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A Waste of Time: Harmonizing the Comprehensive Environmental Response, Compensation, and Liability Act Under the Lens of Federalism

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**A Waste of Time: Harmonizing the Comprehensive
Environmental Response, Compensation, and Liability Act
Under the Lens of Federalism**

CTS Corp. v. Waldburger, 134 S. Ct. 2175, 2180 (2014)

Stephen M. Cady

I. INTRODUCTION

Section 9658 of the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”) gives the federal government the power to preempt state law statutes of limitation in certain tort and property actions.¹ In recent years, § 9658 has become the subject of heated debate regarding whether it also extends federal preemption to state law statutes of repose.² This question was addressed in *CTS Corp. v. Waldburger*, where the United States Supreme Court held that § 9658 does not preempt statutes of repose.³

However, this issue has largely escaped scrutiny from a federalist perspective.⁴ Instead, courts have primarily focused on § 9658 as a matter of statutory interpretation.⁵ This is somewhat surprising given that § 9658 has the potential to dramatically alter the operation of state tort and property law.⁶ This note analyzes the legal implications of the *CTS Corp.* decision and how it affects important concerns of state sovereignty in the United States’ federalist system.

¹ 42 U.S.C § 9658(a)(1) (2012).

² Jesse Kyle, *Waldburger v. CTS Corporation: Ensuring the Plaintiff’s Day in Court As a Matter of Principle*, 73 MD. L. REV. ENDNOTES 66, 68 (2014).

³ *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2180 (2014).

⁴ Robin Kundis Craig, *Federalism Challenges to CERCLA: An Overview*, 41 SW. L. REV. 617, 621 (2012).

⁵ Kyle, *supra* note 2, at 76.

⁶ Craig, *supra* note 4, at 642.

II. LEGAL BACKGROUND

Congress passed CERCLA in 1980 to combat the increasing danger of toxic waste dumping throughout the United States.⁷ Even though CERCLA is specifically aimed at promoting efficient and equitable responses to the fallout from hazardous waste,⁸ courts have criticized its lack of precision and clarity.⁹ CERCLA's purpose is to "establish a program for appropriate environmental response action to protect public health and the environment from the dangers posed by [inactive hazardous waste] sites,"¹⁰ as well as to shift the financial burden of waste cleanup to the parties responsible for the contamination.¹¹ However, it has been disputed exactly how much power CERCLA has over existing state laws addressing the same problems.¹² Specifically, the question is: to what extent does the federally enacted CERCLA preempt state statutes of limitations and repose?¹³

Although statutes of limitations and repose are both legal instruments that limit a cause of action by imposing a time constraint,¹⁴ there are several key differences.¹⁵ While a statute of limitation imposes a time constraint on the time before which a plaintiff may bring a cause of action in court, a statute of repose limits the time during which a defendant may be found liable for a plaintiff's injuries.¹⁶ A limitations period begins to run once a

⁷ *Waldburger v. CTS Corp.*, 734 F.3d 434, 438 (4th Cir. 2013), *rev'd*, 134 S. Ct. 2175 (2014).

⁸ *Id.*

⁹ *Id.*; *See State of New York v. Shore Realty Corp.*, 759 F. 2d. 1032, 1039-40 (2d Cir. 1985); *Artesian Water Co. v. New Castle Cnty.*, 851 F.2d. 643, 648 (3rd Cir. 1988)

¹⁰ H.R. Rep. No. 96-1016 (1980).

¹¹ *Metropolitan Water Reclamation Dist. of Greater Chicago v. North American Galvanizing & Coatings, Inc.*, 473 F. 3d. 824 (7th Cir. 2007)

¹² *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2182 (2014); *compare, e.g., Burlington N. & S.F.R. Co. v. Poole Chemical Co.*, 419 F.3d 355, 362 (5th Cir. 2005) *and Clark County v. Sioux Equipment Corp.*, 753 N.W. 2d 406, 417 (S.D. 2008) *with McDonald v. Sun Oil Co.*, 548 F.3d 774, 779 (9th Cir. 2008), *abrogated by CTS Corp. v. Waldburger*, 134 S. Ct. 2175 (2014).

¹³ *Id.*

¹⁴ Andrew A. Ferrer, *Excuses, Excuses: The Application of Statutes of Repose to Environmentally-Related Injuries*, 33 B.C. ENVTL. AFF. L. REV. 345, 348 (2006).

¹⁵ *Id.*

¹⁶ *Id.*

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plaintiff's cause of action accrues.¹⁷ On the other hand, a repose period begins after the defendant's last act or omission.¹⁸ Even if a plaintiff files an action within a limitations period, the claim may still be considered extinguished if it is outside the repose period.¹⁹

The CERCLA provision in question, § 9658, originated as an amendment. It was enacted after a congressional report was commissioned to “determine the adequacy of existing common law and statutory remedies in providing legal redress for harm . . . caused by the release of hazardous substances into the environment.”²⁰ The resulting report proposed certain changes to state tort law that would allow tort actions resulting from hazardous waste dumping to start accruing after a plaintiff *discovers or should have reasonably discovered* the harm—the “discovery rule”—in order to address the type of latent harm unique to environmental injuries.²¹ Congress' reasoning for this recommendation stemmed from the fact that injuries caused by hazardous waste dumping often have long latency periods of twenty years or more, time during which harm may not be ascertainable to the victim.²² Because of this, Congress reasoned, normal state statutes of limitations and repose often fully run before a plaintiff becomes aware of his or her injury, barring them from recovery.²³

After recommending that states change their statutes of limitations and repose to reflect this recommendation, Congress instead decided to act at the federal level and amend CERCLA to preempt these state statutes in favor of the “discovery” rule in situations where the state limitations period begins to run earlier than the federal limitations period.²⁴

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 349.

²⁰ 42 U.S.C. § 9651(e)(1) (2012).

²¹ *Waldburger v. CTS Corp.*, 723 F.3d 434, 439 (4th Cir. 2013), *rev'd*, 134 S. Ct. 2175 (2014); Superfund Section 301(e) Study Grp., 97th Cong., Injuries and Damages from Hazardous Wastes--Analysis and Improvement of Legal Remedies, S. Doc. No. 97-571 (Comm. Print 1982).

²² *Id.*

²³ *Id.*

²⁴ *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2181 (2014).

However, where the congressional report specifically recommended that states change both their statutes of limitations and, the much stricter, statutes of repose to include the “discovery rule,” § 9658 only mentions statutes of limitations within the actual text.²⁵ As a result, this inconsistency has created confusion in that courts, where they are conflicted on how to interpret § 9658 and whether it was meant to include both statutes of limitations and statutes of repose.²⁶ Prior to the *CTS Corp.* decision, the highest federal courts to discuss this issue were the Fifth²⁷ and Ninth²⁸ Circuits.

In *Burlington Northern & Santa Fe Ry. Co. v. Poole Chemical Co.*, the Fifth Circuit ruled that § 9658 could not be interpreted to include statutes of repose.²⁹ In that case, a Texas railroad sued an owner of chemical storage tanks whose tanks ruptured and spilled all over one of the railroad’s right-of-ways, prompting an expensive cleanup.³⁰ In response, the storage tank owner filed a third-party complaint against the manufacturer of the tank, alleging that the tank had been sold to the owner in a defective condition.³¹ Because the relevant state statute of repose had already run, barring the owner from recovering from the manufacturer, the case turned on whether § 9658 of CERCLA was created with the purpose of including statutes of repose.³² The court reasoned that the plain language of the provision, and “the fundamental principle of statutory interpretation—common sense” made it clear that § 9658 did not include statutes of repose.³³

²⁵ *Id.* at 2185.

²⁶ Compare, e.g., *Burlington N. & S.F.R. Co. v. Poole Chemical Co.*, 419 F.3d 355, 362 (5th Cir. 2005) and *Clark County v. Sioux Equipment Corp.*, 753 N.W. 2d 406, 417 (S.D. 2008) with *McDonald v. Sun Oil Co.*, 548 F.3d 774, 779 (9th Cir. 2008), *abrogated by* *CTS Corp. v. Waldburger*, 134 S. Ct. 2175 (2014).

²⁷ *Burlington N. & Santa Fe Ry. Co. v. Poole Chemical Co.*, 419 F. 3d 355 (5th Cir. 2005).

²⁸ *McDonald v. Sun Oil Co.*, 548 F.3d 774 (9th Cir. 2008), *abrogated by* *CTS Corp. v. Waldburger*, 134 S. Ct. 2175 (2014).

²⁹ *Burlington*, 419 F.3d at 362.

³⁰ *Id.* at 358.

³¹ *Id.*

³² *Id.* at 361-62.

³³ *Id.* at 362, 364.

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In *McDonald v. Sun Oil Co.*, the Ninth Circuit disagreed with the Fifth Circuit’s reasoning.³⁴ Instead, the Ninth Circuit held that the term “statute of limitations” was historically ambiguous and that the provision’s legislative history was proof that § 9658 was meant to include statutes of repose.³⁵ In that case, property owners sued a mining company for negligence, contribution, breach of contract, and fraud in relation to the sale of property containing contaminated waste.³⁶ In holding that § 9658 included statutes of repose, the court looked to the history of the terms, which it decided were used interchangeably at the time of the provision’s enactment, creating confusion as to precisely what the term “statute of limitations” meant.³⁷ Additionally, the court cited Congressional Report 301(e) as evincing Congress’ primary purpose in passing the amendment as a remedy for situations in which a plaintiff may lose a cause of action before becoming aware of the harm.³⁸ Establishing this purpose, it is only proper that § 9658 would include statutes of repose as well.³⁹

III. FACTS AND HOLDING

Respondents (“Landowners”) are twenty-five landowners occupying land previously owned and used by Petitioner, CTS Corporation (“CTS”), to operate an electronics plant.⁴⁰ While under the ownership of CTS from 1959 to 1985, the chemicals trichloroethylene (“TCE”) and cis-1, 2-dichloroethane were stored on the land as part of CTS’ manufacturing and disposing of electronics.⁴¹ Both of these chemicals have carcinogenic effects.⁴² After the property was sold in 1987, the landowners purchased it in the instant action.⁴³ Upon learning from the Environmental Protection Agency (“EPA”) that the well water was contaminated with these chemicals in 2009, the landowners brought suit in 2011—twenty-four years after CTS

³⁴ *McDonald v. Sun Oil Co.*, 548 F. 3d 774, 779 (9th Cir. 2008), *abrogated by* CTS Corp. v. Waldburger, 134 S. Ct. 2175, 2181 (2014).

³⁵ *Id.*

³⁶ *Id.* at 777.

³⁷ *Id.* at 781.

³⁸ *Id.* at 783.

³⁹ *Id.* at 779.

⁴⁰ *CTS Corp.*, 134 S. Ct. at 2181, *rev’d*, 134 S. Ct. 2175 (2014).

⁴¹ *Id.*

⁴² *Waldburger*, 723 F.3d at 439 (4th Cir. 2013), *rev’d*, 134 S. Ct. 2175 (2014).

⁴³ *CTS Corp.*, 134 S. Ct. at 2181.

sold the property—alleging damages sustained from the chemical storage on the land.⁴⁴

The original suit, filed in the United States District Court for the Western District of North Carolina, was a state law nuisance action brought against CTS seeking (1) reclamation of “toxic chemicals contaminants” belonging to CTS; (2) “remediation of the environmental harm caused by these contaminants;” and (3) monetary damages to compensate for the harm and losses the landowners suffered because of the chemical storage.⁴⁵ CTS moved to dismiss the claim, citing North Carolina’s statute of repose for real property actions, which prevents individuals from bringing a tort claim against a defendant more than ten years after the “last act or omission of the defendant giving rise to the cause of action.”⁴⁶ The landowners countered that dismissal was improper under § 9658 of CERCLA.⁴⁷

The trial court granted CTS’s motion, holding that § 9658 did not apply, as it only mentions statutes of limitations, not statutes of repose.⁴⁸ Because the last culpable act of CTS, the defendant, occurred in 1987 when the property was sold, the trial court held that the North Carolina statute of repose barred the claim.⁴⁹

The landowners appealed the decision to the Fourth Circuit Court of Appeals, which reversed and remanded the decision of the trial court in favor of the landowners.⁵⁰ The Fourth Circuit reached its decision by finding that although the trial court’s reading of the provision was not necessarily wrong, § 9658 was ambiguous at best, and capable of multiple interpretations.⁵¹ Because of this, the court interpreted the meaning that most precisely effectuated Congress’ intent when it created the provision.⁵² To determine

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*; see N.C. Gen. Stat. § 1-52(16) (2014).

⁴⁷ *Waldburger*, 723 F.3d at 441 (4th Cir. 2013), *rev’d*, 134 S. Ct. 2175 (2014).

⁴⁸ *Id.*

⁴⁹ *CTS Corp.*, 134 S. Ct. at 2181.

⁵⁰ *Id.*

⁵¹ *Waldburger*, 723 F.3d at 441.

⁵² *Id.* at 444.

this congressional intent, the court looked “beyond the language of the provision to the legislative history for guidance.”⁵³

The Fourth Circuit was unconvinced that the mere omission of the term “statute of repose” was dispositive of Congress’ desire to leave such situations out of § 9658. In support, the court cited scholars’ and courts’ historical tendencies to use the phrases interchangeably.⁵⁴ Additionally, the court found that the trial court’s interpretation of the provision “thwarted Congress’ unmistakable goal of removing barriers to relief from toxic wreckage.”⁵⁵ Thus, the Fourth Circuit reversed the trial court’s decision and remanded for litigation.⁵⁶

The United States Supreme Court granted certiorari and reversed the decision of the Fourth Circuit, holding that the lower appellate court’s interpretation of the provision was both unfounded and against the natural interpretation of the text of § 9658.⁵⁷ In its opinion, the Court held that although it was true that there was historical ambiguity concerning the use of the term “statute of limitation,” it was unnecessary to reach for these interpretations because of the existence of a congressional report, which was the basis for the addition of § 9658 in the first place.⁵⁸

The Court considered the report, which distinguished and discussed both statutes of limitation and statutes of repose, as clear evidence that Congress was aware of the distinction between the terms and chose to leave statutes of repose out of § 9658.⁵⁹ Additionally, the Court held that other key features of the provision’s textual language, including singular usage of the term “statute” throughout, as apparent applicability to only pre-existing civil actions. Tolling is further proof that § 9658 does not cover state statutes of repose.⁶⁰

⁵³ *Id.* at 442.

⁵⁴ *Id.* at 443.

⁵⁵ *Id.* at 444.

⁵⁶ *Id.* at 445.

⁵⁷ *CTS Corp.*, 134 S. Ct. at 2180.

⁵⁸ *Id.* at 2186.

⁵⁹ *Id.*

⁶⁰ *Id.* at 2186-88.

The Court remained unconvinced by the Fourth Circuit's argument that § 9658 should impliedly preempt statutes of repose because of the obstacle they pose to the execution of CERCLA's goals.⁶¹ Because of the number of other important areas of state law that remain unattended to by CERCLA, one more area—statutes of repose—is an unacceptable barrier to CERCLA's goals and purposes.⁶² Lastly, the Court held that where a preemptory interpretation of a federal statute over state law can be avoided, it should be for purposes of federalism.⁶³

IV. INSTANT DECISION

The United States Supreme Court granted certiorari after being originally brought in the United States District Court for the Western District of North Carolina and appealing to the United States Court of Appeals for the Fourth Circuit.⁶⁴ The instant Court reviewed the case to determine whether a grant of a motion to dismiss was proper, a decision that hinged on whether § 9658 of CERCLA was written to preempt state statutes of repose as well as statutes of limitations.⁶⁵

In analyzing this issue, the Court first established that state statutes of limitations are clearly preempted by § 9658.⁶⁶ Section 9658 names statutes of limitations as specifically subject to this preemption.⁶⁷ However, as the Court noted, § 9658 does not say anything about state statutes of repose.⁶⁸ While the Fourth Circuit held that statutes of repose could impliedly be read into the federal statute,⁶⁹ the Court was unconvinced for several reasons.⁷⁰

First, the Court denounced the Fourth Circuit's decision to interpret this statute broadly and liberally, instead of based solely on the provision's

⁶¹ *Id.* at 2188.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 2178.

⁶⁵ *Id.*

⁶⁶ *Id.* at 2180; *see* 42 U.S.C § 9658(b)(4)(A) (2012).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *CTS Corp.*, 134 S. Ct. at 2180.

⁷⁰ *Id.* at 2179.

text and structure.⁷¹ While the lower court thought that a liberal interpretation was appropriate because of the remedial purpose of the federal statute, the Court held that this logic was faulty, as almost any statute could be described as remedial.⁷² No legislation, it stated, should be pursued at any cost.⁷³

Next, the Court conceded that omitting the phrase “statute of repose” was not dispositive of Congress’ intent to leave it out of § 9658, given the informal way that the phrase “statute of limitation” was used in the past.⁷⁴ However, the Court noted that the Fourth Circuit’s reliance on historical ambiguity of the distinction between statutes of limitation and statutes of repose was misguided.⁷⁵ Instead, the Fourth Circuit should have looked to the 1982 congressional study group report, which spurned the creation of § 9658, for guidance on this issue.⁷⁶ That report was instructive in interpreting the federal statute because, while it does distinguish and discuss both statutes of limitation and statutes of repose, the actual statute only discusses statutes of limitation.⁷⁷ Therefore, the Court found that there was a strong argument that Congress chose specifically to omit statutes of repose from the federal statute.⁷⁸

Even though this fact alone was not dispositive of an unambiguous reading of the provision, the Court went on to note that omitting the phrase “statutes of repose,” together with other key textual features of § 9658, made it clear that the federal statute was not meant to include statutes of repose.⁷⁹

Specifically, the text of the provision includes language describing the covered period in the singular, which seems to imply that only statutes of limitation, and not both statutes of limitations and statutes of repose are meant to be included.⁸⁰ Additionally, the Court noted that § 9658 speaks

⁷¹ *Id.* at 2185.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 2186.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 2186-87.

only of when “cause of action” may be brought.⁸¹ This is important because statutes of repose are not related to the accrual of causes of action, but rather serve to prohibit actions from commencing.⁸² Thus, the federal statute presupposes that a cause of action already exists, making statutes of limitation the only relevant time limits considered in § 9658.⁸³

The last textual feature of the federal statute that the Court found controlling was the discussion of equitable tolling for minor or incompetent plaintiffs.⁸⁴ Because a critical distinction between statutes of limitations and statutes of repose is the inability of statutes of repose to be delayed by estoppel or tolling, the Court found this feature to be an “altogether unambiguous textual indication that § 9658 does not preempt statutes of repose.”⁸⁵

While the Fourth Circuit argued that an implied inclusion of statutes of repose into the federal statute was necessary to advance CERCLA’s purpose and goals, the instant Court disagreed.⁸⁶ The Fourth Circuit held that the purpose of CERCLA was to help plaintiffs bring tort actions for harm caused by toxic contaminants and, because statutes of repose create an unacceptable obstacle to the accomplishment of that goal, the federal statute must impliedly preempt them as well.⁸⁷ However, CERCLA actually does not provide a general cause of action for those harmed by toxic contaminants, but rather leaves the states’ judgment about causes of action, scope of liability, burdens of proof, rules of evidence, and other important rules governing civil actions untouched.⁸⁸ Since CERCLA leaves many areas of state law “untouched,” the Court held that the Fourth Circuit failed to show why statutes of repose were any different or an “especially egregious” omission.⁸⁹

⁸¹ *Id.* at 2187.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* (quoting 42 U.S.C. § 9658(b)(4)(B) (2012)).

⁸⁵ *Id.* at 2187-88 (quoting Charles Alan Wright & Arthur R. Miller, 4 FEDERAL PRACTICE AND PROCEDURE § 1056 (3d ed. 2015)).

⁸⁶ *Id.* at 2188.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

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Lastly, the Court reasoned that in light of the importance to preserve states' powers, where multiple interpretations of a federal statute may be plausibly found, the courts will ordinarily accept the reading that disfavors federal preemption of state law.⁹⁰ This approach is "consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety."⁹¹

For the aforementioned reasons, the Supreme Court reversed the decision of the Court of Appeals for the Fourth Circuit.⁹²

V. COMMENT

While the immediate impact of the *CTS Corp.* decision is minimal, the potential for large-scale implications remains.⁹³ It is undisputed that allowing potential defendants, who would otherwise be liable for tortuously creating environmental hazards, to escape liability simply because the external manifestation of their harm takes longer to process seems unfair.⁹⁴ Additionally, providing potential defendants a loophole to avoid liability could incentivize them to plan and execute environmental duties with less caution knowing that few, if any, claims will be actionable against them.⁹⁵

Perhaps realizing these harmful implications, following the Supreme Court's decree that § 9658 did not preempt state statutes of repose, North Carolina modified its statute of repose to exempt claims relating to groundwater contamination, thereby saving future plaintiffs similarly situated to those in *CTS Corp.* from being barred by the time limitation.⁹⁶ This, coupled with the fact that only four states have enacted generally applicable statutes of repose,⁹⁷ indicates that the *CTS Corp.* decision has little to no

⁹⁰ *Id.*

⁹¹ *Id.* (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)).

⁹² *Id.* at 2189.

⁹³ Justin Pidot & Chelsea Thomas, *Supreme Court Rules CERCLA Does Not Preempt State Statutes of Repose*, 46 No. 1 ABA TRENDS 9, 12 (2014).

⁹⁴ Andrew A. Ferrer, Note, *Excuses, Excuses: The Application of Statutes of Repose to Environmentally-Related Injuries*, 33 B.C. ENVTL. AFF. L. REV. 345, 371 (2006).

⁹⁵ *Id.* at 372.

⁹⁶ Pidot & Thomas, *supra* note 93, at 12.

⁹⁷ *Id.* at 10.

substantial legal implications. However, some contend that should more states choose to adopt statutes of repose, they could easily insulate commercial and industrial interests from tort liability, where injuries may not be ascertainable for long periods of time, as was the case for the plaintiffs in *CTS Corp.*⁹⁸

Whether this concern has merit and whether it outweighs important policy issues of state sovereignty and federalism is up for debate.⁹⁹ At the very least, there is an implied presumption against federal preemption of state law meant to ensure that the delicate balance between federal and state authority will not be unnecessarily disturbed.¹⁰⁰ This is true especially for matters that are traditionally subject to state regulation, such as the determination of tort rights and immunities—an area encompassed by statutes of repose.¹⁰¹ Thus, where the text of a preemption clause is ambiguous and susceptible to more than one reading, this presumption will guide courts to accept the meaning disfavoring preemption.¹⁰²

Those who believe that § 9658 should be read to include statutes of repose point out that an important reason for the presumption against preemption is to ward against federal law preempting state law and to bar recourse to state liability regimes without placing appropriate federal remedies in their place.¹⁰³ In light of these concerns, proponents for a repose-including interpretation argue that including statutes of repose in § 9658 does not actually detract from state’s legal rights, but instead expands them so that plaintiffs may continue to bring substantive state law claims.¹⁰⁴ In doing so, § 9658 does not preempt or change state tort actions, they argue, but instead creates national uniformity of commencement dates for tort actions within its scope.¹⁰⁵

⁹⁸ *Id.* at 12.

⁹⁹ Compare Kyle, *supra* note 2, at 68 with Craig, *supra* note 4, at 621 and Adam Bain, *Determining the Preemptive Effect of Federal Law on State Statutes of Repose*, 43 U. BALT. L. REV. 119, 162 (2014).

¹⁰⁰ Bain, *supra* note 99, at 144.

¹⁰¹ *Id.* at 162.

¹⁰² *Id.* at 146-47.

¹⁰³ Kyle, *supra* note 2, at 92.

¹⁰⁴ *Id.* at 93.

¹⁰⁵ *Id.*

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At first, courts were hesitant to accept the statutes of limitations preemption in § 9658 as proper. Now, they seem to have slowly agreed that it is not a constitutional overreach.¹⁰⁶ For example, a handful of cases have addressed whether § 9658 violates the Tenth Amendment by requiring states to permit claims that the state law otherwise bars.¹⁰⁷ One of the earliest cases found support for the proposition that § 9658 was constitutional because the Tenth Amendment does not include an affirmative restriction on the constitutional authority of Congress to legislate under powers otherwise conferred by the Commerce Clause.¹⁰⁸ And upon objections that the provision exceeded constitutional authority under the Commerce Clause, courts have held that § 9658 is an integral part of CERCLA, which itself is well-connected to interstate commerce.¹⁰⁹

Despite being found constitutional, § 9658 has been consistently interpreted very narrowly.¹¹⁰ Originally, it was interpreted as only applying to situations in which a state cause of action existed in conjunction with a CERCLA cause of action.¹¹¹ This strict standard of applicability was loosened by a Seventh Circuit case, which ruled that although § 9658 terms of art cannot be interpreted independently, an accompanying CERCLA claim was not necessary for § 9658 to apply.¹¹²

Additionally, courts have been hesitant to extend the federal preemption's reach beyond what is absolutely required by the provision.¹¹³ For example, in 1997, the Alabama Supreme Court concluded that § 9658 did not apply to workplace exposures to hazardous substances because the "release into the environment" requirement of § 9658 did not cover a release into the workplace.¹¹⁴ Furthermore, that court noted that the provision's ability to retroactively revive state law based claims created serious

¹⁰⁶ *Id.* at 74.

¹⁰⁷ *Id.* at 75.

¹⁰⁸ *Bolin v. Cessna Aircraft Co.* 759 F. Supp. 692, 705 (D. Kan. 1991) (citing *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, (1985)).

¹⁰⁹ *Freier v. Westinghouse Elec. Corp.*, 303 F.3d 176, 202 (2nd Cir. 2007).

¹¹⁰ *Craig*, *supra* note 4, at 637.

¹¹¹ *Knox v. AC & S, Inc.*, 690 F. Supp 752, 758 (S.D. Ind. 1988).

¹¹² *Covalt v. Carey Canada, Inc.*, 860 F.2d 1434, 1436-37 (7th Cir. 1988).

¹¹³ *Craig*, *supra* note 4, at 637.

¹¹⁴ *Becton v. Rhone Poulenc, Inc.*, 706 So. 2d 1134, 1141 (Ala. 1997).

federalism concerns.¹¹⁵ Elsewhere, the Florida Second District Court of Appeals ruled that the personal injury language of § 9658 does not encompass wrongful death actions.¹¹⁶ This continued resistance seems to “create[], at the very least, a perception of federal overreaching into and commandeering of state law.”¹¹⁷ Yet, despite this resistance, it is now generally accepted that § 9658 does in fact preempt state statutes of limitations, and does so constitutionally.¹¹⁸

Somewhat remarkably, only one Supreme Court case explicitly addressed CERCLA’s possible federalism implications, while no Supreme Court cases have addressed § 9658 specifically.¹¹⁹ This is particularly interesting given that the courts have not been shy about addressing such concerns in connection with other federal environmental statutes that impose liability on land use.¹²⁰

One potential reason for this disjunction is that these other environmental statutes—specifically the Clean Water Act and the Endangered Species Act—directly prohibit certain activities on private property, whereas CERCLA is simply a liability scheme (although it may impose substantial liability on these activities if they contaminate the environment).¹²¹ Another reason is that CERCLA provides federal money to clean up properties, instead of using state tax dollars.¹²² Yet another explanation is that CERCLA is not perceived as interfering with land use, but rather as solving the problem of the increasing, and increasingly costly, amount of pollution resulting from the growth of the chemical industry in the United States.¹²³

¹¹⁵ *Id.* at 1142.

¹¹⁶ *Lee v. CSX Transp., Inc.*, 958 So. 2d 578, 583-84 (Fla. Dist. Ct. App. 2007).

¹¹⁷ *Craig*, *supra* note 4, at 638; *But see* *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 2 (1989).

¹¹⁸ *See, e.g.*, *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2180 (2014); *Rockwell Int’l Corp. v. Wilhite*, 143 S.W.3d 604, 617 (Ky. Ct. App. 2003); *Tower Asphalt, Inc. v. Determan Welding & Tank Serv., Inc.* 530 N.W.2d 872, 876 (Minn. Ct. App. 1995); *Soo Line R.R. Co. v. B.J. Carney & Co.*, 797 F. Supp. 1472, 1487 (D. Minn. 1992).

¹¹⁹ *Craig*, *supra* note 4, at 618.

¹²⁰ *Id.* at 641.

¹²¹ *Id.* at 641-42.

¹²² *Id.* at 642.

¹²³ *Id.*

These explanations might explain why CERCLA, as a whole, has survived the few constitutional challenges lobbied against it. But, it fails to explain why § 9658, which can drastically change the way state tort and property law is applied, has been so passively accepted.¹²⁴ Moreover, some argue that § 9658's imposition on state law may raise serious due process and equal protection challenges.¹²⁵

Therefore, if § 9658's preemption of state statutes of limitation has been so passively accepted as proper under the lens of federalism, why are statutes of repose so different? One of the main reasons the courts seem to distinguish between the two limitation periods is because statutes of repose deal with substantive rights, whereas statutes of limitation are procedural rights.¹²⁶ Thus, where a claimant's failure to take some action within a statutory limitation period can provide an affirmative defense to a cause of action, a claimant's failure to take some action within a statutory repose period will entirely extinguish a cause of action.¹²⁷ Because statutes of repose create a substantive right for putative defendants to be free from liability after a certain period of time, they are significantly and legally distinguishable from statutes of limitations and deserve separate and unique scrutiny.¹²⁸

This difference, together with the fact that § 9658 does not expressly mention preempting statutes of repose, could lead to serious breaches of state sovereignty through the creation of state substantive rights if statutes of repose are read into this regulation.¹²⁹ However, a presumption against preemption can be sufficiently rebutted if there is evidence of congressional intent that runs contrary to the presumption.¹³⁰ Evidence of congressional

¹²⁴ *Id.*

¹²⁵ *Id.* at 643; Alfred R. Light, *New Federalism, Old Due Process, and Retroactive Revival: Constitutional Problems with CERCLA's Amendment of State Law*, 40 U. KAN. L. REV. 365 (1992).

¹²⁶ Bain, *supra* note 98, at 125.

¹²⁷ *Id.*

¹²⁸ *Id.* at 131-32.

¹²⁹ *Id.* at 146-47.

¹³⁰ *Id.* at 150.

intent to include statutes of repose in § 9658 would, at the very least, favor a presumption that it does not violate federalist concerns.¹³¹

To this end, proponents of a repose-including interpretation point out that the language of § 9658 expressly states that the provision is meant to preempt state law if “the applicable limitations period for such action (as specified in the statute of limitations or *under common law*) provides a commencement date which is earlier than the federally required commencement date.”¹³² Since common law rules of repose exist in certain states, the result of allowing states that have these common law rules of repose, as opposed to those that are codified in the statutes, to be preempted—despite any meaningful distinction between the two—creates an illogical and inconsistent reading of § 9658.¹³³

However, this argument inflates the commonality of common law rules of repose. As discussed earlier, while there are only four states with generally applicable statutes of repose, Alabama appears to be the only state with a generally applicable rule of repose not codified in a statute and still in use.¹³⁴

Moreover, it is likely that any reference to “the common law” in § 9658 was included to incorporate common law principles that could impact the commencement date of the *limitations* period, taking into consideration the fact that some states have judicially interpreted discovery rules.¹³⁵ This interpretation is consistent with another area of CERCLA where “the common law” shows up: the savings clause.¹³⁶ The savings clause provision states that “nothing in this chapter shall affect or modify in any way the obligations or liabilities of any person . . . under State law, including common law.”¹³⁷ Thus, under a plain reading of the savings clause, CERCLA intends only to affect state procedural rights, while preserving state

¹³¹ *Id.* at 150-51.

¹³² 42 U.S.C. § 9658(a)(1) (2012) (emphasis added).

¹³³ Bain, *supra* note 98, at 150-51.

¹³⁴ Moore v. Walter Coke, Inc., No. 2:11-cv-1391-SLB, 2012 WL 4731255, at 3 (N.D. Ala. 2012).

¹³⁵ Bain, *supra* note 91, at 177-178.

¹³⁶ 42 U.S.C. § 9652(d) (2012).

¹³⁷ *Id.*

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substantive rights.¹³⁸ And, as previously discussed, since statutes of repose are considered substantive rights, the logical conclusion suggests that only statutes of limitations were meant to be preempted under this language.

VI. CONCLUSION

CTS Corp. v. Waldenburg definitively represents that § 9658 of CERCLA does not include state statutes of repose. This conclusion raises some interesting questions about the fundamental differences between statutes of limitation and statutes of repose, not just from an operational standpoint, but also from a federalist perspective. Although the immediate impact of the instant decision seems to be minimal, how it affects important principles of federalism and state sovereignty is worth exploring.

While serious concerns with the way CERCLA potentially frees tortious defendants from liability remain, that argument is outside the scope of § 9658, which is purely a matter of statutory interpretation. To that end, even with minimal evidence of legislative intent, attempting to read this provision to include statutes of repose is merely an exercise in wishful thinking. If nothing more, the issue is a divisive one, and when no consensus exists on whose interests to serve, or by what means those interests should be served, the issue is best left up to the states to decide—especially when that issue implicates important substantive rights.¹³⁹ If North Carolina is any indication, states will rise to the occasion.

¹³⁸ Bain, *supra* note 99, at 160.

¹³⁹ Josephine Herring Hicks, *The Constitutionality of Statutes of Repose: Federalism Reigns*, 38 VAND. L. REV. 627, 654-55 (1985).