The Proper Standard for Directed Verdicts in the Federal Courts: The Influences of the Seventh Amendment and the Erie Doctrine

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I. INTRODUCTION

The decision in Erie R.R. Co. v. Tompkins\(^1\) did more than merely overrule Swift v. Tyson;\(^2\) it overruled an entire jurisprudence.\(^3\) The effects of the holding have been predictably far reaching, and what has emerged has been broadly characterized as the " Erie Doctrine."\(^4\) The " Erie Doctrine" stands for the proposition that a federal court sitting because of the diversity of citizenship of the parties must apply the constitutional, statutory, and common law of the state in which it sits.

After the Supreme Court's decision in Swift v. Tyson,\(^5\) it was considered settled that in diversity suits\(^6\) federal courts were required to adhere to state statutes and state decisions regarding matters of strictly local law, but were free to decide matters of "general" law. The objective of the Erie decision was to provide relief from the inequities which arose because of variances between state and federal general standards under Swift.\(^7\) The precise holding of Erie was that where federal law was not controlling, federal courts sitting because of diversity jurisdiction must apply the applicable state substantive law.\(^8\)

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3. Prior to Erie, law was regarded as a function of reason. Precedent, as such, did not necessarily formulate reason, but rather, gave evidence of it. Consequently, federal courts considered themselves completely independent from state courts in the quest to discover what was reasonable. This was true notwithstanding the federal government was otherwise without constitutional authority to create certain rights or obligations in the first instance. Guaranty Trust Co. v. York, 326 U.S. 99, 101-02 (1945).
5. 41 U.S. (16 Pet.) 1 (1842).
8. Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or "general," be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.

304 U.S. at 79.
Because of the language employed by Mr. Justice Brandeis in the *Erie* decision, the Supreme Court and the various circuit courts have had to delineate the scope and application of *Erie* to the many areas where the federal law conflicts with state law. It has been determined that state law governs the manner in which presumptions operate,\(^9\) the appropriateness of resorting to *res ipsa loquitur*,\(^10\) the choice of law rule,\(^11\) and the allocation of the burden of proof.\(^12\) On the other hand, the Supreme Court has concluded that *Erie* does not mean that state law must resolve issues relating to the procedural operation of the Federal Rules.\(^18\) The Court has also held that whether an individual is entitled to a jury trial is purely a federal question answered through the application of federal law.\(^14\) Left unanswered, however, is the question of whether state or federal standards determine the sufficiency of evidence to warrant a submission of the case to a jury.\(^15\) It is the purpose of this Comment to examine that precise question. The resolution of the problem of which standard to apply becomes of crucial significance when the federal courts would direct a verdict on the basis of the evidence presented but the state courts would submit the issue to the jury. For example, there may be a state constitutional provision that requires certain issues to be decided by a jury\(^16\) or a state rule that requires only a scintilla of evidence to take a case to the jury.\(^17\) These provisions, of course, clash with the generally recognized federal standard that the court may direct a verdict if the evidence is such that reasonable men could not differ as to the result.\(^18\)

9. Worthington Corp. v. Lease Management, Inc., 352 F.2d 24 (6th Cir. 1965); Barnett v. Aetna Life Ins. Co., 139 F.2d 483 (3d Cir. 1943); British America Assur. Co. v. Bowen, 134 F.2d 256 (10th Cir. 1943); 5 J. Moore, FEDERAL PRACTICE ¶ 43.08 (2d ed. 1967) [hereinafter cited as Moore].

10. Detroit Edison Co. v. Knowles, 152 F.2d 422 (6th Cir. 1945); Hotel Dempsey v. Teel, 128 F.2d 673 (5th Cir. 1942); Andrus v. Nieto, 112 F.2d 250 (9th Cir. 1940); Coca-Cola Bottling Co. v. Munn, 99 F.2d 190 (4th Cir. 1938); Hill, State Procedural Law in Federal Nondiversity Litigation, 69 HARV. L. REV. 66, 71-72 (1955).


12. Cities Service Oil Co. v. Dunlop, 308 U.S. 208 (1938); Sampson v. Chandell, 110 F.2d 754 (1st Cir. 1940); 5 Moore, supra note 9, at 43.08; Morgan, Choice of Law Governing Proof, 58 HARV. L. REV. 153, 187 (1944); Note, Diversity Jurisdiction: State Policy and the Independent Federal Forum, 39 IND. L.J. 582, 592-93 (1964).


Before examining the question of whether state or federal standards do or should govern the sufficiency of the evidence in diversity cases, it would seem important to note some difficulties which relate to the constitutional problems presented. In *Erie*, Mr. Justice Brandeis asserted that it was necessary to overrule *Swift* because of the "unconstitutionality of the course pursued" by the federal courts prior to *Erie*. This broad statement has prompted a number of commentators to criticize the *Erie* decision on the grounds that the federal courts are not bound by the tenth amendment to follow state decisional law in diversity cases.

In addition, it has been suggested that Congress may constitutionally

19. The injustice and confusion incident to the doctrine of *Swift v. Tyson* have been repeatedly urged as reasons for abolishing or limiting diversity of citizenship jurisdiction. . . . If only a question of statutory construction were involved, we should not be prepared to abandon a doctrine so widely applied throughout nearly a century. But the unconstitutionality of the course pursued has now been made clear and compels us to do so.

304 U.S. at 77-78 (1937).


The thrust of the constitutional argument centers around the principles of federalism reflected in the tenth amendment. Mr. Justice Brandeis referred to these principles when he quoted with approval the comments of Mr. Justice Field in his dissenting opinion in *Baltimore & O.R.R. v. Baugh*, 149 U.S. 368 (1893):

I am aware that what has been termed the general law of the country — which is often little less than what the judge advancing the doctrine thinks at the time should be the general law on a particular subject — has been often advanced in judicial opinions of this court to control a conflicting law of a state. I admit that learned judges have fallen into the habit of repeating this doctrine as a convenient mode of brushing aside the law of a State in conflict with their views. And I confess that, moved and governed by the authority of the great names of those judges, I have, myself, in many instances, unhesitatingly and confidently, but I think now erroneously, repeated the same doctrine. But, notwithstanding the great names which may be cited in favor of the doctrine, and notwithstanding the frequency with which the doctrine has been reiterated, there stands, as a perpetual protest against its repetition, the Constitution of the United States, which recognizes and preserves the autonomy and independence of the States — independence in their legislative and independence in their judicial departments. Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specially authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the State and, to that extent, a denial of its independence.

304 U.S. at 78-79. Brandeis went on to declare "that in applying the doctrine this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several states." 304 U.S. at 80. In this light it is significant that in the decisions following *Erie*, the Supreme Court has only had occasion to refer to the Constitution in two cases, and in each case implicitly refused to adopt a constitutional basis for the *Erie* doctrine. *Hanna v. Plumer*, 380 U.S. 460, 468 (1964); *Bernhardt v. Polygraphic Co. of America, Inc.*, 350 U.S. 198, 202 (1956).
enact substantive law for the regulation of diversity cases. However, in spite of these conflicting views it would appear that *Erie* was intended to be, and should be considered to express, a constitutional doctrine. Any other reading is undermined by the clear statement of Mr. Justice Brandeis that the rule of *Swift v. Tyson* was unconstitutional. Moreover, while it is clear that Congress has the authority to enact substantive law which must be adhered to by the states pursuant to such constitutional provisions as the commerce clause, it is far from clear that the federal judiciary could establish a uniform body of law in basic tort or contract law. Such a view clearly violates the tenth amendment mandate of federalism. Accordingly, despite the disagreement as to the constitutionality of *Erie*, this Comment presupposes that *Erie* is constitutionally required.

Although these tenth amendment implications of *Erie* present interesting questions, this Comment will primarily concern itself with the constitutional problems posed by the interrelationship of *Erie* and the seventh amendment right of jury trial. Admittedly, the right to trial by jury was not specifically at issue in *Erie*, however, both the seventh amendment and *Erie* have played influential roles in recent decisions of courts confronted with the problem of choosing between a federal or state standard governing the sufficiency of the evidence. In order to fully develop the effects which *Erie* and the seventh amendment have had on the question of sufficiency of evidence in diversity cases, this Comment will also examine the expanding scope of the *Erie* doctrine, the seventh amendment implications of decisions following *Erie*, and the federal policy considerations which pervade this area of the law.


23. The seventh amendment to the Constitution provides: In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rule of the common law.
II. History

As noted earlier *Erie* stood for the proposition that state law would have to govern the substantive rights and obligations of the litigants. As a means of ascertaining the limits of *Erie* the Court endorsed the “substantive-procedural” test in *Sibbach v. Wilson & Co.*24 This vague standard was soon recognized as unworkable, and consequently was abandoned in *Guaranty Trust Co. v. York*25 where the Court adopted the “outcome-determinative” test.

In *York* certain noteholders alleged that the defendant trust company had breached its fiduciary duties by failing to protect their interests and by neglecting to disclose its own self interest in sponsoring a collection plan. The trust company moved for summary judgment on the grounds that the state statute of limitations barred the action. The noteholders argued that under *Sibbach* the federal court was not obliged to follow the state law since limitation of action statutes had been traditionally characterized as procedural in nature. The Court rejected the noteholders’ contention, declaring:

> It is . . . immaterial whether statutes of limitation are characterized either as “substantive” or “procedural.” . . . 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 tried in a State court.26

The *York* case clearly redefined the thrust of *Erie* to the extent that the *Erie* rule was reduced to a mechanical test, *viz.* if state law substantially affects the outcome of the litigation, regardless of the traditional classification of the rule of law, that rule rather than the divergent federal law controls the litigation.27 Criticism of the outcome-determinative test soon arose.28 Legal scholars doubted whether the test was required either by *Erie* or by the Constitution.29 It was suggested that

24. 312 U.S. 1, (1941). The Court in *Sibbach* enunciated the scope of the “substantive-procedural” approach when it stated:

> Congress has undoubted power to regulate the practice and procedure of federal courts, and may exercise that power by delegating to this or other federal courts authority to make rules not inconsistent with the statutes or Constitution of the United States; but it has never essayed to declare the substantive state law, or to abolish or nullify a right recognized by the substantive law of the state where the cause of action arose, save where a right or duty is imposed in a field committed to Congress by the Constitution. On the contrary it has enacted that the state law shall be the rule of decision in the federal courts.

26. *Id.* at 109.
the avoidance of the substantive-procedural classification would lead to the "obliteration of the role of the federal judiciary. . . ."30 One commentator remarked that the outcome-determinative test passed over the essential rationale of *Erie* which recognized that state courts were to be organs of coordinate judicial authority, and, instead focused on an incidental consideration of *Erie*, *i.e.*, the discouragement of forum shopping.31

The weakness of *York* having become apparent, the Supreme Court again re-examined *Erie* in *Byrd v. Blue Ridge Rural Elec. Co-op, Inc.*32 There, a North Carolina plaintiff sued a South Carolina corporation in federal court to recover damages sustained as a result of the defendant's alleged negligence. The defense asserted by the corporation was that the applicable state law granted an employer tort immunity from claims prosecuted by its employees. The question, therefore, resolved itself into one of ascertaining the employment status of the plaintiff. According to local practice, the question of whether an individual is the defendant's employee was one decided by the judge, not the jury.33 The federal court, however, elected to ignore the state practice and submitted the question of the plaintiff's status to the jury. In approving the application of the conflicting federal practice, Mr. Justice Brennan, speaking for the Court, remarked:

> It may well be that in the instant personal-injury case the outcome would be substantially affected by whether the issue of immunity is decided by a judge or a jury. Therefore, were "outcome" the only consideration, a strong case might appear for saying that the federal court should follow that state practice.

But there are affirmative countervailing considerations at work here. The federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction. An essential characteristic of that system is the manner in which . . . it distributes trial functions between judge and jury. . . .

The policy of uniform enforcement of state-created rights and obligations . . . cannot in every case exact compliance with a state rule — not bound up with rights and obligations — which disrupts the federal system of allocating functions between judge and jury. . . . Thus the inquiry here is whether the federal policy favoring jury decisions of disputed fact questions should yield to the state rule. . . .34

30. *Id.* at 1032.
34. 356 U.S. at 537-38.
Significantly, the Byrd approach contemplates a two step analysis. First, a federal court must determine whether the conflicting rule is bound up with the rights and obligations of the litigants. Then, if the disputed law is so inextricably bound up, Erie requires that the federal law yield. However, if the point of disagreement is not so intimately related to the litigants respective rights and obligations, then the court must balance the possibility of reaching divergent outcomes and the possibility of encouraging forum shopping against the countervailing considerations.85 Clearly, foremost among those considerations is the deep-rooted principle that the judge's relationship with the jury is a fundamental tenet of an independent federal judiciary.86

The Erie metamorphosis was not completed with Byrd, for in Hanna v. Plummer87 the Supreme Court narrowed the situations in which the Byrd balancing approach is permissible. In Hanna the Court confronted a conflict between the state and the federal procedural rules — a conflict of law which was not one which directly bore on the rights and obligations of the parties. The question to be resolved was whether the federal rule regarding service of process preempted a contrary state rule. In electing to follow the Federal Rules, the Court agreed with Byrd that the outcome-determinative test was not intended to serve as a talisman.88 Instead of grounding its decision on the Erie—York—Byrd rationale, however, the Court looked to the Rules Enabling Act,89 thereby avoiding any balancing considerations, and held that service of process in a diversity case should be made in accordance with the Federal Rules rather than adhering to the revelant state rules on service. It is important to note that in spite of Hanna's exclusion of the Federal Rules from the ambit of Erie, this in no way indicates that all incidents of the federal jury trial are outside the scope of the Erie doctrine.90 In summary, it may

86. See generally Hart, The Relations Between State and Federal Law, 54 COLUM. L. REV. 489, 512 (1954); Quigley, supra note 11 at 1033–34; Comment, Federal Rule 43(a): The Scope of Admissibility of Evidence and the Implications of the Erie Doctrine, 62 COLUM. L. REV. 1049, 1065 (1962); 58 HARV. L. REV. 153 (1944). The question of what other "countervailing considerations" might exist must await further comment by the Court. See pp. 209–12 infra for a discussion of this aspect of the problem.
88. Id. at 466–67.
89. The Rules Enabling Act provides in part:
   The Supreme Court shall have the power to prescribe, by general rules, the 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. . . .
be stated that in matters outside the Federal Rules, the *Erie* doctrine as refined in *York* and *Byrd* should provide the test with which to resolve the proper standard to be applied in submitting questions to the jury.

III. THE CONSTITUTIONAL IMPLICATIONS OF *Erie* AND ITS PROGENY UNDER THE SEVENTH AMENDMENT: POLICY OR COMMAND?

As previously noted *Erie* did not involve the issue of what should be done when the state standard for sufficiency of the evidence varies from the federal standard. However, the underlying rationale of the Court's decision in *Byrd* that federal law determines the right of jury trial under the seventh amendment indicates the direction in which the Court is heading. In *Herron v. Southern Pacific Co.*\(^{41}\) there was a state constitutional provision that the affirmative defense of contributory negligence must be decided by the jury. The district court directed a verdict for the defendant holding the plaintiff contributorily negligent as a matter of law. On appeal, the Supreme Court affirmed and held that state laws could not alter the basic function of a federal court, and that the seventh amendment governs the distribution of functions between judge and jury, despite state constitutional provisions to the contrary.\(^{42}\) The vitality of *Herron* is questionable, however, since it was decided prior to the Supreme Court's decision in *Erie*. Primary attention must, therefore, be directed at the Court's decision in *Byrd v. Blue Ridge Rural Elec. Co-op.*\(^{43}\) which has been cited for the proposition that federal courts are required to follow the federal standard in determining when it is permissible for the court to direct a verdict.\(^{44}\) As previously noted\(^{45}\) the issue to be resolved in *Byrd* was whether the judge or jury should decide the employment status of plaintiff in order to determine if defendant employer had immunity under a state workmen's compensation statute. Despite existing state case law which reserved such decisions to the judge, the Supreme Court affirmed the district court's determination that the issue be submitted to a jury. The Court recognized that under *Erie* the federal courts must adhere to local law when a statute involves state-created rights and obligations but noted that the state cases in-

\(^{41}\) 356 U.S. 525 (1958).
\(^{42}\) See pp. 198-99 supra.
\(^{44}\) 356 U.S. 525 (1958).
\(^{45}\) See pp. 198-99 supra.
interpreting the statute involved did not expressly decide whether the matter was substantive or procedural. The Court cited both *Erie* and *York*, and found no
ting that this rule [requiring a judge to decide the plaintiff’s status] was announced as an integral part of the special relationship created by the statute. Thus the requirement appears to be merely a form and mode of enforcing the immunity, [citing *York*] and not a rule intended to be bound up with the definition of the rights and obligations of the parties.46

Clearly, by *Erie* standards, the Court had concluded that the state rule in question was not substantive in nature and, as such, plaintiff was entitled to a jury trial. However, the Court went further and declared that, even though assigning the issue of plaintiff’s status to the jury instead of the judge might substantially affect the outcome of the litigation under *York*, thereby requiring that the state rule be applied, that there were “affirmative countervailing considerations” which required adherence to the federal rule. The Court felt, “under the influence — if not the command — of the Seventh Amendment,”47 that jury verdicts were an essential characteristic of the federal judicial system and that the state rule must give way to an overriding “federal policy against allowing state rules to disrupt the judge–jury relationship in the federal courts.”48

These crucial passages have borne considerable weight in the decisions of those courts in the various circuits which hold that the sufficiency of the evidence is governed by a federal test because of the seventh amendment.49 Typical of the decisions which have adopted the reasoning of *Byrd* is *Planters Manufacturing Co. v. Protection Mutual Ins. Co.*,50 where the evidence offered by the insured was found on appeal to be sufficient to raise a question for the jury. In so deciding the court asserted that it was required to follow the federal standard because, “if the seventh amendment requires uniformity in the exercise of the jury trial right in the federal courts, surely that subsumes uniformity in the exercise of the power to direct a verdict or grant a judgment n.o.v.”51 The court also concluded that “[i]t is the task of state law to dictate when a federal trial judge must take questions of fact from a jury by means of a directed verdict or a judgment or a judgment n.o.v. seems hardly less disruptive of the federal judge–jury relationship than assigning the task of resolving factual disputes to the trial judge initially.”52 The crucial question to be resolved at this juncture is, therefore, whether the seventh amendment

47. Id. at 537.
48. Id. at 538.
50. 380 F.2d 869 (5th Cir. 1967).
51. Id. at 871.
52. Id.
commands the federal courts to apply the federal standard. It would appear that for at least three reasons the seventh amendment does not require such a result.

First, it is important to note that the Supreme Court has never explicitly interpreted the seventh amendment to require the application of a federal standard. Admittedly the Court in *Byrd* emphasized the importance of preserving the independence of the federal courts and assuring the proper distribution of judge-jury functions in federal court. However, the Court clearly avoided grounding its decisions upon constitutional absolutes stating only that the Court's decision was "influenced" by the seventh amendment. Since the Court had the opportunity to rest its decision on the seventh amendment, its failure to do so undermines any contention that the amendment controls the correct standard to be used. Moreover, *Byrd* did not involve the question of the proper standard for the quantum of evidence necessary to submit a case to the jury, but rather the more basic question of the availability of jury trials in diversity cases when the state rule was in conflict with the federal right. In such an instance the Court was clearly correct in looking to the seventh amendment since the right to a jury trial is derived from that amendment and implemented by federal statute. Nevertheless, the Court did not indicate that the seventh amendment commands that a federal standard apply to the sufficiency of evidence and, in fact, in a footnote, it denied that there was any necessity to consider the constitutional question. Therefore, it may be suggested that the federal courts which adopt this approach are in error.

Secondly, there is a fallacy in the reasoning which concludes that, because the seventh amendment requires a right to jury trial in certain civil actions, all the incidents of a jury trial must be determined according to the federal standard, including the federal standard governing sufficiency of the evidence. Such reasoning is indeed tenuous in view of the fact that the operation of presumptions and the allocation of burden of proof during the trial have been consistently controlled by state law. It would be startling to envision every dismissal of a complaint demanding a jury trial or every judgment n.o.v. as raising a constitutional question under the seventh amendment. One court has expressed distaste for such an approach by stating:

If an appellate court is of the view that the trial judge made an error of judgment in withdrawing a case from the jury, or in entering judgment for the defendant notwithstanding a plaintiff's verdict, a reversal is no doubt called for; but we cannot see that anything is gained by blowing up that error of judgment into a denial.

54. 356 U.S. 525, 537 n.10.
55. *E.g.*, Worthington Corp. v. Lease Management, 352 F.2d 24 (6th Cir. 1965); Barnett v. Aetna Life Ins. Co., 139 F.2d 483 (3d Cir. 1943).
56. *E.g.*, Cities Service Oil Co. v. Dunlop, 308 U.S. 208 (1938); 5 Moore, *supra* Note 9 at 43.08.
of the constitutional right to a jury trial as guaranteed by the Seventh Amendment. 57

It is submitted that the courts which consider the right to jury trial as controlling the applicable standard have erroneously extended the seventh amendment to situations beyond its reach. 58 This conclusion follows if the problem is considered as posing two separate and distinct questions: (1) whether in a given situation there is a right to a jury trial and (2) if such a right has been established, whether the judge or the jury shall resolve a particular question incident to the trial. While the seventh amendment controls the former, it is only one of several influences on the latter — one of which is the state interest involved.

A third reason is suggested by the Supreme Court's decision in Dick v. New York Life Ins. Co. 59 In Dick the Court expressly left open the question of which standard should be applied in submitting evidence to the jury and made no reference whatsoever to the seventh amendment. This decision is of great significance since it was handed down just one year after Byrd thereby giving another indication that the seventh amendment was not deemed to require application of the federal standard.

For the aforementioned reasons it would seem clear that the seventh amendment does not command adherence to a federal standard. Nevertheless, it is equally clear that under the influence of the seventh amendment there exists a strong federal policy in favor of jury trials. It is important, however, to note that this policy has not yet risen to a constitutional mandate. This conclusion is validated by language used by the Court in Simler v. Conner. 60 Once again, as in Byrd, the Court had to decide whether plaintiff, suing to determine the amount of legal fees he owed to his lawyer, was entitled to a jury trial. The Court held that plaintiff was entitled to a jury trial and in support of this holding stated:

We agree . . . that 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 favoring jury trials is of historic and continuing strength . . . Byrd v. Blue Ridge Rural Electric Co-op., 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. 61

If it is assumed that neither Byrd nor the seventh amendment command that the federal standard governing sufficiency of evidence be

61. Id. at 222. (Emphasis added.)
uniformly adopted, the remaining question to be considered is what effect the expanded *Erie* doctrine, as refined in *York* and *Byrd*, should have on the decisions of the federal courts.

IV. APPLICATION OF THE *Erie-York-Byrd* APPROACH

The suggestion was made in the last section that the proper standard to be applied in submitting evidence to the jury could not be resolved by stating that the seventh amendment, as utilized in the decisions following *Erie*, required the use of the federal standard. In this section an examination of the cases adopting both the state and federal standards will follow as a prelude to an analysis of the competing policy considerations which influence the problem in question.

A. Cases Applying Federal Law

Although the Supreme Court has not decided the precise question of which standard to apply for submitting a case to the jury, the circuit courts have had occasion to pass on the matter. At the present time the Third, Sixth, Seventh, Ninth, and Tenth Circuits apply the federal standard when a disparity between state and federal standards exists. Of the cases applying federal law, *Wratchford v. S. J. Groves & Sons* presents a most thorough-going analysis. In that case plaintiff’s conservatee was found at the bottom of an open highway drainage hole, and the plaintiff maintained that defendants were negligent in not placing a grating or barricade around the hole to warn pedestrians of the presence of the danger. The evidence was such, however, that it was equally possible for a jury to infer that the injuries were sustained through a prior fall, and that the conservatee merely fell into the hole while


64. *Prassel Enterprises, Inc. v. Allstate Ins. Co.*, 405 F.2d 616 (5th Cir. 1968); *Brown v. Seaboard Coastline R.R.*, 405 F.2d 601 (5th Cir. 1968); *ABC — Paramount Records, Inc. v. Topps Record Distrib., Inc.*, 374 F.2d 455 (5th Cir. 1967); *Shirey v. Louisville & Nashville R.R.*, 327 F.2d 549 (5th Cir. 1964); *Braud v. Baker*, 324 F.2d 213 (5th Cir. 1964); *Kirby Lumber Corp. v. White*, 288 F.2d 566 (5th Cir. 1961); *Rutherford v. Illinois Cent. R.R.*, 276 F.2d 330 (5th Cir. 1960); *Revlon, Inc. v. Buchanan*, 271 F.2d 795 (5th Cir. 1959); *Reuter v. Eastern Airlines, Inc.*, 226 F.2d 443 (5th Cir. 1955); *but see Miller v. Boston Ins. Co.*, 271 F.2d 9 (5th Cir. 1959).

65. *Safeway Stores v. Fannan*, 308 F.2d 94 (9th Cir. 1962).


67. *405 F.2d 1061 (4th Cir. 1969)*. For other cases applying the federal standard in the Fourth Circuit, see *Hill v. Scudder*. 

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crawling for help. Since the injuries could have been caused in one of
two ways, each equally possible, the district court applied Maryland law,
and directed a verdict for the defendants on the grounds that the plaintiff
did not produce sufficient evidence to establish prima facie that the
alleged negligence proximately caused the injuries. On appeal the Fourth
Circuit reversed, holding that the question of how much evidence is
necessary before a case must be submitted to a jury on a particular
issue is one answered by federal law. Since the federal law required
the jury to choose between conflicting inferences, the court held that
the plaintiff had produced sufficient proof to have the issue of proximate
cause decided by the jury. To support its decision the court relied heavily
on Byrd. Thus, in discussing the fashion by which the federal courts
distribute the trial functions between the judge and jury, the court
remarked that "grave disruption of the federal system would result from
the application of state law rules as to the sufficiency of evidence to go
to the jury."68 The court then observed that the rule regarding whether
or not a federal court could send a case to a jury is one not bound up
with the rights and obligations of the litigants. Indeed, the court declared
that

choice of a rule as to the quantum of proof necessary to support
the submission of a case to a jury plays no role in the ordering of
the affairs of anyone. It is not the kind of rule which must inex-
orably find its governance in a diversity case in the corpus of
state law.69

In an earlier case in the same circuit, the court reached a similar
conclusion. In Summers v. Watkins Motor Lines,70 the administratrix
of the decedent brought an action alleging negligence on the part of the
defendant and the trial judge sitting without a jury found for the plaintiff.
On appeal, the decision was affirmed. The court employed Byrd as
authority for the proposition that a "state court's judgment of the
sufficiency of evidence to avoid a directed verdict [in a companion case
decided by a jury] does not control when the same or a similar question
arises in a federal court exercising its diversity jurisdiction."71 The
court went on to state that this rationale supports the underlying purpose
of Erie.

In the Fifth Circuit72 the leading case supporting use of the federal
standard is Reuter v. Eastern Air Lines, Inc.,73 a case decided before the
Supreme Court's decision in Byrd. There the court relied exclusively on
the Federal Rules of Civil Procedure74 and the seventh amendment in

68. Id. at 1065.
69. Id. at 1065-66.
70. 323 F.2d 120 (4th Cir. 1963).
71. Id. at 123.
72. See note 64 supra for other Fifth Circuit cases dealing with this pre-
cise question.
73. 226 F.2d 443 (5th Cir. 1955).
74. 28 U.S.C. § 1331 et seq.
announcing that the federal standard must be adhered to. The court also advanced a policy consideration similar to that discussed in *Byrd* by stating that "[i]n determining whether there is sufficient evidence to take the case to the jury, a federal judge performs a judicial function and is not a mere automaton." In two cases decided after *Byrd*, the Fifth Circuit in *Shirey v. Louisville & Nashville R.R.* and *ABC-Paramount Records, Inc. v. Topps Record Distributing Co.* reaffirmed the efficacy of applying the federal standard. However, in both of these cases, the court did not ground its decision on either the seventh amendment or the Federal Rules of Civil Procedure. Rather the court felt that *Byrd* was established authority for the proposition that the sufficiency of the evidence to raise a question of fact for the jury was controlled by federal law.

In *Woods v. National Life and Accident Ins. Co.*, the Third Circuit Court of Appeals was confronted with the question of which standard to apply. In opting for the federal standard, the court could find no precedent within its own circuit for adopting the federal standard. Accordingly it cited with approval the recent Ninth Circuit decision in *Safeway Stores v. Fannan*. In *Safeway* the court remarkably admitted that *Byrd* involved a different factual and procedural situation, but nevertheless maintained that the result in *Byrd* required an application of the federal standard.

Aside from the policy considerations discussed below, the logical fallacy in these decisions is evident. As noted earlier, *Byrd* dealt solely with the issue of the availability of jury trial and is of doubtful authority in determining which standard to apply for submitting evidence to the jury. This is buttressed by the Court's decision in *Dick* expressly leaving open the correct standard to be applied, thereby indicating that neither *Byrd* nor the seventh amendment can at this time be cited as definitive authority for applying a federal standard. It is perplexing that these decisions have neglected to recognize the unsettled nature of the question by using as authority a decision which did not decide the issue for which it is cited. Therefore these decisions, insofar as they ground their decisions in *Byrd*, would appear to be in error. However, as will be noted later in this Comment the policy considerations underlying these decisions nevertheless justify their result.

75. 226 F.2d 443, 445 (5th Cir. 1955).
76. 327 F.2d 549 (5th Cir. 1964).
77. 374 F.2d 455 (5th Cir. 1967).
78. *ABC-Paramount* was not so clear in its holding that *Byrd* decided the proper standard as was *Shirey* but it did quote *Byrd* extensively and cited *Shirey* as authority for applying the federal standard. 374 F.2d at 460.
79. 347 F.2d 760 (3d Cir. 1965).
80. See note 62 supra for other Third Circuit decisions applying the federal standard.
81. 308 F.2d 94 (9th Cir. 1962).
82. Id. at 97.
83. See pp. 209–12 infra.
B. Cases Not Applying Federal Law

Despite the opinion of the *Wratchford* court and the several other courts which have chosen to apply federal law and notwithstanding the scholarly exponents of the federal position,64 courts in the Second,65 Sixth,66 Seventh67 and Eighth68 Circuits rely upon the state standards. A close analysis of these cases reveals, however, that in some instances there is no conflict of standards. Not infrequently a court may couch its decision in terms of whether the plaintiff produced sufficient evidence to withstand a directed verdict and announce that *Erie* demands the application of state law to determine the sufficiency of evidence. However, the real question before the court is often one of substantive law.69 That is, the question is whether the plaintiff proved all of the elements of the cause of action and not whether the plaintiff failed to meet his burden of proof. For example, in *Clay County Cotton Co. v. Home Life Ins. Co.*80 the plaintiff sought to recover on an insurance policy insuring the life of another. The policy in question contained a provison wherein the company agreed to pay additional benefits in the event that the insured died as a result of an accident. The company agreed to pay the stated value of the policy but refused to pay additional amounts claiming that the insured did not die from accidental causes. In reversing the lower court's decision directing a verdict for the defendant, the circuit court said, "[T]he question presented by the motion to direct a verdict was whether a cause of action had been proved, which clearly is a question of substantive law and state law applies."91 However, it is clear from the opinion that the question presented was not concerned

64. 2B W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 871.1 (1961); 5 MOORE, supra note 9, at ¶ 50.06; C. WRIGHT, FEDERAL COURTS § 92 (1963).
65. Presser Royalty Co. v. Chase Manhattan Bank, 272 F.2d 838 (2d Cir. 1959); Pierce Consulting Eng'r Co. v. City of Burlington, 221 F.2d 607 (2d Cir. 1955); Gutierrez v. Public Service Interstate Transp. Co., 168 F.2d 678 (2d Cir. 1948); but cf. Stephan v. Marlin Firearms Co., 353 F.2d 819 (2d Cir. 1965); Zauderer v. Continental Cas. Co., 140 F.2d 211 (2d Cir. 1944).
67. Wieloch v. Rogers Cartage Co., 290 F.2d 235 (7th Cir. 1961); Nattens v. Grolier Soc'y, 195 F.2d 449 (7th Cir. 1952).
68. Ozark Air Lines, Inc. v. Larimer, 352 F.2d 9 (8th Cir. 1965); Dun & Bradstreet, Inc. v. Nicklaus, 340 F.2d 882 (8th Cir. 1965); Continental Can Co. v. Horton, 250 F.2d 637 (8th Cir. 1957); but see Curry v. Pyramid Life Ins. Co., 271 F.2d 1 (8th Cir. 1959).
70. 113 F.2d 856 (8th Cir. 1940).
71. Id. at 861.
with the amount of proof necessary to preclude a directed verdict. Instead, the real holding was that the district court failed to recognize the substantive elements of the cause of action. Consequently, the validity of these decisions as authority for applying a state standard governing the quantum of evidence is dubious.

After the cases deciding substantive law are excepted, courts which apply the state standard consistently maintain that Stoner v. New York Life Ins. Co.\(^2\) is authority to support their findings that the matter of sufficiency of evidence is a substantive question controlled by the Erie doctrine. Under close examination, however, Stoner does not support that proposition. In Stoner the petitioner brought an action in state court for payments allegedly due on an accident insurance policy and was non-suited. On appeal, the state appellate court remanded for a new trial holding that plaintiff's evidence was sufficient to submit the controversy to a jury. The second trial resulted in a verdict for the plaintiff. However, the insurance company appealed, and the case was again reversed. The error assigned by the appellate court did not relate to the sufficiency of evidence, but rather to errors committed in the charge to the jury. The insurance company thereupon instituted an action for a declaratory judgment in federal court seeking a determination of whether the insured was disabled within the meaning of the policy. Jurisdiction was by way of diversity. The action resulted in a judgment against the insurer. However, on appeal the circuit court held that the evidence was insufficient to support the verdict. The Supreme Court reversed, holding that the circuit court erred in not following the rule of Erie since the appropriate state law had already declared that the evidence was sufficient.

It is suggested that the thrust of Stoner was not that state law answers the question of what quantum of evidence is sufficient to support a verdict. On the contrary, Stoner decided that the two prior state decisions concluded as a matter of law that the insured was at least prima facie within the purview of the disability clause of the policy. Those prior decisions established the definitional standards of disability, a substantive issue; and therefore, the circuit court erred in failing to follow those standards. Moreover, the Court in Stoner could not have intended to assert that a state standard for sufficiency of evidence was to govern since in that case there was no jury in the first state trial and the question was not argued.\(^3\) What is most striking about Stoner however, is the interpretation of the holding in Stoner by the Court in Byrd. There the Court stated in a footnote:

It was held [in Stoner] that the federal court should follow the state rule defining the evidence sufficient to raise a jury question whether the state-created right was established.\(^4\)

\(^{92}\) 311 U.S. 464 (1940).
\(^{93}\) See C. Wright, Federal Courts 351-52 (1963).
\(^{94}\) 356 U.S. at 540 n.15.
At that juncture the Byrd Court proceeded to distinguish Stoner from Herron reasoning that the state rule involved in Stoner did not attempt to deny entirely the right to a jury trial while the Arizona constitutional provision in Herron did have such a result. The motivation of the Byrd Court in attempting to distinguish Stoner from Herron is not clear since, as noted earlier, Byrd did not deal with the question of sufficiency of evidence which Stoner purportedly involved while Herron clearly involved issues similar to those resolved in Byrd. Therefore it may be concluded that the Byrd Court could have reached the same result without any interpretation of what it considered Stoner to hold, and the footnote language should be considered as dicta.

Furthermore in view of Dick v. New York Life Ins. Co. it is clear that the Court can not be considered to have spoken finally on the proper standard to be applied. In Dick the beneficiary under two life insurance policies instituted suit in federal court by utilizing diversity to obtain jurisdiction. The beneficiary sought to recover certain additional death benefits in excess of the stated value of the policy. The plaintiff maintained that the insured's death was effected by violent and external means thereby qualifying himself for the extra benefits. The plaintiff successfully obtained a verdict, but the Eighth Circuit reversed. On appeal the Supreme Court reversed on the grounds that the circuit court misapplied the substantive law of North Dakota. However, the dicta of the case is noteworthy. The court observed:

Lurking in this case is the question whether it is proper to apply a state or federal test of sufficiency of the evidence to support a jury verdict where federal jurisdiction is rested on diversity of citizenship. On this question, the lower courts are not in agreement. (citing cases) But the question is not properly here for decision because ... parties assumed that the North Dakota standard applied. ... A decision as to which standard should be applied can well be left to another case where the question is briefed and argued.

Moreover it is significant that in the Supreme Court's discussion of the open question, Stoner is never cited thereby implying that it has no relevance to the controversy.

V. Policy Considerations Affecting Choice of Standards

It has previously been suggested in this Comment that the Erie doctrine was intended to reach constitutional proportions under the tenth amendment. It has also been posited that this view can be reconciled with the right to a jury provided for under the seventh amendment because the seventh amendment does not require that a federal standard

96. Id. at 444-45.
governing sufficiency of the evidence be uniformly adopted. Therefore any conflict in dealing with the standard to be used for directed verdicts between the constitutional overtones of *Erie* under the tenth amendment and the more explicit command of the seventh amendment can be avoided. What cannot be avoided, however, are the policy considerations which form the underpinnings of the *Erie* doctrine as refined in *York* and *Byrd* and the "influence" exerted by the seventh amendment in deciding the proper standard. An attempt will be made below to demonstrate that the proper standard for submitting evidence to the jury follows from these policy considerations.

In applying the *Erie* doctrine the crucial question is whether the policies underlying the *Erie–York–Byrd* holdings require that federal courts sitting in diversity jurisdictions adhere to the state standard governing sufficiency of the evidence. Clearly a broad policy has evolved since *Erie* which maintains that "in the absence of other considerations" the federal courts should adhere to state law so that the outcome of the litigation would not differ substantively from that tried in a state court "a block away." A related policy consideration is the Court's desire to eliminate forum-shopping between state and federal courts sitting in the same state by assuming identity of outcome "so far as legal rules determine the outcome of a litigation." While the Court's desire to eradicate forum-shopping is indeed commendable and desirable, it is difficult to understand how the standard for sufficiency of evidence will so affect a litigant's choice of forum as to exclude other more meaningful considerations. For example, the difference in competence between one judge or another or the availability of an early adjudication of the disputed claims would seem to be more meritorious considerations. Moreover, the very purpose of diversity jurisdiction is to allow litigants a choice of forum in disputes between citizens of two different states. Clearly the elimination of forum-shopping was not the compelling reason for *Erie* but rather was merely a concomitant to the goal of *Erie* to achieve uniformity of result. Therefore, the question resolves itself into one of asking whether the *Erie–York* desire of uniformity of result will be undermined by not adhering to the relevant state standard. It would seem that a difference in procedure between a state and federal court in submitting evidence to a jury could substantially affect the outcome of litigation since the jury might be more easily swayed by clever trial tactics or emotional pleas than would a judge deciding the same issue. Therefore, were *Erie* and *York* to stand alone it would appear that a

99. *Id.*
differing state standard should be adhered to in order to assure uniformity between the state and federal court. However, additional policy considerations were declared by the Court in *Byrd* which provided considerable impetus towards accepting the application of a federal standard in all federal courts. *Byrd* decided that outcome was not the sole or even primary consideration. Rather the Court admitted that the outcome of the litigation might be substantially affected by application of the federal requirement of a jury trial. Nevertheless the Court stated that there existed "affirmative countervailing considerations"\(^{102}\) which primarily included maintaining the "federal system [as] an independent system for administering justice to litigants"\(^{103}\) and assuring that the distribution of trial functions between judge and jury are not disrupted by state laws. A more exacting delineation of what is included in the term "affirmative countervailing considerations" must await further guidance from the Court but the language in *Byrd* clearly marks the way.

It is questionable whether the application of a state standard for the sufficiency of evidence would seriously undermine the independence of the federal judiciary, and yet it is not clear that such a serious threat is required before the federal courts will refuse to adhere to state rules. Obviously the Supreme Court in *Hanna*\(^{104}\) did not feel that a severe threat to the independence of the federal courts was required when it held that the federal rule for service of process must be applied, despite a contrary state rule. Moreover any attempt to deny by state rule the practice of federal judges to submit a fact question to the jury surely disrupts the judge–jury relationship and militates against the proscription of *Byrd*. These considerations alone suggest that the policies underlying the *Erie* progeny would best be served by adopting a uniform federal standard. Clearly, however, consideration must also be given to the policies underlying the seventh amendment since it is relied on so heavily by the various Courts of Appeals.

The Court in *Byrd* intimated that the influence of the seventh amendment should afford a strong policy consideration in applying a uniform federal standard. This is indicated by the fact that the *Byrd* Court placed considerable emphasis on an overriding "federal policy favoring jury decisions of disputed fact questions"\(^{105}\) which it felt should not yield to a contrary state rule despite the interest in applying the state standard to avoid forum-shopping. This would indicate the Court's desire to have certain incidents of a jury trial — once the right to a jury has been established — controlled by federal law. While it is true that *Byrd* involved the availability of a jury trial, it is also true that the policies underlying that decision reflect an unmistakeable intent to preserve the integrity of the judge–jury relationship and to assure that

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102. 356 U.S. at 537.
103. *Id.*
104. 380 U.S. at 460. *See* p. 199 *supra*.
105. 356 U.S. at 538.
federal law is not frustrated by differing state practices which infringe on the established procedures of the federal courts in assigning disputed questions of facts to the jury. This does not mean that each and every aspect of a jury trial should be governed by federal law under the authority of the seventh amendment. Clearly rules pertaining to parol evidence and privileges must be construed as affecting the substantive rights of the litigants and therefore within the ambit of *Erie* despite any "countervailing considerations." It is submitted, however, that rules governing the amount of proof necessary to submit a case to the jury is not bound up with the substantive rights of the individual in most cases, but rather are procedural rules designed to aid the federal judge in efficiently disposing of cases where the "minds of reasonable men" could not differ on the result. This should not prove startling since judges have a number of jury control devices — such as granting new trials and the power to comment on the credibility and probative force of the evidence — which similarly limit the independence of the jury.

It is suggested that since the crucial policy underlying the Court's holding in *Byrd* demands a balancing between the state rule on the one hand and maintaining the integrity of the judge-jury relationship under the seventh amendment on the other, the federal standard governing the submission of evidence to the jury is appropriate. It seems unlikely that the Supreme Court would decide otherwise since it has upheld the federal rule in the face of a contrary state constitutional provision and a state statute.

VI. Conclusion

The question of the applicability of *Erie* in a diversity case to the issue of whether state or federal law sets the standards to judge whether the evidence is sufficient to warrant the sending of the case to the jury is one ripe for determination by the Supreme Court. This is especially true in view of the split among the various circuits. Since the Court's more recent decisions refining *Erie* have tended to emphasize the independent character of the federal judicial system, it is likely that the Supreme Court will adopt the holding and the reasoning of *Wratchford*.

This conclusion finds support in the recent decision in *Simler v. Conner* where the Court stated that irrespective of state statutory, decisional, or constitutional law the right to a jury trial is purely a federal issue. The Court further declared that to hold otherwise would vitiate the

106. *E.g.*, Patterson-Ballagh Corp. v. Byron Jackson Co., 145 F.2d 786 (9th Cir. 1944).
107. *E.g.*, Hotel Dempsey Co. v. Tell, 128 F.2d 673 (5th Cir. 1942).
111. Wratchford v. S.J. Groves & Sons, 405 F.2d 1061 (4th Cir. 1969).
seventh amendment. The position has already been advanced that if federal standards determine whether or not a plaintiff is entitled to have his case tried before a jury, it follows that federal law should decide if a particular case is submitted to that jury. It is suggested that adoption of a uniform federal standard governing the sufficiency of the evidence would satisfy the underlying purpose of the *Erie* progeny by assuring the independence of the federal judiciary in the distribution of trial functions and would promote the policy considerations evident in the seventh amendment by assuring the submission of a case to the jury when the minds of reasonable men could differ.

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