OF LAWYERS AND LAYMEN: A STUDY OF FEDERALISM, 
THE JUDICIAL PROCESS, AND ERIE*

As the holder of a promissory note which was uncollectible within the boundaries of the state of his domicile, Mr. Charles Resnick, citizen of Nevada, was perhaps moved to ponder whether the blessings provided by the untrammeled flow of commerce within the United States are not indeed somewhat mixed. The debtor, La Paz Guest Ranch, had admitted obligation upon the note, and a federal district court located in California—where Mr. Resnick had traveled in search of payment—had, with admirable efficiency, granted a partial summary judgment in favor of the Nevadan creditor. A writ of execution was duly issued and the United States Marshal levied upon certain real property belonging to La Paz. But, alas, no sale was held. Approximately a year later, debtor's counsel returned to the court and moved to set aside the summary judgment. Invoking "the rule of Erie v. Tompkins," he claimed that state law required a joinder of certain partial assignees as indispensable parties in any action on the note and that such a joinder would destroy the "diversity," which alone enabled the district court to assume jurisdiction over the controversy. Without rendering an opinion, the court thereupon issued an order vacating the original judgment.1 Undaunted, Mr. Resnick appealed to the Ninth Circuit Court of Appeals. In its opinion reversing the order below, the appellate court declared that "even if the rule of Erie v. Tompkins were to govern the question of determining which parties are indispensable," the federal rather than state rule "would apply to diversity cases."2 In reaching this conclusion, the court felt that it was able to dispel the troublesome mists of "the rule of Erie v. Tompkins" by discovering that the issue before it could be characterized as "a procedural matter." Mr. Resnick was undoubtedly puzzled by the relevance of "the rule of Erie v. Tompkins," "procedural matters" and "diversity jurisdiction" to the question of whether or not he could recover the loan he had made to La Paz; but his concern is hardly unique, for the mists summarily dealt with by the Ninth Circuit are not indigenous to our smog-bound western shores. Nor has a voluminous literature3 thus far succeeded either in supplying a satisfactory rationale for "the rule of Erie v.

*Resnick v. La Paz Guest Ranch, 289 F.2d 814 (9th Cir. 1961).
1. Since the district court opinion is not reported, the facts of the case stated herein are taken from the appellate decision, and from briefs of the counsel (on file at the Yale Law Library). Resnick v. La Paz Guest Ranch, 289 F.2d 814 (9th Cir. 1961).
2. Id. at 820.
To be understood, judicial doctrines, like royal families, must usually be traced through a long line of antecedents. And so it is with *Erie R.R. v. Tompkins.* As Mr. Justice Brandeis' opinion amply demonstrated, any understanding of *Erie* must begin with an analysis of *Swift v. Tyson,* the centenarian case which *Erie* purported to overthrow. The issue involved in *Swift v. Tyson* was whether a preexisting debt constituted valid consideration for a bill of exchange. The defendant contended that such a debt was not regarded as consideration by the law of New York, the state in which the bill was "accepted." After a scholarly analysis of defendant's citations, the Supreme Court found the New York law to be unsettled. Not being content with this emancipation from the New York decisions, Mr. Justice Story, with the assent of eight other Justices, decided that even if New York decisions had clearly supported the defendant's position, the United States Supreme Court would not be bound to accept them as conclusive. His rationale was that section 34 of the Judiciary Act, which provided that state law constituted the rule of decision in trials at common law, did not require federal courts to decide questions of commercial law by reference to the decisions of the state courts, since the law involved was not "of a single country only, but of the commercial world." Admitting that state statutes and even "long-established local customs having the force of laws" would be determinative, Mr. Justice

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4. 304 U.S. 64 (1938).
5. 41 U.S. (16 Pet.) 1 (1842).
6. Mr. Justice Catron's dissent was limited to the question of whether a pre-existing debt did actually constitute a valid consideration for a negotiable note at common law. *Id.* at 23.
7. Section 34 of the Judiciary Act of 1789 provides:

[T]he laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in courts of the United States in cases where they apply.

9. In all the various cases, which have hitherto come before us for decision, this court have uniformly supposed, that the true interpretation of the 34th section limited its application to state laws, strictly local, that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character.

*Id.* at 18.

From this quotation some commentators have assumed that Mr. Justice Story meant by state law, not only the statutes and "long-established" customs, but also local rules governing property rights. But it is clear from the context in which the statement was made that Mr. Justice Story did not intend to include the latter category. He included it only to
Story went on to hold that the decisions of state courts, while persuasive as evidence of the state law, were not binding upon the federal courts. Later cases, however, disregarded these limits and extended the holding of *Swift v. Tyson* to justify the independent promulgation of rules of decision by the federal courts. Consequently, the fortuitous circumstance of the citizenship of one of the parties at the time of suit determined the rule of law applicable to a particular litigation, often with results which clearly contradicted the policies of the forum state. The extreme limit was reached in *Black and White Taxicab & Transfer Co.*, where a taxicab company, in order to avoid Kentucky's prohibition against grants of exclusive privileges by railroads, dissolved itself and reincorporated in a neighboring state, thereby enabling it to bring a diversity suit in a federal court, which refused to apply the state law.

Friendly co-existence, at least within the United States, requires a complex and continuous process of accommodation between state and federal law. It was perhaps inevitable, therefore, that results such as those embodied in the progeny of *Swift v. Tyson* would lead to a judicial upheaval. The fatal blow was administered by the decision in *Erie R.R. v. Tompkins*. Mr. Tompkins had been injured by a freight train while walking on a path beside the railroad tracks. The defendant railroad company contended that the law of Pennsylvania, where the injury occurred, treated persons in Mr. Tompkins'
position as trespassers, since the path he traversed ran along, but not across, the railroad tracks. The federal district and circuit courts, without examining the Pennsylvania decisions, awarded Mr. Tompkins a verdict of $30,000, relying on principles "of general law." On appeal, neither of the parties attacked the doctrine of *Swift* *v.* *Tyson*. The Supreme Court, however, proved more venturesome. Reversing the courts below, Mr. Justice Brandeis denied the existence of "federal general common law," and went on to hold that the course followed by the federal judiciary under the *Swift* doctrine had been unconstitutional. As a result, Mr. Tompkins lost a verdict for $30,000, and the federal judiciary entered upon a new era.

The decision in *Erie* was based upon an awareness that judicial decisions dealing with substantive laws are as much a part of the law making process as legislative enactments. Hence, due regard for state sovereignty in those areas of governmental concern reserved to the states by the Constitution was held to require that federal courts in diversity cases follow state substantive law without regard to its source. Moreover, since Congress lacked power to promulgate substantive rules of common law binding upon state courts, there could be no such thing as federal common law. The syllogism is neat. But a perusal of *Swift* *v.* *Tyson* fails to reveal a single mention of the existence of the federal common law which *Erie* struggled to disavow. Nor did Mr. Justice Story attempt to deny that rules of state substantive law were binding upon federal courts in diversity cases. Rather, Mr. Justice Story's opinion focused on what he believed was a fundamental distinction between statutory and decisional law. Decisions, he noted, are "often re-examined, reversed and qualified by the [state] courts themselves, whenever they are found to be either defective, or ill-founded, or otherwise incorrect." Judicial decisions, in other words, represented for Mr. Justice Story a dynamic aspect of the law making process. And federal courts, he felt, were equally qualified as those of the state to participate in the venture of improving the law. There

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17. Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).
18. Ibid.
19. This, like most neat syllogisms, proved to be considerably simpler than the reality which it purported to describe. The Court, on the same day on which *Erie* was decided, rendered an opinion, by the same Justice, in another case in which it was pointed out that there may be questions of "federal common law" upon which state laws cannot be conclusive, such as the apportionment between two states of the water of an interstate stream. Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938). See also, D'Oench, Duhme & Co. Inc. v. Federal Deposit Ins. Co., 315 U.S. 447, 465, 469, 470 (1942) (concurring opinion of Jackson, J.).
21. Id. at 17-19.
22. Id. at 17.
is nothing in the *Erie* opinion to indicate that Mr. Justice Brandeis disagreed with this view of the nature of the judicial process. *Erie*, therefore, although it clearly disavowed those cases which had independently created substantive rules of law while relying on *Swift,* does not itself contradict the *rationale* upon which *Swift* was based.

Limited to its holding, *Erie* did no more than prohibit the federal courts from independently making substantive law in fields of state competence under the guise of discovering the “general principles of jurisprudence.” Two years after *Erie*, the plight of Mrs. Sibbach, whom a federal district court had threatened to imprison, was brought to the attention of the Supreme Court. Having refused to submit to a medical examination in the course of a tort suit, Mrs. Sibbach was cited for contempt. The Supreme Court, relying upon the fact that the Federal Rules of Civil Procedure specifically provided for less severe sanctions in such a situation, reversed, and—without reference to *Erie*—established the doctrine that, in matters of “procedure,” federal courts in diversity cases were exempt from the requirement of adherence to state rules. Mr. Justice Frankfurter dissented on the ground, *inter alia,* that an analytical distinction between procedure and substance was inadequate to solve the issues presented by Mrs. Sibbach’s claim to a right of privacy. Five years later, this time as spokesman for a majority, Mr. Justice Frankfurter again denied the existence of a great divide between procedure and substance. This time the issue involved, not one individual’s right to privacy, but rather the integrity of the federal procedural apparatus. *Erie* had denied

23. See cases cited at note 10 *supra.*
25. FED. R. Civ. P. 35, 37 provide that:
   Rule 35. Physical and Mental Examination of Persons.
   (a) Order for Examination.
   In an action in which the mental or physical condition of a party is in controversy, the court may order him to submit to a physical or mental examination by a physician. The order may be made only on motion for good cause shown and upon notice to the party to be examined and to all other parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.
   Rule 37. Refusal to Make Discovery: Consequences.
   (b) Failure to Comply with Order
   (2) Other Consequences. If any party . . . refuses to obey an order made under . . . Rule 35 . . . , the court may make such orders in regard to the refusal as are just . . . .
   (iv) . . . an order directing the arrest of any party . . . for disobeying any of such orders except an order to submit to a physical or mental examination.
27. Mr. Justice Frankfurter dissented also on the ground that the “inviolability of a person” was such a deep rooted right in the Anglo-American law that any “drastic change . . . ought not to be inferred from a general authorization to formulate rules for the . . . federal courts,” but rather “would require explicit legislation.” *Id.* at 17-18.
the existence of federal common law; *Guaranty Trust Co. v. York* came near
to declaring that—for purposes of diversity jurisdiction—federal courts as
such no longer existed.29 In that case, Grace York, a note-holder of Van
Sweringen Corp., brought a class suit against Guaranty Trust Co., the
trustee, claiming a breach of trust. The federal district court, apparently relying
on *Erie*,30 held that a New York statute of limitations barred the suit, but it
was reversed by the Second Circuit Court of Appeals on the ground that a
state statute of limitations did not affect substantive rights,31 and was therefore
not governed by the rule in *Erie*. Reversing, Mr. Justice Frankfurter declared
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 . . . as it would be if tried
in a State court.”32 Though considering its decision as a logical extension of
the *Erie* holding, the Court was able to justify its formulation of an outcome-
determinative test only on the basis of its conformity to the “intent” and
“policy”33 of *Erie*, for nowhere in Mr. Justice Brandeis’ opinion can one find
either a direct indication or an indirect implication to the effect that *Erie*
required the same outcome in state and federal courts. Furthermore, while
breaches in the inviolability of the Federal Rules of Civil Procedure have
periodically been sanctioned, it is significant that the Supreme Court has con-
sistently justified such deviations from a uniform system of federal procedure
on the ground that the provisions in question affected “substantive” rights.34
The touchstone of a distinction between substance and procedure has thus by
no means universally been abandoned. But such a distinction seems patently
incompatible with adherence to an outcome-determinative test.35 Assuming

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29. “[A] federal court adjudicating a State-created right solely because of the diver-
sity of citizenship of the parties is for that purpose, in effect, *only another court of the
State . . .*” (Emphasis added.) *Id.* at 108.

30. Although the full text of the district judge’s opinion in *York v. Guaranty Trust
Co.* is not available, the respondent Trust Co.’s argument in the Court of Appeals strongly
suggests that the determinative element in the district court’s decision was *Erie*. See 143
F.2d 503, 521-26 (2d Cir. 1944).


34. See, *e.g.*, Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949);
Woods v. Interstate Realty Co., 337 U.S. 535 (1949); Cohen v. Beneficial Industrial Loan
766 (W.D. Ky. 1953); Wright v. Lumbermen’s Mut. Cas. Co., 134 F. Supp. 715 (W.D.
La. 1955).

35. See, *e.g.*, Hill, *The Erie Doctrine and the Constitution*, 53 NW. U.L. REV. 427,
(1941); Note, 51 NW. U.L. REV. 338 (1956); Note, 66 HARV. L. REV. 1516 (1953); Note,
therefore that *Erie* and *Sibbach* can stand together, an analysis must be undertaken of the relationship between the holding in *Erie* and the outcome-determinative test established by *York*.

It is probably true—to paraphrase the opinion in *York*—that state and federal courts may often be found down the block from each other. But why this statement ineluctably compels the conclusion that those courts may not differ in any significant particular is a problem which cases following *York* have never fully explored. Nor can the failure to provide a bridge between the fact of geographical proximity and the justification for an undeviating duplication be attributed to a lack of opportunity; cases exploring the ramifications of the *York* decision are by now legion. Both its limits and the precise nature of its relationship to the *Erie* holding, however, have remained stubbornly cryptic. And recently the Supreme Court seems to have taken a somewhat jaundiced view of *York*'s more precocious progeny.

In the case of *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*

petitioner, an employee of a contractor doing work for the respondent, brought a diversity action in federal court claiming damages for injuries allegedly sustained as the result of the negligence of the respondent. The district court submitted the issue of petitioner's status to the jury, which found for petitioner.

jury as a question of fact.41 The Supreme Court, reversing the appellate court, denied that the question before it was controlled by the outcome-determinative test and declared that “the policy of uniform enforcement of state-created rights and obligations . . . cannot in every case exact compliance with a state rule. . . .”42 In reaching this conclusion, the Court first referred—albeit somewhat vaguely 43—to the “influence” of the 7th amendment’s guarantee of the right to a jury trial. Having thus suggested that constitutional considerations might militate against application of the outcome-determinative test, the Court resorted to a footnote to deny that the 7th amendment represented a determinative element in the case.44 It then referred to the “strong federal policy against allowing state rules to disrupt the judge-jury relationship in the federal courts,”46 but the only authority invoked to attest to the existence of this phenomenon was a single pre-Erie decision.46 Finally, it pointed out that there was no evidence showing that “a different result would follow”47 from the rejection of state procedure in favor of the federal practice on jury trial: a somewhat unpersuasive position in view of the fact that respondent had cited to the Court a recent decision of the State Supreme Court which would have barred Byrd’s recovery.48 The holding in Byrd thus demonstrates that the need for limiting York has been recognized. But the invocation and hasty disavowal of the spectre of a constitutional issue, together with the refusal to indicate clearly the basis for its holding—leaving the decision almost destitute of visible means of support—seems also to suggest that the Court at present is unwilling to undertake the thoroughgoing re-examination of the Erie doctrine which any successful attempt in this direction would require.

The “outcome-determinative” gloss which York placed upon the Erie decision, like the progeny of the Swift case, involved significant extensions of

43. Id. at 537.
44. Our conclusion makes unnecessary the consideration of—and we intimate no view upon—the constitutional question whether the right of jury protected in federal courts by the 7th Amendment embraces the factual issue of statutory immunity when asserted, as here, as an affirmative defense in a common-law negligence action.

Id. at 537 n.10.
45. Id. at 538.
47. Id. at 539.
48. In Adams v. Davison-Paxon Co., 230 S.C. 532 (1957) plaintiff, an employee of a concessionaire in defendant’s store, was injured. She sued for common law damages, and the district court submitted the jurisdictional issue under the Workmen’s Compensation Act to the jury, which returned a verdict for plaintiff. The Supreme Court of South Carolina, in reversing, ruled that the trial court should have decided as a matter of law the issue of whether plaintiff’s remedy is exclusively under the Workmen’s Compensation Law. It went on to hold that in the instant case, “and in other similar,” the employee’s remedy is limited to the compensation benefits and that he “is not entitled to maintain this action at law.”
both the assumptions and the results of the original holdings.\textsuperscript{49} If the outcome-determinative test is rigidly applied—as cases following \textit{York} have tended to do\textsuperscript{50}—it results in a demand that federal courts in diversity cases become, in effect, indistinguishable from their state counterparts. Whether or not \textit{York} itself was intended to be applicable only to material variations, the phrasing of the test in terms of effect on the outcome made it inevitable that no satisfactory distinction between material and immaterial factors could be drawn by courts applying the rule.\textsuperscript{51} More important, perhaps, by demanding un-deviating imitation of state rules from the federal judiciary in diversity cases, the outcome-determinative test, unlike \textit{Erie}, considerably modifies the view of the judicial process which provided the \textit{rationale} for the decision in \textit{Swift v. Tyson}. Rigid application of the \textit{York} rationale has created, in diversity cases, a static body of law, frozen in the form in which it was most recently announced by the state courts, and incapable of being refined or developed by the federal judiciary. Thus, in \textit{Fidelity Union Trust Co. v. Field},\textsuperscript{52} for ex-

\textsuperscript{49} Mr. Justice Holmes wrote in 1897 that:

If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside it, in the vaguer sanctions of conscience. . . . If we take the view of our friend the bad man we shall find that he does not care two straws for the (legal) axioms or deductions, but that he does want to know what the . . . courts are likely to do in fact. I am much of his mind. \textit{The prophecies of what the courts will do in fact, and nothing more pretensions, are what I mean by the law}. (Emphasis added.)


In view of this concept of law, it is not unreasonable to view the outcome-determinative test as based upon the premise that the outcome of any given litigation is predictable at the outset, once the applicable substantive and procedural provisions are known. But such a premise is fallacious in view of the fact that judicial process is a complex mechanism involving multifarious elements, substantive and procedural, conscious and unconscious, which act upon both the judge and jury to shape the form and content of the final result. See \textit{Cardozo, The Nature of the Judicial Process} 168-69 (1927). It may be argued, however, that the \textit{York} opinion may be read to allow the federal judges to place themselves in the position of state judges adjudicating controversies under the applicable state law, thus enabling the federal judges to participate in the process of dynamic growth of the state law. But such a theoretical interpretation of \textit{York} has not prevailed. In practice, the outcome-determinative test has resulted in rigidifying the state laws in federal courts. See note 52 infra and accompanying text.


\textsuperscript{51} “An ‘outcome’ test, unless worded with much greater nicety than in the \textit{York} opinion, yields no stopping place, since virtually all procedural rules may, and on occasion do, affect the result of the litigation.” \textit{Hart & Wechsler, The Federal Courts and the Federal System} 678 (1953).

\textsuperscript{52} 311 U.S. 169 (1940), \textit{rev’d} Field v. Fidelity Union Trust Co., 108 F.2d 521 (3d Cir. 1939). Although this case was decided before \textit{York}, the \textit{rationale} that federal courts are bound to accept any statement of state law even if made by a single judge in an inferior state court in fact postulates the addition of the \textit{York} decision to the \textit{Erie} holding,
ample, the Supreme Court reversed the Third Circuit Court of Appeals for failing to follow a lower state court decision which was later repudiated by the state courts themselves. The creative process described by Mr. Justice Story, in which both state and federal judges could participate, has thus been replaced by a system in which the federal judge in diversity cases has less freedom in interpreting precedents than a lower state court, or in the picturesque phrase of the late Judge Jerome Frank, in which the federal judge has been relegated to the role "of ventriloquist's dummy to the courts of some particular state ...."

Quoting Mr. Justice Holmes, Mr. Justice Brandeis in *Erie* stressed that "the common law ... is not the common law generally but the law of that state." He thus rejected the claims of cases following *Swift* that the common law, in the guise of "principles of general jurisprudence," could validly be applied as rules of decision in diversity cases. Insofar as the *Erie* holding is restricted to denying to federal courts in diversity cases the power to administer a body of law separate from that enforced by state courts, it performed a function which decisions such as *Black & White Taxicab* had rendered imperative. But the quotation from Mr. Justice Holmes continues to define the common law as "... the law of that state existing by the authority of that state without regard to what it may have been in England or anywhere else ... the authority and only authority is the state, and if that be so, the voice adopted by the state as its own [whether it be of its Legislature or of its Supreme Court] should utter the last word." What *York* did, then, in rejecting the "brooding omnipresence" theory of decisional law was fully to accept the Holmesian definition of the sources of common law as a necessary consequence of the *Erie* decision. If one adheres to Mr. Justice Holmes' insistence that all law be directly traceable to the pronouncements of identifiable sovereigns, and in addition if one views the federal courts solely as instrumentalities of the federal sovereign, then the contradiction involved in permitting federal courts to participate in the task of developing state law becomes apparent. But standing alone, the fact that no separate body of federal common law exists in diversity cases by no means compels the conclusion that federal courts are incapable of contributing to the task of interpreting and

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54. Richardson v. Commissioner, 126 F.2d 562, 567 (2d Cir. 1942).


56. See cases cited at note 10 supra.

57. See note 55 supra.
refining the law of the states. Moreover, complete acceptance of the York view would effectively eliminate the most plausible rationale for the continued maintenance of a separate system of federal courts in cases involving state substantive law. Assuming, therefore, that state courts are fully capable of fulfilling the judicial functions outlined by Mr. Justice Story in Swift, a complete analysis of the validity of the York doctrine requires that an attempt be made to determine whether or not the existence of diversity jurisdiction in the federal courts can be justified in terms of the unique contributions which the federal judiciary can make to the development of state substantive law.

Recent studies of international organizations have stressed the continuing importance of decision makers within the constituent units of any non-unitary governmental structure. Commenting on the lack of significant differences between the functional effectiveness of supranational and international organizations, one prominent historian has suggested that the formal powers granted to governmental institutions representing the wider community are less significant than the extent to which decision makers within the component political units themselves become aware of the broader implications of their own actions. Federalism cannot survive without an harmonious integration of the component states through a continuing process involving de-emphasis of divisive values, stress on common aspirations and the development of easily interchangeable group and personal roles in the performance of common tasks. By allowing federal circuit judges to bring an experience based on familiarity with conditions in several states to bear upon the task of evolving the law of any given state, the existence of diversity jurisdiction provides a potentially powerful instrument for the continuing development of federalism within the United States. If federalism is to be fully developed, state judges, who bear the primary responsibility for the growth of state law, must come to see their particular problems in the wider context of a federal interest. And diversity

58. Many commentators have concluded that the historical basis for the justification of diversity jurisdiction, the apprehension of discrimination against outer-state litigants based on local prejudices, no longer exists in our nation. Thus, they have long advocated the abolition of the federal diversity jurisdiction. See, e.g., Frankfurter, Distribution of Judicial Power Between United States and State Courts, 13 CORNELL L.Q. 499 (1928); Friendly, The Historic Basis of Diversity Jurisdiction, 41 HARV. L. REV. 483 (1928); Campbell, Is Swift v. Tyson an Argument for or against Abolishing Diversity of Citizenship Jurisdiction, 18 A.B.A.J. 809 (1932); Ball, Revision of Federal Diversity Jurisdiction, 28 ILL. L. REV. 356 (1933); Wechsler, Federal Jurisdiction and the Revision of the Judicial Code, 13 LAW & CONTEMP. PROB. 216, 234-40 (1948). Assuming the original fear of local prejudice no longer exists today, therefore, it seems clear that only plausible justification for the preservation of diversity jurisdiction is the development of state law within the framework of our federal government. But see Parker, Dual Sovereignty and the Federal Courts, 51 NW. U.L. REV. 407 (1956).


60. Beloff, supra note 59, at 547-49.
jurisdiction provides an opportunity for state judges constantly to be reminded of this larger interest by the presence of federal judges engaged in applying provisions of state law in controversies involving citizens of more than one state. Thus, the importance of bringing national interests to the attention of state decision makers might well provide a sufficient rationale for continued maintenance of diversity jurisdiction.

At this point, the problem which *Erie* raised to constitutional proportions becomes relevant; for if federal judges are to have sufficient freedom to make a significant impact on state decision makers, then the danger arises that they will be tempted once again to establish a separate system of federal common law. If the position that the *Erie* doctrine can remain viable even in the absence of the *York* exegesis is to be maintained, therefore, a classification of legal issues is required which will ensure that federal judges do not again transgress into realms reserved to the states, while yet permitting them sufficient freedom to make meaningful the continued existence of diversity jurisdiction.

Law, for purposes of such a classification, can be viewed as a system of general arrangements which is authoritatively declared, which claims to be entitled to observance and acceptance by all members of the society, and which speaks from one point of time to another with clearly defined addressees who are supposed to carry out the directions. Law may then further be subdivided into two overlapping categories. The *directive* aspect of the law describes the purpose of the particular arrangement in the form of direction given to the addressees, thus telling people like Mr. Resnick what to do or not to do under given circumstances; and the *sanctional* aspect provides means and remedies by which official determinations of non-compliance with relevant directive provisions can be made and enforced. The judicial process, under this view, serves both to provide authoritative interpretations of directive provisions and to provide procedures by which sanctional provisions are brought into operation in a variety of fact situations. In this way the judicial process at its best is constantly molding a body of rules and doctrines into flexible instruments by means of which society achieves its articulated goals. And it was in this sense that Mr. Justice Story spoke of a general jurisprudence. As the *Swift* doctrine was developed, however, the growth of an independent federal common law resulted in the creation of two sets of directive provisions applicable to any given general arrangement, with no means of reconciling

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62. The subdivisions, primary and remedial provisions, employed by Hart & Sacks, *op. cit. supra* note 61, at 135-38, are redefined here in order to give a more comprehensive meaning and application to them. Furthermore, the use of the terms, *directive* and *sanctional* has the advantage of avoiding the traditional connotations that are implicit in the words primary and remedial. *Sanctional* provision, as it is defined here, includes many provisions of law that are often classified as jurisdictional, procedural, and remedial.

disparities between the two except by formal action of the state legislature. Consequently, the principal addressees of the directive provision of the state law were told to do two different things at the same time depending on which court happened to interpret the law—an anomaly which the *Erie* decision clearly repudiated, by declaring that federal judges in diversity cases are obliged to relate their decisions to the directive provisions of state law governing the fact situations before them. Under *Erie*, in other words, directive provisions applicable to a given fact situation must remain the same whether they are applied by state or federal courts.

Directive provisions, however, are not the whole of the law. Much of what is contained in the case reports is addressed, not directly to people like Mr. Resnick who are asserting rights growing out of claimed violations of general arrangements, but rather to courts and counsel, who are the addressees of decisions purporting to refine the mode of operation and application of the state law. There are valid reasons, of course, for preferring a certain amount of stability with regard to sanctional as well as directive provisions of the law. But arguments based on such reasons are directed not at the inability of a federal court to participate in the development of state law but rather at the inadvisability of any further development at all. But if Mr. Justice Story was correct in postulating that constant change and development represent the price which is necessarily exacted by efforts to keep decisional law in contact with the society it governs, then state decision makers can ill afford to dispense with the unique contributions which the federal judiciary is capable of making to the refinement of state law. Moreover, it does not appear unreasonable to subject *courts* and *counsel* to the risks inherent in such change, so long as *laymen*—whose conduct is assumed to be governed by directive provisions—are not again placed in the position of being subject to two inconsistent sets of such provisions. In this sense, *Erie* remains reconcilable with the view of the judicial process contained in the *Swift* decision. Furthermore, appreciation of the difference between *York* and *Erie* hinges upon a recognition of the fact that directive provisions constitute only a part of the law, and that application of identical directive provisions is therefore not alone suffi-

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64. See cases cited at note 10 *supra*.

65. Businesses regularly involved in litigation, such as insurance companies, present special problems. Such “persons” are often so directly concerned with the changes in any rule affecting the outcome of a given group of cases that they may be said to rely on sanctional provisions fully as much as on directive ones. A shift in rules governing burden of proof, for example, might have a substantial effect upon the daily conduct of insurance companies whereas such a result would be unlikely in the daily life of an individual. This is to say that businesses like insurance companies are different from other addressees in the way in which they perceive the law. But this fact does not necessarily imply that the definition of law given here is defective. What it indicates, rather, is that certain addressees differ from ordinary laymen in their relationship to the law, and that an effective legal system would have to be so structured as to be able to deal with such differences. Even a preliminary description of content of the necessary variations, however, would involve questions beyond the scope of this Note.
cient to ensure identical outcomes. Even were it possible to ensure identical outcomes in diversity cases by undeviating imitation of both directive and sanctional state law provisions by federal courts, any final judgment on the wisdom of attempting to achieve this goal must take into account the fact that adherence to York requires greater sacrifices in the development of law than those demanded by Erie. The latter, in the name of federalism, barred federal courts from developing an independent set of directive provisions in areas reserved to the states by the Constitution. But a wholesale adoption of the York test would require federal courts, in the name of federalism, wholly to refrain from introducing awareness of wider federal interests into the processes by which state law is developed.

The introduction of a directive-sanctional classification does not, of course, provide a panacea for the judicial problems created by the rule in Erie R.R. v. Tompkins, primarily because no simple distinction can be made between the two categories. Thus, cases will arise where the presence or absence of a sanctional provision (e.g. an injunction or treble damage recovery) has so great an impact upon the conduct of laymen that a federal court in a diversity case would be compelled to follow the state sanctional provisions. The directive-sanctional classification, in other words, is in many ways similar to the procedure-substance distinction adopted in Sibbach. But by focusing on the degree to which any given rule of law affects laymen involved in the general arrangements which it is intended to order, rather than upon the outcome of a particular lawsuit, this classification makes possible the continued viability of diversity jurisdiction as well as adherence to the constitutional prohibitions placed upon federal courts by the Erie decision. Whether or not the importance of allowing federal judges to contribute to the development of state law is regarded as sufficient to justify modification of the Erie holding itself, it would in any case provide a rationale for the attempts made first in Sibbach and then in Byrd to preserve the integrity of the judicial apparatus of the federal courts.

68. “The test must be whether a rule really regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them.” Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941).
69. The federal interest suggested as a rationale for the continued maintenance of diversity jurisdiction might be regarded as sufficiently compelling to justify participation by federal courts in the process of developing directive provisions of state law. And even at present an analogous problem arises whenever state directive provisions are unsettled. At the root of the view of judicial process expounded in Swift is a realization that pressures stemming from the necessity of arriving at a decision will often force federal courts to participate in the process of refining state laws. But the constitutional prohibitions which lie at the basis of the Erie decision obviously place severe restrictions upon such activity. And in addition to constitutional limitations, it must be remembered, that pluralism is as important a goal for a federal state as a widespread awareness of national interests.
The dilemma in which Mr. Resnick found himself may now be employed to illustrate the manner in which the directive-sanctional classification could be applied in diversity cases. Given the time-honored doctrines that an absent party is not bound by an in personam judgment and that any judgment rendered in the absence of an indispensable party is void, the question of indispensability might be viewed as involving sanctional provisions on the ground that it is concerned solely with the means utilized by courts in settling controversies. But an analysis of the relevant decisions indicates that a variety of factors may be determinative on questions of indispensability. Thus, where a possibility of adverse effect upon the absent person is inescapable and state courts have held him to be indispensable, federal courts should be bound by such decisions, for the question of indispensability in such a situation can be viewed as involving a directive provision of the state law, prohibiting persons from utilizing the advantage given them by the absence of the other party. But where the state court's decisions were designed to avoid the possibility of rendering an inconclusive judgment, federal courts should not be bound, since such decisions were based on considerations involving the preservation of the dignity of judicial tribunal and the finality of decrees, distinguishing elements of sanctional provisions. Choices, however, will often require delicate and complex judgments as, for example, where present parties may be subject to multiple litigation or "to a liability under the decree, more extensive and direct, than if the absent persons were before the court." To the extent that state courts' decisions on this issue are designed to protect the present parties

70. 1 Freeman, Judgments § 407 (5th ed. 1925).
71. 3 Moore, Federal Practice ¶ 19.05(2) (2d ed. 1948).
72. See, e.g., United States v. Bank of New York & Trust Co., 296 U.S. 463 (1936) (In a suit to obtain a payment out of fund in which the absent person has an interest, he is held indispensable); Northern Indiana R.R. v. Michigan Cent. R.R., 50 U.S. (15 How.) 233 (1853) (All parties to a contract are held indispensable in a suit involving the performance of that contract); Roos v. Texas Co., 23 F.2d 171 (2d Cir. 1927), cert. denied, 277 U.S. 587 (1928) (In a suit for accounting on a contract, all parties to the contract are held indispensable). But see Vetterlein v. Barnes, 124 U.S. 169 (1888) (the absent cestui que trust were held not indispensable in a suit by an assignee in bankruptcy to enjoin the trustee from collecting the insurance money under the trust on the ground that the representation by the trustee was adequate).
73. See, e.g., Thayer v. Life Ass'n of America, 112 U.S. 717 (1885) (where a trustee holds property as security for a debt, with the power to sell on default, both the trustee and the creditor were held indispensable in a suit by the debtor to enjoin the trustee from selling the land); Kendig v. Dean, 97 U.S. 423 (1878) (In a suit by a stockholder to compel a corporation official to enter his name on the stock register, the Corporation was held indispensable, since the official did not have the authority himself to make the entry); Barney v. Baltimore, 73 U.S. (6 Wall.) 280 (1868) (In a partition suit, all of the co-tenants were held indispensable since the absent co-tenants would not be bound by the decree); but see New England Mut. Life Ins. Co. v. Brandenburg, 8 F.R.D. 151 (S.D.N.Y. 1948) (In a suit to rescind for fraud an insurance policy payable to creditors, the estate was not held indispensable, although the excess of the proceeds was to be paid to the estate).
74. Story, Equity Pleadings § 138 (10th ed. 1892).
from undue harassment,\textsuperscript{76} such decisions might be classified as directive. But to the extent that such decisions are designed primarily to foster the orderly administration of justice,\textsuperscript{78} then the question should be viewed as one involving sanctional provisions, and federal courts should not be required to follow the state decisions.

\textsuperscript{76} See, e.g., Davenport v. Dows, 85 U.S. (18 Wall.) 626 (1873) (In a suit by stockholders to enjoin the defendant city from collecting the taxes levied on the corporation, the corporation was held indispensable); Niles-Bement-Pond Co. v. Local 68, Iron Moulders Union, 254 U.S. 77 (1920) (In a suit by Niles to prevent a strike against another firm with whom it had a contract, the other firm was held indispensable, because otherwise it too could have sued the defendant even if Niles had lost); Phillipbar v. Derby, 85 F.2d 27 (2d Cir. 1936) (In a shareholder suit against the directors of a corporation, the corporation was held indispensable, because otherwise the directors would be subject to a later suit by the corporation). Compare Davis v. Henry, 266 Fed. 261 (6th Cir. 1920); West v. Randall, 29 Fed. Cas. 718 (No. 17424) (C.C.R.I. 1820); Fineman v. Cutler, 273 Pa. 189, 116 Atl. 819 (1922).

\textsuperscript{78} See, e.g., Calcote v. Texas Pac. Coal & Oil Co., 157 F.2d 216 (5th Cir.), \textit{cert. denied}, 329 U.S. 782 (1946) (An absent person was held indispensable even though his interest was not shown to be prejudiced and his presence would not aid the defendant). \textit{But cf.}, Waterman v. Canal-Louisiana Bank & Trust Co., 215 U.S. 33 (1909); Thomas v. Anderson, 223 Fed. 41 (8th Cir. 1915); Rogers v. Penobscot Mining Co., 154 Fed. 606 (8th Cir. 1907); Williams v. Crabb, 117 Fed. 193 (7th Cir. 1902).