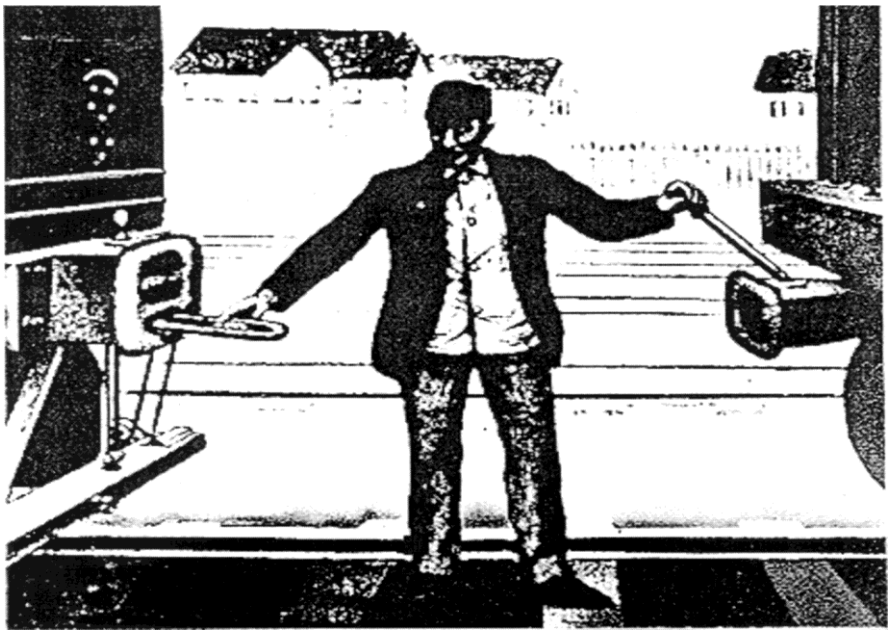


C. WORKPLACE SAFETY AND THE RAILROADS

We now return to the problem of workplace safety, a context in which legislative efforts at resolution became common in the face of enduring judicial enthusiasm for the common law's rules of worker responsibility reflected in the *Farwell* case you may already have read, p. 88—even in the face of remarkable levels of injuries that workers could not hope to control. Your editor's hope is that these materials will be instructive for you in at least two dimensions:

First, after some initial scene-setting, they will provide a concentrated introductory unit on statutory problems—both a first opportunity to encounter Congress at work in creating a statutory regime, and an extended chance to consider, at a beginning level, the problems of statutory interpretation. If your instructor chooses to use them fully, here's what may happen:

- **Hour 1:** Some background is set, that in addition to framing the state of the common law will reveal the state of Swift v. Tyson at century's end and provide an exercise about holding and dictum. You will then consider three problems arising under a relatively simple statute, the Federal Railroad Safety Appliances Act of 1893. Lawyers often encounter problems of statutory interpretation, and help their clients make decisions of large financial consequence, long before a court ever sees the problems they must resolve. Indeed, if they are successful, a court never will see these problems. This is what you are asked to do here—for the moment, not trying to say what the statute does mean, but what it could mean—what problems of interpretation the statute's text opens up that you would have to resolve in advising your client.

- **Hour 2:** You may be asked to read a fairly extensive set of legislative materials revealing some of the things that happened in Congress as this Act was debated—presidential messages, reports, debates. This should serve as a concrete introduction to the legislative process and the materials of legislative history. Likely you will leave them with some confidence about how the members of Congress (and interested bystanders like the railroads) probably understood some of the issues you will have identified; and little confidence about how they probably understood (or whether they even imagined) others. Now you may be asked to venture resolutions of the three interpretive problems—with or without reliance on these legislative materials.
- **Hour 3:** The Act was not immediately effective. The railroads were given several years, with an opportunity for extension that they availed themselves of, to make the necessary investments in new equipment. The interim period elapsed under the supervision/observation of a new federal agency, the Interstate Commerce Commission. You may be asked to read a series of excerpts from its reports during the intervening years (reports that would certainly have been available to, and interesting reading for, railroad executives and their attorneys during this period). The other element of this hour's reading is a first opinion, in the United States Court of Appeals for the Eighth Circuit, interpreting the provisions you will have been considering.

  Postponing your encounter with the court's opinion is an important (and unusual) element of these materials. You might, of course, be tempted to peek ahead—there are people who cannot resist flipping to the end of a mystery novel to learn whodunnit. Perhaps understanding the pedagogic aims of approaching the materials this way will help you resist that temptation: Most often—much too often in your editor's judgment—you will encounter a statute in your law school classes only through the eyes of judges asked to resolve a particular problem. This is unrepresentative of lawyers' work in at least two respects. First, lawyers usually encounter statutes, and have to advise clients about high-consequence decisions under them, long before courts see them. Second, the cases judges encounter (as in the case you will eventually read) often are not only long delayed past the time when action under the statute was called for, but also involve facts unrepresentative of the general problem with which the statute was enacted to deal. One could believe that, in such circumstances, judges will be handicapped in understanding the statutory scheme before them.
- **Hours four and five:** You will read two Supreme Court decisions—in one, the Court reviews the Eighth Circuit judgment in the case you will just have read; in the other it confronts a problem that reveals some difficulties in the relationship between this federal statute and the state common law action for railroad negligence that it purports to regulate.

> You may also read some materials introducing the worker compensation statutes that now emerged as an alternative to tort recovery for workplace injuries and, finally, pages briefly exploring the end-of-century developments under the civil law. These sessions should provide an opportunity to develop important issues about the task of interpretation generally, and to appreciate both the contingency of law's development, and the influences attending important shifts in its paradigms.

The second and rather different contribution of these materials is that they start us into consideration of a strikingly different way of thinking about the problem of responsibility for harm than the individualistic, fault-focused analyses that have characterized the Nineteenth Century materials we have read to date. As in the Safety Appliance Act and Workmen's Compensation Acts we will later meet, legislatures begin to see the issue of workplace injury as one for scientific management. Doing so inevitably suggests that responsibility is better placed on someone other than the injured individual workman. That is, it points to someone in a position both to manage the level of risk workers encounter and to pass on the costs of managing it (or responding to the costs resulting from management failures) to the consuming public. If a predictable number of people are likely to be killed during the course of a certain type of project (building a dam, say), this begins to seem both a "cost" of that project that is better attributed to the project than to the families of the particular workmen who happen to be its victims, and a statistic that could possibly be reduced if the project's manager could be led to take ameliorative steps under the right incentives. Much of the remainder of this course will be concerned with this and related shifts in the way lawyers and courts came to think about the problems of workplace injury—and product liability as well. It would be surprising if similar (though at the moment unpredictable) shifts did not occur during your own professional life. Paying attention to this shift may help you to recognize the later ones you will encounter, as they occur.

You can find a remarkable history of this particular shift in the pages of John Fabian Witt, THE ACCIDENTAL REPUBLIC-CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW (2004); you may encounter extracts from its pages (or from the pages of law review articles representing chapters of the book) as we progress.

As remarked, the pages that follow are not typical law school teaching materials. You may not often encounter statutory materials independent of cases in your classes, or indeed be asked to deal with them in bulk—to immerse yourself in a statute's formation. Again, however, for *practitioners,* these are very common experiences. They are perhaps especially common for practitioners who are counselors more than litigators. It seems like an important step, at the outset of your legal career, to provide you with that experience, and to introduce you to the somewhat irrational legislative process as well as the "reasoned" judicial one. Toward the end of this course, we will have one more chance for such an exercise—this time, with the contemporary Congress and contemporary courts.

Setting the Stage

In 1893, the year in which Congress enacted the statute with which you will shortly be concerned, the Supreme Court decided a case which suggested problems and growing doubts about *Swift v. Tyson.* Editing it for presentation here has greatly compressed its discussion of existing caselaw; even so, it should both strikingly illustrate the relationships among holding, dictum and material fact, and reveal the contemporary common law doctrine on the liability of employers for workplace injury.

Baltimore & O. R. Co. v. Baugh

Supreme Court of the United States.
149 U.S. 368 (1893).

[By 1893, railroads reached every corner of the United States, but their operation was much more dependent on human interventions than today. Railroad cars lacked automatic couplers or power brakes, so cars had to be connected manually, and braking a train required several brakemen who would go from car to car while the train was in motion, setting manual brakes. Automatic signals did not exist. Safety for trains, often running in opposite directions on single tracks having occasional sidings to permit trains to pass, depended on schedules enforced by dispatchers' telegraph notices. In this world, the train conductor was a powerful figure having managerial control over all the crew, who commanded a train's movements, directing when it would start, where it would stop at a station or siding, and how fast it would travel. In 1884, these facts had led the Supreme Court to affirm a jury finding for a locomotive engineer who had been injured through the negligence of his train's conductor, despite the generally applicable "fellow servant" doctrine of *Farwell.* In contrast to *Albro,* the jury in the case had been charged "that if the company sees fit to place one of its employees under the control and direction of another, that then the two are not fellow-servants engaged in the same common employment." A closely divided Court, in an opinion written by Justice Field, agreed as a matter of general common law. "[A] conductor of a railroad train, who has a right to command the movements of a train and control the persons employed upon it, represents the company while performing those duties, and does not bear the relation of fellow-servant to the engineer and other employees on the train." Chicago, Milwaukee & Saint Paul Railroad Co. v. Ross, 112 U.S. 377 (1884).

John Baugh was the fireman on a B&O locomotive being used in Ohio to help another train over a grade; at the top of the grade it was disconnected and it headed back for the freight yards from which it had come, with only its engineer and Baugh on board. Under company policy, there were two ways in which such a helper engine could return to its starting point—either on the special orders of the responsible train dispatcher or by following some regular scheduled train that could carry signals to notify trains coming in the opposite direction that Baugh's helper engine was following it, a method called "flagging back." The engineer, however, started back *without* special orders, and *not* following any scheduled train. When it then collided with a regular local train, Baugh lost his right arm and the use of his right leg. He had worked for the B&O for about a year, had been a fireman for about six

months, and had worked on the helper, two trips a day, for about two months. He knew that the helper had to keep out of the way of the trains, and was familiar with the method of flagging back. He brought suit in Ohio state court, where a rule like the *Ross* rule would have been applied, on the theory that the engineer was, for these purposes, the "conductor"— representing the company as manager and thus not a fellow servant. The B&O removed the case to a federal circuit court in Ohio, and Baugh's attorney persuaded the judge to give the jury this charge, to which the railroad objected: "If the injury results from negligence or carelessness on the part of one so placed in authority over the employee of the company, who is injured, as to direct and control that employee, then the company is liable." The jury returned a verdict for $6750, and the B&O then brought the case to the Supreme Court.]

MR. JUSTICE BREWER: The single question presented for our determination is, whether the engineer and fireman of this locomotive, running alone and without any train attached, were fellow-servants of the company, so as to preclude the latter from recovering from the company for injuries caused by the negligence of the former. This is not a question of local law, to be settled by an examination merely of the decisions of the Supreme Court of Ohio . . . but rather one of general law, to be determined by a reference to all the authorities, and a consideration of the principles underlying the relations of master and servant.

The question as to what is a matter of local, and what of general law, and the extent to which in the latter this court should follow the decisions of the state courts, has been often presented. . . . In all the various cases which have hitherto come before us for decision, this court has uniformly supposed that the true interpretation of the thirty-fourth section [of the Judiciary Act of 1789] limited its application to state laws strictly local, that is to say, to the positive statutes of the State, and . . . to rights and titles to things having a permanent locality . . . [citing Swift v. Tyson]. . . . Congress has never amended that section; so it must be taken as clear that the construction thus placed is the true construction, and acceptable to the legislative as well as to the judicial branch of the government. . . . Whatever differences of opinion may have been expressed, have not been on the question whether a matter of general law should be settled by the independent judgment of this court, but upon . . . whether a given matter is one of local or of general law. [I]t is not open to doubt that the responsibility of a railroad company to its employees is a matter of general law. . . . In Hough v. Railway Company, 100 U.S. 213, 226 . . . Mr. Justice Harlan thus expressed the views of the entire court: ". . . [T]he questions before us, in the absence of statutory regulations by the State in which the cause of action arose, depend upon principles of general law, and in their determination we are not required to follow the decisions of the state courts." [Seven railroad injury cases are invoked in support of this proposition, concluding with *Ross.* In three, including *Ross,*] . . . the question of the liability of the company was discussed as one of general law, and no reference made to the decisions of the State in which the injuries took place. And, in [*Ross*], the instruction given by the circuit judge . . . was in direct opposition to the rulings of the Supreme Court of Minnesota [citing several Minnesota cases]. . . .

But passing beyond the matter of authorities, the question is essentially one of general law. It does not depend upon any statute; it does not spring from any local usage or custom; there is in it no rule of property, but it rests upon those considerations of right and justice which have been gathered into the great body of the rules and principles known as the "common law." . . . Further than that, it is a question in which the nation as a whole is interested. It enters into the commerce of the country. Commerce between the States is a matter of national regulation, and . . . the main channels through which this interstate commerce passes are the railroads of the country. Congress has legislated in respect to this commerce . . . by an act passed at the last session, requiring the use of automatic couplers on freight cars. Public Acts, 52d Cong. 2d Sess., c. 113. The lines of this very plaintiff in error extend into half a dozen or more States, and its trains are largely employed in interstate commerce. As it passes from State to State, must the rights, obligations and duties subsisting between it and its employees change at every state line?. . . Whatever may be accomplished by statute—and of that we have now nothing to say—it is obvious that the relations between the company and employee are not in any sense of the term local in character, but are of a general nature, and to be determined by the general rules of the common law. . . .

Counsel for [Baugh] rely principally upon the case of Railroad Co. v. Ross, 112 U.S. 377, taken in connection with this portion of rule No. 10 of the company: "Whenever a train or engine is run without a conductor, the engineman thereof will also be regarded as conductor, and will act accordingly." . . . What was the Ross case, and what was decided therein? The instruction given on the trial in the Circuit Court . . . was in these words: "It is very clear, I think, that if the company sees fit to place one of its employees under the control and direction of another, that then the two are not fellow-servants engaged in the same common employment, within the meaning of the rule of law of which I am speaking." The language of that instruction, it will be perceived, is very like that of the one here complained of, and if this court had approved that instruction as a general rule of law, it might well be said that that was sufficient authority for sustaining this and affirming the judgment. But though the question was fairly before the court, it did not attempt to approve the instruction generally, but simply held that it was not erroneous as applied to the facts of that case. . . . "We agree with them in holding—and the present case requires no further decision—that the conductor of a railway train, who commands its movements, directs when it shall start, at what stations it shall stop, at what speed it shall run, and has the general management of it, and control over the persons employed upon it, represents the company, and, therefore, that, for injuries resulting from his negligent acts, the company is responsible. If such a conductor does not represent the company, then the train is operated without any representative of its owner." . . . And it quotes from Wharton's Law of Negligence, sec. 232a:" "The true view is, that, as corporations can act only through superintending officers, the negligences of those officers, with respect to other servants, are the negligences of the corporation." . . .

The court, therefore, did not hold that it was universally true that, when one servant has control over another, they cease to be fellow-servants within the rule of the master's exemption from liability, but

did hold that an instruction couched in such general language was not erroneous when applied to the case of a conductor . . . "clothed with the control and management of a distinct department" . . . Indeed, where the master is a corporation, there can be no negligence on the part of the master except it also be that of some agent or servant, for a corporation only acts through agents. The directors are the managing agents; their negligence must be adjudged the negligence of the corporation, although they are simply agents. So when they place the entire management of the corporation in the hands of a general superintendent, such general superintendent, though himself only an agent, is almost universally recognized as the representative of the corporation, the master, and his negligence as that of the master. And it is only carrying the same principle a little further . . . when it is held that, if the business of the master and employer becomes so vast and diversified that it naturally separates itself into departments of service, the individuals placed by him in charge of those separate branches and departments of service, and given entire and absolute control therein, are properly to be considered, with respect to employees under them, vice-principals. . . . It was this proposition which the court applied in the Ross case . . .

The truth is, the various employees of one of these large corporations are not graded like steps in a staircase, those on each step being as to those on the step below in the relation of masters and not of fellow-servants, and only those on the same steps fellow-servants, because not subject to any control by one over the other. . . . All enter into the service of the same master, to further his interests in the one enterprise; each knows when entering into that service that there is some risk of injury through the negligence of other employees, and that risk, which he knows exists, he assumes in entering into the employment. Thus, in the opinion in the Ross case, it was said: "Having been engaged for the performance of specified services, he takes upon himself the ordinary risks incident thereto. As a consequence, if he suffers by exposure to them he cannot recover compensation from his employer. The obvious reason for this exemption is, that he has, or, in law, is supposed to have, them in contemplation when he engages in the service, and that his compensation is arranged accordingly. He cannot, in reason, complain if he suffers from a risk which he has voluntarily assumed, and for the assumption of which he is paid." . . .

But the danger from the negligence of one specially in charge of the particular work is as obvious and as great as from that of those who are simply coworkers with him in it. Each is equally with the other an ordinary risk of the employment. If he is paid for the one, he is paid for the other; . . . there must be some personal wrong on the part of the master, some breach of positive duty on his part. . . . Obviously, a breach of positive duty is personal neglect; and the question in any given case is, therefore, what is the positive duty of the master? He certainly owes the duty of taking fair and reasonable precautions to surround his employee with fit and careful coworkers, and the employee has a right to rely upon his discharge of this duty. . . . Again, a master employing a servant impliedly engages with him that the place in which he is to work and the tools or machinery with which he is to work, or by which he is to be surrounded, shall be reasonably safe. It is the master who is to provide the place and the tools and the machinery, and when

he employs one to enter into his service he impliedly says to him that there is no other danger in the place, the tools and the machinery, than such as is obvious and necessary. . . . Therefore it will be seen that the question turns rather on the character of the act than on the relations of the employees to each other. . . .

Where, as in this case, the sole act of negligence relied on is participated in, and voluntarily consented to by the person injured, with full knowledge of the peril, the question of the master's liability does not arise. . . . Baugh equally with the engineer knew the peril, and with this knowledge voluntarily rode with the engineer on the engine. He assumed the risk.

For these reasons we think that the judgment of the Circuit Court was erroneous, and it must be. Reversed and the case remanded for a new trial.

MR. JUSTICE FIELD, dissenting: I am unable to concur in the judgment of reversal in this case. I think the judgment of the Circuit Court is correct in principle and in accordance with the settled law of Ohio, where the cause of action arose, which, in my opinion, should control the decision. . . . [T]his court reverses the judgment . . . and holds it to have been error that it was not rendered according to some other law than that of Ohio, which it terms the general law of the country. . . . Had the case remained in the state court, where the action was commenced, the plaintiff would have had the benefit of the law of Ohio. The defendant asked to have the action removed, and obtained the removal to a Federal court because it is a corporation of Maryland, and thereby a citizen of that State by a fiction adopted by this court that members of a corporation are presumed to be citizens of the State where the corporation was created, a presumption which, in many cases, is contrary to the fact, but against which no averment or evidence is held admissible for the purpose of defeating the jurisdiction of a Federal court. . . . Many will doubt the wisdom of a system which permits such a vast difference in the administration of justice for injuries like those in this case, between the courts of the State and the courts of the United States.

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

Constitution specially authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the State and, to that extent, a denial of its independence. . . . If a Federal court exercise its duties within one of the States where the law on the subject under consideration is uncertain and unsettled, where, as Chief Justice Marshall said, "the state courts afford no light," it must, as we have already stated, exercise an independent judgment thereon, and pronounce such judgment as it deems just. But no foreign law, or law out of the State, whether general or special, or any conception of the court as to what the law ought to be, has any place for consideration where the law of the State in which the action is pending is settled and certain. A law of the State of that character, whether expressed in the form of a statute or in the decisions of the judicial department of the government, cannot be disregarded and overruled, and another law, or notion of what the law should be, substituted in its place without a manifest usurpation by the Federal authorities. I cannot permit myself to believe that any such conclusion, when more fully examined, will ultimately be sustained by this court. I have an abiding faith that this, like other errors, will, in the end "die among its worshippers."

The independence of the States, legislative and judicial, on all matters within their cognizance is as essential to the existence and harmonious workings of our Federal system, as is the legislative and judicial supremacy of the Federal government in all matters of national concern. Nothing can be more disturbing and irritating to the States than an attempted enforcement upon its people of a supposed unwritten law of the United States, under the designation of the general law of the country, to which they have never assented and which has no existence except in the brain of the Federal judges in their conceptions of what the law of the States should be on the subjects considered. . . .

The position that the plaintiff, the fireman, voluntarily assumed the risk in this case, because he knew the helper had no right to the track without orders, and there was possibly a local train somewhere on the track, by continuing on the train instead of leaving it, does not strike me as having much force. It was not considered of sufficient importance to be called to the attention of the court below, or of the jury. Its suggestion now seems to be an afterthought of counsel. . . . It would be a dangerous notion to put into the heads of firemen and other employees of a railroad company that if they had reason to believe, without positive information on the subject, that dangers attended the course pursued by the movements of the train under the direction of its conductor, they would be deemed to assume the risk of such movements if they did not expostulate with him, and, if he did not heed the expostulation, leave the train, even after it had commenced one of its regular trips. . . .

. . .[T]he observations made upon the decision in the Ross case . . . seem to me to greatly narrow its effect and destroy its usefulness as a protection to employees in the service of large corporations, under the direction and control of supervising agents. . . . The correctness of the charge was the question discussed in the case by counsel, and determined by the court. Its correctness was necessarily sustained by the judgment of affirmance, which could not have been rendered if the

exceptions to it were well taken. . . . [While] admitting that the charge is much like the one in the present case, . . . [the majority in this case] contend that the court did not attempt to approve the instruction generally, but simply held that it was not erroneous as applied to . . . the conductor of a railway company, exercising certain authority . . . A conductor of a railway company, directing the movements of its train, and having its general management, illustrates the general doctrine asserted and sought to be maintained throughout the opinion in the Ross case, that railroad companies in their operations, extending in some instances hundreds and even thousands of miles . . . must necessarily act through superintending agents; employees subordinate to the company, but superior to the employees placed under their direction and control. . . . The necessity of subordinate agencies exists whenever a train or engine is removed from the immediate presence and direction of the head officers of the company.

The opinion of the majority not only limits and narrows the doctrine of the Ross case, but, in effect, denies, even with the limitations placed by them upon it, the correctness of its general doctrine, and asserts that the risks which an employee of a company assumes from the service which he undertakes is from the negligence of one in immediate control, as well as from a co-worker, and that there is no superintending agency for which a corporation is liable, unless it extends to an entire department of service. . . . There is a marked distinction in the decisions of different courts upon the extent of liability of a corporation for injuries to its servants from persons in their employ. One course of decisions would exempt the corporation from all responsibility for the negligence of its employees, of every grade, whether exercising supervising authority and control over other employees of the company, or otherwise. Another course of decisions would hold a corporation responsible for all negligent acts of its agents, subordinate to itself, when exercising authority and supervision over other employees. The latter course of decisions seems to me most in accordance with justice and humanity to the servants of a corporation.

I regret that the tendency of the decision of the majority of the court in this case is in favor of the largest exemptions of corporations from liability. The principle in the Ross case covers this case, and requires, in my opinion, a judgment of affirmance.

MR. CHIEF JUSTICE FULLER dissenting.

I dissent because, in my judgment, this case comes within the rule laid down in Chicago, Milwaukee & Railway v. Ross, 112 U.S. 377, and the decision unreasonably enlarges the exemption of the master from liability for injury to one of his servants by the fault of another.

NOTES

(1) Edward A. Purcell, Jr., BRANDEIS AND THE PROGRESSIVE CONSTITUTION 39–40, 46, 51–53, 55, 58 (2000) identifies Justice Brewer with a particularly aggressive use of Swift v. Tyson. He writes: "[T]he most pervasive and enduring achievement of [Justice Brewer's] Court was not political, social or economic. It was institutional. The Court strengthened the power of the federal courts and moved—albeit somewhat erratically and incompletely—to establish the primacy of the national judiciary in

American government. Its unifying thrust lay . . . in expanding the ability of the national judiciary to review exercises of that power, especially by the states. . . .

"Justice David Josiah Brewer was an ardent proponent and creative architect of the Court's complex restructuring of federal law. . . . Nowhere was the nature of Brewer's jurisprudence more apparent than in his uses of what was called "general law" or "federal common law.". . . . By century's end, [the federal courts] had inflated the domain of general jurisprudence to encompass most common law subjects. . . . Brewer, of course, reveled in the idea of general law. . . . [I]t was a charter of federal judicial freedom that enabled him to serve his ideas of right and justice. . . . The idea of a federal common law fostered an amorphous concept of law that allowed the Court to make rules without identifying their source or legitimating their creation. It was also particularly useful because it allowed the Court to cover whatever gaps might result from narrowing or invalidating state and federal statutes. . . . Brewer used the *Swift* doctrine, for example, to assert federal judicial control over the field of tort law, especially over personal injury claims by employees against their employers. . . ." *Baugh,* in Professor Purcell's view, exemplifies "both Brewer's commitment to national judicial power and his willingness to subordinate the claims of workers to the welfare of national corporations."

More generally, Purcell argues, Brewer was emphatic that the judicial power could reach subjects, such as insurance law, on which at the time it was held Congress had no constitutional power to legislate. "Repeatedly, he voted to reaffirm the constitutional limitation on congressional power, and just as regularly he used the authority of the federal courts to make general common law rules for insurance contracts. . . . The Constitution gave Congress 'no general grant of legislative power'. . . . Conversely, Article III 'granted the entire judicial power of the Nation' to the federal courts, and its charter was 'not a limitation nor an enumeration.' Rather, Article III granted 'all the judicial power which the new Nation was capable of exercising' . . . Thus, he established a more flexible and expansive test for judicial power than for legislative power, necessarily broadening the reach of the former beyond that of the latter."

(2) Justice Brewer's treatment of *Chicago, Milwaukee & Saint Paul Railroad* is both an object lesson in the use of holding/dictum/material fact and a striking demonstration of the hold the "fellow servant" doctrine and the closely related doctrine of "assumption of the risk" still had in American common law.

(3) Lawrence M. Friedman, A HISTORY OF AMERICAN LAW, 482–84 (2d Ed. 1985): At the turn of the century, industrial accidents were claiming about 35,000 lives a year, and inflicting close to 2,000,000 injuries. One quarter of these were serious enough to disable the victim for a solid week or more. These accidents were the raw material of possible law-suits. Litigation was costly, but lawyers took cases on contingent fees. If the case was lost, the lawyer charged nothing; if he won, he took a huge slice of the gain. The upper part of the bar looked with beady eyes at this practice, "most often met with in suits for alleged negligent injuries." Thomas Cooley thought they were beneath contempt: "mere ventures," no better than "a lottery ticket." They debased the bar, brought "the jury system into contempt," and horror of horrors, helped created "a feeling of antagonism between aggregated capital on the one side and the community in general

on the other." But the contingent fee had its merits. A poor man could sue a rich corporation. By 1881, the contingent fee was said to be an "all but universal custom of the profession."

Neither the number of accidents nor the contingent fee system, in itself, can completely explain the rise in litigation. To justify taking risks, and to make a living, the lawyer had to win at least some of his cases. The erosion of the fellow-servant rule was a conspiracy in which juries, judges made of less stern stuff than Lemuel Shaw, and legislatures all joined in. The rule evolved along a pattern common to many rules. The courts laid it down simply and flatly, in a form intended as a final formulation. But it was not accepted as such by groups that resented the rule, and by workers and their lawyers. In a sense, strict tort rules simply did not work. The rules choked off thousands of lawsuits, no doubt. Workers and their families simply did not sue; or they settled for peanuts. Still, thousands of cases descended on the courts. Plaintiffs won some of these cases—not by any means all; but some. The more plaintiffs won, the more lawyers were encouraged to try again. Few juries and lower-court judges took as their sole duty upholding stern and salutary general principles. In Wisconsin, in 307 personal-injury cases appealed to the state supreme court, up to 1907, the worker had won nearly two-thirds in the trial court. Only two-fifths were decided for the worker, however, in the supreme court. These appellate cases, of course, were merely the visible part of a huge iceberg of cases. Other states probably had a similar experience. Trial judges and juries were not playing the *Farwell* game as strictly as they might. . . .

Small wonder, then, that the law of industrial accidents grew monstrously large. In 1894, William F. Bailey published a treatise on "The Law of the Master's Liability for Injuries to Servants"; the text ran to 543 pages. "No branch of the law," Bailey wrote in the preface, was "so fraught with perplexities to the practitioner." The law was wildly nonuniform, full of "unpardonable differences and distinctions." This meant that, by 1900, the rule had lost some of its reason for being. It was no longer an efficient device for disposing of accident claims. It did not have the courage of its cruelty, nor the strength to be humane. It satisfied neither capital nor labor. It siphoned millions of dollars into the hands of lawyers, court systems, administrators, insurers, claims adjusters. Companies spent and spent, yet did not buy industrial harmony—and not enough of the dollars flowed to the injured workmen. . . .

(4) W. Licht, WORKING FOR THE RAILROAD, 197–207 (1983): Workers disabled in accidents and the widows and families of deceased railwaymen faced a grim and uncertain future. In making claims for compensation for their losses, the legal system offered little or no relief. Railroad companies often granted gratuities to injured men and sometimes paid hospital and funeral expenses, but only in an informal and unsystematic fashion. Structured, comprehensive insurance programs for railwaymen did not emerge until the 1880s. . . .

Two documents are available that can give some inkling of the exact degree to which legal actions proved fruitless. In 1875 the St. Louis & Southeastern Railroad reported to the railroad commissioners of Illinois on damages claimed and paid to employees by the company in the course of the year. They included the following: one injured yardman sued for $10,000 and was awarded $47.66; an injured switchman claimed $5,000 and received $500; another switchman asked for $1,000 and received $100;

an injured brakeman similarly asked for $200 and was awarded $15. Two families of killed brakemen claimed $15,000 and $10,000 in damages, respectively, and received no award. The St. Louis & Southeastern further reported that twenty-seven injured employees and the family of one deceased worker chose not to bring suits against the company. Of these twenty-eight cases the company decided to award fourteen with gratuities amounting to $934.50. . . .

Further evidence on the subject is provided in the annual report of the railroad commissioners of Illinois for 1876. In that year, the fifty-three railroad companies operating in the state reported paying $3,654.70 in damages to employees killed or injured while on duty. During that year, 102 [sic] railwaymen had been injured in accidents in the state and 262 [sic] killed. Only twenty-four of these workers received damages amounting to the above figure. The report did not state how many claims were actually filed. What is of interest, too, is that in the same year the fifty-three railway companies operating in Illinois reported paying $119,288.24 in damages for livestock killed and $26,100.29 for property burned by locomotives. . . .

In extending relief to injured railwaymen and the families of employees killed while on duty, the motives of nineteenth-century road managers were not entirely benevolent. . . . The true justification lay elsewhere. In offering relief to needy families of the disabled and deceased, all nineteenth-century companies made the recipients sign comprehensive waivers agreeing not to bring suits against the firms. Furnishing awards thus provided the roads with a clear and facile avenue for avoiding legal liability. . . .

An injured railwayman or his widow could do little to insure corporate benevolence. Victims tried to help their cases by accompanying their claims with letters from clergymen and fellow townspeople attesting to their grievous circumstances. Nothing was guaranteed. The unpredictable and discretionary nature of relief giving is revealed in the following letter of January 1873 from A. M. Mitchell, general superintendent of the Illinois Central, to I.C. President John Newell, describing how he settled two claims:

> Some ten days since, O'Connor a brother of the Fireman that was killed by Engine No. 128 running (broken rail near Peotone February 5) asked what the company proposed to do in the way of settlement. I replied that it had been the custom of the company to meet surgical and burial expenses and in case a family or parents were in need made small donations. Some other conversation followed and he left saying he would call again. He called yesterday asked if the company were ready to settle. I asked him what terms a settlement was proposed. He stated the sum of $4000, the only proposition he had to make. I answered that it would not be accepted.
>
> Shortly after he left Ed Davis the Engineer that run the Engine and whose ankle was badly broken called and asked to have a settlement of his case (previously he had been promised his pay as Engineer while off duty). I asked him what settlement he desired. He said if the company paid him $1000 for settlement for

lost time and injury he would sign a release. I accepted the proposition and the money was paid him.

The coupling of cars accounted for the greatest number of accidental injuries and deaths suffered by pioneer railwaymen. (Drawing by Peter Copeland. Courtesy of Smithsonian Institution.)[1]

(5) Richard Reinhardt (ed.), WORKIN' ON THE RAILROAD 274–75 (1970):

To couple cars with the old-time link and pin, perfect coordination of mind and muscle were an absolute necessity. The link was first fastened with a pin in one car. Then a pin was "cocked" at a slight angle in the other car to be coupled. As the two cars came together, the trainman guided the link into its slot. The impact of the coupling usually shook down the cocked pin, completing the coupling. If the pin did not shake down, the trainman stepped in between the cars and pounded it down with a spare pin. Oftentimes it was necessary to walk between the two moving cars. Wary

[1] From Walter Licht, Working for the Railroad, The Organization of Work in the Nineteenth Century, p. 187 (1983, Princeton University Press).

feet, an alert mind, and chilled nerve were needed every instant. A man lived only long enough to make one mistake.

The uncoupling of the cars was always the most dangerous job. Often it was necessary to uncouple with the cars in motion, especially in making some of the more intricate switching movements. The switchman had the choice of running along between the cars and pulling out the pin at the proper time or of lying on the beam that held the coupling slot. In the latter choice the danger was equally great. . . . If there was any miscue, or if the pin could not be pulled, the trainman stood a fine chance of being thrown under the car.

The Federal Railroad Safety Appliances Act of 1893

27 Stat. 531.

Chap. 196.—An act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Sec. 1. That from and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system, or to run any train in such traffic after said date that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose.

Sec. 2. That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.

Sec. 3. That when any person, firm, company, or corporation engaged in interstate commerce by railroad shall have equipped a sufficient number of its cars so as to comply with the provisions of section one of this act, it may lawfully refuse to receive from connecting lines of road or shippers any cars not equipped sufficiently, in accordance with the first section of this act, with such power or train brakes as will work and readily interchange with the brakes in use on its own cars, as required by this act.

Sec. 4. That from and after the first day of July, eighteen hundred and ninety-five, until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars.

Sec. 5. That within ninety days from the passage of this act the American Railway Association is authorized hereby to designate to the Interstate Commerce Commission the standard height of drawbars for freight cars, measured perpendicular from the level of the tops of the rails to the centers of the drawbars, for each of the several gauges of railroads in use in the United States, and shall fix a maximum variation from such standard height to be allowed between the drawbars of empty and loaded cars. Upon their determination being certified to the Interstate Commerce Commission, said Commission shall at once give notice of the standard fixed upon to all common carriers, owners, or lessees engaged in interstate commerce in the United States by such means as the Commission may deem proper. But should said association fail to determine a standard as above provided, it shall be the duty of the Interstate Commerce Commission to do so, before July first, eighteen hundred and ninety-four, and immediately to give notice thereof as aforesaid. And after July first, eighteen hundred and ninety-five, no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply, with the standard above provided for.

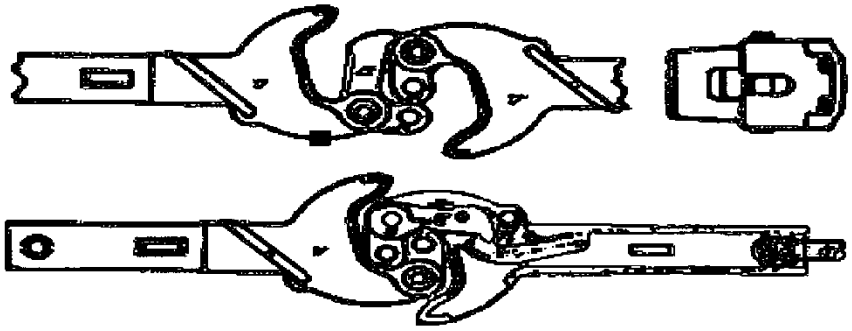
Sec. 6. That any such common carrier using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of this act, shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered in a suit or suits to be brought by the United States district attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed, and it shall be the duty of such district attorney to bring such suits upon duly verified information being lodged with him of such violation having occurred. And it shall also be the duty of the Interstate Commerce Commission to lodge with the proper district attorneys information of any such violations as may come to its knowledge: *Provided,* that nothing in this act contained shall apply to trains composed of four-wheel cars or to locomotives used in hauling such trains.

Sec. 7. That the Interstate Commerce Commission may from time to time upon full hearing and for good cause extend the period within which any common carrier shall comply with the provisions of this act.

Sec. 8. 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.

Approved, March 2, 1893.

COUPLING MECHANISM



THREE SAFETY APPLIANCES ACT PROBLEMS

Outline your responses to the following problems just on the basis of the statutory text given above.

1. Imagine yourself Southern Pacific's counsel in 1893. Your client's company has adopted the Miller Company's automatic coupler mechanism for its passenger cars, because of its valuable shock-absorbing qualities. For its freight cars, however, it uses couplers made by the Janney Company, which have proved more durable under abuse. The two types of couplers are automatic with others of the same type, but are incompatible with one another. The Company does not mix freight and passenger cars in the same trains. Since the Company's passenger and freight engines are equipped with the couplers appropriate for the cars used in their respective trains, however, the differences between Miller and Janney couplers will rarely present a compatibility problem in practice. Most of the large railroads have been making the same choice, with the result that freight cars are widely interchangeable among different roads, and so are passenger cars. When the two kinds of couplers are mixed, however—if, for example, a passenger engine must be used to move freight cars on a railroad siding, or vice versa—coupling will have to be done manually.

May your client plan to continue to use different couplers on its passenger cars than it uses on its freight cars? With what possible consequences and/or risks? What can you infer about statutory objective(s) and its/their bearing on this issue? What bases do you have for knowledge on issues of this character? What concrete steps might you take to resolve any issues of interpretation you find in the statute?

2. It is now 1900, and you remain General Counsel to the Southern Pacific. Because your client is a "common carrier,"[1] as you well know, it has a legal obligation to accept cars coming to it from other railroads for transportation on its system at its usual rates, unless it has some legal justification for refusing to accept them. Wrongful refusal to accept cars could expose it to common law damage actions (as well as to a certain loss of commercial reputation). Has your

[1] We have already encountered the idea that some persons offering services to the general public—innkeepers are another example—have legal duties not shared by most merchants as a result of this status. See *Farwell* p. 88 above.

client a legal basis for refusing to accept cars that will not couple automatically with its own

(a) Because they entirely lack automatic couplers;

(b) Because although they have automated couplers installed, they are Miller couplers, and thus will not work automatically with the Janney couplers that the Southern Pacific uses;

(c) Because their Janney couplers, compatible with Southern Pacific couplers if they are in working order, are out of repair and so have to be coupled manually.

What consequences might your client face if it *accepts* such cars? What can you infer about statutory objective(s) and its/their bearing on this issue? What bases do you have for knowledge on issues of this character? What concrete steps might you take to resolve any issues of interpretation you find in the statute?

3. The Southern Pacific Co. was operating passenger trains between San Francisco and Ogden, Utah. It habitually used a dining car in these trains. Such a car formed a part of a train leaving San Francisco, and ran through to Ogden, where it was ordinarily turned and put into a train going west to San Francisco. On August 5, 1900, the east-bound train was so late that it was not practicable to get the dining car into Ogden in time to place it in the next westbound train, and it was therefore left on a side track at Promontory, Utah, to be picked up by the west-bound train when it arrived. While it was standing on this track the conductor of an interstate freight train which arrived there was directed to take this dining car to a turntable, turn it, and place it back upon the side track so that it would be ready to return to San Francisco. The conductor instructed his crew to carry out this direction. The plaintiff, Johnson, the head brakeman, undertook to couple the freight engine to the dining car for the purpose of carrying out the conductor's order. The freight engine and the eight-wheel dining car involved were the property of defendant railroad company. The freight engine, regularly used in interstate hauling of standard eight-wheel freight cars, was equipped with a Janney coupler, which would couple automatically with another Janney coupler, and the dining car was provided with a Miller automatic hook; but the Miller hook would not couple automatically with the Janney coupler. (Because of differing orientations, the two could not "shake hands" in the manner suggested by the illustration above). Johnson knew this, and undertook to make the coupling by means of a link and pin. He knew that it was a difficult coupling to make, and that it was necessary to go between the engine and the car to accomplish it, and that it was dangerous to do so. Nevertheless, he went in between the engine and the car without objection or protest and tried three times to make the coupling. He failed twice; the third time his hand was caught and crushed so that it became necessary to amputate his hand above the wrist.

If Johnson now sues Southern Pacific for damages, what result? Is Southern Pacific in violation of the statute? Must/may brakeman Johnson be said to have assumed the risk involved in coupling the dining car and locomotive?

Legislative Background to the Federal Railway Safety Appliances Act

To give you a lawyer's experience in assessing possibly relevant materials, the following materials have been edited less stringently than many you will encounter in law school. Read them with primary attention to what if anything they tell you about congressional understandings and purposes with regard to the interpretive problems you have identified. As you do so, you might want to keep track of

- Any differences between House and Senate approaches
- Changes that occur in the language of the proposed legislation as it progresses through the legislative process, and (to the extent you can say) what these changes were thought to accomplish.
- The genuineness (or not) of the debate—who is speaking, and what is his general position on the matter at issue; who is being addressed by the arguments made; your impression whether proposed amendments were well-intentioned or diversionary; etc.

(1) PRESIDENTIAL MESSAGES

Public Papers and Addresses of Benjamin Harrison, 57–58, 87, 122

ANNUAL MESSAGES TO CONGRESS

I.

December 3, 1889

To the Senate and House of Representatives:

. . .

The attention of the Interstate Commerce Commission has been called to the urgent need of Congressional legislation for the better protection of the lives and limbs of those engaged in operating the great interstate freight lines of the country, and especially of the yard-men and brakemen. A petition, signed by nearly 10,000 railway brakeman was presented to the Commission, asking that steps might be taken to bring about the use of automatic brakes and couplers on freight cars.

At a meeting of State railroad commissioners and their accredited representatives, held at Washington in March last, upon the invitation of the Interstate Commerce Commission, a resolution was unanimously adopted urging the Commission "to consider what can be done to prevent the loss of life and limb in coupling and uncoupling freight cars, and in handling the brakes of such cars." During the year ending June 30, 1888, over 2,000 railroad employees were killed in service and more than 20,000 injured. It is competent, I think, for Congress to require uniformity in the construction of cars used in interstate commerce, and the use of improved safety appliances upon such trains. Time will be necessary to make the needed changes, but an earnest and intelligent beginning should be made at once. It is a reproach to our civilization that any class of American workmen should, in the pursuit of a necessary and useful vocation, be subjected to a peril of life and limb as great as that of a soldier in time of war.

II.

December 1, 1890

To the Senate and House of Representatives:

It may still be possible for this Congress to inaugurate, by suitable legislation, a movement looking to uniformity and increased safety in the use of couplers and brakes upon freight trains engaged in interstate commerce. The chief difficulty in the way is to secure agreement as to the best appliances, simplicity, effectiveness, and cost being considered. This difficulty will only yield to legislation, which should be based upon full inquiry and impartial tests. The purpose should be to secure the cooperation of all well-disposed managers and owners, but the fearful fact that every year's delay involves the sacrifice of two thousand lives and the maiming of twenty thousand young men should plead both with Congress and the managers against any needless delay.

III

December 9, 1891

To the Senate and House of Representatives:

I have twice before urgently called the attention of Congress to the necessity of legislation for the protection of the lives of railroad employees, but nothing has yet been done. During the year ending June 30, 1890, 369 brakemen were killed and 7,841 maimed while engaged in coupling cars. The total number of railroad employees killed during the year was 2,451 and the number injured 22,390. This is a cruel and largely a needless sacrifice. The Government is spending nearly $1,000,000 annually to save the lives of shipwrecked seamen; every steam vessel is rigidly inspected and required to adopt the most approved safety appliances. All this is good; but how shall we excuse the lack of interest and effort in behalf of this army of brave young men who in our land commerce are being sacrificed every year by the continued use of antiquated and dangerous appliances? A law requiring of every railroad engaged in interstate commerce the equipment each year of a given per cent of its freight cars with automatic couplers and air brakes would compel an agreement between the roads as to the kind of brakes and couplers to be used, and would very soon and very greatly reduce the present fearful death rate among railroad employees.

(2) HOUSE OF REPRESENTATIVES COMMITTEE REPORT

52D CONGRESS	HOUSE OF REPRESENTATIVES	REPORT
1ST SESSION		No.1678

SAFETY OF RAILWAY EMPLOYEES AND THE TRAVELING PUBLIC.

June 27, 1892.—Referred to the House Calendar and ordered to be printed.

Mr. JOHN J. O'NEILL, from the Committee on Interstate and Foreign Commerce, submitted the following

REPORT:

[To accompany H.R. 9350.]

The Committee on Interstate and Foreign Commerce, to whom were referred various bills to promote safety of railway employees and the traveling public, submits the accompanying bill in lieu thereof, and the following report:

ATTENTION FIRST CALLED TO SUBJECT.

At a meeting of the railroad commissioners of the country held at Washington in the spring of 1888, the reports from the States where railroads are required to report each and every accident showed such an extraordinary percentage of casualties to the men engaged in handling the trains that a resolution was unanimously adopted urging the Interstate Commerce Commission "to consider what could be done to prevent the loss of life and limb in coupling and uncoupling freight cars and in handling the brakes for such cars."

DEMAND OF EMPLOYEES FOR PROTECTION.

Following this railroad commissioners' conference the order of Brotherhood of Railroad Brakeman sent to the Interstate Commerce Commission a petition with 9,682 names attached, in which they ask the Commission to take such steps as they may think proper to bring about the adoption of automatic couplers and brakes on freight cars used on the railroads of the United States, and earnestly appealing to the Commission to urge upon Congress the necessity of national legislation, that the terrible slaughter of brakemen on the railroads of the country might be diminished.

As a result inquiries were instituted by the committee appointed by the National Convention of Railroad Commissioners and it was ascertained that during the year ending June 30, 1889, over 2,000 railroad employees were killed in the service and more than 20,000 injured. The publication of these facts awakened popular interest and formed a strong public opinion demanding legislation requiring the use of safety appliances.

* * *

NATURE OF ACCIDENTS.

We have carefully examined as to the nature of the accidents to which railway employees are exposed, and if the causes that result in so many deaths, so much pain, and such widespread suffering can not be mitigated if not obviated by legislation.

The demand of railway employees for the protection of the law came to us with great force as we recognized that they could not to any great extent guard against the casualties to which they were exposed; they must face the danger while others determined the conditions under which they labor.

The nature of the accidents to which railway men are exposed appear in the following tables obtained from the Interstate Commerce Commission:

Railway accidents to employees for the years ending June 30, 1889 and 1890.

Kind of Accident	1889		1890	
	Killed	Injured	Killed	Injured
Coupling and uncoupling	300	6,757	369	7,842
Falling from trains and engines	493	2,011	561	2,348
Overhead obstructions	65	296	89	343
Collisions	167	820	235	1,035
Derailments	125	655	150	720
Other train accidents	189	1,016	146	894
At highway crossings	24	45	22	32
At stations	70	699	98	691
Other causes	539	7,729	754	8,250
Unclassified	—	—	27	236
Total	1,972	20,028	2,451	22,396

The number of employees engaged directly in the handling of trains, June 30, 1890—that is, trainmen, switchmen, yardmen, engineers, firemen, and conductors—was 153,235, and out of this number there occurred 1,459 deaths and 13,172 injuries due to some form of railway accident. A glance at the above table for the same year indicates at once where the chief danger lies. The total number killed in coupling and uncoupling cars was 369, and the number injured was 7,841.

The number killed in falling from trains and engines was 561 and the number injured was 2,363; that is to say, 38 per cent of the total number of deaths and 46 per cent of the total number of injuries sustained by railway employees resulted while coupling cars or setting brakes, and whatever cuts off these two sources of great danger, would largely reduce the total losses of life and limb.

REMEDY SUGGESTED.

It is the judgment of this committee that all cars and locomotives should be equipped with automatic couplers, obviating the necessity of the men going between the cars, and continuous train brakes that can be operated from the locomotive and dispense with the use of men on the tops of the cars; that the locomotives should be provided with power driving-wheel brakes rendering them easy of control.

UNIFORMITY REQUIRED.

The efficiency of such devices, provided that all cars and locomotives be furnished with uniform type of coupler and brake, is generally admitted; without uniformity the danger to employees is fully as great as with the old link and pin coupler and hand brake, and representatives of the switchmen and trainmen who appeared before the committee stated that unless there could be uniformity they would

prefer to go back entirely to the old link and pin; that the danger had increased from the use of so many different types, which statement seems corroborated by the large increase in casualties appearing in the statistics of 1890 over those of 1889.

STANDARD TYPE REQUIRED.

The interest of the railroads as well as the dictates of humanity demand that a standard type shall be established as soon as possible. The increased public interest in this question and the uncertainty as to what Congress may do has seriously retarded the work of fitting the trains with automatic couplers and brakes, which many of the railroads are anxious to apply, but do not deem it prudent to incur this vast expense with the danger of complete loss by the subsequent adoption, through Congressional action, of some different type.

With the standard type once established a large majority of the roads would take immediate steps to conform to it. Their managers are progressive, have an intense sympathy with their men, and from a strong sentiment of humanity, and also recognizing it as a feature of great economy to their roads, they would proceed at once to equip them with safety appliances, although it would require the application of a law to compel many of the roads to conform to it.

RAILROADS UNABLE TO DECIDE.

That the roads, no matter how well intentioned, by their own unaided efforts can obtain any uniformity of action on this subject within any reasonable time is not possible; they require the aid of law.

The secretary of the Interstate Commerce Commission last November issued a set of inquiries to presidents of different railroads.

The replies to the question regarding the best means of bringing about uniformity in safety car couplers are not clear in many cases, but the following statement shows as near as possible the position of the roads:

Roads representing 13,014.24 miles of road operated—in favor of national legislation	69
Roads representing 46,791.09 miles of road operated—in favor of voluntary action by the railroads	88
Roads representing 139.09 miles of road operated—in favor of State legislation	2
Roads representing 11,915.88 miles of road operated—in favor of the M.C.B. types of couplers	17
Roads representing 4,829.83 miles of road operated—in favor of different couplers	10
Roads representing 9,447.79 miles of road operated—expressing the opinion that the matter is still in the experimental stage	15
While 145 roads representing 38,985.59 miles of road operated—expressed no opinion.	

Several roads express themselves in favor of the Safford coupler.

This report shows what might have been expected when taken in connection with the fact that there are forty-four different kinds of couplers and nine kinds of train brakes in actual use.

THE STATES UNABLE TO PROVIDE REMEDY.

The incompetency of the States to meet the situation is illustrated by the fact that the legislatures of Massachusetts, Iowa, Mississippi, Nebraska, Minnesota, New York, Ohio, Michigan, Wisconsin, and other States, realizing their inability to afford a remedy, have called upon Congress to act.

CONGRESS ALONE CAN ACT.

The national convention of railroad commissioners at each convention during the past three years have requested Congress to legislate upon this subject.

There are more than one million freight cars scattered all over the country that can be reached only by legislation of equal extent.

To obtain uniformity in couplers we must invoke the law of the United States to provide a method of securing the adoption of some standard type, and, if need be, to compel its use.

PROVISIONS OF THE BILL.

Five things appear to be fundamentally important, and for these the bill provides:

(1) *The application of driving-wheel brakes to locomotives.*—This concerns the safety of railway travel generally.

(2) *Train brakes for freight cars.*—The brakes have to be now largely operated by the brakemen, traveling over the tops of the cars by night and by day, through sleet and rain, exposed to great danger of falling from the cars or from overhead obstruction.

But with the train brake that can be immediately applied to the entire train the necessity of their going on top of the cars is obviated and a great measure of safety to all who travel will be brought into general use; for when the rails are in constant use by passenger and freight trains indiscriminately, running within a few minutes of each other, the driving brake and the train brake are essential means of safety to the traveler and the employee alike. No opposition has been heard to this requirement.

(3) *Automatic couplers*.—This has been previously fully discussed in this report.

The committee recognize that it is a serious question whether the best type of coupler has yet been devised, but they believe that if the railroads of the country are compelled to act, and reasonable time is given them to come together, the result will be the adoption of some uniform interchangeable type of coupler, and also train brake, that will prove satisfactory to them and will accomplish the result desired.

(4) *Uniform height of draw-bar*.—The railroads have themselves largely established a uniform height of drawbar from the rails with a maximum variation. It sometimes happens, however, that when cars

are started out from the road to which they belong they do not get back for many months, and during that time the drawbars are getting down until they get away from the standard, in which condition it is impossible to couple them with those of a standard height without using crooked links, the difficulty of which adds largely to the danger and death rate. It is therefore considered highly important that a standard height of drawbar from the rails with a maximum variation should be maintained, and that cars should not be used when out of repair.

(5) *Hand holds*.—Until the changes contemplated by this bill can be affected[sic], and with a view to minimize the dangers by every means possible, we recommend a requirement of hand grabs or hand irons on all cars, something that the switchman or brakeman can seize to if he slips, instead of trying to clutch the side of a wet or perhaps icy car.

RAILROADS TO DESIGNATE STANDARD TYPE.

Believing that the standard type of coupler and brake should be established as soon as possible, it is provided that on July 1, 1893, the roads themselves shall by ballot decide, and in order to secure practical unanimity, that the vote of 75 per cent of the cars owned or controlled by the roads shall determine; and it is only in the event of their failure to agree then that the duty of selecting such type devolves upon the Interstate Commerce Commission.

WHEN LAW SHALL TAKE EFFECT.

In relation to the application of driving-wheel brakes to locomotives, most of them are now provided with them, undoubtedly within a brief time all locomotives will be provided with them, and it is only out of abundance of caution that the provision is inserted compelling their use after a certain date.

Concerning the application of safety couplers and train brakes, considering the enormous expense to the roads, we think reasonable time should be given.

The number of freight cars in use is 1,105,042, of which number about 87,390 are now provided with safety couplers and 100,990 with train brakes.

It is estimated that the cost of equipping a car with safety couplers and brakes is about $75 a car; which involves an expense to the roads of many millions of dollars. We provide that after July 1, 1895, all new cars, and all old cars sent to the shops for general repairs to one or both of its drawbars, shall be provided with the standard couplers and brakes.

The average life of a freight car is estimated at about eight years, and we think the provision requiring old cars to be fitted with safety couplers and brakes by July 1, 1898, is not unreasonable—believing also that the establishment of an outside date does not imply a delay until that time, as undoubtedly most of the roads would, as soon as the standard was established, provide the means and arrange for the change at once.

EXPENSE AND SAVING TO THE ROADS.

The expense seems enormous and would appear harsh and oppressive, but we believe in addition to the humane aspect of this

subject, which touches all men alike, whether president, manager, or trainman, that the great saving to the roads in the cost of running their trains and in the loss from suits at law that they will be fully repaid, and within a few years.

EXPENSE TO EMPLOYEES.

In estimating the expense to the roads it is but just that some reference be made to the vast outlay of money by the employees in their voluntary relief societies rendered necessary by the refusal of the insurance companies to take the risk, which is due to the fact that death and injury is greater among trainmen than any other avocation followed by man.

The Brotherhood of Brakemen, to which but one-fifth of the brakemen belong, pays out not less than $37,000 per month—nearly half a million dollars a year. One order of the switchmen, numbering 10,000 members, pays out $170,000 per year. If all the different organizations of railway men would publish the amounts expended each year for the relief of their fellow-workmen, and the care of their widows and orphans, it would show in all probability an expenditure of several million dollars each year.[1]

. . .

SAFETY TO TRAVELERS RECOGNIZED.

We recognize the extraordinary genius and enterprise of the railroad managers of our country, whose successful conduct of the interests in their charge is a marvel to the traveler, and to their wonderful management is undoubtedly due the comparative immunity from danger of the passengers on railways in the United States—during

[1] [Ed.] John Fabian Witt, THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW 77–79 (2004): Early railway brotherhoods were organized precisely to create accident insurance protections among men in high-risk railroad occupations. The Brotherhood of Locomotive Firemen, later led by Debs, formed in the early 1870s not as a collective bargaining organization, but as a fraternal mutual insurance society, as did the Order of Railway Conductors; indeed, Debs eventually quit the Locomotive Firemen because of their continued focus on insurance functions rather than organizing. . . . Typical railway brotherhood death benefits ranged from $1000 to $3000 and often reached as high as $4500. The brotherhoods paid permanent total disability benefits in similar amounts, usually in place of death benefits, and also provided significant permanent partial and temporary disability benefits. The Brotherhood of Railroad Trainmen, for example, in the 1880s provided members injured while in the discharge of their duties with temporary disability payments of $1.07 per day for up to 40 days. . . .

Through the first decade of the twentieth century, brotherhood beneficiary departments were principally concerned with compensating victims of work accidents. In the Switchmen's Union of North America in 1901, for example, work-accident claims outnumbered all other claims by more than two to one. Over time, railroad brotherhood benefit associations would provide increasingly large shares of their benefits to members whose disability or death was not caused by a work accident. . . . By the middle of the first decade of the twentieth century, the leading railway brotherhoods had a combined membership of more than one quarter million, representing as many as one in four railroad workers. The seven great railway brotherhoods—the Brotherhood of Locomotive Firemen, the Grand Brotherhood of Locomotive Engineers, the Order of Railway Conductors of America, the Switchmen's Union of North America, the Brotherhood of Railway Trainmen, the Order of Railway Telegraphers, and the International Brotherhood of Maintenance-of-Way Employees—distributed more than $4 million in death benefits each year to their memberships, as well as over on-half million dollars in permanent disability benefits.

And see p. 100 above.

last year but one fatal accident to every 1,700,000 passengers carried, and but one injury for every 200,000 passengers carried.

The passenger trains, being provided with automatic couplers, the percentage of injury to brakemen in that branch of the service is very slight, and by comparison lends additional argument for the legislation we propose.

THE DUTY OF CONGRESS.

In conclusion it may well be considered whether any matter before Congress at this time demands, in justice to humanity and justice to the bread winners of the country, so much attention and consideration.

The railway employees of the country are in every sense among its best bone and sinew, splendid types of physical manhood and vigor. They are active, intelligent, strong, and brave men; in the flower of their youth, many of them with families. When we reflect that during this present year, judged by the statistics of the past, probably 25,000 of these men will be killed or injured, and when we contemplate the misery and suffering that will be brought to so many poor homes, the failure of Congress to legislate on this subject would be almost a crime.

APPALLING COMPARISONS.

To rivet the public mind on the appalling list of casualties and bring home to all men the frightful loss of life, a glance at some of the decisive battles of the world will suffice.

Wellington won Waterloo and Meade Gettysburg with a loss of 23,185 and 23,203, while the total loss on both sides at Shiloh in two days' murderous fighting was 24,000.

In the three years' war of the Crimea England lost in killed and wounded 21,035 men.

None of these terrible battles furnished a list of losses equal to the loss in a single year of our railroad men, a loss equal, in fact, to the entire present force of the United States Army.

In the Johnstown flood 2,280 persons perished, while during the year 1890 casualties on our railways resulted in railway employees killed 2,451 and injured, 22,394. The Johnstown disaster filled the imagination with horror and sent a thrill of sympathy throughout the civilized world, but that calamity came in one fell swoop, while fatalities on the railways, involving in the aggregate a far greater sacrifice of human life, have scarcely attracted public attention. Nightly several poor fellows are picked off—in the freight yard, on the rail—often the only vestige that morning reveals being a pool of blood and the dismembered remains of the unfortunate victim. Two lines of a newspaper headed "Brakeman killed," tells the whole story.

The vast army of maimed men, of homes left desolate, and of widows and children bereaved appeals to Congress for action.

CONCLUSION.

The committee desires to report the fact that it has been greatly aided in its investigations by the efficient secretary of the Interstate Commerce Commission, Edw. A. Moseley, whose experience gained from years of devotion to this reform and the data in his possession were invaluable aids to its investigation.

Also that through the courtesy of the general manager of the Baltimore and Ohio Railroad they were enabled to thoroughly investigate at the company's yards the merits of the present automatic couplers and brakes.

The representatives of many of the roads aided us to the fullest extent in furnishing information to enable us, if possible, to reach a solution of this question.

The committee recommend the passage of the bill and that H.R. 117, 180, 334, 582, 5134, 6187, 7512, 6648, and S. 2951 lie upon the table.

(3) SENATE DEBATES

24 Congressional Record (Senate)

Pp. 1246–51, 1273–77, 1279–82, 1284–85, 1287–88, 1323, 1330–33, 1370–72, 1375–76, 1416–18, 1423–25, 1478–83

February 6, 1893: Safety of Life on Railroads

MR. CULLOM.[1] I move that the Senate proceed to the consideration of the bill (H.R. 9350) to promote the safety of employees and travelers upon railroads, etc.

The motion was agreed to; and the Senate, as in Committee of the Whole, proceeded to the consideration of the bill (H.R. 9350) to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes, which had been reported from the Committee on Interstate Commerce with an amendment, to strike out all after the enacting clause and insert a substitute.

. . .

THE SECRETARY. The Committee on Interstate Commerce report to strike out all after the enacting clause of the bill and insert:

> That from and after the 1st day of January, 1895, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system, or to run any train in such traffic after said date that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose.
>
> SEC. 2. That on and after the 1st day of January, 1898, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers uniform in type

[1] Chair of the responsible Senate Committee.

and action, coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars. And said uniform automatic coupler shall always be of the standard type established by such common carriers controlling 75 per cent of the cars used in such traffic. Said common carriers shall report to the Interstate Commerce Commission within one year from the date of the passage of this act the standard type of automatic couplers so established, but on failure to do so the said Commission shall designate and publish properly the type of couplers to be used.

SEC. 3. That when any person, firm, company, or corporation engaged in interstate commerce by railroad shall have equipped a sufficient number of its cars so as to comply with the provisions of section 1 of this act, it may lawfully refuse to receive from connecting lines of road or shippers any cars not equipped sufficiently, in accordance with the first section of this act, with such power or train brakes as will work and readily interchange with the brakes in use on its own cars, as required by this act.

SEC. 4. That from and after the 1st day of July, 1893, until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars.

SEC. 5. That within ninety days from the passage of this act the American Railway Association is authorized hereby to designate to the Interstate Commerce Commission the standard height of drawbars for freight cars, measured perpendicular from the level of the tops of the rails to the centers of the drawbars, and shall fix a maximum variation from such standard height to be allowed between the drawbars of empty and loaded cars. Upon their determination being certified to the Interstate Commerce Commission, said Commission shall at once give notice of the standard fixed upon to all common carriers, owners or lessees engaged in interstate commerce in the United States by such means as the Commission may deem proper, and thereafter all cars built or sent to the shops for general repairs shall be of that standard. But should said association fail to determine a standard as above provided, it shall be the duty of the Interstate to Commerce Commission to do so. And after July 1, 1893, no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard above provided for.

SEC. 6. That any such common carrier using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of this act, shall be liable to a penalty of $100 for each and every such violation, to be recovered in a suit or suits to be brought by the United States district attorney in the

district court of the United States having jurisdiction in the locality where such violation shall have been committed; and it shall be the duty of such district attorney to bring such suits, upon duly verified information being lodged with him of such violation having occurred. And it shall also be the duty of the Interstate Commerce Commission to lodge with the proper district attorneys information of any such violations as may come to its knowledge.

SEC. 7. That the Interstate Commerce Commission may from time to time, upon full hearing and for good cause, extend the period within which any common carrier shall comply with the provisions of this act.

. . .

MR. CULLOM. . . . The Senate committee propose a substitute for the bill as it passed the House of Representatives extending the time beyond the House provision in that respect, and, in addition to that, in order to enable those who might be in distress and not be able to comply with the provisions of the law on account of want of funds or anything of that sort inserted a clause at the end of the Senate substitute, leaving it to the Interstate Commerce Commission, from time to time, upon full hearing and good cause shown, to extend the period within which any common carrier shall comply with the provisions of the proposed act.

This or some other bill must be passed if there is to be any legislation at all on this subject, in pursuance of the calls upon us by the people, by the President, and by the two political parties. I may say well I remember very distinctly that the national Democratic convention censured the Senate for not having acted upon this subject before. I think under all the circumstances that there ought not to be further delay in the passage of some kind of a bill upon the question. Certainly the Senate committee has been disposed to be as kindly towards the railroads as it could afford to be and at the same time do anything in the direction of requiring these common carriers to put upon their cars and locomotives improved devices.

. . .

MR. GORMAN. . . . Mr. President, I never conceived when I gave my consent to legislation heretofore and aided in its passage that Congress would be called upon to regulate the running of railroads and the details of management, and to determine such questions for the hundreds of thousands of men who have invested their money in them, and whose genius and enterprise have made the railroads what they are to-day, to tell them by act of Congress what sort of engines they shall run, the kind of driving-wheels that shall be placed upon the engines, the length of the stroke of the piston, what kind of cars shall be used or what kind of a brake or coupler shall be used. I doubt very much whether the combined wisdom of this or any other Congress would ever be able to properly regulate that matter.

. . .

I am not prepared to put the railroads of this country into the hands of one man or five men appointed by the President of the United

States, and confirmed by this Senate, who may be able to say to the great transportation interests, "You must spend $50,000,000 within the next five or ten years, or the next two years," as suggested by my friend on my right [MR. FAULKNER]. I would not permit it at any time. It is a revolution in our form of government, which comes here in this shape, first, in the interest [of] humanity; it comes secondly, as was suggested by the Senator from Colorado [MR. WOLCOTT], through the inventors, who expect to reap thousands and millions of dollars benefit from such legislation.

It is unwise legislation, in my view, in every aspect. This Government was not constituted for such a purpose. It will be a failure when it attempts to say what shall be done in the modes of transportation and the character of cars that must be used.

. . .

MR. FAULKNER. I ask the Senator from Maryland to permit me to ask him a question for information?

MR. GORMAN. Certainly.

MR. FAULKNER. I should like the Senator from Maryland, if he can, to give the Senate information as to what extent the interstate-commerce lines of railroad during the last two or three years have proceeded to carry out the view which seems to be embodied in the bill, and have attempted to secure a practical coupler similar to the one described in the bill.

Has it not been the uniform practice among railroad companies to change their cars as rapidly as they can and adopt a character of couplers similar to the device described in the bill, and have not the interstate lines moved very rapidly toward the accomplishment of that purpose?

. . .

MR. GORMAN. . . . In answer to the question of the Senator from West Virginia [MR. FAULKNER], I will state that there can be no question but there have been very rapid strides made in this direction. There is an association of all the principal railroads called the American Railway Association of Master Car Builders, who have taken this subject up, and they hold a convention, I understand, at least once a year, with a view of determining what is a proper coupler to be used, and what other devices are proper to be used in the matter of transportation and in equipping trains. They have spent millions of dollars already in that direction.

It is true that there is no uniform device used by all the railroads. What is aimed at now in the proposed legislation is that there shall be a uniform device, and that that uniformity shall be secured at once by an act of Congress; that by an act of Congress the railroad companies shall cause every engine to be equipped with air brakes, and that the ordinary cars for purposes of transportation shall be so equipped that they can be used with air brakes and not by hand brakes; and so with couplers. . . .

Possibly it may be proper, but I should doubt the wisdom of saying that Congress shall provide for a uniform coupler to be adopted by all

the railroads themselves upon agreement, to be used upon all trains; but to follow it with a provision that if they fail to do it in one year the five or six commissioners who hold their sessions in the Sun Building, on F street, surrounded with a number of lawyers and clerks, well paid, with all their duties, social and otherwise (and principally probably the first), shall come to a conclusion as to what paraphernalia ought to be used in running the 40,000 or 50,000 miles of railroad in the country, it seems to me, is absurd. If it is not absurd, no such power ought to be attempted to be used by the General Government.

I think the only exception we have made is in the matter of ocean transportation. There are certain devices which the law requires to be used on all steamships and other vessels. But this is the first attempt at legislation by the General Government in the direction of the management of railroads. It will unquestionably lead to one of two things. We shall go on increasing the power of this commission to an utter failure of our attempt to give the country the relief it ought to have in preventing discrimination against individuals and localities, the robbery of the public by these corporations, or else it will lead to more corruption in that office than has ever been known in the history of this country.

. . .

MR. CULLOM. . . . So this subject has been before the Interstate Commerce Committee I think for three or four years, and from time to time we have heard gentlemen representing railroads and representing the employees of railroads and we have felt a degree of uncertainty heretofore (at least before the last session of Congress) in regard to the matter. We felt that we were not prepared to formally recommend any legislation on the subject lest we might recommend something that Congress ought not to do.

In the mean time the President of the United States has been calling upon Congress to act. In the mean time, as I said the other day, railroad commissioners of States have been calling upon us to act. In the mean time the labor organizations whose members have had the work to do in the conduct of the railroads have been calling upon us to act. But there was such a diversity of judgment as to the kind of action we ought to take that we thought we were justified in letting the matter wait for the development of further information on the subject.

However, during the last session of Congress the Senate committee acted, and acted upon the House bill which is now before us, and reported a substitute for that House bill, which, I may say frankly, is more liberal to the common carriers of the country than the House bill itself. The desire of the committee, so far as I know, has been that something should be done upon this question that would give the common carriers or railroads of the country to understand that they must put these devices or some devices upon their cars and their locomotives to give greater security to the lives of the men who are operating the railroads.

. . .

Still the Senate of the United States, I may say, because perhaps the bill was in the control of the Interstate Commerce Committee, has

taken no action. We have let it rest and continue to rest hoping that we might arrive at something that would be certain to result in the very best possible interest of the men operating the roads. In the mean time the national conventions took up the subject. I do not refer to it myself for the purpose of making this a party discussion, but to show that the Senate itself ought to take some action if it has any regard for pledges to the country as Democrats and Republicans. Let us see what the national conventions say. Take the Republican platform adopted at Minneapolis:

> We favor efficient legislation by Congress to protect the life and limbs of employees of transportation companies engaged in carrying on interstate commerce, and recommend legislation by the respective states that will protect employees engaged in State commerce, in mining and manufacturing.

Then the Democratic convention at Chicago adopted the following:

> SEC. 19. We favor legislation by Congress and State Legislatures to protect the lives and limbs of railway employees and those of other hazardous transportation companies, and denounce the inactivity of the Republican party, and particularly the Republican Senate, for causing the defeat of measures beneficial and protective to this class of wage workers.

MR. KYLE. I should like to ask the Senator from Illinois a question just there.

MR. CULLOM. Certainly.

MR. KYLE. In regard to the suggestion made just a few minutes ago by the Senator from Colorado [MR. WOLCOTT], that the measure is brought forward at the instigation of a number of patent holders, who wish to have these devices put into operation by the railroad companies, is it not true that the men who came to the great conventions of the Democratic and Republican parties, the persons who appeared before the committees there to get such a plank placed in the platforms, were the representatives of the great labor organizations of this country, persons who represented the railroad employees of the United States, who number thousands upon thousands?

MR. CULLOM. Unquestionably that is true. As the Senator from South Dakota has referred to the matter of patent lawyers and owners of patents pressing upon the committee, I desire to say that while there may have been hundreds of gentlemen who sought to come before the committee with particular devices, the committee has always absolutely refused to hear anybody on the question of a particular device.

We have said to them, "We have nothing to do with your patents; we simply desire a uniform coupler that will be adopted by the common carriers of the whole country so that the laboring men engaged in the operation of the cars and trains shall be protected in their lives and limbs as far as possible when they undertake to couple cars together." That is all we desire, and any suggestion that patent lawyers and patent owners have had any influence with the Committee on Interstate Commerce is absolutely without foundation in fact.

. . .

MR. GEORGE. I should like to ask the Senator a question, which appears to me a very pertinent one. The first provision I see in this bill, which I think is extraordinary and unprecedented and carries the power of Congress beyond anything I have ever before heard of, is that it is made the duty of common carriers to adopt as the standard type of automatic couplers that type which shall have been considered and adopted by a majority of the railroad companies in the United States engaged in interstate commerce. That is in section 2.

I should like to know by what authority Congress can confer upon the railroad companies of the United States, a majority of them, or any number of them less than the whole, the power to bind the minority in reference to a regulation of interstate commerce as defined in this bill. How is it, I should like the Senator to explain, that Congress can abdicate its power to make a rule regulating interstate commerce and leave that power to be exercised by an association of the railroad companies of the United States agreeing upon a certain thing?

It seems to me—and that is the point to which I wish to call the attention of the Senator—that this bill, instead of being a regulation of commerce by Congress, is a delegation of the power to regulate commerce to an association of railroad companies, of course an association not recognized or known in the Constitution. I should like the Senator to explain that.

While I am up I wish to call the Senator's attention to another thing very much like the matter which I have read from section 2. I find in section 5 the following language:

> That within ninety days from the passage of this act the American Railway Association—

I understand that to be a voluntary association of railroad companies. They are not officials of the United States; they are not sworn officers of the United States. The language continues:

> The American Railway Association is authorized—

To do what?

> to designate to the Interstate Commerce Commission the standard height of draw bars for freight cars.

Then the Interstate Commerce Commission is to adopt them. I should like to know by what authority in passing a law regulating interstate commerce Congress can decline to exercise that power and confer it upon the American Railway Association? That is the point to which I now desire to call the attention of the Senator.

. . .

MR. CULLOM. Mr. President, in the first place Congress has the power to regulate commerce among the States and with foreign nations, etc. Congress, as a body of men, can do nothing more than pass a law providing for the regulation of commerce among the States and with foreign nations, etc. In order to enforce a law for the regulation of commerce among the States somebody outside of Congress must exercise the power as the hand of Congress.

In the first place we passed a law for the regulation of commerce and provided for a Commission to stand as the representative of

Congress. Is not that so? It seems so to me. That Commission proceeded to perform its duty in pursuance of the statutes passed. A majority of that Commission can decide a case or make an order, can require a railroad company—unless the case goes to the courts—to do whatever it says in reference to the price of transportation or as to questions of unjust discrimination, etc.

The courts have decided that regulation of interstate commerce or interstate commerce itself not only applies to the articles transported from one State to another, but that the Government has the right to determine the vehicles in which this commerce shall be transported. Mr. Justice Johnson, in the case of Gibbons vs. Ogden, defined "commerce" as follows:

> Commerce, in its simplest signification, means an exchange of goods; but in the advancement of society labor, transportation, intelligence, care, and the various mediums of exchange become commodities, and enter into commerce; the subject, the vehicle, the agent, and their various operations become the objects of commercial regulation.

I am myself unable to see any difference between the passage of a law providing for a commission to settle the question of what kind of device shall be put upon cars engaged in interstate commerce by the designation of some outside organization, if you please, who are experts, and who are not railroad owners by any means, but who are scientific men, and who can determine better what, in the interest of commerce and the protection of life and property, the device ought to be, than Congress itself or the Interstate Commerce Commission; I do not myself see any difference between the designation of that association who shall determine in some way what the devices shall be, and Congress itself determining the question, or the Commission which has been provided by the interstate commerce act.

Therefore, as the best means of arriving at what is the best legislation and the best devices for the protection of life and limb, the Congress of the United States proposes to designate this particular association. It simply authorizes them to do it. If they decline to do it, then we provide that the Interstate Commerce Commission shall do it, but the purpose of the Interstate Commerce Committee has been to keep as clear as possible, so far as Congress is concerned, of any responsibility for the selection of any particular device by its own vote or by its own examination of the several devices which have been made in the country. So I do not think, in all fairness, that the point made by the Senator from Mississippi is really a good one.

[In subsequent debates, Section 5 was amended to appear as on p. 181 above, but the reference to the Railroad Association was kept in.]

February 7, 1893: Safety of Life on Railroads

THE VICE-PRESIDENT. The Senate resumes the consideration of the unfinished business.

The Senate, as in Committee of the Whole, resumed the consideration of the bill (H.R. 9350) . . .

MR. CULLOM. Mr. President, I see that the pending bill is to have a tolerably hard road to travel in the Senate of the United States, but I am inclined to think that if we can ever get to a vote upon the question such a bill will receive the sanction of the Senate.

. . .

I will state that the first section of the amendment reported by the committee as a substitute for the House bill simply provides that after the first of January, 1895, it shall be unlawful for a common carrier engaged in interstate commerce by railroad to use on its lines locomotive engines in moving interstate traffic not equipped with power driving-wheel brakes and appliances for operating the trains, etc., the section requiring only a sufficient number of cars, to be so equipped as will enable the engineer to control the train.

There is nothing in the section that has any reference to the Interstate Commerce Commission or to any board outside in determining anything about it. The naked proposition is that it shall be unlawful after a given date to run locomotives not equipped with power brakes, or to run any train in interstate traffic which has not a sufficient number of cars in it so equipped with power brakes that the engineer can control it.

Now, as to the second section, that applies exclusively to what we call automatic couplers. An automatic coupler to equip a car costs about $25, while the power brake to equip a car, according to the testimony, costs from $45 to $75. There is a pretty large difference between the two, and that is what called my attention to the question whether the time as to brakes was not too short. There is no outside influence or power that has anything to do with the determination of what kind of coupler shall be used except the railroads themselves. . . .

When we first began to investigate this question there were about 1,000,000, but now there are something over 1,100,000 freight cars in the country. The only provision in the bill in reference to what kind of a coupler shall be used, is that the roads themselves shall determine it by a vote or whatever means they may arrive at a determination, and when those controlling 75 per cent of the cars vote or report to the Commission that a certain coupler is adopted, then the Interstate Commerce Commission proclaims that fact, and that is the standard coupler.

The Committee on Interstate Commerce has been desirous all the time of avoiding all legislation that would look as though Congress was determining any specific type of coupler.

We have kept patent owners away from us. We have kept every one whoever it was away from us who desired that any specific patent should be adopted by the Congress of the United States. The committee thought that the scheme specified in the bill was as simple and as just and as fair a way to arrive at what the standard coupler should be as any other.

. . .

MR. HARRIS. In this exact connection I should like to ask my friend from Illinois if he is not satisfied by the testimony which has been given

before his committee that the railroad companies of this country are adopting the automatic coupler, the self-coupler, as rapidly as in their financial condition they can afford to do. Such is my recollection of the testimony which has been given before the committee.

If that be true, while all of us desire safer appliances of every description that will protect life and limb, still it is a question as to exactly how far we should coercively go to compel companies to adopt one particular thing, and while the thing adopted may be regarded as the best to-day it may be utterly discarded day after to-morrow.

MR. CULLOM. In response to the inquiry of the Senator from Tennessee, I will state that most of the railroads, and I might say all of them, insist that they are doing the best they can. I agree that they say that, but while they are saying that, not one-third of the freight cars of the country are equipped with these brakes or couplers. While that is true, and while the railroads are going forward at their own gait putting some on every year, the laboring men, the employees of the roads, the switchmen, the yardmen, the men upon the tops of the cars, are complaining that the roads are not putting them on as rapidly as they ought to be put on.

MR. VILAS. Mr. President—

THE PRESIDING OFFICER. Does the Senator from Illinois yield to the Senator from Wisconsin?

MR. CULLOM. I do.

MR. VILAS. I should like to ask the Senator from Illinois, who has given a good deal of attention to this subject, if he has known any instance in which any of the railroad companies deferred paying dividends in order to add these facilities to protect the lives of their employees?

MR. CULLOM. I am obliged to the Senator from Wisconsin for asking me that question. The truth is, Mr. President, that while the railroad companies insist that they are doing the best they can, they are looking to their finances more than to the protection of life and the security to limb of the men operating their trains.

MR. WOLCOTT. May I ask the Senator from Illinois a question?

MR. CULLOM. Certainly.

MR. WOLCOTT. The Senator stated with great warmth and a good deal of feeling the unfortunate situation of the railroad employees. I desire to ask him if it is not a fact that the Association of Switchmen, in convention assembled, protested against the adoption of anything except the link and pin coupling. I also desire to ask whether that fact does not appear in the testimony of our committee?

MR. CULLOM. I will state what I think the testimony does show. Some link-and-pin men came before our committee, as I remember, and said if we were going to allow this matter to drag along, making only a little improvement each year, it would result in making confusion worse confounded, and they would rather go back to the old link-and-pin arrangement, for then they would know what they had to deal with.

MR. WOLCOTT. I know the Senator from Illinois is extremely anxious to state the fact as it really exists. If he will turn to page 106 of

the testimony, which was taken under the supervision of the chairman of the committee, he will find the following statement, made under date of September 24:

BUFFALO, *September 24, 1892.*

> The switchmen's convention last night selected Philadelphia as the next place of meeting. On the question of car couplers the vertical plane or carbuilders' type was almost unanimously condemned, the members citing the crippled delegates as a result of the many patent couplers used, and a motion was made and carried indorsing the link and pin bar with a recess on the side that affords protection to the operator.

I ask the Senator if I have not fairly stated the testimony.

MR. CULLOM. Of course, if the Senator reads it.

MR. WOLCOTT. I ask if that does not look as if there was some objection to this proposed legislation by the switchmen themselves?

MR. CULLOM. I do not raise any question about the testimony being as the Senator has read it.

MR. HISCOCK. I wish to interject a question which is somewhat in response to the question asked by the Senator from Wisconsin [MR. VILAS] and also pertinent in view of the remarks which have been made. Is it not true that committees of mechanics connected with the railroad companies have absolutely failed in any such committee or conference—whether of three or five I do not know—to secure a majority, even, of any commission appointed in favor of any one device?

MR. CULLOM. Referring to the testimony as read by the Senator from Colorado [MR. WOLCOTT] and suggested by some other Senator, it is true that there was more or less confusion or difference of judgment as expressed to the committee by the witnesses coming before us. For instance, Mr. Crocker, of Boston, who for a number of years was one of the railroad commissioners of Massachusetts, had a bill of a particular kind and came before us advocating it. One of the railroad commissioners of the State of New York also had a bill a little different.

Mr. King, I believe, representing a large labor organization or organization of employees of railroads, had a still different bill; so the men who had been giving the question attention differed as to the particular kind of bill that ought to be passed. So the switchmen, the engineers, and the yardmen all came before us, and some of them wanted one kind of legislation and some another. But all of them, I may say, wanted some legislation that would result in a uniform coupler, and in power brakes being placed upon the engines and cars for the protection of life.

Very few of them, if any, were willing to allow the situation to remain as it is, with one railroad putting on one kind of a coupler, another putting on another kind, and all of them going on at a slow pace, but all together doing something which resulted, as these employees used to say, in a degree of uncertainty as to the kind of cars with which they had to deal that caused a greater loss of life every year than the previous year.

The proposition was that if that situation was to continue they would rather go back to the old principle of the link and pin, and then when a switchman stepped behind a car, waiting for an engine to back up with another car to be attached to it, to couple them together, he would know with what he had to deal. But if he stood there in the dark, with his lamp in his hand, and an engine was backing up a train of cars to be coupled to the one he stood behind, not knowing what kind of a coupler was coming, he said the danger was greater because in that case he did not know what to expect.

. . .

I have been furnished a table showing the mortality and the injuries that have occurred to employees of railroads within the last four years, being the years 1888, 1889, 1890, and 1891 up to June 30. This table shows that in the year 1888 there were killed, 2,070; injured, 20,148. In 1889 there were killed, 1,972; injured, 20,028. In 1890 there were killed, 2,451; injured, 22,396. In 1891, up to June 30, the end of the fiscal year, and as far as we have the statistics, there were killed, 2,660; injured, 26,140.

I submit, in the light of the figures contained in that table, whether Congress ought to hesitate one moment in passing whatever reasonable legislation may be agreed to in order, if possible, to reduce the number of casualties among the gallant men who are operating railroads and engaged in the yards in coupling and switching cars.

MR. FAULKNER. If the Senator from Illinois will permit me, I have had some doubt in examining the report of the committee, and I have the same doubt now, and I desire to call the attention of the chairman of the committee to it, in connection with the table which he has furnished us. That doubt is as to whether the killed and injured he speaks of during the several years are those who were injured by reason of having to couple cars or whether they were injured generally in the railroad transportation service of the country.

MR. CULLOM. I have a table before me which answers the Senator's question. After giving the figures I have stated, the table goes on to show that in coupling and uncoupling cars in 1891 the number killed was 415, or 15.6 per cent of those employed; that in 1890 the number killed was 369, or 15.5 per cent of those employed; and in 1889 the number killed was 300, or 15.21 per cent of those employed. The figures are not given here for 1888.

. . .

MR. WOLCOTT. Then, according to those figures, only 3,000 were engaged in train service in the United States. I do not think the Senator from Illinois intends to make any such statement as that.

MR. CULLOM. I do not know whether the figures are correct, but—

MR. DOLPH. I understand that the percentage given of killed is the percentage of those employed in moving trains.

MR. CULLOM. It is the percentage of total number killed.

MR. WOLCOTT. Not employed. There is some difference between the two kinds of employment.

MR. CULLOM. Now, I want to give some statistics as to the number injured. I have not the figures for 1888. In 1889, 6,757 were injured, being 33.74 per cent of the total number injured. In 1890 there were 7,842 injured, or 35.2 per cent of the total number injured. In 1891 there were 9,431 injured, or 36.8 per cent of the total injured.

All these tables show that the attempt on the part of the common carriers to put on different devices, slow as they have been in putting them on, has resulted in greater injury and a greater number of killed as a consequence of the confusion existing in reference to the coupling of cars, the fact being that the greater the number of improvements, until we reach a particular point of uniformity, the greater the confusion will be. But when the cars shall all be equipped with an improved coupler of a certain type, then the men engaged in coupling the cars will know with what they have to deal.

MR. FAULKNER. I ask the Senator whether we are to understand that the effect of the bill would be to cause more rapid progress to be made by the companies in having couplers attached to their trains, and whether we are to expect then a greater number of injuries and a greater number of deaths during the next five years.

MR. CULLOM. I hope not. I hope that the passage of this bill will result in a conclusion on the part of the railroad men or those controlling or owning the roads that they will put these appliances upon their cars and locomotives as rapidly as possible. As soon as they do that, then the extraordinary number of deaths and injuries will to a great extent, I trust, cease.

. . .

I assume that these statistics are correct, because they were furnished me by a statistician. With that table of facts before the Senate it does seem to me that if we have any regard for human life we ought to do something that will hasten the time when this tremendous slaughter shall cease, if we can do anything to bring about that situation.

MR. FAULKNER. I should like to ask the Senator from Illinois if he can state to the Senate the relative proportion or percentage of killed and wounded on railroads as compared with the number killed and wounded in other dangerous occupations, so as to compare the results in this occupation with other dangerous occupations, such as mining, engineering, etc.

MR. CULLOM. I am sorry I can not furnish the Senator with statistics as to any other vocation.

. . .

I have here a little paragraph that I desire to read, and which I think is rather forceful. The total number of railway employees June 30, 1890, was 749,301. The number killed during the year ended on that date was 2,451, and the number injured was 22,396. Of the above total of 749,301 employees, 153,235 were directly engaged in the train service, of whom 1,459 were killed and 13,172 injured. That is to say, out of every 105 men directly engaged in the handling of trains 1 was killed, and out of every 12 men so employed 1 was injured. In fact, it is

proved by the statistics that the total loss in killed and injured in eight years is equal to the total number of men engaged in this service at any one time.

That seems to me to be a striking fact, if true, and one that ought to startle every man into the feeling, if he had it not before, that something should be attempted to be done to put an end to this indiscriminate slaughter.

. . .

I said a while ago that such gentlemen as Mr. Crocker, of Massachusetts, came before the committee urging strenuously that Congress should adopt some legislation, for the reason that the States could not do it; that every State set up for itself; that every State had its own notions as to what devices should be put on trains, and that the result was that whatever the States undertook to do would only bring about confusion worse confounded.

As evidence that this is true, the State commissioners have held their meetings here annually for three or four years, and in every instance have petitioned Congress to take some steps upon this question because their own action would amount to nothing so far as concerns bringing about uniform couplers. The Massachusetts Legislature—and I do not see the Senator from Massachusetts [Mr. HOAR] in his seat—appointed a committee to visit Congress, and that committee was heard by the Interstate Commerce Committee of the Senate. They urged upon us the importance of acting upon this question.

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MR. HUNTON. Mr. President, notwithstanding the very attractive, and even seductive, title to the bill, I have not been able to give my assent to its provisions. The title of the bill is:

> To promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes, and their locomotives with driving-wheel brakes, and for other purposes.

There is not a Senator upon this floor, I take it for granted, who does not sympathize with any legitimate effort that can be made to lessen the number of casualties to travelers and employees upon the railroads of the country. But it is a fact which everybody will admit that a railroad life is one filled with hazards. A person who takes his seat in a railroad car as a passenger, or one who takes employment at the hands of a railroad company, knows that he is subject to disasters unavoidable in themselves, and the employee knows that he is engaged in a business which four times out of seven will ultimately result in his injury, notwithstanding all the efforts that can be made to prevent it. Notwithstanding all that has been said upon the subject, I believe the history of railroad employees will show that wherever there is a vacancy now in any position upon a railroad car or in railroad employment, there are from five to ten applications for that place.

I believe, for one, that a railroad, operated by men who have devoted their lives to the science of building and operating railroads, will be better conducted by the officers of that company than can possibly be done by the Congress of the United States, by the Interstate Commerce Commission, or by the American Railway Association, or even by a Democratic or Republican national convention assembled to nominate a President of the United States.

In the first place, a railroad company is bound to keep itself abreast of the improvements going on in railroading, and I understand, according to the decisions of courts on the subject, a railroad company that falls behind the march of improvement in railroad machinery and appliances is liable to anybody injured if that injury results from the failure of the company to have secured the very best machinery in the world that is known to the trade. So I say it is the duty, as well as to the interest of the railroad company, to adopt the best machinery, the best locomotives, the best couplers, and the best brakes, because the history of railroads throughout this land shows that if they fail to do so, and injury results to a passenger or employee on account of that failure, that company is held responsible for damages ensuing, which damages greatly exceed in the aggregate the cost of putting the improved machinery upon the railroad.

MR. WHITE.[2] May I ask the Senator from Virginia a question?

MR. HUNTON. Certainly.

MR. WHITE. Do I understand the Senator to say that the state of the law is such that if an employee is killed or injured upon a railroad which uses the link-and-pin coupling, the railroad company is responsible?

MR. HUNTON. I undertake to say that, according to my understanding of the law, if the railroad company has not good machinery and appliances and is not well abreast of the improvements of the times, and, by reason of failure to get that best machinery, a passenger or employee is killed or injured, the company is liable. I do not think that can be disputed. I think my friend will admit that.

MR. WHITE. I think the Senator is far out of the way in his law. I think the courts have held that if the appliance is the one normally used, then the railroad company is only bound in that respect to ordinary diligence; that although the proof may be overwhelming that there existed better machinery than was used, that there were better appliances than were used, yet if the machinery and appliances which were used were those normally used, that justifies the railroad company and it is exempt on that account. If the Senator from Virginia has any law supporting the proposition which he states, I shall be glad to have him refer me to it.

MR. HUNTON. I have not had time to look up the cases upon the subject, but there is not very much difference between the Senator from Louisiana and myself upon the question. We know that the courts have decided (and the Senator from Louisiana will not controvert the proposition) that if the machinery used by the railroad company is

[2] Edward White, Senator from Louisiana, became Associate Justice of the Supreme Court in 1894 and Chief Justice in 1910.

defective, and that by reason of the use of that defective machinery accident occurs by which a passenger or employee is killed or wounded, the railroad company is responsible.

Mr. President, I beg to call the attention of the Senate to a fact stated by the Senator from Maryland [MR. GORMAN] yesterday, that it has been proved before the Interstate Commerce Committee of the Senate, upon the testimony of an expert, that it would cost the railroad companies of this country . . . $75,000,000 to $100,000,000 to comply with this proposed law.

MR. CULLOM. Suppose it does.

MR. HUNTON. I beg to say that in my section of the country the railroads are to some extent to-day in the hands of receivers, and the companies originally owning them are not able to keep the roads in operation under the present law. If the $75,000,000 to $100,000,000 involved in the attempt to comply with this measure is put upon the burdens already existing and under which they are laboring, I ask the Senator from Illinois to state how many more railroads in the country must go into the hands of receivers.

MR. HOAR. May I ask the Senator from Virginia a question?

MR. HUNTON. Certainly.

MR. HOAR. Suppose the adoption of the plan proposed by the railroad commissioners in certainly a good many States, and also by the railroad commissioners of the United States (otherwise it would not be effective), as well as by the committee, will save a loss of between three and four thousand human lives annually, and the wounding and injuring of some twenty thousand human beings besides, and they are not to be saved if things go on as they are now, would not the Senator require the expenditure of that $50,000,000 to do it?

. . .

MR. HUNTON. There is no difference between the Senator from Massachusetts and myself upon the duty of the Senate of the United States, or of any other body of men to do whatever is in their power to save human life. But, Mr. President, that was not the point I was arguing. I was arguing that the railroad companies are themselves interested to save the lives of their employees and passengers, and that they will do it better, that they will save more lives than if the management of their roads is taken out of their hands and put into the hands of the Interstate Commerce Commission, or the American Railway Association, which I understand is a voluntary association not liable to anybody, or responsible to any human being, except themselves.

Mr. President, I was arguing the point that the Southern railroads particularly have not the money to spend to go into the new equipment for in the pending bill. They have not the money to spend, and the question is if this bill passes, shall the railroads cease to carry passengers and to take into their employment laborers to run their trains, or shall they be allowed to carry on their railroads and perfect these arrangements and make these improvements as soon and as fast as they can? The testimony taken before the committee, I understand, was to the effect that these very improvements are going on day by day

throughout the whole country, and, according to the answer to the question asked by the Senator from Wisconsin [Mr. VILAS], they would have to postpone absolutely all dividends in order that they might carry out these improvements.

But what I meant to say when I rose was that I believe human life would be safer and the railroads would be run better for the preservation of human life if the management of the roads were left to the companies than if they were turned over to the American Railway Association or the Interstate Commerce Commission. For that reason, sir, I am opposed to the provisions of the pending bill.

. . .

MR. CHANDLER. I said that nearly every locomotive in the country, whether engaged in hauling passenger cars or freight cars, has a power driving-wheel brake of its own. Then I say that a large proportion of them have appliances for operating train brakes, and that a sufficiently large proportion of the freight cars of the country to-day are equipped with brakes which can be operated from the locomotive. I doubt if there is a freight train running to-day upon any of the great roads in this country which has not upon it the brake which the first section of this bill requires. That being the case, the House thought that it was sufficient to give until July 1, 1893, for the enforcement of the provisions of the first section, but the Interstate Commerce Committee of the Senate have substituted the 1st day of January, 1895, instead of the 1st day of July, 1893, and the Senator from Illinois has intimated a willingness to have even that time extended.

Now, we come to Section 2. In reference to the requirements of that section, the House bill gave until the 1st day of January, 1895. It was the judgment of the House committee and the judgment of the house that on the 1st day of January, 1895, we could have automatic car couplers upon all the freight cars in this country, or upon a sufficient number of them to fortify an imperative rule that all cars should have such couplers; but the Senate committee has changed that date to 1898, in order that there may be no complaint that anything unreasonable or harsh is being enacted in this bill.

The Senate committee adopted as a final clause one which it seems to me ought to stop anyone here from applying any term of opprobrium to this bill, because it is admitted by everybody that in the progress of railway improvement in this country the time is to come somewhere in the future when there shall be automatic car couplers. The Senate Committee on Interstate Commerce concluded to insert the last provision of the bill, section 7:

> That the Interstate Commerce Commission may from time to time upon full hearing and for good cause extend the period within which any common carrier shall comply with the provisions of this act.

The whole point and force of the bill has been taken out of it by that clause. It has seemed to me, when I have reflected upon it, a mistaken concession to the railroads of the country, after giving this long period of time in which they are required to do this thing, to then say that if they are not able to do it, they may go to the Interstate

Commerce Commission and be relieved entirely from all obligation to comply with the provisions of the law; but there it is. It is the proposition of the chairman of the committee, and as such I support it.

With that provision, however, this bill is made as gentle and as ineffective and as inoperative as a resolution of the Democratic national convention; and I can imagine no term which will describe the feebleness and worthlessness of a statute than the comparison I make in view of the disregard of the resolutions of that convention by Senators of the Democratic Party upon this floor. I am amazed that Senators when they have succeeded—no, I will not say that they have succeeded—but I am amazed when somebody has succeeded in so lengthening out and whittling down the provisions of the bill and then getting into it a provision that it may be utterly abrogated as to any railroad company which can convince the Interstate Commerce Commission that it ought to be abrogated as to that railroad company, that then anybody should come here at this late day in the session, with the universal, popular demand there is for some legislation on this subject, and undertake by one means and another and by one suggestion and another to prevent the passage of a bill which, while it looks in the right direction, is not a bill, I am free to say, which the Congress of the United States owes it to the 750,000 railroad employees, owes it to the switchmen and the car couplers of the country to pass.

. . .

Just imagine what takes place every time a freight train is made up. A railroad employee, a laboring man, is asked to step inside the track, stand up against a car which is not moving, and watch the coming of another car, which is being pushed steadily up against the car near which he stands. It is being pushed up by the locomotive away at the farther end of the train, 100 cars off perhaps, the engineer utterly unable to see the space which is to be filled up by his train, pushing the train back, back, back, watching perhaps for a wave of the hand or a wave of a lantern to tell him when he has gone far enough. With that engineer moving that train this long distance off, there stands the railroad's employee waiting until the cars come up near to him, which a few inches nearer would destroy him. Then if the dead wood come together and his life is saved, he is to couple the cars.

I think it is a horrible custom; I think that the sooner it is done away with, whatever the expense may be to the railroad companies of this country, the better. It has been done away with as to passenger cars. We do not hear of any loss of life in coupling passenger cars. The killing of railroad men engaged in coupling passenger cars is entirely done away with, simply because the railroad companies of the country have put safety couplers on, and their workmen do not go in between the passenger cars to couple them. It is entirely done away with, while the horrible requirement exists as to freight cars.

. . .

MR. HAWLEY. Mr. President, I have been listening with some interest, and have summed up what seem to me are substantially the conclusions of those who are opposing the bill. In the first place, they

say the railroad companies can do this work better than anybody else. They also allege that the railroad companies are doing it. Then I have heard another one arguing that they are not doing it because they do not know what to do. Another one says, you can not do much at it anyhow; railroading is a very dangerous business; and they proceed also to say substantially that they can better afford to let the killing go on because it will take $75,000,000 to prevent it. These reasons are slightly contradictory.

While I have great respect for the wisdom and power of the managers of the railroads of the country as a body, I do not believe them when they say the railroad companies can do this work better than anybody else. They say they will do it because they have a pecuniary interest in avoiding damage to property and in saving lives. So they have, and so has every citizen the highest possible interest in taking care of the sanitary condition of his own house, but the law does not trust him to do it.

The Senator from Virginia [MR. HUNTON] was arguing a little while ago that the railroads are more likely to do it because they have an interest in doing it. At the same time he can not be allowed to let the sewage of his house run all over his own land at random. He has got to obey the plumber. He can not be allowed to build a house just as he pleases, because he must take some precautions against fire.

When it comes to the question of contagious diseases you would suppose he would be sure to take a great deal of care, but the law does not trust him to do that; it does not trust him to take care of his own children; it does not trust him for fear there may be danger of contagion to the children around him. In fact, the thing known as government, whether it be a State or city government, does not trust any of you in the substantial things of your life.

MR. WHITE. Will the Senator from Connecticut allow me?

MR. HAWLEY. Certainly.

MR. WHITE. The report of the committee shows that for the year 1890 there was an increase of 94,787 cars in the United States, exclusive of those in the passenger service, and only 16,287 of them were equipped with train brakes, and only about one-third of those put in use during the year were fitted with automatic couplers.

MR. HAWLEY. I thank the Senator. I remember hearing the Senator from Illinois say the other day that somebody—I do not know who it was—had built 18,000 cars during the last year, and had made no provision upon them whatever in the nature of safety couplers.

I affirm that the railroad companies are not better adapted to take care of this matter than the Government. I say they will not do it and can not be trusted to do it, and they ought not to be trusted to do it. I say that without any disrespect whatever to anybody.

. . .

MR. WOLCOTT. . . . Mr. President, there is no question that a uniform coupler is a desirable thing. Any device which will minimize danger, any device which will minimize labor, any device which will

quicken the transaction of the business of the railroads is desirable. We are all agreed upon that.

It is desirable that all railroads should have double tracks. There are infinitely more people killed by collisions on single-track railways every year than are killed coupling cars. It is most desirable that all over crossings to railroads should be built higher than they are or the roadbeds of railroads sunk lower than they are. It is desirable that substantial railings or other appliances be put around the tops of cars so that those engaged in walking upon them shall not fall off. More people are killed every year by falling off cars or by being pushed off by bridges than are killed by coupling cars.

It is most important that the danger at street crossings should be done away with. It is more dangerous to cross Pennsylvania Avenue at Ninth Street than it is to act as brakeman of a car between Washington and New York. It is most desirable that some measure should be passed that such crossings be elevated. There is danger in stairs. There is danger in steps. There is danger in almost every walk of life.

It is most desirable that so far as we can we should take measures to minimize danger to human life. We fixed upon railroads because it is so easy to legislate respecting other people's property. There is nothing so cheap and so easy and so pleasant to the average mind as to get up and talk about railroad men who live in palaces and make their fortunes on watered stock, and to regret from the bottom of their souls that some measure respecting other people's property is not a great deal more drastic than it is. That is easy; that is common; but it is not fair legislation.

In my opinion the man who is afraid to stand up and protect vested interests when they need protection, whether the substance of the proposed measure be included in party platforms or not, and whether the provisions appeal to the good sense of the different organizations of labor, federated or unfederated, is not fit to legislate for the American people. For our interests, the interests of the whole country, are wrapped up in those of all our citizens, and there should be no objects of more intelligent legislation than the vast railway interests of the United States, in which the small savings of people all over the land are invested.

I am in favor of everything that will protect human life. I am in favor of going to the extreme measure of our rights respecting such legislation; but I am unwilling to proceed blindly and foolishly to the enactment of legislation which can serve no good or useful purpose, solely because the object against which the legislation is aimed is a corporation or a railroad and I may thereby earn some cheap applause from people who, having nothing, desire that the rest of the people of the world shall have nothing.

. . .

Mr. President, there is not a railroad in the United States that pays a dividend or has paid a dividend for five years that has not adopted the most approved coupler which can be found.

MR. CULLOM. Will it interrupt the Senator if I make a statement at this point?

MR. WOLCOTT. Nothing interrupts me from the Senator from Illinois.

MR. CULLOM. I simply wish to state in connection with the remarks of the Senator from Colorado that the railways of the United States for the year ending June 30, 1890, received $23,367,873 from the Government for carrying the mails; and that for the year ending June 30, 1890, the railways of the United States paid in dividends on common stock $71,707,212, or 5.73 per cent, and they paid in dividends on preferred stock $15,364,401, or 4.42 per cent.

MR. WOLCOTT. I suppose to the average Grange audience to which the Senator from Illinois may be in the habit of appealing that statement carries some sense of conviction with it, but every man who knows anything about railroading knows that the dividends which have been paid on railroads to which the Senator refers are limited to the few trunk lines. Everybody knows that the great trunk lines of the country, the large railroad companies, are the companies which are prosperous, are the companies which pay these dividends, which seem to me quite reasonable. Everybody knows that the small branch lines, the feeders, the new roads in unsettled parts of the country, are, 90 per cent of them, without dividend earning power. Those are the roads which are to be affected if the bill becomes a law.

The Pennsylvania Railroad, the New York Central Railroad, the Baltimore and Ohio Railroad, the great lines running out of Chicago, have every appliance known to invention. They are not to be affected by this measure. They have already the vast proportion of their rolling stock equipped as this proposed law provides, and they will have the rest of their stock so equipped as it is turned into the shops for repairs.

This measure, which in its coupling provision alone requires an expenditure within the next five years of from fifty to eighty million dollars, will fall almost exclusively upon the smaller lines of the country, largely upon the Southern railroad lines. We had a statement made before the Interstate Commerce Committee by the representative of the Trunk Line Association of the South in which he was backed by figures and statistics, and he satisfied at least a majority of the committee that the necessary and essential result of the passage of this measure would be to send many of the roads within his Trunk Line Association into the hands of a receiver.

He stated what is true, that while the risk is great the brakemen and the switchmen along the lines of the road receive double the pay of the farm hand and the average laborer. He is paid for the risk. He is paid for the skill. He stated that as they had new cars equipped they had them equipped so far as possible with this coupler, but if they were compelled to turn their cars in now and have them changed they could not do it and operate their railroads.

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MR. WHITE. I do not want to interrupt the distinguished Senator in his very interesting and able argument, but—

MR. WOLCOTT. You do not.

MR. WHITE. I should like at sometime for my enlightenment as he goes on in his argument, if it does not disturb him, to notice one point. I

find this difficulty in my mind. Taking all the statements which the distinguished Senator has made as accurate, how does that meet the difficulty that the railroads using their best endeavor at the present time, this best endeavor being used upon different roads, reach different conclusions upon different roads? Road A, using its best endeavor, reaches one conclusion and puts in one form of appliance; road B, using its best endeavor, puts in another form of appliance. If those two appliances brought together, because of their want of uniformity beget fatality to human life, does the argument of best endeavor remove that difficulty?

MR. WOLCOTT. No, it does not. The sum of the situation is simply as I shall state. There are five thousand patents. The vast majority of railroads in the United States say that a certain type which embraces some twenty-nine different patents is the best type yet invented and the type that should be adopted. Practically all the railroads—122,000 out of 170,000 miles—say we will try that, and as fast as we are able to do it we shall do it. They are spurred on by the awful penalty they pay for every employee they injure or every employee they kill.

There are outside of the association other roads who believe, as I said a moment ago, that the last word has not been said upon this question and they are groping and seeking for something better. They are also spurred on by the same necessity. I say that out of their efforts, out of the self-interest which prompts them, out of the humanity which animates a railway manager to the same extent that it does a Senator of the United States who inveighs against him, with every constant incentive to the best, they themselves are infinitely more able to devise and apply that which shall save human life and reduce the danger to a minimum than is a Senate ignorant of what a coupler means, or the appliance of an air brake, or an Interstate Commerce Commission, which seems to be seeking to aggrandize to itself the management of railroads even to the couplers which they shall use. That is what I mean to say, and I have answered the Senator's question so far as I can.

Mr. President, this bill comes in under the guise of humanity. No man wants to stand up here and say that there is any sacrifice he would hesitate to make in the interest of human life. The destruction of life by coupling is tremendously overstated. The proportion of it that would continue to exist if we had the patent couplers is almost as great, in my opinion, as that which now exists.

I remember when the roads, in the time of the link and pin days, furnished (and it was adopted by almost every line of railroads in the United States) a long stick with a scabbard and required the brakemen to go between the cars with the stick and couple the cars. They had a school of instruction in all of the railroads. They all had it. It was common to them all. If the scheme were faulty the danger was reduced to a minimum. But the switchmen and the brakemen, daring, impetuous, and proud, said always, "This is the scheme of a tenderfoot. We are able to couple our cars without the use of this stick;" and every railroad company in the United States, after constant efforts of months to induce these people to protect themselves by its use, was compelled to reject it because the railroad hands would not use it.

You will find carelessness anywhere. You will find indifference to mutilation, indifference to pain, negligence the world over. These men

realize the danger which they undertake when they enter the employment. They are not befooled. They know what awaits them when they enter upon their railroad job and they are paid proportionately. They get two or three times what they would receive upon the farm or in the store.

That danger they are glad to undergo. Against all peril the railroad companies, prompted by self-interest and by humanity, throw every possible safeguard. Every endeavor is made that may be devised to reduce the peril; and I say that they are infinitely better fitted to deal with it than is this body, especially in view of the fact that the men whose lives we seek to save object to our saving them in the way we propose.

. . .

MR. HOAR. Mr. President, I do not propose to enter upon a discussion of this question at this time, except so far as to remind the Senate that the provision of the bill in regard to the question which affects so largely the security of life of a most meritorious body of American citizens is precisely in accordance, in substance, and in principle with the policy adopted by Congress on the sea.

The Senator from New York and the Senator from Colorado seem to think it a strange thing that we prohibit a carrier of freight on land under penalty from plying his function, in danger of human life, or with certain securities and safeguards which are prescribed, not by Congress, but by a board of experts to whom we commit the question. That is exactly what we have done from the beginning of the Government in regard to carriers by sea.

Here is Title LII of the Revised Statutes, and it is full of provisions, some of them going back to 1871, some of them copied from older statutes, which I suppose in Great Britain go back beyond the independence of this country, by which the passenger-carrying vessels are obliged to have certain means and appliances for the protection and safety of human life committed to their care, which are to be approved not by Parliament, not even by any judicial or legislative body, but by a board of experts.

February 8, 1893

MR. PALMER. I should like to ask my colleague a question. I ask him whether it would not be entirely satisfactory to him to strike out all of section 2 from line 8 to line 15, inclusive. What is the object to be gained by retaining that provision? Why would it not be an improvement to strike out all that part of section 2?

. . .

THE SECRETARY. It is proposed to strike out all of section 2 from line 8 to line 15, inclusive, as follows:

> And said uniform automatic coupler shall always be of the standard type established by such common carriers controlling 75 percent of the cars used in such traffic. Said common carriers shall report to the Interstate Commerce Commission within one year from the date of the passage of this act the

> standard type of automatic couplers so established, but on failure to do so the said Commission shall designate and publish properly the type of couplers to be used.

So as to make the section read:

> SEC. 2. That on and after the 1st day of January, 1898, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers uniform in type and action, coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.

MR. CULLOM. If my colleague will allow me to make a suggestion, I am inclined to think if those words were stricken out it would simply leave every railroad to have its own type of coupler and there would not be that uniformity all over the country which we are seeking. That might be the result of striking out the latter part of the section.

MR. PALMER. I may be allowed to say from my observation of couplers uniformity is desirable, and that there are a variety of couplers which may be safe, but on account of the ignorance of operatives their true office is misunderstood, and sometimes accidents happen, but if the law provides imperatively that the couplers shall be automatic and shall operate without the necessity of the manual interference of the individual brakeman, then the question of uniformity is entirely unimportant as the coupler acts automatically without the aid of individuals.

MR. CULLOM. It would be if the automatic coupler put on the cars of one railroad company acts in connection with any other automatic coupler put on the cars of another company, so that the cars will properly come together.

MR. PALMER. It is automatic in each instance.

MR. CULLOM. I confess I am not sure whether it would work right or not.

MR. HARRIS. I should be glad to ask the two Senators from Illinois who is to decide upon the first automatic coupler with which all other automatic couplers are to act?

MR. PALMER. If my colleague will permit me to answer, I will say that there is no necessity for any answer to be given to it at all. The requirement is that the coupler shall be automatic, that it shall couple and uncouple without the necessity of men going between the cars for that purpose; and if that end is accomplished, a certain type is a matter of no consequence whatever.

MR. HARRIS. There must be, if the Senator will allow me, a beginning; there must be some one coupler with which other couplers will couple, and somebody must determine what that coupler shall be.

MR. PALMER. Mr. President, the law imposes upon the carrier the duty of providing couplers of the character indicated in the bill. If he fails to do so, he is subjected to the penalties imposed by the bill. The question is not to be determined in advance, but the carrier is to be punished if he fails to comply with the law. What is the necessity for a preliminary judgment? The carrier has a plain, precise, specific duty

imposed upon him, and, as in every instance where a positive duty is imposed upon a citizen, he must find the means of discharging that duty. No preliminary determination is necessary. The law requires that the couplers shall be automatic, that they shall couple and uncouple without the necessity of any switchman or brakeman going between the cars. It is at the peril of the carrier whether he complies with that law or not, and I propose to leave it just there, and punish those who disregard the law.

. . .

February 9, 1893

MR. BRICE. Do I understand that the chairman of the committee accepted the amendment of his colleague [MR. PALMER], striking out lines 8 to 15, inclusive, in section 2 on page 7?

MR. CULLOM. No, I did not accept it. When my colleague called attention to it, I stated that I was not sure but that it was a good amendment; but the more I have thought of it the more doubtful I am as to whether, if the rest of the section from line 8 is stricken out, the purposes of the section will be accomplished.

MR. BRICE. In that event I desire to offer an amendment, which I ask to have read.

THE VICE-PRESIDENT. The amendment to the substitute reported by the committee will be stated.

THE CHIEF CLERK. It is proposed to strike out section 2 and to insert in lieu thereof:

> That on and after January 1, 1898, the use of any car equipped with couplers which require the person using or operating the same to go between or to place any portion of his body between the cars, be, and the same is, hereby prohibited.

MR. DOLPH. I suggest to the Senator from Ohio that his amendment, I think, needs a slight amendment. After the word "use" the words "by any such common carrier" are necessary to limit it to interstate commerce.

MR. BRICE. I accept the amendment.

THE VICE-PRESIDENT. The proposed modification will be stated.

THE CHIEF CLERK. So as to read:

> That on and after January 1, 1898, the use by any such common carrier of any car, etc.

THE VICE-PRESIDENT. The question is on agreeing to the amendment of the Senator from Ohio [MR. BRICE] as modified.

MR. WHITE. I should like to ask the Senator from Ohio a question, if he will allow me. With the spirit of his amendment I think I am in sympathy. I wish to ask the Senator if under that amendment a car could not be run with the old vertical linkpin where a man would not be required to go in between the cars, and might use a stick? In other words, his amendment strikes out the provision in the bill providing for coupling by impact. I understand a man may possibly couple a car now by a stick, without putting his body between the cars.

Even with the old link pin, which I understand has sacrificed so many lives, it was not absolutely necessary for the man to use his body; and therefore, if my construction of the amendment be true, the amendment would leave the appliances just in the form in which they are now, and the statute it is proposed to enact would mean nothing.

MR. PALMER. It has occurred to me that if any alteration is to be made in the second section we should probably strike out lines 8 to 15, inclusive. The section would be in better shape with that portion stricken out than the proposition of the Senator from Ohio would make it.

MR. CULLOM. I was about to make the same remark. I think the proposition of my colleague made yesterday is preferable to the suggestion of amendment made by the Senator from Ohio.

MR. BRICE. That was the reason why I inquired if the chairman of the committee had accepted the amendment of his colleague. If he would accept that, I would withdraw the amendment I have offered.

MR. CULLOM. I have not accepted it. My own belief is that we should stand by the second section as it is; but if any amendment is to be made of the nature indicated I would prefer the adoption of the amendment proposed by my colleague to that of the Senator from Ohio. I suppose that my colleague intended to offer his amendment if he himself believes that it reaches the point desired.

MR. PALMER. If in order I will make the motion now that I indicated the other day, to strike out that portion of the second section, from line 8 to line 15, inclusive.

THE VICE-PRESIDENT. Does the Senator from Ohio withdraw his amendment?

MR. BRICE. I will withdraw my amendment for that purpose.

THE VICE-PRESIDENT. The amendment proposed by the Senator from Illinois [MR. PALMER] to the substitute of the committee will be stated.

THE CHIEF CLERK. On page 7, section 2, after the word "cars," at the end of line 7, strike out the remainder of the section, the words to be stricken out being as follows:

> And said uniform automatic coupler shall always be of the standard type established by such common carriers controlling 75 percent of the cars used in such traffic. Said common carriers shall report to the Interstate Commerce Commission within one year from the date of the passage of this act the standard type of automatic couplers so established, but on failure to do so the said Commission shall designate and publish properly the type of couplers to be used.

MR. HOAR. I should like to call the attention of the Senator from Illinois [MR. PALMER] to the condition in which the section would be left if his amendment should prevail. It would then read, ending at the end of the seventh line:

> That on and after the 1st day of January, 1898, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate

> traffic not equipped with couplers uniform in type and action, coupling automatically by impact, and which can be uncoupled without the necessity of men going between the cars.

That taken literally I suppose would be nonsense, because it would only mean that the single car should have couplers uniform in style and action; but if, disregarding the letter of the section as it would be left, it means that all the cars used by any common carrier shall have couplers uniform in style and action with each other, and consequently to apply to all the cars that any carrier uses on its road, then there is no provision left in the bill by which the uniformity of the couplers put on the cars by one road with those put on its car by any other road shall be secured. Of course, as we all know, every train of freight cars consists of cars mixed up, coming by roads from all over the country. That must be the case. So the section, it seems to me, must require something more than would be left after the Senator's amendment should prevail.

MR. PALMER. The section would probably be quite as incomplete with the portions I propose to strike out as it would be after they are stricken out. But I would rely upon the third section as containing the cure of the difficulty, which provides—

> That when any person, firm, company, or corporation engages in interstate commerce by railroad shall have equipped a sufficient number of its cars so as to comply with the provisions of section 1 of this act, it may lawfully refuse to receive from connecting lines of roads or shippers any cars not equipped sufficiently, in accordance with the first section of this act, with such power or train brakes will work and readily interchange with the brakes in use on its own cars, as required by this act.

That would relieve one of the difficulties. I had supposed that after the very complete and thorough information and explanation of this whole subject given by the Senator from New Jersey [MR. MCPHERSON] to-day, in which he states the habits and customs and conditions of railway traffic in the country, no further detail would be necessary. The whole section as it stands, it will be understood, must be construed with reference to the general bill, and any want of precision in that particular section would be cured by the general and controlling intention of the whole bill.

MR. CHANDLER. The section in the bill as amended, if the motion of the Senator from Illinois is adopted, goes a certain way in the right direction, but it seems very clear to me that it does not go far enough. It is very evident that admitting it requires every common carrier engaged in interstate commerce to have automatic coupling cars, yet it does not require that those couplers shall couple with the couplers on the cars of other carriers engaged in interstate traffic. That will be the defect of the bill if it should stand amended on the motion of the Senator from Illinois [MR. PALMER], or as it would stand if amended by the amendment proposed by the Senator from Ohio [MR. BRICE]. It is then an injunction upon each carrier, but it is not an injunction upon the carriers altogether to agree upon a uniform type of coupler. Therefore, it seems to me that the bill would be very defective if the amendment is adopted.

If Senators will look at the bill as it was adopted in the House of Representatives, it will be seen that the House of Representatives thought quite an elaborate process was necessary in order to bring the various railroads of the country together. I refer to section 7, on page 3 of the bill as printed, where it is provided that every such common carrier shall file with the Interstate Commerce Commission the details of the couplers which are used upon the roads of that carrier, and when all the evidence is given before the Interstate Commerce Commission, then the Interstate Commerce Commission shall designate a standard type of coupler to which all the roads must conform.

It seems to me that some provision of this sort is necessary in order to bring all the carriers of the country into the adoption of a uniform type. While you seem to provide for an automatic coupler by requiring every carrier to have an automatic coupler, you have not reached the difficulty by providing that the automatic coupler of each company shall interlock with the automatic coupler of every other company.

Therefore I think the amendment of the Senator from Illinois and the amendment of the Senator from Ohio ought to be voted down, unless those Senators will annex to their amendments some provision by which we can bring the carriers of the country sooner or later to the adoption of a uniform type of coupler.

. . .

MR. BRICE. Will the Senator from Illinois allow me to answer the suggestion made by the Senator from Louisiana?

MR. CULLOM. Certainly.

MR. BRICE. I propose adding the following words to the amendment which I offered if it shall be renewed and come before the Senate, in order to cover the suggestion made by the Senator from Louisiana:

> That on and after January 1, 1898, the use of any car equipped with couplers which require or which in practice result in the persons using them or operating the same going between or placing the body between the cars shall be, and the same is hereby, prohibited.

MR. WHITE. I will state to the Senator from Ohio that my suggestion was not unfriendly to the purpose he has in view.

MR. CULLOM. As I was about to state, when my colleague made the suggestion of the amendment which he proposed yesterday, it occurred to me that it probably answered the purpose which we are all, or at least I imagine most of us, seeking, and that is to arrive at some system or uniformity of couplers which will result in the saving of life and the prevention of the injury which comes from going between the cars.

MR. BRICE. May I ask the Senator from Illinois a question?

MR. CULLOM. Certainly.

MR. BRICE. Does he consider the matter of uniformity a paramount consideration?

MR. CULLOM. I do not understand that there is any purpose to be attained by uniformity but that of safety to life and limb.

MR. BRICE. And if the purpose can be accomplished without uniformity, then it is not necessary.

MR. CULLOM. As far as I am concerned I am not wedded to any language or any specific provision in terms, if what is proposed accomplishes the purpose which I am anxious to secure and which I understood all members of the Senate desire.

The only trouble about my colleague's amendment, which occurred to me afterwards, was that one railroad might put on a coupler which would prevent killing and waive the necessity of going between the cars, but when it came to commingling with cars putting on some other device, perhaps a little different but general in principle, they might not come together in such way as to avoid the necessity of going between the cars and would not thereby protect human life.

MR. FAULKNER. Then, if the Senator will permit me, under those circumstances are they not prohibited by the bill up to the point where the amendment is suggested, because it is proposed to prohibit the employees from going between the cars if they do not couple by impact? Then under that amendment, if adopted, of course it would be a violation of the law, to go between the cars.

MR. CULLOM. All I desire to say further is that I am entirely willing to let the sense of the Senate be taken on the question of striking out the lines suggested by my colleague; and if the Senate thinks that that covers the case, that it protects these men, that is all I wish. If, however, I should come to the conclusion later on, after a more thorough and definite investigation of the question, or if in conference it should be determined that that is not sufficient, so far I am concerned I should try to remedy it. I am willing, however, without discussing the subject further to take the sense of the Senate on the amendment.

MR. HUNTON. What is the amendment of the Senator's colleague?

MR. CULLOM. The amendment proposed by my colleague is to strike out all after line 7, in the second section, down to and including line 15.

MR. BUTLER. I think we are all aiming at the same object, and I am quite sure the Senator from Illinois will conclude, after giving to it more thorough investigation, that striking out that part of the section will accomplish his purpose. If I thought it did not do so, I should not vote for it. I think, however, it simplifies the bill very much and really makes it more effective than by having that provision in it.

MR. CULLOM. As a matter of fact, I should prefer having the language remain as it stands in the substitute, because I wish to eliminate as far as possible any control over this subject by the Interstate Commerce Commission, provided we are sure of doing what we are trying to do.

THE VICE-PRESIDENT. The question is on the amendment submitted by the junior Senator from Illinois [MR. PALMER] to the amendment of the committee.

The amendment to the amendment was agreed to.

. . .

MR. GRAY. Mr. President, if I am in order, I should like to move an amendment in section 2, line 5, of the committee's amendment, that the words "uniform in type and action" be stricken out.

This seems to prescribe to the railroad companies engaged in interstate traffic, and which are to be regulated by this act, a uniformity in type and action of these automatic couplers, when such uniformity is absolutely unnecessary to accomplish the end, which I understand to be the only justifiable end of this legislation, and that is the protection of life and limb of the brakeman and those in the employ of the companies.

Leaving out those words, the section would read:

> SEC. 2. That on and after the 1st day of January, 1898, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers, coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of cars.

I think we shall have accomplished by the amendment all that we may legitimately seek to accomplish, and shall not impose upon the railroad companies a condition which may have no reference at all to the end we have in view, but may very materially impair their ability to carry on the traffic which may be brought to their road.

For instance, suppose a railroad company receives every day, as all our great trunk lines are receiving, a lot of cars from another road, and though they may have the automatic couplers coupled by impact, which will not make necessary the interposition of the body of the brakeman to couple, they should not be uniform, what do we care whether they are uniform or not, if we accomplish the end that, in the language of this bill under my amendment, prescribes that they shall be automatic couplers, coupling by impact, and which shall not make necessary the interposition of the body of the brakeman?

Suppose a road, from caprice, from one of those antagonisms which come from the fierce competition for traffic, should refuse cars which come from another road, even though they may have an automatic coupler, one that will couple by impact, one that will not make necessary the interposition of the body of the brakeman, and say, "This train is not uniform in the character of the coupler, in type or action, and therefore we refuse to receive it."

I think that every extraneous and unnecessary condition should be eliminated from this bill, and that only those provisions should remain which are necessary to accomplish the great and humane end which this bill unquestionably has in view; that is, the protection of the life and limb of the brakemen on the railroads.

THE PRESIDING OFFICER. The amendment of the Senator from Delaware to the amendment of the committee will be stated.

THE SECRETARY. In section 2, line 5, after the word "couplers," it is proposed to strike out "uniform in type and action;" so as to read:

> That on and after the 1st day of January, 1898, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by

> impact, and which can be uncoupled without the necessity of men going between the ends of the cars.

THE PRESIDING OFFICER. The question is on the amendment to the amendment.

The amendment to the amendment was agreed to.

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. . .

MR. MCPHERSON. . . . I move, in section 2, on page 7 of the copy of the bill that I have before me, to strike out the following words, beginning with the word "coupling," in line 5, to and including the word "and," in line 6; so as to make the section read:

> That on and after the 1st day of January, 1898, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers which can be uncoupled without the necessity of men going between the ends of the cars.

The amendment eliminates from the bill anything and everything which directs railroads to put on car couplers which must be automatically coupled by impact.

The words in line 5, "uniform in type and action," I understand have already been stricken out of the bill. Now, if there is any reason for striking those words out there is equally a good reason for striking out the other words to which I have referred. This leaves the section then as I have read it. It directs the railroad company to have some form of coupler that will not compel the men to go between the ends of the cars to couple them, and without directing whether they shall use an automatic coupler which couples by impact or what it shall be. This amendment, I think, should be made.

. . .

THE PRESIDING OFFICER. The amendment will be stated.

THE CHIEF CLERK. On page 7, section 2, line 5, strike out the words "coupling automatically by impact and;" so as to make the section read:

> That on and after the 1st day of January, 1898, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers which can be uncoupled without the necessity of men going between the ends of the cars.

MR. MCPHERSON. That is all you can accomplish by legislation, and I repeat it is infinitely safer, better, and wiser in every way, without any direction in a bill passed by Congress, to permit them to regulate their own coupling affairs in their own way, as will be most consistent with the public interest, because what is for the interest of the railroad in this respect is for the interest of the public.

MR. WHITE. Under the Senator's amendment will men be required to couple the cars without going between them?

MR. MCPHERSON. It does not matter whether the cars are to be coupled or uncoupled. The only thing we are trying to reach here by legislation is that the employee of the railway company shall not be required to expose his life and limb to the impact of the car. It may be done by a coupler which is adjustable by impact. It may by any other device which the railway company may seek to employ.

MR. WHITE. I did not make my question perhaps clear to the Senator. By the terms of his amendment will it be necessary that the cars shall be coupled without men being permitted to go between the cars?

MR. MCPHERSON. Most assuredly.

MR. WHITE. I ask that the amendment be read again.

THE PRESIDING OFFICER. The amendment will be again read.

THE CHIEF CLERK. On page 7, section 2, line 5, after the word "couplers," it is proposed to strike out the words "coupling automatically by impact and;" so as to make the section read:

> That on and after the 1st day of January, 1898, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line, any car used in moving interstate traffic not equipped with couplers which can be uncoupled without the necessity of men going between the ends of the cars.

MR. MCPHERSON. It should read "which can be coupled or uncoupled." I will supply the words "coupled or." I did not notice that.

MR. WHITE. That answers my question.

. . .

MR. HOAR. . . . I understand that the old link and pin cars which are in use can not (sic) be coupled and uncoupled without going between the cars. A stick or some mechanism, four or five feet long, is used for the purpose, but practically the men will go between the cars. Practically they will be required to do so, for a brakeman who will not do it and takes the longer method, the longer time to do it, is very likely to be discharged by his company. So, as the Senator's amendment would leave the bill applicable only to cars which can not be uncoupled except by going within, we should have no practical legislation on the subject.

MR. MCPHERSON. We would have this legislation. The Senator speaks of what would be a practical working device. Certainly it has been proven by experience, and long experience, that the common cars now in use coupled with links can not be coupled and uncoupled in practice in any other way, except by going between the cars.

MR. HOAR. I understood the Senator to say just now that they could.

MR. MCPHERSON. I say they can not, as a practical fact, be coupled in any way except by going between the cars; and with my amendment

to the bill, as I understand it, the effect of it would be to put on some devices that would not require the men to go in between the cars.

MR. HOAR. It is not true that the old-fashioned link-and-pin car can be coupled or uncoupled by a stick with a hook at the end of it without going between the cars?

MR. MCPHERSON. The Senator knows perfectly well that in the practice of running railroads in this or any other country such a thing would be totally impracticable and out of all reason.

MR. HOAR. That is precisely the point of my objection. The Senator has not described what can be done in practice under the bill as he leaves it. He has described what is possible. He uses the word "necessity." Therefore if the Pennsylvania or Baltimore and Ohio railroad shall go back to the old link and pin on every freight car, it has, as the Senator leaves the bill, a perfect defense to any legal complaint, because your bill does not say they shall not use cars which in practice forbid the men to go between, but you provide against cars where there is a necessity to go between.

MR. MCPHERSON. You require that they shall be coupled or uncoupled automatically by impact in the bill as it stands at present.

MR. HOAR. I am not speaking of the bill as it stands.

MR. MCPHERSON. Now, I do not care how they are coupled, if they are coupled by some device outside of the car by some system of leverage which may be employed, provided that it does not require the operator to go between the cars. I can imagine a device whereby an operator might stand on the outside of the car, by a system of leverage which is attached to the car. The idea, though, of directing the bolt or directing the link by a stick would be totally impracticable and to me very absurd.

MR. HOAR. On the contrary, several Senators have stated the reverse.

MR. BERRY. Will the Senator from New Jersey yield to me for a moment?

MR. MCPHERSON. I have promised to yield to the Senator from Ohio [MR. BRICE], and after that I will yield to the Senator from Arkansas.

MR. HOAR. Will the Senator pardon me one moment? The point of my question to the Senator is not in relation to the object or purpose of the measure. I am in accord with him as I understand him. I suppose, in regard to this matter, the Senator and I are exactly in accord in our desire as to what is to be done. The point of my question had reference to the mere question of phraseology. The Senator has offered an amendment, which, as I understand it, enables the carrier to defend himself if he can show that there is not an absolute physical necessity for the man to go in between the cars, although he still continues [to use] a form of coupler under which, in practice, every man will go in between cars. It is a question about the phraseology of the bill as left by the Senator's amendment.

MR. BRICE. It is precisely as to that point I wanted to make the suggestion that in the amendment I offered yesterday, at the suggestion of the Senator from Louisiana [MR. WHITE], I inserted the following

words, which I will ask the Senator from New Jersey to incorporate in his amendment:

Which require or which in practice result in.

MR. HOAR. That is the point I want to get at.

MR. MCPHERSON. That I think would be a betterment. I do not know that the amendment I moved would be liable technically to the objection made by the Senator from Massachusetts. In practice it would not be at all liable to his objection.

THE PRESIDING OFFICER. The Senator from New Jersey will present the amendment in the form he and the Senator from Ohio have agreed upon.

. . .

MR. MCPHERSON. I move an amendment to section 2, which I send to the desk.

THE PRESIDING OFFICER. The amendment will be stated.

THE CHIEF CLERK. In Section 2, line 5, after the word "couplers," it is proposed to strike out "coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars," and insert "which can be coupled or uncoupled without requiring, or which in practice would result, in persons using them or operating the same, going between or placing the body between the cars;" so as to read:

> That on and after the first day of January, 1898, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers which can be coupled or uncoupled without requiring or which in practice would result in persons using them or operating the same going between or passing the body between the cars.

MR. MCPHERSON. This answers, as I understand, the technical criticism made by the Senator from Illinois and the Senator from Massachusetts. I invite their attention to the phraseology of the amendment. My intention was simply to require the use of a car where the operative would not be required to expose himself to danger between the ends of the cars, and I think the phraseology will do that. I propose to leave to the railroad companies the adoption of such devices as they in their better judgment may see fit to adopt.

MR. CULLOM. It is very difficult to understand exactly what is couched in the language of an amendment offered in the Senate, and I hope the Senator will not insist on his amendment. Let the bill go through, and then I shall be very glad to consider the proposition as critically as possible with whatever light I can get from experts on the subject; and so far as I shall have anything to do with it, I shall endeavor in conference to arrange the matter properly.

MR. MCPHERSON. This amendment removes the objection which I have to this entire legislation, because you are attempting here to prescribe a certain kind of improvement which railroad companies must use, whether it is the best thing for them to adopt or not. If they can adopt any kind of a device which will prevent the loss of life by not

requiring a brakeman or a man who couples cars to go between the trains, why not give them the opportunity of doing it?

MR. CULLOM. The amendment of the Senator would leave the amendment reported by the committee so that the coupling business may go on with sticks as heretofore. I want to call the attention of the Senator to the fact that common carriers now have rules by which the switchmen employed in coupling cars shall use these sticks or whatever they may be called. That rule is adopted, as I have understood, as a precaution against their being liable for damages in case a man happens to go between the cars and is injured. So I think the Senator had better allow the section to remain as it stands. I shall be very glad, so far as I am concerned, to change it later on, if it seems to me a safe thing to do.

MR. MCPHERSON. I do not wish to permit myself to neglect improving a bill as it ought to be improved in the Senate before it reaches a committee of conference.

MR. CULLOM. Let the vote be taken on the amendment, then.

MR. MCPHERSON. Therefore I think a vote had better be taken on the amendment.

THE PRESIDING OFFICER. The question is on the amendment proposed by the Senator from New Jersey [MR. MCPHERSON] to the amendment of the committee.

The amendment to the amendment was rejected.

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MR. GEORGE . . . Mr. President, the bill I will call the prince of shams. During my long service in this body it has never been my fortune or misfortune to have encountered a bill which thundered so much in the index and performed so little in actual work and operation. We have been engaged for days, under the leadership of the Senator from Illinois, in trying to perfect a bill which might properly be termed a bill to promote not the safety of railroad employees, but to encourage the slaughter of railroad employees.

. . .

I wish to call the attention of the Senate to section 11 of the bill as it came from the other House, which the Interstate Commerce Committee have run their pen through and ask us to strike out, and have provided no substitute for it. I will say that the Senate will discover as soon as I do read it that without the eleventh section of the bill as it came from the other House there is but little if any protection to the employees. Now let us see what section 11 is, which the Interstate Commerce Committee ask us to strike out:

> SEC. 11. That any employee of any such common carrier who may be injured by any locomotive, car, or train in use contrary to the provisions of this act shall not be deemed guilty of contributory negligence, although continuing in the employ of such carrier after habitual unlawful use of such locomotive, car, or train had been brought to his knowledge.

The learned Senator from Illinois, in advocacy of the bill, brought before us a very recent decision of the Supreme Court, which he was kind enough to loan to me this morning, a part of which I will read and comment on to the Senate, showing the absolute necessity of section 11.

I read from Kohn *vs.* McNulta, in the Supreme Court of the United States, October term, 1892. [Senator George presented *Kohn* at some length, calling attention to its assumption-of-the-risk reasoning] . . .

That being the rule of law settled by the highest court in the country, the Democratic House saw fit to insert a provision in the bill which would protect the employees. What does the Interstate Commerce Committee ask us to do? After furnishing a sham protection, no real protection, then the only real benefit to accrue to these unfortunate fellow-citizens of ours, in whose name and for whose interest this bill is supposed to be pressed here, after furnishing them no protection or next to none, the Committee on Interstate Commerce strike out the only thing which could be of essential service.

The committee provide for a fine. What does that mean? It means you have to secure an indictment, you must have a grand jury, then you must have a trial before a petit jury, and then you must have a district attorney, and all that, and then the money is to go into the Federal Treasury.

When the poor man whose leg or whose arm has been destroyed, or his widow or personal representative in case his life is lost, complains, they are to be turned out of court upon what idea? That the employee knew that the railroad company whom he was serving had not complied with the law of Congress upon that subject. Is that fair? Is that just? These men are not financially able, although legally they are at liberty, to quit the service of the railroad companies at any time they see proper. Because in winter, when no employment can be had, when their wives and children need every dollar to their earnings to keep the wolf from the door, because at that season of the year they are financially unable to quit the employment of the railroad company and go out into the world to starve and freeze, by the striking out of the eleventh section of the bill they are denied redress.

. . .

February 11, 1893

. . .

MR. DOLPH. If no one desires at present to speak upon the bill, I wish to occupy a few minutes of the time of the Senate on an amendment which is not now before the Senate. But the Senate has agreed to vote at 4 o'clock on the bill. I understand it is the purpose of the Senator from Mississippi [Mr. GEORGE] to offer the amendment, and if I wait until it is offered I may not have an opportunity to say what I wish to say in a few minutes upon the amendment. . . .

The experience of generations if not of centuries has led the courts and generally legislators to adopt certain rules in regard to the liability of an employer for an injury to passengers, if he is a common carrier, and for injuries to servants. I will see if I can state in a few words what

the rule is. In regard to passengers a common carrier is liable for slight negligence. In regard to employees the common carrier, corporation, or other employer is liable to the employee for his own negligence and for the negligence of any servant or superintendent or foreman who has control and direction of the servant, but is not under existing law liable to one servant for the negligence of another in the same employment.

Then there is another rule, that an employee or even a passenger guilty of contributory negligence can not recover, although the negligence of the common carrier or of the employer may have in some measure contributed to the injury.

There is another rule which was discussed yesterday by the Senator from Mississippi, that an employee who day after day works around a machine which is more or less defective and has knowledge of the defectiveness of the machine can not recover if he is injured on account of that defect.

I say these are rules which have been settled after many years of experience by the courts. . . .

I will read the general rule on the subject of the liability of an employer for an injury to the servant caused by the neglect or the negligence of the fellow-servant in the same employment. It is section 180 of [Shearman and Redfield on the Law of Negligence]:

> Sec. 180. The general rule.—Under the principles before stated it must be conceded to be settled at common law that a master is not liable for injuries personally suffered by his servant through the negligence of a fellow-servant, acting as such, while engaged in the same common employment, unless the master is chargeable with negligence in the selection of the servant in fault or in retaining him after notice of his incompetency.
>
> * * *
>
> The first real decision of the question was made in South Carolina, in 1841. This was cited and approved by Chief Justice Shaw, of Massachusetts, in 1842, in the Farwell case, which is the leading case on the question, and contains all the reasoning in favor of the rule which is worth mentioning. His opinion was followed in New York in 1844. The precise point was first decided in England in 1850, and followed ever since. Since then it has been forced upon Scotland by the votes of English judges overruling the Scotch courts; and it has been accepted by all American courts, both Federal and State, with only some qualifications in Kentucky and perhaps Louisiana.

That is the general rule. The Senator from Mississippi proposes to abrogate this general rule in regard to common carriers engaged in interstate commerce, and to adopt a rule which, if applied to a housekeeper, for instance, would make the master of the house liable to his chambermaid if the cook left a pail of hot water exposed in the kitchen by which she was scalded, or which would make a corporation liable if two men were digging with picks in the same pit and one carelessly hit the other and injured him, notwithstanding both persons might have been employed with the utmost care and might have the best qualifications for the work.

To put before the Senate some of the reasons for the rule I will ask the Secretary to read from the case of Priestley *vs*. Fowler, on page 5 of Meeson and Welsby's Reports, commencing at the point I have marked.

THE PRESIDING OFFICER. The Secretary will read as requested.

. . .

MR. DOLPH. I call the attention of the Senate to the suggestion in this opinion that the rule which exempts the master from liability for an injury to a servant caused by the negligence of a fellow-servant and for injuries caused by defects in machinery which the servant is familiar with and has notice of is intended to secure attention and prevent negligence by an employee.

Take a common carrier engaged in interstate commerce. He is liable as an insurer for goods received for transportation, and liable to passengers for slight negligence. As to passengers he is bound to have competent employees and safe machinery. He is liable to employees for the negligence of any superior officer or servant who is over him, is in the position of superintendent or foreman or in any such way represents the master.

Now, it is of great interest to the common carrier that employees working in the same employment shall not be negligent, because their negligence causes the common carrier great losses by being compelled to pay damages for injuries to passengers. The amendment of the Senator from Mississippi, as I understand it, proposes to remove this inducement to care and attention by employees. It proposes to provide, in the first place, that the master or employer shall be liable to a servant for all carelessness. That would abrogate the rule, I think, that where it is shown that there is contributory negligence the plaintiff can not recover.

It would abrogate the other rule which has been adopted by the courts, that where an employee works around dangerous machinery and continues in the employment when he might quit the employment, or when it was his duty to notify the master of the defect, he can not recover. Then it abrogates the other rule which has been adopted by courts, that an employer shall not be liable for injury to one servant by the negligence of another in the same employment.

. . .

THE VICE-PRESIDENT. The question is on agreeing to the amendment of the committee as amended.

MR. GEORGE. The effect of that, if adopted, would be to substitute the amendment of the committee in place of the House bill?

THE VICE-PRESIDENT. It would.

MR. GEORGE. On that point I should like to ask the Senator from Illinois who has the bill in charge, to so modify the motion to amend that a separate vote may be had upon section 11 of the bill, as proposed by the House of Representatives.

. . .

Mr. President, I should prefer, if there was any parliamentary way to accomplish it, that there should be a direct vote of the senate upon the action of the House of Representatives itself; but as I learn from my friend from Tennessee [Mr. HARRIS], who understands these matters much better than I do, that there is no way by which I can have the sense of the Senate taken separately upon the propriety of retaining or rejecting section 11 as adopted by the House, I now offer as an amendment that section in the words exactly in which it passed the other House.

THE VICE-PRESIDENT. The amendment will be stated.

THE SECRETARY. It is proposed to add the following as a new section:

> SEC. 8. That any employee of any such common carrier who may be injured by any locomotive, car, or train in use contrary to the provisions of this act shall not be deemed guilty of contributory negligence, although continuing in the employ of such carrier after habitual unlawful use of such locomotive, car, or train had been brought to his knowledge.

MR. GEORGE. The only remark I desire to make upon the amendment is to call the attention of the Senate to the fact that the affirmative vote which any Senator may give on this amendment will be simply to sustain the action of the House of Representatives in that respect.

I call for the yeas and nays on the amendment.

The yeas and nays were ordered.

. . .

MR. WHITE. I do not understand that the doctrine of contributory negligence has any relation whatever to an employee continuing in the employment of his employer. I do not understand that that is the doctrine of contributory negligence. I understand that that is a doctrine which holds that an employee takes the risk of the employment. That is the way it is laid down in the books. Therefore the use of the expression in the amendment—I am in entire sympathy with the intention of the Senator's amendment—but the use of the words "contributory negligence" there conveys no legal significance whatever in my judgment. The doctrine of contributory negligence is the doctrine which holds that a man having by his act contributed to bring about the condition of things which has produced the accident, can not recover from his employer because of his contribution to the production of the accident.

The doctrine of the bill that an employee is stopped from recovering from a corporation or from the employer, because of his continuing in the employment with a knowledge of the inadequacy of the implements used, does not involve the doctrine of contributory negligence at all. It involves another rule, which is an elementary principle, that the employee takes the risk of the employment. . . .

MR. GEORGE. I desire simply to have a vote upon the section as it came from the House of Representatives. I recognize the doctrine of contributory negligence, as stated by the Senator from Louisiana, but I

propose also to say that the section, although it be not skillfully drawn, has the same effect exactly as if the word "contributory" was stricken out. If, however, it will aid in getting any votes in favor of the amendment, I am very willing that the word "contributory" shall be stricken out.

. . .

MR. WHITE. Let me read the section and call the attention of the Senator from Mississippi to it as I propose to modify it:

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

. . .

[Senator George accepted this substitute language, which thus became the proposal under debate.]

MR. GRAY. I think there is a very serious objection to this amendment, and I have doubt about the right of Congress, in regulating the instrumentalities of commerce, to stretch its powers so as to regulate the contracts in every respect which may be made with these people. I have enough doubt about it to control my vote.

. . .

Mr. President, this amendment seeks to introduce to every one of our forty-four States an amendment to the common law of that State of a character more far reaching than any which has ever been before attempted by Congress, so far as I can now recall, by one enactment. We undertake now to prescribe to the courts in every State in this Union a rule in regard to negligence, a rule in regard to the liability of employers, and a rule in regard to the ordinary risk assumed by all persons who engage with their eyes open in certain employment, to be administered not only by the courts of the United States, but by the courts of every State in this country, whether that contravenes the policy of a State or not, whether, in the opinion of its Courts or in the policy adopted by its Legislature, such a rule be wise or not. I believe that this exercise of power by Congress in this respect is unnecessary, and that there is no exigency demanding so far reaching and radical an exercise of power as would be made by this amendment if adopted.

The law in regard to the risks assumed by one man who takes employment from another are the product of a long series of years, of many decisions, of the philosophy of the best minds which have been devoted to the elucidation of that subject. They do not rest upon any capricious or haphazard foundation, they are not the result of hasty consideration; but they have been the development of the laws of human action and intercourse and relation of parties *inter se* which have been developed by our courts after argument and discussion through a long series of years and by many wise tribunals, with an

entire consensus of opinion. I believe that it would be better to leave it so.

I believe that justice would be better administered, that the relations of man and man would be in a more satisfactory condition, if we were to restrain our hand, if we have the power—which I am not now discussing—from interference in this intimate and delicate relation. If the States choose to do it, that is one thing; they have the power; and in the competition going on between the States in the improvement of our jurisprudence, one State advancing tentatively and making experiments in this direction or that, and other States adopting it if they find that it stands the test of experience and the best judgment of the courts and of the public opinion of the country, I think that is the best way to attain these results, and the safest and surest way in which advancement can be made along these lines.

I do not think we have sufficiently considered how far we are invading the jurisprudence of the States, and how tremendous a thing it is if we reach out our hand and place it upon the courts of forty-four States in this Union, to control them in administering the law, which has been administered from time out of mind. I think there is no necessity for it and no exigency demanding our interference.

THE VICE-PRESIDENT. The question is on the amendment submitted by the Senator from Mississippi as modified. . . .

MR. CALL. I suggest to the Senator from Mississippi to strike out the word "habitual." It is entirely unnecessary.

MR. GEORGE. I will accept the amendment to strike out "habitual."

. . .

MR. PEFFER. I move to insert the word "the" before "unlawful."

MR. GEORGE. That is right.

MR. WHITE. I wish to make a very brief statement, if it be in order.

I entirely agree with the constitutional view expressed by the Senator from Delaware [MR. GRAY], but I do not think that constitutional view will operate to prevent me from voting for the amendment, because if there be a class of contracts which, under the Constitution, is not brought within the purview of this section by the operation of this proposed law and the Constitution upon which it rests, then this proposed law will not affect that class of contracts; but if there be a class of contracts which it is within our constitutional power to legislate in reference to, then I think the provision will be a wise one, and the legislation will be valid to the extent of its constitutionality, and necessarily invalid wherever it extends beyond the limits of the Constitution.

. . .

The Secretary proceeded to call the roll.

The result was announced—yeas 42, nays 7; as follows:

YEAS—42

Bate	Dubois	Kyle	Stewart
Berry	Felton	McMillan	Stockbridge
Blackburn	Frye	McPherson	Teller
Call	Gallinger	Mills	Turpie
Chandler	George	Morrill	Vance
Coke	Hansbrough	Peffer	Vilas
Cullom	Harris	Perkins	Voorhees
Daniel	Hawley	Proctor	Washburn
Davis	Hoar	Pugh	White
Dawes	Jones, Ark.	Sherman	
Dolph	Jones, Nev.	Squire	

NAYS—7

Blodgett	Caffery	Gray	Sawyer
Brice	Camden	Morgan	

NOT VOTING—38

Aldrich	Faulkner	Manderson	Sanders
Allen	Gibson	Mitchell	Shoup
Allison	Gordon	Paddock	Stanford
Butler	Gorman	Palmer	Vest
Cameron	Hale	Pasco	Walthall
Carey	Higgins	Pettigrew	Warren
Casey	Hill	Platt	Wilson
Cockrell	Hiscock	Power	Wolcott
Colquitt	Hunton	Quay	
Dixon	Irby	Ransom	

So the amendment to the amendment was agreed to.

. . .

THE VICE-PRESIDENT. The question now is on the amendment reported by the committee as amended.

The amendment of the committee as amended was agreed to.

The bill was reported to the Senate as amended, and the amendment was concurred in.

The amendment was ordered to be engrossed, and the bill to be read a third time.

MR. MCPHERSON. I ask for the reading of the bill at length in order that the Senate may understand what amendments have been made.

THE VICE-PRESIDENT. The bill will be read the third time at length.

The Chief Clerk read the bill [whose language was by now nearly identical to the enacted statute] the third time. . . .

THE VICE-PRESIDENT. The question is, Shall the bill pass?

MR. BLODGETT. On that question I ask for the yeas and nays.

The yeas and nays were ordered, and the Secretary proceeded to call the roll.

* * *

The result was announced—yeas 39, nays 10, as follows:

YEAS—39

Allison	Dawes	Jones, Nev.	Pugh
Berry	Dolph	Kyle	Sherman
Caffery	Dubois	McMillan	Squire
Call	Felton	McPherson	Teller
Carey	Frye	Morrill	Turpie
Chandler	Gallinger	Palmer	Vilas
Cockrell	Gray	Pasco	Voorhees
Coke	Hansbrough	Peffer	Washburn
Cullom	Hawley	Perkins	White
Davis	Hoar	Proctor	

NAYS—10

Blodgett	George	Morgan	Vance
Brice	Gorman	Sawyer	
Daniel	Harris	Stewart	

NOT VOTING—38

Aldrich	Faulkner	Manderson	Shoup
Allen	Gibson	Mills	Stanford
Bate	Gordon	Mitchell	Stockbridge
Blackburn	Hale	Paddock	Vest
Butler	Higgins	Pettigrew	Walthall
Camden	Hill	Platt	Warren
Cameron	Hiscock	Power	Wilson
Casey	Hunton	Quay	Wolcott
Colquitt	Irby	Ransom	
Dixon	Jones, Ark.	Sanders	

So the bill was passed.

MR. CULLOM. I move that the Senate ask for a conference with the House of Representatives on the bill and amendments.

The motion was agreed to.

By unanimous consent, the Vice-President was authorized to appoint the conferees on the part of the Senate; and MR. CULLOM, MR. WILSON, and MR. HARRIS were appointed.

NOTES

(1) As you will have noted, the Conference Committee accepted the Senate's changes on the matters of interest to us. Fairly read, what do the debates or other materials tell you about the purposes of this legislation? If you were describing the course of the legislation, how would you explain the changes that were made—for example, with respect to a possible purpose of securing uniformity of railroad practice?

(2) For each of the three problems on pp. 182–183, reconsider your initial response in light of the foregoing.

While these legislative materials may seem extensive, they in fact are rather condensed. Only the House Report and only the Senate debates are given. The Senate debates alone fill 77 pages of the Congressional Record. Reflect not only on the light (if any) cast, but also on the propriety of consulting these materials or possible problems involved in doing so.

The Interstate Commerce Commission and Implementation of the Railway Safety Appliances Act

The text of the Act and the debates implicate the Interstate Commerce Commission in the railroads' implementation of their new duties. The principal responsibilities of the ICC, a federal agency, were regulating the rates common carriers charged for shipments in interstate commerce, to prevent mistreatment of small shippers.[1] Nonetheless, the Safety Appliances Act added safety regulation to its responsibilities. During the period between passage of the Act and the taking effect of its provisions, the ICC was called on to monitor progress toward compliance, to deal with requests for the extensions it was authorized to grant, and otherwise to act in ways that gave it both a view of implementation issues overall, and an opportunity to shape the railroads' understanding of and approach to the statute. Even apart from these responsibilities, it was an interested and well-informed witness to the railroads' efforts. Excerpts from a decade of its annual reports, 1893–1902, suggest both how the railroads responded and what were the principal problems of understanding or implementation they encountered.

These materials may be considered from at least three perspectives. The first and most straightforward is the perspective of interpretation. As you read these excerpts, consider the following questions

1. Would you have been reading them as they were produced, as general counsel to Southern Pacific? In what

[1] The ICC was initially only a railroad regulator, but its jurisdiction was later expanded to other surface carriers as well. The ICC celebrated its centennial in 1987 and was submerged into the Department of Transportation as the Surface Transportation Board eight years later, as part of a general trend to reduce the intensity of rate regulation in the American economy.

ways might you have sought to influence their content, or had the effect of doing so?

2. How does it appear that the railroads and/or the ICC understood the interpretive questions you discovered in your consideration of the three problems raised above.

3. What opportunities were there to resolve these issues in the ICC or using its offices, and to what extent were these employed?

4. What would be the risks, and what would be the benefits, of using materials like these in statutory interpretation, as indicators of statutory meaning?

Second, you might consider that we are now encountering a new kind of government institution with responsibilities for understanding and applying statutory commands, the administrative agency—one rare at the time, but very common today. To this point, we have been dealing almost exclusively with the courts as the social mechanism relied upon for application and evolution of law. Statutes have intruded in a limited way, as texts that shape the possibilities for judicial action but leave the courts in place as the principal resolvers of particular disputes. In the ICC we find for the first time a competitor to the courts, a mechanism quite distinct from the courts for the possible evolution of law, *and chosen by the legislature in preference to the courts*. The ICC's characteristics and possibilities for action are strikingly different from those of a court; its commissioners, appointed for only a limited term, are intimate with Congress and the regulated industry, self-starting, responsible on a continuing basis for policy implementation and, perhaps most important, have a variety of means available to them for action—conferences, the adoption of regulations, self-informing through inspections, the issuance of annual reports, the bringing of enforcement actions, etc.

Why might a legislature choose such a body? Might the resistance of the courts to changing established rules the public had come to regard as unjust, e.g. *Baugh*, play a role? What ought to be the response of a court, in dealing with questions of its authority, when the legislature does make such a choice?

Finally, these materials confront us for the first time with the question whether we ought to be regarding statutes as static texts, whose meaning is fixed at the moment of their enactment, or as more dynamic creations, susceptible as the common law is to change in response to emerging circumstances. The problem of *maintaining* railroad safety equipment emerged only with experience. Does it matter that the enacting Congress appears to have focused its attention on the initial stage of equipping cars with necessary appliances, if its language can be read to reach the problem of faulty maintenance as well? May agencies and/or courts properly adapt some/all statutes to problems that emerge with time, even if not foreseen or perhaps even foreseeable by the enacting Congress? These pages will suggest to you that in the seven and one-half years between enactment and effectiveness, industry, worker and ICC understanding evolved through the processes of planning and interaction the Act created. If those developments might be relevant, it would be because we conceptualize the statute not

as embodying a single transaction projecting a fixed meaning forward into the future, but as creating a constrained set of relationships that develop over time.

Like the legislative history materials set out in prior pages, these readings have been somewhat condensed. Yet they have not been thoroughly pre-digested. They are presented in sufficient detail, your editor hopes, to provide you with a lawyer's experience of mining raw materials for your own sense of the possibly relevant.

Seventh Annual Report 74–76 (1893): Safety Appliance Legislation

There was pending before Congress at the time the Commission transmitted its annual report for 1892, a bill entitled "An act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes." This bill was passed, approved, and became a law March 2, 1893. . . .

In the exercise of the authority conferred by this act the American Railway Association on the 12th day of April, 1893, designated the standard height of drawbar for standard-gauge railroads at 34 ½ inches, measured perpendicularly from the level of the tops of the rails to the center of the drawbars, and the maximum variation at 3 inches. . . .

Communications from the leading railroads of the country show that the requirements of the law establishing the uniform height of drawbar has met with prompt acquiescence. . . .

For a considerable portion of the time necessary to effect the changes in equipment required by the law, a reduction of the number of casualties to railway employees, especially those which result from coupling cars, can hardly be hoped for. Experience has shown that dangers incurred in coupling cars are likely to continue while new devices are from time to time being introduced, owing to lack of uniformity.

It will be observed that the law does not in any way restrict the use of automatic couplers to any particular type or types, and therefore it can hardly be open to the objection urged against it that it would especially benefit a particular patentee.

In the matter of couplers the aim of the law is that the men shall not be required to go between cars in order to couple or uncouple them, and therefore a road must not only equip its freight cars with couplers that are interchangeable, but can not use upon its line the cars of other roads which do not automatically couple with their own. . . .

Tenth Annual Report 93–94 (1896): Safety Appliances on Railway Equipment

Sections 1 and 2 of the safety-appliance act, approved March 2, 1893, will become effective on the 1st day of January, 1898. On April 9, 1896, the Commission issued an order to all common carriers engaged

in interstate commerce, requesting them to state to what extent they had brought their equipment into conformity with the requirements of these sections prior to April 1, 1896. In compliance with this order, replies have been received from 1,690 companies. Of this number, 727 report that they own or operate 33,323 passenger cars, 1,217,064 freight cars, and 35,898 locomotives; and 963 roads, most of which are operated by other companies, have no equipment. As shown by these reports, 32,962 passenger cars, or 98.91 per cent, are fitted with train brakes; 32,331 passenger cars are equipped with automatic couplers, or 97.02 per cent of the total number; 16,454 of the passenger cars so equipped are fitted with couplers of the Miller type; 15,426 have the vertical plane or master car builders' type; . . .

Of the 1,217,064 freight cars reported, 360,079 freight cars, or 29.58 per cent, are equipped with train brakes; 448,014 are equipped with master car builders' vertical plane automatic couplers; 2,082 are equipped with other types of automatic couplers; while 5,236 freight cars are equipped with automatic couplers the type of which is not given; 455,332, or 37.41 per cent,[2] of the total number of freight cars are equipped with automatic couplers. . . . Many of the couplers claimed to be automatic only couple automatically with those of the same pattern or type, and not with the couplers in more general use.

Equipment of cars with this class of couplers will apparently compel the owning carriers to confine their use to roads using similar types and to trains entirely composed of cars so equipped. It is also indicated by the figures given in the returns that the rate of progress toward compliance with the coupler feature of the law which obtained prior to April 1 must be greatly increased if the equipment of the roads is to be brought into conformity with this statute on January 1, 1898.

Eleventh Annual Report 127–131 (1897): Safety Appliances

. . .

About October 1, 1897, the Chicago and Alton Railroad Company filed a petition with the Commission asking for an extension of time under the seventh section of the act, and similar petitions were also received from other carriers. In consequence of these, and for the purpose of considering at one time whatever applications of this sort might be made, the Commission, October 8, 1897, entered a general order addressed to all carriers engaged in interstate traffic, by which it was directed that any petitions which might be filed before November 15 should stand for hearing on December 1, 1897. The order further required that notice to the public of all such petitions should be given in a manner specified, and that there should be filed along with each petition a statement under oath, setting forth, among other things, the total number of freight cars owned by the petitioner which would be equipped with train brakes and automatic couplers on December 1, 1897.

A copy of this order was sent to all interstate carriers, and as a result 294 operating roads filed petitions with the Commission asking for an extension of time beyond January 1, 1898. These petitioning

[2] [Ed.] In 1894 the proportion had been 25%.

roads owned a total of 1,164,932 freight cars. Of these, 29 roads, owning 125,413 freight cars, reported that they would, on January 1, 1898, have all their cars equipped with the automatic coupler; 43 roads, owning 195,512 freight cars, more than 75 per cent and less than 100 per cent; 55 roads, owning 394,700 freight cars, more than 50 and less than 76 per cent; 48 roads, owning 240,716 freight cars, more than 25 and less than 51 per cent; 27 roads, owning 107,765 freight cars, more than 10 and less than 26 per cent; 20 roads, owning 74,901 freight cars, more than 1 and less than 11 percent; while 72 roads, owning 25,925 freight cars, had equipped none of them with automatic couplers.[3]

. . .

More cars have been equipped with the coupler than with the air brake. As a rule the work of equipment has gone on together, so that the company which is farthest advanced in the matter of couplers is usually proportionally advanced with the train brake, but this is not invariably so. Some lines are practically all equipped with the air brake while they have made little progress with the coupler, this being due to the fact that their roads embrace such gradients that they have found it necessary to use the train brake without any reference to the law. Taking the roads in the whole country together, roughly speaking, there will be January 1 something over 60 per cent of the freight cars owned by railroad companies and used in interstate commerce equipped with the automatic coupler, and something over 40 per cent equipped with the train brake.

A full hearing was had upon these petitions on December 1 and days following. The carriers were very generally represented at this hearing and made whatever statements and arguments they desired. Various labor organizations were also represented, particularly those embracing trainmen and other railway employees, for whose benefit the law was largely enacted, and these representatives fully presented their views as to what should be done under the circumstances. Certain testimony was also taken under oath.

The length of extension asked for varied from one to five years, by far the greater number asking for the longer period. The reasons assigned were somewhat different, but in almost every case they had reference to the financial condition of the carrier. The Denver and Rio Grande Railroad, operating 1,646 miles of road, had gross earnings for

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[3] [Ed.] That is, compliance with the act on the initial effectiveness date was expected to be as follows:

Number of lines	Percent equipped	Average number of cars/line
29	100%	4,325
43	>75%	4,577
55	>50%	7,176
48	>25%	5,015
27	>10%	3,991
20	>01%	3,745
72	0%	360

Error! Main Document Only. More than half the railroads (167/294) had equipped half or less of their cars; bearing out some of the predictions made in the legislative history, the 127 lines in better than 50% compliance were also the most powerful—owning among themselves 715,625 cars, 61% of the total.

the fiscal year ending June 30, 1893, of $9,303,246, and for the year ending June 30, 1894, $6,461,643, a falling off of more than 30 per cent. The decrease in net earnings was in the same ratio, and the operations of that road since have shown no substantial improvement. This, of course, is an extreme case, but it illustrates what, in a measure, was true with all railroad companies in the United States. Road after road which was thought to be perfectly solvent when this law was enacted went into the hands of receivers within the next twelve months. The net revenues of all the railroads in the United States fell off more than $50,000,000 between the year ending June 30, 1893, and that ending June 30, 1894.

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Some companies had fully complied with the law, while other companies had made no serious effort to do so. There were a few instances in which companies had done substantially nothing toward compliance, although they had regularly paid dividends since its enactment. Such carriers do not apparently deserve the same consideration as does one that has done everything that could be reasonably required. An examination of the act leads to the conclusion that it was originally intended that relief might be granted in some instances and not in others, and that, perhaps, no general relief should be given at all, but the situation as a whole seemed to render any such application of the law at the present time impossible.

The first section prohibits a carrier from hauling a train in interstate traffic which is not controlled by train brakes. The second section provides that no carrier shall haul or permit to be hauled on its lines any car used in interstate traffic which is not equipped with the automatic coupler. The requirement, therefore, is not that a carrier shall equip its cars with the brake or the coupler, but that it shall not use in interstate traffic a train which is not controlled by the train brake or haul in interstate traffic a car not equipped with the automatic coupler. Now carriers do not use upon their lines their own cars altogether in the moving of interstate traffic. It appeared from the statements upon this hearing that from 40 to 65 per cent of the car mileage in such traffic was by foreign cars which came to the various roads in the interchange of business. To refuse to extend the time to a particular carrier was, therefore, to forbid that carrier to haul either its own or any other car not properly equipped. The road which had fully equipped, so far as its own equipment went, required an extension of time just as much as its connecting road, which had, perhaps, made no substantial progress in its equipment. To have refused to extend the time at all would have been to withdraw entirely from the interstate commerce of the country about 40 per cent of the freight cars, which would have been at the present time a very serious inconvenience to the public itself. The Commission felt, therefore, that any extension which was made must be made to all petitioning carriers alike.

. . . An examination of the returns of the different carriers shows that the greater part of the equipment has been put on within the last two years. The expense of equipping a car with the automatic coupler varies somewhat according to the work which must be expended in applying it to a particular car, apparently running from $18 to $35 per

car. The Commission was satisfied that the greater part of the carriers could easily equip the balance of their freight cars within the next two years with the automatic coupler, and that there would be no undue hardship in requiring them to do so. There are undoubtedly cases where the carrier has made no substantial progress up to the present time in which it will be difficult to complete the equipment within that time, and there may be instances in which it can not be so completed, but those will be for the most part cases in which the carrier has not done up to the present time what it ought, and that carrier ought to suffer in the future some inconvenience for its dereliction in the past.

. . . We accordingly granted to all petitioning carriers an extension of two years with respect to both the first and second sections.

The whole number of train men employed during the year ending June 30, 1896, was 162,873. Of that number 1,073 were killed and 15,936 injured. Of these, again, 157 were killed and 6,457 injured in coupling and uncoupling cars, while 373 were killed and 3,115 injured by falling from trains and engines. Of other railroad employees, 72 were killed and 2,000 injured in coupling and uncoupling cars, and 99 killed and 783 injured by falling from trains and engines.

These figures appealed strongly to us against any undue extension. It was urged that when all carriers were within the law such casualties would, in the main, cease. However this may be, the law was undoubtedly enacted in that view, and careful consideration was given to that aspect of the case in disposing of it. The representatives of the railway employees thought that a year's extension should be granted, and no more. The Commission felt that the carriers could not possibly comply within that time, and that it was better for the employers themselves to fix a limit within which general compliance could and probably would be made.

Thirteenth Annual Report 51–53 (1899): Safety Appliances

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As has been stated in a previous report, some time before January 1, 1898, on which date the act by its terms became effective, a large number of railroad companies, embracing practically all of the railroads of importance operating in the United States, petitioned the Commission for an extension of time. These petitioners were heard on December 1, 1897, and upon consideration of the facts developed upon that hearing an extension of two years was granted by the Commission.

It was then expected that within the time as extended substantially all carriers would be able to complete their equipment in compliance with the requirements of the act. In November of the present year, however, numerous petitions from carriers were filed asking for a further extension of this time, and these petitions were set for hearing at Washington on December 6, general notice being given to the public. At that time the petitioning carriers, as well as those who opposed such extension and those who were otherwise interested in the application, were fully heard. The carriers based their claim to further relief upon two grounds: First, that they had acted in good faith, having made great progress in the equipment of their cars and all the progress that, under the circumstances, could have been reasonably expected;

second, that to refuse to extend the time and to put the law into effect on January 1, 1900, would result in the enforced withdrawal from interstate traffic of a large number of freight cars, to the great hardship both of the railways, which would thereby be compelled to refuse traffic, and of the shipping public, which would thereby be denied the facilities for moving its traffic.

It was also urged that the necessary material could not be obtained and that the roads could not get possession of their cars for the purpose of equipping them in less than one year.

As to the first position of the carriers, it may be said that the progress towards the required equipment has been constant, as shown by their semiannual reports. On June 30, 1893, four months after the enactment of the law, there were 1,047,577 freight cars reported as owned, of which number 229,289, or 22 per cent, were equipped with automatic couplers. On December 1, 1897, the petitioning roads reported 1,159,029 freight cars owned, of which number 695,171, or 59 per cent, were equipped with automatic couplers. On December 1, 1898 the number so equipped had risen to 77 per cent.

On December 1, 1899, the returns made by the carriers which had been granted an extension showed that practically all of their locomotives and passenger cars were equipped and that 1,250,808 freight cars were owned, of which number 1,137,229 were equipped with automatic couplers, or 91 per cent, and that 763,644, or 61 per cent, were equipped with train brakes. Where the grades are comparatively level, and this comprises a large proportion of the trackage, it is understood that not more than 50 per cent of the cars in a given train need be fitted with air brakes to make it possible for the engineer to control the train from the locomotive.

The second position of the carriers was also in the main well taken, as the immediate withdrawal of all cars not equipped with automatic couplers for the purpose of fitting them with that device would seriously cripple many of the railroads and would greatly inconvenience the shipping public. The great volume of traffic which was and had been moving for some months made it extremely difficult for the railroads to find the necessary cars.

The Commission also found that, owing to the great demand for all sorts of iron manufactures, the material necessary to make the changes required by the statute had been hard to obtain for some time past.

The petitioners asked for one year. Representatives of the railway employees who appeared at the hearing practically united in conceding that some further extension of time ought to be granted, but expressed various opinions as to the length of the extension. It was evident to the Commission upon the showing made that some further extension should be given, and after full consideration it was determined to extend the time until August 1, 1900.

One of the petitioning carriers also applied for relief on behalf of all other railroads engaged in interstate traffic within the United States. We had some doubt about the right, and even greater doubt about the propriety, of extending relief to those which had not requested it; but as withholding such extension might operate more seriously against those lines not in fault than those which were, we concluded to make the

extension apply not only to the petitioners, but generally to all carriers subject to the statute.

An inspector detailed by the Commission has visited numerous freight yards during the past few weeks. It appears from his reports that with reference to those appliances which became obligatory two or three years ago—grab irons, hand holds, and standard height of drawbars—an almost ideal state of equipment exists. Practically no cars are now found which do not conform to the requirements of the law in respect of those appliances. On the other hand, the condition of cars which the owning carriers had reported as equipped with coupling devices was often found very defective, and in some instances so much so as to reflect discreditably upon the roads.

A very large number of cars have been found where the appliances for operating the couplers, especially the unlocking machinery, were so out of order and unworkable that, though the cars were actually provided with automatic couplers, they could not be uncoupled without the trainmen going between the cars, and in some cases being obliged to resort to mechanical assistance in order to get the cars apart. Such a coupler is not automatic in the sense contemplated by the law. Its use subjects the men to risks and dangers which are obviously greater than those which existed when the old link and pin coupler was employed.

This inspection was limited, and as a rule the reports covered only such defects as were plainly apparent. Until practically all cars are equipped with automatic couplers and until those devices are kept in thorough repair, it is manifest that those which are placed upon the cars constitute a menace rather than a protection to trainmen, and this was one of the considerations which influenced the Commission in determining the length of time which the roads should be given to complete their equipment.

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Fourteenth Annual Report 77, 79–84 (1900): Safety Appliances

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The making up and movement of trains will always be a very hazardous business, and death and injury thereby caused can not be wholly avoided. In this connection the Commission desires to invite attention to what was said in its last report to Congress, for the Commission believes it as necessary to inculcate care on the part of the men as it is for the railroads to keep their equipment in order. It was recently decided by the supreme court of Kansas that where there were two ways of doing a given thing connected with the operation of a train of which the employee had knowledge, it was the duty of the employee to adopt that method which was the least hazardous, and that his failure to adopt the safer method relieved the employer from liability for his injury, unless the employer had knowledge or apprehension of the employee's perilous position and made no effort to avoid injuring him.

In this case a workman,[4] who had knowledge of a grossly negligent and wantonly reckless habit of his employer, voluntarily placed himself unnecessarily in a dangerous position whereby he received injuries resulting fatally, when there was a safer way to perform the duty known to the employee. The court held him guilty of contributory negligence. (Beal v. A., T. & S.F.Ry. Co., Pac. Rep., 321.) It will thus be seen that this court held that the rule of nonliability for contributory negligence in case of injuries recklessly inflicted does not apply when the injured person had or should have had knowledge of the grossly negligent habit or the impending reckless act and could have avoided the injury to himself by prudence and caution upon his own part.

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To the end that every precaution may be taken and that no careless, or indifferent, ignorant, or selfish individual may be permitted to endanger his fellows, a system of public supervision should be maintained and a close inspection made of the rolling stock in service, so that no wear or breakage may go unnoticed and unremedied. It is not proposed that such public inspection shall in any respect interfere with the duties of the operating companies respecting repairs, but that the inspectors shall see that cars in use are equipped with safety appliances, and those appliances kept in the condition contemplated by the provisions of law intended to promote the safety of traveler and employee. Such inspection will require some expenditure of money—small, however, in comparison with the interests affected.

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Recognizing that a law of this character can only be made effective by a system of supervision and inspection, Congress appropriated $15,000 at its last session to enable the Commission to keep informed regarding compliance with the safety-appliance act and to render its requirements effective. This sum is mainly expended in the employment of inspectors.

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The inspections have served to give a general idea of the conditions existing, and this has been of great value. The inspectors' reports indicate that violations of the law consist chiefly in failure to keep the equipment up to the required standard, including automatic couplers which are operative and in such working order that the men need not go between the cars. Inspection by the Government has undoubtedly proved beneficial not only to the employees interested, but also to the railroad companies. It has acquainted the railway presidents with conditions existing on their respective roads, of which they probably would not have been apprised in any other way. The air brake and the automatic coupler are not merely measures of safety. Without them the heavy freight train of today could not be successfully handled and the decreased cost of operation which has resulted from the use of larger cars and more powerful locomotives would not have been attained.

[4] [Ed.] A sixty-eight year old cleaner of cattle cars, who crawled under the cars in the yard rather than walk around the trains to get to his next work site, and who was run over when the cars unexpectedly started.

Consequently these appliances have been most potent agencies in bringing about the great increase in the capacity of railroad trains during the past decade.

Railway equipment throughout the country is now interchangeable by reason of the general application of automatic couplers and brakes and standard-height drawbars required by the safety appliance act. It is reported, however, that probably 20 per cent of the couplers now used become nonautomatic through failure to keep them in proper repair. While in such condition it is agreed that they are far more dangerous to the men employed in handling the cars than the old link and pin coupler. When an accident in coupling now occurs it is said there is more probability of its resulting fatally. Again, when it was known that the men had to go between the cars to couple or uncouple it is claimed that engineers exercised greater care than they do now with couplers in use which are supposed to work automatically. These considerations indicate the necessity for most careful attention to the condition and repair of the appliances provided.

When railway officials reach the point of requiring car inspectors to reject any car having defective couplers or other defective safety appliances, as they now do on account of imperfect running gear, the dangers of railway operation will be largely reduced. It is understood that the most common defects in couplers are disconnected pin chains and loose brackets.

Under the instructions of the Commission inspections have been openly made, the inspector always introducing himself to the management and disclosing his identity. Railway officials generally are much interested in this inspection work, and the majority of them appear surprised to learn that so many automatic couplers are in the condition found by the inspectors. A few were inclined at first to take advantage of the technicality that the law does not apply to engines since it specifies only cars, but when their attention was called to the fact that a coupler on an interstate car ceases to be automatic the moment a link is inserted for the purpose of coupling to an engine or a car used in State traffic the necessity for equipping such engine or car with the automatic coupler was generally conceded. Automatic couplers, therefore, are rapidly being applied upon locomotives and tenders. The failure of the law to require specifically this may have been an oversight, but the roads are generally recognizing the necessity of such equipment, and no amendment to the law is recommended in this particular.

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There has been criticism of the couplers now in general use for the alleged reason that they are not really automatic in many conditions and circumstances of railway operation and because failure to make proper repairs renders the coupler a menace to the employee rather than an instrument of safety. Already an agitation has been begun for the use of other and better appliances. With this end in view the Commission has been asked to order tests of automatic couplers in order to decide which coupler is best adapted to the general requirements of operation. The Commission has given no encouragement to such requests and has replied that no provision is

found in the law for such examination or any authority to decide in favor of a particular device, that the law has only recently gone into full operation, and that there are as yet no sufficient data to show the alleged inefficiency of the devices now in use, and that further time is necessary to determine the truth or falsity of the statements made by those who are taking part in this movement. It is proper to state that none of the agitation in this respect or suggestions of change have come from organizations of railway employees or from any of the men whose employment renders them personally interested.

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Since the law went into effect no complete or accurate information regarding accidents has been obtainable. As the railroads are merely required to make annual returns of the casualties to their employees, the value of the law can only be matter of conjecture for a year at least. It may well be repeated that a large number of the accidents to employees can only be attributed to carelessness.

Impressed with the necessity of particularly directing the attention of the employees to this subject, the secretary of the Commission addressed a letter to the subordinate branches of various railway organizations calling attention, among other matters, to the necessity of greater care and caution on the part of railway employees in the discharge of their duties. It was also stated to be the understanding of the Commission that section 8 of the act does not fully release them from responsibility for contributory negligence. It was also suggested that reports of accidents should be made by the organizations to the Commission, with a view of minimizing, as much as possible, the need of resorting to the courts for enforcing the law, and so avoiding the friction and consequent hostility which frequent litigations of this character must inevitably engender. No prosecutions under the act have yet been found necessary. In cases where we have found it necessary to call attention to defects in appliances or in their operation the railroad managers have so far readily complied with not only the letter but the spirit of the law, and have not been inclined to cavil about the application of the statute in doubtful cases.

RAILWAY EMPLOYEES KILLED AND INJURED IN COUPLING AND UNCOUPLING CARS									
Year ending June 30.	Trainmen[1]			Switchmen, flagmen and watchmen			Number of trainmen employed, excepting enginemen and firemen, to one trainman –		Number of switchmen, flagmen, and watchmen employed to one –	
	Number employed on June 30, excepting enginemen and firemen	Killed	Injured	Number employed on June 30.	Killed	Injured	Killed	Injured	Killed	Injured
1900		187	3,788		77	1,261				
1899	97,729	180	5,055	48,686	74	1,533	543	19	658	32
1898	93,844	182	5,290	47,124	90	1,486	516	18	524	32
1897	88,995	147	4,698	43,768	58	1,325	605	19	755	33
1896	90,263	157	6,457	44,266	58	1,686	575	14	763	26
1895	87,497	189	6,077	43,158	90	1,826	463	14	480	24
1894	88,240	181	5,539	43,219	63	1,492	488	16	686	29
1893	100,496	310	8,753	46,048	109	2,290	321	12	422	20
1892	94,774	253	7,766	42,892	115	2,252	376	12	373	19
1891	89,060	288	7,155	40,457	111	2,044	309	12	364	20
1890	85,247	265	6,073	37,669	75	1,528	322	14	502	25
TOTAL		2,339	66,651		920	18,723				

Fifteenth Annual Report 63, 65–69, 77–78 (1901): Safety Appliances

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The number of conductors, brakemen, switchmen, flagmen and watchmen, killed in coupling accidents in the year ending June 30, 1901, expressed by the ratio of the number killed to the total number employed, appears to have been less than in the year immediately preceding by about 35 per cent, and the number injured by about 52 per cent. This appears in the following table, which covers 70 per cent of the operated mileage of the country.

Table No. 1—*Accidents incurred in coupling and uncoupling cars.*

Year ending June 30—	Employees on 87 roads		Number of trainmen *employed to 1—	
	Killed	Injured	Killed	Injured
1898	209	5,433	555	21
1899	196	5,281	592	22
1900	228	3,970	546	31
1901	161	2,082	837	65

* Ratio based on trainmen other than enginemen and firemen, and including switchmen, flagmen, and watchmen.

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The smaller ratios for the later years, as compared with 1893, indicate the increased security to life and limb effected by the partial

introduction of automatic couplers and power brakes, the use of hand holds and compliance with the law fixing a standard height for drawbars. All of these improvements were introduced gradually and produced good results in proportion to the number of cars properly equipped, except that in the transition period, when some cars had automatic couplers and some had not, the dangers encountered by the men were greatly increased by the increased diversity.

Deaths and injuries caused by falling from trains and engines have long been a marked feature of railroad-accident records, and the deplorably large totals under this head have been the subject of comment in the reports of the Commission for former years. The following table shows the totals under this head, in the same form as in our last annual report:

Table No. 3—*Accidents caused by falling from trains and engines*.

Year ending June 30—	Total number of employees—		Number of trainmen *employed to one—	
	Killed	Injured	Killed	Injured
1893	644	3,780	354	60
1897	408	3,627	497	59
1898	473	3,859	480	57
1899	459	3,970	390	45
1900	529	4,425	361	43

* Number of trainmen includes enginemen, firemen, conductors, and other trainmen.

It will be observed that there is a material increase in the ratio of killed in 1900 over the three years next preceding. The various causes of this increase can only be conjectured, but among them are obviously the increase in the number of inexperienced men employed, and the increased amount of work done by the men when the volume of traffic is constantly increasing, as was the case on many of the railroads during the year under consideration. The use of air brakes on freight trains is confidently expected to lessen the deaths and injuries under this head; but air brakes were not nearly so generally used in 1899–1900 as they are now. On the other hand, it is well known that, with the more powerful locomotives, heavier cars and longer freight trains which have come into general use during the past few years, the use of air brakes on these trains has been the occasion if not the cause in some circumstances of an increased number of violent shocks, which of course tend to increase the danger to men on the cars. The increase in the dangers due to the practice of running longer trains is not to be measured alone by the increased proportion of powerful locomotives in use, for two engines on the same train, on level lines as well as on steep grades, is now very common.

. . . The increase in the efficiency of the men, resulting from larger locomotives and improved methods, which was marked a year ago, is still more marked now. In 1893 the number of ton-miles to each

trainman employed was 638,635; in 1899 it was 844,638; in 1900 it was 913,425.

. . . White *v.* The Chicago Great Western Railway Company, recently decided by the United States circuit court for the southern district of Iowa, . . . involved the application and construction of a statute of Iowa, one section of which is quite similar to the second section of the Federal statute under discussion. Each statute prohibits the use of any car not equipped with automatic couplers so they may be coupled or uncoupled without the necessity of a trainman going between the cars. The plaintiff, White, was injured while attempting to make a coupling between a car that was properly equipped, in accordance with the provisions of both the State and Federal law, and the tender of an engine that was not provided with automatic appliances, which necessitated the use of the old link and pin. The United States circuit court instructed the jury to return a verdict for the railroad company, on the ground that a locomotive tender was not a car within the meaning of the act.

As the State and Federal acts are substantially similar, that court would undoubtedly construe the Federal statute as not broad enough to require the locomotive and tender to be equipped with safety couplers. If that construction shall be upheld by the Supreme Court, the safety appliance act will be considerably impaired in its practical value. It is therefore recommended that section 2 of the act be amended so as to specifically include locomotives and tenders. Such an amendment is necessary to put the statute in accord with the approved practice of all the prominent railroads. The reports from the roads to this Commission show that railroad officials, recognizing the need of uniformity in couplers throughout the whole length of a train, or a series of trains, have made good progress in equipping their locomotives and tenders with automatic couplers, and have so far equipped more than 75 per cent of them with such couplers. While this action is highly commendable, it is still desirable to add this reasonable and useful amendment to the law, if for no other reason than to insure uniformity among all of the roads.

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But while we recommend the perfecting of the law in this respect, we desire to give recognition to the fact that as a rule the railroad companies of the country now need no compulsion to induce them to use automatic couplers. It is only in details of a minor character that any road has taken a critical or reluctant attitude. Both the automatic coupler and the continuous power brake are now absolute necessities in the operation of railroads which have long trains, or use the powerful locomotives and heavy cars which are now common. As freight cars are freely interchanged through the country, and as powerful locomotives are everywhere demanded in the interest of economy, this statement is really of universal application. Competent observers, both among railroad officers and persons who are wholly disinterested, are substantially agreed that without the close coupler the movement of the very long and heavy trains now hauled would be out of the question; that without the power brake it would be not only highly unsafe to move these trains, at the greatly increased speed now in vogue, but

practically impossible, in the great majority of cases, by reason of the difficulty of regulating the movements of the trains at stations, yards and meeting points; and that without the automatic coupler the work of switching and making up trains in yards would require from a fourth to a third more time than it now does. Thus the policy of the Congress in enacting the safety-appliance law is amply vindicated on what may be called "business considerations" and without any regard to the question of safety of life and limb. In short, the use of power brakes and improved couplers of uniform type, constituting as they do radical improvements in the construction of cars and locomotives, must be regarded as a most important element in the marvelous progress by which the railroads of the country have continued to cheapen the cost of transportation, and at the same time conserve the safety of their employees and passengers.

One of the greatest obstacles in the way of safety in freight-train operations at the present time is in the presence, in nearly all trains, of old and weak cars. In the unavoidable shocks incident to the movement of heavy (new) cars at the increased speed now found necessary, these weak cars are often damaged and sometimes completely crushed, thus endangering the lives of the trainmen. . . . It seems reasonable to expect that every well-managed railroad will do away with this element of danger as fast as is practicable, and therefore no recommendation is made on the subject at this time.

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In making it unnecessary for men to be on the tops of high cars the power brake has thus far had only a moderate effect, partly because trains are still run with only a moderate proportion of the cars air braked, and partly because railroad superintendents, always conservative in matters of this kind, are slow to modify their former regulations. In making it possible to stop trains more quickly its value has been to a considerable degree neutralized by the increase in speed which has everywhere accompanied the introduction of the power brake. It is easier to avoid danger, but the increase in speed increases the danger. It is gratifying to be able to state that many railroads are introducing or extending the use of the block system and otherwise improving their signaling appliances, all of which decrease the dangers of train movement and make the duties of the men simpler and easier. . . .

Sixteenth Annual Report 57–59, 61–63 (1902): The Safety Appliance Law

The gratifying results of the law of 1893, requiring the use of automatic car couplers and of power brakes, were spoken of in the Fifteenth Annual Report. The benefits of the law have been increasingly evident during the past year. In particular, the number of persons killed and injured in coupling and uncoupling cars during the year ending June 30, 1902—the first entire year reported since the law went into full effect—shows a diminution as compared with 1893, the year in which the law was passed, of 68 per cent in the number killed and 81 per cent in the number injured.

In 1893 the number of casualties from this cause was 11,710 (433 killed, 11,277 injured); in 1902 it was 2,256 (143 killed, 2,113 injured); showing a reduction of 9,454. And it is to be borne in mind that the number of men engaged in this work is much larger now than it was in 1893. Nearly complete figures for 1902 indicate the total number of employees in that fiscal year to have been approximately 1,195,371, and this represents an increase of 321,769 or 36.83 per cent, as compared with the number employed in 1893.

But casualties continue to occur, and their number is such as to call for continued and earnest efforts to eliminate their causes. We have the automatic coupler, but there are dangers against which it does not fully provide. Cars are frequently moved while not in complete running order. This is practically unavoidable, and it is the source of some of the casualties that appear in current reports. Much the larger part of the casualties are due, however, to causes which are avoidable. There is much complaint among trainmen that some couplers, being of bad material or workmanship, do not work properly; cars coming together do not couple except by a somewhat violent impact. This leads to breakage and to delays and annoyances. The men go between the cars to prepare for a second trial (when the first is unsuccessful) and sometimes are crushed or otherwise injured. This is a particularly insidious danger, since when one car is approaching another the danger to the man walking ahead of the moving car increases more rapidly as the space is diminished, and the danger from obscure difficulties, which the man while walking along, perhaps backward, does not clearly perceive, is greater than that from a pronounced defect which is understood at sight. The uncoupling levers or rods and their connections are a source of many injuries—probably from 20 to 30 per cent of all coupling accidents now reported. The fault with these is attributable to both bad design and imperfect maintenance. A perfect uncoupling device is as clearly required by the statute as is the automatic coupler; but the uncoupling requirement is not nearly so well complied with.

The report of the chief inspector, which appears as an Appendix to this report, gives a mass of interesting data concerning the condition of couplers on the freight cars of the country. He shows that during the fiscal year ending June 30, 1902, the 10 inspectors employed by the Commission examined 161,371 cars, as compared with 98,624 examined by the smaller number of inspectors during the year before. The number of cars on which one or more defects were found was 42,718, as compared with 19,462; the percentage found defective was 26.47, as compared with 19.73. This condition is due, not to worse conditions, but to the more systematic inspection of air brakes, the inspections of the earlier year having been devoted more particularly to couplers. The principal features in which the condition of couplers shows improvement are the increased use of solid knuckles and a diminution in the number of uncoupling rods incorrectly applied. On the other hand, some of the unsatisfactory conditions are as bad as ever. The poor maintenance of locking pins, a vital part of every coupler, calls for criticism, the number of defects reported under this head being 559, as compared with 128 the previous year. Almost one fourth of the 559 cases were “wrong pin or block,” a broken pin having been replaced by one not designed for that particular pattern of coupler.

The inspector's comments on this point deserve special attention. "Worn knuckles" is a serious defect which shows an increase, and the increase becomes the more significant when it is recalled that this is a dangerous condition which must in a large percentage of cases necessarily escape the scrutiny of the Commission's inspectors. Their inspection usually deals only with cars at rest, and in large yards such cars are in long trains, coupled together. Only in those couplers at the ends of the train—2 out of, perhaps, 50 to 200—are the contour lines sufficiently visible to be fairly examined. To detect more surely worn couplers the inspector recommends the use, both by railroad inspectors and those of the Commission, of a simple gauge, without movable parts, by which a coupler worn beyond the limit of safe service can be instantly detected. Uncoupling mechanism continues to be the most unsatisfactory feature of the coupler situation. In new cars there is, as just mentioned, an improvement in the application of this part; but of chains too short or too long, bent levers and other faults, there is a large increase. A chain too short will uncouple a car in motion, and this is a probable cause of disastrous wrecks. In coupler defects as a whole there is a great need of better records, and the inspector's report calls attention to two roads on which valuable records are kept of those couplers which fail in moving trains. It is regrettable to have to add that these two are the only companies, so far as known, which have undertaken this useful work.

. . .

In Johnson *v.* Southern Pacific Company (117 Fed. Rep., 462) the eighth United States circuit court of appeals held, in August last, that the equipment of a car with automatic couplers which will couple automatically with those of the same kind is compliance with the safety-appliance act of March 2, 1893, and that the act does not require cars used in interstate commerce to be equipped with couplers which will couple automatically with cars equipped with automatic couplers of other makes. If this ruling should be upheld on appeal it would have the effect of nullifying a main object of the statute, which is to secure such uniformity in applied automatic coupling devices as to permit all cars in a train to be coupled and uncoupled without requiring men to go between the cars. The act in terms prohibits any carrier from hauling or permitting to be "hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars." Carriers are left free by the statute to use any kind of automatic coupler they see fit, the sole and governing restriction being that, whatever kinds of coupler may be used, no cars shall be hauled or used on the line which do not couple automatically by impact, or can not be uncoupled without men going between the cars; and this applies to the hauling of all cars, whether owned by the carrier operating the road or by other carriers. Plainly, if carriers use different types of couplers which do not work automatically with each other, the law is violated when a carrier undertakes to haul two cars so equipped in the same train. This was pointed out by the Commission in its report to Congress for the year 1893, and has been generally understood and followed by carriers throughout the country.

. . .

That a remedial statute which has proved of such benefit to a large and important number of citizens should be rendered nugatory by a decision in a case brought by an individual to recover personal damages without the Government's representative being heard upon a proper construction of the statute is unfortunate, to say the least, and an effort will be made to have it properly presented.

. . .

ACCIDENT REPORTS.

. . .

Many men are injured while opening by hand the knuckle of a coupler on a moving car, when such car is dangerously near to another car. A considerable share of these cases is due to the negligence of the man himself, or to his lack of caution. There is a small but constant percentage of injuries occurring when a man undertakes to adjust a coupler laterally by pushing it or kicking it with the foot. This is often done when the car is in motion, and is manifestly a risky proceeding. "Going between cars on the inside of a curve" is an explanation which frequently occurs. This, in nearly every case, must be taken to indicate contributory negligence, for the added danger of going between cars on the inside of sharp curves as compared with the situation on a straight track is obvious.

PROBLEM

One sense you will have had from the foregoing is that as the years progressed, problems that arguably were unanticipated by Congress emerged—here, the problem of faulty maintenance. Advise the Chairman of the ICC whether he should lodge with the relevant U.S. Attorney a request for an action to collect statutory fines from the Southern Pacific Railroad, because it permitted to be used on its lines two cars each equipped with Miller couplers, but one coupler was broken so that it would not in fact couple automatically and men had to go between the cars.

The Courts Encounter the RSA

Johnson v. Southern Pacific Co.

Circuit Court of Appeals, Eighth Circuit, 1902.
117 F. 462.

■ SANBORN, CIRCUIT JUDGE, after stating the case . . . [see Problem 3, p. 183 above, for a statement of the facts], delivered the opinion of the court.

Under the common law the plaintiff assumed the risks and dangers of the coupling which he endeavored to make, and for that reason he is estopped from recovering the damages which resulted from his undertaking. He was an intelligent and experienced brakeman, familiar with the couplers he sought to join, and with their condition, and well aware of the difficulty and danger of his undertaking, so that he falls far within the familiar rules that the servant assumes the ordinary risks and dangers of the employment upon which he enters, so far as

they are known to him, and so far as they would have been known to one of his age, experience, and capacity by the use of ordinary care, and that the risks and dangers of coupling cars provided with different kinds of well-known couplers, bumpers, brakeheads and deadwoods are the ordinary risks and dangers of a brakeman's service. [Citations omitted.]

This proposition is not seriously challenged, but counsel base their claim for a reversal of the judgment below upon the position that the plaintiff was relieved of this assumption of risk, and of its consequences, by the provisions of the act of Congress of March 2, 1893 (27 Stat. c. 196). [The Court here quoted the title and Sections 1, 2, 6 and 8 of the act, set out at pp. 180–181 above].

The first thought that suggests itself to the mind upon a perusal of this law, and a comparison of it with the facts of this case, is that this statute has no application here, because both the dining car and the engine were equipped as this act directs. The car was equipped with Miller couplers which would couple automatically with couplers of the same construction upon cars in the train in which it was used to carry on interstate commerce, and the engine was equipped with a power driving wheel brake such as this statute prescribes. To overcome this difficulty, counsel for the plaintiff persuasively argues that this is a remedial statute; that laws for the prevention of fraud, the suppression of a public wrong, and the bestowal of a public good are remedial in their nature, and should be liberally construed, to prevent the mischief and to advance the remedy, notwithstanding the fact that they may impose a penalty for their violation; and that this statute should be so construed as to forbid the use of a locomotive as well as a car which is not equipped with an automatic coupler. In support of this contention he cites Suth. St. Const. § 360; Wall v. Platt, 169 Mass. 398, 48 N.E. 270; Taylor v. U.S., 3 How. 197, 11 L. Ed. 559; and other cases of like character. The general propositions which counsel quote may be found in the opinions in these cases, and in some of them they were applied to the particular facts which those actions presented. But the interpolation in this act of congress by construction of an ex post facto provision that it is, and ever since January 1, 1898, has been unlawful for any common carrier to use any engine in interstate traffic that is or was not equipped with couplers coupling automatically, and that any carrier that has used or shall use an engine not so equipped has been and shall be liable to a penalty of $100 for every violation of this provision, is too abhorrent to the sense of justice and fairness, too rank and radical a piece of judicial legislation, and in violation of too many established and salutary rules of construction, to commend itself to the judicial reason or conscience. The primary rule for the interpretation of a statute or a contract is to ascertain, if possible, and enforce, the intention which the legislative body that enacted the law, or the parties who made the agreement, have expressed therein. But it is the intention expressed in the law or contract, and that only, that the courts may give effect to. They cannot lawfully assume or presume secret purposes that are not indicated or expressed by the statute itself and then enact provisions to accomplish these supposed intentions. While ambiguous terms and doubtful expressions may be interpreted to carry out the intention of a legislative body which a statute fairly evidences, a secret intention cannot be interpreted into a statute which

is plain and unambiguous, and which does not express it. The legal presumption is that the legislative body expressed its intention, that it intended what it expressed, and that it intended nothing more. U.S. v. Wiltberger, 5 Wheat. 76. . . . Construction and interpretation have no place or office where the terms of a statute are clear and certain, and its meaning is plain. In such a case they serve only to create doubt and to confuse the judgment. When the language of a statute is unambiguous, and its meaning evident, it must be held to mean what it plainly expresses, and no room is left for construction.

This statute clearly prohibits the use of any engine in moving interstate commerce not equipped with a power driving wheel brake, and the use of any car not equipped with automatic couplers, under a penalty of $100 for each offense; and it just as plainly omits to forbid, under that or any penalty, the use of any car which is not equipped with a power driving wheel brake, and the use of any engine that is not equipped with automatic couplers. This striking omission to express any intention to prohibit the use of engines unequipped with automatic couplers raises the legal presumption that no such intention existed, and prohibits the courts from importing such a purpose into the act, and enacting provisions to give it effect. The familiar rule that the expression of one thing is the exclusion of others points to the same conclusion. Section 2 of the act does not declare that it shall be unlawful to use any engine or car not equipped with automatic couplers, but that it shall be unlawful only to use any car lacking this equipment. This clear and concise definition of the unlawful act is a cogent and persuasive argument against the contention that the use without couplers of locomotives, hand cars, or other means of conducting interstate traffic, was made a misdemeanor by this act. Where the statute enumerates the persons, things, or acts affected by it, there is an implied exclusion of all others. Suth. St. Const. § 227. And when the title of this statute and its first section are again read; when it is perceived that it was not from inattention, thoughtlessness, or forgetfulness; that it was not because locomotives were overlooked or out of mind, but that it was advisedly and after careful consideration of the equipment which they should have, that congress forbade the use of cars alone without automatic couplers; when it is seen that the title of the act is to compel common carriers to "equip their cars with automatic couplers . . . and their locomotives with driving wheel brakes"; that the first section makes it unlawful to use locomotives not equipped with such brakes, and the second section declares it to be illegal to use cars without automatic couplers—the argument becomes unanswerable and conclusive.

Again, this act of Congress changes the common law. Before its enactment, servants coupling cars used in interstate commerce without automatic couplers assumed the risk and danger of that employment, and carriers were not liable for injuries which the employees suffered in the discharge of this duty. Since its passage the employees no longer assume this risk, and, if they are free from contributory negligence, they may recover for the damages they sustain in this work. A statute which thus changes the common law must be strictly construed. The common or the general law is not further abrogated by such a statute than the clear import of its language necessarily requires. Shaw v. Railroad Co., 101 U.S. 557, 565; Fitzgerald v. Quann, 109 N.Y. 441, 445;

Brown v. Barry, 3 Dall. 365, 367. The language of this statute does not require the abrogation of the common law that the servant assumes the risk of coupling a locomotive without automatic couplers with a car which is provided with them.

Moreover, this is a penal statute, and it may not be so broadened by judicial construction as to make it cover and permit the punishment of an act which is not denounced by the fair import of its terms. The acts which this statute declares to be unlawful, and for the commission of which it imposes a penalty, were lawful before its enactment, and their performance subjected to no penalty or liability. It makes that unlawful which was lawful before its passage, and it imposes a penalty for its performance. Nor is this penalty a mere forfeiture for the benefit of the party aggrieved or injured. It is a penalty prescribed by the statute, and recoverable by the government. It is, therefore, under every definition of the term, a penal statute. The act which lies at the foundation of this suit—the use of a locomotive which was not equipped with a Miller hook to turn a car which was duly equipped with automatic couplers—was therefore unlawful or lawful as it was or was not forbidden by this statute. That act has been done. When it was done it was neither forbidden nor declared to be unlawful by the express terms of this law. There is no language in it which makes it unlawful to use in interstate commerce a locomotive engine which is not equipped with automatic couplers. The argument of counsel for the plaintiff is, however, that the statute should be construed to make this act unlawful because it falls within the mischief which congress was seeking to remedy, and hence it should be presumed that the legislative body intended to denounce this act as much as that which it forbade by the terms of the law. An ex post facto statute which would make such an innocent act a crime would be violative of the basic principles of Anglo-Saxon jurisprudence. An ex post facto construction which has the same effect is equally abhorrent to the sense of justice and of reason. The mischief at which a statute was leveled, and the fact that other acts which it does not denounce are within the mischief, and of equal atrocity with those which it forbids, do not raise the presumption that the legislative body which enacted it had the intention, which the law does not express, to prohibit the performance of the acts which it does not forbid. Nor will they warrant a construction which imports into the statute such a prohibition. The intention of the legislature and the meaning of a penal statute must be found in the language actually used, interpreted according to its fair and usual meaning, and not in the evils which it was intended to remedy, nor in the assumed secret intention of the lawmakers to accomplish that which they did not express. . . .

The decision and opinion of the supreme court in U.S. v. Harris, 177 U.S. 305, 309 is persuasive—nay, it is decisive—in the case before us. The question there presented was analogous to that here in issue. It was whether congress intended to include receivers managing a railroad among those who were prohibited from confining cattle, sheep, and other animals in cars more than 28 consecutive hours without unloading them for rest, water, and feeding, under "An act to prevent cruelty to animals while in transit by railroad or other means of transportation," approved March 3, 1873, and published in the Revised Statutes as sections 4386, 4387, 4388, and 4389. This statute forbids

the confinement of stock in cars by any railroad company engaged in interstate commerce more than 28 consecutive hours, and prescribes a penalty of $500 for a violation of its provisions. The plain purpose of the act was to prohibit the confinement of stock while in transit for an unreasonable length of time. The confinement of cattle by receivers operating a railroad was as injurious as their confinement by a railroad company, and the argument for the United States was that, as such acts committed by receivers were plainly within the mischief congress was seeking to remedy, the conclusion should be that it intended to prohibit receivers, as well as railroad companies, from the commission of the forbidden acts, and hence that receivers were subject to the provisions of the law. The supreme court conceded that the confinement of stock in transit was within the mischief that congress sought to remedy. But it held that as the act did not, by its terms, forbid such acts when committed by receivers, it could not presume the intention of Congress to do so, and import such a provision into the plain terms of the law. Mr. Justice Shiras, who delivered the unanimous opinion of the court, said:

> "Giving all proper force to the contention of the counsel for the government, that there has been some relaxation on the part of courts in applying the rule of strict construction to such statutes, it still remains that the intention of a penal statute must be found in the language actually used, interpreted according to its fair and obvious meaning. It is not permitted to courts, in this class of cases, to attribute inadvertence or oversight to the legislature when enumerating the classes of persons who are subjected to a penal enactment, nor to depart from the settled meaning of words or phrases in order to bring persons not named or distinctly described within the supposed purpose of the statute." . . .

The act of March 2, 1893, is a penal statute, and it changes the common law. It makes that unlawful which was innocent before its enactment, and imposes a penalty, recoverable by the government. Its terms are plain and free from doubt, and its meaning is clear. It declares that it is unlawful for a common carrier to use in interstate commerce a car which is not equipped with automatic couplers, and it omits to declare that it is illegal for a common carrier to use a locomotive that is not so equipped. As congress expressed in this statute no intention to forbid the use of locomotives which were not provided with automatic couplers, the legal presumption is that it had no such intention, and provisions to import such an intention into the law and to effectuate it may not be lawfully enacted by judicial construction. The statute does not make it unlawful to use locomotives that are not equipped with automatic couplers in interstate commerce, and it did not modify the rule of the common law under which the plaintiff assumed the known risk of coupling such an engine to the dining car.

There are other considerations which lead to the same result. If we are in error in the conclusion already expressed, and if the word "car," in the second section of this statute, means locomotive, still this case does not fall under the law, (1) because both the locomotive and the dining car were equipped with automatic couplers; and (2) because at

the time of the accident they were not "used in moving interstate traffic."

For the reasons which have been stated, this statute may not be lawfully extended by judicial construction beyond the fair meaning of its language. There is nothing in it which requires a common carrier engaged in interstate commerce to have every car on its railroad equipped with the same kind of coupling, or which requires it to have every car equipped with a coupler which will couple automatically with every other coupler with which it may be brought into contact in the usual course of business upon a great transcontinental system of railroads. If the lawmakers had intended to require such an equipment, it would have been easy for them to have said so, and the fact that they made no such requirement raises the legal presumption that they intended to make none. Nor is the reason for their omission to do so far to seek or difficult to perceive. There are several kinds or makes of practical and efficient automatic couplers. Some railroad companies use one kind; others have adopted other kinds. Couplers of each kind will couple automatically with others of the same kind of construction. But some couplers will not couple automatically, with couplers of different construction. Railroad companies engaged in interstate commerce are required to haul over the railroads cars equipped with all these couplers. They cannot relieve themselves from this obligation or renounce this public duty for the simple reason that their cars or locomotives are not equipped with automatic couplers which will couple with those with which the cars of other roads are provided, and which will couple with equal facility with those of their kind. These facts and this situation were patent to the congress when it enacted this statute . . . It doubtless knew the monopoly it would create by requiring every railroad company to use the same coupler, and it did not create this monopoly. The prohibition of the statute goes no farther than to bar the handling of a car "not equipped with couplers coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of the car." It does not bar the handling and use of a car which will couple automatically with couplers of its kind because it will not also couple automatically with couplers of all kinds, and it would be an unwarrantable extension of the terms of this law to import into it a provision to this effect. A car equipped with practical and efficient automatic couplers, such as the Janney couplers or the Miller hooks, which will couple automatically with those of their kind, fully and literally complies with the terms of the law, although these couplers will not couple automatically with automatic couplers of all kinds or constructions. The dining car and the locomotive were both so equipped. . . ..

Again, the statute declares it to be unlawful for a carrier "to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped," etc. It is not, then, unlawful, under this statute, for a carrier to haul a car not so equipped which is either used in intrastate traffic solely, or which is not used in any traffic at all. . . . It is only when a car is "used in moving interstate traffic" that it becomes unlawful to haul it unless it is equipped as the statute prescribes. On the day of this accident the dining car in this case was standing empty on the side track. The defendant drew it to a turntable, turned it, and placed it back upon the side track. The accident occurred during the

performance of this act. The car was vacant when it went to the turntable, and vacant when it returned. It moved no traffic on its way. How could it be said to have been "used in moving interstate traffic" either while it was standing on the side track, or while it was going to and returning from the turntable? . . .

[T]he prohibition is not of the hauling of cars that have been or will be used in such traffic, but only of those used in moving that traffic. . . . Neither the empty dining car standing upon the side track, nor the freight engine which was used to turn it at the little station in Utah, was then used in moving interstate traffic, within the meaning of this statute, and this case did not fall within the provisions of this law.

The judgment below must accordingly be affirmed, and it is so ordered.

■ THAYER, CIRCUIT JUDGE. I am unable to concur in the conclusion, announced by the majority of the court, that the act of congress of March 2, 1893 (27 Stat. 531, c. 196), does not require locomotive engines to be equipped with automatic couplers; and I am equally unable to concur in the other conclusion announced by my associates that the dining car in question at the time of the accident was not engaged or being used in moving interstate traffic.

In my judgment, it is a very technical interpretation of the provisions of the act in question, and one which is neither in accord with its spirit nor with the obvious purpose of the lawmaker, to say that congress did not intend to require engines to be equipped with automatic couplers. The statute is remedial in its nature; it was passed for the protection of human life; and there was certainly as much, if not greater, need that engines should be equipped to couple automatically, as that ordinary cars should be so equipped, since engines have occasion to make couplings more frequently. In my opinion, the true view is that engines are included by the words "any car," as used in the second section of the act. The word "car" is generic, and may well be held to comprehend a locomotive or any other similar vehicle which moves on wheels; and especially should it be so held in a case like the one now in hand, where no satisfactory reason has been assigned or can be given which would probably have influenced congress to permit locomotives to be used without automatic coupling appliances.

I am also of opinion that, within the fair intent and import of the act, the dining car in question at the time of the accident was being hauled or used in interstate traffic. . . . It was a car which at the time was employed in no other service than to furnish meals to passengers between Ogden and San Francisco . . . The cars composing a train which is regularly employed in interstate traffic ought to be regarded as used in that traffic while the train is being made up with a view to an immediate departure on an interstate journey as well as after the journey has actually begun. I accordingly dissent from the conclusion of the majority of the court on this point.

While I dissent on the foregoing propositions, I concur in the other view which is expressed in the opinion of the majority, to the effect that the case discloses no substantial violation of the provisions of the act of congress, because both the engine and the dining car were equipped with automatic coupling appliances. In this respect the case discloses a

compliance with the law, and the ordinary rule governing the liability of the defendant company should be applied. The difficulty was that the car and engine were equipped with couplers of a different pattern, which would not couple, for that reason, without a link. Janney couplers and Miller couplers are in common use on the leading railroads of the country, and congress did not see fit to command the use of either style of automatic coupler to the exclusion of the other, while it must have foreseen . . . that cars having different styles of automatic couplers would necessarily be brought in contact in the same train. It made no express provision for such an emergency, but declared generally that, after a certain date, cars should be provided with couplers coupling automatically. The engine and dining car were so equipped . . . In other words, the plaintiff assumed the risk of making the coupling in the course of which he sustained the injury. On this ground I concur in the order affirming the judgment below.

NOTES ON *JOHNSON*

(1) The 1893 Act finally took effect on August 1, 1900, the ICC having twice used its Section 7 authority to postpone the effective date respecting couplers. Johnson's accident occurred four days later. As counsel for Southern Pacific, what considerations bear on your decision whether or not to invoke the "assumption of the risk" defense to Johnson's tort action?

(2) What do you suppose Judge Sanborn meant in arguing, at p. 255, that "the interpolation in this act of congress by construction of an ex post facto provision [that it had been unlawful since January 1, 1898[1] to use engines not equipped with automatic couplers would be] too rank and radical a piece of judicial legislation"? When a court decides how to interpret language that is susceptible of several possible meanings, doesn't this problem always arise? In this sense, doesn't interpretation essentially *require* that judges assign meanings to words after the fact? How does a judicial choice what meaning to attach to statutory words differ from the choice how to describe the holding of an earlier judicial decision?

Perhaps this problem is not only Judge Sanborn's. Consider two possible ways in which Johnson's counsel might have framed his argument:

> (a) "While it may be conceded that a locomotive is not in literal terms a 'car,' the court should extend the Act's remedies to locomotives, given the importance of those remedies"; or
>
> (b) "In common usage when speaking about trains, the word 'car' can be understood to include locomotives; in light of the remedial purpose of this legislation, that is how you should interpret it."

Do these arguments lead to different outcomes? Would one of them have been more likely than the other to have prompted Judge Sanborn's heated rhetoric? Can you tell from the opinion which of them counsel seems to have employed?

(3) Is the result sustainable because of the way in which the statute uses the word "haul," an argument not clearly addressed in either opinion? GEORGE LARABEE V. NEW YORK, N. H. & H. R. CO., 182 Mass. 348, 66 N.E. 1032 (1902) involved an accident occurring when a locomotive's tender

[1] The date given should have been August 1, 1900.

(carrying its fuel supply), completely lacking any kind of automatic coupler, had to be manually attached to the first of the cars the locomotive and its tender would be hauling. Massachusetts had a statute mirroring the RSA. Oliver Wendell Holmes, Jr., then still a Justice of the Supreme Judicial Court of Massachusetts, reasoned "It may be, as some of us think, that the rear end of the tender is within the policy and object of the act, but the word 'car' in its ordinary use and acceptance does not include it. On the contrary it excludes the tender as obviously as it does the engine. It always is dangerous to give unusual meanings to the words of a document on the strength of an imagination of what the writer had in mind. Moreover, the other language of the section indicates that, whatever the evil which the Legislature sought to prevent, it had in mind only cars properly so called. The prohibition 'no railroad corporation shall haul' hardly would be so expressed if it had in conscious view not merely the cars which are regarded as the inert objects of traction by a separate engine from which they are detached daily, but also the tenders which are so much more closely associated with the source of power as almost to be regarded as one with it, and which only exceptionally and with more or less difficulty are taken apart from it."

NOTES ON INTERPRETIVE TECHNIQUE

(1) Remind yourself of Professor Greenawalt's paradigmatic questions about interpretation, p. 65. above. Is Judge Sanborn's opinion better characterized as taking a writer's meaning or a reader's understanding approach?

(2) "*Plain meaning*": Judge Sanborn repeatedly invokes the idea of "plain meaning." To whom is it that the meaning is supposed to be plain—Members of Congress, when they wrote? Private citizens, planning conduct yesterday? Judges, rendering decisions today? A similar idea is often captured by the idea of "ordinary meaning." Note, however, that "ordinary meaning" has more of a tendency than "plain meaning" to externalize or objectify judgment; "plain meaning" is more of an assertion—if one is not careful in its use, plain *to me*. If you do not recall the brief passages from Farnsworth, et. al., p. 62 above, this would be a good point at which to read them. Coming to questions about meaning from another's point of view is an essential skill. Your own confidence that you just know what a statute's words mean, or a judge's confidence in a meaning your client did not find so plain, can be a trap. There is a straightforward lesson here for counsel advising a client about statutory meaning or arguing a case of statutory interpretation: her first task should be to ascertain for herself or to persuade the judge that the words *could* have a meaning favorable to her client. That will not be enough, but to fail to open the text to a favorable result may well prove fatal to your cause. And recall, in this respect, the experimental results reported by Professor Farnsworth, et al., p. 62 above, suggesting the practical importance of persuading judges to address issues of meaning from the perspective of others than herself—whether those others are "readers" or :writers."

Here are three early observations about "plain meaning" issues predating Judge Sanborn's opinion—two, excerpts from Supreme Court opinions, and the third a writing that remains influential today through its "faithful servant" and "soupmeat" metaphors taking the "faithful agent" view of judicial responsibilities in statutory interpretation, under which

plain or ordinary meanings must be those that would be understood by the speaker or writer, and not what the hearer personally finds "plain.".

(a) STURGES V. CROWNINSHIELD, 4 WHEAT. 122, 202 (1819): "Where words conflict with each other, where the different clauses of an instrument bear upon each other, and would be inconsistent unless the natural and common import of words be varied, construction becomes necessary, and a departure from the obvious meaning of words is justifiable. But if, in any case, the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case would be so monstrous that all mankind would, without hesitation, unite in rejecting the application."

(b) HAMILTON V. RATHBONE, 175 U.S. 414, 421 (1899): "The general rule is perfectly well settled that, where a statute is of doubtful meaning and susceptible upon its face of two constructions, the court may look into prior and contemporaneous acts, the reasons which induced the act in question, the mischiefs intended to be remedied, the extraneous circumstances, and the purpose intended to be accomplished by it, to determine its proper construction. But where the act is clear upon its face, and when standing alone it is fairly susceptible of but one construction, that construction must be given to it. . . . The whole doctrine applicable to the subject may be summed up in the single observation that prior acts may be referred to to *solve* but not to *create* an ambiguity."

(c) Francis Lieber,[1] LEGAL AND POLITICAL HERMENEUTICS, pp. 28–31 (1839): "Let us take an instance of the simplest kind, to show in what degree we are continually obliged to resort to interpretation. By and by we shall find that the same rules which common sense teaches every one to use, in order to understand his neighbor in the most trivial intercourse, are necessary likewise, although not sufficient, for the interpretation of documents or texts of the highest importance, constitutions as well as treaties between the greatest nations.

"Suppose a housekeeper says to a domestic: 'fetch some soupmeat,' accompanying the act with giving some money to the latter; he will be unable to execute the order without interpretation, however easy and, consequently, rapid the performance of the process may be. Common sense and good faith tell the domestic, that the housekeeper's meaning was this: 1. He should go immediately, or as soon as his other occupations are finished; or, if he be directed to do so in the evening, that he should go the next day at the *usual* hour; 2. that the money handed him by the housekeeper is intended to pay for the meat thus ordered, and not as a present to him; 3. that he should buy such meat and of such

[1] Francis Lieber was a professor at Columbia Law School, 1860–1872. This work has been republished by the Legal Classics Library.

> parts of the animal, as, to his knowledge, has commonly been used in the house he stays at, for making soups; 4. that he buy the best meat he can obtain, for a fair price; 5. that he go to that butcher who usually provides the family with whom the domestic resides, with meat, or to some convenient stall, and not to any unnecessarily distant place; 6. that he return the rest of the money; 7. that he bring home the meat in good faith, neither adding anything disagreeable nor injurious; 8. that he fetch the meat for the use of the family and not for himself. Suppose, on the other hand, the housekeeper, afraid of being misunderstood, had mentioned these eight specifications, she would not have obtained her object, if it were to exclude all *possibility* of misunderstanding. For, the various specifications would have required new ones. Where would be the end? We are constrained, then, always, to leave a considerable part of our meaning to be found out by interpretation, which, in many cases must necessarily cause greater or less obscurity with regard to the exact meaning, which our words were intended to convey.
>
> "Experience is a plant growing as slowly as confidence, which Chatham said increased so tardily. In fact, confidence grows slowly, because it depends upon experience. The British spirit of civil liberty, induced the English judges to adhere strictly to the law, to its exact expressions. This again induced the law-makers to be, in their phraseology, as explicit and minute as possible, which causes such a tautology and endless repetition in the statutes of that country, that even so eminent a statesman as Sir Robert Peel declared, in parliament, that he 'contemplates no task with so much distaste, as the reading through an ordinary act of parliament.' Men have at length found out that little or nothing is gained by attempting to speak with absolute clearness, and endless specifications, but that human speech is the clearer, the less we endeavor to supply by words and specifications, that interpretation which common sense must give to human words. However minutely we may define, somewhere we needs must trust at last to common sense and good faith."

(3) *Contracts and statutes*: In this passage at p. 255, Judge Sanborn appears to equate statutory with contractual interpretation.

> "The primary rule for the interpretation of a statute or a contract is to ascertain, if possible, and enforce, the intention which the legislative body that enacted the law, or the parties who made the agreement, have expressed therein. But it is the intention expressed in the law or contract, and that only, that the courts may give effect to."

Do you agree that the principles appropriate for ascribing meaning to the public acts of an elected legislature ought to be the same as are used to determine the meaning of a written agreement between private contractors? Or would you agree with Professor Greenawalt that

> "Statutes differ from typical wills and contracts in four basic ways. They are issued by a group of officials acting formally; they

> cover general categories of behavior, not specific situations; they endure through time; and they aim (at least ostensibly) to serve the public good. (When principals give instructions to agents, these may also specify a continuing course of behavior—e.g., purchase undervalued Impressionist paintings—but they are addressed to particular individuals with whom the principals have a special relationship)."[2]

It may be helpful in understanding the "plain meaning" approach to know that it has a contractual equivalent, the Parole Evidence Rule. Under that rule, as it would have been understood around 1900, the words of a written contract not just reflected but *were* the agreement so far as a court was concerned. Of perhaps greatest importance for our purposes were two assumptions, or perhaps presumptions, about the contracting situation. The first was that language could have "objective" meaning independent of the subjective understanding of a particular speaker, a meaning susceptible of universal understanding. The second was that the typical contract was a discrete transaction, in which the parties agreed at one moment in time how the law should treat all future outcomes of their undertaking. To be a bit more concrete: first, people supposed that any two people could reach an agreement and put it into language that *both* reflected their own bargaining *and* could be accurately understood by any intelligent outsider, without having to know about the special subjective circumstances of the authors. Perhaps the reader appropriately could use, or even would be required to refer to, *some* general context to assess meaning, but she need have no reference to internal states of mind. Second, people supposed that when individuals *did* reach agreements, they reached *complete* agreements about the terms of a particular transaction—say, a wheelwright's manufacture and sale of carriage wheels to a customer. They spelled out everything that should be done when things happened in the future. Nothing was left open-ended, to be determined in the course of a developing relationship.

Does it seem appropriate to understand the "plain meaning" rule as having the same intellectual roots? In particular, consider the second aspect, viewing contracts as discrete transactions that embrace, at the moment of their creation, agreement about all future outcomes of a discrete transaction. What characteristics should legislation have to make this view sustainable? Must legislation have those characteristics? Is it likely to? Consider again, in this respect, the expectations of the drafters of the Napoleonic Code, p. 110 above.

(4) *"Congressional intent"*: The proposition that language has meaning apart from the subjective understandings of those who write and read it is central to an otherwise perplexing aspect of Judge Sanborn's argument. Just a few lines before asserting the "plain meaning" rule, he identifies the "primary rule for the interpretation of a statute"—"to ascertain, if possible, and enforce, the intention which the legislative body that enacted the law . . . ha[s] expressed therein." The idea that interpretation is subservient to "legislative intention" is one to which almost all judges and commentators would subscribe, whether or not they would agree that the relevant intentions could be captured in legislative words that virtually all readers would parse in the same way. Only if you did subscribe to the latter idea,

[2] Statutory and Common Law Interpretation 3 (2013).

however, could both propositions live together comfortably in the same paragraph.

Once we begin to entertain the idea that "intention" might be separated from the words used to express it, significant complications emerge. We will need to spend a fair amount of time considering those complications. For the moment, note that, absent Judge Sanborn's artificial link, an approach giving central place to "legislative intentions," the "faithful servant" or writer's meaning idea, is sharply opposed to one that gives central place to "statutory meaning," Prof. Greenawalt's "independent, cooperative actor," or reader's meaning. We will see these views in conflict throughout this course.

Note too that, as we have already begun to see, "legislative intention" is itself a phrase whose meaning is not plain. First, as is common in speaking about complex institutions (corporations are another frequently encountered example), it attributes "intention" to a body that cannot possibly have one in the human sense. Five hundred thirty-five Senators and Representatives participating to varying degrees and with varying levels of comprehension in the debates and votes of the Congress do not "intend" in the way that an individual firing a rifle at a target does. One wants a metaphor for expressing both the superior political authority of the legislature's work-product and the common experience that groups have identifiable purposes for their behavior, independent of individual ratiocination (consider an army unit on maneuvers, a frequent example used in this respect; the maneuvers have a purpose irrespective of what a given tank driver or colonel knows or is thinking). Pursuing "Congress's intent" is the most common way to express that; but the expression does not correspond to any observable reality.

Three general observations are nonetheless possible: First, it ostensibly refers to meaning in relation to the speaker's act—what Congress did in speaking—more than what the judge understands in reading. Second, it need not be specific in its reference; "legislative intention" may refer either to a specific understanding of the members of the lawmaking body in relation to some quite particular problem, or to the more general overall purposes motivating the statute's enactment. Third, it need not entail reference to extrinsic historical materials, such as transcripts of legislative debates; "legislative intention" may be embodied in the politics of the time, in statutory structure, or in choices of language as well as legislative history. In any of these formulations, however, a "legislative intention" approach stands in theoretical contrast to one that treats a statute as a reader's text. Would you choose one approach over the other and, if so, why?

(5) *The distortions of the difficult case*: Bear in mind that when the import of language really *is* obvious, its meaning is unlikely to be litigated—certainly, it is unlikely to be litigated to the high level of appeal that might bring it to a casebook writer's attention. The cases on statutory interpretation considered in the course on Legal Methods deal for the most part with what might be termed the "pathology" of statutes. That is, they deal with serious difficulties and disputes arising out of legislative language.

There is real danger that a student confronted with such materials will begin to confuse the pathological with the normal. She may conclude

that grave interpretive doubts attend every effort to use statutes. That just isn't so. Thousands of questions are confidently and uncontroversially disposed of in lawyers' offices, in the offices of government, and elsewhere, by recourse to statutory provisions. Only a fraction of the verbiage in our statute books finds its way to the courts for construction. Some of the causes of interpretative problems that do arise have been described earlier. The nature and volume of these problems vary greatly, of course, from statute to statute. And law school materials spend little time with simple cases. It is essential to your understanding and to your effective use of legislation that you realize that for many, if not most, statutes there is normally a substantial body of situations, an "area of no dispute," to which the terms can be applied with assurance and without difficulty.

Consider the bearing of this observation upon interpretation in accordance with "plain meaning." In an article entitled AN EVALUATION OF THE RULES OF STATUTORY INTERPRETATION, 3 Kan.L.Rev. 1 (1954), Professor Quintin Johnstone stated (pp. 12–13):

> If no statute can be perfectly plain, should the plain meaning rule be abolished? Not necessarily. Although no statute may be absolutely unambiguous, the degree of ambiguity in most statutes is very slight when applied to most situations. The degree of ambiguity is likely to be substantial only in limited peripheral sets of situations. The result is that to a large extent statutes are substantially plain, so plain that except in marginal situations it would be a ridiculous forcing of a statute to put more than one meaning on the statutory language. For purposes of interpretation, a vast area of plain meaning exists. If the term plain in the plain meaning rule is understood as plain beyond reasonable question, then the rule makes sense, although admittedly a problem arises as to what is reasonable doubt or substantial lack of ambiguity.
>
> To deny that the plain meaning rule has any force or validity opens the door to violation of a fundamental objective in statutory interpretation. This position leads to a denial of legislative supremacy in the statutory field. Under such a view, statutes never are binding on a court as they never are clear. A court can always make whatever rule it wishes and decide cases in any way it wishes, despite statutory meanings because it cannot be restricted by statutory language.

(7) *Canons and Maxims:* An important feature of Judge Sanborn's opinion lies in its use of what appear to be "rules" of statutory interpretation. You will often encounter and should start now to identify and learn to use these techniques. These rules are commonly divided into two classes, "maxims" and "canons."

Maxims are propositions that embody common interpretive strategies for dealing with linguistic ambiguity. They are strategies relatively independent of any particular policy commitment, ideas about common usage in communication rather than normative propositions about desirable outcomes. Judge Sanborn uses a maxim when he reasons that engines need not have couplers under the statute, because "the expression of one thing is the exclusion of others." (In Latin, *expressio unius est*

exclusio alterius.) This is an observation about how English-speakers usually construct their thoughts. Two other frequently employed maxims embody the common-sense idea that words in a series take color from the other terms in the series (*eiusdem generis,* "of the same kind" and *noscitur e sociis,* a word is "known by its neighbors").

In addition to maxims used in dealing with particular textual passages, one finds "whole act maxims," that embody propositions useful for understanding a statute as a whole. Frequently encountered examples are that words should be given consistent, unique meanings within a statute, and that interpretation should avoid treating any part of a statute as surplusage. Justice Holmes is using "whole act" reasoning in George Larabee v. New York, N. H. & H. R. Co. when he argues that the statute's consistent use of "haul" in relation to "cars" excludes from "cars" those things (locomotives and tenders) that do the hauling. In what ways does Judge Sanborn reason from the whole of the act to his conclusions? Would it be proper to reason from Section 3 of the Act, explicitly permitting railroads lawfully to refuse to receive cars insufficiently equipped with usable power or train brakes to permit compliance with Section 1 of the act, that a railroad is not free under Section 2 to refuse to receive a car whose automatic couplers will not couple with its own?

Unlike maxims, *canons of construction* have a normative slant. They entail policy approaches, giving reasons for resolving common problems in a particular way. Examples can be found in Judge Sanborn's observations that a statute "which . . . changes the common law must be strictly construed" and that "penal statutes are to be construed strictly." These observations do not simply state how an educated reader would use common linguistic practice to parse any text. Rather, the first phrase asserts a normative policy of protecting the integrity of the common law; in order to prevent harm to its intellectual foundations, statutes that seem to undermine it should be given restrictive meanings. The second phrase embodies the normative proposition that citizens have an especially strong claim to precise legislative definition of criminal offenses.

Both maxims and canons are easily lampooned. Take, for a maxim example, *ejusdem generis*—that when general words appear with a list of particulars, their meaning is limited to the class of things indicated by the particulars. In MCBOYLE V. UNITED STATES, 283 U.S. 25 (1931), McBoyle had been convicted of theft of an airplane under a statute prohibiting interstate theft of a "motor vehicle," and defining "motor vehicle" to "include an automobile, automobile truck, automobile wagon, motor cycle, or any other self-propelled vehicle not designed for running on rails." Act of October 29, 1919, c. 89, § 2. 41 Stat. 324. The Court, Justice Holmes writing, unanimously found *ejusdem generis* not to permit McBoyle's conviction; however vehicular an airplane might be in other respects, airplanes were known when the statute was enacted and did not run on land, as both the specific examples and the specific exception did.[3]

UNITED STATES V. ALPERS, 338 U.S. 680 (1950), on the other hand, presented the question whether a reference to "any obscene . . . book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character" applied to a phonograph record—a

[3] Self-propelled boats had been long known; one could properly characterize them as the "vehicles" of trans-oceanic shipping. Would you think the theft of a boat within the statute?

communicative medium, but not one that can be understood by seeing or reading it. Now Justice Minton, of whom history does not think as highly as it does of Holmes, wrote for a divided court (Justices Frankfurter, Black and Jackson dissenting). While, to be sure, it was particularly important in the context of criminal law to assure that law gave fair warning of its scope, "to apply the rule of *ejusdem generis* to the present case would be 'to defeat the obvious purpose of legislation' . . . to prevent the channels of interstate commerce from being used to disseminate any matter that, in its essential nature, communicates obscene, lewd, lascivious or filthy ideas." At 683. Even though Congress had amended the statute to include movies long after phonograph records had entered commerce, the majority was "not persuaded that Congress, by adding motion-picture film to the specific provisions of the statute, evidenced an intent that obscene matter not specifically added was without the prohibition of the statute; nor do we think that Congress intended that only visual obscene matter was within the prohibition of the statute. The First World War gave considerable impetus to the making and distribution of motion-picture films. And in 1920 the public was considerably alarmed at the indecency of many of the films. It thus appears that with respect to this amendment, Congress was preoccupied with making doubly sure that motion-picture film was within the Act, and was concerned with nothing more or less." At 684.

As *Alpers* itself suggests, the canons have been particularly unsuccessful at preventing what might seem surprising extensions of criminal statutes to behavior the Justices find immoral. CAMINETTI V. UNITED STATES, 242 U.S. 470 (1917) is a notorious example. The federal White Slave (Mann) Act made it a felony to transport a woman in interstate commerce "for the purpose of prostitution or debauchery, or for any other immoral purpose." A bare majority of the Court, invoking "plain meaning," concluded that it had properly been used to convict a prominent California politician for having taken his mistress from Sacramento to Reno, Nevada, where they committed adultery. If you share the intuition that taking one's long-time mistress on a trip to Reno is not like "prostitution or debauchery"—indeed, that the members of Congress would have hesitated at criminalizing conduct in which a number of them probably participated with some frequency—you might properly wonder, as most contemporary critics do, what had happened to the canon that "penal statutes are to be construed strictly." That canon reflects what may be developed legal systems' most widely shared legal proposition, that no criminal penalty may be imposed absent prior legal definition of an offense. ("*Nulla poena sine legem.*") The Supreme Court had early and emphatically rejected any idea that federal courts had common-law authority to define crimes. United States v. Hudson and Goodwin, 7 Cranch 32 (1812). In the *Caminetti* statute, Congress not only had expressly indicated that it had *not* at the moment of legislating resolved for itself all cases that might arise under the statute it was enacting; it had left further definition of offenses to the courts under a self-evidently vague and threatening standard, "for any other immoral purpose." Does "plain meaning" have any permissible use in such a case? For what does it then stand?, What is a "strict construction" obviously can vary with the construer, as *Caminetti* should suggest.

Adages often have an ambiguous quality; we rely on context to suggest whether "fools rush in where angels fear to tread," "haste makes waste," "he who hesitates is lost" or "the early bird gets the worm" is best suited to

the current situation. Karl Llewellyn argued at length that each of the canons and maxims appears to have its opposite. Karl Llewellyn, Remarks on the Theory of Appellate Decisions and the Rules or Canons About How Statutes Are to Be Construed, 3 Vand.L.Rev. 395–406 (1950); a revealing table from this article is reproduced at p. 453 below. For Judge Sanborn's "penal statutes are to be construed strictly," there is Judge Thayer's reply, p. 260, that remedial measures are to be construed to effectuate their purposes. It has been suggested, however, that if one looks carefully at Llewellyn's listing of apparently opposed maxims, it is possible to see a certain political or systematic ordering to them—one set that is likely to prove attractive to adherents of textual analysis and another to those who are more strongly oriented to statutory purpose. Alexander Aleinikoff and Theodore Shaw, The Costs of Incoherence: A Comment on Plain Meaning, West Virginia University Hospitals v. Casey, and Due Process of Statutory Interpretation, 45 Vand.L.Rev. 687 (1992)

The point here is not to debunk these approaches as worthless, but to urge thought and discretion. Like much else about statutory interpretation, maxims and canons provide guides for thought, not formulas for the calculation of answers. They identify recurrent types of ambiguity and important legal policies. They can assist drafters of legislation in understanding how their words are likely to be taken, as they also can help readers to identify what may be reasonable or persuasive renderings of ambiguous and controlling texts. Lawyers and courts often use them, and they have again become prominent in Supreme Court usage (and in the scholarly literature) in recent years. While the canons often embody sound policy, none of them are universally applicable, or entitled to control in the face of all other factors. The assessment of a particular term also requires consideration of the whole act, the circumstances of its enactment, the policies underlying it, and an assessment of competing interpretations. Understanding the underlying policy impulse will often suggest their most effective use, and also the contexts in which they are likely to be weak. As you are reading cases here and elsewhere, be aware of these linguistic (and policy) tools and develop your own collection for future use.

With the recently increasing judicial and scholarly attention to textualism, a rich literature on the subject has developed. Supreme Court Justice Antonin Scalia and Bryan Garner's Reading Law: The Interpretation of Legal Texts (2012) is a strongly developed but hardly uncontroversial[4] analysis favoring the use of these textual tools over other approaches to interpretation. One may find more moderate views about the use of maxims and canons in Professor Greenawalt's book often quoted in these pages and in Chapters 7 and 9 of William N. Eskridge, Jr., Phillip P. Frickey and Elizabeth Garrett, Legislation and Statutory Interpretation (2nd ed. 2006). William Eskridge, The New Textualism and Normative Canons, 113 Colum. L. Rev. 581 (2013), argues that the Scalia-Garner book's chief reliance is on normative canons that "make value judgments inevitable. Indeed, canons-based textualism would (if widely followed) be strongly undemocratic."

[4] Fierce arguments were stirred by Seventh Circuit Judge Richard Posner's highly unfavorable review, as may be suggested by its title, The Incoherence of Antonin Scalia, The New Republic (August 24, 2012).

Johnson v. Southern Pacific Co.

Supreme Court of the United States, 1904.
196 U.S. 1.

Certiorari and error to the United States Circuit Court of Appeals for the Eighth Circuit.

[The Court's statement of the facts and procedural setting are omitted.]

■ MR. CHIEF JUSTICE FULLER delivered the opinion of the court:

This case was brought here on certiorari, and . . . [t]he issues involved questions deemed of such general importance that the government was permitted to file a brief and be heard at the bar.

The act of 1893 provided:

> "That from and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system." . . .
>
> "See. 2. That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."
>
> "Sec. 6. That any such common carrier using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of this act, shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered in a suit or suits to be brought by the United States District Attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed, and it shall be the duty of such district attorney to bring such suits upon duly verified information being lodged with him of such violation having occurred."
>
> "Sec. 8. 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."

The circuit court of appeals held, in substance, Sanborn, J., delivering the opinion and Lochren, J., concurring, that the locomotive and car were both equipped as required by the act, as the one had a power driving-wheel brake and the other a coupler; that § 2 did not apply to locomotives; that at the time of the accident the dining car was not "used in moving interstate traffic;" and, moreover, that the

locomotive, as well as the dining car, was furnished with an automatic coupler, so that each was equipped as the statute required if § 2 applied to both. Thayer J., concurred in the judgment on the latter ground, but was of opinion that locomotives were included by the words "any car" in the 2d section, and that the dining car was being "used in moving interstate traffic."

We are unable to accept these conclusions, notwithstanding the able opinion of the majority, as they appear to us to be inconsistent with the plain intention of Congress, to defeat the object of the legislation, and to be arrived at by an inadmissible narrowness of construction.

The intention of Congress, declared in the preamble and in §§ 1 and 2 of the act, was "to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes," those brakes to be accompanied with "appliances for operating the train-brake system;" and every car to be "equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars," whereby the danger and risk consequent on the existing system was averted as far as possible.

The present case is that of an injured employee, and involves the application of the act in respect of automatic couplers, the preliminary question being whether locomotives are required to be equipped with such couplers. And it is not to be successfully denied that they are so required if the words "any car" of the 2d section were intended to embrace, and do embrace, locomotives. But it is said that this cannot be so because locomotives were elsewhere, in terms, required to be equipped with power driving-wheel brakes, and that the rule that the expression of one thing excludes another applies. That, however, is a question of intention, and as there was special reason for requiring locomotives to be equipped with power driving-wheel brakes, if it were also necessary that locomotives should be equipped with automatic couplers, and the word "car" would cover locomotives, then the intention to limit the equipment of locomotives to power driving-wheel brakes, because they were separately mentioned, could not be imputed. Now it was as necessary for the safety of employees in coupling and uncoupling that locomotives should be equipped with automatic couplers as it was that freight and passenger and dining cars should be; perhaps more so, as Judge Thayer suggests, "since engines have occasion to make couplings more frequently."

And manifestly the word "car" was used in its generic sense. There is nothing to indicate that any particular kind of car was meant. Tested by context, subject-matter, and object, "any car" meant all kinds of cars running on the rails, including locomotives. And this view is supported by the dictionary definitions and by many judicial decisions, some of them having been rendered in construction of this act. [Citing cases.]

The result is that if the locomotive in question was not equipped with automatic couplers, the company failed to comply with the provisions of the act. It appears, however, that this locomotive was in fact equipped with automatic couplers, as well as the dining car; but that the couplers on each, which were of different types, would not

couple with each other automatically, by impact, so as to render it unnecessary for men to go between the cars to couple and uncouple.

Nevertheless, the circuit court of appeals was of opinion that it would be an unwarrantable extension of the terms of the law to hold that where the couplers would couple automatically with couplers of their own kind, the couplers must so couple with couplers of different kinds. But we think that what the act plainly forbade was the use of cars which could not be coupled together automatically by impact, by means of the couplers actually used on the cars to be coupled. The object was to protect the lives and limbs of railroad employees by rendering it unnecessary for a man operating the couplers to go between the ends of the cars; and that object would be defeated, not necessarily by the use of automatic couplers of different kinds, but if those different kinds would not automatically couple with each other. The point was that the railroad companies should be compelled, respectively, to adopt devices, whatever they were, which would act so far uniformly as to eliminate the danger consequent on men going between the cars.

If the language used were open to construction, we are constrained to say that the construction put upon the act by the circuit court of appeals was altogether too narrow.

This strictness was thought to be required because the common law rule as to the assumption of risk was changed by the act, and because the act was penal.

The dogma as to the strict construction of statutes in derogation of the common law only amounts to the recognition of a presumption against an intention to change existing law; and as there is no doubt of that intention here, the extent of the application of the change demands at least no more rigorous construction than would be applied to penal laws. And, as Chief Justice Parker remarked, conceding that statutes in derogation of the common law are to be construed strictly, "They are also to be construed sensibly, and with a view to the object aimed at by the legislature." Gibson v. Jenney, 15 Mass. 205.

The primary object of the act was to promote the public welfare by securing the safety of employees and travelers; and it was in that aspect remedial; while for violations a penalty of $100, recoverable in a civil action, was provided for, and in that aspect it was penal. But the design to give relief was more dominant than to inflict punishment, and the act might well be held to fall within the rule applicable to statutes to prevent fraud upon the revenue, and for the collection of customs,—that rule not requiring absolute strictness of construction. Taylor v. United States, 3 How. 197; United States v. Stowell, 133 U.S. 1, 12, and cases cited. And see Farmers' & M. Nat. Bank v. Dearing, 91 U.S. 29, 35; Gray v. Bennett, 3 Met. 522.

Moreover, it is settled that "though penal laws are to be construed strictly, yet the intention of the legislature must govern in the construction of penal as well as other statutes; and they are not to be construed so strictly as to defeat the obvious intention of the legislature." United States v. Lacher, 134 U.S. 624. . . .

Tested by these principles, we think the view of the circuit court of appeals, which limits the 2d section to merely providing automatic

couplers, does not give due effect to the words "coupling automatically by impact, and which can be uncoupled without the necessity of men going between the cars," and cannot be sustained.

We dismiss, as without merit, the suggestion which has been made, that the words "without the necessity of men going between the ends of the cars," which are the test of compliance with § 2, apply only to the act of uncoupling. The phrase literally covers both coupling and uncoupling; and if read, as it should be, with a comma after the word "uncoupled," this becomes entirely clear. Chicago, M. & St. P.R. Co. v. Voelker, 129 Fed. 522; United States v. Lacher, 134 U.S. 624.

The risk in coupling and uncoupling was the evil sought to be remedied, and that risk was to be obviated by the use of couplers actually coupling automatically. True, no particular design was required, but, whatever the devices used, they were to be effectively interchangeable. Congress was not paltering in a double sense. And its intention is found "in the language actually used, interpreted according to its fair and obvious meaning." United States v. Harris, 177 U.S. 309.

That this was the scope of the statute is confirmed by the circumstances surrounding its enactment, as exhibited in public documents to which we are at liberty to refer. Binns v. United States, 194 U.S. 486, 495; Church of Holy Trinity v. United States, 143 U.S. 457, 463.

President Harrison, in his annual messages of 1889, 1890, 1891, and 1892, earnestly urged upon Congress the necessity of legislation to obviate and reduce the loss of life and the injuries due to the prevailing method of coupling and braking. In his first message he said: "It is competent, I think, for Congress to require uniformity in the construction of cars used in interstate commerce, and the use of improved safety appliances upon such trains. Time will be necessary to make the needed changes, but an earnest and intelligent beginning should be made at once. It is a reproach to our civilization that any class of American workmen should, in the pursuit of a necessary and useful vocation, be subjected to a peril of life and limb as great as that of a soldier in time of war."

And he reiterated his recommendation in succeeding messages, saying in that for 1892: "Statistics furnished by the Interstate Commerce Commission show that during the year ending June 30, 1891, there were forty-seven different styles of car couplers reported to be in use, and that during the same period there were 2,660 employees killed and 26,140 injured. Nearly 16 per cent of the deaths occurred in the coupling and uncoupling of cars, and over 36 per cent of the injuries had the same origin."

The Senate report of the first session of the Fifty-second Congress (No. 1049) and the House report of the same session (No. 1678) set out the numerous and increasing casualties due to coupling, the demand for protection, and the necessity of automatic couplers, coupling interchangeably. The difficulties in the case were fully expounded and the result reached to require an automatic coupling by impact so as to render it unnecessary for men to go between the cars; while no particular device or type was adopted, the railroad companies being left free to work out the details for themselves, ample time being given for

that purpose. The law gave five years, and that was enlarged, by the Interstate Commerce Commission as authorized by law, two years, and subsequently seven months, making seven years and seven months in all.

The diligence of counsel has called our attention to changes made in the bill in the course of its passage, and to the debates in the Senate on the report of its committee. 24 Cong.Rec., pt. 2, pp. 1246, 1273 et seq. These demonstrate that the difficulty as to interchangeability was fully in the mind of Congress, and was assumed to be met by the language which was used. The essential degree of uniformity was secured by providing that the couplings must couple automatically by impact without the necessity of men going between the ends of the cars.

In the present case the couplings would not work together, Johnson was obliged to go between the cars, and the law was not complied with.

March 2, 1903, 32 Stat. 943, c. 976, an act in amendment of the act of 1893 was approved, which provided, among other things, that the provisions and requirements of the former act "shall be held to apply to common carriers by railroads in the Territories and the District of Columbia and shall apply in all cases, whether or not the couplers brought together are of the same kind, make, or type;" and shall be held to apply to all "trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce."

This act was to take effect September first, nineteen hundred and three, and nothing in it was to be held or construed to relieve any common carrier "from any of the provisions, powers, duties, liabilities, or requirements" of the act of 1893, all of which should apply except as specifically amended.

As we have no doubt of the meaning of the prior law, the subsequent legislation cannot be regarded as intended to operate to destroy it. Indeed, the latter act is affirmative, and declaratory, and, in effect, only construed and applied the former act. Bailey v. Clark, 21 Wall. 284; United States v. Freeman, 3 How. 556; Cope v. Cope, 137 U.S. 682. This legislative recognition of the scope of the prior law fortifies and does not weaken the conclusion at which we have arrived.

Another ground on which the decision of the circuit court of appeals was rested remains to be noticed. That court held by a majority that, as the dining car was empty and had not actually entered upon its trip, it was not used in moving interstate traffic, and hence was not within the act. The dining car had been constantly used for several years to furnish meals to passengers between San Francisco and Ogden, and for no other purpose. On the day of the accident the eastbound train was so late that it was found that the car could not reach Ogden in time to return on the next westbound train according to intention, and it was therefore dropped off at Promontory, to be picked up by that train as it came along that evening.

. . .

Confessedly this dining car was under the control of Congress while in the act of making its interstate journey, and in our judgment it was equally so when waiting for the train to be made up for the next trip. It

was being regularly used in the movement of interstate traffic, and so within the law.

Finally, it is argued that Johnson was guilty of such contributory negligence as to defeat recovery, and that, therefore, the judgment should be affirmed. But the circuit court of appeals did not consider this question, nor apparently did the circuit court, and we do not feel constrained to inquire whether it could have been open under § 8, or, if so, whether it should have been left to the jury, under proper instructions.

The judgment of the Circuit Court of Appeals is reversed; the judgment of the Circuit Court is also reversed, and the cause remanded to that court with instructions to set aside the verdict, and award a new trial.

NOTES

(1) Reconsider the second Safety Appliances Act problem, p. 182 above, and the "faulty maintenance" problem set on p. 254, in light of this decision.

(2) The statute of March 2, 1903 discussed toward the end of the opinion reflects what occasionally happens: Congress, aware of a decision in the courts of appeal, reacts to it in a disapproving way. The provision that it should not affect pending litigation recognizes that Congress cannot properly "reverse" particular judicial actions; that would be a violation of the constitutional separation of powers. Should courts nonetheless attempt to distinguish actions that accept the correctness of an interpretation leading to an undesirable result ("Oops!") from those that do not ("What the heck?")?

(3) Compare this opinion with the lower court opinions it reverses. What approach does each take to resolving the statutory issues you have identified? How does it treat the language of the statute? Does it identify and reason from supposed statutory objective(s)? Which? How, if at all, does it employ the following factors:

> textual maxims, whole act maxims, and canons
>
> overall statutory context;
>
> the setting within which the statute was enacted;
>
> the specific legislative and administrative history of its provisions;
>
> the allocation of responsibility for law formation between legislature and court?

Be prepared to cite specific portions of the opinions in response to these questions.

(4) The technique of "purpose interpretation", of which the Supreme Court opinion in the Johnson case is a good example, is usually traced back to the classic *Heydon's Case*, 3 Coke 7a, 76 Eng.Rep. 637 (Court of Exchequer, 1584). The much-quoted "Doctrine of Heydon's Case" was there stated as follows:

> "And it was resolved by them, that for the sure and true interpretation of all statutes in general (be they penal or

beneficial, restrictive or enlarging of the common law) four things are to be discerned and considered:—

> "1st. What was the common law before the making of the Act.
>
> "2nd. What was the mischief and defect for which the common law did not provide.
>
> "3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth.
>
> "And 4th. The true reason of the remedy; and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico*."

(5) The use of purpose to illuminate text, explicit in the advice of Hart and Sacks quoted early in this book, p. 60, and implicit in Lieber, p. 263, is conventional, and that use characterizes civil code interpretation.[1] May considerations of purpose ever warrant departure from a statutory text's reasonable possibilities of meaning? Kent Greenawalt, LEGISLATION: STATUTORY INTERPRETATION: 20 QUESTIONS 48–52 (2008)discusses a contemporary of the "plain meaning" excesses of the first *Johnson* decision and *Caminetti* (p. 269), that is sometimes treated as a defining example of excessive judicial liberty in purposive interpretation:

"In the famous *Holy Trinity Church* case[2] the U.S. Supreme Court interpreted statutory language barring United States employers from making contracts with aliens living abroad 'to perform labor or service of any kind in the United States.' The Court conceded that the literal terms of the provision definitely applied to a church's contract with a minister, but it said that the aim of the law was to deal with manual laborers. The act did not apply to bringing 'ministers of the Gospel' into the country."[3] Under the Court's analysis, it was not that Congress had failed to use the language it wanted; rather its general language had an unwished-for application. Justice Scalia has recently expressed his strong disagreement with the statutory result in *Holy Trinity Church*; he believes the Court should have stuck with the language Congress had provided.[4]

"One can distinguish three arguments against a result like that in *Holy Trinity Church*. The first argument is that judges, using appropriate

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[1] James Maxeiner, Scalia & Garner's *Reading Law*: A Civil Law for the Age of Statutes? 6 Journal of Civil Law 1 (2013) ("[P]ure textualism, which largely restricts interpretation to grammatical and historical interpretation and excludes non-textual interpretation such as equitable, pragmatic and purposive approaches, is not consistent with modern civil law methods. In modern civil law, textualism and non-textualism coexist. They must, if law is to honor legal certainty, justice and policy.")

[2] Church of the Holy Trinity v. United States, 143 U.S. 457 (1892).

[3] One basis for the Court's conclusion was legislative history, but it might have reached the same interpretation without relying on that history. Adrian Vermeule has argued that a more accurate reading of the legislative history supports the textual implication that the statute was not limited to manual laborers. "Legislative History and the Limits of Judicial Competence," 50 Stan. L. Rev. 1833, 1839–57 (1998).

[4] Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law: An Essay 18–23 (1996).

techniques of interpretation, rarely can identify over-riding general purposes that conflict with the language of specific provisions. On this view, the Court in *Holy Trinity Church* lacked any solid basis to attribute to Congress a purpose that excluded ministerial contracts.

"A second argument is still more skeptical about the role of purpose in adjudication. Clear, specific provisions should carry the day, even if they conflict with purposes stated unambiguously in the preamble.[5] Legislators, or draftsmen, are typically more careful about specific coverage than about broad purposes.[6]

"Moreover, much legislation in the United States results from self-interested pressure and compromise. Perhaps an organization representing American ministers afraid of English competition quietly and successfully lobbied for language in the crucial section that was broader than stated purposes would suggest. No one may have wished publicly to defend coverage of ministerial contracts, but the final language may have been deliberately designed to reach them. If this kind of account of legislation is generally sound, one should not be surprised at disjunctions of stated purposes and specific language; and, arguably, specific language should carry the day. . . .

"Whatever the power of these three arguments against purposive interpretation for most cases, none has force for situations in which one cannot imagine that any lawmaker would want the application of the literal language that seems called for. If a judge is unable to conceive any plausible purpose for applying the language as it literally reads, should he or she refuse to apply it in that way? A light illustration was provided by Lon Fuller who imagined an ordinance forbidding anyone 'to sleep in any railway station,' applied to a passenger sitting upright in an orderly fashion who has nodded off at 3:00 a.m. waiting for his delayed train."[7] At 48–52.

(6) Victoria Nourse, TWO KINDS OF PLAIN MEANING, 76 Brooklyn L. Rev. 997, 1000–1001 (2011) has more recently argued that judges invoking "plain meaning" can be signifying either a legalistic meaning or an "ordinary" meaning, and that the *Holy Trinity* Court could readily have reached the same result employing "ordinary meaning" textualism as it did by invoking the law's "spirit" to defeat its legalistic meaning. "As linguist Larry Solan has written, ordinary meaning is prototypical meaning[8]—that is, meaning focusing on a core example, rather than reaching the conceptual or logical extension of the term. *Prototypical meaning picks the best example, not the peripheral one.* . . .

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[5] Of course, if more than one purpose is stated, and these are in tension with each other, a provision may further one purpose at the expense of another. I am imagining that the provision conflicts with one stated purpose and does not further any other stated purpose.

[6] The extent to which this conclusion is accurate may depend on the care and consistency with which the final language of statutes is adopted. The lesser attention to purpose in England than in the United States relates partly to the way statutes are drafted in England. See P. S. Atiyah and R. S. Summers, Form and Substance in Anglo-American Law 314–23 (1987).

[7] See Lon L. Fuller, "Positivism and Fidelity to Law—A Reply to Professor Hart," 71 Harv. L. Rev. 630, 664 (1958). I discuss this example in R. Kent Greenawalt, "The Nature of Rules and the Meaning of Meaning," 72 Notre Dame L. Rev. 1449 at 1460, 1463–66 (1997). This illustration is powerful so long as one assumes that a neat station is the obvious concern. If protecting passengers against theft and assault were a plausible purpose, application against the sitting passenger could make sense.

[8] Lawrence M. Solan, *The New Textualists' New Text,* 38 LOY. L.A. L. REV. 2027 (2005).

> "Notice the difference between prototypical meaning and legalist meaning as it relates to the domain of the statute. As Chief Judge Easterbrook has written in a brilliant article, purposivism has a tendency to expand the range of a statute . . .[9] Notice, however, how a similar expansion may occur when one moves from ordinary to legalist meaning. By definition, prototypical meaning looks for the 'best example'; legalist meaning looks for all examples, examples that may invite fringe or peripheral meanings. In *Holy Trinity,* the plain-meaning approach expands the meaning of the statute beyond the status quo ex ante (all labor, including the minister, versus the original baseline of no regulation of alien contract labor). More importantly, it expands the baseline relative to ordinary meaning. If the ordinary meaning was 'manual labor or service' in 1885, then 'all labor' expands the domain of the statute. Plain meaning of this kind (legalist meaning) expands the domain of the statute relative to plain meaning of another kind (ordinary meaning), suggesting that it should be important to decide which meaning counts."

Other recent studies of *Holy Trinity* worth consulting include Carol Chomsky, Unlocking the Mysteries of Holy Trinity: Spirit, Letter and History in Statutory Interpretation, 100 Colum.L.Rev. 901 (2000).; Adrian Vermeule, Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church, 50 Stan. L. Rev. 1833 (1998). William Blatt, Missing the Mark: An Overlooked Statute Redefines the Debate Over Statutory Interpretation, 64 Miami L.Rev. 101 (2010) calls attention to the fact that, as in Johnson, Congress had reacted to the litigation as it developed by passing a statute providing, at least for the future, that the statute did not apply to contracts with ministers of religion. It is also arguable that the text of the *Holy Trinity* statute could have been interpreted to apply only to manual laborers; a section penalizing ship captains for knowing transportation applied in terms only to them.

Harry W. Jones, Some Causes of Uncertainty in Statutes

36 A.B.A.J. 321 (1950).

Every lawyer who holds himself out as a legislative draftsman dreams of one perfect job. Let the painter aspire to his one flawlessly balanced composition, the composer to his one consummate harmony, and the big league pitcher to that one crowning game at which no opposing batter will reach first base. The draftsman of bills will be ready to pronounce his *nunc dimittis* the day he sees enacted into law a statute of his devising that leaves no contingency unprovided for and that is clear and unambiguous in its direction as to each and every conceivable fact situation which may take place in the world of affairs.

Unhappily, the gap between aspiration and accomplishment stretches as wide in legislative craftsmanship as in any other professional field. The draftsman can narrow the area of statutory uncertainty by painstaking fact-gathering and intensive study of every

[9] Frank H. Easterbrook, *Statutes' Domains,* 50 U. Cm. L. REV. 533 (1983).

facet of existing case and statute law bearing on the matter at hand. He can reduce the incidence of statutory ambiguity by conjuring up hundreds of hypothetical fact-situations which may arise in the future for decision under the statute. But, when the job is done and the bill added to the statute books, there will still be cases for which the statute affords no certain guide. It is the purpose of this sketch to suggest a few of the reasons why any statute, however carefully and imaginatively drawn up, must fall short of the goal of perfect certainty.

Words Are Imperfect Symbols to Communicate Intent

Certain of the draftsman's difficulties are not unique to legislative work but arise in connection with the preparation of all legal documents. The draftsman must express his understanding and purpose in words, and words are notoriously imperfect symbols for the communication of ideas. Justice Cardozo was speaking for our entire word-bound profession when he began his little classic, *The Paradoxes of Legal Science*, with the mournful exclamation, "They do things better with logarithms." What makes the legislative draftsman's job more trying than the task of the draftsman of a contract or a will is that the words of the statute must communicate the intention to at least three crucial classes of readers; the legislators who are to examine the bill to decide whether it is in accordance with their specifications, the lawyers who must make use of the statute in counseling and litigation, and the judges who will give the statute its final and authoritative interpretation. One does not have to be an expert in semantics to know that words rarely mean the same thing to all men or at all times. An intent that seems "plainly" expressed to the legislative experts on a standing committee may be ambiguous to affected persons and their lawyers and quite unintelligible to judges with no special knowledge or experience in the field of regulation.

Unforeseen Situations Are Inevitable

Unforeseen cases account for the great majority of the instances of statutory uncertainty. The problem here is that the typical drive for legislative action originates not in a desire for an overall codification of the law but in some felt necessity for a better way of dealing with some specific situation or group of situations. The draftsman must make effective provision for the specific needs which are urged upon him, but he must write the statute in the form of a proposition of general applicability. In our legal system we have a longstanding distrust of legislation so narrowly drawn as to affect only designated persons or a few particularized situations. Inequality in the application of legislation is the evil aimed at in such provisions of the Federal Constitution as the Equal Protection and Bill of Attainder Clauses, and the same general idea is reflected in the provision of most state constitutions against local and special legislation. The policy is sound, beyond any question at all, but it leaves to the draftsman of statutes the hard task of formulating a general rule that adequately takes care of the specific situations before the legislature without including in its apparent scope unthought-of cases somewhat similar in fact content but distinguishable on policy grounds.

Case-minded judges and lawyers might be a little less caustic in their comments on the ambiguity of statutes if they were to reflect that the problem of uncertainty in relation to the unthought-of case arises

also in the use of case precedents. Every first year law student learns that he must distinguish between the *holding* of a case and the *dicta* which may be set out in the court's opinion. In our common law tradition, we take as binding precedent only the decision of the court on the material facts of the case actually before it. All else we discount as *dictum*—persuasive, perhaps, but not authoritative. This immemorial common law distinction between *holding* and *dictum* is based on a recognition that even the finest judge is at his best only when dealing with the facts of the case at hand, the issues on which he has had the benefit of argument of counsel. The same is true of the statute-law maker and his technical drafting assistants. If the draftsman is respectably skilled and careful, he will make unmistakably clear provision for the specific situations called to his attention at committee hearings and in other ways. If he is at all imaginative, he will anticipate and take care of other situations within the reach of reasonable anticipation. But human foresight is limited and the variety of fact-situations endless. Every generally worded statute, sooner or later, will fail to provide a certain direction as to the handling of those inevitable legislative nuisances, the cases nobody thought of.

Uncertainties May Be Added in Cause of Enactment

So far in this sketch, the problems of the legislative draftsman have been considered without reference to the political realities of the legislative process in Congress and the state legislatures. But legislative drafting is not a branch of art for art's sake. After the statute has been drafted it has to be passed, and there are many stages in the process of enactment at which uncertainty may be introduced into the most tightly drafted legislative proposal. The sponsoring legislator or the responsible standing committee is likely to make changes in the bill without having the time to consider the effect of the changes on the articulation of the bill as a whole. An amendment from the floor may add confused or inconsistent provisions which fit awkwardly into the statutory pattern. It sometimes becomes necessary as a matter of political compromise to eliminate some precise key-word in the bill and substitute for it some less exact term, chosen deliberately to leave a controversial issue to the courts for decision. In short, it is wholly unrealistic to read a statute as if it were the product of wholly scientific, detached and uneventful deliberation.

. . .

PROBLEM

Give examples of each of Professor Jones' difficulties for the Railroad Safety Appliances Act of 1893.

On the Problem of Drafting Rules That Can Have Only One Meaning

One of the passages Robert Graves and Alan Hodges quote in their remarkable book on proper English usage, The Reader Over Your Shoulder (MacMillan 1943) is the following extract from the Minutes of an English Borough Council Meeting:

Councillor Trafford took exception to the proposed notice at the entrance of South Park: "No dogs must be brought to this Park except on a lead." He pointed out that this order would not prevent an owner from releasing his pets, or pet, from a lead when once safely inside the Park.

The Chairman (Colonel Vine): What alternative wording would you propose, Councillor?

Councillor Trafford: "Dogs are not allowed in this Park without leads."

Councillor Hogg: Mr. Chairman, I object. The order should be addressed to the owners, not to the dogs.

Councillor Trafford: That is a nice point. Very well then: "Owners of dogs are not allowed in this Park unless they keep them on leads."

Councillor Hogg: Mr. Chairman, I object. Strictly speaking, this would prevent me as a dog-owner from leaving my dog in the back-garden at home and walking with Mrs. Hogg across the Park.

Councillor Trafford: Mr. Chairman, I suggest that our legalistic friend be asked to redraft the notice himself.

Councillor Hogg: Mr. Chairman, since Councillor Trafford finds it so difficult to improve on my original wording, I accept. "Nobody without his dog on a lead is allowed in this Park."

Councillor Trafford: Mr. Chairman, I object. Strictly speaking, this notice would prevent me, as a citizen who owns no dog, from walking in the Park without first acquiring one.

Councillor Hogg (with some warmth): Very simply, then: "Dogs must be led in this Park."

Councillor Trafford: Mr. Chairman, I object: this reads as if it were a general injunction to the Borough to lead their dogs into the Park.

Councillor Hogg interposed a remark for which he was called to order; upon his withdrawing it, it was directed to be expunged from the Minutes.

The Chairman: Councillor Trafford, Councillor Hogg has had three tries; you have had only two.

Councillor Trafford: "All dogs must be kept on leads in this Park."

The Chairman: I see Councillor Hogg rising quite rightly to raise another objection. May I anticipate him with another amendment: "All dogs in this Park must be kept on the lead."

This draft was put to the vote and carried unanimously, with two abstentions.

Schlemmer v. Buffalo, Rochester & Pittsburg R. Co.

United States Supreme Court, 1907.
205 U.S. 1.

■ MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action for the death of the plaintiff's intestate, Adam M. Schlemmer, while trying to couple a shovel car to a caboose. A nonsuit was directed at the trial and the direction was sustained by the Supreme Court of the State. The shovel car was part of a train on its

way through Pennsylvania from a point in New York, and was not equipped with an automatic coupler in accordance with the act of March 2, 1893, c. 196, § 2, 27 Stat. 531. Instead of such a coupler it had an iron drawbar fastened underneath the car by a pin and projecting about a foot beyond the car. This drawbar weighed about eighty pounds and its free end played up and down. On this end was an eye, and the coupling had to be done by lifting the free end, possibly a foot, so that it should enter a slot in an automatic coupler on the caboose and allow a pin to drop through the eye. Owing to the absence of buffers on the shovel car and to its being so high that it would pass over those on the caboose, the car and caboose would crush any one between them if they came together and the coupling failed to be made. Schlemmer was ordered to make the coupling as the train was slowly approaching the caboose. To do so he had to get between the cars, keeping below the level of the bottom of the shovel car. It was dusk and in endeavoring to obey the order and to guide the drawbar he rose a very little too high, and, as he failed to hit the slot, the top of his head was crushed.

The plaintiff in her declaration alleged that the defendant was transporting the shovel car from State to State and that the coupler was not such as was required by existing laws. At the trial special attention was called to the United States statute as part of the plaintiff's case. The court having directed a nonsuit with leave to the plaintiff to move to take it off, a motion was made on the ground, among others, "that under the United States statute, specially pleaded in this case, the decedent was not deemed to have assumed the risk owing to the fact that the car was not equipped with an automatic coupler." The question thus raised was dealt with by the court in overruling the motion. Exceptions were allowed and an appeal taken. Among the errors assigned was one "in holding that the shovel car was not a car used in interstate commerce or any other kind of traffic," the words of the court below. The Supreme Court affirmed the judgment in words that we shall quote. We are of opinion that the plaintiff's rights were saved and that we have jurisdiction of the case, subject to certain matters that we shall discuss.

On the merits there are two lesser questions to be disposed of before we come to the main one. A doubt is suggested whether the shovel car was in course of transportation between points in different States, and also an argument is made that it was not a car within the contemplation of § 2. On the former matter there seems to have been no dispute below. . . .

The latter question is pretty nearly answered by Johnson v. Southern Pacific Co., 196 U.S. 1, 16. . . .

We come now to the main question. The opinion of the Supreme Court was as follows: "Whether the Act of Congress . . . has any applicability at all in actions for negligence in the courts, of Pennsylvania, is a question that does not arise in this case, and we therefore express no opinion upon it. The learned judge below sustained the nonsuit on the ground of the deceased's contributory negligence and the judgment is affirmed on his opinion on that subject." It is said that the existence of contributory negligence is not a Federal question and that as the decision went off on that ground there is nothing open to revision here.

We certainly do not mean to qualify or limit the rule that, for this court to entertain jurisdiction of a writ of error to a state court, it must appear affirmatively that the state court could not have reached its judgment without tacitly, if not expressly, deciding the Federal matter. Bachtel v. Wilson, January 7, 1907, 204 U.S. 36. But on the other hand, if the question is duly raised and the judgment necessarily, or by what appears in fact, involves such a decision, then this court will take jurisdiction, although the opinion below says nothing about it. Kaukauna Water Power Co. v. Green Bay & Missi. Canal Co., 142 U.S. 254. And if it is evident that a ruling purporting to deal only with local law has for its premise or necessary concomitant a cognizable mistake, that may be sufficient to warrant a review. Terre Haute & Indianapolis Railroad Co. v. Indiana, 194 U.S. 579. The application of this rather vague principle will appear as we proceed.

It is enacted by § 8 of the act that any employee injured by any car in use contrary to the provisions of the act, shall not be deemed to have assumed the risk thereby occasioned, although continuing in the employment of the carrier after the unlawful use had been brought to his knowledge. An early, if not the earliest, application of the phrase "assumption of risk" was the establishment of the exception to the liability of a master for the negligence of his servant when the person injured was a fellow servant of the negligent man. Whether an actual assumption by contract was supposed on grounds of economic theory, or the assumption was imputed because of a conception of justice and convenience, does not matter for the present purpose. Both reasons are suggested in the well known case of Farwell v. Boston & Worcester R. R. Co., 4 Met. 49, 57, 58. But, at the present time, the notion is not confined to risks of such negligence. It is extended, as in this statute it plainly is extended, to dangerous conditions, as of machinery, premises and the like, which the injured party understood and appreciated when he submitted his person to them. In this class of cases the risk is said to be assumed because a person who freely and voluntarily encounters it has only himself to thank if harm comes, on a general principle of our law. Probably the modification of this general principle by some judicial decisions and by statutes like § 8 is due to an opinion that men who work with their hands have not always the freedom and equality of position assumed by the doctrine of *laissez faire* to exist.

Assumption of risk in this broad sense obviously shades into negligence as commonly understood. Negligence consists in conduct which common experience or the special knowledge of the actor shows to be so likely to produce the result complained of, under the circumstance known to the actor, that he is held answerable for that result, although it was not certain, intended, or foreseen. He is held to assume the risk upon the same ground. Choctaw, Oklahoma & Gulf R.R. Co. v. McDade, 191 U.S. 64, 68. Apart from the notion of contract, rather shadowy as applied to this broad form of the latter conception, the practical difference of the two ideas is in the degree of their proximity to the particular harm. The preliminary conduct of getting into the dangerous employment or relation is said to be accompanied by assumption of the risk. The act more immediately leading to a specific accident is called negligent. But the difference between the two is one of degree rather than of kind; and when a statute exonerates a servant from the former, if at the same time it leaves the defense of contributory

negligence still open to the master, a matter upon which we express no opinion, then, unless great care be taken, the servant's rights will be sacrificed by simply charging him with assumption of the risk under another name. Especially is this true in Pennsylvania, where some cases, at least, seem to have treated assumption of risk and negligence as convertible terms. Patterson v. Pittsburg & Connellsville R.R. Co., 76 Pa. St. 389. We cannot help thinking that this has happened in the present case, as well as that the ruling upon Schlemmer's negligence was so involved with and dependent upon erroneous views of the statute that if the judgment stood the statute would suffer a wound.

To recur for a moment to the facts, the only ground, if any, on which Schlemmer could be charged with negligence is that when he was between the tracks he was twice warned by the yard conductor to keep his head down. It is true that he had a stick, which the rules of the company required to be used in coupling, but it could not have been used in this case, or at least the contrary could not be and was not assumed for the purpose of directing a nonsuit. It was necessary for him to get between the rails and under the shovel car as he did, and his orders contemplated that he should do so. But the opinion of the trial judge, to which, as has been seen, the Supreme Court refers, did not put the decision on the fact of warning alone. On the contrary, it began with a statement that an employee takes the risk even of unusual dangers if he has notice of them and voluntarily exposes himself to them. Then it went on to say that the deceased attempted to make the coupling with the full knowledge of the danger, and to imply that the defendant was guilty of no negligence in using the arrangement which it used. It then decided in terms that the shovel car was not a car within the meaning of § 2. Only after these preliminaries did it say that, were the law otherwise, the deceased was guilty of contributory negligence; leaving it somewhat uncertain what the negligence was.

It seems to us not extravagant to say that the final ruling was so implicated with the earlier errors that on that ground alone the judgment should not be allowed to stand. We are clearly of opinion that Schlemmer's rights were in no way impaired by his getting between the rails and attempting to couple the cars. So far he was saved by the provision that he did not assume the risk. The negligence, if any, came later. We doubt if this was the opinion of the court below. But suppose the nonsuit has been put clearly and in terms on Schlemmer's raising his head too high after he had been warned. Still we could not avoid dealing with the case, because it still would be our duty to see that his privilege against being held to have assumed the risk of the situation should not be impaired by holding the same thing under another name. If a man not intent on suicide but desiring to live, is said to be chargeable with negligence as matter of law when he miscalculates the height of the car behind him by an inch, while his duty requires him, in his crouching position, to direct a heavy drawbar moving above him into a small slot in front, and this in the dusk, at nearly nine of an August evening, it is utterly impossible for us to interpret this ruling as not, however unconsciously, introducing the notion that to some extent the man had taken the risk of the danger by being in the place at all. But whatever may have been the meaning of the local courts, we are of opinion that the possibility of such a minute miscalculation, under such circumstances, whatever it may be called, was inevitably and clearly

attached to the risk which Schlemmer did not assume, that to enforce the statute requires that the judgment should be reversed.

Judgment reversed.

■ MR. JUSTICE BREWER, with whom concurred MR. JUSTICE PECKHAM, MR. JUSTICE MCKENNA and MR. JUSTICE DAY, dissenting.

I dissent from the opinion and judgment in this case and for these reasons:

This was an action in the Common Pleas Court of Jefferson County, Pennsylvania, to recover damages on account of the death of the husband of plaintiff. On the trial the court ordered a nonsuit on the ground of contributory negligence on the part of the decedent, with leave to the plaintiff to move to take the same off. This motion was made and overruled; judgment for the defendant was entered, which was affirmed by the Supreme Court of the State. The decedent was killed while attempting to couple a steam shovel to a caboose. The steam shovel was being moved in interstate transportation and was not equipped with the safety coupler required by act of Congress of March 2, 1893, 27 Stat. 531. The eighth section of that act provides:

"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."

This, while removing from the employee the burden of any assumption of risk, does not relieve him from liability for contributory negligence. For the rule is well settled that while, in cases of this nature, a violation of the statutory obligation of the employer is negligence *per se*, and actionable if injuries are sustained by servants in consequence thereof, there is no setting aside of the ordinary rules relating to contributory negligence, which is available as a defense, notwithstanding the statute, unless that statute is so worded as to leave no doubt that this defense is also to be excluded. [citing 12 cases from as many jurisdictions] The Interstate Commerce Commission held this to be the rule in reference to this particular statute. 14th Ann. Rep. 1900, p. 84.[1] Indeed it is not contended by the majority that the defense of contributory negligence has been taken away.

That there is a vital difference between assumption of risk and contributory negligence is clear. As said by this court in Choctaw, Oklahoma, & c. Railroad Company v. McDade, 191 U.S. 64, 68: "The question of assumption of risk is quite apart from that of contributory negligence." See also Union Pacific Railway Co. v. O'Brien, 161 U.S. 451, 456. This proposition, however, is so familiar and elementary that citation of authorities is superfluous.

In the motion for a nonsuit the second proposition was that "the evidence upon behalf of plaintiff proves conclusively that the accident happened because the deceased failed to keep his head at least as low as the floor of the steam shovel—that this omission was the fault of the

[1] [Ed.] P. 244 above.

deceased exclusively—and that deceased was guilty of contributory negligence and there can be no recovery in this case."

In ordering the nonsuit the trial court said:

> True, under said act he was not considered to have assumed the risks of his employment, but by this is certainly meant no more than such risks as he was exposed to thereby, and resulted in injury free from his own negligent act. It would hardly be argued that defendant would be liable, under such circumstances, were the employee to voluntarily inflict an injury upon himself by means of the use of the improperly equipped car. And yet it is but a step from contributory negligence to such an act.
>
> . . .
>
> It seems very clear to us that, whatever view we may take of this case we are led to the legal conclusion that decedent was guilty of negligence that contributed to his death, and that the plaintiff, however deserving she may be, or however much we regret the unfortunate accident, cannot recover.

The Supreme Court affirmed the judgment in the following *per curiam* opinion:

> Whether the act of Congress in regard to the use of automatic couplings on cars employed in interstate commerce has any applicability at all in actions for negligence in the courts of Pennsylvania is a question that does not arise in this case, and we therefore express no opinion upon it. The learned judge below sustained the nonsuit on the ground of the deceased's contributory negligence, and the judgment is affirmed on his opinion on that subject.

That contributory negligence is a non-Federal question is not doubted, and that when a state court decides a case upon grounds which are non-Federal and sufficient to sustain the decision this court has no jurisdiction is conceded.

. . .

It would seem from this brief statement that the case ought to be dismissed for lack of jurisdiction. Escape from this conclusion can only be accomplished in one of these ways: By investigation of the testimony and holding that there was no proof of contributory negligence. If the case came from one of the lower Federal courts we might properly consider whether there was sufficient evidence of contributory negligence; but, as shown above, a very different rule obtains in respect to cases coming from a state court. We said this very term, in Bachtel v. Wilson, 204 U.S. 36, 40, in reference to a case coming from a state court to this: "Before we can pronounce this judgment in conflict with the Federal Constitution it must be made to appear that this decision was one necessarily in conflict therewith, and not that possibly or even probably it was." Before then we can disturb this judgment of the Supreme Court of Pennsylvania it must (paraphrasing the language just quoted a little) be made to appear that its decision of the question

of contributory negligence was one necessarily in disregard of the testimony and not that possibly or even probably it was.

It cannot be said that there was no evidence of negligence on the part of the decedent. The plaintiff's testimony (and the defendant offered none) showed that the deceased was an experienced brakeman; that the link and pin coupling was in constant use on other than passenger coaches; that before the deceased went under the car the pin had already been set; that as he was going under the car he was twice notified to be careful and keep his head down, and yet, without any necessity therefor being shown, he lifted his head and it was crushed between the two cars; that all he had to do was to guide the free end of the drawbar into the slot, and while the drawbar weighed seventy-five to eighty pounds, it was fastened at one end, and the lifting and guiding was only of the other and loose end; that the drawheads were of the standard height and the body of the shovel car higher than that of the caboose. Immediately thereafter the coupling was made by another brakeman without difficulty. If an iron is dangerously hot, and one knows that it is hot and is warned not to touch it, and does touch it without any necessity therefor being shown, and is thereby burned, it is trifling to say that there is no evidence of negligence.

A second alternative is that this court finds that the Supreme Court of Pennsylvania recognizes no difference between assumption of risk and contributory negligence. But that is not to be imputed in view of the rulings in the lower court, affirmed by the Supreme Court, to say nothing of the recognized standing and ability of that court.

Or we may hold that the Pennsylvania courts intentionally, wrongfully and without any evidence thereof found that there was contributory negligence in order to avoid the binding force of the Federal law. During the course of the argument, in response to an interrogation, counsel for plaintiff in error bluntly charged that upon those courts. Of course this court always speaks in respectful terms of the decisions it reviews, but the implication of the most courteous language may be as certain as a direct charge. . . .

NOTES

(1) What is the procedural posture in which *Schlemmer* arises, and how does that shape the outcome in the Supreme Court? What is now to happen in this litigation?[2]

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[2] The case returned to the Supreme Court after retrial in state courts produced another verdict for the railroad, 220 U.S. 590 (1911), and this time the Court unanimously sustained that outcome. Said the Court, id. at 597–99:

> A witness who is uncontradicted in the record testified that just before Schlemmer got out of the caboose, when he saw the train backing up, he was told: "We had better shove that up by hand, the same as we did in Bradford. That is a dangerous coupling to make." (At Bradford the method of making the coupling was by means of pushing the caboose up against the train instead of backing the train against the caboose.) To this Schlemmer replied, with emphasis, "Back up." . . .
>
> Another witness, the yard conductor, testified without contradiction [to the same effect] . . . [and] that he called to him twice to get down, the last time not more than a second possibly a couple of seconds, before he was injured. This witness furthermore testified that he had a sufficient crew to push the caboose up by hand, that there was plenty of force to shove the caboose up in that way; that that was a great deal safer way to make the coupling than backing on to the caboose. . . .

(2) The origin of the litigation in state courts obviously complicated matters, for the Supreme Court could act only if a "federal question" was presented. Federal law governed the "assumption of the risk" defense but *no* Justice says that federal law, as such, controls the defense of contributory negligence. The four dissenters say federal law leaves that defense in place; the majority leaves that issue open. Can you state the issue presented to the Supreme Court for decision about Schlemmer's alleged contributory negligence in a way that makes clear the necessary presence of a federal question? Can you frame a proper instruction for the judge to give the jury at the trial on remand?

(3) Notice the narrowness of the margin of decision in the Court, even when the majority opinion is written by the extraordinary Justice Holmes. Compare Holmes' evocation of the facts, particularly in the last paragraph of his opinion, with Justice Brewer's. And compare this opinion with Justice Holmes opinion in *Larabee*, p. 261 above. Can you account for the difference in view (note that Justice Holmes' vote was decisive in this case)?

Note, too, that Justice Holmes was usually a proponent of state law—he was a vigorous opponent of *Swift v. Tyson. Moreover,* as we have seen above, p. 175, Justice Brewer was a champion of *Swift* and of expanded ideas about federal law displacing state law; in Professor Purcell's characterization, this was in the service of protecting corporate interests against local tenderness for employees. How would you explain the apparent role reversal in this instance?

(4) Chief Justice Edward White cast one of the five majority votes in the 5–4 result in *Schlemmer*. Yet one of his interventions as Senator in the RSA debates underlay the decisive issue. See p. 231 above. Should that have led him to recuse himself? Or did it give his view special weight?

Judges must recuse themselves from matters in which they have a *personal* interest; but as a rule prior professional exposure to more general issues is not disqualifying. See. e.g., Laird v. Tatum, 409 U.S. 824 (1972); Liteky v. United States, 510 U.S. 540 (1994). Supreme Court Justices have included a former President (Taft), Attorneys General and Assistant Attorneys General (e.g., Robert Jackson and William Rehnquist), Administrators (e.g., Clarence Thomas), law professors (e.g. Antonin Scalia and Stephen Breyer) and activists (e.g., Thurgood Marshall and Ruth Bader Ginsburg, also a law professor) as well as former Senators, and all have freely acted on general issues (but not factual disputes) they had encountered in their prior capacities. To seek judicial minds free of prior exposure to the important issues of the day would be foolhardy; if we could find a person untouched by experience, reflection or myth, would we want

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> As the record is now presented there is no proof in the case that the deceased was ordered to make the coupling in the manner he did, and there is testimony to the effect that just before the injury the conductor in charge of the train said to the deceased: "Mr. Schlemmer, you be very careful now, and keep your head down low, so as not to get mashed in between those cars." He said he would. . . .
>
> After an examination of the record as now presented, containing testimony not adduced at the former trial, we are constrained to the conclusion that there was ample ground for saying, as both the trial court and the Supreme Court of the State of Pennsylvania did, that the decedent met his death because of his unfortunate attempt to make the coupling in a dangerous way, when a safer way was at the time called to his attention. Furthermore, he was injured in spite of repeated cautions, made at the time, as to the great danger of being injured if he raised his head in attempting to make the coupling in the manner which he did.

that person as a judge? "The great tides and currents which engulf the rest of men do not turn aside in their course, and pass the judges by." Benjamin N. Cardozo, THE NATURE OF THE JUDICIAL PROCESS 168 (1921).

A recent outcropping of this problem arose in connection with United States v. Booker, 543 U.S. 220 (2005), a case involving the validity of guidelines federal courts were instructed to use in sentencing criminals. The guidelines served to limit sentencing discretion from the broader ranges criminal statutes themselves typically provided. They had been created by the United States Sentencing Commission, a federal agency, under statutory authority. (The guidelines were thus, in effect, administrative regulations.) As an attorney for the Senate Judiciary Committee, Justice Breyer had worked for adoption of the statute creating the guideline system. Subsequently, as a judge on the U.S. Court of Appeals for the First Circuit, he had been one of the Commission's judicial members when it adopted guidelines. During his service on the Commission, he had been an enthusiastic proponent of its work. Now as a Justice he wrote an opinion holding for a bare majority of the Court that the proper remedy for their unconstitutionality[3] was to treat them as advisory, not mandatory, propositions; this outcome, sharply criticized (on its merits) in dissent, tended to preserve their effect. Was it proper for him to sit? The press reported that Justice Breyer had consulted a prominent commentator on ethical issues, Prof. Stephen Gillers of NYU Law School; Prof. Gillers advised him that, since he was no longer on the Commission, there was "no longer any reasonable basis to question your impartiality." Another nationally noted advisor, Prof. Geoffrey Hazard of the University of Pennsylvania, agreed that his "past role in devising 'rules of general applicability' does not require recusal." This advice reflects the uncontroversial, conventional view. Yet for a leading critic, Prof. Monroe Freedman of Hofstra Law School, "He was deciding on the life or death of his own brainchild. And what he wrote vindicated himself. When you are sitting in judgment of your own vindication, I think reasonable people might question your impartiality." Tony Mauro, "Breyer Consulted Ethics Expert Over Sentencing Case Reversal," Legal Times, January 17, 2005, p. 10.

(5) Questions about railroad liability for injuries traceable to automatic couplers returned to the Supreme Court in Norfolk and Western Rwy. Co. v. Hiles, 516 U.S. 400 (1996).

NOTES ON THE EMERGENCE OF THE WORKER'S COMPENSATION ALTERNATIVE

The cases we have just read all present the familiar picture of an action brought in court, asserting that an employer's negligence has harmed his employee. We begin to see, as well, statutory modification of the common law doctrines, such as assumption of the risk, that had long protected employers from such liability—that served, in effect, to place the economic burden of workplace accidents on workers rather than their employers. One issue that emerged with these modifications, as you might have found in Judge Sanborn's opinion in *Johnson* or Justice Brewer's

[3] The unconstitutionality of the guidelines was established by another five-vote majority opinion in the case written by Justice Stevens, an opinion from which Justice Breyer and three others had dissented.

opinion in *Baugh*, was judicial resistance, perhaps grounded in the enduring influence of personal fault and responsibility—a close relative to the laissez faire impulse of *Seixas.* Central pillars of common law reasoning were under attack. If fault was the measure of responsibility, it would have to be proved, and the idea that it might have been the employee who was at fault remained a powerful one.

(1) Common law judges' resistance to legislative change was not only an American phenomenon. Walter F. Dodd, ADMINISTRATION OF WORKMEN'S COMPENSATION 9, 11–16 (1936): "As industrial and commercial enterprises increased in size and complexity with the growth of the factory and the railroads, it was inevitable that the number of industrial accidents, and therefore the number of personal injury suits, also increased. It soon became apparent that the common law defenses of contributory negligence, assumption of risk, and particularly the fellow-servant rule were operating too harshly on the claims of injured workers. . . .

"[I]n 1880, the English Employer's Liability Act was passed. . . . It provided . . . that where a workman suffered a personal injury because of defects in the machinery or plant, or from the negligence of anyone in the service of the employer who was entrusted with any superintendence, or from the negligence of an employee who controlled any signal, locomotive engine, or train on a railway, such workman (or his dependents in case of his death), should have the same remedies . . . a stranger had against the employer [if the employer were promptly notified and suit promptly brought, with recovery limited to three years' earnings.] . . .

"The statute effected a modification, rather than the abrogation, of the fellow-servant rule, and did not touch upon the other two defenses. . . . The injured employee still must prove negligence on the part of the employer or superintendent, and he was still held to assume the risk of employment, except the negligent acts of a directing employee. . . . Just one year and a half after the Employers' Liability Act took effect in England, the courts held that it was competent for a workman to contract with his employer not to claim compensation for personal injuries under the act, such contract not being against public policy. . . .

". . . In the period between 1885 and 1910, most of the states of the United States enacted some form of employers' liability law. . . .. The majority of the statutes . . . effected a modification or abrogation of the fellow-servant doctrine, but their application was to railway companies only. . . . Some . . . modified the defense of contributory negligence . . . by providing that it should not bar recovery where the negligence of the employer in violating a safety statute was the ground of action. . . . Almost all the states with employers' liability acts . . . provided that agreements between employees and employers to exempt the latter from liability were illegal or void. . . .

"The first Federal Employers' Liability Act was adopted in 1906 and applied to all employees of common carriers engaged in interstate or foreign commerce or in trade or commerce in the District of Columbia or in any territory. This act was held invalid because applicable to employees not engaged in interstate commerce. The act was subsequently held valid as applicable to the District of Columbia and to the territories, and the Federal Employers' Liability Act of 1908 was

enacted with respect to such employees of common carriers as are engaged in interstate or foreign commerce. The federal acts included substantially all the modifications of common law defenses contained in previous state statutes, and amount in effect to a codification of statutory gains up to the time of their passage. They were regarded as important forward steps at the time of their passage. If the employee was contributorily negligent, his damages were diminished in proportion thereto, but recovery was not barred; nor was contributory negligence allowed as a defense where the employer violated a safety statute. The employee did not assume the risk of his employer's violation of such a law. Railroads were liable to injured employees for the negligence of their officers, agents, or other employees, or because of defects due to negligence in cars, engines, machinery, tracks, etc. And contracts of exemption from the law's operation were prohibited. . . .. . .

"The state and federal employers' liability acts, with all their changes in favor of the employee, succeeded only in lessening the severity of the defenses interposable in industrial injury suits. It was still as necessary for the employee to prove fault on the part of the employer in order to recover as it was under the unmodified common law."

(2) John Fabian Witt, THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW 30–31, 39–40, 111–12, 118–19, 126–27, 129–32, 139–145 (2004): The deeper problem toward which American observers of the industrial scene began to grope at the end of the century was that there seemed to be an emerging tension between widely shared ideas about free labor and market competition, on one hand, and the fallout from industrial accidents in core industries like railroading, mining, and metal work, on the other. The law of employers' liability, for example, seemed to many commentators to have developed a body of doctrines that minimized employers' responsibility for work accidents in the name of free labor. Under the law of slavery in the American South, slave owners had been able to recover for injuries to a slave caused by the negligence of those to whom the slave had been hired out to work. In contrast to the slave-law approach, explained journalist John Gitterman in 1910, "[t]he American principle" in employers' liability "is . . . briefly this": if the workingman objects to some dangerous task, "he has the privilege of throwing up his job. He is not a slave—he cannot be compelled to work under hazardous conditions." And so if he is injured—"if he scalds to death under his boiler, or has his head scraped off while attempting to couple cars"—he and his "widow and orphan children . . . must suffer the consequences." The ostensible virtues of free labor, it seemed, lay at the foundation of the law of employers' liability, where they contributed to the accident problem itself.

Absent a law of employers' liability that imposed significant accident costs on employers, the free play of competition among firms . . ., inexorably drove down working conditions. Nine out of ten employers might seek to uphold decent standards in industry. But if the tenth lacked such scruples (and some employer inevitably would lack such scruples) the industry would find itself caught in a race to the bottom until all remaining employers in the industry put their workers' lives at risk. . . .

Again and again, industrial risks seemed to turn free labor categories on their heads. As working-men in Alabama's coal region pointed out, the

real problem in the law of employers' liability was not commodification of ostensibly free laborers' bodies. The real problem was insufficient valuations. "[O]n a cabbage, on a codfish, and on a lobster," the Birmingham *Labor's Advocate* contended, "there is a market value." Under the law of employers' liability, however, "there was no fixed value placed on human life." "The labor market," the *Advocate* concluded, "is as permanent an institution as the slave block ever was, and the wage worker has become as worthless as the very dirt underneath his feet.". . .

As early as the 1880s, American engineers began to focus on the prevention of accidents in industry as central to their project of rationalizing labor management, and by 1890 engineering trade journals devoted substantial coverage to railroad and other industrial accidents. "[T]he life and health of every skilled workman," argued the efficiency-minded engineers, "represent an asset that a factory cannot afford to ignore.". . . . [A]t common law, the engineers argued, employers were able to ignore accidents because they were generally not liable for the costs of injuries to workers. Thus, the common law created perverse incentives to waste human labor power. . . . The engineering literature of the late nineteenth century described a . . . workplace . . . that reflected both changes in the structure of work and management engineers' aspirations to substitute managerial power for worker control. . . . According to the engineers, if employee carelessness was inevitable and unpreventable, and if occasional negligence, forgetfulness, and ignorance were endemic to the human condition . . ., accident prevention and the efficient rationalization of economic processes necessarily depended on the implementation of newly scientific approaches to the management of production and labor, not on the workers themselves.

What the engineering literature added up to was a new theory of causation and responsibility in workplace accidents. . . . Both the injured worker and the firm were necessarily "but for" causes of any workplace accident . . . [but] sophisticated firms, not incorrigibly careless workers, were best situated to create engineering solutions to work-accident problems. . . . This new theory of enterprise responsibility and causation, in turn, gave rise to engineers' second answer to the industrial-accident crisis: the beginning of a movement for industrial safety. . . .

In the fall of 1907, a young lawyer named Crystal Eastman arrived in Pittsburgh to study industrial accidents in the great steel mills, coal mines, and railroad yards of western Pennsylvania. Eastman's study was part of the famous Pittsburgh Survey, an investigation of social conditions in what was by many measures the nation's most important industrial city. . . . [T]he book Eastman produced—WORK-ACCIDENTS AND THE LAW**,** published in 1910—became perhaps the Survey's most influential work.

In clear and powerful prose, Eastman described the failings of the institutions that had developed since the Civil War to deal with the risk of industrial accidents. She showed that tort law's incessant search for fault was increasingly "oblivious" to the "actual facts" of modern, hierarchically organized firms and of costly, time-consuming tort litigation. Insurance societies, she explained, rarely provided adequate insurance for workmen in dangerous trades; among the Slavic immigrants Eastman studied, three out of four married men had less than $500 in life insurance and savings combined. And only the "largest and most prosperous employers" had

adopted accident-relief policies; the "stress of competition" had sharply limited the growth and generosity of employer accident plans.

Eastman's proposed solution was to enact laws, like those already in place across western Europe, requiring that employers compensate all employees injured in the course of their work. The fault of the employer, the employee, or some fellow employee would be irrelevant, except where an employee injured himself by his own intentional wrongful act. Injured employees would have to establish merely that their injuries "arose out of and in the course of" their work. Compensation amounts would be determined as a proportion—one-half or two-thirds—of the injured employees' weekly wages; ideally, employers would also pay injured employees' medical expenses. Common law courts might even be replaced by administrative boards convened to resolve injury claims. In any event, wasteful litigation, crowded court dockets, and costly lawyers would be eliminated.

The solution, in short, was workmen's compensation. In the months after the publication of Eastman's study, commentators described the progress of workmen's compensation with phrases like "prairie fire" and "whirlwind." Eastman herself was appointed to the influential Wainwright Commission of New York State that drafted the nation's first compensation statute, enacted in June 1910 and effective that September. Over the next decade, forty-two of the forty-eight states followed suit. . . . Only the South lagged behind; the five states still without compensation programs in 1925 were all in the Deep South.

. . .

Eastman, to be sure, was an unlikely proponent of ameliorative social reform to secure women's dependence on their husbands' wages. In an era with few women professionals, she was a New York University-trained lawyer with a graduate degree in political economy from Columbia. . . . In Work-Accidents and the Law**,** Eastman approached the problem of work accidents "from the 'home' side." The "most appalling feature" of the work-accident crisis she studied in and around Pittsburgh, Eastman contended, was "that it fell exclusively upon workers, bread-winners." Virtually all the workplace fatalities she studied had killed men (only 3 out of 526 killed women). Sixty-three percent of the fatalities "meant the sudden cutting-off of the sole or chief support of a family." "The people who perished," Eastman concluded, "were those upon whom the world leans." Studying the "home side" of the accidents therefore meant telling stories about widows, children, and families. With the help of highly sentimentalized photographs by a young photographer named Lewis Hine (later to become famous for his photographs of industrial America), and with the use of captions written for their shock value ("One Arm and Four Children"; "One of the Mothers"; "One of Six"; "A Breadwinner of Three Generations Taken"), Eastman recounted the fate of dozens of Pittsburgh families in the wake of work accidents. . . .

. . . [W]orkmen's compensation acts seemed to supporters and opponents alike somehow to upend the customary principles of American law. . . . The novelty of the statutes lay in their statistical approach to thinking about accidents, an approach that had already begun to reshape the law of a number of western European nations. Statistical thinking is a remarkably recent development in Western thought. The word "statistics"

itself, which derives from the word "state" and describes the science of gathering facts bearing on the condition of the state, did not appear in English until the late eighteenth century. Only in the nineteenth century did the statistical study of the state come of age in what philosopher of science Ian Hacking has called the "avalanche of printed numbers" generated by nineteenth-century nation-states. . . .

To think in terms of probabilities was to make possible new approaches to the problem of risk. Probabilistic mathematics, for example, made possible the modern actuarial calculations that underwrote the development of insurance systems. And so it was in the beginnings of the European social insurance state that the new technologies of social probability and actuarial thinking emerged onto the center stage of social policy. As François Ewald observes of France, the key underlying observation of social insurance advocates was that such things as industrial accidents "repeat themselves with overwhelming regularity." An 1889 study of accident statistics in the French mining industry, for example, revealed that "taking a large number of workers in the same occupation, one finds a constant level of accidents year by year. . . ." In the face of such statistical regularity, risk-spreading programs suddenly seemed exceedingly important. Individuals could not be blamed for such events, as it was inevitable that they would occur. Social insurance, however, could provide individuals guaranteed protections against the inexorable risks of industrial life. Moreover, social insurance could spread across an entire society the costs of accidents that were bound to happen to an unlucky few.

Statistical thinking about social risks was slower to develop in the United States. . . . [N]ot until debates over work accidents at the turn of the twentieth century did the statistical laws of nineteenth-century Europe come into common parlance in the politics and law of the United States. Oliver Wendell Holmes Jr.'s 1897 "Path of the Law" address at the dedication of the Boston University School of Law, given eight months before Great Britain would enact its workmen's compensation law, noted that tort law was increasingly concerned with those "injuries to person or property" that were the incidents of "well known businesses" such as "railroads, factories, and the like." . . . Injury cases no longer presented questions of justice as between individuals. The new question was "how far it is desirable that the public should insure the safety of those whose work it uses." This was distinctly a question of aggregates. . . . "The man of the future" in the law, Holmes announced in what is among his most famous aphorisms, "is the man of statistics and the master of economics."

. . .

I. M. Rubinow summed up this strand of thinking when he announced that in the statistical view, "an industrial accident is not an accident at all." Workmen's compensation acts had moved analysis of work accidents from the close specificity of individualized inquiries into particular accident cases to a higher plane of statistical generality. From this abstracted perspective, the failings of individual employees—their carelessness, their inattentiveness, their occasional recklessness—seemed to have no significance for the regular toll of industrial accidents. The Moloch of industry would have its yearly sacrifice notwithstanding the individual actions of particular workingmen. . . . "Certain dangers, including negligence of the workman and of his fellow-servants," explained Eugene Wambaugh in the Harvard Law Review, "are inevitable as a business

proposition. A man who plans a suspension bridge, or a tunnel, for example, knows that experience tables tell in advance almost as well as after the fact how many lives must be lost." . . . Injuries that arose in the course of employment were nobody's fault in the personal sense. They were instead attributable to the inherent hazards of industry. Actuarial categories and statistical laws thus seemed to undercut moral responsibility, autonomy, and independence as meaningful categories in analyzing the problem of industrial accidents. . . . Since accidents were "a necessary hazard of the work," in the words of a Washington State commission, "the moral fault of the workman" had been "eliminated."

. . .

[I]n Eastman's careful analysis of coroners' inquest reports, the "personal factor in industrial accidents," as she called it, seemed almost to disappear. In point of fact, she contended, responsibility for only one in four workplace fatalities could be attributed solely to "those killed or their fellow workmen." On the whole, the problem of accidents was best understood not at the level of each "distinct and separate incident," but at a higher level of generality that encompassed modern industry as a whole and thereby allowed for "generalizing or drawing conclusions." Yet at this level of generality, individuals no longer seemed to have control over their own fate. Industrial accidents seemed instead to be governed by a law of social life outside of the efforts of individual actors. And in the face of such statistical regularities, classical tort law's attempt to assign fault and responsibility through individualized inquiry into each work-accident case seemed beside the point. . . . Eastman argued that "[a]ll that can be hoped for is a rule that is fair in the average case." The aim of workmen's compensation statutes was therefore not to provide what Eastman called "merely justice between individuals" but rather to establish "a distribution of the loss which shall be to the best interests of all concerned."

It would be wrong, however, to suggest that the new perspective of statistical regularity generated a wholesale fatalism. . . . [T]he structures and institutional environs—the *systems*—in which individuals acted might redirect the sum of the outcomes of such individualized efforts. . . . Reengineered systems and effectively managed institutions, in other words, had the power to change the expected yearly toll of accidents. . . .

The American workmen's compensation movement thus coalesced with the claims of the first generations of managerial engineers. Scientific managers would be best able to create systems designed to minimize the yearly toll of industrial accidents. As Eastman emphasized, an "employer intelligently determined to reduce the number of industrial accidents" could establish systems of "yard management" and "discipline among employees." The "effective force in creating and managing the employment," contended another commentator, "is the employer." Employers and managerial engineers created and controlled the systems of the workplace; "the employer provides the place of work, assembles the machinery, materials, apparatus, selects the personnel, determines the processes and directs the operations." Making employers (those in the position to scientifically manage their firms) responsible was therefore "the key to the prevention of industrial injuries." Indeed, the prevention-inducing effects of making employers bear at least a substantial share of the costs of accidents resounded through the compensation movement. If the workman in "modern machine industries . . . is a part of the service of

machines which do not belong to him, and which he has not chosen, . . . he ought not be held responsible" for the accidents resulting from them. Workmen's compensation, as Theodore Roosevelt had said in his great Georgia Day speech of 1907, would mean "that with the increased responsibility of the employer would come increased care."

(3) Workers' compensation statutes came under vigorous constitutional assault. While you ought not concern yourself with the constitutional dimensions of the argument, two aspects seem worth attention.

(a) ARIZONA EMPLOYERS' LIABILITY CASES, 250 U.S. 400, 431 (1919) rejected the constitutional arguments.[4] Justice Holmes' concurring opinion embodies the shift in thinking just described. "The plaintiff (the defendant in error) was employed in the defendant's mine, was hurt in the eye in consequence of opening a compressed air valve and brought the present suit. The injury was found to have been due to risks inherent to the business and so was within the Employers' Liability Law of Arizona, Rev. Stats. 1913, Title 14, c. 6. By that law as construed the employer is liable to damages for injuries due to such risks in specified hazardous employments when guilty of no negligence. Par. 3158. . . .

"There is some argument made for the general proposition that immunity from liability when not in fault is a right inherent in free government . . .. But if it is thought to be public policy to put certain voluntary conduct at the peril of those pursuing it, whether in the interest of safety or upon economic or other grounds, I know nothing to hinder. A man employs a servant at the peril of what that servant may do in the course of his employment and there is nothing in the Constitution to limit the principle to that instance. . . .

"I do not perceive how the validity of the law is affected by the fact that the employee is a party to the venture. There is no more certain way of securing attention to the safety of the men, an unquestionably constitutional object of legislation, than by holding the employer liable for accidents. Like the crimes to which I have referred they probably will happen a good deal less often when the employer knows that he must answer for them if they do. I pass, therefore, to the other objection urged and most strongly pressed. It is that the damages are governed by the rules governing in action of tort—that is, as we have said, that they may include disfigurement and bodily or mental pain. . . . The legislature may have reasoned thus. If a business is unsuccessful it means that the public does not care enough for it to make it pay. If it is successful the public pays its expenses and something more. It is reasonable that 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. If a legislature should reason in this way and act accordingly it seems to me that it is within constitutional bounds . . ."

(b) The constitutional doubts about workers' compensation schemes were that they seemed to give benefits to employees, but only costs to employers—thus, they acted to effect redistribution, to take resources from A and give them to B. Legislative action that could be characterized in this

[4] Justice Pitney wrote a cautious opinion for five votes (including Holmes, Brandeis and Clarke, who joined the opinion described in the text); four Justices would have found the statute unconstitutional as an interference with liberty.

way was constitutionally vulnerable. A feature particularly open to this criticism was a provision that permitted an employee to elect, *after* being injured, between taking compensation under the workers' compensation scheme and suing his employer in tort; English employees have the right to make such an election to this day.[5] One could avoid this issue by making the workers' compensation scheme the *exclusive* remedy against the employer, and this is the course universally taken today, with the encouragement of a New York case finding the 1910 New York workers' compensation statute an unconstitutional taking of employers' property, Ives v. South Buffalo Railway, 201 N.Y. 271, 94 N.E. 431 (1911).

Both exclusivity of remedy and, in distinction to the Arizona statute, the creation of a schedule of possible recoveries linked both to harm suffered and to the worker's salary persuasively answered the redistribution arguments. Now there was a quid pro quo; for the certainty of recovery for his injury irregardless of personal fault, the worker had given up the potentially greater recovery he might have had with success at playing the lottery of the tort system.

(4) The Federal Employer's Liability Act remained and remains today a remedy requiring judicial hearing (and often, consequently, jury trial) and a showing of negligence. Worker compensation statutes, in contrast, are administered by specialized administrative tribunals—created not only for their expertise and in anticipation that they could more efficiently handle a large number of individually less consequential cases, but also as a means of assuring greater sympathy for workers' claims than might be expected from judges wedded to common law doctrine. In Louis Jaffe & Nathaniel Nathanson, Administrative Law: Cases and Materials 133–136 (1961), two leading scholars of administrative law opined that "[t]he reasons why the business was not conferred on the courts are these. First, the doctrines of the common law were inapposite. Second, the courts could not be trusted to apply statutory doctrines which departed so radically from the common law. . . . [I]n deciding the issue of negligence, the courts were unwilling to criticize too severely plant layouts and industrial operations. They were new, experimental. The investment in them seemed to the judges too precious and too rich in the potentiality of increased production to subject them to the uncertain effects of paying for the costs of industrial accident. It was held that if the employee could be thought to know of the risk he could be taken to have assumed it. Under the earlier conditions of hand-powered production, a worker could perhaps take care of himself. The philosophy of laissez faire added the emphasis of self-reliance regardless of risk. Yet it became clear that the machines inevitably consumed a constant number of arms and legs and eyes. The workers were without resources to absorb the cost to themselves and their families."

In Jaffe and Nathanson's understatement, "the courts still under the dominion of the earlier common law did not always construe these changes liberally." And so, they report, legislators gave up on the courts. They were "thought to be hostile to the purposes of the legislation and were incidentally too expensive and too much taken up with other business. What was needed was an agency which was sympathetic, which cost the worker little or nothing and had no other business. In what sense is such an agency 'administrative' as

[5] But then, civil juries have been abolished in England.

distinguished from a court? We see at once that the answer must run as much in terms of our constitutional system as in generic or functional terms. A court and a compensation board are fundamentally alike in that they determine controversies under the law upon the basis of evidence received in a hearing between the parties. (This is a shade more true of cases where the proceeding is against the employer than it is of proceedings against a state fund.) They are different in that a court as we know it today is a court of general jurisdiction, the board is restricted to one subject. This creates, perhaps, a psychological if not an organic distinction between the two agencies. The judge has breadth of vision and relative disinterestedness qualified by potential prejudice for the status quo; the board member has the special knowledge, sympathy, and the potential intolerance of an expert. Thus though in its functional and organic aspects the compensation board is similar to a court, in its attitudes and methods of thinking, its affinities ally it to those who operate the administrative process.

"In any case, the common administrative bond is specialization. In the case of industrial accidents, certain advantages of specialization—speed, cheapness, and sympathy—dictated the creation of a new organ. Though expertness came to be an important aspect of this specialization, it came perhaps as a by-product. It was the advocate rather than the expert who was sought.

"Yet the peculiar example of the Federal Employers Liability Act demonstrates that . . . the industrial accident problem does not defy judicial jurisdiction.[6] Under FELA the compensation of industrial accidents occurring in interstate railroading is administered in the courts under the negligence principle. The act contains all the known relaxations of the common law short of the abolition of the negligence principle itself. But it is said that railway labor resists the enactment of a compensation law—compensation benefits are very small in comparison to the verdicts which juries are willing to return against railroads in favor of employees. And the Supreme Court has been willing to sustain such verdicts though the evidence of negligence is comparatively conjectural."

The Civil Code at Century's End[1]

Rather earlier than the United States, civilian systems found their way to worker's compensation schemes. These were special statutory schemes, but the way to them was paved by judicial interpretations of code materials. A compelling account of the German development can be found in a work already cited, John M. Kleeberg, From Strict Liability to Workers' Compensation: The Prussian Railroad Law, The German Liability Act, and the Introduction of Bismarck's Accident Insurance in Germany, 1838–1884, 36 N.Y.U. J. Int'l L. & Pol. 53 (2003). Here, we will briefly consider French developments under Art. 1384. As you may recall, that Article provided

[6] For a comparative study of costs and benefits under workmen's compensation and FELA, see Arthur Conard and Mehr, Costs of Administering Reparation for Work Accidents in Illinois (1952), summarized in Arthur Conard, Workmen's Compensation: Is It More Efficient than Employer's Liability? 38 A.B.A.J. 10011 (1952).

[1] For these materials I am greatly indebted to Aref Amanat, BCL and LLB McGill 2003, and an Associate at Columbia Law School 2005–07.

> "One is responsible not only for the damage that one causes by one's own act, but also for that which is caused by the act of the persons for whom one ought to answer, or of the things that one has under one's care.
>
> The father, and the mother after the death of her husband, are responsible for the damage caused by their minor children living with them;
>
> Masters and employers, for the damage caused by their servants and agents in the work for which they have employed them;
>
> Schoolmasters and artisans, for the damage caused by their pupils and apprentices while they are under their supervision.
>
> The above-mentioned responsibility attaches, unless the father and mother, schoolmasters and artisans, prove that they could not prevent the act which gives rise to this responsibility."

Remind yourself, now, of the materials on Civil Code Arts. 1382–85 at pp. 109–115 above.

It is fair to say that, at its inception, and as the preceding discussion may suggest, Art. 1384 was seen as a relatively minor provision, a mere reminder that fault could be derived not only from one's own conduct, but also from a failure to prevent other persons or dangerous things in one's care from causing damage. The expansive potential of this language was not immediately seized upon. If that potential for expansion lay in the final phrase of the first sentence of Art. 1384, "of the things that one has under one's care," these words

> "were never given any practical application until the year 1897[sic]. For almost a century it was assumed that, with a few well recognized exceptions, all liability was based on fault. Art. 1382 applied to all cases, except liability for the torts of servants and damage caused by animals or ruinous buildings. Moreover, except where the Code established a presumption of fault, as in the liability of parents for children or schoolmasters or artisans for their pupils or apprentices, it was assumed that fault must everywhere be proved, though no doubt it would often be inferred easily from circumstances."

F.H. Lawson, Notes on the History of Tort in the Civil Law, 22 J. Comp. Legis. & Int'l Law 136, 150–51 (1940).

The year 1896 saw the following landmark decision of France's highest court, the *Cour de cassation.* Note well the form the decision took, and compare it with such decisions as *Farwell* and *Johnson.*

Guissez, Cousin & Oriolle v. Teffaine

Cassation, Civil Chamber, 16 June 1896.

[On June 4, 1891 there was an explosion aboard the steam-tug Marie. Teffaine, a member of the crew, was fatally injured in the explosion. His widow brought an action for damages in her own name and as guardian of his minor children before the Tribunal civil of the Seine against the owners of the tug, Guissez and Cousin, and Guissez

and Cousin joined Oriolle, who had manufactured the engine, in the action.

The lower courts found that Teffaine was conceded to be a skillful and careful employee, blameless for an accident which had occurred because of defectively welded pipe—Oriolle's direct responsibility. On July 1, 1893 the Tribunal civil of the Seine ruled for the defendants under article 1382 of the Civil Code, on the ground that no fault on their part could be shown. On Teffaine's widow's appeal, the Court of Appeal of Paris reversed, finding Guissez and Cousin directly responsible to Teffaine on an analogy to Art. 1386 (concerning flaws in building construction), and ordering Oriolle to indemnify them. The case was then brought to the Cour de Cassation, France's highest court for these purposes; France's avocat general appeared on behalf of the Ministry of Justice, arguing for reversal in light of the broad implications upholding this verdict would have for liability generally.]

■ THE COURT: . . . —Whereas the challenged decision found finally as a matter of fact that the explosion of the engine on the steam-tug Marie, which caused Teffaine's death, was due to a defect in construction; as under article 1384 of the Civil Code this finding, which excludes the *cas fortuit* and *force majeure,* established, as to the victim of the accident, the responsibility of the owner of the tug and the owner cannot avoid this responsibility by proving either the fault of the builder of the engine or the hidden character of the fault in question;—From which it follows that, in condemning Guissez and Cousin, owners of the tug Marie, to pay damages to Teffaine's widow and children, the decision in question . . . did not violate any of the articles cited in the [challenge made here].

For these reasons, [we] reject [the challenge to the ruling below].

NOTE

R. Saleilles, *Les Accidents de Travail et la Responsabiliti Civile-Esas d'une Thiorie Objective de la Responsabiliti Dilictuelle* 1 (1897) [footnotes omitted]: The Cour de cassation recently handed down in the field of industrial accidents a decision [Guissez, Cousin et Oriolle v. Teffaine] that can, I believe, have a considerable importance. It may well be that the whole theory of industrial risk has entered, through this decision, into our case law. This is desirable when one considers the slowness with which the legislator acts today on the most urgent laws. We must expect most progress in the law, therefore, to come from the courts . . .

More than half the railroads (167/294) had equipped half or less of their cars; bearing out some of the predictions made in the legislative history, the 127 lines in better than 50% compliance were also the most powerful—owning among themselves 715,625 cars, 61% of the total.