

CTS CORP. V. WALDBURGER

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INTRODUCTION

In *CTS Corp. v. Waldburger*,¹ several North Carolina landowners brought a state-law nuisance action against electronics manufacturer CTS Corporation (“CTS”) in federal court, alleging damages resulting from well-water contamination caused by CTS’s storage of trichloroethylene and other chemicals on a property that CTS had sold nearly twenty-four years earlier. North Carolina’s statute of repose barred suits brought more than ten years after a defendant’s last culpable act.² Unlike a statute of limitations, which requires that plaintiffs bring claims within a certain period of time after the plaintiffs’ exposure to or discovery of harm (subject to equitable tolling), a statute of repose presents an absolute bar to suit after a specified time from a defendant’s last act.³ Here, because CTS’s last act was the sale of the property, the district court dismissed the landowners’ complaint.⁴ The U.S. Court of Appeals for the Fourth Circuit reversed, holding that § 9658 of the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”),⁵ which preempts the commencement dates for state statutes of limitations, also preempts state statutes of

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¹ 134 S. Ct. 2175 (2014).

² N.C. GEN. STAT. § 1-52(16) (2013). As discussed *infra* Part III.A, North Carolina has since exempted groundwater contamination suits from its statute of repose. See N.C. GEN. STAT. ANN. § 130A-26.3 (West 2014).

³ See *infra* Part I.D.

⁴ *Waldburger v. CTS Corp.*, No. 1:11CV39, 2011 WL 7153937, at *1 (W.D.N.C. Oct. 4, 2011), *rev'd and remanded*, 723 F.3d 434 (4th Cir. 2013), *rev'd*, 134 S. Ct. 2175 (2014).

⁵ 42 U.S.C. §§ 9601–9675 (2012).

repose.⁶ In a 7–2 opinion by Justice Kennedy, the Supreme Court rejected the Fourth Circuit’s reasoning.⁷ Relying on the text, structure, and legislative history of § 9658, the Court held that CERCLA unambiguously preempted only statutes of limitations, and not statutes of repose.⁸ Justice Kennedy, who wrote only for a plurality on this point, further contended that the presumption against preemption also supported this narrow reading.⁹ This Comment analyzes the Court’s decision and argues that the decision will have limited practical effect and that industry’s potential constitutional concerns were exaggerated. Part I surveys CERCLA’s legislative history and distinguishes statutes of limitations from statutes of repose. Part II discusses the Fourth Circuit and Supreme Court *Waldburger* decisions. Part III evaluates the practical implications of the Supreme Court’s decision and potential constitutional ramifications implicit in the Court’s holding.

I. OVERVIEW OF CERCLA PREEMPTION OF STATUTES OF REPOSE

A. CERCLA’s Compromise

Congress enacted CERCLA in 1980 in response to the “serious environmental and health risks posed by industrial pollution,” including the release of hazardous substances into the environment.¹⁰ CERCLA authorizes a federal cause of action for governmental and private parties seeking to recover cleanup costs from polluters.¹¹ However, one of the more contentious debates during CERCLA’s consideration was whether to enact an additional federal cause of action for personal injuries or property damage from hazardous waste releases.¹² That proposal met strong opposition,¹³ and Congress ultimately substituted a provision directing the creation of a “study group” to evaluate the “adequacy of existing common law and statutory remedies in providing legal redress for harms caused by exposures to hazardous substances released into the environment,” including “barriers to recovery posed by existing statutes of limitations.”¹⁴ The statute directed the study group to submit recommendations based on its findings to Congress within a year on “the need for revisions in existing statutory or common law, and whether such revisions should take the form of Federal statutes or the development of a model code which is recom-

⁶ *Waldburger v. CTS Corp.*, 723 F.3d 434, 437–38 (4th Cir. 2013), *rev’d*, 134 S. Ct. 2175 (2014).

⁷ *Waldburger*, 134 S. Ct. at 2188.

⁸ *Id.* at 2185–88.

⁹ *Id.* at 2189.

¹⁰ *United States v. Bestfoods*, 524 U.S. 51, 55 (1998).

¹¹ See 42 U.S.C. § 9607 (2012) (originally enacted as Pub. L. No. 96-510, § 107, 94 Stat. 2767, 2781–85 (1980)).

¹² See 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, 368–73 (1992) (summarizing CERCLA’s legislative history).

¹³ See *id.* at 371–72.

¹⁴ 42 U.S.C. § 9651(e)(3)(A), (F).

mended for adoption by the States.”¹⁵ Congress enacted CERCLA with this provision intact, and created the study group soon thereafter.¹⁶

B. The 1982 Study Group Report

The study group reported back to Congress in 1982.¹⁷ The study group’s report recommended that the states modify their statutes of limitations by adopting the so-called “discovery rule,” which dictates “that the cause of action accrues from the time the plaintiff discovered or reasonably should have discovered the injury or disease.”¹⁸ The report explained that hazardous wastes have a “delayed impact on different organs or the central nervous system,” resulting in “latency period[s] for the appearance of disease or injury” of “thirty years or more.”¹⁹ This long latency period meant that, in states without the discovery rule, “the cause of action will usually be time barred when the plaintiff discovers his hurt.”²⁰

The study group also recommended the “repeal of state statutes of *repose* which, in a number of states, have the same effect as some statutes of limitation in barring plaintiff’s claim before he knows he has one.”²¹ The distinction between statutes of limitations and statutes of repose will be discussed in depth in Part I.D, *infra*. Suffice it to say here that the study group sharply distinguished between the two by recommending that states *modify* their statutes of limitations but *repeal* their statutes of repose because they both prematurely barred plaintiffs with latent diseases from suit. The study group did not explain why it recommended different solutions for each type of statute.²² But the study group’s recommendations are relevant only to the extent that they influenced Congress, which quickly stepped in to force the states’ hands.

C. Congressional Response

Congress did not wait for the states to act on the report, but instead amended CERCLA in 1986 by adding 42 U.S.C. § 9658. Section 9658 provides that the default statute of limitations in state law personal injury or property damage actions caused by hazardous substances would be the *state* statute of limitations.²³ However, § 9658(a)(1) carves out an important exception:

[A]ny action brought under State law for personal injury, or property damages, which are caused or contributed to by exposure to any haz-

¹⁵ *Id.* § 9651(e)(4)(A), (B).

¹⁶ Brief for Respondents at 6, CTS Corp. v. Waldburger, 134 S. Ct. 2175 (2014) (No. 13-339).

¹⁷ STAFF OF S. COMM. ON ENV’T & PUBLIC WORKS, 92D CONG., REP. ON INJURIES AND DAMAGES FROM HAZARDOUS WASTES—ANALYSIS AND IMPROVEMENT OF LEGAL REMEDIES (Comm. Print 1982) [hereinafter STUDY GROUP REPORT].

¹⁸ *Id.* at 240–41.

¹⁹ *Id.* at 240.

²⁰ *Id.* at 240–41.

²¹ *Id.* at 241 (emphasis added).

²² *See id.*

²³ 42 U.S.C. § 9658(a)(2) (2012).

ardous 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.²⁴

In effect, Congress enacted a federal discovery rule that preempted earlier state commencement dates. The state “commencement date” is defined as the “date specified in a statute of limitations as the beginning of the applicable limitations period.”²⁵ The “applicable limitations period” is “the period specified in a statute of limitations during which a civil action referred to [above] may be brought.”²⁶ Finally, the “federally required commencement date” (“FRCD”) is the “date the plaintiff knew (or reasonably should have known) that the personal injury or property damages referred to [above] were caused or contributed to by the hazardous substance or pollutant or contaminant concerned,” which is essentially how the study group had defined the discovery rule.²⁷ Section 9658 also provides special exceptions for minor or incompetent plaintiffs. In those cases, the commencement date is the date of majority or competency under state law.²⁸ Generally, however, § 9658 means that if the beginning of the period specified in an applicable state statute of limitations is earlier than the discovery rule date, the federal discovery rule applies.

The Conference Committee’s report surrounding passage of § 9658 sheds some light on this definitional labyrinth. The conference report notes that state statutes of limitations that begin to run at the time of first injury may “[i]n the case of a long-latency disease, such as cancer, . . . bar [a party] from bringing his lawsuit.”²⁹ Referencing the study group’s report directly, the conference report also “note[s] that certain State statutes deprive plaintiffs of their day in court” and “that the problem centers around when the statute of limitations begins to run rather than the number of years it runs.”³⁰ “Section [9658],” it continues:

[A]ddresses the problem identified in the [study group’s report]. While State law is generally applicable [to these actions] . . . a Federally-required commencement date for the running of State statutes of limitations is established. This date is the date the plaintiff knew, or reasonably should have known, that the personal injury referred to above was caused or contributed to by the hazardous substance or

²⁴ *Id.* § 9658(a)(1) (emphasis added).

²⁵ *Id.* § 9658(b)(3).

²⁶ *Id.* § 9658(b)(2).

²⁷ *Id.* § 9658(b)(4)(A).

²⁸ *Id.* § 9658(b)(4)(B).

²⁹ H.R. REP. No. 99-962, at 261 (1986) (Conf. Rep.), as reprinted in 1986 U.S.C.C.A.N. 3276, 3354 [hereinafter Conference Report].

³⁰ *Id.*; see also STUDY GROUP REPORT, *supra* note 17, pt. 1, at 240–41.

pollutant or contaminant concerned. Special rules are noted for minors and incompetents.³¹

After the Conference Committee reported the bill, Congress enacted § 9658 in its current form.

D. Statutes of Limitations or Repose

This brief summary of § 9658's enactment sets up a fundamental question: what are statutes of limitations and statutes of repose, and is the difference between them meaningful? As the Supreme Court described, a statute of limitations creates "a time limit for suing in a civil case, based on the date when the claim accrued."³² A claim accrues when "the plaintiff can file suit and obtain relief."³³ States set both the accrual date and the limitation period. For instance, some states define the accrual date as when the plaintiff is first injured and others when the plaintiff discovers or should have discovered his injury (i.e., the discovery rule).³⁴ Statutes of limitations require plaintiffs to pursue "diligent prosecution of known claims."³⁵ Statutes of limitations thus "promote justice by preventing surprises through [plaintiffs'] revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared."³⁶ However, statutes of limitations may be tolled for equitable reasons when an "extraordinary circumstance," like incompetence or minority status, "prevents [a plaintiff] from bringing a timely action," because the restriction imposed by the statute of limitations does not further the statute's purpose.³⁷

By contrast, statutes of repose "bar[] any suit that is brought after a specified time since the defendant acted . . . even if this period ends before the plaintiff has suffered a resulting injury."³⁸ Unlike statutes of limitations, statutes of repose are not subject to any equitable tolling and instead present an absolute bar to suit. Statutes of repose thus "effect a legislative judgment that a defendant should 'be free from liability after the legislatively determined period of time.'"³⁹ In practice, this means that even if a claim has not accrued (e.g., plaintiff has not discovered his injury under the applicable statute of limitations), a plaintiff may be barred from suit by a statute of repose if enough time

³¹ Conference Report, *supra* note 29, at 261.

³² CTS Corp v. Waldburger, 134 S. Ct. 2175, 2182 (2014) (citing BLACK'S LAW DICTIONARY 1546 (9th ed. 2009)).

³³ Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal., 522 U.S. 192, 201 (1997) (citation omitted).

³⁴ See *supra* Part I.C.

³⁵ BLACK'S LAW DICTIONARY 1546 (9th ed. 2009).

³⁶ Order of R.R. Tels. v. Ry. Express Agency, 321 U.S. 342, 348–49 (1944).

³⁷ Lozano v. Montoya Alvarez, 134 S. Ct. 1224, 1231–32 (2014).

³⁸ BLACK'S LAW DICTIONARY, *supra* note 35, at 1546.

³⁹ CTS Corp. v. Waldburger, 134 S. Ct. 2175, 2183 (2014) (quoting 54 C.J.S. *Limitations of Actions* § 7 (2010)).

has passed since the defendant's last act. Only four states had a general statute of repose before § 9658's enactment, and only five do today.⁴⁰

Courts only began to recognize the conceptual difference between statutes of repose and statutes of limitations over the last half-century, and the line between them remains hard to draw in practice. Section 9658 raises the question of whether Congress acted on that distinction by preempting contrary state statutes of limitations but leaving repose statutes intact, or whether Congress implemented the study group's recommendation by preempting both. This narrow issue of statutory interpretation was the central question presented in *CTS Corp. v. Waldburger*.

II. THE WALDBURGER CASE AND THE COURT OPINIONS

CTS Corporation, an electronics company, operated an electroplating facility in Asheville, North Carolina.⁴¹ As part of its manufacturing process, CTS used and stored several toxic solvents onsite.⁴² In 1987, CTS sold the property where the facility was located to an intermediary.⁴³ Subsequent landowners of the property and adjacent properties believed that the toxic chemicals left at the facility had leached into the ground and contaminated their groundwater.⁴⁴ In 2011, those landowners ("plaintiffs") brought a nuisance action under state law against CTS Corporation in the U.S. District Court for the Western District of North Carolina.⁴⁵

A. *The Fourth Circuit Opinion*

The district court dismissed plaintiffs' complaint, and plaintiffs appealed. The district court found that North Carolina's ten-year statute of repose⁴⁶ barred plaintiffs' claims because CTS's last act, selling the property, occurred almost twenty-four years before plaintiffs filed their action.⁴⁷ The district court rejected plaintiffs' argument that CERCLA preempted the statute of repose under § 9658's "clear language," which was limited to "preempt[ing] the state accrual date" in a state statute of limitations.⁴⁸ If plaintiffs' argument had pre-

⁴⁰ See Transcript of Oral Argument at 4, *Waldburger*, 134 S. Ct. 2175 (No. 13-339); Brief for Respondents, *supra* note 16, at 17.

⁴¹ *Waldburger v. CTS Corp.*, No. 1:11CV39, 2011 WL 7153937, at *1 (W.D.N.C. Oct. 4, 2011).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ North Carolina's statute of repose provides that "no cause of action shall accrue more than 10 years from [a defendant's] last act or omission." N.C. GEN. STAT. § 1-52(16) (2013). North Carolina courts had interpreted this provision as a statute of repose. See *Waldburger*, 2011 WL 7153937, at *3 (citing *Hodge v. Harkey*, 631 S.E.2d 143, 144-45 (N.C. Ct. App. 2006)).

⁴⁷ *Waldburger*, 2011 WL 7153937, at *3.

⁴⁸ *Id.* (citing 42 U.S.C. § 9658(b)(2), (3) (2012); *Burlington N. & Santa Fe Ry. v. Poole Chem. Co.*, 419 F.3d 355, 362-63 (5th Cir. 2005); *Evans v. Walter Indus., Inc.*, 579 F. Supp. 2d 1349, 1364 (S.D. Ala. 2008)). The district court noted that the Ninth Circuit had held the opposite. *Id.* (citing *McDonald v. Sun Oil Co.*, 548 F.3d 774, 782 (9th Cir. 2008)).

vailed, the discovery rule (which plaintiffs satisfied) would have preempted the earlier commencement date in North Carolina's statute of repose and allowed plaintiffs' claims to proceed.

The Fourth Circuit reversed 2–1.⁴⁹ Judge Floyd's opinion for the panel differentiated statutes of limitations and repose, but held that § 9658 was ambiguous as to which it preempted.⁵⁰ Though he acknowledged that the district court's interpretation was a reasonable one, under Judge Floyd's alternative reading, § 9658 preempts statutes with: (1) an "applicable limitations period" that is (2) "specified in the State statute of limitations or under common law," and (3) "a commencement date which is earlier than the federally required commencement date."⁵¹ North Carolina's statute of repose satisfied each condition: (1) it met the definition of an "applicable limitations period" because it was a "period," "specified in a statute of limitations," "during which a civil action . . . may be brought;"⁵² (2) it appeared in a code section titled "Limitations, Other than Real Property" and thus was "specified in the State statute of limitations;"⁵³ and (3) "its 'commencement date . . . [was] earlier than the federally required commencement date'" because the applicable period was triggered by the defendant's last act, not when the plaintiff discovered the harm.⁵⁴ Accordingly, Judge Floyd concluded that § 9658 was "susceptible to an interpretation that includes repose limitations such as North Carolina's."⁵⁵

After holding the text ambiguous, Judge Floyd turned to its legislative history. He found that § 9658 was intended to "'address[] the problem identified in the . . . study [group report],'" which was "equally concerned with statutes of repose and limitations, and with their effect of barring plaintiffs' claims before they are aware of them."⁵⁶ Judge Floyd further invoked the remedial purpose canon, which dictates that statutes with remedial purposes be broadly construed to effectuate Congress's intent, and reasoned that interpreting § 9658 narrowly would "thwart[] Congress's unmistakable goal of removing barriers to relief from toxic wreckage" by "allow[ing] states to obliterate legitimate causes of action before they exist."⁵⁷ Moreover, Judge Floyd noted that the study group foresaw the potential need for the "legislative balance of the respective rights of potential plaintiffs and defendants" underlying statutes of

⁴⁹ Waldburger v. CTS Corp., 723 F.3d 434, 437 (4th Cir. 2013).

⁵⁰ See *id.* at 442.

⁵¹ *Id.* (citing 42 U.S.C. § 9658(a)(1)).

⁵² *Id.* (citing 42 U.S.C. § 9658(b)(2)).

⁵³ *Id.* (citing N.C. GEN. STAT. § 1-52 (2013); 42 U.S.C. § 9658(a)(1)).

⁵⁴ *Id.* (citing 42 U.S.C. § 9658(a)(1)).

⁵⁵ *Id.* Judge Floyd buttressed this conclusion with two observations: (1) courts' and scholars' inconsistent usage of the two terms, and (2) internal inconsistency in § 9658 regarding whether common law can establish the "applicable limitations period." *Id.* at 443.

⁵⁶ *Id.* at 443 (quoting Conference Report, *supra* note 29, at 261 (internal quotation marks omitted)).

⁵⁷ *Id.* at 444.

repose to tip in favor of plaintiffs' vindication of their rights.⁵⁸ Judge Floyd concluded that § 9658 preempted North Carolina's statute of repose.⁵⁹

Judge Thacker dissented. Like the district court, she believed that repeated use of the term "statute of limitations" made § 9658 plain and unambiguous.⁶⁰ Judge Thacker argued that statutes of limitations had come to be viewed as a specific subset of statutes of repose by 1986—thus by using the term "statute of limitations," Congress could not have intended to include the larger category of statutes of repose.⁶¹ Even if § 9658 were ambiguous, Judge Thacker argued, the legislative history did not support the majority's reading because the study group had specifically recommended that the states repeal statutes of repose, but Congress had only acted on the discovery rule.⁶² She further contended that the remedial canon was inappropriate because it overrode § 9658's plain text, itself a product of legislative compromise.⁶³ Instead, the presumption against preemption favored a narrower reading that would not invade a traditional state field of regulation absent clear congressional direction.⁶⁴ Judge Thacker concluded that § 9658 should have been interpreted narrowly to preempt only earlier commencement dates for statutes of limitations, not statutes of repose.⁶⁵ Judge Davis concurred with the majority, but wrote separately to challenge Judge Thacker's preclusive "plain language" analysis over a context-dependent approach to statutory interpretation.⁶⁶

B. *The Supreme Court Opinion*

The Supreme Court granted certiorari and reversed 7–2.⁶⁷ The Court held that § 9658 preempted only state statutes of limitations, not statutes of repose.⁶⁸ Justice Kennedy wrote for the Court, except for his discussion of the presumption against preemption, which commanded only a plurality.

At the threshold, Justice Kennedy rejected the remedial canon as a substitute for an interpretation based on the statute's text and structure.⁶⁹ Turning to

⁵⁸ *Id.* at 445 (quoting *First United Methodist Church of Hyattsville v. U.S. Gypsum Co.*, 882 F.2d 862, 866 (4th Cir. 1989)); *see id.* (citing STUDY GROUP REPORT, *supra* note 17, pt. 2, at 14) ("The policy of repose expressed in the statute of limitations may be outweighed by the policy of affording the plaintiff a just opportunity to vindicate his rights."). Judge Floyd also noted that statutes of repose go beyond "simply . . . protect[ing] defendants . . . [to] also ensure that cases are processed efficiently." *Id.* at 444 (citing *United States v. Kubrick*, 444 U.S. 111, 117 (1979)). This may reflect some residual confusion about the term "statute of repose" in 1979. *See infra* text accompanying note 61 (Judge Thacker's dissent noting same).

⁵⁹ *Waldburger*, 723 F.3d at 444.

⁶⁰ *See id.* at 446–49 (Thacker, J., dissenting).

⁶¹ *Id.* at 448–49 (citing BLACK'S LAW DICTIONARY 835 (5th ed. 1979)).

⁶² *Id.* at 451–52.

⁶³ *Id.* at 452–53.

⁶⁴ *Id.* at 453.

⁶⁵ *Id.* at 454.

⁶⁶ *Id.* at 445 (Davis, J., concurring).

⁶⁷ *See generally* *CTS Corp. v. Waldburger*, 134 S. Ct. 2175 (2014).

⁶⁸ *Id.* at 2180.

⁶⁹ *Id.* at 2185. The Court's final retreat from the longstanding CERCLA remedial canon serves as a clear directive to lower courts to adhere to traditional methods of statutory interpretation and is a

the text of § 9658, Justice Kennedy found instructive that the statute explicitly defined an “applicable limitations period” as a period specified in “a statute of limitations,” a term used four times⁷⁰ in § 9658.⁷¹ He examined the historical development of the terms “statute of limitations” and “statute of repose,” and concluded that while their usage was often imprecise, the distinction between the two was well enough established by 1982 to be reflected in the study group report.⁷² Because that report “clearly urged” states to repeal their statutes of repose, and recognized a distinction between the two that the statute ultimately did not, he found it “proper to conclude that Congress did not exercise the full scope of its pre-emption power.”⁷³ Justice Kennedy supported his conclusion with the statutory term “applicable limitations period,” which he found was an “awkward way to mandate the pre-emption of *two* different time periods with *two* different purposes.”⁷⁴ Moreover, an “applicable” period presupposes that “a [covered] civil action” exists, but a statute of repose can prohibit a cause of action from coming into existence *at all*.⁷⁵

Justice Kennedy found further textual support in the tolling provision for minors and incompetent plaintiffs. Because statutes of repose are not subject to tolling, he found it would be odd for Congress to “pre-empt [the] state law prohibiting tolling of statutes of repose” *as well* as their commencement dates without any express indication that § 9658 was intended to reach either.⁷⁶ Justice Kennedy also rejected an obstacle preemption claim, reasoning that CERCLA did not provide a complete remedial framework and left untouched “States’ judgments about causes of action, the scope of liability, the duration of the period provided by statutes of limitations, burdens of proof, rules of evidence, and other important rules governing civil actions.”⁷⁷

Writing for only a plurality,⁷⁸ Justice Kennedy further justified his reading by invoking the presumption against preemption, which requires an especially

useful avenue for future academic inquiry in itself. *See id.* (“[N]o legislation pursues its purposes at all costs.” (quoting *Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987) (per curiam) (internal quotation marks omitted)); *see also* Blake A. Wilson, *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, 201–02 (1996) (noting the divergence between the Supreme Court and the lower courts on the remedial canon). This is, however, beyond the scope of this Comment.

⁷⁰ Not including the caption. *See* 42 U.S.C. § 9658(a)(1)–(2), (b)(2)–(3) (2012).

⁷¹ *Waldburger*, 134 S. Ct. at 2185.

⁷² *Id.* at 2185–86. Justice Kennedy’s opinion summarized the current understanding of the two statutes’ different purposes and operation. *Id.* at 2182; *see also supra* Part I.D.

⁷³ *Id.* at 2186.

⁷⁴ *Id.* at 2186–87 (emphasis added).

⁷⁵ *Id.* at 2187 (quoting 42 U.S.C. § 9658(b)(2)); *see id.* (citing *Hargett v. Holland*, 447 S.E.2d 784, 787 (N.C. 1994) (“A statute of repose creates an additional *element* of the claim itself which must be satisfied in order for the claim to be maintained” (emphasis added))).

⁷⁶ *Id.* at 2187–88.

⁷⁷ *Id.* at 2188.

⁷⁸ Only Justices Sotomayor and Kagan joined Justice Kennedy on this point. Justice Scalia, joined by Chief Justice Roberts and Justices Thomas and Alito, argued that the presumption against preemption was both “‘extraordinary and unprecedented’” when it was announced and sporadic in its application. *Id.* at 2189 (Scalia, J., concurring in part and concurring in the judgment) (quoting *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 544 (1992) (Scalia, J., concurring in the judgment in part and dissenting in part)). Nonetheless, Justice Scalia believed that ordinary principles

clear statement from Congress to preempt state law in an area of traditional state police powers. Justice Kennedy reasoned that “statutes of repose would cease to serve any real function” under a broader reading of § 9658, and, here, there was no clear textual justification for such a departure.⁷⁹

Justice Ginsburg, joined by Justice Breyer, dissented.⁸⁰ Her “straightforward” textual reading of § 9658 was that Congress directed in § 9658(a)(1) that the FRCD in § 9658(b)(4) “shall apply in lieu of the earlier commencement date.”⁸¹ The “commencement date” was in turn defined by § 9658(b)(3) as “the date specified in a statute of limitations as the beginning of the applicable limitations period,” which here Justice Ginsburg contended was triggered under North Carolina law by the defendant’s last act or omission.⁸² While North Carolina had chosen to label its own repose statute as simply another limitation on commencing actions, she argued, the Court had instead manufactured a distinction where none existed, because both effectively limit the period in which an action can be brought.⁸³ Justice Ginsburg then approvingly cited the conference report’s reaffirmation that “certain State statutes deprive plaintiffs of their day in court” because a limitations period that begins to run before the plaintiff has discovered her injury frequently will make timely suit impossible for long latency diseases.⁸⁴ She emphasized that the conference report stated, “[t]his *section*,” meaning § 9658, addresses “‘the problem’ identified in the [study group report],” one that “cannot be solved when statutes of repose remain operative.”⁸⁵ Justice Ginsburg argued that the Court’s narrow reading thus “thwarts Congress’ clearly expressed intent to fix ‘the problem’ the Study Group described” by leaving statutes of repose intact.⁸⁶ Moreover, in the few states with statutes of repose, she contended that the Court’s interpretation enables polluters to “escape liability for [] devastating [latent] harm,” and “gives contaminators an incentive to conceal the hazards . . . until the repose period has run its full course.”⁸⁷

III. PLUGGING WALDBURGER’S LEAKS: PRACTICAL IMPLICATIONS AND CONSTITUTIONAL SPILLOVER

Waldburger’s immediate aftermath suggests that what could have been a significant defanging of CERCLA may prove largely toothless in practice. More troubling, however, is the road not taken—can Congress constitutionally

of statutory interpretation compelled the majority’s reading of § 9658 and concurred in the judgment. *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 2189–90 (Ginsburg, J., dissenting).

⁸¹ *Id.* at 2190 (internal quotation marks omitted).

⁸² *Id.*

⁸³ *Id.* (“What is a repose period, in essence, other than a limitations period unattended by a discovery rule?”).

⁸⁴ *Id.* at 2191 (quoting Conference Report, *supra* note 29, at 261).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

preempt a state statute of repose after *Waldburger*? This question has far-reaching effects beyond CERCLA and has already begun to spill over into securities and immigration law.⁸⁸

A. Practical Implications

On first glance, *Waldburger*'s interpretation of CERCLA preemption appears to license states to free corporate polluters from liability, resulting in dire practical consequences for plaintiffs with latent diseases. But this parade of horrors has yet to materialize and, with one major caveat for retroactive legislation, is unlikely to do so moving forward.

The narrow interpretation of § 9658 in *Waldburger* seemingly represents a significant shift in power to the states. Plaintiffs who have not yet discovered their injury (as required by the FRCD), but happen to be located in a state with a statute of repose, may be barred from the courthouse door based on their zip code alone. This undercuts CERCLA's promise to ensure federal uniformity for plaintiffs with latent diseases. Congress could unify the resulting patchwork system and overrule *Waldburger* by amending CERCLA to preempt statutes of repose, but this is practically unlikely given current political constraints and because it could have deeper constitutional ramifications, as discussed in Part III.B, *infra*. Thus, the shift in power to the states from enabling them to enact stringent statutes of repose unfettered by CERCLA preemption is not only significant, but is foreseeably permanent. The *Waldburger* respondents suggested that states would rush to enact statutes of repose to free large corporate polluters from extended liability for plaintiffs with latent diseases.⁸⁹ Moreover, corporate polluters now have an incentive to hide hazards until after the relevant statute of repose runs.⁹⁰

But these concerns are overstated. Only five states have a potentially applicable statute of repose on the books.⁹¹ In other words, *Waldburger* bars suit for an already narrow set of plaintiffs in practice: those who have discovered their injury (or else they would not have brought suit), bring suit within the state statute of limitations (triggered from the FRCD), have claims against defendants who are both located in one of the five states with a statute of repose, and sue outside the state's repose window.

Nor has a "race to the bottom" to enact statutes of repose materialized.⁹² In fact, North Carolina did exactly the opposite. Barely three weeks after *Waldburger*, North Carolina amended its statute of repose to specifically exempt

⁸⁸ See, e.g., Nat'l Credit Union Admin. Bd. v. Nomura Home Equity Loan, Inc., 764 F.3d 1199, 1208–09 (10th Cir. 2014), cert. denied, 135 S. Ct. 949 (2015); see also Prasad v. Holder, 776 F.3d 222, 226 (4th Cir. 2015).

⁸⁹ Brief for Respondents, *supra* note 16, at 31; Transcript of Oral Argument, *supra* note 40, at 51–52.

⁹⁰ *Waldburger*, 134 S. Ct. at 2190 (Ginsburg, J., dissenting).

⁹¹ Transcript of Oral Argument, *supra* note 40, at 4.

⁹² See *id.* at 51–52.

personal injury or property actions caused by groundwater contamination.⁹³ The General Assembly noted that its intent was “to maximize under federal law the amount of time a claimant had to bring a claim predicated on exposure to a contaminant regulated by federal or State law,” and that *Waldburger* was “inconsistent with the General Assembly’s intentions [and] understanding of federal law” because the Assembly “never intended the statute of repose in G.S. 1-52(16) to apply to claims for latent disease caused or contributed to by groundwater contamination”⁹⁴ Insofar as statutes of limitations and repose are viewed as a balance between plaintiffs’ and defendants’ interests,⁹⁵ state legislatures may be sensitive to that balance and, if political pressures so demand, will adjust their statutes of repose accordingly. This practical result vindicates Justice Kennedy: his trust of state legislatures no doubt underpinned his *Waldburger* opinion.⁹⁶ It also undercuts respondents’ fears that large corporate polluters like CTS would be able to successfully lobby for passage of stricter repose statutes.⁹⁷ Nonetheless, whether other states with repose statutes (or those who may enact repose statutes in the future) will follow North Carolina’s lead remains to be seen.

Justice Ginsburg’s critique has initial appeal, but is ultimately unpersuasive.⁹⁸ It is unclear how corporate polluters could control when latent diseases manifest in affected plaintiffs. True enough, polluters now have an additional incentive to conceal the contaminants themselves, but it is hardly clear that this incremental increase would outweigh their risk of potential future liability and the cost of legitimate cleanup. Moreover, even the most ardent supporters of statutes of repose as good economic policy support tolling in cases of fraudulent concealment.⁹⁹ Though judicial tolling¹⁰⁰ may be foreclosed by *Waldburger*’s absolute definition of repose statutes, the North Carolina example discussed above suggests that state legislatures may carve out an exception to toll the repose statute if fraudulent concealment presents a significant challenge for plaintiffs.

Finally, if states wanted to limit polluter liability, they could have done so notwithstanding *Waldburger*. Congress deliberately chose *not* to include a federal cause of action in CERCLA, but simply to unify one procedural obstacle to plaintiff suits under state law—namely, the commencement date for statutes of limitations. But otherwise, states retain complete control over their tort law. If so desired, states could make their statutes of limitations just one day. They

⁹³ N.C. GEN. STAT. ANN. § 130A-26.3 (West 2014).

⁹⁴ *Bryant v. United States*, 768 F.3d 1378, 1384 (11th Cir. 2014) (quoting Act of June 30, 2014, N.C. Sess. Laws 2014-44, § 1).

⁹⁵ See *supra* note 58 and accompanying text.

⁹⁶ See, e.g., Transcript of Oral Argument, *supra* note 40, at 52.

⁹⁷ See *id.*

⁹⁸ *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2190 (2014) (Ginsburg, J., dissenting).

⁹⁹ See, e.g., Richard A. Epstein, *The Temporal Dimension in Tort Law*, 53 U. CHI. L. REV. 1175, 1216 (1986) (“For latent injury cases, [a statute of repose] probably should not be absolute: proof of deliberate concealment should revive the cause of action.”).

¹⁰⁰ See, e.g., *Appletree Square 1 Ltd. v. W.R. Grace & Co.*, 815 F. Supp. 1266, 1274 (D. Minn. 1993) (fraudulent actions preventing plaintiff from discovering defective condition toll statute of repose), *aff’d*, 29 F.3d 1283 (8th Cir. 1994).

could further eliminate entire causes of action for groundwater contamination. As a practical matter, it is unclear what granting states control over their repose statutes gives them that they could not accomplish otherwise.

Still, *Waldburger* potentially created a one-way ratchet that allows states to make their repose statutes stricter for plaintiffs who may not yet be barred, but not more relaxed for those who are. *Waldburger* directly implicated a simultaneous suit involving North Carolina's statute of repose. In *Bryant v. United States*,¹⁰¹ injured Marines and their families sued the federal government for injuries stemming from contamination of drinking water while living at Camp Lejeune, North Carolina.¹⁰² The district court concluded that § 9658 preempted North Carolina's statute of repose, potentially putting the federal government on the hook for significant damages.¹⁰³ While that case was pending on appeal, the Supreme Court handed down *Waldburger*, and the North Carolina legislature quickly amended its statute of repose to exclude groundwater contamination claims.¹⁰⁴ When the Camp Lejeune case reached the U.S. Court of Appeals for the Eleventh Circuit, the court held that North Carolina's amended statute of repose applied only prospectively because a statute of repose is a "substantive limit on a plaintiff's right to file an action," the enlargement of which would deprive a defendant of vested rights.¹⁰⁵ According to the Eleventh Circuit's interpretation of North Carolina precedent, the legislature is powerless to enact a statute of repose that extends liability retroactively. As the earlier statute of repose applies, the Camp Lejeune claims are likely dead on arrival on remand, and the federal government will escape liability notwithstanding the state legislature's desire to the contrary. More crucially, *Bryant* suggests that in states where statutes of repose are viewed as substantive elements of a cause of action,¹⁰⁶ states cannot act to revive claims already barred by statutes of repose; they can only further constrict the repose period retroactively. Looking prospectively, states are otherwise free to expand or constrict their statutes of repose for future plaintiffs moving forward.

The practical implications of *Waldburger* remain unclear. The initial aftermath suggests that fears may be exaggerated for plaintiffs with latent diseases. Time will tell if other states follow North Carolina's lead.

B. Constitutional Spillover

At oral argument, CTS asserted that Congress had deliberately preempted only statutes of limitations to avoid impinging on state constitutional prerogatives, to which Justice Kagan quipped: "that's a very legally sophisticated Con-

¹⁰¹ 768 F.3d 1378 (11th Cir. 2014).

¹⁰² *Lejeune v. United States*, 1:11-md-02218-JOF, 2011 U.S. Dist. LEXIS 155687, at *5 (N.D. Ga. Sept. 29, 2011).

¹⁰³ *Id.* at *32.

¹⁰⁴ *Bryant*, 768 F.3d at 1381.

¹⁰⁵ *Id.* at 1383 (citing *McCrater v. Stone & Webster Eng'g Corp.*, 104 S.E.2d 858, 861 (N.C. 1958)).

¹⁰⁶ *See infra* Part III.B.

gress you're asking us to imagine."¹⁰⁷ But even though the Court went with CTS's statutory interpretation, did the Court's decision fully sidestep that concern? And did Congress have need to worry about a state's constitutional prerogative in preempting a statute of repose? For both questions, the answer is probably not.

First, those same constitutional concerns may be implicit in the Court's opinion. In holding that § 9658 preempted statutes of limitations but not statutes of repose, Justice Kennedy took care to distinguish the two in both substance and form. Accepting that there is a meaningful difference between statutes of limitations and repose, is it a matter of degree or kind? In other words, is a defendant-oriented statute of repose just the mirror image of a plaintiff-facing statute of limitations? Or does its absolute bar elevate it to an element of the cause of action?

Both CTS and the government argued for the latter, and Justice Kennedy's opinion suggests he agrees.¹⁰⁸ Justice Kennedy seized on the distinction between a repose statute's absolute bar to defendant liability and a statute of limitations's procedural "time limit for suing in a civil case."¹⁰⁹ Justice Kennedy explicitly juxtaposed statutes of limitations as a *temporal* requirement with statutes of repose as a *necessary antecedent* to a given cause of action: where "the applicable limitations period" presupposes that "a [covered] civil action" exists, "a statute of repose can prohibit a cause of action from coming into existence."¹¹⁰ In so doing, he cited with approval both the repose statute at issue and a North Carolina case holding that its "statute of repose creates an *additional element of the claim itself* which must be satisfied in order for the claim to be maintained."¹¹¹ Justice Kennedy concluded: "a statute of repose can be said to define the scope of the cause of action, and therefore the liability of the defendant."¹¹² For the purposes of preemption, Justice Kennedy appears to have viewed statutes of repose as a substantive element of a state cause of action, at least when the state has held it out as such. If a federal statute did purport to preempt a state statute of repose, the logic of Justice Kennedy's holding suggests that the federal statute would raise the same constitutional prerogatives that the Court sought to avoid.

If *Waldburger* did, in fact, treat statutes of repose as elements of state substantive law, could Congress constitutionally preempt them if it wanted to?¹¹³ Because the Court interpreted § 9658 to preempt only statutes of limita-

¹⁰⁷ Transcript of Oral Argument, *supra* note 40, at 15.

¹⁰⁸ *See id.* at 6, 7, 25–26.

¹⁰⁹ *See supra* Part I.D.

¹¹⁰ *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2187 (2014). By inference, this must mean that causes of action exist before a claim has accrued, even if a plaintiff could not bring suit because he or she was not aware of his or her injury.

¹¹¹ *Id.* (citing *Hargett v. Holland*, 447 S.E.2d 784, 787 (N.C. 1994)) (emphasis added).

¹¹² *Id.* (citing *Hargett*, 447 S.E.2d at 788).

¹¹³ This question involves the complex interaction between the Supremacy Clause, U.S. CONST. art. VI, cl. 2, and areas of sovereignty traditionally reserved to the states by the Tenth Amendment, U.S. CONST. amend. X.

tions, it did not reach that question.¹¹⁴ However, CTS raised the specter of constitutional avoidance at oral argument and in its briefs.¹¹⁵ Specifically, CTS argued that preempting state statutes of repose was equivalent to “*compelling* state legislatures to enact tort causes of action in the first instance,” which Congress could not do directly because it has no authority to “commandeer” state legislatures under Article I of the Constitution.¹¹⁶ To avoid CERCLA preemption, a state would have to repeal the cause of action completely, leaving it a “coercive” Hobson’s choice between extending liability against its wishes or nothing at all. And when Congress cannot commandeer state tort law to achieve either end directly, CTS argued, it cannot force states to choose between them.¹¹⁷

This argument does not hold water. At bottom, CTS attempted to conflate preemption and commandeering by showing they reach the same end. But this obscures the fundamental conceptual difference between the two. Commandeering directs state legislators to enact a statute or directs state officials to take some action. Preemption directly displaces the state substantive statute itself and so the legislature is not compelled to do anything. For example, CTS’s commandeering analogy relied principally on *New York v. United States*,¹¹⁸ where a federal statute forced a state to choose between having state legislators legislate in a certain manner or having state officials take title to particular property.¹¹⁹ As Congress could achieve neither end directly through commandeering, the statute presented an impermissibly coercive choice in violation of the Tenth Amendment and was struck down.¹²⁰ However, CERCLA preemption does not compel a state to take any action. It does not force the state to legislate to either extend liability or compel it to repeal its cause of action. Rather, preemption acts directly on the statute, not the legislature. Because neither choice requires state action, CERCLA cannot present a coercive choice and *New York* is inapposite.

Not to be deterred, CTS attempted to equate preemption and commandeering of substantive law by differentiating types of preemption. CTS argued that Congress could constitutionally use its preemption authority to *negate* state

¹¹⁴ *Waldburger*, 134 S. Ct. at 2186–87.

¹¹⁵ See Transcript of Oral Argument, *supra* note 40, at 7, 15; Brief for Petitioner at 37–41, *Waldburger*, 134 S. Ct. 2175 (No. 13-339).

¹¹⁶ Brief for Petitioner, *supra* note 115, at 38 (emphasis in original).

¹¹⁷ *Id.* (citing *New York v. United States*, 505 U.S. 144, 161 (1992)). CTS also argued in its reply brief that repose statutes “effectively repeal[]” state tort causes of actions “as to the relevant defendant,” and that preemption under “federal law would effectively bar North Carolina from repealing its own cause of action.” Reply Brief for Petitioner at 17, *Waldburger*, 134 S. Ct. 2175 (No. 13-339). These arguments are easily dispatched. First, repose statutes cannot be fairly characterized as an affirmative legislative act to repeal the statute with respect to each defendant that falls outside the repose window, just as one could not characterize a scenario where a plaintiff who could not prove causation as a legislative repeal of an entire cause of action. Rather, in both scenarios, one necessary element is not met for the claim against the particular defendant. Second, North Carolina could, at any time, repeal its cause of action wholesale.

¹¹⁸ 505 U.S. 144.

¹¹⁹ *Id.* at 161.

¹²⁰ See *id.* at 175–77, 188.

substantive law completely.¹²¹ In this case, federal preemption keeps federal officials accountable, since presumably the public can easily identify them as the ones who made the substantive decision on the law.¹²² But where Congress preempts to *expand* or “twist[] state legislation towards federal ends,” CTS argued, federal preemption commandeers by “covert[] decree[]” because state officials will bear the brunt of public opinion when otherwise-insulated federal officials made the substantive decision.¹²³

But respondents noted that the U.S. Court of Appeals for the Second Circuit rejected this “one-way street” of deference to preemption by negation in *Freier v. Westinghouse Electric Corp.*¹²⁴ That court distinguished § 9658 preemption from *New York*-style commandeering because the FRCD “requires no action by a state’s legislative or executive officials [as in *New York*], but only the application of federal law by the courts to recognize the Federal Commencement Date of a state-law claim.”¹²⁵ Preemption, even to expand liability, was thus the sort of “federal ‘direction’ of state judges [that] is mandated by the text of the Supremacy Clause.”¹²⁶ However, *Freier* concerned preemption of procedural statutes of limitations, not substantive statutes of repose, which petitioners argued present a more severe constitutional issue because they govern the substantive contours of tort liability.¹²⁷ But it is not clear this makes much difference, as even substantive state tort law elements are often constitutionally preemptable.¹²⁸ Moreover, viewing such statutes as directing state judges to apply *federal* law to a state-law claim is more faithful to how preemption actually functions—negating or displacing state law with federal law—and thus is likely permissible under the Supremacy Clause. Overall, it is not clear that the constitutional concerns are as troubling as initially made out to be.

Even if the merits of constitutional challenges to preemption are dubious, if *Waldburger* means that statutes of repose are elements of state substantive law, these constitutional arguments will spill over into other federal statutes that *do* preempt statutes of repose—in fact, they already are. For instance, the Nevada Supreme Court refused to hold that a federal statute could never preempt a state statute of repose, relying on pre-*Waldburger* federal cases.¹²⁹ But courts could contain the spillover by denying *Waldburger*’s predicate—that statutes of repose are substantive elements of a claim, rather than merely a subset of procedural statutes of limitations. For instance, courts examining securities laws have not maintained *Waldburger*’s clear distinction between stat-

¹²¹ Brief for Petitioner, *supra* note 115, at 39 (citing *New York*, 505 U.S. at 168).

¹²² *Id.* at 39–40.

¹²³ *Id.*

¹²⁴ Brief for Respondents, *supra* note 16, at 39 (citing *Freier v. Westinghouse Elec. Corp.*, 303 F.3d 176, 205 (2d Cir. 2002)).

¹²⁵ *Freier*, 303 F.3d at 205.

¹²⁶ *Id.* (quoting *New York*, 505 U.S. at 178–79).

¹²⁷ Reply Brief for Petitioner, *supra* note 117, at 18; Brief for Petitioner, *supra* note 115, at 40.

¹²⁸ Brief for Respondents, *supra* note 16, at 38 (citing *Mut. Pharm. Co. v. Bartlett*, 133 S. Ct. 2466 (2013); *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567 (2011); *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008)).

¹²⁹ See *FDIC v. Rhodes*, 336 P.3d 961, 966–68 (Nev. 2014) (collecting cases).

utes of limitations and repose.¹³⁰ In the immigration context, by contrast, the Fourth Circuit cited *Waldburger* to clearly distinguish statutes of repose (“a substantive bar to liability”) from statutes of limitations (a “purely procedural defense”).¹³¹ Notably, neither contain the constitutional concerns above because they concern displacement of *federal* statutes. Regardless, these cases serve as an advance warning to mark *Waldburger*’s potential to spill over into other areas of law. Until the true import of *Waldburger*’s message that repose statutes are substantive elements is borne out, the constitutional questions regarding preemption of state law remain live.

CONCLUSION

Waldburger made significant doctrinal strides in holding that § 9658 did not preempt statutes of repose. But despite initial concerns that states would now rush to bar plaintiffs with latent diseases from the courthouse door, *Waldburger*’s initial aftermath suggests its practical implications are more limited—though a state may be forbidden from extending its repose statutes retroactively. However, in distinguishing statutes of repose from statutes of limitations, Justice Kennedy elevated statutes of repose to a substantive element of a state cause of action. Even though *Waldburger* attempted to sidestep the issue, this sets up constitutional questions concerning preemption of state substantive law that, although potentially exaggerated, may threaten the viability of other federal statutes that seek to preempt state statutes of repose.

¹³⁰ For instance, the Tenth Circuit has been inconsistent on whether a clear distinction exists between statutes of repose and statutes of limitations. *Compare* Nat’l Credit Union Admin. Bd. v. Barclays Capital Inc., No. 13-3183, 2015 WL 876526, at *5 (10th Cir. Mar. 3, 2015) (citing *Waldburger* to maintain a clear distinction between a statute of limitations and a statute of repose), *with* Nat’l Credit Union Admin. Bd. v. Nomura Home Equity Loan, Inc., 764 F.3d 1199, 1209 (10th Cir. 2014) (rejecting an “ironclad distinction” between statutes of limitations and repose, and finding that most case law treated repose periods as “a subcategory of statute of limitations,” but without reference to *Waldburger* on that point), *cert. denied*, 135 S. Ct. 949 (2015). Texas courts have maintained a more clear distinction. *See* FDIC v. Merrill Lynch, Pierce, Fenner & Smith Inc., No. A-14-CA-126-SS, 2014 WL 4161561, at *9 (W.D. Tex. Aug. 18, 2014); FDIC v. Goldman, Sachs & Co., No. A-14-CA-129-SS, 2014 WL 4161567, at *3 (W.D. Tex. Aug. 18, 2014) (both noting that *Waldburger* overturned earlier decisions refusing to recognize a difference between “‘procedural’ [meaning a statute of limitations] or ‘substantive’ [meaning a statute of repose] statutes”).

¹³¹ Prasad v. Holder, 776 F.3d 222, 226 (4th Cir. 2015) (citing *CTS Corp. v. Waldburger*, 134 S. Ct. 2175 (2014)).

