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JUSTICE BRANDEIS AND RAILROAD ACCIDENTS: FAIRNESS, UNIFORMITY AND CONSISTENCY

*Larry Zacharias**

I. INTRODUCTION

My interest in Brandeis began during law school: I was struck by the extraordinary nature of his first sentences in the opinions we read. Consider the opening of his opinion in *Bd. of Trade of Chicago v. United States*:¹

Chicago is the leading grain market in the world. Its Board of Trade is the commercial center through which most of the trading in grain is done.²

This wording was unusual as judicial opinions go, especially for someone like Brandeis who was renowned for his objections to “bigness.” Ironically, in *Bd. of Trade of Chicago* Brandeis became a defender of bigness by adapting the “rule of reason” exception to overt restraints of trade under the Sherman Act.³ His opening sentences clearly signaled the exception.⁴

Ten years after my first encounter with Brandeis’ distinctive style a law school fellowship afforded me the opportunity to examine Brandeis’ framing techniques more systematically. In an article entitled *Reframing the Constitution: Brandeis, “Facts,” and the Nation’s Deliberative Process*, I described how Brandeis rendered ordinary facts salient by placing them in the first sentences of his opinions and how he then used those facts to frame the legal issues in

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¹ 246 U.S. 231 (1918).

² *Id.* at 235.

³ *Bd. of Trade of Chi.*, 246 U.S. at 235.

⁴ *Id.* at 238; David A. Ettinger & Gerard Mantese, *The Rule of Reason*, 64 MICH. B.J. 36, 36 (1985).

the case.⁵ My article focused on Brandeis' strategy in cases involving judicial review under the Constitution.⁶ When Brandeis joined the Court the central constitutional battle was the reallocation of state and federal regulatory powers to manage the nationalizing of industry.⁷ Brandeis' first sentences at the time contextualized or "reframed" these battles by tying the underlying social and economic facts of each case to the deliberative process – that is, to give the Court insight into the appropriateness, and so legitimacy, of state versus federal power, and legislative versus administrative versus judicial process for resolving the kind of regulatory problem at hand.

As I was sorting out his first sentences back in the 1980s, a group of cases involving railroad accidents also caught my attention.⁸ In most of the railroad opinions Brandeis began with the name of the victim and followed with a stylized fact recitation of the circumstances surrounding the accident.⁹ It was another puzzle, but one I left behind at the time. However, when Sam Levine asked me to present a paper at the Louis D. Brandeis Conference at Touro College – Jacob D. Fuchsberg Law Center, I took it as an opportunity to revisit those railroad cases.

⁵ This article was rejected in the 1980s by about sixty different law reviews, but an Australian law review did finally publish it some thirty years later. See L.S. Zacharias, *Reframing the Constitution: Brandeis, "Facts," and the Nation's Deliberative Process*, 20 J. JURIS. 327 (2013) [hereinafter Zacharias, *Reframing the Constitution*]. However, a companion piece on Brandeis and the regulation of the modern corporation that I wrote at the time was published then – see L.S. Zacharias, *Repaving the Brandeis Way: The Decline of Developmental Property*, 82 NW. U.L. REV. 596 (1988) [hereinafter Zacharias, *Repaving the Brandeis Way*].

⁶ Zacharias, *Reframing the Constitution*, *supra* note 5, at 331.

⁷ Zacharias, *Reframing the Constitution*, *supra* note 5, at 329-30.

⁸ See, e.g., *Swinson v. Chi., St. Paul, Minneapolis & Omaha Ry. Co.*, 294 U.S. 529 (1935); *W. & Atl. R.R. v. Hughes*, 278 U.S. 496 (1929); *Mich. Cent. R.R. Co. v. Mix*, 278 U.S. 492 (1929); *Chi., Burlington & Quincy R.R. Co. v. Wells-Dickey Tr. Co.*, 275 U.S. 161 (1927); *Atchison, Topeka & Santa Fe Ry. Co. v. Wells*, 265 U.S. 101 (1924); *Yazoo & Miss. Valley R.R. Co. v. Mullins*, 249 U.S. 531 (1919); *New Orleans & Ne. R.R. Co. v. Scarlet*, 249 U.S. 528 (1919); *Union Pac. R.R. Co. v. Laughlin*, 247 U.S. 204 (1918); *Louisville & Nashville R.R. Co. v. Holloway*, 246 U.S. 525 (1918); *Nelson v. S. Ry. Co.*, 246 U.S. 253 (1918); *Balt. & Ohio R.R. Co. v. Whitacre*, 242 U.S. 169 (1916).

⁹ See, e.g., *Swinson*, 294 U.S. at 530; *Hughes*, 278 U.S. at 497; *Scarlet*, 249 U.S. at 529; *Nelson*, 246 U.S. at 254.

II. FIRST SENTENCES AND THE FRAMING OF RAILROAD WORKER'S ACCIDENT LITIGATION

Brandeis had a lifelong intimate relationship with the American railroad industry, both its operations and its regulation.¹⁰ Curiously, one of the areas of railroad regulation Brandeis apparently had little to do with, neither in his private practice nor in his public service, was the field of railroad accidents, which included the compensation and protection of railroad workers from accidental deaths and injuries.¹¹ Most, though not all, of the cases in my series

¹⁰ His famous turn to public advocacy and service was said to begin around the time of the Homestead Strike in 1892 and the Pullman Strike two years later, although Melvin Urofsky has downplayed the connection between those events and Brandeis' conversion. See MELVIN UROFSKY, *LOUIS D. BRANDEIS: A LIFE* 83-97 (2009). At any rate, beginning in 1896 Brandeis became involved in a decade-long battle to improve the franchising of Boston traction and transit companies. He then fought against J.P. Morgan and his railroad czar, Charles Mellen, over their merger of the New Haven Railroad with Boston & Maine starting in 1907. *Louis D. Brandeis Versus the New Haven Railroad, Part I*, BRANDEIS & HARLAN WATCH (Apr. 8, 2016), <https://brandeiswatch.wordpress.com/2016/04/08/louis-d-brandeis-versus-the-new-haven-railroad-part-i/#comments>.

Later still, in 1910-1913, Brandeis worked closely with shippers and the Interstate Commerce Commission (ICC) itself during the ICC's hearings over shipping rates, known as the "Eastern Rate" and "Advanced Rate" cases. Zacharias, *Repaving the Brandeis Way*, *supra* note 5, at 608-612.). Along the way, Brandeis wrote two monographs on these issues, along with several articles and chapters. See *generally* LOUIS D. BRANDEIS, *BUSINESS – A PROFESSION* (1933); LOUIS D. BRANDEIS, *OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT* (1914). He was not single-mindedly against the railroads or their managers, as some historians have suggested. see, Zacharias, *Repaving the Brandeis Way*, *supra* note 5, at 608-610. Indeed, in becoming familiar with all the details of railroad operations and finances, he even invested in their bonds, including in some railroad firms in whose cases he wrote opinions for the Court. See *The Louis Dembitz Brandeis Papers 1870-1941* (1979), *microformed on reel no. 142* (Univ. of Louisville) [hereinafter LDB Private Papers]. And after having spent much of his public career opposing the railroads' privileges, he seemed to become nostalgic and take pity on that great American institution. His opinion in *Nashville, Chattanooga & St. Louis Railway v. Walters* was a masterful defense of a railroad against an unconstitutional taking when the Tennessee highway commissioner sought to tax the railroad for road improvements that served highway traffic – that is, automobiles and trucks – but undercut the railroad's own business. 294 U.S. 405, 412-13 (1935).

¹¹ He was involved occasionally in the more general field of industrial accidents. See Letter from Louis D. Brandeis to Joseph David Beck (Oct. 12, 1908), in 2 LETTERS OF LOUIS D. BRANDEIS, (1907-1912): PEOPLE'S ATTORNEY 209 (Melvin I. Urofsky & David W. Levy eds., 1972) [hereinafter 2 LETTERS]; Letter from Louis D. Brandeis to Alfred Brandeis (Oct. 12, 1908), in 2 LETTERS, *supra* note 11, at 209; Letter from Louis D. Brandeis to Fredrick Howard Gibson (Feb. 21, 1910), in 2 LETTERS, *supra* note 11, at 319; Letter from Louis D. Brandeis to Industrial Insurance Committee, Wisconsin State Legislature (June 27, 1910), in 2 LETTERS, *supra* note 11, at 359-60; Letter from Louis D. Brandeis to J. M. Neenan (Mar. 11, 1912), in 2 LETTERS, *supra* note 11, at 566-67.

here involve the Federal Employers' Liability Act (FELA) of 1908.¹² And though I did not notice it at first, once I finished compiling my list of cases I realized that the series led inexorably to *Erie v. Tompkins*,¹³ Brandeis' last decision involving a railroad accident.¹⁴ Before turning to some data underlying these cases and their background, please consider the opening sentences in Brandeis' first and last railroad accident opinions, penned twenty-two years apart:

Whitacre, a freight train brakeman, while walking through a railroad yard on a dark and foggy night, fell into a water cinder pit and was seriously injured.¹⁵ (1916)

Tompkins, a citizen of Pennsylvania, was injured on a dark night by a passing freight train of the Erie Railroad Company while walking along its right of way at Hughestown in that state.¹⁶ (1938)

¹² 45 U.S.C.S. §§ 51-60 (LEXIS through PL 114-254) [hereinafter FELA, including instances that should read "The FELA"].

¹³ 304 U.S. 64 (1938).

¹⁴ *Id.* at 69 (stating *Erie* did not involve FELA, but was an accident involving a third-party bystander walking along the tracks).

Prior to the Louis D. Brandeis conference, I had circulated a draft of this paper to the other participants on my panel. Shortly before the conference we conferred about the panel by phone. Steve Winter recommended that I look at Ed Purcell's book on Brandeis and *Erie*. EDWARD A. PURCELL, JR., *BRANDEIS AND THE PROGRESSIVE CONSTITUTION: ERIE, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA* (2000). I responded that I had already purchased a copy, but had difficulty getting past the beginning. "So did I," said Steve, "but I pushed past it, and it's quite a brilliant book." So, I too, pushed past and concur with Steve – it is brilliant. The central difference between Purcell's book and this paper, apart from the scope of the inquiry (Purcell's being far more ambitious than mine here), is our respective starting points. Purcell, essentially, unpacks the *Erie* decision (including the three opinions) and traces back the path, or provenance, of *Erie's* major concerns and issues historically: the role of the railroads in American litigation, the growth and place of the federal or general common law in American constitutional doctrine, forum shopping, diversity jurisdiction, the regulatory authority of federal courts, and so forth. The book's brilliance is in the map Purcell furnishes his readers of all these intersecting paths leading up to *Erie*. In contrast, when I began this paper, I did not even have *Erie* in mind; my interest was solely in making sense of Brandeis' style of writing in the first sentences of his railroad accident opinions, in particular those involving railroad workers. That it led me to many of the same interpretations and conclusions as Purcell was largely happenstance. In that sense, my story is a supplement to Purcell's; it offers a different kind of evidence of Brandeis' intentions leading up to *Erie*. Still, for a more robust account of the different themes embedded in *Erie* and Brandeis' relation to them, the reader should consult Purcell's book.

¹⁵ *Whitacre*, 242 U.S. at 170.

¹⁶ *Erie*, 304 U.S. at 69.

You may be questioning my use of *Erie v. Tompkins* in the example above. But Brandeis' iconic opening headline in *Erie* – “The question for decision is whether the oft-challenged doctrine of *Swift v. Tyson*¹⁷ shall now be disapproved” – was a sentence he only added in later drafts, most likely after he had secured a majority for his point of view.¹⁸ Initially, he began his opinion as he did almost all his other railroad accident opinions - with the name of the victim followed by additional facts.¹⁹

It is readily apparent that the two opening sentences from *Whitacre* and *Erie* are strikingly similar – a name, followed by a key characterization of the person, followed by the treacherous circumstances (e.g., darkness) of the injury. These two openings are also similar to those in most of Brandeis' other FELA opinions, although most of the other opinions follow an even tighter script.²⁰

During his tenure, Brandeis wrote fourteen FELA opinions for the Court – not including his dissent in *N.Y. Cent. R.R. Co. v. Winfield*.²¹ Of these, all but three begin with the name of the victim followed by some facts salient to the decision.²² There were also three other, non-FELA majority opinions, including *Erie*, that began

¹⁷ 41 U.S. 1 (1842), *overruled by Erie*, 304 U.S. 64 (citation omitted) (the Court's actual footnote is omitted here; it reviews the century-long judicial controversy over *Swift v. Tyson*).

¹⁸ *Erie*, 304 U.S. at 69. In his first handwritten draft of the *Erie* opinion, Brandeis wrote as follows: “Tompkins, a citizen of Pennsylvania, was struck by a freight train of the Erie Railroad while walking on its property at Hughestown in that State.” Louis D. Brandeis Papers, *microformed on reel no. 28*, pp. 0001-0344 [hereinafter LDB Court Papers]. He then amended the introduction by hand to: “Tompkins, a citizen of Pennsylvania, was struck on a dark night by a freight train of the Erie Railroad Company while walking on its right of way at Hughestown in that State.” *Id.* The handwritten draft was then typed and further amended to read as follows: “Tompkins, a citizen of Pennsylvania, was injured on a dark night by a passing freight train of the Erie Railroad Company while walking along its right of way at Hughestown in that State.” *Id.* In the fifth draft, typewritten, Brandeis inserted the following sentence by hand at the start: “The question for decision is whether the oft-challenged doctrine of *Swift v. Tyson* shall now be disapproved.” *Id.* There followed another ten or so drafts, but the first two sentences of the opinion remained as in the fifth typewritten draft, above. See also PURCELL, *supra* note 14, at 105-06 (indicating that Brandeis already had his majority when he began drafting).

¹⁹ *Erie*, 304 U.S. at 69.

²⁰ See, e.g., *Mix*, 278 U.S. at 493; *Wells-Dickey Tr. Co.*, 275 U.S. at 161-62; *Wells*, 265 U.S. at 102.

²¹ 244 U.S. 147, 154-70 (1917) (Brandeis, J., dissenting).

²² See *Swinson*, 294 U.S. at 530-31; *Hughes*, 278 U.S. at 497; *Mix*, 278 U.S. at 493-94; *Wells-Dickey Tr. Co.*, 275 U.S. at 161-62; *Wells*, 265 U.S. at 102-03; *Mullins*, 249 U.S. at 531-32; *Scarlet*, 249 U.S. at 529; *Laughlin*, 247 U.S. at 204-05; *Holloway*, 246 U.S. at 526; *Nelson*, 246 U.S. at 254-55; *Whitacre*, 242 U.S. at 170.

with the victim's name;²³ these three all involved railroad accidents.²⁴ Finally, there were three FELA opinions that did not begin with the victim's name.²⁵

Before we discuss FELA itself – its background and passage – let's consider the specific character of seven of the first sentences from this series of opinions that are distinctively similar:

Holloway, a locomotive engineer, was killed on the Louisville and Nashville Railroad while engaged in the performance of his duties.²⁶ (1918)

Xedes, a section hand on the Union Pacific Railroad, was injured, in Kansas, while in the performance of his duties.²⁷ (1918)

Mullins, a flagman on the Yazoo & Mississippi Valley Railroad, was injured while engaged in switching an interstate train.²⁸ (1919)

Wells, a citizen and resident of Colorado employed by the Atchison, Topeka & Santa Fe Railway Company, was injured while performing his duties in New Mexico.²⁹ (1924)

Anderson was killed instantly while employed in interstate commerce by the Chicago, Burlington & Quincy Railroad.³⁰ (1927)

Thomas Doyle, a switchman employed by the Michigan Central Railroad, was killed in Michigan in the performance of his duties.³¹ (1929)

²³ *Erie*, 304 U.S. at 69; *Gay v. Ruff*, 292 U.S. 25, 27 (1934); *Pan. R.R. Co. v. Toppin*, 252 U.S. 308, 309 (1920). In addition, one dissenting opinion also begins with the name of the victim, "Knudsen": though the case does not fit directly into the line of decisions I am discussing here, it raises some interesting tangential issues, insofar as the case addressed the proper role of federal courts in federal administrative processes governing workers' compensation – namely, the Longshoremen's and Harbor Workers' Compensation Act. See *Crowell v. Benson*, 285 U.S. 22, 65-95 (1932) (Brandeis, J. dissenting).

²⁴ *Erie*, 304 U.S. at 69; *Gay*, 292 U.S. at 27; *Toppin*, 252 U.S. at 309.

²⁵ *McKnett v. St. Louis & S.F. Ry. Co.*, 292 U.S. 230, 230 (1934); *Hoffman v. Missouri ex rel. Foraker*, 274 U.S. 21, 21 (1927); *Lee v. Cent. of Ga. Ry. Co.*, 252 U.S. 109, 109 (1920).

²⁶ *Holloway*, 246 U.S. at 526.

²⁷ *Laughlin*, 247 U.S. at 204.

²⁸ *Mullins*, 249 U.S. at 531.

²⁹ *Wells*, 265 U.S. at 102.

³⁰ *Wells-Dickey Tr. Co.*, 275 U.S. at 161-62.

³¹ *Mix*, 278 U.S. at 493.

Ira L. Hughes, a traveling fireman, was killed on the Western & Atlantic Railroad while engaged in the performance of his duties.³² (1929)

One other case began similarly – there is hardly sufficient variation to designate it as inconsistent with the preceding introductions:

Scarlet was a fireman on the New Orleans & Northeastern Railroad. While engaged in the performance of his duties he was injured by being thrown down between the engine and the tender.³³ (1919)

Even though the introduction to all of these cases is consistent³⁴ – the victim’s name, his function as an employee of the railroad, that he was injured while performing his duties, and that the injury occurred in interstate commerce – minor differences also provide clues about the salient facts in the case.³⁵ Indeed, despite the similarity of these introductory sentences, the content and legal issues in these cases differed broadly. One salient fact that all eight cases did share, yet not mentioned in the first sentence, was that the victim filed suit in state court.³⁶

³² *Hughes*, 278 U.S. at 497.

³³ *Scarlet*, 249 U.S. at 529.

³⁴ During the breaks, in private conversations, Conference participants offered alternative explanations for the consistency. Judith McMorrow, for instance, suggested that Brandeis began with the names to put identifiable faces on the carnage of American industrial accidents, much like a listing of the fallen at war memorial services. Judith McMorrow, Brandeis and Lawyering (II), Address at Touro Law Center for a Conference on Louis D. Brandeis (Mar. 31, 2016). Yet, in other opinions involving accident victims, Brandeis did not begin with a name – see, e.g., *infra* notes 93-98. For example, his opinions for the Court in Workmen’s Compensation Law (WCL) cases – see, e.g., *Bradford Elec. Light Co. v. Clapper*, 286 U.S. 145 (1932); *Ohio v. Chattanooga Boiler & Tank Co.*, 289 U.S. 439 (1933); or his opinions under the Federal Control Act – see, e.g., *Alabama & Vicksburg Ry. Co. v. Journey*, 257 U.S. 111 (1921). Joel Goldstein suggested that the configuration of facts in the first sentence might have laid a basis for jurisdiction, but jurisdiction was rarely at issue in these cases, and in the cases where it was, Brandeis tended to begin his opinion with the jurisdictional facts. See, e.g., *infra* notes 201-210.

³⁵ For instance, Brandeis noted in the *Wells-Dickey Tr. Co.* opening that the victim was “killed instantly” and this subsequently played a part in denying the plaintiff’s claim for damages for pain and suffering. See *Wells-Dickey Tr. Co.*, 275 U.S. at 161-64. In some of the other cases, the plaintiff’s place of residency or the site of the accident figures in the outcome – e.g., whether the trial court had jurisdiction. See, e.g., *Mix*, 278 U.S. at 493-95.

³⁶ *Hughes*, 278 U.S. at 497; *Mix*, 278 U.S. at 493; *Wells-Dickey Tr. Co.*, 275 U.S. at 162; *Wells*, 265 U.S. at 102; *Mullins*, 249 U.S. at 531; *Scarlet*, 249 U.S. at 529; *Holloway*, 246 U.S. at 526; *Laughlin*, 247 U.S. at 205.

As I demonstrated in my earlier article, Brandeis drew on facts of the case to frame the issues, and in general he included the most salient facts in the first sentence of his opinions.³⁷ The stylized presentation of certain facts in FELA and related cases strongly suggests that he was signaling *something*. But what, exactly, was going on? How can we account for the formulaic, almost ritual nature of these sentences? To unlock the mystery will require that we come to grips first with the context in which Brandeis was framing these cases, in particular, ongoing issues surrounding FELA.

III. THE FEDERAL EMPLOYER'S LIABILITY ACTS OF 1906 AND 1908

Congress passed FELA in 1906,³⁸ but in January of 1908 the Supreme Court overturned the law, 5-4, primarily because it was not strictly limited to matters within Congress' powers under the Constitution's interstate commerce clause.³⁹ Three months later, in April of 1908, Congress passed essentially the same Act with some "improvements" and sufficient modifications of the interstate commerce language to pass the Supreme Court's test.⁴⁰

³⁷ See Zacharias, *Reframing the Constitution*, *supra* note 5, at 359.

³⁸ John Fabian Witt, *Federal Employers' Liability Act (1908)*, ENCYCLOPEDIA.COM (2004) <http://www.encyclopedia.com/history/encyclopedias-almanacs-transcripts-and-maps/federal-employers-liability-act-1908>.

³⁹ *Howard v. Ill. Cent. R.R. Co. (Employers' Liability Cases)*, 207 U.S. 463, 498-99, 504 (1908) (the majority, opinion by White, J., over-reached. The cases under consideration admittedly involved injuries in interstate commerce, and the defendant railroads were both interstate carriers. So, the Court could have disregarded the question of the statute's constitutionality and reserved it for an occasion on which the injury was not clearly within Congress' power to regulate. Yet, the Court determined that the language of the Act was such that the interstate and intrastate cases could not be treated separately. The Court's opinion also raised other issues regarding Congressional power over state common law doctrine and the Court made it clear that the majority disfavored federal intervention altogether in this realm. The four justices in the minority – Moody, McKenna, Harlan, and Holmes – published three separate opinions).

⁴⁰ *Mondou v. N.Y., New Haven, & Hartford R. R. Co. (Second Employers' Liability Cases)*, 223 U.S. 1, 53 (1912); see *Howard*, 207 U.S. at 541 (Holmes, J., dissenting) (observing that "[t]he phrase 'every common carrier engaged in trade or commerce' may be construed to mean 'while engaged in trade or commerce' without violence to the habits of English speech . . ."). Congress adopted the language in Justice Holmes' dissent and amended the Act to "common carrier . . . while engaging in commerce between the several states . . ." 45 U.S.C. § 51 (1908).

Congress sharpened the negligence and fellow-servant provisions and extended the time to sue from one to two years from the day of the cause of action accrued. *Mondou*, 223 U.S. at 6, 49. Congress also broadened the provision, regarding contributory negligence, in which the earlier act had barred recovery except "where [the victim's] contributory negligence was

FELA was an awkward compromise.⁴¹ On the one hand, it was not a workmen's compensation law that guaranteed all railroad accident victims compensation. Essentially, it modified the common law rules applied in railroad workers' injury and wrongful death suits against their employers, but only for accidents that had occurred in interstate commerce.⁴² Railroads had long enjoyed exemptions from liability to their injured and dead employees, insofar as victims had to demonstrate the railroad's fault in court and the railroad could plead the fellow-servant, assumption of risk, or contributory negligence defenses, except in states where legislatures had limited the application of such defenses.⁴³ To address the festering injustice of the common-law tort system, Congress largely eradicated the defenses in these cases, but employees still had to prove the railroad's fault (generally, negligence), something they would not have to do under most states' workmen's compensation laws.⁴⁴

slight and that of the employer was gross in comparison." Lester P. Schoene & Frank Watson, *Workmen's Compensation on Interstate Railways*, 47 HARV. L. REV. 389, 392 (1934). H.R. REP. NO. 60-1386, at 3-4. In 1908 Congress decreed that "the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee." *Id.* at 4. Congress also barred the contributory negligence defense whenever the injury was caused in part by a violation of a safety statute aiming to protect workers. *Id.* at 2, 6; Schoene & Watson, *supra* note 40, at 392. Congress barred "assumption of risk" defenses in all FELA cases that involved a violation of any safety statute. *Id.* at 6. Schoene & Watson, *supra* note 40, at 392. For an overview of the amendments as well as their shortcomings, see Lester P. Schoene & Frank Watson, *Workmen's Compensation on Interstate Railways*, 47 HARV. L. REV. 389, 391-394. The 1906 law had been mute on this issue because the rule barring assumption of risk defenses was applied pursuant to the Safety Appliance Act of 1893; but as of 1908, the ICC was recommending further safety legislation and Congress was close to enacting the Federal Boiler Inspection Act, passed in 1911. See C.T. Foster, Annotation, *Employer's Compliance with Specific Legal Standard Prescribed by or Pursuant to Statute for Equipment, Structure, or Material, as Defense to Charge of Negligence*, 159 A.L.R. 870 (1946) (presuming the expansion here anticipated subsequent federal safety legislation).

⁴¹ See Schoene & Watson, *supra* note 40, at 390.

⁴² See Schoene & Watson, *supra* note 40, at 392-98.

⁴³ See Schoene & Watson, *supra* note 40, at 391-92.

⁴⁴ The law disallowed certain tort defenses to claims of negligence. First, Congress nullified the infamous fellow-servant doctrine very elegantly, by holding the railroad liable to the victim for the negligent acts of its "officers, agents or employees"—thus turning what had formerly been the railroad's defense into the victim's cause of action. *Owens v. Union Pac. R.R. Co.*, 319 U.S. 715, 720-21 (1943). Second, earlier federal railroad regulation, the Safety Appliance Act of 1893, had required railroads to install safe equipment, in large part to secure the safety of passengers; but section 8 of that Act also barred non-compliant railroads from asserting "assumption of risk" defenses against suits by their injured employees. See Act of Mar. 2, 1893, ch. 196, 27 Stat. 531, *amended by* The Safety

By 1906, most states made some effort at tort reform in the realm of industrial accidents, especially concerning the fellow servant and assumption of risk doctrines.⁴⁵ The more progressive states were soon to introduce workers' compensation laws that recognized the inevitability of such accidents and ensured that all victims would be compensated for their injuries, regardless of fault.⁴⁶ At the same time, workers' compensation laws did not provide the levels of compensation an employee could win in a successful tort suit – damages for each kind of injury, such as loss of a limb or an eye, were specified by statute or administrative boards; and the payments to dependent beneficiaries for the death of an employee were often relatively meager.⁴⁷ In passing FELA, Congress had removed much of the chanciness from employee tort suits and converted the negligence of fellow servants from an employer defense into a cause of action.⁴⁸ Ultimately, railroad workers benefited from jury largesse, and so resisted attempts by Congress to repeal FELA and replace it with a more general compensation law for workers within

Appliance Act of Mar. 2, 1903, ch. 976, 32 Stat. 943. Section 8 of the original Act reads as follows:

That any employee of any such common carrier who may be injured by any locomotive, car, or train in use contrary to the provision of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge.

Act of Mar. 2, 1893, ch. 196, 27 Stat. 532. FELA extended this principle to all federal safety requirements. Third, FELA enabled employees who were contributorily negligent to sue nevertheless for damages in proportion to their own and their employer's relative negligence. 45 U.S.C.S. § 53 (LEXIS through PL 114-254). In such suits juries were instructed to deduct that part of the damages attributable to the employee's own negligence from the total or, in other words, apportion the damages. *Id.* Fourth, the Act voided virtually all contract provisions disclaiming the employer's liability and all waivers of liability. Act of Mar. 2, 1893, ch. 196, 27 Stat. 532.

⁴⁵ H.R. REP. NO. 60-1386, at 30-75 (1908) (compiling relevant state, territorial and federal legislation). The Senate included a similar compilation during its hearings entitled "Laws Regulating Liability of Employers for Injuries to Employees." S. DOC. NO. 60-207 1-60 (1908).

⁴⁶ See JOHN FABIAN WITT, *THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW* 126 (2004); see also SAMUEL B. HOROVITZ, *INJURY AND DEATH UNDER WORKMEN'S COMPENSATION LAWS: HOROVITZ ON WORKMEN'S COMPENSATION* 153 (1944).

⁴⁷ WITT, *supra* note 46, at 123.

⁴⁸ FELA, *supra* note 12.

its jurisdiction, such as those Congress established for the marine and harbor industries.⁴⁹

Why was FELA an “awkward” compromise in the larger context of progressive legislation? A central constitutional problem in the U.S. at the turn of the 20th century was the reallocation of state and federal power to deal with the nationalization of industry and its regulation.⁵⁰ At the heart of the problem was the emergence of the large corporation.⁵¹ The Supreme Court, at the time, took as its assignment the supervision of that constitutional reallocation process, and it did so largely under the rubric of the commerce clause and due process clauses protecting liberty (as in “liberty of contract”) and property – to wit, economic due process.⁵² Economic due process served largely to limit state regulatory powers that presumably interfered with overarching ideas about the proper functioning of a national market, whereas the commerce clause served to smooth supposed disruptions of that market at state borders.⁵³

⁴⁹ See HOROVITZ, *supra* note 46, at 152-53; *see, e.g.*, John Williams-Searle, *Risk, Disability, and Citizenship: U.S. Railroaders and the Federal Employers’ Liability Act*, DISABILITY STUD. Q., (2008) <http://dsq-sds.org/article/view/113/113> (discussing railroad workers’ resistance to conventional insurance schemes such as those initiated under workers’ compensation acts); *see also* Crowell, 285 U.S. at 72-73 (Brandeis, J. dissenting) (regarding problems administering the federal Longshoremen’s and Harbor Workers’ Compensation Act).

⁵⁰ See Zacharias, *Reframing the Constitution*, *supra* note 5, at 328-330.

⁵¹ See Zacharias, *Repaving the Brandeis Way*, *supra* note 5, at 610-11; *see* Allen Kaufman & Lawrence Zacharias, *From Trust to Contract: The Legal Language of Managerial Ideology, 1920-1980*, 66 BUS. HIST. REV. 523, 531-33 (1992); *see also* ALLEN KAUFMAN, LAWRENCE ZACHARIAS & MARVIN KARSON, *MANAGERS VS. OWNERS: THE STRUGGLE FOR CORPORATE CONTROL IN AMERICAN DEMOCRACY* 11-20 (1995).

⁵² *See generally* Lochner v. New York, 198 U.S. 45 (1905), *abrogated by* West Coast Hotel Co. v. Parish, 300 U.S. 379 (1937).

⁵³ *See*, MORTON KELLER, *AMERICA’S THREE REGIMES: A NEW POLITICAL HISTORY* (2007), at 158-59; and William N. Eskridge, Jr. & John Ferejohn, *The Elastic Commerce Clause: A Political Theory of American Federalism*, 47 VAN. L. REV. 1355, 1376-1385 (2007). The notion of “smoothing” is linked to “dormant Commerce Clause” jurisprudence—*see, Id.* at 367-68. It meant limiting or overturning state actions that “interfered” with or burdened interstate commerce, such as protectionist state legislation designed to secure business for a state’s producers and merchants against outside competition. *Id.* at 568-69. It also meant striking down state actions that tended to reach beyond a state’s borders, such as corporate regulations that impeded what a firm might do outside the state. Abram F. Myers, *Federal Regulation of Corporations Under the Commerce Clause*, 129 ANNALS AM. ACAD. POL. & SOC. SCI. 143, 143-44 (1927). State actions that ran afoul of exclusive federal jurisdiction of interstate commerce, such as the regulation of navigable waters, were also subject to restraints; interstate railroads posed issues of this sort as well – e.g., when states in some way regulated railroad through-traffic that was designated interstate). *See* Gibbons v. Ogden, 22 U.S. 1, 94-100 (1824) (discussing

One of FELA's objectives, apart from achieving a measure of social justice for railroad workers, was to promote a kind of uniformity in the regulation of railroad accidents.⁵⁴ Among conservative justices, the idea of uniformity was a constitutionally implicit smoothing device: it rested on the principle that the common law was the central means for regulation of economic life and that friction between state and federal regulatory power could be smoothed by elaborating the common law in a uniform manner.⁵⁵ Among other things, this meant that the Court had to take a leading role in tamping down the diversity of state common law rules and, as we shall see below, using the common law to negate disruptive state statutes and administrative rulings.⁵⁶

FELA fell awkwardly into this framework of uniformity and the common law. Although it was a statute, rather than judicial elaboration of the common law, it was passed specifically to modify an acknowledged problem of common law diversity – namely the different state standards for holding railroads accountable to their workers.⁵⁷ In both the Senate and House reports on their respective FELA bills, the authors point to a compilation of state laws on the subject of industrial accidents, including those that governed railroad employee accidents occurring in interstate commerce.⁵⁸ Generally speaking, both houses of Congress sought to bring uniformity to the system of tort rules, even though Congress was limited to regulating only those accidents that occurred in interstate commerce; furthermore, at least in the Senate, legislators wanted to establish a minimum threshold for the railroads' liability and their workers' chances for restitution.⁵⁹

the state regulation of waterways); *see also* *S. Ry. Co. v. United States*, 222 U.S. 20, 26-27 (1911) (speaking of the state regulation on railroad traffic). My point here is that the Commerce Clause gave federal courts substantial power to restrict state action in varying ways.

⁵⁴ *A Council Policy Paper: A Summary of Current Legislative Provisions Prescribing the Legal and Regulatory Framework Governing The National Railroad Passenger Corporation (Amtrak)*, AMTRAK REFORM COUNCIL 1, 34 (Dec. 4, 2000), <http://govinfo.library.unt.edu/arc/materials/legsum.pdf>.

⁵⁵ *See* William P. Murphy, *Sidetracking the FELA: The Railroads' Property Damage Claims*, 69 MINN. L. REV. 349, 372 n.99 (1985).

⁵⁶ *Id.*

⁵⁷ *Id.* at 372-74.

⁵⁸ H.R. REP. NO. 60-1386, at 30-75 (1908); S. DOC. NO. 60-207, at 1-60 (1908).

⁵⁹ *See* Thomas E. Baker, *Why Congress Should Repeal the Federal Employers' Liability Act of 1908*, 29 HARV. J. ON LEGIS. 79, 80-82 (1992).

Although FELA was not progressive legislation in the sense of expanding government power to address social injustice, it nevertheless gave railroad workers a leg up in injury suits against their employers and it did so by raising the common law rules to their “highest” common denominator in terms of social justice.⁶⁰ Conservative justices acknowledged that Congress was using its legislative powers properly when it modified the common law in small doses to smooth the disruptive effects of state common law diversity; but those justices were also the jealous guardians of the common law, and so they limited FELA’s modifications to what they perceived the common law tradition to be.⁶¹ In doing so, they appealed to the idea of “uniformity,” an idea that grew rife in the early decades of the 20th century.⁶² This was precisely the paradox that would play itself out in the Court’s *Winfield* decision.⁶³

In addition to the problem of state law diversity and the absence of a uniform set of rules to regulate liability for the injuries and deaths of railroad workers in interstate commerce, Congress also had to address the similarly vexing problem of inconsistency.⁶⁴

⁶⁰ See *id.* at 83-84 (discussing how FELA made it easier for railway workmen to recover in negligence actions against their employers by loosening common-law negligence standards).

⁶¹ See, e.g., William Schofield, *Uniformity of Law in the Several States as an American Ideal*, 21 HARV. L. REV. 510, 510, 519-26 (1908) [hereinafter Schofield, *Uniformity of Law I*]. The American common law tradition, imported via Blackstone and elaborated by his earlier American imitators, such as Zephaniah Swift and James Kent, projected the common law as a unitary, seamless whole. ROSCOE POUND, *THE FORMATIVE ERA OF AMERICAN LAW* 6-13 (1938). See generally, WILLIAM E. NELSON, *THE AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830* (1975); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1977). LEGISLATIVE modifications, in the eyes of those who sought to preserve the tradition, threatened to corrupt the unitary fabric; conservative judges accepted limited statutory modification as the price of social progress and change, but hardly welcomed it. Schofield, *Uniformity of Law I*, *supra* note 61, at 519-26.

⁶² See *Winfield*, 244 U.S. 147. For a contemporary discussion of uniformity issues in the law, see, e.g., William Schofield, *Uniformity of Law in the Several States as an American Ideal*, 21 HARV. L. REV. 416 (1908) [hereinafter Schofield, *Uniformity of Law II*]; see also William Schofield, *Uniformity of Law in the Several States as an American Ideal*, 21 HARV. L. REV. 583 (1908) [hereinafter Schofield, *Uniformity of Law III*]. Consider also that the State Boards of Commissioners for Promoting Uniformity of Legislation in the United States were in their eighteenth year in 1908. Schofield, *Uniformity of Law I*, *supra* note 61, at 518-19.

⁶³ See *Winfield*, 244 U.S. 147.

⁶⁴ See Schofield, *Uniformity of Law I*, *supra* note 61, at 510.

Inconsistency was not a regulatory problem,⁶⁵ but rather a procedural one. To wit, the same case could be tried in a variety of different fora, and in each the outcome might be different, not because the different fora were applying different regulations or substantive rules, but because their decision-making processes differed.⁶⁶ Indeed, the legal system is always prone to inconsistency: two judges may not decide the same case alike; two different juries might give contradictory verdicts.⁶⁷ To address inconsistency of this sort, the law searches for explicit ways to render the decision process consistent.⁶⁸ Even so, there will be opportunities for forum shopping that capitalize on differences in decision processes.⁶⁹ To some degree, Congress addressed forum shopping by amending FELA in 1910, precluding the removal of suits initiated in state courts to federal courts.⁷⁰

⁶⁵ This regulatory problem was embedded in the larger one involving corporate regulation and the collapsing of state authority and the building up of a federal capacity to regulate the corporation in interstate commerce. See Zacharias, *Repaving the Brandeis Way*, *supra* note 5, at 599; see also Zacharias, *Reframing the Constitution*, *supra* note 5, at 329.

⁶⁶ See Daniel James, *Law and the Modern Mind*, by Jerome Frank, 6 IND. L. REV. 351, 351 (1931) (book review).

⁶⁷ See Oscar Cox, *Law and the Modern Mind*, by Jerome Frank, 40 YALE L.J. 670, 670-72 (1931) (book review).

⁶⁸ See Francis M. Burdick, *Is Law the Expression of Class Selfishness?* 25 HARV. L. REV. 349, 360-61 (1912) (discussing a conservative apology for the judiciary with respect to the immunization of railroads from workers' injury claims. On the one hand, he speaks to the uniformity problem in addressing the fellow-servant doctrine as a reasonable, though admittedly debatable, rule for regulating the railroads' liability respecting their workers' injury claims; on the other hand, he speaks to the consistency problem in highlighting the judicial reasoning process, disclaiming class interest on the part of the judiciary insofar as individual judges exhibited no railroad-favoring bias in their ongoing attempts to get the accident regulation right); see also Schoene & Watson, *supra* note 40, at 410 (discussing consistency under FELA).

⁶⁹ Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. 481, 483 (2011).

⁷⁰ The 1910 Amendment to the 1908 Act, Section 6, reads as follows:

Under this Act an action may be brought in a circuit court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this Act shall be concurrent with that of the courts of the several States, and no case arising under this Act and brought in any state court of competent jurisdiction shall be removed to any court of the United States.

FELA, ch. 143, 36 Stat. 291 (1910) (codified as amended at 45 U.S.C. § 56 (2016)) (emphasis added).

IV. JUSTICE BRANDEIS' EARLIER ENCOUNTERS WITH FELA

Where did Brandeis stand on these issues – that is, social justice, uniformity and consistency? The question will be easier to address once we have reviewed his first three FELA opinions, his opinions for the Court in *Whitacre* and *Nelson*, and his dissent in *Winfield*.⁷¹

The *Whitacre* decision was a relatively simple one, disposed of in three paragraphs.⁷² *Whitacre*, the victim, had fallen into an unprotected and unlit railroad pit “on a dark and foggy night” while at work.⁷³ He sued in a Maryland state court under FELA.⁷⁴ The railroad, in its defense, claimed that there was no proof of negligence and asked for a directed verdict, but the judge sent the case to the jury.⁷⁵ The jury returned a verdict for the plaintiff and, on appeal, the Maryland Court of Appeals affirmed the judgment.⁷⁶ Brandeis, in re-affirming the Maryland court’s judgment, concluded, “[n]o clear and palpable error is shown which would justify us in disturbing that ruling.”⁷⁷

The *Whitacre* case was only significant because it gave Brandeis some insight into what was to follow: most of the FELA litigation would be handled by state courts, especially because the statute precluded removal once a case began in state court.⁷⁸ Further, the state courts’ handling of negligence trials differed from one another and from the federal district courts with respect to evidentiary standards and other procedures.⁷⁹ Brandeis understood that victims would still have to prove the railroads’ negligence, but in 1916 he was apparently willing to let the state courts’ laxity on this point

⁷¹ *Winfield*, 244 U.S. at 148, 154-70 (Brandeis, J., dissenting) (being brought under the NY State Workmen’s Compensation Law, this was not technically a FELA case: the defendant objected to the victim’s claim, arguing that FELA pre-empted the NY WCL in the present suit).

⁷² *Whitacre*, 242 U.S. at 169-71.

⁷³ *Id.* at 170.

⁷⁴ *Id.*

⁷⁵ *Id.* at 170-71.

⁷⁶ *Id.*

⁷⁷ *Whitacre*, 242 U.S. at 170-71.

⁷⁸ *Id.*

⁷⁹ The fact that the first sentence in *Whitacre* is somewhat different in style from those in opinions that followed suggests that Brandeis developed his signaling strategy later, probably in response to *Winfield*. *Whitacre*, 242 U.S. 169; see also PURCELL, *supra* note 14, at 105.

prevail, so long as they tried the issue of negligence.⁸⁰ The *Nelson* case no doubt buoyed Brandeis' optimism that state appellate courts would regulate the state judiciary adequately so that trial courts would perform this obligation with consistency: that is, that trial judges would in fact find negligence as FELA prescribed rather than hand juries a carte blanche to award damages to plaintiffs regardless of the underlying facts.

In *Nelson*, Nelson, a surveyor, stumbled on a rotting railroad tie, fell through into a depression below the tie, and dislocated his knee.⁸¹ Though the rot and the lack of ballast below the tie could have been discovered, neither affected the safety of the railroad's operations, and both conditions were deemed ordinary hazards in Nelson's line of work.⁸² Nevertheless, the trial court sent the case to the jury, and issued judgment upon the jury's verdict for Nelson.⁸³ The North Carolina Supreme Court, however, reversed the judgment "on the ground that there was no evidence of negligence . . ."⁸⁴ Brandeis wrote in affirming the North Carolina court's reversal, "[i]t is clear that the defendant did not fail in any duty which it owed to the plaintiff."⁸⁵

Between the *Whitacre* and *Nelson* cases, Brandeis penned his first dissent as a Justice. In *N.Y. Cent. Railroad Co. v. Winfield*,⁸⁶ the Court confronted the issue of the law's uniformity.⁸⁷ Winfield lost an eye through a no-fault accident, and because he could not sue successfully under FELA, he filed a claim under New York State's Workmen's Compensation Law (WCL).⁸⁸ The majority, per Justice Van Devanter, decided that FELA preempted the NY WCL, even

⁸⁰ See *Scarlet*, 249 U.S. at 529-30; *Mullins*, 249 U.S. at 532-33; *Hughes*, 278 U.S. at 497.

⁸¹ *Nelson*, 246 U.S. at 254. Brandeis' *Nelson* opinion began as follows: "Nelson a civil engineer who had been in the employ of the Southern Railway eleven years, was directed to make a survey in one of its yards." *Id.* He then goes on to describe the circumstances leading to the injury in the next three sentences. *Id.*

⁸² *Id.*

⁸³ *Id.* at 255.

⁸⁴ *Nelson*, 246 U.S. at 255

⁸⁵ *Id.*

⁸⁶ *Winfield*, 244 U.S. 147.

⁸⁷ In Melvin Urofsky's recent biography, *Louis D. Brandeis: A Life*, Urofsky's book spends two pages dissecting Brandeis' first dissent, focusing for the most part on implicit versus explicit federal preemption; unfortunately, he wholly misses the uniformity issue that vexed Brandeis and his contemporaries, both on the Court and off. UROFSKY, *supra* note 10, at 481-82.

⁸⁸ *Winfield*, 244 U.S. at 148.

though technically speaking, FELA did not explicitly give notice of its preemptive scope and was mute on the subject of non-negligent or no-fault accidents.⁸⁹ Van Devanter, however, argued that Congress had intended to preempt state laws governing all injuries to railroad employees that occurred in interstate commerce.⁹⁰ Drawing on language in the House of Representatives and Senate Reports, he claimed that Congress sought to construct a “national law having a uniform operation throughout all the states.”⁹¹ Furthermore, he opined, “Congress, in its discretion, acted upon the principle that compensation should be exacted from the carrier where, and only where, the injury results from negligence imputable to it.”⁹²

The quest for uniformity is explicit only in the House Report;⁹³ the language of the more progressive Senate Report reads as follows:⁹⁴

An examination of the laws of the various States of the Union will show that this measure brings the United States in harmony with the prevailing spirit which has actuated the law-making power throughout the country. It is no part of the purpose of this legislation to oppress or add burdens to the business enterprises of the country, but rather to promote the welfare of

⁸⁹ *Id.* at 152-54.

⁹⁰ *Id.* at 149.

⁹¹ *Id.* at 150. Van Devanter’s opinion cites the reports of both houses for this proposition (uniform national law), but it is noteworthy that only the House Report used such language—*see, infra* notes 94-95.

⁹² *Id.*

⁹³ H.R. REP. NO. 60-1386, at 1 (1908) (including two passages relating to uniformity: “Many of the States have already changed the common-law rule in these particulars, and by *this bill it is hoped to fix a uniform rule of liability throughout the Union* with reference to the liability of common carriers to their employees.”) (emphasis added). The Report also stated that:

A Federal statute of this character will supplant the numerous State statutes on the subject so far as they relate to interstate commerce. *It will create uniformity throughout the Union*, and the legal status of such employer’s liability for personal injuries instead of being subject to numerous rules will be fixed by one rule in all the States

Id. at 3 (emphasis added).

⁹⁴ S. REP. NO. 60-460, at 8 (1908) (discussing the “[l]iability of [c]ommon carriers to their employees.” The Report also anticipates broader remedies: “Undoubtedly, the time is coming when a liberal scheme of compensation to injured employees will become general in the United States, either under wise provisions of law or through the voluntary actions of our great corporations.”).

both employer and employee, by adjusting the losses and injuries inseparable from industry and commerce to the strength of those who in the nature of the case ought to share the burden [T]he bill under consideration, is not only within the constitutional power of Congress, but a wise step toward the establishment of justice and fair-dealing among men.⁹⁵

Van Devanter was probably correct that Congress had intended to preempt state laws *then* in force, but only insofar as they were employer-favoring common-law rules.⁹⁶ In 1908, when Congress passed FELA, none of the states had yet adopted a no-fault workmen's compensation law.⁹⁷ New York, in 1910, was the first to do so.⁹⁸ The diversity among the state laws in 1908 pertained only to variations in the common-law, in particular the extent to which the different states had declawed employer defenses in negligence suits.⁹⁹

Between the passage of FELA in 1908 and arguments on *Winfield* in 1917, the landscape of industrial accident law changed considerably, and Brandeis' dissent tried to clear space out from under FELA for the emerging state workmen's compensation laws – laws that in the eyes of progressives offered “a wise step toward” as the Senate Report had put it, “the establishment of justice and fair-dealing” in the realm of industrial accidents.¹⁰⁰ Earlier in that term, the Court had approved three states' WCLs – New York's, Iowa's and Washington's – but in the latter case by only a 5-4 margin, with Justice Van Devanter among the dissenters.¹⁰¹

Alexander Bickel's *The Unpublished Opinions of Mr. Justice Brandeis* reviews those WCL cases along with the *Arizona Employers' Liability Cases*, which involved a somewhat modified

⁹⁵ *Id.* at 3-4.

⁹⁶ *Winfield*, 244 U.S. at 150.

⁹⁷ *Id.* at 165.

⁹⁸ *Id.* at 158 n.5.

⁹⁹ S. REP. NO. 60-460, at 1 (1908) (supporting the idea that legislators may only have been seeking to unify the rules of decision in the federal courts (“courts of the United States”), but the House Report resists this notion, as do the 1910 amendments to the Act).

¹⁰⁰ *Id.* at 4. On the changing landscape, *see*, MARK ALDRICH, SAFETY FIRST: TECHNOLOGY, LABOR AND BUSINESS IN THE BUILDING OF WORK SAFETY, 1870-1939 (1997).

¹⁰¹ *N.Y. Cent. R.R. Co. v. White*, 243 U.S. 188 (1917); *Hawkins v. Bleakly*, 243 U.S. 210 (1917); *Mountain Timber Co. v. Washington*, 243 U.S. 219 (1917).

workmen's compensation law.¹⁰² Bickel concluded that the conservative justices convinced themselves, case by case, that these laws were acceptable only insofar as they preserved the spirit of "liberty of contract."¹⁰³ The state legislature's modifications of pre-existing employment relations had to reflect balanced trade-offs.¹⁰⁴ In other words, if the state allowed employees to recover for no-fault accidents, then it had to protect employers from the kinds of large damages juries routinely awarded in negligence suits.¹⁰⁵ Insofar as WCLs constrained all damages through fixed awards for specific injuries and replaced juries with administrators or compensation boards, the more conservative justices came to accept most of these new laws.¹⁰⁶ As Bickel showed, Brandeis learned to argue within these parameters,¹⁰⁷ even though he tended to side with Justice

¹⁰² ALEXANDER M. BICKEL, *THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS: THE SUPREME COURT AT WORK* (1957). The *Arizona Employers' Liability Cases* are at 250 U.S. 400 (1919).

¹⁰³ *Id.* at 62-63, 65-67, 71-72, 75-76.

¹⁰⁴ See Arthur Ballantine, *A Compensation Plan for Railway Accident Claims*, 29 HARV. L. REV. 705, 708-09 (1916) (describing an instance of a balanced tradeoff amongst railway worker's employment relations in the railway industry).

¹⁰⁵ *Id.* at 708-09, 711-13 (discussing trade-offs where Ballantine proposed an insurance scheme that would render railways strictly liable as insurers for all third-party (i.e., non-worker) accident claims. He argued that the supposed right of an entrepreneur to be shielded from no-fault claims is a soft one, compromised, for instance, by the strict liability rule of *respondeat superior*; and he argued that the supposed rights of claimants to jury damage awards – which would be the trade-off for ridding the system of fault—have similarly soft foundations in the law); see also *Arizona Employers' Liability Cases*, 250 U.S. 400, 431 (1919) (Holmes, J., concurring).

¹⁰⁶ See *Arizona Employers' Liability Cases*, 250 U.S. at 448-49 (McReynolds, J., dissenting) (showing a majority decision which follows several of the new laws).

¹⁰⁷ According to Bickel's account of the run-up to the *Arizona Employers' Liability Cases*, argued in January 1918, Chief Justice White was initially in the majority and assigned Holmes the opinion of the Court. BICKEL, *supra* note 102, at 62, 64-65. In his draft, Holmes argued that if a business is successful "the public pays its expenses and something more." *Arizona Employers' Liability Cases*, 250 U.S. at 433 (Holmes, J., concurring). He continued:

[i]t is reasonable the public should pay the whole cost of producing what it wants and a part of that cost is the pain and mutilation incident to production. By throwing that loss upon the employer in the first instance we throw it upon the public in the long run and that is just.

Id. (Holmes, J., concurring). This principled approach did not wash with Justices Day and Pitney, and so Brandeis tried his hand at an opinion, ultimately unpublished, that would engage the more conservative members of the majority. BICKEL, *supra* note 102, at 67-68. In the end, Justice Pitney wrote an opinion for the Court that drew on the kinds of arguments Brandeis' draft had suggested. *Id.*

Holmes' more expansive acceptance of no-fault compensation as the fair way to treat the industrial carnage then current in America.¹⁰⁸

As I noted, Brandeis was on relatively weak ground in arguing that Congress, in 1908, did not intend to preempt state tort

¹⁰⁸ Just how close Brandeis' and Holmes' views were on this point is not clear. On the one hand, Brandeis favored an insurance scheme that would compensate workers injured or killed on the job, but he also favored regulations that prevented accidents in addition to compensating victims. WITT, *supra* note 46, at 150. This required workers and their unions to collaborate with industry to keep the workplace safe, which in turn suggested some degree of worker accountability. WITT, *supra* note 46, at 150. Even though Brandeis joined Holmes' concurrence in the *Arizona Employers' Liability Case*, he nevertheless seemed warier than Holmes of the kind of statute at issue in the Arizona case, namely one that gave workers a right of election to go after a larger jury payout in cases in which they could prove negligence. BICKEL, *supra* note 102, at 68-73. Ironically, Brandeis, though he disdained forum shopping, defended the Arizona statute in his unpublished opinion on the basis, among other things, that it gave plaintiffs a right of election much like forum shopping which had been an ordinary part of the litigation landscape:

Such options commonly enjoyed by the plaintiff in a litigation, may be likened to the option which he so frequently enjoys in selecting the forum in which the controversy shall be conducted. A law which grants to the one who institutes adversary proceedings, the right to determine by which of several possible remedies the alleged claims shall be determined, necessarily denies to the other party the choice of remedies.

BICKEL, *supra* note 102, at 73; *see also Bradford Elec.*, 286 U.S. 145 (demonstrating that Brandeis wrote a rather arbitrary opinion for the Court). The plaintiff had sued in New Hampshire – the victim was killed there and the administratrix resided there – under a New Hampshire WCL that gave the victim a right of election to make a no-fault claim under the insurance provisions of the act or to sue in court for negligence (in the case at hand, she sued for wrongful death). *Bradford Elec.*, 286 U.S. at 150-51. The employer removed the case to federal court and argued that Vermont's WCL, which contained no right of election, but simply defined benefits, governed. *Id.* The case could have been decided either way, but Brandeis ruled in favor of the defendant, meaning that the Vermont WCL applied. *Id.* at 161-63. His reasoning is uncharacteristically formalistic – to the effect that the victim had signed on to the job in Vermont, at which point the Vermont WCL created a relationship between the parties (employee and employer), and the fact that the victim was injured and died in New Hampshire was merely incidental. *Id.* The better explanation here is that Brandeis was simply not as tolerant of state variations as Holmes, and as in the Arizona case was willing to conform the law as much as possible to a standard or uniform form of legislation. Otherwise, he might have objected to the federal judiciary's meddling with administrative forms of WCL proceedings. *See, e.g., Crowell*, 285 U.S. 22. *See also* Letter from Louis D. Brandeis to Felix Frankfurter (Nov. 13, 1927), in 5 LETTERS OF LOUIS D. BRANDEIS, (1921-1941); ELDER STATESMEN 309, 309-11 (Melvin I. Urofsky & David W. Levy eds., 1978) [hereinafter 5 LETTERS] (stating that “Holmes J. is incorrigible when there is an opportunity of curbing the power & province of a jury.” This statement was referring to Holmes' opinion in *Balt. & Ohio R.R. v. Goodman*, 275 U.S. 66 (1927), a third-party railroad accident case.). *See also* WITT, *supra* note 46, at 141 (explaining Holmes' antipathy to juries in these cases).

laws on the subject of railroad employers' liability.¹⁰⁹ Justice Van Devanter; however, was perhaps on even weaker ground in asserting that Congress had intended to keep no-fault compensation off the books for interstate carriers.¹¹⁰ Accordingly, Brandeis' opinion focuses on the majority's obsession with uniformity, arguing that the absence of any preemptive language in the statute itself left room to consider what the states had done since FELA's passage in the area of industrial accidents, and why.¹¹¹ For instance, he offers evidence that at the time FELA established its threshold standards for employers' liability no states had yet adopted WCLs;¹¹² yet, in the years since FELA's passage thirty-seven states had enacted such laws.¹¹³ Brandeis also counters the majority's insistence on judicially elaborated uniformity by showing how frequently the Court has had to intercede to resolve the real lack of uniformity that had resulted under FELA.¹¹⁴ In the preceding term, according to Brandeis, ninety-three of the Court's 1,069 cases involved FELA: thirty-seven of those cases involved the question whether the employee had been engaged in interstate or intrastate commerce – that is, subject to different tort rules depending on an evidently arbitrary distinction; and fifty-two of those cases raised the question whether the employer's negligence had been proven, an issue that would not have been germane under no-fault claims pursuant to a state's WCL, such as the one at issue in *Winfield*.¹¹⁵ In other words, if the goal of regulating the national market was to establish a single rule for liability, then the Supreme Court's exclusive common law approach was failing.¹¹⁶ Furthermore, as Brandeis makes clear, the Court's insistence on uniformity undercut the primary goal of FELA, to ensure fairness in industrial accident cases, especially since a truer version of uniformity in that

¹⁰⁹ Brandeis argued that by the time Congress intervened in 1906, and again in 1908, most states had already eliminated the offending negligence defenses that railroads raised against employee suits. See *Winfield*, 244 U.S. at 160-61 (Brandeis, J., dissenting).

¹¹⁰ *Id.* at 150.

¹¹¹ *Id.* at 163-64 (Brandeis, J., dissenting) (stating that “[t]he scope of the act is so narrow as to preclude the belief that thereby Congress intended to deny to the states the power to provide compensation for relief of injuries not covered by it.”).

¹¹² *Id.* at 165-66 (Brandeis, J., dissenting).

¹¹³ *Id.* at 165 (Brandeis, J., dissenting).

¹¹⁴ *Winfield*, 244 U.S. at 169 (Brandeis, J., dissenting).

¹¹⁵ *Id.* at 168 n.11 (Brandeis, J., dissenting).

¹¹⁶ *Id.* at 168 (Brandeis, J., dissenting).

respect was already emerging through the adoption of WCLs by *all* states.¹¹⁷

V. BALANCING UNIFORM NATIONAL REGULATION AGAINST CONSISTENT JUDICIAL DECISION-MAKING

At this point it may be useful to review just where Brandeis stood on the central issues of FELA legislation – fairness and social justice, uniformity and consistency – and to ask how these positions led him to focus his attention on consistency.

Above all, Brandeis held strongly to the belief that it was fair to protect workers against industrial accidents and to compensate them when accidents did occur.¹¹⁸ His 1912 letter to Mary Sumner¹¹⁹

¹¹⁷ *Winfield*, 244 U.S. at 160-61 (Brandeis, J., dissenting) (stating that “the number of accidents to railroad employees had become appalling” and before turn of the century state legislative tort reforms improved the situation, employers compensated workers for less than 80% of all injuries. “In the year 1905-06 the number killed while on duty was 3,807, and the number injured 55,524.”). See HOROVITZ, *supra* note 46, at 3-4. With respect to the state WCLs, Brandeis acknowledged that they were unlikely to be uniform apart from their general purposes:

The subject of compensation for accidents in industry is one peculiarly appropriate for state legislation. There must, necessarily, be great diversity in the conditions of living and in the needs of the injured and of his dependents Though the principle that compensation should be made, or relief given, is of universal application, the great diversity of conditions in the different sections of the United States may, in a wise application of the principle, call for differences between states The [field] of compensation for injuries appears to be one in which uniformity is *not* desirable, or at least not essential to the public welfare.

Winfield, 244 U.S. at 168-69 (Brandeis, J., dissenting) (emphasis in original).

¹¹⁸ See Letter from Louis D. Brandeis to Mary B. Sumner (Mar. 12, 1912), in 2 LETTERS, *supra* note 11, at 567.

¹¹⁹ On March 12, 1912, Brandeis wrote Mary B. Sumner, a staff writer on *The Survey*, to comment on a monograph about the German accident insurance system:

[First,] The social need for a comprehensive system for indemnifying working men against industrial accidents is unquestioned [Second,] An adequate system of accident insurance must tend to eliminate preventable accidents as well as to compensate adequately for the loss sustained. No system can be effective in preventing accidents which is not of a nature to secure the fullest cooperation of employer and employee; and none can be just which does not place the burden of making compensation for accidents actually occurring jointly upon those who jointly had the responsibility of preventing them. The responsibility for the prevention of accidents, and the administration of the compensation fund should be vested in a board composed of representatives of both employer and employee.

indicates that he believed producers had a responsibility to make working environments safe and that workers should be compensated for their injuries through insurance rather than by having to file suit.¹²⁰ Although Brandeis' letter also suggests that in 1912 he accepted the idea that companies should hold workers accountable for their own acts, he nevertheless came to approve of the consistency of the administered compensation schemes that emerged under both state and federal workmen's compensation legislation.¹²¹ He also disdained the kinds of legal shenanigans both sides resorted to in tort litigation to recover for accidental injuries and deaths.¹²² His dissent in the *Winfield* case strongly signaled his inclinations in this realm of regulation.¹²³

Letter from Louis D. Brandeis to Mary B. Sumner (Mar. 12, 1912), in 2 LETTERS, *supra* note 11, at 567.

¹²⁰ Letter from Louis D. Brandeis to Mary B. Sumner (Mar. 12, 1912), in 2 LETTERS, *supra* note 11, at 567.

¹²¹ *Id.* (stating "No system can be . . . just which does not place the burden of making compensation for accidents actually occurring jointly upon those who jointly had the responsibility of preventing them"). In addition to the earlier workmen's compensation cases, his comments in *Crowell* are worth noting. *Crowell*, 285 U.S. 22. *Crowell* began as a claim for damages under the federal Longshoremen's and Harbor Worker's Compensation Act. *Id.* at 36-37. The employer, Benson, contested the claimant Knudsen's employment status – i.e., that he was an independent contractor rather than an employee under the terms of the act; however, the Deputy Commissioner, in an administrative hearing, found that Knudsen was in fact covered under the act and issued an award in his favor. *Id.* at 36-37. Benson then sought injunctive relief in the federal district court, which in turn granted him a trial *de novo*. *Id.* at 37. The district court found that Knudsen had not been a covered "employee" at the time of the accident and accordingly issued an order restraining enforcement of the Deputy Commissioner's award. *Id.* at 37. The Circuit Court of Appeals affirmed the order. *Crowell*, 285 U.S. at 37. Brandeis, in a dissenting opinion, objected to Benson's resort to the district court as well as the latter court's trial *de novo*:

No good reason is suggested why all the evidence which Benson presented to the District Court in this cause could not have been presented before the deputy commissioner; nor why he should have been permitted to try his case provisionally before the administrative tribunal and then to retry it in the District Court upon additional evidence theretofore withheld. To permit him to do so violates the salutary principle that administrative remedied must first be exhausted before resorting to the court, imposes unnecessary and burdensome expense upon the other party and cripples the effective administration of the act . . . [S]ince the advantage of prolonged litigation lies with the party able to bear heavy expenses, the purpose of the act [i.e., cost effective, reasoned and timely processing of injury claims] will be in part defeated.

Id. at 93-94.

¹²² See *Mix*, 278 U.S. 492.

¹²³ See *Winfield*, 244 U.S. at 154 (Brandeis, J., dissenting).

Brandeis' views on uniformity dovetailed with his views on the regulation of industrial accidents. He was, as his dissent in the *Winfield* case shows, against the sort of knee-jerk uniformity that infused the judiciary at the time.¹²⁴ Judge Schofield's amazingly pedestrian article on *Uniformity of Law in the Several States as an American Ideal* was symptomatic of contemporary conservative views; Schofield places his faith in the common law and assigns to the courts its guardianship and the unique role of ensuring its uniformity.¹²⁵ In *Winfield* Brandeis had an opportunity to lash out at this sort of thinking, to argue that the passage of a federal tort reform statute for interstate railroad workers (i.e., FELA) ought not preclude state workmen's compensation laws, grounded on a no-fault liability insurance scheme, from supplementing the federal law. The Court's conservative majority claimed that Congress' desire for uniformity – that is, one nation-wide standard based on common law principles that precluded no-fault liability for interstate carriers – required the exclusion of supplementary state workmen's compensation remedies from FELA cases: Brandeis, in his dissent, saw the majority's claims simply as an exercise in subjugating states' authority to the requirements of a federal judiciary in the name of uniformity.¹²⁶

¹²⁴ *Id.* (Brandeis, J., dissenting).

¹²⁵ This article was spread out over three issues of the Harvard Law Review in 1910. See Schofield, *Uniformity of Law I*, *supra* note 61; Schofield, *Uniformity of Law II*, *supra* note 62; Schofield, *Uniformity of Law III*, *supra* note 62.

¹²⁶ See Schofield, *Uniformity of Law II*, *supra* note 62, at 417, 430 (discussing the unitary fabric of the common law and its corrosion under the pressure of legislative modification and replacement). Consider Brandeis' dissent in *Olmstead*, 277 U.S. 438. Chief Justice Taft, writing for the Court, addressed the question whether "evidence obtained through intercepting of telephone messages by government agents was inadmissible because the mode of obtaining it was unethical, and a misdemeanor under the law of Washington." *Id.* at 466. To answer the question Taft drew on the federal common law, which held "admissibility of evidence is not affected by the illegality of the means by which it was obtained." *Id.* at 467. Taft acknowledged that many states had legislated exceptions to this rule of evidence, but that the federal courts had no discretion to undercut the rule "[i]n the absence of controlling legislation by Congress." *Id.* at 468. Brandeis, in responding to the same question on the laws of evidence, wrote: "Independently of the constitutional question, I am of opinion that the judgment should be reversed. By the laws of Washington, wire tapping is a crime." *Olmstead*, 277 U.S. at 479 (Brandeis, J., dissenting). To this statement he appended a footnote in which he cited the laws of 26 states that had criminalized the interception of "a message sent by telegraph and/or telephone," while also stating that 35 states had criminalized the disclosure or assistance in disclosure of any message by telegraph or telephone companies, their employees or "persons conniving with them," and three federal acts to this effect (one for the territory of Alaska, the other two pertaining to government transmissions and communications under the Radio Act. *Id.* at 479 n.13.

At the same time, Brandeis was not against all forms of uniformity. He supported the development of uniform state acts by commission or other devices that demonstrated a forged consensus around the solving of mutually experienced problems.¹²⁷ Furthermore, he approved the sort of uniformity that tended to appear among state laws when groundswells of popular opinion informed one state legislature after another, as for instance in the case of state workmen's compensation legislation.¹²⁸

One further point warrants mention regarding uniformity and the FELA cases. The regulation of liability could not in fact be uniform on a nationwide basis, because the evidentiary requirements for negligence differed from state to state and between federal and state courts.¹²⁹ Insofar as FELA expressly forbade the litigants from removing suits filed in state courts to federal courts, the locus for shaping the law was going to be primarily in the state courts.¹³⁰

¹²⁷ See, e.g., *Swift & Co. v. Hocking Valley Ry. Co.*, 243 U.S. 281 (1917). Also, Brandeis was directly involved with the movement for uniform state laws from about 1900 to 1906, sitting as a member of the Massachusetts committee of the "Commission on Uniformity of Laws." See Letter from Louis D. Brandeis to James Barr Ames (Dec. 28, 1900), in 1 LETTERS OF LOUIS D. BRANDEIS, (1870-1907): URBAN REFORMER 156 (Melvin I. Urofsky & David W. Levy eds., 1971)[hereinafter 1 LETTERS]; Letter from Louis D. Brandeis to James Barr Ames (Feb. 6, 1905), in 1 LETTERS, *supra* note 127, at 280-81; Letter from Louis D. Brandeis to William Lewis Douglas (July 24, 1905), in 1 LETTERS, *supra* note 127, at 347; Letter from Louis D. Brandeis to William Lewis Douglas (Sept. 7, 1905), in 1 LETTERS, *supra* note 127, at 359; Letter from Louis D. Brandeis to William Lewis Douglas (Oct. 21, 1905), in 1 LETTERS, *supra* note 127, at 364; Letter from Louis D. Brandeis to Glendenning B. Groesbeck (Oct. 31, 1905), in 1 LETTERS, *supra* note 127, at 366; Letter from Louis D. Brandeis to William Lewis Douglas (Nov. 3, 1905), in 1 LETTERS, *supra* note 127, at 367; Letter from Louis D. Brandeis to Thomas E. Drake (Jan. 15, 1906), in 1 LETTERS, *supra* note 127, at 398; Letter from Louis D. Brandeis to Curtis Guild, Jr. (Jan. 24, 1906), in 1 LETTERS, *supra* note 127, at 401; Letter from Louis D. Brandeis to Curtis Guild, Jr. (May 14, 1906), in 1 LETTERS, *supra* note 127, at 433; Letter from Louis D. Brandeis to Curtis Guild, Jr. (May 14, 1906), in 1 LETTERS, *supra* note 127, at 434; Letter from Louis D. Brandeis to Amasa Mason Eaton (May 18, 1906), in 1 LETTERS, *supra* note 127, at 435.

¹²⁸ In *Winfield*, Brandeis noted that 37 jurisdictions had already adopted WCLs: "Not one of the thirty-seven states or territories which now have Workmen's Compensation Laws had introduced the system [i.e., in 1908]." *Winfield*, 244 U.S. at 165 (Brandeis, J., dissenting). As of 1944, 47 of 48 states had adopted such workers' compensation legislation (Mississippi was the sole outlier). HOROVITZ, *supra* note 46, at 7. See also, Zacharias, *Reframing the Constitution*, *supra* note 5, at 334-36 (describing Brandeis's support for the trend of maximum hours legislation in 30 states to protect women).

¹²⁹ See *Erie*, 304 U.S. 64.

¹³⁰ See *Kan. City S. Ry. Co. v. Leslie*, 238 U.S. 599, 602 (1915) (holding that a plaintiff bringing a case in state court in which it arose out of FELA cannot remove the case to any court in the United States). Uniformity would have required the U.S. Supreme Court to hear every aberrant negligence decision – i.e., aberrant from a federal evidentiary standard—from the state courts, where most FELA suits were in fact filed.

Indeed, I submit, Brandeis set out to redirect the Court's attention following *Winfield* away from the problem of uniformity and toward the problem of consistency. The framing of his FELA opinions, along with some other railroad accident cases, was at least part of a long-term strategy to do so.¹³¹ The style of Brandeis' first sentences in FELA opinions was not uniform, but remained, as we have seen, consistent for well over a decade.¹³² But given the differences among those similarly styled cases – in particular, widely different issues of law -- it will help to consider how Brandeis used those differences to refashion the Court's perspective on consistency.

Once he had spoken his mind about the Court's misguided obsession with uniformity in *Winfield*, Brandeis turned his attention to the issues that *Whitacre* and *Nelson* raised.¹³³ He focused on setting parameters to ensure that the state courts applied consistent processes, both in adjudicating Congress' common law modifications of negligence and in providing litigants – railroad workers as well as the railroads – with fair and reasoned hearings.¹³⁴ His concern for consistency helps explain his seeming heartlessness in some FELA cases – e.g., ruling against victims although he might have artfully saved their judgments.¹³⁵ To the extent that the federal statute (FELA) provided the courts with explicit instructions (e.g., the negligence requirement, the line of succession for dependent survivors), he insisted that state courts enforce these.¹³⁶ He apparently believed that the courts should try negligence as a matter of fact, and he was comfortable with giving juries a broad berth in deciding a railroad's liability; but he balked when judges, including federal judges, imposed their own findings as matters of law,

¹³¹ The styling of *Whitacre's* and *Nelson's* first sentences is less refined, but by *Holloway* the ritual consistency seems fixed; I believe that the strategy must have emerged following the two earlier cases, along with *Winfield*. Unfortunately, we do not have the drafts of Brandeis' opinions written before 1920, so it is difficult to provide evidence of Brandeis' strategic intentions with respect to framing and first sentences. We can trace the evolution of his opening paragraphs for the later opinions, however, and we do so in context below. Still, following the *Whitacre* and *Nelson* case openings – see *supra* notes 6 and 42 – the opening sentences assume a constant form, both as to style and content, but they are by no means “uniform.” See *Whitacre*, 242 U.S. at 170; *Nelson*, 246 U.S. at 254; *Holloway*, 246 U.S. at 526.

¹³² See, e.g., *Whitacre*, 242 U.S. 169; *Nelson*, 246 U.S. 253; *Holloway*, 246 U.S. 525.

¹³³ See *Whitacre*, 242 U.S. 169; *Nelson*, 246 U.S. 253.

¹³⁴ *Whitacre*, 242 U.S. at 170-71; see generally *Nelson*, 246 U.S. 253

¹³⁵ See *Nelson*, 246 U.S. at 255.

¹³⁶ See, e.g., *Holloway*, 246 U.S. at 528-29; *Winfield*, 244 U.S. at 168-70 (Brandeis, J., dissenting).

regardless in whose favor the judges had ruled.¹³⁷ Further, where FELA was not explicit, he allowed state courts to apply their own procedures and procedural rules – for instance, in the calculation of damages for wrongful death or in managing attorneys’ fees.¹³⁸ Brandeis also sought to develop consistency through jurisdictional means. Despite the specific requirements of FELA, state procedural variations offered forum shoppers their opportunities. Brandeis reined in the effects of the more extreme state law variations; thus, when he perceived that plaintiffs had filed suit in particular state courts purely for litigation advantages, he imposed tight jurisdictional restraints (e.g., insufficient contacts, burdens on interstate commerce).¹³⁹

In these ways, he did his utmost to render the litigation as consistent as the language of his first sentences. And over the course of two decades of FELA litigation he became increasingly confident that the locus of the common law should be entirely in the states.¹⁴⁰ He adopted his writing strategy following his frustration with the Court in the *Winfield* case and he refined it over time as he heard more FELA cases.¹⁴¹ The fact that he started three FELA opinions in a different style, and that he began four non-FELA opinions – though all involving railroad accidents – in a similar style can be explained to some extent by the content of the cases.¹⁴² With regard to the latter cases, I believe he must have noticed the overlapping problems of other railroad accident cases, like *Erie*; and because this other tort litigation was not bound by some of the restrictions on FELA cases – i.e., FELA’s injunction against removing cases from state court and FELA’s explicit statutory language modifying the common law that prevailed over federal courts – he sought solutions to render that other litigation consistent as well. Hence, we can come to grips with his landmark decision overthrowing *Swift v. Tyson*-style common-law uniformity in favor of high standards, or “consistency,” in the decision-making processes of the state courts.¹⁴³

¹³⁷ See *Winfield*, 244 U.S. at 169 (Brandeis, J., dissenting).

¹³⁸ *Winfield*, 244 U.S. at 168-69 (Brandeis, J., dissenting) (discussing the issue of state diversity in the context, of diversity among the WCLs).

¹³⁹ See, e.g., *Hoffman*, 274 U.S. at 21-23.

¹⁴⁰ See, e.g., *Whitacre*, 242 U.S. 169; *Swinson*, 294 U.S. 529.

¹⁴¹ See, e.g., *Winfield*, 244 U.S. at 154 (Brandeis, J., dissenting); *Hughes*, 278 U.S. 496.

¹⁴² See *Lee*, 252 U.S. at 109; *Hoffman*, 274 U.S. at 21; *McKnett*, 292 U.S. at 230; *Toppin*, 252 U.S. at 309; *Gay*, 292 U.S. at 27; *Erie*, 304 U.S. at 69.

¹⁴³ See *Erie*, 304 U.S. at 79.

VI. MANAGING CONSISTENCY IN STATE COURT FELA LITIGATION

Let's turn finally to the opinions following *Winfield*. First, the *Scarlet*,¹⁴⁴ *Mullins*,¹⁴⁵ and *Hughes*¹⁴⁶ cases followed the path Brandeis paved in *Whitacre*, his very first FELA opinion.¹⁴⁷ In each of these cases the defendant railroads claimed that the plaintiff had failed to demonstrate negligence (Scarlet was seriously injured, the other two killed on the job), and they challenged the trial courts' evidentiary rules and jury instructions.¹⁴⁸ In *Whitacre*'s case, as we saw, Brandeis acquiesced in the state court's requirements for finding negligence, a low standard, apparently, that turned over the question of negligence to a jury.¹⁴⁹ In contrast, in *Scarlet*'s case, after the trial judge had simply rendered a verdict and judgment for the plaintiff, Brandeis, for the Court, reversed the judgment and remanded it for a retrial on the negligence issue.¹⁵⁰ In *Mullins*'s case, like *Scarlet*'s case tried in a Mississippi state court, the record shows that the trial judge applied the "Mississippi Prima Facie Act"¹⁵¹ -- in effect that the burden of proof of negligence was met because *res ipsa loquitur*.¹⁵² When the judge had instructed the jury on negligence, he noted that the defendant "has an absolute duty . . . to furnish the [plaintiff] with

¹⁴⁴ *Scarlet*, 249 U.S. 528.

¹⁴⁵ *Mullins*, 249 U.S. 531.

¹⁴⁶ *Hughes*, 278 U.S. 496. The first draft of this case, handwritten, read as follows: "This action, under the Federal Employers' Liability Act, was brought in a state court of Georgia against the Western & Atlantic Railroad by the administratrix of a traveling fireman. Hughes was killed while on the locomotive ["of a" – deleted] moving in interstate commerce." LDB Court Papers, *supra* note 10, at Pt. 1, Reel 46, p. 0317-0382. Brandeis then inserted the phrase "while in the discharge of his duties" to the second sentence. LDB Papers, *supra* note 10, at Pt. 1, Reel 46, p. 0317-0382 (emphasis added). He next changed the subsequent typewritten draft by hand to read as follows: "Ira L. Hughes, a traveling fireman, was killed on the Western & Atlantic Railroad while engaged in the performance of his duties." This became the published version, though the rest of the first paragraph underwent further changes. LDB Court Papers, *supra* note 10, at Pt. 1, Reel 46, p. 0317-0382.

¹⁴⁷ *Whitacre*, 242 U.S. 169.

¹⁴⁸ See, e.g., *Scarlet*, 249 U.S. at 529-30; *Mullins*, 249 U.S. at 532; *Hughes*, 278 U.S. at 497. Roughly half of Brandeis' FELA opinions involved questions about negligence – either its definition or the evidentiary standard. As Brandeis had pointed out in his review of FELA cases on the 1915 Supreme Court docket, about half had involved the same questions. *Winfield*, 244 U.S. 147, 165-66 (Brandeis, J., dissenting).

¹⁴⁹ *Whitacre*, 242 U.S. at 170-71.

¹⁵⁰ *Scarlet*, 249 U.S. at 529-30.

¹⁵¹ *Mullins*, 249 U.S. at 532-33.

¹⁵² *Id.* at 532.

a safe place to perform the duties incident to his employment.”¹⁵³ Here too Brandeis, for the Court, reversed the judgment and remanded the case for a trial on the question of negligence.¹⁵⁴ Finally, in Hughes’s case the trial court applied Georgia’s “scintilla of evidence rule” in sending the case to successive juries, which twice (the initial verdict was overturned and the case retried with a different judge and jury) returned verdicts for the plaintiff.¹⁵⁵ In this case, Brandeis, for the Court, found that there was sufficient evidence in the record to support the jury’s finding of negligence and damages.¹⁵⁶

Second, Brandeis also gave the states considerable discretion in introducing procedural quirks into the management of their FELA dockets so long as they abided by the explicit terms of the federal statute.¹⁵⁷ In Holloway’s case, the railroad challenged the state trial court’s method in arriving at a death benefit for the widow.¹⁵⁸ Brandeis, for the Court, affirmed the judgment, observing that the “local rule of practice [on damages] . . . is a question of state law, with which we have no concern.”¹⁵⁹ The contrast no doubt had to do with the fact that the statute (FELA) required proof of the carrier’s negligence, but said nothing about methods for arriving at damages.¹⁶⁰ Accordingly, the Court insisted on something like a federal standard for negligence, but was apparently content to let state law govern or fill in the unelaborated details of the Act.¹⁶¹ This distinction helps explain the outcomes in Xedes’¹⁶² and Anderson’s¹⁶³ cases. The Xedes case is peculiar – suffice it to say that the Court

¹⁵³ *Id.* at 533.

¹⁵⁴ *Id.*

¹⁵⁵ *Hughes*, 278 U.S. at 497.

¹⁵⁶ *Id.* at 498. Responding to the opinion Brandeis circulated, Justice Butler wrote, “I voted to reverse, but I acquiesce in the views of the majority as attractively put by you.” LDB Court Papers, *supra* note 18, at Pt. 1, Reel 46, pp. 0317-0382. Similarly, Justice McReynolds wrote: “I thought otherwise but do not care to say anything now.” Justice Sutherland simply responded, “I yield.” LDB Court Papers, *supra* note 18, Pt. 1, Reel 46, pp. 0317-0382.

¹⁵⁷ *Holloway*, 246 U.S. at 526, 529.

¹⁵⁸ *Id.* at 527.

¹⁵⁹ *Id.* at 528.

¹⁶⁰ FELA, *supra* note 12.

¹⁶¹ *Holloway*, 246 U.S. at 528-29.

¹⁶² *Laughlin*, 247 U.S. 204.

¹⁶³ *Wells-Dickey Tr. Co.*, 275 U.S. 161.

honored state procedural rules.¹⁶⁴ Anderson's case is harsh, but as in the two Mississippi cases remanded for retrials, the outcome was again dictated by the terms of the federal statute.¹⁶⁵

Third, Brandeis was comfortable in exposing the defendant railroads to the quirks of state law insofar as they were doing business in the states where they were sued. However, insofar as plaintiffs sought to take advantage of these quirks in states that had little connection with the defendant or the cause of action, Brandeis resisted.¹⁶⁶ The last two cases in this series reflect his take on the problem. Each was a forum shopping case gone bad. In Wells's case,¹⁶⁷ the plaintiff, as Brandeis' opening line indicates, was a citizen of Colorado injured in New Mexico.¹⁶⁸ He filed suit in a

¹⁶⁴ *Laughlin*, 247 U.S. at 206-07. In Xedes's case, the plaintiff's lawyer, Laughlin, filed suit in state court and at that time, in effect placed a lien to secure his fee on any judgment in the case; he also provided notice of the lien to the railroad. *Id.* at 204-06. His client then got a second lawyer who filed suit in federal court and won a settlement. *Id.* at 205. Laughlin sued the railroad for his agreed upon fee (half of the award or settlement). *Id.* Brandeis, for the Court, approved the Kansas lien procedure and found that the railroad had simply "deforced" the lien in paying the settlement to the other attorney and his client. *Id.* at 206.

¹⁶⁵ In Anderson's case, the employee was killed instantly and was survived by his dependent mother and sister. *Wells-Dickey Tr. Co.*, 275 U.S. at 161-62. Before a suit was brought the mother also died, so the trustee sued on behalf of the sister. *Id.* at 162. The railroad challenged the verdict and judgment on the ground that the right of action under FELA had died with the mother. *Id.* Brandeis, for the Court agreed: because Anderson died instantly his heirs were not entitled to damages for his pain and suffering; and because the statutory order for dependent survivors' claims to support had vested the claim in the mother, once she died there was no longer a claim for support. *Id.* at 163-64.

The drafting of the case proceeded as follows. The first handwritten draft read: "Elmer E. Anderson, an employee of the Chicago, Burlington & Quincy Railroad Co. was killed while in interstate commerce." Still in hand, Brandeis immediately changed this to: "Anderson was killed while employed by the Chicago, Burlington & Quincy Railroad Co. in interstate commerce." Brandeis then placed the word "instantly" at the end of the sentence, but thought better of it and moved it (with an arrow/caret) to follow the word "killed." The rest of the first paragraph draws substantial attention and redrafting, and the word "instantly" seems to fall out and be replaced in the first sentence two or three more times (it ultimately plays a large part in the decision, because instant death vitiated the survivors' claims for the victim's pain and suffering). As the drafting process wound down, around draft eight or nine, the order of the words "while employed by the Chicago, Burlington & Quincy Railroad Co. in interstate commerce" becomes "while employed in interstate commerce by the Chicago, Burlington & Quincy Railroad Co.," the final version. Louis Dembitz Brandeis, *COURT THE LOUIS DEMBITZ BRANDEIS PAPERS*, Pt. 1, Reel 34, pp. 0709-0756, University of Louisville, 1980.

¹⁶⁶ *Wells*, 265 U.S. at 103.

¹⁶⁷ *Id.* at 102.

¹⁶⁸ *Id.* The initial handwritten draft begins as follows: "Wells, a citizen and resident of Colorado, was an employee of the Atchison, Topeka & Santa Fe Railway Company, an interstate carrier. For injuries received while so employed in New Mexico, he sued the company in a state court of Texas . . ." LDB Court Papers, *supra* note 18, at Pt. 1, Reel 16,

Texas state court, but because the defendant railroad had no presence in Texas.¹⁶⁹ Thereafter, Wells sued on a writ of garnishment against another railroad that owed the actual defendant money and controlled some of its rolling stock.¹⁷⁰ The defendant did not appear, and the state court entered a default judgment against it.¹⁷¹ The case then took several turns before arriving at the Court, but in the end Brandeis threw out the default judgment on the ground that forcing the defendant to stand trial in Texas would have burdened interstate commerce.¹⁷²

The other case, Doyle's case,¹⁷³ involved even more overt forum shopping motives.¹⁷⁴ Doyle had been a resident of Michigan when he was killed working there for a Michigan corporation whose

pp. 0789-0836. This introduction next changed in two stages to: "Wells, a citizen and resident of Colorado, was an employee of the Atchison, Topeka & Santa Fe Railway Company, an interstate carrier. While performing his duties in New Mexico, he was injured. He sued the company in a state court of Texas." Then following another typed version of the above, Brandeis inserted changes so that it read: "Wells, a citizen and resident of Colorado, employed by the Atchison, Topeka & Santa Fe Railway Company. [sic] He was injured while performing his duties in New Mexico." In the final version, Brandeis collapsed these two sentences, so that they read: "Wells, a citizen and resident of Colorado, employed by the Atchison, Topeka & Santa Fe Railway Company, was injured while performing his duties in New Mexico." Louis Dembitz Brandeis, *THE LOUIS DEMBITZ BRANDEIS COURT PAPERS*, Pt. 1, Reel 16, pp. 0789-0836., University of Louisville, 1980.

¹⁶⁹ *Wells*, 265 U.S. at 102.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.* at 103. The garnishee objected to the writ, but was overruled; so, the defendant appeared in a Texas federal District Court, suing to enjoin enforcement of the garnishment and the district court dismissed the suit and the Fifth Circuit Court of Appeals affirmed. *Id.* at 102. Brandeis, for the Court, reversed the judgment because making the defendant stand trial in Texas would have been a burden on interstate commerce and that the Texas state court had incorrectly overruled the garnishee's objection in the first place. *Wells*, 265 U.S. at 103.

¹⁷³ *Mix*, 278 U.S. 492. Brandeis' first draft began as follows: "Thomas Doyle, a citizen and resident of Michigan employed there as switchman by the Michigan Central Railroad, was injured in the performance of his duties at Lansing Michigan." LDB Court Papers, *supra* note 18, at Pt. 1, Reel 41, pp. 0466-0532. This next became: "Thomas Doyle, a switchman employed by the Michigan Central Railroad, was killed in Michigan in the performance of his duties," which remained in the published opinion. LDB Court Papers, *supra* note 18, at Pt. 1, Reel 41, pp. 0466-0532. Brandeis' clerk raised the question why a court could not assert jurisdiction if a state statute could authorize jurisdiction constitutionally; Brandeis and the clerk debated the question in a series of handwritten memos, and Brandeis finally concluded as he began, that a court could not assert jurisdiction under the circumstances.

¹⁷⁴ *Mix*, 278 U.S. at 494-95 (discussing in *Wells*' case that the victim had ultimately resettled in Texas because he wanted to live there, and not apparently because it was advantageous to sue there).

business was largely confined to that state.¹⁷⁵ Following Doyle's death, his surviving spouse relocated to Missouri, where she filed suit under FELA and the Safety Appliance Act in a Missouri state court.¹⁷⁶ The defendant objected on the grounds that Missouri did not have jurisdiction and, alternatively, that having to defend their placed a burden on interstate commerce.¹⁷⁷ Following some procedural wrangling in the Missouri state and federal courts, the case reached the Court.¹⁷⁸ There, Brandeis, for the Court, wrote as follows:¹⁷⁹

For aught that appears [the widow's] removal to St. Louis shortly after the accident was solely for the purpose of bringing the suit, and because she was advised that her chances of recovery would be better there than they would be in Michigan. The mere fact that she had acquired a residence within Missouri before commencing the action does not make reasonable the imposition . . . of the heavy burden which would be entailed in trying the cause in a state remote from that in which the accident occurred and in which both parties resided at the time.¹⁸⁰

Accordingly, the Court reversed the Missouri court's judgment, in effect dismissing the suit.¹⁸¹

To summarize these eight cases, Brandeis reinforced the "uniformity" of the federal law only insofar as Congress had explicitly laid down the rules for common law regulation – namely, the negligence requirement and the line of succession in vesting dependents' survivor claims.¹⁸² Further, he allowed for a degree of variation in state procedure, including evidentiary rules, but he resisted plaintiffs' attempts to seek trials in states that were unrelated to the case itself – that is, cases that reeked of patent forum shopping and, one might expect, more extreme departures from the ordinary state rules of evidence and procedure governing negligence trials.

¹⁷⁵ *Mix*, 278 U.S. at 493.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 494-95.

¹⁷⁸ *Id.* at 494.

¹⁷⁹ *Id.* at 495.

¹⁸⁰ *Mix*, 278 U.S. at 495.

¹⁸¹ *Id.* at 496; *see also* John Hancock Mut. Life Ins. Co. v. Yates, 299 U.S. 178 (1936) (Brandeis reversing an even more egregious forum shopping case).

¹⁸² *Winfield*, 244 U.S. at 162, 169 (Brandeis, J., dissenting).

Apart from the two earliest cases, *Whitacre's* and *Nelson's*, in which Brandeis deviated somewhat from his introductory script,¹⁸³ there was one other FELA opinion that begins with the victim's name:

Swinson, a freight brakeman in the employ of the Chicago, St. Paul, Minneapolis & Omaha Railway, brought this action under the Federal Employers' Liability Act, in the federal District Court for Minnesota.¹⁸⁴

Although Brandeis did elaborate on the accident and injury in his following sentences, his opening above differs from the others because it does not call attention to the victim's injury in the very first sentence.¹⁸⁵ More importantly, perhaps, it differs from the other opening sentences in that it identifies where the victim filed suit – to wit, in federal court.¹⁸⁶ As in so many other FELA cases, the defendant here claimed that the plaintiff had failed to prove negligence and, further, that the plaintiff's own misuse of the equipment had given rise to the accident.¹⁸⁷ The District Court directed a verdict for the defendant, and the Circuit Court of Appeals affirmed.¹⁸⁸ Brandeis reversed, on the ground that the equipment had failed, which would have been a violation of the Safety Appliance Act; and under FELA, such violations are evidence of negligence.¹⁸⁹ In Brandeis' words, “[t]he Safety Appliance Act . . .

¹⁸³ *Whitacre*, 242 U.S. at 170; *Nelson*, 246 U.S. at 254. *Swinson*, 294 U.S. at 530.

¹⁸⁴ *Id.* (citation omitted).

¹⁸⁵ The first handwritten draft is somewhat illegible, but the second and third drafts reflect the following changes: “Swinson, a freight brakeman in the employ of the Chicago, St. Paul, Minneapolis & Omaha Railway, brought in the federal court for Minnesota this action under the Federal Employers' Liability Act,” changed to “Swinson, a freight brakeman in the employ of the Chicago, St. Paul, Minneapolis & Omaha Railway, brought this action under the Federal Employers [sic] Liability Act in the federal court for Minnesota.” Draft 6 amends “Employers” in the title of the Act to “Employers”; draft seven inserts the word “the federal district court for Minnesota”; and draft eight amends the phrase to “a federal district court in Minnesota.” Draft 9, finally, changes the phrase again, to “in the federal district court for Minnesota.” When the justices responded to the circulated opinion, Butler thought, “this goes too far, p. 2, but others being content, I shall not object.” McReynolds also offered, “I shant object.” In contrast, Stone found it a “beautiful salient opinion.” Louis Dembitz Brandeis, *THE LOUIS DEMBITZ BRANDEIS COURT PAPERS*, Pt. 2, Reel 15, pp. 0646-0693, University of Louisville, 1980.

¹⁸⁶ *Swinson*, 294 U.S. at 530.

¹⁸⁷ *Id.*, at 530-31.

¹⁸⁸ *Id.* at 531.

¹⁸⁹ *Id.* at 531-32.

has been liberally construed so as to give a right of recovery for every injury the proximate cause of which was a failure to comply with a requirement of the act.”¹⁹⁰ Ironically, in order to achieve a degree of consistency with the state court procedures that he channeled (i.e., jury trials on the question of negligence), here he was conforming the federal court’s process and evidentiary standard to those of the state courts.

My point here is that the Federal District Court and the Circuit Court on appeal had taken a much more restrictive view of plaintiff’s rights under FELA than the state courts took in most of the other cases described so far. In that regard, there is nothing uniform about the rules applied in such litigation against the railroads. So, it is hardly surprising, that in the interest of greater consistency, Brandeis was thinking about how to conform the ways federal courts ruled in a given case to the way state courts might rule in the same case.¹⁹¹

VII. BRIDGING THE GAP: FROM FELA TO ERIE

To continue, what can we learn from Brandeis’ three other FELA opinions with different introductory styles, and also from his three non-FELA opinions, all involving railroad accidents, that begin with the name of the victim? Were FELA opinions which do not begin with the victim’s name simply aberrations, stylistically, or did Brandeis deliberately, so to speak, leave them out of the series?

The first of these cases is somewhat revealing; it begins as follows:

An injured employee brought an action in a state court of Georgia jointly against a railroad and its engineer
¹⁹²

The problem was that the plaintiff was suing the railroad under FELA and the engineer under Georgia tort law.¹⁹³ The two defendants filed demurrers for misjoinder, but the trial court overruled.¹⁹⁴ On appeal, the Georgia Supreme Court held that the

¹⁹⁰ *Id.* at 531.

¹⁹¹ *Id.*

¹⁹² *Lee*, 252 U.S. 109.

¹⁹³ *Id.* at 109.

¹⁹⁴ *Id.* at 109-10.

joinder was not permissible, so the plaintiff appealed to the U.S. Supreme Court, citing his right to sue under FELA.¹⁹⁵ Brandeis, for the Court, held that Georgia state law governed procedure and that the joining of suits, or not, was a matter of pleading and procedure. Accordingly, he affirmed the state court's ruling.¹⁹⁶

On its face, this case seems to fit the profile of the other cases in the series: Brandeis, writing for the Court, deferred to state law on a procedural matter, and in that way undercut the notion that FELA has established uniformity.¹⁹⁷ At the same time, the case is peculiar. When it reached the Supreme Court, there had not yet been a verdict; and apart from the procedural question, no issues of accident law had been addressed.¹⁹⁸ Perhaps most significant, as we shall see with the following two cases, the interlocutory nature of this appeal had not yet produced a reliable statement of facts; given Brandeis' meticulous attention to the facts underlying his cases, the absence of facts about the accident might have kept him from introducing this case as he had the others.¹⁹⁹ Instead, the principal facts that Brandeis had before him were the procedural facts of the case.

The last two cases seem to follow this conclusion – that the underlying facts of the case did not reach disposition before the appeal arrived at the Supreme Court's door.²⁰⁰ At the same time, these two cases fit more closely with some of the other cases in the series and their rulings. They begin as follows:

This is a writ of error to the Supreme Court of Missouri, which had granted, in an original proceeding, a peremptory writ of mandamus. Its

¹⁹⁵ *Id.* at 110.

¹⁹⁶ *Id.* at 110-11 (elaborating on the conditions for the Court's review of state procedural rulings: to wit, only when matters nominally of procedure are actually matters of substance that affect a federal right. He concluded by observing that the ruling here, as a procedural matter, was appropriate, insofar as the railroad's obligations to the plaintiff under FELA differ from the engineer's obligations under state tort law, and a single jury would have been hard-pressed to separate them out in a joint trial).

¹⁹⁷ *Lee*, 252 U.S. at 110.

¹⁹⁸ *Id.* at 109-10.

¹⁹⁹ *Id.* at 109. The drafts of the opinion are at Brandeis Court Papers, Pt. 1, Reel 2, pp 0053-0062. In his first handwritten draft, Brandeis began: "An injured employee brought suit in a state court of Georgia jointly against a railroad and an [associate?] employee," etc. He then amended this draft, substituting "an action" for the word "suit" and also substituting "its engineer" for the words "[associate] employee." This was the opening sentence of the published opinion.

²⁰⁰ *Hoffman*, 274 U.S. at 21; *McKnett*, 292 U.S. at 230.

judgment directed the judge of an inferior court to set aside a judgment dismissing an action and ordered him to entertain jurisdiction. That action had been brought under the [F]ederal Employers' Liability Act by a citizen and resident of Kansas²⁰¹

This action was brought under the Federal Employers' Liability Act, in the circuit court of Jefferson [C]ounty, Ala[bama], to recover damages for an injury suffered in Tennessee. The plaintiff, McKnett, is a resident of Tennessee. The defendant, St. Louis & San Francisco Railway Company, is a foreign corporation doing business in Alabama. It pleaded in abatement that the court lacked jurisdiction, since the cause of action had arisen wholly in Tennessee and did not arise by the common law or statute of that state.²⁰²

The *Foraker* case (first one, above) came before the Court on an interlocutory review.²⁰³ As in the Georgia case (*Lee*), there was no verdict and the questions before the Court were procedural.²⁰⁴ Nevertheless, this case falls into the forum shopping category and mirrors one of the other cases in the series, namely Doyle's case.²⁰⁵ The *McKnett* case (second one, above), though not technically an interlocutory appeal, had also not reached a verdict.²⁰⁶ Indeed, the Alabama court had refused to hear the case on the grounds that a cause of action under FELA was not one that had arisen in Alabama or "by the common law or statute of another state," as the Alabama jurisdictional statute commanded.

What is interesting about both cases is that Brandeis sets some parameters for state court jurisdiction in FELA cases. In the first case he defends the state's jurisdiction – that a trial there would not impose a burden on interstate commerce;²⁰⁷ in the second case he

²⁰¹ *Hoffman*, 274 U.S. at 21-22 (citations omitted).

²⁰² *McKnett*, 292 U.S. at 230-31.

²⁰³ *Hoffman*, 274 U.S. at 21.

²⁰⁴ *Lee*, 252 U.S. at 109-10. The draft opinions for the *Foraker* case are at Brandeis Court Papers, Pt. 2, Reel 29, pp. 0186-0222. There is no initial handwritten draft, and the printed drafts begin as the published opinion does, with the words: "This is a writ of error to the Supreme Court of Missouri," etc.

²⁰⁵ *Mix*, 278 U.S. at 494.

²⁰⁶ *McKnett*, 292 U.S. at 231.

²⁰⁷ *Hoffman*, 274 U.S. at 22-23.

insists on the state's jurisdiction – that Alabama courts cannot refuse access to litigants who, but for the fact that the cause of action is based on a federal statute, would otherwise be free to litigate in that state's courts.²⁰⁸ That he chose to treat these two cases differently in style probably has to do with their interlocutory nature: that is to say, their underlying facts were still awaiting disposition, and thereby he felt compelled to begin with the procedural facts rather than assume facts about the injury and related matters based on the pleadings.²⁰⁹

The remaining two opinions worth considering were non-FELA tort cases involving railroad accidents in which Brandeis began with the victim's name.²¹⁰ In both of these cases, as in *Erie*, the victim was a third-party bystander – that is, neither an employee of the railroad, nor a passenger.²¹¹ The first of these opinions, like Brandeis' opening in the *Bd. of Trade of Chicago* case, is memorable for the image it evokes:

Toppin was struck by a locomotive of the Panama Railroad Company while riding a horse in the City of Colon.²¹²

At the same time, the case does fit squarely with what we have said about the other cases in the series. The suit for negligence was filed in the federal court of the territory, the Panama Canal Zone, but the court applied the civil code of Colombia, which was the received law of the Republic of Panama at the time because the injury occurred in Colon, the capital of the Republic.²¹³ The rule of *respondeat superior* was at issue: did the engineer's criminal behavior exculpate the railroad?²¹⁴ The civil code held not.²¹⁵ The defendant railroad objected to the choice of law, but on appeal Brandeis affirmed the judgment for the plaintiff.²¹⁶

²⁰⁸ *McKnett*, 292 U.S. at 233-34 (showing Brandeis' insistence on the state court's accepting jurisdiction is premised in part on the "privileges and immunities clause" and in part on the "full faith & credit clause.").

²⁰⁹ *Hoffman*, 274 U.S. at 21-22; *McKnett*, 292 U.S. at 230-31.

²¹⁰ *Toppin*, 252 U.S. at 309; *Gay*, 292 U.S. at 27.

²¹¹ *Toppin*, 252 U.S. at 309; *Gay*, 292 U.S. at 27.

²¹² *Toppin*, 252 U.S. at 309.

²¹³ *Id.* at 309-10.

²¹⁴ *Id.* at 309.

²¹⁵ *Id.* at 310-11.

²¹⁶ *Id.* at 309, 313.

The other case, Ruff's case,²¹⁷ falls between the FELA cases in the "first-name series" and the three FELA cases that Brandeis began with procedural facts.²¹⁸ To be sure, Ruff's case involves the competence of state courts where matters of federal law are at stake:

Ruff brought in a state court of Georgia this suit against Gay, as receiver of the Savannah & Atlanta Railway, appointed by the federal court for southern Georgia sitting in equity. The cause of action alleged is the homicide of plaintiff's minor son as the result of the negligent operation of a train by employees of the receiver.²¹⁹

In many ways, this was just another way station on the road to *Erie*. In Ruff's case, the federally appointed receiver of the bankrupt railroad being sued tried to remove the proceedings from the Georgia state court to a federal district court.²²⁰ He claimed that as a "federal officer" he was entitled to have his case tried in federal court pursuant to the federal Judicial Code.²²¹ Brandeis, for his part, runs out the history of the applicable provisions of the code and concludes that they were not intended for occasions of this kind, but rather occasions on which federal bill collectors and the like were apt to be disfavored in state courts.²²² This case, Brandeis goes on, falls more in line with Congress' intentions in the FELA:²²³

Congress had by the Federal Employers' Liability Act provided that suits for injuries resulting from negligence in the operation of a railroad, although arising under a federal statute, could be brought in a state court, and if so brought could not be removed to the federal court.²²⁴

So, this case too was a blow for consistency – the consistency of maximizing state courts' jurisdiction and the application of state law rather than pursuing the white whale of "uniformity" by enabling

²¹⁷ *Gay*, 292 U.S. at 27.

²¹⁸ *Id.* at 27-28.

²¹⁹ *Id.* at 27.

²²⁰ *Id.*

²²¹ *Id.*

²²² *Gay*, 292 U.S. at 31-33.

²²³ *Id.* at 36.

²²⁴ *Id.*

federal courts to conform state matters to unwritten rules of federal common law.

VIII. CONCLUSION

The aim of this essay was not to revisit *Erie*, but rather to show how Brandeis' underlying concerns in *Erie* evolved over 20 years, particularly in the realm of deciding FELA cases along with other railroad accident cases and employee compensation claims for industrial accidents. Brandeis' characteristic style in introducing so many of these opinions – their framing – seems to indicate that Brandeis had the intertwined problems of uniformity and consistency in mind long before he arrived at *Erie*. Indeed, it seems as if a trio of early opinions, including his dissent in the *Winfield* case, led him to understand what he was trying to resolve as he grappled with state and federal court jurisdiction and their respective rules of decision. FELA provided him with a useful laboratory because most of the cases came from state courts and were protected, by the terms of the federal statute, from federal interventions that plagued so many other progressive laws (viz., federal court injunctions disrupting administrative proceedings and decisions). As he observed this rich subject matter over the years, Brandeis gained confidence that the administration of law by state courts, and not some unifying federal common law, could best serve the nation. It was this confidence that he used to win over a majority in *Erie* and that reflects itself in his opinion for the Court.