Sidetracking the FELA: The Railroads' Property Damage Claims*

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INTRODUCTION

Major railroad accidents have become almost commonplace in recent years, often resulting in tragic injury and loss of life to railroad workers as well as extensive property damage to the railroads.¹ The Federal Employers’ Liability Act (FELA)² al-

¹ See, e.g., Pattern Sought in Recent Series of Rail Crashes, N.Y. Times, July 24, 1984, § 2, at 4, col. 6 (a head-on collision raised Amtrak’s passenger fatality total to 24 since its inception in 1971, eight of which occurred during the seven-month period ending in July 1984); Officials Cite Safety Concerns After Two Fatal Amtrak Accidents, N.Y. Times, July 16, 1984, § 1, at 21, col. 1 (citing unguarded crossings and weather-related track problems as main trouble areas); 3 Killed as Train Falls into Ravine in Vermont Hills, N.Y. Times, July 8, 1984, § 1, at 1, col. 6 (bad weather washed out track); Bodies of Train Crew Found, N.Y. Times, Jan. 4, 1984, § 1, at 20, col. 1 (locomotive plunged from open railroad bridge); 4 Reported Dead as Train Jumps Tracks in Texas, N.Y. Times, Nov. 13, 1983, § 1, at 27, col. 1 (director of Texas Railroad Commission described some track in area as being deteriorated); Derailment in Canyon Starts Big Fire, N.Y. Times, Nov. 18, 1983, § 1, at 16, col. 3 (describing derailment incident killing one crewman); Switch Misdirects Train, id. at col. 4 (unexplained switch of train from main track responsible for accident); 2 Rail Deaths Tied to Traffic Change, N.Y. Times, Oct. 6, 1983, § 2, at 5, col. 3 (track workers apparently unaware of traffic coming from both directions); Trains Kill 2 Amtrak Workers, N.Y. Times, Oct. 2, 1983, § 1, at 46, col. 5 (describing two separate accidents involving railroad employees); Train with Toxic Liquids Derails and Explodes, N.Y. Times, Sept. 3, 1983, § 1, at 8, col. 6 (freight train derailment); Troubled Amtrak Train in a New Accident, N.Y. Times, Aug. 27, 1983, § 1, at 5, col. 5 (a single train, within a three-day period, struck a car and killed the driver, struck and killed a woman fishing from a train trestle, hit an abandoned pickup, and later struck a disabled tractor trailer, all without the crew being cited for any safety violations); 11 Hurt in Train Derailment, N.Y. Times, Jan. 31, 1983, § 1, at 20, col. 6 (train struck empty freight car, injuring seven railroad employees, three passengers, and a firefighter).

² Labor Department statistics indicate that workers in the category of “transportation and public utilities,” which includes railroads, suffer 24% of the occupational fatalities although comprising only 7% of the workforce sam-
allows interstate railroad workers and their dependent families to recover from the railroad for injuries and death caused, at least in part, by the negligence of the railroad or fellow employees.\(^3\) Recovery is proportionately reduced, but not barred, by the injured or deceased worker's contributory negligence.\(^4\) The FELA thus provides compensatory relief for the worker's injury or death and encourages railroads to improve industry safety through the economic incentive of liability.\(^5\)

The FELA's continued effectiveness is seriously threatened, however, by the developing railroad strategy of filing "common law" claims for property damage caused by employee negligence. Accidents causing injury and death to employees also may involve extensive damage to tracks and

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\(^5\) See infra note 22 and accompanying text.
equipment. In several recent FELA suits, railroads have pressed counterclaims alleging that their property damage resulted from the negligence of the worker who was injured or killed. In at least one FELA action, the railroad also asserted a property damage claim against the deceased employee’s co-workers.

These claims place the FELA in imminent and serious jeopardy precisely at a time when the safety of our nation’s railroads is increasingly called into question. The FELA’s exclusive remedies are cold comfort to workers faced with rail-

6. See Cavanaugh v. Western Maryland Ry., 729 F.2d 289 (4th Cir. 1984), cert. denied, 105 S. Ct. 222 (1984). The Cavanaugh majority, id. at 294, cited several cases in support of its holding that a railroad can, under certain circumstances, maintain a counterclaim against an FELA plaintiff. E.g., Consolidated Rail Corp. v. Dobin, No. 81-2539 (E.D. Pa. Sept. 30, 1981) (court consolidating for trial FELA action and railroad’s separate property damage diversity suit after it previously had dismissed railroad’s property damage counterclaim); Key v. Kentucky & Ind. Terminal R.R., Civ. C-78-0313-L(A) (W.D. Ky. 1979); Kentucky & Ind. Terminal R.R. v. Martin, 437 S.W.2d 944 (Ky. 1969) (counterclaim deemed barred by employer’s contributory negligence); Capitola v. Minneapolis, St. P. & S.S.M. R.R., 258 Minn. 206, 103 N.W.2d 867 (1960) (counterclaim deemed barred by attributing co-workers’ negligence to employer). In pursuing the counterclaim strategy, the railroads seek to take advantage of the age-old master-servant relation at common law, a strategy that apparently went either unnoticed or unpursued by railroads for many decades. See infra text accompanying notes 74-96.


8. See supra note 1 and accompanying text.

9. The FELA preempts all state workers’ compensation statutes. See New York Cent. R.R. v. Winfield, 244 U.S. 147 (1917); infra notes 118-23 and accompanying text. A disadvantage of this preemption is that the FELA requires the plaintiff to show that some employer or co-worker negligence resulted in the worker’s injury or death. See 45 U.S.C. § 51 (1982); S. REP. NO. 460, 60th Cong., 1st Sess. 2-3 (1908) (pointing out that the FELA was not designed to create liability without negligence “although many wise and good men think that that ought to be done”). Most workers’ compensation systems do not demand any showing of fault. See 1 A. Larson, The Law of Workmen’s Compensation § 1.10 (1984). But cf. W. Keeton, supra note 3, § 80, at 573 (some worker’s compensation cases still apply assumption of risk doctrine to bar recovery). Customarily, therefore, a broader base of workers injured on the job is entitled to some award under workers’ compensation statutes than under the FELA. Attorneys’ fees also are recoverable under some state workers’ compensation laws. See 3 Larson, supra, § 83.

A disadvantage of the workers’ compensation systems is that they limit compensation by a standard formula for measuring the level of disability and the economic loss that flows from it. That formula, applied by an administrative, rather than judicial, body, typically does not take into account elements such as pain and suffering even when the injury is particularly severe and results from gross employer negligence. In many cases, compensation awards are less than jury awards would be in a comparable situation. See W. Keeton,
road claims for property damage. Judgments for railroads on

supra note 3, § 80, at 574; Page, The Exclusivity of the Workmen's Compensation Remedy, 4 B.C. INDUS. & COMM. L. REV. 555 (1963). See generally 2 A. Larson, supra, ch. X (discussing disability and personal injury benefits). Workers’ compensation programs also often require a trial-like demonstration that injuries are work-related. See 3 A. Larson, supra, § 77A.44. Although, theoretically, many workers’ compensation cases could be concluded more speedily than would be expected in the judicial process, the system still suffers at times from payment delays and frivolous employer appeals. See Workers’ Comp: A Pocket Full of Woes, News Report, Channel 7, New York, New York, June 28, 1984. See generally 3 A. Larson, supra, § 80 (review of workers’ compensation awards).

In 1917, the Supreme Court upheld a series of state workers’ compensation laws. In New York Central R.R. v. White, 243 U.S. 188 (1917), the Court rejected a fourteenth amendment due process attack on a program mandating employer compliance with a no-fault scheme of compensation requiring the employer either to pay for insurance or to make a security deposit to ensure prompt payment of awards to injured workers. Id. at 206-09. In Hawkins v. Bleakly, 243 U.S. 210 (1917), the Court upheld an Iowa statute allowing workers and employers to choose whether to be covered. Id. at 218. Under the Iowa statute, an employer who unilaterally rejected the compensation system would lose the “common law defenses,” i.e. assumption of risk, contributory negligence, and fellow servant rule, in tort actions brought by the worker. Id. at 213. Finally, in Mountain Timber Co. v. Washington, 243 U.S. 219 (1917), the Court approved a compulsory social insurance system that drew from a state fund financed by industries classified into groups and assessed according to the perceived level of hazard within each group. Id. at 243-44. Of course, the program deprived employees of any common law action. Id. at 228; see also Boston & Me. R.R. v. Armburg, 285 U.S. 234, 238 (1932) (upholding state’s power to alter common law).

In the heyday of workers’ compensation programs, one author rejected the idea of a federal workers’ compensation act covering railroad workers in favor of repealing the FELA so as to allow state workers’ compensation acts to apply instead. Note, Workmen's Compensation on Interstate Railways, 47 HARV. L. REV. 389 (1934) (prepared as a thesis in Professor Felix Frankfurter’s class). Another author suggested abandoning the FELA in favor of “automatic” social insurance. Pollack, The Crisis in Work Injury Compensation On and Off the Railroads, 18 LAW & CONTEMP. PROBS. 296 (1953). Neither approach was ever adopted.

Notably, in 1912, a federal Employers’ Liability and Workmen’s Compensation Commission headed by Senator Sutherland recommended a workmen's compensation bill. See MESSAGE OF THE PRESIDENT OF THE UNITED STATES TRANSMITTING THE REPORT OF THE EMPLOYERS’ LIABILITY AND WORKMEN’S COMPENSATION COMMISSION, S. Doc. No. 338, 62nd Cong., 2d Sess. (1912). The bill, which would have created an exclusive and compulsory means of compensation, was supported by President Taft and easily passed both the House and the Senate. It never emerged from the conference committee, however. See 49 Cong. Rec. 4677 (1913) (statement of Sen. Sutherland) (withdrawing bill because of inability to work out differences between House and Senate versions). One author attributes the death of the federal workmen’s compensation bill to its lukewarm reception from railroad unions. Miller, The Quest for a Federal Workmen's Compensation for Railroad Employees, 18 LAW & CONTEMP. PROBS. 188, 191-92 (1953). Workers might have regarded the right to a jury trial and the opportunity to recover for pain and suffering as essential in
property damage counterclaims in FELA actions negatively affect the FELA’s remedial design by reducing, extinguishing, or surpassing the plaintiff’s recovery. Moreover, railroad workers or their families may be deterred from filing FELA suits in circumstances involving both personal injury and property loss; the potential FELA plaintiff would always risk the danger that the railroad, with its manifestly superior investigative resources and its position of authority over the injured worker and coemployees, might respond aggressively with a major property damage claim. Coemployees could also be inhibited from volunteering evidence of their own negligence or of the railroad’s negligence for fear that they too would be swept up as defendants in a suit for the railroad’s property damage.

Two major appellate decisions disagree sharply with respect to the railroads’ ability to assert property damage claims against negligent employees in FELA actions. In Stack v. Chicago, Milwaukee, St. Paul & Pacific Railroad Co., an FELA suit was commenced on behalf of a worker killed in a railroad collision. The railroad counterclaimed against decedent’s estate for negligently caused property damage and impleaded surviving co-workers. The Washington Supreme Court found that the FELA’s provisions interpreted in light of the Act’s remedial purpose barred the railroad’s claims. In 1984, however, a divided panel of the United States Court of Appeals for the

securing optimum recoveries. Perhaps the fear that attorneys’ fees from possible administrative litigation would reduce the predictably lower compensation awards offset the perceived benefits of the proposed bill. No strong opposition to the bill appears to have been raised by railroad companies.

Had the federal workmen’s compensation bill become law, a question would have arisen as to whether a purely administrative federal remedy would impinge on article III judicial powers and on the right to a jury trial, particularly in the handling of the threshold question of coverage. One author surmised that if, to solve such difficulties, a judicial forum were made available, the benefits of the program would be cancelled by the resulting increased burden and cost of trials. Note, supra, at 408.

A federal workers’ compensation scheme giving workers the option to refuse coverage was also considered in the years after the 1912 bill. Resistance among some railroad labor unions persisted and union pressure ultimately was directed toward securing more effective enforcement of the FELA itself. See Miller, supra, at 204.


13. Id. at 159-62, 615 P.2d at 459-61.
Fourth Circuit upheld a railroad's property damage counterclaim in *Cavanaugh v. Western Maryland Railroad Co.*, finding that nothing in the FELA demands such a "sacrifice" of the railroad's "rights." As recognized in the *Cavanaugh* dissent, the decision supports the result in *Cook v. St. Louis-San Francisco Railroad Co.*, in which the FELA plaintiff recovered $46,000, only to be found liable for $1.2 million on the railroad's property damage counterclaim.

This Article contends that the FELA prohibits railroads from asserting claims against employees for negligently causing property damage. Part I discusses the evolution of the FELA, examining the history of judicial hostility to the Act and Congress's responsive clarification and expansion of the Act's protection of railroad workers. Part II focuses on the railroads' counterclaim procedure for raising property damage claims in FELA suits and explains the absence of any specific provision expressly barring this procedure in light of the pre-FELA common law. This section further asserts that such claims, whether brought as separate actions against potential FELA plaintiffs or as counterclaims, are preempted by the FELA's comprehensive liability design.

The Article next examines specific FELA provisions that by their terms impliedly bar the railroads' property damage counterclaims. Part III contends that the "no contract-no device" prohibition against exemptions from liability and its sole setoff exception for railroad contributions to insurance benefits require the exclusion of property damage counterclaims from FELA actions. Part IV explores the inhibitory effect that independent railroad claims against co-workers of FELA plaintiffs might have in discouraging such employees from testifying against the railroad in light of the congressional intent to protect FELA plaintiffs' free access to information regarding the negligence of railroads and co-workers. It concludes that such actions would unjustly hinder the ability of FELA plaintiffs to gather information necessary to maintain their suits. Finally, Part V suggests that Congress, in keeping with its long history of protecting the FELA from judicial resistance, should clarify the issue by amending the Act to bar railroads' property damage claims against their employees.

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15. *Id.* at 291.
16. 729 F.2d at 297 (Hall, J., dissenting).
I. THE FELA IN HISTORICAL PERSPECTIVE

By the advent of the twentieth century, the railroad industry was one of America's most prominent businesses.18 Its operation was vital to the nation's economy.19 The industry's rapid technological and geographical growth, however, produced new risks and hazards for its workers. The incidence of employee injury and death escalated alarmingly. In 1906 one member of Congress grimly related:

In three months of last year there were 931 railroad employees killed at their posts of duty. In three months of last year there were 13,217 railway employees injured at their posts of duty, not mentioning those who met such slight injuries as only required lay off of two or three days.20

The railroad industry and its labor force were pitted against each other on an expanding and potentially catastrophic battlefield.21

A. THE 1906 ACT

Disturbed by the railroads’ rising rate of employee injury and death and the resulting labor unrest, Congress proceeded to develop legislation in 1906 designed to provide compensatory relief for victims of negligence and to encourage railroads to improve industry safety.22 An entirely new system imposing li-

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21. Major railroad strikes in 1886, 1892, and 1894 highlighted the “close relation between railroad transportation and the public welfare” and the devastating impact that a breakdown in labor relations could have on the nation. See R. SMITH, LABOR RELATIONS LAW: CASES AND MATERIALS 26 (5th ed. 1974). As a result of these strikes, the railroad industry became the focus of an incipient federal labor policy. Railroad labor unrest, such as that experienced in the Pullman Strike of 1894, helped to produce the Erdman Act, which banned “yellow dog” contracts forbidding union membership. Erdman Act, ch. 370, § 10, 30 Stat. 424, 428 (1898); see B. MELTZER, LABOR LAW: CASES, MATERIALS, AND PROBLEMS 29 (2d ed. 1977); R. SMITH, supra, at 26. The Supreme Court, however, declared the “yellow dog” prohibition unconstitutional in Adair v. United States, 208 U.S. 161 (1908), reflecting, at least in part, the judicial reluctance to approve statutory changes in common law rights. Cf. infra text accompanying notes 56-59 (describing courts' continued application of common law defenses to frustrate remedial purpose of FELA).
22. In expressing the compensatory purpose of the 1908 FELA, the Senate Committee on Education and Labor reported that “there is nothing extreme or
ability on railroads was necessary to achieve these remedial and regulatory ends. Common law was no longer adequate to govern the complicated area of industrial labor relations:

In the complex organization of society that now exists the oldtime common law of master and servant has no longer fitting application to this subject. There is a new heaven and a new earth with respect to the organization of labor. Consequently, despite some concern about its power to alter common law tradition, Congress enacted the Federal Employer’s Liability Act “to give relief against the rigors of the common law” by placing liability for employee injuries and deaths on the “important, extensive, and hazardous” railroad industry.

The 1906 FELA modified the common law contributory negligence bar, abolished the fellow servant rule, and pro-

revolutionary in the opinion that the whole community should share... in the loss which arises from an accident which befalls one [railroad employee].” S. REP. No. 460, 60th Cong., 1st Sess. 3 (1908). The Committee recognized that, although common law placed much of the economic burden for industrial accidents on the worker, the railroads now were stronger and better able to absorb the cost and, at times, did so voluntarily. See id. at 1-3.

In addition to this compensatory purpose of the Act, its closely related regulatory aim has been noted by the Supreme Court: “The natural tendency of the changes [from common law] is to impel the carriers to avoid or prevent the negligent acts and omissions which are made the bases of the rights of recovery which the statute creates and defines... .” Mondou v. New York, N.H. & H. R.R., 223 U.S. 1, 50-51 (1911); see also Jamison v. Encarnacion, 281 U.S. 635, 640 (1930) (“The Act... is intended to stimulate carriers to greater diligence for the safety of their employees and of the persons and property of their patrons.”).

24. See 40 CONG. REC. 4605 (1906) (statement of Rep. Crumpacker) (“Personal-injury cases, even against interstate-transportation companies, have always been regarded as local and subject only to State laws... .”). The argument that the alterations of the common law contained in the 1906 enactment violated states’ rights and exceeded the power of Congress were dismissed by the Supreme Court in Howard v. Illinois Cent. R.R., 207 U.S. 463, 491-92 (1908); see infra text accompanying notes 37-40, which in turn increased the chances of additional aggressive legislative intrusions.


27. Id. § 1, 34 Stat. 232, 232 (1906) (reenacted in amended form and codified at 45 U.S.C. § 51 (1982)) (railroad liable for negligence of “its officers, agents, or employees”). The fellow servant rule barred workers’ recovery against their employer for injuries caused by the negligence of fellow employees. See W. KEETON, supra note 3, § 80, at 577.
vided an action for wrongful death. Because the Act was not a workers' compensation act, however, the FELA plaintiff was still required to prove that some negligence by railroad officers, agents, or fellow workers caused the employee's injuries or death. Furthermore, contributory negligence as a complete bar to recovery was relaxed only when the negligence of the employee was slight and that of the railroad or coemployee was gross by comparison, in which case the employee's negligence would reduce the FELA recovery proportionately.

Although Congress was cautiously selective in modifying specific common law doctrines, it was determined to protect the impact of such modifications. Congress feared that railroads, with approval from courts accustomed to common law limitations, would escape FELA liability under contractual arrangements such as releases in employment contracts. To preclude this possibility, Congress added a stern "no contract" provision to the FELA:

[N]o contract of employment, insurance, relief, benefit, or indemnity for injury or death entered into by or on behalf of any employee, nor the acceptance of any such insurance, relief benefit or indemnity by the person entitled thereto, shall constitute any bar or defense to any action brought to recover damages for personal injuries to or death of such employee.

Because Congress believed that this provision would have pre-

29. Workers' compensation schemes were considered and rejected without criticism of their concept. S. REP. No. 460, 60th Cong., 1st Sess. 2-3 (1908); see also supra note 9 (discussing workers' compensation programs).
30. In its present form, the FELA provides that an FELA plaintiff may recover for injury or death "resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." 45 U.S.C. § 51 (1982). This is substantially the same provision as § 1 of the 1906 enactment. FELA, Pub. L. No. 59-219, § 1, 34 Stat. 232, 232 (1906) (reenacted in amended form and codified at 45 U.S.C. § 51 (1982)).
32. H. REP. No. 2355, 59th Cong., 1st Sess. 5 (1906). One variation of such railroad-initiated exoneration consisted of the employee's written discharge of the railroad's liability in exchange for railroad-funded insurance protection through so-called "relief departments." Id. at 6. Although these practices were banned by some state court decisions and state statutes, Congress, in enacting the "no contract" provision, intended to create a uniform, national rule. Id. at 5.
vented railroads from setting off their contributions to certain benefit programs, such as insurance compensating employees for injury or death, Congress added a proviso allowing railroads to deduct such contributions from FELA damages.34

Congress, relying on its still-fledgling commerce clause power,35 employed a casually broad approach to extend the scope of the 1906 FELA to include "every common carrier" engaged in interstate commerce.36 The Act thus applied to workers injured in intrastate railroad activities if the carrier did some general interstate business. This novel theory of congressional commerce clause power was fatal to the 1906 FELA. In 1908, the Supreme Court, in Howard v. Illinois Central Railroad Co.,37 held that the statute unconstitutionally regulated purely intrastate commerce.38 The Court stated that Congress could impose liability on a railroad only when the employee was killed or injured while the railroad was engaged in interstate commerce.39 In declaring the FELA invalid, however, the Supreme Court minimized challenges to those portions of the Act modifying common law doctrines: "[W]ithout even for the sake of argument conceding the correctness of these suggestions, we at once dismiss them from consideration as concerning merely the expediency of the act and not the power of Congress to enact it."40

B. The 1908 Act

In 1908, Congress reenacted the FELA, limiting the scope of the railroads' liability to those injuries and deaths occurring "while engaging" in interstate commerce.41 Heeding President

34. Id.; see infra notes 148-54 and accompanying text.
37. 207 U.S. 463 (1908).
38. The Court stated:
   The act then being addressed to all common carriers engaged in interstate commerce, and imposing a liability upon them in favor of any of their employees, without qualification or restriction as to the business in which the carriers or their employees may be engaged at the time of the injury, of necessity includes subjects wholly outside of the power of Congress to regulate commerce. . . .
Id. at 498.
39. Id.
40. Id. at 492.
41. FELA, Pub. L. No. 60-100, § 1, 35 Stat. 65, 65 (1908) (codified at 45
Theodore Roosevelt's advice, however, Congress took advantage of Howard's implied approval of the common law alterations in the 1906 FELA by greatly strengthening the Act's compensatory provisions. The legislation was decisively pro-employee, and it reflected Congress's growing suspicions that railroads would seek to evade the FELA's remedial and regulatory design by pursuing common law defenses.

Congress demonstrated its resolve to prevent such industry evasions by rejecting the 1906 FELA's modified contributory negligence bar in favor of a pure comparative negligence provision. Thus, under the 1908 enactment, the FELA plaintiff always could recover damages in proportion to the negligence of the railroad or co-workers, even if those parties were only slightly negligent and the plaintiff was grossly negligent. Significantly, the worker was deemed free of all negligence when a railroad violation of a statute enacted for employee safety contributed to the worker's injury or death. The restored Act

U.S.C. § 51 (1982)). This definition gave rise to the so-called "moment of injury" test for determining whether a worker was within the regulation of interstate commerce. See Shanks v. Delaware, Lack. & W. R.R., 239 U.S. 556, 558 (1916) (test is whether employee was "at the time of injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it").

42. In a message to the Senate, President Roosevelt urged Congress to re-enact a strengthened FELA:

By a substantial majority the Court holds that the Congress has power to deal with the question in so far as interstate commerce is concerned.

As regards the employers' liability law, I advocate its immediate enactment, limiting its scope so that it shall apply only in the class of cases as to which the Court says it can constitutionally apply, but strengthening its provisions within this scope.

43. See supra note 31 and accompanying text.

44. FELA, Pub. L. No. 60-100, § 3, 35 Stat. 65, 66 (1908) (codified at 45 U.S.C. § 53 (1982)). The FELA's comparative negligence provision is "pure" in the sense that it does not bar recovery even if the worker's negligence was greater than that of the railroad. For examples of state statutes applying such a preclusion, see COLO. REV. STAT. § 13-21-111 (1973); IDAHO CODE § 6-801 (1979); N.D. CENT. CODE § 9-10-07 (1975); UTAH CODE ANN. § 78-27-37 (1977).

also abolished the assumption of risk defense in such cases.\textsuperscript{46} an issue that the 1906 FELA had not addressed.

Another telling example of Congress's determination to safeguard its liability program was its revision of the FELA's "no contract," rule.\textsuperscript{47} Congress was aware that the expanded rights of railroad workers might encounter strong judicial resistance, just as it was aware of the courts' sometimes aggressive use of injunctions to quell concerted action by labor unions.\textsuperscript{48} The amended Act inserted broad admonitory language prohibiting interference with the FELA's objectives: "[A]ny contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act, shall to that extent be void."\textsuperscript{49} Congress added a single setoff exception to this new "no contract-no device" command for insurance contributions by employers.\textsuperscript{50}

The Supreme Court had forced Congress to sacrifice application of its remedial legislation to workers injured or killed on intrastate jobs, but the 1908 Act otherwise was more protective of the interests of railroad workers and more constitutionally secure than was the 1906 version. Although the FELA remained in this basic form for more than three decades, in 1910 Congress had to make an interim adjustment to counter the effect of an unexpected judicial interpretation.


\textsuperscript{47} Id. § 5, 35 Stat. 65, 66 (codified at 45 U.S.C. § 55 (1982)). For the text of the 1906 version, see supra text accompanying note 33.

\textsuperscript{48} The civil injunction device replaced criminal prosecutions once statutes began to legalize the existence of unions. Witte, \textit{Early American Labor Cases}, 35 \textit{Yale L. J.} 825 (1926). One of the first examples of the use of the injunction against organized labor was the celebrated case of \textit{In re Debs}, 158 U.S. 564 (1895). Professor Owen Fiss relates that because of the injunction issued by the trial court in the \textit{Debs} case, 64 F. 724 (C.C.N.D. Ill. 1894), "federal troops had been deployed, Eugene Debs was arrested and removed from the field, the [Pullman] strike was broken, and the American Railway Union destroyed." O. Fiss, \textit{The Civil Rights Injunction} 2 (1978). Once ushered in, the injunction flourished as a device by which legislative reforms and regulation of business practices were judicially resisted. \textit{Id.}


\textsuperscript{50} Id.; see H.R. REP. No. 1386, 60th Cong., 1st Sess. 7 (1908); H.R. REP. No. 2335, 59th Cong., 1st Sess. 6 (1906); infra notes 148-54 and accompanying text.
C. The 1910 Amendments

In *Hoxie v. New York, New Haven and Hartford Railroad Co.*[^51] the Connecticut Supreme Court held that federal courts had exclusive jurisdiction over suits brought under the 1908 FELA.[^52] Hoxie's inhospitable treatment of the FELA set the stage for further strengthening by Congress of its remedial program. The resulting amendment evidenced a strong federal policy to endow the FELA plaintiff with even more protections by honoring the plaintiff's choice of legal battlefield. It not only assured FELA plaintiffs of concurrent jurisdiction,[^53] but also precluded railroad defendants from removing actions filed in state court.[^54] The amendment also expanded possible venues to allow plaintiffs to file suit in a district court for the district where the defendant resided or did business or where the cause of action arose.[^55]

[^51]: 82 Conn. 352, 73 A. 754 (1909).
[^52]: Id. at 363, 73 A. at 759.

I think it so well established and so thoroughly settled that both federal and state courts have jurisdiction, subject to the power of removal of these causes of action, that it seems unnecessary to incorporate it into the law.

But nevertheless a very respectable court, and one whose opinions are entitled to a great deal of respect, has refused to take jurisdiction of this class of cases, holding that it was the evident intent of Congress to confine this class of cases to the jurisdiction of the federal court. . . .


[^55]: Id. (codified at 45 U.S.C. § 56 (1982)). This venue provision also was a congressional reaction to restrictive judicial interpretations of the FELA. See 45 CONG. REC. 2253 (1910) (statement of Rep. Sterling) ("As the law is now suit can be brought only in the district where the defendant is an inhabitant. It has been so held by one of the federal courts in Texas.").


[This] amendment relates to the survival of the action. One of the courts in Connecticut held that under this law, where the injured party died before action was commenced . . . , the action did not survive to the personal representative of the deceased. This provides
Despite the clear intent of Congress to prevent common law frustration of FELA enforcement, some courts continued to apply common law defenses permitting railroads to escape liability. The courts' aversion to the FELA was most conspicuous in the judicial resistance to the 1908 "no contract-no device" provision. For example, after railroads began publishing routine reports of unsafe conditions in timetables and other documents, several courts found that employees thereby had received "notice" of the hazards and assumed the risk of any resulting injuries. The House Judiciary Committee in 1938 condemned these decisions, insisting that "such a scheme of charging notice to an employee is a device to escape liability" and thus is barred as an FELA defense. The Committee observed further that "the aggressions of the courts have given to the defense of assumption of risk a scope and quality that threatens the enforcement of the act."

Congress's 1939 amendments responded to this judicial hos-
ility to the FELA’s remedial and regulatory purposes. Unwilling to risk further misinterpretations of the “no contract-no device” provision, Congress explicitly barred the assumption of risk defense in FELA actions. It also extended the Act’s statute of limitations from two to three years and expanded the definition of interstate commerce to profit from recent Supreme Court decisions giving Congress greater regulatory power. Under the latter change, all railroad workers whose activities were in “furtherance of interstate or foreign commerce” or would, “in any way directly or closely and substantially, affect such commerce” were protected by the FELA’s umbrella.

Finally, an additional amendment barred “[a]ny contract, rule, regulation, or device whatsoever, the purpose, intent, or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest” regarding an accident. The amendment also imposed criminal sanctions for any “threat, intimidation, order, rule, contract, regulation, or device whatsoever” that prevented any person from furnishing such information. Adopting the open-ended language of the “no contract-no device” provision, this new section protected against both the practices enumerated in the legislative history and “any device whatsoever” that would have the effect of preventing voluntary furnishing of info taking it away from the jury; and the courts have decided now it is a question of law.

60. Because some railroad labor unions were not convinced that workers’ compensation boards were a better alternative than jury trials, efforts were focused on improving FELA protections within the existing system. Bills were introduced to amend the FELA in both 1938 and 1939. See, e.g., S. 1708, 76th Cong., 1st Sess. (1939) (expanding class of workers deemed to be engaged in interstate commerce); H.R. 4988, 76th Cong., 1st Sess. (1939) (eliminating the assumption of risk defense); H.R. 10,296, 75th Cong., 3d Sess. (1938) (same).


63. Id. sec 1, § 1, 53 Stat. 1404, 1404 (codified at 45 U.S.C. § 51 (1982)).

64. Id. This effectively did away with the “moment of injury” doctrine and expanded FELA coverage to virtually all railroad workers. The question of coverage under this amendment becomes simply whether anything the employee does affects interstate commerce. See, e.g., Reed v. Pennsylvania R.R., 351 U.S. 502 (1956) (applying FELA to railroad filing clerk hurt by a broken window).


67. See supra text accompanying note 49.
formation. By enacting these changes, Congress demonstrated even more strongly than it had before its dissatisfaction with courts' use of common law theories to thwart the FELA's remedial purposes.

II. THE SIGNIFICANCE OF CONGRESS'S "INATTENTION" IN THE FELA TO THE RAILROADS' PROPERTY DAMAGE COUNTERCLAIM

The FELA's historical evolution reveals Congress's continuous effort to provide relief for an employee killed or injured through the negligence of the railroad or co-workers. No railroad defensive tactic has more potential for destroying the worker's relief than the railroad's property damage counterclaim. If the railroad should succeed on the counterclaim, the FELA plaintiff's recovery could be largely, if not entirely, eliminated. No FELA provision, however, expressly bars railroads from pursuing property damage counterclaims in FELA actions.

In Cavanaugh v. Western Maryland Railway Co., the United States Court of Appeals for the Sixth Circuit inferred from this lack of any explicit prohibition of counterclaims that Congress intended to allow them in FELA suits. In expressing its view that this omission was not inadvertent, the court noted that Congress had expressly barred or modified other railroad defenses prejudicial to FELA plaintiffs. Thus, the court reasoned, Congress's inattention to the property damage counterclaim implied its intention to preserve such defensive claims.


69. 729 F.2d 289 (4th Cir. 1984).

70. See id. at 291 (plaintiff unable to point to any explicit language in FELA prohibiting counterclaim).

71. Id. (citing the Act's preclusion of the assumption of risk defense and modification of the contributory negligence defense).

72. Id. ("[Congress] could as easily, had it intended such a result, have barred the defending railroad from asserting by a counterclaim in such action its own claim for damages against the suing plaintiff for damages caused wholly by the negligence of that plaintiff, but it did not choose to do so."). The Cavanaugh majority found evidence of Congress's intent to allow the railroad's counterclaim in Rule 13(a) of the Federal Rules of Civil Procedure, which requires a defendant to plead all transactionally related counterclaims. Fed. R. Civ. P. 13(a). The court questioned the logic of barring counterclaims
Inflexible application of the expressio unius est exclusio alterius theory of statutory construction often does violence to the true intent of Congress. The Cavanaugh court's reliance under the FELA that would seem to be compulsory under Rule 13(a), 729 F.2d at 294, and indicated its disbelief that Congress would compel such an "unfair result." Id. at 291.

Barring the counterclaim, however, would be "unfair" only if the FELA, in conjunction with the supremacy clause of the constitution, otherwise permitted the railroad's claim. Since the Federal Rules of Civil Procedure "shall not abridge, enlarge or modify any substantive right," 28 U.S.C. § 2072 (1982), Rule 13(a) obviously does not create any right of action in the railroad for property damage negligently caused by a railroad worker. Instead, the inquiry must be whether a state law cause of action such as that asserted in Cavanaugh exists at all and, if so, whether it nevertheless has been superseded by virtue of the supremacy of the FELA over any state law that conflicts or interferes with its terms or policies. As always, it is the intent of Congress that controls. See, e.g., Diamond v. Chakrabarty, 447 U.S. 303, 308 (1980); Philbrook v. Glodgett, 421 U.S. 707, 713 (1975); United States v. Braverman, 373 U.S. 405, 408 (1963).

Several traditional and interrelated principles of statutory construction are relevant in determining congressional intent under the FELA: that safety legislation is to be construed liberally to effectuate the congressional purpose, Whirlpool Corp. v. Marshall, 445 U.S. 1, 13 (1980); "that remedial legislation should be construed broadly to effectuate its purpose," Tcherepnin v. Knight, 389 U.S. 332, 336 (1967); that state legislation that frustrates the full effectiveness of federal law and policy is invalid under the supremacy clause, Perez v. Campbell, 402 U.S. 637, 650-52 (1971); and that a statute must be construed in keeping with the spirit of the legislation, United Steelworkers of America v. Weber, 443 U.S. 193, 201 (1979).

These general principles of construction, however, are subject to certain limiting rules. One is the presumption against preemption of state law in an area traditionally under state police power control. See Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977). Another is that statutes in derogation of common law rights should be strictly construed. See Checkrite Petroleum, Inc. v. Amoco Oil Co., 678 F.2d 5, 8 (2d Cir. 1982). Such restrictive rules, like those liberal ones stated above, are subservient to the overriding objective of ascertaining, through sensitive and enlightened reasoning, exactly what the enacting Congress really intended. The Supreme Court has indicated that the general assumption against preemption of police powers is subordinate to the principle that the true intent of Congress controls, "whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977) (citations omitted). More specifically, as the Court observed in Jamison v. Encarnacion, 281 U.S. 635 (1920), the extent of the FELA's alteration of the common law "is not to be narrowed by refined reasoning." Id. at 640.

73. This theory refers to the inference that by expressing only one standard, duty, or prohibition, a legislature intended to exclude all others from the scope of the legislation. See Andrus v. Glover Constr. Co., 446 U.S. 608, 616-17 (1980) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent."); see also Ash v. Cort, 495 F.2d 416, 427 (3d Cir. 1974) (Aldisert, J., dissenting) (arguing that a legislature's provision for a private cause of action in one title of an act indicates that such a remedy
on the theory in this instance is particularly susceptible to criticism. There are several explanations for the failure of Congress explicitly to bar railroad property damage claims when enacting the core of the FELA in 1906 and 1908. None of them leads necessarily to the conclusion that Congress’s silence was tantamount to a conscious decision to permit such claims, a conclusion that would violate both reason and the policies underlying the FELA.

A. The Existence and Impact of Employer Property Damage Claims at Common Law

In Cavanaugh, the court stated that common law allowed an employer to recover affirmatively from an employee for negligently caused property damage. In order to justify its application of expressio unius, however, it also must have assumed implicitly that Congress knew of the right when it adopted the FELA and that it could predict the consequences of permitting the right in FELA actions. Congress could not intend to preserve what did not exist, was not known to exist, or was not expected to develop. Each assumption, therefore, bears critical examination; if any proves unjustified, the expressio unius chain of reasoning is broken.

Pre-FELA cases and treatises reveal that the employer’s property damage claim was not prominent as an independent or affirmative basis for recovery. Blackstone’s Commentaries do not even mention the possibility of a master’s claim against a servant for property damage caused by the servant’s negligence. Even in later periods of common law development,
this supposed common law claim escaped the attention of several comprehensive treatises. An implied common law contract action for property damage began to surface, albeit without much precedential support, only in the late 1800's with the emergence of true industry and a mass competitive labor force.

Early case law indicates that the common law only tentatively embraced an employer's right to proceed against an employee for negligently caused property damage. Such actions certainly did not have the prominence of common law defenses such as contributory negligence, assumption of the risk, or fellow servant negligence. Usually, the employer was limited to the defensive benefit of setting off some amount against the employee's recovery in a suit for wages. For example, in Glen-

76. The property damage action by employer against employee is not even mentioned in the discussions of the master-servant relationship in several authoritative treatises. See, e.g., 2 W. ODGERS, ODGERS ON THE COMMON LAW OF ENGLAND 213-27 (3d ed. 1927); H. STEPHEN, 2 STEPHEN'S COMMENTARIES ON THE LAWS OF ENGLAND 435-41 (L. Warmington ed. 1950). A vague reference to this action, however, does appear in J. SMITH, SMITH'S COMMON LAW 454 (9th ed. 1880) (asserting that "if [the servant's] work has been productive of injury rather than benefit, he is liable to an action").

In subtle contrast to this issue of an employee's liability to an employer for negligent property damage is the issue of the employer's right, by way of indemnification, to recover from the employee the cost of a judgment obtained by a third party against the employer on account of the employee's negligence. In such circumstances, the controversy goes beyond the labor relationship itself. It generally is regarded that the liability of employees in this situation is primary and that the master-servant relationship does not absolve employees of their duties against the world. See H. SMITH, ADDISON ON CONTRACTS 448 (8th ed. 1888). This legal conclusion is significant because the employees often are covered by insurance, which serves as an indemnification fund. See, e.g., United Pac. Ins. Co. v. Ohio Cas. Ins. Co., 172 F.2d 836, 845 (9th Cir. 1949). In the absence of insurance, employees usually are judgment-proof.

In one FELA case a court upheld the impleader of fellow workers by the railroad on an indemnification theory. Greenleaf v. Huntingdon & Broad Top Mtn. R.R. & Coal Co., 3 F.R.D. 24, 24-25 (E.D. Pa. 1942). Even this practice, however, runs counter to 45 U.S.C. § 60 (1982), which prohibits "[a]ny contract, rule, regulation, or device" that prevents employees from volunteering information about an accident to a party in interest. See infra text accompanying notes 157-78. In another, non-FELA, case the court precluded the employer's insurance carrier from recovering against a worker for injury to a third party because the worker fell within the coverage of the insurance policy. Builders & Mfrs. Mut. Cas. Co. v. Preferred Auto Ins. Co., 118 F.2d 118, 121-122 (6th Cir. 1941).
non *v. Lebanon Manufacturing Co.*,\(^77\) an 1891 Pennsylvania case, a machinist sued his employer in assumpit for wages. The employer claimed a setoff for the employee's negligent damage to the employer's property.\(^78\) The court wrestled with the common law nature of such a setoff only to conclude that it was "an equitable defense, growing out of the contract itself, and going directly to its consideration."\(^79\) The court reasoned: "Surely, if my servant sue me for wages, I may show as a defense to his claim that he has been unfaithful, negligent, or dishonest, or that he wasted or embezzled my property."\(^80\) The court never discussed any affirmative recovery or claim pursuant to the common law.\(^81\)

Cases suggesting that an employer could recover affirmatively from an employee for negligently caused property damage typically introduce statutes or rules that go beyond the

\(77\) 140 Pa. 594, 21 A. 429 (1891).

\(78\) Id. at 595, 21 A. at 429.

\(79\) Id. at 600, 21 A. at 429.

\(80\) Id. at 601, 21 A. at 430.

\(81\) Another example of the employer's contract-based action is Zulkie *v.* Wing, 20 Wis. 429 (1866). The Wisconsin Supreme Court in Zulkie, without reference to any precedent, permitted an employer to recoup the value of a team of horses negligently destroyed by an employee against the amount due to the employee in his suit for wages. The court observed: "It would be strange if the servant, in answer to such an action, could say: 'Respondeat superior. I was your servant at the time of the injury; my act was your act, my negligence your negligence; and therefore you cannot recover.'" Id. at 432. But cf. 1 W. BLACKSTONE, *supra* note 75, at *432 (noting that since the wrong of the servant is the wrong of the master, the master may frequently be a loser but never a gainer "by the trust reposed in his servant."). The Wisconsin Supreme Court may have been motivated as much by the social pressures favoring industrialization as by the fact that a worker's suit for wages created a handy "fund" from which such costs could be deducted.

For other cases involving employers' claims against employees, see Stebbins *v.* Waterhouse, 58 Conn. 370, 20 A. 480 (1890) (separate suit for misappropriation of mule and buckboard by defendant servant for his own use); Parker *v.* Platt, 74 Ill. 430, 432 (1874) (employer can recoup damages sustained as a result of employee's lack of skill and care in performing work); Selley *v.* American Lubricator Co., 119 Iowa 591, 93 N.W. 590 (1903) (same); Hudson *v.* Feige, 58 Mich. 148, 24 N.W. 863 (1885) (same); Alberts *v.* Stearns, 50 Mich. 349, 352, 15 N.W. 505, 506 (1883) (employee's lack of diligence in performing work can act as reduction or bar to recovery of damages from termination); Dunlap *v.* Hand, 26 Miss. 460, 461 (1853) (employer may set up negligence of employer in discharging duties to defeat a recovery of wages or reduce the amount owed); Alpaugh *v.* Wood, 53 N.J.L. 638, 23 A. 261 (N.J. 1891) (separate suit for breach of management contract by defendants after the defendants had prevailed in an action on the contract for their 10% of profits); Goskin *v.* Hodson, 24 Vt. 140, 141 (1852) (employer's suffering greater loss than sum due for services "will defeat" the employee's action); J. POMEROY, *CODE REMEDIES* § 608, at 983 & n.24 (5th ed. 1929) (discussing recoupment).
common law in protecting the interests of employers.\textsuperscript{82} In \textit{Harlan v. St. Paul, Minneapolis & Manitoba Railway Co.},\textsuperscript{83} an 1884 Minnesota case, a railroad brakeman brought suit to recover from the railroad for services rendered. The railroad alleged "by way of defense and counter-claim" that the employee performed his job negligently, thereby causing property damage.\textsuperscript{84} Although the Minnesota court did not reveal the precise nature of the employee's negligence or the extent of the resulting damage, it did explain the common law rule underlying the railroad's counterclaim:

It was well settled, upon common-law principles, that where the defendant has sustained damages by reason of the plaintiff's non-performance of his part of the agreement sued on, such defendant has the right to abate the plaintiff's claim by the amount of such damages. . . . Damages incurred by the defendant through the negligence of the plaintiff in the performance of the contract of employment sued on, might be thus interposed by way of recoupment. . . . Our statute has extended this right so that now a defendant may plead such damages, not merely in reduction or bar of plaintiff's claim, but also so that if the balance be found in his favor \textit{he may have affirmative judgment for the amount against the plaintiff}. . . . \textsuperscript{85}

\textit{Harlan} presented not a claim of an injured worker for personal injuries, but rather a contractual defense that—but for a statutory modification—merely would have reduced the employee's recovery of wages due.\textsuperscript{86}

\textsuperscript{82} In the absence of a special statute or rule, an employer's ability to recover affirmatively on a counterclaim was nonexistent at common law. Prior to the advent of code pleading, recoupment and setoff were the only methods by which a defendant could raise a claim against a plaintiff. Recoupment was available when the defendant possessed a right of recovery "confined to the particular subject of litigation that gave rise to the suit." G. \textit{PHILLIPS, THE PRINCIPLES OF CODE PLEADING} \textsection{371}, at 412 (1932). It was not a cause of action, but rather a "reduction of damages." \textit{Id.} at 411. Setoff, which derived from English statutes and later became part of the American common law, allowed the defendant to raise any liquidated, sum-certain contract demand. \textit{See id.} at 413-15. At common law, neither recoupment nor setoff would produce an affirmative recovery. \textit{Id.} at 413. Upon the adoption of code pleading, the definitions and scope given to these procedures and to counterclaims, although not always perfectly consistent, often allowed a wider range of affirmative recoveries. \textit{See id.} at 417.

\textsuperscript{83} 31 Minn. 427, 18 N.W. 147 (1884).

\textsuperscript{84} \textit{Id.} at 427, 18 N.W. at 147 (quoting defendant's answer).

\textsuperscript{85} \textit{Id.} at 428, 18 N.W. at 147-48 (emphasis added).

\textsuperscript{86} \textit{Accord} Mobile & Mont. Ry. v. Clanton, 59 Ala. 392 (1877). In \textit{Clanton}, the defendant railroad company raised a setoff for damage to its train against a conductor who had sued only for wages due. This setoff procedure was introduced by a state statute for "matters arising out of the plaintiff's breach of the contract sued on." \textit{Id.} at 398. Another state statute permitted affirmative recovery, not just a reduction of the claim for wages. \textit{See id.} at 399. The court in
In 1905, a year before the first passage of the FELA, the New York Supreme Court, Appellate Division, also considered an employer's counterclaim against an employee for property loss. In *Hagin v. Cayuga Lake Cement Co.*, a night watchman sued for past-due wages, and his employer, a cement company, counterclaimed for damages to its boiler caused when it overheated after the night watchman fell asleep on duty. Once again, the case did not involve personal injuries. Because New York's procedural rules permitted only contract-based counterclaims, the key issue in *Hagin* was whether the counterclaim sounded in contract or tort. The court permitted the counterclaim, deciding, as had courts in earlier cases, that the employer's action was contractual because the duty Hagin breached arose pursuant to his employment contract. Since Cayuga Cement's counterclaim for $150.00 exceeded Hagin's claim for only $12.05, the decision implies that the employer could recover affirmatively from its employee for the negligently caused property damage.

The employer's property damage claim, therefore, was contextually limited in pre-FELA common law. Even assuming *Clanton* did not, however, cite any common law authority supporting the property damage claim. In permitting the setoff, the court condemned employee negligence without indicting the railroad industry in general, stating that "negligence on the part of such agents, while running railroad trains, is almost always but little less than a crime." *Id.* at 397.

87. 105 A.D. 269, 93 N.Y.S. 428 (1905).
88. *Id.* at 270, 93 N.Y.S. at 430.
89. *Id.* at 272, 93 N.Y.S. at 430. The holding of the lower court in *Hagin*, as described in the syllabus of the appellate court's opinion, was that the asserted counterclaim for negligent property damage could not be raised in the plaintiff's contract suit for wages because that counterclaim sounded in tort. *Id.* at 269, 93 N.Y.S. at 429.

90. E.g., Jarrett Lumber Co. v. Reese, 66 Fla. 317, 318, 63 So. 581, 582 (1913); Weymer v. Belle Plaine Broom Co., 151 Iowa 541, 544, 132 N.W. 27, 29 (1911); Glennon v. Lebanon Mfg. Co., 140 Pa. 594, 594, 21 A. 429, 429 (1891); see J. Smith, supra note 76, at 453.

92. *Id.* at 270, 93 N.Y.S. at 429.
93. None of the cases found presented an employer's claim or counterclaim for property damage against a worker who received work-related injuries. The case of Doremus v. Root, 23 Wash. 710, 63 P. 572 (1901), cited in support of a common law action against an employee for property damage in Stack v. Chicago, M., St. P. & P. R.R., 94 Wash. 2d 155, 157, 615 P.2d 457, 459 (1980), actually was a suit by an injured railroad fireman against both the railroad company and the conductor who failed to pull his train off to a siding to avoid a collision. *Doremus*, 23 Wash. at 711-12, 63 P. at 572-73. The jury awarded damages against the railroad only. *Id.* at 713, 63 P. at 573. Because the jury absolved the conductor, the Washington Supreme Court ordered that judgment be entered for the railroad as well. *Id.* at 723, 63 P. at 576.
that Congress was aware of these cases, it could not anticipate that such claims, raised exclusively in employees' suits for wages and often influenced by state statutes, would expand into a defensive action in employees' suits for injury and death. As a purely procedural matter, Congress had little reason to expect in 1906 and 1908 that setoffs sounding in assumpsit could be raised against injured workers suing in trespass on the case. Moreover, the prevalence of the contributory negligence bar in pre-FELA common law also explains Congress's failure to enact an express prohibition of employers' property damage counterclaims in FELA suits. If the FELA plaintiff proved that any employer negligence contributed to the employee's injury or death, common law presumably would bar the employer's property damage claim. Although an FELA plaintiff might fail to prove such employer negligence, thereby eliminating the contributory negligence bar, the probability that Congress engaged in this process of reasoning seems miniscule in the absence of any support in the record.

Consequently, the expressio unius doctrine cannot fairly imply that Congress intended to allow the railroad property damage counterclaims in FELA actions. Historical analysis proves that employer claims raised under pre-FELA common law differed significantly from those presently asserted by railroads. Congress could not have anticipated the development or

94. See supra note 82.

95. As the House Judiciary Committee pointed out, "The United States has adhered much closer to the common-law doctrine of contributory negligence than the leading countries in Europe." H.R. REP. NO. 1386, 60th Cong., 1st Sess. 5 (1908). The Committee did note, however, that Maryland and some other states had enacted comparative negligence statutes. Id.

In Kentucky & Ind. Terminal R.R. v. Martin, 437 S.W.2d 944 (Ky. 1969), the railroad property damage counterclaim to an FELA action had been dismissed in light of the jury's finding that the railroad was 70% negligent and Martin was 30% negligent. See id. at 951. The appellate court, in affirming the dismissal, observed:

The usual common-law rule is applicable insofar as the railroad's claim against Martin [the plaintiff] is concerned, so that the railroad's contributory negligence would bar its claim against Martin. It is only by virtue of the provisions of the FELA that Martin's claim is not barred by his contributory negligence.

Id.

96. By turn-of-the-century standards, in virtually any nonfrivolous FELA action the contributory negligence bar would prevent a counterclaim. Modern state comparative negligence statutes and state law doctrines that prevent treating a fellow servant's negligence as contributory negligence of the employer, however, now threaten completely unforeseeable and dramatic intrusions on the FELA. See infra notes 105-07 and accompanying text.
impact of modern property damage claims even had it been aware of the claims' limited common law existence. Moreover, as explained below, permitting such counterclaims is at odds with the overriding remedial purpose of the FELA.

B. THE EFFECT OF EMPLOYER PROPERTY DAMAGE CLAIMS ON CONGRESS'S COMPREHENSIVE AND BALANCED LIABILITY PROGRAM

When Congress enacted, reenacted, and amended the FELA, its goal was to design a remedial statute to address important social problems affecting interstate commerce. When Congress undertakes such a task but neither takes into account nor specifically precludes state laws that inhibit the statute's goals, the constitutional mandate of federal supremacy still demands that the congressional design prevail over the state laws. The FELA, intended to operate uniformly in all states, therefore preempts any state laws in conflict with its purpose.

97. See supra notes 18-25 and accompanying text.
98. See U.S. Const. art. IV, cl. 2.
99. Examples of the preemption of specific state statutes by a general federal policy are numerous. In City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973), for instance, a local antinoise ordinance precluding aircraft takeoffs between 11:00 p.m. and 7:00 a.m. was struck down because of interference with the general federal legislative and regulatory program to control national air traffic flow. Although recognizing that "[c]ontrol of noise is of course deep-seated in the police power of the States," id. at 638, the Court held that the local ordinance placed an unacceptable burden on the Federal Aviation Administration's power to control uniformly the broader subject of national air traffic flow. Id. The Court noted that even sporadic and seemingly incidental state interference could be disruptive of uniformity. Id. at 639. Thus, although there was no explicit federal statutory prohibition of the local antinoise ordinance, it nonetheless succumbed to federal preemption. Four years later, in Jones v. Rath Packing Co., 430 U.S. 519 (1977), a California regulation requiring net weight labeling of flour was held to be preempted by the federal Fair Packaging and Labeling Act. The Court observed that if the state regulation were upheld, national manufacturers would have to overpack to allow for moisture loss due to longer delivery times. Id. at 543. As a result, the state regulation was preempted, even in the absence of any express prohibition against it in the federal statute, because it threatened to disturb the congressional objective of establishing a uniform basis for solid content, as opposed to net weight, comparisons. Id. at 540-43; see also Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) (federal preemption of state law by the United States Warehouse Act).
100. See New York Cent. R.R. v. Winfield, 244 U.S. 147, 150 (1917).
101. See, e.g., id. at 151-54 (FELA preempts application of New York Workmen's Compensation Act to injury suffered by railroad worker); Second Employers' Liability Cases, 223 U.S. 1, 56-59 (1912) (FELA enforceable in state courts despite conflicting state statutes).
If permitted in FELA suits, the railroads' state law property damage claims would interfere extensively with the Act's objectives. Examining the effect of such claims on the FELA's comparative negligence provision demonstrates this interference. That provision was added in 1908, replacing the prior qualified contributory negligence bar.\(^\text{103}\) A House Judiciary Committee report explained the rationale for the replacement:

This provision thus resulted from a careful balancing of the equities in view of the purposes of the Act. Imposing liability on the railroad in proportion to its own negligence and that of other workers was intended to encourage railroad safety. In this balance, reducing the FELA award in proportion to the injured worker's negligence was a "sufficient" burden for the employee to bear.

To illustrate the disruption to this balance that occurs when an FELA defendant railroad counterclaims for property damage, consider a situation in which an injured worker and the railroad both are fifty percent negligent and the jury assesses damages for the employee's injury at $500,000. In the absence of a property damage counterclaim, the injured worker would recover half of $500,000, or $250,000, from the railroad. A radically different result occurs, however, if the railroad asserts and proves that the same negligence resulted in $500,000...

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103. See supra notes 43-44 and accompanying text.
104. H.R. REP. NO. 1386, 60th Cong., 1st Sess. 4 (1908). The Senate Committee on Education and Labor also emphasized the need to avoid placing an intolerable burden on negligent workers:

Everybody understands that our railway workmen do their work in the constant presence of danger, where a single misstep is often fatal. They are, almost without exception, intelligent and capable men. They are, as a rule, the heads of families, and there is nothing extreme or revolutionary in the opinion that the whole community should share with them and their families the loss which arises from an accident which befalls one of them. The present proposal . . . is intended in case the accident arises from the joint negligence of the employee and the employer, requiring the jury to determine the proportion of damages due to the negligence of each, diminishing the amount of its verdict in a sum equal to that portion of damage which arises from the negligence of the employee.

S. REP. NO. 460, 60th Cong., 1st Sess. 3 (1908).
in property damage.105 Even if the applicable state comparative negligence law reduces the railroad's recovery in proportion to its own negligence,106 the property damage claim offsets the FELA recovery.

Assuming the same damage figures, in a case in which a plaintiff is fifty percent negligent and proves that a co-worker also is fifty percent negligent, the plaintiff's recovery on the FELA claim once again would be $250,000. If the state law under which a property damage counterclaim arises recognizes joint and several liability,107 however, the railroad may be legally entitled to obtain full recovery of its $500,000 property loss from the FELA plaintiff. This occurs if state law prohibits imputing the negligence of an employee to the employer when the employer raises its own claim.108 The employer's judgment against the FELA plaintiff, of course, probably could be satisfied only to the extent of the plaintiff's recovery against the railroad; that recovery is exactly what made the FELA plaintiff

105. A railroad's actual property damage claim conceivably could be for a much larger amount than $500,000. See, e.g., Cavanaugh v. Western Maryland Ry., 729 F.2d 289, 290 (4th Cir. 1984) (property damage claim for $1.7 million); Stack v. Chicago, M., St. P. & P. R.R., 94 Wash. 2d 155, 157, 615 P.2d 457, 458 (1980) (property damage claim for $1.5 million).

106. A railroad's property damage claim is grounded in state common law and, therefore, subject to the state's rules apportioning damages in negligence suits even if the FELA claim was brought in federal court. See Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1937) (application of substantive state law in federal courts). The state is more likely to have a comparative negligence statute than a contributory negligence bar. See H. WOODS, COMPARATIVE FAULT: THE NEGLIGENCE CASE § 1:11, at 24-28 (1978). A few comparative fault states still would bar the railroad's recovery under these facts, however, because the railroad was 50% negligent, while others would not bar the railroad's claim unless it was more than 50% negligent. See V. SCHWARTZ, COMPARATIVE NEGLIGENCE § 3.5(B), at 75 & nn.51-52 (1974). The 50% figure is used here only for simplicity's sake; innumerable other configurations of figures could be assigned with similar results.

107. See V. SCHWARTZ, supra note 106, § 3.5(C), at 80 (noting that some comparative negligence states retain the principle of joint and several liability). But see Comment, Doctrine of Common Law Indemnity Abolished in Negligence Cases as Inconsistent with the Comparative Negligence and Contribution Statute, 12 ST. MARY'S L. REV. 769 (1981) (comment on B & B Auto Supply, Sand Pit, & Trucking Co. v. Central Freight Lines, Inc., 603 S.W.2d 814 (Tex. 1980)).

108. Some states do not permit an employee's negligence to be imputed to the suing employer. See, e.g., Brown v. Poritzky, 30 N.Y.2d 289, 292-93, 283 N.E.2d 751, 753, 332 N.Y.S.2d 872, 875 (1972); Zulkie v. Wing, 20 Wis. 429, 431-32 (1866). Contra Capitola v. Minneapolis, St. P. & S.S.M. R.R., 258 Minn. 206, 208-09, 103 N.W.2d 867, 869 (1960). Results similar to those described in the text would flow from a successful property damage claim by the employer whether such a state is a comparative or contributory negligence jurisdiction.
vulnerable to an enforceable judgment. Because the negligent co-worker has achieved no recovery, any rights of contribution possessed by the FELA plaintiff against the co-worker would be of little value. Notably, it does not matter whether the state allowing a property loss counterclaim has adopted comparative negligence or still treats contributory negligence as a bar. In either case the railroad has not been negligent in any way under state law.

These computations, all flowing from the application of fairly ordinary principles of state tort law, indicate the disruption to the FELA's comparative negligence scheme caused by the introduction of the railroads' property damage counterclaim. The FELA's application of comparative negligence principles, however, is not the only example of a provision the purpose of which is upset by allowing such a counterclaim. Another is the proviso in the comparative negligence section stating "[t]hat no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee." This prohibition against considering the worker's negligence, of course, would not apply to a purely state law property damage claim. Such a claim consequently could offset the FELA recovery of a contributorily negligent worker even if the railroad violated a safety statute. This result directly conflicts with Congress's firm intention to prevent railroads from escaping FELA liability when the violation of a safety statute contributed to the worker's injury or death and squarely defeats the railroads' statutory incentive to comply with safety acts.

Interference with the FELA's purpose does not result solely from the counterclaim procedure for raising negligence-based property damage claims. Conceivably, railroads could file property damage claims in separate state law actions. Indeed, the three-year FELA statute of limitations may induce railroads facing shorter limitations periods for their state claims to initiate first strikes. Consistent with the Supreme Court's

110. Id.
111. For a listing of states with a torts statute of limitations of less than three years, see McGovern, The Status of Statutes of Limitations and Statutes of Repose in Product Liability Actions: Present and Future, 16 FORUM 416, 438-43 (1981).
pronouncement in Migra v. Board of Education, the disposition of such state law claims could bar later FELA suits under the principles of res judicata and collateral estoppel to the extent that the state courts themselves would apply those doctrines in a subsequent action brought in state court.

More practically, a railroad’s first filing could force the prospective FELA plaintiff to raise the FELA as a counterclaim to the railroad’s state law action to prevent the preclusion of the FELA claim. Such defensive actions could occur whether the railroad filed in state court or in federal court. Regardless of the railroad’s filing situs, Congress’s intention to permit FELA plaintiffs to choose the legal forum would be soundly defeated. On the one hand, if the employer files first in federal court, the congressional aim, embodied in the FELA’s removal prohibition, to permit FELA claimants to litigate in state courts if they so desire is thwarted. On the other hand, if a nondiverse employer files first in state court, no generally accepted principle permits the FELA counterclaimant to remove the action to federal court.

Thus, a state law cause of action for property damage,

112. 104 S. Ct. 892, 896-98 (1984) (holding that a state court judgment has the same preclusive effect when the plaintiff attempts to bring a subsequent claim in federal court as it would if the plaintiff tried to do so in state court).

113. Presumably, the Federal Full Faith and Credit Statute, 28 U.S.C. § 1738 (1982), requires that these principles be applied in FELA suits to the extent that state courts would apply them in a similar setting under state law. In Allen v. McCurry, 449 U.S. 90 (1980), the Supreme Court applied § 1738 to subject a plaintiff suing under the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1982), to state collateral estoppel principles. The plaintiff claimed at his state criminal trial that police had violated his fourth amendment rights in conducting an illegal search. See 449 U.S. at 91-93. The plaintiff, foreclosed from habeas corpus relief for fourth amendment claims by Stone v. Powell, 428 U.S. 405 (1976), followed the only remaining course and filed suit under § 1983. See 449 U.S. at 93-94. In holding that state collateral estoppel principles were applicable to a civil rights claim, possibly binding a § 1983 plaintiff to the result in a previous state criminal trial, id. at 103-05, the Court revealed the broad scope of the doctrines of collateral estoppel and res judicata, indicating the inevitability of their application in the FELA context.


115. Of course, a defendant cannot “remove” a case to state court. A worker or representative bringing an FELA counterclaim, therefore, would be forced to litigate the claim in federal court even if a state forum was preferred.

116. The railroad’s action does not arise under federal law, and authorities are divided as to whether a counterclaimant can remove an action to federal court when the counterclaim arises under federal law. C. WRIGHT, supra note 3, at 203 (citing divided authorities); see Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 108 (1941) (plaintiff unable to remove when defendant filed counterclaim that otherwise could have been brought in federal court).
whether raised by a counterclaim or by a separate action, disturbs virtually every aspect of Congress's careful balancing of the railroads' and employees' responsibility for negligence. Congress could not have intended to permit such a dramatic alteration of its remedial plan by state law remedies the existence and nature of which were doubtful when the FELA was adopted. The congressional design therefore demands that state law property damage claims be preempted by the FELA.

That the FELA impliedly forecloses certain state law remedies is not a novel idea. Not long after passage of the FELA, the Supreme Court established that the Act foreclosed even those state law remedies more favorable than the FELA to the injured employee. In the 1917 case of New York Central Railroad Co. v. Winfield, the most dramatic example of this preclusion, an interstate railroad worker laying cross ties lost an eye when struck by a bounding pebble. Since no railroad or co-worker negligence contributed to the accident, the worker was precluded from recovering damages under the FELA. The worker sought relief instead under the New York Workman's Law, which did not require employer negligence for recovery. The Court, however, held that the FELA's regulation was so comprehensive as to preclude state remedies, even though the FELA provided no relief for this injured worker:

[T]he reports of the congressional committees having the bill in charge disclose, without any uncertainty, that it was intended to be very comprehensive, to withdraw all injuries to railroad employees in interstate commerce from the operation of varying state laws and to apply to them a national law having a uniform operation throughout all the States. . . .

Those state remedies more favorable to railroad workers killed or injured on the job thus were sacrificed to the congressional design of establishing a uniform body of national law providing relief to such workers.

117. See supra notes 74-96 and accompanying text.
118. 244 U.S. 147 (1917).
119. Id. at 148.
120. Id. at 148-49.
121. See id. at 148.
122. Id. at 150. Elsewhere the court stated that the FELA was "comprehensive and also exclusive." Id. at 151.
123. In another FELA preemption case, Mondou v. New York, N.H. & H. R.R., 223 U.S. 1, 53-54 (1912), the Supreme Court quoted Chief Justice John Marshall's opinion in the famous case of McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405-06, 426 (1819), to emphasize the superiority of federal law and policy. The Court in Mondou then explained:
As a direct consequence of this wide-ranging preemption, workers covered by the FELA are also discriminated against in comparison to tort victims among the public at large. In the event of a worker's death, for example, courts have limited recovery under the FELA to the worker's pain and suffering and the designated beneficiaries' pecuniary loss reduced to present worth. Beneficiaries may recover as pecuniary loss only the amount that they would have received from the decedent if he or she had lived. This amount can be drastically less than the amount the deceased worker would have earned over an entire career minus the cost of personal maintenance—a measure of recovery frequently permitted under more modern state survival statutes. Moreover, FELA plaintiffs, unlike plaintiffs suing under some state statutes, cannot recover such items.

True, prior to the present act the laws of the several States were regarded as determinative of the liability of employers engaged in interstate commerce for injuries received by their employees while engaged in such commerce. But that was because Congress, although empowered to regulate that subject, had not acted thereon, and because the subject is one which falls within the police power of the states in the absence of action by Congress. . . . The inaction of Congress, however, in no wise affected its power over the subject. . . . And now that Congress has acted, the laws of the States, in so far as they cover the same field, are superseded, for necessarily that which is not supreme must yield to that which is.

223 U.S. at 54-55 (citations omitted). Thus, the Court eliminated the possibility of an FELA plaintiff's taking advantage of certain favorable state remedies even though the Act itself did not explicitly bar their use.

124. The Supreme Court, in Michigan Cent. R.R. v. Vreeland, 227 U.S. 59 (1913), assumed that the FELA limited the amount of recovery to "proper compensation for the loss of any pecuniary benefit which would reasonably have been derived . . . from the decedent's earnings." Id. at 72-73; see also Dow v. Carnegie-Illinois Steel Corp., 165 F.2d 777, 779 (3d Cir. 1948) ("The 'benefit' is the amount which the jury finds the dead man would have given to his wife and other dependents had he lived."). Three years after Vreeland, the Court further required that recovery attributable to a loss of future expected benefits be reduced to the amount that would reproduce the future economic expectancy if invested at the time of the verdict. Chesapeake & O. Ry. v. Kelly, 241 U.S. 485, 489-91 (1916). As a result of the 1910 FELA amendment, Pub. L. No. 61-117, sec. 2, § 9, 36 Stat. 291, 291 (1910) (codified at 45 U.S.C. § 59 (1982)), the plaintiff in a death action also may recover for pain and suffering of the deceased between the injury and death, see St. Louis Iron Mtn. & S. Ry. Co. v. Craft, 237 U.S. 648, 657-61 (1915).

125. See Michigan Cent. R.R., 227 U.S. at 70.

as funeral expenses\textsuperscript{127} and punitive damages in cases of recklessness.\textsuperscript{128}

The consequences of preempting FELA plaintiffs' state law remedies provide an indispensable guide in determining whether the Act similarly preempts railroads' state law property damage claims. The FELA's purpose is to protect railroad workers;\textsuperscript{129} it does not purport to protect railroad equipment and other property, nor can such a policy logically be inferred from it. To regard the FELA as sufficiently comprehensive to preempt state remedies more protective of workers while allowing property damage claims to survive unscathed is inequitable and inconsistent with the Act's purpose. Having reaped the benefit of preemption of state law remedies favorable to employees, the railroads should have to pay the price of preemption of those state law remedies favorable to them. The FELA establishes the most plenary regulation, balancing railroad and employee responsibility for work-related injuries. In this balance, the railroad is denied specified common law defenses to FELA actions but is relieved of state law responsibilities more exacting than the FELA. This balance leaves no room for the newly discovered property damage counterclaim.

III. REFUTING THE THEORY OF CONGRESS'S "INATTENTION" TO THE RAILROADS' PROPERTY DAMAGE COUNTERCLAIM IN THE FELA: THE "NO CONTRACT-NO DEVICE" PROHIBITION AND ITS SETOFF EXCEPTION

Thus far, this Article has assumed that Congress was silent as to the railroads' ability to assert counterclaims for property damage in FELA suits. Accepting that assumption, of course, does not mean that Congress intended to permit such counterclaims in FELA actions. A direct analysis of Congress's "inattention," however, reveals that the assumption itself is not


\textsuperscript{128} Compare Kozar v. Chesapeake & O. Ry., 449 F.2d 1238, 1240-43 (6th Cir. 1971) (punitive damages not recoverable under FELA) with Harvey v. Hassinger, 315 Pa. Super. 97, 461 A.2d 814, 816-17 (1983) (allowing punitive damages pursuant to state survival statute in situations in which decedents could have recovered them had they lived).

\textsuperscript{129} See supra note 22 and accompanying text.
valid. On the contrary, the "no contract-no device" prohibition and its setoff exception confirm that Congress intended to bar all defensive tactics, including property damage counterclaims by railroads in FELA actions.

A. THE "NO CONTRACT-NO DEVICE" PROHIBITION

In reaction to the railroads' growing practice of obtaining contractual exoneration from liability to employees injured or killed in railroad accidents,130 Congress expressly admonished in the 1906 FELA that "no contract of employment, insurance, relief benefit, or indemnity for injury or death . . . shall constitute any bar or defense to any [FELA] action."131 This provision guarded railroad workers against a multitude of threats to FELA recoveries. By preventing contract-related bars or defenses from having any judicial effect on the FELA's liability design, Congress protected its interest in compensating employees and their families for injury and death and in encouraging railroad safety improvements.132 The breadth of matters condemned in this "no contract" section evidences Congress's intent to prohibit all known and potential liability-avoidance techniques permitted under common law.

By its very terms, this 1906 prohibition superseded any common law right of employers to assert property damage counterclaims in employees' personal injury actions. As discussed earlier, employers asserted pre-FELA property damage claims exclusively as setoffs, recoupments, or counterclaims in employees' suits for wages.133 Court decisions examining the common law basis of these claims agreed on one essential point: the employer's claim derived from the employment contract.134 At this stage of common law development, Congress could an-

130. See supra notes 32-33 and accompanying text.
132. See supra note 22 and accompanying text.
133. See supra notes 77-92 and accompanying text.
134. See supra notes 90-91 and accompanying text. For example, in Glenndon v. Lebanon Mfg. Co., 140 Pa. 594, 21 A. 429 (1891), the Pennsylvania Supreme Court described the employer's claim as an "equitable defense" stemming from the employment contract. Id. at 600, 21 A. at 429. Other cases described the claim as originating in an implied contract by which workers warranted that they would use ordinary skill and care in performing their duties. See, e.g., Weymer v. Belle Plaine Broom Co., 151 Iowa 541, 547, 132 N.W. 27, 29 (1911) (continuing to express this theory after the passage of the FELA). Courts going beyond the contract defense theory relied on state statutes, not common law. See supra notes 82-92 and accompanying text.
ticipate, at most, that courts also would characterize any similar claims asserted in employees' personal injury suits as contract defenses, and it provided for such contingencies by banning all contract bars and defenses in FELA suits.

In the 1908 FELA reenactment, Congress extended the "no contract" prohibition to include "[a]ny contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any [FELA] liability." Although this section no longer contained the 1906 provision's "bar or defense" language, Congress could not have intended to reinstate contractual bars and defenses to FELA liability. On the contrary, Congress sought to expand the prohibitions beyond those expressed in 1906. The 1906 prohibition of contract-related defenses thus was reasserted in the 1908 "no contract-no device" provision, albeit in slightly different language.

The majority in Cavanaugh, in holding that the "contract . . . or device" language did not prohibit a railroad's property damage counterclaim, failed to recognize that the closest ancestor of the modern property damage counterclaim in pre-FELA common law was rooted in contract. Rather, the court held that "device" referred only to the attempts of railroads to "exempt" or excuse themselves from liability and that "a counterclaim by the railroad for its own damages is plainly not an 'exempt[ion] . . . from any liability' and is thus not a 'device' within the contemplation of Congress." Under this algebraic analysis, however, neither are most contracts, rules, and regula-

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135. Whether Congress could anticipate the railroad's property damage claim at all is questionable. See supra notes 93-96.
137. The House Judiciary Committee report on the 1908 FELA demonstrates Congress's intent to prohibit the same problems that produced the 1906 "no contract" prohibition, in that much of the 1906 report describing the problem of employers' using contracts to escape liability was inserted verbatim into the 1908 report. H.R. Rep. No. 1386, 60th Cong., 1st Sess. 6-8 (1908) (quoting H.R. Rep. No. 2335, 59th Cong., 1st Sess. 5-6 (1906)).
138. See supra notes 47-49 and accompanying text.
139. Cavanaugh v. Western Maryland Ry., 729 F.2d 289, 292 (4th Cir. 1984), cert. denied, 105 S. Ct. 222 (1984). The court tried to bolster its argument by stating that it should not read into the FELA a prohibition "almost eighty years after the FELA was originally enacted." Id. at 294. Alternatively, because those eighty years rarely saw the kind of counterclaim raised in Cavanaugh and never saw it approved in any reported decision, it could be argued that, after eighty years of FELA litigation without such claims, the "common law" should not be used to create one.
140. Id. at 292.
tions "exemptions" even though they preclude employee compensation and eliminate the liability incentive for safety improvements.

An even more basic flaw in the Cavanaugh court's reasoning is the assumption that Congress intended to prohibit only those "devices" within its immediate contemplation. By adding the "[a]ny . . . device whatsoever" clause, Congress attempted to bar all future creative defenses that common law might otherwise permit to defeat railroads' FELA liability.\textsuperscript{141} To accomplish this purpose, Congress adopted the broadest and most open-ended language possible. This language consequently should be interpreted to prohibit railroads' property damage counterclaims in FELA suits.\textsuperscript{142} Allowing such claims enables railroads to escape liability quite effectively by extinguishing the FELA plaintiff's recovery. Such a result violates Congress's intention to preclude all potential liability-avoidance techniques.

The FELA's 1939 amendments reinforce the necessity of interpreting the "no contract-no device" prohibition to apply to the railroads' property damage counterclaims. The amendments resulted from congressional frustration with courts' applying the assumption of risk defense when railroads had issued a general notice of unsafe conditions.\textsuperscript{143} In reaction to these "aggressions of courts,"\textsuperscript{144} Congress abolished the common law assumption of risk defense in FELA actions.\textsuperscript{145} The House Judiciary Committee report, however, maintained that the amendment was unnecessary because the defense already was barred by the "no contract-no device" provision: "[S]uch a scheme of charging notice is a device to escape liability. . . . [T]he prohibition of devices, regulations, and so forth, to defeat liability covers a subject matter outside of relief associations, against which the provisions . . . were mainly directed."\textsuperscript{146}

The 1939 Judiciary Committee report thus confirms that Congress intended the 1908 "no contract-no device" provision to prohibit FELA defenses not yet envisioned. Specifically ban-

\textsuperscript{141} See supra text accompanying notes 47-49.


\textsuperscript{143} See supra notes 56-57 and accompanying text.

\textsuperscript{144} H.R. REP. No. 2153, 75th Cong., 3d Sess. 2 (1938).


\textsuperscript{146} H.R. REP. No. 1222, 76th Cong., 1st Sess. 3 (1939) (repeating verbatim H.R. REP. No. 2153, 75th Cong., 3d Sess. 3 (1938)).
ning the assumption of risk defense gave an annoyed Congress the opportunity to flex its muscles against the recalcitrance of lower courts. For courts to interpret narrowly the "no contract-no device" prohibition is to place them in the same obstructionist position that provoked Congress's sharp response in 1939. No fair interpretation can ignore the expansive role Congress assigned this prohibition.147

B. THE SETOFF EXCEPTION TO THE "NO CONTRACT-NO DEVICE" PROHIBITION

Closely related to the "no contract-no device" prohibition is the prohibition's sole exception, which allows a railroad to set off its contributions to insurance designed to compensate workers for injury or death.148 This exception suggests two additional flaws in the Cavanaugh court's interpretation of the "no contract-no device" prohibition. First, the setoff exception is purposeless if, as the court in Cavanaugh maintained,149 the prohibition itself applies only to technical exemptions from liability and not to setoffs. Second, Congress's exclusion of one specific setoff from the "no contract-no device" prohibition im-

147. The Cavanaugh court also relied on Federal Rule of Civil Procedure 13(a), relating to compulsory counterclaims, to conclude that Congress intended to permit property damage counterclaims in FELA suits. 729 F.2d at 291; see supra note 72. Conceivably, Rule 13(a) could fall within the prohibition against "rules" also contained in the "no contract-no device" prohibition. See supra text accompanying note 136. Although state rules evidently were the primary object of the FELA's prohibition, various committee reports also indicate general dissatisfaction with some legal rules applied by federal courts. See infra note 166 and accompanying text; see also Radzanower v. Touche Ross Co., 426 U.S. 148, 153 (1976) (observing that "a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum").

148. The setoff provision reads as follows:

Provided, That in any action brought against any such common carrier under or by virtue of any of the provisions of this Act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

45 U.S.C. § 55 (1982). This provision contains only minor editorial changes from the 1906 version of the setoff exception:

Provided, however, That upon the trial of such action against any common carrier the defendant may set off therein any sum it has contributed toward any such insurance, relief benefit, or indemnity that may have been paid to the injured employee, or, in case of his death, to his personal representative.


149. See supra text accompanying note 140.
plies that Congress did not intend to except other forms of setoff, including the common law equivalent of counterclaim, from the prohibition's scope.\textsuperscript{150}

The court in \textit{Cavanaugh} maintained that the "no contract-no device" prohibition applies only to contracts and devices that permit railroads to "exempt" themselves from FELA liability.\textsuperscript{151} By this view, a railroad's counterclaim falls outside the prohibition because it does not prevent finding the railroad liable on the FELA claim; it affects only the amount of damages the FELA plaintiff can recover from the railroad. Neither does a railroad's claim for setoff seek to exempt the railroad from FELA liability, however, since it also merely permits the railroad to reduce the plaintiff's recovery. Thus, under the \textit{Cavanaugh} analysis, Congress had no need to exclude railroad setoffs for contributions to insurance and other compensatory benefits from the "no contract-no device" prohibition. All setoff claims were already excluded. Congress nonetheless did adopt the narrow setoff exception to the 1906 "no contract" prohibition\textsuperscript{152} and the 1908 "no contract-no device" prohibition\textsuperscript{153} because it apparently believed that a specific exclusion for a limited setoff was necessary to avoid the operation of the prohibition. The setoff exception thus implies a result opposite to that reached under the \textit{Cavanaugh} analysis: all setoffs are prohibited under the "no contract-no device" provision unless otherwise excepted.

The legislative history of the setoff exception supports this conclusion and further suggests that counterclaims were also within the prohibition as the common law equivalent of setoffs. In the 1906 congressional debates on the setoff exception, Sena-

\textsuperscript{150} This is, of course, an application of the expressio unius theory of statutory construction. \textit{See supra note 73}. The \textit{Cavanaugh} court's reliance on this theory to conclude that Congress intended to permit property damage counterclaims in FELA suits was unjustified because the court did not ascertain Congress's knowledge at the time it specifically excluded other defensive tactics, \textit{see supra} notes 74-95 and accompanying text, and did not reconcile its conclusions with the intent underlying the FELA as a whole, \textit{see supra} notes 97-129 and accompanying text. In applying the expressio unius canon in this situation, however, this Article examines the knowledge of Congress when it specifically excluded setoffs from the "no contract-no device" prohibition and demonstrates how this exclusion, when viewed in light of the remedial purpose of the FELA, implies coverage of other forms of setoff.

\textsuperscript{151} 729 F.2d at 292.


tor Daniels, the FELA’s Senate sponsor, argued forcefully against allowing railroads to reduce FELA recovery for insurance contributions, whether such reductions were called setoffs, recoupments, or counterclaims:

As it would seem to me, Mr. President, [the setoff exception] is a most incongruous and most perverted effort to interject into [an FELA] action a plea of set-off that does not properly belong there.

... What is an offset, Mr. President? I read from Waterman on Set Off, Recoupment and Counterclaim:
Set off signifies the subtraction or taking away of one demand from another opposite or cross demand, so as to extinguish the smaller demand and reduce the greater by the amount of the less; or if the opposite demands are equal, to extinguish both.
This is a condensed definition of offset or set-off, but neither the indemnity, the relief, the benefit, nor the insurance which is here authorized to be pleaded as an offset answers to that definition. Neither, Mr. President, would any equitable extension of the law of offset, nor any definition of recoupment or counterclaim, which are connate branches of the law of offset, apply to such a case as this.\textsuperscript{2}

The debate's broad discussion of setoffs, counterclaims, and recoupment produced a solitary exception for a narrow setoff, thus indicating that Congress intended other types of setoffs to be among the prohibited defenses and bars.

The property damage counterclaim is the product of pre-FELA decisions' interchangeably terming an employer's action in employee suits for wages as setoff, recoupment, and counterclaim.\textsuperscript{155} The courts' procedural name for these actions is inconsequential, however, because each procedure was merely a "connate branch" of the same concept,\textsuperscript{156} and each was prohibited under the 1906 "no contract" provision and the 1908 "no contract-no device" provision. Congress, even if unaware of these early property damage claims, excluded their product by genus, if not by specific provision.

\textsuperscript{154} 40 CONG. REC. 7917 (1906) (statement of Sen. Daniel) (emphasis added).

\textsuperscript{155} See cases cited supra note 81. Setoff was used more frequently than counterclaim, perhaps because affirmative relief could not be had on counterclaims at common law. See, e.g., M. Green, Basic Civil Procedure 124 (1979); J. Cound, J. Friedenthal & A. Miller, Civil Procedure: Cases & Materials 501-02 (3d ed. 1980).

\textsuperscript{156} See supra text accompanying note 154.
IV. THE RAILROADS’ PROPERTY DAMAGE CLAIM AGAINST CO-WORKERS: THE MEANING OF THE “FREE ACCESS” GUARANTEE AND PROTECTING THE VOLUNTARY FLOW OF EVIDENCE

Counterclaims are not the only manner in which railroads can assert property damage claims against employees nor the only procedural context in which such claims can frustrate the FELA’s provisions and purpose. As discussed above, a railroad’s “first strike” action against a potential FELA plaintiff can defeat Congress’s intent to allow FELA plaintiffs to choose the legal battlefield.157 A railroad’s independent property damage action against a co-worker of the FELA plaintiff, however, can abolish the FELA’s protections in a more fundamental way: such claims may inhibit co-workers from volunteering information necessary to establish an FELA suit.

The FELA, even though conceived as remedial legislation,158 is still grounded on the plaintiff’s ability to prove at least some negligence by the railroad or co-workers.159 Some very practical consequences flow from this requirement. A worker not mortally injured may be able to testify regarding railroad or co-worker negligence. When the employee has no personal knowledge or died as a result of the accident, however, the FELA plaintiff must investigate the accident independently to obtain much of the necessary proof. The FELA plaintiff is rarely as equipped to conduct an immediate inquiry as is the railroad.160 Consequently, the evidence may become stale and the accident difficult or impossible to reconstruct. In these circumstances, information from co-workers is essential for the plaintiff to prevail in the FELA action. If the railroad, keeping its own investigatory files confidential,161 creates the impression that it might retaliate against co-workers who admit

157. See supra notes 110-16 and accompanying text.
158. See supra note 22 and accompanying text.
159. 45 U.S.C. § 51 (1982); see supra note 30 and accompanying text.
160. A 1939 report by the Senate Judiciary Committee states:
The railroads maintain well-organized and highly efficient claim departments. When an employee is injured, the claim agent promptly endeavors to procure statements from all witnesses to the infliction of the injury, takes photographs, measurements, and obtains all available information considered necessary to protect the railroad company against a possible suit for damages. S. REP. NO. 661, 76th Cong., 1st Sess. 5 (1939).
161. The FELA does not divest the railroad of any confidentiality that might apply to its files. See 45 U.S.C. § 60 (1982); infra note 164. A district
their own negligence or testify as to railroad negligence, the likelihood of a full and effective investigation by the FELA plaintiff diminishes significantly.

Although the 1906 and 1908 versions of the FELA contained no provisions ensuring plaintiffs free access to co-worker information, by 1939 Congress had recognized that the threatening practices of railroads could suppress the free flow of information from co-workers to parties interested in seeking FELA remedies. Although the resulting FELA amendment did not compel employees to provide information or eliminate railroads’ privilege with respect to their investigatory files, the amendment is remarkable for its attempt to anticipate and prohibit all railroad maneuvers designed to inhibit free access to information:

Any contract, rule, regulation, or device whatsoever, the purpose, intent, or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest as to the facts incident to the injury or death of any employee, shall be void, and whoever, by threat, intimidation, order, rule, contract, regulation, or device whatsoever, shall attempt to prevent any person from furnishing voluntarily such information, [shall be punished by fine or imprisonment]. . . .

This “free access” guarantee thus should bar railroad property damage claims against co-workers when such claims are deemed to be “devices” having the effect of preventing employ-

court that is so inclined therefore might attach a work product privilege to the railroad’s on-the-spot investigation. See FED. R. Civ. P. 26(b)(3).

162. Bills were introduced in both Houses of Congress to protect the free flow of information to FELA plaintiffs. S. 1708, 76th Cong., 1st Sess. (1939); H.R. 10,296, 75th Cong., 3d Sess. (1938).


164. Congress approved a proviso to the amendment added by the House Judiciary Committee: “Provided, That nothing herein contained shall be construed to void any contract, rule, or regulation with respect to any information contained in the files of the carrier, or other privileged or confidential reports.” FELA, Pub. L. No. 76-382, sec. 3, § 10, 53 Stat. 1404, 1405 (1939) (codified at 45 U.S.C. § 60 (1982)).

165. Id. (emphasis added). The House author of the amendment described its purposes:

It makes it possible for the widow of a man who is killed, or the children of a man who is killed to get some information and facts relative to his death. This information is made available also to persons in interest of a man who has been injured; it makes it possible for them to get some evidence.

As I understand it at the present time no employee is willing, for fear of losing his job, to give this evidence in the case of a man who is injured or killed while he is working at his job.

ees from volunteering information to parties interested in pursuing and maintaining FELA suits.

Significantly, Congress adopted this amendment soon after the House Judiciary Committee report criticized courts for narrowly interpreting the "any . . . device whatsoever" clause within the "no contract-no device" prohibition.166 In response to such misinterpretations by the courts, Congress banned the assumption of risk defense in FELA actions.167 This rebuke stands as a warning against limiting unjustifiably the meaning of "device" within the "free access" guarantee. The 1939 amendment's contemporaneous repetition of the "[a]ny . . . device whatsoever" language evidences Congress's strong desire to bar all present and future railroad practices obstructing free access to information supporting FELA actions.

Property damage claims against employees thus are "devices" within the "free access" guarantee, just as counterclaims are "devices" within the "no contract-no device" prohibition.168 Congress apparently was unaware of the limited history of employers' claims against employees for negligently caused property damage,169 but it adopted the "[a]ny . . . device whatsoever" language to compensate for such limited knowledge and its limited ability to predict all railroad practices that could inhibit employees from volunteering information.170 The flexible "device" concept consequently includes property damage claims against employees if the effect of such claims on the dissemination of employee information is similar to that caused by threats of discharge, demotion, or other discipline.171

For any arguably negligent worker, the risk of supplying information is the risk of complete financial disaster. When a worker furnishes evidence of personal negligence to anyone interested in pursuing an FELA action, the worker may be furnishing evidence on which the railroad could base a property damage claim. Even worker-witnesses who believe themselves free of negligence would risk suffering retaliatory charges of

166. H.R. Rep. No. 2153, 75th Cong., 3d Sess. 2 (1938) ("Since the original act was adopted, the aggressions of the courts have given to the defense of assumption of risk a scope and quality that threatens enforcement of the act.").
167. See supra text accompanying notes 56-61.
168. See supra text accompanying notes 130-47.
169. See supra notes 75-96 and accompanying text.
170. See supra text accompanying notes 141-42.
negligence and railroad property damage suits. The "common law" property damage claim, however doubtful its heredity, would prevent the very flow of co-worker information supposedly protected by the "free access" guarantee.

In *Stack v. Chicago, Milwaukee, St. Paul and Pacific Railroad Co.*,\(^\text{172}\) the railroad counterclaimed in an FELA suit against the decedent's estate for property damage caused in a railroad collision and subsequently impleaded surviving crew members.\(^\text{173}\) The natural instinct of such defendant-witnesses is to defend their own interests against the million dollar property loss claim.\(^\text{174}\) The Washington Supreme Court, recognizing that the railroad chilled the plaintiff's FELA suit by impleading the crew members, barred the "responsive" actions.\(^\text{175}\) The court, however, asserted that the railroad had a common law right to sue employees for negligently caused property damage; it merely disapproved the procedure by which the railroad pursued the claims.\(^\text{176}\) In reaching this conclusion, the court failed to recognize that the offending "device" under the "free access" guarantee was not the railroad's impleader of third party defendants into the FELA suit, but the property damage cause of action itself. The effect on employees' willingness to furnish information is the same whether the property damage claim is raised in an FELA suit or brought as an independent action.

The court in *Cavanaugh*\(^\text{177}\) tersely rejected the proposition that a common law claim ever could be barred by the "free access" guarantee:

> It would seem that the plaintiff is saying that all railroad employees who have any knowledge of an accident must be given immunity from liability lest they be prevented "from voluntarily furnishing information" in support of plaintiff's action by the threatened possibility that they too would be sued by the railroad for their responsibility in connection with the accident. We cannot believe that Congress had any such far-fetched purpose in enacting [the "free access" guarantee].\(^\text{178}\)

The court, however, ignored the practical consequences of the permitted property damage action. A close scrutiny of such consequences would have forced it to recognize that the claim's chilling effect was not far-fetched but rather all too likely.

\(^{172}\) 94 Wash. 2d 155, 615 P.2d 457 (1980) (en banc).
\(^{173}\) Id. at 157, 615 P.2d at 458.
\(^{174}\) The railroad in *Stack* claimed $1.5 million in property damage. Id. at 157, 615 P.2d at 458.
\(^{175}\) Id. at 159-60, 615 P.2d at 460.
\(^{176}\) Id. at 158-59, 615 P.2d at 459.
\(^{178}\) Id. at 293.
By avoiding detailed analysis of the probable effect of the property damage claim, the Cavanaugh court avoided its duty under the FELA. The "free access" guarantee expressly prohibits devices having the proscribed chilling effect. Every railroad property damage claim against an employee potentially hinders the availability of evidence in FELA litigation. The claim's effect is most severe, of course, when asserted against an employee who may have information about the cause of a fellow worker's injury or death. Even a claim against an employee for an accident not involving injury or death, and consequently producing no FELA actions, however, may have a substantial effect on employee willingness to supply necessary information in FELA settings. By simply establishing a record of such claims, railroads may sufficiently intimidate employees from supplying information in situations in which FELA suits are possible. The "free access" guarantee logically prohibits "devices" such as the railroads' property damage claims from jeopardizing FELA recoveries.

V. AN INVITATION FOR LEGISLATIVE ACTION

Throughout the FELA's history, courts have responded with hostility to the Act's common law alterations, and Congress time and again has reacted to this judicial aggression by clarifying and expanding the railroad workers' protections under the FELA. In Cavanaugh, a court once again found that a railroad's common law "rights" could defeat the FELA protections. Congress once again should "clarify" the FELA provisions, in this instance by expressly barring railroads from asserting property damage claims against employees.

Public policy supports such legislative action. Presumably, railroads, like other businesses, have liability insurance. Precluding railroads' property loss claims consequently should not result in the financial ruin of the railroads. A railroad's inability to recover against a worker, even assuming that the worker has adequate assets to pay the judgment, would make the railroad absorb property losses only to the point that its self-insurance ends and its liability coverage begins. This is not a new

179. See supra text accompanying notes 51-67.
180. See S. HUEBNER, K. BLACK & R. CLINE, PROPERTY AND LIABILITY INSURANCE 4 (1982) ("Less and less of the total risk is borne by capital in industry and more reliance is placed on insurance and prevention."); see also C. ELLIOT, PROPERTY AND CASUALTY INSURANCE 124-42 (1960) (discussing general liability coverage for businesses).
problem for the railroads; the prospect of their being able to shift this loss through property damage claims against employees was not considered a viable option until recently. Moreover, railroads can distribute property losses and insurance premiums as a cost of doing business. In contrast, permitting the property damage claim places the burden of accident and misfortune not on the business in which the worker is engaged, but squarely on a single individual or family. Such liability distribution conflicts with the policies underlying the FELA and turns FELA recoveries into evanescent funds, providing workers with just enough wealth to make property damage claims worthwhile.

Railroads also might act more affirmatively to improve railway safety if they could not anticipate reductions of FELA liability. The railroad industry, although more prominent among the major industries in 1906, 1908, and 1939, is still a vital and vast enterprise. Within this "important, extensive, and hazardous" industry, however, railroad collisions and derailments continue at an alarming rate. Although the technology exists to improve railroad safety, most tracks, cars, locomotives, signal equipment, and trafficking systems in the United States are products of an earlier period of industrial development and, in many instances, are now unreliable and outmoded. Automatic train-stopping devices, which could

181. Such liability distribution conflicts with the policies behind the FELA provisions apportioning liability for joint negligence. See supra text accompanying notes 97-108. The 1908 Senate Judiciary Committee report, submitted in support of the comparative negligence adjustments, expressed some of these underlying policies:

[A] principle fairly applicable to a man working with tools which he could handle and inspect is surely obsolete when applied to the occupation of a brakeman on a modern freight train. Yet somebody must assume these risks, and the tendency throughout the world in those countries where the industrial life of the community is thoroughly organized has been to modify the doctrine of negligence so as to allow the burden of accident and misfortune to fall, not upon a single helpless family, but upon the business in which the workman is engaged; that is, upon the whole community.

S. REP. No. 460, 60th Cong., 1st Sess. 2 (1908).

182. In 1984, for example, Consolidated Rail Corporation enjoyed profits in excess of $300 million and received bids from prospective purchasers in excess of $1 billion. Wall St. J., June 18, 1984, at 4, col. 1.


184. See authorities cited supra note 1.

185. In 1982, the House Subcommittee on Transportation, Aviation and Materials reported: "There is already a backlog of deferred maintenance and capital improvements that exceeds $6 billion." HOUSE SUBCOMMITTEE ON TRANSPORTATION, AVIATION & MATERIALS, 97th Cong., 2d Sess., REPORT ON
prevent virtually all railroad collisions, have been largely ignored in this country.\footnote{186} Only a relatively small number of locomotives contain the less expensive and less sophisticated cab signals that sound an alarm when a train enters an occupied block.\footnote{187}

As Congress recognized in 1906, the railroad industry's decisions to improve the safety conditions in which its labor force works are largely governed by economic pressures and incentives. Railroads, having met with some success in placing accident costs on injured workers or their families, can be expected to press property damage claims against employees whenever possible.\footnote{188} The railroad industry's safety conditions conse-

\addcontentsline{toc}{section}{References}

\footnote{186. These devices currently are being developed in England. See Hill, Fail-safe speed sensor for London Transport automatic trains, 128 I.E.E. PROC. 277 (Nov. 1981); Kerr, An Electronic Signalling System Gets Private Support, 252 THE ENGINEER 13 (June 18, 1981). As explained by the National Transportation Safety Board, however, recommendations for their use in this country have been largely ineffective:

On March 14, 1973, as a result of its investigation of an accident at Herndon, Pennsylvania, the Safety Board recommended that:

"The Federal Railroad Administration, in cooperation with the Association of American Railroads, develop a fail-safe device to stop a train in the event that the engineer becomes incapacitated by sickness or death, or falls asleep. Regulations should be promulgated to require installation, use, and maintenance of such a device."

This recommendation has been reiterated four times since 1973, following Safety Board investigations of train accidents at Indio, California, on March 20, 1974; Pettisville, Ohio, on September 10, 1976; Lewisville, Arkansas, on December 7, 1978; and Muncy, Pennsylvania, on August 2, 1979.

\footnote{187. See ROYERSFORD REPORT, supra note 186, at 15. Alerting devices, which sound an alarm in the locomotive cab when a wayside signal is violated, have been under consideration by the Transportation Systems Center since at least 1973. \textit{Id.} The technology itself is not experimental.

\footnote{188. Railroads apparently are already organizing for this onslaught by collecting unpublished opinions favorable to the property damage claims. See Cavanaugh, 729 F.2d at 297 (Hall, J., dissenting).}
quently are more likely to continue to deteriorate. A railroad
that can rely on a common law theory to shift the financial bur-
den of accidents to its workers, even though the railroad itself
has been negligent, is a railroad that will more readily accept
rather than correct grim statistics of employee injury and
death. By expressly prohibiting railroads' property damage
claims against employees, Congress could secure the FELA's
salutary purposes: to compensate injured workers and their
families and to provide a financial incentive for railroads to im-
prove industry safety.

Congress also should take this opportunity to modernize
the FELA's provisions to permit railroad workers and their
families to enjoy the same remedies that are available under
many state statutes and decisions. When adopted, the FELA
was a vanguard of remedial relief. Today, however, its terms
are often surpassed by state law remedies. An interstate rail-
road worker should not receive a lower recovery when injured
in a railroad collision than when injured in an automobile colli-
sion. To equalize this disparity of remedies, Congress should
provide that FELA plaintiffs can resort to any judicial remedies
that would be available in the absence of FELA exclusivity.
Railroads would still be protected from the strict liability of
worker compensation schemes, and the amount of the FELA
recovery would still be reduced in proportion to the employee's
negligence. Unlike allowing property damage claims against
employees, federal statutory incorporation of state damage
remedies would further the FELA's aim of ensuring fair com-
ensation and due railroad observance of safety requirements.

CONCLUSION

When Representative Flood stated in 1906 that "the
[FELA's] purpose is to give relief against the rigors of the com-
mon law," he heralded an important shift in national law-
making and social philosophy. Although the FELA did not
wholly abandon common law influences, a strong sentiment
that common law alone was not competent to govern the com-
plex area of industrial labor relations runs through the FELA's

189. See supra text accompanying notes 124-28.
190. See supra notes 118-23 and accompanying text.
191. See supra text accompanying notes 102-04.
193. See 45 U.S.C. § 51 (1982) (FELA plaintiff must show that negligence of
railroad or co-worker caused worker's injury or death).
legislative history. The industrial changes in the nation's most prominent industry had exposed the general inadequacies and unfairness of that judge-made law, law born not only in a different country but in a different era. The history of the FELA is the history of repeated congressional modifications designed to protect the Act's remedial objectives against the application by courts of outdated common law bars to recovery.

If courts continue to thwart Congress's overriding remedial objective by permitting such liability-avoidance techniques as the recently invented property damage counterclaim, Congress once again should intervene to clarify the situation by explicitly barring such actions. Moreover, just as the FELA should not be permitted to be disrupted by questionable "common law" theories of recovery, neither should it be used to preclude recovery of damages available under more generous state laws. By incorporating state damage remedies into the FELA as well as barring the property damage counterclaim, Congress would be carrying out the Act's twin objectives of providing effective relief to railroad workers injured or killed because of their employer's negligence and giving railroads an economic incentive to improve the safety of this nation's railroads.

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194. See supra notes 22-25 and accompanying text.