SUPREME COURT OF THE UNITED STATES

No. 92–1956

CONSOLIDATED RAIL CORPORATION, PETITIONER *v.* JAMES E. GOTTSHALL

CONSOLIDATED RAIL CORPORATION, PETITIONER *v.* ALAN CARLISLE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[June 24, 1994]

JUSTICE SOUTER, concurring.

I join the Court's opinion holding that claims for negligent infliction of emotional distress are cognizable under FELA, and that the zone of danger test is the appropriate rule for determining liability for such claims. I write separately to make explicit what I believe the Court's duty to be in interpreting FELA. That duty is to develop a federal common law of negligence under FELA, informed by reference to the evolving common law. See *Atchison, T. & S. F. R. Co.* v. *Buell*, 480 U. S. 557, 568–570 (1987). As we have explained:

> "[I]nstead of a detailed statute codifying common-law principles, Congress saw fit to enact a statute of the most general terms, thus leaving in large measure to the courts the duty of fashioning remedies for injured employees in a manner analogous to the development of tort remedies at common law. But it is clear that the general congressional intent was to provide liberal recovery for injured workers . . . and it is also clear that Congress intended the creation of no static remedy, but one which would be developed and enlarged to meet the changing conditions and changing concepts of industry's duty toward its workers." *Kernan* v. *American Dredging Co.*, 355 U. S. 426, 432 (1958).

Because I believe the Court's decision today to be a faithful exercise of that duty, and because there can be no question that adoption of the zone of danger test is well within the discretion left to the federal courts under FELA, I join in its opinion.