

# American University Law Review

---

Volume 60 | Issue 1

Article 2


---

2010

## Tort Law is State Law: Why Courts Should Distinguish State and Federal Law in Negligence-Per-Se Law

Barbara Kritchevsky  
bkrtchvs@memphis.edu

Follow this and additional works at: <http://digitalcommons.wcl.american.edu/aulr>

 Part of the [Conflicts of Law Commons](#), [State and Local Government Law Commons](#), and the [Torts Commons](#)

---

### Recommended Citation

Kritchevsky, Barbara (2010) "Tort Law is State Law: Why Courts Should Distinguish State and Federal Law in Negligence-Per-Se Law," *American University Law Review*: Vol. 60: Iss. 1, Article 2.  
Available at: <http://digitalcommons.wcl.american.edu/aulr/vol60/iss1/2>

This Article is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in American University Law Review by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact [fbrown@wcl.american.edu](mailto:fbrown@wcl.american.edu).

---

Tort Law is State Law: Why Courts Should Distinguish State and Federal Law in Negligence-Per-Se Law

# TORT LAW IS STATE LAW: WHY COURTS SHOULD DISTINGUISH STATE AND FEDERAL LAW IN NEGLIGENCE-PER- SE LITIGATION

BY BARBARA KRITCHEVSKY\*

## TABLE OF CONTENTS

|   |     |
|---|-----|
| Introduction .....  | 72  |
| I. The Doctrine of Negligence Per Se .....  | 76  |
| A. The Evolving Rationales for Negligence Per Se .....  | 76  |
| B. The Scope of Negligence-Per-Se Liability .....   | 84  |
| C. The Need for Legislative Action.....   | 87  |
| II. Which Legislature Acted? How Courts Came to Find that<br>Violations of Federal Law are Negligence Per Se .....                                    | 91  |
| A. Courts Equated State and Federal Law in Pre- <i>Erie</i><br>Negligence-Per-Se Cases.....   | 92  |
| B. Courts Used Negligence Per Se to Fill Gaps in Federal<br>Statutory Protection in the Years After <i>Erie</i> .....                                 | 99  |
| III. Why Courts Continue to Find that Violations of Federal Law<br>Are Negligence Per Se .....  | 104 |
| A. Misuse of Precedent Has Led Courts to Find that<br>Violations of Federal Law are Negligence Per Se.....  | 105 |
| B. Courts Have Treated the Negligence-Per-Se Question as<br>One of Federal Law, Not State Tort Law .....  | 107 |
| C. Courts that Recognize that Negligence-Per-Se Liability<br>Alters the Contours of Tort Law Do Not Follow the<br>Implications of their Analysis..... | 111 |
| IV. The Problems with the Current Negligence-Per-Se Analysis.....   | 116 |

---

\* Cecil C. Humphreys Professor of Law, *University of Memphis, Cecil C. Humphreys School of Law*. J.D., *Harvard Law School*. B.A., *Middlebury College*. I thank my colleague, Andrew J. McClurg, for his comments and suggestions on an earlier version of this Article. I am indebted to my research assistant, Matthew Gabriel, for his help with this Article. I also gratefully acknowledge the research assistance of Michael Goodin, Adam Ragan, and Todd Richardson at earlier stages of this project.

|  |     |
|--|-----|
| A. Courts' Failure to Focus on State Tort-Law Principles in Negligence-Per-Se Cases Has Led to Blatant Inconsistencies in State Law..... | 116 |
| B. Very Few Cases Consider the Federalism Implications of Treating Violations of Federal Law as Negligence Per Se.....                   | 119 |
| V. Why Courts Should Not Give Violations of Federal Law Negligence-Per-Se Effect .....   | 123 |
| Conclusion.....  | 129 |

### INTRODUCTION

A gun dealer sells a handgun to an eighteen-year-old in violation of a state statute that prohibits such sales. The teenager then accidentally shoots and kills a friend. It should not be difficult for the victim's estate to recover from the dealer in a state tort action under the doctrine of negligence per se.<sup>1</sup> The dealer violated a statute that the state legislature intended to protect against the type of accident the sale caused, and the conduct harmed a person in the class the legislature intended to protect.<sup>2</sup> Would the result be different if the state had no laws restricting gun sales and the dealer violated only federal law?<sup>3</sup> Is violation of the federal law negligence per se under state tort law? Most courts would say yes.<sup>4</sup> Most courts treat violations of state and federal law identically in applying the

1. *See, e.g.*, *Crown v. Raymond*, 764 P.2d 1146, 1149 (Ariz. Ct. App. 1988) (holding that defendant's sale of a firearm to a minor in violation of state law was negligence per se); *Rubin v. Johnson*, 550 N.E.2d 324, 328–30 (Ind. Ct. App. 1990) (finding that an individual who sells a firearm to a minor in violation of a state statute is negligent per se); *Ward v. Univ. of the S.*, 354 S.W.2d 246, 250 (Tenn. 1962) (explaining that defendant conceded that it was negligence per se to sell a firearm to a minor in violation of state law).

Negligence per se is the rule in the "strong majority" of states. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 14 reporters' note, cmt. c (2010).

2. "An actor is negligent if, without excuse, the actor violates a statute that is designed to protect against the type of accident the actor's conduct causes, and if the accident victim is within the class of persons the statute is designed to protect." RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 14 (2010).

3. The federal Gun Control Act of 1968 makes it illegal for a dealer to sell any firearm to a person under eighteen and to sell a firearm other than a shotgun or rifle to a person under twenty-one. 18 U.S.C. § 922(b)(1) (2006). Courts have found that there is no implied right of action under the statute. *See, e.g.*, *Estate of Pemberton v. John's Sports Ctr., Inc.*, 135 P.3d 174, 180–83 (Kan. Ct. App. 2006) ("[W]e determine that a private right of action does not exist under either the federal or Kansas laws."); *T & M Jewelry, Inc. v. Hicks*, 189 S.W.3d 526, 530 (Ky. 2006) ("[W]e have discovered no case that holds that Congress intended to provide a federal right to damages under this statute.").

4. *See, e.g.*, *Hetherington v. Sears, Roebuck & Co.*, 593 F.2d 526, 529–30 (3d Cir. 1979) (finding that violation of Gun Control Act was negligence per se under Delaware law); *Martin v. Schroeder*, 105 P.3d 577, 582–83 (Ariz. Ct. App. 2005) (holding that sale of firearm in violation of the Gun Control Act was negligence per se under Arizona law); *West v. Mache of Cochran*, 370 S.E.2d 169, 173 (Ga. Ct. App. 1988) (finding violation of Gun Control Act negligence per se under Georgia law).

doctrine of negligence per se.<sup>5</sup> This Article argues that those courts are wrong. Finding that a violation of federal law is negligence per se under state tort law violates the institutional comity rationale for the doctrine, leads courts to enforce federal standards as a matter of state law, and allows Congress to define the contours of state tort law.

State courts have long found that violations of federal law are negligence per se.<sup>6</sup> This practice is now so well established that the commentary to the Restatement (Third) of Torts (“Third Restatement”) states that its negligence-per-se provision applies to violations of federal law.<sup>7</sup> The United States Supreme Court has also recognized that “[t]he violation of federal statutes and regulations is commonly given negligence-per-se effect in state tort proceedings.”<sup>8</sup>

Finding that violations of federal law are negligence per se contravenes the chief reason the doctrine exists. While courts and commentators have long debated the justification for negligence per se,<sup>9</sup> the Third Restatement roots the doctrine in “institutional comity.”<sup>10</sup> This rationale says that courts should not find that it was reasonable for a person to engage in conduct that the legislature prohibited.<sup>11</sup> The legislature’s role as the representative of

---

5. See *infra* Part III (discussing how modern courts treat violations of federal law as negligence per se under state tort law).

6. In 1876, for example, the Alabama Supreme Court found violation of a federal law regulating cotton shipments to be negligence per se. *Grey’s Ex’r v. Mobile Trade Co.*, 55 Ala. 387, 402–03 (1876); see *infra* text accompanying notes 127128–32 (discussing *Grey’s Executor*).

7. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 14 cmt. a (2010). The Reporters state: “The violation of federal statutes and regulations is commonly given negligence per se effect in state tort proceedings.” *Id.* Reporters’ note, cmt. a. The Reporters also noted that this development was somewhat surprising. See *infra* text accompanying notes 95–97.

8. *Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 545 U.S. 308, 318 (2005) (quoting RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 14 reporter’s note, cmt. a (Proposed Final Draft No. 1, 2005)).

9. See Charles L. B. Lowndes, *Civil Liability Created by Criminal Legislation*, 16 MINN. L. REV. 361, 361 (1931) (explaining that there is “great confusion” surrounding the theory of negligence per se); William P. Malburn, *The Violation of Laws Limiting Speed as Negligence*, 45 AM. L. REV. 214, 214 (1911) (acknowledging the disagreement among courts regarding the doctrine of negligence per se); Clarence Morris, *The Relation of Criminal Statutes to Tort Liability*, 46 HARV. L. REV. 453, 453 (1932) (arguing for a modification of the doctrine of negligence per se); Ezra Ripley Thayer, *Public Wrong and Private Action*, 27 HARV. L. REV. 317, 317 (1914) (recognizing that much confusion “has come from obscurity as to fundamental conceptions of the law of negligence”); see also W. PAGE KEETON, ET AL., PROSSER & KEETON ON THE LAW OF TORTS 220 (W. Page Keeton ed., 5th ed. 1984) (“Much ingenuity has been expended in the effort to explain why criminal legislation should result in a rule for civil liability.”).

10. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 14 cmt. c (2010).

11. *Id.*

the community justifies having a court take the question of negligence out of the jury's hands and defer to the legislative judgment.<sup>12</sup>

While many negligence-per-se cases recognize that the doctrine stems from deference to legislative judgment,<sup>13</sup> very few courts ask which legislature has made the judgment. Most cases contain essentially no discussion of whether courts should equate federal law and state law in applying the doctrine.<sup>14</sup> The courts rarely ask why, or whether, they should adopt federal policy as that of the state or whether the federal policy is one that the state shares.<sup>15</sup>

Careless application of the law of negligence per se can lead courts to use state tort law to enforce policies that do not reflect state legislative judgments on appropriate conduct. States and the federal government set different policies in matters such as highway safety and gun ownership.<sup>16</sup> A determination that a violation of a federal standard is negligence per se uses state tort law to enforce a policy the state legislature may not share. Even if the state and federal policies are not in conflict, finding that a violation of federal law is negligence per se contravenes the institutional comity rationale for the doctrine. Congress does not make state policy and the violation of a federal standard does not justify taking the question of whether a person acted reasonably away from a jury. Finding that a violation of federal law is negligence per se in a state law case allows the federal government to set standards that govern state tort law.

Tort law is state law.<sup>17</sup> It has been clear since *Erie Railroad Co. v. Tompkins*<sup>18</sup> that there is no general federal common law and that Congress

---

12. *Id.*

13. *See infra* Part I.C (explaining that legislative action is a necessary predicate to negligence-per-se liability).

14. *See infra* Part III.A. The use of a negligence-per-se analysis assumes that the federal legislation does not directly govern the action or preempt state law. *See* Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 508 (1992) (discussing federal preemption of state tort claims). *See generally* Catherine M. Sharkey, *Preemption by Preamble: Federal Agencies and the Federalization of Tort Law*, 56 DEPAUL L. REV. 227, 227–28 (2007) (discussing agencies' roles in asserting preemption and state incorporation of federal standards as a route to providing a remedy for harm); Paul Sherman, *Use of Federal Statutes in State Negligence Per Se Actions*, 13 WHITTIER L. REV. 831, 898–905 (1992) (discussing the relationship between negligence per se, preemption, and implied private rights of action).

15. *See infra* Parts III and IV.B. There is also essentially no commentary on the issue. The only article that focuses on the issue is Sherman. *See supra* note 14. Professor Sherman chiefly addresses how plaintiffs use negligence per se to seek recovery for a defendant's alleged violation of federal law. *Id.* at 906.

16. *See* Murray v. Briggs, 569 So. 2d 476, 480 (Fla. Dist. Ct. App. 1990) (highway safety); T & M Jewelry, Inc. v. Hicks, 189 S.W.3d 526, 533 (Ky. 2006) (Roach, J., concurring in part and dissenting in part) (gun ownership).

17. *See, e.g.*, DAN B. DOBBS, THE LAW OF TORTS 39 (2000) (“The common law of torts is almost exclusively state law.”); VINCENT R. JOHNSON & ALAN GUNN, STUDIES IN AMERICAN TORT LAW 2 (1994). *See generally* OLIVER WENDELL HOLMES, THE COMMON LAW 77–163 (1881).

does not have the power to declare “substantive rules of common law applicable in a state.”<sup>19</sup> Congress may not rewrite a state’s tort law.<sup>20</sup> State courts should not allow Congress to rewrite state law through the application of the doctrine of negligence per se, by allowing federal standards to determine the contours of a state-law tort. Courts should directly confront the question of whether to treat violations of federal standards as negligence per se under state tort law and should refuse to give federal standards that effect.

This Article will explore how state courts have come to use the law of negligence per se to enforce federal standards and explain why courts should stop the practice. Part I will discuss the development of the doctrine of negligence per se, focusing on how the institutional comity rationale for the doctrine has become increasingly specific even as the reach of the doctrine has expanded. Part II will explain how courts came to find that violations of federal laws are negligence per se. Part III explains why courts continue this practice. It shows that a lack of rigorous analysis and careless use of precedent have led many courts to view the question of whether violation of a federal statute is negligence per se as a question of federal law instead of state tort law. Part IV discusses the problems with this approach and how courts have generally failed to consider the federalism implications of this expansion. Part V explains why courts should not find that violations of federal law are negligence per se without an express state legislative determination that the federal policy is the policy of the state. Absent such an express indication, courts should treat violations of federal law in the same way they treat non-governmental regulations of proper conduct, such as private safety codes.<sup>21</sup> The violation of federal law may be relevant to a negligence inquiry, but it should not be negligence per se under state tort law.

---

18. 304 U.S. 64 (1938).

19. *Id.* at 78.

20. *See* *New York v. United States*, 505 U.S. 144, 161 (1992) (quoting *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 288 (1981)) (“Congress may not simply ‘commandeer[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.’”). Even when Congress can require or prohibit certain acts, “it lacks the power to directly compel the States to require or prohibit those acts.” *New York*, 505 U.S. at 166. This principle stems from the Tenth Amendment and limits on Congressional authority. *Id.* at 161–66. *See generally* JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 207–25 (7th ed. 2004) (discussing the Tenth Amendment).

21. *See infra* text accompanying notes 99–101 (discussing why private safety codes do not establish legal standards of care).

## I. THE DOCTRINE OF NEGLIGENCE PER SE

Negligence per se has been an established aspect of tort law for well over a century.<sup>22</sup> It was “well settled” doctrine by 1889<sup>23</sup> and was the topic of extensive scholarly debate in the years before the first Restatement of Torts (“First Restatement”).<sup>24</sup> Two aspects of negligence per se have been the topic of consistent discussion: the rationales justifying the doctrine and the proper scope of negligence-per-se liability. The developments in these areas have pulled the doctrine in different directions. The justification for negligence per se has moved away from treating civil liability as a penalty for violating the law to one that emphasizes institutional comity and consistency between court decisions and legislative judgment.<sup>25</sup> The reach of the doctrine has, however, remained expansive and many courts apply it indiscriminately to violations of all laws and regulations, regardless of whether institutional comity supports its application.

### A. *The Evolving Rationales for Negligence Per Se*

Courts have long found that a person who violates a clear legal duty is per se negligent. Early cases recognized that the duty could be one that courts established through the development of the common law,<sup>26</sup> or it

22. DOBBS, *supra* note 17, at 319 (“The history of the negligence per se rule does not seem to have been written.”). This Article does not attempt to write that history, but only to sketch the developments that are important to understanding why courts find that persons who violate federal statutes or regulations are negligent per se.

23. *Osborne v. McMasters*, 41 N.W. 543, 543 (Minn. 1889).

24. See articles cited *supra* note 9. The First Restatement was published in 1934. RESTATEMENT OF TORTS (1934).

25. See Barbara Kritchevsky, *Whose Idea Was It? Why Violations of State Laws Enacted Pursuant to Federal Mandates Should Not Be Negligence Per Se*, 2009 WIS. L. REV. 693, 697–705. The discussion in this section draws extensively on my previous exploration of the topic.

26. For instance, a series of early North Carolina Supreme Court decisions held that railroads that did not use automatic train couplers were per se negligent. *Troxler v. S. Ry. Co.*, 32 S.E. 550, 550–51 (N.C. 1899); *Greenlee v. S. Ry. Co.*, 30 S.E. 115, 116 (N.C. 1898); *Mason v. Richmond & Danville R.R. Co.*, 16 S.E. 698, 699–700 (N.C. 1892). A railroad’s failure to have the devices was negligence per se even though the railroad was under no legislative compulsion to use them. *Greenlee*, 30 S.E. at 115 (explaining that the fact that Interstate Commerce Commission rules requiring automatic couplers did not go into effect until 1900 only meant that railroads were not subject to administrative penalties); see also *Troxler*, 32 S.E. at 550–51 (discussing development of the law). Professor Blomquist traces the doctrine of negligence per se to *Simpson v. Hand*, 6 Whart. 311 (Pa. 1841), which found the violation of a common-law requirement that an anchored vessel have a warning light to prevent collisions negligence per se. Robert F. Blomquist, *The Trouble with Negligence Per Se*, 61 S.C. L. REV. 221, 225–26 (2009). For a general discussion of common-law rules of negligence, see DOBBS, *supra* note 17, § 132 (discussing common-law rules requiring an individual to “stop, look, and listen” at a railway crossing and requiring that a driver be able to stop within the range of the car’s headlights).



could be the result of legislative action.<sup>27</sup> The Minnesota Supreme Court recognized in 1899 that negligence was a breach of a legal duty and that it was immaterial whether common law or a state statute established the duty.<sup>28</sup> Other courts echoed that conclusion, explaining that when an act or failure to act was “so universally wrongful as to attract the attention of the lawmaking power,” and the legislature acted, “a commission of the specific act forbidden is for civil purposes correctly called negligence per se.”<sup>29</sup>

Many of the early cases suggested that a person who violated a statute was necessarily negligent and appeared to believe that tort liability was an appropriate penalty for violating the law.<sup>30</sup> An 1876 Alabama Supreme Court decision finding violation of a federal statute to be negligence per se stated as an “axiomatic truth, that every person, while violating an express statute, is a wrongdoer, and, as such, is *ex necessitate*, negligent in the eye of the law.”<sup>31</sup> Other cases took a similar approach, treating someone who

27. See *infra* Part I.C (discussing the need for legislative action).

28. *Osborne*, 41 N.W. at 543–44 (Minn. 1889).

29. *Platt v. S. Photo Material Co.*, 60 S.E. 1068, 1070 (Ga. Ct. App. 1908). The United States Supreme Court offered the same explanation in a case finding that New York’s workers’ compensation law was constitutional. *N.Y. Cent. R.R. Co. v. White*, 243 U.S. 188, 197–98 (1917).

The early cases did not consistently use the term “negligence per se” to refer to the liability that stemmed from violating a statute. The *Platt* court noted that the term “negligence per se” had not yet acquired “that precise and definite meaning so essential to the prevention of ambiguity.” 60 S.E. at 1070. The cases holding shippers liable for failing to comply with the federal law requiring them to provide food and water for animals in transit illustrate this point. See *Nashville, Chattanooga & St. Louis Ry. Co. v. Heggie*, 12 S.E. 363, 364 (Ga. 1890) (calling such a violation “negligence per se”); *Brockway v. Am. Exp. Co.*, 47 N.E. 87, 87 (Mass. 1897) (saying that violation would be “gross negligence”); *Burns v. Chicago, Milwaukee & St. Paul Ry. Co.*, 80 N.W. 927, 929 (Wis. 1899) (calling violation of the statute “actionable negligence”). For further discussion of these cases, see *infra* text accompanying notes 151–60.

30. See, e.g., *Grey’s Ex’r v. Mobile Trade Co.*, 55 Ala. 387, 407 (1876) (finding individual who violated passenger-safety statute regulating the shipment of cotton liable for value of cotton lost in fire); *Osborne v. Van Dyke*, 85 N.W. 784, 785–86 (Iowa 1901) (finding individual who violated a statute prohibiting cruelty to animals liable to a person he injured with a blow meant for his horse); *Koonovsky v. Quellette*, 116 N.E. 243, 243–44 (Mass. 1917) (holding individual driving an unregistered car liable for all injury directly resulting from that act); *White v. Levarn*, 108 A. 564, 564 (Vt. 1918) (finding individual who violated law prohibiting hunting on Sunday liable for injuries to fellow hunter whom he shot); see also *infra* text accompanying notes 151–60 (discussing cases imposing liability for violations of the law requiring care for animals in transit). Professor Fleming James called this the “outlaw” theory of negligence per se and said it was “a barbarous relic of the worst there was in puritanism.” Fleming James, Jr., *Statutory Standards of Negligence in Accident Cases*, 11 LA. L. REV. 95, 104–05 (1950); see 3 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 17.6, at 617–18 (2d ed. 1986) (making the same argument).

31. *Grey’s Executor*, 55 Ala. at 403; see also 3 BYRON K. ELLIOTT & WILLIAM F. ELLIOTT, A TREATISE ON THE LAW OF RAILROADS § 1155 (1897) (saying that a person who violates a statute is a “wrong-doer” and ordinarily negligent per se).

violated a statute as a wrongdoer who was not entitled to the protection of the laws.<sup>32</sup>

Other early cases and commentators justified negligence per se by explaining that juries should not override legislative decisions. A 1901 treatise said that the rule of negligence per se was the only view “reconcilable with reason,”<sup>33</sup> and argued that courts that failed to adopt the doctrine clothed juries with the power to set aside legislative acts.<sup>34</sup> The Ohio Supreme Court explained that juries cannot say that something that is not the law is the law, “so they should not be permitted to say that which is the law is not the law.”<sup>35</sup>

The developing law of negligence per se faced scholarly resistance. Professor William Malburn condemned the doctrine in a 1911 law review article, arguing that a person who violated a law should only suffer the statutory penalty and that the violation should not even be evidence of negligence.<sup>36</sup> Professor Ezra Ripley Thayer responded with his influential

32. See, e.g., *Balt. & Ohio R.R. v. Miller*, 29 Md. 252, 261 (1868) (finding that those who do not conform to city ordinances are “not entitled to the consideration of the law”); see also *Koonovsky*, 116 N.E. at 244 (considering an unregistered vehicle a trespasser on the highway and the driver liable for injury he caused); *Van Norden v. Robinson*, 45 Hun. 567, 570 (N.Y. Sup. Ct. 1887) (calling violation of a statute a nuisance).

33. 1 SEYMOUR D. THOMPSON, COMMENTARIES ON THE LAW OF NEGLIGENCE IN ALL RELATIONS § 10 (1901).

34. *Id.* § 11. Thompson said that courts that called a statutory violation only evidence of negligence granted juries the “dispensing power,” the power English kings had to set aside legislative acts, and “sinks acts of the legislature below the grade of by-laws of corporations.” *Id.* Thompson did note, however, that offenses against the public did not give rise to negligence-per-se liability and that negligence-per-se liability required that the statute the defendant violated be one the legislature intended to prevent injuries like those the plaintiff suffered. *Id.* § 12. Another early treatise recognized the same limit on the reach of negligence per se. It said that violation of a statute or municipal ordinance enacted “for the benefit of private persons, is of itself sufficient to prove such a breach of duty as will sustain a private action for negligence, brought by a person belonging to the protected class.”

1 THOMAS G. SHEARMAN & AMASA A. REDFIELD, A TREATISE ON THE LAW OF NEGLIGENCE § 13, at 11 (5th ed. 1898) [hereinafter 1 SHEARMAN & REDFIELD].

35. *Variety Iron & Steel Works Co. v. Poak*, 106 N.E. 24, 27 (Ohio 1914).

36. See Malburn, *supra* note 9, at 234; see also Lowndes, *supra* note 9, at 364 (arguing that a court should not assume that a legislature intended an enactment to impose civil liability when it did not so provide). Malburn strongly criticized Thompson’s negligence treatise, *supra* note 33, saying that it “includes almost every fallacy by which courts have been misled.” Malburn, *supra* note 9, at 216; see *supra* notes 33–34. Other early commentators argued that a person who violated a statute was not necessarily culpable. See Morris, *supra* note 9, at 458 (explaining that individuals can violate criminal statutes without being “guilty of fault in any sense of the word”). Morris objected that negligence per se removed the jury’s ability to decide how the defendant should have acted and reduced it to performing the “historical” function of determining what happened. Morris, *supra* note 9, at 455.

These are not the only arguments against the doctrine. An article published after the First Restatement explained that the doctrine disregards the discretion inherent in the decision whether to enforce criminal statutes, ignores the fact that many statutes “are ill conceived, or hastily drawn, or obsolete,” can lead to liability without fault or prevent a

article, *Public Wrong and Private Action*, which defended the doctrine and argued that a jury could not properly find that a person acted reasonably in disregarding the legislature's judgment regarding appropriate conduct.<sup>37</sup> Thayer reiterated the idea that a reasonable person obeys the law,<sup>38</sup> but he also focused on the need for courts to respect legislative judgment.<sup>39</sup> He explained that the legislature acts to set safety standards and condemn dangerous activities in view of changing conditions.<sup>40</sup> Thayer argued that a jury could not properly determine that a defendant reasonably substituted his judgment on how to act for the legislature's judgment, especially when the fact that the conduct caused harm showed that the legislative judgment was correct.<sup>41</sup> Thayer also argued that it was appropriate to assume that a legislature, which is presumed to know the law, understood how courts would treat statutory violations.<sup>42</sup>

Many early cases did not embrace the full implications of a doctrine that would hold any individual who violated a statute per se liable in tort. These cases recognized a limit on the doctrine, allowing individuals whose statutory violations caused harm to escape negligence-per-se liability.<sup>43</sup> This limitation undermined the notion that the rationale for the doctrine was to penalize wrongdoers.<sup>44</sup> These decisions looked to legislative intent and said that a statutory violation was negligence per se only when the injury the defendant caused was one the legislature aimed to prevent.<sup>45</sup> The most famous of these cases, the British case of *Gorris v. Scott*,<sup>46</sup> found that a violation of a law requiring that animals shipped at sea be confined in separate pens did not impose negligence-per-se liability when the animals were swept overboard in a storm.<sup>47</sup> There was no liability because the

---

person who has not been meaningfully negligent from recovering, and exposes a person to substantial damages when the statute imposes only a small penalty. James, *supra* note 30, at 108.

37. Thayer, *supra* note 9, at 322–23.

38. *Id.* at 323–24.

39. *Id.* at 326–28.

40. *Id.*

41. *Id.* at 323. Lowndes responded that Thayer erroneously assumed that the legislature decided how a prudent person would act. Lowndes, *supra* note 9, at 368. Lowndes said that a court should not find a person negligent for failing to comply with an absolute rule of law instead of a standard that a jury found appropriate in the particular case. *Id.* at 376.

42. Thayer, *supra* note 9, at 320.

43. See Lowndes, *supra* note 9, at 373 n.20 (explaining how the act or omission that violated the statute is a cause of the injury but not the proximate cause).

44. See *id.* (noting cases where criminal liability does not create tort liability due to problems in causation).

45. See *id.* at 373 (discussing *Gorris v. Scott*, (1874) L.R. 9 Exch. 125, and *Boronkay v. Robinson & Carpenter*, 160 N.E. 400 (N.Y. 1928)); see also 1 SHEARMAN & REDFIELD, *supra* note 34, § 13, at 11.

46. (1874) 9 L.R. Exch. 125.

47. *Id.*

purpose of the statute was to protect against disease, not the hazards of the seas.<sup>48</sup>

This limiting principle rejects the outlaw approach to negligence-per-se analysis; it prevents negligence per se from serving to penalize individuals simply because they violated the law. The reason the legislature acted would be irrelevant if that were the purpose underlying the doctrine. The reason for the statute is irrelevant to the question of whether a person violated it.<sup>49</sup>

The First Restatement codified the doctrine of negligence per se in this limited form. The Restatement provided that an individual who violated a law faced liability if four criteria were met: (a) “the intent of the enactment” was to protect the other’s individual interests; (b) “the interest invaded” was one which the enactment was “intended to protect;” (c) the violation resulted from the hazard against which an enactment was intended to protect in cases where the legislation aimed to guard against a specific risk; and (d) the violation was “a legal cause of the invasion” and the injured person did not act in a way that precluded him from bringing a claim.<sup>50</sup>

---

48. *Id.* at 129. *Boronkay* provides an early American application of this limitation. 160 N.E. at 400–01. The defendant in *Boronkay* violated a statute that required drivers to park vehicles with their right sides to the curb. *Id.* at 400. The defendant’s vehicle was parked with its left side to the curb. *Id.* A chain with a hook hung down the left side of the truck. *Id.* The chain killed a boy who was caught by the hook when the truck started. *Id.* The court said that the trial court erroneously instructed the jury that it could find the defendant negligent if it found a violation of the traffic law. *Id.* at 400–01. The court found the statutory violation irrelevant to the question of liability. *Id.* The purpose of the statute was to aid the safe passage of vehicles and individuals using the road; the injury was not connected to the violation. *Id.* The court explained that disregard of a statute is a breach of duty to those for whose protection the statute’s safeguards existed but that there was no breach of duty toward individuals who were not in the “zone where danger is apprehended” even in cases “where a statutory command is not obeyed.” *Id.* at 400.

49. See Lowndes, *supra* note 9, at 375 (explaining that a defendant’s conduct could be just as culpable and anti-social when it inflicted an injury that the legislature did not intend to prevent as when it caused an injury the legislature anticipated); see also Thayer, *supra* note 9, at 336–38 (discussing *Gorris*). Professor James explained the statutory-purpose cases somewhat differently, saying that they were not relevant to the outlaw theory of negligence-per-se liability. James, *supra* note 30, at 104–05. He argued that the statutory-purpose inquiry recognized that a court that accepted a legislature’s statutory standard would also logically adopt the legislature’s judgment regarding the “limits of the need that brought it forth.” *Id.* at 112. He did, however, caution against an overly broad interpretation of statutory purpose, explaining that consideration of the statute would then only come into play under the outlaw theory of negligence-per-se liability. *Id.* at 114.

50. RESTATEMENT OF TORTS § 286 (1934). A related provision stated that a violation of a statute would not create civil liability if the provision were designed to protect municipal interests or to secure rights to which a person was entitled only as a member of the public. *Id.* § 288.

The First Restatement and its commentary tied negligence per se to legislative intent. A person who violates a statute is only per se negligent if the violation injures the individual interests of a person whom the legislature aimed to protect against the harm the legislature aimed to prevent.<sup>51</sup> The commentary relied on the facts of *Gorris* and its focus on legislative intent to illustrate this point.<sup>52</sup>

The provisions on negligence per se in the Restatement (Second) of Torts (“Second Restatement”) closely mirrored those in the First Restatement and limited the doctrine in much the same way.<sup>53</sup> The Second Restatement provided that a court could adopt statutory requirements as the reasonable person’s standard of conduct when the legislature intended to serve four purposes.<sup>54</sup> The legislature must have intended to protect: (a) “a class of persons which includes the one whose interest is invaded,” and (b) “the particular interest which is invaded,” against (c) “the kind of harm which has resulted,” and (d) “the particular hazard from which the harm results.”<sup>55</sup> An additional provision made it clear that violation of such a standard was negligence per se, noting that “[t]he unexcused violation of a legislative enactment or an administrative regulation which is adopted by the court as defining the standard of conduct of a reasonable man, is negligence in itself.”<sup>56</sup>

The Second Restatement emphasized that there was no expectation that courts would automatically apply criminal standards in tort cases.<sup>57</sup> The Reporter’s Notes (“Notes”) explained that courts were under no obligation

51. *Id.* § 286 & cmts. on cls. (a)–(c).

52. *Id.* cmt. on cl. (c), illus. 4.

53. See RESTATEMENT (SECOND) OF TORTS § 286 (1965). Professor James noted in 1950 that the outlaw theory of negligence per se then enjoyed “little currency.” James, *supra* note 30, at 105.

There was very little academic discussion of negligence per se in the years preceding the 1965 enactment of the Second Restatement. See David P. Leonard, *The Application of Criminal Legislation to Negligence Cases: A Reexamination*, 23 SANTA CLARA L. REV. 427, 427 (1983) (noting in 1983 that there was little theoretical analysis of the issue after the early 1950s). Notable contributions to the literature in the years between the publication of the First and Second Restatements were the James article, *supra* note 30, and two by Professor Clarence Morris. See Clarence Morris, *The Role of Administrative Safety Measures in Negligence Actions*, 28 TEX. L. REV. 143 (1949) [hereinafter Morris, *The Role of Administrative Safety Measures*]; Clarence Morris, *The Role of Criminal Statutes in Negligence Actions*, 49 COLUM. L. REV. 21 (1949) [hereinafter Morris, *The Role of Criminal Statutes*]. Morris argued in the latter article that negligence per se generally aims to replace a precise standard for the reasonable person formulation and that applying the doctrine inflexibly could lead to unfair results. *Id.* at 28–29.

54. RESTATEMENT (SECOND) OF TORTS § 286 (1965).

55. *Id.*

56. *Id.* § 288B.

57. *Id.* § 288A, cmt. B (explaining that there may be cases in which particular conduct may be excused for the purposes of a negligence action where it would not be excused in a criminal action or where it may be excused for criminal but not civil purposes).

to find that statutory requirements governed in a negligence action unless the legislature so stated.<sup>58</sup> The Notes cited *Rudes v. Gottschalk*,<sup>59</sup> which explained that the usual negligence-per-se case involved conduct that a court would consider substandard absent a statutory prohibition.<sup>60</sup> The *Rudes* court explained that courts adopt the legislative standard because a legislative body is generally better suited than a court to establish such a test “by reason of its organization and investigating processes.”<sup>61</sup> Courts could still reject the criminal standard.<sup>62</sup>

The Third Restatement continues to articulate the same basic principle of negligence per se, but simplifies the formulation of the doctrine.<sup>63</sup> The

58. *Id.* § 286 reporter’s notes.

59. 324 S.W.2d 201 (Tex. 1959).

60. *Id.* at 204–05 (holding that a child should not be held to an adult standard of care simply because negligence per se was involved).

61. *Id.*

62. *Id.* at 204–05. The Notes also relied on *Phoenix Refining Co. v. Powell*, 251 S.W.2d 892, 895 (Tex. Civ. App. 1952), which emphasized that courts did not have to apply legislative standards in tort because “[a]t times violation of the criminal law is not unreasonable.” The court explained that a defendant should be able to argue that the statutory violation was excusable. *Id.* at 896–97; see RESTATEMENT (SECOND) OF TORTS § 286 Reporter’s Notes (1965).

The Second Restatement, like the First, contained a provision stating that a court would not adopt a legislative standard when the legislation aimed to serve broad public goals. RESTATEMENT (SECOND) OF TORTS § 288 (1965). Section 288 stated that a statute that the legislature intended to protect the public’s interests did not set a standard of reasonable conduct. *Id.* § 288(a). The provision listed seven instances in which a statute did not establish the reasonable person’s standard of conduct. *Id.* § 288. The instances largely duplicated the limits on the doctrine in the general negligence-per-se provision, section 286. The first two specifically focused on public interests. The first was if the purpose of the enactment was “to protect the interests of the state or any subdivision of it as such.” *Id.* § 288(a). The second was when the enactment was “to secure to individuals the enjoyment of rights or privileges to which they are entitled only as members of the public.” *Id.* § 288(b). The Comment noted that many statutes and regulations aim to protect “the public at large,” not specific individuals. *Id.* cmt. on cl. (a). These provisions created an obligation only to the state and they did not establish the standard of conduct of a reasonable person. *Id.*

63. There continued to be relatively little scholarly discussion of negligence per se in the years between the Second and Third Restatements. There were, however, some notable contributions to the literature. See Caroline Forell, *Statutory Torts, Statutory Duty Actions, and Negligence Per Se: What’s the Difference?*, 77 OR. L. REV. 497 (1998); H. Miles Foy, III, *Some Reflections on Legislation, Adjudication, and Implied Private Actions in the State and Federal Courts*, 71 CORNELL L. REV. 501 (1986); Leonard, *supra* note 53; Harvey S. Perlman, *Thoughts on the Role of Legislation in Tort Cases*, 36 WILLAMETTE L. REV. 813 (2000); David E. Seidelson, *The Appropriate Judicial Response to Evidence of the Violation of a Criminal Statute in a Negligence Action*, 30 DUQ. L. REV. 1 (1991); Paul Yowell, *Judicial Discretion in Adopting Legislative Standards: Texas’s Solution to the Problem of Negligence Per Se?*, 49 BAYLOR L. REV. 109 (1997). There was also some judicial discussion of the theoretical issues. See *Bittle v. Brunetti*, 750 P.2d 49, 55–59 (Colo. 1988) (discussing background of the doctrine and relationship to other tort concepts); *Zeni v. Anderson*, 243 N.W.2d 270, 279–83 (Mich. 1976) (discussing rationales for, and criticisms of, the doctrine).

Most of the articles that discussed negligence per se at length, however, focused on the application of the doctrine in specific substantive areas. See, e.g., Kenneth S. Abraham,

provision simply states: “An actor is negligent if, without excuse, the actor violates a statute that is designed to protect against the type of accident the actor’s conduct causes, and if the accident victim is within the class of persons the statute is designed to protect.”<sup>64</sup> This doctrine of negligence per se is the rule in the “strong majority” of states.<sup>65</sup>

The commentary accompanying the Third Restatement goes much further than did previous Restatements in justifying the doctrine.<sup>66</sup> Chief among the reasons it gives is deference to legislative judgment.<sup>67</sup> First, it would be “awkward,” as a matter of “institutional comity,” for a court to find that conduct that a legislature had prohibited was reasonable.<sup>68</sup> Second, while juries generally serve as the community’s voice in determining if conduct was negligent, the judgment of the legislature, “as the authoritative representative of the community,” should prevail over a jury’s view when the legislature has decided what conduct is appropriate.<sup>69</sup>

The Third Restatement emphasizes that limitations on the reach of the doctrine remain in force. “Negligence per se applies only when the accident that injures the plaintiff is the type of accident that the statute

---

*The Relation Between Civil Liability and Environmental Regulation: An Analytical Overview*, 41 WASHBURN L.J. 379 (2002); James M. Beck & John A. Valentine, *Challenging the Viability of FDCA-Based Causes of Action in the Tort Context: The Orthopedic Bone Screw Experience*, 55 FOOD & DRUG L.J. 389 (2000); Sheila G. Bush, *Can You Get There From Here?: Noncompliance with Environmental Regulations As Negligence Per Se in Tort Cases*, 25 IDAHO L. REV. 469 (1989); Andrew E. Costa, *Negligence Per Se Theories in Pharmaceutical & Medical Device Litigation*, 57 ME. L. REV. 51 (2005); Matthew W. Daus, *Negligence and the ADA*, 70 N.Y. ST. B.J. 30 (1998); Alexandra B. Klass, *Bees, Trees, Preemption, and Nuisance: A New Path to Resolving Pesticide Land Use Disputes*, 32 ECOLOGY L.Q. 763 (2005); Donald A. Loose & C. Kyle Brown, *The Use of OSHA Regulations in Negligence Cases*, 36 ARIZ. ATT’Y, 29 (2000); Ellen Relkin, *The Sword or the Shield: Use of Governmental Regulations, Exposure Standards and Toxicological Data in Toxic Tort Litigation*, 6 DICK. J. ENVTL. L. & POL’Y 1 (1997).

64. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 14 (2010).

65. *Id.* Reporter’s Notes, cmt. c. The comment cites cases from four states that hold that a statutory violation “creates a rebuttable presumption of negligence, or prima facie proof of negligence.” *Id.* The Notes explain that the views of these states are very similar to the Restatement approach, which allows a showing of excuse to rebut a presumption that the actor was negligent per se. *Id.* (citing *id.* § 15). Approximately a dozen states provide that a statutory violation “is only some evidence of negligence.” *Id.*

66. *Id.* cmt. c. Explaining why a person who violated a statute could be found to be negligent even when a legislature did not provide that a statutory violation would give rise to civil liability, the comment says: “[C]ourts, exercising their common-law authority to develop tort doctrine, not only should regard the actor’s statutory violation as evidence admissible against the actor, but should treat that violation as actually determining the actor’s negligence.” *Id.*

67. *Id.*

68. *Id.*

69. *Id.* Negligence per se also helps to establish consistency in cases of recurring conduct because legislatures generally address problems that occur frequently. *Id.*

seeks to avert.”<sup>70</sup> Additionally, the doctrine does not apply when the “statute is not a safety statute at all.”<sup>71</sup> Similarly, the doctrine only applies if the plaintiff is in the class of persons the legislature sought to protect.<sup>72</sup> The limits on the doctrine reveal that it serves to substitute the legislature’s judgment on what conduct is safe in a particular situation for the judgment of a jury.<sup>73</sup>

### B. *The Scope of Negligence-Per-Se Liability*

The rationale for finding a person who violates a statute negligent per se has become increasingly explicit over the years. The reach of the doctrine has not changed to reflect the changing rationale, however. Indeed, the Restatements’ discussions of the doctrine have consistently expanded its reach. These developments have led to widespread acceptance of the practice of applying negligence per se when so doing does nothing to further the doctrine’s rationale, which is preventing a jury from overriding the legislature’s determination that identified conduct is inappropriate.<sup>74</sup> The current use of the doctrine, instead, allows federal law to define the contours of state tort law.

Courts have generally equated state statutes and municipal ordinances in applying the negligence-per-se doctrine. An 1898 treatise captioned its discussion of negligence per se “Violation of duty imposed by statute or ordinance,” equating violations of statutes and “valid municipal regulation[s].”<sup>75</sup> It cited cases such as the 1893 decision in *Mueller v. Milwaukee Street Railway Co.*,<sup>76</sup> which said that proof that a car obstructed the street in violation of a city penal ordinance was proof of negligence.<sup>77</sup> The early commentary debated whether this development was appropriate.

70. *Id.* cmt. f.

71. *Id.* The comment says that the legislation does not have to aim only to promote safety. It is enough that avoiding the type of accident at issue is one of the statute’s objectives. *Id.*

72. *Id.* cmt. g. The comment notes that this analysis generally adds little to the legislative purpose analysis. *Id.* The Third Restatement recognizes that excused violations of a statute are not negligence per se. *Id.* § 15 (listing situations in which a statutory violation is excused). The comment explains that recognizing excuses prevents application of the negligence-per-se doctrine in many cases in which public officials would decide not to prosecute a technical violation of the law. *Id.* cmt. a.

73. See 3 FOWLER V. HARPER ET AL., *supra* note 30, § 17.6, at 617–18 (stating that the notion that a person who violates a statute should be held liable for any injury has “little currency”); *supra* text accompanying notes 49–52.

74. See *supra* text accompanying notes 66–69.

75. 1 SHEARMAN & REDFIELD, *supra* note 34, § 13, at 11.

76. 56 N.W. 914 (Wis. 1893).

77. *Id.* at 915. In some cases, however, the ordinances at issue provided that violators would be liable for harm that the violation caused. See *Toledo, Peoria & Warsaw Ry. Co. v. Deacon*, 63 Ill. 91, 93 (1872) (discussing ordinance regulating the speed of trains).



Malburn criticized the courts' failure to distinguish statutes and ordinances, arguing that state legislatures had a power to make laws regarding negligence and could not delegate that power to municipalities.<sup>78</sup> Thayer, however, argued that violations of ordinances and statutes should receive the same treatment because, in both cases, the state had spoken through a legislative body that had the authority to regulate the matter.<sup>79</sup> He argued that a court that approved the wrongful conduct would not show proper respect "for another branch of the government."<sup>80</sup> The First Restatement adopted this approach. While the provision on negligence per se referred to violations of a "legislative enactment,"<sup>81</sup> the comments referred to a "statute or ordinance."<sup>82</sup>

Administrative regulations became increasingly important in the years following the First Restatement, raising the question of what effect the violation of such a regulation would have in tort.<sup>83</sup> The 1941 revised edition of Shearman & Redfield's negligence treatise contained a section entitled "Rules and regulations" and noted that violation of administrative regulations was "some evidence" of negligence.<sup>84</sup> Professor Morris explored the issue later in the decade and argued that regulations generally "are deserving of respect as criteria of fault" because administrators are presumably experts who regulate in areas where legislators cannot act adequately.<sup>85</sup>

The later Restatements built on this foundation. The Second Restatement not only equated statutes and ordinances, but also reached violations of administrative regulations.<sup>86</sup> The negligence-per-se provision explicitly stated that courts could adopt the requirements of a "legislative enactment or an administrative regulation" as that of the reasonable person.<sup>87</sup> The Third Restatement draws on the Second Restatement and recognizes that violation of administrative regulations is generally

78. Malburn, *supra* note 9, at 219–20.

79. Thayer, *supra* note 9, at 324.

80. *Id.*

81. RESTATEMENT OF TORTS § 286 (1934).

82. *Id.* cmts. b & c. The illustrations and commentary accompanying the provision that explain when violations of legislative enactments would not impose liability also deal with both statutes and municipal ordinances. *Id.* § 288 illus. & cmts. on cls. (a), (b) & (c).

83. See Morris, *The Role of Administrative Safety Measures*, *supra* note 53.

84. SHEARMAN & REDFIELD, *A Treatise on the Law of Negligence* § 18, at 40 (Clarence S. Zipp ed. Rev. ed. 1941). The section cites predominately cases from New York, a state that has never equated statutes and administrative regulations for negligence-per-se purposes. See *infra* text accompanying notes 109, 114.

85. Morris, *The Role of Administrative Safety Measures*, *supra* note 53, at 144.

86. See RESTATEMENT (SECOND) OF TORTS § 286 & cmt. f (1965).

87. *Id.* §§ 286, 288B(1). The comments noted, however, that courts have tended to adopt administrative standards less frequently than those of legislative enactments. *Id.* § 288B cmt. on subsec. (1).

negligence per se.<sup>88</sup> Not all states, however, accept this conclusion. Several states find that violation of administrative regulations is not negligence per se, reasoning that only the state legislature can define the common law of torts.<sup>89</sup>

The Restatements and commentators have paid virtually no attention to the question of whether violations of federal law are negligence per se despite the fact that cases have found violations of federal law to be negligence per se since the earliest days of the doctrine. For example, the 1876 Alabama Supreme Court decision that found a violation of a federal law regulating the shipment of cotton negligence per se never suggested that it was relevant that a federal law was at issue.<sup>90</sup> An 1898 treatise asserted that the violation of a federal statute “may be made the basis of an action for negligence in a state court.”<sup>91</sup> The early articles, however, did not address the issue.

The First and Second Restatements did not explicitly address whether violations of federal statutes could be negligence per se, but the reporters appear not to have distinguished violations of state and federal statutes. The First Restatement referred to federal legislation in an illustration of the operation of the statutory-purpose limitation on negligence per se.<sup>92</sup> The Second Restatement also addressed the significance of a violation of federal law only in passing. Commentary on the effect of a violation of an administrative regulation referred to the likelihood that a violation of an Interstate Commerce Commission (“ICC”) regulation would be negligence per se.<sup>93</sup> The comment stated that courts consider the “character and importance” of the administrative body issuing a regulation as relevant factors in determining whether a violation of a regulation was negligence per se, making it more likely that a court would accord negligence-per-se

---

88. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 14, Reporters’ note, cmt. a (2010). The comment states that negligence per se most often applies to violations of state statutes, but “equally applies to regulations adopted by state administrative bodies.” *Id.* cmt. a.

89. *See infra* text accompanying notes 109–11. Similarly, not all states equate state laws and municipal ordinances in applying negligence per se law. *See infra* text accompanying notes 102–106.

90. *Grey’s Ex’r v. Mobile Trade Co.*, 55 Ala. 387, 403 (1876).

91. 1 SHEARMAN & REDFIELD, *supra* note 34, § 13, at 13. The cases which it cited for this proposition, however, dealt with violations of a federal statute requiring the inspection of steamboat boilers that explicitly provided that a person who violated the statute would be liable to the injured person. *Van Norden v. Robinson*, 45 Hun. 567, 569 (N.Y. Sup. Ct. 1887); *Carroll v. Staten Island R.R. Co.*, 58 N.Y. 126, 127 (1874).

92. RESTATEMENT OF TORTS § 286, cmt. on cl. c, illus. 5 (1934) (saying that a railroad employee could recover for injuries suffered in coupling cars not equipped with federally-mandated automatic couplers because the law aimed to prevent such harms).

93. RESTATEMENT (SECOND) OF TORTS § 288B cmt. on subsec. (2)(d) (1965).

effect to a violation of an ICC regulation than to one of a city fire commission.<sup>94</sup>

The Third Restatement explicitly states that violation of federal law is negligence per se. The commentary explains that the provision on negligence per se, which “most frequently applies to statutes adopted by state legislatures,” applies equally to “federal statutes as well as regulations promulgated by federal agencies.”<sup>95</sup> The Reporters’ Note goes on to state that “[t]he violation of federal statutes and regulations is commonly given negligence-per-se effect in state tort proceedings.”<sup>96</sup> The Reporters, however, found this development somewhat surprising, stating that “[o]ne might have expected that some state courts, concerned with protecting state lawmaking prerogatives, would have resisted allowing violation of federal regulations to be given the effect of negligence per se; but that resistance has not materialized.”<sup>97</sup>

### C. *The Need for Legislative Action*

The one point that has remained consistent through the development of the doctrine of negligence per se is that only violation of a standard that a governmental entity sets can be negligence per se. The idea that underlies the doctrine is that legislative bodies can define the contours of state tort law and substitute legislative standards for the common law reasonable person standard.<sup>98</sup>

The focus on governmental action explains why violations of private standards are not negligence per se. Industry custom and private safety codes may be relevant to determining whether a person acted reasonably, but they do not establish a binding standard of care.<sup>99</sup> Only bodies with

---

94. *Id.* The cases that the Reporter’s notes cited as authority for the proposition that violation of a regulation could be negligence per se all referred to violations of state agency regulations. *Id.* Reporter’s notes. In one of the cases, however, the defendant was liable because it violated a federal regulation which the state agency required it to follow. *See Rinehart v. Woodford Flying Serv.*, 9 S.E.2d 521, 522–23 (W. Va. 1940).

95. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 14 cmt. a (2010).

96. *Id.* Reporters’ Note cmt. a.

97. *Id.* The notes also do not attempt to square the use of federal law to determine what action is negligent per se with the idea that the doctrine rests on the rationale that the judgment of the legislature, “as the authoritative representative of the community” should supersede a jury’s decision. *Id.* cmt. c.

98. *Toll Bros. v. Considine*, 706 A.2d 493, 495 (Del. 1998) (“It has long been recognized that a legislative body may substitute its enactments for the general negligence standard of conduct required of a reasonable person.”). *See generally* DOBBS, *supra* note 17, at §§ 133–34 (discussing types of state statutes).

99. *See, e.g., City of Dothan v. Hardy*, 188 So. 264, 265 (Ala. 1939) (“[S]uch rules are not regulations having the force of law, whose violation is negligence per se.”); *Jorgensen v. Horton*, 206 N.W.2d 100, 102 (Iowa 1973) (en banc) (“Proof of compliance or

legislative authority can establish rules that bind all individuals.<sup>100</sup> As the Iowa Supreme Court explained, “rules of conduct that establish absolute standards of care, the violation of which is negligence per se, must be ordained by a state legislative body or an administrative agency regulating on a statewide basis under authority of the legislature.”<sup>101</sup>

The requirement of government action has led courts to ask which bodies speak for the state. Do municipal ordinances or administrative regulations sufficiently reflect state legislative judgment for violations to be negligence per se? The courts take different approaches here, with some taking a very rigid view of which bodies exercise state legislative authority. Some courts distinguish state statutes and local ordinances for negligence-per-se purposes.<sup>102</sup> New York courts, for instance, say that only the state legislature can change the common law and that it cannot delegate that power to a “subordinate rule-making body” such as a local government.<sup>103</sup> Other courts state that only a legislative body that has statewide authority

---

noncompliance with such safety code . . . is not conclusive upon the jury on the question of defendant’s due care.”); *Kent Vill. Assocs. Joint Venture v. Smith*, 657 A.2d 330, 337 (Md. Ct. Spec. App. 1995) (“[S]afety standards . . . may be admitted to show an accepted standard of care, the violation of which may be regarded as evidence of negligence.” (emphasis added)); *Hansen v. Abrasive Eng’g & Mfg., Inc.*, 856 P.2d 625, 628 (Ore. 1993) (“Although violation of an industry custom does not constitute negligence per se, it may be shown in order to establish whether a party has met a standard of care . . .”). See generally DOBBS, *supra* note 17, at §§ 163–64 (discussing relevance of custom to negligence claims); David G. Owen, *Proving Negligence in Modern Products Liability Litigation*, 36 ARIZ. ST. L.J. 1003, 1023 (2004) (acknowledging that “compliance or noncompliance with an industry standard of care” is admissible evidence, “but is rarely conclusive of a defendant’s negligence”); Daniel E. Feld, Annotation, *Admissibility in Evidence, On Issue of Negligence, of Codes or Standards of Safety Issued or Sponsored by Governmental Body or by Voluntary Association*, 58 A.L.R.3d 148 (1974 & 2010 Supp.).

100. *E.g.*, *Fanean v. Rite Aid Corp.*, 984 A.2d 812, 823–24 (Del. Super. Ct. 2009) (finding that violation of American Pharmaceutical Association standards is not negligence per se because the goal of the doctrine is to alleviate the burden of proving negligence when a person inflicts harm that the legislature aimed to prevent); *Griglione v. Martin*, 525 N.W.2d 810, 812 (Iowa 1994) (finding that violation of police operating procedures and private safety codes is not negligence per se); see also *Harwood v. Glacier Elec. Coop., Inc.*, 949 P.2d 651, 656 (Mont. 1997) (saying that violation of non-statutory standards can be evidence of negligence but is not negligence per se). Courts have also expressed concern that making a violation of policies that lack the force of law negligence per se would serve as a disincentive to the adoption of such policies. See *Flechsigg v. United States*, No. 92-5189, 1993 WL 47200, at \*3 (6th Cir. Feb. 23, 1993) (discussing Bureau of Prisons’ internal operating procedures).

101. *Griglione*, 525 N.W.2d at 812.

102. New York, for instance, has long distinguished state statutes from local ordinances for negligence-per-se purposes, finding that violations of local ordinances are only evidence of negligence. *Elliott v. City of New York*, 747 N.E.2d 760, 762 (N.Y. 2001) (citing *Martin v. Herzog*, 126 N.E. 814 (N.Y. 1920)); accord *Major v. Waverly & Ogden*, 165 N.E.2d 181, 184 (N.Y. 1960); see *supra* text accompanying notes 75–82 (discussing the early debates on the issue).

103. *Elliott*, 747 N.E.2d at 762 (quoting *Major*, 165 N.E.2d at 184); see also *Martin*, 126 N.E. at 815 (saying that courts have been reluctant to hold that regulations of subordinate officials “create rights of action beyond the specific penalties imposed”).

should establish state law.<sup>104</sup> Most courts now, however, equate state and local regulations in negligence-per-se litigation because in both cases the state has spoken through a legislative body with authority to act.<sup>105</sup> Municipalities have the authority to govern themselves and exercise legislative power on behalf of the state.<sup>106</sup>

The same questions concerning which bodies exercise state legislative authority underlie the debates on whether violation of administrative regulations should be negligence per se. Most courts equate the acts of a state agency with those of the legislature,<sup>107</sup> appearing to rely on the fact that agencies act at the legislature's direction.<sup>108</sup> Courts that reject this view argue that administrative regulations cannot set the standard of care because agencies do not exercise legislative authority. New York and Ohio courts hold that violation of administrative regulations is not negligence per se, explaining that only the legislature can change the common law of torts.<sup>109</sup> Indiana courts hold that violations of administrative regulations are not negligence per se because the legislature cannot delegate its

104. See *Griglione*, 525 N.W.2d at 812; *supra* text accompanying notes 100–01; see also *Baker v. White*, 65 S.W.2d 1022, 1024 (Ky. 1933) (finding that violation of city ordinance does not impose negligence per se because an ordinance is not a “statute” within the meaning of Kentucky’s law authorizing negligence per se).

105. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 14, Reporters’ Note cmt. a (2010); see also *Martin*, 126 N.E. at 815 (noting that the distinction between statutes and ordinances is subject to criticism because an ordinance, like a statute, “is a law within its sphere of operation”); *Schell v. Du Bois*, 113 N.E. 664, 667 (Ohio 1916) (saying that a municipal regulation has the same legal force as a law the legislature enacted and that a violation is negligence per se).

106. *Clinger v. Duncan*, 141 N.E.2d 156, 158 (Ohio 1957) (stating that violation of municipal ordinance is negligence per se); see also *Commercial Union Ins. Co. v. Frank Perrotti & Sons, Inc.*, 566 A.2d 431, 434–35 (Conn. App. Ct. 1989) (determining that violation of municipal ordinance can be negligence per se); *Brazier v. Phoenix Grp. Mgmt.*, 633 S.E.2d 354, 357 (Ga. Ct. App. 2006) (applying general negligence-per-se principles to violation of county ordinance); *Karle v. Kan. City, St. Joseph & Council Bluffs R.R.*, 55 Mo. 476, 481–83 (1874) (discussing city’s power to enact ordinance the violation of which was negligence per se); *Knisely v. Cmty. Traction Co.*, 180 N.E. 654, 655 (Ohio 1932) (explaining that violation of local ordinance is negligence per se).

107. *Griglione*, 525 N.W.2d at 812; *supra* text accompanying notes 100–01.

108. *Hyde v. Conn. Co.*, 188 A. 266, 268 (Conn. 1936) (explaining that public utility acted under an express delegation of authority to regulate safety and its orders have the force of law); *Toll Bros. v. Considine*, 706 A.2d 493, 497 (Del. 1998) (finding no valid distinction between a statutory rule and an administrative regulation “promulgated pursuant to legislative directive”) (quoting *Sammons v. Ridgeway*, 293 A.2d 547, 549–50 (Del. 1972)); *Griglione*, 525 N.W.2d at 812; see also *Ferrell v. Baxter*, 484 P.2d 250, 257 (Alaska 1971) (equating violation of statewide administrative traffic regulation adopted “pursuant to statutory authority” with violation of a statute); see *supra* text accompanying notes 100–01.

109. *Major v. Waverly & Ogden, Inc.*, 165 N.E.2d 181, 184 (N.Y. 1960) (“If the legislature desires to change the prevailing rules of the common law, it must do so itself and not by virtue of authority delegated to a subordinate rule-making body.”); *Chambers v. St. Mary’s Sch.*, 697 N.E.2d 198, 202 (Ohio 1998) (explaining that allowing a violation of administrative regulations to be negligence per se would give agencies the power to adopt rules altering proof requirements in litigation, a power that only the legislature has).

lawmaking power.<sup>110</sup> The law in these states reflects a determination that only the actions of the state legislature can change the state's common law.<sup>111</sup>

Courts have not, however, recognized the broader implications of the determination that only the state legislature can change the state's law of torts. Courts generally equate federal and state statutes for negligence-per-se purposes. This has led to jarring inconsistencies, if not outright contradictions, in the law. While the Iowa Supreme Court said in 1994 that only "a state legislative body or an administrative agency regulating on a statewide basis under authority of the legislature" can make rules that lead to negligence-per-se liability,<sup>112</sup> that court's later cases say that violations of federal Occupational Safety and Health Administration regulations can be evidence of negligence per se.<sup>113</sup> Similarly, New York courts refuse to find violations of administrative regulations negligence per se because only the state legislature can change the law of the state,<sup>114</sup> but courts applying

110. Zimmerman v. Moore, 441 N.E.2d 690, 696 (Ind. 1982) (quoting Kryder v. State, 15 N.E.2d 386, 389 (Ind. 1938)); Town of Kirklín v. Everman, 29 N.E.2d 206, 206 (Ind. 1940).

111. Elliott v. City of New York, 747 N.E.2d 760, 762 (N.Y. 2001) (quoting Major, 165 N.E.2d at 181). The New York cases rely on a 1925 decision, Schumer v. Caplin, which found that violation of an administrative provision was not negligence per se. 150 N.E. 139, 139 (N.Y. 1925). The Schumer court said that "[t]he Constitution of the state commits to the Legislature alone the power to enact a statute." *Id.* at 140. The New York cases also rely on state cases which argue that violation of municipal ordinances is not negligence per se. *See, e.g., Elliott*, 747 N.E.2d at 762; *Major*, 165 N.E.2d at 183–84.

The Ohio Supreme Court decision in *Chambers* explained that administrators are not elected and do not share the public accountability of legislators. 697 N.E.2d at 202. The administrative process also does not "involve the collaborative effort of elected officials" that characterizes the legislative process. *Id.* Ohio law, however, does not draw a distinction between violation of state and local ordinances for purposes of negligence-per-se liability. *See Clinger v. Duncan*, 141 N.E.2d 156, 158 (Ohio 1957) (stating that violation of municipal ordinance is negligence per se); *see also* 8 OHIO JUR. 3D, Automobiles and Other Vehicles § 463 (2007).

A related argument is that violation of administrative rules should not give rise to negligence-per-se liability because the electorate does not have the power to change the make-up of an administrative body. *Jackson v. Harsco Corp.*, 364 So. 2d 808, 810 (Fla. Dist. Ct. App. 1978) (Barkdull, J., concurring specially). Justice Barkdull also said that an agency should submit a rule for legislative approval if it wants the rule to have the force of a law and claimed that courts "should not, by judicial fiat, raise an administrative rule to equal dignity with a penal statute or ordinance." *Id.*

112. *Griglione*, 525 N.W.2d at 812.

113. *See Leaf v. Goodyear Tire & Rubber Co.*, 590 N.W.2d 525, 537 (Iowa 1999) (en banc); *Piper v. Jerry's Homes, Inc.*, No. 01-2018, 2003 WL 22199580, at \*4 (Iowa Ct. App. Sept. 24, 2003). These cases followed *Wiersgalla v. Garrett*, a pre-1994 case reaching this conclusion. 486 N.W.2d 290, 292–93 (Iowa 1992) (en banc).

114. *See Elliott*, 747 N.E.2d at 762; *Major*, 165 N.E.2d at 184; *see supra* text accompanying note 103.

New York law assume that violations of federal statutes are negligence per se under that state's law.<sup>115</sup>

This state of affairs leads to two related questions. First, how did courts come to accept that violations of federal statutes could be negligence per se? Second, why do courts continue to apply that rule despite the current focus on the institutional-comity rationale for the doctrine and recognition that only bodies that exercise state legislative authority can make rules the violation of which is negligence per se? The next sections answer those questions.

## II. WHICH LEGISLATURE ACTED? HOW COURTS CAME TO FIND THAT VIOLATIONS OF FEDERAL LAW ARE NEGLIGENCE PER SE

The cases agree that negligence-per-se liability rests on a violation of a standard that a government body established.<sup>116</sup> Courts reach this conclusion because only bodies with legislative authority can establish binding rules of conduct.<sup>117</sup> State courts recognize the importance of this principle in cases that debate whether municipalities or state administrative agencies exercise sufficient state legislative authority to make violations of their regulations negligence per se.<sup>118</sup> It is surprising, then, that courts do not discuss the question when federal law is at stake.

The federal government does not, and cannot, make state law.<sup>119</sup> Most courts, however, find no distinction between state and federal law in applying the doctrine of negligence per se. Remarkably few cases discuss the question of which legislature has acted and whether violations of federal law should render a person per se negligent in state tort cases. Most courts simply equate state and federal law without considering that so doing is inconsistent with the institutional comity rationale for the doctrine and need for a state legislative judgment.

### A. Courts Equated State and Federal Law in Pre-Erie Negligence-Per-Se Cases

State courts have found individuals who violate federal law negligent per se since the earliest days of the doctrine. An 1876 case found that a

---

115. *Ezagui v. Dow Chem. Corp.*, 598 F.2d 727, 733 (2d Cir. 1979); *Vitolo v. Dow Corning Corp.*, 634 N.Y.S.2d 362, 366 (N.Y. Sup. Ct. 1995). For more discussion of New York law and examples of similar inconsistencies in the law of other states, see *infra* Part IV.A.

116. *See supra* Part I.C.

117. *See supra* text accompanying notes 100–01.

118. *See supra* text accompanying notes 102–06 (municipal ordinances), 107–11 (administrative regulations).

119. *See supra* notes 17–20.

violation of federal laws regulating steamboats was negligence per se.<sup>120</sup> A line of cases in the 1890s and early 1900s found that shippers who violated a federal law regulating care of animals in interstate transit were per se negligent.<sup>121</sup> And cases in the early 1900s found that railroads that violated the Federal Safety Appliance Act (“FSAA”),<sup>122</sup> requiring automatic couplers and similar safety devices on trains in interstate commerce, were negligent per se.<sup>123</sup> These courts did not suggest that it was relevant that federal statutes were at stake.

An examination of these cases reveals that the decisions rest on legal theories that are no longer valid. Some cases used the outlaw approach and found the defendant negligent per se simply because he violated a statute.<sup>124</sup> Many of the cases rested on the idea that the existence of a right required the court to find a remedy; the courts believed that the plaintiff had a right to redress even if nothing in the statute provided for liability.<sup>125</sup> Additionally, the cases were decided before *Erie* and did not carefully distinguish state and federal law principles.<sup>126</sup> The cases show that courts in the pre-*Erie* era had a very different view of the judicial role than do current courts.<sup>127</sup>

Some early cases that found that defendants who violated federal law were negligent per se took the outlaw approach to negligence-per-se liability, holding the defendant liable simply because he violated a statute.

120. *Grey’s Ex’r v. Mobile Trade Co.*, 55 Ala. 387, 397 (1876); *see also* *Van Norden v. Robinson*, 45 Hun. 567, 574 (N.Y. Sup. Ct. 1887) (Bockes, J., concurring) (speaking in terms of nuisance).

121. *See, e.g.*, *Nashville, Chattanooga & St. Louis Ry. Co. v. Heggie*, 12 S.E. 363, 364 (Ga. 1890); *Atchison, Topeka & Santa Fe Ry. Co. v. Hill*, 171 S.W. 1028, 1031 (Tex. Civ. App. 1914); *Reynolds v. Great N. Ry. Co.*, 82 P. 161, 164–65 (Wash. 1905); *see infra* text accompanying notes 151–62 (discussing these cases).

122. Act of March 2, 1893, ch. 196, 27 Stat. 531 (recodified as amended, 49 U.S.C. § 20302 (Supp. 1995)).

123. *See, e.g.*, *Phila. & Reading Ry. Co. v. Winkler*, 56 A. 112, 114 (Del. 1903); *Austin v. Cent. of Ga. Ry. Co.*, 61 S.E. 998, 1000 (Ga. Ct. App. 1907); *Hairston v. U.S. Leather Co.*, 55 S.E. 847, 849 (N.C. 1906).

124. *See infra* text accompanying notes 128–34.

125. *See infra* text accompanying notes 135–45, 155–60.

126. *See infra* text accompanying notes 150, 165–68.

127. *See* John E. Noyes, *Implied Rights of Action and the Use and Misuse of Precedent*, 56 U. CIN. L. REV. 145, 164–65 (1987). Professor Noyes’s article explains that courts in the early 1900s had a much more expansive view of judicial power than do current courts and a different conception of federal common law. *Id.* He also emphasizes the importance of the “traditional ‘where there is a right, there is a remedy’ approach” to courts of the era. *Id.* at 168; *see also* Foy, *supra* note 63, at 524–69 (discussing the history of implied rights of action and the relationship between implied rights of action and negligence law); Thomas A. Lambert, *The Case Against Private Disparate Impact Suits*, 34 GA. L. REV. 1155, 1225–32 (2000); Susan J. Stabile, *The Role of Congressional Intent in Determining the Existence of Implied Private Rights of Action*, 71 NOTRE DAME L. REV. 861, 864–66 (1996).



This was the case with *Grey's Executor v. Mobile Trade Co.*,<sup>128</sup> which used a negligence-per-se analysis to find a steamboat company that violated a federal law requiring that shipments of cotton be covered with fire-proof material liable for cotton lost in a fire.<sup>129</sup> The court said that it was “the axiomatic truth” that every person who violated a statute was a wrongdoer and “negligent in the eye of the law.”<sup>130</sup> The court recognized that the purpose of the federal statute was to protect the safety of passengers, but did not consider the statutory purpose controlling.<sup>131</sup> It held that the company was liable solely because it violated a statute.<sup>132</sup>

That the court nowhere suggested that it was relevant that a federal statute was at issue is not surprising given the court's use of the outlaw theory of negligence-per-se liability and determination that the fact that the company was a wrongdoer justified liability.<sup>133</sup> If liability in tort is essentially a penalty for violating the law, it does not logically matter whether the law the wrongdoer violated was state or federal.<sup>134</sup>

Other decisions rested on the belief that beneficiaries of legislation had a right to recover in tort when a violation of the statute injured them, fearing that the statutory protection would otherwise become meaningless.<sup>135</sup> An 1899 case from the United States Court of Appeals for the Sixth Circuit illustrates this view.<sup>136</sup> The court said that a railroad's failure to comply

128. 55 Ala. 387, 397 (1876).

129. *Id.* at 402–03.

130. *Id.* at 403. This same language appears in a number of other early cases. See *Siemers v. Eisen*, 54 Cal. 418, 421 (1880); *Jetter v. N.Y. and Harlem R.R. Co.*, 2 Abb. Pr. 458, 464 (N.Y. 1865); *Peterson v. Standard Oil Co.*, 106 P. 337, 340 (Or. 1910).

131. The court explained that the law “clearly intended for the protection of travellers [sic].” *Grey's Executor*, 55 Ala. at 404.

132. *Id.* at 407. The Oregon Supreme Court took a similar approach in *Myrtle Point Transportation Co. v. Port of Coquille River*, 168 P. 625 (Or. 1917). The plaintiff's steamboats sustained damage when brush that defendant had cut and deposited in the river was swept downstream and carried away the boom to which the boats were tied. *Id.* at 625. The defendant had deposited the brush in violation of a federal statute prohibiting such deposits without a permit from the Secretary of War. *Id.* at 627. The statute aimed to prevent obstruction of navigation. *Id.* at 627–28. The court nonetheless found the defendant liable under a negligence-per-se analysis. *Id.* at 628. It said, citing cases dealing with violations of state statutes, that the court was “firmly committed to the doctrine that the violation of such a statute is negligence per se.” *Id.*

133. See *Morris*, *supra* note 9, at 475 (saying that the case rejects the statutory-purpose limitation on negligence-per-se liability and that the court found the defendant liable for failing to follow the law).

134. See *supra* text accompanying note 49.

135. See *Cincinnati, H. & D.R. Co. v. Van Horne*, 69 F. 139, 140 (6th Cir. 1895) (holding that the failure of a railway company to comply with a statute was negligence per se because the effect of the statute was to make a failure by a railroad company to comply with it negligence, as a matter of law.); see also *Lake Erie & W. Ry. Co. v. Craig*, 73 F. 642, 643 (6th Cir. 1896).

136. *Narramore v. Cleveland, Cincinnati, Chi. & St. Louis Ry. Co.*, 96 F. 298 (6th Cir. 1899).

with state railway-safety legislation was negligence per se.<sup>137</sup> The fact that the legislature provided for criminal penalties as one means of furthering its goal of protecting railroad employees from injury did not preclude the use of other, “more efficacious[] means” of securing compliance.<sup>138</sup> Unless the statute explicitly precluded other remedies, it follows that a person injured by the railroad’s breach of duty had a cause of action.<sup>139</sup> The court explained that the legislature passed the act to secure a right, and confining the remedy to criminal proceedings “would make the law not much more than a dead letter.”<sup>140</sup>

The United States Supreme Court built on that reasoning in *Texas & Pacific Railway Co. v. Rigsby*,<sup>141</sup> a case recognizing that a railroad employee could sue his employer to recover for injuries attributable to the railroad’s violation of the FSAA.<sup>142</sup> The Court explained that disregard of the statute was a “wrongful act,” and that the common law gave the person for whose benefit the statute was enacted a right to recover from the wrongdoer.<sup>143</sup> “This is but an application of the maxim, *Ubi jus ibi remedium*.”<sup>144</sup> The Court went on to explain that the statute’s provision stating that the injured employee could not be deemed to have assumed the risk made “[t]he inference of a private right of action . . . irresistible.”<sup>145</sup>

---

137. *Id.* at 300.

138. *Id.*

139. *Id.*

140. *Id.* at 301–02.

141. 241 U.S. 33 (1916).

142. Act of March 2, 1893, ch. 196, § 8, 27 Stat. 531; *see supra* notes 122–23.

143. 241 U.S. at 39.

144. *Id.* at 39–40. The phrase “*ubi jus, ibi remedium*” means “where there is a right, there is a remedy.” *Kiyemba v. Obama*, 555 F.3d 1022, 1027 (D.C. Cir. 2009). *See generally* Tracy A. Thomas, *Ubi Jus, Ibi Remedium: The Fundamental Right to a Remedy Under Due Process*, 41 SAN DIEGO L. REV. 1633 (2004).

A case decided some thirty years before *Rigsby*, *Hayes v. Michigan Central Railroad Co.*, used similar reasoning to find that a child who was injured when he strayed onto train tracks had a claim against the railroad that did not fence the tracks in accordance with a city ordinance. 111 U.S. 228 (1884). The Court said that the railroad’s breach of its duty to fence was negligence, “and each person specially injured by the breach of the obligation is entitled to his individual compensation.” *Id.* at 240.

145. *Rigsby*, 241 U.S. at 40. Professor Noyes’s extensive discussion of *Rigsby* argues that the reference to inferring a private right of action did not suggest that the Court believed that it was dealing “with an implied right of action case in any modern sense[.]” saying that the legal community did not give much thought to implied rights of action until the 1960s. Noyes, *supra* note 127, at 189–90. For another discussion of the importance of *Rigsby* in the developing law, *see* Foy, *supra* note 63, at 552–54.

The Supreme Court debated the meaning of *Rigsby* in *Cannon v. University of Chicago*, one of the major decisions establishing modern implied-right-of-action analysis. 441 U.S. 677 (1979). The majority treated *Rigsby* as an implied-right-of-action case. *Id.* at 689. Justice Powell argued in dissent, however, that the *Rigsby* Court was creating substantive liability standards for a common-law negligence claim. *Id.* at 732 (Powell, J., dissenting).

Courts following *Rigsby* referred to liability for violating the statute as negligence per se. The Court used negligence-per-se language to describe FSAA claims in a case decided the year after *Rigsby*.<sup>146</sup> Numerous state cases of the era said that violation of the FSAA was negligence per se.<sup>147</sup>

One possible explanation for the state court decisions finding violations of the FSAA to be negligence per se is that the courts believed that the Act's exclusion of the assumption-of-the-risk defense strongly implied that Congress anticipated that the injured employee could sue in tort.<sup>148</sup> State courts of the pre-*Erie* era, however, found violations of federal law to be negligence per se even when there was no indication that Congress intended for recovery in tort.<sup>149</sup> Cases of the era often did not clearly distinguish whether state or federal law governed a case.<sup>150</sup>

---

Justice Stevens cited both *Rigsby* and *Hayes* in discussing 1890 law in his opinion in another modern implied-right-of-action case, *California v. Sierra Club*, 451 U.S. 287 (1981) (Stevens, J., concurring). He explained that the implication of private rights of action was common at the time and said that members of Congress in 1890 would have assumed that courts would "follow the ancient maxim 'ubi jus, ibi remedium' and imply a private right of action." *Id.* at 300. He explained that treatises of the era supported that position. *See id.* at 300 n.2 (quoting THOMAS COOLEY, *THE LAW OF TORTS* 790 (2d ed. 1888) (saying that, when a statute imposes a duty to benefit individuals and a breach of the duty injures an individual, the common law "will supply a remedy, if the statute gives none"))).

146. *N.Y. Cent. R.R. Co. v. White*, 243 U.S. 188, 198 (1917); *see Noyes*, *supra* note 127, at 168.

147. *See, e.g.*, *Phila. & Reading Ry. Co. v. Winkler*, 56 A. 112, 114 (Del. 1903); *Austin v. Cent. of Ga. Ry. Co.*, 61 S.E. 998, 1000 (Ga. Ct. App. 1907); *Hairston v. U.S. Leather Co.*, 55 S.E. 847, 848–49 (N.C. 1906); *see also McAlester-Edwards Coal Co. v. Hoffar*, 166 P. 740, 742 (Okla. 1917) (*per curiam*) (referring to FSAA in finding that coal company that violated state mining law was negligent per se).

148. *See* 3 FOWLER V. HARPER ET AL., *supra* note 30, at 614 (finding that the provision was a concrete indication that Congress intended that a breach of the statute would lead to civil recovery). A treatise of the era furthered the confusion, saying that violations of federal statutes "may be made the basis of an action for negligence in a state court," but citing as support cases dealing with violations of a federal statute that explicitly provided that a person who violated the statute would be liable to the injured person. 1 SHEARMAN & REDFIELD, *supra* note 34, § 13, at 13. The treatise cited *Van Norden v. Robinson*, 45 Hun. 567 (N.Y. Sup. Ct. 1887), and *Carroll v. Staten Island R.R. Co.*, 55 N.Y. 126 (1874). Both cases dealt with a federal statute requiring the inspection of steamboat boilers which provided for liability.

149. *See infra* text accompanying notes 155–60.

150. For example, the Supreme Court in 1913 reversed a state court decision saying that violation of a federal railroad safety statute was negligence per se, holding that the question of liability was a matter of federal law. *St. Louis, Iron Mountain & S. Ry. Co. v. McWhirter*, 229 U.S. 265, 278 (1913). The case involved a federal law which limited the number of hours railroad employees could work. *Id.* at 266–67. The Kentucky Court of Appeals held that the employer was strictly liable for violating the law without regard to causation, saying that a violation of a statutory duty was negligence per se. *St. Louis, Iron Mountain & S. Ry. Co. v. McWhirter*, 140 S.W. 672, 674 (Ky. Ct. App. 1911). The Supreme Court reversed, saying that Congress did not intend "to subject carriers to the extreme liability of insurers." *McWhirter*, 229 U.S. at 280; *see also Deserant v. Cerillos Coal R.R. Co.*, 178 U.S. 409 (1900) (reversing the decision of the Supreme Court of the

The line of cases dealing with violations of the federal law regulating the interstate shipment of animals<sup>151</sup> reflects these early trends: the reliance on an outlaw theory of negligence per se, belief that the existence of a right requires a remedy, and a failure clearly to distinguish state from federal law. Many cases that found a violation of the Twenty-Eight Hour law negligence per se used the outlaw approach to liability. The Supreme Court of Georgia, for instance, said that a shipper who violated the law was per se negligent and liable for the diminished value of the horses mistreated in shipment even though the statute was anti-cruelty legislation.<sup>152</sup> Other cases found liability despite determining that the only statutory purposes were to protect animals or to provide a safe food supply.<sup>153</sup> Only one of the cases suggested that a purpose of the statute was to protect owners.<sup>154</sup>

Many cases imposing liability for violations of the Twenty-Eight Hour Law appeared to follow the “where there is a right there is a remedy” approach and believed that the violation of legislation should lead to liability. This reasoning is clearest in the Virginia Supreme Court of Appeals’ decision in *Chesapeake & Ohio Railway Co. v. American Exchange Bank*.<sup>155</sup> The court denied that the suit asked it to enforce another sovereign’s penal laws, saying the claim was “merely a civil action to recover damages for injuries” the plaintiff suffered by reason of defendant’s failure to perform a congressionally-imposed duty.<sup>156</sup> The fact that the legislation provided a criminal penalty for violations did not prevent a claim for damages.<sup>157</sup> The statute imposed a duty and the right to recover for a breach was “unquestionable.”<sup>158</sup> The court said that violation

---

Territory of New Mexico, finding that the jury instructions in a case dealing with liability for violating federal mine-safety legislation were inconsistent with Congressional intent).

151. The federal statute, which some cases called the Twenty-Eight Hour law, generally prohibited railroad companies that shipped animals interstate from keeping them confined for more than twenty-eight hours without unloading them for rest, food, and water; the statute imposed a penalty for violations. Act of June 29, 1906, ch. 3594, 34 Stat. 607, Rev. St. §§ 4386–4390; see *Atchison, Topeka & Santa Fe Ry. Co. v. Hill*, 171 S.W. 1028, 1030 (Tex. Civ. App. 1914) (discussing the legislation).

152. *Nashville, Chattanooga & St. Louis Ry. Co. v. Heggie*, 12 S.E. 363, 364 (Ga. 1890); accord *Atchison*, 171 S.W. at 1030.

153. *Brockway v. Am. Exp. Co.*, 47 N.E. 87, 87 (Mass. 1897) (saying that statute was to prevent cruelty “as well as danger to the public health, from inducing diseases in animals which are to be used for food”); *St. Louis & S.F. Ry. Co. v. Piburn*, 120 P. 923, 926–27 (Okla. 1911) (noting difference of opinion over whether the statute was anti-cruelty legislation or legislation to provide a healthful food supply).

154. *Chesapeake & Ohio Ry. Co. v. Am. Exch. Bank*, 23 S.E. 935, 937 (Va. 1896) (calling the statute anti-cruelty legislation but then noting that a purpose of the legislation was to prevent losses to the owners of animals in interstate transit).

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* (quoting THOMAS COOLEY, *THE LAW OF TORTS* 654 (1st ed. 1879)).

of a federal statute could form the basis of a state-court negligence action regardless of whether the statute provided that the violator would be liable for damages.<sup>159</sup> Other state court opinions similarly reflected a belief that tort liability followed directly from a violation of the federal law.<sup>160</sup>

Another factor that appeared to influence early state court decisions that found violations of federal statutes negligence per se was a belief that the supremacy of federal law required that the state court provide redress. The South Carolina Supreme Court took that approach in a Twenty-Eight Hour Law case, saying the federal statute was “obviously controlling” and “displaces any state law on the subject.”<sup>161</sup> The court explained that, given the absence of any federal court decisions dealing with liability under the federal law, “we must” give the statute the same effect a similar state statute regulating animals in intrastate shipment would have.<sup>162</sup> Similarly, a 1931 Ohio decision found that a violation of an ICC regulation was negligence per se, assuming that the federal standard should govern because federal law has greater controlling authority than state law.<sup>163</sup> The court said that an ICC rule “has an even greater binding force and effect than an act of the state Legislature.”<sup>164</sup>

Just as it is unsurprising that state courts would give federal statutes negligence-per-se effect under an outlaw theory, it is unsurprising that courts would give federal statutes that effect if they did not clearly distinguish state and federal law. Federal courts were free to create substantive standards of liability in common-law negligence actions in the days before *Erie*.<sup>165</sup> The idea that “where there is a right, there is a

159. *Id.* The court relied on Supreme Court authority in addition to treatises on torts, a Georgia Twenty-Eight Hour Law case, and *Grey's Executor*. The court quoted a passage from *Dennick v. Railroad Co.*, 103 U.S. 11 (1880), a wrongful death case. The *Dennick* Court said that the nature of a remedy did not depend on whether the claim was based on common law or a statute. *Id.* at 12–13. The Court said that when “a right of action has become fixed and a legal liability incurred, that liability may be enforced” in any court of competent jurisdiction. *Id.* at 18. The Virginia court also cited the Supreme Court decision in *Hayes v. Michigan Central Railroad Co.*, 111 U.S. 228 (1884), discussed *supra* note 144.

160. The Oklahoma Supreme Court said that the act gives a shipper whose animals are injured “a cause of action enforceable in a state court.” *St. Louis and S.F. R.R. Co. v. Piburn*, 120 P. 923, 923 (Okla. 1911); *see also* *S. Ry. Co. v. Proctor*, 57 So. 513, 516 (Ala. Ct. App. 1911) (saying that “[u]nder the statute,” a carrier cannot relieve itself of the obligations by contract and “its failure to perform the duty imposed upon it by the statute is negligence per se”).

161. *Gilliland & Gaffney v. S. Ry. Co.*, 67 S.E. 20, 23 (S.C. 1910).

162. *Id.*

163. *Pa. R.R. Co. v. Moses*, 182 N.E. 40, 42 (Ohio Ct. App. 1931).

164. *Id.*; *see supra* text accompanying notes 92–94 (explaining that the Second Restatement adopts this reasoning).

165. *See Cannon v. Univ. of Chi.*, 441 U.S. 677, 731–32 (1979) (Powell, J., dissenting) (making this point to explain the Supreme Court’s decision in *Rigsby*); *see also* *Noyes*,

remedy” influenced both state and federal courts to provide redress for statutory violations.<sup>166</sup> The modern division between state tort claims and implied rights of action had yet to develop.<sup>167</sup> And courts that failed clearly to differentiate between state and federal law readily looked to precedent involving the federal statute at issue, instead of state tort law, in deciding whether a violation was negligence per se.<sup>168</sup> Perhaps given this development of the law, it is not that surprising that modern courts continue to use much the same approach in the modern era without realizing that the legal landscape is now very different.

*B. Courts Used Negligence Per Se to Fill Gaps in Federal Statutory Protection in the Years After Erie*

Three factors are largely responsible for the post-*Erie* cases that find that violations of federal law are negligence per se as a matter of state tort law. First, courts deciding claims under federal employee-compensation statutes developed a body of law saying that violations of federal statutes were negligence per se. Second, courts suggested that plaintiffs who fell through gaps in the federal statutes’ coverage and could not recover under those federal statutes could rely on state law to obtain compensation. Third, the Supreme Court’s increasingly restrictive approach to implied private rights of action led plaintiffs to seek recovery for violations of federal law using common-law tort theories of liability.

The modern cases finding that violations of federal law are negligence per se largely stem from the FSAA cases. Congress acted to supplement the FSAA in 1908, enacting the Federal Employers’ Liability Act (“FELA”).<sup>169</sup> The FELA gave employees of interstate carriers who were employed in interstate commerce the right to recover for injuries that the

---

*supra* note 127, at 156–57, 170–81 (discussing *Rigsby* and pre-*Erie* law); *supra* note 144 (discussing the Court’s treatment of *Rigsby*).

166. See *supra* text accompanying notes 135–45 155–60; Noyes, *supra* note 127, at 168 (noting that many current discussions of *Rigsby* downplay or ignore the “where there is a right there is a remedy” approach).

167. See *Cannon*, 441 U.S. at 732–39 (Powell, J., dissenting); Noyes, *supra* note 127, at 150–54, 188–91; Stabile, *supra* note 127, at 864–66.

168. The state cases dealing with the effect of violations of the Twenty-Eight Hour Law looked to past cases dealing with violations of the law, not suggesting that differences in state law might be relevant. See, e.g., *St. Louis & S.F. Ry. Co. v. Piburn*, 120 P. 923, 925 (Okla. 1911) (citing cases from Georgia, Virginia, Massachusetts, and Nebraska); *Chesapeake & Ohio Ry. Co. v. Am. Exch. Bank*, 23 S.E. 935, 938 (Va. 1896) (citing a Georgia case); *Burns v. Chicago, Milwaukee & St. Paul Ry. Co.*, 80 N.W. 927, 929 (Wis. 1899) (citing Massachusetts and Virginia cases). The Georgia case to which all the other cases refer, *Nashville, Chattanooga & St. Louis Railway Co. v. Heggie*, 12 S.E. 363, 364 (Ga. 1890), cited no authority for its negligence-per-se holding.

169. Act of April 22, 1908, ch. 149, 35 Stat. 65.

employer's violation of the FSAA caused.<sup>170</sup> Congress's action in the area led the Supreme Court to focus on specific legislation as the source of a right to recover for violations of a federal statute instead of assuming that the existence of legislation provided a remedy.<sup>171</sup>

The key case in this development, the Supreme Court's 1934 decision in *Moore v. Chesapeake & Ohio Railway*,<sup>172</sup> came shortly before *Erie*. *Moore* reversed *Rigsby* to the extent that the case authorized an implied right of action under the FSAA.<sup>173</sup> It was now clear that FELA provided the federal remedy for the FSAA violation. The Court explained that Congress intended that courts deciding FELA claims would treat FSAA violations as negligence, "what is sometimes called negligence per se."<sup>174</sup> The employee could bring the FELA claim in state court.<sup>175</sup> Additionally, FELA did not preclude a state from treating FSAA violations as negligence per se under state law.<sup>176</sup> The FSAA established the railroad's duty, but the right to recover arose through the common law or FELA.<sup>177</sup>

*Moore* was significant for three reasons. First, it established that state courts hearing FELA claims would treat violations of a federal statute as negligence per se. Second, it said that states could do the same under state law. Third, it signaled that courts could no longer assume that the existence of a right implied a remedy. The right to recover came either from congressional action or the common law.

FELA and other federal remedial statutes that followed it gave rise to a number of state and federal court decisions finding that individuals who violated federal law were negligent per se. FELA provides a federal cause of action for railroad employees who were injured or killed by the railroad's negligence.<sup>178</sup> The Merchant Marine Act (or "Jones Act")<sup>179</sup> provides a parallel federal right of action for the wrongful death of a

170. *Moore v. Chesapeake & Ohio Ry. Co.*, 291 U.S. 205, 209–11 (1934).

171. See Lambert, *supra* note 127, at 1227 (saying that the judiciary became more passive as the legislature became more active).

172. 291 U.S. 205 (1934); see Foy, *supra* note 63, at 554–56 (explaining that *Moore* came "on the eve of the revolution in federal law" and marked a turning point away from the traditional approach to viewing the federal courts' powers); Stabile, *supra* note 127, at 865 (noting that a more restrictive view of implied rights of action surfaced with *Moore*).

173. *Moore*, 291 U.S. at 214.

174. *Id.* at 210 (quoting *San Antonio & Aransas Pass Ry. Co. v. Wagner*, 241 U.S. 476, 484 (1916)).

175. *Id.* at 216.

176. *Id.* at 212–15.

177. *Id.* at 215–16.

178. *Pratico v. Portland Terminal Co.*, 783 F.2d 255, 262 (1st Cir. 1985) (discussing FELA); see *supra* text accompanying notes 169–70.

179. Merchant Marine Act ("Jones Act"), ch. 250, 41 Stat. 988 (1920) (current version at 46 U.S.C. § 30104 (2006)).

seaman.<sup>180</sup> These statutes spoke in general terms to provide liberal recovery, allowing courts to fashion remedies for injured employees in a manner similar to the development of common-law tort remedies.<sup>181</sup>

Courts have often used negligence per se to hold defendants in FELA and Jones Act cases liable for violating various federal statutes and regulations. The court in *Pratico v. Portland Terminal Co.*,<sup>182</sup> for instance, found that a FELA plaintiff could recover for the defendant's violation of the Occupational Safety and Health Act ("OSHA") under a negligence-per-se theory.<sup>183</sup> The court relied on *Reyes v. Vantage Steamship Co.*,<sup>184</sup> a Jones Act case in which the United States Court of Appeals for the Fifth Circuit found that failure to follow a Coast Guard regulation was negligence per se.<sup>185</sup> Courts also found that violations of federal safety regulations were negligence per se in actions under the federal Longshore and Harbor Workers' Compensation Act.<sup>186</sup>

The federal statutes, however, provide remedies to only a limited class of individuals. The United States Court of Appeals for the Second Circuit explained how state law could, post-*Erie*, fill gaps in federal protection in *Jacobson v. New York, New Haven & Hartford Railroad*.<sup>187</sup> The plaintiff and her intestate were victims of an accident while passengers on defendant's train. The plaintiff alleged that the train's faulty brakes and couplings, a violation of the FSAA, caused the harm.<sup>188</sup> The court explained that the FSAA did not confer a federal cause of action.<sup>189</sup> While FELA gave railroad employees in interstate commerce a right to recover when an FSAA violation caused harm, the class of individuals that the FSAA protected was much broader and included passengers.<sup>190</sup> While Congress did not give passengers a right to recover for an FSAA violation,

---

180. *Kernan v. Am. Dredging Co.*, 355 U.S. 426, 429 (1958).

181. *Id.* at 432.

182. 783 F.2d 255 (1st Cir. 1985).

183. *Id.* at 263. The court relied on the Supreme Court's decision in *Kernan* to explain that courts should interpret FELA to provide for liberal recovery and explained that the *Kernan* view of the statute meant that new safety statutes such as OSHA should receive the same treatment as established statutes. *Id.* at 263-64.

184. 609 F.2d 140 (5th Cir. 1980), *aff'd*, 672 F.2d 556 (5th Cir. 1982).

185. *Id.* at 143.

186. *See Manning v. M/V "Sea Road"*, 417 F.2d 603, 607-09 (5th Cir. 1969) (discussing 33 U.S.C. § 901).

187. 206 F.2d 153, 153 (1st Cir. 1953), *aff'd per curiam*, 347 U.S. 909 (1954).

188. *Id.* at 154. The plaintiff alleged the FSAA violation in an attempt to show that the claim arose under federal law, giving rise to federal jurisdiction. *Id.* The court ultimately disagreed with that assertion. *Id.* at 158.

189. *Id.* at 155.

190. *Id.* at 155-56.



the Second Circuit said that courts could do so as a matter of common law.<sup>191</sup>

The *Jacobson* court explained that many courts found violations of penal statutes negligence per se.<sup>192</sup> It said that “there would be nothing incongruous” if a state, as a matter of state tort law, were to allow injured passengers to recover from a railroad that violated a penal law Congress enacted in part for the passengers’ protection.<sup>193</sup> State courts “might well give the same significance to a breach of a penal act of Congress that they would give to a breach of a similar act of their state legislature. But the point is that the extent and conditions of any such liability would be a matter of local law.”<sup>194</sup>

The need for plaintiffs to rely on state tort law to fill gaps in federal statutory coverage became increasingly evident as the Supreme Court began to tighten the standards for finding an implied right of action under federal law. The Court became reluctant to imply rights of action after *Erie* and has become increasingly less hospitable to the idea.<sup>195</sup> A court now must find that Congress intended the private claim.<sup>196</sup> Individuals who suffer injury at the hands of a person who has violated federal law must bring state claims if the federal statutes do not provide a private right of action. From a plaintiff’s standpoint, a state negligence-per-se claim and a federal cause of action can accomplish the same goal.<sup>197</sup>

The *Jacobson* opinion explains why a state court might want to treat a violation of a federal statute as negligence per se. The court might give the violation of the federal law the effect it would give a violation of a state law to provide an avenue of redress to an injured person who has no federal right to recover.<sup>198</sup> The question, the court emphasizes, is one of state law.<sup>199</sup> While state courts consistently take the approach *Jacobson* suggested in finding violations of federal law negligence per se, very few

191. *Id.* at 156.

192. *Id.* at 156–57 (explaining that *Rigsby* supported its analysis).

193. *Id.* at 158.

194. *Id.*

195. See Lambert, *supra* note 127, at 1228–32. See generally Pauline E. Calande, *State Incorporation of Federal Law: A Response to the Demise of Implied Federal Rights of Action*, 94 YALE L.J. 1144, 1163 (1985).

196. Alexander v. Sandoval, 532 U.S. 275, 286–87 (2001); see also California v. Sierra Club, 451 U.S. 287, 292–97 (1981); Transamerica Mortg. Advisors, Inc. v. Lewis, 444 U.S. 11, 15–18 (1979); Touche Ross & Co. v. Redington, 442 U.S. 560, 568 (1979).

197. “Although the negligence per se claim is not the same as an implied cause of action—in the former the cause of action is a state tort claim, whereas the latter is a federal statutory cause of action—the two claims get the plaintiff to the same place.” Stabile, *supra* note 127, at 865 n.19; see also Calande, *supra* note 195, at 1144–45.

198. *Jacobson*, 206 F.2d at 158.

199. *Id.*

take the first step and ask if that approach is appropriate as a matter of state tort law. Courts instead tend to focus on the federal statutes involved in the case and treat the negligence-per-se question as a question of federal law.<sup>200</sup>

Many courts in the years after *Jacobson* took this step by relying on cases that decided negligence-per-se questions in cases which arose under federal employee-compensation laws. Courts deciding a state-law claim in which the plaintiff alleged that a violation of OSHA was negligence per se, for instance, could look to FELA decisions discussing the issue instead of state tort cases.<sup>201</sup> Both state courts and federal courts sitting in diversity turned to FELA and Jones Act cases in determining whether violations of federal law were negligence per se. In so doing, they ignored the state law underpinnings of negligence per se.

The Fifth Circuit's decision in *Lowe v. General Motors Corp.*<sup>202</sup> provides an excellent illustration of the approach. The case was a wrongful death case under Alabama law in which the plaintiffs argued that General Motors' violation of the Motor Vehicle Safety Act ("MVSA"), a federal law, caused the accident.<sup>203</sup> The district court found that the claim erroneously sought to imply a private right of action under the federal law.<sup>204</sup> The Fifth Circuit reversed, emphasizing that the case was a state law negligence claim.<sup>205</sup>

The Fifth Circuit's determination that General Motors could be liable under a negligence-per-se theory took two steps. The court first said it had "often held that violation of a Federal law or regulation can be evidence of negligence and even evidence of negligence per se."<sup>206</sup> It cited *Reyes* and *Manning*, cases finding violations of federal regulations negligence per se in claims under two federal compensation statutes, the Jones Act and the

---

200. The Illinois Supreme Court's decision in *Boyer v. Atchison, Topeka & Santa Fe Railway Co.*, 230 N.E.2d 173 (Ill. 1967), provides an illustration. The court relied on *Jacobson* in finding that a violation of the FSAA gave rise to liability under a negligence-per-se theory. The court said that it looked to federal decisions to interpret the Act, *id.* at 176, and that the Act "is as much a part of the law and policy of the States as are their own laws enacted by the State legislatures," *id.* at 177. The court went on to explain that it is common for a plaintiff to rest a civil claim on a violation of a penal statute and said that violation of a statute enacted to benefit a class of individuals can give rise to civil liability. *Id.* (citing two state negligence cases and the Second Restatement's provision on negligence per se); see also *Armstrong v. Kan. City S. Ry. Co.*, Civ. A. No. 91-2465-V, 1992 WL 105063, at \*2 (D. Kan. April 22, 1992) (relying on *Jacobson* in finding a violation of the FSAA can give rise to negligence-per-se liability under state law).

201. See *infra* text accompanying notes 246-57 (discussing cases that debate whether violations of OSHA are negligence per se).

202. 624 F.2d 1373 (5th Cir. 1980).

203. *Id.* at 1375. The plaintiffs filed the action in state court and General Motors removed it to federal court because of diversity. *Id.* at 1379.

204. *Id.* at 1375-76, 1378.

205. *Id.* at 1379.

206. *Id.*

Longshore and Harbor Workers' Compensation Act.<sup>207</sup> It then turned to Alabama law and the standards that state's courts set for application of negligence per se.<sup>208</sup> The Fifth Circuit concluded that, under this precedent, "violation of the MVSA is . . . negligence per se in Alabama."<sup>209</sup>

There are many shortcomings in the *Lowe* court's analysis. The court reached the conclusion that violation of a federal law was evidence of negligence per se in Alabama without focusing on the issue at hand. The *Lowe* court did not cite any Alabama case that held that a violation of federal law was negligence per se. The court relied only on circuit cases dealing with federal claims<sup>210</sup> and a state case dealing with violations of state law.<sup>211</sup> There was no explanation of why it was proper to assume that Alabama courts would have found a violation of a federal law such as the MVSA to be negligence per se as a matter of state tort law.<sup>212</sup>

### III. WHY COURTS CONTINUE TO FIND THAT VIOLATIONS OF FEDERAL LAW ARE NEGLIGENCE PER SE

The *Lowe* decision illustrates how modern courts find that violations of federal law are negligence per se under state tort law. The *Lowe* decision itself has been influential; cases and secondary sources cite it uncritically. The Alabama Supreme Court,<sup>213</sup> federal courts,<sup>214</sup> and secondary sources<sup>215</sup>

207. *Id.*; see *supra* notes 184–86 and accompanying text (discussing *Reyes* and *Manning*).

208. *Lowe*, 624 F.2d at 1380 (discussing *Fox v. Bartholf*, 374 So. 2d 294, 295–96 (Ala. 1979)).

209. *Id.*

210. *Id.* at 1379.

211. The only state case that the court discussed was *Fox*, which dealt with a violation of state traffic laws.

212. The court did not cite *Grey's Executor* or discuss whether that case had continued validity. See *supra* text accompanying notes 128–32 (discussing *Grey's Executor*). The court did cite two cases which stated that violations of federal air regulations were negligence per se under Alabama law: *Todd v. United States*, 384 F. Supp. 1284, 1294 (M.D. Fla. 1975) *aff'd*, 553 F.2d 384 (5th Cir. 1977), and *Fla. Freight Terminals, Inc. v. Cabanas*, 354 So. 2d 1222, 1225 (Fla. Dist. Ct. App. 1978). The court cited these cases in connection with a statement that the fact that federal law was involved did not make the claim federal, not as authority for the proposition that violation of the MVSA was negligence per se in Alabama. *Lowe*, 624 F.2d at 1379–80. Additionally, both the *Todd* and *Florida Freight Terminals* cases evidence the same errors in logic as *Lowe*; neither case provided direct authority for the proposition that violation of federal law is negligence per se in Alabama. See *infra* text accompanying notes 233–44 (discussing the cases).

213. See *Allen v. Delchamps*, 624 So. 2d 1065, 1068 (Ala. 1993) (citing *Lowe* to support conclusion that claim alleging violations of the federal Food, Drug, and Cosmetics Act could go to jury on negligence-per-se theory).

214. See *Stryker v. City of Atlanta*, 738 F. Supp. 1423, 1428 n.6 (N.D. Ga. 1990) (calling *Lowe* "binding authority" for the proposition that "violations of federal laws or regulations can provide evidence of . . . negligence per se"); *Full Serv. Sys. v. Innovative Hospitality Sys.*, No. 1:06cv113-HSO-JMR, 2007 WL 4370309, at \*2–3

have all cited *Lowe* as authority for the proposition that federal statutory violations are negligence per se. Courts continue to find that violations of federal law are negligence per se as a matter of state law by making the same errors that the *Lowe* court, and courts that rely on it, have made. Both state courts and federal courts sitting in diversity assume that violations of federal law are negligence per se and apply the doctrine if they would do so were a state law at issue.<sup>216</sup>

The assumption that violations of a federal law are negligence per se leads to a further problem. As more courts find that violation of a federal law or regulation is negligence per se, state and federal courts begin treating cases dealing with violations of that law as precedent.<sup>217</sup> The courts begin to treat the negligence-per-se question as one of federal law, seemingly forgetting the fact that state law governs state negligence actions.

A. *Misuse of Precedent Has Led Courts to Find that Violations of Federal Law Are Negligence Per Se*

The *Lowe* court found that violations of federal law were negligence per se in Alabama without citing any authority for the proposition or analyzing why that was a proper assumption regarding state law. The situation is not unique. The proposition that violations of federal law are negligence per se can become an accepted aspect of a state's law without any court explicitly analyzing whether federal law should provide the standard for state tort cases.

Wisconsin law provides an example. The Wisconsin Supreme Court in *Locicero v. Interpace Corp.*<sup>218</sup> found that violation of state and federal highway safety regulations was negligence per se.<sup>219</sup> The court stated that violation of a safety statute was ordinarily negligence per se in Wisconsin and applied that principle to a federal safety regulation without analysis.<sup>220</sup>

---

(S.D. Miss. Dec. 10, 2007) (relying on *Lowe* as authority for proposition that plaintiff could bring negligence action challenging violation of a federal statute that did not provide a private right of action).

215. See 57A AM. JUR. 2D *Negligence* § 755 (2004) (citing *Lowe* as support for the statement that violation of federal regulations could be evidence of negligence per se).

216. See *infra* text accompanying notes 218–23, 229–31. Additionally, state courts rely on federal courts that make the assumption that violations of federal law are negligence per se without considering the lack of state law support for the proposition. See *infra* text accompanying notes 224–28.

217. See *infra* Part III.B.

218. 266 N.W.2d 423 (Wis. 1978).

219. *Id.* at 426–27.

220. *Id.* at 427. The court also did not discuss whether it was significant that a federal administrative regulation, not a federal statute, was at issue.

The next year, in *Olson v. Ratzel*,<sup>221</sup> the Court of Appeals of Wisconsin relied on *Locicero* in stating that “[t]he same principles which determine the effect of a Wisconsin statute on the standard of care are applicable to determine the effect of a federal statute or regulation.”<sup>222</sup> Federal courts sitting in diversity then relied on *Locicero* and *Olson* in holding that violations of “both state and federal legislative and administrative enactments” gave rise to negligence-per-se liability under Wisconsin law.<sup>223</sup>

Wisconsin state courts equated state and federal standards in applying the Wisconsin law of negligence per se and federal courts followed their lead. Pennsylvania state courts have also unthinkingly concluded that violation of federal regulations is negligence per se as a matter of state law. They, however, have done so by relying on federal cases that made the assumption. The Pennsylvania Superior Court in *Cabiroy v. Scipione*<sup>224</sup> found that a violation of the Medical Device Act (“MDA”) amendments to the Food, Drug, & Cosmetics Act (“FDCA”) was negligence per se.<sup>225</sup> The court relied on a case from the United States Court of Appeals for the Third Circuit, holding that a violation of the FDCA was negligence per se because “[u]nder Pennsylvania law, the violation of a governmental safety regulation constitutes negligence per se.”<sup>226</sup> The Third Circuit, however, relied on a Pennsylvania case dealing with a state law limiting the sale of alcohol to intoxicated persons as support for the proposition.<sup>227</sup> None of the cases explicitly discussed the basis for the assumption that state and federal statutes have the same effect under Pennsylvania tort law.<sup>228</sup>

221. 278 N.W.2d 238 (Wis. Ct. App. 1979).

222. *Id.* at 247 (refusing to find that violation of the federal statute limiting the sale of firearms to minors was negligence per se). The *Olson* court’s analysis does go beyond the *Lucicero* court’s in that it addressed the federal statute separately from state law and suggested that a different analysis could govern state and federal negligence-per-se claims. *Id.* at 247–49.

223. *E.g.*, *Lukaszewicz v. Ortho Pharm. Corp.*, 510 F. Supp. 961, 964 (E.D. Wis. 1981); *accord* *Cali v. Danek Med., Inc.*, 24 F. Supp. 2d 941, 954 (W.D. Wis. 1998) (citing *Olson*, 278 N.W.2d at 247) (stating that Wisconsin applies the same law to violations of state and federal statutes); *see also* *Smith v. United States*, No. 93-2225, 1994 WL 55559, at \*2 (7th Cir. Feb. 24, 1994) (assuming that principles governing negligence per se under Wisconsin law apply to federal statutes).

224. 767 A.2d 1078, 1081–82 (Pa. Super. Ct. 2001).

225. *Id.* at 1081.

226. *Id.* (quoting *Stanton v. Astra Pharm. Prods., Inc.*, 718 F.2d 553, 563 (3d Cir. 1983)).

227. *Stanton*, 718 F.2d at 563 (citing *Majors v. Brodhead Hotel*, 205 A.2d 873, 875 (Pa. 1965)).

228. *See also* *McCain v. Beverly Health & Rehab. Servs.*, No. Civ. A. 02-657, 2002 WL 1565526, at \*1 (E.D. Pa. July 15, 2002) (relying on federal cases to find that violation of federal regulations regarding nursing home care is negligence per se under Pennsylvania law); *Karle v. Nat’l Fuel Gas Distrib. Corp.*, 448 F. Supp. 753, 767 (W.D. Pa. 1978) (saying that “[t]he violation of a federal statute or regulation may provide the basis for a finding of liability under Pennsylvania law,” but citing only cases dealing with violations of state law

Numerous other state courts and federal courts sitting in diversity assume that a violation of federal statutes or regulations is negligence per se under state law without discussing the relevance of the fact that federal law is involved. The cases frequently equate state and federal standards without discussion. In *NeSmith v. Bowden*,<sup>229</sup> for instance, the Washington Court of Appeals simply stated that federal regulations limiting motor carriers' driving time were safety regulations with the force of law that could give rise to negligence-per-se liability under the Second Restatement approach to the doctrine that Washington adopted.<sup>230</sup> The United States Court of Appeals for the Fourth Circuit found that a violation of the FDCA was negligence per se under Virginia law because the "majority of American courts" found violations of analogous state laws negligence per se and Virginia law established that violation of motor vehicle statutes was negligence per se.<sup>231</sup> The United States District Court for the District of Connecticut found that a plaintiff could state a negligence-per-se claim for violation of federal environmental laws because the federal statutes aimed to protect against the alleged harm, the standard for applying the doctrine under state law.<sup>232</sup>

*B. Courts Have Treated the Negligence-Per-Se Question as One of Federal Law, Not State Tort Law*

The assumption that violations of federal law are negligence per se under state tort law has become further established because courts addressing the

---

as support); *Goda v. White Cliff Leasing P'ship*, 62 Pa. D. & C.4th 476, 481–83 (Ct. C.P. 2003) (applying standards from the Second Restatement and citing *McCain* in finding that violation of provisions of the Omnibus Budget Reconciliation Act regulating nursing home care is negligence per se).

229. 563 P.2d 1322 (Wash. Ct. App. 1977).

230. *Id.* at 1325–26; *see also* *Stong v. Freeman Truck Line, Inc.*, 456 So. 2d 698, 707 (Miss. 1984) (finding violation of state and federal highway safety regulations negligence per se without acknowledging any difference); *Ward v. Ne. Tex. Farmers Co-op Elevator*, 909 S.W.2d 143, 147–50 (Tex. App. 1995) (discussing negligence per se claims for violations of state and federal law without acknowledging any difference in the types of claims).

231. *Orthopedic Equip. Co. v. Eutsler*, 276 F.2d 455, 461 (4th Cir. 1960) (citing *Reid v. Boward*, 26 S.E.2d 27, 29 (Va. 1943)); *see also* *Teal v. E.I. DuPont de Nemours & Co.*, 728 F.2d 799, 802–03 (6th Cir. 1984) (relying on general principles of Tennessee negligence-per-se law and cases dealing with violations of state statutes to find that OSHA violations were negligence per se); *Taylor v. Pa. R.R. Co.*, 246 F. Supp. 604, 605 (D. Del. 1965) (finding it "reasonable to believe" that Delaware courts would find violation of ICC safety regulations negligence per se because they had the force of law and Delaware's exceptions to negligence per se were not applicable in the case).

232. *Bernbach v. Timex Corp.*, 989 F. Supp. 403, 408 (D. Conn. 1996) (applying Connecticut law). The court also noted that Connecticut did not require that a statute create a private cause of action in order to become the standard of care. *Id.*

negligence-per-se question tend to focus on precedent dealing with the federal law at issue instead of on state tort law. This focus leads courts to treat the negligence-per-se question as one of federal substantive law instead of as one of state tort law.

A series of cases dealing with violations of Federal Aviation Authority (“FAA”) regulations illustrates the point. In *Florida Freight Terminals, Inc. v. Cabanas*,<sup>233</sup> the Third District Court of Appeal of Florida was faced with the question of whether violation of FAA regulations was negligence per se under Florida law.<sup>234</sup> It found that a negligence-per-se claim was available, relying on Florida cases discussing negligence per se generally and on federal cases “in which the laws of Pennsylvania, California and Alabama . . . were found to compel the conclusion that violation of an FAA safety regulation was negligence per se.”<sup>235</sup> The court did not discuss whether Florida tort law is generally similar to the law of those states or why precedent analyzing the law of those states should govern.<sup>236</sup> This approach divorces the negligence-per-se question from state tort principles and treats it largely as a question of the meaning of the federal law at issue.

The cases on which the *Florida Freight Terminals* court relied further demonstrate the problem. None of the federal cases that *Florida Freight Terminals* cited actually analyzed the question of whether a violation of a federal regulation should be negligence per se under state law. The case that the court said established Pennsylvania law, *Gatenby v. Altoona Aviation Corp.*,<sup>237</sup> simply relied on cases saying that violations of motor vehicle laws are negligence per se in Pennsylvania; it did not address the relevance of the fact that federal law was at stake.<sup>238</sup> The case establishing California law relied on *Gatenby*, the Pennsylvania case, for the proposition that “[a] violation of Federal Aviation Regulations is

233. 354 So. 2d 1222, 1225 (Fla. Dist. Ct. App. 1978).

234. *Id.* The court noted that Florida courts had not addressed the question. *Id.*

235. *Id.* (citing *Gatenby v. Altoona Aviation Corp.*, 407 F.2d 443, 446 (3d Cir. 1968) (Pennsylvania law); *Rudelson v. United States*, 431 F. Supp. 1101, 1107 (C.D. Cal. 1977) (California law); *Todd v. United States*, 384 F. Supp. 1284, 1294 (M.D. Fla. 1974), *aff’d*, 553 F.2d 384 (5th Cir. 1977) (Alabama law).

236. More recent Florida decisions have, however, questioned whether administrative regulations generally, or federal regulations specifically, should give rise to negligence-per-se liability. See *Murray v. Briggs*, 569 So. 2d 476, 480–81 (Fla. Dist. Ct. App. 1990); see also *Jackson v. Harsco Corp.*, 364 So. 2d 808, 810 (Fla. Dist. Ct. App. 1978) (Barkdull, J., concurring specially) (arguing that administrative rules should not give rise to negligence per se and stating that his concurrence in the decision did not indicate agreement with *Florida Freight Terminals*); *infra* text accompanying notes 355–64.

237. 407 F.2d 443 (3d Cir. 1968).

238. *Id.* at 446 (citing *Jinks v. Currie*, 188 A. 356 (Pa. 1936); *Gaskill v. Melella*, 18 A.2d 455 (Pa. Super. Ct. 1941)).

negligence per se,<sup>239</sup> and found this “consistent with California law that a violation of a safety regulation is negligence per se.”<sup>240</sup> The case deciding the question under Alabama law simply said that violation of “such regulations” is negligence per se in Alabama, citing motor vehicle cases.<sup>241</sup>

The effect of this method of analysis is to treat the negligence-per-se question as one of federal aviation law, not as one of state tort law. This federal focus becomes sharper as later cases rely on these cases as support for the principle that violation of FAA regulations is negligence per se. Courts purporting to apply Puerto Rico,<sup>242</sup> Tennessee,<sup>243</sup> and Arizona<sup>244</sup> law have all cited *Gatenby*, which applies Pennsylvania law, as support for that proposition, without suggesting that their principles of tort law might differ from Pennsylvania’s. Courts decide what should be a question of state tort law without discussing any state-law principles.<sup>245</sup>

The numerous state cases discussing whether OSHA violations are negligence per se under state law follow much the same pattern as the FAA cases.<sup>246</sup> The courts generally focus on the meaning of OSHA and debate other courts’ readings of the statute instead of asking whether a violation of a federal law should even be negligence per se under the state’s tort law. These courts treat the question of whether the violation of a federal statute is negligence per se as a question of Congressional intent, not as one of state law.

The OSHA cases generally focus on a section of the statute that provides that it does not supersede state workers’ compensation law or “enlarge or diminish or affect in any other manner” employers’ and employees’ “common law or statutory rights, duties, or liabilities.”<sup>247</sup> Some courts have found that a negligence-per-se claim would enlarge common law rights. The Supreme Court of Colorado reached that conclusion after an extensive analysis of federal cases on both sides of the issue.<sup>248</sup> Other

239. *Rudelson*, 431 F. Supp. at 1107.

240. *Id.* (citing *Haft v. Lone Palm Motel*, 478 P.2d 465 (Cal. 1970) (considering a state regulation of swimming pool safety)).

241. *Todd v. United States*, 384 F. Supp. 1284 (M.D. Fla. 1974), 384 F. Supp. at 1294 (citing *Robbins v. Voigt*, 191 So. 2d 212 (Ala. 1966) (per curiam); *Sims v. Greniewicki*, 184 So. 2d 157 (Ala. Ct. App. 1966)).

242. *In re N-500L Cases*, 691 F.2d 15 (1st Cir. 1982).

243. *Ins. Co. of N. Am. v. United States*, 527 F. Supp. 962, 966–67 (E.D. Ark. 1981) (applying Tennessee law); *Bandy v. United States*, 492 F. Supp. 13, 21 (W.D. Tenn. 1978) *aff’d*, 628 F.2d 935 (6th Cir. 1980).

244. *Anderson Aviation Sales Co. v. Perez*, 508 P.2d 87, 95 (Ariz. Ct. App. 1973).

245. Much of the commentary that discusses negligence per se also focuses on the application of the doctrine in specific areas. See articles cited *supra* note 63.

246. See *Loose & Brown*, *supra* note 63, at 31 (discussing Arizona cases).

247. 29 U.S.C. § 653(b)(4) (2006).

248. *Canape v. Peterson*, 897 P.2d 762, 765 (Colo. 1995) (en banc). The *Canape* court discussed, among other cases, *Ries v. National Railroad Passenger Corp.*, 960 F.2d 1156



cases weighed other Congressional policies in finding a violation of OSHA to be negligence per se. The Idaho Supreme Court stated that it was persuaded that Congress's goal of assuring safe working conditions "can best be served by allowing instructions of negligence per se for violations of OSHA regulations."<sup>249</sup> As with the FAA cases, the courts treat the negligence-per-se question more as a substantive question of OSHA law than as one of state tort law.<sup>250</sup>

The focus on federal law may be a factor that leads courts to ignore the implications that their analysis of the negligence-per-se question has for the underlying question of whether a violation of federal law should ever be negligence per se under state tort law. The Supreme Court of Connecticut conducted a careful analysis of negligence-per-se law before rejecting the claim that an OSHA violation was negligence per se in *Wendland v. Ridgefield Construction Services*.<sup>251</sup> The court explained that negligence per se engrafts a statutory standard onto the traditional tort standard of care.<sup>252</sup> The doctrine changes the role of the jury and the nature of its inquiry.<sup>253</sup> Instead of deciding if the defendant acted as a reasonably prudent person would have acted, the jury simply decides if the defendant

---

(3d Cir. 1992), and *Pratico v. Portland Terminal Co.*, 783 F.2d 255 (1st Cir. 1985). Both *Ries* and *Pratico* were FELA cases, not state tort claims, and applied federal law. *See supra* text accompanying notes 201–12 (discussing other courts' reliance on FELA cases to decide state tort issues).

249. *Sanchez v. Gale*, 733 P.2d 1234, 1244 (Idaho 1987) (denial of rehearing) (quoting 29 U.S.C. § 651(b) (1982)); *see also* *Bellamy v. Fed. Express Corp.*, 749 S.W.2d 31 (Tenn. 1988) (finding OSHA violations negligence per se under Tennessee law).

250. The courts, for example, almost always analyze other OSHA cases, and not state tort law, in reaching their conclusions. *See supra* note 248 (discussing *Canape*); *Sanchez*, 733 P.2d at 1241–44 (citing some Idaho tort cases, but analyzing primarily Fifth and Sixth Circuit OSHA cases). There are some exceptions. The United States Court of Appeals for the First Circuit discussed OSHA cases from other circuits, but ultimately concluded that an OSHA violation was not negligence per se because Maine law governed the claim and Maine does not recognize the doctrine. *Elliott v. S.D. Warren Co.*, 134 F.3d 1, 4–5 (1st Cir. 1998); *see* *Seither v. Balbec Corp.*, No. 90C-11-257, 1995 WL 465187, at \*3 (Del. Super. Ct. July 27, 1995) (discussing numerous Delaware cases and state and federal cases applying the law of other states in concluding that OSHA violations are negligence per se); *Castine Energy Const., Inc. v. T.T. Dunphy, Inc.*, 861 A.2d 671 (Me. 2004) (following *Elliott*).

Some courts address a related question of state law, whether violation of a state regulation incorporating OSHA standards is negligence per se. *See infra* text accompanying notes 251–57 (discussing *Wendland v. Ridgefield Constr. Servs.*, 439 A.2d 954 (Conn. 1981)).

251. 439 A.2d at 954. The court was analyzing claims under both the federal law and the Connecticut Occupational Safety and Health Act, CONN. GEN. STAT. § 31-372(a) (1978). The court said that the state statutes and regulations at issue essentially mirrored the federal ones. *Wendland*, 439 A.2d at 955 n.1.

252. *Wendland*, 439 A.2d at 956.

253. *Id.*

violated the statute or regulation.<sup>254</sup> The *Wendland* court concluded: “Because the standard of care is the key factor in determining liability, we conclude that the application of a negligence-per-se instruction affects common-law rights, duties and liabilities of employers and employees . . . .”<sup>255</sup> Both OSHA and the Connecticut Safety and Health Act provided that the statutes did not “enlarge, diminish, or affect” the duties and liabilities of employers and employees with regard to workplace injuries.<sup>256</sup> The negligence-per-se instruction was improper because application of the doctrine altered common law rights under state law.<sup>257</sup>

*C. Courts that Recognize that Negligence-Per-Se Liability Alters the Contours of Tort Law Do Not Follow the Implications of their Analysis*

The OSHA cases that find that use of the negligence-per-se doctrine alters common law rights implicitly recognize that giving a violation of federal law negligence-per-se effect allows federal law to alter the contours of state tort law. Courts have recognized the same general point in other contexts, finding that imposing liability on a negligence-per-se basis would alter duties under state tort law. These courts have not, however, followed the logical implications of this recognition. They have not asked whether the conclusion that negligence per se alters the contours of tort law should always preclude courts from treating violations of federal law as negligence per se.

A number of state cases find that violations of particular federal statutes are not negligence per se because the statute does not regulate an area in which there is a pre-existing duty under state tort law. In *Sierra-Bay Federal Land Bank Ass’n v. Superior Court*,<sup>258</sup> for instance, the California Court of Appeals found that a person could not bring a negligence-per-se claim challenging a violation of the federal Farm Credit Act provisions regulating lending practices. The court said that the underlying claim did not sound in negligence<sup>259</sup> and that the plaintiff was “simply pursuing a private cause of action for damages based upon the alleged violation of federal law.”<sup>260</sup> The court recognized, though, that violations of some

254. *Id.*

255. *Id.* at 956–57.

256. *Id.* at 956 (citing 29 U.S.C. § 653(b)(4) (1976); CONN. GEN. STAT. § 31-369(b)).

257. *See id.* at 956–57; *accord* *Canape v. Peterson*, 897 P.2d 762, 767 (Colo. 1995) (en banc) (citing *Wendland*); *Valdez v. Cillessen & Son, Inc.*, 734 P.2d 1258, 1261 (N.M. 1987) (quoting *Wendland*); *Taft v. Derricks*, 613 N.W.2d 190, 196 (Wis. Ct. App. 2000) (same). *Contra* *Sanchez v. Galey*, 733 P.2d 1234, 1243 (Idaho 1987) (quoting and rejecting *Wendland*).

258. 277 Cal. Rptr. 753 (Cal. Ct. App. 1991).

259. *Id.* at 762.

260. *Id.*

federal laws could be negligence per se under state law.<sup>261</sup> Federal law could establish the standard of care under state law if the claim sounded in negligence.<sup>262</sup>

Federal courts applying state law have reached similar conclusions. The United States District Court for the District of Arizona found that violation of the Home Owners Loan Act (“HOLA”) regulations was not negligence per se under Arizona law.<sup>263</sup> The court explained that Arizona adopted legislative standards of conduct when the duties they reflect are recognized under Arizona law.<sup>264</sup> The duty that the plaintiff alleged HOLA imposed was unknown under Arizona law and the claim would essentially be a private claim under HOLA.<sup>265</sup> Similarly, the United States District Court for the Western District of Texas found that violations of the FDCA and FDCA regulations would not be negligence per se under Texas law because the violations would not give rise to liability under state common law and the FDCA does not provide a private cause of action.<sup>266</sup>

261. *Id.* at 760 (discussing violation of FDA and FAA regulations).

262. *Id.* at 760–61. The court explained that the plaintiff in a negligence-per-se action was not pursuing a private cause of action for violation of the statute but was bringing a negligence claim and relying on the statute to establish the standard of care. *Id.* at 761; *see* Forell, *supra* note 63 (distinguishing negligence per se from liability for violating a duty imposed by statute); *see also* Lugo v. St. Nicholas Assocs., 772 N.Y.S.2d 449, 453–55 (N.Y. Sup. Ct. 2003), *aff’d*, 795 N.Y.S.2d 227 (N.Y. App. Div. 2005). The Lugo court found that a violation of the Americans with Disability Act (“ADA”) could only be evidence of negligence because negligence per se would effectively create an implied cause of action under the ADA. Lugo, 772 N.Y.S.2d at 454–55. The court also recognized that it was questionable whether a violation of federal law could give rise to a negligence-per-se claim under New York law, an issue the litigants did not raise. *Id.* at 455 n.4; *see infra* text accompanying notes 292, 375.

263. Resolution Trust Co. v. Dean, 854 F. Supp. 626 (D. Ariz. 1994).

264. *Id.* at 642.

265. *Id.* at 643. The court did note that Arizona courts had not considered negligence-per-se claims based on non-safety statutes or federal statutes. *Id.* at 643 n.26 (distinguishing Brand v. J.H. Rose Trucking Co., 427 P.2d 519, 522–23 (Ariz. 1967) (en banc), in which the court found violation of a state law that incorporated federal ICC standards was negligence per se); *see also* Resolution Trust Co. v. Hess, 820 F. Supp. 1359, 1368 n.14 (D. Utah 1993) (stating that violation of HOLA regulations cannot be negligence per se under Utah law because Utah only recognizes negligence per se in cases involving dangerous instrumentalities). These cases suggest another factor that militates against imposing negligence-per-se liability. The Third Restatement notes that only violations of safety statutes are negligence per se. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 14 cmt. f (2010).

266. Hackett v. G.D. Searle & Co., 246 F. Supp. 2d 591, 594 (W.D. Tex. 2002). The court relied on FDCA cases from other circuits and an unreported Texas case that carefully analyzed the issue. *Id.* (citing Baker v. Smith & Nephew Richards, Inc., No. 95-58737, 1999 WL 811334 (Tex. Dist. June 7, 1999), *aff’d on other grounds sub. nom.* McMahon v. Smith & Nephew Richards, Inc., No. 14-99-00616-CV, 2000 WL 991697 (Tex. Ct. App. July 20, 2000)). The Texas case explained that negligence per se allows a court to adopt a statutory standard of care when there is a preexisting duty. Baker, 1999 WL 811334, at \*8. “Duties set forth in federal law do not, therefore, automatically create duties cognizable under local tort law.” *Id.* The question was whether the federal duties were analogous to those in state law. *Id.* The court did not find the violation negligence per se under Texas

The focus on state-law duties is also evident in many of the Federal Torts Claims Act (“FTCA”)<sup>267</sup> cases that allege that violations of federal law are negligence per se. The FTCA waives the United States’ sovereign immunity from tort claims.<sup>268</sup> The United States is only liable, however, “under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.”<sup>269</sup> This requires that an FTCA plaintiff who claims that the United States is liable for a violation of a federal statute or regulation under a negligence-per-se theory be able to show that the claim would succeed in a state-law tort action if a private person engaged in the same conduct.<sup>270</sup>

Most FTCA claims seeking to impose liability on a negligence-per-se theory fail because the court finds that the challenged conduct does not violate a duty under state tort law. The FTCA does not make violations “of federal statutes or regulations standing alone” actionable.<sup>271</sup> A violation of federal law does not give rise to liability under the FTCA unless the relationship between the federal actor and the injured party “is such that the former, if a private person or entity, would owe a duty under state law to the latter in a *nonfederal* context.”<sup>272</sup> The negligence-per-se claim in *Johnson v. Sawyer*<sup>273</sup> failed for this reason; Texas law did not impose a

---

standards for applying the doctrine. *Id.* at \*8–11. The court relied on a Federal Tort Claims Act case, *Johnson v. Sawyer*, 47 F.3d 716 (5th Cir. 1995) (en banc), in its discussion of duty.

*Baker*, 1999 WL 811334, at \*8; see *infra* text accompanying notes 272–74 (discussing *Johnson*). For an extensive discussion of how courts treat negligence-per-se claims under the FDCA, see Beck & Valentine, *supra* note 63; cf. Sanford St. Local Dev. Corp. v. Textron, Inc., 788 F. Supp. 1218, 1223–24 (W.D. Mich. 1991) (finding that the fact that there was no private right of action for damages for violation of the Toxic Substances Control Act preempted a state negligence-per-se claim alleging a violation of its provisions; a negligence-per-se claim was little different from an implied right of action under the act and an award of damages on such a theory would conflict with Congressional intent to preclude damage awards under the act).

267. 28 U.S.C. §§ 1291, 1346, 2671–80 (2006).

268. *Id.* § 2674.

269. *Id.* § 1346(b). The Act also provides that the government is liable in tort “in the same manner and to the same extent as a private individual under like circumstances.” *Id.* § 2674. The Supreme Court set out the general standard for FTCA liability in *Indian Towing Co. v. United States*, 350 U.S. 61 (1955). The Court explained that the reason for the statute was to “compensate the victims of negligence in the conduct of governmental activities in circumstances like unto those in which a private person would be liable.” *Id.* at 68–69.

270. See, e.g., *Delta Sav. Bank v. United States*, 265 F.3d 1017, 1025–26 (9th Cir. 2001); *Johnson v. Sawyer*, 47 F.3d 716, 727–28 (5th Cir. 1995) (en banc); *Art Metal-U.S.A., Inc. v. United States*, 753 F.2d 1151, 1167 (D.C. Cir. 1985).

271. *Chen v. United States*, 854 F.2d 622, 626 (2d Cir. 1988) (citing *Cecile Indus., Inc. v. United States*, 792 F.2d 97, 100 (3d Cir. 1986)); see also *Johnson*, 47 F.3d at 727 (quoting *Chen*).

272. *Johnson*, 47 F.3d at 728.

273. 47 F.3d 716 (5th Cir. 1995) (en banc).

duty not to disclose personal information that was analogous to the obligations in the Internal Revenue Code provision the government employees allegedly violated.<sup>274</sup> Similarly, the claim that the government was negligent per se for violating federal procurement regulations failed in *Art Metal-U.S.A., Inc. v. United States*<sup>275</sup> because District of Columbia tort law did not provide a remedy for the injuries the plaintiff alleged.<sup>276</sup>

The cases that focus on state tort-law duties in the FTCA context and elsewhere take a correct step in looking to state law in analyzing the negligence-per-se issue and recognizing that allowing the claim would allow federal law to alter state tort law obligations. Most of the cases, however, do not consider another basic aspect of the issue. They generally do not question that the state would apply the doctrine of negligence per se if the federal statute at issue imposed a duty analogous to one under state tort law. While some FTCA cases point specifically to state cases finding a violation of federal law to be negligence per se,<sup>277</sup> others do not acknowledge that the fact that federal law is at stake might be relevant to the state tort analysis.<sup>278</sup> None of the FTCA cases appears directly to analyze the question of how state negligence-per-se law treats violations of federal law.<sup>279</sup>

274. *Id.* at 729.

275. 753 F.2d 1151 (D.C. Cir. 1985).

276. *Id.* at 1159–60.

277. *See, e.g., Myers v. United States*, 17 F.3d 890, 900 (6th Cir. 1994) (citing case finding violation of an OSHA regulation negligence per se under Tennessee law); *Moody v. United States*, 774 F.2d 150, 157 (6th Cir. 1985) (same).

278. *See, e.g., Janitscheck v. United States*, 45 F. App'x 809, 811 (9th Cir. 2002) (discussing Alaska law of negligence per se and discussing only cases dealing with violation of state law); *Lutz v. United States*, 685 F.2d 1178, 1184–85 (9th Cir. 1982) (concluding that violation of military base regulation mandating that dogs be kept under control would be negligence per se under Montana law and opining that the regulation is analogous to a Montana municipal ordinance but never discussing whether the fact that the regulation is federal would be relevant); *Zimmerman v. United States*, 171 F. Supp. 2d 281, 293 (S.D.N.Y. 2001) (saying that breach of a federal obligation would be negligence per se under New York law without discussing New York cases); *Appley Bros. v. United States*, 924 F. Supp. 944, 961 (D.S.D. 1996) (discussing only cases dealing with violations of South Dakota law).

The Second Circuit's opinion in *Chen v. United States* looked to New York law and found that a violation of federal procurement regulations was not actionable under the FTCA on a negligence-per-se theory because violation of administrative regulations is not negligence per se under New York law. 854 F.2d at 627 (quoting *Long v. Forest-Felhaber*, 433 N.E.2d 115, 117 (N.Y. 1982)). The *Chen* court refused to follow *Doe v. United States*, 520 F. Supp. 1200 (S.D.N.Y. 1981), an FTCA case saying that a breach of regulatory duties would give rise to a negligence claim under New York law, because "of the flatly contrary statements of the law by New York's highest court." *Chen*, 854 F.2d at 627. Perhaps because of its focus on the question of whether violations of regulations were negligence per se, the *Chen* court did not discuss the significance of the fact that the regulations were federal. *See infra* text accompanying notes 289–94 (discussing New York law).

279. One of the cases that considered whether violations of federal banking regulations were negligence per se did conduct this analysis. The Tenth Circuit decision in *FDIC v.*

The cases that recognize difficulties with treating a violation of federal law as negligence per se do not explore the implications of what that determination means for state tort law. The cases instead generally treat the question as one that implicates Congressional intent. The OSHA cases find that imposing negligence-per-se liability would contravene Congress's intent that OSHA not alter state law.<sup>280</sup> Courts in other areas generally assume that recognizing a negligence-per-se claim would effectively imply a private right of action under the federal statute against Congress's wishes.<sup>281</sup> The courts do not recognize that any finding that a violation of a federal statute is negligence per se changes the contours of state tort law by changing the nature of the plaintiff's claim. As the Connecticut Supreme Court recognized in *Wendland*, negligence per se engrafts a statutory standard onto the traditional tort standard of care, changing the role of the jury and the nature of its inquiry.<sup>282</sup> Instead of deciding if the defendant acted as a reasonably prudent person would have acted, the jury simply decides if defendant violated the statute or regulation.<sup>283</sup> The courts do not ask why it is ever proper to allow a federal statute to change the analysis of a state tort case.

---

*Schuchmann*, 235 F.3d 1217 (10th Cir. 2000), considered and rejected defendant's argument that New Mexico law would not find a violation of federal law to be negligence per se. *Id.* at 1224–25. The court then went on to find that New Mexico would not find that the violation of the federal regulations at stake was negligence per se because doing so would recognize a private right of action contrary to Congress's intent. *Id.* at 1225–26.

280. See *supra* text accompanying notes 251–57.

281. See *supra* notes 266, 279 and accompanying text. The focus on whether a private cause of action is available can be a question of state law, however. For instance, violation of a statute only gives rise to negligence-per-se liability under Kansas law if the legislature intended a private right of action for violations of the statute. *Pullen v. West*, 92 P.3d 584, 594 (Kan. 2004). The Kansas Court of Appeals relied on *Pullen* in finding that violation of the federal Gun Control Act, 18 U.S.C. § 922 (2006), was not negligence per se because the statute did not create a private right of action. *Estate of Pemberton v. John's Sports Ctr., Inc.*, 135 P.3d 174, 187 (Kan. Ct. App. 2006); see *Pantages v. Cardinal Health 200, Inc.*, No. 5:08-cv-116-Oc-10GRJ, 2009 WL 2244539, at \*2 (M.D. Fla. July 27, 2009) (saying that violation of a federal statute was not negligence per se under Florida law unless the legislature intended a private right of action under the statute); Sharkey, *supra* note 14, at 250 (arguing that the absence of a private right of action under federal law should not preclude a state negligence per se claim).

282. 439 A.2d 954, 956 (Conn. 1981).

283. *Id.* See generally Leonard, *supra* note 53, at 449–50 (discussing the effect of negligence-per-se analysis on the jury's role).

## IV. THE PROBLEMS WITH THE CURRENT NEGLIGENCE-PER-SE ANALYSIS

A. *Courts' Failure to Focus on State Tort-Law Principles in Negligence-Per-Se Cases Has Led to Blatant Inconsistencies in State Law*

Courts generally assume that violation of federal law is negligence per se as a matter of state tort law. Two major analytical errors lead to this assumption. First, courts establish the principle that violations of federal law are negligence per se by careless use of precedent. State and federal courts use precedent finding violations of federal law negligence per se in cases that arise under federal law to decide state tort cases without noting the difference in the source of governing law.<sup>284</sup> Courts also treat cases dealing with violations of state laws as authority for the premise that violations of federal law are negligence per se under state law.<sup>285</sup> Second, courts treat the negligence-per-se question as a matter of federal law by looking to precedent dealing with the federal statute or regulation at issue and not addressing state tort law, again failing to suggest that a different analysis should apply.<sup>286</sup> The courts' failure to focus on state tort-law precedent leads courts to find that violations of federal law are negligence per se even when doing so clearly contradicts established state law principles.

In some cases, finding that violations of federal law are negligence per se contradicts the reasoning a state's highest court has given to support limitations on the law of negligence per se. The Iowa Supreme Court, for instance, stated in 1994 that rules of conduct that give rise to negligence-per-se liability "must be ordained by a state legislative body or an administrative agency regulating on a statewide basis under authority of the legislature."<sup>287</sup> More recent Iowa cases, however, have determined that violation of OSHA regulations can be negligence per se.<sup>288</sup> The cases do not attempt to reconcile that determination with the court's requirement that the state legislature have acted.

---

284. See *supra* text accompanying notes 206–07, 210.

285. See *supra* Part III.A.

286. See *supra* Part III.B.

287. *Griglione v. Martin*, 525 N.W.2d 810, 812 (Iowa 1994).

288. See *Leaf v. Goodyear Tire & Rubber Co.*, 590 N.W.2d 525, 537 (Iowa 1999) (en banc); *Piper v. Jerry's Homes, Inc.*, No. 01-2018, 2003 WL 22199580, at \*4 (Iowa Ct. App. Sept. 24, 2003). These cases relied on *Wiersgalla v. Garrett*, 486 N.W.2d 290, 292–93 (Iowa 1992), a pre-*Griglione* case holding that injured employees could recover in OSHA negligence-per-se claims. *Accord Koll v. Manatt's Transp. Co.*, 253 N.W.2d 265, 270 (Iowa 1977).

New York cases also establish that only the state legislature can make rules that give rise to negligence-per-se liability.<sup>289</sup> Violations of administrative regulations are not negligence per se under New York law because only the state legislature can change the common law of the state.<sup>290</sup> The federal government could not change state common law,<sup>291</sup> so this reasoning logically dictates that violation of federal legislation could not be negligence per se. One New York court has recognized this point, saying that it is questionable whether a legislative body other than the New York State legislature could enact “a statute whose violation constitutes negligence per se, and which alters the New York state common law.”<sup>292</sup>

State and federal courts applying New York law have nonetheless assumed that the violation of a federal statute is negligence per se under New York law. A decision from the United States Court of Appeals for the Second Circuit, citing no authority, stated that violation of the labeling requirements of the FDCA was negligence per se under New York law.<sup>293</sup> New York state cases have made the same assumption, allowing a negligence-per-se claim alleging a violation of the MDA to go to trial.<sup>294</sup>

289. *Elliott v. City of New York*, 747 N.E.2d 760, 762 (N.Y. 2001); *see supra* text accompanying note 102.

290. *Major v. Waverly & Ogden*, 165 N.E.2d 181, 184 (N.Y. 1960); *see supra* text accompanying note 109.

291. *See supra* text accompanying notes 17–20.

292. *Lugo v. St. Nicholas Assocs.*, 772 N.Y.S.2d 449, 455 n.4 (N.Y. Sup. Ct. 2003) (citing *Elliott*), *aff'd*, 795 N.Y.S.2d 227 (N.Y. App. Div. 2005). The appellate decision did not address this point. *See supra* note 262 (discussing *Lugo*); *see also* *Murray v. Briggs*, 569 So. 2d 476, 480–81 (Fla. Dist. Ct. App. 1990) (questioning whether administrative regulations, and especially federal regulations, which enlarge common law duties or impose new duties should give rise to negligence-per-se liability under Florida law).

293. *Ezagui v. Dow Chem. Corp.*, 598 F.2d 727, 733 (2d Cir. 1979). In the same sentence, the court said that violation of a state statute governing the action also gave rise to a negligence-per-se claim. *Id.* A New York district court twenty years later relied on the Second Circuit opinion to find that violations of the MDA Amendments to the FDCA were negligence per se, saying that the goals of the federal legislation “will be advanced by allowing New York to utilize its standards in common law negligence actions.” *Loewy v. Stuart Drug & Surgical Supply, Inc.*, No. 91 CIV. 7148(LBS), 1999 WL 216656, at \*2–3 (S.D.N.Y. Apr. 14, 1999); *see also* cases cited *supra* note 278 (making that assumption about New York law in the FTCA context). Federal cases also say that violation of federal law can be negligence per se under the law of Kentucky. *See Flechsig v. United States*, No. 92-5189, 1993 WL 47200, at \*3 (6th Cir. Feb. 23, 1993) (recognizing that a public safety regulation could provide a basis for negligence per se); *Dilts v. United Grp. Servs.*, Civil Action No. 07-38, 2010 WL 497731 (E.D. Ky. Feb. 5, 2010) (affirming that a violation of OSHA can be negligence per se); *Goldman Servs. Mech. Contracting, Inc. v. Citizens Bank & Trust Co.*, 812 F. Supp. 738, 741 (W.D. Ky. 1992) (acknowledging the possibility that the standard of care for negligence could come from a federal safety law). Kentucky law is to the contrary. *See infra* text accompanying notes 307–10 (explaining Kentucky law).

294. *See Vitolo v. Dow Corning Corp.*, 634 N.Y.S.2d 362, 366 (N.Y. Sup. Ct. 1995) (holding that the duty to warn under the MDA “gives rise to a cause of action on behalf of the injured party”); *see also Ayala v. Hagemann*, 714 N.Y.S.2d 633, 635–36 (N.Y. Sup. Ct. 2000) (finding that federal regulations prohibiting dogs from running loose on federal land had the force of a statute and that violation of the regulation was negligence per se under



Some courts in other states have found that violations of federal law are negligence per se, even though other state cases have recognized that negligence per se alters obligations under state tort law. The Connecticut Supreme Court's decision in *Wendland v. Ridgefield Construction Services, Inc.*<sup>295</sup> explained that negligence per se engrafts a statutory standard onto the traditional tort standard of care, changing the role of the jury and the nature of its inquiry.<sup>296</sup> The court found that it was improper to treat OSHA violations as per se negligence because application of the doctrine altered common-law rights under state law.<sup>297</sup> In cases since *Wendland*, however, Connecticut courts and federal courts applying Connecticut law have found that violation of federal law is negligence per se without explaining how it could be appropriate to allow Congress to alter state common law.<sup>298</sup> Courts that focused on state-law principles in analyzing

---

New York law); *Wedlock v. Troncoso*, 712 N.Y.S.2d 328, 332 (N.Y. Sup. Ct. 2000) (stating in dicta that "a violation of a state or federal statute constitutes negligence *per se*"). Ohio law also establishes that violation of administrative regulations is not negligence per se. *See supra* text accompanying note 109 (noting that neither New York nor Ohio accepts administrative regulations as a basis for negligence-per-se liability). The reason for this determination is that only the General Assembly has legislative power, and giving agencies the power to adopt rules that alter the proof requirements would amount "to an unconstitutional delegation of legislative authority." *Chambers v. St. Mary's Sch.*, 697 N.E.2d 198, 202 (Ohio 1998). Federal cases that have considered whether violation of federal law can be negligence per se under Ohio law in light of *Chambers* have focused on whether a statute or regulation was at stake. *See Kemp v. Medtronic, Inc.*, No. 99-3720, 2001 WL 91119, at \*1 (6th Cir. Jan. 26, 2001) (citing *Chambers*, 697 N.E.2d at 203) (finding a violation of FDA regulations not negligence per se under Ohio law because *Chambers* held that a violation of administrative regulations is not negligence per se); *Estep v. Danek Med., Inc.*, No. 1:96CV2580, 1998 WL 1041330, at \*1-2 (N.D. Ohio Dec. 8, 1998) (suggesting that *Chambers* does not preclude a determination that violation of the FDA is negligence per se, but finding that allowing a negligence-per-se claim would circumvent Congress's intent to preclude private enforcement of the statute). The courts did not consider the *Chambers* court's reasoning. *Chambers* explained that only the Ohio General Assembly can set state policy—reasoning that clearly implies that a violation of federal law cannot be negligence per se under Ohio law. *Chambers*, 697 N.E.2d at 202.

295. 439 A.2d 954 (Conn. 1981).

296. *Id.* at 956. Instead of deciding if the defendant acted as a reasonably prudent person would have acted, the jury simply decided if the defendant violated the statute or regulation. *Id.*

297. *Id.* at 956-57.

298. *See, e.g., Bernbach v. Timex Corp.*, 989 F. Supp. 403, 408 (D. Conn. 1996) (finding violation of federal environmental laws negligence per se under Connecticut law); *Lancaster v. Jackson*, No. CV030567614, 2005 WL 2009018, at \*3-4 (Conn. Super. Ct. July 11, 2005) (upholding complaint that defendant violated state and federal regulations regarding medical staffing and was negligent per se). The Connecticut Supreme Court had found a violation of federal law to be negligence per se in a case before *Wendland*. *See Bailey v. Bruneau's Truck Serv., Inc.*, 175 A.2d 372, 376-77 (Conn. 1961) (declaring that a violation of an Interstate Commerce Commission regulation would be negligence per se). Neither *Wendland* nor the post-*Wendland* cases relied on *Bailey*.

Wisconsin has followed Connecticut on OSHA claims and the Wisconsin Court of Appeals has quoted *Wendland* approvingly. *See Taft v. Derricks*, 613 N.W.2d 190, 196 (Wis. Ct. App. 2000) (quoting *Wendland* to support the conclusion that OSHA does not

claims that violations of federal law are negligence per se would be unlikely to ignore the point.

*B. Very Few Cases Consider the Federalism Implications of Treating Violations of Federal Law as Negligence Per Se*

Not all courts automatically equate state and federal law in analyzing negligence-per-se questions. Some courts have addressed the federalism implications of using federal statutory standards in state court. Only one state opinion, however, has carefully analyzed the implications of allowing federal law to set state tort policy.

Some cases touch on the federalism issue but nonetheless conclude that violations of federal law are negligence per se. One federal court rejected the argument that using federal law to establish standards of care violated principles of federalism, noting that whether to use the standard was ultimately a question of state law.<sup>299</sup> The Colorado Court of Appeals rejected a trial court's conclusion that federal standards should not give rise to negligence-per-se liability.<sup>300</sup> The Colorado trial court had refused to instruct a jury that a violation of federal highway regulations was negligence per se because the regulations had not been "subsumed" into Colorado law and because case law did not convince the court "that the law and the policy of the state of Colorado" required such an instruction.<sup>301</sup> The Colorado Court of Appeals, however, reversed.<sup>302</sup> It said that a violation of similar state laws would have been negligence per se and it could "perceive no qualitative difference" between the regulations at issue and the laws in Colorado negligence-per-se cases.<sup>303</sup>

A few other courts have touched on federalism-related issues. The North Dakota Supreme Court has stated that separation of powers and federalism

---

create "a negligence standard to be applied at common law"). Wisconsin courts, however, treat violations of federal law as negligence per se. *See supra* text accompanying notes 218–23 (discussing Wisconsin law). The New Mexico Supreme Court has also quoted *Wendland* approvingly. *See Valdez v. Cillessen & Son, Inc.*, 734 P.2d 1258, 1261 (N.M. 1987) (using language from *Wendland* to bolster the court's belief that OSHA does not supply a negligence standard). The Tenth Circuit, however, considered and rejected the argument that New Mexico law would not find a violation of federal law to be negligence per se in *FDIC v. Schuchmann*, 235 F.3d 1217, 1224–25 (10th Cir. 2000), noted *supra* note 279.

299. *Brogdon v. Nat'l Healthcare Corp.*, 103 F. Supp. 2d 1322, 1342–43 (N.D. Ga. 2000) (discussing the use of Medicaid and Medicare regulations to establish the standard of care in Georgia malpractice cases, but not explicitly discussing negligence per se).

300. *See Hageman v. TSI, Inc.*, 786 P.2d 452, 453–54 (Colo. App. 1989) (finding no reason to distinguish federal regulations from state laws in terms of their suitability to provide a negligence standard).

301. *Id.* at 453.

302. *Id.* at 455.

303. *Id.* at 454.

principles “militate[d] against the adoption of [a] federal statute as the standard of care in a state negligence action when [there was] no private cause of action” under the federal statute.<sup>304</sup> Courts have also occasionally suggested that states should not find that the violation of a federal regulation is negligence per se<sup>305</sup> and a federal court specifically left the negligence-per-se question for state court analysis.<sup>306</sup>

Kentucky is the one state in which courts have firmly held that violation of federal law is not negligence per se. Kentucky has codified its law of negligence per se in a statute that provides: “A person injured by the violation of any statute may recover from the offender such damages as he sustained by reason of the violation, although a penalty or forfeiture is imposed for such violation.”<sup>307</sup> Kentucky courts long held that the word “statute” excluded local ordinances.<sup>308</sup> In 1997, the Kentucky Court of Appeals held that the word “statute” in the negligence-per-se law applies only to laws that the Kentucky General Assembly enacted.<sup>309</sup> The Kentucky negligence-per-se statute “is limited to violations of Kentucky statutes and does not extend to federal regulations.”<sup>310</sup> The court went on to find that the Gun Control Act of 1968<sup>311</sup> did not set a standard of care, declining to find that the federal law modified state common law or created a duty that the General Assembly had not imposed.<sup>312</sup>

The Kentucky Supreme Court addressed the same question in 2006 and engaged in a rare debate about the effect of federal statutes on state tort

304. *R.B.J. Apartments, Inc. v. Gate City Sav. & Loan Ass’n*, 315 N.W.2d 284, 290 (N.D. 1982). The court did not explain the basis for this conclusion.

305. *See, e.g., Security Nat’l Bank v. Chloride, Inc.*, 602 F. Supp. 294, 297 (D. Kan. 1985) (saying, in refusing to find that a violation of OSHA standards was negligence per se, that “the Kansas cases speak of ‘laws’ and ‘ordinances,’ not administrative regulations by agencies of the federal government”); *Murray v. Briggs*, 569 So. 2d 476, 480–81 (Fla. Dist. Ct. App. 1990) (arguing that “federal regulation[s] should [not] necessarily control state law questions of negligence” and finding it “illogical” that the difference between negligence per se and no liability in the case of identical accidents would depend on whether a truck carried cargo in interstate commerce).

306. *See Hofbauer v. Nw. Nat’l Bank*, 700 F.2d 1197, 1201 (8th Cir. 1983) (leaving question of whether violation of National Flood Insurance Act would establish standard of conduct in Minnesota negligence litigation to the state courts).

307. KY. REV. STAT. ANN. § 446.070 (West 1993).

308. *See Baker v. White*, 65 S.W.2d 1022, 1024 (Ky. 1933) (holding that an ordinance banning fireworks sales in a city was not a statute), discussed *supra* note 104.

309. *Alderman v. Bradley*, 957 S.W.2d 264, 266 (Ky. Ct. App. 1997).

310. *Id.* at 266–67.

311. *See* 18 U.S.C. § 922(b)(1) (2006) (prohibiting the sale of any firearm to individuals under eighteen and of firearms other than a shotgun or rifle to individuals under twenty-one).

312. *Alderman*, 957 S.W.2d at 268–69. The court also found that there was no private right of action under the federal law. *Id.* at 267–68.

law. The plaintiff in *T & M Jewelry, Inc. v. Hicks*<sup>313</sup> suffered injuries when her eighteen-year-old boyfriend accidentally shot her with a pistol.<sup>314</sup> She brought a negligence-per-se claim against the vendor of the gun, alleging that the store had violated the federal Gun Control Act of 1968 by selling a pistol to an eighteen-year-old.<sup>315</sup> The court held that she did not state a negligence-per-se claim but that a common-law negligence claim could go forward.<sup>316</sup> The Kentucky negligence-per-se statute only applied to violations of state law.<sup>317</sup> That did not mean, however, that the federal statute was irrelevant to a state negligence claim.

The *Hicks* court concluded that the federal law was relevant to the analysis of general questions of negligence and foreseeability of harm.<sup>318</sup> The federal law aimed to keep firearms out of the hands of irresponsible persons by limiting how young people could acquire firearms.<sup>319</sup> The court said that the regulations imposing obligations on firearms dealers “have a direct bearing on our view of foreseeability.”<sup>320</sup> The court recognized that it had no duty to observe the federal standard but said that nothing prohibited it from borrowing the standard under the common law.<sup>321</sup> The court concluded that “the provisions of the [federal law] represent a reasonable and satisfactory duty to impose upon licensed gun dealers in Kentucky” and left it to the jury to determine if the defendant breached that duty of care.<sup>322</sup>

Justice Roach wrote a partial dissent.<sup>323</sup> He agreed that there was no private right of action under the Gun Control Act and that the term “any statute” in Kentucky’s negligence-per-se statute only applied to state laws.<sup>324</sup> He argued vehemently, however, that “Kentucky public policy” should determine the duty of care in the state.<sup>325</sup> Kentucky law did not prohibit transferring a firearm to an eighteen-year-old and the state General Assembly, “Kentucky’s arbiter of public policy,” had not adopted the

---

313. 189 S.W.3d 526 (Ky. 2006).

314. *Id.* at 527.

315. *Id.* at 527–528 (relying on 18 U.S.C. § 922(b)(1)); *see supra* note 311 (describing the relevant provision of the Gun Control Act of 1968).

316. *Hicks*, 189 S.W.3d at 528–29, 533. The court reached the negligence-per-se question after determining that it could not imply a cause of action for violations of the federal statute. *Id.* at 529–30.

317. *Id.* at 530.

318. *Id.* at 530–31.

319. *Id.* at 531.

320. *Id.*

321. *Id.* at 532.

322. *Id.* at 532–33.

323. *Id.* at 533 (Roach, J., concurring in part and dissenting in part). Justice Graves joined the partial dissent.

324. *Id.*

325. *Id.*

federal standard.<sup>326</sup> The General Assembly's inaction was "a clear statement of the relevant public policy in Kentucky and [was] . . . fundamental to the resolution" of the case.<sup>327</sup>

The dissent argued that "Kentucky public policy, statutory and common law theories" should determine the duty of care.<sup>328</sup> While it might appear "counter-intuitive" to find that a violation of federal criminal law did not violate the state duty of care, that result was "a necessary aspect of a system of dual-sovereign federalism."<sup>329</sup> State law applied in a case that the Constitution or federal law did not govern, and state government made state law.<sup>330</sup> In this case, the dissent explained, the majority had erroneously applied a "federal standard of correct behavior despite the fact that the General Assembly has also spoken on the issue."<sup>331</sup> The court should defer to state public policy when the state legislature has spoken.<sup>332</sup> It was "not surprising" that Kentucky's General Assembly treated firearms differently than Congress did, "given the long tradition of firearms ownership in Kentucky."<sup>333</sup> Absent Congressional preemption, "our own public policy, as announced by the General Assembly, should control in this matter."<sup>334</sup>

Justice Roach is correct. States should not allow federal law to alter the contours of state common law.<sup>335</sup> States do, however, allow federal law to alter state common law when they give violations of federal law negligence-per-se effect in state tort cases.<sup>336</sup> State courts should not find that violations of federal law are negligence per se.

---

326. *Id.*

327. *Id.*

328. *Id.* at 533–34.

329. *Id.* at 534.

330. *Id.* The dissent discussed the fact that there was no general federal common law and asked, "[i]f the federal courts have been unwilling to impose a federal common law rule, why should we do so?" *Id.* (discussing *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938)).

331. *Id.* The dissent said that "reliance on the federal statute as evidence of the applicable standard of care" could be appropriate if the court was "writing on a blank slate," but that the General Assembly had spoken in this case. *Id.*

332. *Id.*

333. *Id.* at 534–35.

334. *Id.* at 535.

335. Federal legislation can, of course, always preempt the state law. *See infra* text accompanying notes 378–79 (describing the doctrine of preemption). In cases of preemption, Congress is exercising its enumerated powers directly to control the law. That is very different from a state court allowing federal law to control state-law principles when Congress has not indicated a preemptory intent.

336. *See supra* text accompanying notes 253–55 (noting the *Wendland* case's recognition that basing state-court negligence per se on a federal statute alters state common law).

V. WHY COURTS SHOULD NOT GIVE VIOLATIONS OF FEDERAL LAW  
NEGLIGENCE-PER-SE EFFECT

Negligence per se has been accepted doctrine for over a century.<sup>337</sup> The justification for the doctrine has become increasingly clear as the law has developed: it exists to promote institutional comity—to prevent a state court from second-guessing the state legislature’s judgment regarding what conduct is safe.<sup>338</sup> The scope of the doctrine has nonetheless continued to expand, with most courts unquestioningly treating violations of federal law and regulations as negligence per se.<sup>339</sup> The United States Supreme Court has observed that violations of federal law commonly have negligence-per-se effect.<sup>340</sup> The Third Restatement of Torts accepts this approach as established law,<sup>341</sup> even though the Reporters note that states might have been expected to resist this practice in order to “protect [their] . . . lawmaking prerogatives.”<sup>342</sup>

States should have resisted the practice, for three reasons. First, finding violations of federal statutes to be negligence per se is inconsistent with the institutional-comity justification for the doctrine.<sup>343</sup> Second, state and federal judgments regarding which conduct is appropriate may differ.<sup>344</sup> Courts should only apply negligence per se when conduct violates a standard that the state legislature has approved. Third, Congress does not have the power to control state tort law.<sup>345</sup> Courts should not allow federal law to alter state tort obligations through the doctrine of negligence per se.

337. *See supra* text accompanying notes 22–29 (tracing the doctrine of negligence per se back to its infancy).

338. *See supra* text accompanying notes 66–69 (discussing institutional comity).

339. *See supra* text accompanying Part III.A (highlighting how courts misuse precedent and unthinkingly base negligence-per-se liability on violation of federal law). In one sense, this is not truly an expansion; state courts have given federal laws negligence-per-se effect since the earliest days of the doctrine. *See supra* text accompanying notes 120–23 (examining courts’ treatment of negligence per se in early cases). The term expansion is appropriate, however, in light of the broad equation of state and federal law in post-*Erie* cases and the Third Restatement’s recognition of the practice.

340. *See* *Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 545 U.S. 308, 318–19 (2005).

341. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 14 cmt. a (2010).

342. *Id.* § 14 Reporters’ Note, cmt. a.

343. *See infra* text accompanying notes 366–73 (illuminating the conflict between promoting the institutional-comity principle and basing negligence-per-se liability on a violation of federal law).

344. *See* Kritchevsky, *supra* note 25, at 696–97 (explaining that local factors such as population density affect states’ judgments regarding whether to regulate conduct such as driving while talking on a cell phone); *infra* text accompanying notes 355–64 (using the case of *Murray v. Briggs* to illustrate the difference between state and federal judgments).

345. *See infra* text accompanying note 376 (pointing to *Erie*’s assertion that, with certain exceptions, Congress cannot dictate the law to be applied in state cases).

The doctrine of negligence per se rests on deference to legislative judgment. “Institutional comity” prevents courts from second-guessing the legislature’s judgment regarding how to act in a given situation.<sup>346</sup> Violations of private standards, such as industrial safety codes, are not negligence per se because the private regulator does not exercise state legislative authority.<sup>347</sup> Individuals only face negligence-per-se liability for violating rules of conduct that bodies with state legislative authority promulgated.<sup>348</sup>

Most states equate the actions of agencies and legislatures in applying negligence per-se-law, recognizing that agencies exercise legislatively-delegated power and have the power and expertise to establish standards of care.<sup>349</sup> Several states reject that approach, however, finding that bodies that are subordinate to the legislature cannot change state law.<sup>350</sup> There are two main rationales for this determination. The first is that only the legislature can alter the law.<sup>351</sup> The second is that administrative officials, unlike legislators, are not politically accountable.<sup>352</sup>

The reasoning that precludes finding that violations of state administrative provisions are negligence per se also precludes finding that violations of federal law are negligence per se. First, the federal government cannot alter state law. Second, federal lawmakers are not accountable to state voters.

346. See *supra* text accompanying notes 66–69 (discussing institutional comity).

347. See *Griglione v. Martin*, 525 N.W.2d 810, 812 (Iowa 1994) (finding that violation of police operating procedures and private safety codes is not negligence per se).

348. *Id.*

349. See *Toll Bros. v. Considine*, 706 A.2d 493, 497 (Del. 1997) (looking to precedent that equated regulations and statutes) (quoting *Sammons v. Ridgeway*, 293 A.2d 547, 549–50 (Del. 1972)).

350. See *supra* text accompanying notes 109–11 (discussing law of New York, Ohio, and Indiana). Kentucky also rejects that approach because its negligence-per-se statute only applies to actions of the Kentucky General Assembly. *Alderman v. Bradley*, 957 S.W.2d 264, 266 (Ky. Ct. App. 1997), discussed *supra* notes 309–12.

351. See, e.g., *Zimmerman v. Moore*, 441 N.E.2d 690, 696 (Ind. Ct. App. 1982) (“Violation of an administrative regulation . . . is only some evidence of negligence.”); *Major v. Waverly & Ogden, Inc.*, 165 N.E.2d 181, 184 (N.Y. 1960) (“If the Legislature desires to change the prevailing rules of the common law, it must do so itself and not by virtue of authority delegated to a subordinate rulemaking body.”); *Chambers v. St. Mary’s Sch.*, 697 N.E.2d 198, 202 (Ohio 1998) (“Administrative agencies may make only ‘subordinate’ rules.”); *supra* text accompanying notes 109–11.

352. See *Jackson v. Harsco Corp.*, 364 So. 2d 808, 810 (Fla. Dist. Ct. App. 1978) (Barkdull, J., concurring specially) (“If an administrative agency desires to have an administrative rule possess the dignity of a penal statute or ordinance, it should submit same for consideration to the elected legislative representatives . . . .”); *Chambers*, 697 N.E.2d at 202 (asserting that only the General Assembly can dictate public policy). There is also the concern that finding violations of administrative regulations to be negligence per se would “open the floodgates to litigation,” given the number and complexity of administrative rules. *Chambers*, 697 N.E.2d at 202–03.

The rationale underlying the doctrine of negligence per se makes it inappropriate for courts to find that violations of federal law are negligence per se even if violations of administrative regulations have that consequence. A state agency exercises power that the legislature delegated and it must act within the scope of the delegated power.<sup>353</sup> There is some measure of political accountability because the appointing authorities are answerable to the state electorate.<sup>354</sup> The federal government shares neither of these characteristics. Congress acts independently of the states and one state's voters have political control over only a few federal legislators.

Treating violations of federal law as negligence per se can make the outcome of state negligence cases hinge on the happenstance of the reach of a federal regulation and subject an individual to negligence-per-se liability for conduct that the state deemed appropriate. The Florida District Court of Appeal discussed this point in *Murray v. Briggs*,<sup>355</sup> a case arising out of an accident in which a passenger pickup truck drove into the back of a delivery truck.<sup>356</sup> The passenger pickup went under the bed of the delivery truck because the delivery truck lacked a protective rear bumper.<sup>357</sup> A passenger in the pickup was severely injured and filed suit against several defendants.<sup>358</sup> The passenger argued that the delivery truck should have complied with ICC bumper regulations and that the absence of protective bumpers was negligence per se<sup>359</sup> despite the fact that Florida law did not require all trucks to have bumpers that limited clearance.<sup>360</sup> The jury found that the defendant delivery truck was not negligent.<sup>361</sup>

The Florida District Court of Appeal found that federal law did not apply because the delivery truck was not engaged in interstate commerce.<sup>362</sup> It then explained that it would be inappropriate to find that a violation of the

---

353. See *Mountaineer Disposal Serv., Inc. v. Dyer*, 197 S.E.2d 111, 115 (W. Va. 1973) (finding that State Director of Health unlawfully exercised discretion that had not been delegated to him by statute); *Racine Fire & Police Comm'n v. Stanfield*, 234 N.W.2d 307, 309 (Wis. 1975) (explaining that agency can only exercise powers the legislature confers); MODEL STATE ADMIN. PROC. ACT § 5-116 (1981) (listing grounds for invalidating state agency action). See generally Gary J. Greco, *Standards or Safeguards: A Survey of the Delegation Doctrine in the States*, 8 ADMIN. L.J. AM. U. 567, 578-601 (1994) (outlining the various state approaches to the delegation doctrine).

354. See *State ex rel. Topping v. Houston*, 143 N.W. 796, 800 (Neb. 1913) (discussing removal of administrative officials and political accountability); *Hall v. Tirey*, 501 P.2d 496, 499-500 (Okla. 1972) (discussing governor's power to remove member of state board).

355. 569 So. 2d 476 (Fla. Dist. Ct. App. 1990).

356. *Id.* at 477.

357. *Id.*

358. *Id.*

359. *Id.* at 477-78.

360. *Id.* at 480-81.

361. *Id.* at 478.

362. *Id.* at 480.



ICC regulations was negligence per se even if the regulations applied.<sup>363</sup> The court found it “illogical” that, in hypothetical accidents involving identical delivery trucks, “the presence or absence of cargo in interstate commerce on one of the vehicles would determine whether the owner of the vehicle was per-se negligent or, as the jury found in this case, not negligent at all.”<sup>364</sup>

As *Murray* illustrates, state and federal lawmakers may make different judgments regarding appropriate conduct and safety policy. The state in *Murray* decided not to require a safety measure, opting to leave conduct unregulated.<sup>365</sup> Violation of the federal standard should not be negligence per se as a matter of state tort law because the actor did not violate the state’s judgment regarding safe conduct.<sup>366</sup> Imposing negligence-per-se liability would not promote institutional comity, the goal of the doctrine.<sup>367</sup> Instead, it would improperly allow federal standards to control state tort liability.

Justice Roach of the Kentucky Supreme Court made an impassioned argument to this effect in his partial dissent in *Hicks*, arguing that a showing that the defendant violated federal law by selling a pistol to an eighteen-year-old was not even evidence of negligence.<sup>368</sup> “[N]othing in Kentucky law prohibit[ed] . . . transferring a handgun to an eighteen-year-old”; indeed, Kentucky law allowed sales to individuals eighteen and older.<sup>369</sup> The state legislature’s policy should govern. Justice Roach explained that different standards were “not surprising . . . given the long tradition of firearms ownership in Kentucky.”<sup>370</sup> Absent federal preemption, “our own public policy, as announced by the General Assembly, should control in this matter.”<sup>371</sup>

Giving federal law negligence-per-se effect does more than allow federal policy to govern state tort actions; it allows the federal government to alter the contours of state tort law. Negligence per se alters the jury’s role. It

---

363. *Id.* at 480–81.

364. *Id.* at 481.

365. *Id.* at 480–81.

366. Congress could decide to provide a remedy to individuals who are injured by a violation of the standards by providing a private right of action. *See generally* Sherman, *supra* note 14, at 864–77 (examining the creation of federal causes of action); *supra* text accompanying notes 166–67, 195–97 (discussing the relationship between private rights of action and negligence per se).

367. *See supra* text accompanying notes 66–69 (explaining how negligence per se promotes institutional comity).

368. 189 S.W.3d 526, 533–34 (Ky. 2006) (Roach, J., concurring in part and dissenting in part).

369. *Id.* at 533.

370. *Id.* at 534–35.

371. *Id.* at 535.

deprives the jury of the job of determining whether the defendant acted as a reasonable person and reduces it to performing the “historical function” of determining what happened.<sup>372</sup> As the Connecticut Supreme Court recognized in *Wendland*, “[n]egligence per se operates to engraft a particular legislative standard onto the general standard of care” and alters common law rights under state law.<sup>373</sup>

The *Wendland* court, however, did not take the next logical step and determine that federal statutes should never have negligence-per-se effect. Only a few cases have tentatively recognized the broader significance of using federal statutes to alter state tort law. The Florida District Court of Appeal in *Murray* stated it was “not satisfied that a federal regulation should necessarily control state law questions of negligence by enlarging common law duties or creating new duties.”<sup>374</sup> Similarly, a New York court noted that it was questionable “whether a statute whose violation constitutes negligence per se, and which alters the New York state common law, can be enacted by a legislative body other than the New York State legislature.”<sup>375</sup>

Courts should recognize that the doctrine of negligence per se alters the contours of state tort suits and refuse to give violations of federal law negligence-per-se effect. “Congress has no power to declare substantive rules of common law applicable in a state . . . .”<sup>376</sup> Courts should not use the doctrine of negligence per se to give Congress that power. So doing undermines the role of state legislatures as the bodies that make state law and abdicates the courts’ responsibility to apply state tort law.

State courts’ refusal to give federal law negligence-per-se effect would not make federal law irrelevant. Congress and federal agencies may have detailed knowledge of an area and their judgment on safe conduct is likely to be relevant to determining how a reasonable person would act. Federal standards are certainly as relevant as industry safety codes, which may be relevant evidence that supports a finding of negligence.<sup>377</sup> Courts should

---

372. *Morris*, *supra* note 9, at 455; *see also* Leonard, *supra* note 53, at 449–50 (describing how the use of the doctrine of negligence per se redistributes power from both the judge and the jury to the legislature).

373. *Wendland v. Ridgefield Constr. Servs., Inc.*, 439 A.2d 954, 956–57 (Conn. 1981). For a full discussion of *Wendland*, *see supra* text accompanying notes 251–57.

374. *Murray v. Briggs*, 569 So. 2d 476, 480 (Fla. Dist. Ct. App. 1990); *see also* *Cadillac Fairview of Fla., Inc. v. Cespedes*, 468 So. 2d 417, 421 (Fla. Dist. Ct. App. 1985) (saying that OSHA was not determinative of state negligence questions).

375. *Lugo v. St. Nicholas Assocs.*, 772 N.Y.S.2d 449, 455 n.4 (N.Y. Sup. Ct. 2003), *aff’d*, 795 N.Y.S.2d 227 (N.Y. App. Div. 2005).

376. *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938).

377. *See supra* text accompanying notes 99–100 (discussing the use of safety codes to define the standard of care).

treat federal laws and regulations in the same manner as they treat industry customs and private safety codes. The federal law will generally be a relevant factor for the jury to consider, but the federal law should not determine the appropriate standard of conduct.

This approach does not undermine the appropriate application of federal law. A state cannot enforce a standard that directly conflicts with federal law, and Congress can occupy a field and preempt state regulation in the area.<sup>378</sup> Congressional action may also preempt state tort suits that would have the effect of upsetting the federal regulatory balance.<sup>379</sup> If Congress has not acted to preempt state regulation, however, states are free to refrain from following federal law.

State legislatures that agree with federal regulatory policy can adopt federal standards as those of the state. Minnesota law, for instance, prohibits using pesticides in a manner that is inconsistent with federal law.<sup>380</sup> Other states have adopted OSHA standards.<sup>381</sup> A state court can properly determine that the state legislature has adopted federal standards and allow those standards to govern if the state legislative intent is clear.<sup>382</sup> When the state has adopted a federal standard, state courts should give that standard the same negligence-per-se effect that they would give any other

---

378. See *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368–69 (1986) (outlining law of preemption). See generally NOWAK & ROTUNDA, *supra* note 20, §§ 9.1–9.4 (discussing law of preemption).

379. See *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 508, 515, 519–20, 524–25 (1992) (finding that Federal Cigarette Labeling and Advertising Act, as amended in 1969, preempted common-law failure to warn tort claims). See generally Richard C. Ausness, *Preemption of State Tort Law by Federal Safety Statutes: Supreme Court Preemption Jurisprudence Since Cipollone*, 92 KY. L.J. 913, 922–24 (2003) (discussing “conflict preemption”); Marin R. Scordato, *Federal Preemption of State Tort Claims*, 35 U.C. DAVIS L. REV. 1, 13–14 (2001) (examining “‘frustration-of-purposes’ preemption”).

380. See *Anderson v. State Dep't of Natural Res.*, 693 N.W.2d 181, 190 (Minn. 2005) (discussing MINN. STAT. § 18B.07, subd. 2(a)(1) (2004)).

381. See *Toll Bros., Inc. v. Considine*, 706 A.2d 493, 496 (Del. 1998) (describing how the Delaware Secretary of Labor adopted some of the federal regulations issued under OSHA). As the court explained, however, OSHA regulations preempt state law if the state does not obtain federal approval for its regulatory plan. *Id.* at 496–98 (discussing *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 96–97 (1992)).

382. A court could reach this conclusion even if the legislation did not control the case. Legislative findings could endorse federal standards and legislation that is void for procedural reasons might nonetheless show that the legislature intended to adopt federal law. In this light, the Delaware Supreme Court was perhaps overly cautious in determining that a violation of OSHA was evidence of negligence but not negligence per se in *Toll Bros., Inc.*, 706 A.2d at 498. Delaware courts had found that OSHA violations were negligence per se prior to the Supreme Court's decision in *Gade*. *Id.* at 497. The *Toll Bros.* court found that the state's failure to obtain federal approval of its regulations after *Gade* meant that the Delaware regulations did not have the force of law. *Id.* at 498. The court could have appropriately decided that the OSHA standards evidenced state legislative policy if the failure to obtain federal approval were an oversight and state law otherwise treated the standards as controlling.

state law.<sup>383</sup> The key in all cases is that there is an explicit state legislative judgment that sets the standard of care under state law. Use of the negligence-per-se doctrine in such cases promotes institutional comity and allows the state legislature to develop the contours of state tort law.

#### CONCLUSION

It is a long-accepted principle of tort law that an individual who violates a statute is negligent per se. A determination that an individual violated a statute shows that the individual breached a duty of care, taking the question of reasonableness from the jury and substituting the legislative judgment regarding acceptable conduct.<sup>384</sup> It is also a long-accepted aspect of tort law that not all statutory violations lead to a determination that the actor was negligent per se.<sup>385</sup> A finding that a person was per se negligent is not a penalty for violating the law.<sup>386</sup> It is instead a recognition that a single jury should not second-guess a legislature's determination of what conduct is appropriate in a situation—a form of “institutional comity.”<sup>387</sup>

Courts routinely apply the negligence-per-se doctrine in a way that ignores the rationale for the doctrine and has the effect of allowing federal law to set state tort standards. Courts generally equate state and federal statutes in applying the doctrine of negligence per se. This practice undermines the institutional-comity rationale for the doctrine and gives federal determinations of proper conduct controlling force in state tort law. Negligence per se thus operates to federalize state tort law and allows Congress to alter state common law.

The practice of giving federal law negligence-per-se effect in state tort suits is not a recent development. Courts have equated state and federal statutes since the earliest days of the doctrine. The practice was

---

383. This is the approach the Minnesota Supreme Court took in *Anderson*, reversing summary judgment for the defendant on the negligence-per-se claim. *Anderson*, 693 N.W.2d at 191; *see also* *Brand v. J.H. Rose Trucking Co.*, 427 P.2d 519, 522–24 (Ariz. 1967) (finding that a violation of ICC regulations that the Arizona Corporation Commission had adopted was negligence per se).

384. *See supra* text accompanying notes 69, 372–73 (describing the power shift from juries to the legislature).

385. *See supra* text accompanying notes 70–72 (explaining that not all statutory violations are negligence per se). An individual is only per se negligent if he “violate[d] a statute that is designed to protect against the type of accident the actor’s conduct cause[d]” and injured a victim who was “within the class of persons the statute is designed to protect.” RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 14 (2010). In practice, this generally means that the doctrine applies to statutes that regulate safety. *Id.* § 14 cmt. f.

386. *See supra* text accompanying notes 43–44 (explaining how the focus on the purpose of a statute shows a rejection of the outlaw approach to negligence per se).

387. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 14 cmt. c (2010).

understandable when it developed in the pre-*Erie* era: the rationales for negligence per se were less developed, there was no clear division between state and federal common law, courts had not yet articulated limitations on implied statutory rights of action, and courts adhered to the principle that the existence of a right mandated a remedy.

It is also logical for tort plaintiffs to argue that defendants who violated federal laws and regulations are negligent per se. Negligence per se makes the plaintiff's job easier. The plaintiff's ability to show that the defendant violated the law substitutes for a showing that the defendant did not act like a reasonably prudent person. It is understandable that plaintiffs who fall through the gaps of direct federal protection will seek to use negligence per se to recover for the violation of a federal law. Plaintiffs will logically rely on negligence per se to seek recovery for violations of federal statutes when they are unable to show that Congress intended private actions to seek redress for statutory violations.<sup>388</sup>

State courts in the modern era have consistently accepted the plaintiffs' theories and found that violations of federal law are negligence per se. No court, however, has analyzed the question directly and argued that it is appropriate to give violations of federal law negligence-per-se effect. Courts instead have found violations of federal law negligence per se chiefly by careless use, or outright misuse, of precedent. They have treated negligence-per-se cases dealing with violations of state law as authority for the proposition that a violation of a federal law is also negligence per se and have treated the negligence-per-se question as one of federal substantive law instead of state tort law. Courts that have recognized that negligence per se alters state tort law duties have failed to pursue the implications of that recognition for the doctrine of negligence per se generally.

State courts should not give violations of federal law negligence-per-se effect because doing so allows federal standards to alter the state's common law. Violation of a federal standard should not have negligence-per-se effect unless the state legislature adopts that standard as that of the state. Absent such adoption, courts should treat federal statutes in the same manner as non-governmental regulations of appropriate conduct, such as private safety codes. The fact that a defendant violated a federal law may

---

388. The Supreme Court has made the implied-right-of action inquiry increasingly rigorous. *See supra* text accompanying notes 195–96 (explaining that the Court must now find that Congress intended to create a private right of action). The current standard recognizes that the question is ultimately one of legislative intent. *See Alexander v. Sandoval*, 532 U.S. 275, 286–87 (2001) (“Statutory intent . . . is determinative.”); other cases cited *supra* note 196. *See generally* Stabile, *supra* note 127, at 877–903 (discussing role of Congressional intent in implied-private-right-of-action cases).

be relevant to the question of whether the defendant was negligent, but it should not determine that the defendant was negligent as a matter of state law.

Tort law is state law. Unthinking application of the doctrine of negligence per se, however, has allowed federal law to set the standard of conduct in a vast number of cases. Federal law governs even though there is no federal preemption and no indication that the state legislature agrees with the federal standard. Courts should stop allowing this federalization of state tort law. State courts should not abdicate their responsibility to enforce state common law and to follow state legislative policy.<sup>389</sup> Federal courts should honor their obligation under *Erie* to apply state common law and not assume that federal standards govern state tort cases. Courts should not give federal law negligence-per-se effect.

---

389. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 14 Reporter's Note, cmt. a (2010) (noting that it is surprising that states have not resisted giving federal law negligence per se effect to protect "state lawmaking prerogatives").