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TREATING OSHA VIOLATIONS AS NEGLIGENCE PER SE

Abstract: The doctrine of negligence per se, in its simplest formulation, enables courts to hold a defendant negligent as a matter of law when that defendant's violation of a statute or regulation results in injury to another. Although courts widely accept negligence per se, many do not apply the doctrine when a defendant is alleged to have violated regulations implemented by federal agencies, such as the Occupational Safety and Health Administration (OSHA). In fact, several courts take the position that treating a party's violation of OSHA standards as negligence per se is not only a misapplication of the doctrine, but incompatible with the Occupational Safety and Health Act (OSH Act), the federal legislation which established OSHA. This Note explores the rise of negligence per se as an established doctrine of American tort law, considers the nature of OSHA standards and their relationship with state law, and provides a comprehensive survey of federal and state courts' treatment of OSHA violations in negligence cases. Further, this Note argues that, given the discretionary nature of negligence per se, treating OSHA violations as negligence per se is wholly legitimate and altogether compatible with the OSH Act, contrary to the view of many courts.

INTRODUCTION

Negligence per se has long been a staple of the law student's first-year curriculum.[1] Ordinarily, to prove liability in a typical negligence case, a plaintiff must first establish that a defendant violated the applicable standard of care—in other words, that the defendant failed to act as a reasonably prudent person would under the same or similar circumstances.[2] This flexible inquiry enables the finder of fact to engage in a far-reaching analysis, weighing numerous factors in determining whether a defendant failed to act prudently on a particular occasion.[3] The doctrine of negligence per se, by contrast, simplifies this ordinary negligence analysis by allowing a plaintiff to establish a defendant's departure from the applicable standard of care merely by demonstrating

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[1] Christopher J. Robinette, *The Prosser Notebook: Classroom as Biography and Intellectual History*, 2010 U. ILL. L. REV. 577, 590 (discussing legendary torts maestro William Prosser's lectures on negligence per se in his 1938–1939 torts course at the University of Minnesota Law School).

[2] RESTATEMENT (SECOND) OF TORTS § 291 (AM. LAW INST. 1965); *see also* Benjamin C. Zipursky, *Reasonableness in and Out of Negligence Law*, 163 U. PENN. L. REV. 2131, 2134 (2015) (discussing the "reasonable person" standard).

[3] Thomas C. Galligan Jr., *A Primer on the Patterns of Negligence*, 53 LA. L. REV. 1509, 1522, 1525 (1993).

that such defendant violated a statute.[4] The conventional rationale for such a doctrine, as Professor Ezra Ripley Thayer so emphatically asserted over a century ago, is that prudent people do not contravene the expressed intent of the legislature.[5]

Courts have long disagreed about the degree to which they should apply negligence per se in tort actions.[6] In the vast majority of states,[7] violations of statute, if the statute was designed to prevent the sort of harm that occurred and protect the class of persons of which the plaintiff is a member, may furnish conclusive evidence of negligence.[8] In a number of other states, even if a defendant violated a statute designed both to prevent the resultant harm and to protect the type of plaintiff involved, a court will treat such violation as a presumption of negligence,[9] or, in some cases, as merely "some" evidence of neg-

[4] *See id.* at 1525 (discussing the innovation of the "duty-risk" approach and its superiority over earlier common law formulas for negligence). In practice, however, the analysis is more complicated because the plaintiff must also prove what some scholars have referred to as "limiting liability conditions": typically, that the plaintiff falls within the class of persons protected by the statute and that the injury is of the type that the statute was intended to prevent. *See* Ariel Porat, *Expanding Liability for Negligence Per Se*, 44 WAKE FOREST L. REV. 979, 979 (2009) (arguing for a diminished role for such "limiting liability conditions" in assessing tort liability). Further, as the average first-year law student knows, negligence per se is not liability per se. *See id.* In other words, although statutory violations may sometimes be conclusive evidence of breach of duty, they cannot themselves establish causation or harm, which are the other necessary elements of a valid negligence action. *See* Martin v. Herzog, 126 N.E. 814, 816 (N.Y. 1920), *superseded by statute*, 1975 N.Y. Laws 94, *as recognized in* Barker v. Kallash, 468 N.E.2d 39, 41 (N.Y. 1984) ("We must be on our guard, however, against confusing the question of negligence with that of the causal connection between the negligence and the injury.").

[5] Ezra R. Thayer, *Public Wrong and Private Action*, 27 HARV. L. REV. 317, 321–22 (1914). Some scholars have argued that this premise is dubious, contending not only that expressed legislative intent can be difficult or impossible to discern, but also that the legislature never intends to impose tort liability unless it expressly says so. *See* Barry L. Johnson, *Why Negligence Per Se Should Be Abandoned*, 20 N.Y.U. J. LEGIS. & PUB. POL'Y 247, 271 (2017) (discussing criticisms of negligence per se rooted in public choice theory and textualism).

[6] *See infra* notes 126–189 and accompanying text. As Professor Paul Yowell notes, the "presumption of negligence" and "some evidence of negligence" alternatives have been considered "types of negligence per se." *See* Paul Yowell, *Judicial Discretion in Adopting Legislative Standards: Texas's Solution to the Problem of Negligence Per Se?*, 49 BAYLOR L. REV. 109, 111 (1997) (emphasis omitted) (distinguishing these variants from "true" negligence per se); *see also* Paul Sherman, *Use of Federal Statutes in State Negligence Per Se Actions*, 13 WHITTIER L. REV. 831, 878–80 (1992) (referring to the "presumption of negligence" and "some evidence of negligence" alternatives as "distinct approaches" to negligence per se). Accordingly, this Note refers to the conventional form of the doctrine that treats a defendant's statutory violation as dispositive of the issue of breach of duty as "pure" negligence per se and other variants as "types" of negligence per se. *See infra* notes 25–218 and accompanying text.

[7] RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 14 reporters' note on cmt. c (AM. LAW INST. 2005, amended 2016) (observing that negligence per se is the "strong majority rule" in American jurisdictions).

[8] *See, e.g.*, Parker Bldg. Servs. Co. v. Lightsey, 925 So. 2d 927, 931 (Ala. 2005) (holding that proof of a violation of statute is proof of breach of duty).

[9] *See, e.g.*, Kalata v. Anheuser-Busch Cos., 581 N.E.2d 656, 661 (Ill. 1991) (holding that violations of statute constitute "prima facie" negligence (emphasis omitted)); Vandergrift v. Johnson, 206

ligence.[10] Indeed, several states apply negligence per se in a different manner for different types of statutes.[11] Although these disagreements have existed nearly as long as the doctrine itself, they have only grown more pronounced following the surge of statutes and regulations in the second half of the twentieth century.[12] One significant and little-discussed area of difference in courts' application of negligence per se, which this Note takes as its subject, concerns tort actions arising from violations of the Occupational Safety and Health Act (OSH Act).[13]

Enacted by Congress in 1970 to curb a perceived epidemic of workplace accidents, the OSH Act established a new federal agency within the Department of Labor known as the Occupational Safety and Health Administration (OSHA).[14] As the OSH Act declares, the basic function of OSHA is to develop and enforce federal safety and health standards in the workplace.[15] Since its inception, OSHA has promulgated numerous workplace standards, both "horizontal" (applying across industries) and "vertical" (applying to single industries only), violations of which are punishable by a range of monetary penalties.[16] Although courts unanimously agree that OSHA standards do not create a

S.E.2d 515, 517 (W. Va. 1974) (distinguishing "prima facie" negligence from "negligence per se" (emphasis omitted)); *see also* CAL. EVID. CODE § 669(a)(1) (Deering 2019) ("The failure of a person to exercise due care is *presumed* if . . . [h]e violated a statute, ordinance, or regulation of a public entity . . . ." (emphasis added)).

[10] *See, e.g.*, Horstmeyer v. Golden Eagle Fireworks, 534 N.W.2d 835, 838 (N.D. 1995) (holding that violation of a statute, if the plaintiff establishes a causal connection between the violation and the harm, may be evidence of negligence, but is not negligence in itself); DeJesus v. Seaboard Coast Line R.R. Co., 281 So. 2d 198, 200–01 (Fla. 1973) (noting that, under Florida law, violation of traffic statutes is some evidence of negligence, but not pure negligence per se).

[11] *See, e.g.*, *DeJesus*, 281 So. 2d at 200–01; Elliott v. City of New York, 747 N.E.2d 760, 762 (N.Y. 2001) (noting that, under New York law, violations of state statutes may be negligence per se, whereas violations of local ordinances are merely some evidence of negligence).

[12] *See* Mark A. Geistfeld, *Tort Law in the Age of Statutes*, 99 IOWA L. REV. 957, 960 (2014) (observing that the rise of statutory law in the latter part of the twentieth century has created considerable controversy around the doctrine of negligence per se). Indeed, in the famous words of Judge Guido Calabresi, modern American law finds itself "[c]hoking on [s]tatutes." GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 1 (1982).

[13] Occupational Safety and Health Act of 1970, Pub. L. 91-596, 84 Stat. 1590, 1590–1620 (codified as amended at 29 U.S.C. §§ 651–675, 677, 678 (2018)).

[14] Walter Jr. Jensen, Jr., Coenraad L. Mohr & Duke N. Stern, *Administration of the OSH Act in the Face of Criticism from Industry and Labor*, 11 AM. BUS. L.J. 37, 37–39 (1973). At the time of its enactment, the amount of work-related injuries resulting in disability per one million worker hours in the U.S. was twenty percent higher than the rate of the previous decade, and manufacturers were introducing an estimated seventy new chemicals into industry each day. *See* MARK A. ROTHSTEIN, OCCUPATIONAL SAFETY AND HEALTH LAW § 1:2 (2019) (recounting Congress's motivation for enacting the OSH Act).

[15] 84 Stat. at 1590 ("An Act [t]o assure safe and healthful working conditions for working men and women; by authorizing enforcement of the standards developed under the Act . . . .").

[16] Jensen, Mohr & Stern, *supra* note 14, at 39.

private right of action,[17] they have reached different conclusions about whether such standards may establish the applicable standard of care when a plaintiff alleges he or she was injured at work due to another's negligence.[18] In other words, they disagree about whether violations of OSHA standards should be treated as negligence per se.[19]

This Note examines of the foundations of negligence per se and surveys the ways in which courts apply it in OSHA-related tort actions, ultimately presenting an argument in favor of a more liberal application of the doctrine in such cases.[20] Part I reviews the history and rationale of negligence per se.[21] Part II examines the nature of OSHA standards and their connection with state law.[22] Part III discusses the different positions adopted by both the federal appeals courts and the state courts of last resort concerning the relationship between a party's alleged violation of OSHA standards and that party's liability in tort.[23] Finally, Part IV argues that, contrary to the view of many courts and commentators, treating violations of OSHA standards as negligence per se is purely a matter of judicial discretion and altogether compatible with both the nature of the doctrine and the purpose of OSHA.[24]

I. THE FOUNDATIONS OF NEGLIGENCE PER SE

Before considering the nature of OSHA standards and surveying the ways courts have treated a party's violation of such standards in negligence cases, it is necessary to thoroughly examine the foundations of negligence per se.[25] As

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[17] *See* Clark v. Wells Fargo Bank, N.A., 669 F. App'x 362, 363 (9th Cir. 2016) (citing 29 U.S.C. § 653(b)(4)) (affirming dismissal of cause of action based on alleged OSHA violations); Pratico v. Portland Terminal Co., 783 F.2d 255, 265 (1st Cir. 1985) (recognizing negligence per se for OSHA violations alleged in action under the Federal Employers Liability Act); Minichello v. U.S. Indus., Inc., 756 F.2d 26, 29 (6th Cir. 1985) (rejecting negligence per se theory of recovery based on OSHA violation in products liability case); Jeter v. St. Regis Paper Co., 507 F.2d 973, 977 (5th Cir. 1975) (holding that the OSH Act's provisions for enforcement render a private cause of action based on OSHA violations unnecessary to effectuate the legislation's intent); ROTHSTEIN, *supra* note 14, § 21:13 (noting that it is "firmly established" among courts that the OSH Act does not create a private cause of action).

[18] *See infra* notes 126–189 and accompanying text.

[19] *See infra* notes 126–189 and accompanying text. There is, however, near unanimous agreement among the states that testimonial or documentary evidence of an employer's OSHA violations is inadmissible at trial, because such evidence is either irrelevant, unduly prejudicial, or hearsay. *See* ROTHSTEIN, *supra* note 14, § 21:13 (surveying state approaches). Only Alabama permits admissions of this sort. *See* Wyser v. Ray Sumlin Constr. Co., 680 So. 2d 235, 238 (Ala. 1996) (holding that OSHA report detailing various citations employer received was admissible to show employer's knowledge of non-compliant workplace).

[20] *See infra* notes 25–218 and accompanying text.

[21] *See infra* notes 25–75 and accompanying text.

[22] *See infra* notes 76–125 and accompanying text.

[23] *See infra* notes 126–189 and accompanying text.

[24] *See infra* notes 190–217 and accompanying text.

[25] *See infra* notes 26–75 and accompanying text.

commentators have observed, there is a relatively scarce amount of scholarship concerning the theoretical foundations of the doctrine.[26] Nevertheless, the emergence and development of negligence per se in nineteenth-century American law is well-documented,[27] and courts and scholars since that time have occasionally attempted to articulate its proper justification.[28] Section A of this Part outlines the origins and development of negligence per se in the United States.[29] Section B discusses the conventional rationale for the doctrine, famously articulated by Ezra Ripley Thayer, as well as the extent to which this rationale retains currency among today's courts and legal commentators.[30]

A. The Origins and Development of the Doctrine

The origins of negligence per se in American law date to the second half of the nineteenth century, when rapid industrialization brought with it an unprecedented surge of work-related personal injury suits.[31] Perhaps the first use of the doctrine by a state's high court was in 1866 when the New York Court of Appeals decided *Ernst v. Hudson River Railroad Co.*[32] In *Ernst*, the court held that a defendant's violation of a state safety statute, which required trains to sound their whistle and bells at specified railroad junctions, rendered that defendant liable for the death of a teamster who was struck by the defendant's locomotive.[33] Judge John Kilham Porter's vehement declaration that "[i]t is not the policy of the law to favor those who deliberately violate its mandates" captured the novel idea that contravening legislatively enacted safety standards could conclusively establish a defendant's breach of duty in a negligence action brought by a private plaintiff.[34] In the decades following *Ernst*, many

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[26] *See, e.g.*, 1 DAN B. DOBBS, THE LAW OF TORTS 319 (2001) ("The history of the negligence per se rule seems not to have been written . . . ."); Robert F. Blomquist, *The Trouble with Negligence Per Se*, 61 S.C. L. REV. 221, 224 n.11 (2009) ("No scholar to date has exhaustively examined, on an in-depth basis, the origins and legal theory of negligence per se.").

[27] *See* Blomquist, *supra* note 26, at 225–43 (discussing early American case law deriving negligence principles from violations of statute); Johnson, *supra* note 5, at 258–62 (reviewing the origins of negligence per se).

[28] *See, e.g.*, Porat, *supra* note 4, at 980; Thayer, *supra* note 5, at 321–22.

[29] *See infra* notes 31–57 and accompanying text.

[30] *See infra* notes 58–75 and accompanying text.

[31] Yowell, *supra* note 6, at 110. Negligence per se emerged in Great Britain roughly around the same period. *See* Gorris v. Scott [1874] 9 L.R. Exch. at 125 (Eng.) (establishing that, for a defendant's statutory violation to constitute a breach of duty, the harm to the plaintiff must be of the sort that the statute was intended to prevent).

[32] Ernst v. Hudson River R.R. Co., 35 N.Y. 9, 28–29 (1866).

[33] *Id.* The court also noted that the defendant failed to observe the custom (not legally required) of waving a flag when a locomotive was approaching a crossing. *Id.* at 28.

[34] *Id.* at 28–29; Blomquist, *supra* note 26, at 229 n.45. This is not to say, however, that courts had not previously recognized liability when defendants violated statutes that expressly provided civil liability for the noncompliant. *See, e.g.*, Langlois v. Buffalo & Rochester R.R. Co., 19 Barb. 364, 370

judges began utilizing the principles of negligence per se in their opinions, albeit not always in the same manner as the *Ernst* court.[35] By 1913, even the United States Supreme Court, in *St. Louis, Iron Mountain & Southern Railway Co. v. McWhirter*, addressed the fledgling tort doctrine, reversing an aggressive state court decision that held a defendant-railroad negligent for its violation of a federal law restricting the length of its employees' shifts.[36] Although the Supreme Court's ruling did not endorse the application of the doctrine to the particular facts of the case, it also did not reject, in general, the use of a federal statutory violation to find that a defendant acted negligently.[37]

Less than a decade after *McWhirter*, the New York Court of Appeals, the same court that gave birth to the doctrine half a century earlier, decided *Martin v. Herzog*, a case that would produce the seminal opinion on negligence per se.[38] In *Martin*, the court held that a plaintiff's failure to signal with her lights while travelling by buggy on a public way, as required by state statute, rendered her contributorily negligent with regard to the resultant collision.[39] The then-Judge Benjamin Cardozo famously announced that the plaintiff's "unexcused omission of the statutory signals is more than some evidence of negligence. It *is* negligence in itself."[40] A highly influential opinion, *Martin* helped elevate negligence per se to even greater prominence among United States courts and legal academics.[41]

(N.Y. Gen. Term 1854) (noting that a violation of statute requiring fences to be built along railroads would have constituted a breach of duty if the legislature had expressly provided so in the statute).

[35] Blomquist, *supra* note 26, at 231. Many early courts used the phrase not to denote negligence resulting from statutory violations, but rather to denote negligence resulting from the breach of certain duties considered so important as to be outside the province of the jury. *See, e.g.*, Ohio & Miss. R.R. Co. v. Shanefelt, 47 Ill. 497, 500 (1868) ("In that case, as in this, it was contended, that it was negligence *per se* to permit dry weeds and grass to accumulate on the right of way of a railway company; that its presence there created a legal presumption of negligence."); Pa. R.R. Co. v. Beale, 73 Pa. 504, 510 (1873) (holding that failure to stop before crossing a railroad track was "not merely evidence of negligence for the jury, but negligence per se, and a question for the court").

[36] 229 U.S. 265, 281 (1913). The federal law at issue was the Hours of Service Act of 1907. *See* Hours of Service Act, ch. 2939, 34 Stat. 1415 (1907).

[37] *See McWhirter*, 229 U.S. at 280 ("[W]e think that where no such liability is expressed in the statute it cannot be supplied by implication. It requires no reasoning to demonstrate that the general rule is that where negligence is charged, to justify a recovery it must be shown that the alleged negligence was the proximate cause of the damage."). Thus, the Court suggested that, had proximate causation between the statutory violation and the injury been shown, they would have upheld the Kentucky Court of Appeals' negligence per se analysis. *See* Blomquist, *supra* note 26, at 243.

[38] *Martin*, 126 N.E. at 815.

[39] *See id.* (observing that the plaintiff "f[e]ll short of the standard of diligence to which those who live in organized society are under a duty to conform").

[40] *Id.*

[41] Blomquist, *supra* note 26, at 252. Between the time *Martin* was decided and the end of the twentieth century, more than 10,000 federal and state court opinions utilized, or at least mentioned, the principles of negligence per se. *Id.* (citing Westlaw search of U.S. cases between 1920 and 2000).

In 1934, negligence per se became codified[42] when the American Law Institute published its *Restatement (First) of Torts* (First Restatement).[43] The First Restatement provided that the violation of a statute or other legislative enactment would constitute a breach of a duty when: (a) the intent of the statute was to protect the plaintiff's interests; (b) the violation was the factual cause of the invasion of particular interests that the statute was designed to protect; (c) the statute was one designed to protect against a certain hazard, and the invasion of interests resulted from that hazard; and (d) the violation was the proximate cause of the invasion, and the plaintiff was not contributorily negligent.[44] Thus, by tying the doctrine to legislative intent, the First Restatement considerably limited the scope of negligence per se, at least compared to the liberal application of the doctrine by many earlier courts.[45] This formulation of negligence per se remained generally intact in the 1965 *Restatement (Second) of Torts* (Second Restatement), which, in a slight departure from the First Restatement, emphasized that deriving the appropriate standard of care in a negligence case from a particular legislative enactment is entirely a matter of discretion for the trial court.[46] Half a century after that, despite restrictions on the use of negligence per se imposed by some state legislatures amid the "tort reform" furor of the 1980's,[47] the *Restatement (Third) of Torts* (Third Restate-

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[42] *See* RESTATEMENT (FIRST) OF TORTS § 286 (AM. LAW INST. 1934, amended 1939). Given that they do not have the force of law, the American Law Institute's Restatements may be termed private codifications. *See* Deborah A. DeMott, *Restatements and Non-State Codifications of Private Law*, *in* CODIFICATION IN INTERNATIONAL PERSPECTIVE: SELECTED PAPERS FROM THE 2ND IACL THEMATIC CONFERENCE 75 (Wen-Yeu Wang ed., 2014). Other scholars have also observed that the Restatements' form and purpose resemble traditional legal codes. Kristen David Adams, *Blaming the Mirror: The Restatements and the Common Law*, 40 IND. L. REV. 205, 226–27 n.116 (2007) (explaining that, although the American Law Institute did not originally wish that the Restatements be considered codes, it allowed for the possibility that they would acquire "quasi statutory sanction").

[43] RESTATEMENT (FIRST) OF TORTS § 286. Although persuasive authority, Restatements, which purport to merely describe the common law, are not binding unless officially adopted by a jurisdiction's highest court. *Restatement*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[44] RESTATEMENT (FIRST) OF TORTS § 286.

[45] *See* 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, 81 (2010) (discussing early development of negligence per se).

[46] *See* RESTATEMENT (SECOND) OF TORTS § 286 cmt. d ("The decision to adopt the standard is purely a judicial one, for the court to make. When the court does adopt the legislative standard, it is acting to further the general purpose which it finds in the legislation, and not because it is in any way required to do so.").

[47] *See* Nancy L. Manzer, *1986 Tort Reform Legislation: A Systematic Evaluation of Caps on Damages and Limitations on Joint and Several Liability*, 73 CORNELL L. REV. 628, 628 (1988). In 1986 alone, more than three-fifths of the states enacted some form of tort reform legislation. *Id.* In some states, such legislation limited the discretion of courts' application of negligence per se. *See, e.g.*, 1986 Wash. Legis. Serv. 1365 (West) (limiting pure negligence per se to violations of statutes regulating electrical fire safety, the use of smoke alarms, or driving while under the influence).

ment) retained largely the same formula as its predecessors and noted that the doctrine remains popular among American courts.[48]

Although the basic outline of negligence per se by the Restatements looks, by and large, the same from the time of the First to that of the Third, some differences warrant mention.[49] Notably, unlike the First, the Second Restatement indicated that courts may apply negligence per se principles not only to violations of legislative enactments, but also to violations of administrative regulations.[50] Such an acknowledgement was perhaps more prescriptive than descriptive; even though state courts had been applying negligence per se principles to violations of federal statutes since the earliest days of the doctrine,[51] the same practice with respect to federal administrative regulations was not as widespread when work began on the Second Restatement in the early 1950s.[52] But considering the relative scarcity, by today's standards, of federal administrative regulations prior to the mid-1900s, this is hardly surprising.[53] What *is* surprising, however, is that even today, amidst the "era of big regulation,"[54]

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[48] *See* RESTATEMENT (THIRD) OF TORTS § 14 ("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.").

[49] *See supra* notes 43–48 and accompanying text (describing the Restatement's evolution); *infra* notes 50–57 and accompanying text.

[50] RESTATEMENT (SECOND) OF TORTS § 286 cmt. d; RESTATEMENT (FIRST) OF TORTS § 286. The Third Restatement acknowledges the same. *See* RESTATEMENT (THIRD) OF TORTS § 14 cmt. a ("This Section most frequently applies to statutes adopted by state legislatures, but equally applies to . . . regulations promulgated by federal agencies."). Even the Supreme Court has recently declared that the "violation of federal statutes *and regulations* is commonly given negligence-per-se effect in state tort proceedings." Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 318 (2005) (emphasis added) (quoting RESTATEMENT (THIRD) OF TORTS § 14 cmt. a).

[51] *See* Kritchevsky, *supra* note 45, at 91 (discussing state decisions in the late nineteenth century that held that violations of federal industrial safety statutes were negligence per se). Professor Kritchevsky notes that the practice by state courts of giving negligence per se effect to violations of federal statutes continues to be commonplace today. *See id.* at 73. The Third Restatement expressly acknowledges this as well. RESTATEMENT (THIRD) OF TORTS § 14 cmt. a; *see Grable & Sons Metal Prods.*, 545 U.S. at 318.

[52] *See* Clarence Morris, *The Role of Administrative Safety Measures in Negligence Actions*, 28 TEX. L. REV. 143, 145 (1949). This is not to say, however, that the treatment of violations of federal agency regulations as negligence per se by state courts was unheard of prior to the Second Restatement. *See* Kritchevsky, *supra* note 45, at 91–92 (discussing early negligence per se cases). For example, in *Rinehart v. Woodford Flying Services, Inc.*, the West Virginia Supreme Court of Appeals held that a federal aircraft safety regulation supplied the applicable standard of care in a negligence action. 9 S.E.2d 521, 522–23 (W. Va. 1940); *see also* Pa. R.R. Co. v. Moses, 182 N.E. 40, 42 (Ohio Ct. App. 1931) (holding that violation of the orders of the federal Interstate Commerce Commission, specifying equipment for locomotives, constituted negligence per se in a state tort action).

[53] *See* Johnson, *supra* note 5, at 268 (stating that Congress alone has created "twelve times the statutory law during the last fifty years" than during the previous 150 years).

[54] Jeff Jacoby, Opinion, *Will the Era of Big Regulation Ever Be Over?*, BOS. GLOBE (May 10, 2016), https://www.bostonglobe.com/opinion/2016/05/10/will-era-big-regulation-ever over/jNiPMgc UvniGgxN62AeRDM/story.html [https://web.archive.org/web/20201011015714/https://www.boston globe.com/opinion/2016/05/10/will-era-big-regulation-ever-over/jNiPMgcUvniGgxN62AeRDM/st

relatively few courts in the United States have come to treat violations of agency rules the same as statutory violations in tort actions, notwithstanding the American Law Institute's recognition and implicit endorsement of the practice.[55] Moreover, even those jurisdictions that do apply negligence per se to administrative rule violations do not do so in the same manner for every type of regulation.[56] Accordingly, the relationship—both normative and descriptive—between administrative regulations, such as OSHA standards, and the applicable standard of care in negligence cases, remains considerably opaque.[57]

B. The Justifications for the Doctrine: Then and Now

In its earliest days in the United States, the leading rationale behind negligence per se was the simple premise that reasonably prudent people do not violate what the legislature has pronounced to be a standard of proper conduct.[58] Without a doctrine of negligence per se, courts feared, a defendant would be "permitted to violate the law with impunity, provided the jury f[ou]nd it to have been carefully done."[59] In his seminal 1914 article, *Public Wrong and Private Action*, Ezra Ripley Thayer further elaborated upon this traditional rationale, arguing that the reasonably prudent person could never violate the public law.[60] Such a person would inevitably fall into self-contradiction, said Thayer, given that the public law is itself authored by and for reasonably prudent people.[61] According to Thayer, it would be not only absurd, but an affront to a sovereign's lawmaking authority, for a jury to find that a defendant's personal judgment

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ory.html] (lamenting that if "federal regulation" were a country, it would boast the ninth-largest economy on earth).

[55] MARSHALL S. SHAPO, PRINCIPLES OF TORT LAW § 22.07 (3d ed. 2010).

[56] *See id.*; *infra* notes 126–189 and accompanying text.

[57] *See infra* notes 126–189 and accompanying text.

[58] *See* Grey's Ex'r v. Mobile Trade Co., 55 Ala. 387, 403 (1876) ("[E]very person, while violating an express statute, is a wrongdoer, and, as such, is, *ex necessitate*, negligent in the eye of the law . . . ."). This has been referred to as the "outlaw" theory of negligence per se. *See* Fleming James Jr., *Statutory Standards and Negligence in Accident Cases*, 11 LA. L. REV. 95, 104–05 (1950).

[59] Smith v. Mine & Smelter Supply Co., 88 P. 683, 683, 686 (Utah 1907) (affirming a judgment in favor of the plaintiff when the defendant violated statutes restricting the possession of substances "having an explosive power greater than that of ordinary gunpowder").

[60] *See* Thayer, *supra* note 5, at 324–26.

[61] *See id.* In Thayer's words,

> It is an unjust reproach to our old friend the ordinary prudent man to suppose that he would [violate an] ordinance. It would mean changing his nature, and giving over the very traits which brought him into existence. And when by so doing he caused the very harm which the ordinance aimed to prevent, he would be the first to admit that he should break the ordinance at his peril.

Id. at 326. Thayer did, however, distinguish between statutes prohibiting malfeasance and those prohibiting nonfeasance, maintaining that negligence per se should only apply to violations of the former. *See id.* at 329.

concerning proper behavior superseded the legislature's judgment, particularly when the defendant's conduct caused injury.[62] Despite early criticism that he had too greatly diminished the deliberative role of the jury in assessing whether a defendant acted properly,[63] Thayer's justification for the doctrine proved highly influential among courts throughout the twentieth century.[64]

Despite the dominance of Thayer's analysis, courts and commentators have also emphasized other rationales for negligence per se in the century since *Public Wrong and Private Action* was first published.[65] For example, Professors William Prosser and W. Page Keeton maintained that the rationale behind the doctrine is principally to effectuate legislative policy.[66] Thus, in their view, violations of laws intended only to protect the interest of the community *at large*—as opposed to the interests of specific persons within the community—should not be treated as negligence per se because doing so would not further such laws' legislative purposes.[67] Accordingly, unlike Thayer's justification, which rooted the doctrine in the sheer unreasonableness of violating the law, Prosser and Keeton's justification concentrated on the specific intent of the legislature in enacting particular laws.[68] In addition, others have emphasized the superior predictive power as compared to the reasonable person standard,[69] the need to equalize the administration of negligence and contributory negligence,[70] and the importance of exact and uniform ob-

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[62] *Id.* at 323.

[63] *See, e.g.*, Charles L.B. Lowndes, *Civil Liability Created by Criminal Legislation*, 16 MINN. L. REV. 361, 368 (1932) ("Underlying Thayer's whole article is the tacit premise that the court defines what a reasonably prudent man would or would not do, and the jury says that this is what the defendant has or has not done. This is manifestly not so.").

[64] *See, e.g.*, Toll Bros. v. Considine, 706 A.2d 493, 495 (Del. 1998) (discussing Thayer) ("It has long been recognized that a legislative body may substitute its enactments for the general negligence standard of conduct required of a reasonable person."); Structural Metals, Inc. v. Impson, 469 S.W.2d 261, 266, 276 (Tex. Civ. App. 1971) (discussing Thayer when holding that the application of negligence per se was consistent with the doctrine's "legal justification"), *rev'd*, 487 S.W.2d 694 (Tex. 1972).

[65] *See* James, *supra* note 58, at 107 (discussing proffered rationales for negligence per se).

[66] W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 36 (5th ed. 1984); *see also* Bittle v. Brunetti, 750 P.2d 49, 57 (Colo. 1988) (discussing Prosser and Keeton's theory of negligence per se).

[67] KEETON ET AL., *supra* note 66, § 36.

[68] *See id.* As Part I mentions, the notion that legislative intent should guide the applicability and scope of negligence per se has become widely accepted. *See* Yowell, *supra* note 6, at 118 (arguing that courts created negligence per se to adhere to legislative will); *supra* notes 25–75 and accompanying text.

[69] *See* RESTATEMENT (THIRD) OF TORTS § 14 cmt. c ("When each jury makes up its own mind as to the negligence of . . . conduct, there are serious disadvantages in terms of inequality, high litigation costs, and failing to provide clear guidance to persons engaged in primary activity . . . . Negligence per se hence replaces decisionmaking by juries in categories of cases where the operation of the latter may be least satisfactory.").

[70] *See* James, *supra* note 58, at 107.

servance of certain public safety regulations as alternative justifications for the doctrine of negligence per se.[71]

Insofar as the doctrine's treatment in the Third Restatement represents the leading rationale for negligence per se today, it appears that the traditional Thayerian justification maintains considerable currency.[72] The Third Restatement cites "institutional comity" as the doctrine's animating rationale, asserting that the judiciary should not come to conclusions incompatible with those of the legislature concerning the reasonableness of certain conduct.[73] Thus, much like Thayer, the Third Restatement insists that the legislature's determination with respect to reasonable conduct must supersede that of a jury, lest the authority of the legislature be rendered illusory.[74] Nonetheless, much like Prosser and Keeton, the Third Restatement also emphasizes the centrality of specific legislative intent, stating that the purpose of negligence per se is to further a state's legislative judgment about which conduct is acceptable in a given situation.[75]

II. OSHA AND THE NATURE OF ITS STANDARDS

Just a few years after the American Law Institute affirmed the legitimacy of negligence per se in the Second Restatement, Congress published a significant legal document of its own: the OSH Act.[76] This legislation established OSHA, the federal agency tasked with developing and implementing workplace safety guidelines, commonly known as OSHA standards.[77] Understanding the nature of these standards—the manner in which they are implemented and enforced, what legal force they command, and the actors they bind—is essential to a proper examination of their relationship with the applicable standard of care in OSHA-related tort cases and the doctrine of negligence per se.[78] Accordingly, this Part sketches a brief overview of the nature of OSHA

[71] *See* Clinkscales v. Carver, 136 P.2d 777, 778 (Cal. 1943) (holding that violation of traffic law constituted negligence per se "whether or not the driver is immune from criminal prosecution because of some irregularity in the erection of the stop-sign").

[72] Barbara Kritchevsky, *Whose Idea Was It? Why Violations of State Laws Enacted Pursuant to Federal Mandates Should Not Be Negligence Per Se*, 2009 WIS. L. REV. 693, 704 (stating that the Third Restatement's rationale for negligence per se is the "[c]urrent [j]ustification" for the doctrine).

[73] RESTATEMENT (THIRD) OF TORTS § 14 cmt. c (noting that it would be "awkward" for a court to consider reasonable that which the legislature has implicitly decreed unreasonable).

[74] *See id.* ("[W]hen 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.").

[75] *See id.*; Kritchevsky, *supra* note 72, at 704–05 (maintaining that the Third Restatement emphasizes the furtherance of legislative intent as the primary rationale of negligence per se).

[76] Occupational Safety and Health Act of 1970, Pub. L. 91-596, 84 Stat. 1590, 1590–1620 (codified as amended at 29 U.S.C. §§ 651–675, 677–678 (2018)). The Act was signed into law on December 29, 1970, and went into effect on April 27, 1971. *Id.*

[77] Jensen, Mohr & Stern, *supra* note 14, at 39.

[78] *See infra* notes 126–189 and accompanying text.

and the standards it promulgates.[79] Section A provides an overview of the procedures for issuing and enforcing OSHA standards, as well as a summary of the effect of such standards on employers and employees.[80] Section B examines the intersection between federal OSHA standards and state law, a relationship that courts in OSHA-related negligence per se cases often discuss.[81]

A. The Issuance, Enforcement, and Scope of Standards Under the OSH Act

Intended by Congress to stem a perceived epidemic of workplace injuries and deaths, the OSH Act assigns to OSHA two principal functions: first, setting standards promulgated by the United States Secretary of Labor, and second, conducting workplace inspections to ensure that employers are complying with those standards.[82] Section 6(b) of the Act describes the procedures for modifying, nullifying, or issuing new OSHA standards.[83] In general, the promulgation of OSHA standards begins when the Secretary of Labor submits proposals to an advisory committee, which then recommends that the proposed standard be adopted, rejected, or modified.[84] After the advisory committee recommends a rule, the Secretary of Labor publishes the proposed rule in the Federal Register, thereby inviting public comment.[85] Thereafter, the Secretary of Labor makes a final determination as to whether to promulgate the standard.[86] If a proposed standard is adopted, it is not necessary that the final form of the standard be republished in the Federal Register.[87]

Critically, the OSH Act grants authority to the Secretary of Labor and OSHA to promulgate both "standards" and "regulations," and the two terms are not interchangeable.[88] Courts have held that "standards" under the Act are

[79] *See infra* notes 82–125 and accompanying text.

[80] *See infra* notes 82–107 and accompanying text.

[81] *See infra* notes 108–125 and accompanying text.

[82] *See supra* notes 14–16 and accompanying text (providing overview of OSH Act's enactment and OSHA's authority).

[83] *See* 29 U.S.C. § 655(b)(1) (2018).

[84] *Id.*

[85] *See id.* All "interested person[s]" may also request a public hearing during this period. *Id.*

[86] *Id.* The Secretary of Labor may subvert the ordinary promulgation procedures by adopting an emergency temporary standard upon their determination that employees are imminently at risk of "grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards." 29 U.S.C. § 655(c). Such emergency temporary standards may only remain in effect for six months. *Id.*

[87] *See* Edison Elec. Inst. v. OSHA, 849 F.2d 611, 617 (D.C. Cir. 1988) (finding that the revised OSHA standard, which was not republished, did not cover employers any differently than the original standard and that the petitioner incorrectly assumed the original standard excluded certain workplace wiring requirements that were made explicit in the revised standard).

[88] *See* Steel Erectors Ass'n of Am., Inc. v. OSHA, 636 F.3d 107, 113–15 (4th Cir. 2011) (rejecting immediate appellate review on the basis that challenged OSHA rule was a "rule," not a "standard"); La. Chem. Ass'n v. Bingham, 657 F.2d 777, 782 (5th Cir. 1981) (defining OSHA "standards" as "remedial measure[s] addressed to a specific and already identified hazard" and "regulations" as

remedial measures adopted to address specified hazards, whereas "regulations" are administrative efforts designed to enforce compliance with the standards.[89] This terminological distinction is important, as it has significant implications for the type of judicial review that an aggrieved party may obtain.[90] As section 6(f) of the OSH Act provides, any party who alleges adverse impact by a promulgated standard may petition a federal appellate court in which the party resides for pre-enforcement review within sixty days of promulgation.[91] Reviewing courts typically apply the "substantial evidence" test to a challenged standard, asking whether sufficient explanation supported OSHA's rejection of public objection to a proposed standard.[92] Section 8(g) of the Act, on the other hand, which authorizes OSHA to promulgate "rules and regulations," does not provide for similar judicial review.[93] Thus, courts have held that a party challenging a promulgated *regulation* cannot receive immediate appellate review and must instead initiate administrative proceedings.[94]

All enforcement functions authorized by the OSH Act rest with OSHA.[95] One of the principal enforcement functions authorized by the Act is the power of OSHA compliance officers to inspect the workplaces of covered employers.[96] During any such inspection, every employer has the right to be present and accompany an OSHA compliance officer.[97] Once an inspection concludes, a conference is held between the compliance officer and a representative of the

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"purely administrative effort[s] designed to uncover violations of the [OSH] Act and discover unknown dangers").

[89] *See La. Chem. Ass'n*, 657 F.2d at 782–84 (holding that an OSHA rule requiring employers to make available to employees and OSHA representatives any internal records concerning chemical exposure was a regulation, not a standard, because it did not function to ameliorate a "particular or significant" hazard).

[90] Chamber of Commerce v. U.S. Dep't of Labor, 174 F.3d 206, 208, 211–12 (D.C. Cir. 1999) (affirming jurisdiction on the basis that challenged OSHA rule was a "standard," as the rule imposed new safety obligations on employers to adopt a "comprehensive safety and health program" more demanding than existing OSHA safety requirements); ROTHSTEIN, *supra* note 14, § 4:31.

[91] ROTHSTEIN, *supra* note 14, § 4:31.

[92] *See, e.g.*, N. Am.'s Bldg. Trades Unions v. OSHA, 878 F.3d 271, 286 (D.C. Cir. 2017) (upholding an OSHA rule concerning workplace exposure to silica, despite evidence suggesting silica-related deaths were declining rapidly in the absence of any rule, on the basis that OSHA provided ample explanation for finding such evidence flawed); Associated Indus. of N.Y. State, Inc. v. U.S. Dep't of Labor, 487 F.2d 342, 350, 354 (2d Cir. 1973) (vacating an OSHA rule concerning required number of lavatories at a work site on the basis that the Department of Labor failed to provide any "reasoned explanation" for such a rule).

[93] *Chamber of Commerce v. U.S. Dep't of Labor*, 174 F.3d at 209–11.

[94] *See id.*

[95] ROTHSTEIN, *supra* note 14, § 1:4.

[96] *Id.* For discussion of covered employers, see *infra* notes 101–103 and accompanying text.

[97] 29 U.S.C. § 657(e).

employer, after which the compliance officer may request approval to issue a citation from an OSHA area director.[98]

The scope of OSHA's jurisdiction is vast.[99] OSHA standards bind employers in every state, the District of Columbia, and all United States territories.[100] Moreover, the Act defines "employer" in very broad terms: "a person engaged in a business affecting commerce who has employees."[101] The Occupational Safety and Health Review Commission, the quasi-judicial agency which adjudicates alleged OSHA violations, maintains that the term "employer" is not limited to formal employment relationships.[102] As such, courts often evaluate whether a person is an employee, as opposed to an independent contractor, by applying common law agency principles—considering, primarily, the extent to which the subject "controls" the work.[103]

Before examining the relationship between OSHA and state law, one additional provision of the OSH Act, often at issue in negligence per se litigation, warrants consideration here: the general duty clause.[104] This provision imposes on employers a residuary duty to take preventative measures against serious

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[98] *Id.* In addition, OSHA must issue citations within six months following the observation of any violation and must describe in writing the nature of the violation and note the specific standard, regulation, or other provision alleged to have been violated. *See* 29 U.S.C. § 658(a)–(c).

[99] *See infra* notes 100–103 and accompanying text.

[100] *See* Caribtow Corp. v. Occupational Safety & Health Review Comm'n, 493 F.2d 1064, 1066 (1st Cir. 1974) (rejecting argument that Congress lacked authority to unilaterally enact OSHA rules binding upon employers in Puerto Rico).

[101] 29 U.S.C. § 652(5). The OSH Act makes clear that this definition does not encompass the United States itself, nor "any State or political subdivision of a State." *Id.* Further, it defines "person" as including but not limited to "one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any organized group of persons." *See id.* § 652(4). According to OSHA's own interpretation, "employers" under the OSH Act are effectively any persons who exercise authority to direct or control labor. *See* Foit-Albert Assocs., Architects & Eng'rs, P.C., 17 BNA OSHC 1975 (No. 92-654, 1997). In *Foit-Albert Associates, Architects & Engineers, P.C.*, for example, the Occupational Health and Safety Review Commission found that an entity was not subject to certain OSHA construction standards because the company's authority with respect to a job site was contractually limited to inspecting for compliance with contractual specifications. *Id.* at *2. The Commission reached this conclusion despite acknowledging that the company's "inspection activities may unavoidably address safety issues and require its employees to perform some incidental physical labor." *Id.* at *1.

[102] *See* S & S Diving Co., 8 BNA OSHC 2041, *3 (No. 77-4234, 1980) (finding an employer-employee relationship where workers and putative employer "constituted an integrated economic unit").

[103] For an illustrative example of this practice, see *Absolute Roofing & Construction., Inc. v. Secretary of Labor*, 580 F. App'x 357, 361, 362–63 (6th Cir. 2014), in which the court considered over a dozen factors, including "the provision of employee benefits" and "duration of . . . relationship" in assessing whether a worker was an employee or an independent contractor. There, however, the court noted that "the hiring party's right to control the manner and means by which the product is accomplished" remained the overriding consideration. *Id.*

[104] 29 U.S.C. § 654(a)(1). The clause provides that "[e]ach employer . . . shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." *Id.*

hazards for which no specific OSHA standard applies.[105] Nonetheless, courts have been reluctant to interpret the general duty clause as a mechanism for imposing strict liability on employers, typically recognizing a breach of the provision only when an employer fails to address "feasibly preventable" forms of hazardous conduct.[106] Although the general duty clause creates an obligation for an employer to keep its "place of employment" free from recognized hazards, this obligation typically does not make an employer responsible for anyone other than its own employees.[107]

B. The Relationship Between OSHA and State Law

According to ordinary principles of federal preemption, pervasive federal regulatory schemes, such as that which the OSH Act establishes, bar states from enacting or enforcing their own supplementary laws dealing with the same regulatory field as the federal scheme.[108] Despite being a federal agency with nationwide jurisdiction over workplace safety, however, OSHA does not preclude the states from enacting their own health and safety standards.[109] To the contrary, the OSH Act expressly encourages and empowers states to play a prominent role in such regulation.[110] The primary mechanism by which the OSH Act promotes state involvement is found in section 18, which gives states the option to develop and administer their own OSHA plans and thereby, in some sense, "preempt" federal OSHA standards.[111] Many of the cases dis-

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[105] ROTHSTEIN, *supra* note 14, § 6:1.

[106] *See, e.g.*, Getty Oil Co. v. Occupational Safety & Health Review Comm'n, 530 F.2d 1143, 1145 (5th Cir. 1976) (holding that an employer breached OSHA's general duty provision when it failed to pressure test an oil pressure vessel that exploded soon after installation, on the basis that pressure treating such vessels is a universally accepted industry standard and easily carried out); ROTHSTEIN, *supra* note 14, § 6:1.

[107] Fry's Tank Serv., Inc., 4 BNA OSHC 1515 (Nos. 4447 & 4648, 1976) (finding that an employer did not violate general duty provision when an independent contractor died from drowning in an oilfield accident and the employer's workers attempted to rescue him, as it was not foreseeable that employees would be exposed to hazard); ROTHSTEIN, *supra* note 14, § 6:1. *But see* Acosta v. Hensel Phelps Constr. Co., 909 F.3d 723, 743 (5th Cir. 2018) (holding that OSHA may issue citations to controlling employers at multi-employer worksites pursuant to the general duty provision).

[108] Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 105 (1992) (holding that the OSH Act preempted state regulation of workplace safety, but only because the state failed to obtain federal approval of its state-administered OSHA plan).

[109] ROTHSTEIN, *supra* note 14, § 3:1 (providing a broad overview of the procedures by which states receive federal approval for their state-administered OSHA plans).

[110] *See* 29 U.S.C. § 651(b)(11) (stating that one of the purposes of the OSH Act is to encourage states to assume responsibility for workplace safety).

[111] *See id.* § 667(b) ("Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health issue with respect to which a Federal standard has been promulgated . . . shall submit a State plan for the development of such standards and their enforcement."); ROTHSTEIN, *supra* note 14, § 3:1.

cussed in the following Part of this Note involve standards promulgated under such state OSHA plans.[112]

In order for a state OSHA plan to receive approval from the Secretary of Labor, it must, among other requirements, designate or create a new state agency to enforce the plan, assure that this agency will have the legal authority and funding necessary to serve as an effective enforcement mechanism, and specify procedures for the promulgation of standards and regulations.[113] Most importantly, however, the proposed state plan must be "at least as effective" at providing workplace safety as OSHA's existing standards.[114] To evaluate the comparative effectiveness of proposed state plans, OSHA uses ad hoc, process-based criteria and "procedural indices."[115] Currently, twenty-one states, along with Puerto Rico, have federally-approved OSHA plans covering all employees within their state.[116]

Besides its provision for optional state OSHA plans, the OSH Act interacts with state law in another significant way, one which is especially salient in many negligence per se cases.[117] This interaction comes by way of section 4(b)(4), which expressly refers to the effect of OSHA standards on state tort law.[118] Specifically, it provides that "[n]othing in this Act shall . . . enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees."[119] The primary purpose of this "savings clause"[120] is to prevent defendant-employers from asserting dur-

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[112] *See, e.g.*, Hottmann v. Hottmann, 572 N.W.2d 259, 263 (Mich. Ct. App. 1997) (holding that MIOSHA standards cannot constitute evidence of the standard of care owed to a non-employee).

[113] *See* 29 U.S.C. § 667(c); *see also* ROTHSTEIN, *supra* note 14, § 3:4 (discussing prerequisites for state plan approval).

[114] SCOTT D. SZYMENDERA, CONG. RESEARCH SERV., R43969, OSHA STATE PLANS: IN BRIEF, WITH EXAMPLES FROM CALIFORNIA AND ARIZONA 2 (2016). States are free to enact standards that are more stringent than federal OSHA standards and may establish standards governing specific hazards that federal OSHA leaves unregulated. *See id.* at 5 (discussing California's "unique" OSHA plan that includes a specific standard that applies in cases of employees working outdoors during periods of high temperatures).

[115] *See* Courtney M. Malveaux, *OSHA Enforcement of the "as Effective as" Standard for State Plans: Serving Process or People?*, 46 U. RICH. L. REV. 323, 326–29 (2011) (arguing that OSHA's "at least as effective" test for state OSHA plan approval leaves the states without suitable guidance for creating a program that embodies the goals of the OSH Act).

[116] ROTHSTEIN, *supra* note 14, § 3:10. These include Alaska, Arizona, California, Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, North Carolina, Oregon, South Carolina, Tennessee, Utah, Vermont, Virginia, Washington, and Wyoming. *Id.* In addition, Connecticut, Illinois, Maine, New Jersey, New York, and the U.S. Virgin Islands have state OSHA plans that apply only to public employees. *Id.*

[117] *See infra* notes 126–189 and accompanying text.

[118] *See* 29 U.S.C. § 653(b)(4).

[119] *Id.*

[120] Occupational Safety & Health Admin., Opinion Letter on the Preemption Provision in OSHA's Hazard Communication Standard (Oct. 18, 2011) (maintaining that, as made clear by section 4(b)(4), nothing in the OSH Act evinces any legislative intent to preempt state tort law).

ing litigation that any OSHA standard overrides or preempts an element of a cause of action recognized under state law.[121] For example, in *Jones v. Cincinnati, Inc.*, the Massachusetts Appeals Court held that, in a negligence action brought against a manufacturer by a worker injured by an industrial product, the defendant could not escape liability by relying on an OSHA standard that provided that assuring the safe operation of machinery in the workplace is a duty held solely by an employer.[122]

Nonetheless, barring defendants from avoiding tort liability merely by asserting their compliance with OSHA standards has not been the only effect of section 4(b)(4).[123] Courts have unanimously held that the provision also operates to bar plaintiffs from maintaining a cause of action based solely on a defendant's violation of OSHA standards.[124] Accordingly, as discussed in Part III, this provision has significant implications for the tenability of the position that a defendant's OSHA violation constitutes negligence per se.[125]

III. The Applicability of Negligence Per Se To Violations of OSHA Standards: A Survey

Not long after the ratification of the OSH Act, tort plaintiffs injured in the workplace began to argue that violations of OSHA standards by defendant-

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[121] United Steelworkers of Am. v. Marshall, 647 F.2d 1189, 1234–36 (D.C. Cir. 1980) (holding that OSHA standard protecting laborers from lead exposure did not "enlarge or diminish or affect" existing state workers' compensation laws), *amended* Jan. 30, 1981.

[122] *See* 589 N.E.2d 335, 339–40 (Mass. App. Ct. 1992); Richard C. Ausness, *The* Welding Fume *Case and the Preemptive Effect of OSHA's HazCom Standard on Common Law Failure-to-Warn Claims*, 54 BUFF. L. REV. 103, 133–35 (2006) (discussing *Jones*, 589 N.E.2d at 339–40, and other cases relying on section 4(b)(4) to prevent preemption of state law claims by OSHA).

[123] *See* Minichello v. U.S. Indus., Inc. 756 F.2d 26, 29 (6th Cir. 1985) (holding that section 4(b)(4) of the OSH Act bars parties from maintaining a negligence per se theory premised on an OSHA violation); *infra* notes 126–189 and accompanying text.

[124] *See* Ellis v. Chase Comm'cns, 63 F.3d 473, 477–78 (6th Cir. 1995) (rejecting a theory of liability premised solely on a defendant's violation of Tennessee OSHA standards); *supra* note 17 and accompanying text (noting the consensus among courts that the OSH Act does not create a private right of action based on violation of its terms); *see also* Jonathan L.F. Silver, *National Labor Policy and the Conflict Between Safety and Production*, 23 B.C. L. REV. 1, 32–33 (1981) (detailing Congress's justification for not creating a private right of action based on the OSH Act). To say that OSHA does not create a private right of action is, however, not necessarily to say that OSHA violations cannot be pure negligence per se. *See, e.g.*, Trankel v. Dep't of Military Affairs, 938 P.2d 614, 625 (Mont. 1997) (holding that, although the OSH Act does not create a private right of action, OSHA violations can serve as the basis for a negligence per se claim). Some courts, nonetheless, have held that section 4(b)(4) implies both. *See, e.g.*, Ries v. Nat'l R.R. Passenger Corp., 960 F.2d 1156, 1162 (3d Cir. 1992) (stating that it would "def[y] reason" to interpret section 4(b)(4) as *only* precluding the creation of a private right of action based on the OSH Act). This Note argues in Part IV *infra* that such an interpretation of section 4(b)(4) is erroneous. *See infra* notes 190–217 and accompanying text.

[125] *See* Todd Brilliant, *Square Peg and Round Hole: Forcing OSHA Regulatory Violations into the Negligence Per Se Framework*, 46 LAB. L.J. 228, 232 (1995) (arguing that section 4(b)(4) operates as a bar against deriving the standard of care from OSHA standards).

employers constituted "pure" negligence per se.[126] Although some jurisdictions have adopted this position, most have not.[127] In fact, the effect of an OSHA violation on a defendant's liability in negligence cases varies significantly across both the federal and state appellate courts.[128] This Part considers the competing approaches the state and federal courts have adopted concerning the role of OSHA violations in tort cases.[129] Section A considers jurisdictions that treat OSHA violations as pure negligence per se.[130] Section B considers jurisdictions that treat OSHA violations as "some evidence" of negligence.[131] Section C considers jurisdictions that consider OSHA standards irrelevant to the applicable standard of care.[132] Finally, Section D briefly considers the few jurisdictions yet to address the issue.[133]

A. OSHA Violations as "Pure" Negligence Per Se

Nine state high courts[134] and three federal courts of appeals[135] have held that OSHA violations, at least under some circumstances, constitute pure neg-

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[126] For an early example of this argument, ultimately endorsed by a state's high court, see Knight v. Burns, Kirkley & Williams Construction Co., 331 So. 2d 651, 654–55 (Ala. 1976) (holding, in wrongful death action, that plaintiffs should have been given opportunity to present to a jury evidence of OSHA standards governing trench cave-in precautions).

[127] *See infra* notes 134–189 and accompanying text.

[128] *See infra* notes 134–189 and accompanying text.

[129] *See infra* notes 134–189 and accompanying text.

[130] *See infra* notes 134–149 and accompanying text.

[131] *See infra* notes 150–162 and accompanying text.

[132] *See infra* notes 163–168 and accompanying text.

[133] *See infra* notes 169–189 and accompanying text.

[134] *See, e.g.*, Sanchez v. Galey, 733 P.2d 1234, 1242 (Idaho 1986) (noting, somewhat dubiously, that negligence per se for OSHA violations when the plaintiff is the defendant's employee is "[t]he decided majority and modern trend"). By my count, besides Idaho, the nine states whose high courts recognize, or at least suggest a favorable stance toward, pure negligence per se in cases of alleged OSHA violations are Alaska, California, Iowa, Kentucky, Minnesota, Montana, Oklahoma, and Tennessee. *See* Pagenkopf v. Chatham Elec., Inc., 165 P.3d 634, 647–49 (Alaska 2007) (assuming, without deciding, that OSHA violations could constitute negligence per se); SeaBright Ins. Co. v. U.S. Airways, Inc., 258 P.3d 737, 745 (Cal. 2011); Koll v. Manatt's Transp. Co., 253 N.W.2d 265, 270 (Iowa 1977); Hargis v. Baize, 168 S.W.3d 36, 46 (Ky. 2005) (applying negligence per se to violation of state OSHA standards); Anderson v. Anoka Hennepin Indep. Sch. Dist. 11, 678 N.W.2d 651, 662 (Minn. 2004); Trankel v. Dep't of Military Affairs, 938 P.2d 614, 625 (Mont. 1997); Howard v. Zimmer, Inc., 299 P.3d 463, 468 (Okla. 2013) (holding that violation of a federal regulatory scheme, including OSHA, will support a claim of negligence per se); Bellamy v. Fed. Express Corp., 749 S.W.2d 31, 34–35 (Tenn. 1988).

[135] *See, e.g.*, Teal v. E.I. DuPont de Nemours & Co., 728 F.2d 799, 802–05 (6th Cir. 1984) (holding that violation of OSHA's general duty clause is not negligence per se in claims brought by nonemployees, but violations of other specific duties may be). By my count, besides the Sixth Circuit, the First and Fifth Circuits also treat violations of OSHA as negligence per se, at least under certain circumstances. *See* Pratico v. Portland Terminal Co., 783 F.2d 255, 268 (1st Cir. 1985); Melerine v. Avondale Shipyards, Inc., 659 F.2d 706, 711–13 (5th Cir. 1981). Nonetheless, the First Circuit has, in a subsequent decision, suggested a less liberal application of negligence per se to OSHA violations. *See* Elliott v. S.D. Warren Co., 134 F.3d 1, 4 (1st Cir. 1998) (limiting negligence per se to FELA cases

ligence per se. These jurisdictions typically apply the analysis of the Second and Third Restatements, asking whether OSHA intended for the regulation to prevent the sort of harm alleged and protect the type of plaintiff involved.[136] As such, several of the jurisdictions that have applied pure negligence per se to OSHA violations do not do so when the plaintiff is not an employee of the defendant, concluding that the class of persons many OSHA standards are intended to protect is limited to *employees*.[137] Thus, many appellate courts have held that a defendant's violation of OSHA is negligence per se when the defendant is the plaintiff's employer, but that such violation is merely "some evidence" of negligence when the parties lack a genuine employment relationship.[138]

Although effectuating legislative intent appears to be the primary rationale courts employ when applying pure negligence per se principles to OSHA violations, this is not the only justification on which courts rely.[139] For instance, in sharp contrast to Prosser and Keeton's rationale for negligence per

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and remarking that the *Pratico* decision is "of questionable validity"). At the same time, however, the Fifth Circuit has arguably broadened the potential application of the doctrine in some cases involving non-employees alleging violation of OSHA's general duty clause. *See* Acosta v. Hensel Phelps Constr. Co., 909 F.3d 723, 742 (5th Cir. 2018) (holding that OSHA may issue citations to controlling employers at multi-employer worksites pursuant to the general duty provision); *see also supra* notes 104–107 and accompanying text (discussing OSHA's general duty clause).

[136] *See, e.g.*, *Melerine*, 659 F.2d at 708 (holding that OSHA standards may furnish evidence of the standard of care, but only as between employers and employees); *Sanchez*, 733 P.2d at 1242 (remarking that OSHA violations easily fit within the framework of negligence per se). California, however, although still insisting that a given OSHA regulation be intended to protect the kind of plaintiff involved and prevent the sort of harm alleged, treats any violation as "presumptively" negligence per se. *See SeaBright Ins. Co.*, 258 P.3d at 744 (holding that an employer's violation of an OSHA provision at a multiemployer worksite that caused injury to another employer's employee established prima facie negligence); *see also* CAL. EVID. CODE § 669 (Deering, LEXIS through 2020 Sess.) ("The failure of a person to exercise due care is presumed if . . . [h]e violated a statute, ordinance, or regulation of a public entity . . . .").

[137] *See, e.g.*, Wiersgalla v. Garrett, 486 N.W.2d 290, 293 (Iowa 1992) (reversing trial court's jury instruction, where the plaintiff was not the defendant's employee, that a defendant's OSHA violation constituted negligence per se). Additionally, the Supreme Court of Alaska has held that violations of OSHA and other federal regulations may be negligence per se, but not where the plaintiff was an independent contractor. *See Pagenkopf*, 165 P.3d at 647–49; State v. Johnson, 2 P.3d 56, 62–63 (Alaska 2000) (endorsing negligence per se generally).

[138] *See Koll*, 253 N.W.2d at 270 (holding, where a worker was killed by a truck that was operated by a company for whom the worker was not employed, that the truck operator's violation of OSHA guidelines was only evidence of negligence). The United States Court of Appeals for the Sixth Circuit, another court that has treated OSHA violations as pure negligence per se, takes this position even further, holding that admission of OSHA standards to determine the applicable standard of care when the parties lack an employment relationship would be unduly prejudicial to the defendant. *See* Minichello v. U.S. Indus., Inc. 756 F.2d 26, 30 (6th Cir. 1985).

[139] *See, e.g.*, *Sanchez*, 733 P.2d at 1244 ("[W]e are persuaded that the intent of Congress in enacting OSHA . . . can best be served by allowing instructions of negligence *per se* for violations of OSHA regulations."); *Trankel*, 938 P.2d at 625.

se,[140] the Supreme Court of Tennessee has pointed to another justification: consistency.[141] In *Bellamy v. Federal Express Corp.*, the court held that OSHA violations may create a basis of liability for negligence per se because of Tennessee's policy of "giving the maximum effect to" such safety statutes.[142] The court expressly acknowledged that the application of negligence per se to OSHA violations was "on the outer periphery" of legislative intent.[143] Nonetheless, the court insisted that such an application was proper because it was "consistent with" the state's general treatment of other statutory and regulatory violations.[144] Not surprisingly, the United States Court of Appeals for the Sixth Circuit, when applying Tennessee law, has employed this consistency-based rationale as well.[145]

Some courts that apply pure negligence per se to OSHA violations do so only when the underlying action is brought pursuant to certain statutes.[146] In *Pratico v. Portland Terminal Co.*, for example, the First Circuit held, in an action brought under the Federal Employers' Liability Act (FELA), that a plaintiff-employee allegedly injured due to his employer's failure to use certain OSHA-required railroad equipment was entitled to a jury instruction on negligence per se.[147] The court made clear in a subsequent decision that *Pratico*'s holding is limited to claims brought under that federal statute and has no applicability to cases involving common law negligence.[148] Interestingly, at least one other court has held just the opposite: that OSHA violations *cannot* be

[140] *See supra* notes 66–68 and accompanying text (discussing Prosser and Keeton's proffered rationale for negligence per se—namely, that the doctrine's principal purpose is to give effect to the specific intent of the legislature and thus cannot exceed such scope); *see also* KEETON ET AL., *supra* note 66, at 230 (maintaining that a statutory violation "stamp[s] the defendant's conduct as negligence, with all of the effects of common law negligence, *but with no greater effect*" (emphasis added)).

[141] *See Bellamy*, 749 S.W.2d at 34–35.

[142] *Id.* The court cited its previous decision, *Acuff v. Commissioner of the Tennessee Department of Labor*, 554 S.W.2d 627, 630 (Tenn. 1977), which held that state safety regulations could furnish the basis for negligence per se against an employer who would not have been liable under Tennessee's common law tort principles. *Bellamy*, 749 S.W.2d at 34–35.

[143] *Bellamy*, 749 S.W.2d at 34–35.

[144] *Id.* at 34. *But see* King v. Danek Med., Inc., 37 S.W.3d 429, 457–58 (Tenn. Ct. App. 2000) (departing from the *Bellamy* approach where a statute set out "only administrative requirements," rather than "substantive context").

[145] *Teal*, 728 F.2d at 804–05 (6th Cir. 1984) (interpreting the scope of intended beneficiaries of OSHA regulations "in a broad fashion" consistent with Tennessee case law).

[146] *See, e.g.*, *Pratico*, 783 F.2d at 268 (affirming negligence per se instruction).

[147] *Id.*; *see also* Federal Employers' Liability Act, 45 U.S.C. §§ 51–60 (2018) (enabling railroad workers not covered by workers' compensation laws to recover for injuries sustained due to negligence of federal employers).

[148] *Elliott*, 134 F.3d at 4 (remarking that the *Pratico* decision is "of questionable validity").

treated as negligence per se in FELA cases, but may be construed as such in common law negligence suits.[149]

B. OSHA Violations as "Some" Evidence of Negligence

In contrast to the courts that have taken the pure negligence per se approach, the vast majority of state high courts and federal appellate courts to consider the issue directly have held that OSHA violations are just *some* evidence of negligence in tort cases.[150] Courts often justify their rejection of pure negligence per se principles to OSHA violations on the grounds that doing so is contrary to the intent of Congress in enacting the OSH Act.[151] For example, in *Toll Brothers v. Considine*, the Supreme Court of Delaware held that, in order to serve as the basis for negligence per se, administrative regulations must

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[149] Hebel v. Conrail, Inc., 475 N.E.2d 652, 657, 658 (Ind. 1985) (citing 29 U.S.C. § 653(b)(4) (1982)); *see also* Blocher v. DeBartolo Props. Mgmt., 760 N.E.2d 229, 239 (Ind. Ct. App. 2001) ("While *Hebel* was decided within the context of a FELA action, we find its rationale equally applicable to the present action.").

[150] *See, e.g.*, C & M Builders, LLC v. Strub, 22 A.3d 867, 875 (Md. 2011) (holding that the admissibility of both state and federal OSHA standards to show any evidence of negligence depends upon whether the alleged OSHA-violator owed an employer's duty to the plaintiff). According to reported state case law, in addition to Maryland, twenty state high courts that have directly considered the issue have held that OSHA violations constitute evidence, albeit not conclusive evidence, of a party's negligence. *See* Smith v. Int'l Paper Co., 656 So. 2d 355, 358 (Ala. 1995); Dunn v. Brimer, 537 S.W.2d 164, 166 (Ark. 1976); Scott v. Matlack, Inc., 39 P.3d 1160, 1166–67, 1170 (Colo. 2002); Mazurek v. Great Am. Ins. Co., 930 A.2d 682, 691 (Conn. 2007); Toll Bros. v. Considine, 706 A.2d 493, 494 (Del. 1998); Rapoza v. Willocks Constr. Corp, No. 22052, 2004 WL 27460, at *15 n.38 (Haw. Jan. 2, 2004); Schultz v. Ne. Ill. Reg'l Commuter R.R. Corp., 775 N.E.2d 964, 986 (Ill. 2002); Balagna v. Shawnee Cty., 668 P.2d 157, 165–66 (Kan. 1983); Giddens v. Kan. City S. Ry. Co., 29 S.W.3d 813, 821 (Mo. 2000); Orduna v. Total Constr. Servs., 713 N.W.2d 471, 479 (Neb. 2006); Alloway v. Bradlees, Inc., 723 A.2d 960, 967 (N.J. 1999); Valdez v. Cillessen & Son, Inc., 734 P.2d 1258, 1261 (N.M. 1987); Hernandez v. Martin Chevrolet, Inc., 649 N.E.2d 1215, 1217 (Ohio 1995); Duncan v. Pennington Cty. Hous. Auth., 283 N.W.2d 546, 548–49 (S.D. 1979); Daugherty v. S. Pac. Transp. Co., 772 S.W.2d 81, 83 (Tex. 1989) (allowing for the OSHA standard to serve as evidence of the standard of care, but declining to decide whether OSHA violations can constitute negligence per se); Tallman v. City of Hurricane, 1999 UT 55, ¶ 21, 985 P.2d 892, 897; Marzec-Gerrior v. D.C.P. Indus., 674 A.2d 1248, 1249 (Vt. 1995); Adkins v. Aluminum Co. of Am., 750 P.2d 1257, 1266 (Wash. 1988); Poulos v. HPC, Inc., 765 P.2d 364, 366 (Wyo. 1988). Note that Florida is included in this tally; although its high court has not addressed the issue directly, its current civil jury instructions provide that OSHA violations constitute some evidence of a party's negligence. *In re* Standard Jury Instructions in Civil Cases—Report No. 09-01 (Reorganization of the Civil Jury Instructions), 35 So. 3d 666, 687–88 (Fla. 2010). Additionally, four of the federal appeals courts that have directly considered the issue have held the same. *See* Jones v. Spentonbush-Red Star Co., 155 F.3d 587, 595 (2d Cir. 1998); Robertson v. Burlington N. R.R. Co., 32 F.3d 408, 410 (9th Cir. 1994); Ries v. Nat'l R.R. Passenger Corp., 960 F.2d 1156, 1162 (3d Cir. 1992); Albrecht v. Balt. & Ohio R.R. Co., 808 F.2d 329, 332–33 (4th Cir. 1987).

[151] *See, e.g.*, *Scott*, 39 P.3d at 1166–67, 1170 (citing 29 U.S.C. § 653(b)(4) (2000)) (holding that the OSH Act rules out the application of pure negligence per se principles in tort actions involving an alleged OSHA violation).

be promulgated pursuant to *state* legislative directive.[152] Thus, because Delaware's state legislature had never formally adopted federal OSHA standards, the court held that violations of such standards could not be negligence per se.[153] According to the court, Congress itself recognized this limitation when it stated in the OSH Act that OSHA regulations shall not operate to "enlarge state common law rights, duties or liabilities."[154] Many other "some evidence" jurisdictions have justified their approach by citing this same congressional disclaimer as well.[155] Therefore, it is perhaps unsurprising that several of these jurisdictions endorse negligence per se for other regulatory violations but treat OSHA violations—often not formally adopted by state legislatures—differently.[156]

Although the "some evidence" jurisdictions agree that OSHA violations are sometimes admissible as evidence of the standard of care, and that pure negligence per se principles are inappropriate in OSHA litigation, they disagree on other points.[157] For example, a few of these jurisdictions have expressly held that OSHA standards are only admissible in suits between employees and employers,[158] whereas several others have not been so restrictive.[159] An-

[152] 706 A.2d at 494 (holding that trial court's jury instruction that OSHA violations constituted negligence per se was reversible error).

[153] *Id.* As discussed *supra* at notes 108–116, although the OSH Act permits states to adopt their own safety standards in place of OSHA regulations if such standards are at least as effective as federal ones, the United States Supreme Court held in *Gade v. National Solid Wastes Management Ass'n* that OSHA regulations preempt state safety standards if a state does not seek federal approval of its state-promulgated standards. *See* 505 U.S. 88, 111 (1992). Thus, although Delaware had promulgated its own standards in place of OSHA regulations, it failed to seek federal approval by the time *Toll Brothers* was decided. *See* 706 A.2d at 497. As such, its state safety standards were preempted. *Id.*

[154] *See Toll Bros.*, 706 A.2d at 494, 496, 497 (citing 29 U.S.C. § 653(b)(4) (1994)).

[155] *See, e.g.*, *Scott*, 39 P.3d at 1166–67, 1170 (citing 29 U.S.C. § 653(b)(4) (2000)) (holding that Congress intended neither for OSHA violations to be negligence per se, nor for such standards to be totally excluded as evidence in negligence litigation); *Hernandez*, 649 N.E.2d at 1216, 1217 (citing 29 U.S.C. § 653(b)(4) (1994)) (holding that the OSH Act precludes the application of pure negligence per se to OSHA violations). *But see Tallman*, 985 P.2d at 897 ("[D]espite []OSHA's provision prohibiting its use to affect common-law rights, duties, or liabilities of employers, the factfinder may look to . . . OSHA for evidence of industry standards in certain circumstances.").

[156] *Compare Mazurek*, 930 A.2d at 691 (rejecting negligence per se instruction where defendant had allegedly violated OSHA standards), *with* Gore v. People's Sav. Bank, 665 A.2d 1341, 1348, 1349–50 (Conn. 1995) ("[U]nder general principles of [Connecticut] tort law, a requirement imposed by statute may establish the applicable standard of care to be applied . . . .").

[157] *See infra* notes 158–162 and accompanying text.

[158] *See, e.g.*, *Melerine*, 659 F.2d at 708 (holding that OSHA standards only provide relevant evidence of the duty an employer owes to its immediate employees); Taira v. Oahu Sugar Co., 616 P.2d 1026, 1030 (Haw. Ct. App. 1980) (finding OSHA standards "irrelevant and properly excluded" in action between parties not in an employment relationship); *see also* Banovetz v. King, 66 F. Supp. 2d 1076, 1081 (D. Minn. 1999) (noting that OSHA does not define the duties of care between third-parties and employers).

[159] Reed v. Malone's Mech., Inc., 765 F.3d 900, 905 (8th Cir. 2014) (holding that OSHA standards may provide evidence of the applicable standard of care owed a plaintiff even if that plaintiff is a mere contractor of the defendant); *Dunn*, 527 S.W.2d at 166 (same); *Orduna*, 713 N.W.2d at 479

other difference in approach among the "some evidence" jurisdictions is the evidentiary weight afforded OSHA violations.[160] At least one state high court has held that OSHA violations can provide "substantial evidence"[161] of negligence, but most jurisdictions do not specify the evidentiary weight afforded to OSHA violations, instead reserving this determination for the jury.[162]

C. OSHA Violations as Irrelevant to a Finding of Negligence

Although more states adopted the approach in the past,[163] today only one state high court holds that OSHA standards are categorically inadmissible in negligence cases, and thus, that violations of OSHA have no bearing on a party's breach of duty.[164] In *Sumrall v. Mississippi Power Co.*, the Supreme Court of Mississippi considered whether, in a suit brought by a laborer allegedly injured while digging a trench for the defendant's coal burning operation, evidence regarding the defendant's compliance with OSHA standards was admissible.[165] The court affirmed a finding in favor of the defendant, holding that evidence of OSHA violations may not be admitted to show a party's negligence.[166] The basis for the court's decision was its view that federal safety standards are admissible as evidence of negligence only when the state legislature gives compulsory force to such standards, which the Mississippi Legisla-

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(same); Ball v. Melsur Corp., 633 A.2d 705, 712 (Vt. 1993) (declining to limit evidence of the standard of care established by OSHA standards to the "employer-employee" relationship).

[160] *See* ROTHSTEIN , *supra* note 14, § 21:13.

[161] *Smith*, 656 So. 2d at 358 (holding that documentary evidence of OSHA violations compiled in an OSHA representative's report constituted significant evidence that defendant breached its duty to provide a safe place to work).

[162] *See, e.g.*, *Toll Bros.*, 706 A.2d at 498 (holding that OSHA standards may legitimately contribute to "the total mix of what is reasonable conduct" in the mind of the jury); Kollmer v. Slater Elec., Inc., 504 N.Y.S.2d 690, 692 (App. Div. 1986) (holding that "relevant OSHA regulations may be admitted into evidence and it will be for the jury to determine . . . whether the violation constituted some evidence of negligence of the employer").

[163] *Compare* Strouse v. Webcor Constr., L.P., 246 Cal. Rptr. 3d 419, 431, 432 (Ct. App. 2019) (quoting Elsner v. Uveges, 102 P.3d 915, 917 (Cal. 2004)) (affirming the trial court's negligence per se instruction on the basis that California's state OSHA provisions "are to be treated like any other statute or regulation" for negligence per se purposes), *with* CAL. LAB. CODE § 6304.5 (Deering 1971) (barring courts in negligence actions from treating OSHA standards as admissible as to a party's negligence). California Labor Code § 6304.5 was later amended in 1999, when the state legislature restored the prior treatment of OSHA violations as "presumptive" negligence. 1999 Cal. Stat. 4337.

[164] Sumrall v. Miss. Power Co., 693 So. 2d 359, 367 (Miss. 1997).

[165] *Id.* Specifically, the injured party's role as it related to the coal burning operation was to repair the "discharge structure" that connected the two "pond[s]" in which the defendant discarded thousands of pounds of "fly ash," the powdery residue that forms from the coal burning process. *See id.* at 361–62. This required digging a trench thirty feet deep to recover and replace the discharge structure that was lying beneath several thousand pounds of ash. *See id.*

[166] *Id.* at 367 (rejecting the admissibility of OSHA standards to impeach witness who declared that work on the discharge structure project complied with all state and federal safety standards).

ture had expressly declined to do.[167] Although *Sumrall* has not been directly overruled, the scope of its holding is somewhat unclear, as the Mississippi Supreme Court has subsequently held that OSHA standards, although irrelevant to the question of negligence, may be admitted for other "limited purposes."[168]

D. Jurisdictions Yet to Decide

Over a dozen state high courts and several federal appellate courts have not yet directly addressed the role of OSHA violations in negligence cases.[169] Nonetheless, the approach such jurisdictions would likely adopt may be discerned from analogous cases involving other administrative safety standards, as well as from the decisions of intermediate appellate courts.[170]

Most yet-undecided jurisdictions would likely adopt the "some evidence" approach to OSHA violations.[171] For example, although Arizona's highest court has not addressed the issue,[172] its lower appellate court has held that OSHA standards may establish the standard of care and that their violation may be evidence of negligence for the jury to consider—even when OSHA standards are not binding on a particular defendant.[173] The intermediate appel-

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[167] *Id.* Notably, as discussed in the preceding Section, this is the same logic employed by many of the "some evidence" jurisdictions that interpret section 4(b)(4) of the OSH Act as a prohibition merely on pure negligence per se. *See, e.g.*, *Toll Bros.*, 706 A.2d at 498 (permitting OSHA violations to be admissible as evidence of a defendant's negligence); *supra* notes 152–156 and accompanying text.

[168] *See* Accu-Fab & Constr., Inc. v. Ladner, 778 So. 2d 766, 771 (Miss. 2001) ("In the present case, the OSHA regulations were not admitted to show negligence on the part of [defendants], but rather they were admitted only to be used as a measure of reasonable care consistent with industry standards."), *overruled on other grounds by* Mack Trucks, Inc. v. Tackett, 841 So. 2d 1107, 1115 (Miss. 2003) (overruling *Ladner* insofar as it held that immune parties may not be assessed fault, as opposed to liability, under state damages statute).

[169] *See* ROTHSTEIN, *supra* note 14, § 21:13. These include the state courts of last resort of Arizona, Louisiana, Maine, Massachusetts, Michigan, North Carolina, North Dakota, Nevada, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Virginia, and West Virginia and the United States Courts of Appeals for the Seventh, Eighth, Tenth, Eleventh, District of Columbia, and Federal Circuits. Although a few such courts have expressly acknowledged their indecision on the matter, *see, e.g.*, Mailhot v. C & R Constr. Co., 514 A.2d 1255, 1256 (N.H. 1986) (declining to address the role of OSHA violations in negligence actions); Praus *ex rel.* Praus v. Mack, 2001 ND 80, ¶ 35, 626 N.W.2d 239, 250; Halterman v. Radisson Hotel Corp., 523 S.E.2d 823, 825 n.1 (Va. 2000) (declining to articulate proper relationship, under Virginia law, between OSHA violations and negligence per se), most have simply left the matter unaddressed entirely. *See* ROTHSTEIN, *supra* note 14, § 21:13.

[170] *See infra* notes 171–189 and accompanying text.

[171] *See infra* notes 172–189 and accompanying text.

[172] Wendland v. AdobeAir, Inc., 221 P.3d 390, 394 (Ariz. Ct. App. 2009) ("[W]hether OSHA standards may be presented to a jury as some evidence of a standard of care is a matter of first impression in Arizona.").

[173] *See id.* at 395–96. *But see* Hallmark v. Allied Prods. Corp., 646 P.2d 319, 325 (Ariz. Ct. App. 1982) (holding that trial court did not abuse its discretion in refusing to admit OSHA regulations as evidence of standard of care).

late courts of Louisiana,[174] Massachusetts,[175] Michigan,[176] New York,[177] North Carolina,[178] and Pennsylvania[179] have all held the same, that is, that OSHA standards, although not a basis for negligence per se, are relevant evidence of the standard of care.[180] In addition, the Supreme Judicial Court of Maine has held that a violation of a "safety statute" is some evidence of negligence,[181] and the high courts of North Dakota[182] and West Virginia[183] maintain similar positions. Thus, it is reasonable to assume that such jurisdictions would adopt the "some evidence" approach to OSHA violations.[184]

On the other hand, a few state courts of last resort could quite possibly adopt an approach to OSHA violations akin to pure negligence per se.[185] The intermedi-

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[174] Gatlin v. Entergy Corp., 2004-0034, 2004-1368 (La. App. 4 Cir. 5/4/05); 904 So. 2d 31, 35 (permitting the defendant, to show contributory negligence, to introduce OSHA standards that the plaintiff was required to follow).

[175] Eagan v. Marr Scaffolding Co., 442 N.E.2d 743, 745 (Mass. App. Ct. 1982) (allowing the plaintiff, in an action arising out of a scaffolding collapse, to introduce expert testimony regarding OSHA standards as evidence of the applicable standard of care). *But see* Almeida v. Pinto, 115 N.E.3d 574, 579–80 (Mass. App. Ct. 2018) (holding that the OSHA standards were inadmissible as evidence of a defendant's negligence when the defendant was a homeowner and the plaintiff was an independent contractor hired to work at the defendant's home).

[176] Sanderson v. Cahill Constr. Co., No. 294939, 2011 Mich. App. LEXIS 611, at *10–11 (Apr. 5, 2011) (holding that violations of federal OSHA standards and of Michigan's state-promulgated OSHA standards constitute evidence of negligence on the basis that the purposes of such standards "overlap with those underlying tort law").

[177] *Kollmer*, 504 N.Y.S.2d at 692 (App. Div. 1986) (holding that "relevant OSHA regulations may be admitted into evidence and it will be for the jury to determine whether . . . the violation constituted some evidence of negligence").

[178] Cowan v. Laughridge Constr. Co., 291 S.E.2d 287, 290 (N.C. Ct. App. 1982) (holding that OSHA standards constitute evidence of construction industry custom, which was relevant to a jury's assessment of whether the defendant acted reasonably).

[179] Wood v. Smith, 495 A.2d 601, 603 (Pa. Super. Ct. 1985) (concluding that the trial court's jury instruction was insufficient because it failed to indicate that the defendants' conduct should be measured in light of existing OSHA standards).

[180] *See* ROTHSTEIN, *supra* note 14, § 21:13. At least one other intermediate appellate court has expressly indicated that OSHA violations cannot serve as the basis for negligence per se, without speaking to whether OSHA violations are nonetheless relevant to the question of negligence. *See* Taft v. Derricks, 2000 WI App 103, 235 Wis.2d 22, ¶ 22, 613 N.W.2d 190, 196 (interpreting the OSHA general duty provision and concluding that the defendant was not an employer bound by OSHA).

[181] Town of Stonington v. Galilean Gospel Temple, 1999 ME 2, ¶ 10, 722 A.2d 1269, 1272 (affirming trial court's "evidence of negligence" instruction with respect to the defendant's violation of a noise control ordinance, which was akin to a "safety statute").

[182] *Praus*, 626 N.W.2d at 250 (N.D. 2001) (affirming the trial court's jury instruction that stated that OSHA standards could be considered in determining the applicable standard of care but could not constitute negligence per se).

[183] Vandergrift v. Johnson, 206 S.E.2d 515, 517 (W. Va. 1974) (holding that violations of statutes and regulations cannot serve as the basis for negligence per se).

[184] *See* ROTHSTEIN, *supra* note 14, § 21:13.

[185] *See, e.g.*, *Halterman*, 523 S.E.2d at 825 n.1 (Va. 2000) (assuming, without deciding, that the violation of an OSHA regulation is negligence per se).

ate appellate courts of Georgia[186] and South Carolina,[187] for instance, have held that OSHA violations constitute negligence per se when the plaintiff is a worker that the standard was intended to protect.[188] Likewise, Nevada's Supreme Court, although it has not yet addressed the role of OSHA violations in negligence cases, might be willing to adopt the pure negligence per se position, as it has occasionally taken a more liberal approach to the doctrine in other contexts.[189]

IV. TREATING OSHA VIOLATIONS AS NEGLIGENCE PER SE IS LEGITIMATE

Upon surveying the various positions adopted by the state and federal courts on the proper role of OSHA standards in negligence cases, one conclusion is clear: relatively few courts accept that OSHA violations ought to constitute negligence per se, and even those that do will often only apply the doctrine under limited circumstances.[190] But why is this so? If the decision to derive the applicable standard of care from a statute or regulation is "purely a judicial one . . . for the court to make,"[191] then why should so many courts conclude that they are powerless to treat OSHA violations as negligence per se?[192] This Part

[186] Kull v. Six Flags Over Ga. II, L.P., 592 S.E.2d 143, 144–46 (Ga. Ct. App. 2003) (holding that a plaintiff laborer who failed to "deenergize" equipment on which he was working, in violation of an OSHA requirement, was contributorily negligent per se and thus barred from recovery).

[187] Holst v. S.C. State Port Auth., No. 2011-UP-198, 2011 WL 11734309, at *10 (S.C. Ct. App. May 3, 2011) (holding that OSHA standards could serve as evidence of contributory negligence where there was evidence that decedent was aware of such standards).

[188] *But see* Bryant v. Waste Mgmt., Inc., 536 S.E.2d 380, 384 (S.C. Ct. App. 2000) (holding that OSHA regulations establish a standard of care only between parties in a formal employment relationship).

[189] Vega v. E. Courtyard Assocs., 24 P.3d 219, 222 (Nev. 2001) (holding that violation of building code ordinance may furnish the basis for negligence per se). *But see* Sanchez v. Wal-Mart Stores, Inc., 221 P.3d 1276, 1283–84 (Nev. 2009) (refusing to apply negligence per se where the defendant pharmacy allegedly violated statutes concerning drug dispensation and where a driver under the influence of prescription drugs injured the plaintiffs, as such statutes were not intended to protect the general public from injury from drug-induced drivers).

[190] *See, e.g.*, Elliott v. S.D. Warren Co., 134 F.3d 1, 4 (1st Cir. 1998) (limiting the application of negligence per se to OSHA-related cases brought under FELA); Koll v. Manatt's Transp. Co., 253 N.W.2d 265, 270 (Iowa 1977) (limiting the application of negligence per se to OSHA-related cases between parties in a formal employment relationship).

[191] *See* RESTATEMENT (SECOND) OF TORTS § 286 cmt. d (AM. LAW INST. 1965); *see also* Zeni v. Anderson, 243 N.W.2d 270, 280 (Mich. 1976) (noting that courts are free in their discretion to adopt or not adopt legislative standards as the applicable duty of care at tort).

[192] *See, e.g.*, Minichello v. U.S. Indus., Inc. 756 F.2d 26, 29 (6th Cir. 1985) ("To use OSHA regulations to establish whether a product is unreasonably dangerous is . . . improper. If knowledge of the regulations leads the trier of fact to find a product defective, the effect is to *impermissibly* alter the civil standard of liability." (emphasis added)). Certainly, courts may recognize their ability to derive the applicable standard of care wholly from an OSHA standard that a party is alleged to have violated, and simply elect not to do so. *See, e.g.*, Tallman v. City of Hurricane, 1999 UT 55, ¶ 21, 985 P.2d 892, 897 ("In determining the appropriate standard of conduct, the Restatement *permits* courts to adopt a standard from legislative enactments or administrative regulations which do not themselves purport to establish the standard." (emphasis added)). Such elections are reasonable, to be sure. *See* RESTATEMENT (SECOND) OF TORTS § 286 cmt. d (describing when it is appropriate for a court to adopt a stand-

submits that the reason is primarily due to both a misunderstanding of negligence per se and a misapplication of the OSH Act, and that, contrary to the position of such courts, treating OSHA violations as negligence per se is consistent with both the OSH Act and the doctrine of negligence per se itself.[193]

As the preceding Part discusses, one of the primary justifications courts rely upon when holding that OSHA violations are not negligence per se is the OSH Act's "savings clause," which provides that the Act may not "enlarge," "diminish," or even "affect," the duties and liabilities of employers under state law.[194] To apply negligence per se to violations of OSHA standards, the thinking goes, would be to impermissibly "enlarge," or at least "affect," the liability of employers under state tort law.[195] This is so, apparently, because the standard of care that OSHA mandates is often more onerous than the ordinarily applicable one, the "reasonably prudent person under the same or similar circumstances" standard.[196] Therefore, the argument concludes, negligence per se is incompatible with both the letter and intent of the OSH Act.[197]

This argument is flawed for two reasons.[198] First, to interpret the OSH Act's section 4(b)(4) "disclaimer" as a bar against negligence per se in the case of OSHA violations is to misunderstand the discretionary nature of negligence per se; in other words, it is to presume that when courts treat a particular OSHA standard alleged to have been violated as commensurate with the applicable standard of care, such courts do so under compulsion.[199] But this is not, or at least, need not, be so.[200] From its earliest application in American law,

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ard of conduct for a regulation). In many cases, however, particularly when courts cite the OSH Act's "savings clause" or "disclaimer" discussed *supra* at notes 117–125 and 152–156 and accompanying text, the analysis suggests a perceived powerlessness to apply negligence per se rather than a deliberative declination. *See Minichello*, 756 F.2d at 29.

[193] *See infra* notes 194–217 and accompanying text.

[194] 29 U.S.C. § 653(b)(4) (2018); *see supra* notes 152–156 and accompanying text (discussing the influence of section 4(b)(4) on the "some evidence" jurisdictions).

[195] *See* Ries v. Nat'l R.R. Passenger Corp., 960 F.2d 1156, 1162 (3d Cir. 1992) ("If a violation of an OSHA regulation could constitute negligence per se . . . it would be almost axiomatic that the effect would be to 'enlarge or diminish or affect' the statutory duty or liability of the employer." (citing 29 U.S.C. § 653(b)(4))).

[196] *See* Brilliant, *supra* note 125, at 231–33 (arguing that the purpose of the OSH Act was to create a heightened standard of care beyond that of regular tort liability); *see also supra* notes 2–4 and accompanying text (discussing "reasonable person" standard).

[197] *See* Brilliant, *supra* note 125, 232 (noting the "prophylactic" nature of OSHA standards (quoting Whirpool Corp. v. Marshall, 445 U.S. 1, 12 (1980))).

[198] *See infra* notes 199–209 and accompanying text. For a compelling scholarly argument to the contrary, see Brilliant, *supra* note 125, at 231–34 (arguing that, given OSHA's heightened standard of care, treating an OSHA regulatory violation as negligence per se would be barred by section 4(b)(4) of the OSH Act).

[199] *See* Kritchevsky, *supra* note 45, at 126 (arguing that treating violations of federal statutes and regulations as negligence per se enables Congress to supersede the will of state legislatures).

[200] *See id.* at 123–28. Professor Kritchevsky characterizes a state's use of negligence per se as an act of deference to the legislature. *Id.* To be sure, deference to legislative judgments forms part of the

negligence per se has been characterized, above all, by judicial discretion.[201] The Restatements, for their part, did not merely acknowledge the discretionary nature of negligence per se—they buttressed it, emphasizing that a court's derivation of the standard of care from a statute or administrative regulation is a choice entirely the court's own.[202] For this reason, courts have long acknowledged that they are "free, in making [their] own judicial rules, to adopt and apply . . . the standard of conduct" that the legislature or other regulatory body prescribed.[203] The OSH Act's savings clause does not function to rob the courts of this power in tort actions involving OSHA violations.[204]

Second, to hold that treating OSHA violations as negligence per se impermissibly "affects" state tort policy implies, on the principle that *omne majus continet in se minus*,[205] that *any* admission of OSHA standards is improper.[206] In other words, because any and all evidence of negligence necessarily "affect[s] . . . the liabilities of employers," it would seem to follow that treating OSHA violations even as some evidence of negligence is inconsistent with the OSH Act.[207] Thus, when courts hold, on the one hand, that OSHA violations are relevant evidence for assessing a defendant's negligence, but on the other, that such violations cannot render that defendant negligent per se because the

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traditional rationale for negligence per se. *See supra* notes 58–75 and accompanying text (discussing influence of Thayer and Prosser and Keeton on development of rationale for negligence per se). At the same time, however, such deference need not be reflexive, which is apparently the only way that Professor Kritchevsky can conceive a court applying negligence per se when federal statutes and regulations are at issue. *See* Kritchevsky, *supra* note 45, at 128 ("Courts should recognize that the doctrine of negligence per se alters the contours of state tort suits and refuse to give violations of federal law negligence-per-se effect."). Contrary to Professor Kritchevsky's account, a court's decision to derive the applicable standard of reasonable conduct from a legislative or administrative enactment is, properly understood, a *deliberative*, not a reflexive, one; it is determination based ultimately upon the court's own judgment, not the legislature's, as to the suitability of a particular enactment's declared standard of conduct for the circumstances of a given case. *See* RESTATEMENT (SECOND) OF TORTS § 286 cmt. d.

[201] *See* Rong Yao Zhou v. Jennifer Mall Rest., Inc., 534 A.2d 1268, 1274 (D.C. 1987) (discussing negligence per se) ("Defining the contours of common law liability, including the duty that may have been breached in a negligence case, is a task traditionally within the purview of the judicial branch.").

[202] *See* RESTATEMENT (SECOND) OF TORTS § 286 cmt. d.

[203] *See, e.g.*, *Tallman*, 1999 UT 55, ¶ 21 (quoting RESTATEMENT (SECOND) OF TORTS § 286 cmt. d) ("In determining the appropriate standard of conduct, the Restatement permits courts to adopt a standard from legislative enactments or administrative regulations which do not themselves purport to establish the standard.").

[204] *See* Sanchez v. Galey, 733 P.2d 1234, 1243–44 (Idaho 1986) (interpreting section 4(b)(4) as merely precluding a private right of action based on an OSHA violation alone).

[205] HERBERT BROOM, A SELECTION OF LEGAL MAXIMS, CLASSIFIED AND ILLUSTRATED 173 (5th ed. 1874). That is, that the greater includes the less. *See* Michael Herz, *Justice Byron White and the Argument that the Greater Includes the Lesser*, 1994 BYU L. REV. 227, 227, 280 (observing that the argument that the greater includes the less is often valid, notwithstanding that it is also "slippery").

[206] *See* Brilliant, *supra* note 125, at 232 n.30 (posing that section 4(b)(4) of the OSH Act may suggest the total inadmissibility of OSHA standards in tort cases).

[207] *See id.*; 29 U.S.C. § 653(b)(4).

OSH Act forbids OSHA violations from influencing state tort law, they occupy a logically incoherent and legally indefensible middle ground.[208] Astonishingly, however, as Part III of this Note makes clear, the majority of courts that have directly addressed the relationship between OSHA violations and negligence appear to inhabit this turbid legal realm.[209]

Contrary to the view of many courts, treating OSHA violations as pure negligence per se would only run afoul of section 4(b)(4) if a court concluded that it had no choice other than to apply the doctrine.[210] If courts were in fact restricted in this way, federally promulgated regulations would become subsumed into state tort law without the state court having any say.[211] Indeed, if this were so, litigants could force courts to incorporate new standards of care into the state common law simply by filing a negligence action upon their employer's receipt of a citation from OSHA.[212] Certainly, this state of affairs *would* impermissibly enable federally promulgated standards to alter state tort law to the detriment of employers, which, as section 4(b)(4) makes clear, is violative of the OSH Act.[213]

But again, that is not how negligence per se works.[214] Properly understood, a court's application of negligence per se to violations of OSHA reflects that court's *own* deliberative judgment—not the judgment of a legislature or administrative body—as to how a defendant was obliged to conduct themselves.[215] Then-Judge Cardozo's specific choice of words in what would become the most cited passage on negligence per se by an American court perhaps best illustrates the discretionary nature of applying negligence per se: "*We think* the unexcused omission of the statutory [requirements] is . . . negligence

[208] *See* Ries v. Nat'l R.R. Passenger Corp., 960 F.2d 1156, 1168 (3d Cir. 1992) (Nygaard, J., concurring) (maintaining that any admission of OSHA standards impermissibly affects the liability analysis in contravention of section 4(b)(4), as this is the very reason plaintiffs would seek to admit such standards in the first place).

[209] *See supra* notes 150–162 and accompanying text (stating that approximately twenty-one state courts of last resort and four federal appeals courts have found that OSHA violations are not negligence per se, but are nonetheless relevant to the issue of breach of duty).

[210] *See* Pratico v. Portland Terminal Co., 783 F.2d 255, 265 (1st Cir. 1985) (concluding that section 4(b)(4) does not bar treating OSHA violations as negligence per se because negligence per se does "not create any new 'rights, duties or liabilities'" under state tort law); Sanchez v. Galey, 733 P.2d 1234, 1243–44 (Idaho 1986) (applying negligence per se to OSHA violation in spite of section 4(b)(4)).

[211] *See* Kritchevsky, *supra* note 45, at 128. Again, this is apparently how Professor Kritchevsky believes courts behave at present. *See id.*

[212] *See id.*

[213] *See* 29 U.S.C. § 653(b)(4).

[214] *See supra* notes 199–204 and accompanying text.

[215] *See* Martin v. Herzog, 126 N.E. 814, 815 (1920), *superseded by statute*, 1975 N.Y. Laws 94, *as recognized in* Barker v. Kallash, 468 N.E.2d 39, 41 (N.Y. 1984); *see also Pratico*, 783 F.2d at 265; *Sanchez*, 733 P.2d at 1243–44.

in itself."[216] As such, courts err when they conclude that the OSH Act places any bar on the application of negligence per se to OSHA violations.[217]

CONCLUSION

Negligence per se, despite its deep roots in American law, remains a divisive doctrine among courts, particularly in OSHA-related litigation. Although many courts are of the view that treating a party's violation of federally promulgated OSHA standards as negligence per se is contrary to OSHA itself, this is not so. Indeed, negligence per se is, and has been since its earliest days, inextricably linked to judicial discretion. Whether to adopt a legislative or administrative enactment, federal or otherwise, as the applicable standard of care in a negligence case is "purely" a judicial determination.[218] OSHA does not diminish this discretion. Choosing to derive the applicable standard of care in tort from an OSHA promulgation may not always be the best course of action, to be sure. The prudence of such a decision will likely depend upon the circumstances of the case at hand, the relationship between the parties, and the particular OSHA standard at issue. That such a decision remains *solely one for the court to make*, however, ought to be conceded.

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[216] *Martin*, 126 N.E. at 815 (emphasis added).
[217] *See id.*
[218] *See* RESTATEMENT (SECOND) OF TORTS § 286 cmt. d (AM. LAW INST. 1965).