the best products, guarantees fair dealing and offers the best facilities for the public comfort will benefit. The companies will still be able to train retail dealers in courtesy and efficiency. But instead of compulsion being the sanction for the continuance of the relationship, the oil companies will compete vigorously for the business of the retail operators. And the resultant smaller competitive unit at the retail level could establish a type of competition that some have implied is inconsistent with our ologopolistic economy.[60] For those who believe our free enterprise system is adaptive enough to allow the co-existence of efficient bigness, where necessary, and individualistic smallness, the result would be eminently satisfactory.

THE DIRECTED VERDICT AND APPLICABILITY OF STATE PROCEDURAL RULES IN FELA CASES: THE ROLE OF THE SUPREME COURT

Implicit in the scheme of concurrent enforcement of national legislative enactments by state and federal courts is the question of the proper procedural rules to be observed in the state forum. A serious contention has been that the state's interest in administering its own judicial system is so significant that local rules of pleading and practice must be applied even at the sacrifice of legitimate claims arising under federal law.[1] Adequate appraisal of the validity of this argument must

60. Marxists have long embraced the theory that concentration is an inevitable result of the capitalistic system. See SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 34 (2d ed. 1947).

Today this Marxian theory has been augmented, strangely enough, by those who contend that there exists an economic and technological necessity for bigness in today's industry. See Charles E. Wilson, *Big Business and Big Progress Go Together* (Privately Printed Brochure 1949); DRUCKER, CONCEPT OF THE CORPORATION 224 (1946).

1. The most important legal problem confronting our jurisprudential system is that inherent in the co-existence of national and state governments. Solution of the really significant social problems forced upon us by the interdependence of modern institutions requires a constant adjustment in this relationship. During the upheaval of the 1930's this truism was mirrored in the controversy over the limits of federal power under the commerce clause. Since this provision was found to be substantially co-extensive with national requirements, the problem is now focused in the extent of state power to tax and to regulate economic activity. Yet the limits of federal authority are still being probed with reference to the explosive issues of protection against state abuses of the criminal processes and of the other numerous safeguards, embodied in the 14th Amendment, against unjust state action.

Hardship resulting from arbitrary exercise of power by a strong central government provides the historical justification for our federal system; to allay the popular fear of tyranny caused by such centralized authority, our Federal Constitution created a national government with expressly limited powers. Nevertheless, as the United States grew geographically and industrially the functions of the national government

take into account the policy underlying the particular statute and also prior Supreme Court pronouncements concerning utilization of state procedural rules. An examination of these factors in the context of recent Federal Employers Liability Act[2] decisions suggests that this contention cannot be sustained.

Moreover, widespread criticism has been leveled at the Court for too frequent review of FELA cases turning on mere assessment of the evidence. Although close supervision of such litigation may have been justified in the past, appreciation of the proper function of the Court suggests the need for a re-examination of the propriety of such continued surveillance.

The FELA, enacted in 1908, conferred a right of action upon railway workers for injuries caused by the negligence of the railroad, its agents and employees. Recovery under the Act was facilitated by negation of the common law defenses of contributory negligence[3] and the fellow servant doctrine. Further indicating the obvious desire of Congress to reduce obstacles to recovery by injured railroad employees, amendments in 1910[4] and 1939[5] extended the right of action to the deceased's personal representatives or next of kin and abolished assumption of risk.

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necessarily increased. For as problems arose, demanding solutions of which the states were incapable, the traditional concept of negative government was replaced by the thesis that federal machinery must be used to meet undeniable national needs. Although acceptance of this view is now commonplace in many areas of our social and economic life, the extension of government aid into new fields is meeting progressively stronger opposition by those who view traditional state prerogatives with a jealous eye.

Unquestionably, as the matters to be resolved vary geographically in substance and complexity, so must the solutions. Thus states' rights objections to some federal encroachment may be firmly based upon reason and experience. This, however, should not obscure the possibility that a particular issue may best be decided by a uniform solution administered by a central authority. The controversy certainly should not be further befogged by opposition on the grounds of as yet unrealized fears of the misuse of power by the federal government.

Problems growing out of concurrent jurisdiction of state and federal courts to enforce the FELA have presented one small feature of this controversy within the vast panorama of federal and state power. But it is suggested that on the basis of a realistic evaluation of opposing state and federal interests, this aspect of the larger picture may be more properly termed a pseudo-federalism conflict. The state's interest in preserving the autonomy of its court system fades into relative insignificance beside the strong national policy expressed by FELA. No important state prerogative is overridden when effective assertion of a federal right requires subordination of a particular state procedural rule.

2. 35 STAT. 65 (1908), as amended, 45 U.S.C. §§ 51-6 (1946).

3. The doctrine of comparative negligence was adopted so that contributory negligence is still relevant to reduce damages.

4. 36 STAT. 291 (1910), 45 U.S.C. §§ 56, 59 (1946).

5. 53 STAT. 1404 (1939), 45 U.S.C. §§ 51, 54, 56, 60 (1946). The original Act did abolish assumption of risk as a defense where the injury was due to violation of a safety appliance statute.

Despite the evident intent to liberalize recovery under the Act[6], initially the Supreme Court strictly construed the facts necessary to constitute a cause of action[7] and even preserved the defense of contributory negligence, labelling it assumption of risk.[8] Consonant with other reversals in the philosophy of the Court, however, the pendulum completed its full arc and the word "negligence" is no longer narrowly defined.[9] Indeed some Justices have asserted that recovery is presently based upon strict liability[10] rather than fault.[11]

Certainly a definite conflict exists within the Court over the grant of certiorari in FELA cases turning on the sufficiency of the evidence to go to the jury and over the applicability of state procedural rules when it is sought to enforce the federal right in a state forum. Although

6. Some critics contend that Congress in establishing a federal cause of action envisaged simply the abolition of the common law negligence defenses. An equally tenable position is that Congress created a uniform right of action which contemplated that state rules of procedure interfering with effective assertion of such right would be inapplicable. See Gavit, *States' Rights and Federal Procedure*, 25 IND. L.J. 1, 11 n.33 (1949). It is unwarranted to infer that Congress did not foresee the diverse results which have actually occurred when state procedural rules have been applied. To accommodate such consequences with an intent to establish uniform recovery is impossible.

7. Atchison, T. & S. F. R. v. Saxon, 284 U.S. 458 (1932) (deceased was running alongside the moving train with the purpose of boarding it. Plaintiff's theory was that deceased stepped into a soft spot along the roadway and fell under the train. Supporting evidence was the soft spot with a footprint therein, and blood eight or ten feet west of the soft spot. There were no eye witnesses but the evidence persuaded the jury. The Supreme Court reversed, holding that the cause of death could only be "surmised."); C. & O. R. v. Kuhn, 284 U.S. 44 (1932). *Compare* Pennsylvania R. v. Chamberlain, 288 U.S. 323, 339 (1932), where the Court said: ". . . where proven facts give equal support to each of two inconsistent inferences . . . neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these infcrences as against the other, before he is entitled to recover," *with* Tennant v. Peoria & P. U. R., 321 U.S. 29, 35 (1943): "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences." *Compare* New York C. R. v. Ambrose, 280 U.S. 486 (1929), *with* Lavender v. Kurn, 327 U.S. 645 (1945).

8. GELLHORN, VALIDITY OF FEDERAL COMPENSATION FOR TRANSPORTATION EMPLOYEES, 25 AM. LAB. LEG. REV. 71 (1935).

9. *See, e.g.*, Urie v. Thompson, 337 U.S. 163, 180 (1948); Lavender v. Kurn, 327 U.S. 645, 653 (1945); Jamison v. Encarnacion, 281 U.S. 635, 640 (1929).

10. Congress has had repeated opportunities to adopt a workmens' compensation scheme of recovery for railroad workers. For tabulation of such bills introduced in Congress see Pollack, *Workmen's Compensation for Railroad Work Injuries and Diseases*, 36 CORNELL L.Q. 236, 271-72 (1950). At present, however, both the railroad industry and labor unions are, for different reasons, opposed to adoption of this legislation. When labor sentiment was favorable to this type of compensation for industrial injuries, the railroads effectively sabotaged the enabling legislation. See 49 CONG. REC. 4547, 4562-3, 4673-5, 4676-7 (1910).

11. *See, e. g.*, Wilkerson v. McCarthy, 336 U.S. 53, 76 (1948); Johnson v. U. S., 333 U.S. 46, 55 (1947); Bailey v. Central Vt. R., 319 U.S. 350, 358 (1942).

agreeing on the inadequacy of FELA as a device to impose upon the railroad industry the personal injury risks incident to its operations, Justices Black and Frankfurter represent two widely divergent approaches to these problems.[12]

In FELA controversies, as in other areas of the law, Justice Black has exhibited his great confidence in the propriety of jury trials.[13] Therefore, for him the question whether plaintiff has presented sufficient evidence to reach the jury is significant enough to merit Supreme Court review. A conceivable explanation for this attitude is that the jury usually favors the plaintiff in these railway negligence cases,[14] which accords with Justice Black's predilections.[15] An equally plausible answer is his desire to protect the jury system from judicial erosion. This democratic institution, evolved through centuries of struggle against arbitrary officialdom, should not be stripped of its traditional prerogatives.[16] Whatever his motivation, he has adopted the position that the "right to trial by jury is part and parcel of the remedy afforded railroad workers under FELA."[17] Justice Frankfurter, on the other hand, has frequently indicated that FELA cases concerning sufficiency of the evidence do not present any question necessitating issuance

12. The cases do not reveal Justice Black's attitude toward FELA, but presumably he recognizes the deficiencies of the Act—at least his vigorous defense of the jury, conspicuously favorable to plaintiffs, evidences his understanding of the importance of this legislation to the railroad worker. Mr. Justice Frankfurter has repeatedly manifested awareness of the inefficacy of the Act. ". . . [T]he common law concept of liability for negligence is archaic and unjust as a means of compensation for injuries sustained by employees under modern industrial conditions. . . ." Tiller v. Atlantic C. L. R., 318 U.S. 54, 71 (1943); Carter v. Atlanta & St. A. B. R., 338 U.S. 430, 438 (1949); Urie v. Thompson, 337 U.S. 163, 196 (1948). Despite this attitude Justice Frankfurter has been caustically criticized for ". . . his insistence on 'negligence' being construed as a technical word of art requiring absolute proof of dereliction by the railroad." Richter and Forer, *FELA—A Real Compensatory Law for Railroad Workers*, 36 CORNELL L.Q. 203, 210 n.20 (1950).

13. See Galloway v. U.S., 319 U.S. 372, 297 (1943); Brady v. Southern R., 320 U.S. 476, 484 (1943); Tiller v. Atlantic C. L. R., 318 U.S. 54, 67-68 (1943); Blair v. B. & O. R., 323 U.S. 600, 602 (1944); FRANK, MR. JUSTICE BLACK—THE MAN AND HIS OPINIONS 117 (1949); WILLIAMS, HUGO L. BLACK—A STUDY IN THE JUDICIAL PROCESS 118 (1950).

14. Studies of the practical working of the jury system have revealed that juries do favor the plaintiff. Where the dispute involves a worker and a large corporation, the bias of the jury is probably even more pronounced. Although, in reality, justice may thus be better served, no pious pronouncements that the jury can be expected to accomplish its task impartially can obscure such prejudice. See Clark and Shulman, *Jury Trial in Civil Cases*, 38 YALE L.J. 867 (1934).

15. Frank, *op. cit. supra* note 13.

16. For an interesting account of the trend toward strict judicial control of the jury see Justice Black's dissent in Galloway v. U. S., 319 U.S. 372, 396 (1943). And for a discussion of methods of jury control resting in appellate courts see GREEN, JUDGE AND JURY 391 (1930).

17. Dice v. Akron, Canton & Youngstown R., 72 Supt. Ct. 312, 315 (1951).

of the writ of certiorari.[18] He can perceive no "general principle requiring pronouncement"[19] by the Court in the unique fact patterns of successive applications.

Manifestly, no single tribunal could possibly administer a judicial hierarchy consisting of countless forums and numerous court systems if every dissatisfied litigant were entitled to pursue his grievance ultimately to the very apex of the judicial pyramid. Hence, it early became apparent that the proper role of the Supreme Court must be restricted to abstract resolution of the many crucial problems confronting the federal system; assuring just solution of particular controversies must, of necessity, be relegated to the lower courts.[20] An outgrowth of this realization was the institution of statutory certiorari jurisdiction, conferring on the Supreme Court broad discretion to select those cases which it would review.

Basic to the conflict over the grant of certiorari in FELA sufficiency of the evidence cases are opposing views as to what evidence should be considered by the judge when ruling on a motion for a directed verdict. It is fundamental that a plaintiff must introduce substantial evidence in order to present a case for the jury.[21] But should the judge view only plaintiff's evidence, or should *all* the evidence in the case figure in his determination whether there is an issue of fact for the jury? Those who favor the former rule contend that for the trial judge to evaluate

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18. Moore v. C. & O. R., 340 U.S. 573, 578 (1950); Affolder v. New York C. & St. L. R., 339 U.S. 96, 101 (1949); Carter v. Atlanta & St. A. B. R., 338 U.S. 430, 439 (1949); Reynolds v. Atlantic C. L. R., 336 U.S. 207, 209 (1948); Wilkerson v. McCarthy, 336 U.S. 53, 66-67 (1948); Justice Frankfurter held a similar view before he was appointed to the Court. FRANKFURTER AND LANDIS, BUSINESS OF THE SUPREME COURT 213 (1927); Frankfurter and Landis, *The Judiciary Act of 1925*, 32 HARV. L. REV. 18 (1928). The backgrounds of Justices Black and Frankfurter may reveal some basis for their divergent views. Justice Black was a noted plaintiffs' lawyer in Alabama—it is to be expected that his previous experience would affect his view of the importance of the jury trial. Justice Frankfurter, on the other hand, reflects his training and discipline as a legal scholar who was not, perhaps, practically familiar with the personal hardship of litigants in trial courts. Nevertheless, Justice Frankfurter's opposition to the liberal view recently prevalent on the Court may be grounded in his outspoken belief that the FELA is a "cruel survival of a by-gone era" and that strict construction of negligence requirements is the best method of attaining reform.

19. Carter v. Atlanta & St. A. B. R., 338 U.S. 431, 438 (1949).

20. *See, e. g.*, Wilkerson v. McCarthy, 336 U.S. 53, 67 (1948); Bailey v. Central Vt. R. 319 U.S. 350, 358 (1943); Deputy v. du Pont, 308 U.S. 488, 500, 503 (1939); Magnum Import Co. v. Coty, 262 U.S. 159 (1922); Hughes, *Address before American Law Institute* 1934, 20 A.B.A.J. 341 (1934).

21. Western & A. R. v. Hughes, 278 U.S. 496 (1928) (state courts must apply federal rule requiring substantial evidence for submission of case to jury); L. & N. R. v. Reverman's Adm'r, 228 Ky. 500, 15 S.W.2d 300 (1929). That this was not clearly understood by some state courts even as late as 1940 may indicate a reason for the frequent grants of certiorari. See Kurn v. Weaver, 25 Tenn. App. 556, 161 S.W. 2d 1005 (1940); Hoogbruin v. Atchison T. & S. F. R., 297 Pac. 61 (Cal. App. 1931).

all the evidence in a case constitutes usurpation of the jury's function of resolving contradictory evidence and weighing the credibility of witnesses.[22] The latter view finds support in the recognition that whether there actually is a factual issue for jury determination depends necessarily upon the evidence presented by *both* parties to a controversy. Moreover, it must be realistically conceded, a judge who has heard all the evidence will find it virtually impossible to consider only plaintiff's version of the case in ruling on the sufficiency question.

Any attempt to solve the current certiorari dispute must be predicated upon an understanding of the Court's vacillation concerning the proper rule for direction of a verdict. Prior to 1943, the settled federal rule required the judge to consider both plaintiff's and defendant's evidence.[23] In that year the Court reiterated this position in a five to four decision.[24] Since the assent of only four justices is required to grant certiorari, the status of the rule was seriously weakened. As a consequence of this changed alignment on the Court, certiorari was frequently granted in the period from 1943 to 1948; and the cases seem to manifest, without specifically delineating a clear standard, an increas-

22. Justice Douglas, concurring in Wilkerson v. McCarthy, 336 U.S. 53 (1948), compiled a list of all applications for certiorari from the 1943 term to the 1948 term classified according to the disposition of each case. *Id.* at 71-74. One of the conclusions he drew from an analysis of these cases was that, "The criterion governing the exercise of our discretion in granting or denying certiorari is not who loses below but whether the jury function in passing on disputed questions of fact and in drawing inferences from proven facts has been respected." *Id.* at 70-71. See McBaine, *Trial Practice; Directed Verdict; Federal Rule,* 31 CALIF. L. REV. 454 (1943); Blume, *The Directed Verdict,* 48 MICH. L. REV. 555 (1950).

23. The cases do not indicate any conflict over the rule. Professor McBaine seemed to be incorrect in saying that the federal rule called for consideration of only plaintiff's evidence. See McBaine, *supra* note 22. The sudden prominence of the dispute over the proper rule may be explained partially by Justice Black's appearance on the Court since he has been described as ". . . the first member of the Supreme Court in a hundred years to have a really zealous desire to preserve that system [the jury]." FRANK, MR. JUSTICE BLACK—THE MAN AND HIS OPINIONS 117 (1949). The later appointments of Justices Douglas, Murphy, and Rutledge added considerable influence to Justice Black's attempts to formulate a new rule.

24. Brady v. Southern R., 320 U.S. 476 (1943). The rule enunciated by Justice Reed was an attempt to evade the objection of usurption of the jury functions: "When evidence is such that *without weighing credibility of witnesses* there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by a non-suit, directed verdict, or otherwise practicable procedure without submission to the jury, or by judgment notwithstanding the verdict." *Id.* at 279-80 (emphasis added). Justice Black, before stating his disagreement over the proper rule, said: "Twelve North Carolina citizens who heard many witnesses and saw many exhibits found on their oaths that the railroad's employees were negligent. The local trial judge sustained their finding. Four members of this Court agree with the local trial judge that the jury's conclusion was reasonable. Nevertheless five members of the Court purport to weigh all the evidence offered by both parties to the suit, and hold the conclusion unreasonable. Truly, appellate review of jury verdicts by application of a supposed norm of reasonableness gives rise to puzzling results." *Id.* at 484-85.

ing solicitude for the rule favoring submission.[25] Finally, in *Wilkerson v. McCarthy*,[26] Justice Black, speaking for the majority, announced that "it is the established rule that in passing upon whether there is sufficient evidence to submit an issue to the jury we need only look to the evidence and reasonable inferences which tend to support the case of a litigant against whom a peremptory instruction has been given."[27] Unfortunately the permanency of this rule likewise is subject to doubt, due to a peculiar division on the Court.[28] This uncertainty was compounded in a 1950 decision in which the Court apparently reviewed all the evidence, yet failed to repudiate the recently established rule.[29]

Clearly the Supreme Court has failed to enunciate any guide adequate to dispel the confusion surrounding this issue and to supply a criterion of sufficient particularity that state judges can follow with assurance. In addition, the uncertain cleavage within the Court in the *Wilkerson* case presents strong inducement to unsuccessful defendants to besiege the Court with applications for certiorari.[30]

It may be conceded, perhaps, that the Court's sustained preoccupation with the sufficiency question in FELA cases is unwarranted in light of the numerous other urgent matters demanding judicial solution.[31]

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25. See Tennant v. Peoria & P. U. R., 321 U.S. 29 (1943); Lavender v. Kurn, 327 U.S. 645 (1945); Myers v. Reading R., 331 U.S. 477 (1946); Johnson v. United States, 333 U.S. 46 (1947) (case brought under Jones Act, which incorporates the FELA standards of liability). See Note, 44 ILL. L. REV. 854 (1950).

26. 336 U.S. 53 (1948).

27. *Id.* at 57. With the exception of the cases listed in note 25 *supra*, past decisions do not seem to justify use of "established." However, Justice Black could as well have meant it is *now* the established rule.

28. Two justices dissented from the majority opinion but Justice Frankfurter, concurring in an opinion in which Justice Burton joined, disagreed as to the proper rule. Since Justice Burton also joined in the majority opinion, the numerical division on the Court as to the announced rule was uncertain.

29. Moore v. C. & O. R., 340 U.S. 573 (1950). Plaintiff contended that decedent fell while riding on the tender and was killed because the engineer negligently made a sudden stop. The engineer testified, as plaintiff's witness, that the sudden stop was made after decedent fell. The jury, evidently disbelieving the engineer, found for the plaintiff, but the district court sustained the motion for judgment notwithstanding the verdict. The Supreme Court, in affirming, said that for the jury to infer that the train stopped for no purpose and that decedent fell because the train stopped was "speculation run riot." Justices Black and Douglas, dissenting, thought that this was a "totally unwarranted substitution of a court's view of evidence for that of a jury." Compare Lavender v. Kurn, 327 U.S. 645 (1945).

30. Since two of the Justices in the *Wilkerson* majority are no longer on the Court, the change in personnel increases the possibility of a reversion to the former rule.

31. No matter what explanation may be proffered by the Court, basically the review is limited to a study of the facts to see whether there could be *any* reasonable basis for a jury verdict that defendant was negligent. Yet it is pertinent to recognize, as did Justice Frankfurter, that "perhaps no field of law comes closer to the lives of so many families in this country than does the law of negligence imbedded as it is [in] the FELA." Tiller v. Atlantic C. L. R., 318 U.S. 54, 73 (1943). For a

But the muddled status of the rule suggests that the Court should formulate a definitive and authoritative standard before relinquishing its constant supervision of this area. Once such action is taken, primary reliance must be placed in the state tribunals to follow scrupulously the leadership of the Court. This fundamental prerequisite to the successful functioning of our judicial system precludes constant review merely because an accepted doctrine has been incorrectly applied. Particularly is this true with reference to the law of negligence, where application of general principles is difficult because of the bewildering array of potential fact situations. Unjust results may be reached not because the wrong rule was applied but because the facts were interpreted incorrectly. Only where frequent disregard for the rule threatens to subvert its basic policy is judicial intervention justifiable.

Justice Black's perspective with regard to the applicability of state procedural rules is as unequivocal as his view on the jury question. Plaintiff may elect to pursue, in a state court, a cause of action conferred by the FELA; in this event, federal substantive law must be followed while the state ordinarily may utilize its own rules of pleading and practice.[32] But local rules of practice must not interfere with a party's assertion of his federally created right.[33] And for Justice Black preservation of comity between federal and state judicial systems is overshadowed by the need to implement the policy underlying the federal act,[34] *i.e.*, creation of a uniform right of action for all railroad workers and facilitation of recovery through relaxation of common law negligence principles. In light of the current liberal attitude toward the degree of proof necessary to substantiate a cause of action based on negligence, a similar approach to technical rules of pleading and practice is warranted.

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discussion of the significance of cases the Court does not review, see Harper and Rosenthal, *What the Supreme Court Did Not Do in the 1949 Term—An Appraisal of Certiorari*, 99 U. of PA. L. REV. 293 (1950)

32. In essence the problem is how much of its procedure the state may apply—this is the specific pseudo-federalism problem which is a part of the general controversy discussed in note 1 *supra*.

33. Brown v. Western R., 338 U.S. 294 (1949); Garrett v. Moore-McCormack Co., 317 U.S. 239 (1942); Davis v. Wechsler, 263 U.S. 22 (1923).

34. The governing consideration was plainly articulated by Justice Black in Garrett v. Moore-McCormack Co., 317 U.S. 239, 244 (1942): "If by its practice the state courts were permitted substantially to alter the rights of either litigant, as those rights were established in federal law, the remedy afforded by the state would not enforce, but actually deny, federal rights which Congress, by providing alternative remedies, intended to make not less, but more secure." In Brown v. Western R., 338 U.S. 294 (1949), although Justice Black used language indicating that the problem was susceptible of solution within the procedure—substance dichotomy, the Court actually held that the Georgia rule construing the pleading strictly against the pleader deprived the plaintiff of his right to trial by jury.

Justice Frankfurter adheres to a radically different concept of the import of dual sovereignty, ascribing inordinate consequence to the problem of federalism implicit in the grant of concurrent jurisdiction under FELA.[35] To him the mere fact that a state tribunal is enforcing a right created by federal law does not forestall resort to the procedure used in similar cases arising under state law.[36] Justice Frankfurter has indicated that he would address the problem of determining how much of the state practice can be retained in FELA litigation in essentially the same manner that the federal courts today approach the *Erie-Tompkins* choice of law question.[37] In diversity cases, state procedural rules will be applied in a federal forum if failure to do so would materially affect the outcome.[38] That this cannot be the parallel Justice Frankfurter envisages is conclusively demonstrated in the very decision in which he first suggested the analogy. For there he condoned use of a state rule of pleading in a Georgia FELA proceeding, although the result thus achieved was manifestly inconsistent with the disposition which would have been reached by a federal district court.[39]

35. Justice Frankfurter's view is that the state has complete control of its judicial system subject only to the privileges and immunities clause, and that Congress must have contemplated such when it conferred concurrent jurisdiction on state courts. For a full statement of his conception of this federal-state relationship, see Brown v. Gerdes, 321 U.S. 178, 188 (1943).

36. See Brown v. Western R., 338 U.S. 294, 300 (1949); Miles v. Illinois C. R., 315 U.S. 698, 712 (1941). "The history of Congressional legislation regulating not only interstate commerce as such but also activities intertwined with it, justify the generalization that, when the Federal Government takes over such local radiations in the vast network of our national economic enterprise and thereby radically readjusts the balance of state and national authority, those charged with the duty of legislating are reasonably explicit and do not entrust its attainment to that restrospective expansion of meaning which properly deserves the stigma of judicial legislation." Frankfurter, *Reading of Statutes,* 47 COL. L. REV. 527, 540 (1947). Justice Frankfurter reasons that since an FELA plaintiff could have brought his action in a federal court rather than the state forum, he should not be heard to complain of the imposition of state procedural requirements even though a possibly meritorious claim may be defeated. The answer to this contention was given long ago by Justice Black: "The constant objective of legislation and jurisprudence is to assure litigants full protection for all substantive rights intended to be afforded them by the jurisdiction in which the right itself originates. Not so long ago we sought to achieve this result with respect to enforcement in the federal court of rights created or governed by state law. . . . [Citing Erie v. Tompkins]. So here, in trying this case the state was bound to proceed in such a manner that all substantial rights of the parties under controlling federal law would be protected." Garrett v. Moore-McCormack Co., 317 U.S. 239, 245 (1942). See note 35 *supra.*

37. Brown v. Western R., 338 U.S. 294, 301 (1949).

38. The converse of this rule is demonstrably true in FELA cases, *i.e.,* where the state rule materially affects the outcome of an FELA case in a state forum, it may not be applied. *Compare* Ragan v. Merchants Transfer and Warehouse Co., 336 U.S. 917 (1949), *with* Herb v. Pitcairn, 324 U.S. 117 (1945), 325 U.S. 77 (1945), and *compare* Palmer v. Hoffman, 318 U.S. 109 (1943), *with* Central Vt. R. v. White, 238 U.S. 507 (1914).

39. In the *Brown* case, the plaintiff's dismissal for failure to allege his cause of

The similarity he apparently perceives lies in the functional characterization of "substance" and "procedure", *i.e.*, in terms of the end to be achieved, which has typified the judicial process in recent *Erie-Tompkins* controversies. While no one will challenge this laudable attempt to avoid the tyranny of labels long dominating procedure-substance disputes, the ultimate goal in terms of which Justice Frankfurter would place a rule of pleading and practice in one category or the other merits critical study.

His excessive emphasis of the federalism question and facile deference to the inviolability of state procedure in the local forum may well subvert fundamental social policies permeating the FELA.[40] Paradoxically, these policies may best be achieved, perhaps, by a thoroughgoing adaptation of the *Erie-Tompkins* principle to FELA litigation, rather than by the mere imitation, suggested by Justice Frankfurter, of a familiar method of classification. If the determinative criterion in state FELA litigation were achievement of a result identical with that which the federal forum would reach on the same facts, implementation of desired uniformity and facilitation of recovery would be attained.[41]

A case which casts new light upon the permissible limits of state control over the function of the jury where a federal right is invoked in a state court is *Dice v. Akron, Canton & Youngstown R.*,[42] decided last term. Although under Ohio practice fraud in a negligence action is an equitable issue, the jury found for the plaintiff on the question of alleged deception in procurement of a release. Nevertheless, the trial judge rendered judgment notwithstanding the verdict, finding that plaintiff was guilty of "supine negligence" in signing the release without reading it. Following affirmance by the Ohio Supreme Court,[43] the

action with sufficient particularity could not have occurred in a federal court where pleadings are to be construed very liberally. If the correct *Erie* approach had been utilized, the result, so far as maintaining the action, would have been different.

40. Thus the end to be achieved is, in Justice Frankfurter's conception, the preservation of state control over local tribunals. It is with this goal in mind that he utilizes the substance-procedure dichotomy. In face of the previously declared intent of Congress to make recovery uniform throughout the country, his argument is unsound. See Gavit, *States' Rights and Federal Procedure*, 25 IND. L.J. 1, 11 n.33 (1949), for the contention that Congress must have intended the Supreme Court to resolve the procedural conflicts inherent in the Act.

41. Past decisions have failed to formulate any precise criterion by which state courts could decide whether or not a particular procedural rule is applicable. Certainly, putting the standard in terms of "unreasonable obstructions" or "discriminatory against the federal cause of action" provides no certainty for the courts or future litigants. See Douglas v. N. H. & H. R., 279 U.S. 377 (1928); Davis v. Wechsler, 263 U.S. 22 (1923). Forthright assertion of the suggested standard would furnish a reliable guide to lower courts.

42. 72 Sup. Ct. 312 (1951).

43. 155 Ohio St. 185, 98 N.E.2d 301 (1951).

decision was reversed by the United States Supreme Court. In a five to four opinion, the Court regarded the withdrawal of this matter from the jury as error.[44]

Justice Frankfurter, concurring in the result, dissented from the reasoning of the majority on three grounds: (1) the controlling precedent is *Minneapolis & St. L. R. v. Bombolis*,[45] which entitled the Ohio court to follow its own procedure, leaving the fraud issue to the judge; (2) the Court has covertly repudiated the *Bombolis* case; (3) the ultimate result is to subject state tribunals to a hybridization of state and federal procedure.[46]

Minneapolis & St. L. R. v. Bombolis determined that Minnesota could authorize a non-unanimous verdict without Constitutional impediment, since the Seventh Amendment right to trial by jury did not apply to state courts engaged in enforcing federal rights. However, as Justice Black points out in the *Dice* case, Ohio has not attempted to abolish the jury in negligence cases[47] nor has it attempted to provide for a non-unanimous verdict. The Court merely asserted that the Act did not permit Ohio to remove certain issues of fact from the jury's consideration. Examination of the subsequent history of *Bombolis* and the rationale underlying the case reveal no support for Justice Frankfurter's exaggerated estimate of its ramifications.[48]

Presumably a state may withdraw all issues from the jury simply by abolishing it.[49] But if the state chooses to provide a jury as the

44. The minority concurred in the result but dissented from the grounds of the majority opinion.

45. 241 U.S. 211 (1915).

46. Justice Frankfurter stated the significance of these conclusions: "We have put the questions squarely because they seem to be precisely what will be roused in the minds of lawyers properly pressing their clients' interests and in the minds of trial and appellate judges called upon to apply this Court's opinion." 72 Sup. Ct. 312, 318 (1951).

47. The point Justice Black was suggesting is that *Bombolis* would be a valid precedent if Ohio had done away with the jury as the trier of fact in negligence cases.

48. It surely would not be inconsistent to require that all issues of fact be tried by a jury permitted under state law to render a non-unanimous verdict.

49. Apparently no Federal Constitutional obstacle would prevent such action since *Bombolis* does stand for this proposition. However, the contention may be advanced that the right to jury trial of all fact issues in FELA litigation is guaranteed by the supremacy clause of the United States Constitution. This argument is in no way weakened by acceptance of the frequently reiterated proposition that the Seventh Amendment does not require trial by jury in state courts. The reasoning would take the following form: if the state provides a forum for its own negligence cases, it is Constitutionally required to likewise provide for state enforcement of federal rights established by statutes conferring concurrent jurisdiction on state and federal tribunals. See Testa v. Katt, 330 U.S. 386 (1946). As has been emphasized, page 547 *infra*, jury trial is "part and parcel" of the federal right under the FELA. (As meant here, the right to jury trial is that of having a jury as the trier of fact. This is not the sense

trier of fact, *Bailey v. Central Vt. R.*,[50] decided since *Bombolis*, establishes the requirement that all questions of fact must be submitted to it. If this interpretation is not correct then the language of the *Bailey* case that "the right to trial by jury is part and parcel of the remedy afforded railroad workers under FELA" is meaningless.[51] Such a ruling is inconsistent with the extension of the *Bombolis* reasoning espoused by Mr. Justice Frankfurter in his dissent.

Although Justice Frankfurter asserts that *Bombolis* has "often been cited by this Court but never questioned"[52] the fact is that he himself has referred to it in two dissenting opinions in FELA cases[53] and in two dissents[54] and one concurrence[55] in other contexts. And except for those decisions directly involving a non-unanimous verdict,[56] it has been mentioned but four other times in FELA opinions.[57] Indeed the

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in which the word is used in the *Bailey* or *Dice* cases). Hence, provision of adequate state machinery for enforcement of the "entire" federal right entails jury consideration of all factual issues. Consequently, since all states have established court systems, and are required to observe the supreme law of the land, jury trial in FELA cases assumes Constitutional stature.

50. 319 U.S. 350 (1943) (Vermont Supreme Court had reversed a jury verdict for plaintiff).

51. The holding quoted above was taken from a case which arose from a federal district court where the Seventh Amendment did apply. Jacobs v. New York, 315 U.S. 752 (1941). Although Justice Roberts wrote a critical separate opinion in the *Bailey* case, in which Justice Frankfurter joined, see note 20 *supra*, no objection was made to the holding.

52. Dice v. Akron, Canton & Youngstown R., 72 Sup. Ct. 312, 316 (1951).

53. Brown v. Western R., 338 U.S. 294, 300 (1949) (reversing state rule of construing pleading strictly against the pleader); Miles v. Illinois C. R., 315 U.S. 698, 709 (1941) (state court was not permitted under FELA to enjoin a citizen from prosecuting a suit in another state on the grounds that the latter suit was unjust and inequitable).

54. Kennecott Copper Corp. v. State Tax Comm., 327 U.S. 573, 581 (1945) (held federal district court in Utah not a "court of competent jurisdiction" within meaning of those words in a state statute granting consent to be sued for fiscal claims in such courts); Freeman v. Bee Machine Co., 319 U.S. 448, 460 (1942) (dissenting from holding that plaintiff could, after removal of a simple contract action from a state court, amend his complaint to state a new cause of action under § 4 of the Clayton Act. Amendment was allowed even though venue was improper, since such action could be brought only where defendant resides, or is found or has an agent, and here defendant was not a resident and had not been found in the jurisdiction in so far as the new cause of action was concerned).

55. Brown v. Gerdes, 321 U.S. 190, 191 (1943) (dissenting from holding that power to fix fees of attorneys representing bankrupt estate rests exclusively in federal bankruptcy court so that state court was precluded from doing so).

56. Minneapolis and St. L. R. v. Winters, 242 U.S. 353 (1916); St. Louis & S. F. R. v. Brown, 241 U.S. 223 (1915); C. & O. R v. Carnahan, 241 U.S. 241 (1915); L. & N. R. v. Stewart, 241 U.S. 261 (1915); C. & O. R. v. Kelly, 241 U.S. 485 (1915); C. & O. R. v. Gainey, 241 U.S. 494 (1915).

57. Brady v. Southern R., 320 U.S. 476 (1943) (state need not provide in FELA cases any trial by jury according to the requirements of the Seventh Amendment); Lee v. Central Ga. R., 252 U.S. 109 (1920) (joinder of causes of action and joinder of parties governed by state law); Dickinson v. Stiles, 246 U.S. 631 (1917) (upheld

facts suggest that any vitality retained by *Bombolis* as precedent is directly attributable to Justice Frankfurter. This conclusion is strengthened by the Court's manifest disregard of the proposition which *Bombolis* represents to Mr. Justice Frankfurter, that the states may apply their own procedural rules in FELA cases[58] Never has it been cited until now with reference to the functions of court and jury in this area of concurrent jurisdiction.[59]

Dice v. Akron, Canton & Youngstown R. does not imply that the Seventh Amendment now constitutes a restriction upon state courts in FELA cases; hence *Bombolis* is not overruled. Clearly the decision does forestall an expansion of the rule to negate federal control of *any* jury function. *Dice* is but a logical extension of *Bailey v. Central Vt. R.*, which should have established the proposition that control of state courts and jurors is not a matter of exclusively local concern. Where the state provides for trial by jury, it now seems clear that the federal statute requires that all factual issues having sufficient evidentiary basis go to the jury.[60]

As a result of the *Dice* case, it is true that the factual issues tried by the judge in ordinary negligence controversies must now be handled differently by the state courts in FELA litigation. The resulting hybridi-

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state statute giving attorneys a lien upon a cause of action); C. & O. R. v. Atley, 241 U.S. 310 (1915) (preparation of instructions a matter of state law).

58. See notes 52, 53, 54 *supra*. *Bombolis* has been cited favorably to support the general proposition that state courts have concurrent jurisdiction with federal courts over suits relating to the regulation of interstate commerce, Grubb v. Public Utilities Comm., 281 U.S. 470 (1929), and that state courts may not refuse to enforce a right arising from federal law " . . . because of conceptions of impolicy or want of wisdom on the part of Congress. . . ." Testa v. Katt, 330 U.S. 391, 393 (1946). More specifically, *Bombolis* has been cited to support Missouri procedure of permitting attachment without personal service on defendant even though such procedure would not be proper in a federal court, Missouri v. St. Louis, B. & M. B. v. Taylor, 266 U.S. 200 (1924), and to uphold a state's power to determine venue of its own courts in enforcing the Jones Act, Bainbridge v. Merchants & M. Transfer Co., 287 U.S. 278 (1932).

59. Non-FELA cases citing *Bombolis* as to functions of court and jury: Wagner Electric Co. v. Lyndon, 262 U.S. 226 (1922) (if directed verdict deprives litigant of right to trial by jury in a state court this is not a denial of due process of law under the Federal Constitution); Chicago, R. I. & P. R. v. Cole, 251 U.S. 54 (1919) (state may provide that defenses of contributory negligence and assumption of risk are questions of fact and must always go to the jury); St. Louis & Kansas City Land Co. v. Kansas City, 241 U.S. 419 (1915) (effect of jury verdict in an original assessment proceeding on later assessment in a supplemental proceeding is a matter of state law. Despite defendant's nebulous contention to the contrary, it was determined that the Seventh Amendment does not require a different result).

60. To give this abstract "right" a meaning, one should visualize the consequence of removing from jury consideration every issue of fact but one. Clearly, in such an event there is realistically no jury trial. Conversely, the "right" does have meaning if *all* issues must go to the jury. Therefore, existence of the right is inconsistent with state power to determine the issues for jury decision.

zation is not a recent innovation; numerous Supreme Court decisions[61] since 1908 have ruled that various rules of state procedure are not applicable under the Act. But the *Dice* holding can only lead to increased certainty, since it is not difficult for trial judge and counsel to perceive that the state may no longer assign trial of certain facts to the judge and others to the jury in FELA cases. Any confusion engendered by the remote potentialities of this case is purely speculative.

While no single opinion lends credence to this theory, the composite perspective emerging out of the FELA decisions seems to bear a marked resemblance to the *Erie-Tompkins* uniformity principle.[62] Unequivocal articulation of this standard in the FELA area would create a workable rule promoting achievement of a delicate balance between flexibility and certainty. Such a criterion admittedly would require application of federal procedure in the state courts whenever failure to do so might produce disparity of result depending upon the forum.[63] But acquiescence in local control over the procedural matters not thus removed from the orbit of state influence constitutes ample deference to the relatively insignificant state prerogatives involved. The proposed approach would achieve a judicious subordination of states' rights to the advancement of the vital policies underlying the Act.

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61. See Herb v. Pitcairn, 324 U.S. 117 (1945), 325 U.S. 77 (1945) (whether or not an action is commenced in a state court within meaning of § 6 of the FELA is a matter of federal law); C. & O. R. v. Kelly, 241 U.S. 485 (1915) (measure of damages is inseparably connected with the right of action and must be settled according to federal law); Central Vt. R. v. White, 238 U.S. 507 (1914) (burden of proof in FELA cases is not subject to control by states).

62. This, perhaps, is the ultimate implication of the *Dice* case although it is nowhere articulated clearly. If any criticism were to be made of the Court in these FELA procedural cases, it is that the *Erie* principle of uniformity discussed here has not been made clearly applicable to state FELA litigation. Justice Black, in Garrett v. Moore-McCormack, 317 U.S. 239 (1942), cited by him in his *Dice* opinion, asserted in a dicta the same view here set forth. The decision actually was based on the requirement that the state courts must apply admiralty law, under which burden of proof was on defendant to substantiate the validity of a release. Yet Justice Black recognized that the Jones Act, as based upon the FELA, required a uniform application and that this "extends to the type of proof necessary for judgment." *Id.* at 244. See notes 35 and 37 *supra*. Similarly, in the *Dice* case uniform application of the Act extends to the issues to be tried by the jury. Although the opinion in the *Moore-McCormack* case indicated that the Court would apply the same rule to releases in FELA cases, the Court, in a 5 to 4 decision, refused to do so! Callen v. Penn. R., 332 U.S. 625 (1947).

63. In addition to supplying a standard of certainty for the guidance of state courts, see note 41 *supra*, the suggested criterion would furnish a sounder basis for the grant of certiorari than the "unreasonable obstruction" or "discriminatory" theories, although the latter would still be utilized. See Missouri v. Mayfield, 340 U.S. 1 (1950) (upheld Missouri forum non conveniens doctrine as not being discriminatory against non-citizens).