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Diversity Jurisdiction: State Policy and the Independent Federal Forum

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to allow such an important limitation or right to be eliminated without the clearest evidence of intent of the parties to do so, particularly since it is not uncommon for a party to seek to put even clearly implied rights in writing or to broaden existing rights with express contract terms.

V. CONCLUSION

Suggesting the need for and desirability of a standard for deciding subcontracting disputes may be symptomatic of a necessary development in the entire labor arbitration process. As it matures as a means of settling labor disputes, arbitration seems to be following the general pattern of the development of equity and administrative law. With age tribunals acquire collective experience and the sources of their rulings inevitably become routinized. This result is brought about by many factors, and among the most significant is the tendency of the parties, as the tribunal becomes older and more respected, to raise the stakes by bringing before it disputes of increasing importance. When the stakes rise, the need for the greater certainty of result which is afforded by a clearly articulated standard increases. Already the handling by arbitrators of problems of “just cause” in dismissals has become standardized. Subcontracting now seems ripe for similar treatment. Perhaps the time is not so distant when arbitrators will evolve a set of standards for the recurring problems of shop and industry which, like the subcontracting standard proposed, will be compatible with the much prized informality of the arbitration process and yet will provide the necessary certainty and uniformity of result.

DIVERSITY JURISDICTION:
STATE POLICY AND THE INDEPENDENT FEDERAL FORUM

The Supreme Court in Erie R.R. v. Tompkins initiated the first of

89. To show the required clear and unmistakable waiver it would seem necessary to prove that in rejecting a proposed subcontracting term the parties had agreed that all limits on subcontracting were waived. It also seems reasonable, however, to presume that if such a drastic agreement had been reached it would have been included in the written agreement. In other words, the fact that the agreement is silent on subcontracting rebuts the contention that rejection shows waiver clearly and unmistakably.

1. 304 U.S. 64 (1938).
two 1938 reforms designed to clarify the principles of federalism which underly federal diversity jurisdiction. After *Erie* federal courts were required to look not only to state statutes, but also to state court decisions in ascertaining the law to be effected in diversity actions. When the Federal Rules of Civil Procedure took effect later the same year the evolution was complete. While *Erie* supplanted the "uniform" federal common law by requiring federal courts to conform to the policy embodied in the statutory and decisional law of the forum-state, use of the uniform system of adjective law provided by the Federal Rules superseded the practice of federal conformity to state procedure. These changes appeared complementary. The uniform system of procedure did not enlarge, modify or abridge the substantive rights of litigants, and

2. U.S. Const. art. III, § 2, provides in part, "The judicial power shall extend to all Cases, in Law and Equity . . . between Citizens of different States . . . ." The Judiciary Act of 1789, enacted by the First Congress pursuant to the grant of the judicial power in article III of the Constitution, established the federal court system, stating that:

The circuit courts shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law, or in equity, where the matter in dispute exceeds, exclusive of all costs, the sum or value of five hundred dollars, and . . . the suit is between a citizen of the state where the suit is brought, and a citizen of another state.

Act of Sept. 24, 1789, ch. 20, § 11, 1 Stat. 73. The act further provided for removal to a federal court where a diversity action was commenced in a state court against an out-of-state defendant. Act of Sept. 24, 1789, ch. 20, § 11, 1 Stat. 73. These provisions have remained substantially unchanged, except for periodic increases in the jurisdictional sum which is now fixed at $10,000, and are presently found at 28 U.S.C. §§ 1332, 1441(a), (b) (1958).

Perhaps the most frequently advanced reason for the inclusion of the enabling provision of article III in the Constitution and the portion of the Judiciary Act of 1789 creating diversity jurisdiction, is that such measures arose from an apprehension that provincialism would prejudice the rights of the out-of-state litigant if left to seek his remedies in state courts. See, e.g., Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49, 83 (1923). This grant of original jurisdiction in matters of diversity was a subject of lively controversy at its inception and has been continually subjected to grave doubts. Warren, supra at 82. The American Law Institute, in a recent review of the functions of federal diversity jurisdiction, concluded that while present conditions may not justify a contemporary establishment of such jurisdiction, it should be retained unless it can be asserted with confidence that the shortcomings of state court justice which originally gave rise to it no longer exist to any significant degree. ALI, *STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS* 40 (Tent. Draft No. 1, 1963).

3. The Rules of Decision Act, which was enacted in 1789 by the First Congress, provides: *The laws of the several states*, except where the Constitution or treaties of the United States or acts of Congress otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply. Rev. Stat. § 721 (1875). (Emphasis supplied.) This act has been amended and now applies to civil actions generally. 28 U.S.C. § 1652 (1958).

In *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), it was held that Congress had intended "the laws of the several states" to include only state statutes, and where the state legislature had not spoken, the federal "general common law" applied. It was this distinction which was repudiated when *Erie* overruled *Swift*.

4. The enabling act under which the Federal Rules of Civil Procedure were promulgated provides:

The Supreme Court shall have the power to prescribe, by general rules, the
it appeared equally clear that recognition of state substantive policy did not detract from the authority of the federal courts to prescribe their own procedure.⁶

While the reforms initiated in 1938 represented substantial changes in judicial approach to the controversial problem of diversity jurisdiction, they were grounded firmly upon principles of federalism which had been accepted since the time of the constitutional convention. Foremost of these principles is that a government's legislative and judicial power should be co-extensive.⁶ However, where cases arising under state law are adjudicated in the federal courts, the judicial power of the state is less extensive than its legislative power. This disparity threatens to interfere with the federal plan of state autonomy to promulgate policy through legislative and judicial processes.

Mr. Justice Brandeis, writing for a majority of the Court in *Erie*, chose to emphasize that the federal plan of state autonomy was implicit in the Constitution. He used this premise as a basis for the assertion that Congress, and hence the federal judiciary, lacked the constitutional power to make substantive law applicable to diversity cases.⁷ This declaration of constitutional law was doubted in its inception and has failed to gain the Court's acceptance in subsequent years.⁸ Nonetheless, the soundness of the *Erie* doctrine as a principle of federalism seldom has been doubted. It is appropriate that the policy of the forum-state should define the rights and obligations which flow from relationships and transactions that

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⁶ Forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts of the United States in civil actions.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.


⁵ Sibbach v. Wilson & Co., 312 U.S. 1 (1941). The *Sibbach* case involved the application of Fed. R. Civ. P. 35, which provides for a physical examination in a personal injury action brought in a federal district court by virtue of diversity of citizenship. The Court, in a 5-4 decision, rejected the plaintiff's contention that *Erie* prevented federal courts from applying the rule where there was no comparable provision in the applicable state law. In upholding the application of the rule, the majority relied upon the "undoubted power" of the federal judicial system to regulate the procedure to be followed in its courts. Mr. Justice Frankfurter, writing for the dissenting justices, thought that the labelling of the rule as substantive or procedural offered little assistance in resolving the matter. Rather, the question as he viewed it, was whether the federal rule interfered with the inviolability of the person.

⁶ See The Federalist No. 80 (Hamilton) for a discussion of the significant role this principle played in giving form to the federal judicial system.

⁷ 304 U.S. at 78.

⁸ See the concurring opinion of Mr. Justice Reed, *id.* at 90. The Court made a passing reference to the constitutional doctrine in Bernhardt v. Polygraphic Co. of America, 350 U.S. 198 (1956) (dictum). As Judge Clark has stated, the constitutional articulation "seems to have been rather carefully avoided by the Court ever since." Clark, State Law in the Federal Courts: The Brooding Omnipresence of *Erie* v. *Tompkins*, 55 Yale L.J. 267, 273 (1946).
are the legitimate concern of the state. Only in this manner can state autonomy be insured in matters committed to state regulation.

The significant corollary of Erie is the principle that the functioning of the federal judicial process, a matter of primary federal concern, is to be governed by federal law. Thus, federal adjective law presumably applies to all litigation in federal courts irrespective of the source of the substantive right being asserted. Rules traditionally labelled "procedural," however, often express a state policy which is equally as fundamental as that embodied in its "substantive" law. Thus, the substance-procedure dichotomy formulated by Erie and its progeny offers little assistance in determining whether state or federal law governs a particular incident of litigation.

The evolution of the Erie doctrine during the quarter-century since its inception may be characterized as an unceasing effort to establish a sound delineation between the state and federal interests which are involved in diversity litigation. The outcome-determinative test of Guaranty Trust Co. v. York,9 adopted in an attempt to correct the inadequacy of the substance-procedure dichotomy by requiring federal courts to conform to state rules in all matters which might influence the result of litigation,10 was hardly a significant improvement when judged by its success in implementing the principles of federalism. While the substance-procedure standard failed to assess adequately state interests, the outcome test did not accord sufficient weight to federal interests since the only matters evidencing federal judicial independence were a residuum of rules regarded as too insignificant to affect outcome.

Recent cases indicate a new approach to the problem of meaningfully delineating state and federal spheres of interest in diversity litigation.11 They acknowledge that there exist significant federal interests which must be balanced against the benefits of outcome uniformity. The approach they embody requires adherence to federal concepts of trial, not because the conduct of trial is thought too insignificant to alter outcome, but because the dignity of the federal judicial power requires a high degree of independence when administering justice to all litigants properly invoking that power. The following evaluation of this approach examines the fundamental considerations which ultimately must guide any rational demarcation between state and federal authority in diversity litigation, and seeks to determine whether it offers standards that will allow a sound

10. Id. at 99.
delineation between state and federal control over the conduct of trial in diversity cases.

I. Outcome-Determinism: State Door-Closing Devices

The early cases following *Erie* recognized the inadequacy of the substance-procedure dichotomy as a formula for allocating control over diversity litigation between state and federal law. The most obvious weakness was its failure to recognize that rules traditionally regarded as procedural are often as decisive of litigation as substantive law. Disregard of the importance of such rules by federal courts would have been incongruous with the prevailing view that the import of *Erie* was to prevent the fortuity of diverse citizenship from resulting in dispositions substantially different from those that would have obtained in state courts. This rationale led ultimately to *Guaranty Trust*. There the Court, holding that *Erie* required application of a New York statute of limitations barring plaintiff's claim in a diversity action, articulated the outcome determinative test which became the sole criterion for delineating state and federal interests in diversity cases:

In essence, the intent of *Erie* . . . 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.\(^1\)

Under the outcome-determinative standard, whether the rule in question was regarded as procedural or substantive was immaterial. If disregard of the state rule would result in an outcome different from that which would obtain in state courts, the rule was determinative of the litigation's outcome and thus controlling. A federal court exercising diversity of citizenship was regarded, practically speaking, as merely another court of the state.\(^2\)

*Guaranty Trust* was the first in a line of decisions applying the outcome test to state door-closing devices. These cases established that the exercise of federal diversity jurisdiction is confined to controversies cognizable in courts of the forum-state. Application of the outcome test was, for example, held to deny access to the federal forum to a mortgagee where a state statute prohibited issuance of deficiency judgments on foreclosure,\(^3\) and to a plaintiff failing to comply with a state requirement

\(^{12}\) 326 U.S. at 109.
\(^{13}\) Ibid.
\(^{14}\) Angel v. Bullington, 330 U.S. 183 (1947). Bullington had originally brought an action in a North Carolina state court to recover a deficiency judgment. In that
of posting security for the costs of defending an unsuccessful stockholder's derivative action.\textsuperscript{15} Nor were federal courts open to plaintiffs not qualifying to do business within the state who were previously denied access to state courts,\textsuperscript{16} and to those who failed to institute an action by giving notice within the time required by a state statute of limitations.\textsuperscript{17}

action the state's supreme court held that state law barred the requested relief. Bullington v. Angel, 220 N.C. 18, 16 S.E.2d 411 (1941). Bullington then brought a new action in the federal district court. On certiorari, the United States Supreme Court reversed a court of appeals judgment which had affirmed a district court order granting the requested relief. Holding that Bullington's failure to appeal the state court action waived any constitutional question involved in North Carolina's failure to recognize deficiency judgments, the Court reasoned that since a federal tribunal exercising diversity jurisdiction is merely another forum of the state whose purpose is to effectuate state policy, the merits of a claim once litigated by the state court cannot be re-examined in a federal court enforcing the state-created rights. Although the case involved the issue of res judicata, Mr. Justice Frankfurter, writing for the Court, concluded that the jurisdiction of the federal court to entertain the question of state law was, under the outcome test, no broader than that of the state court. In Woods v. Interstate Realty Co., 337 U.S. 535 (1949), the Court rejected counsel's contention that the part of the Angel opinion which dealt with application of the state door-closing rule was merely dictum, stating it was an "alternative ground" for the decision.


\textsuperscript{16} Woods v. Interstate Realty Co., 337 U.S. 535 (1949). The Supreme Court in Woods reversed a circuit court decision which had held that a state rule denying judicial relief to parties who had not qualified to do business within the state did not destroy the plaintiff's cause of action, but merely created a disability to sue in the state courts. The plaintiff thus was left free to pursue his remedy in federal court. Interstate Realty Co. v. Woods, 170 F.2d 694 (5th Cir. 1948). The circuit court had relied upon David Lupton's Sons v. Automobile Club, 225 U.S. 489 (1912) where the Court, when faced with the identical issue, had held the state disability inapplicable in the federal forum on the theory that "the State could not prescribe the qualifications of suitors in the courts of the United States, and could not deprive of their privileges those who were entitled under the Constitution and laws of the United States to resort to the Federal courts for the enforcement of a valid contract." Id. at 499.

Mr. Justice Douglas, writing for a majority of the Court in Woods, held that the Lupton case could no longer be regarded as authority in view of Erie and Guaranty Trust. "The York case was premised on the theory that a right which local law creates but which it does not supply with a remedy is no right at all for purposes of enforcement in a federal court in a diversity case; that where in such cases one is barred from recovery in the state court, he should likewise be barred in the federal court." 337 U.S. at 535, 538.

\textsuperscript{17} Ragan v. Merchant's Transfer & Warehouse Co., Inc., 337 U.S. 530 (1949). In Ragan the Court was faced with the question of whether Fed. R. Civ. P. 3, which provides that an action is commenced by the filing of a complaint, or a divergent state rule, providing that an action commences upon service of process upon the defendant, applied in determining whether the plaintiff had brought an action within the time allowed by the state statute of limitations as required by Guaranty Trust. Mr. Justice Douglas, speaking for the Court, reasoned that the state rule applied since when dealing with a state-created right, "where local law qualifies or abridges it, the federal court must follow suit. Otherwise there is a different measure of the cause of action in one court than in the other. . . ." 337 U.S. at 533.

Mr. Justice Rutledge, in his dissent to the Cohen case, expressed disagreement with the result reached in Ragan and Woods as well. 337 U.S. at 557. Although expressing "grave doubt" that the Erie doctrine has any constitutional foundation, he approved of the doctrine "insofar as it involves a wise rule of administration for the federal courts. . . ." Id. at 558. However, he felt that the majority had gone too far in the instant cases. This extension of the Erie doctrine, in his opinion, required a "mechanical"
While a fortiori the failure to apply state door-closing devices in the federal forum would result in an outcome different than in the state court, these decisions can be sustained on considerations more fundamental than uniformity of outcome. State rules which limit access to courts often express a state policy adopted in response to an obligation to protect local interests. Such policy is equally compelling whether embodied in a statute affirmatively conferring a substantive right, or in statutory or decisional rules limiting the circumstances under which that right may be vindicated. The significance of the role which door-closing devices may play in regulating state-created relationships is illustrated by *Cohen v. Beneficial Industrial Loan Corp.*

The *Cohen* case involved a state statute requiring minority shareholders in stockholder derivative actions to post security for the fees and expenses which the defendant might reasonably be expected to incur in defending the action. The defendant’s statutory right to reimbursement for fees and expenses in the event the plaintiff’s action should be unsuccessful was limited to the security posted. It is clear that this statute was intended as more than a manner of enforcing a state-created right of recovery. The fact that the act applied only to minority stockholders indicated a state policy of protecting the corporation, its officers, and the majority of its stockholders from the abuses of spurious and vexatious stockholder derivative litigation. While the state-created stockholder’s derivative action is a right designed to protect shareholders from the wrongful acts of corporate management, the limitations imposed on its exercise are intended to protect shareholders from the substantial costs they would indirectly incur through its misuse. The limitation is thus an important part of the state policy which defines the rights of the litigants.

It is not suggested that every limitation which a state imposes upon the right to judicial relief is an integral part of state policy defining the closing of the doors of the federal courts, and seriously impaired the authority of the federal judicial power to control the procedure of its courts.


In any action instituted or maintained in the right of any domestic or foreign corporation by the holder or holders of shares... having a total par value or stated value of less than five per centum (5%) of the aggregate par value of stated capital value of all the outstanding shares of such corporation's stock of every class... the corporation in whose right such action is brought shall be entitled, at any stage of the proceeding before final judgment, to require the complainant or complainants to give security for the reasonable expenses, including counsel fees, which may be incurred by it in connection with such action and by the other parties defendant... to which the corporation shall have recourse in such amount as the court having jurisdiction shall determine upon the termination of such action.
rights which attach to a state-created relationship. However, where a
state in the legitimate exercise of its powers to regulate matters of local
concern imposes limitations upon a state-created right—whether through
a direct regulation as in the Cohen case, or by imposing general restric-
tions such as a statute of limitations—the policy expressed by those restric-
tions should be effectuated in the federal forum. Disregard of these
limitations would afford a litigant ready means for circumventing state
policy. It is precisely this abuse of the federal judicial power against
which Erie militates.

It has been argued that state door-closing provisions should not af-
fect diversity suits commenced in the federal forum on the ground that
state law cannot enlarge or diminish the congressionally established juris-
diction of federal courts. State law, it is contended, cannot be applied
where it would interfere with the federal judicial process and thus impair
the integrity of the Article III judicial powers. Of course if Brandeis' con-
stitutional premise were accepted this contention would fail, for Con-
gress could not by extending diversity jurisdiction confer a right, i.e., the
right to judicial relief, where none existed under state law. As noted
above this constitutional rationale has failed to gain the Court's accep-
tance, but an alternative ground for upholding the application of state
door-closing provisions has been advanced. Under it Erie is viewed

20. See, e.g., Jaftex Corp. v. Randolph Mills, Inc., 282 F.2d 508 (2d Cir. 1960),
discussed in text accompanying note 50 infra.
Co., 276 U.S. 518 (1928), a case which precipitated the downfall of Swift v. Tyson,
presented just such a situation. There, Brown & Yellow and a railway company, both
Kentucky corporations operating in Kentucky, desired to enter an agreement which
would give the former the exclusive privilege to solicit passenger and baggage trans-
portation at the latter's terminal. As such a contract would have been void under the
Kentucky common law, it was agreed that Brown & Yellow re-incorporate under the
law of Tennessee and that the contract be executed in Tennessee. Subsequently, Brown
& Yellow petitioned the district court to enjoin competition by Black & White.
See also, Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941), where it was
held that it was necessary to apply the forum-state's doctrine of conflict of laws to
prevent a non-resident litigant from thwarting forum-state policy. For a recent discussion
of the problems engendered by Klaxon see Weintraub, The Erie Doctrine and State
22. This was the theory of the concurring opinion of Mr. Justice Jackson in First
was faced with applying in a diversity action an Illinois statute which provided that no
action of wrongful death could be maintained in Illinois where the death occurred out-
side the state and the defendant was subject to service of process in the state where the
death occurred. ILL. STAT. c. 70, § 2 (Smith-Hurd 1962). The majority held that the
statute violated the full faith and credit clause. U.S. CONST. art. IV, § 1. Mr. Justice
Jackson concurred on the ground that while the statute might be properly applied in the
state courts, it could not operate to restrict the jurisdiction of the federal courts. 342
U.S. at 398. See also David Lupton's Sons v. Automobile Club, 225 U.S. 489 (1912).
23. See the dissents of Mr. Justice Rutledge in the Woods, Cohen and Ragan
cases in note 17 supra. And for the relevant text of article III see note 2 supra.
24. See text accompanying note 8 supra.
merely as a new interpretation of the Rules of Decision Act, and state jurisdictional requirements are said to be "rules of decision" which federal courts are required to apply. But this argument overlooks the limitation upon state rules of decision: state law applies in federal courts except where . . . acts of Congress otherwise require or provide." Congress, pursuant to the powers granted it by Article III of the Constitution, has legislated specific jurisdictional requirements which define the scope of the federal judicial power, and thus has brought the matter of jurisdiction within the act's exception.

Application of state door-closing provisions need not, however, rest upon federal assimilation of state jurisdictional requirements as rules of decision, nor upon lack of congressional authority to regulate jurisdiction in diversity cases. The issue does not go to the dignity of federal judicial power, but rather to the integrity of the rights and obligations which stem from state-created relationships. The federal judicial power extends to the adjudication of state-created rights in controversies between citizens of different states. However, where by the terms of the state policy which defines those rights the litigants are not entitled to judicial relief, they have no standing to invoke that power. It is thus difficult to understand how federal judicial power is threatened by closing the doors of federal courts to litigants who are not entitled to relief by the terms of the right they assert. If it is thought unseemly to apply state rules to deny relief in federal forums, the result would appear an inherent weakness in a federal system where one forum is called upon to enforce rights which are created and defined by the policy of a non-coordinate sovereign.

It is quite a different question, however, whether state rules may direct the manner in which litigation is conducted after the federal judicial power is properly invoked and the parties are beyond the doors of a federal court.

II. CONDUCT OF TRIAL: THE BYRD-SIMLER APPROACH

Application of the outcome-determinative test to rules governing conduct of trial leaves much to be desired. It is apparent that rules pertaining to the orderly administration of justice do not "determine" the result of litigation with the certainty of statutes of limitation. They are but one of several variables which combine to bring about the outcome of an action, and speculation as to the impact which they might have upon

25. See note 3 supra.
26. This argument is developed in Note, State Statutes Depriving State Courts of Jurisdiction as Affected by the Rules of Erie v. Tompkins, 56 Yale L.J. 1037 (1947).
27. 28 U.S.C. § 1652 (1958). In his concurring opinion in First National Bank of Chicago v. United Air Lines, 342 U.S. 398 (1952), Mr. Justice Jackson refuted the argument on the ground that Congress has "otherwise required and provided." Id. at 400.
the result of litigation can lead only to unnecessarily compromising aspects of trial which are unique to the federal judicial process. Moreover, no meaningful purpose could be attributed diversity jurisdiction if federal courts were merely "another court of the state," applying state law in all matters which conceivably might affect outcome. The Constitution charges the federal judiciary to provide an independent forum for the adjudication of state-created rights in diversity matters. Thus, the very existence of diversity jurisdiction presupposes that the conduct of litigation often may have a substantial influence upon state-created rights. And, where divergent state and federal rules reflect different concepts of the judicial function, the need for federal judicial independence is all the greater because the different rules are likely to produce different outcomes. If Erie is applied to deny federal judicial independence in matters pertaining to the administration of justice, the essence of diversity jurisdiction is lost.

In Byrd v. Blue Ridge Rural Elec. Coop., Inc. the Court rejected the concept that a federal court exercising diversity jurisdiction is merely another court of the state, and recognized that considerations other than identity of outcome must determine what law is to govern the conduct of trial. The Byrd case involved a negligence action brought in the federal district court by virtue of diversity of citizenship. The defendant contended that a state workmen's compensation act provided the plaintiff an exclusive remedy. The district court, adhering to the act's provision that a plaintiff's status as a statutory employee was to be determined solely by the court, found that the plaintiff was not an "employee" within the act. The issue of negligence was then submitted to the jury which returned a verdict for the plaintiff. The court of appeals reversed, concluding that the plaintiff was, as a matter of law, a statutory employee. On certiorari, the Supreme Court held that the issue of the plaintiff's status under the act was one of fact to be determined by a jury in a federal court, notwithstanding contrary state provisions.

In reaching the decision in the Byrd case, the Court adopted a two-step approach for determining whether state or federal law governs a particular aspect of litigation. The first step is to inquire whether the disputed rule is an integral part of the parcel of state-created rights, i.e., whether it expresses a state policy which is intended to be "bound up with the definition of the rights and obligations of the parties." The second step of the Byrd inquiry seeks to determine whether there are "affirmative countervailing considerations" which oppose application of the

29. 238 F.2d 346 (4th Cir. 1956).
30. 356 U.S. at 535.
state rule. This second inquiry asks whether the federal rule performs a function which is fundamental to the federal interest of administering justice. The Court concluded under the facts in *Byrd* that the manner in which the federal judicial system "distributes functions between the judge and jury, and under the influence—if not the command—of the Seventh Amendment, assigns disputed questions of fact to the jury" is an essential characteristic of the federal judicial process, and one which prevails over considerations of outcome uniformity.

The Parcel of Rights Approach to State Policy

*Byrd's* rejection of the view that a federal court exercising diversity jurisdiction is merely another court of the state illustrates a significant change in the judicial approach to *Erie* problems. Nonetheless, the "parcel of rights" criterion adopted by the Court was first relied upon to determine whether a state rule purporting to govern the conduct of trial should be applied in diversity actions in *Cities Service Oil Co. v. Dunlap*.

There it was held that a Texas rule, which placed the burden of proof in quiet title actions upon the party attacking legal title, applied to diversity actions. The court determined that the rule was an expression of state policy designed to afford the bona fide purchaser of Texas realty added assurance of title. This decision appears sound. Burden of proof and other rules traditionally regarded as "procedural" are intended not only to guide the orderly and logical progression of trial, but are often designed to enlarge or qualify the rights and obligations which attach to the basic "substantive" relationship. If federal courts are to effectuate state policy it is essential that they apply the rules bound up with the definition of the rights and obligations of the parties.

Other rules pertaining to conduct of trial are not intended to define the parcel of rights asserted, but rather seek to protect a fundamental interest extraneous to the administration of justice. For example, the rule that confidential communications between husband and wife are not admissible as evidence may contravene federal prescriptions designed to facilitate the orderly and efficient administration of the judicial process. The marital communication privilege manifests a state's decision that confidence is essential to the maintenance of the marriage relationship, and that the possible injury to the marriage by disclosure outweighs any benefit of a judicial investigation of the truth. The respect which *Erie* attributes a state's authority to pursue policies different from those of

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31. This aspect of the *Byrd* approach is discussed in text accompanying note 37 infra.
32. 356 U.S. at 537.
33. 308 U.S. 208 (1939).
34. 8 WIGMORE, EVIDENCE § 2332 (McNaughton Rev. 1961).
NOTES

its neighbors logically includes recognition of state prerogative to prevent any single right from encroaching upon other fundamental interests which are proper objects of state protection. Failure to respect such collateral interests could more profoundly affect state policy than the result of a litigation. Yet, the outcome test does not adequately protect the state's interest in safeguarding the marriage in this instance, for the privilege would be "outcome-determinative" and hence applicable only if the excluded evidence were essential to proving a litigant's claim. Here state policy obviously is not concerned with the result of litigation, but with protecting the marriage. The parcel of rights approach would appear to respect the state's interest in the matter not from the narrow view of a specific claim, but as an integrated legal system which defines individual rights and obligations against a background of comprehensive state policy.

A third category of rules which govern the conduct of trial is comprised of those not concerned with the integrity of an underlying legal relationship, but of rules that are directly aimed at regulating the judicial process. Rules of this nature, exclusionary rules of evidence, for example, embody a forum concept of objective fairness. The litigating forum's interest in a just and expedient adjudication of each controversy's merits suggests that it should have the authority to prescribe rules which guarantee integrity in the judicial process.36

Categorization of procedural rules fails to protect adequately state interests, however, for rules do not bear their policy on their face; they acquire meaning only through the functions assigned them in carrying out state policy. To illustrate, exclusionary rules of evidence do not prima facie purport to protect the integrity of primary relationships which are the legitimate objects of state control. Rather, they seek to regulate the judicial process in a manner somewhat opposed to the broad federal policy of basing an adjudication on all the relevant evidence.36 However, where an exclusionary rule combines, for example, with that of the presumptive validity of marriage, it impedes attack upon the mar-

35. See generally Ladd, Uniform Evidence Rules in the Federal Courts, 49 Va. L. Rev. 692 (1963), where it is concluded that a uniform system of evidence rules, with some exceptions, may be applied in diversity actions, and that state rules relating to the competence of witnesses should be thoroughly re-examined in view of their relationship to state interests. The outcome test is concerned only with uniformity of result and fails to consider either the state interest to be served by a particular characterization or the relationship of the rule in question to the intricacies of the process of adjudication. Comment, Federal Rule 43 (a): The Scope of Admissibility of Evidence and the Implications of the Erie Doctrine, 62 Colum. L. Rev. 1049, 1073 (1962).

36. This policy is expressed in Fed. R. Civ. P. 43(a) which provides for admissibility if sanctioned by either federal or state practice. See Ladd, supra note 35, at 697.
riage and thus helps effectuate the state's interest in preserving marital solidarity.

In determining whether a given rule generally thought to regulate the conduct of trial is an integral part of the parcel of state-created rights, a diligent inquiry must be made as to whether the state policy underlying the rule is designed to enlarge or qualify the rights stemming from the relationship. If it is not, the federal rule prevails. But, even if it is determined that the rule is so interwoven into the state policy surrounding the relationship as to be an integral part thereof, the inquiry is not at an end. As illustrated by exclusionary rules of evidence, the great bulk of adjective law does aid state policy in some manner. The second step of the Byrd approach must then be applied to determine whether the federal interest of administering justice to all litigants in the federal forum requires application of an independent federal rule.

Countervailing Considerations: Charting the Course After Byrd

The real significance of Byrd v. Blue Ridge Rural Elec. Coop., Inc. was the Court's recognition that conformity to state law is not confined only by the intrinsic limitations of the Erie doctrine, i.e., to instances where the state rule is an integral part of the parcel of state-created rights asserted. Conformity is further limited by countervailing considerations due the integrity of the federal judicial process. That acknowledgment represents a return to the fundamental principle of federalism at the basis of Erie, viz., that the state's interest in a relationship created by it requires application of state policy to define the rights and obligations which flow from that relationship, and that the rights thus defined are secured by an independent federal judicial process. That is the principle so often obscured by the superficial formulae enunciated in the early cases which applied Erie. While federalism demands the effectuation of state rights and obligations, the rules of the litigating forum which pertain to the administration of justice must be respected in adjudicating those rights.

As noted, where a state rule is bound up with the rights and obligations created by state law, federal courts must determine whether departure from the federal rule is too high a price for giving effect to state policy. They must decide whether the departure will so detract from the integrity of the federal judicial process as to impair the ability of the forum to independently adjudicate litigants' rights. While this process clearly intimates that state policy cannot dictate compliance with state rules where inimical to federal judicial independence, the court in the Byrd case did not decide authoritatively whether an outcome determinative federal rule could prevail over a state rule intended to be an integral part
of the parcel of state-created rights. However, the recent case of Simler v. Conner indicates that substantial federal interests may require adherence to federal determinants of trial notwithstanding contrary state policy.

In Simler the court confronted the issue of jury trial availability where a client petitioned the district court for a declaratory judgment determining his liability to an attorney under a contingent fee contract. The validity of the contract was drawn into question under an Oklahoma statute which provided that contracts entered into between attorney and client while such relationship exists and which are to the advantage of the attorney, are presumed fraudulent. Construing the statute the Oklahoma Supreme Court had held that, as the issue of contract cancellation had to be resolved before relief could be granted, the action was equitable in character and the issue of fraud was triable to the court. In a unanimous per curiam opinion the United States Supreme Court held:

The right to a jury trial in the federal courts is to be determined as a matter of federal law in diversity as well as other actions. The federal policy of favoring jury trials is of historic and continuing strength. Byrd v. Blue Ridge Rural Electric Cooperative, Inc. Only through a holding that the jury-trial right is to be determined according to federal law can the uniformity in its exercise which is demanded by the Seventh Amendment be achieved. In diversity cases, of course, the substantive dimension of the claim asserted finds its source in state law, but the characterization of that state-created claim as legal or equitable for purposes of whether a right to jury trial is indicated must be made by recourse to federal law.

37. In fact, the Court in Byrd decided that the rule in question was "merely a mode or manner of enforcing the immunity." 356 U.S. at 536. This phrase was employed in Guaranty Trust in contradistinction to state rules which would "significantly affect the result of a litigation" if disregarded in the federal courts. Thus, while it was recognized that there were rules to which the outcome determinitive test did not apply, the rationale underlying the exception was that such rules were too insignificant to affect outcome. The "countervailing consideration" approach adopted by Byrd is clearly at odds with this rationale, and insists upon the independence of federal rules because of their significance. Although the rule in question in the Byrd case was considered to be "merely a mode or manner of enforcing the immunity," the Court went on to suggest, in dicta, that even though the state rule is bound up in the parcel of state created rights it cannot in all cases apply in the federal forum.
39. OKLA. STAT. tit. 5, § 7 (1961). This statute permits contingent fee contracts, not to exceed 50% of recovery, but where they are entered during the time the relationship of attorney-client exists, they are presumptively fraudulent. The statute thus places the burden on the attorney to show that the contract is fair, just and equitable. Haunstein v. McCalister, 172 Okla. 613, 46 P.2d 552 (1935).
41. 372 U.S. at 222.
Although citing Byrd as authority for the federal policy favoring jury trial, it is significant that the Court did not apply the first step of the Byrd approach; it made no effort to determine whether the state rule was an integral part of the parcel of state-created rights. The single conclusion to be drawn from Simler is that the state interest, no matter how extensive, cannot outweigh the availability of a jury trial where a litigant is, as a matter of federal law, entitled to such a trial.

Although the issue in both Byrd and Simler concerned the availability of a jury trial, in neither instance did the Court rest its decision on the command of the seventh amendment. Instead, the distinction drawn in the Byrd case between the "mandate" and the "influence" of the amendment was adhered to in Simler where the federal "policy" favoring jury trial was the countervailing consideration which required application of independent federal rules. While the Court did not in either case delineate the scope of the federal policy favoring jury trial, there is no reason to assume that the right extended by this policy would not be at least coextensive with the protection afforded by the mandate of the constitutional provision. The guarantee of the seventh amendment comprehends several aspects of trial. It protects the common law distinction between the province of the court and jury by preserving the control which the judge exercises over the finder of fact. It also encompasses all rules of adjective law incident to the basic right and essential to the preservation of its character, protects the substantive right as distinguished from mat-

42. The amendment provides that "in suits at common law . . . the right of trial by jury shall be preserved, and no fact, tried by a jury, shall be otherwise re-examined, in any court of the United States, than according to the rules of the common-law." U.S. Const. amend. VII. It was early recognized that "suits at common law" was employed in contradistinction to controversies in equity and admiralty, and did not deprive a litigant of the amendment's protection where the right in question was created by statute. Parsons v. Bedford, 28 U.S. (3 Pet.) 433 (1830).

In Byrd, the Court specifically stated that the decision was not intended to intimate any view as to the application of the seventh amendment since the case was disposed of on non-constitutional grounds. 356 U.S. at 537. The Court did intimate a constitutional ground for their decision at one point in the Simler case when speaking of the uniformity demanded by the seventh amendment. 372 U.S. at 222. This, however, appears to have been in reference to the policy favoring jury trials which derives from the "influence" of the amendment, and is consistent with the policy of the Court not to adjudicate a constitutional issue when, as there, it is not essential to the disposition of the case. Dissenting from a previous order which remanded the case for rehearing before the court of appeals in view of a recent decision by the state supreme court, Chief Justice Warren, and Mr. Justices Black and Douglas, stated that in their opinion the case should have been remanded for trial of disputed issues of fact by the jury "as required by the Federal Rules of Civil Procedure . . . our prior decisions and the Seventh Amendment." 367 U.S. at 486. This indicates that the dissenting Justices, at this juncture at least, considered the right as deriving from something other than the mandate of the amendment.

ters of form, and thus facilitates the adoption of improved methods of trial.44

Even if the policy favoring jury trial was all that Byrd and Simler sought to protect, there would nevertheless be few rules governing the conduct of trial which would not fall within its purview. The receipt of evidence, giving of instructions and setting aside a verdict all are tools through which a court exercises control over the jury. In spite of the comprehensive nature of the jury trial right, however, it is but a single element of the federal judicial process. It is thus fortunate that the scope of the countervailing consideration principle need not be viewed so narrowly.

The Court of Appeals for the Fifth Circuit in Monarch Ins. Co. v. Spach45 elaborated on the principles which oppose conformity to state rules governing conduct of trial. The court reversed a district court ruling that a Florida statute excluded evidence offered to impeach certain testimony. The state rule was held not outcome-determinative, since the jury could credit or reject the testimony notwithstanding the proffered evidence, and therefore did not control in the federal forum. In dictum the court continued:

Not the least of these countervailing considerations is the indispensable necessity that a tribunal, if it is to be an independent court administering law, must have the capacity to regulate the manner by which cases are to be tried and facts are to be presented in the search for the truth of the cause. As Erie epitomized, the constitutional factors subject federal courts in diversity cases to special limitations. But the jurisdiction of courts in such cases is no less constitutional than in non-diversity litigation. The judicial power of the United States vested by Art. III of the Constitution “in such inferior Courts as the Congress may * * * establish” is declared to “extend to all cases, in Law and Equity * * *; to Controversies * * *—between Citizens of different States * * *.” A United States District Court clothed with power by Congress pursuant to the Constitution is not a mere adjunct to a state’s judicial machinery. In entertaining diversity cases it is responding to a constitutional demand made effective by congressional action and, as the recent abstention cases have made so clear, it has a constitutional duty to hear and adjudicate. Investment of this profound power and duty carries with it the capacity, if not the affirmative obligation, to pre-

44. Ibid.
45. 281 F.2d 401 (5th Cir. 1960).
scribe such rules as will enable the federal district courts to fulfill these constitutional demands without, at the same time, trespassing upon others of equal and fundamental nature.46

Thus, the jury trial right is not the only element of the federal judicial process protected from unqualified conformity to state law. As Monarch indicates, the integrity of the federal judiciary as an independent forum is itself a countervailing consideration. This independence is essential not as an end in itself, but to insure litigants before a federal forum an independent adjudication of state-created rights by a distinctively federal judicial process. While the federal policy favoring jury trial is "of historic and continuing strength,"47 that particular aspect of the federal judicial process does not prevail against contrary state law because it enjoys an innate sanctity. Rather, it prevails because the manner in which federal courts distribute functions between court and jury is a distinctive characteristic of that process which is essential to its independence as a system for administering justice.

The search for the elements of trial that are necessary characteristics of the federal judicial process, and thus controlled by federal law, is not confined to express congressional policy or common law tradition. The federal interest of adjudicating merits in the most just and expedient manner can be advanced only if federal courts are free to improve the process of judicial administration.48 The recent revisions of the Federal Rules of Civil Procedure illustrate the need for a frequent modernization of the judicial process corresponding to the changing demands which are made upon the system.49 The evaluation, rejection and innovation of techniques incident to the adjudicatory process is only a part of the federal judiciary's responsibility for administering justice. Fulfillment of this responsibility requires the adoption of improved methods of trial either through legislation or judicial innovation.

It might be thought that Erie prohibits the application of judge made federal law in diversity cases, but the First Circuit repudiated that notion in Jaflex Corp. v. Randolph Mills, Inc.50 Jaflex involved an action to re-

46. Id. at 407.
49. The amendment of Fed. R. Civ. P. 50(a), effective as of July 1, 1963, while not momentous in itself perhaps best evidences a response to the varying demands placed upon the federal judicial system. This amendment eliminated the practice which impliedly required the jury's assent by submitting the case to the jury under a directed verdict. The change was designed to expedite the process of adjudication, and thus aid in alleviating the congested docket problem of federal courts. See generally, Judicial Conference of the United States, Amendment to certain Rules of Civil Procedure for the United States District Courts 1962, 31 F.R.D. 621 (1963).
50. 282 F.2d 508 (2d Cir. 1960).
cover damages for injuries suffered when clothing that had been processed by the defendant ignited and severely burned the plaintiff. Defendant Jaftex sought to implead the ultimate manufacturer Randolph Mills, which asserted that it was not subject to service of process under the laws of the forum state and thus, under the *Erie* doctrine, was not amenable to service in a federal diversity action brought in that state. The district court vacated the service of process on Randolph Mills.\(^5\)

The Court of Appeals determined that service was valid under either federal or state practice, and therefore reversed the district court.\(^2\) Judge Clark however, speaking for the court, went on to reject the contention that the doors of a federal court must always be closed to litigants who are barred from state courts. While rules governing access to state courts often express a policy which seeks to regulate the basic relationships that are a legitimate concern of the state, Judge Clark found the jurisdictional issue before him to be a matter vitally affecting federal interests which did not concern state policy. He was of the opinion that the question was only which federal court Jaftex could enter, since it could have brought its claim in Randolph Mills' home district.\(^3\) The determination of which federal court should adjudicate the parties' rights was considered by the court to be a federal matter whose disposition would not offend state policy.\(^4\)

No federal statute explicitly provides for extrastate service on a foreign corporation in such instances. Indeed, the absence of a congressional enactment providing for extrastate service, in addition to the broad provision of Rule 4(d) (7) for service in the manner prescribed by the law of the state in which the federal court sits, indicates a general willingness to allow state law to control.\(^5\) Nonetheless, Judge Clark concluded that *Erie* did not prevent the federal court from formulating a

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53. Jaftex, processor of the cloth, and Wendy Wilson, the original defendant and manufacturer of the allegedly defective garment, were both New York corporations. Thus no question of amenability to process was raised when Wendy Wilson served a third party complaint on Jaftex. However, Jaftex in turn sought to implead Randolph Mills, a North Carolina corporation and manufacturer of the cloth, by service of process upon the New York sales agent of Randolph Mills. The district court reviewed New York law and concluded that where a foreign corporation is not physically within the jurisdiction and is represented only by a person who sells on commission as part of such person's general business of acting in behalf of primary sellers, the corporation is not subject to state court jurisdiction. Shawe v. Wendy Wilson, Inc., 171 F. Supp. 117 (S.D.N.Y. 1959).
mode of proceeding at odds with a state rule. In Jaftex, the federal interest of avoiding unnecessary and inefficient litigation was considered sufficient to require judicially innovated extrastate service.

This aspect of Jaftex appears sound. Erie inaugurated a new concept of the law-making function of the federal courts, not an abdication of that function. It would be most incongruous if the doctrine recognizing the exclusive authority of state courts to promulgate policy in matters of local concern denies a like authority in federal courts as to matters of common federal interest. Federal courts fashion law to fill the interstices of Congressional enactments in an effort to uniformly effectuate legislative purpose. Similarly, the administration of justice in a nation-wide network of courts is not a local concern, but a distinctly federal matter, and it calls for a uniform effort to administer and improve the judicial process. Whether the authority of the federal judiciary to shape the legal consequences which attach to a transaction and to formulate rules of adjective law stem from the same or different sources is of little moment.

The crucial point is that Erie does not prevent the application of judge-made "procedural" law which has "substantive" overtones. Where there is a difference between a state and federal conduct of trial rule, the considerations are the same whether either or both are legislative enactments or uncodified judge-made law. Erie confirmed the competency of state courts as expositors of state policy. Similarly, the creative function of the federal judiciary in promulgating rules for the administration of justice is an essential characteristic of the judicial process. The application of judge-made federal law in these instances differs considerably from the pre-Erie practice of applying "federal common law" instead of state decisional law. The difference lies in adjudicating a controversy by an independent judicial process giving conscien-

56. 282 F.2d at 513.
57. The assault on the federal common law was immediately qualified in Hinderlider v. LaPlata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938), where the Court declared that it would continue to apply judge-made federal law to complement Congressional regulation of interstate rivers. Clearfield Trust Co. v. United States, 318 U.S. 363 (1943) enunciated the authority of federal courts to apply a federal common law, distinct from the law of any particular state, to controversies which so affect the federal government and its operations that a uniform federal rule is essential. This would appear to be a dynamic concept susceptible to adaption to the changing emphasis on federal-state regulation of various relationships. For example, this concept has been invoked to allow application of independent federal rules of construction to a subcontract between a prime contractor under a government defense contract and a third person. American Pipe & Steel Corp. v. Firestone Tire & Rubber Co., 292 F.2d 640 (9th Cir. 1961). See generally Leflar, supra note 55.
58. See Bergner & Szasz, Erie Limited: The Confinements of State Law in the Federal Courts, 40 CORNELL L.Q. 651, 674 (1955), where it is concluded that Erie did not impugn the authority of the federal judiciary to create uniform substantive law in the exercise of the judicial power, but that since Erie there has not been a federal general common law, only many federal common laws differing in source and substance.
tious regard to local policy, and the deliberate fashioning of extrinsic precepts in disregard of state interests.}

In determining which of divergent rules applies in diversity litigation, the importance of the rule as part of an independent system must be weighed against its function as an element of state policy which defines the parcel of state-created rights. This balancing technique required by the Byrd approach preserves the dual character of diversity jurisdiction. It implements the constitutional plan of an independent forum for the fair and just enforcement of state-created rights and, in applying state policy in matters concerning the legitimate interests of the state, it adheres to the principles of federalism.

III. APPLICATION OF THE BYRD-SIMLER APPROACH

Application of the Byrd-Simler approach to determine whether a given aspect of trial is governed by state or federal law is complicated by the fact that divergent state and federal rules may be assigned different tasks in their respective systems. A rule may be interwoven into the parcel of state-created rights and also perform an essential function in the administration of the federal judicial process. This problem is illustrated by instances where state and federal rules are at odds on the sufficiency of evidence required to submit a disputed issue of fact to the jury. A state provision that the issues of contributory negligence and

60. The Supreme Court, in Dick v. New York Life Ins. Co., 359 U.S. 437 (1959), recognized that whether state or federal standards are to be applied in determining the quantum of evidence required to take a disputed issue of fact to the jury is still an open question. The Court declined to decide the issue, however, since counsel had not briefed the question, and disposed of the case on other grounds. The pre-Erie case of Herron v. Southern Pac. Co., 283 U.S. 91 (1931), had once mooted this question by holding that a state constitutional provision requiring submission of the issue of contributory negligence "in all cases whatsoever" did not apply in the federal forum. Chief Justice Hughes, speaking for the Court, found that the district court had acted properly in directing a verdict where the plaintiff was, as a matter of law, guilty of contributory negligence, notwithstanding the contrary state constitutional provision. The Chief Justice reasoned that the Rules of Decision Act did not require the federal court to apply state law where to do so would alter the "essential character or function" of that court, and that the judge-jury relationship is "an essential factor in the process for which the Federal Constitution provides." Id. at 94.

Subsequent to the decision of Erie, the Tenth Circuit followed the Herron case when faced with an almost identical state rule in Diederich v. American News Co., 128 F.2d 144 (10th Cir. 1942). The Herron case concerned the allocation of functions between judge and jury in the federal courts and this, the circuit court thought, was not affected by Erie. This position is supported by the extensive reliance upon Herron in Byrd where the Court commented:

Concededly the Herron case was decided before Erie R. Co. v. Tompkins, but even when Swift v. Tyson ... was governing law and allowed federal courts sitting in diversity cases to disregard state decisional law, it was never thought that state statutes or constitutions were similarly to be disregarded. ...

Yet Herron held that state statutes and constitutional provisions could not disrupt
assumption of risk in all cases must be questions of fact for the jury.\textsuperscript{61} may evince a state policy designed to favor injured plaintiffs by allowing a jury to mitigate the harshness of the law.\textsuperscript{62} On the other hand, granting that whether the proof shows the necessary elements of a cause of action is a question of state law, determining whether a disputed issue presents a question of fact or of law is an integral aspect of the judicial process. Moreover, while a state rule may affect the underlying state-created rights of litigants, it may infringe upon the right of a party in the federal forum to challenge the sufficiency of his adversary’s evidence.\textsuperscript{63}

It will be argued that application of different rules concerning the quantum of evidence required to submit a disputed question of fact to the jury will create a situation conducive to forum shopping. The mere likelihood that the \textit{Byrd-Simler} approach would influence a litigant’s choice of forum does not, however, prevent adherence to independent federal standards of trial. The obvious reason a litigant prefers one forum to another is his anticipation that the ultimate disposition of the controversy will be more favorable to him in the selected forum. Differences in outcome as an inducement to the selection of forum were obviated by \textit{Erie} in-

\textsuperscript{61} 356 U.S. at 539.

There is a lack of unanimity among the lower federal courts on the quantum of evidence issue. \textit{Compare} Trivette v. New York Life Ins. Co., 283 F.2d 441 (6th Cir. 1960) (state law controls), \textit{with} Johnson v. Buckley, 317 F.2d 644 (5th Cir. 1963) (federal law controls), Davis Frozen Foods v. Norfolk & So. R. Co., 204 F.2d 839 (4th Cir. 1953), and Lind v. Schenley Industries, Inc., 278 F.2d 79 (3rd Cir. 1960). But see Berwanger v. Delaware, Lackawanna & Western R. Co., 290 F.2d 589 (3rd Cir. 1962) (affirmed district court decision applying state law). It is worthy of note that Safeway Stores v. Fannan, 308 F.2d 94 (9th Cir. 1962), applied independent federal standards upon the ground that \textit{Byrd} had concluded the issue.

\textsuperscript{62} Anz Const. art. 18 § 5 (1910). This provision was involved in Herron v. Southern Pac. Co., \textit{supra} note 60.

\textsuperscript{63} Note, \textit{State Trial Procedure and the Federal Courts: Evidence, Juries, and Directed Verdicts Under the Erie Doctrine}, 66 Harv. L. Rev. 1516 (1953). There the position is taken that notwithstanding the state policy attributed the state rule, independent federal standards should be applied in view of the constitutional mandate of the seventh amendment. However, the note continues, “since it is a minimum right to jury trial that the Amendment guarantees, it might be argued that federal courts should follow state practice where a state provides a jury but the federal court does not.” \textit{Id.} at 1520. This characterization of the jury trial guarantee as a minimal standard fails to recognize the significance of the jury trial right as a two-sided proposition. See note 43 \textit{supra} and accompanying text. Not only does the amendment protect the litigant’s right to a jury determination of disputed issues of fact in accordance with the rules of common law as they existed in 1789, but his adversary is guaranteed the right to challenge the sufficiency of the evidence brought forward in support of the issue. Galloway v. United States, 319 U.S. 372 (1941). Indeed, if there is any basis in fact for the apprehension that out-of-state litigants would be prejudiced if forced to seek relief in local courts (see note 1 \textit{supra}), the right to challenge the sufficiency of an adversary’s evidence would be instrumental in protecting the out-of-state litigant from local racial, religious and economic bias. Without this guarantee, jury speculation would afford a ready means for vindicating those prejudices.

\textsuperscript{63} See the discussion in note 62 \textit{supra}.
sofar as they resulted from disregard of state policy. Yet, to the extent that differences in result reflect divergencies in the adjective law of the two systems, they will and must continue to influence a litigant's choice of forum as long as two independent systems have concurrent jurisdiction over the enforcement of state-created rights.

A far more objectionable aspect of forum shopping is the uncertainty at the primary transaction level which results from the prospective choice of forum. Diversity principles should not enable one party to determine the legal consequences which attach to a transaction, and thus defeat the just expectations of the other party. They should instead leave the rights and obligations of a state-created relationship substantially unaffected. However, while certainty of legal consequence is desirable, there are countervailing considerations. A party who engages in transactions within the jurisdiction of foreign courts has been assured since the enactment of the Judiciary Act of 1789 the even-handed justice of the federal judicial process. If a state rule so deviates from federal concepts of objective fairness as to change the character of the basic rights and obligations of the parties, the need for independent federal rules appears all the greater. Thus, a change of forum justifiably alters the legal consequences which attach to a state-created relationship when the change occurs through higher standards of fairness in the administration of justice.

Furthermore, it appears that any "uncertainty" from a conceivable difference in legal consequence should not be determinitive of whether a state or federal rule governs. A right which flows from a legal relationship has little value in itself, but its nature depends largely upon the characteristics it acquires in the judicial system in which it is enforced. Thus, it has been observed that "the nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action." 64 Where a party to a contemplated transaction will be entitled in the event of litigation to an adjudication of his rights in a federal forum, the influence which the independent rules of that forum will have upon the rights and obligations that attach to the transaction becomes a part of those rights and must be reckoned with at the planning stage. It is therefore anomalous to assert that a litigant who invokes the aid of a federal court to adjudicate state-created rights "determines" the legal consequences of a transaction and defeats the expectations of his adversary. Instead, he is merely asserting his rights in a manner contemplated by the transaction.

A fundamental criticism of applying divergent rules which might in-

duce forum shopping is that citizens of the forum state are discriminated against because greater freedom is allowed out-of-state parties in selecting the litigating forum. The non-citizen plaintiff is free to choose the forum most favorable to his cause, while the defendant has no choice but to defend his rights in that forum. Yet, it is far from clear that this inequality in choice is unfair. The very existence of diversity jurisdiction presupposes that choice of forum is necessary for a fair adjudication of out-of-state litigants’ rights. On the other hand, there would appear no reason for affording citizens of the forum state the same opportunity to avail themselves of the federal judicial process. A citizen may share in the political life of the state. He is thus responsible for its institutions and can reasonably be required to accept the state courts determination of his rights.

In addition it might be objected that adherence to a state rule which would require a case to be submitted to the jury would not impair substantially the ability of federal courts fairly and adequately to determine litigants’ rights since the court may, in its discretion, set aside a verdict as against the weight of the evidence. But the federal policy of securing the “just, speedy, and inexpensive determination of every action” weighs against this argument since resort to a new trial would entail unnecessary delay and expense. Additionally, the argument avoids the central issue, for the question of whether state or federal law is to govern the allocation of functions between judge and jury must be resolved in either instance.

The considerations involved in determining whether federal courts should be bound by state rules which would require the judge to submit a given question to a jury do not differ materially from those involved in the Byrd and Simler cases where application of the state rule would have required that a question of fact be withheld from the jury. In both in-

65. The present provisions of 28 U.S.C. § 1332, § 1441 (1958), defining jurisdiction in diversity of citizenship cases, are substantially the same as those enacted by the First Congress. See note 2 supra. Under those provisions, the following parties may invoke the federal judicial power, either by instituting an action in the federal forum or through removal of an action commenced in the state court: (a) out-of-state plaintiff, (b) out-of-state defendant, and (c) citizen-plaintiff. While the plaintiff who is a citizen of the forum state may select the forum by instituting an action, his choice of the state court is subject to the out-of-state defendant’s right to remove the action to the federal court. On the contrary, the out-of-state plaintiff’s choice is absolute, for in no event does the defendant who is a citizen of the forum have any voice in the selection of the tribunal which will determine his rights.

A revision of diversity jurisdiction suggested by the American Law Institute would also withdraw the initial choice of forum from the plaintiff who is a citizen of the forum state by limiting federal diversity jurisdiction to removal by the out-of-state defendant in such instances. ALI, op. cit. supra note 2. The rationale upon which this revision is based is that the litigant who is a citizen of the forum state has a voice in the political affairs of that state, and may properly be held responsible for the method in which the state’s judicial machinery operates. Id. at 41.

66. FED. R. CIV. P. 1.
stances the method in which the federal judicial system distributes functions between court and jury is at issue. In both situations, the significance of this distribution as an element of the federal judicial process must be balanced against the role which the state rule, as an element of state policy, plays in defining the state-created rights asserted. The judge-jury relationship is an essential characteristic of the federal judicial process, and is vital to the independence of the federal forum. Thus, notwithstanding the fact that the state rule expresses a state policy, the federal rule prevails. As indicated by the Simler case, frustration of state policy must necessarily be tolerated in matters pertaining to conduct of trial where the alternative is to sacrifice federal judicial independence.

**CONCLUSION**

*Erie R.R. v. Tompkins* requires that state legislative and judicial policy be respected by federal courts when adjudicating claims derived from state-created rights. This doctrine presents a difficult problem concerning rules governing the conduct of trial in cases where a federal court is exercising jurisdiction solely because of the party's diverse citizenship. Since the policy which a state expresses in "procedural" rules often is intended to define the rights and obligations which flow from state-created relationships, it would appear that the federal court should apply state rules pertaining to conduct of trial when adjudicating state-created rights. Federal diversity jurisdiction is, however, an integral part of our federalism and serves a dual function. A federal court exercising diversity jurisdiction not only is required to effectuate the state policy expressed in rules which define a state-created right, but it must also provide an independent forum for the fair and just adjudication of those rights.

A litigant who has properly invoked the federal judicial power therefore possesses two distinct rights—that which derives from relationships created by state law and defined by state policy, and the right to a fair and just determination of the state-created rights by an independent judicial process. There is no simple dichotomy which separates the rules which are bound up in these two distinct rights for, while the state rule may be integrated with the parcel of state-created rights, a divergent federal rule may perform an essential function in the administration of justice. When such a rule is confronted, the significance of the state rule as an element of state policy must be weighed against the affect which departure from the federal rule will have upon the ability of the federal forum to make a fair and just determination according to independent concepts of objective fairness. Only through this balancing technique can the precarious equilibrium demanded by our federalism to protect
a litigant’s state-created right be achieved, and encroachment upon his right to an independent federal trial be stemmed.

The delineation of state and federal law which is necessary to preserve this equilibrium cannot be attained by so-called “tests” which purport to categorize various “procedural” rules on the basis of correlations supposed to exist between the categories into which the rules are fitted, and the rights which the rules represent. The Byrd-Simler approach does not create a talismanic dichotomy which separates state and federal control over diversity litigation, but it does succeed in laying bare the issues in a manner never before achieved. The return to the principles of federalism which is required by this approach, while it does not offer expediency, affords a basis upon which federal courts may build a sound delineation between state and federal authority.

SEGREGATION LITIGATION IN THE 1960’S: IS THERE AN AFFIRMATIVE DUTY TO INTEGRATE THE SCHOOLS?

The flood of school segregation litigation has spilled over the dike of the Mason-Dixon line into the courtrooms of the northern states. This litigation in the north subsequent to the decision in Brown v. Board of Education1 is a relatively new phenomenon, occurring mainly in the last three years, and presents a number of new legal issues for analysis. Litigation centers around the administration of most northern school systems on the neighborhood school plan which in many instances has resulted in extensive racial imbalance within individual schools of a system.2 The problem has been labeled in much of the recent literature as “de facto” segregation. This choice of labels is unfortunate for in the context of public school litigation segregation is a legal conclusion and implies unconstitutionality; thus, the label assumes the conclusion of the issue.

The major legal problem arising from this factual context is whether racial imbalance is unconstitutional in and of itself. The determination

2. The use of the neighborhood school plan as the primary method of school organization is so widespread and so traditional that exact figures as to the extent of its use do not seem to be available. “Attendance zones constitute the time-honored method of apportioning children among schools. . . .” [1961] 2 COMM’N ON CIVIL RIGHTS REP. 20. Apparently educational researchers have never felt it worthwhile to determine exactly what per cent of the nation’s school systems operate on this plan. However, a rough indication of its extensive use is given by a recent nation-wide poll of school administrators in which 95 per cent of those replying favored neighborhood schools. SANCTION NEIGHBORHOOD ATTENDANCE POLICY, 70 NATION’S SCHOOLS 55 (Jul. 1962).

The term racial imbalance is used in this note to denote the disproportionate representation of white and Negro races within the schools of a system.