

1997

## CERCLA's Mistakes

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### Recommended Citation

John C. Nagle, *CERCLA's Mistakes*, 38 Wm. & Mary L. Rev. 1405 (1996-1997).

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## CERCLA'S MISTAKES

JOHN COPELAND NAGLE\*

Judge Dowd was far too modest. Three years after Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),<sup>1</sup> he wrote that "CERCLA was rushed through a lame-duck session of Congress, and therefore, might not have received adequate drafting."<sup>2</sup> Courts struggling to interpret CERCLA since then have abandoned such understatement. Judges now hope that "if they stare at CERCLA long enough, it will burn a coherent afterimage on the brain."<sup>3</sup> The usual explanation for CERCLA's poor drafting blames the hurry with which the lame-duck Ninety-sixth Congress passed

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1. 42 U.S.C. §§ 9601-9675 (1994).

2. *Ohio ex rel. Brown v. Georgeoff*, 562 F. Supp. 1300, 1310 n.12 (N.D. Ohio 1983).

3. *CP Holdings, Inc. v. Goldberg-Zoino & Assocs., Inc.*, 769 F. Supp. 432, 435 (D.N.H. 1991). For recent, albeit less colorful, complaints about CERCLA's drafting, see *Atlantic Richfield Co. v. American Airlines, Inc.*, 98 F.3d 564, 570-71 (10th Cir. 1996); *Hanford Downwinders Coalition, Inc. v. Dowdle*, 71 F.3d 1469, 1480 (9th Cir. 1995); *United States v. USX Corp.*, 68 F.3d 811, 824-25 nn.26-27 (3d Cir. 1995); *Adhesives Research Inc. v. American Inks & Coatings Corp.*, 931 F. Supp. 1231, 1237 (M.D. Pa. 1996); *Pinal Creek Group v. Newmont Mining Corp.*, 926 F. Supp. 1400, 1404 & n.4 (D. Ariz. 1996); *North Carolina ex rel. Howes v. W.R. Peele, Sr. Trust*, 889 F. Supp. 849, 852 (E.D.N.C. 1995); *United States v. Montrose Chem. Corp.*, 883 F. Supp. 1396, 1399 (C.D. Cal. 1995); and *United States v. Davis*, 882 F. Supp. 1217, 1220 n.1 (D.R.I. 1995). See also WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW: HAZARDOUS WASTES AND SUBSTANCES 514 (1st ed. 1988) ("Vagueness, contradiction, and dissembling are familiar features of environmental statutes, but CERCLA is secure in its reputation as the worst drafted of the lot.").

the hazardous waste law in December 1980 before President-elect Reagan and a Republican Senate majority assumed office.<sup>4</sup>

The circumstances of CERCLA's enactment present formidable challenges to any theory of statutory interpretation. You favor a textualist theory that examines the statutory language alone? "CERCLA is not a paradigm of clarity or precision. It has been criticized frequently for inartful drafting and numerous ambiguities attributable to its precipitous passage."<sup>5</sup> You rely on canons of construction from which to glean statutory meaning? "Because of the inartful crafting of CERCLA . . . reliance solely upon general canons of statutory construction must be more tempered than usual."<sup>6</sup> You prefer to rely on the legislative history of a statute's enactment? "[T]he legislative history of CERCLA gives more insight into the 'Alice-in-Wonderland'-like nature of the evolution of this particular statute than it does helpful hints on the intent of the legislature."<sup>7</sup> You seek to implement congressional intent? "[C]ongressional intent may be

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4. See Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1, 1-2 (1982).

5. *Rhodes v. County of Darlington*, 833 F. Supp. 1163, 1174 (D.S.C. 1992) (quoting *Artesian Water Co. v. New Castle County*, 851 F.2d 643, 648 (3d Cir. 1988)); *accord Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209, 1221 (3d Cir. 1993) (acknowledging that "congressional intent may be particularly difficult to discern with precision in CERCLA, a statute notorious for its lack of clarity and poor draftsmanship"); *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 258 n.5 (3d Cir. 1992) (noting that CERCLA "is riddled with inconsistencies and redundancies"); *United States v. Kramer*, 913 F. Supp. 848, 857 (D.N.J. 1995) (discussing defendants' argument that CERCLA's status as a "poorly drafted statute" means that a court "should not place emphasis on slight distinctions in language and should not interpret language literally").

6. *Tippins Inc. v. USX Corp.*, 37 F.3d 87, 93 (3d Cir. 1994).

7. *HRW Sys., Inc. v. Washington Gas Light Co.*, 823 F. Supp. 318, 327 (D. Md. 1993); *accord Riverside Mkt. Dev. Corp. v. International Bldg. Prods., Inc.*, 931 F.2d 327, 330 n.3 (5th Cir. 1991) ("CERCLA has acquired a well-deserved notoriety for . . . an indefinite, if not contradictory, legislative history.") (quoting *United States v. Mottolo*, 605 F. Supp. 898, 902 (D.N.H. 1985)); *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986) ("CERCLA's legislative history is shrouded with mystery"); Grad, *supra* note 4, at 1 (noting that "the actual bill which became law had virtually no legislative history at all" (footnote omitted)). *But see Tanglewood E. Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568, 1572 (5th Cir. 1988) (insisting that CERCLA "has an extensive legislative history").

particularly difficult to discern with precision in CERCLA.<sup>8</sup> You try to interpret statutes to promote good public policy? "CERCLA 'can be terribly unfair in certain instances in which parties may be required to pay huge amounts for damages to which their acts did not contribute'.<sup>9</sup> You consider the current attitude toward a statute? "CERCLA is now viewed nearly universally as a failure."<sup>10</sup> Those who emphasize the purpose of a statute have found CERCLA more to their liking,<sup>11</sup> but there is an increasing awareness that purpose alone cannot solve all of CERCLA's riddles.<sup>12</sup>

Congress did not foresee this confusion in 1980. Alarmed by Love Canal,<sup>13</sup> but perhaps even more alarmed by the prospect of a transfer of political power in the presidency and in the Senate, Congress rushed to pass a federal hazardous waste law.<sup>14</sup> Earlier in 1980, Congress had considered several different bills addressing the problem of hazardous wastes, and the Senate and House had approved strikingly different proposals.<sup>15</sup> The

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8. *Lansford-Coaldale*, 4 F.3d at 1221.

9. *Redwing Carriers, Inc. v. Saraland Apartments, Ltd.*, 875 F. Supp. 1545, 1568 (S.D. Ala. 1995), *aff'd in part and rev'd in part*, 94 F.3d 1489 (11th Cir. 1996) (quoting *In re Bell Petroleum Servs., Inc.*, 3 F.3d 889, 897 (5th Cir. 1993)); *accord* *Long Beach Unified Sch. Dist. v. Dorothy B. Godwin Cal. Living Trust*, 32 F.3d 1364, 1366 (9th Cir. 1994) ("CERCLA liability has been described as 'a black hole that indiscriminately devours all who come near it.'") (quoting Jerry L. Anderson, *The Hazardous Waste Land*, 13 VA. ENVTL. L.J. 1, 6-7 (1993)); *see also infra* text accompanying notes 214-18 (listing equitable objections to CERCLA).

10. *United States v. A&N Cleaners & Launderers, Inc.*, 854 F. Supp. 229, 239 (S.D.N.Y. 1994).

11. For an excellent analysis of judicial reliance on the purposes of CERCLA, along with an exhaustive discussion of the interpretation of CERCLA and purposive interpretation generally, see 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 (1996).

12. *See United States v. Cordova Chem. Co.*, 59 F.3d 584, 588 (6th Cir.) ("[I]t is difficult to divine the specific, as opposed to the general, goals of Congress with respect to CERCLA liability since the statute represents an eleventh hour compromise."), *vacated and reh'g en banc granted*, 67 F.3d 586 (6th Cir. 1995); *see also infra* text accompanying notes 170-78 (discussing hesitancy to rely on CERCLA's remedial purposes).

13. *See* Grad, *supra* note 4, at 7-8; *see also* *Congress Clears 'Superfund' Legislation*, 36 CONG. Q. ALMANAC 584, 585 (1980) [hereinafter CONG. Q. ALMANAC] (describing the passage of CERCLA).

14. *See* Grad, *supra* note 4, at 1-2.

15. *See* CONG. Q. ALMANAC, *supra* note 13, at 587-93.

November election of Ronald Reagan and a Republican majority in the Senate created a new sense of urgency for members of Congress and the Carter Administration who feared that all of their work would go for naught once the new Senate and President assumed office on January 20, 1981.<sup>16</sup> Congress acted immediately after the election:

The bill which became law was hurriedly put together by a bipartisan leadership group of senators (with some assistance from their House counterparts), introduced, and passed by the Senate in lieu of all other pending measures on the subject. . . . It was considered [by the House] on December 3, 1980, in the closing days of the lame duck session of an outgoing Congress. It was considered and passed, after very limited debate, under a suspension of the rules, in a situation which allowed for no amendments. Faced with a complicated bill on a take it-or-leave it basis, the House took it, groaning all the way.<sup>17</sup>

The result, not surprisingly, was a statute that left many questions unanswered and that did not answer clearly even those questions that it addressed.

Time has failed to remedy the mistakes resulting from Congress's haste. The lower federal courts remain split concerning numerous issues raised by CERCLA.<sup>18</sup> The Supreme Court

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16. See Grad, *supra* note 4, at 1-2.

17. *Id.* at 1; see also CONG. Q. ALMANAC, *supra* note 13, at 584 (describing CERCLA's passage).

18. Some of the issues dividing the lower federal courts include (1) the proper cause of action by which one liable party can recover cleanup costs from another liable party, *compare, e.g.,* United States v. Colorado & E. R.R. Co., 50 F.3d 1530, 1539 (10th Cir. 1995) (holding that the claim for contribution falls under § 113(f) of CERCLA), *with* Companies for Fair Allocation v. Axil Corp., 853 F. Supp. 575, 579 (D. Conn. 1994) (holding that liable parties are not precluded from pursuing a claim under § 107 of CERCLA); (2) whether an injured party can recover medical monitoring costs, *compare, e.g.,* Durfey v. E.I. DuPont De Nemours Co., 59 F.3d 121, 125 (9th Cir. 1995) (holding that medical monitoring costs are not "response costs" within the meaning of CERCLA and therefore are not recoverable), *with* Williams v. Allied Automotive, 704 F. Supp. 782, 784 (N.D. Ohio 1988) (holding that medical monitoring costs may be recovered as response costs); (3) whether leaking containers and the migration of hazardous substances count as the "disposal" of hazardous substances, *compare, e.g.,* Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837, 847

rarely has intervened to resolve this confusion in the lower

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(4th Cir. 1992) (holding that the term "disposal" is not limited to active human conduct), *with* *United States v. CDMG Realty Co.*, 96 F.3d 706, 714 (3d Cir. 1996) (denying a claim, in part, because it alleged a passive, migratory release); (4) the liability of a deceased individual's estate, *compare, e.g.*, *Bowen Eng'g v. Estate of Reeve*, 799 F. Supp. 467 (D.N.J. 1992), *aff'd*, 19 F.3d 642 (3d Cir. 1994) (holding that a decedent's estate may be liable), *with* *Snediker Developers Ltd. Partnership v. Evans*, 773 F. Supp. 984, 990 (E.D. Mich. 1991) (holding that the heirs of a decedent cannot be liable); (5) a party's ability to allocate CERCLA liability by contract, *compare* *Niecko v. Emro Mktg. Co.*, 973 F.2d 1296, 1301 (6th Cir. 1992) (holding that the parties may transfer liability), *with* *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1459 (9th Cir. 1986) (holding that such agreements do not excuse liability but can change who ultimately pays); (6) the scope of CERCLA exclusion of "petroleum" from the list of covered hazardous substances, *compare* *Cose v. Getty Oil Co.*, 4 F.3d 700, 704 (9th Cir. 1993) (holding that substances indigenous to petroleum fall within the exclusion unless present at an elevated concentration level) *with* *Wilshire Westwood Assocs. v. Atlantic Richfield Corp.*, 881 F.2d 801, 803 (9th Cir. 1989) (holding that the petroleum exclusion applies to gasoline, even if the components have themselves been designated hazardous substances); (7) the right to a jury trial in CERCLA cases involving money damages, *compare* *Hatco Corp. v. W.R. Grace & Co.-Conn.*, 59 F.3d 400, 411-12 (3d Cir. 1995) (holding that there is no right to a jury trial in a claim brought under CERCLA for recovery of response costs or contribution), *with* *New York v. Lashins Arcade Co.*, 881 F. Supp. 101, 102-03 (S.D.N.Y. 1995) (holding that the Seventh Amendment guarantees a jury trial for a CERCLA claim for natural resource damages), *aff'd on other grounds*, 91 F.3d 353 (2d Cir. 1996); (8) the retroactivity of CERCLA's liability provisions, *compare* *United States v. Monsanto Co.*, 858 F.2d 160, 173 (4th Cir. 1988) (holding that even if CERCLA were retroactive, it would satisfy the requirements of due process), *with* *United States v. Olin Corp.*, 927 F. Supp. 1502, 1519 (S.D. Ala. 1996) (holding that CERCLA liability provisions are not retroactive), *rev'd*, 107 F.3d 1506 (11th Cir. 1997); (9) the degree of corporate control necessary to establish "operator" liability, *compare* *Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209, 1221 (3d Cir. 1993) (holding that determinations of "operator" liability turn on the "actual control" test rather than the "authority and control" test), *with* *Nurad*, 966 F.2d at 842 (holding that actual control is not necessary if authority is present); (10) the reach of the consumer products exception to CERCLA's general definition of "facility," *compare* *Dayton Indep. Sch. Dist. v. U.S. Mineral Prods. Co.*, 906 F.2d 1059, 1065 (5th Cir. 1990) (holding that the sale of asbestos-containing products for useful consumption is not the disposal of hazardous material at a "facility"), *with* *Reading Co. v. City of Philadelphia*, 823 F. Supp. 1218, 1233 (E.D. Pa. 1993) (holding that the definition of "consumer product" for purposes of CERCLA does not include commuter railcars); (11) the availability of equitable defenses to CERCLA liability, *compare* *General Elec. Co. v. Litton Indus. Automation Sys., Inc.*, 920 F.2d 1415, 1418 (8th Cir. 1990) (holding that "unclean hands" is not a defense to a private action to recover CERCLA response costs), *with* *United States v. Marisol, Inc.*, 725 F. Supp. 833, 844-45 (M.D. Pa. 1989) (holding that the applicability of equitable defenses to CERCLA actions is not settled as a matter of law); and (12) the circumstances in which joint and several liability applies, *see generally In re Bell Petroleum Servs., Inc.*, 3 F.3d 889, 901 (5th Cir. 1993) (discussing three alternative approaches).

courts.<sup>19</sup> The Superfund Amendments and Reauthorization Act (SARA) of 1986<sup>20</sup> failed to resolve these disputes, and no subsequent effort to amend the statute has succeeded. Administrative reforms have not corrected the mistakes inherent in the statute itself. Lacking direction from the traditional tools of statutory construction, and unable to wait for Congress to correct the errors, the courts interpreting CERCLA muddle along.

The thesis of this Article is that CERCLA confounds every theory of statutory interpretation. This conclusion should be obvious from the conflicting readings of CERCLA announced by the lower federal courts and from their frequent complaints about CERCLA's drafting. Because the lower federal courts cannot turn to past Supreme Court cases or to existing administrative interpretations for guidance, CERCLA's drafting problems are magnified. The few CERCLA cases that the Supreme Court has decided provide little help in understanding CERCLA's many other unclear provisions. The Environmental Protection Agency's (EPA) understanding of CERCLA is not dispositive because the courts do not owe such interpretations the deference usually accorded administrative interpretations under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*<sup>21</sup> CERCLA thus offers a rare opportunity to examine how lower federal courts interpret a statute when they are unconstrained by the interpretations of others and unhelpt by most of the tools traditionally used in determining congressional intent.

This Article considers the interpretive issues raised by CERCLA in the context of three different kinds of mistakes made by Congress when it enacted the law in 1980. Building on a description of statutory mistakes that I have developed else-

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19. See Watson, *supra* note 11, at 326-27; *infra* note 172 and accompanying text.

20. Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified at 42 U.S.C. §§ 9601-9675 (1994)).

21. 467 U.S. 837 (1984). In *Chevron*, the Supreme Court held that courts must defer to reasonable administrative interpretations of ambiguous statutory language. See *id.* at 866. In *Kelley v. EPA*, 15 F.3d 1100, 1108 (D.C. Cir. 1994), however, a divided court held that Congress expected the courts—not the EPA—to interpret CERCLA pursuant to a common law-like process. The congressional delegation of interpretive authority that serves as the precondition for *Chevron* deference is thus missing from CERCLA.

where,<sup>22</sup> this Article focuses on three recent cases to demonstrate how the courts struggle to interpret CERCLA's mistakes. Section I discusses CERCLA's drafting errors. There is widespread agreement that CERCLA contains many such errors, but there is less consensus regarding which of CERCLA's provisions resulted from such drafting mistakes or what the response of the courts should be. Thus, the district court in *Redwing Carriers, Inc. v. Saraland Apartments, Ltd.*<sup>23</sup> adopted an interpretation of an apparent drafting error that every previous court to decide the question had rejected.<sup>24</sup> The court's interpretation is difficult to disprove even though it was original, so Section I also discusses approaches to statutory interpretation that seek to preserve widely accepted understandings of a statute.

Section II considers CERCLA's ambiguous and vague provisions. The absence of definitions for key statutory terms and the lack of other evidence of congressional intent regarding many of CERCLA's key provisions has produced many circuit splits. *Citizens Electric Corp. v. Bituminous Fire & Marine Insurance Co.*,<sup>25</sup> a case involving one of CERCLA's many ambiguous provisions, presents the unusual spectacle of noted textualist Judge Frank Easterbrook adopting an interpretation of CERCLA that is seemingly contrary to the plain statutory language and to numerous district court decisions adhering to that language. Section II also uses *Citizens Electric* to analyze the debate concerning the propriety of relying on CERCLA's broad remedial purposes as a way of interpreting the statute.

Section III examines a different kind of mistake. Repeated judicial criticism of CERCLA as unfair, harsh, and inequitable echoes broader complaints that Congress made a policy error in the first instance when it crafted CERCLA. Although courts usually leave to Congress debates about the wisdom of a statute, many courts do consider the policy results of various possible statutory interpretations. *New York v. Lashins Arcade Co.*<sup>26</sup> is

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22. See John Copeland Nagle, *Corrections Day*, 43 UCLA L. REV. 1267 (1996).

23. 875 F. Supp. 1545 (S.D. Ala. 1995), *aff'd in part and rev'd in part*, 94 F.3d 1489 (11th Cir. 1996).

24. See *id.* at 1555-56.

25. 68 F.3d 1016, 1019 (7th Cir. 1995).

26. 91 F.3d 353, 361-62 (2d Cir. 1996).



one of many recent cases that openly struggles to interpret CERCLA in light of the actual results that the law produces. *Lashins Arcade* also is notable because it was the first CERCLA case heard by Judge Guido Calabresi, who has written extensively about tort liability and about statutory interpretation. Section III reviews the possible consequences of Judge Calabresi's writings as they relate to the continuing vitality of CERCLA. In particular, CERCLA displays some (though not all) of Judge Calabresi's characteristics of an obsolete statute.<sup>27</sup> CERCLA's problems, however, go further than that. The hurried enactment of CERCLA by obsolete representatives—a lame-duck Congress and a lame-duck President—explains many of the problems CERCLA encounters today, but it does little to aid those who continue to grapple with the law's meaning.

### I. INTERPRETING CERCLA'S DRAFTING MISTAKES

Congress commits a drafting mistake when it says one thing but means another. CERCLA subsection 101(23) describes what "[t]he terms 'remove' or 'removal' means,"<sup>28</sup> and CERCLA subsection 101(24) describes what "[t]he terms 'remedy' or 'remedial action' means,"<sup>29</sup> which shows that Congress did not use a grammar-check program when it drafted the law. An apparently misplaced comma in CERCLA section 107(a)(4) has divided the courts.<sup>30</sup> The fact that CERCLA contains many such errors would not surprise the Congress that rushed to enact the law in 1980.<sup>31</sup> Identifying those drafting mistakes is another matter. To identify a drafting error there must be some indicia that the statutory text is mistaken. Finding that evidence proves to be an

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27. See *infra* notes 257-88 and accompanying text.

28. 42 U.S.C. § 9601(23) (1994).

29. *Id.* § 9601(24).

30. See John Copeland Nagle, *CERCLA, Causation, and Responsibility*, 78 MINN. L. REV. 1493, 1515 n.7 (1994).

31. See 126 CONG. REC. 31,969 (1980) (statement of Rep. Broyhill) (asserting that CERCLA "was hurriedly drafted without the use of legislative counsel and as the result contains a large but unknown number of drafting errors. In just one night of review, legislative counsel has identified more than 45 technical errors alone"); *id.* at 31,964-69 (statement of Rep. Florio) (identifying several drafting errors and professing to establish the true congressional intent with respect to each provision).

especially challenging task in CERCLA cases because of the confusion that surrounds other evidence of the meaning of the statute. Even if all can agree that a certain provision did, in fact, result from a drafting mistake, the authority of the courts to correct the error is not self-evident.

Consider an issue thought to have been settled long before 1995. CERCLA section 107 contains two provisions that address the liability of facility "owners" and the liability of facility "operators." Subsection 107(a)(1) imposes liability on "the owner *and* operator" of a facility.<sup>32</sup> Section 107(a)(2) imposes liability on those who "owned *or* operated" a facility at the time of the disposal of hazardous substances.<sup>33</sup> The use of "and" with respect to current owners and operators, as compared to the use of "or" with respect to past owners or operators, invites defendants to argue that liability attaches under section 107(a)(1) only if the current owner and the current operator are one and the same person.

That textual argument failed in every case in which a CERCLA defendant raised it prior to 1995. Numerous cases read section 107(a)(1) to apply to current owners *or* operators without commenting on the statute's actual language,<sup>34</sup> several cases simply cited existing precedents,<sup>35</sup> and only two courts discussed the "and" versus "or" distinction at all.<sup>36</sup> By 1995,

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32. 42 U.S.C. § 9607(a)(1) (emphasis added).

33. *Id.* § 9607(a)(2) (emphasis added).

34. *See, e.g.*, *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1044 (2d Cir. 1985); *United States v. Conservation Chem. Co.*, 619 F. Supp. 162, 186-87 (W.D. Mo. 1985); *United States v. Northeastern Pharm. & Chem. Co.*, 579 F. Supp. 823, 843-44 (W.D. Mo. 1984); *United States v. Cauffman*, 21 *Env't. Rep. Cas. (BNA)* 2167, 2168 (C.D. Cal. 1984).

35. *See United States v. Moore*, 698 F. Supp. 622, 624 n.1 (E.D. Va. 1988); *Artesian Water Co. v. New Castle County*, 659 F. Supp. 1269, 1280-81 (D. Del. 1987), *aff'd*, 851 F.2d 643 (3d Cir. 1988).

36. *See United States v. Fleet Factors Corp.*, 901 F.2d 1550, 1554 n.3 (11th Cir. 1990); *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573, 578 (D. Md. 1986). Four law review articles also have considered the issue. *See Ann M. Burkhardt, Lender/Owners and CERCLA: Title and Liability*, 25 *HARV. J. ON LEGIS.* 317, 329-37 (1988); Susan C. Gieser, *Federal and State Environmental Law: A Trap for the Unwary Lender*, 1988 *BYU L. REV.* 643, 658-60; Susan M. King, *Lenders' Liability for Cleanup Costs*, 18 *ENVTL. L.* 241, 270-74 (1988); Lynda J. Oswald & Cindy A. Schipani, *CERCLA and the "Erosion" of Traditional Corporate Law Doctrine*, 86 *NW. U. L. REV.* 259, 270 (1992).

CERCLA defendants had long since abandoned any effort to persuade a court to depart from the judicial consensus. Then, on its own initiative, the district court in *Redwing Carriers, Inc. v. Saraland Apartments, Ltd.*<sup>37</sup> became the first to hold that the plain language of section 107(a)(1) requires that a party both own *and* operate a facility.<sup>38</sup> Indeed, the plain meaning of “owner *and* operator” never was in dispute, but before *Redwing Carriers* every court found an applicable exception to the plain meaning rule.<sup>39</sup>

*United States v. Maryland Bank & Trust Co.*,<sup>40</sup> the first case to discuss the issue, attributed the use of “and” instead of “or” in section 107(a)(1) to the haste with which Congress passed CERCLA:

The structure of section 107(a), like so much of this hastily patched together compromise Act, is not a model of statutory clarity. . . . Proper usage dictates that the phrase “the owner and operator” include only those persons who are both owners and operators. But by no means does Congress always follow the rules of grammar when enacting the laws of this nation. In fact, to slavishly follow the laws of grammar while interpreting acts of Congress would violate sound canons of statutory interpretation. Misuse of the definite article is hardly surprising in a hastily conceived compromise statute such as CERCLA, since members of Congress might well have had no time to dot all the i’s or cross all the t’s.<sup>41</sup>

Writing “and” when one means “or” is an especially common drafting mistake.<sup>42</sup> Moreover, even textualists like Justice Scalia acknowledge that the courts can remedy a “scrivener’s error” notwithstanding plain statutory language.<sup>43</sup> The chal-

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37. 875 F. Supp. 1545 (S.D. Ala. 1995), *aff’d in part and rev’d in part*, 94 F.3d 1489, 1497-98 (11th Cir. 1996).

38. *See id.* at 1555-56.

39. *See infra* notes 40-64 and accompanying text.

40. 632 F. Supp. 573 (D. Md. 1986).

41. *Id.* at 578 (citations omitted).

42. *See generally* NORMAN J. SINGER, SUTHERLAND’S STATUTES AND STATUTORY CONSTRUCTION § 21.14 (5th ed. 1993) (collecting cases involving the alleged misuse of “and” versus “or”).

43. *See United States v. X-Citement Video, Inc.*, 115 S. Ct. 464, 474 (1994)

lenge lies in identifying the statutory words that appear only because of a slip of the pen. Lest the exception swallow the plain meaning rule, judicial identification of a scrivener's error presupposes that "the meaning genuinely intended but inadequately expressed must be absolutely clear."<sup>44</sup> Many courts have applied a similar rule when considering whether the legislature confused the words "and" and "or,"<sup>45</sup> though some courts are less willing to assume that the legislature chose "and" instead of "or" by mistake.<sup>46</sup>

The challenge lies in discerning the legislature's genuine intent. Typically, courts that correct scrivener's errors find such intent in a statute's legislative history or in the absurd results that the plain language would produce.<sup>47</sup> CERCLA's sparse leg-

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(Scalia, J., dissenting). Among the current members of the Court, Justice Stevens appears to be most confident of his ability to identify and correct scrivener's errors. See, e.g., *City of Chicago v. Environmental Defense Fund*, 511 U.S. 328, 343-45 (1994) (Stevens, J., dissenting); *Pittston Coal Group v. Sebben*, 488 U.S. 105, 128-49 (1988) (Stevens, J., dissenting); see also *United States Nat'l Bank of Or. v. Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 462 (1993) (Souter, J., writing for a unanimous court) (changing a statute's punctuation in order to correct a scrivener's error). By contrast, some courts refuse to correct any alleged scrivener's errors. See *Dodd v. City of E. Helena*, 591 P.2d 241, 243 (Mont. 1979).

44. *Redwing Carriers, Inc. v. Saraland Apartments, Ltd.*, 875 F. Supp. 1545, 1556 (S.D. Ala. 1995), *aff'd in part and rev'd in part*, 94 F.3d 1489, 1497-98 (11th Cir. 1996) (quoting *X-Citement Video*, 115 S. Ct. at 474 (Scalia, J., dissenting)).

45. See *Byte Int'l Corp. v. Maurice Gusman Residuary Trust No. 1*, 629 So. 2d 191, 192 (Fla. Dist. Ct. App. 1993) ("Courts may construe 'and' as 'or' in statutes where a construction based on the strict reading of the statute would lead to an unintended or unreasonable result and would defeat the legislative intent of the statute."); *Wildwood Storage Ctr., Inc. v. Mayor & Council of Wildwood*, 616 A.2d 1331, 1334 (N.J. Super. Ct. App. Div. 1992) (indicating that a court can read "or" to mean "and" when such a reading "is more consistent with legislative intent").

46. See *Beauregard-Bezou v. Pierce*, 487 N.W.2d 792, 795 (Mich. Ct. App. 1992) (explaining that "the literal meaning of 'or' should be followed unless it renders the statute dubious"); see also WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION* 641 & n.4 (2d ed. 1995) (explaining that "[t]erms connected by the disjunctive 'or' are often read to have separate meanings and significance," whereas "the use of 'and' usually is held to create a conjunctive rather than a disjunctive meaning").

47. See *National Bank*, 508 U.S. at 454-57 (relying on the structure, title and other provisions of a 1916 banking law as evidence that Congress made a mistake in punctuation); *In re Chateaugay Corp.*, 89 F.3d 942, 954 (2d Cir. 1996) (noting that Congress did not intend to make any substantive changes in a bill that it labelled a "technical correction"); *Sebesta v. Miklas*, 272 So. 2d 141, 144 (Fla. 1972) (correcting the legislature's failure to place a municipality within one of the districts

islative history adds little in the search for congressional intent, so the district court in *Maryland Bank & Trust* invoked the absurd results rule.<sup>48</sup> Even textualists like Justice Scalia refuse to interpret a statute pursuant to its plain meaning if that meaning would produce an absurd result.<sup>49</sup> The court in *Maryland Bank & Trust Co.* feared the allegedly absurd result of creating "a class defined as consisting of persons who are both owners and operators [that] would contain no members."<sup>50</sup> The

created by a countywide consolidation scheme); *Charter Med. Info. Servs., Inc. v. Collins*, 470 S.E.2d 655, 657 (Ga. 1996) (concluding that the legislature committed a scrivener's error because it did not intend to make any substantive changes when it adopted an official code); see also Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 850 (1992) (noting that legislative history may identify a drafting error that the courts should correct). The cases involving "and" versus "or" demonstrate a similar approach. See *Byte Int'l*, 629 So. 2d at 192 (relying on legislative history to show that the Florida legislature meant "or" instead of "and").

48. *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573, 578 (D. Md. 1986).

49. See, e.g., *Dewsnup v. Timm*, 502 U.S. 410, 427 (1992) (Scalia, J., dissenting); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527-30 (1989) (Scalia, J., concurring). William Eskridge has criticized the "absurd result rule" as malleable and, therefore, indicative of the indeterminacy of a textualist approach to statutory interpretation. See WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 45 (1994). I disagree. See John Copeland Nagle, *Newt Gingrich, Dynamic Statutory Interpreter*, 143 U. PA. L. REV. 2209, 2229-30 (1995) (reviewing Eskridge's book). For other discussions of the absurd result rule, see Veronica M. Dougherty, *Absurdity and the Limits of Literalism: Defining the Absurd Result Principle in Statutory Interpretation*, 44 AM. U. L. REV. 127 (1994); Margaret Gilhooley, *Plain Meaning, Absurd Results and the Legislative Purpose: The Interpretation of the Delaney Clause*, 40 ADMIN. L. REV. 267 (1988).

50. *Maryland Bank & Trust*, 632 F. Supp. at 578. A related argument suggests that a literal reading of CERCLA § 107(a)(1) renders § 107(a)(2) superfluous:

If the use of "and" in section 107(a)(1) was interpreted to mean that current owners are liable only if they are also operators of a hazardous waste facility, but section 107(a)(2) makes liable those who owned or operated the facility at the time any hazardous substances were disposed of, parties who would fall within the narrow section 107(a)(1) category would also fall within the broader section 107(a)(2) category.

Gieser, *supra* note 36, at 659 n.82. This argument, however, wrongly assumes that all operators dispose of hazardous substances. Numerous cases have held that past operators are not liable precisely because they did not dispose of hazardous substances during their operation of the facility. See, e.g., *United States v. CDMG Realty Co.*, 96 F.3d 706, 716 (3d Cir. 1995) (holding that mere ownership of property is insufficient to render a party liable). Conversely, a current operator is liable even if it has not disposed of hazardous substances at the facility. See, e.g., *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1044 (2d Cir. 1985) (stating that CERCLA sec-

class would be a null set, the court explained, because a committee report on one of the House bills that Congress considered in 1980 defined "operator" as "a person who is carrying out operational functions *for the owner* of the facility."<sup>51</sup> Here the unreliability of CERCLA's legislative history manifests itself. The committee report addressed H.R. 85, a bill that never became law and that played only a modest role in shaping the compromise legislation that Congress approved in December 1980.<sup>52</sup> Congress adopted the Senate's designation of categories of responsible parties, including operators, instead of imposing liability on those who "caused or contributed" hazardous waste contamination, as the House version of the bill provided.<sup>53</sup> Nothing in the legislative history of the leading bills considered by Congress in 1980 precludes a party from being an "owner" and "operator" of a facility simultaneously. In fact, the legislative history anticipated that one can operate a facility that one owns.<sup>54</sup> The possibility of simultaneous ownership and operation of a facility eliminates any absurdity that would result from reading the statute in the conjunctive.

Even if it would not be absurd for Congress to impose liability on current owners only if they are also current operators, that does not explain why Congress would have chosen to do so. *United States v. Fleet Factors Corp.*,<sup>55</sup> the second opinion to discuss this issue, could "perceive no rational explanation, other

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tion 107(a)(1) imposes strict liability on current owners without regard to causation).

51. *Maryland Bank & Trust*, 632 F. Supp. at 578 (quoting H.R. REP. NO. 96-1016, at 64 (1980), reprinted in 1980 U.S.C.C.A.N. 6119, 6182)) (emphasis added). The definition of "operator" used in H.R. 85 specifically excepted owners. H.R. 85, 96th Cong. § 101(x)-(y) (1980).

52. As Professor Grad explained in his exhaustive account of the enactment of CERCLA, some of the features of H.R. 85 were incorporated into the compromise bill, see Grad, *supra* note 4, at 4, but two other bills exerted much greater influence on the compromise. See *id.* at 19-35.

53. See generally Nagle, *supra* note 30, at 1493-94, 1497-98 (describing the liability schemes contained in each bill).

54. See *Redwing Carriers, Inc. v. Saraland Apartments, Ltd.*, 875 F. Supp. 1545, 1556 (S.D. Ala. 1995), *aff'd in part and rev'd in part*, 94 F.3d 1489 (11th Cir. 1996) (noting that "[a]n owner could 'carry[ ] out operational functions' . . . for itself") (quoting *Maryland Bank & Trust*, 632 F. Supp. at 578 (quoting H.R. REP. NO. 96-1016, at 64, reprinted in 1980 U.S.C.C.A.N. 6119, 6182)).

55. 901 F.2d 1550 (11th Cir. 1990).

than careless statutory drafting," for the use of "and" in one subsection and "or" in the other subsection.<sup>56</sup> The *Fleet Factors* approach subtly transforms the absurd result exception to the plain meaning rule into a rational basis requirement for the plain meaning rule—though whether a statute can be irrational without also being absurd is probably an academic question. In any event, the district court that decided *Redwing Carriers* objected that it could not rewrite the statute even if there was no reason for the choice of language,<sup>57</sup> a response that would satisfy a textualist but few others. Consider another explanation: Perhaps Congress wanted to use operator status as a proxy for evidence of sufficient involvement at the facility to justify liability for cleanup costs. Because current owners, unlike past owners, are liable even if they have not disposed of any hazardous substances during the ownership of a facility,<sup>58</sup> they are liable even if they have not caused any hazardous waste contamination.<sup>59</sup> Congress may have required a current owner to be the current operator, too, to mitigate the harshness of the absence of a causation requirement. I have absolutely no evidence indicating that this is what Congress had in mind, but given CERCLA's drafting history, neither is any contrary evidence forthcoming. Alternatively, if a mistake exists, maybe it lies in the use of "or" in CERCLA section 107(a)(2), not in the use of "and" in CERCLA section 107(a)(1).<sup>60</sup>

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56. *Id.* at 1554 n.3 ("Although the 'owner and operator' language of § 9607(a)(1) is in the conjunctive, we construe this language in the disjunctive in accordance with the legislative history of CERCLA and the persuasive interpretations of other federal courts."). *Fleet Factors* is most famous for holding that a lender can be liable under CERCLA, see *id.* at 1555-60, a decision that produced an uproar in the banking community and that triggered an unsuccessful attempt by the EPA to clarify lender liability by regulation. See *Kelley v. EPA*, 15 F.3d 1100, 1108-09 (D.C. Cir. 1994) (holding that the courts, not the EPA, are to determine the scope of liability under CERCLA).

57. See *Redwing Carriers*, 875 F. Supp. at 1556.

58. See *Nagle*, *supra* note 49, at 1513. Current landowners can seek relief from the statutory defenses, but such exceptions to liability are difficult to prove. See *infra* text accompanying notes 232-35.

59. See *Nagle*, *supra* note 49, at 1513.

60. This is unlikely given the number of other places where CERCLA refers to "owners or operators." See 42 U.S.C. § 9601(20)(A) (1994) (defining "owner or operator"); *id.* § 9607(c)(1)-(2) (prescribing limits on the amount of liability that can be imposed on "an owner or operator or other responsible person").

That one can construct a plausible reason for why Congress may have chosen the "owner and operator" language in section 107(a)(1) does not prove that Congress actually intended to do so. In CERCLA cases, such post hoc speculation drives much of the interpretation of the statute in the absence of any direct signals about congressional intent. The last sentence of the footnote that discussed the issue in *Fleet Factors*, however, identified possible structural evidence that Congress did not mean to say "owner and operator" in section 107(a)(1).<sup>61</sup> CERCLA defines the term "owner or operator,"<sup>62</sup> but it does not define "owner and operator," nor does it define "owner" or "operator" alone. *Fleet Factors* thus inferred that the failure to define the term "owner and operator" showed that the term's use was a mistake.<sup>63</sup> But Congress often fails to define statutory terms, and instead of concluding that the use of the term was a mistake, the courts turn to legislative history and statutory purposes, or employ *Chevron* deference to an agency's understanding of a term. Moreover, CERCLA is particularly notorious for its failure to define key statutory terms.<sup>64</sup> The absence of a statutory definition is thus of questionable help in interpreting CERCLA.

Another reason why Congress might have meant to say "owner or operator" in CERCLA section 107(a)(1) concerns the fear of sham transactions. If the operator of a facility could fall outside the statute simply by transferring ownership to another par-

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61. See *Fleet Factors*, 901 F.2d at 1554 n.3.

62. 42 U.S.C. § 9601(20)(A).

63. See *Fleet Factors*, 901 F.2d at 1554 n.3; Gieser, *supra* note 36, at 658 n.78; Oswald & Schipani, *supra* note 36, at 270 n.55.

64. See, e.g., *Reading Co. v. City of Philadelphia*, 36 Env't Rep. Cas. (BNA) 1129, 1143 (E.D. Pa. 1992) ("As with many of the words in CERCLA, Congress failed to provide a definition of arranged."); *Artesian Water Co. v. New Castle County*, 659 F. Supp. 1269, 1286 n.28 (D. Del. 1987) (referring to "CERCLA's predictable failure to define the term 'response costs'"), *aff'd*, 851 F.2d 643 (3d Cir. 1988). Many other courts have noted CERCLA's failure to define key statutory terms. See *New York v. Lashins Arcade Co.*, 91 F.3d 353, 361 (2d Cir. 1996) (providing no definition for "due care"); *Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1533 (10th Cir. 1992) (giving no definition of "necessary costs of response"); *Reading Co. v. City of Philadelphia*, 823 F. Supp. 1218, 1232 (E.D. Pa. 1993) (failing to define either "consumer product" or "consumer use"); *Powell Duffryn Terminals, Inc. v. CJR Processing, Inc.*, 808 F. Supp. 652, 654 (N.D. Ill. 1992) (failing to define "threatened" release); *United States v. Petersen Sand & Gravel, Inc.*, 806 F. Supp. 1346, 1356 (N.D. Ill. 1992) (providing no definition for "ownership").



ty—or vice versa—then current facilities could easily avoid liability. It is hard to believe that Congress intended to countenance such a result. On the other hand, the existence of contrary reasons for requiring simultaneous operation and ownership complicates the case against a literal reading of the statute.

All of this suggests that it is extremely difficult to know the intent of the Ninety-sixth Congress with respect to CERCLA section 107(a)(1). But *Redwing Carriers* was not written on a clean slate in 1995, and not all theories of statutory interpretation limit themselves to the intent manifested by the enacting Congress. The developments of the seventeen years that have passed since Congress passed CERCLA offer some insight into the statute's interpretation, but the circumstances of CERCLA's original enactment still perplex any effort to know whether to interpret section 107(a)(1) to apply to "owners or operators" notwithstanding the contrary statutory language.

One CERCLA decision should have made *Redwing Carriers* an easy case. The only appellate case on point—*Fleet Factors*—was an Eleventh Circuit decision. The Southern District of Alabama lies within the Eleventh Circuit, and appellate decisions normally are considered binding on local district courts within the circuit,<sup>65</sup> but that did not trouble Judge Hand in deciding *Redwing Carriers*.<sup>66</sup> It should have troubled him, and for that reason alone, *Redwing Carriers* was wrongly decided. That was the Eleventh Circuit's conclusion when it reversed Judge Hand's

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65. See *Johnson v. DeSoto County Bd. of Comm'rs*, 72 F.3d 1556, 1559 n.2 (11th Cir. 1996) (explaining that "the basic principle that district courts must follow the holdings of their court of appeals and the Supreme Court" admits of no exceptions, unlike the doctrine of *stare decisis* which allows a court to depart from its prior holdings "if a compelling reason to do so exists"). But see McNollgast, *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*, 68 S. CAL. L. REV. 1631, 1634, 1643-44 (1995) (explaining that lower courts do not always adhere to Supreme Court doctrine).

66. Judge Hand recognized that *Fleet Factors* was circuit precedent, but he "respectfully submit[ted]" his contrary opinion. *Redwing Carriers, Inc. v. Saraland Apartments, Ltd.*, 875 F. Supp. 1545, 1556 (S.D. Ala. 1995), *aff'd in part and rev'd in part*, 94 F.3d 1489 (11th Cir. 1996). He had evidenced a similar willingness to disregard higher court precedent before. See *Jaffree v. Board of Sch. Comm'rs*, 554 F. Supp. 1104, 1128-29 (S.D. Ala.) (holding that the First Amendment does not apply to the states, notwithstanding contrary Supreme Court precedent), *rev'd*, *Jaffree v. Wallace*, 705 F.2d 1526 (11th Cir. 1983), *aff'd*, 472 U.S. 38 (1985).

interpretation on appeal.<sup>67</sup> The appellate court noted that Judge Hand's interpretation was "contrary to the law of this Circuit"—namely, the footnote addressing the issue in *Fleet Factors*—and that both the district court and subsequent Eleventh Circuit panels were bound by that decision.<sup>68</sup> The court declined to respond to the arguments that Judge Hand offered in defense of his interpretation of CERCLA section 107(a)(1), or to add any substantive defense of the *Fleet Factors* reading.

Suppose, however, that next time the question arises in a different state in which Eleventh Circuit precedent is not binding, or suppose that the Supreme Court agrees to consider the issue. Two standard rules of statutory interpretation account for interpretive developments that have occurred since a statute was enacted. First, the congressional ratification rule teaches that Congress can be said to have endorsed an interpretation of a statute when Congress takes subsequent legislative action on the statute without changing that interpretation.<sup>69</sup> Second, the congressional acquiescence rule teaches that Congress may have implicitly acquiesced in an interpretation by not acting to change it.<sup>70</sup>

Both of these claims of post hoc congressional approval are difficult to make regarding CERCLA. President Reagan signed SARA on October 17, 1986.<sup>71</sup> Nothing in SARA appears to ratify an interpretation that applies CERCLA section 107(a)(1) to current owners or operators. Indeed, that interpretation barely had been announced when Congress and the President approved SARA. *Maryland Bank & Trust*—the first reported decision interpreting CERCLA section 107(a)(1) to apply to current own-

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67. See *Redwing Carriers*, 94 F.3d at 1497-98.

68. *Id.* at 1498 ("The district court was not free to disregard *Fleet Factors* reasoning, and neither are we.")

69. See generally ESKRIDGE, *supra* note 49, at 241, 243-45 (describing the Supreme Court's uneven application of the congressional ratification rule).

70. See *id.* at 241-43 (describing the Court's uneven application of the congressional acquiescence rule).

71. He did so reluctantly. See WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW: HAZARDOUS WASTES AND SUBSTANCES 693 (2d ed. 1994) (explaining that President Reagan approved SARA only after he concluded that Congress would have overridden a veto of the bill). Congress has also reauthorized CERCLA in 1991 and 1996, but in each instance, it added little of substance to the statute.

ers or to current operators—was issued on April 9, 1986.<sup>72</sup> The legislative history of SARA indicates congressional familiarity with *Maryland Bank & Trust* as a case pending before the district court,<sup>73</sup> but the legislative history makes no reference to the court's actual decision issued six months before SARA was approved. That SARA did amend the definition of "owner or operator" in an effort to protect innocent landowners could suggest that Congress believed that current owners were being held liable even though they had not caused any contamination at the site.<sup>74</sup> If that is what Congress thought, then it was right.<sup>75</sup> Current operators, however, could face identical liability despite their lack of involvement in causing the contamination,<sup>76</sup> and the text of SARA's innocent landowner defense applies equally to innocent operators. Therefore, SARA probably fails the Supreme Court's test for congressional ratification.<sup>77</sup>

Snippets of the legislative history of SARA actually support the district court's interpretation in *Redwing Carriers*. Congress occasionally mentioned the liability of facilities "both owned and operated" by a state.<sup>78</sup> One congressional hearing even observed that "parties who both own and operate hazardous waste disposal or storage facilities . . . are the parties with the most control over these facilities,"<sup>79</sup> thereby providing a basis for treating an owner *and* operator differently from an owner *or* operator. Con-

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72. *United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573 (D. Md. 1986).

73. See *Superfund Reauthorization: Judicial and Legal Issues: Oversight Hearings Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 99th Cong. 279 (1985) [hereinafter *Oversight Hearings*] (listing *Maryland Bank & Trust* as a pending CERCLA cost recovery action).

74. See *infra* text accompanying notes 233-37 (describing the narrow judicial interpretation of the innocent landowner defense).

75. See *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1044 (2d Cir. 1985) (holding that CERCLA section 107(a)(1) imposes liability on current owners without any need to prove causation).

76. See Nagle, *supra* note 49, at 1513.

77. See *supra* note 69 and accompanying text.

78. See H.R. REP. NO. 99-253, pt. 5 (1985); *Superfund Reauthorization: Hearings on H.R. 4813 and 4915 Before the Subcomm. on Commerce, Transportation, and Tourism of the House Comm. on Energy and Commerce*, 98th Cong. 540 (1984) (discussing "sites owned and/or operated by the state"); *Superfund Expansion and Protection Act of 1984: Hearing H781-21 on H.R. 5640 Before the House Comm. on Ways and Means*, 98th Cong. 200 (1984).

79. *Oversight Hearings*, *supra* note 73, at 578.

gress, however, rejected such a proposal for differential treatment of state-owned facilities and state-owned and -operated facilities, insisting that a state should be held responsible even if it is only the owner of a facility.<sup>80</sup> The conflicting inferences confirm the confusing nature of SARA's legislative history, which is of doubtful relevance anyway in determining the meaning of a statutory provision that was written in 1980.<sup>81</sup>

The congressional acquiescence argument has problems as well. On one hand, the absence of any effort to amend CERCLA in response to the decisions interpreting section 107(a)(1) to apply to current owners or operators lends some support to the argument that Congress is satisfied with the prevailing judicial interpretation. On the other hand, Congress has not exactly acquiesced in this understanding of CERCLA. Many people in Congress, and elsewhere, consider CERCLA to be a failure.<sup>82</sup> More specifically, Congress has reviewed numerous proposals to completely overhaul CERCLA's liability scheme.<sup>83</sup> More specifi-

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80. See, e.g., *Superfund: Hearings on Reauthorization of Superfund; International Competitiveness of the U.S. Chemical Industry; and, Leaking Underground Gasoline Storage Tanks Before the Subcomm. on Commerce, Transportation, and Tourism of the House Comm. on Energy and Commerce*, 99th Cong. 281 (1985) ("A state or political subdivision should be held accountable for waste management decisions they have made or allowed to be made where the site is owned, but not operated by the governmental unit."); *Superfund Issues: Hearings Before the Senate Comm. on Finance*, 98th Cong. 160 (1984).

Where a state is the owner, its connection with the site is sufficiently great to warrant at least 50% responsibility. Any site owner, whether private or public, has primary responsibility for occurrences on its own property and should not be allowed to shirk that responsibility simply by leasing land to others.

*Id.*

81. See *United States v. Texas*, 507 U.S. 529, 535 n.4 (1993) (observing that "subsequent legislative history is a 'hazardous basis for inferring the intent of an earlier' Congress") (quoting *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (quoting *United States v. Price*, 361 U.S. 304, 313 (1960))); *Covalt*, 860 F.2d at 1438 ("By definition, words written after the vote and the President's signature were uninfluential in the process leading to the vote. That is why 'subsequent legislative history' is not helpful as a guide to understanding a law.").

82. See *United States v. A&N Cleaners & Launderers, Inc.*, 854 F. Supp. 229, 239 (S.D.N.Y. 1994) ("CERCLA is now viewed nearly universally as a failure."); *infra* text accompanying notes 265-68.

83. See, e.g., H.R. 2500, 104th Cong. (1995) (proposing a partial repeal of retroactive CERCLA liability); 141 CONG. REC. E1674 (daily ed. Aug. 4, 1995) (statement of Rep. Zeff) (introducing legislation to "repeal superfund's unfair, unjust, and un-

cally still, many complain that CERCLA liability on current landowners and current facility operators has had dramatic, negative, unintended consequences.<sup>84</sup> Congressional acquiescence to the judicial treatment of section 107(a)(1) of CERCLA is hard to find in such circumstances.

Neither the congressional ratification rule nor the congressional acquiescence rule proves that *Redwing Carriers* reached the wrong result, either as an original matter or in light of subsequent congressional developments. Indeed, the question is close enough that different courts would likely read CERCLA section 107(a)(1) differently, but after fifteen years of experience with CERCLA, most affected parties and most environmental lawyers simply assumed that "and" really meant "or" in section 107(a)(1). Several theories of statutory interpretation suggest that the existence of such a common assumption should count for something.

William Eskridge and Philip Frickey, for example, have advanced a theory that law is the equilibrium point struck between competing governmental actors.<sup>85</sup> Eskridge further contends that law in the United States develops from the bottom up, not from the top down.<sup>86</sup> Once Congress enacts a statute, different communities develop their own understandings of that statute.<sup>87</sup> Those communities then compete before administrative agencies and courts for endorsement of their preferred view of the law.<sup>88</sup> Often, courts must choose between the different interpretations, essentially outlawing the understanding reached by the unsuccessful community.<sup>89</sup> Congress and the President can change the

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American retroactive and joint and several liability system").

84. See Nagle, *supra* note 49, at 1534 n.180 (collecting complaints about CERCLA's impact on current landowners, especially landowners in poor urban areas); see also King, *supra* note 36, at 272 (criticizing *Maryland Bank & Trust* because "while it may be unfitting to benefit a lender at the government's expense, it seems equally unfitting to impose upon an innocent lender liability that so far exceeds the value of its collateral").

85. See William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law As Equilibrium*, 108 HARV. L. REV. 26, 28 (1994).

86. See William N. Eskridge, Jr., *Public Law from the Bottom Up*, 97 W. VA. L. REV. 141 (1994).

87. See *id.* at 153-54.

88. See *id.* at 154-55.

89. See *id.* at 155-56.

law if they disagree with what a court has done, so the courts do not have the final word. Eventually, however, an equilibrium point will be reached at which the different private communities and the different governmental actors are unable to change the existing interpretation of the statute.<sup>90</sup> At that point, Eskridge claims, "the consensus has the force of law."<sup>91</sup>

So viewed, *Redwing Carriers* ruptured the existing law. Moreover, it did so for textualist reasons that Eskridge and Frickey criticize for "sacrific[ing] the security and predictability associated with the rule of law."<sup>92</sup> "[A]bsent a strong substantive justification," Eskridge and Frickey would want to maintain the equilibrium that existed before the *Redwing Carriers* decision.<sup>93</sup> If having "a strong substantive justification" is the test, then *Redwing Carriers* erred because the court did not offer a sufficiently powerful reason for imposing liability on current owners and operators instead of current owners or operators.

Eskridge and Frickey's theory would preserve the consensus interpretation that had developed in the lower courts prior to *Redwing Carriers*. Their theory, however, has yet to be adopted by the Supreme Court. The congressional ratification and acquiescence arguments mark the frontier of the Court's reliance on postenactment developments when interpreting a statute. Theory alone, however, fails to explain all judicial approaches to statutory interpretation. For example, some justices have insisted that the Supreme Court should defer to a line of lower court decisions adopting the same reading of a statute.<sup>94</sup> Indeed, that

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90. See *id.* at 169.

91. *Id.* ("When there is general societal agreement about what the rules are, or when dissenters are unable to gain institutional allies for their views, the consensus has the force of law or soon enough influences what had previously been taken as law."); accord Eskridge & Frickey, *supra* note 85, at 81 ("If [institutions] find a stable equilibrium—private action induced by vigilant agency enforcement that has been upheld repeatedly in court—they will consider that 'law,' whatever its relationship to the statutory text.").

92. Eskridge & Frickey, *supra* note 85, at 77.

93. *Id.* at 78; accord *id.* at 81 ("It serves neither democracy nor the rule of law for the Court to unsettle a longstanding private equilibrium without well-considered substantive justification.").

94. See Caplin & Drysdale, *Chartered v. United States*, 491 U.S. 617, 635 (1989) (Blackmun, J., dissenting) (exhorting the majority to "heed the warning of our District Court judges" regarding the application of federal forfeiture statutes to

might be another way of achieving the equilibrium that Eskridge and Frickey describe. It is more likely, however, that the Court would tell any litigants who had relied on a preexisting consensus that they should address their complaints to Congress. Eskridge and Frickey's equilibrium theory also may be best suited to Supreme Court statutory interpretations rather than lower court interpretations. The dynamics of Congress, the President, and the Supreme Court acting with an eye toward the possible reactions of the other branches do not describe the process of lower court decision making. To the extent that lower court judges worry about the durability of their decisions, most are far more concerned about whether their decision will be approved by a higher court than they are about what happens in Congress or the executive branch.<sup>95</sup> Most lower courts seek to avoid the creation of circuit splits, but they are willing to disagree with other courts in circumstances that fall well short of the "strong substantive justification" test proposed by Eskridge and Frickey.<sup>96</sup> After all, much of the Supreme Court's statutory interpretation docket consists of issues that divide the lower courts, and the Court often declines to consider an issue until such division exists. The problem with CERCLA is that the Court has not been willing to decide such questions, even once a division manifests itself. Such unwillingness is understandable when one considers that the Justices have far more interesting issues to decide than whether Congress committed a drafting error when it wrote "or" instead of "and" in CERCLA section 107(a)(1).

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attorneys' fees); *E.I. Du Pont De Nemours & Co. v. Train*, 430 U.S. 112, 135 (1977) (explaining that, when an EPA interpretation of the Clean Water Act is "supported by thorough, scholarly opinions written by some of our finest judges, and has received the overwhelming support of the Courts of Appeals, we would be reluctant indeed to upset the Agency's judgment").

95. Judge Hand is the exception. *See supra* note 66.

96. Eskridge & Frickey, *supra* note 85, at 78.

## II. INTERPRETING CERCLA'S AMBIGUOUS AND VAGUE PROVISIONS

A second category of statutory mistakes consists of provisions that are ambiguous (i.e., susceptible to two possible interpretations) or vague (i.e., susceptible to several possible interpretations). CERCLA contains many of each kind of mistake. When the statute defines "facility" to include pipes leading into publicly owned treatment works (POTWs),<sup>97</sup> does that mean that the POTWs themselves are not facilities?<sup>98</sup> Does a "disposal"<sup>99</sup> of hazardous substances occur when previously disposed drums continue to leak?<sup>100</sup> In each instance, CERCLA is ambiguous.

Other provisions are vague. For example, the scope of the term "operator"—defined less than helpfully as "any person owning or operating"<sup>101</sup>—has proved especially uncertain. When does a parent corporation become the operator of its subsidiary corporation's facilities?<sup>102</sup> How much control must the federal

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97. See 42 U.S.C. § 9601(9) (1994).

98. See *Westfarm Assocs. Ltd. Partnership v. Washington Suburban Sanitary Comm'n*, 66 F.3d 669, 680 (4th Cir. 1995) (holding that POTWs were not excluded from facilities subject to CERCLA liability), *cert. denied*, 116 S. Ct. 1318 (1996).

99. See 42 U.S.C. § 9601(29).

100. The courts are badly divided on that question. See *supra* note 18.

101. 42 U.S.C. § 9601(20)(a)(ii). Most courts have dismissed that definition of "operator" as circular, see *Redwing Carriers, Inc. v. Saraland Apartments, Ltd.*, 875 F. Supp. 1545, 1557 (S.D. Ala. 1995), *aff'd in part and rev'd in part*, 94 F.3d 1489 (11th Cir. 1996); *United States v. A&N Cleaners & Launderers, Inc.*, 788 F. Supp. 1317, 1331 (S.D.N.Y. 1992); *CPC Int'l, Inc. v. Aerojet-General Corp.*, 777 F. Supp. 549, 572 (W.D. Mich. 1991), *aff'd in part and rev'd in part sub nom.*, *United States v. Cordova Chem. Co.*, 59 F.3d 584, *vacated and reh'g en banc granted*, 67 F.3d 586 (6th Cir. 1995), though Judge Easterbrook reads the definition to adopt the ordinary meaning of "operate" and "operator." See *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 861 F.2d 155, 156 (7th Cir. 1988). Cf. *Neff v. American Dairy Queen Corp.*, 58 F.3d 1063, 1066 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 704 (1996) ("Because the [Americans with Disabilities Act] does not define the term 'operates,' we 'construe it in accord with its ordinary and natural meaning'") (quoting *Smith v. United States*, 508 U.S. 223, 228 (1993)).

102. One line of cases imposes operator liability on a parent corporation that enjoys the authority to control the activities of its subsidiary. See, e.g., *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 842 (4th Cir. 1992); *United States v. Fleet Factors Corp.*, 901 F.2d 1550, 1557-58 (11th Cir. 1990). A second line of cases requires that a parent corporation exercise actual control over the activities of its subsidiary before the parent corporation will be treated as an operator. See, e.g., *Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209, 1221 (3d Cir.



government exercise over a facility during wartime before it becomes the "operator" of that facility?<sup>103</sup> CERCLA does not answer these questions.

*Citizens Electric Corp. v. Bituminous Fire & Marine Insurance Co.*<sup>104</sup> addressed one of CERCLA's ambiguities. Giles Armature and Electric Works was sued as a responsible party at a CERCLA site on March 28, 1991—almost (but not quite) five years after the corporation had dissolved in the eyes of Illinois law.<sup>105</sup> Two years later, seven of Giles Armature's former shareholders authorized a suit against the company's insurer for recovery of the cleanup costs.<sup>106</sup> Illinois law, however, provides that corporations are no longer capable of bringing suit after they have been dissolved for five years,<sup>107</sup> and Federal Rule of Civil Procedure 17(b) provides that state law determines the capacity of a corporation to sue or be sued.<sup>108</sup> But CERCLA insists that its liability provisions govern "[n]otwithstanding any

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1993); *Jacksonville Elec. Auth. v. Bernuth Corp.*, 996 F.2d 1107, 1110 (11th Cir. 1993). A third line of cases refuses to find a parent corporation liable as an operator unless such a finding is supported by state law corporate veil piercing principles. See *United States v. Cordova Chem. Co.*, 59 F.3d 584, 590-91 (6th Cir.), *vacated and reh'g en banc granted*, 67 F.3d 586 (6th Cir. 1995); *Joslyn Mfg. Co. v. T.L. James & Co.*, 893 F.2d 80, 82-83 (5th Cir. 1990).

103. Compare *FMC Corp. v. United States Dep't of Commerce*, 29 F.3d 833, 838-45 (3d Cir. 1994) (*en banc*) (holding that the government's active involvement qualified it as an operator), with *United States v. Vertac Chem. Corp.*, 46 F.3d 803, 807-09 (8th Cir. 1995), *cert. denied sub nom. Hercules Inc. v. United States*, 115 S. Ct. 2609 (1995) (holding that government health and safety regulations and inspections do not make the government an operator), and *FMC*, 29 F.3d at 849 (Sloviter, C.J., dissenting) (arguing that liability as an operator should attach only when the government uses its own facilities).

104. 68 F.3d 1016 (7th Cir. 1995).

105. See *id.* at 1018.

106. See *id.* Actually, the original plaintiffs settled the suit against Giles Armature for \$442,068.48 plus 27% of future cleanup costs. See *id.* The shareholders agreed to such a settlement only after the plaintiffs agreed to collect the entire judgment from Giles Armature's insurers. See *id.* Not surprisingly, "[t]he insurers were not amused and [they] refused to pay." *Id.* The plaintiffs then commenced garnishment proceedings against the insurers. See *id.* As discussed below, the court concluded that Illinois corporate dissolution law applied, see *id.* at 1019, but the court also concluded that the garnishment action was timely because it was a part of the original, timely (albeit by two days) suit. See *id.* at 1020.

107. See 805 ILL. COMP. STAT. ANN. 5/12.80 (West 1993).

108. FED. R. CIV. P. 17(b) ("The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized.").

other provision or rule of law, and subject only to the defenses set forth" in the statute itself.<sup>109</sup>

So does CERCLA's "notwithstanding" clause trump Rule 17(b), or does Rule 17(b) trump CERCLA's "notwithstanding" clause? CERCLA's language does not specifically address the liability of corporations that have been dissolved as a matter of state law. The question has elicited the normal complaints about CERCLA's poor drafting and confusing legislative history.<sup>110</sup> Like the issue in *Redwing Carriers*, this question had been litigated heavily before 1995,<sup>111</sup> and like the *Redwing Carriers* district court, the lower courts had reached something of a consensus that was contradicted by a 1995 decision.<sup>112</sup> There the similarities between *Redwing Carriers* and *Citizens Electric* end. While *Redwing Carriers* disrupted a prior consensus by interpreting the statute according to its plain meaning,<sup>113</sup> *Citizens Electric* departed from a line of decisions adhering to the plain meaning of CERCLA.<sup>114</sup>

The antitextualist result in *Citizen Electric* came from Judge Frank Easterbrook, one of the most dedicated textualists on the lower federal courts. Judge Easterbrook has written extensively on statutory interpretation,<sup>115</sup> and he often serves as a foil for

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109. 42 U.S.C. § 9607(a) (1994). The statutory defenses are limited to acts of war, acts of God, acts or omissions of third parties unrelated to the defendant, *see id.* § 9607(b), and innocent landowners. *See id.* § 9601(35).

110. *See* *Columbia River Serv. Corp. v. Gilman*, 751 F. Supp. 1448, 1452 (W.D. Wash. 1990) ("Because of CERCLA's whirlwind adoption by Congress . . . reliance on the statutory language alone may be inappropriate."); Robert D. Snook, *The Liability of Dissolved Corporations Under CERCLA: The Importance of Being "Dead and Buried"*, 66 CONN. B.J. 397, 420 (1992) ("CERCLA is silent on this issue and the legislative history is ambiguous, often contradictory and hence, not useful."); Audrey J. Anderson, Note, *Corporate Life After Death: CERCLA Preemption of State Corporate Dissolution Law*, 88 MICH. L. REV. 131, 133, 142-47 (1989) (acknowledging that "CERCLA's language is far from clear" on this issue and that the legislative history failed to directly discuss the issue); Troy A. Stremming, Note, *Corporate Reincarnation—CERCLA Liability After Corporate Dissolution*, 33 WASHBURN L.J. 874, 875-80 (1994) (noting CERCLA's lack of legislative history).

111. *See infra* note 131.

112. *See infra* note 131.

113. *See* *Redwing Carriers, Inc. v. Saraland Apartments, Ltd.*, 875 F. Supp. 1545, 1555-56 (S.D. Ala. 1995), *aff'd in part and rev'd in part*, 94 F.3d 1489 (11th Cir. 1996).

114. *See* *Citizens Elec. Corp. v. Bituminous Fire & Marine Ins. Co.*, 68 F.3d 1016, 1019 (7th Cir. 1995).

115. Judge Easterbrook's academic writings on statutory interpretation include

those with different views.<sup>116</sup> He believes that "[t]he central question of statutory construction is what Congress meant by *what it said*."<sup>117</sup> That theory of statutory interpretation rests on three propositions. First, original meaning must be dispositive. Such meaning stands opposed to original intent.<sup>118</sup> Any post hoc effort to analyze what Congress intended by a certain statutory provision will be futile, because the intent of each member of Congress—and the President—is unknowable, and misguided, because the text is the law, and the reasons why the text was enacted are not the law.<sup>119</sup> Second, a statute's original meaning is learned from the statute's language and structure

Frank H. Easterbrook, *Legal Interpretation and the Power of the Judiciary*, 7 HARV. J.L. & PUB. POLY 87 (1984) [hereinafter Easterbrook, *Power of the Judiciary*]; Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction Interpretation*, 11 HARV. J.L. & PUB. POLY 59 (1988) [hereinafter Easterbrook, *Original Intent*]; Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983) [hereinafter Easterbrook, *Statutes' Domains*]; Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POLY 61 (1994) [hereinafter Easterbrook, *Text, History, and Structure*]; Frank H. Easterbrook, *What Does Legislative History Tell Us?*, 66 CHI.-KENT L. REV. 441 (1990) [hereinafter Easterbrook, *Legislative History*]. His most notable judicial opinions discussing statutory interpretation include *Stromberg Metal Works, Inc. v. Press Mechanical, Inc.*, 77 F.3d 928 (7th Cir. 1996); *United States v. Marshall*, 908 F.2d 1312 (7th Cir. 1990) (en banc); *In re Sinclair*, 870 F.2d 1340 (7th Cir. 1989); and *Covalt v. Carey Canada Inc.*, 860 F.2d 1434 (7th Cir. 1988). Judge Easterbrook defines textualism as "sticking to lower levels of generality, preferring the language and structure of the law whenever possible over its legislative history and imputed values. Searching for meaning, to be found in structure and appeals to the objective legal culture, rather than in 'intent' . . . ." Easterbrook, *Text, History, and Structure*, *supra*, at 64.

116. See, e.g., William N. Eskridge Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990); Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 289-90 (1989); Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 240-56 (1986); George H. Taylor, *Structural Textualism*, 75 B.U. L. REV. 321 (1995).

117. *FDIC v. Elefant*, 790 F.2d 661, 666 (7th Cir. 1986); see also Easterbrook, *Legislative History*, *supra* note 115, at 449 ("The objective of statutory interpretation is to give the text a meaning appropriate to our particular constitutional republic.").

118. Justice Holmes stated that "[w]e do not inquire what the legislature meant; we ask only what the statute means." Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899), quoted in *In re Sinclair*, 870 F.2d at 1343. Easterbrook is fond of quoting this passage. See Easterbrook, *Original Intent*, *supra* note 115, at 61; Easterbrook, *Statutes' Domains*, *supra* note 115, at 535 n.3; see also *Walton v. United Consumers Club, Inc.*, 786 F.2d 303, 310 (7th Cir. 1986) (citing but not quoting Holmes).

119. See Easterbrook, *Original Intent*, *supra* note 115, at 60.

and from the legislative and democratic processes that produced that text. Judge Easterbrook is skeptical of claims of plain language,<sup>120</sup> and he is even more skeptical of claims regarding the collective intent of Congress.<sup>121</sup> Instead, his theory of meaning asks about the "ring [that] the words would have had to a skilled user of words at the time, thinking about the same problem."<sup>122</sup> The constitutional law-making processes and the relationship that exists between judges and legislatures also inform a statute's meaning. Third, if the search for a statute's original meaning comes up short, then an interpreter simply should conclude that the statute does not cover the question at hand. "The novelty of a question suggests that the legislature did not answer it,"<sup>123</sup> unless the statute clearly empowers the courts to develop a sort of common law to address the matter at hand.<sup>124</sup>

In *Citizens Electric*, Judge Easterbrook concluded that the Illinois corporate dissolution law applied, notwithstanding CERCLA's "notwithstanding" provision.<sup>125</sup> He offered two reasons why the "notwithstanding" clause applied to substantive liability provisions but not to procedural rules. First, according to Judge Easterbrook, circuit precedent said that this was so.<sup>126</sup> Next, Judge Easterbrook identified numerous problemat-

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120. See *In re Sinclair*, 870 F.2d at 1342 (criticizing "[a]n unadorned 'plain meaning' approach to interpretation"); Easterbrook, *Power of the Judiciary*, *supra* note 115, at 91 ("The 'plain meaning' rule is plainly ridiculous . . ."); Easterbrook, *Text, History, and Structure*, *supra* note 115, at 67 ("Plain meaning" as a way to understand language is silly."). But see Easterbrook, *Statutes' Domains*, *supra* note 115, at 533-34 (rejecting the argument that all language is inherently indeterminate).

121. See Easterbrook, *Statutes' Domains*, *supra* note 115, at 547-48; Easterbrook, *Text, History, and Structure*, *supra* note 115, at 68.

122. Easterbrook, *Original Intent*, *supra* note 115, at 61.

123. *Id.* at 66; accord Easterbrook, *Statutes' Domains*, *supra* note 115, at 534, 544.

124. See Easterbrook, *Power of the Judiciary*, *supra* note 115, at 93-94; Easterbrook, *Statutes' Domains*, *supra* note 115, at 544.

125. See *Citizens Elec. Corp. v. Bituminous Fire & Marine Ins. Co.*, 68 F.3d 1016, 1019-20 (7th Cir. 1995).

126. Easterbrook characterized *Town of Munster v. Sherwin-Williams Co.*, 27 F.3d 1268 (7th Cir. 1994), as holding that CERCLA's "notwithstanding" clause "refers only to substantive liability." *Citizens Elec.*, 68 F.3d at 1019. In fact, *Munster* specifically rejected a "parade of horrors" argument, *Munster*, 27 F.3d at 1271, similar to that offered by Judge Easterbrook in *Citizens Electric*. *Citizens Elec.*, 68 F.3d at 1019. The court in *Munster* limited its holding "to the simple proposition that CERCLA does not permit equitable defenses to § 107 liability," specifically rejecting the claim

ic results of a contrary construction. Does CERCLA liability survive despite *res judicata* or improper pleading or bankruptcy judgments?<sup>127</sup> Are frivolous suits allowed (despite Rule 11) and may motions for summary judgment be ignored (despite Rule 56)?<sup>128</sup> And if Illinois corporate dissolution law does not apply, then which law does?<sup>129</sup> Judge Easterbrook noted that the common law rule precludes *any* suits by or against corporations from the moment that they are dissolved, not the result for which the shareholders of Giles Armature hoped.<sup>130</sup> The gist of Judge Easterbrook's opinion is that no one would believe that the plain language of the "notwithstanding" clause applies in this context.

Yet most district courts had read CERCLA's "notwithstanding" clause to override Rule 17(b). Indeed, they deployed a variety of textual, structural, purposive, and policy arguments in favor of reading CERCLA to impose liability on dissolved corporations notwithstanding Rule 17(b).<sup>131</sup> The textual arguments

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of laches advanced by Sherwin-Williams. *Munster*, 27 F.3d at 1271-72. But *Munster* agreed that the "notwithstanding" clause did not affect issues such as *res judicata*, accord and satisfaction, statutes of limitations, and related claims that the court refused to characterize as "defenses." *See id.* at 1272.

127. *See Citizens Elec.*, 68 F.3d at 1019.

128. *See id.*

129. *See id.*

130. *See id.* (citing *Chicago Title & Trust Co. v. Forty-One Thirty-Six Wilcox Bldg. Corp.*, 302 U.S. 120, 125 (1937)).

131. *See* *AM Properties Corp. v. GTE Prods. Corp.*, 844 F. Supp. 1007, 1011-12 (D.N.J. 1994); *In re Tutu Wells Contamination Litig.*, 846 F. Supp. 1243, 1276-77 (D.V.I. 1993); *BASF Corp. v. Central Transp., Inc.*, 830 F. Supp. 1011, 1013 (E.D. Mich. 1993); *Chesapeake & Potomac Tel. Co. v. Peck Iron & Metal Co.*, 814 F. Supp. 1285, 1291 (E.D. Va. 1993); *City of Denver v. Adolph Coors Co.*, 813 F. Supp. 1471, 1474-75 (D. Colo. 1992); *Stychno v. Ohio Edison Co.*, 806 F. Supp. 663, 667-69 (N.D. Ohio 1992); *Traverse Bay Area Intermediate Sch. Dist. v. Hitco, Inc.*, 762 F. Supp. 1298, 1300-01 (W.D. Mich. 1991); *United States v. Distler*, 741 F. Supp. 643, 645-46 (W.D. Ky. 1990); *United States v. Sharon Steel Corp.*, 681 F. Supp. 1492, 1495-98 (D. Utah 1987); *see also* *Soo Line R.R. Co. v. B.J. Carney & Co.*, 797 F. Supp. 1472, 1481 n.2 (D. Minn. 1992) (agreeing with this opinion in dicta); *Columbia River Serv. Corp. v. Gilman*, 751 F. Supp. 1448, 1450-53 (W.D. Wash. 1990) (opining that CERCLA overrides Rule 17(b), but holding consistently with contrary circuit precedent). *But see* *Onan Corp. v. Industrial Steel Corp.*, 770 F. Supp. 490 (D. Minn. 1989), *aff'd*, 909 F.2d 511 (8th Cir. 1990) (unpublished table decision). By contrast, the only other court of appeals to consider the issue agreed with the approach that Judge Easterbrook would take later. *See* *Levin Metals Corp. v. Parr-Richmond Terminal Co.*, 817 F.2d 1448, 1450-51 (9th Cir. 1987).

observe that CERCLA imposes liability on "any person," with "person" being defined very broadly.<sup>132</sup> Likewise, the "notwithstanding" clause displaces "any" law, not just state liability laws.<sup>133</sup> Two district courts thus considered the statute's plain language to be sufficient to decide the question.<sup>134</sup> Judge Easterbrook did not explain why "any person" and "any law" mean "any person except corporations that have dissolved as a matter of state law" and "any law except procedural rules."<sup>135</sup> Indeed, Judge Easterbrook never mentioned any of the earlier district court cases in his *Citizens Electric* opinion.<sup>136</sup>

Other district courts relied on what Congress *could* have said about the question,<sup>137</sup> but such arguments prove little, especially in CERCLA cases. To be sure, if Congress had wanted to exclude dissolved corporations from the definition of liable "persons" or from the "notwithstanding" clause, Congress could have written CERCLA to apply to existing corporations alone.<sup>138</sup> On the other hand, if Congress had wanted to include dissolved corporations, it could have said that, too. Any argument about what is omitted from a statutory text thus becomes an argument about the default rule: How the statute will be interpreted if it does not expressly address a particular question, and therefore, whether Congress has the burden to address that question expressly in the statutory language.

The applicable canons lead to different results here. A later

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132. See 42 U.S.C. § 9601(21) (1994) ("The term 'person' means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body.").

133. And not just state capacity-to-be-sued laws. See *supra* note 131 and accompanying text. Compare *Levin Metals*, 817 F.2d at 1451 (describing the governing California law as a law determining capacity to be sued, not a law limiting the imposition of liability), with *Sharon Steel*, 681 F. Supp. at 1497 (rejecting *Levin Metals* because "[e]very statute limiting liability defines, at least in part, one's capacity to be sued, and every statute limiting one's capacity to be sued also limits liability").

134. See *Distler*, 741 F. Supp. at 645; *Sharon Steel*, 681 F. Supp. at 1496-98.

135. See *Citizens Elec.*, 68 F.3d at 1018-22.

136. See *id.*

137. See *AM Properties Corp. v. GTE Prods. Corp.*, 844 F. Supp. 1007, 1013 (D.N.J. 1994).

138. Other statutes specifically limit liability to "existing" corporations. See *Sharon Steel*, 681 F. Supp. at 1496 n.8 (citing the Sherman Act definition of "corporation").

enacted statute normally prevails against an earlier enacted statute or rule.<sup>139</sup> CERCLA became law in 1980; Rule 17(b) was adopted in 1938; thus, CERCLA wins. Another canon, however, states that "[t]here is no contest as to the plenary power of Congress to statutorily supersede any or all of the Rules [of Civil Procedure]. But unless the congressional intent to do so clearly appears, subsequently enacted statutes ought to be construed to harmonize with the Rules, if feasible."<sup>140</sup> CERCLA's "notwithstanding" clause does not contain such a clear statement of an intent to supersede Rule 17(b).<sup>141</sup> Nonetheless, many courts have relied upon an opposite, albeit implicit, presumption that any exceptions to the broad liability imposed by CERCLA must be express.<sup>142</sup> No such exception for dissolved corporations appears in the text (or even the legislative history) of CERCLA. Such competing presumptions demonstrate why the canons of statutory interpretation do not always produce a clear result—especially in CERCLA cases.<sup>143</sup>

To learn the meaning of a statute, Judge Easterbrook often turns to its structure, but the structure of CERCLA poses additional problems for his interpretation in *Citizens Electric*. CERCLA lists only three statutory defenses, and the fact of cor-

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139. See, e.g., *Autoskill Inc. v. National Educ. Support Sys.*, 994 F.2d 1476, 1485 (10th Cir. 1993).

140. *United States v. Gustin-Bacon Div.*, 426 F.2d 539, 542 (10th Cir. 1970).

141. One commentator suggested that the following language would suffice: "The provisions of this statute shall supersede any and all state laws insofar as they may now or hereinafter relate to the liability of any potentially responsible party." Stremming, *supra* note 110, at 895.

142. See, e.g., *B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192, 1199 (2d Cir. 1992) (indicating that express exceptions for the liability of municipalities provide strong evidence that municipalities can be liable under CERCLA in all other instances); *Idaho v. Hanna Mining Co.*, 882 F.2d 392, 396 (9th Cir. 1989) (concluding that "[e]xceptions to CERCLA liability should . . . be narrowly construed").

143. See *supra* text accompanying note 6 (noting problems with reliance on traditional canons when interpreting CERCLA). A similar analysis caused Karl Llewellyn to conclude that the canons are always indeterminate, see 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, 401-06 (1950), but one need not be that skeptical to recognize the special difficulties that arise in CERCLA cases. For a general discussion of the role of clear statement rules and other canons of construction in statutory interpretation, see John Copeland Nagle, *Waiving Sovereign Immunity in an Age of Clear Statement Rules*, 1995 WIS. L. REV. 771.

porate dissolution is not among them.<sup>144</sup> Liability is to attach "subject only to the defenses set forth" in the statute,<sup>145</sup> and Federal Rule of Civil Procedure 9(a) characterizes an objection to a corporation's capacity to sue or be sued as a defense.<sup>146</sup> But Judge Easterbrook was not the first interpreter of CERCLA to refuse to read the statute's list of defenses as exclusive. Many courts have permitted CERCLA defendants to assert equitable defenses such as laches, although many other courts do not permit such defenses because of CERCLA's command that it be "subject only to the defenses set forth" in the statute itself.<sup>147</sup> Alternatively, some courts have distinguished equitable defenses (preempted by CERCLA's "notwithstanding" clause) from procedural arguments such as inadequate service of process and res judicata (not preempted by the "notwithstanding" clause).<sup>148</sup>

Because the text of CERCLA itself makes no equitable-procedural distinction, there must be some other indication that Congress intended to limit the application of the "notwithstanding" clause or that such a limitation is needed in order to avoid an absurd result. Nothing in CERCLA's legislative history indicates that Congress considered the standard for determining the liability of dissolved corporations. The district courts have therefore satisfied themselves with more general indications of legislative intent. In particular, the sponsors of the CERCLA compromise stated that they did not intend CERCLA liability to differ

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144. See 42 U.S.C. § 9607(b) (1994). This point was made by the courts in *AM Properties Corp. v. GTE Products Corp.*, 844 F. Supp. 1007, 1012 (D.N.J. 1994); *In re Tutu Wells Contamination Litigation*, 846 F. Supp. 1243, 1277 (D.V.I. 1993); and *City of Denver v. Adolph Coors Co.*, 813 F. Supp. 1471, 1474 (D. Colo. 1992).

145. 42 U.S.C. § 9607(a).

146. FED. R. CIV. P. 9(a).

147. The cases holding that equitable defenses are unavailable in CERCLA cases include *Velsicol Chemical Corp. v. Enenco, Inc.*, 9 F.3d 524, 530 (6th Cir. 1993); *General Electric Co. v. Litton Industrial Automation Systems, Inc.*, 920 F.2d 1415, 1418 (8th Cir. 1990); *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 90 (3d Cir. 1988); and *Kelley v. Thomas Solvent Co.*, 714 F. Supp. 1439, 1451-52 (W.D. Mich. 1989). The cases permitting equitable defenses include *United States v. Moore*, 703 F. Supp. 460, 462 (E.D. Va. 1988); *United States v. Mottolo*, 695 F. Supp. 615, 626-27 (D.N.H. 1988); and *Mardan Corp. v. C.G.C. Music, Ltd.*, 600 F. Supp. 1049, 1056 n.9 (D. Ariz. 1984).

148. See, e.g., *Town of Munster v. Sherwin-Williams Co.*, 27 F.3d 1268, 1272 (7th Cir. 1994).



from state to state because of the particular features of state corporation law,<sup>149</sup> which indicates that state law should not apply because it would not produce uniform results. The reasoning of the district court failed to impress Judge Easterbrook in *Citizens Electric*.<sup>150</sup> Setting aside Judge Easterbrook's general disdain of legislative history, this argument contains another flaw: its implicit conclusion that, if state law does not apply, then no law applies.<sup>151</sup> Judge Easterbrook pointed out that the common law rule blocks suits by or against a corporation immediately upon its dissolution.<sup>152</sup> If the traditional common law rule governs this issue, then CERCLA liability would not have attached to the dissolved corporations that lost in the district courts.<sup>153</sup>

A better argument for limiting the reach of the "notwithstanding" clause to substantive liability issues is based on the seemingly absurd results of a contrary interpretation. Judge Easterbrook took that approach in *Citizens Electric* when he speculated about the role of res judicata, pleading rules, and bankruptcy judgments if CERCLA's "notwithstanding" clause were to be read literally.<sup>154</sup> No one has offered a convincing an-

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149. The legislative history on this issue is recounted in *AM Properties*, 844 F. Supp. at 1012; *Stychno v. Ohio Edison Co.*, 806 F. Supp. 663, 669 (N.D. Ohio 1992); and *United States v. Distler*, 741 F. Supp. 637, 646 (W.D. Ky. 1990). See generally *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983) (discussing CERCLA's legislative history in detail).

150. See *Citizens Elec. Corp. v. Bituminous Fire & Marine Ins. Co.*, 68 F.3d 1016, 1019 (7th Cir. 1995) (noting that CERCLA's status as a federal law does not mean that it supersedes Federal Rule of Civil Procedure 17(b), which governs the applicability of state law to suits against corporations).

151. See *id.*

152. See *id.*

153. See *id.*

154. See *Citizens Elec.*, 68 F.3d at 1019; *supra* text accompanying notes 127-28. Judge Easterbrook could have added Federal Rule of Civil Procedure 4(e)'s service of process requirements, which many courts had held to remain in effect despite CERCLA's notwithstanding clause. See *In re Acushnet River & New Bedford Harbor Proceedings*, 675 F. Supp. 22, 30 (D. Mass. 1987); *Violet v. Picillo*, 613 F. Supp. 1563, 1573 (D.R.I. 1985). On the other hand, Congress authorized nationwide service of process when it amended CERCLA in 1986, and it did so with legislative history suggesting that it had meant to prevent objections to the service of process all along. See Monica Conyngham, Comment, *Robbing the Corporate Grave: CERCLA Liability, Rule 17(b), and Post-Dissolution Capacity To Be Sued*, 17 B.C. ENVTL. AFF. L. REV. 855, 860-61 (1990) (citing the House, Senate, and Conference Reports on SARA).

swer to those fears.<sup>155</sup> Judge Easterbrook, however, neglected the questionable results that could occur if state corporate dissolution laws did apply in CERCLA cases. Permitting a corporation to escape liability by allowing it to dissolve upon the threat of CERCLA liability would encourage sham dissolutions.<sup>156</sup> Dissolved corporations may have benefited from cheaply disposing of their wastes.<sup>157</sup> The common latency period after the disposal of hazardous substances but before any environmental contamination is discovered means that a corporation's environmental liabilities may not have been accounted for at the time of corporate dissolution.<sup>158</sup>

Reading CERCLA's "notwithstanding" clause to trump Rule 17(b) also would conflict with the general purposes of CERCLA.<sup>159</sup> Virtually every case interpreting CERCLA refers to the statute's broad remedial purposes.<sup>160</sup> Unlike other environmental statutes,<sup>161</sup> CERCLA does not include a list of its

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155. The only court to respond to the seemingly absurd results identified by Judge Easterbrook insisted that "[i]n the great majority of cases, the general capacity provisions of rule 17(b) would apply. Only where . . . Congress clearly expresses its intention to supersede the general capacity provisions would a court be free to ignore state capacity law." *United States v. Sharon Steel Corp.*, 681 F. Supp. 1492, 1498 (D. Utah 1987). Alas, the court in *Sharon Steel* did not explain why results like those identified by Judge Easterbrook would not ensue.

156. See *AM Properties Corp. v. GTE Prods. Corp.*, 844 F. Supp. 1007, 1012 (D.N.J. 1994); *City of Denver v. Adolph Coors Co.*, 813 F. Supp. 1471, 1474 (D. Colo. 1992); *Stychno v. Ohio Edison Co.*, 806 F. Supp. 663, 669 (N.D. Ohio 1992); *Sharon Steel*, 681 F. Supp. at 1498.

157. See *Columbia River Serv. Corp. v. Gilman*, 751 F. Supp. 1448, 1453 (W.D. Wash. 1990).

158. See *BASF Corp. v. Central Transp., Inc.*, 830 F. Supp. 1011, 1013 (E.D. Mich. 1993); *Adolph Coors*, 813 F. Supp. at 1474-75. One commentator has suggested "similar treatment of dissolved and solvent corporations is fair" because "liability under CERCLA is retroactive and could not have been predicted by a responsible party at the time the action initiating liability was taken." Anderson, *supra* note 110, at 158. Anderson's rationale does justify equal treatment, though many would argue that the resulting liability is equally unfair to all parties. See *infra* notes 214-18 (collecting criticisms of CERCLA's liability scheme as harsh, inequitable, and unfair).

159. See, e.g., *BASF*, 830 F. Supp. at 1013; *Adolph Coors*, 813 F. Supp. at 1474; *Sharon Steel*, 681 F. Supp. at 1498-99.

160. See, e.g., *BASF*, 830 F. Supp. at 1013; *Adolph Coors*, 813 F. Supp. at 1474; *Sharon Steel*, 681 F. Supp. at 1498-99.

161. See, e.g., 33 U.S.C. § 1251 (1994) (stating the purposes of the Clean Water Act); see generally Watson, *supra* note 11, at 202-03 n.10 (citing other statutes and noting that the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136-

purposes. Nonetheless, courts have gleaned multiple purposes from the structure and legislative history of CERCLA. Congress, say the courts, intended for CERCLA to achieve the cleanup of contaminated sites,<sup>162</sup> to encourage quick responses to releases of hazardous substances,<sup>163</sup> to promote settlements,<sup>164</sup> and to discourage parties involved with a contaminated site from remaining idle.<sup>165</sup> Perhaps most importantly, Congress wanted those who are responsible for hazardous waste contamination to pay the cost of cleaning up such contamination.<sup>166</sup> That goal seemingly would be frustrated by applying state corporate dissolution law to insulate polluters from suit. Accordingly, absent a clear statutory text and lacking definite indication of congressional intent on this issue, many judges have relied on CERCLA's purposes to read the "notwithstanding" clause to override Rule 17(b).<sup>167</sup>

Not Judge Easterbrook. He has been critical of purpose arguments in general and arguments based on CERCLA's purposes in particular. This skepticism arises from Judge Easterbrook's view of legislation as the product of compromise.<sup>168</sup> The

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136(y) (1994), is the only other major federal environmental statute not to contain a statement of purposes).

162. See *Employers Ins. of Wausau v. Browner*, 52 F.3d 656, 660 (7th Cir. 1995); *Hydro-Manufacturing, Inc. v. Kayser-Roth Corp.*, 903 F. Supp. 273, 276 (D.R.I. 1995); *United States v. Iron Mountain Mines, Inc.*, 881 F. Supp. 1432, 1445 (E.D. Cal. 1995).

163. See *Control Data Corp. v. S.C.S.C. Corp.*, 53 F.3d 930, 935 (8th Cir. 1995); *New Castle County v. Halliburton Nus Corp.*, 903 F. Supp. 771, 780 (D. Del. 1995).

164. See, e.g., *Elf Atochem N. Am., Inc. v. United States*, 161 F.R.D. 35, 36 (E.D. Pa. 1995).

165. See, e.g., *United States v. TIC Inv. Corp.*, 68 F.3d 1082, 1088 (8th Cir. 1995).

166. See *id.* at 1089; *United States v. USX Corp.*, 68 F.3d 811, 814 (3d Cir. 1995); *Control Data*, 53 F.3d at 936; *North Carolina ex rel. Howes v. W.R. Peele, Sr. Trust*, 876 F. Supp. 733, 746-47 (E.D.N.C. 1995); *AM Properties v. GTE Prods. Corp.*, 844 F. Supp. 1007, 1012 (D.N.J. 1994); *In re Tutu Wells Contamination Litig.*, 846 F. Supp. 1243, 1277 (D.V.I. 1993); *Stychno v. Ohio Edison Co.*, 806 F. Supp. 663, 669 (N.D. Ohio 1992); *Columbia River Serv. Corp. v. Gilman*, 751 F. Supp. 1448, 1452-53 (W.D. Wash. 1990); *United States v. Sharon Steel Corp.*, 681 F. Supp. 1492, 1495 (D. Utah 1987).

167. See *In re Tutu Wells*, 846 F. Supp. at 1276-77; *AM Properties*, 844 F. Supp. at 1012; *Adolph Coors*, 813 F. Supp. at 1474; *Stychno*, 806 F. Supp. at 668-69; *Columbia River*, 751 F. Supp. at 1453; *Sharon Steel*, 681 F. Supp. at 1495-96; see also Conyngham, *supra* note 154, at 856 (questioning whether "Rule 17(b) can permit state corporate law to trump CERCLA liability, and thereby cut a large hole in CERCLA's liability net").

168. See Easterbrook, *Text, History, and Structure*, *supra* note 115, at 68 ("Leg-

compromise nature of legislation has two important lessons for statutory interpreters: first, many questions are left unanswered, and second, no goal is pursued at all costs. The role of the interpreter, therefore, is to honor the compromise by heeding the limits that Congress accepted in order to gain approval for the law<sup>169</sup>

So it is with CERCLA. Judge Easterbrook has searched for CERCLA's limits where other courts justify broader liability based on CERCLA's general remedial purposes.<sup>170</sup> Conversely, he never has relied on the statute's general purposes when deciding a CERCLA case. This distinguishes Judge Easterbrook from judges in every circuit who have relied on CERCLA's broad

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islation is compromise. Compromises have no spirit; they just are.”).

169. See *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 861 F.2d 155, 157 (7th Cir. 1988) (“A court’s job is to find and enforce stopping points no less than to implement other legislative choices.”); *Covalt v. Carey Canada Inc.*, 860 F.2d 1434, 1439 (7th Cir. 1988) (“Courts do not strive for ‘more’ of all legislative objectives; however, laws have both directions and limits, and each must be scrupulously honored.”); *Walton v. United Consumers Club*, 786 F.2d 303, 310 (7th Cir. 1986) (“The invocation of disembodied purposes, reasons cut loose from language, is a sure way to frustrate rather than implement these texts.”); Easterbrook, *Legislative History*, *supra* note 115, at 443 (“[L]aws themselves do not have purposes or spirits.”); Easterbrook, *Original Intent*, *supra* note 115, at 63 (“[L]aws are born of compromise. [L]aw is like a vector. It has length as well as direction. We must find both, or we know nothing of value. To find length we must take account of objectives, of means chosen, and of stopping places identified.”); Easterbrook, *Statutes’ Domains*, *supra* note 115, at 540-41.

Almost all statutes are compromises, and the cornerstone of many a compromise is the decision, usually unexpressed, to leave certain issues unresolved.

What matters to the compromisers is reducing the chance that their work will be invoked subsequently to achieve more, or less, than they intended, thereby upsetting the balance of the package.

No matter how good the end in view, achievement of the end will have some cost, and at some point the cost will begin to exceed the benefits.

*Id.*

170. See *Supporters To Oppose Pollution, Inc. v. Heritage Group*, 973 F.2d 1320, 1325 (7th Cir. 1992) (“Broad though it is, CERCLA has limits.”); *Edward Hines Lumber*, 861 F.2d at 157 (“Born of compromise, laws such as CERCLA and SARA do not pursue their ends to their logical limits.”); *Covalt*, 860 F.2d at 1439. That is not to say that Judge Easterbrook is hostile to CERCLA. See *In re CMC Heartland Partners*, 966 F.2d 1143, 1148 (7th Cir. 1992) (holding that CERCLA liability attaches to a company for operations predating the company’s bankruptcy, and blocking a pre-enforcement challenge to an EPA cleanup because “Congress put decontamination ahead of litigation”).

remedial purposes when interpreting the statute,<sup>171</sup> but it places him in the company of the Supreme Court, which has yet to invoke CERCLA's remedial purposes in any of the four CERCLA cases that it has decided,<sup>172</sup> and which has displayed increasing skepticism about reliance on law's general purposes as an appropriate method of statutory interpretation.<sup>173</sup>

The problem with Judge Easterbrook's method is that we have no way to know what the limits of CERCLA are. Normally the text and structure of an act—or at least its legislative history—indicate how far Congress and the President were willing to pursue the act's goals. Those sources seldom offer help in identifying CERCLA's limits. Judicial reliance on CERCLA's general purposes, therefore, may simply result from the lack of any better evidence regarding the statute's meaning.

Perhaps there is a better reason for reliance on CERCLA's purposes. Blake Watson has advanced an affirmative case for formulating a canon of statutory construction based on CERCLA's remedial purposes.<sup>174</sup> His most compelling argu-

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171. See Watson, *supra* note 11, at 262-63 n.270 (citing cases that have relied on CERCLA's purposes to invoke broad liability).

172. The four cases are *Key Tronic Corp. v. United States*, 511 U.S. 809 (1994); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), overruled by *Seminole Tribe of Fla. v. Florida*, 116 S. Ct. 1114 (1996); *Exxon Corp. v. Hunt*, 475 U.S. 355 (1986); and *Midatlantic National Bank v. New Jersey Department of Environmental Protection*, 474 U.S. 494 (1986). Indeed, 36 years have passed since the Supreme Court read any environmental statute broadly in light of its purposes. See Watson, *supra* note 11, at 258-59 (citing *United States v. Republic Steel Corp.*, 362 U.S. 482 (1960)).

173. See *Babbitt v. Sweet Home Chapter of Communities for a Greater Or.*, 115 S. Ct. 2407, 2426 (1995) (Scalia, J., dissenting).

Deduction from the "broad purpose" of a statute begs the question if it is used to decide by what *means* (and hence to what *length*) Congress pursued that purpose; to get the right answer to that question there is no substitute for the hard job . . . of reading the whole text.

*Id.* But see *Blanchard v. Bergeron*, 489 U.S. 87, 100 (1989) (Scalia, J., concurring in part and concurring in the judgment) (endorsing an approach to statutory interpretation that is "faithful to [a statute's] apparent purpose"). Despite Justice Scalia's complaints, the Court routinely relies on purposive arguments, though not necessarily the kind of broad remedial purpose claims used by the lower courts in CERCLA cases.

174. See Watson, *supra* note 11, at 271-97. Indeed, Watson considers CERCLA "a strong candidate for the employment of the remedial purpose canon . . . because the statute so closely approximates the 'best-case-scenario' for the canon's application." *Id.* at 271. That "best-case-scenario" exists where "most or all of the following circumstances are present:" (1) the statute is "more remedial" than most, *id.* at 270, (2)

ment recognizes that CERCLA is remedial by definition: It is primarily focused on cleaning up existing hazardous waste contamination, unlike other environmental statutes that operate prospectively to regulate current conduct that could adversely impact air, water, or land in the future.<sup>175</sup> Watson's other assertions are more problematic.

First, although CERCLA's goals rarely conflict, they often conflict with other statutes or common law assumptions. *Citizens Electric* demonstrates the problem. Corporate dissolution statutes aim for finality; CERCLA applies retroactively to conduct that was not subject to liability at the time it occurred.<sup>176</sup> The purposes of CERCLA are thus in tension with the purposes of the state corporate dissolution statutes protected by Rule 17(b).<sup>177</sup> Watson acknowledges that reliance on CERCLA's remedial goals should be diminished in such situations,<sup>178</sup> but he does not consider how common those conflicts are. If most CERCLA disputes arise because a broad reading of CERCLA conflicts with other statutory or common law assumptions, then the remedial canon that Watson proposes should have limited application. That the courts rely on CERCLA's remedial purpos-

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"[t]he statute falls in a category that is historically associated with the remedial purpose canon," *id.*, (3) the legislature "deem[ed] the use of the canon to be appropriate," *id.*, (4) the statute is not the product of a legislative compromise, *see id.*, (5) the statute's goals do not conflict with themselves or with other principles, *see id.* at 271, and (6) "[t]he legislature authorized the courts to fill in the statutory gaps on the basis of evolving common law principles." *Id.*

175. *See id.* at 286-88.

176.

Corporate dissolution statutes seek to provide certainty for shareholders by assuring that assets received by shareholders will not have to be relinquished later to satisfy claims against the dissolved corporation. However, CERCLA's policy choice is to impose liability for the cleanup costs of hazardous wastes on those who manufactured, stored, or transported those substances even though, at the time of manufacture, storage, or transportation, those parties did not know and could not have known that liability would later be imposed for their actions.

Anderson, *supra* note 110, at 160 (footnote omitted).

177. *See id.*

178. Ironically, the example that Watson offers—CERCLA versus bankruptcy law, *see Watson, supra* note 11, at 304-05, is one in which Judge Easterbrook has determined that CERCLA prevails. *See In re CMC Heartland Partners*, 966 F.2d 1143, 1148 (7th Cir. 1992) (holding that CERCLA liability survived a railroad's bankruptcy reorganization).

es so frequently suggests that such conflicts are rare—or that the courts reflexively assume that Congress intended CERCLA to prevail.

Watson next contends that CERCLA “was the product of consensus, not compromise.”<sup>179</sup> That claim, even as limited to the statute’s major provisions, seems hard to sustain. Senator Baker—the Minority Leader of the Senate Republicans at the time of CERCLA’s passage—asserted that “[t]his compromise is a fragile thing.”<sup>180</sup> Senator Randolph, chair of the Committee on Environment and Public Works and a Democrat, acknowledged considerable opposition to the Senate’s preferred approach and spoke of “compromise—reasonable compromise.”<sup>181</sup> Even the House’s 274-94 vote to approve the bill disguises the compromises necessary to secure the 246 votes necessary to approve the bill under the suspension of House rules.<sup>182</sup> A comparison of the bills drafted by the House and the Senate before the November 1980 election reveals differences on many key points. The House bill relied on a common law causation scheme,<sup>183</sup> the Senate bill identified specific, broader categories of responsible

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179. Watson, *supra* note 11, at 296 (footnote omitted). Watson writes that CERCLA “is—at least in critical areas—not the product of compromise. . . . [O]n the core issues—cleaning up sites quickly and making the polluters pay if at all possible—there was little dissension or wavering of purpose . . . .” *Id.* at 294-95 (citing *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1040 (2d Cir. 1985)); *accord* 126 CONG. REC. 30,113 (1980) (statement of Sen. Stafford) (indicating that “[t]his compromise incorporates those parts of S. 1480, H.R. 7020 and H.R. 85 on which there is broad consensus”); *id.* at 30,950 (statement of Sen. Dole) (acknowledging “a consensus on the need for action and on most of the particulars of the legislation needed to deal with the problem”). Watson recognizes that compromises did occur on less significant issues, and he finds it less appropriate to rely on the remedial canon in such instances. *See* Watson, *supra* note 11, at 301-03.

180. 126 CONG. REC. 30,916 (1980) (statement of Sen. Baker).

181. *Id.* at 30,932 (statement of Sen. Randolph). Likewise, the *Washington Post* editorialized that the Senate’s compromise bill “bears little resemblance to the original plan” of the Superfund law, particularly because the bill “almost completely” failed to require that businesses be held accountable for the environmental costs of their activities. *Semi-mini-superfund*, WASH. POST, Nov. 26, 1980, at A16.

182. *See* 126 CONG. REC. 31,981-82 (Dec. 3, 1980). Thus, one contemporary account described the vote as “a cliff-hanger” achieved when “President Carter made several 11th-hour telephone calls to Capital Hill urging House passage.” CONG. Q. ALMANAC, *supra* note 13, at 584 (describing the enacted bill as a “drastically scaled-down version of President Carter’s 1979 proposal”).

183. *See supra* text accompanying note 53.

parties.<sup>184</sup> The House bill contained a third-party defense to liability;<sup>185</sup> the Senate bill did not.<sup>186</sup> The House bill included a provision governing the apportionment of liability among defendants;<sup>187</sup> the Senate bill did not.<sup>188</sup> The Senate bill specifically imposed joint and several liability;<sup>189</sup> the House bill did not.<sup>190</sup> The Senate bill would have imposed liability for personal injury damages;<sup>191</sup> the House bill did not.<sup>192</sup> Those issues (and others) were addressed by a lame-duck Congress as the January 20 transfer of political power loomed on the horizon. The time pressures forced the supporters of the most aggressive proposals to abandon some provisions,<sup>193</sup> to qualify others,<sup>194</sup> to include more restrictive liability rules,<sup>195</sup> and to avoid discussing issues that would divide the Congress.<sup>196</sup> In other words, they compromised.

Watson also deems reliance on CERCLA's remedial purposes appropriate because Congress intended the courts to fill the gaps remaining in the statute.<sup>197</sup> The proliferation of CERCLA liti-

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184. *See supra* text accompanying note 53.

185. *See* Grad, *supra* note 4, at 6, 16-17.

186. *See id.* at 19.

187. *See id.* at 5, 10, 17.

188. *See id.* at 19.

189. *See id.*

190. *See id.* at 7, 10.

191. *See id.* at 13.

192. *See id.* at 6.

193. *See* 126 CONG. REC. 30,932 (1980) (statement of Sen. Randolph) (noting that the elimination of the private cause of action for medical expenses, property loss, and lost income); *id.* at 30,935 (statement of Sen. Stafford) (noting the elimination of the federal cause of actions of joint and several liability, and of scope of liability); *id.* at 30,948 (statement of Sen. Cohen) (noting the elimination of the federal cause of action, joint and several liability provisions, and special medical causation provisions).

194. *See id.* at 30,932 (statement of Sen. Randolph) (noting that the bill reduced the size of the Superfund from \$4.1 billion for six years to \$1.6 billion for five years); *id.* at 30,936 (statement of Sen. Stafford) (describing the bill as reducing the size of the Superfund to \$1.6 billion over five years).

195. *See id.* at 30,932 (statement of Sen. Randolph) (noting the addition of a new third-party defense to liability); *id.* at 30,935 (statement of Sen. Stafford) (noting the addition of a third-party defense); *id.* at 30,948 (statement of Sen. Cohen) (noting the elimination of joint and several liability).

196. *See id.* at 30,932 (statement of Sen. Randolph) (noting that the bill "deleted any reference to joint and several liability").

197. *See* Watson, *supra* note 11, at 293-94.



gation since 1980 suggests that Congress did not know how many gaps it left<sup>198</sup>—indeed, one architect of the compromise bill referred to “issues of liability not resolved by this act, *if any*”<sup>199</sup>—but the number of gaps does not necessarily influence how they should be filled. Even Judge Easterbrook agrees that Congress may empower the courts to develop a sort of common law to resolve unanswered questions in some statutes.<sup>200</sup> Watson thus musters the legislative history indicating that the sponsors of the compromise CERCLA bill expected that the courts would develop a common law for interpreting CERCLA’s liability provisions.<sup>201</sup>

The development of a CERCLA common law, strongly influenced by CERCLA’s general purposes, is not as inevitable as Watson suggests. Judge Easterbrook apparently does not believe that CERCLA is the kind of statute in which Congress intended to rely on the courts to fill in the gaps through a common law process.<sup>202</sup> He acknowledges that such statutes exist, but he has never interpreted CERCLA in that manner.<sup>203</sup> Likewise, a leading CERCLA drafter—then-Representative, now Vice President Gore—considered the development of a federal common law interpreting CERCLA to be “improbable.”<sup>204</sup> Much of the congressional discussion of the common law’s role can be read to direct the courts to rely on existing state law, rather than formulating their own federal common law.<sup>205</sup> Consequently,

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198. Cf. *supra* note 18 and accompanying text (illustrating many of the gaps in CERCLA).

199. 126 CONG. REC. 30,932 (1980) (statement of Sen. Randolph) (emphasis added).

200. See *supra* text accompanying note 124.

201. See Watson, *supra* note 11, at 293 n.387 (citing statements of Rep. Florio and Sen. Randolph); see 126 CONG. REC. 31,965 (1980) (statement of Rep. Florio) (observing that “the bill will encourage the further development of a Federal common law in this area” and explaining that the provision imposing joint and several liability had been removed “with the intent that . . . liability . . . be determined under common or previous statutory law”); *id.* at 30,932 (statement of Sen. Randolph) (noting that unresolved liability issues “shall be governed by traditional and evolving principles of common law”).

202. Cf. *Citizens Elec. Corp. v. Bituminous Fire & Marine Ins. Co.*, 68 F.3d 1016, 1019 (7th Cir. 1995) (foregoing application of federal common law).

203. See *id.*

204. 126 CONG. REC. 24,343 (1980) (statement of Rep. Gore); accord *id.* at 24,345 (statement of Rep. Gore) (noting that cases establishing federal common law “are infrequent and the precedents too disjointed to have a significant impact”).

205. Watson acknowledged the division in the courts on this point. See Watson,

Judge Easterbrook was unwilling to fashion a federal common law corporate dissolution rule in *Citizens Electric*.<sup>206</sup>

Even if there should be such a federal common law, it does not follow that CERCLA's broad remedial purposes suffice to inform it. Take the most commonly invoked purpose: those who are responsible for hazardous waste contamination should bear the costs of cleaning up the contamination.<sup>207</sup> Giles Armature sent transformers containing polychlorinated biphenyls to the site at issue in *Citizens Electric*,<sup>208</sup> so the company fairly can be said to be responsible for the contamination resulting there.<sup>209</sup> This responsibility would not necessarily disappear if the corporation still possessed assets five years after it dissolved under Illinois law,<sup>210</sup> but how about twenty years later? What if the only asset the company still possessed was its insurance policy?<sup>211</sup> What if the assets have already been distributed to the former company's shareholders? The broadest reading of CERCLA's remedial purposes supports liability in each of these hypothetical cases.

All of this is to say that Judge Easterbrook had good reasons for insisting that even CERCLA has limits. State corporation law provides a clear and reasonable delineation of what those limits are,<sup>212</sup> yet CERCLA's "notwithstanding" clause purports to displace *any* other law, not just unreasonable or unclear laws.<sup>213</sup> Therein lies the dilemma. When Judge Easterbrook looks to the unacceptable consequences of an interpretation of a statute, while less textualist district courts follow the plain statutory language, the confusion created by CERCLA's hurried enactment becomes uneasily obvious.

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*supra* note 11, at 293 n.388.

206. *Cf. Citizens Elec.*, 68 F.3d at 1019 (foregoing application of federal common law).

207. *See Watson*, *supra* note 11, at 202-03.

208. *See Citizens Elec.*, 68 F.3d at 1018.

209. *See id.*

210. *See id.*

211. *See id.* at 1019-20 (recognizing that a dissolved corporation's insurance policies are often its principal assets).

212. *Cf. id.* (discussing the relationship between CERCLA and Illinois corporate dissolution law).

213. *See id.* at 1019.

## III. INTERPRETING CERCLA'S UNFAIR PROVISIONS

Then there are those who describe the Act as a mistake because of the substantive results it produces. Criticisms of CERCLA as substantively inequitable, harsh, or unfair fill the reported cases.<sup>214</sup> Such complaints have been lodged against numerous provisions of the statute. The EPA itself has complained about the unfairness of some of CERCLA's provisions.<sup>215</sup> More commonly, though, the private parties threatened with liability under CERCLA object to the statute. CERCLA's bar on challenges to EPA cleanup orders until the cleanup is completed yields "seemingly harsh results."<sup>216</sup> The EPA's ability to settle with one responsible party and thereby preclude all other parties from recovering their costs from the settling party has been criticized as unfair.<sup>217</sup> Also, CERCLA's imposition of strict, joint and several, and retroactive liability without regard to causation has been the target of countless complaints.<sup>218</sup>

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214. See *supra* note 9 and accompanying text.

215. See *Hercules Inc. v. EPA*, 938 F.2d 276, 281 (D.C. Cir. 1991) (refusing to interpret CERCLA § 120(h)(1) to avoid an alleged burden on the government); *United States v. Iron Mountain Mines, Inc.*, 881 F. Supp. 1432, 1442 (E.D. Cal. 1995) (describing the state and federal governments' argument that "it would be unfair or unduly burdensome to expose a governmental entity to any liability for acts taken to clean up pollutants not generated by the government and not located on government property even if the government's remedial response is grossly reckless or negligent").

216. *Hanford Downwinders Coalition, Inc. v. Dowdle*, 71 F.3d 1469, 1484 (9th Cir. 1995). The court noted, however, that Congress apparently decided that delayed cleanups present a greater concern than unjustified cleanup orders. See *id.*

217. See, e.g., *New Castle County v. Halliburton Nus Corp.*, 903 F. Supp. 771, 780 (D. Del. 1995).

218. See, e.g., *Westfarm Assocs. Ltd. Partnership v. Washington Suburban Sanitary Comm'n*, 66 F.3d 669, 679 (4th Cir. 1995) (arguing that it is unfair to impose liability for hazardous substances that leaked onto municipality's land and then flowed onto neighboring property); *In re Bell Petroleum Servs., Inc.*, 3 F.3d 889, 897 (5th Cir. 1993) (acknowledging that CERCLA "can be terribly unfair in certain instances in which parties may be required to pay huge amounts for damages to which their acts did not contribute"); *In re Hemingway Transp., Inc.*, 993 F.2d 915, 932 (1st Cir. 1993) (describing CERCLA's strict liability as producing "harsh effects"); *United States v. Alcan Aluminum Corp.*, 990 F.2d 711, 716 (2d Cir. 1993) (characterizing strict liability and liability on generators as unfair, though adding that requiring taxpayers to pay for cleanups would be unfair as well); *United States v. Mexico Feed & Seed Co.*, 980 F.2d 478, 484 n.5 (8th Cir. 1992) (acknowledging that imposing liability on parties for lawful acts, or on parties who lacked knowledge, "does

The Second Circuit's decision in *New York v. Lashins Arcade Co.*<sup>219</sup> contains none of these general criticisms of CERCLA. Indeed, *Lashins Arcade* is an unusual case because it reads CERCLA narrowly to exonerate a party from liability, and it stands alone among appellate decisions in holding that a current owner satisfied the innocent purchaser defense created by Congress in 1986.<sup>220</sup> Nonetheless, the events giving rise to *Lashins Arcade* illustrate the kinds of complaints frequently leveled against CERCLA.<sup>221</sup> Perhaps of greater interest for CERCLA's interpretation, *Lashins Arcade* is the first CERCLA case decided by a Second Circuit panel that included Judge Guido Calabresi.

The Bedford Village Shopping Arcade opened for business in Westchester County, New York in 1955.<sup>222</sup> The one-story building contained six retail stores, one of which was occupied by two different dry cleaning operations between 1958 and 1971.<sup>223</sup> The Lashins Arcade Company purchased the entire shopping center in June 1987, only to learn seven weeks later that the site was the subject of a state effort to clean the groundwater that had been contaminated by the long-since closed dry cleaning businesses.<sup>224</sup> As in most CERCLA cases, numerous companies and individuals qualified as "responsible parties" deemed liable for the costs of cleaning up the site.<sup>225</sup> Rocco Astrologo, Rocco Tripodi, and Bedford Village Cleaners, Inc. operated the dry cleaning establishments that disposed of hazardous wastes into the ground at the site.<sup>226</sup> Holbrook B. Cushman, his widow Beatrice Cushman, and the Bank of New

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lead to harsh results"); *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 267 (3d Cir. 1992) (noting that CERCLA liability without respect to causation or to the amount of hazardous substances at issue "would initially appear to lead to unfair imposition of liability"). *But see United States v. Monsanto Co.*, 858 F.2d 160, 174 (4th Cir. 1988) (denying that joint and several liability under CERCLA is unfair).

219. 91 F.3d 353 (2d Cir. 1996).

220. *See id.* at 359-62 (concluding that Lashins Arcade, the current owner, satisfied the requirements of the innocent purchaser defense established by 42 U.S.C. § 9607(b)(3) (1994)).

221. *See id.* at 356-59; *supra* note 9 and accompanying text.

222. *See Lashins Arcade*, 91 F.3d at 356.

223. *See id.*

224. *See id.* at 357-58.

225. *See* 42 U.S.C. § 9607(a) (1994) (identifying four categories of responsible parties).

226. *See Lashins Arcade*, 91 F.3d at 356.

York owned the shopping center during the time that the dry cleaning operations disposed of the hazardous wastes.<sup>227</sup> Lashins Arcade Company was the current owner of the shopping center.<sup>228</sup> Each party could have been liable under established CERCLA precedent for the costs of cleaning up the site.<sup>229</sup>

The State of New York moved to hold Lashins Arcade strictly, jointly, and severally liable for all costs of cleaning up the site.<sup>230</sup> Attempts to place liability on a current landowner who played no role in causing the contamination have elicited many of the complaints about the unfairness of CERCLA.<sup>231</sup> Nonetheless, prior to *Lashins Arcade*, the courts consistently interpreted CERCLA to authorize liability on current owners without requiring any actual involvement in the events that caused the contamination.<sup>232</sup> Once the courts refused to heed the equitable objections when they interpreted CERCLA, Congress amended the law in 1986 in an effort to respond to the complaints. Three provisions of SARA addressed the concerns of current landowners: an explicit authorization for contribution actions against other responsible parties, a directive for the government to settle with so-called *de minimis* parties, and a new "innocent landown-

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227. *See id.*

228. *See id.*

229. *See supra* notes 32-36 and accompanying text. *But see* Redwing Carriers, Inc. v. Saraland Apartments, Ltd., 875 F. Supp. 1545, 1555-56 (S.D. Ala. 1995), *aff'd in part and rev'd in part*, 94 F.3d 1489 (11th Cir. 1996) (interpreting 42 U.S.C. § 9607(a)(1) to impose liability only if the current owner is also the current operator). The State of New York decided not to sue the past owners; it sought to recover its cleanup costs from the past operators (Astrologo, Tripodi, and Bedford Village Cleaners, Inc.) and the current operator (Lashins Arcade Co.) instead. *See Lashins Arcade*, 91 F.3d at 358.

230. *See* New York v. Lashins Arcade Co., 856 F. Supp. 153, 154 (S.D.N.Y. 1994), *aff'd*, 91 F.3d 353 (2d Cir. 1996).

231. *See, e.g.*, United States v. A&N Cleaners & Launderers, Inc., 854 F. Supp. 229, 240 (S.D.N.Y. 1994) ("If imposing CERCLA liability on [generators of hazardous wastes who sent their wastes to a disposal site] is 'unfair,' it is immeasurably more so to impose CERCLA liability on unwitting owners of contaminated property that have played no part in the activities leading to the contamination.").

232. *See, e.g.*, New York v. Shore Realty Corp., 759 F.2d 1032, 1043-44 (2d Cir. 1985); *see also* Nagle, *supra* note 49, at 1507-10, 1513 (indicating my agreement with that interpretation of the statute). The statutory language imposes liability on "the owner and operator of a vessel or a facility. Notwithstanding any other provision or rule of law, and subject only to the defenses set forth" in the statute itself. 42 U.S.C. § 9607(a)(1).

er" defense.<sup>233</sup>

Prior to *Lashins Arcade*, few parties had successfully invoked the innocent landowner defense.<sup>234</sup> Indeed, one commentator characterized the provision as a "mirage."<sup>235</sup> The typical case determined that the current landowner had a prohibited "contractual relationship" with a third party who caused the contamination or that the current landowner failed to engage in "all appropriate inquiry" regarding the site before the purchase.<sup>236</sup> The courts read those terms narrowly, often because of an explicit desire to further CERCLA's broad purposes.<sup>237</sup>

The Second Circuit took a different approach in *Lashins Arcade*.<sup>238</sup> The court noted that *Lashins Arcade* did have a contractual relationship with a prior owner, but the court refused to apply the exception to the innocent landowner defense to *all* con-

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233. See 42 U.S.C. § 9601(35) (establishing an innocent landowner defense); *id.* § 9613(f) (authorizing contribution actions); *id.* § 9622(g) (directing prompt settlement with parties whose liability "involves only a minor portion of the response costs at the facility").

234. See L. Jager Smith, Jr., Note, *CERCLA's Innocent Landowner Defense: Oasis or Mirage?*, 18 COLUM. J. ENVTL. L. 155, 160-63 (1993).

235. See *id.* at 155; see also *Superfund Program (Part 3): Hearings on H.R. 3800 Before the Subcomm. on Transp. and Hazardous Materials of the House Comm. on Energy and Commerce*, 103d Cong. 208 (1994) (statement of Carol Browner, Administrator, EPA) (acknowledging that the innocent landowner defense "has not functioned effectively").

236. See, e.g., *Kerr-McGee Chem. Corp. v. Lefton Iron & Metal Co.*, 14 F.3d 321, 325 (7th Cir. 1994) (finding that the owner failed to take any precautions to prevent a release of hazardous substances); *Foster v. United States*, 922 F. Supp. 642, 653-57 (D.D.C. 1996) (finding that the owner failed to notify appropriate authorities or to restrict access to the site); *Idylwoods Assocs. v. Mader Capital, Inc.*, 915 F. Supp. 1290, 1300-02 (W.D.N.Y. 1996) (finding that the owner failed to take actions to keep others off the site); *North Carolina ex rel. Howes v. W.R. Peele, Sr. Trust*, 876 F. Supp. 733, 744-46 (E.D.N.C. 1995) (finding that the owner had a contractual relationship with one of the parties who contaminated the site); *United States v. Broderick Inv. Co.*, 862 F. Supp. 272, 275-76 (D. Colo. 1994) (finding that the owner had a contractual relationship with the party who contaminated the site).

237. See *Reichhold Chems., Inc. v. Textron, Inc.*, 888 F. Supp. 1116, 1129 (N.D. Fla. 1995) (asserting that CERCLA's defenses "are narrowly construed to effectuate the statute's broad remedial purposes"); *Westwood Pharms., Inc. v. National Fuel Gas Distrib. Corp.*, 767 F. Supp. 456, 462 (W.D.N.Y. 1991) (rejecting an interpretation of the innocent landowner defense in light of the "broad remedial goals of CERCLA"); see also *United States v. Shell Oil Co.*, 841 F. Supp. 962, 970 (C.D. Cal. 1993) (describing CERCLA's defenses, including the innocent landowner defense, as narrow).

238. *New York v. Lashins Arcade Co.*, 91 F.3d 353, 360 (2d Cir. 1996).

tractual relationships between a current landowner and a third party.<sup>239</sup> Rather, the court read the defense to be inapplicable only where a contractual relationship related to the hazardous substances or where it allowed the landowner to exercise some control over the activities of the third party.<sup>240</sup>

Furthermore, the court held that Lashins Arcade had conducted an adequate investigation prior to purchasing the shopping center.<sup>241</sup> The state, with precedent on its side, argued that Lashins Arcade failed to exercise the requisite "due care" because the company failed to assist the state in investigating and cleaning up the site.<sup>242</sup> Again, the court read the exception to the defense more narrowly.<sup>243</sup> It also offered explicit policy reasons for doing so. First, requiring a current landowner to expend funds to excuse it from liability would be "counterintuitive."<sup>244</sup> Second, placing liability on those responsible for contamination (which is the policy of CERCLA) is different from placing absolute liability for a contaminated site on the owner (which is *not* the policy of CERCLA).<sup>245</sup> Third, the court's repeated references to the time that had elapsed between the disposal of hazardous substances and the purchase of the site by Lashins Arcade seemed to indicate a reluctance to extend liability to situations beyond those demanded by the statute.<sup>246</sup>

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239. *See id.*

240. *See id.* (quoting *Westwood Pharms.*, 964 F.2d at 91-92). For an indication of the division in the courts on the kind of contractual relationship that precludes an innocent landowner defense, see *Reichhold Chems.*, 888 F. Supp. at 1130 (collecting cases).

241. *See Lashins Arcade*, 91 F.3d at 361.

242. *See id.* The state relied on several cases indicating that a current owner must take some affirmative actions in order to demonstrate "due care." *See id.* (citing *Kerr-McGee Chem. Corp. v. Lefton Iron & Metal Co.*, 14 F.3d 321, 325 (7th Cir. 1994); *United States v. A&N Cleaners & Launderers, Inc.*, 854 F. Supp. 229, 238 (S.D.N.Y. 1994); *United States v. DiBiase Salem Realty Trust*, No. Civ. A. 91-11028-MA 1993 WL 729662, at \*6-8 (D. Mass. Nov. 19, 1993); *Lincoln Properties, Ltd. v. Higgins*, 823 F. Supp. 1528, 1543-44 (E.D. Cal. 1992)).

243. *See id.* at 361-62.

244. *Id.* at 361.

245. *See id.* at 361-62.

246. *See id.* at 360 (noting that Lashins Arcade could not have done anything to prevent a release of hazardous substances because "the last release . . . happened more than fifteen years before Lashins' purchase of the Arcade"); *id.* at 362 (concluding that Lashins Arcade did not need to take further actions "to address pollution

*Lashins Arcade* stands as the unusual case in which policy arguments were deployed to read CERCLA narrowly. Such an interpretive approach becomes even more intriguing because *Lashins Arcade* was Judge Guido Calabresi's first CERCLA case. How Judge Calabresi would have written the opinion in *Lashins Arcade* can only be a matter of speculation because he simply joined Judge Mahoney's opinion for the court, but his earlier academic writings offer some clues that point strongly in opposite directions.

Calabresi's writing on torts supports the broad liability scheme imposed by CERCLA. He would place liability on the parties that could most easily act to avoid such liability.<sup>247</sup> That cheapest-cost-avoider theory often leads to the placement of liability on the parties with the deepest pockets,<sup>248</sup> a result often mimicked in CERCLA cases. Indeed, others have noted how Calabresi's theory supports parts of CERCLA's liability scheme.<sup>249</sup> The imposition of CERCLA liability on current landowners seems to fit this rationale because most landowners are best positioned to eliminate any liabilities that reduce the value of their land. Likewise, a narrow construction of the innocent landowner defense provides a powerful incentive for prospective purchasers to take all steps to learn about any contamination before they agree to buy the property.

But Calabresi also has written that the courts should have increased power to remedy obsolete statutes.<sup>250</sup> Under the com-

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that ensued from activities which occurred more than fifteen years before *Lashins* purchased the Arcade"); see also *id.* at 359 (holding that *Lashins Arcade* would be liable as a current owner "notwithstanding the fact that it did not own the Arcade at the time of disposal of the hazardous substances").

247. See GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* 135 (1970) ("A pure market approach to primary accident cost avoidance would require allocation of accident costs to those acts or activities (or combinations of them) which could avoid the accident costs most cheaply.") (footnote omitted).

248. Cf. *id.* at 40 (describing the deep-pocket notion as one in which "losses can be reduced most by placing them on [those] people least likely to suffer substantial social or economic dislocations as a result of bearing [the losses]").

249. See Jerry L. Anderson, *The Hazardous Waste Land*, 13 VA. ENVTL. L.J. 1, 33-36 (1993); David H. Topol, *Hazardous Waste and Bankruptcy: Confronting the Unasked Questions*, 13 VA. ENVTL. L.J. 185, 218 & n.162 (1994).

250. See GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 2 (1982).



mon law, obsolete legal rules are simply discarded.<sup>251</sup> The courts make common law rules and the courts can unmake common law rules.<sup>252</sup> The judicial response to the difficulty of using traditional rules to prove causation in hazardous waste cases demonstrates how the courts can react to changed circumstances.<sup>253</sup> By contrast, statutes result from legislative action, and only the legislature unmakes those statutes.<sup>254</sup> This traditional view suggests that CERCLA's mistakes must await congressional correction, however long that may take.

Calabresi proposed an alternate way for courts to handle obsolete statutes in his provocative book *A Common Law for the Age of Statutes*. He suggested that the courts should update statutes in certain, limited circumstances.<sup>255</sup> Calabresi's idea has been controversial, even among scholars advocating other nontraditional theories of statutory interpretation, and it is not my purpose to repeat that debate here.<sup>256</sup> What I propose to do instead is to consider the implications of Calabresi's thesis for CERCLA.

According to Calabresi, legal obsolescence occurs where there is a "combination of lack of fit and lack of current legislative support."<sup>257</sup> A statute that does not fit is one that is "in some sense inconsistent with . . . our whole legal landscape."<sup>258</sup> The abundant litigation generated by CERCLA offers one indication that CERCLA lacks such a fit.<sup>259</sup> Other signs point in the oppo-

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251. See *id.* at 3-7.

252. See *id.*

253. Cf. Nagle, *supra* note 49, at 1500-03 (describing common law doctrines designed to accommodate injuries whose causation proves difficult to determine).

254. See CALABRESI, *supra* note 250, at 11 (referring to the resulting "legislative inertia").

255. See *id.* at 82, 120-45. For an example of when Judge Calabresi found judicial updating to be appropriate, see *Quill v. Vacco*, 80 F.3d 716, 731-43 (2d Cir.) (Calabresi, J., concurring in the result) (endorsing a "constitutional remand" of an 1828 New York statute criminalizing physician-assisted suicide), *cert. granted*, 117 S. Ct. 36 (1996).

256. For a list of reviews of Calabresi's book, see Edward L. Rubin, *On Beyond Truth: A Theory for Evaluating Legal Scholarship*, 80 CAL. L. REV. 889, 931 n.148 (1992). Calabresi's theory is also discussed in ESKRIDGE & FRICKEY, *supra* note 46, at 411-15; Nagle, *supra* note 22, at 1286-87.

257. CALABRESI, *supra* note 250, at 2.

258. *Id.*

259. Calabresi wrote that "[l]aws that do not fit lead to litigation, as lawyers and

site direction. Many states have enacted statutes modeled after (or even going further than) CERCLA.<sup>260</sup> Also, as noted above, CERCLA bears a marked resemblance to Calabresi's own writing on torts.<sup>261</sup> CERCLA, therefore, probably fits the whole legal landscape in the manner described by Judge Calabresi.

Nonetheless, the fact that CERCLA satisfies the second part of Calabresi's definition of an obsolete law leads to a number of surprising conclusions. Consider the evidence of the lack of support for CERCLA gleaned from 1995 alone. President Clinton complained that "[f]or far too long, far too many Superfund dollars have been spent on lawyers and not nearly enough have been spent on clean-up."<sup>262</sup> The chair of the House subcommittee responsible for CERCLA proclaimed that "Superfund has been enormously costly, grossly inefficient, patently unfair, and short on results."<sup>263</sup> EPA Administrator Carol Browner acknowledged that "there is a need for major reform."<sup>264</sup> Judge Posner ridiculed "Superfund Cloudcuckooland."<sup>265</sup> Other courts routinely described CERCLA as unfair, harsh and inequitable.<sup>266</sup> And the director of the Illinois Environmental Protection Agency commented that "to say that the Superfund program is

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litigants seek desperately and imaginatively to get around the anachronistic results the timeworn laws seem to impose." *Id.* at 143. That does not necessarily mean that the converse is true—that all laws that result in a lot of litigation do not fit—but it at least raises an inference regarding those fitness of the statute that should be investigated further.

260. See, e.g., Industrial Site Recovery Act, 1993 N.J. Sess. Law Serv. Ch. 139 (West); Pennsylvania Hazardous Sites Cleanup Act, PA. STAT. ANN. tit. 35, §§ 6020.101-.1305 (West 1993); see generally Robert B. McKinstry Jr., *The Role of State "Little Superfunds" in Allocation and Indemnity Actions Under the Comprehensive Environmental Response, Compensation and Liability Act*, 5 VILL. ENVTL. L.J. 83 (1994) (discussing state versions of Superfund).

261. See *supra* text accompanying notes 247-49.

262. Message to the Congress on Environmental Policy, 31 WKLY. COMP. PRES. DOC. 558, 559 (Apr. 6, 1995).

263. *Superfund Reauthorization (Part 2): Hearings Before the Subcomm. on Commerce, Trade, and Hazardous Materials of the House Comm. on Commerce*, 104th Cong. 135 (1995) (statement of Rep. Oxley).

264. *Superfund Reauthorization: Hearing Before the Subcomm. on Commerce, Trade, and Hazardous Materials of the House Comm. on Commerce*, 104th Cong. 2 (1995) [hereinafter *Superfund Reauthorization Hearing*] (testimony of Carol M. Browner, Administrator, EPA).

265. *G.J. Leasing Co. v. Union Elec. Co.*, 54 F.3d 379, 385 (7th Cir. 1995).

266. See *supra* notes 214-18 and accompanying text.

broken . . . falsely implies that the program worked at one time.<sup>267</sup> House Democrats and Cleveland Browns fans fared no better than CERCLA did in 1995, but politicians, entertainers, and athletes are used to being described as having bad years.<sup>268</sup> Statutes, however, rarely suffer from negative year-end reviews. That CERCLA experienced such harsh and broad-based criticism shows that it lacked legislative support, thus satisfying the second prong of Judge Calabresi's definition of an obsolete statute.<sup>269</sup>

Yet CERCLA survived 1995, and the chances that its most controversial provisions will be discarded are slim. A push to repeal CERCLA's retroactive liability scheme met determined opposition from environmentalists and state governments who depend on CERCLA to pay for the cost of cleaning up contaminated sites.<sup>270</sup> Indeed, all efforts to amend CERCLA have failed in recent years because the proponents of sweeping changes and the proponents of more modest changes have been unwilling to compromise.<sup>271</sup> But the congressional inability to modify or re-

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267. *Superfund Reauthorization Hearing*, *supra* note 264, at 92 (statement of Mary A. Gade).

268. Perhaps the most famous example is Babe Ruth's response when asked at the beginning of 1930 how he could ask for a higher salary than that received by President Hoover: "I had a better year than he did." Indeed he did. Compare THE BASEBALL ENCYCLOPEDIA 1409 (8th ed. 1990) (reporting that Babe Ruth led the American League with 46 home runs in 1929), with DAVID C. WHITNEY & ROBIN VAUGHN WHITNEY, THE AMERICAN PRESIDENTS 259, 264-65 (8th ed. 1993) (observing that the stock market crash of 1929 turned President Hoover's dream of a progressive reform regime into a nightmare).

269. See *supra* text accompanying note 257.

270. See, e.g., Jennifer Silverman, *Superfund: Both Sides of Liability Issue To Testify Before Oxley Panel*, BNA Daily Env't Rep., Oct. 26, 1995, available in WESTLAW, 1995 DEN 207 d13.

271. See generally *Superfund: House Democrats' Letter to GOP Continues To Fault Oxley Bill, Negotiations*, BNA Daily Env't Rep., June 24, 1996, available in WESTLAW, 1996 DEN 121 d13 (describing a breakdown in CERCLA reform negotiations); 142 Cong. Rec. S2144 (daily ed. Mar. 15, 1996) (remarks of Sen. Chafee) (objecting to President Clinton's alleged mischaracterization of pending CERCLA reform bills). The Clinton Administration has heralded its administrative fixes to CERCLA, but it continues to support the need for a comprehensive revision of the statute. See *Superfund: Senate To Hold Hearings on Proposed Bills on CERCLA Reform, Brownfields Cleanup*, BNA Daily Env't Rep., Feb. 19, 1997, available in WESTLAW, 33 DEN A-9, 1997 (describing a press briefing given by EPA Administrator Carol Browner).

place CERCLA does not prove that the law is not obsolete. To the contrary, Judge Calabresi's proposal for judicial action is aimed at precisely that kind of a stalemate. Judge Calabresi focused on the problem of legislative inertia, statutes that the legislature cannot gain the support to revise, but which the legislature would be unable to reenact.<sup>272</sup> In other words, the forces of the statutory status quo are stronger than the forces of statutory change.<sup>273</sup> The recent unsuccessful struggle to amend CERCLA confirms Calabresi's fear about legislative inertia. Legislative inertia is problematic to Calabresi because "laws must change to meet . . . the demands of changing majorities."<sup>274</sup> The recent criticisms of CERCLA suggest that the law no longer is supported by a current majority and thus fails that test.<sup>275</sup>

But 1995 was not an aberration. Indeed, if Calabresi is correct that one necessary (though not sufficient) indication of an obsolete statute is that it could not be reenacted,<sup>276</sup> then CERCLA evidenced obsolescence six weeks after its creation. Remember that a majority of the American people voted on November 4, 1980 to replace Jimmy Carter with Ronald Reagan and to replace a Democratic majority in the Senate with a Republican one.<sup>277</sup> The new President and the new Senate did not take office, however, until January 20, 1981.<sup>278</sup> Meanwhile, the Senate passed CERCLA on November 24,<sup>279</sup> and it immediately warned the House that "[o]nly the frailest, moment-to-moment coalition" had enabled CERCLA to prevail in the Senate and

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272. Cf. CALABRESI, *supra* note 250, at 80-82 (focusing on who should have to overcome the burden of inertia).

273. Cf. *id.* at 120-21 (explaining that "the courts in exercising the power to induce the updating of statutes should only deal in areas of legislative inertia").

274. *Id.* at 3. He added that it is probably more accurate to refer to "changing coalitions of minorities" instead of "changing majorities." *Id.*

275. See *supra* notes 1-12, 214-18 and accompanying text.

276. See CALABRESI, *supra* note 250, at 6; see also *id.* at 72 ("Obsolescence in legal rules exists when laws do not reflect the views of a current majority on what preferences in treatment are warranted by present conditions."); *id.* at 188 n.24 (emphasizing that "impossibility of reenactment is one but not the only test of the obsolescence of a statute (and is by itself certainly not a sufficient condition) for obsolescence").

277. See *supra* note 16 and accompanying text.

278. See *supra* note 16 and accompanying text.

279. See CONG. Q. ALMANAC, *supra* note 13, at 592.

that it "would now be impossible to pass the bill again, even unchanged."<sup>280</sup> The House acquiesced on December 3,<sup>281</sup> and when President Carter signed the bill, CERCLA became law on December 11, 1980.<sup>282</sup> The whole reason Congress rushed to enact CERCLA was its belief that no such law would be approved by President Reagan or a Republican Senate.<sup>283</sup> CERCLA thus lacked legislative and executive support almost before the ink dried on the Statutes-at-Large.

Moreover, CERCLA lacked *popular* support from the moment it was enacted. CERCLA was passed by a Senate majority and approved by a President who no longer represented the wishes of a majority of the American people.<sup>284</sup> There is little evidence

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280. *Id.* at 593 (quoting a letter from the Senate sponsors to the members of the House); see also 126 CONG. REC. 31,970 (1980) (statement of Rep. Harsha) (referring to and criticizing the letter); *Semi-mini-superfund*, *supra* note 181, at A16 (editorializing that "the fragile Senate coalition that allowed the bill's passage is unlikely to withstand the pressure of further debate").

281. See Grad, *supra* note 4, at 29-34.

282. See *id.* at 35.

283. See *id.* at 34 (indicating that many members of Congress supported an admittedly imperfect bill "for fear that to wait for the next session of Congress might well bring them even less"); see also 126 CONG. REC. 30,941 (statement of Sen. Mitchell) (asserting that "[t]he choice is between this compromise and no bill at all"); *id.* at 31,969 (statement of Rep. Florio) (indicating that "[t]he concern is whether we are going to have legislation or whether we [are] not going to have legislation"). But see CONG. Q. ALMANAC, *supra* note 13, at 584 (explaining that CERCLA "had appeared dead" after the 1980 election because Senate Republican leaders wanted to wait for the inauguration of the new administration, but then President-elect Reagan indicated that he would not object to the lame duck Congress enacting CERCLA); John F. Barton, *Senate Tackles Superfund Bill*, UPI, Nov. 24, 1980, available in LEXIS, News Library, UPI File (reporting that members of the Reagan transition team, though not Reagan himself, had indicated that they wanted the legislation passed); Philip Shabecoff, *Compromise on 'Superfund'*, N.Y. TIMES, Nov. 24, 1980, at D9 (quoting Rep. Florio as accusing the Chemical Manufacturers Association of "misreading . . . the current political climate" by opposing the bill).

284. See Judith Miller, *Getting Lame Ducks in a Row May Be Tricky on Capitol Hill*, N.Y. TIMES, Nov. 9, 1980, at E4 (reporting that the lame-duck 96th Congress included 71 Representatives and 18 Senators who would not be serving in the 97th Congress). Note, however, that President Carter still had a tenuous claim to popular support when he signed CERCLA into law on December 11, 1980. The formal constitutional selection of the President occurs upon the voting of the electoral college, see U.S. CONST. amend. XII, and in 1980 the electoral college voted on December 15. See Adam Clymer, *Signed, Sealed, Certified: Reagan Elected President*, N.Y. TIMES, Dec. 16, 1980, at B19. Only in that strained sense could President Carter contend that his presidency still commanded majority support.

that the 1980 elections were viewed as a national referendum on the pending federal hazardous waste legislation,<sup>285</sup> but the positions of the two presidential candidates on environmental regulation were markedly different.<sup>286</sup> That, of course, is the very reason why Congress acted so quickly *after* the 1980 elections to pass CERCLA.<sup>287</sup> The sense that CERCLA could not wait for the next administration was well founded. Once inaugurated, the Reagan Administration fulfilled the fears of the lame-duck Congress that enacted CERCLA when the incoming administration resisted its obligations under the new law.<sup>288</sup>

Admittedly, this lack of popular support is entirely irrelevant under the Constitution. As Justice Thomas has pointed out, the people of the United States possess absolutely no power under the Constitution to act in their capacity as the people of the United States.<sup>289</sup> The people can only act through their direct representatives (Senators and Representatives), their nearly direct representatives (the President and the Vice President), and other government officials selected by the representatives of the people.<sup>290</sup> Those representatives remain in office after an election because the Constitution itself establishes a lame-duck period between the time of an election and the inauguration of

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285. See J. Michael McCloskey, *Congress's Unfinished Ecological Agenda*, N.Y. TIMES, Nov. 11, 1980, at A15 (noting the insistence of the Sierra Club's executive director that the 1980 elections "did not really constitute a referendum on environmental issues").

286. See *Carter vs. Reagan: A Side-By-Side Comparison of Where They Stand on the Major Issues*, WASH. POST, Oct. 28, 1980, at A8 (noting that President Carter supported much environmental legislation and favored "a massive 'Superfund,'" while Ronald Reagan claimed that "[t]he federal government has lost its sense of balance in this [environmental] area" and had taken no position on the proposed Superfund legislation) (second alteration in original).

287. See *supra* note 283 and accompanying text.

288. See, e.g., James R. Buckley, Note, *The Political Economy of Superfund Implementation*, 59 S. CAL. L. REV. 875, 878-82 (1986) (detailing the conflict between the Reagan Administration and Congress regarding the enforcement of CERCLA in the early 1980s).

289. See *U.S. Term Limits, Inc. v. Thornton*, 115 S. Ct. 1842, 1877 (1995) (Thomas, J., dissenting) ("The Constitution simply does not recognize any mechanism for action by the undifferentiated people of the Nation.").

290. Cf. *id.* at 1876-77 (Thomas, J., dissenting) (observing that "it would make no sense to speak of powers [as that word is used in the Tenth Amendment] as being reserved to the undifferentiated people of the Nation as a whole").

the new officeholders.<sup>291</sup> That period was even longer—four months long, instead of the two-month period today—before the Twentieth Amendment became effective in 1933.<sup>292</sup> On the other hand, the intent of the Twentieth Amendment was to abolish completely lame-duck sessions of Congress like the one that enacted CERCLA, though one would never know that by looking at the amendment's text alone.<sup>293</sup> Ironically, only if the same purposive method of interpretation favored by the lower federal courts in CERCLA cases is used to read the Twentieth Amendment does CERCLA itself become unconstitutional.<sup>294</sup>

What all this means—if it means anything—for the interpretation of CERCLA today remains uncertain. Courts often refer to the circumstances of CERCLA's enactment to explain why the statute is so difficult to interpret,<sup>295</sup> but that history does not tell you how to read the statute. Perhaps Judge Calabresi would read CERCLA in a manner that would pressure Congress to correct all of the law's varied drafting and substantive mistakes.<sup>296</sup> That technique might work. The district court's decis-

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291. See U.S. CONST. amend. XX, §§ 1-2 (moving the presidential inauguration date from March 4 to January 20, and moving the beginning date for the congressional session to January 3).

292. See *id.*; see also Miller, *supra* note 284, at E4 (referring to the 96th Congress's "lame duck session" that would end in January 1981).

293. See U.S. CONST. amend. XX; John Copeland Nagle, *A Twentieth Amendment Parable*, 72 N.Y.U. L. REV. (forthcoming spring 1997) (sketching the history of the Twentieth Amendment).

294. See Nagle, *supra* note 293.

295. See *Exxon Corp. v. Hunt*, 475 U.S. 355, 379 n.5 (1986) (Stevens, J., dissenting); *United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1380 n.8 (8th Cir. 1989); *Artesian Water Co. v. New Castle County*, 851 F.2d 643, 648 (3d Cir. 1988); *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1039-40 (2d Cir. 1985); *Ninth Avenue Remedial Group v. Allis Chalmers*, 1996 U.S. Dist. LEXIS 17761, at \*26 (N.D. Ind. Nov. 25, 1996); *United States v. A&N Cleaners & Launderers, Inc.*, 854 F. Supp. 229, 239 (S.D.N.Y. 1994); *Coburn v. Sun Chem. Corp.*, 28 Env't Rep. Cas. (BNA) 1665, 1667-68 (E.D. Pa. 1988); *In re Acushnet River & New Bedford Harbor Proceedings*, 675 F. Supp. 22, 25 n.2 (D. Mass. 1987); *Mayor of Boonton v. Drew Chem. Corp.*, 621 F. Supp. 663, 668 (D.N.J. 1985); *United States v. Shell Oil Co.*, 605 F. Supp. 1064, 1073 (D. Colo. 1985); *Ohio ex rel. Brown v. Georgeoff*, 562 F. Supp. 1300, 1310 n.12 (N.D. Ohio 1983).

296. See CALABRESI, *supra* note 250, at 2 (proposing that courts should be empowered "to encourage, or even to induce, legislative reconsideration of [a] statute"); see also *Taber v. Maine*, 67 F.3d 1029, 1039 (2d Cir. 1995) (opinion of Calabresi, J.) ("It may occasionally be desirable for courts to invite legislatures to reconsider outdated

ion in *United States v. Olin Corp.*<sup>297</sup> could have forced Congress to act because the district court contradicted years of earlier cases and held that CERCLA liability does not apply retroactively,<sup>298</sup> but the Eleventh Circuit reversed that holding and reinstated the judicial consensus on CERCLA's retroactivity.<sup>299</sup> In any event, only courts that accept a role in judging the wisdom of a statute will feel comfortable in pressuring Congress to act to change an unfair law. The courts that repeatedly complain about the fairness of CERCLA are unwilling to read the statute with fairness in mind, which indicates that the courts will not fix CERCLA, no matter how many mistakes it contains.

#### IV. CONCLUSION

With a Supreme Court that is unwilling to tackle CERCLA and an EPA that is unable to change (or even definitively to interpret) the law, the task of reading CERCLA typically falls to affected parties and the lower federal courts. The lower courts can exercise a great influence on statutory interpretation simply by the large number of cases they decide.<sup>300</sup> But the lower courts' struggle to produce a consistent interpretation of CERCLA suggests that Supreme Court opinions may play a more important role in statutory interpretation than previously recognized. In most other contexts, the Court's general discussion of a statutory scheme provides clues about how the Court thinks the statute should be interpreted. The lower courts cannot grasp any interpretive wisdom from the Supreme Court in CERCLA cases, which explains in part why so many courts try

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statutes so that, unless the legislatures make clear their continued preference for disparate treatment, like cases may be treated alike.").

297. 927 F. Supp. 1502 (S.D. Ala. 1996), *rev'd*, 103 F.3d 1506 (11th Cir. 1997). Judge Hand decided the case, just as he decided *Redwing Carriers, Inc. v. Saraland Apartments, Ltd.*, 875 F. Supp. 1545 (S.D. Ala. 1995), *aff'd in part and rev'd in part*, 94 F.3d 1489 (11th Cir. 1996), discussed *supra* at text accompanying notes 37-68.

298. See *Olin*, 927 F. Supp. at 1507-19.

299. See *Olin*, 103 F.3d 1507-08.

300. See James P. Nehf, *Textualism in the Lower Courts: Lessons from Judges Interpreting Consumer Legislation*, 26 RUTGERS L.J. 1, 7-9 (1994) (emphasizing the distinctive features of statutory interpretation in the lower federal courts); Breyer, *supra* note 47, at 862 (noting that, unlike the Supreme Court, lower federal courts decide many cases involving uncontroversial statutory provisions).



so many different ways to make sense of CERCLA's mistakes.

What to do? The examples detailed in this Article represent only three of the many cases in which the interpretation of CERCLA has confounded every theory of statutory interpretation. But the steady flow of CERCLA litigation demands a coherent approach to reading the statute. My textualist inclinations teach me to begin with the statutory text, and to end there unless the result is truly absurd. CERCLA's language is the one thing about the statute that is steady. That language may yield strange results, as in *Redwing Carriers* and *Citizens Electric*, but those decisions also show that other sources of interpretive insight cannot be expected to resolve difficult issues themselves. Nonetheless, the fact that the statutory language yields results in those cases that were probably unintended by Congress is troubling. Perhaps the only answer is that Congress always retains the ability to change that language if it determines that a particular interpretation was mistaken. The recent congressional action to respond to a longstanding complaint about CERCLA—the liability imposed on banks<sup>301</sup>—demonstrates that Congress may be willing to address specific mistakes as they arise rather than trying to remedy all of CERCLA's failings in one comprehensive reform act.

*Redwing Carriers* and *Citizens Electric* involved statutory language that produced questionable results, but at least the contested terms in those cases possessed a plain meaning. Such clear statutory language is not CERCLA's hallmark, so a textualist approach will not solve many of CERCLA's riddles. Eskridge and Frickey have noted the dilemma that ambiguous statutory language poses for a textualist.<sup>302</sup> Their suggestions—to apply any relevant canons and to consider the statute's purpose<sup>303</sup>—are helpful in but not dispositive of most CERCLA

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301. See Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009, subtitle E: Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996; see also William W. Buzbee, *CERCLA's New Safe Harbors for Banks, Lenders, and Fiduciaries*, 26 Env't. L. Rep. 10656 (1996) (describing the amendments).

302. See ESKRIDGE & FRICKEY, *supra* note 46, at 788 ("If the statute is ambiguous, then what does a faithful textualist do?").

303. See *id.*

cases. The lower federal courts prefer to interpret CERCLA to accomplish its broad remedial purposes, the second suggestion offered by Eskridge and Frickey. The value of that method is tautological: it furthers the purposes of the statute. But the purposes that the courts have identified are not necessarily purposes that Congress intended to pursue in all cases. Taken to its logical extreme, reliance on broad remedial purposes would support the imposition of CERCLA liability on any party with any connection to a contaminated site, however remote in time or geography. Nor can the existing broad interpretation of CERCLA be said to have achieved satisfactory results in light of the frequent complaints about the law. Judge Easterbrook has shown the limits of reliance on a statute's purpose as an interpretive device, especially when one is interpreting a compromise statute like CERCLA whose ends are not immediately apparent.

Perhaps CERCLA should be read explicitly to pursue equitable results. Most courts have shied away from that course, yet there are growing signs of a judicial willingness to rely on equitable arguments to read the statute more narrowly in response to objections about the standard, more sweeping readings. This approach, too, has its limits. Any attempt to use fairness as the lodestar for interpreting CERCLA will collide with two issues: what to do when other interpretive signals point to a seemingly unfair result, and how to judge conflicting claims about the fairness of CERCLA.

Eskridge and Frickey's second option for a textualist—use of canons of statutory interpretation—has its own problems. The traditional canons of statutory interpretation do not always aid in the search for CERCLA's meaning, especially because the assumptions about congressional drafting that those canons embody are questionable given the circumstances in which the statute was enacted. The remedial purpose canon suffers from the shortcomings described above. Another alternative is to fashion a canon applicable to all hastily enacted statutes. What that canon should provide is problematic: sometimes courts interpret hastily enacted statutes narrowly, while sometimes courts interpret such statutes more broadly.<sup>304</sup> A narrow ver-

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304. See John Copeland Nagle, *Direct Democracy and Other Hastily Enacted Stat-*

sion of the canon would conflict with the remedial purpose canon, but it would be consistent with recent proposals for the interpretation of other statutes enacted without the usual legislative deliberation.<sup>305</sup>

Any of these approaches (or any approach that one could create) would disappoint affected parties, the EPA, and members of Congress in a significant number of cases. CERCLA contains too many mistakes—drafting errors, vague and ambiguous provisions, and provisions yielding bad policy—to be remedied by any one approach. Therefore, the best way to correct CERCLA's mistakes is not by interpretation but by actual amendments to the statute. Alas, legislative inertia is alive and well in Congress. Congress made one minor change to the statute in 1996 after spending several years considering many more sweeping amendments. The EPA has concentrated on administrative fixes to recognized problems with CERCLA, and while the agency has succeeded in correcting numerous problems, others remain embedded in the statute, invulnerable to administrative interpretation.

Of course, poorly drafted statutory language, ambiguous legislative history, conflicting purposes, and widespread condemnation as a failure are not unique to CERCLA. Nor is CERCLA the only statute that Congress enacted in a hurry. What distinguishes CERCLA from most other rushed pieces of legislation is that a lame-duck Congress and President (who feared that the act would not become law at all if it did not become law quickly) enacted and approved it. Therein lies the source of many of the interpretive problems presented by CERCLA today. The repeated reference to the lame-duck legislative process that produced CERCLA evidences a sense that the law is somehow illegitimate, the hurried product of a legislative majority about to turn into a legislative minority. Then legislative inertia set in, and Congress has been unable to amend the core provisions of CERCLA. Those provisions may reflect sound policy, but so long

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utes (forthcoming in 1996 ANN. SURV. AM. L.).

305. See Philip P. Frickey, *Interpretation on the Borderline: Constitution, Canons, and Direct Democracy*, at 39 (forthcoming in 1996 ANN. SURV. AM. L.); Jane S. Schacter, *The Pursuit of "Popular Intent": Interpretive Dilemmas in Direct Democracy*, 105 YALE L.J. 107, 152-64 (1995).

as their meaning remains elusive, a host of interested parties will generate litigation that forces the courts to decide how to resolve CERCLA's mistakes.

