Texas SOL statute is procedural, and so forum law should apply.
        - The Texas SOL is sovereign public policy, and so should be within the choice of law public policy exception.

- The Court says:
  - All acts, and everything in connection with the contract here, were in Mexico (or New York).
  - The fact of Dick's permanent residence in Texas is irrelevant.
  - The Court sees no way that Texas could apply its law—i.e., it would be arbitrary and unfair.
    - This outrage of the Court seems to be the measure of DPC protection here.
    - Thus, the Court seems to be expressing favor for the First Restatement approach—territoriality.
      - But, the Court also says that Dick's permanent residence in Texas is irrelevant—Beale wouldn't even go so far as to ask that question, even if just to say it was irrelevant.

- Full Faith and Credit Clause
  - *Pacific Employers* (1939) (p350)
    - N.b. there was an old "obnoxiousness" test.
    - And there was a balancing of interests test.

      These were the traditional approaches that the Court used—itc., it selects the interest balancing test as the main, if not only one.

    - One state cannot demand another state to substitute its own statute with that of another state, the Court says (¶1p352).
      - Thus we see that the essence of the FFC is that the states have a buffer between them.
    - Also, the Court seems to be gravitating towards something other than the pure Bealean approach to choice of law.
      - N.b. that between *Dick* and itc. came the Great Depression, and perhaps the Court has awakened, by this time, to the states' interests in regulating the workplace.
- But the Court has since harmonized the FFC and DPC analyses:
  - *Hague* (1981) (p359)
    - The Court merges FFC and DPC analyses—see ¶2p361. The merged test is:
      - Look at the state interests and see if the choice of law is fundamentally unfair or arbitrary.
        - The choice will be considered fundamentally unfair or arbitrary if there is no significant contract or aggregate of contacts with the state whose law is applied.
    - Itc., the contacts with Minnesota are:
      - Employment
      - Δ does business there

        - Π moved to Minnesota (but only after the accident)
    - Stevens, concurring, wants to apply different standards for DPC and FFC.
    - The dissent, though, agrees with the merged standard, but just says that the contacts itc. aren't enough.
- *Shutts* (1985) (p376)
    - N.b., this is the first time in the modern era that the Court strikes down a state's choice of law.
    - Here, fewer than 3% of the Π class have any connection at all with Kansas. Nevertheless, the Kansas court applied Kansas law to every claim.
    - The Court says:
        1. You only have to do the DPC/FFC analysis if there's a true conflict.
        2. And if there is a true conflict, you do the arbitrary/unfair = no significant contacts test.
            - Itc., Kansas contacts don't justify choice of Kansas law, the Court says.
    - Note Π's arguments, though:
        1. Some class members are Kansas residents.
        2. Kansas has a strong interest in regulating Kansas petroleum industries.
        3. Πs want Kansas law to apply.
        4. Class certification requires a consistency of claims, so Kansas law must apply to preserve the class, and that this should be counted as an interest.

Monday, April 3

- Recall:
    - DPC and FFC limitations:
        - The standard is whether the law choice is fundamentally unfair or arbitrary, which is proved by showing no significant contact or aggregate of contacts.
            - Note how showing contacts would prove forseeability of the application of that state's law.
        - Even though there's a single standard, each clause has different values inherent:
            - DPC: protects individuals
            - FFC: protects states
        - Does the constitution provide significant limitations on choice of law here??

Discrimination and choice of law

- Miller asks: doesn't choice of law *require* some discrimination?
    - So, the question really is whether there is a constitutional limit on the nature of this discrimination. E.g., is it more unfair to treat A differently than B based on:
        - domicile (i.e. interest analysis), or
            - (Miller thinks that interest analysis based on domicile seems designed to protect assets of the state's residents.)
        - location of the activities at the center of the dispute.
- Where to go?
    - Equal Protection Clause
    - Privileges and Immunities Clause (A4)

    These two clauses seem to speak directly to the choice of law/discrimination question. But the Court has given them very little role in this.
        - P&I has been limited by the Court to questions about access to a state's resources (e.g., state timber). It has never been used in choice of law issues (but if it was, we would use a rational basis analysis).
        - Equal Protection has also played a very limited role, because rational basis would also be applied (in nearly every case). The clause has never been applied in the choice of law context.
    - FFC
        - The Court says that "acts" are due absolute FFC, as are judgments and records. That is, acts (and common law rights of action) aren't due FFC in all cases, whereas judgments and records are.
        - With both "door closing" and "localizing" provisions the Court may invoke FFC and strike them down.
            - Door closing: where a state refuses to hear another state's disputes.
                - This is discriminatory because it's not evenhanded—some get to use the state courts and others do not.
            - Localizing: where a state insists on hearing another state's dispute where the other state has precluded the insisting state's jurisdiction.
                - This is discriminatory because some cases that shouldn't get heard will not get heard, but others will.

            Why would a court pursue a door closing or localizing provision?
                - Judicial efficiency
                - Efficiency and convenience for the parties
                - Deference to the state that created the cause of action
        - What does the FFC say, then?
            - The text seems clear: door closing and localizing do no show full faith and credit, and so FFC would seem to preclude these kinds of provisions.
            - But note that there doesn't seem to be a problem with door

closing in other areas—like criminal and family law.

- *Hughes* (1951) (p394)
  - Illinois law raised in Wisconsin courts
    - Wisconsin has a door closing provision, empowering Wisconsin courts to hear wrongful death actions only if they arose in Wisconsin.
      - This is potentially discriminatory because some litigants won't get to be heard in Wisconsin's courts.
  - Must Wisconsin, despite its door closing provision, give full faith and credit to Illinois's wrongful death cause of action?
    - Yes, the Court says. FFC requires it, because it would be unconstitutionally discriminatory otherwise.
    - In reaching this conclusion, the Court measures the conflicting interests and finds no good public policy reason for closing the door.
      - Plus, Wisconsin has no problem with wrongful death actions, generally.
    - That is, the Court balances Wisconsin's interests in closing the door with the *national* interest in federalism and unity.
    - (N.b. that the Court mentions contacts (¶1p395), but this is just a supplementary reason for the Court's decision.)
- *Wells* (1953) (p398)
  - Must Pennsylvania, despite its one-year SOL, give full faith and credit to Alabama's law, which includes a two-year SOL?
    - No, says that Court. How is this different than *Hughes*?
      - SOLs are procedural, and so traditionally excluded from choice of law—i.e., the forum is entitled to invoke its own SOL.
      - In *Hughes*, Wisconsin wouldn't have to subordinate its policies (which recognize wrongful death actions) to Illinois's (which do too). But itc., Pennsylvania would have to subordinate its SOL policy to Alabama's.
- *Hall* (1979) (p402)
  - Here, California waived sovereign immunity altogether, but Nevada waived it only up to a limited amount.
  - California applies its law and holds Nevada liable for the full amount of damages.
    - This is discriminatory because Nevada will pay different amounts depending on where Nevada commits its torts.
  - So, must California, despite its own limitless waiver of sovereign immunity, give full faith and credit to Nevada's limited waiver?

- No, the Court concludes.
- But what about retaliation? The Court says that the *real* threat to federalism would be if the *federal* courts told California what law to apply.

- N.b. that this isn't vertical, federal/state sovereign immunity at issue here—it's horizontal state/state sovereign immunity (so am11 doesn't answer the question).

Monday, April 10

[Quiz #3]

Privileges and Immunities and Equal Protection

- N.b. that the P&I clause of am14 doesn't protect corporations.
- Privileges and Immunities
  - *Austin* (1975) (p412)
    - P&I guarantees substantial equality of treatment for residents and nonresidents alike.
    - The Court focuses on the complete lack of *any* similar treatment of New Hampshire residents here (they are not taxed at all).
    - All of this, though, will be judged by the rational basis standard.
      - Note too that the Court mentions the "reasonably fair distribution of burdens.
      - Together, these tests mean that "substantial inequality" doesn't require exact equality.
- Equal Protection
  - *G.D. Searle* (1982) (p421)
    - This is a corporate invocation of the Equal Protection Clause—here, there was no SOL for corporations without a registered agent in New Jersey, under New Jersey law.
    - Are corporations a protected class? No.
    - Is there a fundamental right involved? No, because states have absolute discretion in setting SOLs.
    - Note, then, that if the Π was a natural person, he could argue P&I. But here, this corporation is left arguing Equal Protection only.
      - Which leaves them with rational basis to go up against. And the Court finds it.

Same-sex marriage, revisited

- Is DOMA in direct contradiction to FFC?
  - Well, how absolute is FFC? It's not absolute—sometimes FFC doesn't even mean FFC.
    - The test is whether a state has a significant enough contact or aggregate

of contacts to justify applying its law.
        - Plus, FFC only fully protects records and judgments. Public acts (and common law rules) are an exception with lesser protection.
        - And, the FFC itself gives Congress the power to determine how FFC is to be given.
- Recall: marriage and choice of law: the traditional rule is that a marriage is valid if valid in the state where celebrated.
- So, what's left of FFC after DOMA?
    - Are marriages "records" or "judgments"? Not typically, argue some, who say its an administrative act.
    - Currie article: arguing that the purpose of FFC is that states should have absolute control of their own affairs.
        - But, Miller asks, isn't FFC also meant to promote national unity??

Monday, April 17

Judgments

- Note the distinction between "public acts" (legislation and common law) and "records and judgments" in FFC.
    - The former gets reduced FFC protection.
- Records and proceedings
    - Note the need for some kind of portability in a federal system—if there's no guarantee of portability, then there's no finality, really. I.e., to say it's portable is to say it's final.
    - But sometimes we eschew finality in favor of other intersts:
        - E.g., child support, desegregation cases, restraining orders.
    - We'll call the line between finality and no finality *the rule of preclusion*.
        - Res judicata: you can't relitigate a particular claim—i.e., this protects the effect of a judgment of subsequent litigation.
        - Collateral estoppel: the effect of findings of fact determined in one lawsuit, in a subsequent lawsuit.
        - Other preclusion rules:
            - Rule governing re-raising arguments already heard and rejected.
            - Rule against hearing arguments not raised before.
    - Preclusion in the interstate context:
        - Why should one state refuse to give force to another state's judgment? E.g.:
            - Policy objections
            - Disrespect for another legal system (this is probably less likely to occur among U.S. states)
            - Open hostility
            - Blatant error
            - The enforcing state may have a different and more permissive set of preclusion rules

So, the Constitution has a specific provision—the FFC—setting preclusion rules across the states. Also, theres the FFC Act.

- These require FFC for records and proceedings, except, perhaps, when:
  - There are jurisdictional defects
  - There are substantive objections
  - The enforcing court objects to rendering another state's preclusion rules

- The jurisdiction exception
  - *Durfee* (1963) (p642): the "ironclad" rule
    - Losers in Nebraska state court go to federal district court in Missouri
      - The federal court says that the land in question is in Missouri, but the Nebraska state court proceedings trigger res judicata.
      - The federal appeals court reverses, saying that res judicata shouldn't apply to land cases.
      - The Court invokes the "ironclad" rule that an enforcing state can inquire into the rendering court's jurisdiction only in very limited circumstances—*only* if the question of jurisdiction wasn't fully, fairly, and finally litigated in the first suit (however, this is dicta here).
  - *Fall* (1909) (p646): still an "ironclad" rule?
    - Here, the property in question was clearly not in the forum state.
    - The Court says that the rule isn't so "ironclad." Rather, the rule is that a decree in equity cannot operate against the land itself—in equity, only the parties before the court are in its jurisdiction, not anything else.
      - So, how do we harmonize itc. with *Durfee*?
        - Here, the SMJ is only the parties themselves.
        - In *Durfee*, the SMJ included the land itself.

        So, maybe there really is a "land taboo." That is, to the extent that a

judgment is without SMJ to support it, it is void everywhere.

What's special about land?

- Basic ideas of sovereignty
- Efficiency—you don't want to require all land to be registered everywhere before it's really protected.

N.b., also, that itc. the Washington court could still have "enforced" its judgment by coercing the Δ to transfer the land through, e.g., contempt proceedings.

Also, most states have a statute that allows you to file a judgment and therefore guarantee its effect in that state. See I.C. § 10-1302 (h/o).

Monday, April 24

- What kinds of objections might a forum have to giving effect to a foreign judgment?
    1. Jurisdictional defects
    2. Interest of the forum in conflict with the judgment
    3. Judgment/preclusion law of the forum differs from the rendering state's

- Jurisdictional objections
    - Here, an ironclad rule—judgments are always owed respect. Except?
        - *Durfee*: even if the rendering court lacked all jurisdiction, a foreign judgment is *still* owed respect. Unless, perhaps, the jurisdictional aspects were not fully, fairly, and finally adjudicated in the rendering court.
            - Recall:
                - Personal jurisdiction: turns on reasonableness, which usually means minimum contacts.
                - Subject matter jurisdiction

                In any case, the point here is that at some point we're not going to hear any more jurisdictional objections.
            - N.b. *Chicot* and *Sherrer*, which make it clear, Miller thinks, that FFC is required *even if* jurisdiction isn't litigated *at all*.
        - *Fall*: the land taboo.
            - Do not distinguish this case based on the fact that it was in

equity, not at law.
- Rather, here, the land was clearly not within the court's jurisdiction.
  - Why do we have this exception to the ironclad rule? Because we want it to be relatively easy to register land.
- *Kalb* (1940) (p652): does federal bankruptcy jurisdiction oust state court jurisdiction in parallel cases?
  - Yes. Federal courts have monopoly authority over the subject matter of bankruptcy litigation.

- Policy/substantive objections
  - *Fauntleroy* (1908) (p657)
    - Procedural history itc.
      - Mississippi gives a judgment, not touching on the legality of the deal.
      - Missouri gives a judgment, saying a debt's owed, based on the Mississippi judgment.
      - Then, Mississippi is asked to give a judgment based on the Missouri judgment.
    - But, the deal is illegal in Mississippi—so, must Mississippi now enforce a Missouri judgment directly in conflict with its own policy?
      - The Court says that the policy here is a Mississippi rule of decision, not a requisite to a Mississippi court's jurisdiction.
      - And that's not sufficient to excuse Mississippi's FFC obligation. I.e., we still have an ironclad rule.
  - *Thomas* (1980) (p662)
    - The plurality says that DC need not give complete preclusive force to a Virginia worker's compensation award—DC, indeed, can give a supplementary award.
      - Why?
        - Stare decisis. *McMartin* said that FFC is required only if there's "unmistakable language" in the governing state statute saying that the statute is to have preclusive effect outside of the state.
        - But, because there is no majority opinion here, all the case really says is that in the administrative decision context, the ironclad rule is perhaps not so ironclad if there's not "unmistakable language" in the state statute.
          - What's crucial is that the case is limited to the administrative context—the plurality is saying that that proceeding isn't even really a judicial proceeding for FFC clause purposes.
        - The plurality also adds that it doesn't even see a true conflict between the DC and Virginia policies, because DC can only award a supplementary award—i.e., there's no double-dipping.

- *Baker* (1998) (p677)
    - Missouri objects substantively to a Michigan order preventing a particular person from testifying. Missouri says it has a policy to hear all relevant evidence.
    - The Court says that FFC does not require a forum state to follow the rendering state's prescribed time, nature, or manner of enforcing a judgment.
        - I.e., FFC is due only to the merits of the judgment, not to the judicial process prescribed by it.
            - This isn't radical—recall that we've consistently seen a procedure exception in our study of choice of law and the constitutional limitations on it.
    - The end result is that the Michigan judgment here is owed FFC in Missouri, but Michigan can't command a particular process for Missouri's enforcement of its order. See ¶3p679.
    - Thus, after itc.:
        - FFC is due with respect to the parties of a particular matter.
        - FFC is due with respect to the controversy of a particular matter.
        - FFC is due with respect to the disposition of a particular matter, if the rendering court had the authority to order that disposition.
        - *But*, foreign courts hearing cases brought by strangers to the underlying litigation do not owe FFC to the rendering court on matters exclusively within those foreign courts' province.
- Judgment/preclusive law objections: the ironclad rule extends to these objections.