DETERMINING THE PREEMPTIVE EFFECT OF FEDERAL LAW ON STATE STATUTES OF REPOSE

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I. INTRODUCTION

Court decisions finding federal preemption of state statutes of repose risk violating the principle of Chesterton's fence. According to the principle, one should not take down a "fence" without full appreciation of the reason why it was put up in the first place.[1] G.K. Chesterton himself described it this way:

> "In the matter of reforming things, as distinct from deforming them, there is one plain and simple principle; a principle which will probably be called a paradox. There exists in such a case a certain institution or law; let us say, for the sake of simplicity, a fence or gate erected across a road. The more modern type of reformer goes gaily up to it and says, "I don't see the use of this; let us clear it away." To which the more intelligent type of reformer will do well to answer: "If you don't see the use of it, I certainly won't let you clear it away. Go away and think. Then, when you can come back and tell me that you *do* see the use of it, I may allow you to destroy it."[2]

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1. *See* G.K. CHESTERTON, THE THING 35–36 (1957). The fourteenth edition of Bartlett's Familiar Quotations includes the saying, "Don't ever take a fence down until you know why it was put up," and notes that it was "[a]scribed to Chesterton by John F. Kennedy in a 1945 notebook." JOHN BARTLETT, FAMILIAR QUOTATIONS 919 (Emily Morison Beck ed., 14th ed. 1968). For examples of courts citing the principle, see Stickler v. Halevy, 794 F. Supp. 2d 385, 390 (E.D.N.Y. 2011); McKinney v. Hanks, 911 F. Supp. 359, 360–61 (N.D. Ind. 1995).
2. CHESTERTON, *supra* note 1, at 35. Chesterton elaborated:

> This paradox rests on the most elementary common sense. The gate or fence did not grow there . . . Some person had some reason for thinking it would be a good thing for somebody. And until we

Statutes of repose are fences on the time continuum that can prevent causes of actions from arising or being enforced after a given period of time has elapsed from a defined event. In recent years, courts applying the doctrine of federal preemption have increasingly found that federal statutes removed the barriers of state statutes of repose to certain tort suits.[3] In doing so, however, courts have not followed a consistent interpretive approach to determine whether Congress meant to tear down the statute of repose "fence" through careful consideration of congressional intent and an understanding of the nature of the fence and the purposes of the state legislature in erecting it.

This article proposes an interpretative framework for determining questions of federal preemption of state statutes of repose that gives due consideration to both the preemptive power of the federal government through the Supremacy Clause as well as the prerogatives of the state legislature to define the limits of a state's causes of action. First, the article considers the nature of statutes of repose, particularly how they have developed as substantive rather than procedural components of state law, which has important implications for determining questions of federal preemption.[4] Second, the article discusses the different doctrines of federal preemption—express preemption, field preemption, and conflict preemption—considering application of each doctrine to questions of federal preemption of state statutes of repose.[5] Third, the article explores how principles of statutory interpretation determine the preemptive reach of a federal statute, focusing on text-based principles, interpretive canons of construction and legislative history.[6]

> know what the reason was, we really cannot judge whether the reason was reasonable . . . But the truth is that nobody has any business to destroy a social institution until he has really seen it as an historical institution. If he knows how it arose, and what purposes it was supposed to serve, he may really be able to say that they were bad purposes, or that they have since become bad purposes, or that they are purposes which are no longer served. But if he simply stares at the thing as a senseless monstrosity that has somehow sprung up in his path, it is he and not the traditionalist who is suffering from an illusion.

Id. at 35–36. *See generally* Dale Alquist, *G.K. Chesterton's Uncommonly Sensible Views on the Law*, 3 AVE MARIA L. REV. 685 (2005) (discussing how Chesterton may have viewed the modern legal system).

3. *See infra* Parts V, VI.
4. *See infra* Part II.
5. *See infra* Part III.
6. *See infra* Part IV.

With this background, the article proposes an interpretive approach which is faithful to Chesterton's principle, striking an appropriate balance between federal and state power through determining the considered intent of Congress to strike down state statutes of repose or leave them standing.[7] The key is congressional intent, and the article will briefly discuss the appropriate goal of the interpretive process before outlining the interpretive approach.[8]

Through the Supremacy Clause,[9] Congress clearly has the constitutional power to preempt state statutes of repose, but the central question in every case will be whether Congress intended to do so.[10] The first inquiry in the interpretive analysis must be whether the plain meaning of the text of the statute reflects congressional intent to preempt state statutes of repose.[11] If there is a preemption provision in the statute then, under principles of express preemption, courts must give effect to the plain meaning of the provision.[12] As we will see, however, an express preemption provision may not be clear regarding whether it applies to state statutes of repose.[13] If there is ambiguity, the next step is to consider whether meaning can be determined through application of "text-based" canons of interpretation.[14] If not, the court should consider whether "substantive" canons of construction can give rise to any presumption regarding preemption.[15] A court should determine the aptness of any potentially applicable substantive canon of construction to the particular federal statute at issue; the analysis must recognize both the purposes of the federal provision and the nature of state power exercised through the statute of repose.[16] The article will discuss how a court should determine whether any presumption regarding preemption should apply when multiple substantive canons provide different indications of meaning.[17]

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7. *See infra* Part IV.E.
8. *See infra* Part IV.A.
9. U.S. CONST. art. VI, cl. 2.
10. *See* Medtronic, Inc. v. Lohr, 518 U.S. 470, 485–86 (1996) (stating that congressional intent is the "ultimate touchstone" for determining whether a federal statute preempts state law).
11. *See infra* Part IV.B.
12. *See, e.g.*, Montalvo v. Spirit Airlines, 508 F.3d 464, 474 (9th Cir. 2007); Peters v. Union Pac. R.R. Co., 80 F.3d 257, 261 (8th Cir. 1996).
13. *See infra* Part V.A.1.
14. *See infra* Part IV.C.1.
15. *See infra* Part IV.C.2.
16. *See infra* Part IV.C.2.
17. *See infra* Part IV.C.2.

Once a court has determined whether there should be a presumption for or against preemption, the final step is to determine whether the presumption is overcome by examining the statutory context, the legislative history, and the purposes of the federal statute.[18] This last step in the interpretive analysis incorporates principles of field preemption and conflict preemption in considering statutory context.[19]

Finally, the last two sections of the article apply the interpretive approach to two ongoing conflicts in federal law regarding whether a particular federal statute preempts state statutes of repose.[20] One statute, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA),[21] includes an express preemption provision;[22] the other statute, the Federal Tort Claims Act (FTCA),[23] does not. The analysis of these conflicts shows how an objective application of an interpretive approach can best determine the considered intent of Congress.

18. *See infra* Part IV.D.
19. *See infra* Part IV.D.
20. *See generally infra* Parts V, VI (discussing matters of preemption between federal and state laws).
21. Comprehensive Environmental Response, Compensation and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended in scattered sections of 26 and 42 U.S.C.).
22. 42 U.S.C. § 9658(a)(1) (2006). This particular provision was added to CERCLA by the Superfund Amendments and Reauthorization Act (SARA), which refined and expanded CERCLA. Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (codified as amended in scattered sections of 10, 26, and 42 U.S.C.).
23. 28 U.S.C. §§ 1346(b), 2671–2680 (2006); *see* Augutis v. United States, 732 F.3d 749, 754 (7th Cir. 2013) ("The FTCA does not expressly preempt state statutes of repose, nor does it impliedly preempt state substantive law; to the contrary, it expressly incorporates it.").

II. CONSIDERING THE NATURE AND PURPOSES OF STATE STATUTES OF REPOSE

A. Distinguishing Statutes of Repose from Statutes of Limitations

Statutes of repose are distinct from statutes of limitations.[24] A statute of limitations is a procedural defense to a legal claim.[25] It provides a period of time from the date that a claim accrues during which a claimant must take some action to prosecute the claim.[26] A claimant's failure to take action within the statutory period usually provides an affirmative defense to the cause of action.[27] By contrast, a statute of repose is a substantive right to be free from liability after a given period of time has elapsed from a defined event.[28] Significantly, the triggering event that starts the limitations period is not the accrual of the cause of action for the claimant, but rather some other defined event, which is usually conduct of the defendant that is related to the claim.[29] A statute of repose will entirely extinguish a cause of action after the passage of time even if the cause of action has not yet accrued.[30]

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24. Ma v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 597 F.3d 84, 88 n.4 (2d Cir. 2010); Moore v. Liberty Nat'l Life Ins. Co., 267 F.3d 1209, 1217–18 (11th Cir. 2001); Hinkle *ex rel.* Hinkle, 85 F.3d 298, 301 (7th Cir. 1996); Dunn v. Dunn, 281 P.3d 540, 548 (Kan. Ct. App. 2012). *See generally* 51 AM. JUR. 2D *Limitation of Actions* § 4 (2011) ("Statutes of limitation are fundamentally or materially different from statutes of repose . . . ."); Josephine Herring Hicks, Note, *The Constitutionality of Statutes of Repose: Federalism Reigns*, 38 VAND. L. REV. 627, 628–29 (1985) ("[I]mportant differences exist between statutes of limitations and statutes of repose.").

25. *Hinkle*, 85 F.3d at 301; First United Methodist Church of Hyattsville v. U.S. Gypsum Co., 882 F.2d 862, 865 (4th Cir. 1989); *Dunn*, 281 P.3d at 548; *see* 51 AM. JUR. 2D, *supra* note 24, § 4.

26. *Moore*, 267 F.3d at 1218; Hicks, *supra* note 24, at 629.

27. *Ma*, 597 F.3d at 88 n.4; Roskam Baking Co. v. Lanham Mach. Co., 288 F.3d 895, 902–03 (6th Cir. 2002).

28. *Hinkle*, 85 F.3d at 301; *First United Methodist Church*, 882 F.2d at 866; *Dunn*, 281 P.3d at 548.

29. *Ma*, 597 F.3d at 88 n.4; *Moore*, 267 F.3d at 1218; *see also* Wong v. Beebe, 732 F.3d 1030, 1048 (9th Cir. 2013) (en banc) (internal quotation marks omitted) ("[A statute of repose] is a fixed, statutory cutoff date, usually independent of any variable, such as claimant's awareness of a violation."); *Roskam Baking Co.*, 288 F.3d at 903 ("A statute of limitations focuses on time measured from an injury; a statute of repose rests on the time from some initiating event unrelated to an injury."); 51 AM. JUR. 2D, *supra* note 24, § 4 ("A statute of repose limits the time within which an action may be brought, but is not related to the accrual of the cause of action.").

30. *See, e.g.*, *Wong*, 732 F.3d at 1048; *Ma*, 597 F.3d at 88 n.4; *Dunn*, 281 P.3d at 548; Hicks, *supra* note 24, at 628–29.

The terms "statute of limitations" and "statute of repose" developed as clearly distinct concepts only during the second half of the twentieth century in response to the incorporation of a "discovery rule of accrual" into statutes of limitations. Under a typical discovery rule of accrual for a tort action, a cause of action "accrues," starting the statute of limitations period running, only when the claimant knows, or has reason to know, of an injury and its cause.[31] The justification for a discovery rule of accrual lies in the perceived unfairness to a claimant of starting the statute of limitations at an earlier time, when a claimant may be "blameless[ly] ignorant" of the "unknown and inherently unknowable" existence of an injury.[32]

During the early twentieth century, most states recognized a discovery rule only in the limited circumstances of fraud or concealment.[33] In the absence of fraud or concealment, the general rule was that the cause of action "accrued" at the time the right of action first arose, even though the claimant had no knowledge of the right to sue, or the facts out of which the right arose.[34] But, in 1949, in *Urie v. Thompson*, the Supreme Court incorporated a "general

31. *See, e.g.*, Litif v. United States, 670 F.3d 39, 43–44 (1st Cir. 2012); A.Q.C. *ex rel.* Castillo v. United States, 656 F.3d 135, 139–40 (2d Cir. 2011); *see also* Merck & Co. v. Reynolds, 559 U.S. 633, 646 (2010) ("[T]reatise writers now describe 'the discovery rule' as allowing a claim 'to accrue when the litigant first knows *or with due diligence should know* facts that will form the basis for an action.'" (emphasis added) (quoting 2 CALVIN W. CORMAN, LIMITATION OF ACTIONS, § 11.1.1, at 134 (1991))).

32. Urie v. Thompson, 337 U.S. 163, 169–71 (1949) (stating that prior to diagnosis, the plaintiff's disease was "unknown and inherently unknowable" and Congress could not have intended that the plaintiff's action be barred by the statute in the face of "blameless ignorance").

33. *See* RESTATEMENT OF TORTS § 899 cmt. e (1939) ("[I]t is still true in many of the States that, in the absence of fraud or concealment of the cause of action, the statutory period runs from the time the tort was committed although the injured person had no knowledge or reason to know of it.").

34. *See* 2 H.G. WOOD, LIMITATION OF ACTIONS § 276c(1), at 1408–10 (4th ed. 1916) ("Mere ignorance of the existence of a cause of action does not prevent the running of the statute of limitations unless there has been fraudulent concealment on the part of those invoking the benefit of the statute."); 17 RULING CASE LAW, *Limitation of Actions* § 193, at 831 (William M. McKinney & Burdett A. Rich eds., 1917) ("The fact that a person entitled to an action has no knowledge of his right to sue, or of the facts out of which his right arises, does not, as a general rule, prevent the running of the statute, or postpone the commencement of the period of limitation, until he discovers the facts or learns of his rights thereunder."); *see also* Adam Bain & Ugo Colella, *Interpreting Federal Statutes of Limitations*, 37 CREIGHTON L. REV. 493, 513 (2004) (showing that law dictionaries in the twentieth century did not include a discovery component in the definition of the word "accrue" as it related to statutes of limitations until the 1979 edition of Black's Law Dictionary).

discovery rule" of accrual into the statute of limitations of the Federal Employers Liability Act (FELA), holding that a plaintiff's cause of action did not accrue until the plaintiff knew, or should have known, of the injury.[35] The Court found that barring a claim of a plaintiff who had been unaware of an injury caused by exposure to silica dust many years prior to a diagnosis of silicosis could not be consistent with FELA's "humane legislative plan" or reconciled with "the traditional purposes of statutes of limitations, which conventionally require the assertion of claims within a specified period of time after the notice of the invasion of legal rights."[36] In 1950, an influential article in the Harvard Law Review recognized the traditional, "convenient rule" that a plaintiff's inability to discover an injury, or other facts supporting a cause of action, was irrelevant to the commencement of the statute of limitations period; but, the article recommended an exception to this rule in "situations where the plaintiff is generally unlikely to learn of the harm before the remedy expires."[37] By 1979, the second Restatement of Torts recognized that a "wave of recent decisions" had held that a statute of limitations "must be construed as not intended to start to run until the plaintiff has in fact discovered the fact that he has suffered injury or by the exercise of reasonable diligence should have discovered it."[38] This represented a significant change in limitations law, particularly with respect to latent injuries. Under this new discovery rule of accrual, as long as a putative plaintiff did not know or have reason to know of an injury, the statute of limitations did not begin to run and the cause of action was not time-barred no matter how long in the past the injury may have occurred.[39]

35. *See Urie*, 337 U.S. at 169–71.
36. *Id.* at 170.
37. Note, *Developments in the Law – Statutes of Limitations*, 63 HARV. L. REV. 1177, 1203 (1950).
38. RESTATEMENT (SECOND) OF TORTS § 899 cmt. e (1979); *see also* SUPERFUND SECTION 301(E) STUDY GRP., 97TH CONG., INJURIES AND DAMAGES FROM HAZARDOUS WASTES—ANALYSIS AND IMPROVEMENT OF LEGAL REMEDIES, at 28–30, 118–19 n.4, app. B at B-1 to B-40 (Comm. Print 1982) (finding that by the early 1980s, thirty-nine jurisdictions had adopted a discovery rule of accrual for personal injury actions); CORMAN, *supra* note 31, § 11.1.1, at 134 (noting that the "potential harshness" of beginning the statute of limitations when a "judicially recognizable injury" or "breach of duty" occurred was mitigated by the judicial development of a discovery rule).
39. *See* Susan D. Glimcher, Note, *Statutes of Limitations and the Discovery Rule in Latent Injury Claims: An Exception or the Law*, 43 U. PITT. L. REV. 501, 501–03 (1981).

B. Appreciating the Intended Purposes of Statutes of Repose

The incorporation of a discovery rule of accrual into state statutes of limitations created what was termed a "long tail" effect of potential liability for defendants for conduct that occurred in the distant past.[40] This effect reduced the ability of insurance companies to predict future liabilities, which resulted in a perceived insurance crisis because insurance companies were reluctant to write certain policies or, alternatively, required very high premiums for the policies.[41] Recognizing this, and the resulting rise in insurance costs to businesses, state legislatures began to enact "statutes of repose" to provide a finite time limit on defendants' potential liability.[42] Such statutes of repose exist in over half of the states and reflect a state legislature's conclusion that, after a certain point in time, a potential defendant should be immune from tort liability for past conduct despite the possibility that an individual may later become aware of some harm arising out of the conduct.[43]

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40. *See, e.g.*, Hinkle *ex rel.* Hinkle v. Henderson, 85 F.3d 298, 301 (7th Cir. 1996); Katz v. Children's Hosp. of Orange Cnty., 28 F.3d 1520, 1525 (9th Cir. 1994); Mohamed v. Donald J. Nolan, Ltd., No. 12-CV-3139 (NGG)(JMA), 2013 WL 4807612, at *8 (E.D.N.Y. Aug. 28, 2013).

41. *See, e.g.*, *Hinkle*, 85 F.3d at 301; *Katz*, 28 F.3d at 1525; *see also* Nancy E. Leibowitz, Case Note, Hill v. Fitzgerald, *304 Md. 689, 501 A.2d 27 (1985)*, 16 U. BALT. L. REV. 571, 574–75 (1987) (discussing the argument that the discovery rule expanded the number of potential tort plaintiffs and removed the "definite period in which liability can be predicted" so that insurance companies were "unable to set affordable and adequate insurance premiums").

42. *See, e.g.*, *Hinkle*, 85 F.3d at 301. State courts frequently recognized that statutes of repose were a response to the open-ended liability created by a discovery rule of accrual. *See, e.g.*, Comstock v. Collier, 737 P.2d 845, 849 (Colo. 1987) (en banc); Orlak v. Loyola Univ. Health Sys., 885 N.E.2d 999, 1003–04 (Ill. 2007); Joslyn v. Chang, 837 N.E.2d 1107, 1110 (Mass. 2005); Hill v. Fitzgerald, 304 Md. 689, 699–500, 501 A.2d 27, 32 (1985); Givens v. Anchor Packing, Inc., 466 N.W.2d 771, 773–75 (Neb. 1991); Hoffman v. Powell, 380 S.E.2d 821, 822 (S.C. 1989); *see also* Gail D. Eiesland, Miller v. Gilmore*: The Constitutionality of South Dakota's Medical Malpractice Statute of Limitations*, 38 S.D. L. REV. 672, 685–86 (1993) (stating that statutes of repose were enacted in response to the insurance crisis thought to be created by the discovery rule); Hicks, *supra* note 24, at 632 ("[The] most noted justification for statutes of repose is the desire to alleviate the insurance problem facing manufacturers, the medical profession, and the construction industry. . . . [A]bnormally long periods of potential liability [or the] . . . 'long tail' problem is the principal culprit . . . ."); Leibowitz, *supra* note 41, at 574–75 (stating that state legislatures enacted statutes of repose in response to the "long tail" effect of the discovery rule).

43. *See, e.g.*, Daily v. New Britain Mach. Co., 512 A.2d 893, 904 (Conn. 1986); Albrecht v. Gen. Motors Corp., 648 N.W.2d 87, 91 (Iowa 2002); Farber v. Lok-N-Logs, Inc., 701 N.W.2d 368, 377 (Neb. 2005); Friends of Clark Mountain Found., Inc. v. Bd. of

Setting an absolute time period of potential liability as measured from the date of a defendant's conduct could "significantly reduce the uncertainty associated with the 'long tail' effect of the discovery rule," theoretically permitting insurance companies to underwrite risks that were previously too open-ended and to lower premiums.[44] State legislatures targeted statutes of repose to certain types of tort actions, such as medical malpractice actions,[45] actions against architects,[46] and product liability actions,[47] perceiving that more certainty regarding liability in those areas was necessary.[48] Some state legislatures also enacted statutes of repose that applied to personal injury and property damage actions generally.[49] While there has been debate regarding whether the discovery rule was responsible for the "insurance crisis,"[50] states have not repealed their statutes of repose based on a policy decision that they were unnecessary or ineffective in controlling insurance costs. As long as the states have statutes of repose, physicians, architects, manufacturers, and other defendants—as well as their insurers—will assume that an applicable statute of repose provides an absolute time barrier to actions based on covered conduct.

Supervisors of Orange Cnty., 406 S.E.2d 19, 21 (Va. 1991); Kohn v. Darlington Cmty. Sch., 698 N.W.2d 794, 806 (Wis. 2005); Bell v. Schell, 101 P.3d 465, 472 (Wyo. 2004).

44. Thaddeus Mason Pope, *Physicians and Safe Harbor Legal Immunity*, 21 ANNALS HEALTH L. 121, 130 (2012); *see also* Hicks, *supra* note 24, at 632–33 ("[S]tatutes of repose lead to more certain liability and thus provide greater actuarial precision in setting insurance rates.").

45. *See, e.g.*, FLA. STAT. ANN. § 95.11(4)(b) (West 2002 & Supp. 2014); GA. CODE ANN. § 9-3-71(b) (2007 & Supp. 2013); 40 PA. CONS. STAT. ANN. § 1303.513(a) (West 1999 & Supp. 2013); TENN. CODE ANN. § 29-26-116(a)(3) (2012 & Supp. 2013); UTAH CODE ANN. § 78B-3-404(1) (LexisNexis 2012).

46. *See, e.g.*, ALA. CODE § 6-5-221(a) (LexisNexis 2005 & Supp. 2013); CONN. GEN. STAT. ANN. § 52-584 (West 2013); 735 ILL. COMP. STAT. ANN. 5/13–214(b) (West 2011); N.J. STAT. ANN. § 2A:14–1.1(a) (West 2000 & Supp. 2013).

47. *See, e.g.*, FLA. STAT. ANN. § 95.031(2)(b) (West 2002 & Supp. 2014); IOWA CODE ANN. § 614.1(2A) (West 1999 & Supp. 2013); OR. REV. STAT. § 30.905 (2013); TENN. CODE ANN. § 29-28-103(a) (2012).

48. *See, e.g.*, Hicks, *supra* note 24, at 633 (providing support for the argument that "statutes of repose" are particularly beneficial to "specific groups of defendants").

49. KAN. STAT. ANN. § 60-513(a) (2005); N.C. GEN. STAT. § 1-52(16) (2013); OR. REV. STAT. § 12.115 (2013).

50. *See* Scott A. DeVries, Note, *Medical Malpractice Acts' Statutes of Limitation as They Apply to Minors: Are They Proper?*, 28 IND. L. REV. 413, 416–17 (1995) (discussing the debate on the causes of the medical malpractice insurance crisis); Eiesland, *supra* note 42, at 685–88 (1993) (discussing the validity and causes of the medical malpractice insurance crisis).

C. Considering "Statute of Repose" as a Term of Art Rather Than a Descriptive Phrase

Some court decisions reflect confusion that the term "statutes of limitations" encompasses statutes of repose.[51] This likely arises from the fact that definitions and descriptions of "statutes of limitations" have often stated that "[s]tatutes of limitations are statutes of repose . . . ."[52] These definitions and descriptions, however, merely state one of the functions of a statute of limitations, namely "repose," or "peace of mind" to a defendant after a set period of time;[53] they do not mean that a "statute of repose,"—as a unique legal term of art in common use over the last several decades—is a subspecies of statute of limitations.[54]

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51. *See, e.g.*, McDonald v. Sun Oil Co., 548 F.3d 774, 781 (9th Cir. 2008) (finding that as of 1986, a number of cases confused the terms statute of limitations and statute of repose "or used them interchangeably"); Nat'l Credit Union Admin. Bd. v. RBS Sec., Inc., 900 F. Supp. 2d 1222, 1240 (D. Kan. 2012) ("The terms 'statute of limitations' and 'statute of repose' are often conflated.").

52. *See, e.g.*, BLACK'S LAW DICTIONARY 835 (5th ed. 1979). An early treatise noted that "[t]he statutes of limitation have been called by Lord Kenyon [Lord Chief Justice of England, 1788-1802], statutes of repose; and have ever been described as a most beneficial system of laws, and of the greatest importance to society; and very high commendations have invariably been bestowed upon them by the Judges . . . ." WILLIAM BLANSHARD, A TREATISE ON THE STATUTES OF LIMITATION 5–6 (London, Joseph Butterworth and Son, 1826) (footnote omitted). Similarly, an early Supreme Court case stated that statutes of limitations "are statutes of repose to quiet titles, to suppress fraud, and to supply the deficiency of proofs arising from the ambiguity and obscurity or antiquity of transactions." Hangar v. Abbott, 73 U.S. 532, 538 (1867). Other early Supreme Court cases likewise stated that statutes of limitations were "statutes of repose" in the descriptive sense rather than as a term of art with independent legal significance. *See, e.g.*, Traer v. Clews, 115 U.S. 528, 542 (1885); Weber v. Bd. of Harbor Comm'rs, 85 U.S. 57, 70 (1873); United States v. Wiley, 78 U.S. 508, 513 (1870).

53. Repose is just one of the functions of statutes of limitations; other functions of statutes of limitations include encouraging the reasonably diligent presentation of claims and promoting the just and efficient adjudication of claims. *See* Bain & Colella, *supra* note 34, at 571–72. Statutes of limitation provide repose to a defendant by relieving a defendant from having to defend stale claims where the quality of the evidence may have deteriorated and by providing security and stability to a defendant to conduct its affairs through a clearer understanding of its potential liabilities. *Id.* at 572. A discovery rule of accrual gives greater weight to a plaintiff's knowledge of the claim and less weight to the value of repose. *See* Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitations*, 28 PAC. L.J. 453, 458 (1997).

54. *See* Wenke v. Gehl Co., 682 N.W.2d 405, 423 (Wis. 2004). In discussing the evolving meaning of the term statute of repose, the court stated that "[e]arly treatise writers and judges considered time bars created by statutes of limitations, escheat and adverse possession as periods of repose. As the courts began to modify statutory limitations by applying the 'discovery rule,' legislatures responded by enacting

In recent years, courts routinely recognize the separate natures and functions of statutes of limitations and statutes of repose. For example, in 1993 one court stated that a statute of limitations "governs the time within which legal proceedings must be commenced after the cause of action accrues," but a statute of repose "is not related to the accrual of any cause of action. The injury need not have occurred, much less have been discovered."[55] Significantly, courts have recognized that while statutes of limitations are procedural, statutes of repose are substantive, creating a "substantive right" to putative defendants "'to be free from liability after a legislatively-determined period of time . . . based on considerations of the economic best interests of the public as a whole.'"[56] Accordingly, statutes of limitations and statutes of repose "apply in ways that are independent of one another," and they "do not affect each other directly, as they are triggered by entirely distinct events."[57] The "defining characteristic of [a statute of repose] is that its time period does not begin to run when the action accrues, but rather when the relevant action occurs."[58]

While having a separate function from a statute of limitations, a statute of repose is sometimes included within the statutory provision establishing the statute of limitations; in such provisions, the statute of repose marks the outer temporal boundary of a defendant's potential liability when there is a discovery rule of accrual for the statute of limitations. North Carolina's general three year statute of

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absolute statutes of repose." *Id.* (emphasis omitted) (internal quotation marks omitted).

55. Bradway v. Am. Nat'l Red Cross, 992 F.2d 298, 301 (11th Cir. 1993) (emphasis omitted) (internal quotation marks omitted)*; see also* Burlington N. & Santa Fe Ry. Co. v. Poole Chem. Co., 419 F.3d 355, 363 (5th Cir. 2005) (discussing the distinction between a statute of limitations and a statute of repose); First United Methodist Church of Hyattsville v. U.S. Gypsum Co., 882 F.2d 862, 865–66 (4th Cir. 1989) (indicating that a statute of limitations is a procedural device and a statute of repose is a substantive right).

56. Moore v. Liberty Nat'l Life Ins. Co., 267 F.3d 1209, 1218 (11th Cir. 2001) (quoting *First United Methodist*, 882 F.2d at 865–66); *see also* Rosenberg v. Town of N. Bergen, 293 A.2d 662, 667 (N.J. 1972) ("The function of [a] statute [of repose] is thus rather to define substantive rights than to alter or modify a remedy."); Cronin v. Howe, 906 S.W.2d 910, 913 (Tenn. 1995) ("[The] distinction has prompted courts to hold that statutes of repose are substantive and extinguish both the right and the remedy, while statutes of limitation are merely procedural, extinguishing only the remedy.").

57. *Moore*, 267 F.3d at 1218.

58. *Id.*

limitations for tort actions for personal injury or physical damage is typical. The statute provides:

> Unless otherwise provided by statute, for personal injury or physical damage to claimant's property, the cause of action, except in causes of actions referred to in G.S. 1-15(c) [concerning professional malpractice actions], shall not accrue until bodily harm to the claimant or physical damage to his property becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs. Provided that no cause of action shall accrue more than 10 years from the last act or omission of the defendant giving rise to the cause of action.[59]

The first sentence provides for a discovery rule of accrual for the statute of limitations and the second sentence sets forth a statute of repose.[60]

The substantive nature of statutes of repose is legally significant. Most states which have enacted statutes of repose recognize that they create "substantive rights."[61] Thus, unlike procedural statutes of limitations, substantive statutes of repose usually cannot be equitably tolled.[62] The substantive nature of statutes of repose can also be

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59. N.C. GEN. STAT. § 1-52(16) (2013).

60. This has been recognized by the North Carolina Supreme Court. *See* Wilson v. McLeod Oil Co., 398 S.E.2d 586, 597 (N.C. 1990) (referencing "the statute of repose found in 1-52(16)" on numerous occasions).

61. *See, e.g.*, Albano v. Shea Homes Ltd. P'ship, 254 P.3d 360, 366 (Ariz. 2011) (en banc) ("[A] statute of repose defines a substantive right."); Harding v. K.C. Wall Prods., Inc., 831 P.2d 958, 967 (Kan. 1992) (stating that a statute of repose "is substantive"); Dawson v. N.C. Dep't of Env't & Nat. Res., 694 S.E.2d 427, 430 (N.C. Ct. App. 2010) ("A statute of repose is a substantive limitation, and is a condition precedent to a party's right to maintain a lawsuit." (internal quotation marks omitted)); FDIC v. Lenk, 361 S.W.3d 602, 609 (Tex. 2012) (stating that the statute of repose was a "substantive definition of rights" (internal quotation marks omitted)).

62. *See, e.g.*, Wong v. Beebe, 732 F.3d 1030, 1048 (9th Cir. 2013) (en banc) (stating that a statute of repose "is not subject to equitable tolling"); Police & Fire Ret. Sys. of Detroit v. IndyMac MBS, Inc., 721 F.3d 95, 106 (2d Cir. 2013) (stating that statutes of repose create substantive rights and are only subject to legislatively-created exceptions, not equitable tolling); First United Methodist Church of Hyattsville v. U.S. Gypsum Co., 882 F.2d 862, 866 (4th Cir. 1989) ("A statute of repose is typically an absolute time limit beyond which liability no longer exists and is not tolled for any reason because to do so would upset the economic balance struck by the legislative body."); Capco of Summerville, Inc. v. J.H. Gayle Constr. Co., 628 S.E.2d 38, 41 (S.C. 2006) ("A statute of repose is typically an absolute time limit beyond which liability no longer exists and is not tolled for any reason because to do so would upset the economic balance struck by the legislative body.").

significant with respect to preemption. The creation of a substantive right under state tort law falls within a traditional area of state legal authority so that there is a strong presumption that Congress did not intend to preempt state law.[63]

III. APPLICATION OF FEDERAL PREEMPTION TO STATE STATUTES OF REPOSE

Under the Supremacy Clause of the United States Constitution, "the Laws of the United States . . . shall be the supreme Law of the land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[64] Courts often must determine whether a particular federal statute preempts state law. The Supreme Court has recognized three types of preemption: express preemption, field preemption, and conflict preemption.[65]

Courts apply the doctrine of express preemption when Congress has explicitly stated that it is preempting state law.[66] As applied to state statutes of repose, Congress could specifically provide that state statutes of repose are preempted for particular actions. In the simplest case, Congress could use the term "statute of repose" in the preemption provision and particularly specify how and when the statute is preempted. But Congress could also expressly preempt state statutes of repose without using the phrase; for example, Congress could preempt "any statutory time period provided by state law that would foreclose the action." As we will see, the analysis of whether CERCLA preempts state statutes of repose involves application of express preemption to determine whether the language

63. *See, e.g.*, *In re* Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig., 725 F.3d 65, 96 (2d Cir. 2013) ("[Since the] imposing [of] state tort law liability falls well within the state's historic powers to protect the health, safety, and property rights of its citizens . . . The presumption that Congress did not intend to preempt state law tort verdicts is particularly strong."); Desiano v. Warner-Lambert & Co., 467 F.3d 85, 94 (2d Cir. 2006) ("[T]he [state] legislature's desire to rein in state-based tort liability falls squarely within its prerogative to 'regulat[e] matters of health and safety,' which is a sphere in which the presumption against preemption applies, indeed, stands at its strongest.") (quoting Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341, 348 (2001)); Coyne & Delany Co. v. Selman, 98 F.3d 1457, 1467 (4th Cir. 1996) (The starting presumption that Congress does not intend to supplant state law is especially true in cases involving fields of traditional state regulation, including common law tort liability.") (citations omitted) (internal quotation marks omitted).

64. U.S. CONST. art. VI, cl. 2.

65. *See* Arizona v. United States, 132 S. Ct. 2492, 2500–01 (2012); Wis. Pub. Intervenor v. Mortimer, 501 U.S. 597, 604–05 (1991).

66. *See* Chamber of Commerce of the United States v. Whiting, 131 S. Ct. 1968, 1974–75 (2011).

of 42 U.S.C. Section 9658[67]—which uses the terms "statutes of limitations" and "limitations period," but not "statutes of repose"—[68] preempts state statutes of repose.

Under the doctrine of field preemption, circumstances give rise to the inference that "Congress intends federal law to 'occupy the field,'"[69] leaving no room for a state law claim.[70] This can occur when Congress enacts a "framework of regulation 'so pervasive . . . that Congress left no room for the States to supplement it,'" or "where there is a 'federal interest . . . so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'"[71] With respect to state statutes of repose, Congress may have decided to occupy an entire field of state substantive law, which would include any state statute of repose for causes of action in that field.

Finally, under the doctrine of conflict preemption, Congress preempts state laws that conflict with federal law.[72] This includes circumstances in which compliance with both state and federal law is a physical impossibility and occasions when state law stands as an obstacle to the accomplishment of Congress's objectives as expressed in federal law.[73] Thus, if it would be impossible to enforce both a federal law and a state statute of repose, then federal law preempts the statute. Alternatively, federal law may preempt a statute of repose, if application of the statute of repose would defeat an expressed congressional objective. That a statute contains an express preemption provision or a savings clause does not foreclose application of conflict preemption.[74]

Whether the FTCA preempts state statutes of repose can involve both field and conflict preemption. There is no express preemption provision in the FTCA, but one court, applying the doctrine of field preemption has considered whether Congress intended to leave any

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67. For ease of reference, this article refers to sections of CERCLA by section designation within the United States Code, rather than by section designation in CERCLA. Courts sometimes refer to provisions of CERCLA by the CERCLA section number; consequently, this section is sometimes referenced as Section 309.
68. 42 U.S.C. § 9658 (2006).
69. Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372 (2000) (quoting California v. ARC Am. Corp., 490 U.S. 93, 100 (1989)).
70. *See, e.g.*, Beneficial Nat'l Bank v. Anderson, 539 U.S. 1, 11 (2003).
71. Arizona v. United States, 132 S. Ct. 2492, 2501 (2012) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).
72. *Id.*
73. *Id.*; Freightliner Corp. v. Myrick, 514 U.S. 280, 287 (1995).
74. Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341, 352 (2001); Geier v. Am. Honda Motor Co., 529 U.S. 861, 870–71 (2000).

room for state statutes of repose,[75] and several courts have considered whether state statutes of repose conflict with limitations provisions in the FTCA.[76]

Whichever mode of preemption analysis applies, congressional intent is the "ultimate touchstone" in determining whether a federal statute preempts state law.[77] This raises the question of how best to determine congressional intent to preempt state statutes of repose.

IV. AN INTERPRETIVE APPROACH FOR DETERMINING WHETHER FEDERAL LAW PREEMPTS STATE STATUTES OF REPOSE

Because the question of federal preemption turns on whether Congress intended to preempt state law, answering the question is an exercise of statutory interpretation. A court must determine whether a particular provision in a federal statute expressly preempts a state statute of repose or whether there are other reliable bases to find congressional intent to preempt. In addition to the plain meaning of the text, courts consider applicable canons of construction, statutory context, legislative history, and statutory purposes to determine congressional intent.[78] Some indicia of intent may be direct, but others may be indirect. For example, the language of a statute or its legislative history may directly show that Congress intended to preempt state statutes of repose. On the other hand, Congress may indirectly show intent to preempt statutes of repose through a comprehensive legislative framework that necessarily precludes operation of these statutes or through a particular provision which cannot be implemented while enforcing a state statute of repose.[79]

Courts are to interpret fairly federal statutes to effectuate congressional intent.[80] Principles of statutory construction offer guidelines to the appropriate outer bounds of statutory interpretation. The starting point must always be the plain meaning of the text of the

75. Mamea v. United States, Civil No. 08-00563 LEK-RLP, 2011 WL 4371712, at *9–11 (D. Haw. Sept. 16, 2011).

76. *See infra* notes 359–67 and accompanying text.

77. Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996).

78. City of Arlington, Tex. v. FCC, 133 S. Ct. 1863, 1876 (2013) (Breyer, J., concurring).

79. *See, e.g.*, Bank of Am. v. City and Cnty. of San Francisco, 309 F.3d 551, 558 (9th Cir. 2002) (stating that under the doctrines of field preemption and conflict preemption, one can find an implicit congressional intent to preempt).

80. *See* Touche Ross & Co. v. Redington, 442 U.S. 560, 578 (1979) ("The ultimate question is one of congressional intent, not one of whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law.").

statute.[81] When the text of the statute is clear, the inquiry is complete.[82] But, when the text of the statute is ambiguous, courts should consider established canons of statutory construction, considering first "text-based" canons and then, if necessary, "substantive" canons.[83] Fair statutory construction involves evaluating all potentially applicable and valid canons of construction, not just those that favor a particular outcome.[84] Courts may also consider the context of the statute, its legislative history and its purposes to determine congressional intent regarding preemption.[85] Statutory context, history and purposes may be particularly important in determining whether Congress has completely occupied a field or enacted a provision that conflicts with state law. As with the canons of construction, a key to fair interpretation is an even-handed assessment of these signposts of congressional intent, including an appreciation that enacted legislation is usually the result of a process of legislative compromises. When a court cherry-picks certain indications of congressional intent to support an outcome, without giving due consideration of those that support an opposite conclusion,

81. Sebelius v. Cloer, 133 S. Ct. 1886, 1893 (2013).

82. Conn. Nat'l Bank v. Germain, 503 U.S. 249, 254 (1992).

83. *See* Corley v. United States, 556 U.S. 303, 325 (2009) (Alito, J., dissenting) ("Canons of [construction] are quite often useful in close cases, or when statutory language is ambiguous. But . . . [they] are not a license for the judiciary to rewrite language enacted by the legislature.") (citations omitted) (internal quotation marks omitted). With respect to canons for statutory interpretation, this article relies primarily on the leading treatise on statutory interpretation, NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION (7th ed. 2007), particularly Chapters 47, 58, 60, and 62, and on ANTONIN SCALIA & BRYAN GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012), which is self-described as "the first modern attempt, certainly in a century, to collect and arrange only the valid canons (perhaps a third of the possible candidates) and to show how and why they apply to proper legal interpretation." *Id.* at 9 (footnote omitted). The distinction between "text-based canons" and "substantive canons," is from 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, 222–28 (1996). Professor Watson draws this distinction based upon the functions of canons from several sources, including Denise W. DeFranco, Chevron *and Canons of Statutory Construction*, 58 GEO. WASH. L. REV. 829, 839 (1990); Daniel B. Rodriguez, *The Presumption of Reviewability: A Study in Canonical Construction and its Consequences*, 45 VAND. L. REV. 743, 743–44 (1992); and Stephen F. Ross, *Where Have You Gone, Karl Llewellyn? Should Congress Turn its Lonely Eyes to You?*, 45 VAND. L. REV. 561, 563 (1992). This distinction is discussed in more detail in the text accompanying notes 106–60 *infra*.

84. SCALIA & GARNER, *supra* note 83, at 59.

85. *E.g.*, City of Arlington, Tex. v. FCC, 133 S. Ct. 1863, 1876 (2013).

the court risks engaging in judicial law-making.[86] Application of a rational interpretive approach can show whether a court is performing a legitimate judicial function in deciding what Congress must have intended in a statute or is instead deciding what Congress should have provided in the statute, which is a matter of policy for the legislature.

A. Using Evidence-Based Methods to Determine Federal Preemption

For years, commentators and judges have argued about the appropriate approach to statutory interpretation. Some have argued for a textualist approach, which draws meaning from the text of the statute and nothing else; others have advocated an intentionalist approach, which goes beyond the text of the statute where necessary to draw meaning from the intent of the legislature, as inferred from the statute's text, legislative history and purposes.[87]

Few disputes reach courts where the text of the statute clearly determines the outcome. Courts must decide cases when the meaning of the statute is not clear from the text. In many such circumstances, courts can rationally infer congressional intent considering canons of construction and extra-textual resources.[88] For example, the doctrines of field preemption and conflict preemption apply when there is no applicable express preemption provision. The analysis requires

86. For example, in reviewing legislative history, which is often extensive, one can rely only on the evidence that supports a preferred conclusion. Justice Scalia has dismissed use of legislative history as providing "something for everyone;" stating that it can "be either relied upon or dismissed with equal plausibility," he argues that it has facilitated decisions "based upon the courts' policy preferences." ANTONIN SCALIA, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 35–36 (Amy Gutmann ed., 1997). Justice Scalia has noted that Judge Harold Leventhal "describe[d] the use of legislative history as the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends." Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring); *see also* Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983) (quoting Judge Harold Leventhal).

87. SINGER & SINGER, *supra* note 83, § 45:8, at 47–49. For a consideration of various textual and extra-textual views of statutory interpretation, see SCALIA & GARNER, *supra* note 83, at 15–28; William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 532–40 (2013) (reviewing SCALIA & GARNER, *supra* note 83).

88. *See* SCALIA, *supra* note 86, at 16–19, 36.

determining congressional intent that is not clear from text but must be determined by statutory context, legislative history, and purpose.[89]

Evaluating competing theories of statutory interpretation is beyond the scope of this article. As a practical matter, most federal judges, particularly those in the district courts and circuit courts of appeal, follow what may best be termed an "evidence-based" approach to statutory interpretation.[90] Invariably, judges will begin by looking at the text of the statute. But when the text is ambiguous, judges use evidence-based paradigms to resolve the ambiguities.[91] Initially, text-based canons of construction allow the courts to draw logical conclusions from the text. Based on principles of semantics, syntax, and context, these canons are comparable to logical conclusions regarding reliability, and therefore admissibility, that evidentiary rules supply for certain types of evidence. Considering the text, along with the text-based canons of construction may be sufficient to decide the interpretive question. If not, the court may then consider substantive canons of construction which supply presumptions of interpretation that are comparable to evidentiary presumptions.

In light of any presumption regarding interpretation of the statute, the court can weigh various forms of "evidence" of congressional intent to resolve the ambiguity.[92] This evidence can include legislative context, history and purpose.[93] Some forms of evidence may be more probative than others; for example, there may be good reasons to discount certain types of evidence, such as the remark of a lone legislator in the Congressional Record regarding the purpose of a particular provision. But, the fact that legislative history may include this type of evidence is not good reason to discount all legislative history. Judges are experienced in weighing evidence and giving it the probative value it deserves in light of evidentiary presumptions. The evaluation of all potentially relevant valid canons of statutory construction along with the careful consideration of any potentially probative evidence of congressional intent can lead to an objective determination of whether Congress intended to preempt statutes of repose. The interpretive approach outlined here provides a framework for reaching objective conclusions on this issue as well as evaluating judicial decision-making.

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89. SCALIA & GARNER, *supra* note 83, at 18–20; SINGER & SINGER, *supra* note 83, § 45:5, at 35–36.

90. SINGER & SINGER, *supra* note 83, § 45:13, at 129.

91. *Id.*

92. *See id.* § 45:5, at 35–40 (explaining examples of forms of evidence that courts may consider in resolving ambiguities).

93. *Id.* § 45:5, at 35–36; SCALIA & GARNER, *supra* note 83, at 18–20.

B. Considering the Plain Meaning of the Text of the Statute

In interpreting a statute, a court must start with the statutory text.[94] The Supreme Court explained in 1917:

> [i]t is elementary that the meaning of a statute, must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the lawmaking body which passed it, the sole function of the courts is to enforce it according to its terms.[95]

The Court stressed, "[w]here the language is plain and admits of no more than one meaning, the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion."[96] As a corollary, the terms in a statute are interpreted in accordance with their ordinary meaning, unless otherwise defined in the statute,[97] and courts should assume that the ordinary meaning of the language in a statute accurately reflects legislative purpose.[98] Unless the plain and ordinary meaning of the text leads to an absurd result, the "sole function of the courts . . . is to enforce it according to its terms."[99] And, to "justify a departure from the letter of the law upon [the ground of absurdity], the absurdity must be so gross as to shock the general moral or common sense."[100]

Beyond the "absurdity exception," the Supreme Court for many years also endorsed a departure from the plain meaning of text in "rare and exceptional circumstances" when the plain meaning was contrary to the congressional intent.[101] But, that is no longer the case.

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94. Sebelius v. Cloer, 133 S. Ct. 1886, 1893 (2013).
95. Caminetti v. United States, 242 U.S. 470, 485 (1917) (citations omitted).
96. *Id.*
97. *Sebelius*, 133 S. Ct. at 1893 (quoting BP Am. Prod. Co. v. Burton, 549 U.S. 84, 91 (2006)); *see* Am. Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982).
98. Marx v. Gen. Revenue Corp., 133 S. Ct. 1166, 1172 (2013) (quoting Hardt v. Reliance Standard Life Ins. Co., 560 U.S. 242, 251 (2010)).
99. Lamie v. U.S. Tr., 540 U.S. 526, 534 (2004) (internal quotation marks omitted) (quoting Hartford Underwriters Ins. Co. v. Union Planters Bank, 530 U.S. 1, 6 (2000)).
100. Crooks v. Harrelson, 282 U.S. 55, 60 (1930); *see also* SCALIA & GARNER, *supra* note 83, at 234 (describing absurdity doctrine as allowing a provision to be "disregarded or judicially corrected as an error (when the correction is textually simple) if failing to do so would result in a disposition that no reasonable person could approve").
101. *See* Ardestani v. INS, 502 U.S. 129, 135–36 (1991); Train v. Colo. Pub. Interest Research Grp., Inc., 426 U.S. 1, 9–10 (1976); United States v. Am. Trucking Ass'ns,

Over the last several decades, the Court has stressed that the plain meaning rule is the "cardinal" canon of statutory construction so that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there."[102] "When the words of a statute are unambiguous . . . this first canon is also the last: 'judicial inquiry is complete.'"[103] Thus, the Court has found that unambiguous statutory text must be applied according to its plain meaning without review of legislative history regarding congressional intent.[104]

Courts have held that the plain meaning rule applies to interpreting the scope of an express preemption provision. So, when federal law contains an express preemption clause, the court must "focus on the plain wording of the clause, which necessarily contains the best evidence of Congress'[s] preemptive intent."[105]

C. Employing Recognized Canons of Statutory Construction

Canons of interpretation reflect "centuries-old wisdom" that they are "helpful, neutral guides" to interpretation.[106] As part of an "interpretive regime," they provide "some degree of insulation against judicial arbitrariness . . . [and render] statutory interpretation more predictable, regular, and coherent . . . ."[107] Canons of construction that might be relevant to determination of whether federal law preempts state statutes of repose can be categorized as

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Inc., 310 U.S. 534, 543 (1940); *see also* MORI Assocs. v. United States, 102 Fed. Cl. 503, 537–39 (2011) (discussing the history of the exception).

102. Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253–54 (1992) (citations omitted); *see also* Desert Palace, Inc. v. Costa, 539 U.S. 90, 98 (2003) ("Our precedents make clear that the starting point for our analysis is the statutory text."); Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 438 (1999) ("As in any case of statutory construction, our analysis beings with 'the language of the statute.'").

103. *Conn. Nat'l Bank*, 503 U.S. at 254 (quoting Rubin v. United States, 449 U.S. 424, 430 (1981)).

104. *See, e.g.*, Carcieri v. Salazar, 555 U.S. 379, 380, 387, 391–93 (2009); Jimenez v. Quarterman, 555 U.S. 113, 118 (2009); Harris Trust & Sav. Bank v. Salomon Smith Barney Inc., 530 U.S. 238, 254 (2000).

105. CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 664 (1993) (quoted in Chamber of Commerce of the U.S. v. Whiting, 131 S. Ct. 1968, 1977 (2011)); *see also* Sprietsma v. Mercury Marine, 537 U.S. 51, 62–63 (2002) (quoting *CSX Transp., Inc.*, 507 U.S. at 664).

106. SCALIA & GARNER, *supra* note 83, at 60–61.

107. William N. Eskridge & Phillip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 66 (1994); *see also* David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 925 (1992) (noting that canons are "important and valuable" in resolving questions of construction).

text-based canons or substantive canons.[108] Text-based canons are not policy-based; they use linguistic principles of semantics, syntax and context to determine what a legislature meant by using particular statutory language.[109] By contrast, substantive canons direct courts to resolve ambiguities in certain ways to further a pre-determined policy objective.[110] Substantive canons do not purport to determine legislative intent based upon inferences from statutory language; but, to the extent they reflect the common law background against which legislation is enacted, they reflect a reasonable inference of legislative intent.[111]

1. Using Text-Based Canons to Derive Meaning from the Text

Text-based canons of construction can help determine whether federal provisions preempt state statutes of repose. First, under the "fixed-meaning" canon words in statutes must take the same meaning they had at the time a text was adopted.[112] Because the common

108. *See* Watson, *supra* note 83, at 222–28. Justice Scalia and Bryan Garner have further categorized the "text-based canons" as semantic canons, syntactic canons, and contextual canons and the "substantive canons" as expected-meaning canons, government-structuring canons, private-right canons, and stabilizing canons. *See* SCALIA & GARNER, *supra* note 83, *passim.*

109. *See* James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 12 (2005) ("Language canons . . . are predictive guidelines as to what the legislature likely meant based on its choice of certain words rather than others, or its grammatical configuration of those words in a given sentence, or the relationship between those words and text found in other parts of the same statute or in similar statutes."); Ross, *supra* note 83, at 563 (noting that "descriptive canons . . . involve predictions as to what the legislature must have meant" by incorporating "[r]ules of syntax or grammar" and other principles such as avoiding "internal inconsistency or conflict with other enactments"); Shapiro, *supra* note 107, at 927 (noting that certain canons are "linguistic," do not "express any policy preference" but rather "simply purport to be helpful ways of divining the nature and limits of what the drafters of the legislation were trying to achieve").

110. *See* Brudney & Ditslear, *supra* note 109, at 13 (stating that "substantive canons" are "grounded in the courts' understanding of how to treat statutory text with reference to judicially perceived constitutional priorities, pre-enactment common law practices, or specific statutorily based policies"); Ross, *supra* note 83, at 563 (referring to substantive canons as "normative canons"); Phillip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 407, 414 (1993) (describing substantive canons as "policy-based" canons).

111. *See* SCALIA & GARNER *supra* note 83, at 61 (stating that "canons influence not just how courts approach texts but also the techniques that legal drafters follow in preparing those texts").

112. *Id.* at 78 (stating that the fixed-meaning canon means "[w]ords must be given the meaning they had when the text was adopted"); *see also* Reinke v. N. Pac. Ry. Co.,

understanding of the phrases "statutes of limitations" and "statutes of repose" can change over time, it is important for courts to consider the commonly understood meaning of those phrases at the time the legislation was enacted in deciding whether federal law preempts the state statute.

The "whole text" canon requires courts to consider the entirety of the text, including its "structure" and the "physical and logical relation of its many parts" in interpretation.[113] In applying this canon, the court should consider "how much of a statutory context of the particular word or passage is relevant and probative for its construction."[114] This canon and its "sub-canons," such as the "associated words" canon[115] and the "surplusage" canon[116] can assist courts in considering "statutory context" to determine whether federal law preempts state statutes of repose.

The "title and heading" canon allows courts, in certain circumstances, to use titles or headings as interpretive aids.[117] In 1947, the Supreme Court stated: "For interpretative purposes, they are of use only when they shed light on some ambiguous word or phrase. They are but tools available for the resolution of a doubt.

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145 F. 988, 990 (C.C.D. Mont. 1906) ("[I]t is laid down as an elementary principle in the construction of statutes that the common usage of words at the time of enactment is a true criterion by which to determine their meaning.") (internal quotation marks omitted).

113. SCALIA & GARNER, *supra* note 83, at 167; *see also* SINGER & SINGER, *supra* note 83, § 46:5, at 189–90 ("[E]ach part or section [of a statute] should be construed in connection with every other part or section to produce a harmonious whole.").

114. SINGER & SINGER, *supra* note 83, § 47:2, at 278; *see also id.* § 47:2, at 279–80 (providing guidelines "for determining how much and what kinds of context are relevant and probative for statutory construction").

115. The associated words canon colloquially holds that "a word is known by the company it keeps," and stands for the proposition that associated words bear on each other's meaning. *See* Gustafson v. Alloyd Co., 513 U.S. 561, 575 (1995); *see also* SCALIA & GARNER, *supra* note 83, at 195 ("[W]ords are given meaning by their context."); SINGER & SINGER, *supra* note 83, § 47:16, at 347–57 ("[T]he meaning of doubtful words may be determined by reference to their relationship with other associated words and phrases.").

116. The surplusage canon holds that every word and phrase should be given effect, if possible because an interpretation that ignores or fails to account for words or phrases is improbable. *See* SCALIA & GARNER, *supra* note 83, at 174; SINGER & SINGER, *supra* note 83, § 46:6, at 230–47; *id.* § 46:7, at 265.

117. *See* SCALIA & GARNER, *supra* note 83, at 221–22; *see also* SINGER & SINGER, *supra* note 83, § 47:14, at 339–40 ("[W]here headings are enacted as part of an act, or as part of a code, or where the meaning of the act is ambiguous, or where there has been a revision, the headings may serve as an aid to the legislative intent.") (footnotes omitted).

But they cannot undo or limit that which the text makes plain."[118] Thus, if there is ambiguity regarding whether a provision preempts statutes of repose, a court may consider the heading of the provision. A heading that stated "Preemption of State Time Limitations," could provide a basis for concluding that the section applied to both statutes of limitations and statutes of repose. On the other hand, a heading that stated "Accrual of State Procedural Periods," would provide evidence that the preemptive reach of the section was limited to procedural statutes of limitations which are triggered by the accrual of a cause of action.

A final example of a common text-based canon of construction that may be relevant to the preemption analysis is the "negative implication" canon reflected in the Latin phrase *expressio unius est exclusio alterius*, which means the expression of one thing is the exclusion of another.[119] In *Cippollone v. Liggett Group, Inc.*,[120] the Court, applying the canon to an express preemption provision regarding "advertising or promotion" of cigarettes, held that the amended Federal Cigarette Labeling and Advertising Act preempted failure to warn claims, but did not preempt other state law claims, such as those based on express warranty, intentional fraud and misrepresentation, or conspiracy.[121] A few years later, in *Freightliner Corp. v. Myrick*,[122] the Court explained that its application of the canon in *Cippollone* did not mean that Congress's inclusion of an express preemption provision necessarily precluded preemption of other matters under the field preemption or conflict preemption doctrines.[123] The Court stated "[t]he fact that an express definition of the pre-emptive reach of a statute 'implies'—*i.e.*, supports a reasonable inference—that Congress did not intend to preempt other

118. Bhd. of R.R. Trainmen v. Balt. & Ohio R.R. Co., 331 U.S. 519, 528–29 (1947) (quoted in SCALIA & GARNER, *supra* note 83, at 221).

119. *See* Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 517 (1992) (applying the canon in the preemption context); *see also* SCALIA & GARNER, *supra* note 83, at 107–11 (discussing the appropriate uses of the canon); SINGER & SINGER, *supra* note 83, §§ 47:23, 47:24, 47:25, at 398–438 (explaining the rule, its relevance, and limitations); *id.* § 47:24 at 421–22 (describing the maxim and noting that it is "a product of 'logic and common sense' . . . [that] acts merely as an aid to determine legislative intent and does not constitute a rule of law") (footnotes omitted).

120. *Cipollone*, 505 U.S. 504.

121. *Id.* at 517–32.

122. 514 U.S. 280 (1995).

123. *Id.* at 287–88.

matters does not mean that the express clause entirely forecloses any possibility of implied pre-emption."[124]

Courts should consider whether these or other text-based canons of construction provide logical inferences of meaning from the language of the statute. A court may be able to resolve any initial ambiguity in interpretation by fair application of the text-based canons. This may not resolve the ambiguity entirely; it may make the text more or less ambiguous. But ambiguity sufficient to resort to other indicators of meaning only exists when one can advance plausible alternative interpretations of statutory text.[125] Therefore, a court should not strain to find ambiguity in a statute by positing implausible interpretations.[126] Nevertheless, some interpretations may be more plausible than others, and a court should take into account the relative plausibility of an interpretation in resolving an ambiguity.[127] If ambiguity in interpretation remains after application of relevant text-based canons, a court should consider the substantive canons of construction and other evidence of congressional intent.[128]

2.Using Substantive Canons to Determine Whether There Should Be a Presumption Regarding Meaning

Because the central question in the interpretive approach is whether federal law preempts state statutes of repose, the analysis of substantive canons of construction begins with the "presumption against preemption" canon. This canon is founded on "the basic assumption that Congress did not intend to displace state law,"[129] because the "exercise of federal supremacy is not lightly to be presumed."[130] "This assumption provides assurance that 'the federal-

124. *Id.* at 288.

125. *See, e.g.*, Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 566–67 (2005) (finding that a proposed interpretation did not create ambiguity because it was not plausible).

126. *See, e.g.*, Lindh v. Murphy, 521 U.S. 320, 331 (1997) (stating that it would be a strain to find ambiguity in a proposed interpretation).

127. *See* Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc., 554 U.S. 33, 41 (2008) (evaluating plausible textual meanings of a statutory provision by considering which meaning is "more natural" before considering other contextual and substantive aides to meaning).

128. *See* United States v. EME Homer City Generation, L.P., 727 F.3d 274, 294–95 (3rd Cir. 2013) (stating that in an interpretive analysis of statutory language, the court considers text-based, or "descriptive" canons first, and if application of such canons "settle the meaning," the court's task is complete, but, if they do not, the court considers substantive or "normative" canons).

129. Maryland v. Louisiana, 451 U.S. 725, 746 (1981).

130. N.Y. State Dep't. of Soc. Servs. v. Dublino, 413 U.S. 405, 413 (1973) (quoting Schwartz v. Texas, 344 U.S. 199, 203 (1952)).

state balance' . . . will not be disturbed unintentionally by Congress or unnecessarily by the courts."[131] Professor Norman J. Singer, an author of the leading treatise on statutory interpretation, has characterized the presumption against preemption as a "strong" one so that "preemption can only be found if the federal law evinces a legislative intent to preempt the state law, or there is such direct and positive conflict that the two acts cannot be reconciled or consistently stand together."[132] Indeed, the Supreme Court has characterized the presumption as a "cornerstone" of its preemption jurisprudence.[133] While some commentators have questioned the vitality of the presumption,[134] it continues to be cited, and relied upon, in Supreme Court decisions.[135]

131. Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977) (quoting United States v. Bass, 404 U.S. 336, 349 (1971)).

132. SINGER & SINGER, *supra* note 83, § 36:9, at 93; *see also* SCALIA & GARNER, *supra* note 83, at 290 ("It is a reliable canon of interpretation— though sometimes dishonored in the breach—to presume that a federal statute does not preempt state law.").

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

134. *See, e.g.*, Mary J. Davis, *The "New" Presumption Against Preemption*, 61 HASTINGS L.J. 1217, 1247, 1251 (2010) (arguing that the presumption continues to be part of Supreme Court jurisprudence and is strongest in express preemption cases, where it is a "meaningful default rule" in the absence of a clear and manifest intent of Congress, but is less rigid and more forgiving in implied preemption cases); S. Candace Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. REV. 685, 733 (1991) (stating that the Supreme Court's devotion to the presumption "can only be described as fickle"); Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 741 (2008) ("[T]he presumption against preemption is honored as much in the breach as in observance . . . [and is] at the very least overbroad, as the Court seems to have recognized in recent decisions."); Ernest A. Young, *"The Ordinary Diet of the Law": The Presumption Against Preemption in the Roberts Court*, 2011 SUP. CT. REV. 253, 308–09 (2011) (noting that the presumption against preemption canon seems be referenced only in "close" cases as a "tiebreaker rule" and thus the failure to mention the presumption does not necessarily signify that it is not good law).

135. *See, e.g.*, Hillman v. Maretta, 133 S. Ct. 1943, 1950 (2013) (regarding state laws governing domestic relations, there is a '"presumption against preemption'"); Arizona v. United States, 132 S. Ct. 2492, 2501 (2012) (stating that courts should not assume that historic state police powers are preempted unless that was the clear and manifest intent of Congress); *Wyeth*, 555 U.S. at 565 (stating that courts should not assume that historic state police powers are preempted unless that was the clear and manifest intent of Congress); Altria Grp., Inc. v. Good, 555 U.S. 70, 77 (2008) (stating that courts should not assume that historic state police powers are preempted unless that was the clear and manifest intent of Congress).

As referenced earlier, the presumption against preemption is particularly applicable to areas of traditional state legal authority.[136] The Supreme Court has specifically stated that such areas of traditional authority include the "historic police powers of the States,"[137] "state regulation of matters of health and safety,"[138] and "family law."[139] State tort law falls within "state regulation of health and safety" as an area of traditional state authority to which courts apply the presumption against preemption.[140] The presence of federal regulation in an area will not foreclose application of the presumption against preemption.[141] But, the presumption will not apply to a preemption analysis concerning a traditional area of state authority when Congress is acting under a specific constitutional provision, such as regulation of election law under the Elections Clause of Article I.[142]

With respect to express preemption in particular, the presumption against preemption resolves any ambiguities in the language of the express preemption provision. Consequently, "when the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.'"[143]

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136. Gregory v. Ashcroft, 501 U.S. 452, 460 (1991); *see also* circuit court cases cited at *supra* note 63.

137. *Arizona*, 132 S. Ct. at 2501 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

138. *Medtronic*, 518 U.S. at 485.

139. Egelhoff v. Egelhoff *ex rel*. Breiner, 532 U.S. 141, 151 (2001).

140. *See Wyeth*, 555 U.S. at 565 & n.3 (finding that presumption applied and federal legislation did not preempt state tort law claim); *Medtronic*, 518 U.S. at 485 (applying presumption in finding that state tort law claims were not preempted); Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 251–53 (1984) (stating Congress enacted legislation under the assumption that state tort law would apply); *see also* circuit court cases cited *supra* note 63 (stating that the presumption applies when displacing state tort law is at issue). *But see* Mut. Pharm. Co. v. Bartlett, 133 S. Ct. 2466, 2483 n.1 (Sotomayor, J., dissenting) (noting that the majority opinion failed "to adhere to the presumption against pre-emption" in finding federal law preempted a state tort law claim).

141. *See Wyeth*, 555 U.S. at 565 n.3 (rejecting the argument that the presumption against preemption does not apply because the federal government has regulated in an area, stating "[t]he presumption . . . accounts for the historic presence of state law but does not rely on the absence of federal regulation"). *But see* United States v. South Carolina, 720 F.3d 518, 529 (4th Cir. 2013) (stating that the presumption against preemption did not apply because the state law impacts immigration, an area traditionally regulated by the federal government).

142. Arizona v. Inter Tribal Council of Ariz., Inc., 133 S. Ct. 2247, 2256–57 (2013).

143. Altria Grp., Inc. v. Good, 555 U.S. 70, 77 (2008) (quoting Bates v. Dow Agrosciences LLC, 544 U.S. 431, 449 (2005)).

Another potentially applicable substantive canon of construction is the "remedial purpose" canon under which remedial statutes are construed broadly or liberally to effectuate their remedial purposes.[144] Professor Singer notes that this canon is "firmly established" and expressions of the canon "appear over and over in judicial opinions."[145] But, some courts disfavor this canon because of its unconstrained elasticity.[146] Justice Scalia, one of the most vocal critics of this canon refers to it as a "dice loading rule" as opposed to a "no-thumb-on-the scales" canon of interpretation.[147] He has written:

> [The presumption] is so wonderfully indeterminate, as to both when it applies and what it achieves, that it can be used, or not used, or half-used, almost *ad libitum*, depending mostly upon whether its use, or nonuse, or half-use, will assist in reaching the result the court wishes to achieve.[148]

Problems with the canon include "determining what constitutes a remedial statute" and "identifying what a 'liberal construction'"

144. *See, e.g.*, Ne. Marine Terminal Co. v. Caputo, 432 U.S. 249, 268 (1977) ("[Remedial legislation] must be liberally construed in conformance with its purpose . . . .") (quoting Voris v. Eikel, 346 U.S. 328, 333 (1953)); Peyton v. Rowe, 391 U.S. 54, 65 (1968) ("[R]emedial statutes should be liberally construed."); R&W Technical Servs. Ltd. v. CFTC, 205 F.3d 165, 173 (5th Cir. 2000) ("Remedial statutes are to be construed liberally.").

145. 3 SINGER & SINGER, *supra* note 83, § 60:1, at 250–52 (7th ed. 2008).

146. *See, e.g.*, United States v. EME Homer City Generation, L.P., 727 F.3d 274, 293 (3rd Cir. 2013) ("[W]e doubt that such a broad interpretive rule can be justified on its own terms."); E. Bay Mun. Util. Dist. v. U.S. Dep't of Commerce, 142 F.3d 479, 484 (D.C. Cir. 1998) (citations omitted) (noting the court has expressed doubt about the canon that "remedial statutes are to be construed liberally" since "virtually any statute is remedial in some respect"); Ober United Travel Agency, Inc. v. U.S. Dep't of Labor, 135 F.3d 822, 825 (D.C. Cir. 1998) (noting that any statute might be thought of as remedial, and stating that "[w]e suspect that the phrase typically has been used to give judicial approval to a particular set of policy viewpoints").

147. *See* SCALIA, *supra* note 86, at 27–29.

148. *See* Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 586 (1990). *See generally id.* at 581-86 (discussing the problems with the presumption that "remedial statutes are to be liberally construed"). Justice Scalia states "[o]f what value, one might reasonably ask, is a rule that is both of indeterminate coverage (since no one knows what a 'remedial statute' is) and of indeterminate effect (since no one knows how liberal is a liberal construction)." *Id.* at 586. *See also* SCALIA & GARNER, *supra* note 83, at 364 (stating that the "oft-repeated and age-old formulation . . . needlessly invites judicial lawmaking") (footnote omitted).

should be.[149] Nevertheless, this canon is part of the background of the law, and as long as there are some limits on its use, it may be a useful aid in resolving textual ambiguities to determine congressional intent. Professor Blake A. Watson, who studied application of the remedial purpose canon to CERCLA, identified limits that courts have recognized for the appropriate use of the canon.[150] According to Professor Watson, courts have circumscribed the use of the remedial purpose canon in four situations:

> (1) when it is "plain" (from the text or otherwise) that Congress did not desire an expansive reading of the remedial statute; (2) when a liberal construction would either upset a legislatively crafted compromise or conflict with other statutory goals; (3) when reliance on the canon clashes with other extrastatutory, meta-principles, or interpretive rules; and (4) when an expansive interpretation might actually hinder—rather than serve—the remedial objectives of the statute in question.[151]

Additionally, a court should not justify a broad interpretation of a provision of a statute when such an interpretation is not directly related to the remedial purposes of the legislation. Because the canon is most often stated in terms of giving a statute a broad or liberal construction to "effectuate its remedial purposes,"[152] there should be a close relationship between that interpretation and the remedial purposes of the statute.[153]

In the context of preemption of state statutes of repose, if the statute is remedial, and preemption of the state statute of repose is directly related to the remedial purpose of the statute, then application of this canon to favor preemption may be appropriate providing there are no countervailing considerations such as those identified by Professor Watson.

A final substantive canon that may be relevant to the determination of whether a federal provision preempts state law is the "presumption against waivers of sovereign immunity" canon which holds that waivers of sovereign immunity must be "'unequivocally expressed'

149. SCALIA & GARNER, *supra* note 83, at 364–65.

150. Watson, *supra* note 83, at 243.

151. *Id.*

152. *See, e.g.*, SEC v. Zandford, 535 U.S. 813, 820 (2002).

153. *See, e.g.*, Potomac Elec. Power Co. v. U.S. Dep't of Labor, 449 U.S. 268, 281–82 (1980) (rejecting a broad interpretation because the sole purpose of the statute was not to provide a complete remedy for industrial injuries).

in statutory text."[154] The Supreme Court has stated that "a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign."[155] As with the other substantive canons, this canon is only helpful in resolving textual ambiguities; it does not apply when the words of the statute are plain.[156] Thus, if the scope of Congress's waiver is not "clearly discernable from the statutory text in light of traditional interpretive tools," the court should "take the interpretation most favorable to the Government."[157] The canon is strongest when it is consistent with other canons of construction.[158] As discussed below for the FTCA, federal preemption of substantive state tort law may impact one of the conditions of the government's waiver of sovereign immunity in the Act; therefore, a court should consider the potential application of this canon in any preemption analysis involving the FTCA.

The substantive canons of construction may point in different directions with respect to whether federal law preempts state statutes of repose. For example, the presumption against preemption canon may favor a narrow interpretation of the preemptive scope of federal law while the remedial purpose canon would recommend a broad construction. Courts should not disregard substantive canons of construction whenever potentially applicable canons provide conflicting indications of meaning.[159] Instead, courts should carefully evaluate which canon is most applicable to the interpretive question and provide sound reasons for favoring one substantive canon of

154. FAA v. Cooper, 132 S. Ct. 1441, 1448 (2012); *see also* United States v. Bormes, 133 S. Ct. 12, 16–17, (2012).

155. Lane v. Pena, 518 U.S. 187, 192 (1996) (citing United States v. Williams, 514 U.S. 527, 531 (1995)); Library of Congress v. Shaw, 478 U.S. 310, 318 (1986); Lehman v. Nakshian, 453 U.S. 156, 161 (1981).

156. Sebelius v. Cloer, 133 S. Ct. 1886, 1895–96 (2013); Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253–54 (1992).

157. *Cooper*, 132 S. Ct. at 1448.

158. *See* Richlin Sec. Serv. Co. v. Chertoff, 553 U.S. 571, 589 (2008) (citing cases in which the canon was cited with other tools of construction).

159. *See* SCALIA & GARNER, *supra* note 83, at 59–61. Responding to Professor Karl Llewellyn's criticism of the use of substantive canons given that "there are two opposing canons on almost every point," the authors state that canons are "helpful, neutral guides" that can offer competing inferences to be considered and that the "skill of sound construction lies in assessing the clarity and weight of each clue and deciding where the balance lies." *Id.* (citing Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 VAND. L. REV. 395, 401 (1950)).

interpretation over another.[160] When a court relies on one substantive canon of construction, while ignoring other arguably applicable canons, there is a risk that the court is following a "results-oriented" approach rather than objectively interpreting the statue. A fair evaluation of the substantive canons will include consideration of the limitations of each canon as discussed above. Once the court has weighed all potentially relevant substantive canons of construction, it can determine whether a presumption for or against preemption of state statutes of repose is appropriate.

D. Considering Whether Statutory Context, Legislative History, or Purposes of the Statute Rebut Any Presumption Regarding Meaning

Any presumption regarding preemption of state statutes of repose can be rebutted if there is sufficient evidence of congressional intent that runs contrary to the presumption.[161] The Supreme Court has often employed presumptions in its statutory analyses, and through analyzing evidence of congressional intent, the Court has demonstrated the strength of the evidence of congressional intent necessary to overcome a presumption.[162] Individual judges may weigh various types of evidence differently depending on judicial outlook, but the categories of evidence generally considered include statutory context, legislative history, and statutory purposes.

The text of a statute, even if it does not expressly preempt state statutes of repose, may provide evidence to overcome a presumption against preemption through the doctrines of field preemption or conflict preemption. Statutory context, as reflected in particular language of the statute, can provide evidence of congressional intent

160. *See* Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc., 554 U.S. 33, 41, 47 (2008) (evaluating "dueling" substantive canons of construction to determining applicability of each canon to the interpretation of a particular statutory provision at issue). *See infra* notes 208–17 and accompanying text.

161. *See* Chickasaw Nation v. United States, 534 U.S. 84, 94 (2001) (noting that canons are guides "designed to help judges determine the Legislature's intent" but "other circumstances evidencing congressional intent can overcome their force"); *see also* Shapiro, *supra* note 107, at 934 (noting that substantive canons serve to establish presumptions or act as "tie-breakers" but allow a court to look at all of the relevant information).

162. *See, e.g.*, Bain & Colella, *supra* note 34, at 540–44 (discussing the evidence the Supreme Court considered to determine whether a presumption of equitable tolling of statute of limitations for claims against the United States was rebutted).

to occupy a field.[163] With respect to conflict preemption, the presumption against preemption is "readily overcome" if state law requires something that the text of a federal law would prohibit or federal law would prohibit something that state law requires.[164] Even where federal and state law do not present a direct conflict in what the law prohibits or allows, the operation of federal and state law may otherwise conflict leading to the conclusion that the state law must give way. For example, where federal and state laws provide different statutes of limitations for the same cause of action, the federal statute of limitations would preempt the state statute of limitations for that action.[165]

Courts frequently consult a statute's legislative history to determine congressional intent, though some judges and commentators have shunned its consideration.[166] Courts should evaluate legislative history just like any other extra-textual evidence of congressional intent and give it whatever weight it deserves. While an isolated statement in a Committee report may not be very probative of the intent of Congress, other parts of the legislative history may be quite valuable in determining meaning. For example, proposed amendments to legislation, whether defeated or adopted, can objectively show congressional intent in enacting legislation. How congressional committees used terms in their deliberations and reports can help determine the meaning of those terms in the legislation if there is any ambiguity.[167] The titles and headings that

163. SCALIA & GARNER, *supra* note 83, at 290–91 (stating their view that the intent to occupy a field can only be derived "from the text of the federal laws and not from such extraneous sources as legislative history").

164. *See id.* at 290.

165. *See* Poindexter v. United States, 647 F.2d 34, 36 (9th Cir. 1981).

166. *See, e.g.*, Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 61–62 (1994); W. David Slawson, *Legislative History and the Need to Bring Statutory Interpretation Under the Rule of Law*, 44 STAN. L. REV. 383, 403–11 (1992); Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371, 375 (1987); Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833, 1885–95 (1998). For a defense of reliance on legislative history, see Carol Chomsky, *Unlocking the Mysteries of Holy Trinity: Spirit, Letter, and History in Statutory Interpretation*, 100 COLUM. L. REV. 901, 951–54 (2000). *See also* Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 848–61 (1992) (discussing the ways in which legislative history can be useful in interpreting statutes); Eskridge, *supra* note 87, at 532 ("Doctrinally, the big debate has been whether interpretive context can include the internal 'legislative history' preceding a statute's enactment into law.").

167. *See* Breyer, *supra* note 166, at 856–59.

Congress gave to certain provisions of legislation, even when not incorporated into the United States Code, can provide insight into meaning.[168] Legislative history is a fixture of statutory interpretation, and one cannot cavalierly discard it. The answer to skeptics of legislative history in statutory analysis is not to dismiss it entirely, but to assess it critically and objectively to arrive at a fair determination of congressional intent. Courts should assess the relevance and reliability of each potentially probative indication of intent in the history. When a court considers only those parts of the legislative history that support a particular outcome or fails to evaluate the probative weight of the history, one could conclude that the use of history is a subterfuge for judicial policy-making rather than a search for congressional intent.

Finally, a court may consider the evidence of congressional intent in the underlying purpose of the federal statute.[169] Finding evidence of legislative intent in a purpose, policy, or objective of a statute is akin to interpreting a statute broadly to achieve its remedial purposes under the remedial purpose canon. As with application of the remedial purpose canon, there must be limits on the use of legislative purposes as evidence of congressional intent to rebut an interpretive presumption. Otherwise, legislative purpose is a convenient vehicle for a court to insert its own notions of what Congress should have provided in the legislation as a matter of policy when there is not a clear expression in the text of the statute.[170] Before using a purpose as evidence of congressional intent to aid in statutory interpretation, a court should consider: whether the purpose is clearly articulated in the legislation itself or in a reliable statement in the legislative history; whether the purpose is an essential or dominant part of the statute; and whether the purpose is sufficiently specific to place reasonable parameters on interpretation. Lastly, the court should consider whether the proposed interpretation of ambiguous statutory language is necessary to achieving the purpose.

168. *See infra* text accompanying notes 239–241.

169. *See supra* note 144 and accompanying text.

170. Professor Singer notes that courts and commentators have rejected this source of legislative intent "on the ground that courts invade the legislative province when they rely on their own notions of a law's spirit to extend or restrict application of a statute," yet acknowledges that "many American decisions have subscribed to the [equitable interpretation] doctrine." *See* 2B SINGER & SINGER, *supra* note 83, § 54.3, at 402–06 (7th ed. 2012) (footnotes omitted).

E. Articulating an Interpretive Approach for Determining Whether Federal Law Preempts State Statutes of Repose.

Given these principles, the following interpretive approach provides a systematic method for determining whether federal law preempts state statutes of repose.

STEP 1. The court should first determine whether the text of the federal statute expressly preempts state statutes of repose. If the plain meaning of the text of the statute indicates that state statutes of repose are preempted, the inquiry is complete. But, a court may also determine that that the language of a statute expressly preempts state statutes of repose through application of accepted text-based canons of construction. So, a court should consider both the plain meaning of statutory language and text-based canons of construction to determine congressional intent before determining where there should be any presumption regarding preemption. A court should conclude its analysis at this first step only when consideration of the text and text-based canons of construction resolves all ambiguity in interpretation.

STEP 2. If the plain meaning of the text of the statute and application of text-based canons of construction leave any ambiguity regarding preemption of state statutes of repose—or if the text fails to reference preemption at all—the court should consider whether there should be a presumption regarding preemption based upon substantive canons of construction. The court should consider all arguably applicable substantive canons of construction and determine the relative weight to give any competing inferences of meaning. This analysis should consider both the nature of federal preemption as it relates to the state interest represented by the statute of repose and the specific purposes of the federal statute as they relate to state repose provisions. The relevant questions a court should consider are:

(1) What weight should the court give a presumption against preemption given the state interest represented by state statutes of repose?

(2) Are there any substantive canons of construction relevant to the purpose of the federal statute that provide inferences favoring or disfavoring preemption, and, if so, how much weight should the court give the inference?

(3) Considering the relative weight of inferences drawn from the applicable substantive canons of construction, should the court adopt an overall presumption to favor or disfavor preemption?

STEP 3. After determining whether there should be a presumption regarding preemption, the court should consider other indications of

congressional intent, including statutory context, legislative history, and purposes of the statute to determine whether there is sufficient evidence to overcome a presumption for or against preemption. The relevant questions a court should consider if there is a presumption against preemption are:

(1) Did Congress intend to occupy a field, thereby leaving no room for operation of state statutes of repose? If not, would operation of state statutes of repose present a direct conflict with federal law?

(2) Is there probative and reliable evidence in the legislative history that leads to the conclusion that Congress intended to preempt state statutes of repose through the federal legislation?

(3) Is preemption of state statutes of repose necessary to achieve a purpose of the federal legislation? Is the purpose essential to, or dominant feature of, the federal statute? Is the purpose specific?

(4) Is the evidence from statutory context, legislative history and purposes strong enough to overcome a presumption against preemption?

On the other hand, if there is a presumption in favor of preemption, the relevant questions a court should consider are:

(1) Did Congress leave room for operation of state statutes of repose? If so, can state statutes of repose operate consistently with federal law?

(2) Is there probative and reliable evidence in the legislative history that leads to the conclusion that Congress did not intend to preempt state statutes of repose through the federal legislation?

(3) Is preemption of state statutes of repose tangential to the purposes of the federal legislation?

(4) Is the evidence from statutory context, legislative history and purposes strong enough to overcome a presumption in favor of preemption?

This systematic interpretive approach provides a rational and objective basis for determining congressional intent regarding federal preemption of state statutes of repose. Additionally, the approach establishes a framework for analyzing court decisions that have addressed the issue. The interpretive approach is not designed to achieve a pre-ordained outcome, but rather has its basis in well-established case law and commentary regarding statutory construction and federal preemption. As shown in the cases discussed in subsequent sections, courts have used interpretive pieces of this approach to analyze whether federal law preempts state statutes of repose.[171] But, it is only through a systematic and holistic

171. *See infra* Part V.B.3.b.

interpretation that courts can achieve consistent results that best reflect congressional intent.

V. APPLYING THE INTERPRETIVE FRAMEWORK TO EXISTING CONFLICTS IN FEDERAL LAW: CERCLA

A. Determining Whether a Provision of CERCLA Expressly Preempts State Statutes of Repose

The federal courts are currently divided on whether a provision of the Comprehensive Environmental Response, Compensation and Liability Act preempts state statutes of repose for certain actions.[172] The dispute centers on an express preemption provision that was added through the Superfund Amendments and Reauthorization Act of 1986 (SARA).[173] This section provides:

> (a) State statutes of limitations for hazardous substances cases
>
> (1) 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.
>
> (2) 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

172. *See infra* Part V.B.1–3.

173. *See infra* text accompanying note 182.

> contaminant, released into the environment from a facility.[174]

Subsection (1) of this of Section 9658(a) expressly preempts state law under the specific conditions articulated in the paragraph.[175] Subsection (2) provides that state law will apply to actions which do not meet the conditions of subsection (1).[176] Section 9658(b) provides definitions for the conditions described in Section 9658(a)(1).[177] In pertinent respect, it states that "[t]he term 'applicable limitations period' means the period specified in a statute of limitations during which a civil action referred to in subsection (a)(1) of this section may be brought."[178] Further, it provides that "[t]he term 'commencement date,' means the date specified in a statute of limitations as the beginning of the applicable limitations period."[179]

The "federally required commencement date" for statutes that meet the other conditions of Section 9658(a)(1) is a discovery rule of accrual that is set at "the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages referred to in subsection (a)(1) of this section were caused or contributed to by the hazardous substance or pollutant or contaminant concerned."[180]

The necessary conditions for application of Section 9658(a)(1) are:

(1) an action is brought under state law for personal injury or property damages;

(2) the injury or damages are caused or contributed to by exposure to a hazardous substance, or pollutant or contaminant;

(3) the hazardous substance, pollutant or contaminant, was released into the environment from a facility; and

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174. 42 U.S.C. § 9658(a) (2006).

175. *Id.*

176. *Id.* § 9658(a)(2).

177. *Id.* § 9658(b).

178. *Id.* § 9658(b)(2).

179. *Id.* § 9658(b)(3).

180. *Id.* § 9658(b)(4)(A). The section also provides "special rules" for the "federally required commencement date" "[i]n the case of a minor or incompetent plaintiff." *Id.* § 9658(b)(4)(B). Notably, this federally-required commencement date provides a discovery rule which delays accrual until a plaintiff knew (or reasonably should have known) that an injury was caused by exposure to a hazardous substance or pollutant. Because accrual is based on discovery of both the injury and its cause, the rule is more generous to plaintiffs than a discovery rule of accrual that is triggered by discovery of injury alone. *See* SUPERFUND SECTION 301(E) STUDY GRP., 97TH CONG., INJURIES AND DAMAGES FROM HAZARDOUS WASTES—ANALYSIS AND IMPROVEMENT OF LEGAL REMEDIES, at 28–29 (Comm. Print 1982) (discussing different types of discovery rules of accrual adopted by the states).

(4) 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.[181]

The question of whether Section 9658(a)(1) expressly preempts state statutes of repose involves only an the interpretation of whether this last condition applies to state statutes of repose.[182]

1.Considering the Plain Meaning of the Provision and Text-Based Canons of Construction

The first interpretive question is whether the plain meaning of "the applicable limitations period . . . as specified in the State statute of limitations or under common law"[183] includes the period mandated by a state statute of repose. The term "applicable limitations period" is also defined as "the period specified in a statute of limitations."[184] Thus, the question is 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.

Resolving this question one way or the other is not as easy as it may first appear. The first plain meaning question is whether the term "statute of limitations" can encompass both statutes of limitations and statutes of repose. As shown earlier, the terms are presently distinct, but that has not always been the case. Under the text-based, fixed-meaning canon, the relevant time to consider the meaning of the terms is in 1986, the date of the enactment of Section 9658(a)(1).[185] At that time, the most recent edition of Black's Law Dictionary from 1979 had not yet adopted separate entries for "statutes of limitations" and "statutes of repose," as exist in all

181. 42 U.S.C. § 9658(a)(1) (2006).

182. For an early discussion of the preemptive scope of this section, particularly with respect to the first three conditions, *see* Van R. Delhotal, *Re-examining CERCLA Section 309: Federal Preemption of State Limitations Periods*, 34 WASHBURN L.J. 415, 443–53 (1995). The author does not focus on preemption of state statutes of repose, and without a detailed analysis, simply concludes "[b]roadly construed, section 309 must apply to statutes of repose as well as statutes of limitations. It simply defeats congressional intent to hold otherwise; statutes of repose were specifically identified as part of the problem by the Study Group and adopted [sic] by Congress." *Id.* at 457.

183. 42 U.S.C. § 9658(a)(1).

184. *Id.* § 9658(b)(2).

185. *Id.* § 9658; SCALIA & GARNER, *supra* note 83, at 78.

subsequent editions.[186] This edition of Black's Law Dictionary defined "statutes of limitations," as:

> A statute prescribing limitations to the right of action on certain described causes of action or criminal prosecutions; that is, declaring that no suit shall be maintained on such causes of action, nor any criminal charge be made, unless brought within a specified period of time after the right accrued. Statutes of limitation are statutes of repose, and are such legislative enactments as prescribe the periods within which actions may be brought upon certain claims or within which certain rights may be enforced. In criminal cases, however, a statute of limitation is an act of grace, a surrendering by sovereign of its right to prosecute.[187]

This definition is notable in several respects. First, it does not recognize the present distinct meanings of statutes of limitations and statutes of repose. Instead, it speaks in terms of bringing a suit within a certain period of time after a "right accrued."[188] This is a concept that is focused on the recipient of the right to sue and is relevant only to statutes of limitations. The definition does not encompass a time period which is triggered by a defined event related to the defendant's conduct, which is a unique characteristic of the modern meaning of "statutes of repose."[189] As with many definitions of statutes of limitations, this definition notes that statute of limitations "are statutes of repose."[190] But, this is best understood as describing a

186. *Compare* BLACK'S LAW DICTIONARY 835 (5th ed. 1979) *with* BLACK'S LAW DICTIONARY 1546 (9th ed. 2009), BLACK'S LAW DICTIONARY 1450–51 (8th ed. 2004), BLACK'S LAW DICTIONARY 1422–23 (7th ed. 1999), BLACK'S LAW DICTIONARY 927, 1411 (6th ed. 1990). The sixth edition of Black's Law Dictionary in 1990 first specifically defined a "statute of repose" as a term of art distinct from a statute of limitations and noted distinguishing characteristics between the two—both in the entry for "statute of limitations" and in the entry for "statute of repose." *See* BLACK'S LAW DICTIONARY 927, 1411 (6th ed. 1990). For example, the entry for statute of repose states that it differs from a statute of limitations because it "cuts off right of action after specified time measured from delivery of product or completion of work, regardless of time of accrual of cause of action or of notice of invasion of legal rights." *Id.* at 1411.

187. BLACK'S LAW DICTIONARY 835 (5th ed. 1979).

188. *Id.*

189. *See* BLACK'S LAW DICTIONARY 1423 (7th ed. 1999) (defining a statute of repose as a statute that "bars a suit a fixed number of years after the defendant acts in some way"); BLACK'S LAW DICTIONARY 1411 (6th ed. 1990) (defining the statute of repose as a statute the "cuts off right of action after specified time measured from delivery of product or completion of work").

190. BLACK'S LAW DICTIONARY 835 (5th ed. 1979).

function of statutes of limitations, namely, providing repose, rather than stating that statutes of limitations are synonymous with statutes of repose, or are a subset of statutes of repose. The definition does not recognize the distinct modern function of statutes of repose or show that such statutes fit within the definition of traditional statutes of limitations.[191]

As of 1979, however, the second Restatement of Torts recognized the operational distinction between statutes of limitations and statutes of repose:

> In recent years special "statutes of repose" have been adopted in some states covering particular kinds of activity, such as professional negligence for doctors, lawyers or architects, or products liability, or liability of building contractors. These statutes set a designated event for the statutory period to start running and then provide that at the expiration of the period any cause of action is barred regardless of usual reasons for "tolling" the statute. The statutory period in these acts is usually longer than that for the regular statute of limitations, but, depending upon the designated event starting the running of the statute, it may have run before a cause of action came fully into existence. . . .[192]

Several cases from 1986 and earlier also show that there was an understanding of the difference between statutes of limitations and statutes of repose at the time Section 9658 was enacted.[193]

Assuming that "statute of repose" was a distinct term of art that did not come within the meaning of "statute of limitations" in 1986, a second plain meaning question is whether statutes of repose are covered by Section 9658(a)(1) as a "limitations period" that is

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191. *See* Waldburger v. CTS Corp., 723 F.3d. 434, 449 (4th Cir. 2013) (Thacker, J., dissenting), *cert. granted*, 82 U.S.L.W. 3130 (U.S. Jan. 10, 2014) (No. 13-339) ("Notably, this definition does not adopt the inverse proposition that all statutes of repose are also statutes of limitation.").

192. RESTATEMENT (SECOND) OF TORTS § 899 cmt. g (1979).

193. *See, e.g.*, Hatcher v. Allied Prods. Corp., 796 F.2d 1427, 1428 (11th Cir. 1986); McMahon v. Eli Lilly & Co., 774 F.2d 830, 836–37 (7th Cir. 1985); Yarbro v. Hilton Hotels Corp., 655 P.2d 822, 825 (Colo. 1982); Daily v. New Britain Mach. Co., 512 A.2d 893, 904 (Conn. 1986); Universal Eng'g Corp. v. Perez, 451 So.2d 463, 465–66 (Fla. 1984); Hill v. Fitzgerald, 304 Md. 689, 699, 501 A.2d 27, 32 (1985); Klein v. Catalano, 437 N.E.2d 514, 516 (Mass. 1982); Cavanaugh v. Abbott Labs., 496 A.2d 154, 161–62 (Vt. 1985).

"specified in a statute of limitations." There is no doubt that a statute of repose is a limitations period, and it is often specified within a provision that is designated as a "statute of limitations," providing the outer temporal boundary of potential liability. If Section 9658(a)(1) referenced multiple limitations periods as "specified in a statute of limitations," then the plain meaning of the provision may more readily include statutes of repose.[194] But, the period that Section 9658(a)(1) references is singular—"the applicable limitations period"—likely referencing only the traditional limitations period that is triggered by the date of the plaintiff's injury or by a discovery rule.[195]

Thus, considering the plain meaning of Section 9658(a)(1), and applying the fixed-meaning of the terms at the relevant time, the language does not show a clear intent of Congress to preempt state statutes of repose. There are, however, some additional contextual clues to meaning which a court should consider under the whole-text canon. First, the preemptive effect of the section is to provide a later commencement date for statutes of limitations in circumstances where the commencement date under state law would be earlier. In those cases, the "federally required commencement date" is a discovery rule of accrual, focusing on the recipient of the right of action, and triggering the time period on a date the plaintiff had, or should have had, certain knowledge. Therefore, context points to a commencement date focused on the accrual of a right to plaintiff rather than to a commencement date tied to the conduct of the defendant. The statute's reference to displacement of "the date" specified in "the limitations period" would further support an interpretation focused exclusively on the date of accrual, and

194. It is hard to imagine why Congress would have the preemptive effect of Section 9658(a)(1) turn on whether the limitations period of statute of repose was included within a statute of limitations, given that a statute of repose could be a stand-alone provision. *See, e.g.*, OR. REV. STAT. § 12.115 (2013). So, even if the statute referenced multiple limitations period, this might not have reflected the intent of Congress to preempt statutes of repose.

195. *See also* 42 U.S.C. § 9658(b)(2) (2006) (defining "applicable limitations period" as "the period specified in a statute of limitations"); *id.* § 9658(b)(3) (defining commencement date as "*the* date specified in a statute of limitations") (emphasis added). Although a singular article is often not limited to the singular construction for purposes of statutory interpretation, see 1 U.S.C. § 1 (2012) (pluralization rule of the Dictionary Act), the context, here, suggests that it is. *See id.* (stating that context may show that singular words do not apply to several things). The Supreme Court has stated that the pluralization rule of the Dictionary Act "is not one to be applied except where it is necessary to carry out the evident intent of the statute." First Nat'l Bank in St. Louis v. Missouri, 263 U.S. 640, 657 (1924); *see also* United States v. Hayes, 555 U.S. 415, 422 n.5 (2009).

therefore preempting only state statutes of limitations and not statutes of repose.

Another contextual consideration is CERCLA's savings clause, which provides, in part, that "[n]othing in this chapter shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants."[196] Because the savings clause reflects an intent to preserve substantive rights,[197] interpreting this provision contextually with Section 9658(a)(1) would recommend limiting the preemptive effect of Section 9658(a) to procedural statutes of limitations and not extending it to statutes of repose, which establish substantive rights.[198]

One cannot support an interpretation applying the preemptive scope of Section 9658(a)(1) to state statutes of repose by reference to any other text-based canon. Obviously, under the negative implication canon, if statutes of limitations and statutes of reposes are considered distinct concepts, then the inclusion of statutes of limitations in the text of the statute would give rise to the inference that statutes of repose are not preempted. Because the plain meaning of Section 9658(a)(1)—considered in conjunction with text-based canons of construction—does not clearly support applying the preemptive effect of Section 9658(a)(1) to state statutes of repose, the next step in the analysis is to consider the substantive canons of construction and determine whether they give rise to any inference regarding preemption.

2.Reconciling Competing Substantive Canons of Construction

Two competing substantive canons of construction are relevant to whether Section 9658 preempts state statutes of repose. First, the presumption against preemption canon most certainly applies because a state statute of repose creates a substantive right of immunity from

196. 42 U.S.C. § 9652(d) (2006).

197. *See* Delhotal, *supra* note 182, at 452 ("The plain language of the savings clause indicates that CERCLA does not change *substantive* rights or obligations.").

198. *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, 406–07 (1992) (suggesting that CERCLA's preemption of state statutes of limitations can be reconciled with its savings clause if it is interpreted to preempt only state "statutes of limitations that are procedural (affect the remedy) but not those that are substantive (affect the liability)"). In *Geier v. American Honda Motor Co.*, 529 U.S. 861, 868 (2000), the Supreme Court relied on a savings clause to support a narrow reading of an express preemption provision.

tort liability after the passage of a certain amount of time from the allegedly wrongful conduct. The determination of tort rights and immunities is a matter of traditional state authority to which a presumption against preemption applies when there is ambiguity in statutory text.[199]

Second, the remedial purpose canon may apply given that CERCLA is a remedial statute.[200] Considering the limitations on the remedial purpose canon that Professor Watson identified,[201] however, it appears that at least two of the limitations would disfavor application of the canon to support a broad interpretation of Section 9658 to preempt state statutes of repose. For one thing, Section 9658 likely reflected a legislatively-crafted compromise, and an interpretation extending preemption to state statutes of repose would upset that compromise.[202] As described in more detail below, Congress commissioned a study group to evaluate statutory and common law remedies for injuries caused by exposure to hazardous substances.[203] The study group made many recommendations, but the only revision affecting state law that Congress implemented was the federally required commencement date for accrual of state statutes of limitations.[204] Additionally, applying the remedial purpose canon to preempt state statutes of repose would conflict with the presumption against preemption canon; Professor Watson noted that the remedial purpose canon generally gives way when it comes into conflict with an important competing interpretive principle.[205]

In addition to the limitations on the canon that Professor Watson identified, it is difficult to conclude that that the preemption of state

199. *See supra* text accompanying notes 136–40.

200. *See, e.g.*, Pakootas v. Teck Cominco Metals, Ltd., 452 F.3d 1066, 1081 (9th Cir. 2006) (applying the remedial purpose canon to interpretation of a provision of CERCLA because of "CERCLA's overwhelmingly remedial statutory scheme") (internal quotation marks omitted); Sierra Club v. Seaboard Farms Inc., 387 F.3d 1167, 1172 (10th Cir. 2004) (stating that CERCLA "must be interpreted liberally so as to accomplish its remedial goals").

201. *See supra* text accompanying notes 150–51.

202. *See* Watson, *supra* note 83, at 301 ("For the most part, the federal district and appellate courts have properly recognized that the remedial purpose canon has diminished utility when the interpretive issue focuses on provisions of CERCLA that are the product of compromise.").

203. *See infra* text accompanying notes 220–25.

204. *See infra* text accompanying notes 224–28.

205. *See* Watson, *supra* note 83, at 306–08 (noting that "courts construing CERCLA should be wary of an uncritical endorsement of the [remedial purpose] canon in situations that involve competing interpretive 'meta-principles'" and identifying the "American rule" for recovery of attorney's fees, and the presumption against "waivers of sovereign immunity" canon as two such meta-principles).

statutes of repose is related to a remedial purpose of CERCLA. Congress enacted CERCLA to provide financing to remediate hazardous waste sites and to apportion the costs of cleanup to those responsible for contamination.[206] Even considering the purpose of Section 9658 in isolation, preemption of state statutes of repose can only be related to the purpose of that section if the purpose is defined very broadly in terms that the language of the section itself does not support. The specific purpose of Section 9658 is to provide a federally required commencement date where a state statute of limitations without a similar discovery rule of accrual would bar the action.[207] Congress has never identified the remedial purpose of Section 9658 as the removal of all state temporal barriers to recovery for damages caused by hazardous wastes. Thus, while there is good reason to apply the presumption against preemption canon because statutes of repose represent substantive law in an area of traditional state authority, there are limitations that recommend against application of the remedial purpose canon.

The Supreme Court's decision in *Florida Department of Revenue v. Piccadilly Cafeterias, Inc.* [208] provides insight regarding how a court might reconcile competing canons of construction. In that case, the Supreme Court was asked to determine whether a provision of the Bankruptcy Code that provided a stamp-tax exemption from state taxes for any asset transferred "under a plan confirmed under [Chapter 11]" of the Code exempted assets transferred after a filing for bankruptcy *but prior to the confirmation* of a Chapter 11 plan.[209] The Court found that there were two plausible interpretations of the text, though the better interpretation limited the exemption to post-confirmation transfers made under the authority of a confirmed plan.[210] Additionally, considering the Bankruptcy Code as a whole, the Court concluded that there was greater contextual support for the interpretation that a confirmed plan must precede the transfer for the exemption to apply.[211] Nevertheless, because each party claimed that substantive canons of construction supported its respective

206. *See* Waldburger v. CTS Corp., 723 F.3d 434, 438 (4th Cir. 2013) (quoting Metro. Water Reclamation Dist. v. N. Am. Galvanizing & Coatings, Inc., 473 F.3d 824, 826–27 (7th Cir. 2007)), *cert. granted*, 82 U.S.L.W. 3130 (U.S. Jan. 10, 2014) (No. 13-339).

207. 42 U.S.C. § 9658 (2006).

208. 554 U.S. 33, 35, 38–41 (2008) (interpreting 11 U.S.C. § 1146(a) (Supp. V)), *rev'd sub nom. In re* Piccadilly Cafeterias, Inc., 548 F.3d 960 (11th Cir. 2008).

209. *Id.* at 35–38.

210. *Id.* at 38–41.

211. *Id.* at 41–45.

interpretation, the Court considered what it called the "dueling canons of construction."[212]

The Florida Department of Revenue, which was arguing that the exemption did not apply to a transfer unless there was a confirmed plan, appealed to a canon akin to the presumption against preemption canon: namely, that Congress must clearly express an exemption from state taxation, and therefore the provision must be construed strictly to prevent unwarranted displacement of state tax laws.[213] On the other hand, the debtor urged the Court to employ the remedial purpose canon to broadly construe the exemption, contending that the Bankruptcy Code is a remedial statute and the obvious purpose of the exemption was to facilitate the Chapter 11 process by granting tax relief.[214] The Court carefully considered the applicability of both canons and found the "federalism" canon that the Florida Department of Revenue urged was "decisive" because recognizing an exemption for pre-confirmation transfers would be recognizing an exemption that Congress had not "clearly expressed," which is precisely what the canon counseled against.[215] On the other hand, interpreting the provision broadly through the remedial purpose canon to apply the exemption to pre-confirmation transfers would be "beyond what the statutory text can naturally bear," and cannot be tied to a particular congressional purpose in enacting Chapter 11.[216] In rejecting the remedial purpose canon, the Court recognized that Chapter 11 struck a balance of several interests: those of the debtor in restructuring debt, those of creditors in maximizing the value of the bankruptcy

212. *Id.* at 47.

213. *See id.* at 48 (citing Nat'l Private Truck Council, Inc. v. Okla. Tax Comm'n, 515 U.S. 582, 590 (1995); Cal. State Bd. of Equalization v. Sierra Summit, Inc., 490 U.S. 844, 851–52 (1989)). The Florida Department of Revenue also invoked the canon that Congress is presumed to be aware of a judicial interpretation of a statute and adopt that interpretation when it re-enacts a statute without change; it argued that this canon also supported its position because the provision had remained unchanged through several revisions of the Bankruptcy Code, including a revision after court decisions interpreting the statute to require a post-confirmation transfer for the exemption. *Id.* at 47–48.

214. *Id.* at 49. The debtor also appealed to the "absurdity" doctrine, arguing that it would be an absurd policy to allow pre-confirmation transfers to be taxed but to exempt others made moments later. *Id.* at 52. The Court responded that it saw no absurdity in setting forth a simple bright-line rule, and it was for the legislature, not the courts, to determine whether the provision needed revision based upon "practical realities." *Id.*

215. *Id.* at 50–51.

216. *Id.* at 51.

estate, and those of the state in determining property rights in the assets of a debtor's estate pursuant to state law.[217]

Likewise, with respect to interpreting the preemptive reach of Section 9658, the presumption against preemption canon would take precedence over the remedial purpose canon in considering "dueling canons of construction." As the Court concluded in considering the "federalism" canon in *Piccadilly Cafeterias*, a construction of Section 9658 to preempt state statutes of repose would extend the preemptive reach of the provision beyond what Congress had clearly expressed; this would be an interpretation that favors rather than disfavors preemption, which is directly contrary to the prescription of the presumption against preemption canon.[218] And, for the same reasons that the remedial purpose canon did not apply in *Piccadilly Cafeterias*, it should not apply to the CERCLA preemption provision: construing Section 9658 to preempt state statutes of repose would go beyond what the text of Section 9658 can "naturally bear," and preemption of state statutes of repose cannot be tied to a specific remedial purpose of CERCLA. To complete the comparison, as shown below,[219] Section 9658 of CERCLA, like Chapter 11 of the Bankruptcy Code, reflected a legislative compromise and balancing of interests.

3.Determining Whether There Is Sufficient Evidence of Congressional Intent to Rebut the Presumption against Preemption

The final step in the interpretive process is to determine whether there is any evidence of congressional intent to overcome a presumption against preemption. First, the statutory context of CERCLA, applying the doctrines of field preemption and conflict preemption, does not indicate congressional intent to preempt state statutes of repose for tort actions claiming damages from releases of hazardous substances. Congress, through CERCLA and SARA, did not intend to occupy the field of remedies for releases of hazardous substances; it did not seek to provide a federal compensatory damage remedy for personal injuries or property damages resulting from hazardous waste releases, let alone displace state law. There is also no conflict in allowing state statutes of repose to operate in

217. *Id.* (citing Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co., 549 U.S. 443, 450–51 (2007)).

218. *Id.* at 50; *see* Altria Grp., Inc. v. Good, 555 U.S. 70, 77 (2008).

219. *See infra* text accompanying notes 236–43.

conjunction with application of Section 9658 to determine the date of accrual for state statutes of limitations.

The legislative history of Section 9658, however, provides some clues to congressional intent regarding its preemptive reach. In 1980, CERCLA established a group (Study Group) to examine 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."[220] This included, among other things, evaluating "barriers to recovery posed by existing statutes of limitations."[221] The Study Group, consisting of "a distinguished panel of lawyers" designated by various bar organizations,[222] responded with a detailed report (Study Group Report) including recommendations for improving remedies under CERLA.[223] The Study Group Report contained ten recommendations,[224] including one recommendation calling for a number of changes related to state law.[225] With respect to state statutes of limitations, the Study Group Report noted that injuries related to exposures to hazardous waste often had long latency periods; consequently, when a state statute of limitations starts to run

220. 42 U.S.C. § 9651(e)(1) (2006). By reference to the authorizing Section of CERCLA, Section 301(e), this group is sometimes referenced as the Section 301(e) Study Group, and their report is sometimes referenced as the Section 301(e) Study Group Report.

221. *Id.* § 9651(e)(3)(F).

222. *See id.* § 9651(e)(2); H.R. REP. NO. 99-962, at 261(1986) (Conf. Rep.), *reprinted in* 1986 U.S.C.C.A.N. 3276, 3354.

223. 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).

224. *Id.* at 181–256. "Tier I" recommendations were the first eight recommendations of the Study Group and encompassed a remedial program to provide remedies for injuries from exposure to hazardous waste. *Id.* at 181–239. The program included establishing a federal administrative remedy through a claims process, which would be "more prompt and less costly than tort litigation." *Id.* at 181. A "Tier 2" recommendation, the ninth recommendation, was to keep intact "the existing system of tort law in the several states, with some recommendations for procedural and other improvement." *Id.* at 182, 240–51. A majority of the Study Group agreed that a claimant who obtained compensation under Tier 1 should be free to pursue a tort remedy under state tort law; however, the award should be reduced by the amount recovered under Tier 1, and the claimant should be liable for costs if the recovery is less than the Tier 1 amount. *Id.* at 182–83. The tenth recommendation concerned state court actions for property damages from hazardous waste activities. *Id.* at 252–56.

225. *Id.* at 240–51. This ninth recommendation of the Study Group included proposals for changes to state law beyond changes to statutes of limitations, including: changing joinder rules, adopting strict liability provisions for hazardous waste activities, and implementing certain evidentiary presumptions. *See id.*

under a traditional accrual rule (for example, when a plaintiff is first injured by exposure), the statute of limitations will bar most potential claims for injuries related to those exposures before a plaintiff is even aware of the injury.[226] The Study Group concluded that "[s]tates can reduce the statutes of limitation barrier by adopting a discovery rule, if they have not done so already."[227] Thus, the Study Group Report made the following recommendation regarding statutes of limitations:

> A small number of states still follow the so-called traditional rule that the cause of action accrues from the time of exposure. Another small number of states has not as yet clearly adopted either the traditional or the discovery rule . . . The Study Group recommends that all states that have not already done so, clearly adopt the rule that an action accrues when the plaintiff discovers or should have discovered the injury or disease and its cause. 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 limitation in barring plaintiff's claim before he knows that he has one.[228]

In 1986, Congress passed SARA, adopting Section 9658 as an amendment to CERCLA, along with many other amendments.[229] The addition of Section 9658 was included in Section 203 of SARA, entitled "State Procedural Reform."[230] The section of the House Conference Report on the legislation (House Report), reflecting the adoption of the amendment, noted that the amendment provided for a federal commencement date for state statutes of limitations for exposure to a hazardous substance.[231] The House Report stated that state statutes of limitations "define the time in which an injured party may bring a lawsuit seeking compensation for his injuries," and

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226. *Id.* at 28.
227. *Id.* at 117.
228. *Id.* at 240–41. In a subsequent "Discussion" of this recommendation, the Study Group Report states that the "Study Group agreed not only that the discovery rule should be applicable, but also in the view that a formulation of the discovery rule be applied that provides that an action accrues when the plaintiff knows, or should know, of the injury or illness, and also of its cause." *Id.* at 246.
229. Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, § 203, 100 Stat. 1613, 1695–96 (codified as amended at 42 U.S.C. § 9658 (2006)).
230. *Id.*
231. H.R. REP. NO. 99-962, at 261 (1986) (Conf. Rep.), *reprinted in* 1986 U.S.C.C.A.N. 3276, 3354.

"usually run from two to four years, depending on the State."[232] The House Report noted that a plaintiff with a long-latency disease may have a claim barred by the statute of limitations if it begins to run at the time of the first injury.[233] Further, the House Report stated that the Study Group Report found that "certain State statutes deprive plaintiffs of their day in court," and "the problem centers around when the statute of limitations begins to run rather than the number of years it runs."[234] The House Report then stated "[t]his section addresses the problem identified in the [Study Group Report]."[235] There is no reference in the House Report to statutes of repose.

Thus, if anything, the legislative history of Section 9658 supports a conclusion that the preemptive effect of Section 9658 should be limited to state statutes of limitations. The Study Group Report contained many recommendations. In discussing statutes of limitations and statutes of repose separately, the Study Group Report showed that lawyers understood the difference in the use of those terms at the time.[236] Of all of the recommendations in the Study Group Report, the only change to state law referenced in the House Report is the change to "statutes of limitations."[237] Reading the full context of the House Report shows that "the problem" that Section 9658 addressed was that statutes of limitations started to run at the time of "the first injury."[238] This is not a feature of statutes of repose.

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232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. *See* Waldburger v. CTS Corp., 723 F.3d 434, 451 (4th Cir. 2013) (Thacker, J., dissenting) (stating that the Study Group Report, in discussing both statutes of limitations and statutes of repose, "put Congress on notice that statutes of limitations are distinct time-bars, separate from statutes of repose, even if they have the same effect"), *cert. granted*, 82 U.S.L.W. 3130 (U.S. Jan. 10, 2014) (No. 13-339).

237. 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, at 240–41 (Comm. Print 1982). In fact, the Study Group Report *did not recommended any changes to federal law* to deal with limitations issues. Instead, it recommended that *the states* adopt a discovery rule for their statutes of limitations so that a cause of action accrues when the plaintiff discovers or should have discovered the injury or disease and its cause; it further recommended that *the states* repeal statutes of repose. *Id.* at 240–41; *see also* Light, *supra* note 198, at 371 ("The Study Group did not, however, recommend that Congress enact legislation in this area.").

238. *See* H.R. REP. NO. 99-962, at 261 (1986) (Conf. Rep.), *reprinted in* 1986 U.S.C.C.A.N. 3276, 3354. That the focus of the Study Group was on statutes of limitations is shown by its survey of the statutes of limitations for each state that noted whether the state employed a discovery rule of accrual. S. DOC. NO. 97-571, app. 12, 15–18 (REPORT ON STATUTES OF LIMITATIONS APPLICABLE TO ACTIONS ARISING OUT OF HAZARDOUS WASTE DISPOSAL). The survey noted that several states that had

Significantly, Section 203 of SARA, which contained what became Section 9658, was entitled "State Procedural Reform."[239] Even though this title was not incorporated into the United States Code,[240] it shows intent to reform state procedures, such as state statutes of limitations, and not to preempt state substantive rights, such as those established by state statutes of repose.[241]

Section 9658 clearly reflects a legislative compromise. Not only did Congress fail to enact any of the specific the recommendations of the Study Group Report—the only recommendation relating to statutes of limitations was that states change their laws, not that Congress preempt state law—[242] but Congress had also rejected various legislative proposals for independent federal causes of action for injuries caused by releases of hazardous substances.[243] Congress left the state tort system to act independently to provide remedies for personal injuries and property damages caused by releases of hazardous substances, with the only change being the establishment of a uniform discovery rule of accrual for actions meeting the conditions of Section 9658.

B. Evaluating Federal Circuit Decisions Determining Whether CERCLA Preempts Statutes of Repose

Federal decisions that have decided whether Section 9658 preempts state statutes of repose have often employed parts of the interpretive

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codified a discovery rule of accrual had also codified a statute of repose to place an outer boundary on liability. *See id.* at App. 19–23 (describing statutes in Connecticut, Kansas, and North Carolina).

239. Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, § 203, 100 Stat. 1613, 1695 (codified as amended at 42 U.S.C. § 9658 (2006)).

240. *See* 42 U.S.C. § 9658. The title of Section 9658 is "Actions under State law for damages from exposure to hazardous substances."

241. *See* Light, *supra* note 198, at 406–07 (stating that this title "hints that the statute amends statutes of limitations that are procedural (affect the remedy) but not those that are substantive (affect the liability)"); *see also supra* text accompanying notes 103–18 (discussing the "title-and-headings" canon, through which the title or heading of a provision can be a permissible indicator of meaning to resolve any ambiguity). Because the heading was not codified in the statute, consideration of the heading does not rise to the level of a text-based canon of construction in the interpretive analysis. Nevertheless, the heading is relevant as part of the legislative history of Section 9658 to determine congressional intent in resolving any textual ambiguity in the section.

242. *See supra* text accompanying notes 227–28.

243. *See* Light, *supra* note 198, at 371 (calling Section 9658 the "Dead Duck" Compromise and noting that "[d]uring the reauthorization of CERCLA, both the Senate and the House of Representatives considered and rejected proposals to establish a federal cause of action for personal injury and property damage in environmental cases").

analysis proposed here, but none have followed a holistic approach considering and balancing all relevant factors in the analysis.[244] The first circuit court to address the issue found that CERCLA did not preempt statutes of repose;[245] the second decision reached the opposite conclusion.[246] In the most recent circuit decision, a majority of the three-judge panel found that CERCLA preempted the state statutes of repose, but a dissenting judge disagreed.[247] Evaluating these decisions in light of the proposed interpretive approach provides insight into the interpretive process.

1. *Burlington Northern*: Determining Meaning from the Text of the Statute without Considering Canons of Construction

The first federal circuit court of appeals to directly address the issue was the Fifth Circuit Court of Appeals in *Burlington Northern & Santa Fe Railroad Co. v. Poole Chemical Co.*[248] The litigation arose after the January 2003 rupture of a chemical storage tank manufactured by the Skinner Tank Company (Skinner) and sold in 1988 to the Poole Chemical Company (Poole).[249] The Burlington Northern & Santa Fe Railway Company conducted an emergency clean-up of the spill and sought to recover its costs from Poole.[250] Poole filed a third-party claim against Skinner alleging that the tank

244. Federal district courts have also addressed the issue. *See, e.g.*, Mechler v. United States, No. 12–2283–EFM, 2013 WL 3989640, at *7–8 (D. Kan. Aug. 2, 2013); Evans v. Walter Indus. Inc., 579 F. Supp. 2d 1349, 1362–64 (N.D. Ala. 2008); German *ex rel.* Grace v. CSX Transp., Inc., 510 F. Supp. 2d 630, 633–34 (S.D. Ala. 2007); A.S.I., Inc. v. Sanders, 835 F. Supp. 1349, 1358–59 (D. Kan. 1993). Given the split in the federal circuit court decisions, the article only discusses the appellate opinions in the text.

245. Burlington N. & Santa Fe Ry. Co. v. Poole Chem. Co., 419 F.3d 355, 358 (5th Cir. 2005).

246. McDonald v. Sun Oil Co., 548 F.3d 774, 782 (9th Cir. 2008).

247. Waldburger v. CTS Corp., 723 F.3d 434, 445 (4th Cir. 2013), *cert. granted*, 82 U.S.L.W. 3130 (U.S. Jan. 10, 2014) (No. 13-339); *see also id.* at 448 (Thacker, J., dissenting).

248. 419 F.3d 355. Other circuit courts have considered the preemptive reach of Section 9658(a)(1) but have not based their decisions on whether the terms of the statute encompassed state statutes of repose. *See, e.g.*, First United Methodist Church of Hyattsville v. U.S. Gypsum Co., 882 F.2d 862, 868 (4th Cir. 1989) (holding that Section 9658 did not preempt a state statute of repose because CERCLA did not apply to an asbestos removal action); Covalt v. Carey Canada, Inc., 860 F.2d 1434, 1435–36 (7th Cir. 1988) (holding that Section 9658 did not preempt a state statute of repose because plaintiff's claim involved an exposure to asbestos and not a release of a hazardous substance covered by CERCLA).

249. *Burlington N. & Santa Fe Ry. Co.*, 419 F.3d at 358.

250. *Id.*

was defective.[251] The district court dismissed the third-party claim based on Texas's fifteen-year statute of repose for product liability actions.[252]

On appeal, Poole argued, among other things, that Section 9658 preempted the statute of repose.[253] The court disagreed. Starting with the plain language of the statute, the court noted that Section 9658 only specified statutes of limitations, not statutes of repose; the court found that statutes of repose were distinct from statutes of limitations and were therefore not covered.[254] The court, however, did not consider what the terms "statute of limitations" and "statute of repose" meant in 1986 under the fixed-meaning canon or why a statute of repose could not qualify as "the limitations period specified in a statute of limitations." Nor did the court consider any other text-based canons of construction.

With respect to substantive canons of construction, the court did not apply, or even acknowledge, the substantive presumption against preemption canon or the remedial purpose canon, perhaps because it found that the issue was resolved through its analysis of the text. Nevertheless, the court considered the purposes of CERCLA generally and of Section 9658 in particular. The court stated that the purpose of CERCLA was "'to facilitate the prompt cleanup of hazardous waste sites,'" and to shift the costs of environmental cleanup to responsible parties.[255] The court then noted that Section 9658 was not originally part of CERCLA but was added in 1986 to address a congressional concern that "many state systems were inadequate to deal with the delayed discovery of the effect of a release of a toxic substance."[256] Based on the House Report, the court recognized a particular congressional concern that when a state statute of limitations runs from the date of the first injury, rather than

251. *Id.*

252. *Id.* (district court dismissal based on TEX. CIV. PRAC. & REM. CODE ANN. § 16.012(b)).

253. *Id.* at 359–63.

254. *Id.* at 362–64 ("[A] statute of repose establishes a 'right not to be sued,' rather than a 'right to sue.'"). The Supreme Court of South Dakota agreed with *Burlington Northern's* interpretation of the plain language of Section 9658, finding that it only preempted state statutes of limitations and noting that "Congress failed to include substantively different statutes of repose within [the] preemptive rule." Clark Cnty. v. Sioux Equip. Corp., 2008 SD 60, ¶ 22–28, 753 N.W.2d 406, 414–17.

255. *Burlington N. & Santa Fe Ry. Co.*, 419 F.3d at 364 (quoting OHM Remediation Servs. v. Evans Cooperage Co., 116 F.3d 1574, 1578 (5th Cir. 1997)).

256. *Id.* (citing H.R. REP. NO. 99-962, at 261 (1986) (Conf. Rep.), *reprinted in* 1986 U.S.C.C.A.N. 3276, 3354).

from the time that a plaintiff discovers that the injury was caused by a hazardous substance, it will bar the claims of a plaintiff with "a long-latency disease like cancer."[257] The court found that Congress met this concern by preempting state statutes of limitations that would prevent plaintiffs who suffered from latent diseases from pursuing an action.[258] Thus, the court reasoned, finding preemption of statutes of limitations but not statutes of repose comported with "common sense"—"a fundamental principle of statutory construction,"—particularly for a case that did not involve a long-latency disease or an inherently undiscoverable injury.[259]

A problem with the court's analysis in *Burlington Northern* is the court's failure to recognize that the logical consequence of its statutory construction would be to cut off claims for persons with long-latency diseases and inherently undiscoverable injuries. The court took comfort in the fact that this was not the consequence of its decision given the facts of the case; but, had Poole bought its storage tanks just one year earlier, the statute of repose would have expired, barring Poole's claim before it could possibly have learned of its injury (when one of the tanks ruptured).[260] By failing to engage in a complete interpretive analysis—considering all of the potentially applicable canons of construction and all of the relevant evidence of congressional intent in the legislative history—the court failed fully to justify an interpretation that would lead to this result.

2. *McDonald*: Finding Textual Ambiguity, but Failing to Consider Canons of Construction and Selectively Reading the Legislative History

257. *Id.* (citing H.R. REP. NO. 99-962, at 261 (1986) (Conf. Rep.), *reprinted in* 1986 U.S.C.C.A.N. 3276, 3354).

258. *Id.*

259. *Id.* at 364–65. The court noted that Poole knew about the injury as soon as the tank ruptured (in January 2003) and knew of the Texas legislature's passage of the product liability statute of repose no later than its effective date of September 1, 2003. *Id.* at 358, 365. Therefore, because the storage tanks were sold to Poole on October 28, 1988, Poole, knowing of its injury, still had almost two months to file its third party complaint before it would be barred by the fifteen-year statute of repose. *See id.* at 358–59, 365. Instead, Poole waited sixteen months after the injury to file a third-party complaint. *Id.* at 365.

260. Because the applicable Texas statute of repose was effective only to actions filed on or after July 1, 2003, Poole theoretically had a short window after the rupture to file a claim before the statute of repose became effective. *See id.* at 358–59. A previous version of this product liability statute of repose applied only to manufacturers of manufacturing equipment. *Id.* at 359 n.4.

The next federal circuit court of appeals to address the issue was the Ninth Circuit Court of Appeals in *McDonald v. Sun Oil Co*.[261] In 1973, the Sun Oil Company (Sun) had sold property including a former mine to the McDonalds.[262] The mine had ceased operations in 1958, but the surface of the property contained a large pile (or piles) of calcine tailings resulting from the mining; the tailings contained mercury.[263] In 2001, a state regulatory agency told the McDonalds that their handling of the calcine had created an environmental release and ordered them to refrain from disturbing the calcine.[264] In 2003, the McDonalds sued Sun for negligence, contribution, breach of contract and fraud.[265] The district court entered summary judgment on the McDonalds' negligence claim, finding it barred by Oregon's ten-year statute of repose for claims alleging negligent injury to persons or property.[266]

The court first looked to the plain meaning of Section 9658, noting that the "'inquiry begins with the statutory text and ends there as well if the text is unambiguous.'"[267] Acknowledging the fixed-meaning canon in its interpretation, the court stated "'[t]he proper inquiry focuses on the ordinary meaning of the [provision] at the time Congress enacted it.'"[268] Thus, the court considered the meaning of the term "statute of limitations" at the time that Congress enacted Section 9658 in 1986, and found the term to be ambiguous regarding whether it included statutes of repose.[269] The court stated, "[a]t that time, although some cases recognized the differences between statutes of limitation and repose, a number of cases confused the terms or used them interchangeably"; therefore, "considerable uncertainty about the distinction existed in 1986."[270] The court,

261. 548 F.3d 774 (9th Cir. 2008).
262. *Id.* at 777–78.
263. *Id.*
264. *Id.* at 778.
265. *Id.*
266. *Id.* at 779–80 (noting the district court entry of summary judgment based on OR. REV. STAT. § 12.115(1)).
267. *Id.* at 780 (quoting BedRoc Ltd. v. United States, 541 U.S. 176, 183 (2004)).
268. *Id.* (quoting *BedRoc*, 541 U.S. at 183). The Ninth Circuit criticized the *Burlington Northern* court for failing to analyze the meaning of "statute of limitations" at the time Section 9658 was adopted. *Id.* at 782.
269. *Id.* at 781.
270. *Id.*; *see also id.* at 781 & n.3 (citing cases); *id.* at 781 & n.4 (citing legal scholarship). Relying on case law to establish ambiguity may have been erroneous. The Supreme Court stated that "[t]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." Robinson v. Shell Oil Co., 519

however, failed to consider the distinction between cases using the term "repose" to describe a function of a statute of limitations and those cases using the term "statute of repose" as a term of art describing a limit that is triggered by the conduct of the defendant. The court did not identify a single case using the term "statutes of limitations" to describe the latter sense of "statute of repose" (i.e., in the sense that a "statute of repose" is a "statute of limitations").[271]

Having found the text of the statute ambiguous, the court analyzed the legislative history of Section 9658 without considering whether any substantive canon of construction would give rise to a presumption regarding preemption. The court found that the Study Group Report coupled with the House Report showed that Congress's "primary concern" in enacting Section 9658 was to adopt a discovery rule for circumstances in which "a plaintiff may lose a cause of action before becoming aware of it."[272] Because this predicament can occur with either statutes of limitations or statutes of repose—"and is probably most likely to occur where statutes of repose operate"—the court concluded that the "only evidence of Congressional intent" showed that the term "statute of limitations" meant to include "statutes of repose."[273]

The court acknowledged that the Study Group Report differentiated between statutes of limitations and statutes of repose in its recommendation.[274] But, the court found this differentiation

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U.S. 337, 341 (1997). Even if that broader context includes judicial precedent, a court must assume that Congress is aware of "relevant judicial precedent," and does not rely on isolated instances where courts make mistakes. *See* Merck & Co. v. Reynolds, 559 U.S. 633, 648 (2010).

271. *McDonald*, 548 F.3d at 781. All but one of the cases that the Ninth Circuit cited concern statutes of limitations in which the court observed, as a descriptive matter, that "statutes of limitation are statutes of repose." Bridges v. United States, 346 U.S. 209, 230–31 (1953); *accord* United States v. Kubrick, 444 U.S. 111, 117 (1979); Anderson v. Yungkau, 329 U.S. 482, 485 (1947); United States v. Or. Lumber Co., 260 U.S. 290, 299 (1922); *see* Gates Rubber Co. v. USM Corp., 508 F.2d 603, 611 (7th Cir. 1975) ("It is this interest in finality which underlies the description of a [statute of] limitations act as a 'statute of repose.'"). In none of these cases does the court consider "statute of repose" as a term of art applying to a period triggered by the defendant's conduct. In the final case that the Ninth Circuit cited, *Bolick v. American Barmag Corp.*, the North Carolina Supreme Court actually recognized the distinction between the two concepts four years before the enactment of Section 9658, citing the Restatement (Second) of Torts, Section 899, comment g, among other authorities. Bolick v. Am. Barmag Corp., 293 S.E.2d 415, 417–18 (N.C. 1982); *see supra* text accompanying note 192.

272. *McDonald*, 543 F.3d at 782–83.

273. *Id.* at 783.

274. *Id.*

insignificant because the House Report stated that Section 9658 "addresses the problem identified in the [Study Group Report]," interpreting "the problem" to necessarily include plaintiffs losing their cause of action by operation of statutes of repose.[275]

The court's analysis of the legislative history gives too great weight to this statement of the House Report and misinterprets the report's use of the word "problem" as expressing congressional intent to preserve any action in which a plaintiff could not have discovered an injury before the action would be foreclosed by a state time bar. As shown above, however, the only change to state law referenced in the House Report was to "statutes of limitations."[276] Given that the House Report did not even mention statutes of repose, in context "the problem" that Section 9658 meant to address was that some state statutes of limitations began to run at the time of injury. This problem is irrelevant to statutes of repose, which were meant to address a different issue, namely that a discovery rule of accrual created a potential for open-ended liability.

McDonald also fails to account for other evidence from the legislative history, including: (1) that Section 9658 reflected a compromise given that none of the recommendations of the Study Group Report were enacted and proposals for private rights of action were considered and rejected as part of the legislative process leading up to SARA, and (2) that the provision of SARA adding Section 9658 to CERCLA was entitled "State Procedural Reform," showing an intent to reform state procedures without impacting state substantive rights (such as the substantive rights provided by statutes of repose), which is consistent with CERCLA's savings clause.

In sum, the court's stretch to find ambiguity in the language of Section 9658, its failure to acknowledge substantive canons of construction, and its selective reading of the legislative history, show that the court was not engaged in a holistic, objective interpretive analysis in its decision.

3. *Waldburger*: Considering Competing Textual Analyses, Applications of Canons of Construction and Interpretations of Legislative History

The next federal circuit court to address the issue, the Fourth Circuit Court of Appeals in *Waldburger v. CTS Corp.*,[277] was sharply

275. *Id.*

276. *See supra* text accompanying notes 237–41.

277. Waldburger v. CTS Corp., 723 F.3d 434 (4th Cir. 2013), *cert. granted*, 82 U.S.L.W. 3130 (U.S. Jan. 10, 2014) (No. 13-339).

divided on the issue. In 2009, landowners in Asheville, North Carolina, discovered that their well water was contaminated with trichloroethylene and dichloroethylene, and, in 2011, they sued the CTS Corporation (CTS) claiming that the company had caused the contamination.[278] The last alleged act or omission of CTS that could have been responsible for the contamination occurred no later than 1987, when CTS sold its electronics manufacturing plant.[279] CTS successfully moved to dismiss the case based on North Carolina's applicable ten-year statute of repose.[280] On appeal, the court determined that Section 9658 preempted the statute of repose, which it recognized as distinct from a statute of limitations.[281]

a.Finding Ambiguity in the Text, the Court Concludes There Is Preemption Based on the Remedial Purpose Canon and Legislative History.

Like the courts in *Burlington Northern* and *McDonald*, the Fourth Circuit appropriately started its analysis by examining the text of the statute; the court concluded that the text was ambiguous with respect to whether statutes of repose were preempted.[282] Given that Section 9658 repeatedly used the words "statutes of limitations" and did not reference "statutes of repose," the court noted that a "simple review" of the language "could reasonably lead to a conclusion that its application is limited only to statutes of limitations."[283] The court, however, considered an alternate reading of Section 9658 that could support preemption of state statutes of repose: namely, that North Carolina's statute of repose was "an 'applicable limitations period' that is 'specified in the State statute of limitations or under common law'" and provides "'a commencement date which is earlier than the federally required commencement date.'"[284] By stating that the statute of repose was "*an* 'applicable limitations period,'" the court slightly modified the actual language of the section which states "*the* applicable limitations period."[285] As stated previously, the use of

278. *Id.* at 437, 440–41.

279. *Id.* at 441.

280. *Id.* (stating the district court dismissal was based on N.C. GEN. STAT. ANN. § 1-52(16)).

281. *See id.* at 441 (citing First United Methodist Church of Hyattsville v. U.S. Gypsum Co., 882 F.2d 862, 866 (4th Cir. 1989) and BLACK'S LAW DICTIONARY 1546 (9th ed. 2009)).

282. *Id.* at 442–43.

283. *Id.* at 442.

284. *Id.* (quoting 42 U.S.C. § 9658(a)(1) (2006)).

285. *Compare id.*, *with* 42 U.S.C. § 9658(a)(1) (emphasis added). The court repeated this modification in the subsequent paragraph when it stated that North Carolina's ten year

"the" in the statute implies that there is only one period subject to preemption, namely, the period applicable to the statute of limitations which is triggered by accrual.[286]

The court made two additional observations to support ambiguity "[l]est [the court] seem to be stretching to find ambiguity in the text."[287] First, like the Ninth Circuit in *McDonald*, the court noted that the terms "statute of limitations" and "statute of repose" had often been used "interchangeably" making it "entirely probable" that Congress meant to include North Carolina's statute of repose within the preemptive scope of Section 9658.[288] As in *McDonald*, however, the court failed to consider precisely how the terms had been used historically; it failed to recognize that the phrase "statute of repose" had historically described a function of statutes of limitations, whereas for the past several decades the legal term of art "statute of repose" had referenced a particular type of statute that operated differently from a statute of limitations. Second, the court found that the statute manifested "a lack of internal consistency" by referencing periods specified in the common law in some places but not in others,[289] but the court failed to explain how that makes the statute ambiguous with respect to whether it preempts statutes of repose. The reference to "common law" in Section 9658 was likely designed to incorporate any common law principle that might affect the commencement date of the limitations period, such as incorporation of a discovery rule through judicial interpretation.[290]

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statute located within the section titled "Limitations, Other than Real Property," was "[a]s such . . . *a* limitations period 'specified in the State statute of limitations or under common law.'" *Waldburger*, 723 F.3d at 442 (emphasis added).

286. *See supra* text accompanying notes 194–95and note 195. While the word "the" here clearly refers to the singular, the word "a" or "an" more readily implies a plural meaning. *See* 2A SINGER & SINGER, *supra* note 83, § 47.34, at 497 ("It is most often ruled that a term introduced by 'a' or 'an' applies to multiple subjects or objects unless there is reason to find that singular application was intended or is reasonably understood.") (footnote omitted).

287. *Waldburger*, 723 F.3d at 443.

288. *Id.* (citing McDonald v. Sun Oil Co., 548 F.3d 774, 781 & nn. 3–4 (9th Cir. 2008)).

289. *Id.*

290. The reference to "common law" appears in Section 9658(a)(1) regarding determining the "commencement date" for statutes of limitations. The Study Group Report included in its Appendix a survey of how statutes of limitations for personal injury operated in every state. The survey found that some states had a discovery rule of accrual within the text of the statute of limitations while other states incorporated a discovery rule through judicial interpretation (*i.e.*, common law). 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, at

Finding that the statutory language was ambiguous, the court turned to other indications of legislative intent.[291] With respect to substantive canons of construction, the court repeatedly referenced the remedial purpose canon to support a "broad interpretation" or "liberal construction" of CERCLA as a remedial statute.[292] The court noted that CERCLA was 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."[293] The court, however, did not make a compelling case that any particular remedial purpose of CERCLA was related to the preemption of state statutes of repose. The court specifically identified two remedial purposes of CERCLA: "to (1) 'establish a comprehensive response and financing mechanism to abate and control the 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.'"[294] Nowhere in its decision does the court tie preemption of 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.[295] 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.[296]

The court also failed to even reference the presumption against preemption canon, let alone consider whether application of that canon was more apt than the remedial purpose canon based on an

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app.13–17 (Comm. Print 1982). Under the "surplusage" canon the phrase "common law" must have some meaning beyond statute of limitations and this is the most plausible interpretation.

291. *Waldburger*, 723 F.3d at 443.

292. *Id.* at 443–44 (citing Urie v. Thompson, 337 U.S. 163, 180 (1949); Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc., 596 F.3d 112, 132 (2d Cir. 2010); Axel Johnson, Inc. v. Carroll Carolina Oil Co., 191 F.3d 409, 416 (4th Cir. 1999); First United Methodist Church of Hyattsville v. U.S. Gypsum Co., 882 F.2d 862, 867 (4th Cir. 1989)).

293. *Id.* at 443 (quoting Watson, *supra* note 83, at 286).

294. *Id.* at 438 (quoting Metro Water Reclamation Dist. v. N. Am. Galvanizing & Coatings, Inc., 473 F.3d 824, 827 (7th Cir. 2007)).

295. *Id.* at 444.

296. The court only noted (in a parenthetical to a case citation) that CERCLA itself was the product of an "eleventh hour compromise." *See id.* at 438 (quoting New York v. Shore Realty Corp., 759 F.2d 1032, 1039–40 (2d Cir. 1985)). The court did not discuss the legislative proposals leading to SARA six years later.

objective evaluation of both canons in the particular legislative context. While failing to reference the presumption against preemption canon, the court stated that it was not ignoring well-known policies underlying statutes of repose.[297] But, the court did not fully and accurately identify the underlying reason for statutes of repose. Significantly, the court did not acknowledge that statutes of repose are designed to curtail the long-tail liability created by a discovery rule of accrual; instead, it merely stated that "[r]epose statutes do not exist simply to protect defendants."[298] The court then quoted *United States v. Kubrick* out of context to support its claim that statutes of repose "ensure that cases are processed efficiently."[299] *Kubrick* actually identified this as a purpose of a statute of limitations, not of a statute of repose.[300] Having incorrectly identified "efficient case processing" as a purpose of statutes of repose, the court noted that in finding preemption, it had not relaxed a plaintiff's burden of proof.[301] The court stated that the passage of time in latent harm cases would still make it more difficult for a plaintiff to establish a case.[302] Finally, the court remarked that its decision had not altered North Carolina's statute of limitations, so that plaintiffs would still be required to "bring claims within three years of discovery," and defendants "will not necessarily be endlessly subjected to the possibility of litigation."[303]

The court's characterization of state policies is a good illustration of the perils of failing to adhere to the principle of Chesterton's fence by fully understanding the purposes of what is being stricken. Had the court looked more deeply into the purposes of statutes of repose, it would have appreciated that statutes of repose were *a response to the discovery rule of accrual* and were designed to give some predictability to a defendant's potential liability. Faithful application of the presumption against preemption canon would have assisted the

297. *Id*. at 444.
298. *Id.*
299. *Id.* (citing United States v. Kubrick, 444 U.S. 111, 117 (1979)).
300. *Kubrick*, 444 U.S. at 117. The inappropriate citation of *Kubrick* was based on the *Kubrick* Court's descriptive statement that statutes of limitations "are statutes of repose," followed with an enumeration of the purposes of *statutes of limitations*. *Id.* The *Waldburger* court simply began its parenthetical quote of *Kubrick* with the words "statutes of repose." *Waldburger*, 723 F.3d at 444. The misimpression results from confusing the phrase "statute of repose" used in a descriptive sense with the phrase "statute of repose" as a legal term of art. *See supra* text accompanying notes 51–58.
301. 723 F.3d at 444.
302. *Id.* at 444–45.
303. *Id.* at 445.

court in giving appropriate deference to substantive state law in an area of traditional state authority; by failing to give appropriate deference, it risked substituting its own policy judgment for that of the state legislature.[304]

While discussing the legislative history in more detail than the *McDonald* court had, the Fourth Circuit, like the *McDonald* court, selectively read the legislative history and assumed that the House Report's statement that Section 9658 was meant to "address[] the problem" identified in the Study Group Report showed that Congress intended to preempt both statutes of limitations and statutes of repose.[305] In fact, the court went a step further and identified statutes of repose as "precisely the barrier that Congress intended § 9658 to address," so that any reading of the statute to make it inapplicable to statutes of repose, "cannot be termed an honest attempt to 'effectuate Congress's intent.'"[306] Like the *McDonald* court, the Fourth Circuit did not discuss other indications of intent in the legislative history. It is particularly significant that the court cited the Study Group's statement that it was proposing "to remove unreasonable procedural and other barriers to recovery,"[307] but failed to note that the provision of SARA that added Section 9658 to CERCLA was entitled "State Procedural Reform." Given that statutes of repose create substantive rights, it is telling that the court did not address the potential relevance of the title that Congress gave to Section 9658 in SARA. The title reveals that procedural state statutes of limitations without a discovery rule were "precisely the barrier" that Congress intended to address, not substantive state statutes of repose.

b.Disagreeing that the Text Is Ambiguous and Considering Additional Indications of Congressional Intent in the Presumption against Preemption Canon and the Legislative History, the Dissent Concludes There Is No Preemption.

The dissent provided a more holistic and balanced interpretation. The dissent concluded that the language of the statute was not ambiguous: "statutes of limitations" did not include "statutes of

304. The court's characterization of the substantive right as the right to be "free from the threat of being called to account for . . . contaminating acts," reflects the low value that the court placed on the North Carolina state legislature's substantive enactment. *Id.* at 444.

305. *Id.* at 439.

306. *Id.* at 444.

307. *Id.* at 439 (citing 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, at 240 (Comm. Print 1982)).

repose," even considering the meaning of those terms at the time of the enactment of Section 9658 in 1986.[308] The dissent recognized that it could have stopped the analysis at that point.[309] The dissent, however, also considered canons of construction and the legislative history of Section 9658 to support its interpretation.[310] The dissent found that the presumption against preemption canon applied with particular force in fields that states traditionally regulate, which would include creating "a substantive right to be free from liability under its own state tort law."[311] The dissent did not ignore the remedial purpose canon, but found that "the plain meaning of the statute and the role of legislative compromise restrain[ed] the application" of the canon.[312] Finally, in reviewing the legislative history of Section 9658, the dissent pointed out that the Study Group Report showed that Congress was aware of the distinction between statutes of limitations and statutes of repose, and could have explicitly covered both of them if that was Congress's intent.[313] Instead, Congress adopted an "enhanced discovery rule" which the Study Group Report had recommended should apply to statutes of limitations.[314] Finally, the dissent recognized that the Study Group Report had recommended a number of other changes to state law, but "the *only* revision affecting state law Congress chose to implement in the section explicitly covering state procedural reform was the

308. *Id.* at 448 (Thacker, J., dissenting) (relying on the definition of "statute of limitations" in the 1979 edition of Black's Law Dictionary, which stated descriptively that "statutes of limitations are statutes of repose," but did not state or imply that a statute of repose is a statute of limitations). The dissent also stated that Section 9658 could not preempt North Carolina's statute of repose because that statute of repose did not provide a "commencement date," or "beginning of the period in which a civil action may be brought," against which to measure the "federally required commencement date." *Id.* at 450. For a statute of repose like the North Carolina statute at issue, one could consider a "commencement date" to be the "last act or omission" of the defendant, but that date does not begin a "period in which a civil action may be brought." The plaintiff must be injured before there can be a cause of action. Rather, the trigger date for a statute of repose begins the period that sets the "outer limit, after which no cause of action may accrue." *Id.*

309. *Id.* at 446; *see also id.* at 450 ("Given the plain meaning of the statute, we need not look to legislative history.").

310. *Id.* at 450–53.

311. *Id.* at 453 (citing Nat'l City Bank of Ind. v. Turnbaugh, 463 F.3d 325, 330 (4th Cir. 2006)).

312. *Id.* at 452 (citing 3550 Stevens Creek Assocs. v. Barclays Bank of Cal., 915 F.2d 1355, 1363 (9th Cir. 1990); Watson, *supra* note 83, at 300–01).

313. *Id.* at 451–52.

314. *Id.* at 451.

enhanced discovery rule via the federally required commencement date."[315]

The analysis of the dissent in *Waldburger* most closely tracks the interpretive approach recommended here. As the dissent recognized, it could have ended its analysis with the text.[316] But, given that the majority had reached a different conclusion regarding the text (giving some credence to a finding of ambiguity), it was prudent to consider other indications of congressional intent. The dissent started with legislative history, whereas the interpretive approach recommends considering substantive canons of construction first to determine whether there should be any presumption regarding preemption before weighing extra-textual evidence. In any event, the dissent considered all potentially applicable canons of construction and most pieces of evidence from the legislative history; in doing so, it provided good reasoning for its opinion without straying into judicial policy-making.

The conclusion that follows from the interpretive analysis is that Section 9658 of CERCLA does not preempt state statutes of repose. Section 9658 does not express a clear intent to preempt statutes of repose. Without a clear expression of preemptive intent in the text, there must be strong extra-textual evidence that Congress intended to preempt state statutes of repose given that the most applicable interpretive presumption disfavors preemption. The extra-textual evidence does not support preemption of statutes of repose, but, if anything, shows that Congress confined itself to enacting a uniform rule of accrual for statutes of limitations for lawsuits subject to the section.

VI. APPLYING THE INTERPRETIVE FRAMEWORK TO EXISTING CONFLICTS IN FEDERAL LAW: THE FTCA

A. Considering Whether the FTCA Preempts State Statutes of Repose – Statutory Background

Another federal statute that some courts have found to preempt state statutes of repose is the Federal Tort Claims Act (FTCA),[317]

315. *Id.* at 452–53 (citing Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, § 203, 100 Stat. 1613, 1695–96 (codified as amended at 42 U.S.C. § 9658 (2006))).

316. *Waldburger*, 723 F.3d at 450 (Thacker, J., dissenting).

317. 28 U.S.C. § 1346(b) (2006); *e.g.*, Cooper v. United States, No. 12-7244, 2013 WL 6845988, at *8 (E.D. Pa. Dec. 30, 2013); Jones v. United States, 789 F. Supp. 2d 883, 885 (M.D. Tenn. 2011); Zander v. United States, 786 F. Supp. 2d 880, 886 (D. Md. 2011).

which waives the sovereign immunity of the United States for certain torts committed by federal employees while acting within the scope of their employment.[318] There are several conditions on the FTCA's waiver of sovereign immunity. One of these conditions is the analogous private liability requirement, which holds that if a private person in similar circumstances would not be liable to the plaintiff for the alleged conduct then a court does not have jurisdiction over the FTCA claim against the United States.[319]

The requirement rests on two separate provisions of the FTCA. First, the FTCA's jurisdictional grant states that a court may exercise jurisdiction over the United States, "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."[320] Second, the FTCA provides that the "United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances."[321] Under these provisions, courts apply substantive state tort law to FTCA claims against the United States.[322] In circumstances where state law would provide substantive protection from tort liability to an analogous private party in like circumstances, the United States is immune to suit under the FTCA.[323] As a result of the private analogous liability requirement, some courts have held that the United States cannot be sued under the FTCA if an action against an analogous private party

318. § 1346(b)(1).

319. *See, e.g.*, United States v. Olson, 546 U.S. 43, 44 (2005) ("[T]he United States waives sovereign immunity 'under circumstances' where local law would make a '*private person*' liable in tort."); Liranzo v. United States, 690 F.3d 78, 97 (2d Cir. 2012) ("Even for alleged torts occurring in quintessentially federal contexts, the question remains whether analogous private liability exists under state law."); *In re* FEMA Trailer Formaldehyde Prod. Liab. Litig., 668 F.3d 281, 287–90 (5th Cir. 2012) (finding no waiver of sovereign immunity under the FTCA where an analogous private party would be immune from suit under state emergency statutes).

320. 28 U.S.C. § 1346(b)(1).

321. *Id.* § 2674.

322. *See* FDIC v. Meyer, 510 U.S. 471, 477–78 (1994).

323. *See, e.g.*, Brown v. United States, 653 F.2d 196, 201 (5th Cir. 1981) ("[L]iability of the United States under the Act arises only when the law of the state would impose it."). An early article on the FTCA noted that "[p]robably no part of the Act will give rise to more perplexing problems" because the language of the Act "inevitably leads to a re-examination of the frequently considered distinction between matters of substance and matters of procedure." *Federal Tort Claims Act: Useful Discussion at Fourth Circuit Conference*, 33 A.B.A. J. 857, 860 (1947) (footnote omitted).

under like circumstances would be barred by a state statute of repose.[324]

Some courts, however, have refused to apply the time bar of a state statute of repose to claims against the United States. These courts have found that the FTCA's statute of limitations preempts state statutes of repose.[325] The FTCA has a statute of limitations which provides that:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of the mailing . . . of notice of final denial of the claim by the agency to which it was presented.[326]

Despite being written in the disjunctive, a plaintiff must comply with each of two separate time requirements to file an action in federal court: (1) a plaintiff must present a tort claim to a federal agency within two years of the date the claim "accrues," and (2) a plaintiff must file a lawsuit within six months after the date that the agency sends a denial of the claim to the plaintiff.[327] With respect to

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324. *See, e.g.*, Simmons (*Ex rel*. Estate of Elliott) v. United States, 421 F.3d 1199, 1199 (11th Cir. 2005) (per curiam) (dismissing an FTCA claim for medical malpractice based on applicable Georgia statute of repose); West v. United States, No. 08-646-GPM, 2010 WL 4781146, at *4–5 (S.D. Ill. Oct. 25, 2010) (finding that an FTCA action was barred by the Illinois statute of repose for medical malpractice claims); Brown v. United States, 514 F. Supp. 2d 146, 155, 157–58 (D. Mass. 2007) (finding an FTCA claim barred by a Massachusetts statute of repose for actions involving improvements to real property), *aff'd*, 557 F.3d 1 (1st Cir. 2009); Vega v. United States, 512 F. Supp. 2d 853, 860 (W.D. Tex. 2007) (dismissing an FTCA negligent design claim based on applicable Texas statute of repose); Manion v. United States, No. CV-06-739-HU, 2006 WL 2990381, at *4, *9 (D. Or. Oct. 18, 2006) (finding an FTCA claim barred by an Oregon statute of repose for negligence claims); Simmons (*Ex rel* Estate of Elliott) v. United States, 225 F.R.D. 688, 694, 696 (N.D. Ga. 2004) (finding an FTCA action barred by a Georgia statute of repose for medical malpractice actions), *aff'd*, 421 F.3d 1199 (11th Cir. 2005).

325. *See, e.g.*, Mamea v. United States, No. 08-00563 LEK-RLP, 2011 WL 4371712, at *12–13 (D. Haw. Sept. 16, 2011); Abila v. United States, No. 2:09-CV-01345-KJD-LRL, 2011 WL 3444166, at *2–3 (D. Nev. Aug. 8, 2011); Jones v. United States, 789 F. Supp. 2d 883, 892 (M.D. Tenn. 2011); Zander v. United States, 786 F. Supp. 2d 880, 886 (D. Md. 2011).

326. 28 U.S.C. § 2401(b).

327. *See, e.g.*, Ellison v. United States, 531 F.3d 359, 361–62 (6th Cir. 2008) (explaining pursuant to principles of statutory interpretation that the FTCA requires both deadlines to be met and any other reading "would effectively eliminate *any* court deadline" for initiating an FTCA suit); Dyniewicz v. United States, 742 F.2d 484, 485 (9th Cir. 1984) ("Section 2401(b) establishes two jurisdictional hurdles, both of which

the second period, if an agency fails to take action within six months after a claim is filed, "any time thereafter" the claimant may deem the claim denied and file suit in federal court.[328]

Courts have applied a "discovery rule" of accrual in certain circumstances to trigger the two-year limitations period for filing a claim with a federal agency. The discovery rule of accrual for FTCA claims had its genesis in *United States v. Kubrick*,[329] a malpractice case in which the Supreme Court found that accrual of the FTCA's statute of limitations did not require knowledge that an injury was negligently inflicted.[330] While the *Kubrick* Court did not directly hold that a discovery rule of accrual applied to the FTCA's two-year statute of limitations,[331] language in the decision strongly implied that the Court would recognize a discovery rule for FTCA medical malpractice claims.[332] Under the rule, the two-year limitations period begins to run when a claimant discovers, or should have discovered, "critical facts" regarding injury and causation that would lead the claimant to seek advice in the medical and legal community.[333] Since *Kubrick*, lower courts have accepted, without question, the proposition that the FTCA's two-year statute of limitations has a discovery rule of accrual.[334] Some courts have stated that this discovery rule is limited to exceptional cases, such as medical malpractice and latent disease cases, in which a plaintiff could not have immediately discovered an injury; other courts, however, have applied the discovery rule more broadly to other FTCA actions.[335]

Applying a discovery rule of accrual to FTCA actions can greatly extend the time during which the United States may be liable for its negligent conduct. As long as a plaintiff does not know or have reason to know of an injury and its potential cause, the two-year

must be met."); Schuler v. United States, 628 F.2d 199, 201 (D.C. Cir. 1980) ("[Section 2401(b)] requires the claimant both to file the claim with the agency within two years after accrual of the claim and then to file a complaint in the District Court within six months after the agency denies the claim.").

328. *See* 28 U.S.C. § 2675(a).

329. 444 U.S. 111, 118–25 (1979).

330. *Id.* at 122–24.

331. *See* Bain & Colella, *supra* note 34, at 556–57 (showing that the Supreme Court did not hold that a discovery rule applied to FTCA claims).

332. *See Kubrick*, 444 U.S. at 122 ("The prospect is not so bleak for a plaintiff in possession of the critical facts that he has been hurt and who has inflicted the injury. He is no longer at the mercy of the latter. There are others who can tell him if he has been wronged, and he need only ask.").

333. *See id.* at 122–23.

334. Bain & Colella, supra note 34, at 559.

335. *Id.* at 561 (citing cases).

statute of limitations does not begin. Unlike many state statutes that provide a statute of repose as an outer limit on the time when a plaintiff can bring a cause of action, the FTCA has no such statutory time barrier.

There are plausible reasons why there is no statute of repose in the FTCA. At the time of the FTCA's passage, a discovery rule of accrual was not generally recognized in the common law in the absence of fraudulent concealment, so there would have been no reason for Congress to consider an outer time limit on claims as measured from the defendant's conduct.[336] In fact, there is good reason to believe that Congress did not think that a discovery rule applied to accrual of the FTCA's statute of limitations when the FTCA was enacted, given that the FTCA's statute of limitations was extended from one year to two years in 1949 to cover situations in which a plaintiff could not discover the injury within a year.[337] Without a discovery rule of accrual there is no need for a statute of repose.[338]

Additionally, because a general discovery rule of accrual had not been included within state statutes of limitations or recognized in state common law by 1946, statutes of repose—which were a reaction to a discovery rule of accrual for statutes of limitations—had not been enacted. Thus, Congress had no precedent for including a statute of repose in the FTCA.[339] Finally, as described above, to the extent statutes of repose are part of the substantive law of the state, they are already incorporated into the FTCA through the analogous private liability requirement. Though Congress could not have

336. A general discovery rule of accrual in the absence of fraud or concealment was not incorporated into a federal statute of limitations until 1949 in *Urie v. Thompson*, 337 U.S. 163 (1949). *See supra* text accompanying notes 33–36; *see also* Bain & Colella, *supra* note 34, at 553–56.

337. A House Report on the 1949 amendment stated that the one-year period was unfair to claimants who "suffered injuries which did not fully develop until after the expiration of the period for making claim," and to those who may not get notice of the potential wrongful death of a next-of-kin until after a suit was already time barred. *See* H.R. REP. NO. 81-276, at 3–4 (1949). The *Kubrick* Court stated that this passage "seems almost to indicate that the time of accrual is the time of injury." 444 U.S. at 119 n.6. Had a discovery rule of accrual been recognized at the time, this amendment would have been unnecessary for the reasons given in the House Report. *See* Bain & Colella, *supra* note 34, at 557–58.

338. *See supra* text accompanying notes 40–49.

339. As a point of comparison, the FTCA's present administrative claims requirement was modeled after state statutes with similar requirements for bringing suits against municipalities. *See* S. REP. NO. 89-1327, at 3–4 (1966), *reprinted in* U.S.C.C.A.N. 2515, 2517; *see also* Avery v. United States, 680 F.2d 608, 610–11 (9th Cir. 1982) (citing legislative history).

known at the time it enacted the FTCA that the state substantive law would someday include statutes of repose, it is not unusual for a state's substantive law to change, and the FTCA's incorporation of substantive state law to determine the scope of the United States' liability is not static.

B. Considering Whether the FTCA Preempts State Statutes of Repose – Interpretive Analysis

1.Considering the Text

With that background, one can consider the question of whether the FTCA preempts state statutes of repose under the interpretive framework. Initially, the FTCA does not contain an express preemption provision. As a waiver of sovereign immunity statute, it created a right that did not exist previously: namely, the right to bring a tort suit against the United States under certain conditions. The conditions that the FTCA established for the waiver of sovereign immunity include both procedural and substantive limitations. For example, as a matter of procedure, plaintiffs must first exhaust administrative remedies and comply with certain time limits in pursuing a claim.[340] Substantively, the United States cannot be held liable for certain types of torts, such as those based in discretionary policy or founded on strict liability.[341] Nothing in the statute displaces state substantive law. To the contrary, state substantive law is expressly incorporated into the statute through the analogous private liability requirement.[342]

2.Reconciling Competing Substantive Canons of Construction

The next step in the interpretive analysis is to determine whether substantive canons of construction give rise to any presumption regarding meaning. Because the FTCA expressly incorporates substantive state law, there should be a strong presumption against preemption of any substantive state law that is consistent with the

340. *See* 28 U.S.C. § 2401(b) (2006) (statutes of limitations); *id.* § 2675 (administrative exhaustion requirement).

341. The "discretionary function exception," which shields policy-based conduct from tort suit, is found in 28 U.S.C. § 2680(a). *See also* United States v. Gaubert, 499 U.S. 315, 322–23 (1991). Additionally, because the United States has only waived its sovereign immunity for tort claims based on "negligent or wrongful" acts or omissions, 28 U.S.C. § 1346(b)(1), there is no waiver for strict liability claims. *See* Laird v. Nelms, 406 U.S. 797, 802–03 (1972).

342. *See* 28 U.S.C. §§ 1346(b)(1), 2671.

FTCA's operation. There are, however, two other potentially relevant substantive canons of construction: the remedial purpose canon and the presumption against waivers of sovereign immunity canon. The FTCA is a remedial statute in the sense that it provides a remedy to those injured by the government's wrongful conduct.[343] It is also a waiver of sovereign immunity statute, and one of the express conditions of the waiver is the private analogous liability requirement that incorporates substantive state law, such as statutes of repose.[344]

The Supreme Court has never explicitly endorsed the remedial purpose canon or the presumption against waivers of sovereign immunity canon as the preeminent canon for construing the FTCA. To the contrary, Supreme Court statements would lead to the conclusion that neither of these substantive canons will establish any presumption in interpreting the statute. In *Smith v. United States*[345] the Court acknowledged that its decisions contained "varying statements" regarding how the FTCA "should be construed,"[346] but, at bottom, concluded that it would neither extend nor narrow the waiver of immunity beyond what Congress intended.[347] More recently, in *Dolan v. United States Postal Service*,[348] the Court emphasized with respect to exceptions to the waiver of immunity in the FTCA that its job was to "identify those circumstances which are within the words and reason of the exception—no less and no

343. Courts have applied the remedial purpose canon to interpretation of the FTCA. *See, e.g.*, Terbush v. United States, 516 F.3d 1125, 1135 (9th Cir. 2008) (stating that FTCA was a remedial statute, and "it should be construed liberally, and its exceptions should be read narrowly") (internal quotation marks omitted); O'Toole v. United States, 295 F.3d 1029, 1037 (9th Cir. 2002) ("The FTCA, as a remedial statute, should be construed liberally, and its exceptions should be read narrowly."); Kielwien v. United States, 540 F.2d 676, 681 (4th Cir. 1976) ("The [FTCA] is remedial and should be liberally construed to grant the relief contemplated by Congress.").

344. Courts have applied the presumption against waivers of sovereign immunity canon to interpretation of the FTCA. *See, e.g.*, Ctr. for Biological Diversity v. Hamilton, 453 F.3d 1331, 1335 (11th Cir. 2006) (interpreting the FTCA's statute of limitations and stating that the "terms upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied") (internal quotation marks omitted); Roma v. United States, 344 F.3d 352, 362 (3d Cir. 2003) (interpreting the FTCA's administrative presentment requirement based on a "strict construction of the limited waiver of sovereign immunity").

345. 507 U.S. 197 (1993).

346. *Id.* at 203 (citing Kosak v. United States, 465 U.S. 848, 853 n.9 (1984); United States v. Orleans, 425 U.S. 807, 813 (1976); Dalehite v. United States, 346 U.S. 15, 31 (1953); United States v. Yellow Cab Co., 340 U.S. 543, 547 (1951)).

347. 507 U.S. at 203 (citing United States v. Kubrick, 444 U.S. 111, 117–18 (1979)).

348. 546 U.S. 481 (2006).

more."[349] These statements have led one court to conclude that the remedial purpose canon and presumption against waivers of sovereign immunity canon "cancel out" one another and are thus "of little assistance in interpreting the FTCA."[350] Thus, a court should not rely on either of these canons in isolation to make a presumption regarding congressional intent to preempt state law. At the same time, the Supreme Court has not considered the preemptive reach of the FTCA, so it has not had occasion to apply the presumption against preemption canon to the Act. Given the FTCA's express incorporation of state substantive law, however, one would expect the Court to require strong evidence of congressional intent to support a conclusion that the FTCA preempts state statutes of repose.

3.Determining Whether There Is Sufficient Evidence of Congressional Intent to Rebut the Presumption against Preemption

Courts finding that the FTCA preempted state statutes of repose have applied the doctrines of field preemption or conflict preemption to determine congressional preemptive intent. In *Mamea v. United States*,[351] a court applied the doctrine of field preemption to find that the FTCA preempted state statutes of repose. In that case, plaintiffs alleged that physicians at an Army medical center failed properly to diagnose and treat plaintiff Suilia Mamea in 1997 and 1998 thereby causing severe injuries, including end stage renal disease.[352] The United States argued that the court lacked subject matter jurisdiction because the plaintiffs failed to file their action before the expiration of Hawaii's six-year statute of repose for medical torts.[353]

The district court found that the FTCA preempted the Hawaii statute of repose, concluding that "Congress'[s] decision to define the FTCA's statute of limitations in terms of accrual [was] a clear indication that it intended to occupy the field of both statutes of limitations and statutes of repose, which would bar claims without regard to accrual."[354] But, the court's application of the field preemption doctrine is flawed. Even if the doctrine could properly apply to fields as narrow as "limitations periods applicable to tort

349. *Id.* at 492 (quoting Kosak, 465 U.S. at 853 n.9 (1984) (internal quotation marks omitted)).
350. Devlin v. United States, 352 F.3d 525, 534 n.10 (2d Cir. 2003).
351. No. 08-00563 LEK-RLP, 2011 WL 4371712 (D. Haw. Sept. 16, 2011).
352. *Id.* at *1.
353. *Id.* at *2 (citing HAW. REV. STAT. ANN. § 657-7.3).
354. *Id.* at *10.

actions against federal employees acting within the scope of their employment" (which is questionable),[355] Congress's "decision to define the FTCA's statute of limitations in terms of accrual," cannot be evidence that it intended to occupy that field. As discussed above, when Congress enacted the FTCA in 1946 there was no general discovery rule of accrual for statutes of limitations and therefore no place for application of statutes of repose.[356] Thus, when the *Mamea* court states, "[i]nsofar as Congress expressly defined the statute of limitations for the FTCA in terms of accrual, applying state statutes of repose can effectively shorten the limitations period,"[357] it was making an assumption about accrual that did not exist when Congress enacted the FTCA. Only if accrual could be delayed by a discovery rule could a statute of repose affect the right to bring an action that would otherwise be timely under the FTCA's statute of limitations. Because this circumstance arose after Congress enacted the FTCA in 1946—through incorporation of a discovery rule into the FTCA and passage of statutes of repose by state legislatures—it cannot be evidence of congressional intent to occupy the field of statutes of repose.

Contrary to the *Mamea* court's conclusion regarding field preemption, the FTCA shows congressional intent through the analogous private liability requirement *to incorporate* the field of state substantive law into the Act to determine the substantive parameters of the United States' tort liability. Congress must have recognized at the time of the FTCA's enactment that the private liability of private parties in the various states would change over time by virtue of state legislation and changes in state common law. Changes in state substantive law could therefore change the extent to which the United States could be liable under the FTCA.[358]

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355. While the field deemed preempted through field preemption can be narrowly defined, it must at least be broad enough to be considered a "field." *See, e.g.*, Arizona v. United States, 132 S. Ct. 2492, 2502–03 (2012) (applying field preemption to the field of alien registration); Entergy Nuclear Vt. Yankee, LLC v. Shumlin, 733 F.3d 393, 409 (2d Cir. 2013) (stating that radiological safety represents an "arena of field preemption"); Abdullah v. Am. Airlines, Inc., 181 F.3d 363, 367 (3d Cir. 1999) (applying field preemption to standards of care for air safety).

356. *See supra* text accompanying notes 336–39.

357. Mamea v. United States, No. 08-00563 LEK-RLP, 2011 WL 4371712, at *10 (D. Haw. Sept. 16, 2011).

358. The *Mamea* court downplayed the distinction between procedural statutes of limitations and substantive statutes of repose. *Id.* at *13. Citing a 1945 Supreme Court case that did not involve the FTCA, the court stated that state court distinctions between procedural statutes of limitations and substantive statutes of repose are "immaterial;" according to the court, because a statute of limitations can completely bar recovery, it can be considered substantive law. *Id.* (citing Guar. Trust Co. of

Courts have made a better case for FTCA preemption of state statutes of repose by applying the principles of conflict preemption. The apparent conflict arises in comparing the operation of the FTCA's two separate statutes of limitations with the typical state statute of repose. By requiring administrative exhaustion through the filing of an administrative claim before a plaintiff may bring a federal lawsuit, the statutes of limitations in the FTCA, are, by their nature, different than the typical state requirements to file a court action that is timely under both the state statute of limitations and the statute of repose.

This is illustrated in *Zander v. United States*,[359] in which the court considered the operation of the FTCA's two statutes of limitations and found a conflict with application of a state statute of repose. In *Zander*, the plaintiff claimed medical malpractice over several years through 2002 and filed FTCA administrative claims in November 2004, "within two years" of the plaintiff's injury and the alleged negligence.[360] Several years later, on April 8, 2009, the government denied the plaintiff's administrative claims, and the plaintiff filed her complaint against the United States less than six months later as required by the FTCA's six-month statute of limitations.[361] Thus, the plaintiff satisfied both of the FTCA's statutes of limitations. The

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N.Y. v. York, 326 U.S. 99 (1945)). This ignores the consistent distinction that courts have drawn between the nature of statutes of limitations and statutes of repose, *see supra* text accompanying notes 25–38, as well as the distinction the FTCA makes between the procedural time limits for first submitting an administrative claim and then filing a lawsuit, and the state substantive law that the FTCA incorporates through the analogous private liability requirement. The court also inappropriately relied on a Ninth Circuit case finding that the FTCA statute of limitations preempted a state statute of limitations by taking out of context the Ninth Circuit's statement that the FTCA preempted the "state period of limitations." 2011 WL 4371712, at *12 (citing Poindexter v. United States, 647 F.2d 34, 36 (9th Cir. 1981)). Similar to the Fourth Circuit's mischaracterization of Section 9658 in *Waldburger*, *see supra* Part V.B.3.a, the court in *Mamea* read the Ninth Circuit to state that the FTCA preempted "*any* 'state period of limitations'," when the Ninth Circuit actually stated it preempted "*the* state period of limitations." *Compare Mamea*, 2011 WL 4371712, at *12, *with Poindexter*, 647 F.2d at 36 (emphases added). The state period of limitations most clearly references the period in a statute of limitations. In that same case, the Ninth Circuit recognized that substantive provisions of state law, even when included in a provision containing a state statute of limitations, must be given effect in an FTCA action. *Poindexter*, 647 F.2d at 36–37; *see also* Abila v. United States, No. 2:09: CV-013450-KJD-LRL, 2011 WL 3444166, at *4 (D. Nev. Aug. 8, 2011) (characterizing the Ninth Circuit's *Poindexter* decision).

359. 786 F. Supp. 2d 880 (D. Md. 2011).

360. *Id.* at 882.

361. *Id.* at 882–83.

United States, however, argued that the plaintiff's action was untimely under the Maryland statute of repose because she failed to file her malpractice suit in court within five years "'of the time the injury was committed.'"[362]

In its preemption analysis, the court found that characterization of the Maryland statute of repose as substantive was "immaterial" if "'there is a direct conflict between the federal and the state law.'"[363] The court determined that such a conflict existed because under the FTCA's "deemed denied" provision if the plaintiff did not receive a response to the administrative claim within six months of filing the claim with the appropriate administrative agency, the plaintiff could file an action "any time thereafter."[364] Consequently, the FTCA allowed Zander to file her claim "any time" between the date six months following the submission of the administrative claims (late May 2005) and the date six months following the date that the agency sent the notice of denial (October 8, 2009).[365] Thus, the *Zander* court reasoned, because the statute of repose would cut off any action not brought by November 30, 2007 (the date five years after the injury), there was a "clear conflict."[366] Other courts have found conflict preemption on the same basis.[367]

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362. *Id.* at 883 (quoting MD. CODE ANN., CTS. & JUD. PROC. § 5-109(a)(1)). The Court of Appeals of Maryland later determined that this provision was a statute of limitations and not a statute of repose. *See* Anderson v. United States, 427 Md. 99, 105–10, 46 A.3d 426, 430–43 (2012).

363. 786 F. Supp. 2d at 885 (quoting Stonehedge/Fasa-Tex. JDC v. Miller, No. 96-10037, 1997 WL 119899, at *2 (5th Cir. Mar. 10, 1997)).

364. *Id.* at 884–86 (citing 28 U.S.C. § 2675).

365. *See id.* at 886.

366. *Id.*; *see also* Mamea v. United States, No. 08-00563 LEK-RLP, 2011 WL 4371712, at *10 (D. Haw. Sept. 16, 2011) ("Applying state statutes of repose, which do not take into account the filing of the required FTCA administrative claim, could bar claims that Congress has deemed timely.").

367. *See* Kennedy v. U.S. Veterans Admin., 526 F. App'x 450, 459 (6th Cir. 2013) (White, J., concurring) (stating preemption is proper where a plaintiff "files an administrative claim within the repose period and in accordance with the deadlines set forth under § 2401(b)"); Abila v. United States, No. 2:09-CV-01345-KJD-LRL, 2011 WL 3444166, at *5 (D. Nev. Aug. 8, 2011) (finding that a plaintiff's lawsuit was timely despite a failure to file an action within the time set by a statute of repose "since it was filed within six months of a final denial of its administrative claim by the Government"); Jones v. United States, 789 F. Supp. 2d 883, 892 (M.D. Tenn. 2011) (finding that a plaintiff's claim "is extinguished only if the claimant fails to meet the deadlines in § 2401(b) and a state's statute of repose has no effect on the federal claim"). The United States has argued that the statute of repose should apply to circumstances in which a plaintiff could have filed a lawsuit within the repose period by deeming the claim denied, but chose not to do so. *Zander*, 786 F. Supp. 2d at 886.

Rather than finding that state statutes of repose are preempted, a better view is that a plaintiff perfects a tort claim against the United States for purpose of the applicable statute of repose through the filing of the administrative claim. Under this view, the date of filing of the administrative claim is that the date that controls the determination of whether an analogous private person would be liable under the state statute of repose. This construction finds support in the interpretation of the FTCA's analogous private liability requirement and in the presumption against preemption canon.

Under the FTCA's private analogous liability requirement, courts do not define the United States' substantive liability by reference to "identical circumstances" of private party liability under state law but rather to "like circumstances."[368] The Supreme Court has stated that the words "like circumstances" do not "restrict a court's inquiry to the *same circumstances*, but require it to look further afield."[369] With respect to application of state statutes of repose, the filing an administrative claim with a federal agency under the FTCA is analogous to the filing of a lawsuit against a private party in state court. Both actions put the alleged tortfeasor on notice of the claim and provide an opportunity to respond. But, as seen in cases like *Zander*, because of the delay inherent in the administrative exhaustion requirement, compelling an FTCA plaintiff to file a court action to satisfy the period in a state statute of repose can create a conflict between federal and state law in circumstances in which the plaintiff has filed an administrative claim within the repose period but cannot file a federal action in that time. Such conflicts can be avoided by considering the filing of an FTCA administrative claim with a federal agency to be analogous to the filing of an action against a private party in state court for purposes of determining compliance with the statute of repose. This logical interpretation would also guard against federal agencies delaying denials of administrative claims to allow the state statute of repose period to expire and bar a plaintiff's action.[370]

Under this interpretation, the statute of repose would bar claims such as those in *Mamea*, where plaintiffs failed to file their

368. 28 U.S.C. § 2674 (2006).

369. United States v. Olson, 546 U.S. 43, 46 (2005) (citing Indian Towing Co. v. United States, 350 U.S. 61, 64 (1955)).

370. *Kennedy*, 526 F. App'x at 458–59 (White, J., concurring) (citing this concern as a reason for finding that the FTCA preempted state statutes of repose).

administrative claims with the period of the statute of repose,[371] but it would not bar claims such as those in *Zander* in which a plaintiff had filed an administrative claim within the period. Courts would reach this result through sensible application of the FTCA's private analogous liability rather than by looking to whether application of the FTCA's statutes of limitations in certain circumstances presented a conflict with operation of state statutes of repose.

Thus, in cases like *Zander*, in which a plaintiff filed the administrative claim within the repose period, courts should not reach the issue of conflict preemption. On the other hand, in cases like *Mamea*, in which a plaintiff did not file an administrative within the repose period, a court could only find a conflict justifying preemption through an overly literal reading of the FTCA. The FTCA's administrative exhaustion requirement allows a plaintiff who has given the appropriate federal agency six months to consider a claim the option to deem the claim denied at "any time thereafter" and file an action.[372] A court could interpret that provision to allow a plaintiff who has filed an administrative claim to file a lawsuit at literally "any time" as long as the six months have passed and the agency has not denied the claim. This interpretation could apply to those cases in which an administrative claim was not filed before expiration of the state repose period, thus presenting a conflict with the state statute that would have precluded the action.[373] As shown in *Huddleston v. United States*,[374] however, this interpretation takes the provision out of its statutory context.

In *Huddleston*, a plaintiff, who had filed an administrative claim two months after the expiration of Tennessee's statute of repose for malpractice actions, argued that he met the requirements of the FTCA's two statutes of limitations, and therefore should be allowed to pursue his claim.[375] "The Supremacy Clause, [plaintiff argued], does not permit Tennessee's statute of repose to trump § 2401(b) [the FTCA's statute of limitations]."[376] The Sixth Circuit Court of Appeals disagreed and considered the complete context of the FTCA in reaching its decision. The court explained that the "'FTCA does

371. *Mamea*, 2011 WL 4371712, at *10 n.7 (acknowledging that the plaintiffs did not file their administrative claims within the repose period).

372. *See* 28 U.S.C. § 2675(a).

373. *See* Zander v. United States, 786 F. Supp. 2d 880, 884 (D. Md. 2011) (recognizing that a strict interpretation of the FTCA's "deemed denied" provision "potentially gives a plaintiff an infinite amount of time to file suit against the Government").

374. 485 Fed. App'x. 744, 746 (6th Cir. 2012), *cert. denied*, 133 S. Ct. 859 (2013).

375. *Id.* at 745–46.

376. *Id.* at 745.

not create liability,'" but "'merely waives sovereign immunity to the extent state-law would impose liability on a private individual in similar circumstances.'"[377] Because the plaintiff had filed his administrative claim after the expiration of the applicable repose period, Tennessee law had already "extinguished his claim."[378] The court stated "[b]ecause federal law incorporates state substantive law for the purposes of FTCA claims, applying Tennessee's statute of repose to FTCA plaintiffs does not run afoul of the Supremacy Clause."[379] Thus, considering the FTCA as a whole, and, in particular, its incorporation of substantive state law, the isolated statement that a plaintiff may deem a claim denied "any time thereafter" cannot serve to resurrect a claim that has already been extinguished under a state statute of repose.[380]

This interpretation is also consistent with the presumption against preemption canon. When there is a reasonable interpretation of the statute that does not create a conflict triggering federal preemption, the court should adopt that interpretation, rather than using an alternative interpretation that would require preemption.

Finally, there is nothing in the legislative history or purpose of the FTCA reflecting a congressional intent to preempt state statutes of repose. The FTCA's legislative history is silent on statutes of repose for good reason, given that a general discovery rule of accrual was not recognized at the time of the FTCA's enactment. But, the legislative history is clear that Congress intended to incorporate state substantive tort law to determine the United States' liability.[381]

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377. *Id.* (quoting Myers v. United States, 17 F.3d 890, 899 (6th Cir. 1994) (emphasis omitted) (internal quotation marks omitted)).

378. *Id.* at 746.

379. *Id.*

380. This interpretation is mandated by the "whole-text" canon, which requires a court to consider the "entire text" of a statute, "in view of its structure and of the physical and logical relation of its many parts." SCALIA & GARNER, *supra* note 83, at 167.

381. In testimony in support of legislation which became the FTCA, Special Assistant to the Attorney General, Alexander Holtzoff stated, "[t]his bill is, of course, limited to those tort claims which the law would recognize as justiciable, and for which a recovery could be had in the event that the defendant were a private individual or a private corporation, as the bill merely waives the immunity of the United States against being sued." *Tort Claims against the United States: Hearings on S. 2690 before a Subcomm. of the S. Comm. on the Judiciary*, 76th Cong., 3rd Sess. 34 (1940). Likewise, Assistant Attorney General Francis M. Shea testified, "[t]he liability of the United States in such cases is to be the same as that of a private individual, subject to the limitations of the bill, and is to be determined under the local law . . . Local law is to govern not only the matter of liability but also such defenses as contributory

Because statutes of repose are part of a state's evolving substantive tort law, applying statutes of repose to FTCA actions involving the United States is consistent with this congressional intent.

In sum, applying the interpretive approach to determine whether the FTCA preempts state statutes of repose leads to the conclusion that Congress did not intend to preempt state statutes of repose, but instead intended to incorporate them to the extent they are part of a state's substantive law. Nevertheless, applying the FTCA's private analogous liability requirement can lead a court to conclude that filing an FTCA administrative claim within the repose period satisfies the state substantive requirement.

VII. CONCLUSION

Examining instances in which courts have found that federal law preempts state statutes of repose reveals how undisciplined statutory interpretation can run roughshod over the principle of Chesterton's fence. States enacted statutes of repose in response to a perceived insurance crisis created, in part, by the open-ended and uncertain tort liability resulting from a discovery rule of accrual for statutes of limitations. But, there is no evidence that Congress considered the legislative purposes underlying state statutes of repose in amending CERCLA through Section 9658 or in enacting the FTCA. With respect to Section 9658 of CERCLA, Congress certainly recognized that statutes of limitations without a discovery rule of accrual could prematurely cut off causes of actions for latent injuries. Congress, however, made no determination regarding the validity of state statutes of repose designed to control insurance costs produced through the "long tail" liability resulting from a discovery rule. There was no study of the effects of a discovery rule on insurance costs or of the efficacy of statutes of repose in controlling those costs. Rather, the Study Group whose report led to enactment of Section 9658 simply surveyed state statutes of limitations to determine which states had discovery rules of accrual and which states did not, thereby justifying the need for a "federal commencement date" where state law failed to provide an adequate discovery rule. The Study Group referenced statutes of repose but did not evaluate, or even acknowledge, their purpose in recommending that states repeal them.

With respect to the FTCA, there is even less basis to justify finding congressional intent to preempt state statutes of repose. Congress affirmatively decided that the United States' tort liability would be

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negligence, aggravation of damages, and the like . . . ." *Tort Claims: Hearings on H.R. 5373 and H.R. 6463 before H. Comm. on the Judiciary*, 77th Cong., 26 (1942).

determined by the substantive tort law of the state where the tortious act or omission occurred. Thus, Congress explicitly left policy choices regarding the substantive parameters the United States' tort liability to the states, subject to certain jurisdictional limitations. Additionally, because enactment of state statutes of repose post-dated Congress's passage of the FTCA, Congress could not have possibly considered the benefit of those statutes in providing defendants and the insurance industry more certainty regarding potential tort liability (or, for that matter, the consequences of foreclosing otherwise valid causes of action).

Following a systematic, holistic approach to determining whether federal statutes preempt state statutes of repose is the best safeguard for ensuring adherence to the principle of Chesterton's fence. The approach proposed here, giving primacy to text and considering all applicable substantive canons of construction and reliable indicators of congressional intent, will lead to preemption of state statutes of repose only when it is clear that preemption is what Congress intended based on its own policy choices. This clear intent will most likely be the result of a legislative process that considered the benefits and the drawbacks of statutes of repose. But, as we have seen, when a court makes the determination that federal law preempts state statutes of repose without following a systematic approach it risks substituting its own policy preferences for those of Congress.