Tort Law in the Age of Statutes

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ABSTRACT: The common law of torts is widely considered to be in conflict with the modern regulatory state. Tort law interacts with regulations and their enabling statutes in different ways that are fully addressed by the doctrines of negligence per se, the regulatory compliance defense, and statutory preemption. According to a substantial body of scholarship, these three statutorily related doctrines are a muddle, lacking any coherent theory that adequately accounts for the competing institutional concerns of the federal regulatory and state tort systems. The problem resides in a mistaken focus on statutory purpose. Due to the supremacy of legislative law, a statutory purpose to modify tort law would seem to fully determine the relation between the common law of torts and the regulatory state. This conclusion is mistaken, however, explaining why there has been so much confusion and controversy about the matter. Systematic analysis across the doctrines of negligence per se, the regulatory compliance defense, and implied statutory preemption shows that they are instead unified by a single underlying principle: When a statute or administrative regulation is based on a policy decision that is relevant to the resolution of a tort claim, courts will defer to the non-binding legislative policy determination as a matter of common-law discretion. This immanent principle of common-law deference gives much-needed structure to the three statutorily related doctrines, filling the analytic gap created by the overly narrow inquiry into statutory purpose. The legislative intent to modify tort law certainly matters, but the principle of deference provides the primary means by which courts integrate health and safety legislation into the common law of torts, eliminating the purported conflict between tort law and the modern regulatory state.

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During the past century, the legal system moved into the "age of statutes,"[1] creating an apparent conflict between the modern regulatory state and the common law of torts. Although the common law originated in medieval times, the modern tort system did not fully emerge until the writ system was abolished in the latter half of the nineteenth century. Due to the limited number of regulatory alternatives at that time, "courts had become the American surrogate for a more fully developed administrative apparatus."[2] With the passage of time, the administrative state fully developed, but courts seemed to be unwilling to cede their historic regulatory authority. Instead of relying on health and safety regulations to determine the safety decisions required by tort law, courts routinely obligated defendants to comply with the judicially defined tort standard of reasonable care.[3] The apparent failure of courts to defer to administrative regulations became increasingly worrisome as markets continued to expand throughout the twentieth century. The tort system's reliance on case-by-case adjudication is well suited for isolated instances of wrongdoing, like occasional collisions at railroad crossings, but tort cases in an increasingly interdependent economy often involve complex decisions in mass markets, like those for determining the optimal amount of safety for product designs or warnings. Products sold in national markets are proper subjects for uniform regulations promulgated by experts on the matter—federal administrative agencies tasked with that particular responsibility. By the final decades of the twentieth century, the evident failure of tort law to defer adequately to regulatory law had become a prominent concern, yielding tort-reform proposals to rein in "a judicial regulatory system that currently runs quite wild."[4] The apparent conflict between the tort and regulatory systems now frames a body of scholarship that "increasingly cast the two less as complementary regimes than as institutional rivals."[5]

A closer look at the statutorily related tort doctrines further reveals an unsettled relation between the common law of torts and statutes. The "age of statutes" was first evoked by Guido Calabresi to describe the evolutionary change in which "we have gone from a legal system dominated by the common law, divined by courts, to one in which statutes, enacted by

1. *See generally* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982).

2. STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877–1920, at 28 (1982).

3. *See infra* Part III (discussing the rule that regulatory compliance is not ordinarily a complete defense to a tort claim).

4. Peter Huber, *Safety and the Second Best: The Hazards of Public Risk Management in the Courts*, 85 COLUM. L. REV. 277, 335 (1985) (using this characterization to justify reforming the regulatory compliance defense).

5. Richard A. Nagareda, *FDA Preemption: When Tort Law Meets the Administrative State*, 1 J. TORT L., Dec. 2006, at 3, *available at* http://www.degruyter.com/view/j/jtl.

legislatures, have become the primary source of law."[6] After describing this well-known development, Calabresi then made the more provocative claim that this "change itself and its effect on our whole legal-political system have not been systematically treated."[7] Regardless of whether this claim continues to be true as a general matter, it accurately describes tort law. There has been no systematic analysis of the relation between the common law of torts and statutory law, leaving open the question of whether tort law adequately accommodates the modern regulatory state.

To be sure, there is now a considerable, quickly growing body of scholarship analyzing the issue of whether a federal statute impliedly preempts state tort law.[8] Scholars have also addressed the issues of whether a statutory violation establishes negligence per se,[9] or whether compliance with a safety statute or regulation constitutes a complete defense to tort liability.[10] Nevertheless, there has been no analysis of how these doctrines of implied preemption, negligence per se, and the regulatory compliance defense each relate to one another; that is, there has been no systematic analysis of how the common law of torts interacts with statutes.[11]

Symptomatic of this analytical gap, each of these doctrines is controversial. In a case of negligence per se, the statute itself does not create a cause of action or otherwise directly modify the common-law duty, so why should the statutory violation be sufficient to establish negligence liability? "So far as there is now any recognized theory at all, it is that the statute itself has no tort law effects. Rather, (unless the statute itself provides otherwise) the courts are free to create tort law rules and to adopt and import rules from statutes about other matters if they wish to do so."[12] How should courts exercise this discretion? The answer depends on the rationale for negligence per se, but "commentators [have] dreamed up fanciful explanations" for the doctrine,[13] predictably producing a range of opinions about its appropriate application. Disagreement about the manner in which statutes should affect

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6. CALABRESI, *supra* note 1, at 1.

7. *Id.*

8. *See, e.g.*, Symposium, *Federal Preemption of State Tort Law: A Snapshot of the Ongoing Debate*, 84 TUL. L. REV. 1127–1275 (2010); Symposium, *Ordering State-Federal Relations Through Federal Preemption Doctrine*, 102 NW. U. L. REV. 503–902 (2008).

9. *See* Robert F. Blomquist, *The Trouble with Negligence Per Se*, 61 S.C. L. REV. 221, 224 n.11 (2009) (observing that "only a few legal scholars in a smattering of articles have touched on the efficacy of the negligence per se doctrine" and then providing citations to eighteen articles that discuss the doctrine).

10. *See, e.g.*, Symposium, *Regulatory Compliance as a Defense to Products Liability*, 88 GEO. L.J. 2049 (2000).

11. For reasons that will become clear, the absence of systematic analysis can be traced to the doctrine of negligence per se. *Cf.* Blomquist, *supra* note 9, at 224 n.11 ("No scholar to date has exhaustively examined, on an in-depth basis, the origins and legal theory of negligence per se.").

12. DAN B. DOBBS, THE LAW OF TORTS 319 (2000).

13. *Id.*

tort law also encompasses the regulatory compliance defense, with this particular controversy centering on the question of whether courts adequately defer to the regulatory expertise of administrative agencies.[14] These long-running debates over negligence per se and the regulatory compliance defense have now been eclipsed by the preemption question. Although the federal preemption of state law is not limited to tort claims, the issue "is particularly focused on the field of product liability and the interplay of federal agency regulation with state tort law."[15] The recent surge of interest concerning the statutory preemption of tort law flows from the large number of these cases recently decided by the U.S. Supreme Court, including four in the 2010 term.[16] Courts have struggled with the issue of whether a statute that does not expressly preempt tort law does so by implication, resulting in a body of law that scholars generally consider "a muddle."[17] According to one recent characterization, the jurisprudence of implied preemption represents a "[n]ervous [b]reakdown in [o]ur [c]onstitutional [s]ystem."[18] Controversy now envelops the three doctrines addressing the relation between statutes and the common law of torts.

This problem stems from the lack of systematic analysis concerning the relation between these two bodies of law. The different ways in which a statute or regulation can interact with tort law are fully captured by the three doctrines of negligence per se, the regulatory compliance defense, and statutory preemption. The first two address the *complementary* relations between tort law and regulatory law with respect to establishing liability (negligence per se) or denying liability (the regulatory compliance defense), with preemption doctrine then addressing the *competing* relations or manner in which one body of (legislative) law can displace the other (tort law). Each doctrine, therefore, must resolve the same substantive problem: How should courts determine the relation between statutory law and the common law of torts? Although this substantive question is common to the three doctrines,

14. *See infra* notes 123–29 and accompanying text.

15. Edward F. Sherman, *Federal Preemption of State Tort Law: Policies, Procedures, and Proposals of the ABA Task Force*, 84 TUL. L. REV. 1127, 1128–29 (2010).

16. *See* Pliva, Inc. v. Mensing, 131 S. Ct. 2567 (2011) (holding that federal law impliedly preempts state laws imposing a duty on manufacturers to change the warning label on generic drugs); Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527 (2011) (holding that federal environmental law displaces any federal common-law right to abate carbon dioxide emissions and leaving for consideration on remand the issue of whether federal law preempts related tort claims based on state nuisance law); Williamson v. Mazda Motor of America, Inc., 131 S. Ct. 1131 (2011) (holding that a federal regulation permitting manufacturers to choose between two seatbelt options does not impliedly preempt state tort liability for defective design involving one of those options); Breusewitz v. Wyeth LLC, 131 S. Ct. 1068 (2011) (holding that the National Vaccine Act expressly preempts all state tort claims alleging that a vaccine is defectively designed).

17. Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 232 (2000).

18. Geoffrey C. Hazard, Jr., *Quasi-Preemption: Nervous Breakdown in Our Constitutional System*, 84 TUL. L. REV. 1143 (2010).

no one has systematically analyzed how that issue is resolved across the doctrines, with the result that there is no clear understanding of how statutory law fully interacts with tort law.

The lack of analysis is understandable in light of the apparently obvious answer to the question of how courts should determine the relation between statutory law and tort law. Due to legislative supremacy, courts must modify tort law to account for legislative mandates, making it seem self-evident that the relation between these two bodies of law is fully determined by legislative or statutory purpose. This conclusion is mistaken, however, producing a skewed understanding of the relation between statutory law and tort law and concomitant problems for the doctrinal analysis of negligence per se, the regulatory compliance defense, and statutory preemption.

Of course, statutory purpose decisively matters. The legislature can obligate courts to modify or even eliminate common-law tort rules. In many cases, though, a statute has no obligatory tort law effects. The legislature (or regulators acting under statutory authority) often does not consider, either expressly or by implication, how a statute (or regulation) should interact with tort law. Statutory purpose could fully determine the relation between statutory and tort law, but in practice it does not.

Even if there is no statutory purpose to modify tort law, a statute or regulation can be based on a policy decision that is relevant to the resolution of a tort claim. These decisions embody a legislative intent to resolve a policy issue in a particular manner within the statutory scheme, but the limited nature of this policy decision entails no legislative intent to modify tort law. Statutory purpose in the more robust sense employed throughout this Article involves a legislative intent to modify tort law, either expressly or by implication. So defined, statutory purpose differs from a legislative policy decision that has no obligatory tort law effects. Courts can defer to legislative policy decisions to resolve particular tort questions, even if they are not statutorily obligated to do so.

Because judges can defer to the legislative policy decisions embodied in a statutory or regulatory scheme, the relation between statutory law and tort law is not fully determined by statutory purpose. Systematic analysis of this issue across doctrines shows that when a statute or administrative regulation is based on a policy decision that is relevant to the resolution of a tort claim, courts will defer to the legislative policy solution as a matter of common-law discretion. The relation between statutory law and tort law largely depends on deference, not statutory purpose.

This principle of common-law deference unifies the doctrines of negligence per se, the regulatory compliance defense, and statutory preemption. By moving the inquiry beyond statutory purpose, the principle of common-law deference also supplies the analytic structure that has been missing from prior formulations of these doctrines, showing that each one is much less controversial than commonly understood.

The principle of common-law deference is more extensively discussed in Part I below, which shows that courts defer to legislative policy decisions across a wide range of tort cases for reasons of institutional comity and comparative institutional advantage. The principle of deference, however, does not expressly guide the legal inquiry in cases of negligence per se, regulatory compliance, or implied preemption, resulting in a great deal of confusion. As Part II shows, the black-letter rule of negligence per se is exclusively formulated in terms of statutory purpose, yielding two lines of puzzling cases that become fully understandable once justified by the principle of common-law deference. For reasons given in Part III, the principle of deference also undergirds the regulatory compliance defense, making that doctrine more robust and less controversial than commonly thought. Part IV concludes by examining the implied statutory preemption of tort law. Although preemption necessarily depends on legislative intent, a focus on statutory purpose does not evidently account for the manner in which implied preemption poses hard questions about federalism and comparative institutional competence. That problem is solved if the inquiry is redirected from statutory purpose to the regulatory compliance defense. Implied preemption is required only if there is some conflict between federal and state law. Pursuant to the principle of common-law deference, regulatory compliance ordinarily establishes a complete defense to any tort claim that would also be impliedly preempted, largely eliminating any conflict between federal and state law and the concomitant need for implied preemption. The principle of common-law deference accordingly dispels otherwise worrisome federalism concerns about federal law overriding the historic state interest in tort law, making the issue of implied preemption much less controversial than commonly assumed.

In the age of statutes, deference provides the primary means by which courts integrate health and safety legislation into the common law of torts. Various reasons might justify reforms of the tort system, but the failure of tort law to accommodate the modern administrative state is not among them.

I. THE PRINCIPLE OF COMMON-LAW DEFERENCE

In exercising their common-law authority, courts will defer to a legislative policy decision that is relevant to the resolution of any issue posed by a tort claim. Courts are not statutorily obligated to adopt these legislative decisions; they instead defer to them as a matter of institutional comity and comparative institutional advantage. This principle of common-law deference has not been expressly denominated as such by courts or commentators, although its existence is readily apparent once one looks for it in the case law.

A good example is provided by the well-known case *Tarasoff v. Regents of the University of California*, in which the California Supreme Court held that

once a psychotherapist "does in fact determine, or under applicable professional standards reasonably should have determined, that a patient poses a serious danger of violence to others, he bears a duty to exercise reasonable care to protect the foreseeable victim of that danger."[19] *Tarasoff* recognized that such a duty implicates a difficult policy problem pitting the confidentiality of the psychotherapist–patient relationship against the threat of violence faced by a third party. That problem, however, had been previously resolved by the legislature in another context, and so the court concluded that the legislative policy solution justified the tort duty:

> We recognize the public interest in supporting effective treatment of mental illness and in protecting the rights of patients to privacy . . . and the consequent public importance of safeguarding the confidential character of psychotherapeutic communication. Against this interest, however, we must weigh the public interest in safety from violent assault. The Legislature has undertaken the difficult task of balancing the countervailing concerns. In Evidence Code section 1014, it established a broad rule of privilege to protect confidential communications between patient and psychotherapist. In Evidence Code section 1024, the Legislature created a specific and limited exception to the psychotherapist-patient privilege: "There is no privilege . . . if the psychotherapist has reasonable cause to believe that the patient is in such mental or emotional condition as to be dangerous to himself or to the person or property of another and that disclosure of the communication is necessary to prevent the threatened danger."
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> . . . We conclude that the public policy favoring protection of the confidential character of patient-psychotherapist communications must yield to the extent to which disclosure is essential to avert danger to others. The protective privilege ends where the public peril begins.[20]

Tarasoff did not conclude that the California Evidence Code created a statutory mandate to modify tort law by obligating psychotherapists to disclose to a third party the threat of physical harm posed by a patient. The court never addressed the issue of whether the legislature had considered this tort question, either expressly or by implication. That tort issue, however, turned on a policy decision that had already been resolved by the Evidence Code, so the court deferred to this legislative policy solution by

19. Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334, 345 (Cal. 1976), *superseded by statute*, CAL. CIV. CODE § 43.92 (West 2007 & Supp. 2013), *as recognized in* Pedeferri v. Seidner Enters., 156 Cal. Rptr. 3d 673, 682 (Cal. Ct. App. 2013).

20. *Id.* at 346–47 (second alteration in original) (citation omitted).

relying on it to recognize a new common-law duty of disclosure. *Tarasoff* resolved the tort issue by invoking deference and not statutory obligation.

The rationale for deference is based on institutional comity and comparative institutional advantage. Consider the cases in which courts exempt the policy decisions of governmental actors from tort liability, such as a governmental policy decision for deploying police offers across the community. Such an exemption can be dictated by statutory purpose. As illustrated by the Federal Tort Claims Act, a statute that waives sovereign immunity can expressly provide for an exemption from tort liability for governmental policymaking functions.[21] Any tort claim alleging that the government negligently adopted a policy for deploying police resources would be foreclosed by such a statute. But even if there is no statutory obligation to exempt such a governmental policy decision from tort liability, courts will defer to these decisions and immunize them from tort liability.[22]

For example, the statutory waiver of sovereign immunity in New York contains no express exemption from tort liability for governmental policy decisions.[23] Although not statutorily obligated to do so, New York courts have nevertheless adopted such a limitation of liability for reasons of institutional comity and comparative institutional advantage:

> Lawfully authorized planning by governmental bodies has a unique character deserving of special treatment as regards the extent to which it may give rise to tort liability. It is proper and necessary to hold municipalities and the State liable for injuries arising out of the day-by-day operations of government—for instance, the garden variety injury resulting from the negligent maintenance of a highway—but to submit to a jury the reasonableness of the lawfully authorized deliberations of executive bodies presents a different question. To accept a jury's verdict as to the reasonableness and safety of a plan of governmental services and prefer it over the

21. *Compare* 28 U.S.C. § 1346(b) (2006) (permitting individuals to recover tort damages for the physical harms caused by the negligent or wrongful act of a government employee "while acting within the scope of his office or employment"), *with id.* § 2680(a) (stating that the provisions of § 1346(b) do not apply to negligence claims "based upon . . . the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government").

22. *Cf.* United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 810 (1984) (observing that Congress adopted the discretionary function exception to the Federal Tort Claims Act even though "[i]t was believed that claims of the kind embraced by the discretionary function exception would have been exempted from the waiver of sovereign immunity by judicial construction").

23. *See* N.Y. JUD. CT. ACTS LAW § 8 (McKinney 1963) ("The state hereby waives its immunity from liability and action and hereby assumes liability and consents to have the same determined in accordance with the same rules of law as applied to actions in the supreme court against individuals or corporations, provided the claimant complies with the limitations of this article.").

> judgment of the governmental body which originally considered and passed on the matter would be to obstruct normal governmental operations and to place in inexpert hands what the Legislature has seen fit to entrust to experts. Acceptance of this conclusion, far from effecting revival of the ancient shibboleth [underlying sovereign immunity] that "the king can do no wrong", serves only to give expression to the important and continuing need to preserve the pattern of distribution of governmental functions prescribed by constitution and statute.[24]

Out of respect for the role of the legislature in the "pattern of distribution of governmental functions," courts deem a legislative policy decision to be a reasonable resolution of that same policy issue when posed by a tort claim, thereby eliminating the need to place that decision in the relatively "inexpert hands" of the jury. Having deemed the legislative policy decision to be a reasonable resolution of the tort issue, courts can then conclusively resolve that aspect of the tort claim by deferring to the legislative determination. A governmental policy decision, therefore, is reasonable as a matter of (tort) law and not subject to independent evaluation under the common-law duty.

This principle of common-law deference finds further expression in the doctrine of negligence per se. In these cases, the defendant violated a safety statute that does not give the plaintiff a statutory right to compensatory damages, but courts will nevertheless permit the plaintiff to rely on the statutory violation to establish negligence per se.[25] The judicial decision to do so is fully discretionary as made clear by the California Supreme Court in a leading case:

> The significance of the statute in a civil suit for negligence lies in its formulation of a standard of conduct that the court adopts in the determination of such liability. The decision as to what the civil standard should be still rests with the court, and the standard formulated by a legislative body in a police regulation or criminal statute becomes the standard to determine civil liability only because the court accepts it.[26]

Courts "accept" these legislative safety standards as a matter of deference, not statutory obligation.

In cases of negligence per se, courts defer to legislative safety standards for institutional reasons described by the *Restatement (Third) of Torts*:

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24. Weiss v. Fote, 167 N.E.2d 63, 65–66 (N.Y. 1960) (citations omitted); *see also* Friedman v. State, 493 N.E.2d 893, 898–900 (N.Y. 1986) (applying this rule in a case filed against the New York State Department of Transportation).

25. *See infra* Part II (discussing the doctrine of negligence per se).

26. Clinkscales v. Carver, 136 P.2d 777, 778 (Cal. 1943) (citations omitted).

> There are several rationales for this common-law practice. First, . . . as a matter of institutional comity it would be awkward for a court in a tort case to commend as reasonable that behavior that the legislature has already condemned as unlawful. . . . [Second,] when the legislature has addressed the issue of what conduct is appropriate, the judgment of the legislature, as the authoritative representative of the community, takes precedence over the views of any one jury.
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> Third, . . . [w]hen each jury makes up its own mind as to the negligence of that conduct, there are serious disadvantages in terms of inequality, high litigation costs, and failing to provide clear guidance to persons engaged in primary activity. . . . In general, statutes address conduct that conspicuously recurs in a way that brings it to the attention of the legislature. Negligence per se hence replaces decisionmaking by juries in categories of cases where the operation of the latter may be least satisfactory.[27]

These commonly accepted rationales for negligence per se are all based on varied considerations of institutional comity and comparative institutional advantage, yielding a doctrine that defers to legislative safety standards for resolving the issue of reasonable care posed by a common-law claim of negligence.

Deference undeniably shapes tort law in a wide variety of cases, and yet one will have a hard time finding express recognition of this common-law principle in the cases or scholarly commentary. The relation between statutory law and tort law instead is routinely defined in terms of statutory purpose due to the supremacy of legislative law, obscuring the role of common-law deference. To fully identify the importance of deference within tort law, we need to determine the role it plays in the doctrines addressing the different types of relations between statutes and the common law of torts.

II. DEFERENCE AND STATUTORY VIOLATIONS AS PROOF OF NEGLIGENCE PER SE

For cases in which the defendant's statutory violation caused injury to the plaintiff, the statute can create a cause of action or legal basis for recovery.[28] A statute that does not expressly provide for civil liability can

27. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 14 cmt. c (2010).

28. For example, some state statutes have codified the common-law tort rules of products liability, in which case the plaintiff sues under the statute and not the common law of torts. *E.g.*, IND. CODE ANN. §§ 34-6-2-29 to 34-20-9-1 (West 2011 & Supp. 2012) (specifying the rules governing all actions brought by a user or consumer against a manufacturer or seller for physical harm caused by a product).

create an implied cause of action under certain conditions.[29] In either case, the cause of action as alleged in the plaintiff's complaint is based directly on the statute and not the common law of torts.

If the statute does not create its own cause of action, proof of the statutory violation can still establish negligence per se.[30] This widely adopted doctrine has been repeatedly criticized. Echoing a concern voiced by others, one scholar has recently concluded that negligence per se depends on a "jurisprudential approach [that] is unsystematic, vague, muddled, and wrongheaded."[31] Though perhaps somewhat exaggerated, this critique finds ample support in the case law. The doctrine of negligence per se has proven to be surprisingly puzzling in application.

A. THE PUZZLE OF NEGLIGENCE PER SE

Negligence per se is based on the straightforward idea that a statutory safety requirement is reasonable, and so one's unexcused failure to comply with such a requirement creates an unreasonable risk of harm that can be subject to negligence liability. The black-letter formulation of negligence per se, however, has problematic limitations that can be traced to the deeply influential nineteenth century English case, *Gorris v. Scott*.[32]

In *Gorris*, the defendant ship owner violated a safety statute requiring livestock pens on the vessel in order to prevent the spread of disease among animals. During the voyage, the plaintiff's cattle were washed overboard. The plaintiff alleged that the statutorily required pens would have prevented this loss, but the court held that the statutory violation did not entitle the plaintiff to recover. One judge concluded that tort liability for a statutory violation is precluded "when the damage is of such a nature as was not contemplated at all by the statute."[33] Another judge concurred, reasoning that even if the statutory "precautions . . . [were] useful and advantageous for preventing animals from being washed overboard, . . . they were never intended for that purpose."[34] Due to the disconnect between statutory

29. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 14 cmt. b.

30. *Id.* § 14.

31. Blomquist, *supra* note 9, at 223; *see also, e.g.*, Henry H. Drummonds, *The Dance of Statutes and the Common Law: Employment, Alcohol, and Other Torts*, 36 WILLAMETTE L. REV. 939, 939 (2000) ("Doctrinal confusion plagues the efforts of lawyers, judges, and law professors to elucidate consistent rules and analyses affecting the private liability of persons who breach statutory commands." (footnote omitted)); Michael Traynor, *Public Sanctions, Private Liability, and Judicial Responsibility*, 36 WILLAMETTE L. REV. 787, 792 (2000) ("Courts . . . have not developed any systematic theory for dealing with the challenging problem of . . . when and for what reasons courts should provide civil remedies for statutory wrongs.").

32. Gorris v. Scott, [1874] 9 L.R. Exch. 125 (Eng.).

33. *Id.* at 128 (Kelly, C.B.).

34. *Id.* at 131 (Pollock, B.).

purpose and the plaintiff's injury, the statutory violation did not subject the defendant to liability.

The statutory-purpose limitations adopted by *Gorris* now frame the black-letter rule of negligence per se in the *Restatement (Third) of Torts*: "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."[35]

As applied to *Gorris*, this rule would render the statutory violation irrelevant either because the statute was not enacted to protect against the type of injury suffered by the plaintiff (cattle washing overboard) or the plaintiff was not within the class of victims protected by the statute (those whose cattle were infected by disease while on the ship). Indeed, these limitations have been called the "*Gorris* rule,"[36] although they are referred to as a "statutory-purpose doctrine" by the *Restatement (Third)*.[37]

In addition to establishing negligence liability, the violation of a safety statute or regulation can render a product defective and subject to strict products liability. Once again, the statutory-purpose limitations of the *Gorris* rule are adopted by the *Restatement (Third)*: "[A] product's noncompliance with an applicable product safety statute or administrative regulation renders the product defective with respect to the risks sought to be reduced by the statute or regulation."[38]

The black-letter formulation of the liability rule has posed problems that have not been adequately resolved. In one class of cases, the black-letter requirements are satisfied, and yet courts deny the plaintiffs' tort claims. In other cases, the rule is not satisfied, but courts still permit tort recovery for the statutory violation. For some reason, the black-letter rule does not fully describe how courts rely on statutory violations to establish tort liability.

1. Cases in Which the Black-Letter Rule Is Satisfied but the Plaintiff Loses

In many cases, the plaintiff satisfies the express requirements of negligence per se, but the court nevertheless concludes that the statutory

35. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 14.

36. *See, e.g.*, Clarence Morris, *The Relation of Criminal Statutes to Tort Liability*, 46 HARV. L. REV. 453, 476–77 (1933). Prior to *Gorris*, these limitations had been recognized in the United States. *See* Langlois v. Buffalo & Rochester R.R. Co., 19 Barb. 364, 370 (N.Y. Gen. Term 1854) (holding that the violation of a railroad fencing statute intended to protect animals such as cattle or horses did not constitute negligence per se in a claim involving human death or injury). Referring to these requirements as the "*Gorris* rule" instead reflects the case's authoritative statement of the rule. *Cf.* 3 FOWLER V. HARPER ET AL., HARPER, JAMES AND GRAY ON TORTS § 17.6, at 722 (3d ed. 2007) (describing *Gorris v. Scott* as "the leading case" for the rule "that the court in adopting the legislative judgment as to the standard [of reasonable care] should also adopt the legislature's judgment as to the limits" of the rule).

37. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 14 cmt. f.

38. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 4(a) (1998).

violation does not establish negligence liability. More precisely, the plaintiff in these cases would seem to be in the class protected by the statute and suffered harm of the type the statute was intended to prevent, and yet the court does not permit the plaintiff to recover under negligence per se. Satisfying the black-letter rule does not necessarily trigger its application.

> A common example occurs with ordinances that require landowners to remove natural accumulations of snow and ice from abutting public walks. Courts often hold that such ordinances impose a duty to the public but not a duty to individuals injured by the violation. The result is that the landowner is not liable for injuries resulting from his violation of the ordinance.[39]

The result in these cases is puzzling. If the statute creates a duty owed to the public, then why would an injured plaintiff—a member of the public—not be within the class protected by the statute as required by negligence per se?

The question is not resolved by the intrinsic properties of the statutory safety obligation. For example, courts across the country have recognized that motor-vehicle regulations are intended to protect other motorists and pedestrians, and so members of this protected class can rely on these statutory violations (like exceeding the speed limit) to establish negligence per se.[40] In England, by contrast, violations of traffic regulations do not establish tort liability because they "were not enacted for the benefit of any particular class of folk [but instead] were provisions for the benefit of the whole public, whether pedestrians or vehicle users, whether aliens or British citizens, and whether working or walking or standing upon the highway."[41] A regulation governing the speed of motor vehicles creates substantively equivalent safety obligations in both the United States and England, and yet such a regulation subjects motorists to a private duty in one country and a public duty in the other. The behavior required by the statute—not to exceed the speed limit—does not determine whether the duty is private or public, so what enables a court to determine whether such a statutory violation is subject to negligence per se?

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39. DOBBS, *supra* note 12, § 142, at 333 (paragraph structure added).

40. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 14 cmt. d. (observing that "the conduct of motorists is extensively dealt with by statutes and regulations; accordingly, in most highway-accident cases, findings of negligence depend on ascertaining which party has violated the relevant provisions of the state's motor-vehicle code"). Motor-vehicle regulations in the United States, therefore, create a duty to the private classes of motorists and pedestrians.

41. Phillips v. Britannia Hygienic Laundry Co., [1923] 1 K.B. 539 at 547 (Eng.).

The answer, according to the conventional view, depends on statutory purpose.[42] The invocation of statutory purpose in a case of negligence per se, however, can be spurious and would seem to be beside the point. The statute itself is silent as to its implications for tort liability, so what justifies the conclusion in these cases that the legislature intended "to exclude the tort liability it never mentioned in the first place"?[43] The invocation of legislative intent, moreover, would seem to be utterly irrelevant because the cause of action is based on the common law of torts, not the statute. For the class of cases under consideration, the statute has no obligatory tort law effects (otherwise the statute would modify or preempt the tort claim in this respect). Consequently, "the courts are free to create tort law rules and to adopt and import rules from statutes about other matters if they wish to do so."[44] Why would courts exercise this discretion by relying on statutory purpose—something they are obliged to follow—after having concluded that the statute has no obligatory tort law effects? Instead of clarifying matters, the invocation of statutory purpose to justify the denial of a claim that satisfies the black-letter rule of negligence per se only adds to the puzzle.[45]

2. Cases in Which the Black-Letter Rule Is Not Satisfied but the Plaintiff Prevails

The confusing role of statutory purpose in cases of negligence per se finds further expression in a different line of equally puzzling cases. As per the statutory-purpose doctrine embodied in the *Gorris* rule, negligence per se is limited to individuals who are protected by the statute and suffered the type of harm that the statute was meant to guard against.[46] Consequently, "[i]f the statute is construed as not covering the plaintiff, or the particular type of harm, many courts have held that its violation is not even evidence of negligence, and can have no effect on liability at all."[47] Cases that conform

42. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 38 cmt. e ("[W]hen a court finds that permitting tort actions would be inconsistent with the statute's design or purpose, imposing a tort duty is improper.").

43. DOBBS, *supra* note 12, § 142, at 333.

44. *Id.* § 135, at 319.

45. Recognizing this problem, Professor Ezra Thayer in his classic article on negligence per se argued that the doctrine is limited to statutes that forbid objectionable conduct, unlike statutes that require affirmative acts (such as the removal of snow) for the protection of others. Ezra Ripley Thayer, *Public Wrong and Private Action*, 27 HARV. L. REV. 317, 329 (1914). Thayer's reasoning, however, is problematic because courts have relied on safety statutes or regulations to create affirmative tort duties. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 38 ("When a statute requires an actor to act for the protection of another, the court may rely on the statute to decide that an affirmative duty exists and to determine the scope of the duty.").

46. *See supra* notes 34–35 and accompanying text.

47. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 36 (5th ed. 1984).

to the rule, of course, are not puzzling. The puzzle instead involves the large number of cases that permit tort recovery even though the *Gorris* rule is not satisfied, a problem, once again, related to the issue of statutory purpose.

> [W]hile the rule is followed in the majority of cases, there are a large number of cases in which the injuries are not within the class of harms which the legislature sought to prevent, and nevertheless the plaintiff is allowed a recovery. . . . There seem to be two fashions in avoiding the rule: some courts ignore it completely; other courts attribute to the legislature an intention to avoid injuries and protect individuals which the legislature probably never had. This second method is facilitated by the haziness of the concept of legislative intention.[48]

A good example is provided by *Harned v. Dura Corp.*, a products case in which the plaintiff was badly injured when a portable tank exploded as he was filling it with air from a compressor.[49] The plaintiff claimed that the explosion was caused by a defect in the design of the tank.[50] To prove defect, the plaintiff showed that the tank did not comply with the American Society of Mechanical Engineers ("ASME") Code, which had been statutorily incorporated into the governing state law.[51] To show that the statutory violation did not entitle the plaintiff to recover, the defendant argued that the safety regulation dealt with the risk of explosion faced by those in a "place of public assembly," whereas the plaintiff was injured while working for his employer at A & M Motors.[52] Even though the plaintiff was not within the class protected by the statute, the court nevertheless cryptically concluded that the statutory violation rendered the product defective: "[Defendant's] duty to comply with ASME construction standards arose during the manufacture of the tank in question; it should not be diminished retrospectively because it happened to be utilized at A & M Motors."[53] The court in *Harned* accordingly permitted the plaintiff to recover in tort, even though his claim did not satisfy the statutory-purpose limitations of the *Gorris* rule.

The result in cases like *Harned* can be justified by statutory purpose insofar as the imposition of tort liability for a statutory violation necessarily bolsters the financial incentive to comply with the statute in the first instance. One might also construe statutory purpose expansively by assuming that, in addition to those risks expressly adverted to in the safety statute, the legislature also accounted for all other foreseeable risks without

48. Morris, *supra* note 36, at 475–76 (footnotes omitted).
49. Harned v. Dura Corp., 665 P.2d 5, 6 (Alaska 1983).
50. *Id.*
51. *Id.* at 10 & n.17.
52. *Id.* at 13–14.
53. *Id.* at 14.

mention simply because they are usual or background risks that do not warrant express recognition.[54]

These formulations of statutory purpose, however, imply that negligence per se should never be limited by the *Gorris* rule. For example, the injuries in *Gorris* and the snow-removal cases were caused by foreseeable risks. Liability in these cases would also create financial incentives for complying with the statutes, and yet courts denied recovery under negligence per se either because the plaintiff was not within the class protected by the statute (the snow-removal cases) or did not suffer injury of the type the statute was meant to guard against (*Gorris*). Is it plausible that courts always make a fundamental mistake by limiting liability under the *Gorris* rule?

To be sure, many other courts have ignored the statutory-purpose limitations of the *Gorris* rule by permitting plaintiffs to recover for injuries not expressly contemplated by the legislature, leading Professor Clarence Morris to conclude that "regardless of what the limiting principle should be, the rule of *Gorris v. Scott* is ill-advised" because it effectively permits the legislature to limit tort liability "without ever realizing that it is doing so."[55] Perhaps the *Gorris* rule is ill-advised, but this conclusion merely begs the question of why its statutory-purpose limitations are so problematic in some cases (denying liability) but not others (permitting recovery).

Yet another explanation for these cases is that courts, in effect, treat the statute as establishing a customary form of safe behavior. Consequently, a statutory violation is analogous to the violation of a "statutory custom, which is entitled to admission as evidence" just like the violation of any other customary form of safe behavior.[56] The problem with this reasoning, as illustrated by *Harned*, is that courts do not analyze the statutory violation in this manner.[57]

We are left, then, with another line of cases in which courts, for some unexplained reason, effectively conclude that the statutory-purpose limitations of the *Gorris* rule are ill-advised. Once again, the black-letter rule

54. *See* Clarence Morris, *Duty, Negligence and Causation*, 101 U. PA. L. REV. 189, 204 (1952) ("When a legislature displays no specially restrictive interest in condemning dangerous conduct in a criminal statute, the statutory purpose rule is a foreseeability requirement."); Ariel Porat, *Expanding Liability for Negligence Per Se*, 44 WAKE FOREST L. REV. 979, 990–91 (2009) (developing this argument further).

55. Morris, *supra* note 36, at 476–77; *see also* KEETON ET AL., *supra* note 47, § 36, at 231 (furthering this argument).

56. KEETON ET AL., *supra* note 47, § 36, at 231.

57. An actor's failure to comply with customary safety practices "is evidence of the actor's negligence but does not require a finding of negligence." RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 13(b) (2010). In *Harned*, by contrast, the court concluded as a matter of law that the safety standard defined "the relevant standard of care." *Harned*, 665 P.2d at 14.

of negligence per se turns out to be puzzling in application for reasons related to statutory purpose.

B. NEGLIGENCE PER SE AND STATUTORY PURPOSE

The confusion concerning the *Gorris* rule stems from a fundamental misapplication of statutory purpose in cases of negligence per se. The *Gorris* rule is called a "statutory-purpose doctrine" by the *Restatement (Third) of Torts*,[58] which is accurate for our purposes because the *Gorris* rule entirely depends on statutory purpose as that term is used in this Article; that is, as a legislative intention to modify tort law. The *Gorris* rule depends on statutory purpose for reasons that do not apply to cases of negligence per se.

Gorris was decided under English law, which does not evaluate statutory violations with the doctrine of negligence per se. The English approach is fundamentally different from negligence per se for reasons described by the Supreme Court of Canada:

> The uncertainty and confusion in the relation between breach of statute and a civil cause of action for damages arising from the breach is of long standing . . . .
>
> There does seem to be general agreement that the breach of a statutory provision which causes damage to an individual should in some way be pertinent to recovery of compensation for the damage. *Two very different forces, however, have been acting in opposite directions*. In the United States the civil consequences of breach of statute have been subsumed in the law of negligence. On the other hand, we have witnessed in England the painful emergence of a new nominate tort of statutory breach.[59]

Negligence per se involves the breach of a common-law duty and accordingly acts in the "opposite direction" from the English "nominate tort" that bases liability on the breach of a statutory duty and not a common-law tort duty.[60] As explained by Lord Wright in a leading English case, "[a] claim for damages for breach of a statutory duty . . . is not to be confused in essence with a claim for negligence. *The statutory right has its origin in the statute* . . . ."[61] This difference, according to a leading English treatise, means that the court must solely rely on statutory purpose to permit tort recovery for breach of a statutory duty, whereas under negligence per se "the court is relieved of the need to look for what is almost certainly a fictitious

58. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 14 cmt. f.

59. R. v. Saskatchewan Wheat Pool, [1983] 1 S.C.R. 205, 211 (Can.) (emphasis added).

60. *Cf.* Garden Cottage Foods Ltd. v. Milk Mktg. Bd., [1984] A.C. 130 (Eng.) (concluding that a tortious action for breach of statutory duty is available for claims alleging a violation of competition law under article 86 of the Treaty of Rome).

61. *Id.* at 211–12 (emphasis added) (quoting London Passenger Transp. Bd. v. Upson, [1949] A.C. 155 at 168 (Eng.)).

Parliamentary intent to grant a private cause of action."[62] The English nominate tort of statutory breach requires a statutory purpose or legislative intention to create a new private cause of action, unlike a common-law claim of negligence per se.

In the United States, the issue of whether a statute gives individuals a right to compensatory damages for breach of the statutory duty has nothing to do with the doctrine of negligence per se, but instead is determined by a different doctrine that asks whether the legislature intended to create a private cause of action.[63] Lacking any such statutory right, the plaintiff's ability to recover for a statutory violation under the doctrine of negligence per se must be wholly based on the common law of torts and not the statute.

Despite the fundamental difference between negligence per se and breach of statutory duty under English law, their black-letter rules are identical. When a statute is the source of a duty and its correlative right as under the English law of statutory duty, then the statute fully determines the scope of the duty and right. Consequently, for English courts, the plaintiff's ability to recover for a statutory violation is solely a matter of statutory interpretation.

> [T]hree issues are relevant: whether the defendant's conduct infringed the standard set by the Act; whether the plaintiff was a member of the class protected by the Act; and whether the damage occurred in the manner the Act was meant to guard against. These requirements are strictly enforced and frequently result in the failure of actions for breach of a statutory duty.[64]

The inquiry employed by English law for determining whether a statute implicitly creates a new private cause of action (a nominate tort) is simply a restatement of the *Gorris* rule that also defines the statutory-purpose limitations in the black-letter rule of negligence per se.[65]

Why is the inquiry for breach of a statutory duty in England no different from the inquiry required by the black-letter formulation of negligence per se in the United States? The statutory duty cases like *Gorris* are completely determined by statutory purpose, whereas negligence per se is a common-law tort that it is derived from the principle of common-law deference—courts exercise their common-law authority in these cases by deferring to

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62. B.S. MARKESINIS & S.F. DEAKIN, TORT LAW 337 (4th ed. 1999). *See generally* Caroline Forell, *Statutes and Torts: Comparing the United States to Australia, Canada, and England*, 36 WILLAMETTE L. REV. 865 (2000) (analyzing the interrelationships between statutory and tort law in England and the United States).

63. *See, e.g.*, Touche Ross & Co. v. Redington, 442 U.S. 560, 568 (1979) (discussing the various factors that courts use to determine whether a federal statute creates an implied cause of action while recognizing that "[t]he question of the existence of a statutory cause of action is, of course, one of statutory construction").

64. MARKESINIS & DEAKIN, *supra* note 62, at 347.

65. *See supra* notes 34–35 and accompanying text.

non-binding legislative policy decisions embodied in a statute.[66] Defining the black-letter rule of negligence per se solely in terms of the *Gorris* rule ignores the fundamental difference between these two doctrines and is bound to create problems.

In principle, a deferential tort inquiry can fully account for a legislative policy decision while also considering other issues posed by the common-law claim; deference does not necessarily tether the tort inquiry to statutory purpose as per the *Gorris* rule. Consequently, *the black-letter rule of negligence per se will not fully describe the appropriate inquiry whenever deference to a non-binding legislative policy decision does not limit the tort inquiry to only those matters considered by the legislature.*

To develop the implications of this conclusion, we need to analyze more fully how deference to a legislative policy determination can affect a tort claim. Having identified the cases in which a deferential tort inquiry differs from an inquiry limited by statutory purpose, we can then determine whether this difference accounts for the two lines of puzzling cases that have otherwise eluded satisfactory explanation for not adhering to the black-letter rule of negligence per se.

C. MAPPING DEFERENCE INTO THE ELEMENTS OF A NEGLIGENCE CLAIM

A statute can interact with tort law in at least seven different ways.[67] The most important difference for present purposes involves statutes that enable courts to recognize new common-law duties as opposed to statutes that operate within previously established common-law duties.

"Courts frequently fail to distinguish between negligence per se, where a duty under tort law already exists, and the use of a statute to provide a duty that has previously been unrecognized by tort law."[68] Courts presumably do not draw the distinction because the black-letter rule of negligence per se subsumes both statutory types into a single inquiry limited by the statutory-purpose doctrine.

Once these two types of statutes are adequately distinguished, it becomes possible to explain the two lines of otherwise puzzling cases that depart from the black-letter rule. Each type of statute implicates a different element of the negligence claim—one is relevant to the element of duty, whereas the other addresses the separate element of whether a previously established common-law duty has been breached. Deference to each type of

66. *See supra* notes 25–27 and accompanying text.

67. *See* DOBBS, *supra* note 12, § 133, at 311–15 (discussing the effects of statutes in tort law in terms of seven categories: statutes imposing a duty but not otherwise altering the incidents of a tort claim; statutes creating a new claim, duty, or defense; statutes limiting a claim or creating defenses; statutes disclaiming tort law effects; implied disclaimer of tort effects; preemptive statutes; and statutes not directed at tort law).

68. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 38 reporters' note cmt. D (2010).

statute produces its own distinctive inquiry that is not wholly defined by the statutory-purpose limitations in the black-letter rule of negligence per se. Deference to these two types of statutes yields two lines of inquiry that can fully explain the two lines of cases that depart from the black-letter rule.

1. Statutes as the Source of Newly Recognized Common-Law Duties

In some cases, courts can rely on a statute to adopt a new common-law duty that they would not otherwise recognize absent the statute.[69] Once the new duty has been established on this basis, the remaining inquiry fully conforms to the black-letter rule of negligence per se.

In a negligence case, the element of duty creates a tort obligation for dutyholders to exercise reasonable care in order to eliminate categories of specified risks, typically defined by the foreseeable risks of physical harm.[70] A foreseeable risk consists of the probability (denoted *P*) that a given loss (denoted *L*) will occur, and so the ordinary duty to exercise reasonable care can be compactly expressed as requiring the dutyholder to incur any burden (denoted *B*) that is reasonable (denoted ®) in light of the foreseeable risks of physical harm (*PL)* that would thereby be eliminated, or *B* ® *PL*.

When a statute is the source of a new common-law duty, it also fully determines the scope and substantive content of the duty—the risks governed by the duty and the precautions that a dutyholder must take in order to avert those harms. By deferring to such a statute, a court would conclude that the dutyholder must take the statutorily required precaution and incur the associated burden (denoted $B_{\text{complying with the statute}}$) because it is a reasonable method (denoted ®) for reducing the foreseeable risks of physical harm contemplated by the statute (denoted $PL_{\text{risks regulated by the statute}}$):

$$B_{\text{complying with the statute}} \text{ ® } PL_{\text{risks regulated by the statute}}$$

A breach of this duty (the statutory violation involving the defendant's failure to take the precaution denoted $B_{\text{complying with the statute}}$) could be a proximate cause of the plaintiff's injury only if the accident in question were encompassed by the new common-law duty (the accident must have been caused by a risk within the category represented by $PL_{\text{risks regulated by the statute}}$).[71] To satisfy this requirement, the plaintiff must be within the class of persons protected by the safety statute and be injured by the type of risk that the

69. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 14 cmt. i (explaining that the violation of a statute is relevant to duty analysis and can lead courts to recognize a duty that they would not otherwise recognize absent the statute).

70. *See id.* § 7 (defining the general duty of reasonable care); Mark A. Geistfeld, *The Principle of Misalignment: Duty, Damages, and the Nature of Tort Liability*, 121 YALE L.J. 142, 148–56 (2011) (explaining why the element of duty defines the category of risks governed by the standard of reasonable care).

71. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 29 (defining scope of liability or proximate cause to limit "[a]n actor's liability . . . to those harms that result from the risks that made the actor's conduct tortious").

statute seeks to avert—the same statutory-purpose limitations required by the black-letter rule of negligence per se.

The principle of common-law deference accordingly justifies the black-letter rule of negligence per se when applied to statutes that enable courts to recognize a new common-law duty. Statutes of this type are also wholly analogous to the statutes that create a statutory duty under English law. In both instances, the statute is the source of a new duty and accordingly fully defines the scope and substantive content of the duty, explaining why the black-letter rule of negligence per se mirrors the statutory-duty inquiry employed by English courts and embodied in the *Gorris* rule.[72]

This rationale for the black-letter rule of negligence per se has not been recognized by courts and commentators. The foregoing analysis derives the black-letter rule from a statute that embodies the legislative policy decisions necessary for courts to recognize a new common-law tort duty in the first instance, making the statutory-purpose limitations of the *Gorris* rule apposite for the common-law negligence claim. Nevertheless, courts and commentators regularly assume that negligence per se applies to a pre-existing tort duty and resolves the separate question of whether a statutory violation constitutes a breach of the duty. Because of the common assumption that negligence per se applies to a previously established common-law duty, "the appropriate role of a statute in providing a duty against a background of no duty is considerably more controversial . . . ."[73] The judicial reliance on a non-binding statute to recognize a new common-law duty would not be controversial if it were commonly understood that a duty of this type provides the foundation for the black-letter rule of negligence per se.

The problem, once again, stems from the misplaced focus on statutory purpose. "American courts typically have no established method of dealing with these kinds of cases."[74] In an effort to develop such a method, scholars have argued that because the negligence per se inquiry is guided by statutory purpose, the duty question should be resolved in a similar manner.[75] Consistent with this reasoning, the *Restatement (Third)* states that "courts may consider the legislative purpose and the values reflected in the statute to decide that the purpose and values justify adopting a duty that the common law had not previously recognized."[76] So, too, "when a court finds that permitting tort actions would be inconsistent with the statute's design or

72. *See supra* notes 63–65 and accompanying text.

73. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 38 reporters' note cmt. e.

74. Forell, *supra* note 62, at 879.

75. *See, e.g.*, *id.* at 882 (arguing that "whether the statute should be that basis for allowing a tort action depend[s] on whether such action would help effectuate the statute's purpose").

76. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 38 cmt. c.

purpose, imposing a tort duty is improper."[77] Insofar as this approach makes the common-law duty question turn on statutory purpose, it is controversial for good reasons.

When a new duty is justified by statutory purpose, the statute is the source of the legal obligation, not the common law. The logic leading to this conclusion is no different from the rationale for recognizing statutory duties under English law.[78] In the class of cases under consideration, however, the statute itself does not create a private cause of action, so how can statutory purpose enable courts to recognize a new common-law tort duty that would not otherwise exist without the statute?

Instead of relying on statutory purpose, courts could invoke a more expansive conception like the "spirit of the statute" to justify a new tort duty, but such a statutory conception would be an even more problematic rationale for the new tort duty.

> Even a non-lawyer can appreciate the potential confusion and chaos that could develop from such a broad legal rule. A court, for example, could read a common law affirmative duty into almost any law related to protective services, custody, control, or oversight authority. Furthermore, a court could do so while acting within the spirit of the rule, even if such action was not the actual intent of the legislature in enacting the law. All that is needed is a law that can plausibly be interpreted as requiring an actor to act for the protection of another.[79]

The "spirit" of any statute would always seem to be furthered by a common-law duty creating an obligation to comply with the statute, and so there is no apparent limiting principle that could justify a court's refusal to recognize a new duty based on any statute requiring one to act for the protection of another. The "spirit" of a statute, like the more narrowly defined statutory purpose, provides a problematic foundation for a new common-law tort duty.

This justificatory problem can be solved if the inquiry is not guided by statutory purpose as suggested by the black-letter rule of negligence per se, but instead is based on the principle of common-law deference to legislative policy decisions. Deference supplies an established reason for recognizing a new common-law duty that courts would not otherwise recognize without the statute.

To determine whether a common-law duty exists, courts consider a number of categorical policy questions, such as the difficulty of compliance across the full range of relevant cases, the potential scope of liability,

77. *Id.* § 38 cmt. e.

78. *See supra* notes 59–64 and accompanying text.

79. Victor E. Schwartz & Christopher E. Appel, *Reshaping the Traditional Limits of Affirmative Duties Under the Third Restatement of Torts*, 44 J. MARSHALL L. REV. 319, 331 (2011).

administrative convenience, and the need to coordinate with other legal institutions or bodies of law.[80] Courts will also reject a duty if it would generate legal uncertainty having an undue chilling effect on socially valuable conduct.[81] All of these varied policy issues must be resolved before a court will recognize a common-law duty to exercise reasonable care, a framework of analysis that is not altered by a statute that has no obligatory tort law effects.

Pursuant to the principle of deference, however, a court can rely on legislative policy determinations that are relevant to the resolution of any issue posed by the common-law duty question. Consequently, if a newly enacted statute resolves a policy issue that courts had previously relied on to reject the duty, then deference to this particular legislative policy determination would enable courts to recognize a new duty. Even if there is no statutory purpose of creating a new form of tort liability, deference to a relevant legislative policy decision can justify a new common-law tort duty.

A good example is provided by the previously discussed case *Tarasoff v. Regents of University of California*, in which the court relied on a legislative policy determination embodied in the California Evidence Code to justify a new common-law duty of reasonable care requiring a psychotherapist to protect a third party from the threat of physical violence posed by his patient.[82] The court could have rejected such a duty on the ground that it would have an undue chilling effect on the psychotherapist–patient relationship, but *Tarasoff* concluded that this concern was outweighed by the value of preventing physical harm to third parties because the legislature had reached that same policy conclusion when formulating the Evidence Code.[83] The legislature's enactment of the Evidence Code evinced no intent to create a new tort duty, but *Tarasoff* was able to recognize such a duty by deferring to the underlying legislative policy determination.

Another example is provided by statutes known as Dram Shop Acts, which typically prohibit the commercial sale of alcohol to a minor or an obviously intoxicated person. Under the early common law, third-party commercial dispensers of alcoholic beverages were not liable for injuries and deaths caused by their drunk customers.[84] The limitation of liability was

80. *See* MARK A. GEISTFELD, TORT LAW: THE ESSENTIALS 152–79 (2008) (discussing the factors that determine the existence of the tort duty).

81. *See* Mark A. Geistfeld, *Social Value as a Policy-Based Limitation of the Ordinary Duty to Exercise Reasonable Care*, 44 WAKE FOREST L. REV. 899, 917 (2009) (showing how courts will limit duty out of the concern that the uncertainty in application is likely to have an overly negative impact on socially valuable forms of behavior).

82. Tarasoff v. Regents of the Univ. of Cal., 551 P.2d 334, 346–47 (Cal. 1976), *superseded by statute*, CAL. CIV. CODE § 43.92 (West 2007 & Supp. 2013), *as recognized in* Pedeferri v. Seidner Enters., 156 Cal. Rptr. 3d 673, 682 (Cal. Ct. App. 2013); *see also supra* notes 19–21 and accompanying text (discussing the case).

83. *Tarasoff*, 551 P.2d at 347.

84. *See* DOBBS, *supra* note 12, § 332, at 899.

justified on the ground that the risks in question were not foreseeable as a categorical matter, thereby justifying a categorical limitation of liability that effectively functioned as a limitation of duty.[85] This rationale ceased to be tenable after the legislature had enacted a Dram Shop Act, which clearly puts tavern owners on notice that serving inebriated patrons creates a foreseeable risk of drunk driving. The statute has the legal effect of making the categorical risk of drunk driving foreseeable, but a legislative determination about foreseeability does not otherwise establish the statutory purpose to create a new cause of action (one, in any event, that would be based on the statute and not the common law). By deferring to this legislative policy decision that makes the risk of drunk driving foreseeable, however, numerous courts have recognized a new common-law duty that subjects tavern owners to negligence liability for violating a Dram Shop Act by serving an obviously intoxicated patron who subsequently injured the plaintiff in a drunk-driving accident.[86] Once again, deference supplies the rationale for the tort duty, not a finding of statutory purpose to create a new cause of action.

In addition to justifying new common-law tort duties, the principle of common-law deference also shows why statutory violations do not necessarily justify tort liability, even if the requirements of negligence per se are otherwise satisfied. Deference only requires a court to incorporate a legislative policy decision into a duty inquiry that is wholly defined by the common law. A safety statute is not always based on legislative policy determinations that would enable courts to recognize a new tort duty. Incorporating these legislative policy decisions into the tort inquiry will not fully answer the duty question. The common-law rules governing the existence of duty accordingly limit the instances in which deference can justify a new common-law duty. In these cases, courts will deny recovery for a statutory violation, even though the black-letter rule of negligence per se is otherwise satisfied.

A good example is provided by the previously discussed cases in which a landowner violated an ordinance requiring snow removal, but nevertheless avoided negligence liability for an unexcused statutory violation that foreseeably caused a pedestrian to slip and fall on the unshovelled sidewalk.[87] Although the black-letter rule of negligence per se is satisfied in

85. Although courts typically denied liability for these unforeseeable risks on grounds of proximate cause, as formulated and applied by the courts, "the common law rule looked like a no-duty rule rather than a proximate cause rule tailored to particular facts." *Id.*

86. *See, e.g.*, Rappaport v. Nichols, 156 A.2d 1 (N.J. 1959) (holding that the common-law bar to recovery for drunk-driving accident caused by the inebriated patron of defendant's tavern did not bar recovery for negligence liability based on violation of state's dram shop statute and providing extensive discussion of cases from other jurisdictions reaching the same conclusion).

87. *See supra* Part II.A.1.

these cases, that doctrine is irrelevant because the statute does not resolve the policy questions that must be answered in order for courts to recognize a new common-law duty. Without the tort duty, the violation of a safety statute cannot establish tort liability, regardless of whether the requirements of negligence per se are otherwise satisfied.[88]

Consider the reasoning employed by the Ohio Supreme Court in a case of this type:

> In a climate where the winter brings frequently recurring storms of snow and rain and sudden and extreme changes in temperature, these dangerous conditions appear with a frequency and suddenness which defy prevention and, usually, correction. . . . To hold that a liability results from these actions of the elements would be the affirmance of a duty which it would often be impossible, and ordinarily impracticable . . . to perform.[89]

As the court explained in a subsequent case, rather than addressing the full set of policy concerns implicated by the tort duty,

> the rationale behind sidewalk snow removal statutes like the one *sub judice* is that it would be impossible for a city to clear snow and ice from all its sidewalks; and the duty imposed by such statutes is most likely a duty to assist the city in its responsibility to remove snow and ice from public sidewalks. This, however, does not raise a duty on owners and occupiers to the public at large, and such statutes should not, as a matter of public policy, be used to impose potential liability on owners and occupiers who have abutting public sidewalks.[90]

Understood in relation to duty analysis, the court's invocation of legislative intent is understandable. The court was simply asking whether the legislature had addressed the policy concerns of relevance for adopting a new common-law duty. In the case at hand, the relevant policy concern involved the difficulty of complying with the safety obligation across the relevant range of cases—an established reason under the common law for limiting the duty to exercise reasonable care.[91] As the court explained, a

88. *See, e.g.*, Cuyler v. United States, 362 F.3d 949, 952 (7th Cir. 2004) ("A conventional principle of tort law . . . is that if a statute defines what is due care in some activity, the violation of the statute either conclusively or . . . presumptively establishes that the violator failed to exercise due care. But the statutory definition does not come into play unless the tort plaintiff establishes that the defendant owes a duty of care to the person he injured . . . because tort liability depends on the violation of a duty of care to the person injured by the defendant's wrongful conduct." (citations omitted)).

89. City of Norwalk v. Tuttle, 76 N.E. 617, 618 (Ohio 1906).

90. Lopatkovich v. City of Tiffin, 503 N.E.2d 154, 157 (Ohio 1986).

91. *See* Geistfeld, *supra* note 81, at 907–16 (showing how courts have rejected a duty in cases of social-host liability based on the difficulty that social hosts would face in attempting to comply with such a duty across the relevant category of cases).

common-law duty for private individuals to remove snow from public sidewalks "would often be impossible, and ordinarily impracticable . . . to perform."[92] This rationale for a no-duty rule is not altered by a legislative policy decision that homeowners should assist the city in the removal of snow and ice from public sidewalks. Because the snow-removal statute did not adequately resolve the policy issue required for the court to recognize a new common-law duty, the court could find that the violation of the statute did not establish tort liability. Without the underlying duty, the court had no legal basis for imposing negligence liability on the defendant for the statutory violation, regardless of whether the plaintiff could otherwise satisfy the black-letter requirements of negligence per se. The denial of liability had nothing to do with a statutory purpose of foreclosing tort liability for statutory violations, but instead pertained to the manner in which the legislative intent showed that the statute was based on a policy decision different from the one that would have justified a new common-law tort duty.

The reasoning in this particular case is not exceptional. "In these cases the opinions usually contain a statement to the effect that there is no duty to individuals who might be injured by its breach."[93]

As revealed by this line of cases, the doctrine of negligence per se can be fully understood only in relation to the principle of common-law deference, a relation that is masked by the black-letter rule's exclusive reliance on the statutory-purpose doctrine. A safety statute does not always resolve the policy issues required for a court to recognize a new common-law duty, explaining the otherwise puzzling cases in which the statutory violation does not establish negligence per se, even though the black-letter rule is expressly satisfied.[94] In other cases, deference resolves the policy questions that enable courts to recognize a new common-law duty. The statute in this limited respect is the source of the common-law duty, and so it also fully defines the scope and content of the new duty, thereby functioning in a manner that is wholly analogous to the statutory duty recognized by English law and embodied in statutory-purpose limitations of the *Gorris* rule. In these cases, the principle of common-law deference justifies the same outcomes that are produced by the *Gorris* rule, explaining why the black-letter rule of negligence per se is limited by the statutory-purpose doctrine. Properly understood, the black-letter rule of negligence per se finds justification in the principle of common-law deference and not statutory purpose.

92. *City of Norwalk*, 76 N.E. at 618.

93. Morris, *supra* note 36, at 468.

94. *See supra* Part II.A.1.

2. Statutes that Are Incorporated into Pre-Existing Common-Law Duties

As we have found, the black-letter rule of negligence per se can be defensibly limited by the statutory-purpose rule when deference to a legislative policy decision would enable courts to recognize a new common-law duty. However, "the defendant in most negligence per se cases already owes the plaintiff a pre-existing common law duty to act as a reasonably prudent person, so that the statute's role is merely to define more precisely what conduct breaches that duty."[95] According to some commentators, negligence per se properly applies *only* to cases in which the statutory safety standard is incorporated into an existing common-law duty.[96] This class of cases differs from those that we have previously analyzed, leading to the question of whether deference to this type of statute conforms to the statutory-purpose limitations in the black-letter rule of negligence per se.

For cases in which courts defer to a statute by incorporating it into a pre-existing common-law duty, the principle of deference can justify outcomes that diverge from the statutory-purpose limitations of the *Gorris* rule. Deference explains the otherwise puzzling line of cases in which courts permit recovery for a statutory violation that does not satisfy the black-letter rule of negligence per se.[97]

Under the common law, "[a]n actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm."[98] This common-law duty is limited to foreseeable risks.[99] Consequently, if the risks contemplated by the statute (denoted $PL_{\text{risks regulated by the statute}}$) do not fully encompass all foreseeable risks of physical harm, these other foreseeable risks (denoted $PL_{\text{non-statutory foreseeable risks}}$) ordinarily are still within the duty to exercise reasonable care (denoted ®). The common-law tort duty accordingly requires dutyholders to take any precautionary burden (denoted *B*) satisfying the following standard of reasonable care:

$$B \text{ ® } PL_{\textit{risks regulated by the statute}} + PL_{\textit{non-statutory foreseeable risks}}$$

Under negligence per se, the defendant's failure to take the statutorily required precaution (denoted $B_{\text{complying with the statute}}$) breaches the common-law duty and entitles the plaintiff to recover for injuries caused by the risks contemplated by the statutory scheme ($PL_{\text{risks regulated by the statute}}$). The problematic cases are those in which negligence per se does not permit recovery because the plaintiff was injured by a foreseeable risk of physical

95. Perry v. S.N., 973 S.W.2d 301, 306 (Tex. 1998).

96. *See* KEETON ET AL., *supra* note 47, § 36, at 221 n.9.

97. *See supra* Part II.A.2.

98. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 7(a) (2010).

99. *Id.* § 7 cmt. j.

harm that was not considered by the legislature when it enacted the safety statute ($PL_{\text{non-statutory foreseeable risks}}$).

To permit recovery in such a case, courts have employed at least three different approaches. First, "courts can consider giving a generous interpretation to the legislature's intent, thereby defining at a higher level of generality those persons whom the statute is designed to protect."[100] An alternative approach, which is in accord "with the broad preponderance of authority" on the matter, treats the statutory violation as some evidence of negligence.[101] Yet another approach relies on the statutory violation to establish liability by ignoring the statutory-purpose limitations of the liability rule.[102]

For reasons revealed by the principle of deference, the first two approaches are misguided. Deference to the legislative safety decision establishes negligence liability with respect to all risks encompassed by the common-law duty, including those that were not considered by the legislature. Consequently, an unexcused statutory violation is not merely some evidence of negligence; it conclusively establishes negligence. Liability in these cases also does not depend on a "generous interpretation" of legislative intent; it instead finds justification in the principle of deference. The appropriate approach in these cases accordingly ignores the statutory-purpose limitations of the liability rule.

Judicial deference to a safety statute requires courts to recognize the following requirement of reasonable care:

$$B_{\text{complying with the statute}} \text{ ® } PL_{\text{risks regulated by the statute}}$$

Because the statutory safety standard is reasonable with respect to the lesser danger contemplated by the legislature, it is necessarily reasonable with respect to the greater danger encompassed by the pre-existing common-law duty:[103]

$$B_{\text{complying with the statute}} \text{ ® } PL_{\text{risks regulated by the statute}} + PL_{\text{non-statutory foreseeable risks}}$$

By deferring to the legislative safety determination, a court can conclude that the statutory violation is unreasonably dangerous behavior that establishes negligence liability with respect to accidents not expressly regulated by the statute (those caused by $PL_{\text{non-statutory foreseeable risks}}$). A statutory violation with respect to at least one risk within the duty ($PL_{\text{risks regulated by the}}$

100. *Id.* § 14 reporters' note cmt. g.

101. Thoma v. Kettler Bros., 632 A.2d 725, 730 (D.C. 1993).

102. *See* Morris, *supra* note 36, at 475–76.

103. "The actor's conduct is . . . negligent if the magnitude of the risk outweighs the burden of risk prevention." RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 3 cmt. e. An increase in the magnitude of the risk, therefore, increases the burden required by the duty to exercise reasonable care. By implication, a precaution that is not unreasonably burdensome when considered in relation to a low risk (B_1 ® PL_1) will also not be unreasonably burdensome when considered in relation to a higher risk (B_1 ® $PL_1 + PL_2$).

$_{\text{statute}}$) is necessarily unreasonable with respect to all other risks within the duty ($PL_{\text{non-statutory foreseeable risks}}$), justifying recovery for the resultant harms even though the liability does not conform to the statutory-purpose limitations in the black-letter rule of negligence per se.

To be sure, tort liability for risks not expressly contemplated by the legislature could result in an amount of aggregate liability across cases that frustrates statutory purpose. Such a statute, however, impliedly preempts these tort claims.[104] Absent preemption, the statute has no obligatory effect of limiting tort liability, and so statutory purpose does not justifiably limit the scope of a pre-existing common-law duty that is fully established independently from the statute.

To illustrate, consider the previously discussed products case *Harned v. Dura Corp.*, in which the court permitted the plaintiff to rely on a statutory violation to establish a defect in the design of the defendant's product, even though the statute applied to "places of public assembly" and the plaintiff was injured at a private workplace.[105] The black-letter rule of negligence per se was not satisfied in this case—the plaintiff was not within the class protected by the statute.[106] By deferring to the legislative safety determination, however, the court could justify liability based on the manner in which the statutory safety standard operated within the pre-existing common-law duty.

A product seller's common-law duty of design encompasses the foreseeable risks of physical harms.[107] In *Harned*, the statute addressed the risk of physical harm to those in a "place of public assembly"[108] (denoted $PL_{\text{public assembly}}$). The common-law duty also includes anyone else who was foreseeably threatened by the product design (denoted $PL_{\text{other foreseeable victims}}$), obligating the manufacturer to incorporate any safety precaution into the design for which:

$$B \text{ ® } PL_{\text{public assembly}} + PL_{\text{other foreseeable victims}}$$

With respect to the more limited risk faced by those in a place of public assembly, deference to the legislative safety determination would lead the court to conclude that:

$$B_{\text{complying with the statute}} \text{ ® } PL_{\text{public assembly}}$$

Because the statutory precaution is not unreasonably burdensome with respect to the smaller set of risks considered by the legislature, it is also not unreasonably burdensome with respect to the larger set of foreseeable risks governed by the broader common-law duty:

104. *See infra* Part IV.A (discussing the doctrine of implied preemption).

105. Harned v. Dura Corp., 665 P.2d 5, 13–14 (Alaska 1983).

106. *Id.*

107. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2(b) (1998).

108. *Harned*, 665 P.2d at 13–14.

$$B_{\text{complying with the statute}} \text{ ® } PL_{\text{public assembly}} + PL_{\text{other foreseeable victims}}$$

By deferring to the legislative safety determination, the court would conclude that a statutory violation with respect to the smaller set of statutory risks necessarily established the unreasonableness of such behavior with respect to the larger set of risks encompassed by the common-law duty of design. The plaintiff was a foreseeable victim of the defectively designed product (or within the class $PL_{\text{other foreseeable victims}}$), and so proof of the statutory violation entitled the plaintiff to recover under the common law of products liability. As *Harned* explained, "[defendant's] duty to comply with [the statutorily mandated] construction standards arose during the manufacture of the tank in question; it should not be diminished retrospectively because it happened to be utilized at [plaintiff's place of employment instead of a place of public assembly]."[109] The statute had no obligatory tort law effects and could not "retrospectively" diminish a pre-existing duty that had been independently established by the common law, making the statutory violation a sufficient basis for finding that the defendant breached the common-law duty with respect to harms not contemplated by the legislature.

Harned is merely one of "a large number of cases in which the injuries are not within the class of harms which the legislature sought to prevent, and nevertheless the plaintiff is allowed a recovery."[110] A common example involves regulations governing safety at the workplace.

> If the legislature, for instance, when it was concerned with the protection of employees, deemed that safety gates were a suitable protection against the hazards of open elevator shafts, why is not this fact some (though not controlling) evidence of the suitable means for protecting others also who may be exposed to such hazards? *A number of courts have answered similar questions affirmatively at least where there is, apart from the statute, a duty to use due care toward those others.*[111]

In these cases, courts do not limit liability with the statutory-purpose doctrine as required by the black-letter rule of negligence per se. When the scope of the defendant's safety obligation is defined by a pre-existing common-law duty, the court can insert the statutory safety standard into the common-law tort duty. If the plaintiff's harm is encompassed by the common-law duty, then an unexcused statutory violation with respect to a more limited set of statutory risks also establishes unreasonable behavior with respect to the larger set of risks encompassed by the common-law duty. By permitting recovery for these statutory violations, courts fully defer to the

109. *Id.* at 14.

110. Morris, *supra* note 36, at 475–76.

111. HARPER ET AL., *supra* note 36, § 17.6, at 726–27 (emphasis added) (footnotes omitted).

legislative safety determination without being limited to the types of risks contemplated by the statutory scheme, contrary to the black-letter rule of negligence per se.

D. DEFERENCE AND THE BLACK-LETTER RULE OF NEGLIGENCE PER SE

The analysis so far has shown that the relevance of a statutory violation for purposes of negligence liability depends on the principle of common-law deference and not statutory purpose as suggested by the black-letter rule of negligence per se. This reasoning explains the numerous cases that do not otherwise conform to the black-letter rule, but one could reject this interpretation and point instead to the much larger number of cases that conform to the rule, supporting the conclusion that negligence per se is tethered to statutory purpose as per its black-letter formulation. Unless the principle of common-law deference can be located within the black-letter rule of negligence per se, the case law does not decisively establish that the doctrine must be interpreted in relation to the principle of deference rather than statutory purpose.

For this reason, the importance of deference is perhaps most fully revealed by the only set of black-letter rules that we have yet to consider. "Negligence per se is a doctrine that has always been applied only to 'unexcused' statutory violations."[112] The widely adopted rules regarding excused violations clearly show that deference is integral to the black-letter formulation of negligence per se.

Consider a criminal safety statute that functions as a form of strict liability. The violation of such a statute is not necessarily relevant to the safety decision implicated by a negligence claim. In these cases, deference requires the court to translate the legislative safety decision into one that is relevant for determining whether the statutory violation establishes that the defendant breached a duty to exercise reasonable care. One who made a reasonable effort to comply with a strict-liability safety statute did not act unreasonably. Such a statutory violation is not relevant to the negligence claim and therefore merits no deference by the court—the violation is excused. By definition, the statute in these cases evinces no legislative intent to excuse such violations—the statute, after all, is one of strict liability. The principle of deference nevertheless explains why "the common law recognizes that [a] person can rebut negligence per se by showing that [she] made a reasonable effort to comply with the statute."[113]

Even if the case does not involve a strict-liability safety statute, courts will still excuse a statutory violation if the actor made a reasonable effort to

112. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 15 cmt. a (2010) (also observing that the "concept of 'excuse' includes what the criminal law would refer to as a combination of excuses and 'justifications'").

113. *Id.* § 15 cmt. c.

comply.[114] Once again, these statutory violations do not establish unreasonably dangerous behavior, and so deference is not warranted because the legislative safety determination is not relevant to the resolution of the particular safety issue posed by the negligence claim before the court.

The remaining type of recognized excuse also relies on this form of deference. Statutes and safety regulations "ordinarily provide general rules, not solutions for specific cases."[115] While reasonable in the ordinary case, a statutorily prescribed standard of safe conduct is not necessarily reasonable in the extraordinary circumstances of an individual tort case. Sometimes it can be safer to violate a statute than to comply with it. In these cases, the legislative safety decision is not relevant to the particular safety decision implicated by the tort claim, eliminating the role for common-law deference. Once again, these statutory violations are excused by courts.[116]

The rules governing excused statutory violations show that the principle of deference best explains how courts evaluate statutory violations without obligatory tort law effects, even though the black-letter rule of negligence per se suggests that the doctrine is limited by statutory purpose. For this reason, courts will use violations of non-preemptive *federal* statutes or non-binding *municipal* ordinances to establish tort liability under *state* law, even though statutory purpose has no plausible role to play in these cases.[117] By doing so, courts are deferring to legislative policy determinations that resolve an issue posed by the tort claim, further establishing that negligence per se is based on the principle of common-law deference and not statutory purpose.

E. DEFERENCE AND THE FORM OF JUDICIAL DECISIONMAKING

If a statute has no obligatory tort law effects, then judges necessarily have discretion to determine whether a statutory violation is relevant to a tort claim. Discretion is an obvious component of negligence per se. The manner in which judges should exercise this discretion, however, is the

114. *See id.* § 15 cmt. b (recognizing that a violation can be reasonable and excused due to the actor's childhood, physical disability, or physical incapacity); *id.* § 15 cmt. d (recognizing excuse for cases in which the actor's "ignorance" of the statutory requirements "was reasonable"); *id.* § 15 cmt. e (recognizing excuse for cases in which "the actor . . . makes a reasonable guess" as to the requirements of "a statute [that] is so vague or ambiguous that even the actor aware of the statute would need to guess as to its requirements").

115. Traynor, *supra* note 31, at 805.

116. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 15 cmt. f; *see also id.* § 15 cmt. g (recognizing excused violations for statutes that are out of date and no longer enforced).

117. *See generally* Barbara Kritchevsky, *Tort Law Is State Law: Why Courts Should Distinguish State and Federal Law in Negligence-Per-Se Litigation*, 60 AM. U. L. REV. 71 (2010) (discussing cases in which courts apply negligence per se by relying on violations of municipal ordinances and federal statutes).

subject of ongoing debate, providing yet another illustration of the extent to which the doctrine of negligence per se is not well understood.

On one view, "whether the statute should be th[e] basis for allowing a tort action depend[s] on whether such action would help effectuate the statute's purpose[s],"[118] an approach to judicial decisionmaking that would seem to be justified by the manner in which the black-letter rule of negligence per se is limited by statutory purpose. A related approach maintains that judges should exercise their discretion "to make the statute work [more] intelligently."[119] An alternative view focuses on the tort claim itself, yielding an approach that lets judges exercise their discretion only to "improve the use of the objective ordinary prudent person standard" of negligence liability.[120] Discretion can take many forms. Which one is appropriate?

The question, as we have found, can be readily answered: *Negligence per se is based on a common-law principle that courts will defer to a legislative policy decision that is relevant to the resolution of any issue posed by the tort claim.* Under this approach, judges engage in the same inquiry required for resolution of the tort claim absent the statute, and then rely on the statute only insofar as it embodies any legislative policy determinations that can answer any questions otherwise posed by the common-law rules governing the tort claim in question.

So conceptualized, negligence per se does not require judges to engage in an open-ended exercise of policymaking, but instead enables courts to draw on the legislative expertise in policymaking. As previously discussed, the legislative determination might help judges resolve the policy issues required for the recognition of a new common-law duty, or it might help courts determine the requirements of reasonable care.[121] In each instance, the tort inquiry takes the same form that it would otherwise take absent the statute. The court simply engages in ordinary duty analysis, for example, and then looks to the statute to determine whether it makes any policy determinations that help to answer the duty question. Deference to these legislative policy determinations enables courts to resolve issues without otherwise altering the common-law inquiry. The only new policy question is whether courts ought to rely on a statute without obligatory tort law effects in order to resolve a tort claim, and courts have affirmatively answered that question by adopting the principle of common-law deference to these legislative policy determinations.

This form of judicial decisionmaking has been unduly obscured by the black-letter rule of negligence per se, which expressly accounts only for

118. Forell, *supra* note 62, at 882.

119. Traynor, *supra* note 31, at 804–05.

120. Blomquist, *supra* note 9, at 283–85.

121. *See supra* Parts II.C.1–.2 (discussing duty and reasonable care, respectively).

statutory purpose and creates no apparent role for deference in the legal inquiry. Identifying the primary role of deference in these cases is critical, for it provides the key to understanding a range of complex issues posed by the other types of interactions between statutory law and the common law of torts.

III. DEFERENCE AND REGULATORY COMPLIANCE AS A DEFENSE TO THE TORT CLAIM

Whereas negligence per se addresses the issue of whether a defendant's statutory violation establishes tort liability, the regulatory compliance defense addresses the converse issue of whether adherence to a statutory or regulatory safety requirement enables the defendant to avoid tort liability. Under the majority rule, regulatory compliance is presumed to be only some evidence that the defendant acted reasonably; compliance does not usually afford the defendant a complete defense.[122]

In contrast to negligence per se, the regulatory compliance defense has a clear relation to statutory purpose. If the legislature intended for compliance to absolve the defendant from tort liability, then the statute in this respect would preempt the tort claim.[123] Absent preemption, the statutory purpose is not one of immunizing a compliant defendant from tort liability, implying that from a legislative perspective, regulatory compliance can only be some evidence of reasonable care—the result obtained by the majority rule.

Because these statutes do not have obligatory tort law effects, courts have discretion to determine how regulatory compliance affects the tort claim. To what extent should courts defer to the legislative safety determination? When compared to negligence per se, the regulatory compliance defense appears to be more problematic in this respect. As a matter of deference, courts routinely rely on statutory violations to establish tort liability, so why do they not equally defer by routinely making statutory compliance a sufficient basis for defending against tort liability? Deference would seem to entail an "asymmetrical judicial treatment of compliance and noncompliance."[124]

This apparent asymmetry became a focal point of the tort-reform movement in the 1980s, with critics forcefully contending that the judicial treatment of regulatory compliance does not adequately defer to the specialized expertise of administrative regulators.[125] In 1991, the American Law Institute published a *Reporters' Study on Enterprise Responsibility* (the "ALI

122. RESTATEMENT (SECOND) OF TORTS § 288C (1965).

123. *See infra* Part IV.A.

124. Lars Noah, *Rewarding Regulatory Compliance: The Pursuit of Symmetry in Products Liability*, 88 GEO. L.J. 2147, 2147, 2150–52 (2000) (describing "the historical origins of the asymmetrical judicial treatment of compliance and noncompliance").

125. *See, e.g.*, Huber, *supra* note 4, at 334–35.

Study"), which proposed a reform of the regulatory compliance defense.[126] In support of this reform, the ALI Study relied on various arguments, including one of institutional competence: regulators have specialized expertise and are able to take a global perspective on the matter, unlike judges and juries confronted only by the circumstances of the case at hand.[127] Based on the comparative expertise of regulatory agencies, the ALI Study concluded that "the risk of overdeterrence of socially valuable activities through imposition of tort liability on regulated products and activities merits more widespread recognition of a regulatory compliance defense."[128]

The ALI Study has largely framed the contemporary debate over regulatory compliance. Today, scholars continue to debate the merits of the regulatory compliance defense by evaluating the relative advantages and disadvantages of tort regulation as compared to administrative regulation.[129]

As shown by this debate, the regulatory compliance defense has not been conceptualized in terms of the principle of common-law deference. Whether courts adequately defer to administrative regulations would be a moot question if it were commonly understood that the regulatory compliance defense is justified by the principle of common-law deference to legislative safety determinations. So, too, if the defense diverges from the principle of deference, then critics would have conclusive proof that the regulatory compliance defense is not adequately deferential to legislative

126. 2 AM. LAW INST., REPORTERS' STUDY: ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY (1991) [hereinafter ALI STUDY].

127. *Id.* at 87–89.

128. *Id.* at 95.

129. For arguments that rely on the relative institutional competence of administrative regulators to justify greater judicial reliance on the regulatory compliance defense, see Richard C. Ausness et al., *Providing a Safe Harbor for Those Who Play by the Rules: The Case for a Strong Regulatory Compliance Defense*, 2008 UTAH L. REV. 115, 132 (2008) (arguing that "[t]he first, and most powerful, argument for greater judicial deference to regulatory standards is that legislative bodies and regulatory agencies are better equipped than courts to formulate effective safety standards"); Noah, *supra* note 124, at 2153–57 (challenging the claim that failures in the administrative process justify rejection of regulatory compliance as a defense); Richard B. Stewart, *Regulatory Compliance Preclusion of Tort Liability: Limiting the Dual-Track System*, 88 GEO. L.J. 2167 (2000) (supporting arguments advanced by the ALI Study). For arguments that administrative regulations do not necessarily have a clear institutional advantage in regulating risks, thereby leaving an important role for tort liability, see Clayton P. Gillette & James E. Krier, *Risk, Courts, and Agencies*, 138 U. PA. L. REV. 1027, 1064–70 (1990) (relying on flaws in the regulatory process as an objection to the regulatory compliance defense); Michael D. Green, *Statutory Compliance and Tort Liability: Examining the Strongest Case*, 30 U. MICH. J.L. REFORM 461, 508 (1997) (identifying limitations of the federal regulatory scheme for drug safety and concluding that "complete immunity from suit based on FDA approval or even compliance with FDA regulations seems ill-advised"); Robert L. Rabin, *Reassessing Regulatory Compliance*, 88 GEO. L.J. 2049 (2000) (relying on flaws in the regulatory process as an objection to the regulatory compliance defense); Carl Tobias, *FDA Regulatory Compliance Reconsidered*, 93 CORNELL L. REV. 1003 (2008) (same).

safety decisions. To date, no one has evaluated the regulatory compliance defense with the principle of common-law deference.

The logic of deference readily extends from negligence per se to regulatory compliance. Like negligence per se, the regulatory compliance defense applies to safety statutes or regulations that have no obligatory tort law effects. The doctrine of negligence per se establishes the principle that courts will nevertheless defer to a non-binding legislative policy decision if it can resolve any issue posed by the tort claim. Courts defer to these legislative policy decisions for reasons of institutional comity and comparative institutional advantage, a rationale that does not depend on whether the legislative policy determination is used for purposes of establishing liability (negligence per se) or defending against liability (regulatory compliance).[130] As a matter of deference, there is no persuasive reason for treating a statutory violation different from statutory compliance.

Instead of creating an "asymmetrical judicial treatment of compliance and noncompliance" as critics have claimed,[131] the principle of common-law deference is capable of fully justifying the regulatory compliance defense. When formulated in this manner, regulatory compliance is not a complete defense in all cases, but this attribute of the rule does not somehow disrespect administrative agencies. Deference will affect the tort claim in different ways depending on the nature of the legislative safety decision embodied in the regulation. Due to the different types of regulatory decisions, courts can fully defer to the regulatory expertise of administrative agencies without making regulatory compliance a complete defense in all or even most cases.

A. STATUTES OR REGULATIONS ESTABLISHING A MINIMUM STANDARD OF SAFETY

The majority rule regarding regulatory compliance is conventionally traced to a late nineteenth century case in which the U.S. Supreme Court held that the defendant railroad's compliance with a safety statute requiring various precautions at a railroad crossing did not provide a complete defense against the plaintiff's allegation of negligence liability:

> The underlying principle in all cases of this kind . . . is, that neither the legislature nor railroad commissioners can arbitrarily determine in advance what shall constitute ordinary care or reasonable prudence in a railroad company at a crossing, in every particular case which may afterwards arise; . . . each case must stand upon its own merits, and be decided upon its own facts and circumstances, and these are the features which make the question

130. *Cf. supra* Part I (discussing reasons why courts have decided to defer to legislative policy determinations).

131. *See* Noah, *supra* note 124 and accompanying text.

> of negligence primarily one for the jury to determine, under proper instructions from the court.[132]

In subsequent cases, courts continued to hold that regulatory compliance does not necessarily establish that the defendant exercised reasonable care.[133] Based on this case law, the *Restatement (Second) of Torts* adopted the rule that "[c]ompliance with a legislative enactment or an administrative regulation does not prevent a finding of negligence where a reasonable man would take additional precautions."[134]

Because this rule was formulated by reference to simple accident cases, like collisions at railroad crossings, commentators have questioned its relevance for the complex tort cases now faced by courts, like those addressing issues of product design and warnings.[135] To evaluate this critique and the logic of the regulatory compliance defense more generally, we can analyze a manufacturer's common-law duty to supply products with designs and warnings that are not defective. As a practical matter, the issue of regulatory compliance is also extremely important in product cases, making it particularly useful to focus on this class of tort cases.

According to the *Restatement (Third) of Torts*:

> [A] product's compliance with an applicable product safety statute or administrative regulation is properly considered in determining whether the product is defective with respect to the risks sought to be reduced by the statute or regulation, but such compliance does not preclude as a matter of law a finding of product defect.[136]

Regulatory compliance does not ordinarily preclude liability due to "the traditional view that the standards set by most product safety statutes or regulations generally are only minimum standards."[137]

If a statute or regulation merely sets a floor or minimum safety requirement, then a design or warning that violates the regulation is necessarily defective (as per the doctrine of negligence per se), whereas a design or warning that satisfies the regulation may still be defective when evaluated by the more demanding tort standard.[138] The question for present

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132. Grand Trunk Ry. Co. v. Ives, 144 U.S. 408, 427 (1892).

133. *See* Paul Dueffert, Note, *The Role of Regulatory Compliance in Tort Actions*, 26 HARV. J. ON LEGIS. 175, 180–88 (1989) (discussing the historical development of the regulatory compliance defense).

134. RESTATEMENT (SECOND) OF TORTS § 288C (1965).

135. Dueffert, *supra* note 133, at 188; Noah, *supra* note 124, at 2051–52.

136. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 4(b) (1998).

137. *Id.* § 4 cmt. e.

138. *Id.* ("Thus, most product safety statutes or regulations establish a floor of safety below which product sellers fall only at their peril, but they leave open the question of whether a higher standard of product safety should be applied.").

purposes is whether this rule adequately defers to the legislative safety determination.

A product design or warning is evaluated by the risk–utility test, a form of reasonable care that compares the disutility or burden of a safety precaution (denoted B) with its safety benefit or the foreseeable risks of physical harm that would be eliminated by the precaution (denoted PL).[139] If the disutility of a precaution is less than the associated reduction in risks ($B < PL$), the precaution must be incorporated into the product design or warning in order to satisfy the risk–utility test and prevent the product from being defective in this respect. All else being equal, the risk–utility test requires increased safety precautions for increased levels of risk (as PL increases, there is an increase in the safety investment B required by the risk–utility test, $B < PL$). In this respect, the risk–utility test is identical to the ordinary standard of reasonable care (previously denoted ®), which also requires increased safety precautions for increased levels of risk, all else being equal.[140] This aspect of the risk–utility test, therefore, generalizes to ordinary cases of negligence.

To determine how a safety regulation affects the risk–utility inquiry, courts must first identify the scope of the common-law duty regarding product designs or warnings. Suppose the common-law duty encompasses two different foreseeable risks of physical harm (denoted PL_1 and PL_2), yielding a risk–utility test that gives product manufacturers the duty to incorporate any safety precaution into the product design or warning for which:

$$B < PL_1 + PL_2$$

Suppose the regulation contemplates only one type of risk (say PL_1) and requires product manufacturers to eliminate that risk by incorporating a particular safety precaution (with a cost or burden denoted by B_1) into the product design or warning. As established by the doctrine of negligence per se, courts will defer to this legislative safety determination, yielding the following risk–utility conclusion applicable to a tort claim:

$$B_1 < PL_1$$

Deference to this legislative safety determination does not foreclose a court from concluding that the common-law duty could require an even greater amount of safety investments (denoted B_2) to eliminate the full set of risks encompassed by the duty:

$$B_2 < PL_1 + PL_2$$

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139. *See id.* § 2(b)–(c) (defining design and warning defects in terms of the risk–utility test). Although most jurisdictions rely on the consumer expectations test, this inquiry reduces to the risk–utility test for evaluating products that do not malfunction. *See* MARK A. GEISTFELD, PRODUCTS LIABILITY LAW 90–103 (2012).

140. *See supra* note 103 and accompanying text.

This same result is reached by the traditional formulation of the regulatory compliance defense: "Compliance with a legislative enactment or an administrative regulation does not prevent a finding of negligence where a reasonable man would take additional precautions."[141]

In these cases, the regulatory compliance defense adheres to the principle of common-law deference to legislative safety determinations, thereby unifying this doctrine with negligence per se. A safety regulation serves only as a floor or minimal safety requirement when it does not account for the full range of risks encompassed by the common-law tort duty. Deference to this type of legislative safety decision does not foreclose courts from concluding that the common-law duty required a defendant to make safety expenditures in excess of the amount required by the regulators. So, too, a defendant's unexcused failure to comply with such a minimal safety requirement conclusively establishes negligence per se with respect to *all* risks encompassed by the common-law duty, including those not expressly accounted for by the regulators.[142] Deference fully explains the manner in which regulatory compliance and noncompliance affect the tort claim.

Of course, regulations do not necessarily take the form of those analyzed above. Regulators can have the objective of establishing the optimal amount of care instead of a minimal safety requirement. What are the implications of deference for regulatory compliance in cases of this type?

B. STATUTES OR REGULATIONS THAT FULLY RESOLVE THE SAFETY QUESTION

In adopting the rule that regulatory compliance does not necessarily establish that the defendant satisfied the common-law duty, courts have also recognized that regulatory compliance can be a complete defense under certain conditions. In the early cases involving accidents at railroad crossings, for example, courts concluded that regulatory compliance would be a complete defense as a matter of law if "reasonable minds could reach the conclusion only that this crossing, at the time of the accident, possessed no features which would make it more than ordinarily hazardous; and,

141. RESTATEMENT (SECOND) OF TORTS § 288C (1965).

142. For regulations that establish a minimal safety requirement, a defendant's statutory violation (the failure to take the safety precaution B_1) also establishes liability with respect to any other risks encompassed by the common-law duty that would also be eliminated by the precaution (if $B_1 < PL_1$, then $B_1 < PL_1 + PL_2$). Consequently, even if the plaintiff was not in the class protected by the statute or was otherwise injured by a risk not contemplated by the statute (each of which can be represented by an accident caused by the non-statutory risk PL_2), the defendant's unexcused violation of the safety statute can establish negligence liability ($B_1 < PL_1 + PL_2$), contrary to the result required by the statutory-purpose limitations in the black-letter rule of negligence per se. *See supra* Part II.C.2. Although liability in these cases departs from the black-letter rule, that outcome should not be controversial because it relies on the same logic that explains why regulatory compliance is not a complete defense for regulations that establish only a minimal safety requirement.

under such circumstances, there is no basis for requiring extrastatutory warnings."[143] Based on this case law, the *Restatement (Second) of Torts* adopted the rule that "[c]ompliance with a legislative enactment or an administrative regulation does not prevent a finding of negligence where a reasonable man would take additional precautions."[144] However, "[w]here there are no such special circumstances, the minimum standard prescribed by the legislation or regulation may be accepted by . . . the court as a matter of law, as sufficient for the occasion."[145]

On one view, "courts accept regulatory compliance as a defense only after inquiries that seem fact-based and ad hoc."[146] This complaint mirrors the claim that judicial decisionmaking in cases of negligence per se "is unsystematic, vague, muddled, and wrongheaded."[147] In both instances, the problem is solved by the principle of common-law deference. As a matter of deference, regulatory compliance entails a structured inquiry that can be precisely defined by inserting the regulatory safety determination into the common-law inquiry required for resolution of the tort claim.

To see why, suppose that in promulgating a regulation covering various aspects of the product design, the administrative agency adequately considered the full range of risks and technologically feasible safety precautions encompassed by the common-law duty with respect to one particular attribute of the design. Having considered all of these factors, the agency then adopted a regulatory safety standard that it believed would optimally solve the safety problem. For present purposes, the issue is whether a plaintiff can establish liability by relying on a safety precaution that was rejected by the regulators.

Suppose that the regulators concluded that it would be too costly for the design to incorporate the only technologically feasible safety feature (denoted B_{feasible}) for eliminating the full set of risks posed by this particular attribute of the design (denoted $PL_1 + PL_2$). Under these conditions, deference to this legislative safety determination yields the conclusion that the safety precaution is not required by the risk–utility test:

$$PL_1 + PL_2 < B_{\text{feasible}}$$

If a plaintiff alleges that the common-law duty requires the defendant to take the technologically feasible precaution rejected by the regulators (B_{feasible}), the defendant could invoke regulatory compliance as a complete defense. Under the risk–utility test, the plaintiff's allegation encompasses

143. Gigliotti v. N.Y., Chi. & St. Louis R.R. Co., 157 N.E.2d 447, 451 (Ohio Ct. App. 1958); *see also* Dueffert, *supra* note 133, at 187 n.57 (citing other cases reaching this conclusion).

144. RESTATEMENT (SECOND) OF TORTS § 288C.

145. *Id.* § 288C cmt. a.

146. Dueffert, *supra* note 133, at 188.

147. Blomquist, *supra* note 9, at 223; *see also supra* note 31 and accompanying text (citing similar critiques of judicial decisionmaking in cases of negligence per se).

the same set of risks considered by the regulators. The plaintiff's allegation of defect ($B_{\text{feasible}} < PL_1 + PL_2$), therefore, is directly contrary to the regulatory safety determination ($PL_1 + PL_2 < B_{\text{feasible}}$). By deferring to this legislative policy decision, the court will reject the plaintiff's claim and conclude that a product complying with the regulation passes the risk–utility test as a matter of law.

As shown by this example, a statute or regulation can embody legislative policy decisions that address all of the safety issues implicated by a tort claim. Deference under these conditions makes regulatory compliance a complete defense.

The conditions under which this conclusion is valid, however, are subject to important qualifications that significantly limit the number of cases in which regulatory compliance will be a complete defense to the tort claim:

- *Changes in technology.* Suppose that the regulators considered the full set of risks encompassed by the common-law duty, but did not consider a newly developed precaution that was not technologically feasible or scientifically known at the time the regulation was promulgated (with a burden denoted B_{new}). In these circumstances, deference to the legislative safety determination with respect to the old set of feasible precautions ($PL_1 + PL_2 < B_{\text{feasible}}$) does not necessarily make regulatory compliance a complete defense. The risk–utility test could require the defendant to take the newly developed precaution instead of the feasible precautions that had been considered by the regulators:

$$B_{\text{new}} < PL_1 + PL_2 < B_{\text{feasible}}$$

- *Changes in cost.* Regulatory compliance would also not necessarily be a complete defense if subsequent to the regulatory determination, the cost of a technologically feasible precaution rejected by the regulators (B_{feasible}) significantly decreased, in which case the court would not defer to the outdated regulatory determination concerning the precaution (the now obsolete conclusion that $PL_1 + PL_2 < B_{\text{feasible}}$). In these circumstances, the risk–utility test could require the design or warning to incorporate the precaution even though the regulators had previously concluded otherwise:

$$B_{\text{feasible}} < PL_1 + PL_2$$

- *Changes in knowledge of risk.* Finally, regulatory compliance would not necessarily be a complete defense if the regulatory safety decision was based on risks known at that time ($PL_1 + PL_2$), and it subsequently became evident that the product (like a drug) poses additional risks (PL_3). In these cases, the regulatory safety decision

> ($PL_1 + PL_2 < B_{\text{feasible}}$) functions like a safety floor and does not foreclose a court from finding that the defendant was required to take the precaution if it would eliminate the full set of risks encompassed by the common-law duty ($PL_1 + PL_2 + PL_3$) in a cost-effective manner:
>
> $$B_{\text{feasible}} < PL_1 + PL_2 + PL_3$$

The principle of common-law deference to legislative safety determinations accordingly makes regulatory compliance a complete defense under an identifiable set of circumstances: The regulation must address the full set of risks encompassed by the common-law tort duty based on a state of technology, cost structure, and knowledge of risk governing the safety decision at issue in the tort claim.

Whereas the principle of deference justifies a decisive role for regulatory compliance under these conditions, the *Restatement (Third) of Torts* appears to be much more ambivalent about the matter:

> Occasionally, after reviewing relevant circumstances, a court *may* properly conclude that a particular product safety standard set by statute or regulation adequately serves the objectives of tort law and therefore that the product that complies with the standard is not defective as a matter of law. Such a conclusion *may* be appropriate when the safety statute or regulation was promulgated recently, thus supplying currency to the standard therein established; when the specific standard addresses the very issue of product design or warning presented in the case before the court; and when the court is confident that the deliberative process by which the safety standard was established was full, fair, and thorough and reflected substantial expertise.[148]

Under the *Restatement (Third)*, regulatory compliance is not necessarily a complete defense under the identical conditions in which it would be a complete defense as a matter of deference. The *Restatement (Third)* rule on regulatory compliance appears to be weaker than the formulation justified by the principle of deference. This difference can be explained by the failure of the *Restatement (Third)* to expressly invoke deference (or any other reason) as the rationale for the regulatory compliance defense in product cases.[149]

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148. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 4 cmt. e (1998) (emphasis added).

149. Because the *Restatement (Third)* does not expressly justify its formulation of the regulatory compliance defense with the principle of deference, a jurisdiction can reject the *Restatement (Third)* rule without necessarily rejecting the formulation of the rule based on deference. To date, the highest court in only one state has expressly rejected the *Restatement (Third)* rule, doing so because it "conflicts with the core principles of Montana's strict products liability law." Malcolm v. Evenflo Co., 217 P.3d 514, 522 (Mont. 2009). Having rejected the *Restatement (Third)* rule of regulatory compliance, however, the court went on to evaluate

The rationale for the *Restatement (Third)* approach to regulatory compliance, however, can be derived from another one of its rules that "a product's noncompliance with an applicable product safety statute or administrative regulation renders the product defective with respect to the risks sought to be reduced by the statute or regulation."[150] This liability rule essentially extends the doctrine of negligence per se to product cases based on a "policy judgment" that these products are "by definition defective."[151] This oblique reference to "policy" is the only point at which the *Restatement (Third)* mentions a potential justification for its rules governing statutory violations and regulatory compliance in product cases. The "policy" that best justifies these doctrines, as we have found, is supplied by deference and not statutory purpose.[152] The *Restatement (Third)* rules that integrate statutory law and tort law in product cases, therefore, are implicitly justified by the principle of common-law deference.

When interpreted with the principle of deference, the *Restatement (Third)*'s formulation of the regulatory compliance defense states that a court *may* make regulatory compliance a complete defense only because that determination is a matter of common-law discretion and not legislative compulsion. In exercising its discretion, however, a court that defers to the legislative policy decision will conclude as a matter of law that regulatory compliance is a complete defense to the tort claim if the regulation addressed the full set of product risks encompassed by the common-law tort duty based on a state of technology, cost structure, and knowledge of risk governing the safety decision at issue in the tort claim—the conditions embodied in the *Restatement (Third)* rule that makes regulatory compliance a complete defense when the "regulation was promulgated recently" and established by a "full, fair, and thorough" "deliberative process" that yielded a "specific standard address[ing] the very issue of product design or warning presented in the case before the court."[153]

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whether the trial court had abused its discretion by denying the defendant manufacturer's evidence of regulatory compliance, concluding that no such abuse occurred because the federal statute in question deemed the regulation to be a minimal safety requirement that could not establish a compliance defense to common-law liability for defective design. *Id.* at 522–23. The case, therefore, is fully consistent with the analysis in text concerning the conditions under which deference makes regulatory compliance a complete defense. For reasons illustrated by this case, any jurisdiction that adheres to the principle of common-law deference should adopt the formulation of the regulatory compliance defense discussed in text, regardless of whether it accepts the particular formulation in the *Restatement (Third)*.

150. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 4(a).

151. *Id.* § 4 cmt. d; *see also id.* § 4 reporters' note cmt. d ("[T]he same rules that apply in determining negligence per se also apply in determining the defectiveness of a design or a marketing scheme as a matter of law.").

152. *See supra* Parts II.B–II.E.

153. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 4 cmt. e.

So interpreted, the regulatory compliance defense is symmetrical with the black-letter rule of negligence per se. For each doctrine, courts defer to legislative policy determinations. The legislative determination can resolve the issue of whether the defendant breached the common-law duty (negligence per se) or complied with it (regulatory compliance). Regardless of how deference affects the tort claim, the logic of deference is identical in the two contexts. Courts simply insert the legislative policy determination into the common-law inquiry required by the tort duty. The principle of common-law deference unifies negligence per se and the regulatory compliance defense.

C. CHARACTERIZING THE REGULATORY COMPLIANCE DEFENSE

According to critics of the regulatory compliance defense, "[f]ew if any cases have barred liability under this provision."[154] Courts purportedly "give little or no weight to compliance" by "frequently dismissing the defense out of hand with the oft-repeated and largely unexamined premise that government safety standards are nothing more than minimum requirements."[155] In short, "the compliance defense gets little respect."[156]

This line of criticism fails to recognize that regulatory compliance is an affirmative defense, with the defendant shouldering the burden of proving that compliance with the regulation provides a complete defense to the plaintiff's tort claim. Due to the presumption that statutes or regulations establish only the minimal requirements constitutive of a safety floor, a defendant cannot merely invoke regulatory compliance as a complete defense. The defendant must instead rebut the presumption by proving that the regulators sought to establish an optimal safety standard addressing the full set of risks encompassed by the common-law tort duty, in which case regulatory compliance would be a complete defense to the tort claim absent changes in cost structure, technology, or knowledge of risk. Without such proof, courts can rightly "dismiss[] the defense out of hand with the oft-repeated and largely unexamined premise that government safety standards are nothing more than minimum requirements."[157]

To be sure, this practice would be indefensible if its underlying premise were indefensible. By presuming that legislative safety decisions establish only minimal safety requirements, courts in effect are adopting a factual presumption that the legislative regulatory process is not ordinarily able to resolve fully the safety question posed by a tort claim. Based on this factual presumption, the regulation at issue in the ordinary case presumably only partially addresses the safety decision implicated by the tort claim,

154. ALI STUDY, *supra* note 126, at 84 n.3.
155. Noah, *supra* note 124, at 2152.
156. *Id.* at 2147.
157. *Id.* at 2152.

presumptively making compliance a partial defense that provides only some evidence of (minimally required) reasonable care. The question, then, is whether courts can defensibly adopt such a factual presumption.

Consider the regulations promulgated by the U.S. Food and Drug Administration ("FDA"), which present the "strongest case" for the regulatory compliance defense because "the prescription drug industry is the most heavily regulated industry (for safety purposes) in this country today."[158] FDA regulations govern "approximately $1 trillion in consumer products or 25 cents of every consumer dollar expended in this country annually."[159] Due to the staggering number of products in the marketplace, the FDA is hard-pressed to examine thoroughly every aspect of every different product within its jurisdiction, a problem that is then exacerbated by rapidly changing technologies and evolving medical knowledge of the health hazards posed by prescription drugs and medical devices.[160] Indeed, the FDA has concluded that it has "serious scientific deficiencies and is not positioned to meet current or emerging regulatory responsibilities."[161] The presumption that FDA regulations establish only a safety floor, therefore, is based on the defensible empirical proposition that the FDA ordinarily is unable to comprehensively regulate risk by reference to the full range of safety precautions and risks encompassed by the tort duty.[162]

To employ the language of the *Restatement (Third) of Torts*, the extent to which regulatory compliance provides a complete defense turns on the empirical question of how often administrative agencies use their "substantial expertise" to resolve by a "full, fair, and thorough" "deliberative process" the "very issue of [safety] presented in the case before the court."[163] The empirical judgment that comprehensive safety regulation is extraordinarily difficult justifies the factual presumption that regulators ordinarily are only able to partially address the safety issue posed by a tort claim, yielding a minimal safety requirement.

For these same reasons, a different empirical judgment—that regulations ordinarily are sufficiently comprehensive to resolve tort claims—would presumptively make regulatory compliance a complete defense, requiring the plaintiff to overcome the presumption by showing that the regulation does not fully resolve the safety decision required by the tort duty. The substantive logic of the regulatory compliance defense, therefore,

158. Green, *supra* note 129, at 463.

159. FDA SUBCOMM. ON SCI. & TECH., FDA SCIENCE AND MISSION AT RISK 1 (2007).

160. This argument is more fully developed in Green, *supra* note 129, at 476, 482.

161. FDA SUBCOMM. ON SCI. & TECH., *supra* note 159, at 2.

162. *Cf. In re* Zyprexa Prods. Liab. Litig., 493 F. Supp. 2d 571, 575 (E.D.N.Y. 2007) ("[L]awyers and their clients often find themselves serving as drug safety researchers of last resort." (quoting Aaron S. Kesselheim & Jerry Avorn, *The Role of Litigation in Defining Drug Risks*, 297 JAMA 308, 311 (2007))).

163. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 4 cmt. e (1998).

is not altered by the tort-reform legislation enacted in some states that presumptively makes regulatory compliance a complete defense.[164]

Under the majority rule, however, compliance is only a partial defense that is based on a factual presumption regarding the regulatory process. Like any other factual presumption, this one can be overcome with proof—in this instance, that deference to the regulation in question fully resolves the safety decision required by the tort duty. Because regulatory compliance is an affirmative defense, the burden of proof is borne by the defendant. Lacking such proof, the presumption applies and courts will not treat compliance as a complete defense.

This reasoning explains why the case law is replete with statements suggesting that regulatory compliance is only "one factor to be taken into account by the jury."[165] That characterization rests on a defensible factual presumption governing the ordinary case and does not show that courts have failed to defer adequately to the regulatory expertise of administrative agencies.

D. FROM THE REGULATORY COMPLIANCE DEFENSE TO IMPLIED PREEMPTION

From a defendant's perspective, how courts characterize the regulatory compliance defense matters a great deal. Instead of relying on a rule that apparently treats regulatory compliance as only one factor for consideration by the jury, a defendant can effectively make regulatory compliance a complete defense by instead claiming that the statute preempts the tort claim. Having complied with a statute that preempts tort law, the defendant is not subject to tort liability. Rather than invoke the regulatory compliance defense, defendants can avoid liability by instead arguing that the tort claim is preempted.

A defendant will ordinarily prefer preemption for a further reason. The regulatory compliance defense is based on judicial deference to a regulation or statute, whereas statutory preemption is a constitutional obligation, requiring courts to follow the supreme will of the legislature. Rather than let courts exercise their common-law discretion, defendants in these cases understandably want to eliminate the discretionary component by instead pursuing the constitutionally grounded claim of statutory preemption.[166]

Although there had been "fervent interest in the regulatory compliance defense on the part of academics, policymakers, courts and legislatures over

164. *E.g.*, COLO. REV. STAT. ANN. § 13-21-403(1)(b) (2005) (creating a rebuttable presumption that a product is not defective if it complied with a federal or Colorado state statute or administrative regulation).

165. Riegel v. Medtronic, Inc., 552 U.S. 312, 345 (2008) (Ginsburg, J., dissenting).

166. *Cf.* Catherine M. Sharkey, *Federalism in Action: FDA Regulatory Preemption in Pharmaceutical Cases in State Versus Federal Courts*, 15 J.L. & POL'Y 1013, 1019 (2007) (finding that "state courts, which by and large have previously rejected any absolute regulatory compliance defense. . . . are now willing to entertain preemption arguments").

the last quarter of the 20th century," the "federal preemption of state tort liability has replaced regulatory compliance as a dominant issue for the 21st century."[167] The strategic decision to invoke preemption has paid off for defendants. "Beginning in 1992, . . . the U.S. Supreme Court has decided a burgeoning number of preemption cases, squarely challenging the continuing vitality of tort in many domains of accident law."[168]

IV. DEFERENCE AND THE STATUTORY PREEMPTION OF TORT CLAIMS

Due to the supremacy of legislative law over the common law, a statute can modify or altogether preempt (foreclose) a common-law tort claim. State legislation that codifies tort law, for example, displaces the associated doctrines of the common law.[169] In a case of preemption, compliance with the statute provides a complete defense to the (preempted) tort claim.

The federal preemption of state law is based on the Supremacy Clause of the U.S. Constitution, which commands that the laws of the United States "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[170] Consequently, the judicial "inquiry into the scope of a [federal] statute's pre-emptive effect is guided by the rule that '[t]he purpose of Congress is the ultimate touchstone' in every pre-emption case."[171] The preemptive effect of a federal statute extends to regulations that agencies promulgate pursuant to such statutory authority.

> One area of the law in which the doctrine of preemption has been especially difficult to interpret has been tort law, and particularly product liability law. State product liability law operates in fields that are entwined with federal regulation. Cigarettes, medical devices, pesticides, and motor vehicles are examples of the many products that traditionally have been subjects of both federal regulation and state common law actions. Federal statutes and regulations often incorporate measures to assure product safety, but the statutes rarely include provisions to compensate for personal injuries or other damages associated with the regulated products. Rather, federal law and state common law exist in a sometimes uncomfortable balance in our federalist society. This

167. *Id.* at 1020–21.

168. Robert L. Rabin, *Territorial Claims in the Domain of Accidental Harm: Conflicting Conceptions of Tort Preemption*, 74 BROOK. L. REV. 987, 989 (2009).

169. *See, e.g.*, WASH. REV. CODE § 7.72.020(1) (2008) ("The previous existing applicable law of this state on product liability is modified only to the extent set forth in this chapter.").

170. U.S. CONST. art. VI, cl. 2. "The Supreme Court has repeatedly identified the Supremacy Clause as the source of its authority to declare state law displaced (preempted)." Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 733 (2008).

171. Altria Grp., Inc. v. Good, 555 U.S. 70, 76 (2008) (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996)).

> discomfort is enhanced by the lack of clear direction from Congress in its statutory enactments and from federal agencies in their administrative regulations. Since the 1990s, product sellers have argued with increasing frequency that plaintiffs' product liability actions under state common law are preempted by the existence of federal regulation governing the alleged injurious product. In most of these cases, the proponent of the preemption defense has asked the court to preclude the plaintiffs' claims without explicit direction from Congress.[172]

Because "Congress repeatedly punts, leaving unresolved the key question of the extent to which federal standards and regulations preempt state common-law remedies," the resulting ambiguity and high monetary stakes have arguably made preemption "the fiercest battle in products liability litigation today."[173]

Of the varied constitutional doctrines, preemption is the one federal courts most frequently apply.[174] Although this practice would seem to suggest that preemption doctrine is well understood, that is not the case.

> Federal preemption doctrine is, famously, a mess, replete with poorly defined, overlapping, hyperformalistic categories. Express preemption provisions in federal statutes are relatively few, and when present, they often contain highly ambiguous terms. Many preemption cases, even some that the courts nominally treat as express preemption cases, involve a judicial inquiry as to whether Congress implicitly preempted a particular state law or program. Within the rubric of implied preemption, the courts rely heavily on various categories—field preemption, conflict or obstacle preemption, and foreign affairs preemption—that lack defined borders, that blur together in specific cases, and that sometimes seem to do little analytic work.[175]

To be sure, "the black-letter law of federal regulatory preemption is easily stated. If a federal statute expressly or implicitly preempts state tort law—an issue of statutory interpretation . . .—then the finding of preemption is perfectly straightforward, although the extent or domain of

172. Jean Macchiaroli Eggen, *The Normalization of Product Preemption Doctrine*, 57 ALA. L. REV. 725, 725–26 (2006) (paragraph structure added and footnotes omitted).

173. Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 GEO. WASH. L. REV. 449, 450 (2008).

174. *See* Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 768 (1994).

175. David A. Dana, *Democratizing the Law of Federal Preemption*, 102 NW. U. L. REV. 507, 509 (2008) (footnotes omitted).

preemption may require further analysis."[176] The problem, however, is that "preemption doctrine is substantively empty. This emptiness helps mask the fact that courts are actually making substantive decisions in the name of preemption."[177]

In an effort to fill this doctrinal void, scholars have addressed the substantive issues that preemption doctrine ought to resolve. Two broad themes have emerged.

The first centers on the federalism concern about the appropriateness of federal law displacing state law, particularly in an area like tort law that has historically been governed by the states. "The preemption case law is dominated by the tension between federal regulatory authority and the residual force of state law usually expressed through common law liability rules."[178] Consequently, "judicial doctrine and much scholarly commentary continue to express a normative preference for a cleaner delineation of federal and state powers."[179]

In addition, scholars have argued that the preemption question should address issues of "institutional choice,"[180] making "implied preemption . . . turn largely on the criterion of comparative institutional competence" for regulating the conduct in question.[181] The debate in this respect largely tracks the one that scholars have engaged in with respect to the regulatory compliance defense.[182]

The argument that preemption analysis should be guided by considerations of comparative institutional competence has been most forcefully made by Professor Catherine Sharkey:

> Behind agency decisions to regulate or to refrain from regulating is a rich body of empirical cost-benefit (or increasingly risk-risk)

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176. Peter H. Schuck, *FDA Preemption of State Tort Law in Drug Regulation: Finding the Sweet Spot*, 13 ROGER WILLIAMS U. L. REV. 73, 79 (2008) (footnotes omitted).

177. Merrill, *supra* note 170, at 742.

178. Samuel Issacharoff, *Federalized America: Reflections on* Erie v. Tompkins *and State-Based Regulation* 23 (N.Y. Univ. Law & Econ. Working Papers, Working Paper No. 324, 2012), *available at* http://lsr.nellco.org/cgi/viewcontent.cgi?article=1328&context=nyu_lewp.

179. William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547, 1549 (2007).

180. *See generally* Merrill, *supra* note 170 (arguing that institutional choice analysis would significantly improve preemption analysis).

181. Schuck, *supra* note 176, at 82.

182. *Compare* Buzbee, *supra* note 179, at 1548 (arguing that the "pervasive risks of regulatory failure" provide a principled basis for interpreting regulations as establishing only minimal safety standards that do not preempt more demanding state laws), *with* Schuck, *supra* note 176, at 113 (arguing that "[t]he overriding policy goal of promoting public health . . . is more likely to be attained by a system in which liability risks depend on preemptive, authoritative decisions made by a single, politically accountable expert agency, rather than by a non-system in which a multitude of lay state court juries wield different and notoriously opaque standards"). This same set of competing arguments characterizes the ongoing debate over the regulatory compliance defense. *See supra* note 129 and accompanying text.

> analyses. These analyses made by the agency at the time of its action (or inaction), as well as the nature of the agency action and the contemporaneous reasons given by the agency to justify it, can guide courts' judgments regarding the need for, and equally significantly, the present feasibility of, uniform national regulatory standards.[183]

In addition to arguing that this "agency reference model . . . contains the seeds of a satisfying normative approach to products liability preemption jurisprudence," Sharkey also showed that this model "provides a better explanation for judicial outcomes" than competing accounts.[184] According to this interpretative model, implied preemption will occur when the agency "has made a conclusive determination about the precise risk at issue."[185] Consistent with this approach, Professor Robert Rabin's independent analysis of the recent case law showed that "the critical factor in determining conflict preemption" under the U.S. Supreme Court's jurisprudence is "*an analysis of whether the agency directive was grounded in the same evidence-based risk/benefit inquiry as the tort process would entail.*"[186]

Further support for this approach is provided by Professor Keith Hylton's statistical analysis of products liability preemption decisions in federal courts, which found that "two factors explain many of the outcomes of the preemption cases: *the degree of congruence between the regulatory and common law standards and the perceived degree of agency independence.*"[187] Implied preemption is statistically more likely for a regulatory decision that closely corresponds to the safety decision implicated by the tort claim, a result consistent with the case law analyses of both Sharkey and Rabin.

When implied preemption involves cases in which a legislative safety decision closely corresponds to the safety decision implicated by the tort claim, the legislative solution ordinarily will also solve the tort question. By deferring to such a legislative policy decision, courts will conclude that the regulatory safety standard fully satisfies the tort obligation.[188] The principle of common-law deference makes regulatory compliance a complete defense for the same cases in which a federal statute impliedly preempts the tort claim, leading to the question of whether this congruence has implications for the ongoing debate about implied preemption.

Preemption depends entirely on statutory purpose, explaining why courts have exclusively focused on that issue. Doing so has muddied the

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183. Sharkey, *supra* note 173, at 453.

184. *Id.*

185. *Id.* at 519.

186. Rabin, *supra* note 168, at 995.

187. Keith N. Hylton, *Preemption and Products Liability: A Positive Theory*, 16 SUP. CT. ECON. REV. 205, 206 (2008).

188. *See supra* Part III.B.

jurisprudence of implied preemption by making it unclear how statutory purpose relates to the underlying substantive issues of federalism and the comparative institutional competence of administrative agencies and common-law courts. Because these substantive issues are fully resolved by the regulatory compliance defense, that common-law resolution of the substantive problem extends to all tort claims that would otherwise be preempted. Once conceptualized in terms of the regulatory compliance defense, implied preemption is much less problematic than courts and commentators have recognized.

A. THE CONGRUENCE BETWEEN IMPLIED PREEMPTION AND THE REGULATORY COMPLIANCE DEFENSE

A federal statute impliedly preempts tort law when compliance with the state tort duty "may produce a result inconsistent with the objective of the federal statute."[189] For purposes of this analysis, "[t]he identification of the relevant 'federal purpose' necessitates an answer to the 'minimum standard' versus 'optimal balance' question."[190]

A statutory objective to establish a minimum safety standard cannot be frustrated by a tort duty that demands even more safety, eliminating any role for implied preemption in cases of this type. To be sure, federal regulators could have the objective of attaining uniformity across the country, but that purpose would be at odds with the regulatory objective to establish only a safety floor that contemplates the desirability of more demanding safety requirements. An optimal safety standard, by contrast, is based on an all-things-considered analysis that accounts for *all* of the regulatory benefits, including those of uniformity, and so the issue of uniformity is best considered in relation to regulations that are supposed to optimally solve the fully defined safety problem.[191]

"If the federal standard sets the optimal balance, then state laws that diverge from it—either to relax or tighten regulations—are in 'conflict' with

189. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (citation omitted) (discussing other instances of preemption as well, none of which matter for present purposes).

190. ALI STUDY, *supra* note 126, at 108.

191. Note in this regard that the benefits of uniformity are fully accounted for by the duty inquiry, which considers the difficulty of compliance across the entire range of cases in order to determine the scope and substantive obligations of the common-law duty. *See supra* notes 80–81 and accompanying text. A legislative safety decision that is deemed to be optimal for reasons of uniformity, therefore, will be fully accounted for by the principle of common-law deference as applied to the duty question. As a matter of deference, the regulatory decision to optimally balance the need for uniformity against the competing needs of heterogeneous safety requirements would justify a limitation of the common-law duty to require the regulatory safety standard across all cases, regardless of whether the circumstances in a particular case might otherwise call for even greater precautions. Such a heterogeneous safety requirement is a cost of uniformity that had been fully considered by the regulators, so deference to this legislative policy decision would foreclose any tort claim seeking to disrupt uniformity by creating a safety obligation of this type.

the 'federal purpose' and therefore preempt[ed]."[192] Implied preemption logically centers on cases in which the regulators sought to establish an optimal safety standard.

Whether federal regulators actually had the purpose of establishing an optimal safety standard turns on a number of difficult evidentiary issues.[193] But once a court has adequately resolved these issues, the judicial conclusion that a regulatory safety standard is optimal in this respect has clear implications for the relation between implied preemption and the regulatory compliance defense.

To establish an optimal safety standard, regulators must strive to adequately evaluate the full set of known or reasonably knowable risks and technologically feasible precautions encompassed by the safety question (anything less would establish only a safety floor relative to the fully defined safety problem). Executive orders since the 1980s have required federal agencies to conduct "a detailed assessment of the costs and benefits for significant regulations as well as a cost-benefit analysis of alternative courses of action to the extent that they may be quantified, and a statement of the agency's regulatory objectives and the means it has selected to pursue those objectives."[194] The federal regulatory exercise necessarily encompasses all known or reasonably knowable risks and precautions, each of which involves a regulatory cost, benefit, or alternative course of action.

As compared to this regulatory exercise, the tort inquiry is more limited. The tort duty does not govern risks threatening many types of pure economic loss and stand-alone emotional harms, excluding these harms from the safety calculus of reasonable care.[195] Tort law addresses a more limited safety question than the one addressed by federal regulators seeking to implement an optimal safety standard.

For reasons previously discussed, courts that defer to legislative policy determinations will conclude that regulatory compliance is a complete defense if the regulators adequately evaluated the full set of risks encompassed by the common-law tort duty based on a state of technology, cost structure, and knowledge of risk governing the safety decision at issue in the tort claim.[196] Federal regulators that seek to adopt an optimal safety standard will adequately account for all of these matters, with the implication that deference to the optimal regulatory standard will make regulatory compliance a complete defense to the tort claim.

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192. ALI STUDY, *supra* note 126, at 108.

193. For insightful discussion of these issues, see Catherine M. Sharkey, *Federalism Accountability: "Agency-Forcing" Measures*, 58 DUKE L.J. 2125 (2009); Catherine M. Sharkey, *Inside Agency Preemption*, 110 MICH. L. REV. 521 (2012).

194. Kevin M. Stack, *Interpreting Regulations*, 111 MICH. L. REV. 355, 397 (2012) (citations omitted) (describing these executive orders).

195. *See* Geistfeld, *supra* note 70, at 153–57.

196. *See supra* Part III.B.

As a matter of logic, the implied preemption of tort law is limited to safety regulations that are supposed to optimally solve the safety problem, and such an optimal safety regulation will embody legislative policy decisions that fully solve the safety question posed by a tort claim. Therefore, as a matter of deference, the implied preemption of tort law is limited to tort claims for which regulatory compliance would otherwise supply a complete defense. The principle of common-law deference unifies implied preemption and the regulatory compliance defense.

B. Reframing Implied Preemption in Terms of the Regulatory Compliance Defense

The congruence between implied preemption and the regulatory compliance defense is well illustrated by an important preemption case recently decided by the U.S. Supreme Court, *Williamson v. Mazda Motor of America, Inc.*[197] The plaintiffs alleged that the defendant's motor vehicle was defectively designed because it did not have a lap-and-shoulder belt for the rear inner seats, which plaintiffs claimed was a reasonable alternative design to the simple lap belt that was installed in the vehicle.[198] The defendant argued that this tort claim was preempted by a federal regulation that gave it the option to install either a simple lap belt or a lap-and-shoulder belt in the rear inner seats of the vehicle.[199] In resolving this issue, the Court employed an approach that fully illustrates the logic of implied preemption, making the case particularly apt for considering the relation between implied preemption and the regulatory compliance defense.

To support its preemption argument, the defendant relied on *Geier v. American Honda Motor Co.*, in which the Court held that an earlier version of the same safety regulation impliedly preempted any tort claim that sought to obligate manufacturers to install airbags in vehicles.[200] Like the newer version of the safety regulation at issue in *Williamson*, the older safety regulation at issue in *Geier* gave manufacturers the option of selecting among various passive restraint devices, such as airbags and lap-and-shoulder belts, for protecting occupants of automobiles from injury in the event of a crash.[201] *Geier* concluded that the regulation was "intended to assure manufacturers that they would retain a choice" of safety measures, thereby preempting "a state tort suit that, by premising tort liability on a failure to install airbags, would have deprived the manufacturers of the choice that the federal regulation had assured them."[202] In *Williamson*, the Court had to

197. Williamson v. Mazda Motor of Am., Inc., 131 S. Ct. 1131 (2011).
198. *Id.* at 1134.
199. *Id.*
200. Geier v. Am. Honda Motor Co., 529 U.S. 861, 874–75 (2000).
201. *Williamson*, 131 S. Ct. at 1134 (describing the regulation in *Geier*).
202. *Id.* (citing *Geier*, 529 U.S. at 874–75).

determine whether the regulatory choice provided to manufacturers was "a *significant objective* of the federal regulation," like the regulation at issue in *Geier*.[203] *Williamson* concluded that, "unlike *Geier*, we do not believe here that choice is a significant regulatory objective."[204] Consequently, the tort claim was not impliedly preempted because it would not "'stand[] as an obstacle to the accomplishment . . . of the full purposes and objectives' of a federal law."[205]

Although the Court's implied preemption analysis only asked whether a successful tort claim would pose an obstacle to attaining a significant federal regulatory objective, the analysis can be easily recast in terms of the regulatory compliance defense. To see why, first consider the tort claim at issue in *Geier*, which alleged that the defendant's motor vehicle was defectively designed for not containing an airbag.

The issue of defective design is governed by the risk–utility test, which deems a design to be defective if there is a reasonable alternative design with a disutility or burden for consumers that is less than the foreseeable risk of physical harm that would thereby be eliminated.[206] According to the plaintiffs' allegation of defective design in *Geier*, an airbag was a reasonable alternative to the existing design that relied only on lap-and-shoulder belts. To recover under such a risk–utility claim, the plaintiffs would have had to prove that the disutility or burden of the airbag (denoted B_{airbag}) is less than the risk that would thereby be eliminated (denoted $PL_{\text{no airbag}}$):

$$B_{\text{airbag}} < PL_{\text{no airbag}}$$

As *Geier* concluded, this identical risk–utility issue had been fully considered by the U.S. Department of Transportation ("DOT") when it promulgated the regulation in question. The risk addressed by the regulation—the foreseeable risk that an occupant in the vehicle would be physically injured in a crash—encompasses the full set of risks governed by the common-law duty.[207] When DOT evaluated the risk posed by the absence of airbags ($PL_{\text{no airbag}}$), it considered the disutility or burden of mandatory airbags (B_{airbag}), concluding that:

> airbags brought with them their own special risks to safety, such as the risk of danger to out-of-position occupants (usually children) in small cars.

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203. *Id.* at 1136.

204. *Id.* at 1137.

205. *Id.* at 1136 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

206. *See supra* notes 138–40 and accompanying text.

207. *See* RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2(b) (1998). Other than the occupants of the vehicle, no one else is foreseeably affected by the presence or absence of an airbag.

> . . . [A]irbags were expected to be significantly more expensive than other passive restraint devices, raising the average cost of a vehicle price $320 for full frontal airbags over the cost of a car with manual lap and shoulder seatbelts (and potentially much more if production volumes were low). . . . [T]he high replacement cost—estimated to be $800—could lead car owners to refuse to replace [airbags] after deployment. . . . [And] the public, for reasons of cost, fear, or physical intrusiveness, might resist installation or use of any of the then-available passive restraint devices—a particular concern with respect to airbags.[208]

Due to these varied costs, DOT "had *rejected* a proposed . . . 'all airbag' standard because of safety concerns (perceived or real) associated with airbags, which concerns threatened a 'backlash' more easily overcome 'if airbags' were 'not the only way of complying.'"[209] Thus, with respect to the full set of risks encompassed by the common-law duty to design, DOT reached a considered conclusion that:

$$PL_{\text{no airbag}} < B_{\text{airbag}}$$

Deference to this regulatory decision would lead courts to find as a matter of law that a plaintiff cannot recover for any tort claim requiring a risk–utility conclusion contrary to the one reached by the regulators. A defendant, therefore, could invoke regulatory compliance as a complete defense for any allegation of liability requiring such a contrary conclusion ($B_{\text{airbag}} < PL_{\text{no airbag}}$), the same claim made by the plaintiffs in *Geier*.

To be sure, deference to a regulatory safety standard is not warranted when advances in technology, increased knowledge of risk, or reductions in cost alter the risk–utility calculus.[210] The regulators, however, also expressly considered these factors and concluded that "a mix of devices would help develop data on comparative effectiveness, would allow the industry time to overcome the safety problems and the high production costs associated with airbags, and would facilitate the development of alternative, cheaper, and safer passive restraint systems. And it would thereby build public confidence . . . ."[211] If an agency has decided that a regulation is integral to the development of safety technology or knowledge of risk, then deference to this aspect of the regulatory decision rules out any tort claim based on the contrary proposition that the regulators did not adequately account for such change.

The regulatory standard at issue in *Geier*, therefore, fully satisfies the conditions under which regulatory compliance is a complete defense. The

208. Geier v. Am. Honda Motor Co., 529 U.S. 861, 877–78 (2000) (citations omitted).

209. *Id.* at 879 (citation omitted).

210. *See supra* Part III.B.

211. *Geier*, 529 U.S. at 879 (citations omitted).

federal regulatory agency had used its "substantial expertise" to resolve by a "full, fair, and thorough" "deliberative process" the "very issue of product design . . . presented in the case before the court," making regulatory compliance a complete defense under the rule adopted by the *Restatement (Third) of Torts*.[212] The regulatory compliance defense yields the same case outcome as the finding of implied preemption in *Geier*.

In *Williamson*, by contrast, the regulators did not make such a conclusive risk–utility determination when promulgating the federal regulation that gave manufacturers a choice to install either a simple lap belt or a lap-and-shoulder belt in the rear inner seats of automobiles. According to the Court,

> DOT did not require lap-and-shoulder belts for rear inner seats [because] it thought that this requirement would not be cost-effective. The agency explained that it would be significantly more expensive for manufacturers to install lap-and-shoulder belts in rear middle and aisle seats than in seats next to the car doors. But that fact—the fact that DOT made a negative judgment about cost effectiveness—cannot by itself show that DOT sought to forbid common-law tort suits in which a judge or jury might reach a different conclusion.
>
> For one thing, DOT did not believe that costs would remain frozen. Rather it pointed out that costs were falling as manufacturers were "voluntarily equipping more and more of their vehicles with rear seat lap/shoulder belts." For another thing, many, perhaps most, federal safety regulations embody some kind of cost-effectiveness judgment. While an agency could base a decision to pre-empt on its cost-effectiveness judgment, we are satisfied that the rulemaking record at issue here discloses no such pre-emptive intent.[213]

Whereas the regulation in *Geier* was intended to foster development of the safety technology implicated by the plaintiffs' tort claim, the regulation in *Williamson* was based only on the state of technology at the time the regulation was promulgated, with the regulators recognizing that changes in technology or cost could yield a risk–utility conclusion different from the one embodied in the regulation. Deference to this regulatory safety decision would not foreclose plaintiffs from claiming that technology or cost had changed in a manner that made lap-and-shoulder belts cost-effective.[214] By fully deferring to this regulatory safety decision, a court would conclude that

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212. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 4 cmt. e; *see also supra* notes 149–53 and accompanying text (justifying this interpretation of the rule).

213. Williamson v. Mazda Motor of Am., Inc., 131 S. Ct. 1131, 1139 (2011) (citations omitted).

214. *See supra* Part III.B (showing why deference does not make regulatory compliance a complete defense for regulations based on outmoded technologies or understandings of risk).

regulatory compliance is not a complete defense against any tort claim alleging that the vehicle was defectively designed for not having lap-and-shoulder belts, the same result reached by the holding in *Williamson* that such a claim is not preempted.

The substantive congruence between regulatory compliance and implied preemption is not limited to *Geier* and *Williamson*. Based on a more extensive review of other Supreme Court opinions, Professors Rabin and Sharkey have each independently concluded that a federal statute or safety regulation impliedly preempts a state tort claim if (as Rabin put it) the regulation is the result of a deliberative agency decision "grounded in the same evidence-based risk/benefit inquiry as the tort process would entail."[215] So, too, under the *Restatement (Third) of Torts*, a product "is not defective as a matter of law" if it complies with a regulatory standard that (1) "was promulgated recently, thus supplying currency to the standard therein established;" (2) "addresses the very issue of product design or warning presented in the case before the court; and" (3) was the product of a "deliberative process" that "was full, fair, and thorough and reflected substantial expertise."[216] As a matter of both logic and practice, implied preemption exists whenever deference would make regulatory compliance a complete defense to the tort claim.

C. Implications of the Regulatory Compliance Defense for Implied Preemption

Because the principle of common-law deference unifies implied preemption and the regulatory compliance defense, it has important implications for the ongoing controversy about the implied federal preemption of state tort law. A virtual chorus of critics contends that the judicial inquiry on implied preemption relies on formal categories that do not adequately account for institutional choice and federalism concerns.[217] Once the preemption inquiry has been reframed in terms of the regulatory compliance defense, these issues can be straightforwardly addressed with the principle of common-law deference.

For reasons of institutional comity and comparative institutional advantage, courts defer to the legislative policy decisions embodied in the regulation. This common-law resolution of the institutional-choice problem extends to any case of implied preemption in which regulatory compliance would also provide a complete defense. In these cases, implied preemption cannot inappropriately favor federal administrative regulation over the tort

215. Rabin, *supra* note 168, at 995 (emphasis omitted); *see also* Sharkey, *supra* note 173, at 453 (concluding that this approach "provides a better explanation for judicial outcomes" than competing accounts).

216. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 4 cmt. e.

217. *See supra* notes 174–77 and accompanying text.

system, because the common law has already deferred to the legislature in this regard.

Insofar as implied preemption reaches the same case outcomes that would otherwise be attained by the regulatory compliance defense, the approach also has important federalism implications. Because the regulatory compliance defense is based on a principle of common-law deference to legislative policy determinations, the exercise of this discretion under state tort law is no different from the result required by federal legislative compulsion via implied preemption. There is no conflict between state tort law and federal regulatory law. So formulated, implied preemption does not create any federalism problem or conflict between the historic state interest in tort law and the federal interest in the uniformity required by national markets.

This solution to the federalism problem explains an otherwise puzzling feature of preemption jurisprudence involving the so-called presumption against preemption. According to the U.S. Supreme Court,

> [i]n all pre-emption cases, and particularly in those in which Congress has "legislated . . . in a field which the States have traditionally occupied," . . . we "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[218]

Although the Court has repeatedly invoked this interpretive principle, it has "not otherwise describe[d] how the presumption against preemption operates in these cases."[219] Indeed, the presumption against preemption apparently "breaks down in the products liability realm, rearing its head with gusto in some cases, but oddly quiescent in others."[220] In light of this case law, it is unclear how courts should interpret federal statutes by reference to a presumption against preemption based on the historic state interest in tort law.

Once implied preemption has been reframed in terms of the regulatory compliance defense, the role played by the presumption clearly emerges. As we have found, federal law impliedly preempts tort claims for which regulatory compliance would otherwise serve as a complete defense.[221] In this critical respect, federal law is not displacing liabilities that would otherwise exist under state tort law. The federalism concern embodied in the presumption against preemption, therefore, does not apply. In a case of

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218. Wyeth v. Levine, 555 U.S. 555, 565 (2009) (alterations in original) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)) (internal quotation marks omitted).

219. Mary J. Davis, *The "New" Presumption Against Preemption*, 61 HASTINGS L.J. 1217, 1252 (2010).

220. Sharkey, *supra* note 173, at 454.

221. *See supra* Part IV.A.

implied preemption, the principle of common-law deference solves the federalism problem, making it defensible for the Court to ignore the presumption against preemption.

Consider in this respect our prior reformulation of both *Geier* and *Williamson* in terms of regulatory compliance rather than implied preemption.[222] Our analysis in each case did not give any express role to the presumption against preemption, nor did the Court in either case invoke that presumption when resolving the preemption question. The substantive concerns embodied in the presumption against preemption were nevertheless fully addressed because the Court's finding of implied preemption would have also established regulatory compliance as a complete defense to the tort claim, thereby solving the federalism problem.

This conceptualization of the preemption inquiry accordingly explains the otherwise "paradoxical[]" trend in which the Court applies "the presumption when interpreting express preemption provisions, but not when called upon to engage in implied preemption analysis."[223] As applied to the interpretation of express statutory provisions, the presumption against preemption is an interpretive rule that determines how courts should resolve textual ambiguities in the express language of the statute or regulation.[224] In a case of implied preemption, by contrast, textual ambiguities are not at issue, eliminating this particular role for the presumption. No other role for the presumption exists when implied preemption is congruent with the regulatory compliance defense, explaining why the Court does not invoke the presumption in cases of implied preemption. The otherwise puzzling role played by the presumption against preemption is fully clarified by an implied preemption inquiry reformulated in terms of the regulatory compliance defense.

A case of implied preemption poses hard problems about the manner in which courts should account for federal interests, state interests, and the different institutional capacities of administrative agencies and the tort system. These issues are not clearly addressed by an inquiry limited to statutory purpose, the mode of analysis apparently mandated by the preemption inquiry. As a consequence, "preemption doctrine is substantively empty. This emptiness helps mask the fact that courts are

222. *See supra* Part IV.B.

223. Sharkey, *supra* note 173, at 458 (footnotes omitted).

224. Rules for resolving textual ambiguities that favor one plausible interpretation over a competing plausible interpretation are commonly applied by courts. In insurance law, for example, "[t]he most frequently employed principle of interpretation . . . is *contra proferentem* ("against the drafter")—the rule that an ambiguous provision in an insurance policy is interpreted against the drafter. . . . Literally thousands of reported decisions have applied this rule." KENNETH S. ABRAHAM, INSURANCE LAW AND REGULATION: CASES AND MATERIALS 36 (4th ed. 2005).

actually making substantive decisions in the name of preemption."[225] The solution to these substantive problems resides in connecting the issue of implied preemption to the principle of common-law deference. By deferring to legislative safety determinations, state courts have decided how to account for any conflicts between federal interests, state interests, and the different institutional capacities of the regulatory and tort systems. This form of deference makes regulatory compliance a complete defense to any tort claim that would otherwise be impliedly preempted. Deference solves the hard substantive problems posed by implied preemption, a solution that becomes apparent only if the implied preemption inquiry is conceptualized in terms of the regulatory compliance defense and not merely statutory purpose.

D. LOCATING THE REGULATORY COMPLIANCE DEFENSE WITHIN PREEMPTION ANALYSIS

The U.S. Supreme Court has never expressly recognized the substantive equivalence between the regulatory compliance defense and implied preemption. Consider a relatively recent opinion by Justice Ginsburg dissenting from the majority's finding of express preemption in a products liability case.[226] Relying in part on the *Restatement (Third) of Torts*, Justice Ginsburg observed that "[m]ost States do not treat regulatory compliance as dispositive, but regard it as one factor to be taken into account by the jury."[227] Justice Ginsburg made this point to show that an express statutory bar to a state tort claim is not required in order to make regulatory compliance relevant to the legal inquiry,[228] but the role of regulatory compliance is even more fundamental than this depiction.

In a recent case, the Court stated that implied "[p]reemption analysis requires us to compare federal and state law. We therefore begin by identifying the state tort duties and federal [regulatory] requirements applicable to the [tort defendant]."[229] Having made this comparison, the preemption analysis then determines whether "[f]ederal law impliedly preempts state law" because "state and federal law 'conflict.'"[230] There can be no conflict between federal and state law if the defendant's compliance with the federal regulation satisfies the state tort duty. Implied preemption analysis, therefore, must consider the regulatory compliance defense in

225. Merrill, *supra* note 170, at 742.

226. Riegel v. Medtronic, Inc., 552 U.S. 312, 345 (2008) (Ginsburg, J., dissenting).

227. *Id.* (citing RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 16(a) (Proposed Final Draft No. 1, Apr. 6, 2005)).

228. *Id.* at 344–45.

229. Pliva, Inc. v. Mensing, 131 S. Ct. 2567, 2573 (2011).

230. *Id.* at 2587 (Sotomayor, J., dissenting) (quoting Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372–73 (2000)).

order to determine whether there is any conflict requiring resolution by preemption.

For this reason, courts must consider the regulatory compliance defense, regardless of whether the defendant invokes that defense to the tort claim. As required by the presumption against preemption, courts are obligated to interpret federal regulations under the "assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[231] If the regulation can be interpreted in two different ways that fully effectuate the same underlying federal legislative safety purpose, with one interpretation superseding state law and the other embracing it, then the presumption against preemption decisively favors the interpretation based on state law.[232] Preemption is unnecessary for cases in which the defendant's compliance with the regulation provides a complete defense to the tort claim under state law. In that event, state law would fully resolve the claim and obviate the need for courts to preemptively displace state law with federal law. Defendants cannot force courts to preempt tort claims when doing so is unnecessary, and so a defendant's strategic choice to frame the defense in terms of preemption does not foreclose an inquiry into regulatory compliance.[233]

"Many, if not most, preemption cases are not about the interpretation of ambiguous statutory text, but rather about how to identify the underlying purposes of federal statutes and to assess the acceptable degree of conflict between those purposes and state regulatory measures."[234] Any conflict between federal and state interests is eliminated by the principle of common-law deference, which immunizes a compliant defendant from state tort liability for any tort claim that would otherwise be barred on grounds of implied preemption. By expressly incorporating the regulatory compliance defense into preemption analysis, courts can address the federalism problem in a substantively satisfying manner.[235]

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231. Wyeth v. Levine, 555 U.S. 555, 565 (2009) (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996)).

232. So formulated, the presumption against preemption is not affected by *Mensing*'s interpretation of the Supremacy Clause, which "suggests that courts should not strain to find ways to reconcile federal law with seemingly conflicting state law." *Mensing*, 131 S. Ct. at 2580. In the circumstances under consideration, there is no conflict between federal law and state law and therefore no need to interpret the federal law in some manner that might attain reconciliation. The only issue is whether the otherwise identical case outcomes should be grounded on state law or federal law, and the presumption simply directs courts to select tort law as the embodiment of the states' historic police powers.

233. *Cf. supra* Part III.D (explaining why defendants prefer implied preemption over the regulatory compliance defense).

234. Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 132 (2004).

235. Arguably, not all states have adopted the formulation of the regulatory compliance defense that makes it a complete defense to the tort claim under these conditions. *Cf. supra* note 149 (discussing a case that rejected the *Restatement (Third)* formulation of the regulatory

CONCLUSION

The importance of statutes for contemporary tort law is hard to overstate for reasons amply illustrated by Judge Robert E. Keeton's characterization of civil litigation: "A fundamental characteristic of judging in late-20th century America is that very few court cases depend solely on common-law grounds. Legislatures have enacted so many statutes on so many subjects that in most cases at least one party invokes at least one statute."[236]

In light of the pervasive interplay between statutory law and tort law, one might be surprised by the extent to which the associated doctrines appear to be in disarray. The doctrine of negligence per se has been sharply criticized for employing a "jurisprudential approach . . . [that] is unsystematic, vague, muddled, and wrongheaded."[237] Critics also contend that the regulatory compliance defense "gets little respect,"[238] although matters are even worse with respect to the jurisprudence of implied preemption, which scholars generally consider "a muddle."[239] Tort law, it would seem, has an uneasy relation with statutory law, requiring reform measures to rein in "a judicial regulatory system that currently runs quite wild."[240]

These depictions fundamentally mischaracterize the manner in which the common law of torts accounts for statutory law. Prior to the emergence of the modern administrative state, common-law courts had already formulated negligence per se in a manner that wholly defers to legislative safety determinations. Contrary to its black-letter formulation, negligence per se does not limit tort liability by reference to statutory purpose, but instead defers as a matter of common-law principle to the legislative policy determinations embodied in the statute or regulation. This principle of common-law deference extends to the regulatory compliance defense, even

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compliance defense and arguing that the case only rejects the *Restatement (Third)*'s rationale rather than its substantive formulation of the regulatory compliance defense). But even if some states do not recognize the majority rule that effectively makes regulatory compliance a complete defense to any tort claim that would otherwise be impliedly preempted, a preemption analysis that accounts for the regulatory compliance defense still enables courts to determine the extent to which the federal interest actually conflicts with state interests across the country. As revealed by this approach, the issue under these conditions reduces to the question of whether the displacement of tort law in a few states that reject the majority rule is acceptable for promoting the federal interest in uniformity that is shared by the vast majority of states as a matter of common-law deference.

236. ROBERT E. KEETON, JUDGING IN THE AMERICAN LEGAL SYSTEM 205 (1999) (footnote omitted).

237. Blomquist, *supra* note 9, at 223.

238. Noah, *supra* note 124, at 2147, 2152.

239. Nelson, *supra* note 17, at 232.

240. Huber, *supra* note 4, at 335 (using this characterization to justify reforming the regulatory compliance defense).

though regulatory compliance is commonly considered to be only one factor that courts use to determine liability. That characterization of the defense rests on the factual presumption that regulators are not ordinarily able to resolve fully the safety issue posed by a tort claim. This presumption, however, can be rebutted. If the defendant can prove that the regulation is based on a legislative assessment that is capable of fully answering the safety question posed by the tort claim, then as a matter of deference to this legislative determination, regulatory compliance is a complete defense. That defense, in turn, is integrally related to the doctrine of implied statutory preemption. For any case in which deference to the legislative safety determination defeats the tort claim as a matter of regulatory compliance, such a tort claim would also frustrate the legislative safety purpose and be preempted as well. Deference unifies the tort inquiry with the preemption inquiry. By deferring to legislative safety decisions, the common-law of torts eliminates any deep conflict between federal safety regulations and state tort law, while ensuring that the state tort system adequately accounts for the specialized expertise of regulatory agencies. In contrast to portrayals of administrative regulation and tort law that "increasingly cast the two less as complementary regimes than as institutional rivals,"[241] the principle of common-law deference shows that the tort system has opted to be a complementary component of the modern administrative state.

241. Nagareda, *supra* note 5, at 3.