Arizona Constitutional Law Derailed in Federal Diversity Court: A Reevaluation of Herron v. Southern Pacific Co.

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According to the common law rule of contributory negligence, a plaintiff who could otherwise hold a negligent defendant liable for damages is denied any recovery if he has failed to exercise due care for his own protection.[1] Courts which have adopted the common law defense submit the question of contributory negligence to a jury only when the evidence of a plaintiff's own negligence is inconclusive. When the existence of even slight contributory negligence is beyond all dispute, however, the court may direct a verdict for the negligent defendant, instead of submitting the plaintiff's case to the jury.[2] An original provision in the Arizona constitution has changed this common law doctrine somewhat by making the jury the sole arbiter of the existence or nonexistence of contributory negligence. Article 18, section 5 of the *Constitution of Arizona* provides that "[t]he defense of contributory negligence or of assumption of risk, shall, in all cases whatsoever, be a question of fact and shall, at all times, be left to the jury."[3] Consequently, in the state courts of Arizona a judge is prohibited from directing a verdict for the defendant in a negligence action despite conclusive evidence of a plaintiff's contributory negligence.[4]

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1. *See generally* 2 F. Harper & F. James, The Law of Torts § 22.1, at 1193-99 (1956); W. Prosser, The Handbook of the Law of Torts § 65, at 416-18 (4th ed. 1971).

2. *See* Herzberg v. White, 49 Ariz. 313, 320, 66 P.2d 253, 256-57 (1937). *See generally* W. Prosser, *supra* note 1, § 65, at 420.

3. Ariz. Const. art. 18, § 5. This Comment will focus on the defense of contributory negligence. The rules and principles that apply to this defense in Arizona, however, would seem to apply also to cases involving assumption of risk. Chavez v. Pima County, 107 Ariz. 358, 361, 488 P.2d 978, 981 (1971).

4. Heimke v. Munoz, 106 Ariz. 26, 470 P.2d 107 (1970); Dennis v. Stukey, 37 Ariz. 510, 295 P. 971 (1931), *denying rehearing to* 37 Ariz. 299, 294 P. 276 (1930); Salt River Water Users' Ass'n v. Berry, 31 Ariz. 39, 250 P. 356 (1926).

In spite of an obvious conflict with this state constitutional provision, over four decades ago the Supreme Court of the United States held in *Herron v. Southern Pacific Co.*[5] that a federal judge sitting in Arizona could direct a verdict on grounds of contributory negligence. Since *Herron*, a noncitizen defendant sued in Arizona by a contributorily negligent plaintiff has been able to reap substantial benefits by invoking diversity of citizenship jurisdiction[6] and removing the suit to federal district court.[7] While a jury sitting in an Arizona state court must be given the opportunity to determine whether recovery should be barred by contributory negligence, a judge sitting in federal court is empowered to withhold the issue from the jury and direct a verdict for the defendant. Thus, it is understandable why a nonresident defendant in Arizona would actively seek the jurisdiction of a federal court rather than remain in state court.

Forum shopping of this nature is among the evils which the Supreme Court attempted to eliminate in *Erie Railroad v. Tompkins*[8] by requiring federal courts to apply state decisional law as well as state statutory law in diversity cases.[9] The federal courts in Arizona, however, have continued to follow the pre-*Erie* dictate of *Herron*.[10]

Regardless of the merits and peculiarities of Arizona's constitutional provision,[11] it is the law of the state and reflects a decided state policy. The full force of the state provision should not be diminished by use of federal diversity jurisdiction, which was created to protect a noncitizen from local prejudices,[12] not to allow forum shopping by litigants seeking a more advantageous law. The inequitable situation which results from this latter practice demands that *Herron* be reexamined in light of post-*Erie* developments.

It will be the purpose of this Note to investigate possible avenues of challenge to the *Herron* decision. The analysis will first

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5. 283 U.S. 91 (1931).
6. U.S. CONST. art. III, § 2; 28 U.S.C. § 1332 (1970).
7. 28 U.S.C. § 1441 (1970).
8. 304 U.S. 64 (1938).
9. *Id.* at 78-80.
10. *See* Merritt-Chapman & Scott Corp. v. Frazier, 289 F.2d 849, 856-57 n.11 (9th Cir. 1961); *cf.* Diederich v. American News Co., 128 F.2d 144 (10th Cir. 1942).
11. In Vegodsky v. City of Tucson, 1 Ariz. App. 102, 399 P.2d 723 (1965), Judge Molloy criticised article 18, section 5.

> The . . . doctrine casts to twelve persons selected by lot shortly before trial the power to determine what the law will be as to the particular individuals before it. It sets down no standard for them to apply. Presumably, they may grant relief to a negligent plaintiff because they have an affinity for him and/or an aversion for the defendant, or, conversely, they may deny relief for equally capricious reasons.

Id. at 105, 399 P.2d at 726.
12. Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61, 87 (1809).

review both historical and recent interpretations of the Arizona constitutional provision by the state supreme court. Next, consideration will be given to the *Herron* decision and its effect on the application of Arizona law in federal diversity court. Thereafter, *Erie* and its lineage will be discussed in an attempt to determine if *Herron* should be overruled. A frequently mentioned seventh amendment basis for assuring a federal judge the right to direct a verdict also will be analyzed.[13]

ARTICLE 18, SECTION 5 AS AFFECTED BY HERRON

Arizona's Contributory Negligence Rule

The common law doctrine of contributory negligence was strongly disfavored by delegates to the Arizona Constitutional Convention.[14] Some delegates had suspected that the defense often had been successfully invoked by judges for the benefit of industrial concerns sued by injured employees.[15] Court rendered verdicts for corporate defendants often had left severely injured workers without any measure of relief, although their own contributory negligence may have been slight.[16] The constitutional provision was intended to alter such a utilization of the common law defense by withholding from a judge any power to act on questions relating to contributory negligence.[17] In effect, the drafters gave Arizona juries the power to determine

13. *See* Diederich v. American News Co., 128 F.2d 144 (10th Cir. 1942).

14. *See* MINUTES OF THE CONSTITUTIONAL CONVENTION OF THE TERRITORY OF ARIZONA 382-83 (1910).

In fact, section 2 of proposition 88 introduced at the convention would have drastically limited the occasions in which a defendant could utilize contributory negligence as a defense. As proposed, section 2 stated:

> (2) No law shall be enacted whereby the defense of "fellow servant, or the defense of assumption of risk" shall be recognized in actions to recover damages, any defense of "contributory negligence" shall be a matter of determination by jury, and when this defense is set up the presumption shall be that there was no contributory negligence on the part of the plaintiff; the burden of proof of the asserted contributory negligence shall be upon the defendant.

4 COMPLETE VERBATIM REPORT OF THE ARIZONA CONSTITUTIONAL CONVENTION 6 (1910) [hereinafter cited as VERBATIM REPORT]. *See also* T. McGinnis, The Influence of Organized Labor on the Making of the Arizona Constitution 70, 1930 (unpublished thesis in University of Arizona Library). By motion, the Committee on Judiciary amended section 2 to read as enacted in ARIZ. CONST. art. 18, § 5. *See* MINUTES OF THE CONSTITUTIONAL CONVENTION OF THE TERRITORY OF ARIZONA 382-83 (1910).

15. *See* T. McGinnis, *supra* note 14, at 72. *See generally* W. PROSSER, *supra* note 1, § 65, at 418.

16. *See generally* "Contributory Negligence—Confusion Out of Compromise," 13 ARIZ. L. REV. 313, 556, 563 (1971) [hereinafter cited as "Confusion Out of Compromise"].

17. Article 18, section 5 was thought to be "more important for the protection of industrial workers than anything else that will appear in the constitution." VERBATIM REPORT, *supra* note 14, at 2. Because the provision was placed within the "Labor" section of the Arizona constitution, concern arose over whether it was intended to affect only employer-employee suits. Considering this issue at an early date, the Arizona supreme court construed the broad language of article 18, section 5 to apply to all litigants. Davis v. Boggs, 22 Ariz. 497, 507, 199 P. 116, 120 (1921).

whether a plaintiff's concurrent negligence should defeat his recovery.[18]

In *Inspiration Consolidated Copper Co. v. Conwell*,[19] the provision received its first judicial interpretation. Article 18, section 5 was deemed to render a jury the sole arbiter of the existence of contributory negligence or assumption of risk.[20] The finding of a jury on the issue was conclusive and hence the court was prohibited from disturbing the verdict.[21] Prior to the state's constitutional convention, factual determinations regarding contributory negligence had been left to a jury only if the court found that evidence of a plaintiff's own negligence was conflicting.[22] *Conwell* made it clear that a judge would no longer be able to withhold the issue from the jury, even if the existence of contributory negligence was considered by the court to be undisputed.[23] The court apparently left open for later attention the question of whether a jury, which had concluded that a plaintiff was indeed negligent, was compelled to honor the common law defense of contributory negligence and defeat a negligent plaintiff's claim.[24] Until recently, decisional law had not detailed the extent to which a jury was able to find a plaintiff concurrently negligent, yet still use its own discretion whether to allow recovery.[25]

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18. VERBATIM REPORT, *supra* note 14, at 6.

19. 21 Ariz. 480, 190 P. 88 (1920). *Conwell*'s value as a judicial interpretation of article 18, section 5 is highlighted by the fact that two members of the court had played significant roles as delegates to the constitutional convention and had participated in the drafting of article 18, section 5. VERBATIM REPORT, *supra* note 14, at 2-6.

20. 21 Ariz. at 486, 190 P. at 90.

21. *Id.*

22. *See* Hobson v. New Mexico & Ariz. R.R., 2 Ariz. 171, 177-80, 11 P. 545, 547-48 (1886); *cf.* Lopez v. Central Ariz. Mining Co., 1 Ariz. 464, 480-81, 2 P. 748, 749-50 (1883).

23. In spite of article 18, section 5, there are two limitations on the required submission of contributory negligence to a jury. First, a court need not send the question of contributory negligence to the jury when there is not sufficient evidence from which a reasonable man might conclude that there was contributory negligence. Sax v. Kopelman, 96 Ariz. 394, 396 P.2d 17 (1964). Secondly, when there is conclusive evidence showing that plaintiff's independent negligence was the sole, proximate cause of his injury, a directed verdict for defendant is permitted. Campbell v. English, 56 Ariz. 549, 110 P.2d 219 (1941).

24. The confusion arises from the court's direct citation to language from an Oklahoma case, Dickinson v. Cole, 74 Okla. 79, 177 P. 570 (1918) and the Supreme Court decision on appeal, *sub. nom.*, Chicago, R.I. & P. Ry. v. Cole, 251 U.S. 54 (1919), regarding the effect of article 23, section 6 of the *Constitution of Oklahoma*, from which Arizona adopted the language for article 18, section 5. The *Conwell* court cited to the syllabus of the *Cole* case which stated only that all *questions of fact* regarding contributory negligence were left solely to the jury. 74 Okla. at 79-80, 177 P. at 570, *cited in* 21 Ariz. at 487, 190 P. at 91. The Supreme Court affirmed the state decision, noting that juries could be given the power to decide questions of law. 251 U.S. at 56, *cited in* 21 Ariz. at 487-88, 190 P. at 91. Thus, the *Conwell* court's use of these two decisions leaves open the question whether or not it was relying upon the expanded Supreme Court opinion as authority for extending such power to an Arzona jury under article 18, section 5.

25. *See* Heimke v. Munoz, 106 Ariz. 26, 470 P.2d 107 (1970), *noted in* "Confusion Out of Compromise," *supra* note 16, at 556.

The Arizona supreme court frequently has appraised the propriety of instructions given to a jury regarding the affirmative defense of contributory negligence.[26] The state court has held that it is reversible error for a trial court to instruct a jury that, if they find a plaintiff contributorily negligent, they *must* deny him any recovery.[27] The prohibition of a "must" instruction suggested that a jury's decision whether to apply contributory negligence as a defense was beyond the control of the court. Without charging a jury that certain facts required a particular verdict, an instruction nonetheless could influence a jury decision. In *Layton v. Rocha*[28] the Supreme Court of Arizona cautioned that the most preferable instruction would inform a jury that, if a plaintiff was contributorily negligent, they *should* find for the defendant.[29] It was felt that such an instruction would more accurately advise the jury of its duty. *Layton v. Rocha* appeared destined to establish contributory negligence as a defense which a jury would feel compelled to apply after concluding that a plaintiff had been negligent. Though a trial court was prohibited from telling a jury that it *must* apply the defense whenever warranted by the evidence, a highly suggestive "should" instruction, without further comment as to the jury's discretion, probably would accomplish the same result with a jury of laymen, unschooled in the rationale behind the constitutional provision.

In *Heimke v. Munoz*,[30] a "may" jury instruction which had been tolerated, though discouraged, in *Layton v. Rocha*[31] was adopted by the *Heimke* court as the preferred form.[32] The rather permissive language in *Heimke* indicated that a jury can be instructed that they may find in favor of a plaintiff, in spite of undisputed evidence of his own contributory negligence.[33] *Heimke*'s extensive discussion of *Layton*

26. *See, e.g.*, Heimke v. Munoz, 106 Ariz. 26, 470 P.2d 107 (1970); Trojanovich v. Marshall, 95 Ariz. 145, 388 P.2d 149 (1963); Zancanaro v. Hopper, 79 Ariz. 207, 286 P.2d 205 (1955); Campbell v. English, 56 Ariz. 549, 110 P.2d 219 (1941).

27. *See* Layton v. Rocha, 90 Ariz. 369, 370-71, 368 P.2d 444, 445 (1962) (jury instruction that certain factors contributing to plaintiff's injuries constituted contributory negligence is fundamental error and may be raised on appeal, even in the absence of an objection at trial); Wolfswinkel v. Southern Pac. Co., 81 Ariz. 302, 305 P.2d 447 (1956), *aff'd on rehearing*, 82 Ariz. 33, 307 P.2d 1040 (1957); Varela v. Reid, 23 Ariz. 414, 204 P. 1017 (1922). The court also may not instruct a jury that if it finds contributory negligence the law will leave the parties where it finds them. Heimke v. Munoz, 106 Ariz. 26, 30, 470 P.2d 107, 111 (1970).

28. 90 Ariz. 369, 368 P.2d 444 (1962).

29. *Id.* at 371, 368 P.2d at 445.

30. 106 Ariz. 26, 470 P.2d 107 (1970).

31. The full jury instruction which was discouraged, although tolerated in *Layton* was: "Even though the undisputed evidence shows that plaintiff's negligence did as a fact contribute to the injury the jury *may* find in favor of the plaintiff and this court cannot direct a new trial." 90 Ariz. at 370, 368 P.2d at 445. *See also* Campbell v. English, 56 Ariz. 549, 110 P.2d 219 (1941); Dennis v. Stukey, 37 Ariz. 299, 294 P. 276 (1930), *rehearing denied*, 37 Ariz. 510, 295 P. 971 (1931).

32. 106 Ariz. at 29, 470 P.2d at 110.

33. *Id.* at 29, 470 P.2d at 110.

v. Rocha, without any mention of the "should" jury instruction recommended in that earlier decision,[34] suggested that such an instruction, without any further comment to a jury as to their discretionary power, was no longer acceptable.[35] This conclusion was bolstered by the command in *Heimke* that "the trial court must not, directly or indirectly, tell the jury that it shall return a verdict compatible with the common law defense of contributory negligence."[36] In addition to addressing the propriety of certain jury instructions, the *Heimke* court examined the specific language of article 18, section 5.

Heimke's interpretation of article 18, section 5 clearly established that the law of contributory negligence in Arizona was considerably different than that which exists at common law. The *Heimke* court focused its attention on the sentence structure of the provision and concluded that the language plainly indicated that a jury not only had exclusive power to decide the factual issue of contributory negligence, but also had the right to decide whether the defense would be applied.[37] Therefore, even if the plaintiff's contributory negligence was conclusively established, the jury could not be required to deny the plaintiff relief. The jury could, if it so desired, defeat a claim on grounds of contributory negligence, but it was not obligated by the law to do so.[38]

Most recently, the Supreme Court of Arizona adopted Uniform Jury Instructions submitted by a court appointed committee.[39] Qualified approval[40] was given to an instruction on contributory negligence that reads as follows:

> The defendant claims that the plaintiff was negligent, and that his negligence contributed to cause the plaintiff's injury. Whether contributory negligence is a defense is left to you. If both plaintiff and defendant were negligent, and if the negligence of each

34. *See* text accompanying notes 28-30 *supra*.

35. *But see* Purchase v. Mardian, 1 CA-Civ. 1668 (Ariz. Ct. App., Mar. 26, 1974), in which Judge Howard ruled that *Heimke* did not overrule the use of the "should" instruction of *Layton v. Rocha*. He did note, however, that plaintiff's counsel would be free to argue to the jury that the word *should* as used in a contributory negligence instruction "was permissive and meant that they could allow the plaintiff to recover or not recover as they saw fit, in their sole discretion."

36. 106 Ariz. at 29, 470 P.2d at 110. *See generally* "Confusion Out of Compromise," *supra* note 16, at 561.

37. 106 Ariz. at 27, 470 P.2d at 108.

38. *Id.* at 29-30, 470 P.2d at 110-11.

39. ARIZ. UNIFORM JURY INSTRUCTIONS.

40. The Court gave the "qualified approval" as part of its expressed position on the use of the uniform instructions. The Court stated:

> The Arizona Supreme Court expresses a qualified approval and recommends the use of the Arizona Uniform Jury Instructions, unless the trial judge is satisfied that there is a compelling legal reason for modifying or refusing to give an instruction.

Letter from Arizona Supreme Court, Chief Justice Jack D.H. Hays to Hon. Irwin Cantor, Judge of the Superior Court of Maricopa County, Feb. 8, 1974.

was the cause of the injury, *the plaintiff should not recover.*[41] This means that you must decide two things:

(1) Whether the plaintiff *was* contributorily negligent, and
(2) If the plaintiff *was* negligent whether his negligence should prevent a verdict in his favor.[42]

Although stating that selected changes could be made by the trial court, the supreme court did not indicate whether litigants would be allowed to challenge the propriety of an instruction by judicial appeal. The lack of Arizona case law on the subject requires that other states' courts be consulted.[43] Illinois' courts, while mandating that their uniform instruction *shall be* used,[44] permit judicial review when the instruction is attacked as an inaccurate statement of the law.[45] Though the Arizona supreme court has not yet reviewed the newly adopted contributory negligence jury instruction, the *Heimke* decision may be interpreted as providing a standard to which a jury instruction on contributory negligence should comply.

Heimke, though approving a "may" instruction, did not necessarily limit future jury instructions to such language. Instead, the "may" language was approved as it satisfied the central command in *Heimke*, that a jury instruction "must not, directly or indirectly, tell a jury that it shall return a verdict compatible with the [common] law of contributory negligence."[46] In examining the newly adopted contributory negligence instruction for compliance with *Heimke*, it is evident that the third sentence reinstates the "plaintiff should not recover" language favored in *Layton v. Rocha.*[47] The numbered explanatory clauses which follow this language, however, may remedy whatever suggestive qualities that might accompany a "should not recover" instruction. The "may" language in *Heimke* was necessary to cure the

41. Emphasis added.
42. ARIZ. UNIFORM JURY INSTRUCTION No. 5 (Civil).
43. Illinois case law has been suggested as a competent source for authority that the Arizona supreme court might consider if the uniform instructions are challenged. Telephone interview with the Hon. J. Holohan, Supreme Court of Arizona, Phoenix, Ariz., Mar. 27, 1974.
The Illinois supreme court was the national leader in forming a committee and later adopting uniform jury instructions in 1961, and would probably furnish the most comprehensive case commentary. *See, e.g.*, Brewer v. Brown, 126 Ill. App. 2d 69, 261 N.E.2d 483 (1970); Miyatovich v. Chicago Transit Auth., 112 Ill. App. 2d 437, 251 N.E.2d 345 (1969); Seibert v. Grana, 102 Ill. App. 2d 283, 243 N.E.2d 538 (1968); Cooper v. Cox, 31 Ill. App. 2d 51, 175 N.E.2d 651 (1961). *See generally* Corboy, *Pattern Jury Instructions—Their Function and Effectiveness*, A.B.A. SECTION OF INS., NEGLIGENCE & COMPENSATION LAW PROC. 119 (1964); Hannah, *Jury Instructions: An Appraisal By A Trial Judge*, UNIV. ILL. L.F. 627 (1963).
44. Miyatovich v. Chicago Transit Auth., 112 Ill. App. 2d 437, 444, 251 N.E.2d 345, 348 (1969).
45. Brewer v. Brown, 126 Ill. App. 2d 69, 72-73, 261 N.E.2d 483, 484 (1970).
46. 106 Ariz. at 29, 470 P.2d at 110.
47. *See* text accompanying notes 28-30 *supra.*

highly suggestive nature of the "should not recover" instruction in *Layton v. Rocha.* Without any further comment to the jury as to their discretionary power to ignore plaintiff's negligence, it became critical whether *may not* rather than *should not* was used in instructing the jury. Such language within the instruction was the only indication by the court to a jury as to what effect a finding of contributory negligence could have. Now that the uniform jury instruction informs the jury of their discretionary power to ignore undisputed contributory negligence, the inclusion within the instruction of the "should not recover" language is not so prohibitorily suggestive that a jury would feel compelled to bar recovery. Rather, the jury may view that part of the uniform instruction as advising them of the usual effect which a factual finding of contributory negligence would have, if the jury were not given the additional power to decide whether to apply the common law defense. It is significant to note that the uniform jury instruction on contributory negligence was the only instruction that the supreme court changed prior to adoption from the form suggested by the court appointed committee.[48] This may give that particular instruction added credence as comporting with the supreme court's view of the correct statement of the law of contributory negligence in Arizona.

Article 18, section 5 is more than a peculiar mode of procedure affecting the application of contributory negligence. *Heimke*, at least, appears to construe the constitutional provision as a modification of the common law defense.[49] Yet in spite of the expanded powers ex-

48. Letter from C.J. Hays, *supra* note 40.

49. The extent of that modification, however, is still subject to dispute. The court of appeals has suggested that Arizona may have approached a policy of comparative negligence. Zadro v. Snyder, 11 Ariz. App. 363, 367, 464 P.2d 809, 813 n.1 (1970). *Contra,* Boies v. Cole, 99 Ariz. 198, 205, 407 P.2d 917 (1965). Yet Arizona law may favor a negligent plaintiff more than the comparative negligence doctrine. In states which have adopted the concept of comparative nelgigence, juries balance the negligence of the plaintiff against that of the defendant and apportion the amount of recovery accordingly. *See* W. PROSSER, *supra* note 1, § 67, at 433-39. Under Arizona law, the jury is able to ignore a plaintiff's negligence altogether and provide complete recovery. There is no basis for a new trial on grounds that the jury ruled contrary to the evidence of a plaintiff's negligence. Prior to *Heimke,* the Arizona supreme court had ruled that article 18, section 5 was not violated by a trial court granting a new trial on grounds that a jury verdict was contrary to the evidence. General Petroleum Corp. v. Barker, 77 Ariz. 235, 269 P.2d 729 (1954). However, granting a new trial is foreclosed after *Heimke.* 106 Ariz. at 29, 470 P.2d at 110. *See also* Layton v. Rocha, 90 Ariz. 369, 370-71, 368 P.2d 444, 445 (1962). *Heimke,* as well as the new jury instruction, gives a jury the clear and unmistakable power to determine whether the defense of contributory negligence will be a complete bar to a personal injury claim in Arizona.

The power of a jury to decide questions of law, as well as fact, may be a bit unusual. Such an expansion of a jury's normal province, however, has met a due process challenge before the United States Supreme Court. In Chicago, R.I. & Pac. Ry. v. Cole, 251 U.S. 54 (1919), Oklahoma's constitution, article 23, § 6, worded identically to Arizona's article 18, section 5 was objected to as a violation of the fourteenth amendment. The Court rejected a claim that a defendant in a state negligence action had a vested

tended to a jury in state court, federal courts sitting in Arizona continue to direct verdicts for negligent defendants on grounds of contributory negligence.

Federal Rejection of Arizona Law

In *Herron v. Southern Pacific Co.*,[50] plaintiff brought an action in the federal district court of Arizona seeking to recover damages for personal injuries received in a collision between his automobile and defendant's train. In an unreported decision, a verdict was directed for the railroad on grounds that plaintiff had been contributorily negligent. Plaintiff appealed, contesting the propriety of rendering a directed verdict in contravention of article 18, section 5 of the Arizona constitution. In view of the apparent conflict between the general federal practice and the Arizona constitutional provision, the circuit court of appeals reserved a report of their decision and certified the question of law to higher authority. The United States Supreme Court was asked to determine whether a federal court sitting in a diversity action could direct a verdict, notwithstanding a state constitutional provision which prohibited this method of resolving the case.[51]

The Court first considered the relevancy of legal authority which might have appeared to control the issue. The Practice Conformity Act of 1872,[52] which required federal courts to adopt modes of procedure followed in the state courts of each federal district, was considered inapplicable because article 18, section 5 was not regarded as relating merely to practice or procedure.[53] On the contrary, the con-

right to have contributory negligence applied as it normally was at common law. *Id.* at 55, *citing* Arizona Copper Co. v. Hammer, 250 U.S. 400 (1919). A state was not precluded from confering larger powers upon a jury than would usually prevail at common law: "There is nothing . . . in the Constitution of the United States . . . that requires a state to maintain the line with which we are familiar between the function of the jury and those of the court. . . . it may confer larger powers upon a jury than those that generally prevail." 251 U.S. at 56. The defendant in a negligence action could not complain that his chance to prevail upon grounds of contributory negligence were diminished as the defense could have been altogether removed. *Id.* at 55.

50. 283 U.S. 91 (1931).

51. *Id.* at 92-93.

52. The Practice Conformity Act, June 1, 1872, ch. 255, § 5, 17 Stat. 196, was superseded by the *Federal Rules of Civil Procedure.* The Act had required federal courts to conform, as near as possible, to the practice, forms and modes of proceeding which were followed in the state courts within each federal district. The purpose of the conformity statute was to remedy the problem of practicing under two different systems of procedure within one locality. Barrett v. Virginian Ry., 250 U.S. 473, 475 (1919); Nudd v. Burrows, 91 U.S. 426, 441 (1875). The adoption of the Federal Rules in 1938 made the Practice Conformity Act of little importance. Federal district courts no longer are required to follow state procedural law covered by a federal rule. *See* Hanna v. Plumer, 380 U.S. 460 (1965). Since the Federal Rules do not cover every conceivable point of practice, there may be areas in which the Practice Conformity Act is not superseded. W. SIMKINS, FEDERAL PRACTICE § 4, at 5-9 (3d ed. Schweppe's rev. 1938); *see* F. JAMES, CIVIL PROCEDURE § 1.7, at 18-19 (1965); C. WRIGHT, LAW OF FEDERAL COURTS § 61, at 255-57 (2d ed. 1970).

53. 283 U.S. at 93.

stitutional provision was viewed as cutting deeply into a right observed at common law.[54] The *Rules of Decision Act*,[55] though seeming to apply, also was deemed not to control the matter. That statute required the "laws" of a state to be observed in federal courts. Almost a century earlier, when delineating the requirments of the *Rules of Decision Act* in *Swift v. Tyson*,[56] the Court had interpreted the word "laws" as being limited to state statutes and local laws and usages.[57] Decisions of state courts were regarded only as evidence of state law, rather than conclusive authority.[58] Since the challenged Arizona law was a state constitutional provision, the *Rules of Decision Act* normally would have called for federal court acceptance.[59] The Court concluded, however, that the controlling principle governing its decision must be that the essential character or function of a federal court could not be altered by a state constitutional provision.[60] The function of a trial judge in a federal court was not considered in any sense to be a "local matter."[61] Emphasis was placed on his position as governor of the trial, and according to the Court, a federal judge would be relegated to the position of a mere moderator if state statutes were permitted to impair the court's power to conduct a trial.[62] Following this reasoning, the general practice in federal courts relating to directed verdicts was permitted to defeat a contrary policy embodied within a state constitution.[63]

54. *Id.*; Atchison, T. & S.F. Ry. v. Spencer, 20 F.2d 714, 718 (9th Cir. 1927).

55. The Federal Judiciary Act, September 24, 1789, ch. 20, § 34, 1 Stat. 92 (Rules of Decision Act), *as amended*, 28 U.S.C. § 1652 (1970). When *Herron* was decided, the statute read: "That the laws of the several states, except where the Constitution, treaties, or statutes of the United States otherwise provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply." 28 U.S.C. § 725 (1926), *amended*, 28 U.S.C. § 1652 (1970). The amended version reflects various changes in form, one of which is the substituting of "civil actions" for "trials at common law," in order to include suits in equity after the Court's decision in Ruhlin v. New York Life Ins. Co., 304 U.S. 202 (1938).

56. 41 U.S. (16 Pet.) 1 (1842).

57. *Id.* at 19. "Local laws" would suggest laws in the nature of municipal ordinances, while "usages" connotes local custom assigned to a particular locality.

58. *Id.*

59. Even before *Erie*, it was the general rule that federal courts were required to acknowledge the authority of state court decisions construing state constitutions and statutes. Hawks v. Hamill, 288 U.S. 52 (1933); Green v. Neal's Lessee, 31 U.S. (6 Pet.) 291 (1832). *But see* Gelpcke v. City of Dubuque, 68 U.S. (1 Wall.) 175 (1864).

60. 283 U.S. at 94.

61. *Id.*

62. *Id.* at 95. In support of its reasoning, several earlier cases were cited, each having upheld federal practice over state rules and laws. *E.g.*, Barrett v. Virginian Ry., 250 U.S. 473 (1918) (state statute dictated that court shall not direct a verdict, where the evidence is such that a verdict the other way would be set aside); Lincoln v. Power, 151 U.S. 436 (1894) (state statute specified that written instructions shall be taken by the jury in their retirement); St. Louis, Iron Mt. & S. Ry. v. Vickers, 122 U.S. 360 (1886) (state constitution prohibited a charge to the jury with regard to matters of fact); Vicksburg & Meridian R.R. v. Putnam, 118 U.S. 545 (1886) (state statute prevented court from expressing any opinion upon the facts).

63. Conforming to the answers of the Supreme Court in *Herron*, the court of appeals affirmed the judgment of the district court. 50 F.2d 1078 (9th Cir. 1931).

The continued vitality of *Herron* and use of directed verdicts in federal court on grounds of contributory negligence, has fostered a dual system of justice within the state of Arizona. The recent *Heimke* decision and its substantial modification of the common law defense of contributory negligence has resulted in even greater disparity between the law applied in Arizona's state and federal diversity courts than during the period immediately following the *Herron* decision. It was exactly such lack of uniform application of state substantive law that prompted the United States Supreme Court to render its landmark decision in *Erie*.[64]

HERRON AND THE ERIE DOCTRINE

Erie and the Substance-Procedure Dichotomy

Seven years after *Herron* was decided, *Erie* commanded federal courts, whose jurisdiction was based solely on diversity of citizenship, to honor all state "laws", whether statutory or decisional.[65] The reign of general federal common law, which federal courts had formulated to supplant nonobligatory state decisional law, was ended abruptly. In *Erie* the plaintiff was struck by a train door while he was walking adjacent to a railroad track. The question of the railroad's liability hinged on the classification of the plaintiff as either a licensee or a trespasser. According to the general common law of the federal courts, a party proceeding along a commonly used footpath was a licensee to whom the railroad owed a duty of reasonable care. As declared by the highest court of Pennsylvania, however, the user of a longitudinal pathway adjacent to a railroad track was entitled to no greater duty of care than that owed to a trespasser. The *Erie* Court rejected the application of general federal common law and concluded that the decisional law of the state would have to be followed by a district court sitting in a diversity case.

The general common law which had been fashioned by federal courts was criticized as an unconstitutional appropriation of state power.[66] The authorization issued by *Swift v. Tyson*[67] to ignore state

64. *See, e.g.*, Boner, *Erie v. Tompkins, A Study in Judicial Precedent*, 40 TEX. L. REV. 509, 619 (1962); Clark, *State Law in the Federal Courts: The Brooding Omnipresence of Erie v. Tompkins*, 55 YALE L.J. 267 (1946); Friendly, *In Praise of Erie —And of the New Federal Common Law*, 39 N.Y.U.L. REV. 383 (1964); Shulman, *The Demise of Swift v. Tyson*, 47 YALE L.J. 1336 (1938).

65. 304 U.S. 64, 78-80 (1938). *See* text accompanying notes 56-58 *supra*.

66. 304 U.S. at 78-80. Though Mr. Justice Brandeis did not invoke a specific constitutional provision as his authority, some authorities have presumed that the reserved powers of the states provided for in the tenth amendment controlled. *See* Iovino v. Waterson, 274 F.2d 41, 48 (2d Cir. 1959); C. WRIGHT, *supra* note 52, § 56, at 229; Friendly, *supra* note 64, at 395; *cf.* Bernhardt v. Polygraphic Co. of America, 350 U.S. 198, 202 (1958).

court decisions in favor of federal common law was blamed for encouraging noncitizens to use federal diversity jurisdiction as a means of finding a friendly forum.[68] State autonomy was considered to require that federal courts adopt not only the statutory law, but also the decisional law of state judicial departments. Since Congress was constitutionally without power to declare "substantive" rules of common law,[69] articulation of general common law principles was to be left exclusively to the states.[70]

The constitutional rationale for the *Erie* decision was supplemented by a review of the practical difficulties that had arisen after *Swift v. Tyson.* The Court recalled the outrageous manipulation of diversity jurisdiction by noncitizens in order to avoid state laws.[71] The decision in *Swift* to honor only state statutes and local laws and usages had eliminated any hope for a uniform application of law within a state. Federal common law was permitted to exist side by side with those laws peculiar to the various states.[72] Additionally, federal courts were required constantly to decide what matters were local so that they could be governed in accordance with state rules.[73] This had led to a history of continuous litigation focusing on distinctions between local and general laws.[74] Therefore, the ruling in *Erie,* although based on constitutional grounds, also was prompted by practical considerations of judicial administration.[75]

In the wake of *Erie* there arose a dichotomous classification of state law as either "substantive" or "procedural."[76] Because *Erie* de-

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Although this constitutional basis for *Erie* was energetically presented, the immediate result also could have been reached by an expanded reading of the *Rules of Decision Act* to include state court decisions as "laws" to be observed by federal courts, thus allowing for the application of Pennsylvania decisional law without relying on constitutional grounds. Mr. Justice Brandeis did refer to a previous legal commentary, Warren, *New Light on the History of the Federal Judiciary Act of 1789,* 37 HARV. L. REV. 49 (1923), which suggested that an earlier draft of the Rules of Decision Act section of the Federal Judiciary Act of 1789 had included the unwritten and common law of the states within the "laws" to be recognized in federal courts. 304 U.S. at 73.

67. *See* text accompanying notes 56-59 *supra.*

68. 304 U.S. at 74-77; *see* Shulman, *supra* note 64, at 1346.

69. 304 U.S. at 78.

70. *Id.* at 78-79; *see* C. WRIGHT, *supra* note 52, at 224.

71. See Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518 (1928), *cited at* 304 U.S. at 73. For criticism of the *Black & White Taxicab* case, see Ball, *Revision of Federal Diversity Jurisdiction,* 28 ILL. L. REV. 356, 362-64 (1933); Frankfurter, *Distribution of Judicial Power between Federal and State Courts,* 13 CORNELL L.Q. 499, 524-30 (1928); Shelton, *Concurrent Jurisdiction—Its Necessity and its Dangers,* 15 VA. L. REV. 137 (1928).

72. *See* C. WRIGHT, *supra* note 52, § 55, at 224. *See also* Ahrens, *Erie v. Tompkins—The Not So Common Law,* 1 WASHBURN L.J. 343 (1961).

73. 304 U.S. at 74.

74. The Court in *Erie* noted that after *Swift* nearly 1000 federal decisions had been rendered on such issues. 304 U.S. at 74 n.8. *See also* 2 C. WARREN, THE SUPREME IN UNITED STATES HISTORY 89 (rev. ed. 1935).

75. *See generally* Shulman, *supra* note 64, at 1346.

76. *See* Clark, *supra* note 64, at 278.

manded federal court conformity in state "substantive" matters,[77] federal courts were forced to determine whether a state rule of law affected the legal relations among parties and thus was to be observed in federal court. Only when the state rule merely created a mode of enforcing state-created rights could a federal court consider it to be classified a procedural device which could be ignored.[78]

Post-*Erie* treatment of state rules governing burdens of proof is of particular interest when considering the relationship between substance and procedure. The Court of Appeals for the First Circuit denominated as "substantive" a state law designating which party had the burden of proving contributory negligence.[79] Hence, under the "substantive"—"procedural" dichotomy the state rule would control over a conflicting federal law.[80] The propriety of this approach was subsequently approved by the Supreme Court.[81] These holdings are especially significant when reexamining *Herron.*

The *Herron* Court had supported its holding by emphasizing that in federal courts a state rule on burden of proof would not be allowed to defeat conflicting federal practice.[82] The weight of that argument now has been dissipated.[83] A state law on burden of proof reflects a judgment by that state as to which party should bear the loss when evidence is inconclusive or unobtainable. In effect, a state has made a determination as to the requirements of assembling and proving a claim for relief.[84] Article 18, section 5, likewise, demonstrates certain state policy considerations. Arizona has somewhat favored a concurrently negligent plaintiff due to a historical distaste for the harsh consequences ensuing from the imposition of contributory negligence as a common law defense.[85] If Arizona's constitutional provision is

77. 304 U.S. at 78-79.

78. *See* Horowitz, *Erie R.R. v. Tompkins—A Test to Determine Those Rules of State Law to Which Its Doctrine Applies*, 23 S. CAL. L. REV. 204, 208-09 (1950).

79. Sampson v. Channell, 110 F.2d 754, 758 (1st Cir. 1940), *cert. denied*, 310 U.S 650 (1940); *accord*, Ira S. Bushey & Sons v. United States, 172 F.2d 447 (2d Cir. 1949); *cf.* Porto Rico Gas & Coke Co. v. Frank Rullan & Assocs., 189 F.2d 397, 404 (1st Cir. 1951).

80. *See also* Lee v. Cannon Mills Co., 107 F.2d 109 (4th Cir. 1939); Montgomery Ward & Co. v. Snuggins, 103 F.2d 458 (8th Cir. 1939); Central Surety & Ins. Corp. v. Murphy, 103 F.2d 117 (10th Cir. 1939); Equitable Life Assur. Soc. v. MacDonald, 96 F.2d 437 (9th Cir. 1938).

81. Palmer v. Hoffman, 318 U.S. 109 (1943).

82. 283 U.S. at 94.

83. *See* Palmer v. Hoffman, 318 U.S. 109 (1943); text accompanying notes 79-81 *supra.* In Cities Service Oil Co. v. Dunlap, 308 U.S. 208 (1939), a Texas rule allocating the burden of proof on the status of a bona fide purchaser was held to be a rule which the federal courts in Texas were bound to follow. The Court referred to the "substantial" right upon which the holder of recorded legal title to Texas land may confidently rely. *Id.* at 212.

84. Note, *State Trial Procedure and the Federal Courts: Evidence, Juries, and Directed Verdicts Under the Erie Doctrine*, 66 HARV. L. REV. 1516, 1519 (1953).

85. *See* text accompanying notes 14-18 *supra.*

deemed to have modified the imposition of a common law defense,[86] the provision would seem to fall within the protective "substantive" category. Since in Arizona conclusive evidence of a plaintiff's negligence does not necessarily defeat his claim, the state apparently has altered the common law requirement that the plaintiff be free of any contributory negligence. Protecting a state's power to create such legal rules which specify which acts of prospective litigants will invite or defeat liability, and to have those laws enforced in federal courts would seem to have been the dominant theme voiced in *Erie*.[87] The *Herron* Court's rejection of a mere procedural label for article 18, section 5[88] should foreclose any lingering doubt as to the merits of classifying Arizona's provision as "substantive."[89]

Guaranty Trust and the Outcome-Determinative Test

Recognition of the critical effect "procedural" rules might have on litigation prompted the Supreme Court to modify the *Erie* litmus test in favor of a more encompassing model in *Guaranty Trust Co. v. York*.[90] *Guaranty Trust* rendered protection to any state law which, if not applied in a diversity action in federal court, could significantly affect the outcome of the case.[91] Following this approach, even state law that did not fall within the mechanical "substantive" classification still might warrant federal court adoption. The *Guaranty Trust* Court reached this conclusion when it considered whether a suit in equity, brought in a federal diversity case, was governed by a state statute of limitations.[92] Although this statute would have barred the suit in state court, a federal forum would have been free to entertain the action if the state statute of limitations was considered to be a matter of procedure and hence not controlling in federal court.

Recalling the problems that beset courts attempting to follow the *Erie* dichotomy,[93] the opinion focused upon the effect of the state statute in question. The Court noted that in spite of being "procedural" in some sense of the word, a rule of law could be of "substantive"

86. *See* text accompanying notes 36-38 *supra*.
87. 304 U.S. at 78-80.
88. 283 U.S. at 93.
89. *See* "Confusion Out of Compromise," *supra* note 16, at 558-60.
90. 326 U.S. 99 (1945).
91. Mr. Justice Frankfurter's opinion modified *Erie* policy to such an extent that a renaming of the precept in honor of *Guaranty Trust* has been suggested. Kurland, *Mr. Justice Frankfurter, The Supreme Court and The Erie Doctrine in Diversity Cases*, 67 YALE L.J. 187, 187-88 (1957).
92. Any question of equity court immunity from *Erie* was dismissed by reference to the Court's earlier decision in Ruhlin v. New York Life Ins. Co., 304 U.S. 202 (1938). Thus the statute of limitation became the primary issue in *Guaranty Trust*. 326 U.S. at 107.
93. 326 U.S. at 108.

importance. It was concluded, therefore, that if the refusal of a federal diversity court to recognize state law could significantly affect the result of litigation, the state law would have to be observed.[94] If a law merely governed the manner and means by which a state right was enforced, however, and did not significantly influence the outcome of the litigation, it was not considered of sufficient state concern to merit federal court adoption.[95] Thus, *Guaranty Trust* substituted the so called "outcome-determinative" test for use in resolving *Erie* doctrine problems.

The decision also was significant for its characterization of a federal court's role in diversity suits. A diversity court was considered to be only another court of the state, rather than an independent forum within the federal judicial system.[96] This parallel nature of state and federal diversity courts dictated that a federal court could not be permitted to substantially alter the enforcement of a right provided by the state.[97]

Unlike the statute of limitations in *Guaranty Trust*, article 18, section 5 would not be an absolute bar to litigation if it were honored in federal court. A directed verdict in federal court, however, relieves a negligent defendant from liability which could have been imposed by a jury impaneled in state court proceedings. Thus, a failure to follow Arizona's provision could substantially affect the outcome of negligence litigation. A plaintiff's contributory negligence is not necessarily a bar to recovery in an Arizona state court, yet *Herron* permits its existence to be an absolute defense in federal court. Evaluation of *Herron* after considering *Erie* and *Guaranty Trust* indicates that the federal practice of directing verdicts in contravention of Arizona's constitutional provision is no longer supportable. Article 18, section 5 delineates rights between concurrently negligent parties and thus deserves uniform application as a "substantive" law under *Erie*'s "substance—procedure" test. In addition to being a law of such substantial importance to the citizenry of Arizona, the constitutional provision also meets the requirements of the more encompassing test in *Guaranty Trust*. Article 18, section 5 is clearly "outcome-determinative."[98]

94. *Id.* at 109.
95. *Id.*
96. *Id.* at 108.
97. *Id.* at 108-09.
98. With the Supreme Court's decision in Hanna v. Plumer, 380 U.S. 460 (1965), the "outcome-determinative" approach to the *Erie* doctrine may have been somewhat modified. A possible change in *Erie* doctrine principles was indicated by dictum in the decision, rather than the specific holding. Limited to its facts, *Hanna* would not have a direct bearing on the reexamination of *Herron*. The narrow issue of the case involved what Mr. Chief Justice Warren phrased as the first direct collision between

BYRD: BALANCING FEDERAL AND STATE INTERESTS

The requirement that federal courts conform to state "procedural" rules that might be "outcome-determinative" has been objected to as an unnecessary shackling of federal court practice and procedure.[99] *Byrd v. Blue Ridge Rural Electric Cooperative*[100] signaled that federal practice would be accorded freedom from the strictures of some state "procedural" laws.

As a defense to a negligence action in federal diversity court, it was asserted that plaintiff Byrd was the defendant's employee, and therefore his exclusive remedy should be in accordance with the South Carolina *Workmen's Compensation Act.* An earlier decision by the state's supreme court had held that the factual issue of whether a litigant should be classified as an employee was to be determined by a judge, rather than a jury. This state decision notwithstanding, the *Byrd* Court held that in federal court a plaintiff was entitled to have the question of whether he was an employee and thus restricted to relief under the Act presented to a jury.[101] Although Mr. Justice Brennan acknowledged the apparent priority given to state law by *Guaranty Trust,*[102] a new method for resolving certain *Erie* doctrine problems was introduced. Specifically, the new formula would apply to situations involving conflicting state "procedural" laws that might otherwise be accepted in federal court under an "outcome-determinative" test.

When federal court practice came into conflict with a state law which was not bound up with the definition of rights and obligations of parties, the *Byrd* Court proposed a balancing of federal and state

state "procedural" law and the corresponding federal rule of civil procedure. In resolving the conflict in favor of the federal rule, the Court stated that an *Erie* doctrine test was not appropriate. *Id.* at 474.

In spite of the rejection of *Erie* as controlling the specific issue, the Court indicated that an *Erie-Guaranty Trust* examination would have provided a similar result. Mr. Chief Justice Warren seized the opportunity to redefine what he thought to have been the "twin aims" of *Erie*: the discouragement of forum shopping and avoidance of inequitable administration of the laws. *Id.* at 468. Though this portion of the opinion has value only as dictum, it has prompted the comment that *Erie* policy has been narrowed from the more encompassing "outcome" standard. McCoid, *Hanna v. Plumer: The Erie Doctrine Changes Shape,* 51 VA. L. REV. 884, 895-96 (1965). This conclusion is apparently based on that part of *Hanna* which seemed to indicate that the Court will not prohibit nonsubstantial or trivial variations between state and federal court proceedings. 380 U.S. at 467-68. Uniform enforcement would be necessary only if state law was of such significance that nonrecognition in federal diversity court would encourage forum shopping or alter the mode of enforcement of state-created rights. *Id.* at 469. *See* McCoid *supra,* at 898.

99. *See* Friendly, *In Praise of Erie—and Of the New Federal Common Law,* 39 N.Y.U.L. REV. 383, 402 (1964); Kurland, *supra* note 93, at 214; Note, *Of Lawyers and Laymen: A Study of Federalism, The Judicial Process, and Erie,* 71 YALE L.J. 344, 352 (1961).

100. 356 U.S. 525 (1958).

101. 356 U.S. at 531.

102. *Id.* at 537.

interests.[103] The South Carolina rule would have to meet a challenge from countervailing considerations at work in the independent federal judicial system.[104] Although failure to follow the state rule possibly could lead to a different outcome in federal court, the policy of *Guaranty Trust*, encouraging uniform application of outcome-determinative laws within a state, could not demand federal court compliance with a state law that would disrupt the federal allocation of functions between judge and jury.[105]

Byrd, in its presentation of a federal-state balancing test, left substantial doubt as to the controlling reasons for its decision. In requiring the issue of a litigant's employee status to be ruled upon by a jury, vague reference was made to the seventh amendment's guarantee of trial by jury.[106] Having planted a suggestion of a constitutional basis for the holding, a footnote was then employed which appears to discredit the amendment as a determinative element.[107] However, the attention given to the seventh amendment has prompted suggestions that *Byrd* be narrowly interpreted as constitutionally controlled.[108]

The *Byrd* Court's reluctance to rely expressly upon the seventh amendment left room for a case-by-case balancing of competing federal and state interests. In *Byrd*, the particular state law was deemed of little importance to South Carolina, when compared with a commanding federal policy providing for jury determination of questions of fact.[109] Rejection of an express directive from the seventh amendment did not preclude its looming shadow from underscoring the tra-

103. *Id.* at 537-38.

104. "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, in civil common-law actions, it distributes trial functions between judge and jury and, under the influence—if not the command—of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury."

Id. at 537 (footnote omitted). Contrast this language in *Byrd* referring to the *independent* federal judicial system, with the earlier comment in *Guaranty Trust* which emphasized the *accident* of diversity jurisdiction, 326 U.S. at 109, and characterized the forum for diversity suits as just another state court. *Id.* at 108-09.

105. 356 U.S. at 537-38; *see* Note, *supra* note 99, at 351.

106. 356 U.S. at 537. U.S. CONST. amend. VII reads:

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 re-examined in any Court of the United States, than according to the rules of the common law.

107. 356 U.S. at 537 n.10. The Court explained that its decision to support the countervailing federal interests, which distributed the resolution of the issue to a jury, made unnecessary the consideration of whether a jury determination of the factual issue of statutory immunity was protected by the seventh amendment. *Id.*

108. *See* Atlantic & Gulf Stevedores v. Ellerman Lines Ltd., 369 U.S. 355, 360 (1962); Phipps v. N.V. Nederlandsche Amerikaansche Stoomvart, Maats, 259 F.2d 143 (9th Cir. 1958). *See generally* Friendly, *supra* note 99, at 403 n.95; Stason, *Choice of Law Within the Federal System: Erie Versus Hanna*, 52 CORNELL L. REV. 377, 393 (1967); Whicher, *The Erie Doctrine and the Seventh Amendment: A Suggested Resolution of Their Conflict*, 37 TEX. L. REV. 549 (1959).

109. 356 U.S. at 537-39.

dition that juries resolve factual issues. Since *Byrd* involved federal interests that were challenged by what was considered a rather non-substantial state law, the decision left unanswered the question of how important a law must be to a state before it would be permitted to prevail over conflicting federal practice of similar importance to that upheld in *Byrd*.

Whether or not the seventh amendment actually was controlling in *Byrd* is crucial to an evaluation of that decison's balancing test. Assuming a constitutional basis for *Erie* such as the tenth amendment, rather than an interest in maintaining the general scheme of federalism, it has been argued that a balancing test is improper.[110] A weighing of federal and state interests cannot supersede any aspect of the earlier *Erie-Guaranty Trust* standard for deciding whether a state law is to be honored in federal court.[111] Accepting the validity of this view, it follows that where the conflicting federal practice is not shielded by an overriding constitutional command, a federal court must focus on the state law without diverting attention to competing federal interests. The decisions in *Erie* and *Guaranty Trust* would require a judgment on whether the state law was either "substantive" or procedurally "outcome-determinative" and thus deserving of federal court acceptance. Competing federal interests would not be a factor since characteristics of the state law alone would determine whether federal courts were free to follow their own practice. Based on these conclusions, the balancing test used in *Byrd* has been attacked as unconstitutional.[112] It is argued that having refused to rely expressly on the seventh amendment, the Court in *Byrd* should not have disregarded a state law which admittedly was "outcome-determinative" because the constitutional basis for the *Erie* doctrine, and specifically *Guaranty Trust*, precluded any balancing in favor of federal interests.[113] Attributing some measure of strength to this view, it has been demonstrated previously that Arizona's constitutional provision would satisfy *Erie-Guaranty Trust* requirements for state law acceptance in federal court.[114]

Byrd and Article 18, Section 5

In spite of such attacks on its legitimacy, the *Byrd* balancing test has been used by a number of federal courts.[115] Before such a bal-

110. *See* Smith, *Blue Ridge and Beyond: A Byrd's-Eye View of Federalism in Diversity Litigation*, 36 TUL. L. REV. 443, 466-67 (1962).
111. *Id.* at 466.
112. *Id.* at 466-67.
113. *Id.*
114. *See* text accompanying notes 82-89, 97-98, *supra*.
115. *See* Wratchford v. S.J. Groves & Sons, 405 F.2d 1061 (4th Cir. 1969); Szantay

ancing test can be applied to article 18, section 5, however, it must be determined if the provision is closely tied to substantive rights of the parties. In *Byrd*, the Court first questioned whether the South Carolina law was "intended to be bound up with the definition of the rights and obligations of the parties."[116] The Court responded that the state law was only a practical means of resolving master-servant requisites necessary to invoke a statutory defense. Such a nonsubstantial state policy weighed little when balanced against substantial federal interests. Arizona's constitutional provision, however, has received recognition as an important modification of the common law. The *Herron* Court observed that article 18, section 5 cut deeply into a right recognized at common law.[117] The provision clearly manifests a strong state policy in favor of allowing juries to balance the equities in negligence situations and render their verdicts accordingly. Thus, if article 18, section 5 was subjected to a balancing test, distinguishing it from South Carolina's law might furnish a means of escaping the result in *Byrd*. However, since Arizona's provision seems unquestionably to be bound up in rights and obligations of the parties, any possible balancing with federal interests should be foreclosed. The opening language of the *Byrd* opinion appears to direct federal courts to observe unquestionally such substantial state laws.[118]

Although the analysis applied in *Byrd* seemed to dictate an overruling of *Herron*, the Court instead reaffirmed that decision.

> Concededly, the Herron case was decided before Erie R. Co. v. Tompkins, but even when Swift v. Tyson . . . was governing law and allowed federal courts sitting in diversity cases to disregard state decisional law, it was never thought that state statutes or constitutions were similarly to be disregarded. . . . Yet Herron held that state statutes and constiutional provisions could not . . . alter the essential character or function of a federal court.[119]

In support of its revalidation of *Herron, Byrd* emphasized the strong influence of the seventh amendment without actually declaring it to be an underlying constitutional basis for *Herron*. Avoiding an express constitutional argument, the Court stressed the priority that should be given to the accepted relationship between federal judges and juries, directing attention to *Diederich v. American News Co.*[120]

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v. Beech Aircraft Corp., 349 F.2d 60 (4th Cir. 1965); Stason, *supra* note 82, at 393 n.62.

116. 356 U.S. at 536.

117. 283 U.S. at 93.

118. 356 U.S. at 535; *see* Hill, *The Erie Doctrine and the Constitution*, 53 NW. U.L. REV. 541, 605 (1958).

119. 356 U.S. at 539.

120. 128 F.2d 144 (10th Cir. 1942), *cited in* 356 U.S. at 539 n.14.

Diederich, a Tenth Circuit opinion decided after *Erie*, held that an Oklahoma constitutional provision which was identical to article 18, section 5 of the Arizona constitution was not binding on a federal judge in a diversity case.[121] The *Byrd* Court, therefore, appears to have introduced *Diederich* to demonstrate that, in spite of *Erie*, an issue of law similar to that dealt with in *Herron* had been resolved in favor of federal practice. Any balancing in favor of federal procedure extracted from *Diederich*, however, does not necessarily apply when article 18, section 5 is involved. Oklahoma courts have plainly not given their constitutional provision the same interpretation as have courts in Arizona.[122] As stated recently by the Supreme Court of Oklahoma:

> Whether the court uses the word "should" or "must" is not of great importance. . . . *Either word used will inform the jury that plaintiff is not entitled to a verdict if they find and believe from the evidence that the plaintiff was negligent.*
>
> . . . .
>
> We have examined the Layton case and note that the Supreme Court of Arizona tolerated the use of the word "may". . . . "We think the preferable form is that in the event of contributory negligence the jury "should" find for the defendant."[123]

The requirement in *Heimke v. Munoz*[124] that the trial court must not suggest to the jury that they shall render a verdict compatible with the law of contributory negligence has removed Arizona from any earlier similarity with Oklahoma's constitutional provision.[125] The new uniform jury instruction on contributory negligence assures that a jury is made aware of their discretionary power to ignore conclusive evidence of a plaintiff's negligence.[126] Oklahoma has maintained an attitude that its provision requires only that the jury will decide any factual issue concerning the existence of contributory negligence. Once this determination has been made, the continued acceptance of a "must" instruction indicates that a jury in Oklahoma need not be allotted the discretion to decide whether a contributorily negligent plaintiff will nevertheless be permitted to recover.

The recently adopted Uniform Jury Instruction on contributory

121. 128 F.2d at 146.
122. Miller v. Price, 168 Okla. 452, 33 P.2d 624 (1934), *cited in* Smith v. Chicago, R.I. & Pac. R.R., 498 P.2d 402, 405 (Okla. 1972) (establishing the rule in Oklahoma that the defense of contributory negligence is not a question of law for the jury); *accord*, St. Louis—S.F. Ry. v. Robinson, 99 Okla. 2, 225 P. 986 (1924).
123. Smith v. Chicago, R.I. & Pac. R.R., 498 P.2d 402, 405 (Okla. 1972) (emphasis added).
124. 106 Ariz. 26, 470 P.2d 107 (1970).
125. *Id.* at 29, 470 P.2d at 110.
126. See text accompanying notes 41-42 *supra*.

negligence has little in common with the preferred Oklahoma instruction. Though the new instruction contains language suggesting that a negligent plaintiff *should not* recover, the next two clauses indicate to the jury that a verdict for a negligent plaintiff would be consistent with the law of Arizona. The charge in *Heimke*, that trial courts must not directly or indirectly imply to the jury that it shall return a verdict compatible with the common law defense of contributory negligence,[127] applies to the new jury instruction, and disassociates Arizona's law from that of Oklahoma. Accordingly, if the *Byrd* Court cited *Diederich* to emphasize that *Herron* is valid under the balancing test introduced in *Byrd*, the difference in the approach taken in the two states in construing their provisions should serve to repudiate such a comparison.

The court of appeals in *Diederich*, however, justified its holding by relying upon the seventh amendment.[128] The court concluded that article 23, section 6 of the Oklahoma constitution, which prohibited directed verdicts on grounds of contributory negligence, interfered with a federal judge's power to rule on questions of law, a power which the court claimed was protected by the seventh amendment's preservation of trial by jury.[129] *Byrd*'s reference to *Diederich* seems to reinforce the argument that the holding in *Byrd* was not merely reached under the influence of the seventh amendment's looming shadow, but in response to the provision's absolute directive. Undoubtedly, an express constitutional basis for the decision in *Byrd* would discredit a reference to that decision as authority for weighing federal interests against state law. A *Byrd* balancing test would be unnecessary for those instances in which the countervailing federal practice is sanctioned by express constitutional authority. The seventh amendment basis for *Diederich* and the *Byrd* Court's citation to the former case when discussing *Herron* implies that such a constitutional command may impede the unqualified acceptance of article 18, section 5 by federal diversity courts. While a seventh amendment basis for *Herron* may not necessarily reflect the majority view of that decision, such an interpretation has received sufficient endorsement to merit critical attention.

THE SEVENTH AMENDMENT CHALLENGE

Directed Verdicts and the Seventh Amendment

Though it may be possible to challenge the current validity of

127. 106 Ariz. at 29.
128. 128 F.2d at 145.
129. *Id.* at 146.

Herron based on *Erie* doctrine principles, that attack would be to no avail if *Herron* can be justified on seventh amendment grounds. General constitutional authority for enforcing Arizona law in federal court would be subordinated to an express provision of the Constitution.[130]

Several distinct situations could cause state law to conflict with possible seventh amendment requirements. State law could deny a jury trial on an issue where the seventh amendment would demand it.[131] This conflict was opined by some interpreters of *Byrd* as the actual controlling factor in that case.[132] A second confrontation exists in those cases where state law denies trial by jury but federal courts customarily permit jury resolution of such issues.[133] This second instance of conflict compares with the express holding in *Byrd*. Some authorities suggest that *Herron* involved yet a third possible clash between state law and the Constitution. Such discord is said to arise when state law provides for mandatory jury resolution of an issue, while in certain instances the seventh amendment would appear to require the same issue to be decided by a federal court judge.[134]

Language in *Herron* alluded to a constitutional basis for the decision, although no particular provision was singled out for authority.[135] Later federal court decisions, however, have cited *Herron* as controlled by the seventh amendment.[136] In *Herron*, unlike *Byrd*, there was no question as to the right to a trial by jury. Rather, the dispute involved the question of whether Arizona's constitutional provision altered the essential character of a federal court by expanding the types of situations where a jury would be required to rule on an issue. The arguments that based *Herron* on seventh amendment grounds apparently concluded that article 18, section 5 interfered with a federal judge's ability to direct a verdict. This latter right was one considered to be encompassed by implication within the seventh amendment's right to trial by jury.[137]

130. *See generally* Note, *supra* note 84, at 1521 n.29.
131. C. WRIGHT, *supra* note 52, § 92, at 403.
132. Friendly, *supra* note 99, at 403 n.95; Stason, *supra* note 110, at 393; Whicher, *supra* note 108, at 554.
133. C. WRIGHT, *supra* note 52, § 92, at 403.
134. *Id.*
135. The Court in *Herron* stated:

> In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law. This discharge of the judicial function as at common law is an essential factor in the process for which the Federal Constitution provides.

283 U.S. at 95.
136. *See* Atlantic & Gulf Stevedores v. Ellerman Lines, Ltd., 369 U.S. 355 (1962); Schell v. Ford Motor Co., 270 F.2d 384 (1st Cir. 1959); Diederich v. American News Co., 128 F.2d 144 (10th Cir. 1942).
137. *See* Schell v. Ford Motor Co., 270 F.2d 384 (1st Cir. 1959); *cf.* Jaftex Corp. v. Randolph Mills, Inc., 282 F.2d 508 (2d Cir. 1960). *See also* Bagalay, *Directed Ver-*

A review of the Supreme Court's treatment of the right to trial by jury reveals little support for the assertion that a federal court judge's power to direct a verdict is protected by the seventh amendment. The seventh amendment was enacted to preserve jury trials in civil actions as known at common law. In maintaining the right to a jury trial, the Supreme Court has not required inflexible reverence for its historical character. Instead, the Court has emphasized that the seventh amendment was intended to preserve only the "substance" of a jury trial, not mere matters of form and procedure.[138] In addressing the question of what fundamental characteristics must be preserved, the Court has stated that trial by jury at common law meant a trial to a jury composed of twelve individuals presided over by a judge. The Court has ruled that the seventh amendment allotted to the jury the exclusive province in resolving questions of fact, and allotted to the court the exclusive control over questions of law.[139] A judge's authority to rule on the law enables him to aid the jury by explaining and commenting upon the testimony and to set aside their verdict if it was contrary to the law or the evidence.[140] Since a directed verdict is a means by which a federal judge is able to decide a case as a matter of law, some courts have accorded that procedure seventh amendment protection.[141] Providing a directed verdict with such constitutional character supports a conclusion that article 18, section 5, which prohibits directed verdicts on grounds of contributory negligence, infringes upon a litigant's right to a jury trial in federal court.

In those instances in which directed verdicts have been discussed in the context of the seventh amendment, however, the Supreme Court has not held that such federal court procedure is necessarily part and parcel of a trial by jury. Rather, the Court has ruled that a directed verdict in federal court is not a violation of the right to trial by jury, since it is a permissible modification of the common law trial.[142] While safeguarding the most fundamental elements of trial by jury, the Court has permitted rational modifications of federal

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dicts and the Right to Trial by Jury in Federal Courts, 42 TEX. L. REV. 1053, 1058 (1964); Smith, *supra* note 110, at 463.

138. Galloway v. United States, 319 U.S. 372, 390-92 (1943); *Ex parte* Peterson, 253 U.S. 300, 309 (1920); Walker v. New Mexico & S. Pac. R.R., 165 U.S. 593, 596 (1897). *See generally* 5 J. MOORE, FEDERAL PRACTICE ¶ 38.08[5](5) (2d ed. 1971).

139. Galloway v. United States, 319 U.S. 372 (1943).

140. Capital Traction Co. v. Hof, 174 U.S. 1, 13-14 (1899). *See also* 5 J. MOORE, *supra* note 138, at ¶ 38.08[5](5).

141. *See* Jaftex Corp. v. Randolph Mills, Inc., 282 F.2d 508, 517 (2d Cir. 1960); Diederich v. American News Co., 128 F.2d 144, 146 (10th Cir. 1942).

142. Galloway v. United States, 319 U.S. 372 (1943); Berry v. United States, 312 U.S. 450 (1941); *see* FED. R. CIV. P. 50.

court procedure in the interests of judicial efficiency.[143] The use of directed verdicts in federal court has been upheld in the face of a charge that such a procedure is a limitation upon the jury's fact finding powers. A judge has the right to direct a verdict when there is no substantial issue of fact in dispute.[144] The conclusiveness of the evidence required for the rendering of a directed verdict is considered to make the issue a question of law, outside the exclusive province of the jury. It seems rather tenuous to assert that because the directed verdict is an accepted federal procedure which does not infringe upon a jury's exclusive fact finding powers it also falls within the protection of the seventh amendment.

Even accepting the merits of inferring such an express constitutional basis for *Herron*, article 18, section 5 should still be applied in federal court. Since the *Herron* Court found that evidence of plaintiff's contributory negligence was conclusively established, a directed verdict was deemed proper. However, the *Herron* Court was operating under the assumption that the law of Arizona would not allow recovery by a contributorily negligent plaintiff.[145] Thus, the directed verdict was justified because if the jury had found for the negligent plaintiff, it would have required a new trial for the defendant. If Arizona law would not permit a contributorily negligent plaintiff to recover, then sending the issue to a jury under article 18, section 5 when contributory negligence had been conclusively established could be viewed as interfering with the court's exclusive province to decide questions of law through the use of the directed verdict. *Herron* relied upon *Inspiration Consolidated Copper v. Conwell*[146] for its interpretation of Arizona law. As previously indicated,[147] *Conwell* assured an Arizona jury the exclusive right to resolve all factual issues of contributory negligence. *Conwell* apparently failed, however, to treat the state provision as permitting a jury to determine whether or not the defense actually would be applied to completely bar recovery, and thus did not notify federal courts of the fact that in Arizona a negligent plaintiff was not necessarily precluded from receiving damages.

Heimke v. Munoz has changed the law in Arizona regarding contributory negligence to such an extent that federal court reliance on

143. Procedural devices which the Court has ruled do not violate the seventh amendment include: the use of summary judgment procedures, Fidelity & Deposit Co. v. United States, 187 U.S. 315 (1902); a master's report as evidence in a jury trial, *Ex parte* Peterson, 253 U.S. 300 (1920); and special or general verdicts accompanied by interrogatories, Walker v. New Mexico & S. Pac. R.R., 165 U.S. 593, 596 (1897).

144. *See generally* 5 J. MOORE, *supra* note 138, at ¶ 50.02[1].

145. 283 U.S. at 95-96.

146. 21 Ariz. 480, 190 P. 88 (1920).

147. *See* text accompanying notes 19-25 *supra.*

Herron is subject to rebuttal. In Arizona, a judgment for a negligent plaintiff would not be grounds for a new trial. According to the requirements presented in *Herron*, the validity of a directed verdict is conditioned upon the existence of evidence that would require a new trial if a jury rendered a verdict for the non-moving party.[148] A judge sitting in a federal diversity case in Arizona, however, is seated within a state whose substantive law does not accept contributory negligence as an absolute defense.[149] Since a verdict for a negligent plaintiff is not contrary to the law of Arizona, conclusive evidence of a plaintiff's negligence does not create the occasion for the proper use of a directed verdict.[150] In Arizona, a plaintiff's contributory negligence does not, as a matter of law, preclude recovery. Accordingly, though contributory negligence is conclusively established, a federal court should not charge that article 18, section 5 intrudes upon the exclusive province of the court to decide questions of law.[151]

148. A directed verdict is proper in two instances: where the non-moving party has failed to plead or prove an issue or issues material to a claim or defense, and where the court determines there are no controverted issues of fact upon which reasonable men could differ. 5A J. MOORE, *supra* note 138, at ¶ 50.02[1]. The directed verdict in *Herron* falls within the latter example. The court determined that conclusive evidence of plaintiff's negligence prevented reasonable men from rendering a verdict against the defendant railroad.

In the years since the *Herron* decision was rendered, it appears that the Supreme Court has changed the standard for granting a directed verdict. *See* Brady v. Southern R.R., 320 U.S. 476 (1943). In fact, Professor Moore questions the constitutionality of the standard used in *Herron*. 5A J. MOORE, *supra* note 138, at ¶ 50.03[2]. *Brady* is viewed by Moore as implying that it is not sufficient ground for directing a verdict that the judge would consider it his duty to set aside a contrary verdict by the jury and grant a new trial. 5A J. MOORE, *supra* note 138, at ¶ 50.03[2]. *See* Adams v. United States, 116 F.2d 199 (7th Cir. 1940). A directed verdict raises a question of law, while the granting of a new trial could involve both questions of law and fact. After *Brady*, a directed verdict seems proper when as a matter of law a jury verdict for the non-moving party would be contrary to the evidence. 5A J. MOORE, *supra* note 138, at ¶ 50.03[2]. *See* Tidewater Oil Co. v. Waller, 302 F.2d 638 (10th Cir. 1962); Grepke v. General Elec. Co., 280 F.2d 508 (7th Cir. 1960), *cert. denied*, 364 U.S. 899 (1960); United States v. Alger, 68 F.2d 592 (9th Cir. 1934). Accordingly, the court is able to withhold the verdict from the jury and direct a verdict for the movant.

After *Heimke*, it is extremely doubtful that a verdict for a negligent plaintiff would be grounds for a new trial. See the discussion of *Heimke* at note 49 *supra*. Even if it were adequate grounds, under the *Brady* standard for directed verdicts, article 18, section 5 would not interfere with a federal judge's power to direct a verdict. In Arizona, a verdict in favor of a negligent plaintiff is not precluded by conclusive evidence of contributory negligence. Thus, the *Brady* standard for a directed verdict is not satisfied, since a verdict for a conclusively negligent plaintiff would not be regarded as contrary to the evidence.

149. *See* text accompanying notes 30-38 *supra*.

150. *See* Note, *supra* note 84, at 1525. Though *Heimke* should be interpreted as a substantial modification of the common law doctrine of contributory negligence in Arizona, when a federal court determines whether a state law interferes with the right to trial by jury the state court characterization of its own law is not controlling. Instead, the decision is made by recourse to federal law. Simler v. Conner, 372 U.S. 221, 222 (1963).

151. Whether or not *Herron* should even be accorded the status of a seventh amendment decision may be revealed if the Supreme Court answers an issue which has divided the federal circuit courts of appeal for years.

Federal appellate courts have reached conflicting results when considering whether a state or federal standard should determine when there is sufficient evidence either

CONCLUSION

Since the Supreme Court's decision in *Herron* a dual system of justice has existed in Arizona. A contributorily negligent plaintiff who suffers a directed verdict in federal diversity court is denied the benefits of state policy which allows a negligent plaintiff to recover damages if a jury has weighed the equities in his favor.

The Supreme Court's decisions in *Erie* and *Guaranty Trust* should provide the necessary authority for overruling *Herron* and assuring uniform enforcement of law within the state. After *Heimke v. Munoz*[152] freedom from contributory negligence was no longer a necessary element for a successful negligence suit. Thus, continued nonrecognition of article 18, section 5 in federal court prevents the state of Arizona from defining the rights and obligations of all of its citizens and those noncitizens that have contact with the state. After *Erie*, there should not be any doubt that Arizona's provision should be observed in federal diversity court as a "substantive" state law. In addition, article 18, section 5 falls within the more encompassing protection of *Guaranty Trust*, for the state law is clearly "outcome-determinative." In spite of this strong authority for acceptance of Arizona's constitutional provision, however, the *Byrd* Court's reaffirmation of *Herron* must be reconciled.

The approval given to the *Herron* decision may have followed

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to send a question of fact to the jury or to support a jury verdict. *See, e.g.*, Weeks v. Latter-Day Sts. Hosp., 418 F.2d 1035 (10th Cir. 1969) (upholding the federal standard); Calvert v. Katy Taxi, Inc., 413 F.2d 841 (2d Cir. 1969) (adopting the state standard); Wratchford v. S.J. Groves & Sons, 405 F.2d 1061 (4th Cir. 1969) (federal standard); ABC-Paramount Records, Inc. v. Topps Record Distrib. Co., 374 F.2d 455 (5th Cir. 1967) (federal standard); Phipps v. N.V. Nederlandsche Amerikaansche Stoomvart, Maats, 259 F.2d 143 (9th Cir. 1958) (federal standard); Continental Can Co. v. Horton, 250 F.2d 637 (8th Cir. 1957) (state standard); Lovas v. General Motors Corp., 212 F.2d 805 (6th Cir. 1954) (state standard).

Herron has attained a popular position among authority cited in support of a federal sufficiency of evidence standard. When the merits of a federal standard are advanced, *Herron* serves to underscore either one of two positions. In some instances, *Herron* is thought to demonstrate that a state sufficiency of evidence standard may not alter the internal function of a federal court. *See* ABC-Paramount Records, Inc. v. Topps Record Distrib. Co., 374 F.2d 455 (5th Cir. 1967); Reynolds v. Pegler, 223 F.2d 429 (2d Cir. 1955). Other cases associate *Herron* with a seventh amendment argument by finding a relationship between the amendment and a federal judge's power to pass questions of fact to the jury. *See* Phipps v. N.V. Nederlandsche Amerikaansche Stoomvart, Maats, 259 F.2d 143 (9th Cir. 1958); Diederich v. American News Co., 128 F.2d 144 (10th Cir. 1942). In at least one instance, the issue in *Herron* has been identified as identical to the sufficiency of evidence conflict. Merritt-Chapman & Scott Corp. v. Frazier, 289 F.2d 849, 857 n.11 (9th Cir. 1961). *See also* BATOR, MISHKIN, SHAPIRO, WECHSLER; HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM, 739 n.3 (2d ed. 1973). Article 18, section 5 is seen as contrary to federal court standards designating when sufficient conflicting evidence has been introduced to raise a factual question of contributory negligence for jury resolution.

A Supreme Court decision on the sufficiency of evidence question might provide dictum on whether the federal interests exalted in *Herron* were actually controlled by the seventh amendment.

152. 106 Ariz. 26, 470 P.2d 107 (1970).

from the *Byrd* Court's failure to appreciate the important definition of rights and obligations provided by article 18, section 5.[153] Recognizing the development of the Arizona provision, since *Herron*, into a statement of "substantive" law should promote a reassessment of the *Herron* decision and the support rendered in *Byrd*. An acknowledgment that Arizona's provision is bound up in the definition of rights and obligations of parties precludes the balancing of interests employed by the *Byrd* Court in treating the nonsubstantial state rule at issue in that case. Even if article 18, section 5 were subjected to a challenge from competing federal interests such as those presented in *Byrd*, the difference between the South Carolina rule dealt with in *Byrd* and Arizona's constitutional provision could provide for a different result. The last possible obstacle to article 18, section 5 being afforded full recognition in federal diversity court is the contention that the Arizona provision is in conflict with the seventh amendment. Such a constitutional challenge should be seriously questioned. It is doubtful that a federal judge's power to direct a verdict is encompassed within the right to a common law jury trial, for the Supreme Court has stated only that directed verdicts in federal court do not infringe upon the exclusive province of the jury protected by the seventh amendment. Even if such a constitutional basis for *Herron* is accepted, the argument that Arizona's constitutional provision interferes with a federal court's power to direct a verdict is not compelling.[154] Article 18, section 5 should be applied in federal court under the dictates of *Erie*, *Guaranty Trust* and *Byrd*.

While a judicial challenge to *Herron* should be successful, revision of article 18, section 5 also could remedy the inequities arising from federal court failure to enforce that provision. Nonrecognition of article 18, section 5 seems to have resulted in part from a lack of appreciation by federal courts of the importance which Arizona has attached to the constitutional provision. A constitutional amendment could plainly demonstrate a committed state policy as to when a concurrently negligent plaintiff should be allowed to recover for his injuries. By explicitly defining the rights and obligations of parties in negligence actions within an amended constitutional provision, rather than relying upon jury resolution on an *ad hoc* basis, equal treatment of all of Arizona's citizens could be guaranteed.

153. *See also* Perez v. Campbell, 402 U.S. 637, 648 (1971); Hanna v. Plumer, 380 U.S. 460, 473 (1965).

154. *See* text accompanying notes 142-145 *supra*.