SARA's State Procedural Reform: Reading CTS v. Waldburger through Canons of Statutory Interpretation

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This Article takes Justice Antonin Scalia and Professor Bryan A. Garner’s 2012 treatise Reading Law seriously by showing how the Supreme Court applied (or failed to apply) Reading Law’s canons of statutory interpretation in a recent decision evaluating a preemptive provision of the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA” or “Superfund”) – 42 U.S.C. §9658 in CTS v. Waldburger. Justice Kennedy applied several semantic and contextual canons: the Ordinary-Meaning Canon, the Fixed-Meaning Canon, the Whole-Text Canon, and the Harmonious Reading Canon. As important, the Court plainly rejected a principle which Reading Law calls a “falsity”: the false notion that remedial statutes should be liberally construed. The Court then divided over the potential applicability of a government-structuring canon: the Presumption Against Federal Preemption. Four members of the Court refused to apply the canon, instead following its narrower definition found in Reading Law. The Court concluded that CERCLA’s preemptive provision did not work to repeal state law statutes of repose.

The Article then further examines the same statute using two canons not relied on by the Supreme Court in Waldburger: (1) The Presumption Against Retroactivity and (2) The Constitutional-Doubt Canon. These canons also point toward a narrow, but distinct, interpretation – that the CERCLA statute only preempts statutes of limitation that affect only a remedy, not a right. Even this alternative interpretation, however, fails to eliminate constitutional questions regarding § 9658 under principles of federalism, which remain to be addressed.

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This June, the United States Supreme Court decided *CTS Corporation v. Peter Waldburger*, which deals with the scope of a provision added to CERCLA in the Superfund Amendments and Reauthorization Act of 1986. ("SARA"). The question was whether 42 U.S.C. § 9658 should be interpreted to preempt state statutes of repose in addition to state statutes of limitations. As with past U.S. Supreme Court decisions interpreting provisions of CERCLA, the *Waldburger* Court focused in on the text of the provision and largely ignored supposed "legislative history" as an aid to statutory construction.

The textualist analysis of the Supreme Court relied on canons of statutory interpretation set forth in Justice Antonin Scalia and Professor


4 See infra notes 76-94 and accompanying text. See Alfred R. Light, *The Importance of “Being Taken”: To Clarify and Confirm the Litigative Reconstruction of CERCLA’s Text*, 18 B.C. ENVTL. AFF. L. REV. 1, 46-48 (1990) (discussing early Supreme Court decisions interpreting CERCLA).
Bryan A. Garner’s treatise, *Reading Law: The Interpretation of Legal Texts*. These included several semantic and contextual canons: the Ordinary-Meaning Canon, the Fixed-Meaning Canon, the Whole-Text Canon, and the Harmonious Reading Canon. As important, the Court plainly rejected a principle which Reading Law calls a “falsity”: the false notion that remedial statutes should be liberally construed. The Court then divided over the potential applicability of a government-structuring canon: the Presumption Against Federal Preemption. Four members of the Court refused to apply the canon, instead following a narrower definition of the canon found in *Reading Law*.

Section 9658 supposedly arose out of a recommendation of a study commission created in the 1980 version of CERCLA. But the Superfund Section 301(e) Study Group did not recommend federal preemption of state tort law. Its concerns over the retroactive application of federal statutes and constitutionality prevented the Group from recommending a federal “discovery rule” to be applied in state tort law. Interestingly, these very reasons the Study Group refused to recommend federal preemption also are embodied in two textualist principles applicable to government prescriptions set forth in *Reading Law* but not relied on by the Supreme Court in *Waldburger*: (1) The Presumption Against Retroactivity and (2) The Constitutional-Doubt Canon. As we show below, these canons also point toward a narrow

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6 See infra note 76-93 and accompanying text.
7 See infra notes 133-166 and accompanying text.
8 See infra notes 95-132 and accompanying text.
9 CERCLA §301(e), 42 U.S.C. § 9651(e).
10 See infra notes 46-56 and accompanying text.
11 See infra notes 61-65 and accompanying text.
12 See infra notes 169-187 and accompanying text.
construction of Section 9658 -- that Section 9658 should be construed to affect statutes of limitations that affect only a remedy, not a right, and not to affect substantive limitations on liability within state law such as statutes of repose.13 Because the Court narrowly construed the statute not to reach statutes of repose based on the statute’s text, it did not resort to the Presumption Against Retroactivity or the Constitutional Doubt canon to resolve the case.14 This leaves the scope of Section 9658’s preemption of state of limitations and associated constitutional questions about 9658 for another day.15

The Original CERCLA and Section 301(e): An Insider’s Account

One of the compromises® that made passage of CERCLA possible was deletion of a federal toxic tort cause of action from a pending bill.16 As the Supreme Court put the matter in Waldburger, “The Act provided a federal cause of action to recover costs of cleanup from culpable entities but not a federal cause of action for personal injury or property damage. Instead, CERCLA directed preparation of an expert report. . . ”17 This compromise® included a complex structure for the study commission B three lawyers each from four different legal organizations - American Bar Association, American Law Institute, Association of Trial Lawyers of America, and National Association of Attorneys General.18 When the time came to set up the

13 See infra notes 167-187 and accompanying text.
14 See infra notes 76-94 and accompanying text.
15 See infra notes 188-212 and accompanying text.
16 126 Cong. Rec. 30,932 (1980), reprinted in 1 Legis. Hist at 685 (“We have made many concessions from the original bill reported last summer. . .We have deleted the Federal cause of action for medical expenses or property or income loss.”) (remarks of Sen. Randolph); Alfred R. Light, Legislative Disaster, supre note 1, at _ (showing how objections to broad retroactive liability doomed a Senate CERCLA bill during the lame duck session and led to the fragile “compromise” which was enacted). Outgoing President Carter was personally involved in the negotiations which led to the compromise bill. See generally JIMMY CARTER, WHITE HOUSE DIARY 488 (2010).
17 CTS, slip. op., at 2.
18 42 U.S.C. §9651(e)(2).
Study Group, the American Bar Association knew that one of its three members should be Freeman, who had advised Senator Domenici about the structure of the Study Group.19 And his staff for that Study Group participation was one lawyer (me since all the other associates had to bill hours – even back in the eighties) and one paralegal (a former secretary who has since become an attorney).20 One of the ALI representatives, Professor Frank Grad at Columbia, was elected as the Group’s Reporter, and was able to convince the group at its first meeting that his students at that law school could do background research that could serve as the basis for the Group=s deliberations..21 Columbia was reimbursed from the Superfund.22 The Justice Department had to arrange these meetings of the Group once every month or two, several of which I attended, but DOJ made clear at the outset that its role was administrative and that it would have no involvement in the substantive deliberations of the Group.23 The scope of the study described in CERCLA Section 301(e) was very broad, Ato determine the adequacy of existing common law and statutory remedies in providing legal redress for harm to man and the environment caused by the release of hazardous substances into the environment.”24 Most pertinent to Waldburger, the statutory

19 Alfred R. Light, Superfund Section 301(e) Study Group Report as “Legislative History,” supra note 1, at 415 (“This ‘compromise’ was the brainchild of several U.S. senators—led by Pete Domenici of New Mexico”); see generally Alfred R. Light, Clean Up of a Legislative Disaster, supra note 1, at 414 (discussing the lame duck session with an emphasis on the limitation of retroactive liability and the private cause of action for damages)

20 The paralegal was Karen Donegan, now Karen Donegan Salter. See https://sites.google.com/site/karenldonegansalterconsultant/services

21 Report, supra note 1, at 18. (“The Reporter was also authorized to engage the Legislative Drafting Research Fund of Columbia University to provide background research services (Professor Grade is the Director of the Legislative Drafting Research Fund).”

22 42 U.S.C. §9651(e)(5) (authorizing $300,000 for “administrative expenses” and the Reporter).

23 Report, supra note 1, at 20 (“J. Vance Hughes, Esq. and W. Lawrence Wallace, Esq., Chief and Assistant Chief of that Division’s Policy, Legislation, and Special Litigation Section, acted as the Department’s liaison with the Study Group and were most effective in supplying useful background materials from time to time. . . Ms. Marty Kaplan of the Department of Justice’s Policy Legislation and Special Litigation Section acted as secretary and kept the Study Group’s minutes.”). The Study Group met ten times from June 1981 through June 1982. Id., at 19.

mandate included an evaluation of barriers to recovery posed by existing statutes of limitations.” 25  As to its recommendations, Congress expressly required that the Group consider whether any recommended revisions should take the form of Federal statutes or the development of a model code which is recommended for adoption by the States.” 26

In 1982 I was a first-year associate at a prestigious law firm in Richmond, Virginia – Hunton & Williams, Justice Powell’s former firm. 27  It was a unique position, though I even had a special title: the Freeman Fellow. @ George Clemon Freeman, Jr. was the partner for whom I worked. 28  A Ph.D. in Political Science as well as a new J.D., I had agreed to work for one of this firm’s most senior lawyers on his nonprofit or pro bono activities. For example, we prepared the testimony of the American Bar Association on pending Federal Criminal Code legislation, as my boss was the lead on this issue for the ABA’s Business Law Section. 29  I attended a number of events in the area of regulatory reform, including a luncheon with a D.C. Circuit judge nicknamed Nino. @ 30  There were no clients for any of these activities. I remember that I billed exactly four hours total for my first two years at the firm. Being a little older than the typical first-year associate (with some gray hair on my temples), those with whom I

25 42 U.S.C § 9651(e)(3)(F); see CTS, slip.op., at 2.
28 See George Clemon Freeman, Jr., http://www.hunton.com/george_freeman/.
dealt during those days probably assumed I was a junior partner. Today, my boss is retired, and I can't imagine that something like the Freeman Fellow could exist in the current context.

Freeman was the senior attorney on the firm's Energy and Environmental Team, and at the crest of his career when I joined the firm. As a Ph.D., one my fields of study was Energy Policy (a National Science Foundation Energy-Related Postdoctoral Fellow), and while a law student, I had written a law review article on an insurance provision of an environmental statute that had somehow been enacted during the lame duck session between Jimmy Carter's departure and Ronald Reagan's arrival in D.C. So, I was one of the first Superfund lawyers. And perhaps my most time-consuming activity had to do with Superfund, as I was the lawyer assisting Freeman in his role as a member of the Superfund Section 301(e) Study Group.

As Weyman Lundquist, one of the other ABA representatives on the Group subsequently testified under oath in a congressional hearing, It is clear from the composition of the Study

34 In a number of ways, Freeman’s role was among the more prominent and transparent on the commission, as is plainly apparent from an examination of the Comments to the Appendices in Part 2 of the Section 301(e) Report, which mainly consists of correspondence and memoranda to the commission from Freeman, some of which I prepared. Comments to the Appendices, Report, supra, note 1, available at http://babel.hathitrust.org/cgi/pt?id=mdp.39015005133650;view=1up;seq=461
Group that Congress did not intend a group that would reach an easy consensus.”  

35 He elaborated in that testimony, AIt should be noted that some of the committee members B both plaintiffs= lawyers and defense lawyers B have a vested self-interest in their espoused views. As the discussions of the Group progressed, it became evident that certain other Group members, particularly academicians, sometimes also had a vested interest in views they had expressed over a number of years.”  

36 Freeman=s prepared statement to a congressional subcommittee, stated, AThe debate within our Group of some of these issues sometimes became so lively that it appeared that no Report would ever be delivered to Congress.@  

37 Left out of the testimony was an episode in which the Attorney General of North Carolina, Rufus Edmisten, chairing a session of the Study Group, suggested that two members of the Group engaged in a heated interchange should simply Atake it outside@ for resolution, presumably wild west style.  

38 From my insiders’ view of the Group, it is easy to understand what Justice Scalia and Professor Garner mean in their characterization of the “false notion that the purpose of interpretation is to discover intent.”  

39 The Study Group was comprised of “multiple authors who may not have had the same objects in

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36 Id. at 795-796  
37 Id. at 817.  
38 Cf. BRANTLEY GILBERT, Take It Outside (country song), on Highway to Heaven, available at http://www.youtube.com/watch?v=MMZSmT0w&feature=hp (youtube).  
39 SCALIA AND GARNER, supra note 5, at 391-396.
mind.”

Outside the language of the Study Group’s Report, “the use of the term legislative intent encourages this search for the nonexistent.”

The Superfund Section 301(e) Report

The Group did issue a Report. Its Part 1 contained the Aconsensus@ report and separate views of various Group members who dissented from key recommendations made in the Report. Its Part 2 contained many Abackground reports@ prepared by the Columbia law students as well as AComments to the Appendices,@ where disagreements remained after negotiations among staff of the various members.

Interestingly, the Report unanimously recommended against creation of a Federal statutory judicial tort or nuisance remedy. Its recommendations for federal action were limited to recommendation of a federal program administered by the states to provide Ano-fault compensation for personal injury resulting from hazardous waste.

The Superfund Study Group worried a lot about federal preemption of state tort law. In part, this focus came about because of an inquiry to the group from Senators Randolph and Stafford, who specifically asked the Group to comment on recent Supreme Court decisions that had found no implied private right of action under federal law (i.e. no federal common law) in light

40 Id., at 391.
41 Id. at 392.
43 Report, pt. 2, available at http://babel.hathitrust.org/cgi/pt?id=mdp.39015005133650;view=1up;seq=1 ; Comments to the Appendices, available at http://babel.hathitrust.org/cgi/pt?id=mdp.39015005133650;view=1up;seq=461
of comprehensive federal regulatory statutes such as the Clean Water Act. The Study Group clearly rejected these Senators’ call for the Group to endorse the judicial manufacture of federal common law rights of action through construction of CERCLA’s “savings clause.” The Study Group essentially endorsed what Scalia and Garner call the Presumption Against Implied Right of Action. “A statute’s mere prohibition of a certain act does not imply creation of a private right of action for its violation. The creation of such a right must be either express or clearly implied from the text of the statute.”

One of the other reasons the Study Group did not recommend a preemptive federal provision was its concerns about the constitutional infirmities of dictating state tort law through federal legislation. Scalia and Garner call this the Constitutional-Doubt Canon: “A statute should be interpreted in a way that avoids placing its constitutionality in doubt.” Criticizing a provision in pending legislation stating that the bill’s preemption “shall constitute the law of such State,” Freeman testified before Congress, “This provision is premised on the assumption that Congress can constitutionally rewrite state law where it conflicts with federal policies rather than


47 See Report, supra note 1, at 85-90 and Appendix F (Study Group conclusions) and at 323, 342-343 (comments of George Clemon Freeman, Jr.)

48 SCALIA & GARNER, supra note 5, at 313


50 SCALIA & GARNER, supra note 5, at 247.
to write a federal law which would then displace state law through traditional preemption. . . I should add that the Superfund Study Group considered this approach but rejected it on policy as well as legal grounds.”

It should be noted that this was in the early 1980’s, before the Supreme Court overruled National League of Cities v. Usery. but then revived principles of federalism as a constraint on congressional power in New York v. United States, United States v. Lopez, and Printz v. United States. Beginning in the 1990’s, the Supreme Court has clarified that Congress cannot command States to enact or repeal legislation.

Among its recommendations to the states, however, was that states adopt a discovery rule, such that a plaintiff’s cause of action would not accrue until the plaintiff discovered or reasonably should have discovered the injury and its cause. As the Supreme Court noted in Waldburger, the Study Group’s recommendation expressly stated, “The Recommendation is intended also to cover the repeal of the statutes of repose which, in a number of states have the same effect as some statutes of limitations in barring plaintiff’s claim before he knows he has one.”

The background documents in Part 2 of the Report describing current law show that its authors understood that a state could have a discovery rule regarding its statute of limitations and still have the same fairness issue from the perspective of plaintiffs because of its separate statute of

51 Public Works Hearing, supra note 35, at 871-872.
57 Lundquist Testimony, Public Works Hearing, supra note 35 at 802; Report, pt.1, supra note 1, at 241.
58 Report, supra note 1, pt.1, at 256; CTS, slip.op., at 3.
repose. For the state of North Carolina, for example, the Report characterized the state as having a discovery rule, but as also having a statute of repose.

It is important to understand the context in which the Study Group made its “discovery rule” recommendation. The Study Group had extensive discussion of the issue of retroactivity, including the Presumption Against Retroactivity: “A statute presumptively has no retroactive effect.” The principal innovation of the Study Group was creation of an administrative compensation regime in which persons exposed to hazardous wastes would be able to claim compensation for injuries and damages presumed to result from such exposure. The federal administrative fund paying compensation would have a right of subrogation against tortfeasors, but only for injuries or damages “arising out of exposure to hazardous substances or wastes disposed of, transported or spilled after the adoption of this proposal.” Thus, the Report stated, “[t]he Study Group recommends that the ‘discovery rule’ apply to all claims and that claims not be time-barred by reason of the passage of time from exposure or injury to the discovery of the illness or injury on which the claim is based, and regardless of whether the responsible party knew, or should have known of the hazardous condition, or of the hazardous nature of the wastes.”

The Group recommended by majority vote “that the compensation fund should pay all proven claims arising out of exposure to hazardous substances disposed of, transported, or spilled prior to the adoption of this proposal. . .”

59 Report, supra note 1, pt. 2, at B-6.
60 Id. at B-9.
61 SCALIA & GARNER, supra note 5, at 261.
62 Report, pt. 1, supra note 1, at 246..
63 Id.
64 Id., at 245.
emphasized this feature of the Study Group’s Report, stating, “If Congress decides to enact new legislation creating a federal administrative remedy or a federal cause of action for persons who have been injured or whose property has been damaged by hazardous wastes, it should scrupulously avoid imposing liability retroactively. As I pointed out earlier, one of the most important decisions in our Superfund Study deliberations was our unanimous recommendation against any form of retroactivity in federal legislation.”

Legislative History of Section 9658

After the Superfund Section 301(e) Study Group issued its Report in 1982, Congress adopted amendments to the Superfund statute in 1986. Congress largely ignored the Report’s recommendations but did adopt a peculiar provision addressing the “discovery rule” in statutes of limitations. In a provision styled, “State Procedural Reform,” the Superfund Amendments established a “federally required commencement date” delaying the date when the state tort law statute of limitations would begin to run in environmental cases.

65 Public Works Hearing, supra note 35, at 848-849.

66 Exception to State statutes

In the case of any action brought under State law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility, if the applicable limitations period for such action (as specified in the State statute of limitations or under common law) provides a commencement date which is earlier than the federally required commencement date, such period shall commence at the federally required commencement date in lieu of the date specified in such State statute.

(1) State law generally applicable

Except as provided in paragraph (1), the statute of limitations established under State law shall apply in all actions brought under State law for personal injury, or property damages, which are caused or contributed to by exposure to any hazardous substance, or pollutant or contaminant, released into the environment from a facility. (42 U.S.C. §9658(a)).
Waldburger that this provision was “[i]n response to the Study Group Report.” Indeed, the House Conference Report for SARA states, “The study done pursuant to Section 301(e) of CERCLA by a distinguished panel of lawyers noted that certain State statutes deprive plaintiffs of their day in court. The study noted that the problem centers around when the statute of limitations begins to run rather than the number of years it runs.” The question clearly before the Supreme Court was whether the provision preempts not only statutes of limitations but also statutes of repose which prohibit tort litigation after a given number of years after the defendant last acted or owned contaminated property at issue.

In 1984, nine of the twelve members of the Study Group apparently startled some members of the Senate Environment and Public Works Committee when they sent a letter criticizing two Committee witnesses whose testimony had seriously “misperceived” the group’s recommendations. The witnesses had cited the report as supporting the advocacy of a new federal cause of action, failing to note that the Study Group had deliberately rejected recommending such an amendment. The 1985 House floor debate over CERCLA added a new dimension to misuse of the Section 301(e) Report. The opponents, rather than the proponents, of a federal cause of action amendment, caused confusion. Congressman Glickman attempted to blunt Congressman Frank’s arguments in favor of the federal cause of action by reference to the provision which became Section 9658, stating:

67 CTS, Brief of Respondents, at 9.
The compromise version of Superfund contains an important provision which really addresses the major problem addressed by the Federal cause of action – the fact that currently residents of some States have no right to sue for damages arising from hazardous substances because the State statute of limitations applicable to their claim has already passed before they even know they have been injured.

This provision called section 203 State Procedural Reform adds a new section 309 to Superfund. This section which is based on the section 301(e) study mandated by Superfund, provides that State statutes of limitations will not commence until the injured person knew or reasonably should have known that their personal injury or property damages were caused by exposure to a hazardous substance.

Thus, under this provision, all persons, regardless of which State they live in, will be able to sue for damages when they know they have been damaged. This is of particular importance because of the long latency period for many injuries resulting from exposure to hazardous substances, and because both the fact that a person was exposed and the fact that he was harmed by such exposure are often known only at a date much later than their exposure.”72

Mistakenly hoisting the Section 301(e) flag, Congressmen Dingell, Lent, Snyder, and Breaux agreed to “vigorously support” this ‘State Procedural Reform’ amendment in Conference.73 It was Congressman Frank, promoting his amendment to add a federal cause of action for damages on the floor of the House, who criticized his colleagues for ordering the states to do what Congress

73 Id. at H11,577-78 (statements of Congressmen Dingell, Lent, Snyder, and Breaux); see Light, Federal Preemption, Federal Conscription, supra note 1, at 656-657.
would not do directly, and for refusing to offer federal courts as a forum. Such contradictory and confused floor debate shows the unreliable nature of such materials as aids to statutory construction.

The Supreme Court’s Textual Analysis

From a textual point of view, what had divided the circuits before Waldburger in interpreting Section 9658 was that Section 9658, unlike the recommendation in the Superfund Section 301(e) Study, makes no reference to “statutes of repose.” The first question in Waldburger thus was whether the plain meaning of “the period specified” in a “statute of limitations” (which could include a period specified in “the State statute of limitations or under common law”) would include the period set by a state statute of repose, thereby mandating preemption of state statutes of repose. Stated more simply, the first question was whether the term “statute of limitations” in Section 9658 can encompass both statutes of limitations and statutes of repose. At Oral Argument, several justices suggested that the term statute of limitations might cover both. Scalia exclaimed, “I used to consider them when I was in law school and even as late as 1986, I – I would have considered that a statute of limitations. Now, you think Congress is smarter. They – they know the law better.” Justice Kagan evoked laughter with the comment, “That’s a very sophisticated Congress you’re asking us to imagine.” Scalia evoked further laughter with a comment about exchanges on the floor of Congress, “And

7474 131 Cong. Rec. H11,579 (daily ed. Dec. 10, 1985). Congressman Frank might have suggested the potential invalidity of Section 9658 by characterizing it as “dicta to the States.” Id.
75 SCALIA AND GARNER, supra note 5, at 369-390.
76 Oral Argument, at 13
77 Oral Argument, at 15.
everybody was listening to that: The chamber was full and -- -“78 Justice Kennedy also got a laugh later in the argument, “And the study commission did recognize the distinction between limitations and repose. I agree with Justice Scalia. I didn’t have Justice Ginsburg as a law professor, but I – this was new for me.”79 Based on all the laughter at the oral argument, CTS v. Waldburger was a funny case. As Justice Scalia put it after listening to textual argument after textual argument, “Anyway, this is – this is – it is angels on the head of a pin, isn’t it? [Laughter.]” Oral Argument Transcript, at 38. The simple superficial way to resolve the case would have been simply to say that the federal statute does not preempt statutes of repose because there is no express reference to statutes of repose in the statute.

Frankly, the terminology is not in itself significant.80 Justice Kennedy notea in Waldburger that “petitioner does not point out an example in which Congress has used the term “statute of repose.”81 After a lengthy description of the history of the two terms, he concludes, “it is apparent that general usage of the legal terms has not always been precise, but the concept that statutes of repose and statutes of limitations are distinct was well enough established to be reflected in the 1982 Study Group Report, commissioned by Congress.”82 Congress could have written Section 9658 in such a way that the statute preempted both “statute of limitations”

78 Oral Argument, at 16.
80 As a result, the Amicus Brief of Environmental Law Professors as Amici Curiae in Support of Respondents, even if correct, was not relevant to resolution of the case. In any event, it is quite curious to me that “Environmental Law Professors” limited their analysis of whether statutes of limitations include statutes of repose to statutes outside the environmental area. They ignore CERCLA’s language and legislative history as well as the Section 301(e) Report. It is especially curious since the “Environmental Law Professors” express their amicus interest in the case by noting the important of the issues and stating, “Because of that importance, amici believe this Court should make its decision based on complete and accurate information not only about CERCLA itself, but also about the legal background against which CERCLA was enacted.” The amici brief cites absolutely no legislative history or cases interpreting CERCLA.
81 CTS, slip op., at 11.
82 CTS, slip.op., at 12-13.
traditionally understood and “statutes of repose” under the statutory rubric of “statute of limitations.”

But it did not clearly do so. Justice Kennedy concluded, “The Report clearly urged the repeal of statutes of repose as well as statutes of limitations. But in doing so the Report did what the statute does not: It referred to statutes of repose as a distinct category. And when Congress does not make the same distinction, it is proper to conclude that Congress did not exercise the full scope of its preemptive power.”

In light of the Report as background, the opinion applies a version of the Negative-Implication Canon: The expression of one thing (statute of limitations) implies the exclusion of others (expressio unius est exclusio alterius).

The Court did not stop there, though, after finding “the use of the term ‘statute of limitations’ in §9658 not dispositive.” To bolster its conclusion of “the exclusion of statutes of repose” from CERCLA’s preemption, it examined “other features of the statutory text.” In essence, it turns to what Scalia and Garner call “The Whole Text Canon: The text must be construed as a whole.” This canon “calls on the judicial interpreter to consider the entire text, in

83 Justice Ginsburg, joined by Justice Breyer in dissent, thinks that the language of §9658 does do this, finding the “federally-required commencement date” to substitute the date of plaintiff’s discovery of his injury and its cause for “the last act or omission of the defendant giving rise to the claim.” CTS, slip. op., Ginsburg, J., dissenting, at 2. Justice Ginsburg’s dissent simply ignores the contextual cues, discussed in the text, upon which the majority in part based its opposite conclusion. She based her broad preemption conclusion primarily on the Study Group Report’s recommendation to repeal statutes of repose and the policy argument that statutes of repose “give contaminators an incentive to conceal the hazards they have created.” Id., at 5. This, of course, ignores the contrary incentive created by the private cause of action for cleanup costs, including retroactive liability, previously acknowledged by the Supreme Court. United States v. Atlantic Research Corp., 551 U.S. ___, 127 S. Ct. 2331 (2007).

84 CTS, slip op., at 13. The Study Group probably considered it necessary to address statutes of repose separately because of the stabilizing canon – Presumption Against Implied Repeal, “Repeals by implication are disfavored- ‘very much disfavored.’ SCALIA & GARNER, supra note 5, at 327 A reader of its statute of limitations recommendation probably would not infer that it was intended to effect a repeal of a statute of repose.

85 SCALIA & GARNER, supra note 5, at 107-111.
86 Id.
87 CTS, slip. op. at 13.
view of its structure and of the physical and logical relation of its many parts.” 88 The Court found significance in the use of the singular, implying that the provision did not envision “the preemption of two different time periods with two different purposes” (the statute of limitations and the statute of repose). 89 It also found the statutory language to presuppose the existence of a “civil action” whose statute of limitations Congress might extend. 90 This could not apply, according to the majority, to a statute of repose which “can prohibit a cause of action from coming into existence” and even “preclude an alleged tortfeasor’s liability “before an actionable harm even occurs.” 91 This reasoning may also be informed by the Harmonious-Reading Canon: The provisions of a text should be interpreted in a way that renders them compatible, not contradictory. 92

The Court also found significance to Congress’s inclusion of a provision providing for equitable tolling for “minors and incompetents.” 93 The Court explained that “[e]quitable tolling is applicable to statutes of limitations because their main thrust is to encourage the plaintiff to ‘pursue[e] his rights diligently’, a matter that does not apply to statutes of repose “beyond which consequence, the inclusion of a tolling rule in §9658 suggests that the statute’s reach is limited to statutes of limitations, which traditionally have been subject to tolling. It would be odd for Congress, if it did seek to pre-empt statutes of repose, to pre-empt not just the commencement date of statutes of repose but also state law prohibiting tolling of statutes of repose—all without an

88 SCALIA & GARNER, supra note 5, at 167-169.
89 CTS, slip op., at 13.
90 CTS, slip op., at 14.
91 CTS, slip.op., at 14.
92 SCALIA & GARNER, supra note 5, at 180-182..
express indication that §9658 was intended to reach the latter.”94 The Court’s “equitable tolling” argument, however, is not very satisfying. Assuming that Congress did intend to repeal statutes of repose, there would be nothing odd in a mandate that the limitations period be further extended until a minor reaches majority or until an incompetent becomes competent. In fact, both the singular/plural and equitable tolling features seem quite conclusory – they can fit into a statute that covers or one that does not cover a statute of repose equally well.

**The Presumption Against Preemption**

Three members of the Court found “additional support for its conclusion in well established “presumptions about the nature of preemption.””95 Justices Kennedy, Sotomayor, and Kagen found assistance in a presumption “when the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily ‘accept the reading that disfavors preemption.’”96 State courts prior to *Waldburger* identified the presumption against preemption “that the historic police powers of the States [are] not to be superseded by [federal legislation] unless that was the clear and manifest purpose of Congress.”97 Four of the courts conservatives, Justice Scalia, joined by Chief Justice Roberts, Alito, and Thomas disagreed in *Waldburger*, remaining convinced that “[t]he proper rule of construction for express pre-emption provisions is . . . the one that is customary for statutory provisions in general: Their language should be given its ordinary meaning.”98 This schism is part of the Court’s continuing saga concerning principles the court should use in determining the scope of federal preemption of state law in such diverse

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94 *CTS*, slip. op., at 15.
95 *CTS*, slip op., at 16.
96 *CTS*, slip op. at 17.
98 *CTS*, slip. op. (Scalia, Jr. concurring in part and concurring in the judgment).
fields as cigarette labeling, pesticide regulation, ERISA, and Medicaid reimbursement. Often, it is the defendant in these cases advocating federal preemption rather than the plaintiff as in *Waldburger*.

In the FIFRA pesticide regulation decision, for example, the Court permitted a suit by Texas peanut farmers of pesticide manufacturers over crop loss by narrowly construing FIFRA’s labeling requirements to prohibit only state requirements that were “in addition to or different from” FIFRA’s requirements, not those consistent with the FIFRA standards. The Court stated: The long history of tort litigation against manufacturers of poisonous substances adds force to the basic presumption against preemption. If Congress had intended to deprive injured parties of a long available form of compensation, it surely would have expressed that intent more clearly.”

The poster child for an express preemption morass, though, is ERISA, where over the years “[e]mployers and others have argued that many state laws—from family leave to workers compensation to health care finance and malpractice claims— are preempted because they ‘relate to’ employee benefit plans.”

Justice Scalia has gone on record in *Reading the Law* that the preemption canon ought not to be applied to the text of an explicit preemption provision. He reasons, “The presumption is based on an assumption of what Congress, in our federal system, would or should normally desire. But when Congress has explicitly set forth its desire, there is no justification for not taking Congress at its word—i.e., giving its words their ordinary, fair meaning. So, for example, we

100 Bates v. Dow Agrosciences, LLC, 544 U.S. 441, 448 (2005)
101 CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES, §5.2.2, at 411.
disagree with the decision of the Supreme Court in *Cipollone* to give the preemption provision of the Federal Cigarette Labeling and Advertising Act a ‘narrow’ meaning rather than simply the meaning that its words fairly convey.”102

The Presumption Against Federal Preemption is a canon more often invoked in the CERCLA context by state rather than federal courts. Professor Robin Kundis Craig recently opined, “States’ continued resistance to CERCLA’s FRCD (‘Federally required commencement date’) suggest that the FRCD creates, at the very least, a perception of federal overreaching into and commandeering of state law. . . . The imposition of the FRCD on state tort law, without preempting state tort law in its entirety, would seem to fit neatly within the *Printz* Court’s lists of actions that are inconsistent with constitutional federalism.”103 What these courts were referencing is an application of the Constitutional Doubt canon—avoidance of a statutory construction which raises doubts about the provision’s constitutionality.104

This argument in favor of a narrow construction though application of the Constitutional Doubt canon is not very strong, however. Professor Craig is correct that Section 9658 raises the policy concerns of *Printz*. But it does so in the context the Printz case distinguishes, namely, state judicial proceedings.105 Section 9658 implicates all of the policies underlying the *Printz* decision’s invalidation of federal conscription of state sheriffs to administer a gun registration law – political accountability, state protections of individual liberty, and cost internalization. Section

102 SCALIA & GARNER, *supra* note 5, at 293.

104 See *infra*, at notes 167-187 and accompanying text.
9658 blurs the lines of political accountability by establishing the same scheme for judicial review of a federal statutory provision that would exist if the state legislature had enacted the provision. 106 The only apparent federal court review of such cases is through a writ of certiorari to the U.S. Supreme Court for review of state supreme court decisions. 107 Section 9658 appears to thwart protections of individual liberty by preempting state protections, often contained in state constitutions, against the retroactive review of claims barred by a statute of limitations. 108 It also shifts the costs of administering the federal standard to state courts. In addition, this provision may interfere with state supreme courts’ control over interpretations of state tort law. If broadly construed, Section 9658 forces state adoption of policies that arguably violate state constitutional protections, without bearing any of the costs of administering the law. 109 Nonetheless, there are technical limitations of the Printz doctrine as it currently stands. Section 9658 is fairly crude – a command to the States to use the federal standard in adjudicating state law claims, but Section 9658 does not command the state executive to do anything (unlike Printz), and its effect is limited to judicial (adjudicative) functions, not executive ones. 110 In Waldburger, the Respondents principally relied on this technical limitation of the Printz doctrine, quoting the Second Circuit which had stated, “The [federal required commencement date], which requires no action by a state’s legislature or executive officials, but only the application of federal law by the courts to

108 See infra notes 174 -187 and accompany text.
109 See Light, Retroactive Revival, supra note 1, at 410.
110 Printz v. United States, 505 U.S. at 928-929.
recognize the Federal Commencement Date of a state-law claim, does not violate the Tenth Amendment.”

In its briefs, CTS invoked the policies behind Printz and New York v. United States, arguing that “the Constitution does not give Congress the far greater power to control the context or existence of state law. . .Such a power would subvert the basic distinction between federal and state sovereigns by permitting Congress to work its will through state law. The result would be an impermissible blurring of accountability between federal and state lawmakers.” CTS argued that “a federal order preempting state statutes of repose could in theory be averted by state legislation entirely eliminating the underlying state-law causes of action.” In this way, it distinguished Testa v. Katt, “because CERCLA does not create a private federal cause of action for the kinds of claims subject to §9658” in that §9658 “does not implicate Congress’s separate authority to legislate federal-law claims, or proper procedures for the resolution of those claims.” Justice Sotomayor at oral argument in Waldburger posed the hypothetical, “assume a State said, nah, we’re tired of environmental claims. You can’t have them. We’re not going to have one at all. Was Congress preempting that decision? . . . Why isn’t a statute of repose simply a decision that you can’t have a claim at all if it’s older than 20 years old?”

This line of questioning gets at the Testa exception to state prerogatives – if the state has jurisdiction over the

111 Respondents’ Brief, at 39 (quoting Freir v. Westinghouse, 303 F.2d 176, 205 (2002)).
112 Reply Brief, at 16. See also Petitioner’s Brief, at 37-41 “[I]f § 9658 were read to preempt statutes of repose, it would actually dictate the substantive content of state tort law, and so would force the States to do federal work. Tort liability would have to be found—as a matter of state law—even where the State had decreed that no liability should exist.” Id., at 41.
113 Petitioner’s Brief, at 38.
115 Petitioner’s Brief, at 40.
116 Oral Argument Transcript, at 40-41.

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type of claim Congress preempted, the state cannot refuse to apply the preemptive federal law because of the Constitution’s Supremacy Clause.117.

After the Supreme Court revived principles of constitutional federalism in *United States v. Lopez*,118 Congress enacted some preemptive causes of action which sought to change some, but not all, elements in state law causes of action without totally preempting the area. For example, in the Volunteer Protection Act of 1997, Congress dictated changes of state law personal injury actions against volunteers.119 That Act even contains a strange provision allowing states by legislative act to “opt out” of the federal standards by legislative action.120 These features of the VPA were intended to avoid constitutional challenges under the Supreme Court’s new federalism.121 Because § 9658 was enacted before *Lopez* was decided, it does not contain such an “opt out” provision. In *Waldburger*, CTS argued that the distinction between ordering a state to enact legislation and to preempt state law was not significant because, if interpreted to preempt substantive state law,§ 9658 would “force States to either extend substantive tort liability to a greater extent than the State itself desired, or enact state legislation eliminating the relevant category of substantive tort law altogether.”122 This would offend the “coerced choice” prohibition forbidden in *New York v. United States*.123

117 Art. VI (”[T]he laws of the United States . . .which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).
119 42 U.S.C. §14502
122 Petitioner’s Brief, at 39.
123 As Petitioner explained, “In *New York v. United States*, the Federal Government forced states to choose between unconstitutional options: either take title to certain radioactive waste, or enact the federally prescribed
CTS distinguished the usual preemption situation, arguing that “the constitutional
difficulties potentially connected to §9658 do not arise when Congress uses its preemptive
authority to *negate* state substantive law.” In response, Waldburger simply quoted DOJ’s
brief in the Second Circuit case, in which DOJ asserted “preemption in fact routinely has the effect
of expanding [State] remedies.” Interestingly, neither party made reference to the General
Aviation Revitalization Act of 1994 (GARA), in which Congress created a preemptive
eighteen-year statute of repose for product liability suits with respect to noncommercial small
aircraft. Presumably, Waldburger found it inconvenient to cite a federal statute expressly
favoring a statute of repose, and CTS did not wish to distinguish that statute, where Congress
clearly preempted state law by establishing a federal statute of repose in the context of state law
causes of action.

Is there a constitutionally significant different between extinguishing a state tort claim by
imposing a federal statute of repose and extending a state tort claim by delaying the date beyond
which an action may not be brought? In its amicus brief in *Waldburger*, the United States makes
reference to choice of law rules, quoting *Sun Oil Co. v. Wortman*, that “the Constitution does
not bar application of the forum State’s statute of limitations to claims that in their substance are

regulatory scheme. *New York*, 505 U.S. at 174-76. Because each of these options entailed unconstitutional
commandeering, the choice between them was likewise unconstitutional.” *Petitioner’s Brief*, at 38-39.
124 *Petitioner’s Brief*, at 40, citing *New York*, 505 U.S. at 168.
125 *Respondents’ Brief*, at 39.
1638, 1638-4; Burton v. Twin Commander Aircraft, LLC, 171 Wn.2d 204 (Wash. 2011); Estate of Kennedy v. Bell
Helicopter Textron, Inc., 283 F.3d 1107, 1110 (9th Cir. 2002); Lyon v. Agusta, SPA, 252 F.3d 1078, 1084 (9th Cir.
2001). GARA is mentioned, however, in the Brief of Environmental Law Professors as *Amici Curiae* in Support of
Respondents, at 19. The Environmental Law Professors cited GARA because Congress there used the term
“applicable limitations period” in the context of a provision clearly establishing a “statute of repose.” It is difficult
to see, however, how this could be “legal background upon which CERCLA was enacted,” *Environmental Law
Professor Brief*, at 1, the supposed interest of *amicus*, since GARA was enacted in 1994, long after Section 9658.
and must be governed by the law of a different state.” 128 Indeed, the Restatement (Second) of Conflict of Laws §142, “the forum will apply its own statute of limitations barring the claim” but may not apply the forum state’s statute “permitting the claim” where maintenance of the claim “would serve no substantial interest of the forum” and the claim would be barred “under the statute of limitations of a state having a more significant relationship to the parties and the occurrence.” 129 Perhaps these principles suggest that a federal statute of repose barring state claims does stand on a somewhat different footing that a federal statute repealing a state statute of repose to revive or expand state tort claims. Forcing a state to entertain a claim seems a little like forcing an individual to buy insurance—constitutionally suspect under the Commerce Power. 130 Assuming, however, that Congress does have a “substantial interest” in extending a statute of limitations, 131 Wortman seems to indicate that it does not violate constitutional due process to apply a longer federal statute of limitations to a state law tort action so long as the supplanted state statute of limitations only deals with the remedy and does not affect the underlying right. 132

CERCLA’s Remedial Purpose (A False Canon)

Because of the skimpy and confused “legislative history,” the lower courts prior to Waldburger mainly resorted to two other general precepts of statutory interpretation in trying to decide whether Section 9658 covered statutes of repose: (1) the constitutional-doubt canon in the

129 Restatement (Second) Conflicts of Laws, 1988 Revision, §142.
131 In Jinks v. Richland Cnty., 535 U.S. 456 (2004), this substantial evidence was the enhancement of the jurisdiction of the federal courts under Article III by extending limitations in state court for the time a claim was pending in federal court prior to its dismissal. This followed the precedent of Stewart v. Kahn, 78 U.S. 492, 11 Wall. 493 (1871), which upheld under the War Power congressional extension of limitations in federal court for the period in which federal courts were not accessible because of the Civil War. See Jinks, 535 U.S. at 461.
context of federal preemption discussed above and (2) CERCLA’s remedial purpose. The United
States argued in its amicus brief in the Supreme Court that CERCLA’s remedial purpose does not
support a broad preemption of state tort law.133 Scalia and Garner refer to this as “the false
notion that remedial statutes should be liberally construed.”134 For them, it is a false notion
because of “the difficulty of determining what constitutes a remedial statute” and “that identifying
what a ‘liberal construction’ consists of is impossible.”135 The Fourth Circuit, however,
referenced this canon many times in its lower court Waldburger opinion, speaking of CERCLA’s
“broad interpretation” and “liberal construction” as a remedial statute.136 CERCLA was said to
be the “most remedial of all environmental statutes” designed to clean up “expeditiously
abandoned hazardous waste sites and respond to hazardous spills and releases of toxic wastes into
the environment.”137 As Adam Bain explained in a 2014 law review article:

The court [Fourth Circuit] specifically identified two remedial purposes of CERCLA: “to
(1) ‘establish a comprehensive response and financing mechanism to abate and control the


133 That amicus brief states, “[I]t does not follow that helping private plaintiffs to collect tort damages
years after the contamination has ended—and after the point at which the state legislature determined as a substantive
matter that liability under state law should cease—fits into that same federal remedial focus of the Act. Cf. 131 Cong.
damages relating to hazardous substances because such a cause of action ‘ha[d] to do with adjustment of private rights
and liabilities and remedies” and was thus “at odds” with purpose of CERCLA “to clean up hazardous waste sites in
order to protect the public interest”); 131 Cong. Rep. 35,689 (statement of Rep. Glickman) (explaining that
CERCLA’s “real purpose. . . is the cleanup of hazardous waste sites” and that a new federal tort remedy would
improperly turn CERCLA “into a private compensation program”); 131 Cong. Rec. 35,640 (statement of Rep. Fish)
(“The purpose of the Superfund law is to provide a Federal response to the urgent need to clean up existing hazardous
waste sites. . . This House has consistently rejected expanding the Superfund statute to deal with legal rights aimed at
compensation for damages.”).”

134 SCALIA & GARCIA, supra note 5, at 364.
135 Id. at 364-365.
137 723 F.3d at 443 (quoting Blake A. Watson, Liberal Construction of CERCLA Under the Remedial
Purpose Canon? Have the Lower Courts Taken a Good Thing Too Far? 20 HARV. ENVTL. L. REV. 199, 286)).
vast problems associated with abandoned and inactive hazardous waste disposal sites’ and (2) ‘shift the costs of cleanup to the parties responsible for the contamination.’” Nowhere in its decision does the court tie the preemption state statutes of repose to either of these purposes; instead, the court articulated a broad congressional purpose for Section 9658, namely, “removing barriers to relief from toxic wreckage,” and justified its interpretation on that basis. The court also failed to consider explicitly whether Section 9658 reflected a “legislatively crafted compromise;” in such circumstances, it would be inappropriate to use the remedial purpose canon to justify a broad construction of Section 9658 to preempt state statutes of repose.138

Waldburger relied heavily on a Second Circuit opinion interpreting §9658, which Mr. Bain discusses, as well as the Government’s brief as an intervenor in that Second Circuit case, where the Government had supported application of § 9658.139 Strangely, Waldburger supported the broad application of §9658 on the grounds that the Superfund Section 301(e) Study was directed broadly to evaluation of “legal redress for harm to man and the environment.”140 Waldburger seemed unaware that the Superfund Section 301(e) was directed to the study of remedies “for personal injury, or property damages” because Congress had self-consciously deleted the federal remedy for property injury and property damages from the 1980 legislation which became CERCLA.141 The Study was commissioned to study legal remedies in part because Congress had deliberately deleted the remedy for personal injury or property damage from the Senate bill in

139 Respondents’ Brief, at 42-43.
140 Respondents’ brief, at 41.
141 See supra notes 16-17 and accompanying text.
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its CERCLA 1980 lame duck compromise. They also seem unaware of the irony of their position in favor of a broad preemptive effect of §9658 on the grounds that CERCLA is a “comprehensive federal program.” As noted above, the Superfund Section 301(e) Study Group, at the request of Senators Randolph and Stafford, carefully evaluated the implications of Supreme Court decisions in the early 1980’s which had concluded that the comprehensive nature of federal environmental regulation under the Clean Water Act meant that no federal common law right of action continued to exist in light of that comprehensive regulation. Subsequent Supreme Court decisions clarified that the comprehensive nature of federal regulation under that statute did not eliminate state common law causes of action, though it might influence choice of law rules regarding state damage actions.

CERCLA’s very broad savings clause, reads, in relevant part, “Nothing in this chapter shall affect or modify in any way the obligations or liabilities of any person under other Federal law or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants.” This provision was part of the 1980 Act and has remained unchanged. In 1983, Senator Stafford proposed to substitute the language “diminish” for “affect or modify” in the provision as part of his bill intended to aid toxic tort plaintiffs. However, his bill failed. This contrasts with other provisions of SARA making conforming changes to the savings clause where SARA preempts state law. As I argued in a 1992 law review article, the

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142 See supra at notes 18-26 and accompanying text.
143 Respondents’ brief, at 37.
144 See supra notes 46-48 and accompanying text.
146 42 U.S.C. §9652(d).
147 S. 917, 98th Cong., 1st Sess. §5(a)(3).
148 See Light, Retroactive Revival, supra note 1, at 405 n.283.
The savings clause can be read to preserve those state statute of limitations affecting “obligations” or “liabilities,” but not those statutes of limitations merely affecting remedies, which are preempted by § 9658.149 This would explain why Congress made no conforming change to the savings clause when it added Section 9658 in 1986.

Of course, Government lawyers may be excused if in this context they exemplify (or even caricature) Rufus Miles’ famous maxim, “where you stand depends on where you sit.”150 In Waldburger, the United States explained its interest supporting CTS as resulting from the Government’s posture as a defendant under the Federal Tort Claims Act, “To the extent that CERCLA is held to preempt statutes like North Carolina’s, those statutes would therefore be unavailable to the United States in negligence actions under the FTCA that involve alleged exposure to hazardous substances.”151 The irony is that CERCLA’s “remedial purpose” canon in part arose out of the Government’s desire as a CERCLA plaintiff in other cases to avoid having to address constitutional limitations on retroactive legislation. A statute is not considered retroactive unless it attaches new legal consequences to events completed before its enactment.152 It is not retroactive if it simply provides a new remedy for acts already illegal. As Judge Hand pointed out in the district court opinion in United States v. Olin,153 the Government argued in the 1980’s that imposing liability on a CERCLA defendant’s pre-enactment conduct was not

149 Light, Retroactive Revival, supra note 1, at 407.
152 Landgraf v. USI Film Prods, 511 U.S. 244, 269-270 (1994).
“retroactive.”154 This was because, as DOJ representatives testified before Congress, “CERCLA did not create ‘retroactive’ liability in the sense of creating new liability where none previously existed.”155 If this were really so, then CERCLA cleanup liability could be construed “as providing a new federal procedural remedy against generators or transporters whose preenactment conduct made them legally responsible (liable) under then existent state law.”156 The constitutional due process constraints on retroactive legislation would not apply. Construed narrowly, courts would not have “no need to reach the constitutional validity of retroactive application of CERCLA under the due process clause.”157 Having fought so hard for its establishment of new strict and joint and several liability under the statute, however, one can forgive the Government for its duplicity in not really following through with such a “remedial” theory regarding CERCLA cleanup liability in CERCLA litigation. Its successes in defending cleanup liability against constitutional challenges under the due process clause rendered such duplicity largely moot.158 Its sensitivities in this regard, however, may help explain the absence of any discussion of the anti-retroactivity features of the Section 301(e) Report in its amicus brief in Waldburger.159 Its unwillingness to address the retroactivity issue generally, however, meant

156 George C. Freeman, Jr., Unconstitutional Retroactive Application of Superfund Liability, 42 BUS. LAW. 215, 665 (1986).
159 See infra notes 64-65 and accompanying text.
that its argument that CERCLA’s “remedial purpose” did not support a broad preemptive effect of §9658 was less effective. Actions under CERCLA §107, for natural resources damages are prospective only in light of Congress express prohibition on the imposition of liability for damages “where such damages and the release of a hazardous substance from which such damages resulted have occurred wholly before enactment of this Act.”160 Several courts have relied upon the negative implication of the exemption contained in § 107(f) in order to conclude that Congress clearly intended that CERCLA would be applied retroactively for cleanup claims.161 That Congress refused to provide for retroactive damages actions clearly supports the Government’s argument in Waldburger that CERCLA’s “remedial purpose” does not imply broad expansion of state tort law damages liability. The Government could have made that argument in Waldburger, but did not.

Less defensible is the Government’s contrasting interpretation of SARA’s amendment to CERCLA adding a cost recovery statute of limitations. As a plaintiff in CERCLA actions, the United States has invoked the broad remedial purpose canon in favor of prospective only application of CERCLA’s cost recovery statute of limitations.162 The new cost recovery statute of limitations did not apply, in the Government’s view, to cost recovery claims made prior to its 1986 enactment in SARA. In that context, the invocation “amounts to little more than claiming that the Government needs the money so the statute should be interpreted to accomplish that

160 42 U.S.C. § 9607(f); see 94 Stat. 2767, 2783.
As I noted in a law review article in 2008, “Starting in the late 1990’s, . . . circuit courts began to put an end to this ‘policy’ approach [in adopting a plaintiff-oriented construction of the cost recovery statute of limitations], which amounted to the notion that the Government should not have its claims barred simply because it is the Government.”

Like the adoption of a cost recovery statute of limitations, “Section 9658 reflected a ‘legislatively crafted compromise,’” in 1986 in which “it would be inappropriate to use the remedial purpose canon to justify a broad construction of Section 9658 to preempt state statutes of repose.”

In neither situation does CERCLA’s broad remedial purpose imply that plaintiffs should always win.

In the end, the Supreme Court in *Waldburger* dispatched the plaintiffs’ “remedial purpose” argument in a similar way in the preemption context. Justice Kennedy noted, “the level of generality at which the statute’s purpose is framed affects the judgment whether a specific reading will further or hinder that purpose. CERCLA, it must be remembered, does not provide a complete remedial framework. The statute does not provide a general cause of action for all harmed caused by toxic contaminants.” Quoting *Wyeth*, Justice Kennedy, stated, “The case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there is between them. . . . Respondents have not shown that in light of Congress’ decision to leave those many areas of state law untouched, statutes of repose post an unacceptable obstacle to the attainment of CERCLA’s purposes.”

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163 *Id.* at 281.
164 *Id.* at 283.
166 *CTS*, slip op., at 10.
Constitutional Doubt and Retroactivity

The possibility that Section 9658 could, by extending a statute of limitations where the defendant’s culpable act pre-dated SARA, retroactively revise a barred claim, raises additional difficulties. As a member of the Section 301(e) Group, George Freeman testified in 1983, “Retroactive application of a more stringent liability standard can render an objectionable legal standard unconscionable. In addition, retroactive application of a vicarious, strict liability raises serious constitutional due process questions analogous to the explicit prohibition of ex post facto laws in the criminal area. Indeed, the concepts of fairness and substantial justice which underlie these constitutional concepts also serve as the philosophical underpinning for the general rule of construction that a statute is to be given only prospective application.”

The purpose of a statute of repose is to “demarcate the bounds of substantive tort liability under state law.” As I argued in a law review article in 1992, there is no evidence that Congress intended to preempt state law to override state constitutional prohibitions on retroactive legislation. Section 9658, styled “State Procedural Reform,” may be read to preempt only statutes of limitations that are procedural, that is statutes of limitations in which the state seeks only to extinguish a remedy, not the right. Statutes of repose, which states intend to be substantive limitations on liability under state law, should not be construed as preempted.

167 See generally Alfred R. Light, Retroactive Revival, supra note 1.
168 Public Works Hearing, supra note 35, at 843-845.
169 Petitioner’s Brief, at 37.
170 Light, Retroactive Revival, supra note 1 at 405-410.
172 Cf. Amicus Brief of the United States, at 27 (contrasting North Carolina’s characterization of statutes of limitation as procedural with statutes of repose, which act as a substantive condition precedent).
“Unlike a limitation provision which merely makes a claim unenforceable, a condition precedent establishes a time period in which suit must be brought in order for the cause of action to be recognized.”173

Many state constitutions categorically and expressly forbid retroactive legislation.174 The United States Supreme Court has stated a presumption against retroactive application comes into play where “retroactive application ‘would infringe upon or deprive a person of a right that had matured or become unconditional.’”175 The “venerable rule of statutory interpretation [is] that statutes affecting substantive rights and liabilities are presumed to have only prospective effect.”176 The passing of a limitations or repose period can create a vested right in the defendant that cannot be removed by subsequent legislative action expanding the limitations or repose period. Thus, legislative attempts to revive barred claims often are invalid under state constitutional provisions prohibiting retroactive legislation. In the absence of these provisions, state supreme courts often have found the revival of barred claims to violate state constitutional due process.

What about the U.S. Constitution? In *Campbell v. Holt*,177 the United States Supreme Court held that state legislative revival of a previously barred claim does not always violate the Due Process Clause of the Fourteenth Amendment. In *Chase Securities Corp. v. Donaldson*,178

174 E.g., Colo. Const. art. II, §11; Mont. Const. art. XIII, §1, cl.3; Ohio Const. art. II, § 28; N.H. Const., pt. 1, art. 23 (“Retrospective laws are highly injurious, oppressive, and unjust. No such laws, therefore, should be made, either for the decision of civil caes, or the punishment of offenses”).
176 Id.
177 115 U.S. 620 (1885).
178 325 U.S. 304, 311-312 (1945),
the Court followed *Campbell* in affirming the Minnesota Supreme Court’s decision permitting its legislature to review a barred claim. In *Chase*, the Court distinguished two earlier decisions, *William Danzer & Co. v. Gulf & Ship Island Railway Co.*,179 and *Davis v Mills*,180 on the grounds that the state court in *Chase* had “so construed the relationship between its limitations acts and the state law creating the asserted liability as to make these cases inapplicable.”181 In *Danzer*, the statute creating a “liability also put a period to its existence.”182 A retroactive extension thus “amount to a taking of property without due process of law.”183 In *Davis*, “the period of limitation [was] prescribed by a different statute,” than that creating the liability, but the Court reached the same result as in *Danzer* because the statute stating the limitations period “was directed to the newly created liability so specifically as to warrant saying that it qualified the right.”184 In contrast, the state court in *Chase* had concluded that the challenged statute did not confer “a new right or...a new liability” and that “appellant had acquired no vested right to immunity from a remedy for its wrong.”185 Refusing to disturb those state court interpretations of the state statute at issue, the Court permitted revival. The Court reaffirmed this analytical approach in regard to the Fifth Amendment and congressional legislation in 1976.186 As I concluded in my 1992 law review article, “the federal Constitution poses no due process bar to

179 268 U.S. 633 (1925)
180 194 U.S. 451 (1904),
181 Donaldson, 325 U.S. at 312 n.8.
182 (Danzer, 268 U.S. at 637.
183 Id
184 Id. (quoting Davis v. Mills, 194 U.S. 451, 454 (1903).
185 Id.
revival where statutes of limitations are held to apply to the remedy only.” Thus, both the Constitutional Doubt canon and the Presumption Against Retroactivity counselled a narrow interpretation of Section 9658 not to apply to statutes of repose – which are substantive. The provision also should not apply to some bars which are called “statutes of limitations.”

**A Remaining Constitutional Doubt**

The *Waldburger* Court found that CERCLA did not preempt statutes of repose based on the statute’s text alone, without resort to the Constitutional Doubt canon argued in the briefs, much less the Presumption Against Retroactivity not mentioned in the briefs. At oral argument, Justice Kagan actually hit on this distinction, saying, “You know, to understand this distinction and then to say look, the statute of repose is really an interference with substantive liability in a way that the statute of limitations is not and that might raise constitutional avoidance issues—that’s – that’s pretty sophisticated stuff.” Despite such clues in the Oral Argument that it might do so, the Court did not resort to the distinction between statutes of limitations that are procedural (affect the remedy) and those that are substantive (affect the liability). The statute’s failure to clearly address statutes of repose in light of the Section 301(e) Report’s treatment of that type of limitation as a separate category was sufficient to determine lack of coverage.

Though the Court recognized the history of Section 301(e) in which the Congress had failed to provide for a federal cause of action and the fact that the Study Group had not recommended federal preemption, it had not occasion to assess the form of preemption in Section 9658. To reach the constitutional questions, the Court must have a case where it determines that

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188 Oral Argument, at 15.
the federal preemption does pertain -- where the statute clearly seeks to institute the “state procedural reform” of state tort law to which the provision is directed.

In my 1992 analysis five years after the enactment of Section 9658, I noted that no court save one had applied the statute to the case before it. Many cases found the statute inapplicable based on narrow constructions of the statute. Others found consideration of the statute unnecessary because of the courts’ determination that state law would reach the same result. Professor Craig’s 2012 analysis of subsequent cases shows that advocates for narrow construction of Section 9658 sometimes failed to raise the constitutional questions on appeal after Printz. The Alabama Supreme Court, in dicta, stated, for example, “the rebirth of federalism in United States v. Lopez may call into question the constitutionality of §9658,” while determining that the Section did not apply in the workplace exposure case before it. In Waldburger, though CTS clearly presented a constitutional challenge to Section 9658 in its briefs, Waldburger sought “to evade the avoidance [of unconstitutionality] canon by alleging forfeiture.” In fact, although CTS’s petition for writ of certiorari evoked the “clear statement” rule of interpretation of Gregory v. Ashcroft, it did not make clear reference to New York v. United States or

190 Light, Retroactive Revival, supra note 1, at 366.
191 Id., at 373-375.
192 Id. at 373.
193 Craig, citing Second Circuit opinion finding the issue not raised and therefore waived on appeal but noting, “We note, however, that the section appears to purport to change state law, and is therefore of questionable constitutional validity.”
194 Becton v. Rhone-Poulenc, 706 So.2d 1134, 1142 ( Ala. 1997).
195 Petitioner’s Reply Brief, at 17; Respondents’ Brief, at 38 (“This argument, which was neither raised nor decided below, has been waived.”).
The constitutional challenge must await a case in which Section 9658 more clearly applies, i.e. a purported preemption of a state statute of limitations (rather than a statute of repose) which state courts consider procedural (affecting the remedy only) rather than substantive (affecting the liability).

There are several unusual aspects of this type of federal preemption of state procedural law which should be mentioned. In *Jinks v. Richland Cnty.* the Supreme Court suggested arguendo that federalism considerations might constrain Congressional attempts to control state judicial procedures, acknowledging that there might be a “category of ‘procedure’ immune from congressional regulation.” In other words, the Supreme Court suggested that Congress may only preempt state substantive law (where it has a constitutional basis to do so, e.g. under the Commerce Power) and might not because of principles of federalism be able to dictate state judicial procedure. CTS quoted Professor Tribe’s testimony before a congressional committee, “For Congress directly to regulate the procedures used by state courts in adjudicating state-law tort claims. . . would raise serious questions under the Tenth Amendment and principles of federalism.” The *Jinks* Court quoted a law review article indicating that “’potential constitutional questions’ arise when Congress ‘attempts to prescribe directly the state court procedures to be followed in product liability cases.’” Upholding the constitutional power of Congress under Article III to extend a state statute of limitations for the time period a case had

200 Id. at 465.
been pending in federal court before dismissal, the Court did not hold “that Congress has unlimited power to regulate practice and procedure in state courts.” 203 The suggestion in Jinks instead is that principles of federalism may make state procedure less subject to federal preemption than substantive state law. 204 Professor Bellia, whose article the Supreme Court cites in Jinks, argues, “Congress has no authority to regulate state court procedures in state law because ‘procedural law’ derives exclusively from state authority.” 205 He also follows the lead of Professor Parmet to attack on normative grounds congressional preemption of state procedures in the context of a state right of action as “stealth preemption.” 206

“Even” with respect to preemption of state procedures, Section 9658 offends principles of federalism and should be unconstitutional. There is an important distinction here. On the one side, there is the federal courts’ proper use of state law and policy to “fill in the details” of a federal statute as a matter of federal common law when applying a federal statute in discrete contexts. 207 On the other side, there are congressional commands to state courts and state legislatures to create principles of state law to complete a federal statute that Congress was unable or unwilling to complete itself. 208 While Congress may command a federal agency or the federal courts to

203 Id.
205 Id. at 972.
206 Id. at 997 (citing Wendy E. Parmet, Stealth Preemption: The Proposed Federalization of State Court Procedures, 44 Vill. L. Rev. 1, 65 (1999).
208 Whether the Supreme Court shares my view about this distinction is unclear. In Jinks v Richland Cnty., 538 U.S. 456, 464-65 (2003), the Court endorsed a provision of federal law extending state statutes of limitations in state court to the reflect the period of time the claim had been pending in federal court prior to the federal court’s dismissal of the claim for lack of jurisdiction. See 28 U.S.C. §1367(d). Strangely, Scalia suggests arguendo that the
develop federal regulations to flesh out federal statutory policies, its commands to the states (and in particular to state courts) to do so offends the “double security” intended by federalism and separation of powers doctrines. It is the grafting of federal policy, whether that is viewed as procedural or substantive, into state law that is offensive. If the Congress wishes to preempt preemption is valid because that provision preempts substantive law rather than providing federal procedures for state courts to use. The Respondents in CTS relied on this distinction to argue “even where state-law limitations periods are treated as substantive law, they are subject to preemption by federal law.” Respondents Brief, at 22. Jinks may imply that “the Court would have no federalism objection to a congressional dictation of the content of some (but not all) product liability law while declining to burden the federal courts with adjudications under the Act.” Light, Reverse-Erie, supra note 1, at 604; Jinks, however, turns the law on its head in an “upside down” federalism in which Congress can preempt substantive but not procedural state law. Cf. Felder v. Casey, 487 U.S. 131, 153 (1988) (O’Connor, J., dissenting). This “reverse-Erie” theory of constitutional limits on Congress’s powers hinted at in Jinks seems problematic.” Light “Reverse-Erie”, at 604. As noted in the text, I think the type of partial preemption attempted in Section 9658 offends the federalism policies behind the etiquette of federalism line of cases, whether that preemption is characterized as “procedural” or “substantive.” See Light, “Opt-Out” Preemption, supra note 1, at 63-64. In CTS, however, the matter is not presented squarely since it was a diversity case being decided in the first instance by a federal court. Had the plaintiff chosen to sue in state court, defendant probably would have been able to remove because the state’s statute of repose appears to have been part of the plaintiff’s claim rather than an affirmative defense. Cf. Louisville & N.R. Co. v. Mottley, 211 U.S. 149 (1908) (no removal where federal question only part of affirmative defense). The best procedural context in which to present the constitutional question would be one here no federal jurisdiction to resolve the question of §9658’s effect is available because of the unavailability of either diversity or federal question jurisdiction. It would be in that procedural context that Congress’s preemption would be most likely to confuse the lines of political accountability – requiring state courts to adjudicate claims that the federal courts lacked jurisdiction to resolve in the first instance.

A congressional statute making a “small surgical change” in a state’s tort law, e.g. a stealthy preemption establishing a “federally-required commencement date,” leaves considerable room for state legislative mischief. For example, a state might, as Justice Sotomayor suggested in the CTS oral argument, simply eliminate environmental claims altogether. Oral Argument Transcript, at 40-41. Or under the terms of Section 9658 a state legislature might adopt an extremely short limitations period (say three months), as Justice Scalia suggested. Oral Argument Transcript, at 49; see 42 U.S.C. §9658(a)(2). Or perhaps the legislature could achieve the same ends through evidentiary rules (no evidence admissible where a transaction occurred more than ten years prior to suit) or remedies (only nominal damages for claims arising out of actions more than ten years prior to suit) or subject matter jurisdiction (no claim unless EPA has completed removal or remedial action at the site – cf. 42 U.S.C. §9613(h)(4)) or personal jurisdiction (no cause of action over persons not transacting business or causing tortious injury in the state within ten years of suit) or substantive tort law (no nuisance actions arising out of acts prior to 1986) or even state constitutional law (no revival of claims barred under state constitutional due process clause). In short, it is a lot easier for Congress to bar state law claims than to mandate that claims “arising under State law” be heard. In this sense, while federal negation of state substantive law is the inevitable implication of the Supremacy Clause, “because CERCLA does not create a federal cause of action for the kinds of claims subject to §9658, its interpretation cannot implicate Congress’s separate authority to legislate federal-law claims, or proper procedures for the resolution of those claims..”
state law, it must create the federal cause of action which supplants state law. 211 If it does not or cannot do so, it should leave the details of state tort law, such as the measure of damages, the rights of contribution, and the relevant statute of limitations, to the sovereign responsible for administering the right of action. 212

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211 See supra notes 16-17 and accompanying text.
212 Professor Bellia neatly lays out this argument in the article which Jinks cites, “As a matter of prudence, there are good reasons why each jurisdiction should control the procedures by which the rights of action arising under its laws are enforced. Codes of civil procedure hang together as a whole. Nullifying one rule of procedure has consequences, unintended and unpredictable, on the operation of other rules. Moreover, codes of civil procedure are designed to facilitate enforcement of a particular body of substantive law. Rights of action are created against a background of procedural rules. Indeed, certain procedural rules can be so intertwined with a right of action that they form part of the substance of the right itself. If Congress nullifies a procedural rule that happens in one state to be part of the substance of a right of action, a new right of action results that no governing authority intended. When one jurisdiction dictates procedural rules for another (or for fifty others), inadvertent laws may result that . . . are inconsistent with the normative values of federalism.” Bellia, supra note 204, at 993.