LIBERAL CONSTRUCTION OF CERCLA UNDER THE REMEDIAL PURPOSE CANON: HAVE THE LOWER COURTS TAKEN A GOOD THING TOO FAR?

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I. INTRODUCTION

The remedial purpose canon of statutory construction, which states that remedial legislation should be liberally construed in order to effectuate the beneficial purpose for which it was enacted, is firmly established in the Anglo-American legal system.[1] Despite recurring criticism,[2] courts continue to employ the remedial purpose canon as an aid to statutory interpretation. Members of the Supreme Court, for example, have invoked the canon throughout this century to support liberal interpretations of federal legislation on such diverse topics as worker safety, worker benefits and compensation, labor relations, public health, antitrust, securities, and race, age, and gender discrimination.[3] The lower courts have likewise invoked the remedial purpose canon when construing these types of statutes.[4]

In the field of environmental law, however, there presently exists a sharp division between the Supreme Court and the lower courts regarding the use of the remedial purpose canon. In the past thirty years, the Supreme Court has not employed the canon when construing environmental legislation,[5] while federal district and

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1. *See* NORMAN J. SINGER, 3 SUTHERLAND STATUTORY CONSTRUCTION § 60.01 (5th ed. 1992) [hereinafter SUTHERLAND]. The remedial purpose canon and its antecedents have been part of the Anglo-American legal system for over 400 years. *See infra* part II.A.

2. *See infra* part III.

3. *See infra* part III.C.

4. *See infra* part III.C.

5. In United States v. Republic Steel Corp., 362 U.S. 482, 485 (1960), the Supreme Court held that a deposit of industrial solids created an "obstruction" to the "navigable capacity" of a river forbidden by § 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403. In so holding, the Court found inapplicable the exemption afforded for "any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state" under § 13 of the Act, 33 U.S.C. § 407. *See* 362 U.S at 489–90. Both holdings were supported by an implicit reference to the remedial purpose canon. *See* 362 U.S. at 491 ("We read the 1899 Act charitably in light of the purpose to be served.").

Although the Supreme Court has not invoked the remedial purpose canon in an environmental case since *Republic Steel*, the Court has still often looked to the purposes of environmental legislation to guide its interpretive efforts. *See, e.g.*, Arkansas v. Oklahoma, 503 U.S. 91, 105–06 (1992) (Clean Water Act ("CWA")); Hallstrom v. Tillamook County, 493 U.S. 20, 32 (1989) (Resource Conservation and Recovery Act); International Paper Co. v. Ouellette, 479 U.S. 481, 493 (1987) (CWA); United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 133 (1985) (CWA); Secretary of the Interior v. California, 464 U.S. 312, 332 (1984) (Coastal Zone Management Act). In such cases, the Court has not suggested that an environmental statute's remedial purpose warrants an expansive construction, but rather that "[s]tatutes should be construed in a manner consistent with their underlying policies and purposes." Secretary of the Interior v. California, 464 U.S. at 357 (Stevens, J., dissenting).

appellate courts have cited the remedial purposes of a panoply of environmental laws to justify expansive interpretations of ambiguous statutory provisions.[6]

The purpose of this Article is to examine the use of the remedial purpose canon by the lower courts in connection with a particular environmental statute: the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA").[7] Widespread concern over the severe environmental and public health effects of improper disposal and storage of hazardous substances prompted Congress to enact CERCLA in December, 1980.[8] Despite a legislative history "shrouded with mystery"[9] and the absence of an explicit declaration of congressional goals and policies,[10] the courts have been able to divine two overriding goals of CERCLA:

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6. *See, e.g.*, United States v. Boldt, 929 F.2d 35, 41 (1st Cir. 1991) (stating that Clean Water Act should be "construed in a broad, rather than a narrow fashion"); United States v. Aceto Agric. Chems. Corp., 872 F.2d 1373, 1383 (8th Cir. 1989) (stating that Resource Conservation and Recovery Act "is a remedial statute, which should be liberally construed"); School Dist. of Allentown v. Marshall, 657 F.2d 16, 19 (3d Cir. 1981) (holding that Toxic Substances Control Act is remedial and should be broadly construed); National Lime Ass'n v. EPA, 627 F.2d 416, 454 (D.C. Cir. 1980) (holding that EPA has "latitude to exercise its discretion in accordance with the remedial purposes of the [Clean Air Act]"); United States v. Ringley, 750 F. Supp. 750, 757 (W.D. Va. 1990) ("As a remedial statute, the court must liberally construe the [Surface Mining Control and Reclamation] Act."), *aff'd*, 985 F.2d 185 (4th Cir. 1993); *see also infra* part III.C.

7. 42 U.S.C. §§ 9601–9675 (1988 & Supp. V 1993). CERCLA was amended by the Superfund Amendments and Reauthorization Act ("SARA") of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986).

8. For a succinct summary of the history of the enactment of CERCLA, see ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE AND POLICY 288–92 (1992), describing how legislative efforts were prompted in particular by the discovery of migrating toxic substances in the midst of an upstate New York residential community known as Love Canal. The Love Canal disaster and similar incidents across the country focused national attention on the problem of abandoned hazardous wastes. After much legislative wrangling, CERCLA was enacted during the waning days of the Carter Administration as "an eleventh hour compromise." New York v. Shore Realty Corp., 759 F.2d 1032, 1040 (2d Cir. 1985). *See also* Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1 (1982); *infra* part VI.

9. Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1081 (1st Cir. 1986); *see also infra* part VI.A.

10. When enacting environmental legislation, Congress has typically included a statement of congressional findings and/or a declaration of the statute's policies, purposes, and goals. *See, e.g.*, 16 U.S.C. § 2601 (1994) (Toxic Substances Control Act); 16 U.S.C. §§ 1451–1452 (1994) (Coastal Zone Management Act); 16 U.S.C. § 1531 (1994) (Endangered Species Act); 30 U.S.C. §§ 1201–1202 (1988) (Surface Mining Control and Reclamation Act); 33 U.S.C. § 1251 (1988 & Supp. V 1993) (Clean Water Act); 33 U.S.C. § 1401 (1988 & Supp. V 1993) (Marine Protection, Research, and Sanctuaries Act); 42 U.S.C. §§ 6901–6902 (1988) (Solid Waste Disposal Act); 42 U.S.C. § 7401 (1988 & Supp. V 1993) (Clean Air Act); 43 U.S.C. § 1701 (1988) (Federal Land Policy and Management Act). Aside from CERCLA, the only other major environmental statute without a statement

(1) to clean up hazardous waste sites promptly and effectively; and (2) to ensure that those responsible for the problem "bear the costs and responsibility for remedying the harmful conditions they created."[11]

In order to realize these two goals of CERCLA, Congress included provisions in both the original and amended versions of CERCLA which have engendered considerable controversy and litigation. For example, to further the goal of prompt remediation, Congress amended CERCLA in 1986 by adding section 113(h),[12] which restricts immediate judicial review of CERCLA cleanup actions, even to the point of barring a claim that the proposed remedial action itself is unsafe or unlawful.[13] To further the goal of making those responsible bear the cost of the cleanup, Congress imposed strict, joint, and several liability on certain classes of responsible parties, denoted in section 107(a) of CERCLA as present and past owners and operators of hazardous waste sites, as well as generators and transporters of hazardous substances.[14] In addition, section 107 provides a cause of action, accompanied by narrowly defined defenses, which enables governmental and private parties who have cleaned up hazardous waste sites to recover their response costs from liable parties.[15] The scope of liability under section 107 of CERCLA and the types of response costs recoverable by governmental and private parties rank among the most frequently and fiercely contested issues in CERCLA cases.[16]

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of findings and purpose is the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136–136y (1994).

11. United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1112 (D. Minn. 1982).

12. 42 U.S.C. § 9613(h) (1988).

13. *See* Arkansas Peace Ctr. v. Arkansas Dep't of Pollution Control & Ecology, 999 F.2d 1212 (8th Cir. 1993), *cert. denied*, 114 S. Ct. 1397 (1994); Hanford Downwinders Coalition, Inc. v. Dowdle, 841 F. Supp. 1050 (E.D. Wash. 1993); Neighborhood Toxic Cleanup Emergency v. Reilly, 716 F. Supp. 828 (D.N.J. 1989); Schalk v. EPA, 28 Env't. Rep. Cas. (BNA) 1655 (S.D. Ind. 1988), *aff'd sub nom.*, Schalk v. Reilly, 900 F.2d 1091 (7th Cir. 1990), *cert. denied*, 498 U.S. 981 (1990); *see generally* Michael P. Healy, *Judicial Review and CERCLA Response Actions: Interpretive Strategies in the Face of Plain Meaning*, 17 HARV. ENVTL. L. REV. 1, 35–56 (1993).

14. 42 U.S.C. § 9607(a)(1)–(4) (1988).

15. *See id.* § 9607(a)–(b) (1988).

16. A highly visible example of the controversy surrounding the reach of § 107 is the question of when secured creditors should be deemed "owners" or "operators" for purposes of imposing CERCLA cleanup liability. *See* United States v. Fleet Factors Corp., 901 F.2d 1550 (11th Cir. 1990) (espousing expansive view of lender liability), *cert. denied*, 498 U.S. 1046 (1991). The *Fleet Factors* decision, as understated by the district court on remand, "stirred the financial community" and caused EPA in April 1992 to promulgate

When faced with these and other difficult issues, the lower courts have turned to both the underlying purposes of CERCLA and the remedial purpose canon for guidance.[17] In fact, the lower courts have employed the remedial purpose canon in CERCLA cases with remarkable regularity.[18] This repeated incantation by judges of the disparaged remedial purpose canon invites inquiry on three levels. The initial set of questions are fundamental: why is the canon utilized so often by the lower courts when interpreting CERCLA? Did Congress actually intend for courts to liberally construe the statute in order to effectuate its remedial purposes? Is CERCLA somehow "more remedial" than other environmental statutes?

These basic questions in turn raise critical concerns. Is the use of the remedial purpose canon ever appropriate? If its use may be justified in CERCLA cases, how should courts employ the canon? What are the limitations of the remedial purpose canon? In the CERCLA context, when has its invocation been less appropriate or inappropriate? Under what circumstances, if any, has the remedial

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its Lender Liability Rule. United States v. Fleet Factors Corp., 819 F. Supp. 1079, 1082 (S.D. Ga. 1993); *see also* Lender Liability under CERCLA, 57 Fed. Reg. 18344–85 (1992). The lender liability issue remains controversial, particularly in light of the fact that EPA's rule defining the scope of lender liability under CERCLA was subsequently vacated. *See* Kelley v. EPA, 15 F.3d 1100 (D.C. Cir. 1994), *cert. denied*, 115 S. Ct. 900 (1995).

Perhaps less visible but just as controverted was the issue of whether private parties could recover their attorney fees as a necessary cost of response. *See* Key Tronic Corp. v. United States, 114 S. Ct. 1960 (1994) (holding that CERCLA does not provide for award of private litigants' attorney fees for work associated with bringing cost recovery action). Prior to the Supreme Court's resolution of the issue, the dispute over recovery of fees had produced an almost even split of authority among the circuits. *See, e.g.*, FMC Corp. v. Aero Indus., Inc., 998 F.2d 842, 847–48 (10th Cir. 1993) (holding only nonlitigation fees may be recoverable); *In re* Hemingway Transp., Inc., 993 F.2d 915, 933–35 (1st Cir. 1993) (holding litigation fees not recoverable); Donahey v. Bogle, 987 F.2d 1250, 1256 (6th Cir. 1993) (holding fees recoverable); Stanton Road Assocs. v. Lohrey Enters., 984 F.2d 1015, 1017–22 (9th Cir. 1993) (holding litigation fees not recoverable); General Elec. Co. v. Litton Indus. Automation Sys., Inc., 920 F.2d 1415, 1421–22 (8th Cir. 1990) (holding fees recoverable), *cert. denied*, 499 U.S. 937 (1991) ; *see also infra* part VII.A.

17. The Eleventh Circuit's lender liability decision in *Fleet Factors* was based in large part on the "overwhelmingly remedial" nature of CERCLA. 901 F.2d at 1557. The Eighth Circuit, in *General Elec. Co. v. Litton*, stressed that allowing a private party to recover attorney fees as costs of response furthered, rather than frustrated, the main purposes of CERCLA. 920 F.2d at 1422; *see also* Chesapeake & Potomac Tel. Co. v. Peck Iron & Metal Co., 814 F. Supp. 1281, 1284–85 (E.D. Va. 1993) (permitting recovery of attorney fees as response costs supported by fact that CERCLA is remedial statute that should be liberally construed); Joy v. Louisiana Conference Ass'n, No. CIV.A. 91-4025, 1992 WL 165670, at *3 (E.D. La. July 6, 1992) (same).

18. *See infra* part IV.

purpose canon been appropriately employed as an interpretive aid in construing CERCLA?

Finally, even if we accept that the remedial purpose canon will continue to play an interpretive role in CERCLA cases, normative issues remain. Is there a way for the courts to respond to the chorus of critics and "legitimize" the remedial purpose canon? Or, should legitimacy be sought through legislative confirmation?

In order to explore these and other questions surrounding the use of the remedial purpose canon in CERCLA cases, this Article proceeds in the following fashion. For those unfamiliar with the subject of statutory interpretation, Part II begins by taking a historical and contextual look at canons of construction in general. Because the legitimacy of using canons of construction is inextricably connected to the issue of how statutes ought to be interpreted, the discussion of the origins of the canons is accompanied by a brief survey of the various theories of statutory interpretation. Part II also discusses how the canonical devices—including the remedial purpose canon—can be classified according to function.

Part III focuses specifically on the remedial purpose canon. In order to make use of this canon, a court must decide whether the statute at issue is "remedial" in nature. Although a precise definition of "remedial" cannot be devised, certain categories of statutes—including environmental legislation—have been deemed appropriate candidates for the employment of the canon. Determining the appropriateness of the remedial purpose canon's invocation, of course, is only the first step; a court must then decide *how* to utilize the canon in resolving the interpretive issue at hand. Most judges applying the canon are cognizant of the fact that it may "frustrate[ ] rather than effectuate[ ] legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law."[19] Consistent with this judicial recognition of the remedial purpose canon's limits, the courts have circumscribed its use in four situations: (1) when it is "plain" (from the text or otherwise) that Congress did not desire an expansive reading of the statute; (2) when a liberal construction would either upset a legislatively crafted compromise or conflict with other statutory goals; (3) when reliance on the canon clashes with other interpretive meta-princi-

19. Rodriguez v. United States, 480 U.S. 522, 526 (1987).

ples, such as the *Chevron*[20] rule of deference to agency interpretations or the precept that waivers of sovereign immunity are to be strictly construed;[21] and (4) when an aggressive interpretation would actually disserve the remedial objectives of the statute at issue.

Part IV documents the federal district and appellate courts' consistent invocations of the remedial purpose canon when construing environmental legislation. In particular, Part IV substantiates this Article's central observation that the courts have employed the remedial purpose canon in CERCLA cases with a remarkable frequency.

Part V begins with a summation and assessment of the scholarly criticisms of the courts' uses of the remedial purpose canon. Part V concludes the Article's analysis of the remedial purpose canon (and its proper place in interpretive theory) by presenting a "best-case scenario" for the application of the canon. The Article then turns to a critical examination of the judicial application of the canon in CERCLA cases.

Parts VI and VII examine the symbiotic relationship between CERCLA and the remedial purpose canon. Part VI hypothesizes that both CERCLA's legislative history and its animating goals support the notion that the statute is indeed "more remedial" than other environmental legislation. Part VII offers a critical analysis of the lower courts' appropriate and inappropriate invocations of the remedial purpose canon in CERCLA cases, noting particular "constraints" that, if present, reduce the efficacy of the canon as an interpretive tool.

The Article addresses normative concerns in Part VIII by presenting and evaluating two means by which to legitimize liberal interpretations of CERCLA's provisions. The first option is for the courts to replace the amorphous remedial purpose canon with a tailored, substantive "CERCLA" canon. The Article notes that judicial creation of substantive canons has precedent; the substantive Indian canons of construction originated over one hundred and sixty years ago with the declaration that "[t]he language used in

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20. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) (holding that where Congress does not directly address specific issue in question, court can only determine whether agency's interpretation is permissible construction of statute).

21. *See, e.g.*, United States v. Idaho *ex rel.* Director, Idaho Dep't of Water Resources, 113 S. Ct. 1893, 1896 (1993).

treaties with the Indians should never be construed to their prejudice."[22] Nor is the idea of a specific environmental canon a novel proposition. In recent years, Cass Sunstein has advocated the adoption of the substantive canon that environmental statutes should be interpreted aggressively in order to protect the environment.[23]

An alternative to the judicial creation of a CERCLA canon is for Congress to amend CERCLA and codify the remedial purpose canon. A prototype for this approach is section 904(a) of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), which directs that the "provisions of this title shall be liberally construed to effectuate its remedial purposes."[24] The Article concludes that the codification approach is ultimately preferable to either the judicial creation of a specific CERCLA canon or continued reliance on the generic remedial purpose canon. Legislative endorsement of the notion that CERCLA should be liberally construed to effectuate its remedial purposes promotes the primacy of the text and allays what has been termed "counter-majoritarian anxiety."[25] Expansive judicial readings of CERCLA's ambiguous provisions will be placed on firmer ground—and will be less likely to be overturned—if the lower courts can cite to statute-specific interpretive instructions that have been debated and passed by Congress.

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22. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 582 (1832) (McLean, J., concurring).

23. *See* CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 183 (1990) [hereinafter SUNSTEIN, AFTER THE RIGHTS REVOLUTION] (advancing interpretive principle that environmental statutes should be construed to protect noncommodity values); Cass R. Sunstein, *Principles, Not Fictions*, 57 U. CHI. L. REV. 1247, 1255 n.25 (1990) (mentioning "norm in favor of aggressive interpretation of statutes protecting the environment"); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 478, 485–86, 508 (1989) [hereinafter Sunstein, *Interpreting Statutes*] (noting judicial decisions aggressively construing environmental statutes as protecting nonmarket values and guarding against collective action problems).

24. Organized Crime Control Act of 1970, Pub. L. 91-452, tit. IX, § 904(a), 84 Stat. 922, 947 (codified as note to 18 U.S.C. § 1961 (1994)).

25. This "'counter-majoritarian anxiety' arises from the view that statutory law derives its legitimacy from its enactment by Congress, which is elected by and accountable to the people." William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation As Practical Reasoning*, 42 STAN. L. REV. 321, 378 (1990) [hereinafter Eskridge & Frickey, *Practical Reasoning*].

II. THE CANONS OF CONSTRUCTION: A HISTORICAL AND CONTEXTUAL INTRODUCTION

Black's Law Dictionary defines the term "canons of construction" as "[t]he system of fundamental rules and maxims which are recognized as governing the construction or interpretation of written instruments."[26] This definition, while moderately useful, overstates both the nature and significance of the maxims, background norms, and principles of interpretation which are collected under the rubric of "canons." The reference to the canons as a "system" is misleading because it implies that a sense of perfect cohesion prevails, when in fact it is universally accepted that the canons often conflict and even contradict each other.[27] To dispel the notion of systematic coherence, it is more accurate to describe the canons simply as a "set of conventions . . . designed to assist judges in ascertaining the meaning of statutory language,"[28] or, more simply yet, "the collective folk wisdom of statutory interpretation."[29]

The notion that the canons "govern" the interpretation of statutes and other written instruments is even more deceptive. As discussed below, the Anglo-American canons of construction have always been viewed as "rules of general experience rather than hard-and-fast rules of interpretation."[30] As such, these judge-made common law canons were never intended to "govern" disputes by dictating outcomes, but rather were developed as aids in the interpretive process.[31]

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26. BLACK'S LAW DICTIONARY 207 (6th ed. 1990).

27. *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) (noting existence of two opposing canons on almost every point); *infra* part II.C.1.

28. Eric Tucker, *The Gospel of Statutory Rules Requiring Liberal Interpretation According to St. Peter's*, 35 U. TORONTO L.J. 113, 114 (1985).

29. RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 280 (1990); *see also* SUNSTEIN, AFTER THE RIGHTS REVOLUTION, *supra* note 23, at 147 (defining "canons" to mean "all background principles of interpretation that are used in statutory construction").

30. Robert J. Araujo, *The Use of Legislative History in Statutory Interpretation: A Look at* Regents v. Bakke, 16 SETON HALL LEGIS. J. 57, 98 (1992).

31. *See id.* at 97 ("[T]he canons of construction are designed to *assist* the interpreter in ascertaining the meaning of a statute.") (emphasis added).

A. Canons in History

Canons of construction have long been utilized to decipher laws and other written texts, both religious and secular. In fact, scholar Geoffrey Miller has noted similarities between Anglo-American canons of construction and interpretive principles of more ancient religious or legal traditions.[32] For example, the canon of construction stating that when two statutes are capable of coexistence, the courts should regard each as effective absent a clearly expressed intention to the contrary[33] corresponds to the much older Christian maxim that "[a] text should not be read to be self-contradictory."[34] The Anglo-American canon stating that the more specific statute prevails over the more general one regardless of the priority of enactment[35] has antecedents in both Jewish and Roman law.[36]

English recognition of canons of construction dates back to at least the sixteenth century. In *Heydon's Case*,[37] the Court of the Exchequer construed a statutory reference to "any estate or interest for life" to encompass copyhold tenure, which was technically an interest terminable at will.[38] In support of this expansive reading, the Court propounded some general rules of statutory interpretation:

> [F]or the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law,) four things are to be discerned and considered:—
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> 1st. What was the common law before the making of the Act.
>
> 2nd. What was the mischief and defect for which the common law did not

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32. Geoffrey P. Miller, *Pragmatics and the Maxims of Interpretation*, 1990 WIS. L. REV. 1179, 1183–91 (1990). Professor Miller begins with several examples from the *Mimamsa* of Jaimini, from around 500 B.C., "which systematized principles for interpreting sacred Hindu texts, including texts containing what we would now consider secular law." *Id.* at 1183.

33. *See, e.g.*, County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 502 U.S. 251, 265–66 (1992).

34. Miller, *supra* note 32, at 1186. Miller's primary source for this Christian interpretive principle is ST. AUGUSTINE, ON CHRISTIAN DOCTRINE, Book III, ¶¶ 52–53 (D.W. Robertson, Jr. ed., 1958). *See id.* at 1186 n.29.

35. *See, e.g.*, Morton v. Mancari, 417 U.S. 535, 550–51 (1974).

36. *See* Miller, *supra* note 32, at 1188, 1190. Miller's source for the Jewish maxim is AARON M. SCHREIBER, JEWISH LAW AND DECISION-MAKING: A STUDY THROUGH TIME 204 (1979) (citing explanation and translation in PALTIEL BIRNBAUM, DAILY PRAYER BOOK (1973)). *See id.* at 1188 n.43. His source for the Roman maxim is IV THE DIGEST OF JUSTINIAN 962 (Theodor Mommsen et al. eds., 1985). *See id.* at 1190 n.51.

37. 3 Co. Rep. 7a, 76 Eng. Rep. 637 (Ex. 1584).

38. *See* REED DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 201 (1975).

> provide.
> 3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth.
> And, 4th. The true reason of the remedy; and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico*.[39]

In 1765, William Blackstone placed this canon, commonly referred to as the "mischief rule," at the top of his list of ten "rules to be observed with regard to the construction of statutes."[40] Other familiar canons set forth by Blackstone include the rule calling for strict construction of penal statutes[41] and the rule that "[o]ne part of a statute must be so construed by another, that the whole may (if possible) stand."[42]

B. Canons in Context: A Survey of the Foundationalist Theories of Statutory Interpretation

Blackstone's *Commentaries* was a leading Anglo-American legal treatise at the time of the framing of the Constitution, and his canons were assimilated into the American legal system along with other common law rules of interpretation.[43] It is therefore not surprising that the canons of construction were accorded increasing significance and given a prominent place in contemporary treatises on statutory interpretation during the nineteenth and early twentieth centuries.[44] However, as seen below, this era of almost unques-

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39. Heydon's Case, 3 Co. Rep. 7a, 7b, 76 Eng. Rep. 637, 638 (Ex. 1584). For further background on the case, see generally, Max Radin, *A Short Way with Statutes*, 56 HARV. L. REV. 388, 388–91 (1942) (analyzing virtues of rule of *Heydon's Case* and its relation to common law) [hereinafter Radin, *Short Way with Statutes*]; S.E. Thorne, *The Equity of a Statute and* Heydon's Case, 31 U. ILL. L. FORUM. 202, 215–17 (1931). The notion that judges should interpret a statute so as to effectuate its underlying purposes is also present in Christian and Roman principles of interpretation. *See* Miller, *supra* note 32, at 1184, 1190.

40. 1 WILLIAM BLACKSTONE, COMMENTARIES *87.

41. *Id.* at *88. Blackstone's canon has been recast as the "rule of lenity." *See, e.g.*, Smith v. United States, 113 S. Ct. 2050, 2059–60 (1993).

42. 1 BLACKSTONE, *supra* note 40, at *89; *see also* Colautti v. Franklin, 439 U.S. 379, 392 (1979) (invoking "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative").

43. *See* William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1011 (1989) [hereinafter Eskridge, *Public Values*].

44. *Id.* (citing THEODORE SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN

tioning reliance on the maxims of interpretation eventually came to an end.

The negative critiques of the canons of construction which surfaced this century require contextual explanation, since the legitimacy of the canons is closely tied to the issue of how statutes are (or ought to be) interpreted. American scholars and jurists have generally subscribed to one of three traditional or "foundationalist"[45] theories of statutory interpretation which continue to influence modern theories of statutory interpretation: intentionalism, purposivism, and textualism.[46]

Intentionalism requires that "a statute is to be expounded 'according to the intent of them that made it.'"[47] The intentionalist thus "asks how the legislature originally intended the interpretive question to be answered, or how it would have intended the ques-

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THE INTERPRETATION AND APPLICATION OF STATUTORY AND CONSTITUTIONAL LAW 225–90 (1857)). *See also* EDWARD BEAL, CARDINAL RULES OF LEGAL INTERPRETATION 271–479 (2d ed. 1908); 1 JOHN BOUVIER, INSTITUTES OF AMERICAN LAW 40–43 (1851).

45. Eskridge and Frickey have characterized the three main theories of statutory interpretation as "foundationalist" because "each seeks an objective ground ('foundation') that will reliably guide the interpretation of all statutes in all situations." Eskridge & Frickey, *Practical Reasoning*, *supra* note 25, at 324–25.

46. This Article has drawn its summations of mainstream theories of statutory interpretation from the wealth of materials produced in recent years by legislation scholars. For those interested in exploring the topic of statutory interpretation in greater depth, the following is an exhausting, but not exhaustive, sampler of commentary on theories of statutory interpretation produced in the last 10 years: T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20 (1988); William S. Blatt, *The History of Statutory Interpretation: A Study in Form and Substance*, 6 CARDOZO L. REV. 799 (1985); William N. Eskridge, Jr., *The Case of the Speluncean Explorers: Twentieth-Century Statutory Interpretation in a Nutshell*, 61 GEO. WASH. L. REV. 1731 (1993) [hereinafter Eskridge, *Speluncean Explorers*]; William N. Eskridge, Jr. & Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 MICH. L. REV. 707 (1991); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990) [hereinafter Eskridge, *The New Textualism*]; Eskridge & Frickey, *Practical Reasoning*, *supra* note 25; William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987) [hereinafter Eskridge, *Dynamic Interpretation*]; William N. Eskridge, Jr. & Philip P. Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U. PITT. L. REV. 691 (1987) [hereinafter Eskridge & Frickey, *Legislation Scholarship*]; Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241 (1992) [hereinafter Frickey, *Big Sleep*]; Robert J. Martineau, *Craft and Technique, Not Canons and Grand Theories: A Neo-Realist View of Statutory Construction*, 62 GEO. WASH. L. REV. 1, 1–23 (1993); William L. Reynolds, *A Practical Guide to Statutory Interpretation Today*, 94 W. VA. L. REV. 927 (1992); Peter C. Schanck, *The Only Game in Town: An Introduction to Interpretive Theory, Statutory Construction, and Legislative Histories*, 38 KAN. L. REV. 815 (1990); Sunstein, *Interpreting Statutes*, *supra* note 23, at 414–51; Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073, 1074–88 (1992).

47. ROY WILSON & BRIAN GALPIN, MAXWELL ON THE INTERPRETATION OF STATUTES 1–2 (11th ed. 1962).

tion to be answered had it thought about the issue when it passed the statute"[48] and traditionally calls for judicial examination of both the statute's text and its legislative history.[49]

Purposivism differs from intentionalism in that it considers the spirit or purpose of legislation instead of original intent as the most important factor when interpreting statutory meaning, especially when original intent is uncertain.[50] Purposivism "attributes benevolent purposes to a legislature . . . [and] then construes ambiguities in the statute to promote these purposes."[51]

Textualism, however, opposes interpretive practices which elevate a judge's own conceptions of the spirit of a statute over the words enacted by the legislature.[52] Textualists counsel that "where the language of an enactment is clear, and construction according to its terms does not lead to absurd or impractical consequences, the words employed are to be taken as the final expression of the

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48. Eskridge, *Dynamic Interpretation*, *supra* note 46, at 1479–80. Since intentionalism focuses on legislative intent when a law was passed, it is sometimes equated with creationism, *see* Reynolds, *supra* note 46, at 934 (explaining that creationists "care about determining the meaning that existed when the statute was adopted"), or originalism. *See* DICKERSON, *supra* note 38, at 126; Zeppos, *supra* note 46, at 1077 ("Originalism posits that the intent of the enacting Congress should control statutory interpretation.").

49. *See* Reynolds, *supra* note 46, at 935–36; Eskridge & Frickey, *Practical Reasoning*, *supra* note 25, at 327.

50. See Eskridge, *Dynamic Interpretation*, *supra* note 46, at 1480 (describing purposivism as "modified intentionalist" approach). Blackstone's interpretive methodology was based in part on the purposivism of *Heydon's Case*. While not oblivious to the primacy of the text, Blackstone emphasized the equity of a statute: "The most universal and effectual way of discovering the true meaning of law, when the words are dubious, is by considering the reason and spirit of it; or the cause which moved the legislator to enact it." 1 BLACKSTONE, *supra* note 40, at *61; *see also* Martineau, *supra* note 46, at 6; Blatt, *supra* note 46, at 802–05.

For an early example of judicial application of purposivism to statutory interpretation, see Holy Trinity Church v. United States, 143 U.S. 457 (1892). In holding that the purpose and intent behind a federal law banning assistance in the migration of foreign workers to the United States did not include an English clergyman hired by American church, the Court declared that "a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers." 143 U.S. at 459. *See generally* Eskridge, *Speluncean Explorers*, *supra* note 46, at 1733.

51. Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*. 107 HARV. L. REV. 381, 407 (1993) [hereinafter Frickey, *Marshalling Past and Present*].

52. *See* Eskridge, *Speluncean Explorers*, *supra* note 46, at 1732–36. Instead, courts should act as agents of the legislature and faithfully enforce its intentions by interpreting statutes in accordance with the plain meaning of the words agreed upon by democratically chosen legislators. *See* Oliver Wendell Holmes, Jr., *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899) ("We do not inquire what the legislature meant; we ask only what the statute means."); *see also* Blatt, *supra* note 46, at 813 ("Advocates of the plain meaning rule severely limited the scope of equitable construction, condemning it as judicial legislation . . . .").

meaning intended."[53] Textualists either believe that a statute's text is its *only* legitimate interpretive source or that the text is at least "the best guide to . . . legislative intent or purpose."[54]

C. Canons in Context: Reactions to the Foundationalist Theories

1. Legal Realism

Most jurists in the early twentieth century viewed statutory construction as an objective, formalistic endeavor that involved the "mechanical application" of a favored foundationalist theory to the interpretive problem at hand.[55] Yet the 1930s and 1940s provided a paradigmatic shift in thinking about statutory interpretation with the first broadscale attack on the canons from adherents of the "Legal Realism" movement. The legal realists deconstructed the notion of interpretive objectivity by contending that, since judges realistically make—rather than mechanically apply—the law, it follows that the judicial exercise of the power of statutory interpretation is actually little constrained by the foundationalist theories.[56]

Legal realists such as Max Radin and Karl Llewellyn derided the textualist notion that judicial understanding of words in statutes was achieveable either by resort to the "plain meaning" rule or by application of the text-oriented canons of construction.[57] Karl Llew-

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53. United States v. Missouri Pac. R.R., 278 U.S. 269, 278 (1929). Textualism is connected to the plain meaning rule, which, like the related "literal" and "golden" rules of interpretation, can be viewed as a reaction to the "mischief rule" of *Heydon's Case*. *See* Bradley C. Karkkainen, *"Plain Meaning": Justice Scalia's Jurisprudence of Strict Statutory Construction*, 17 HARV. J.L. & PUB. POL'Y 401, 433 n.124 (1994).

54. Eskridge & Frickey, *Practical Reasoning*, *supra* note 25, at 341.

55. Frickey, *Big Sleep*, *supra* note 46, at 248; *see also* Eskridge, *Speluncean Explorers*, *supra* note 46, at 1735 ("According to [Oliver Wendell] Holmes, our polity could not be a government of laws and not men unless legal standards were external to the decisionmaker."); Eskridge, *Dynamic Interpretation*, *supra* note 46, at 1506 ("The conception that the legislature has a specific 'intention' on a wide range of interpretive questions, and that courts 'objectively' determine that intention, is central to mechanical jurisprudence.").

56. *See* Eskridge, *Speluncean Explorers*, *supra* note 46, at 1736; Frickey, *Big Sleep*, *supra* note 46, at 248. Robert Martineau, a self-described "neo-realist," relies on the distinction between reaching a result (decision-making) and supporting the result reached ("decision justifying") to assert that "[t]hose who develop grand theories of statutory construction, either to explain the values on which judges actually decide how to construe statutes or to advocate the values on which judges should construe them, not only confuse technique with theory but attempt to create values out of mere techniques." Martineau, *supra* note 46, at 40.

57. Radin and Llewellyn argued that the canons are actually used not as aids in the

ellyn, in particular, focused on the question of whether the canons of construction actually constrain judges engaged in statutory interpretation. In his seminal 1950 law review article on the legitimacy of the canons of construction, Llewellyn organized canons in pairs to show "there are two opposing canons on almost every point."[58] According to Llewellyn, the existence of mutually contradictory canons demonstrates that, rather than constraining interpretative choices, the canons serve simply as post hoc "tools of argument" utilized by judges to justify statutory constructions arrived at "by means other than the use of the canon."[59]

2. *Legal Process*

While the legal realists successfully pointed out the shortcomings of mechanical jurisprudence and the formalistic theories of statutory interpretation, theoretical difficulties in turn beset legal realism: if judges are nothing more than unconstrained political actors, then the core democratic values of objectivity, rationality, and legitimacy of rule of law become open to question.[60] Professors Henry Hart and Albert Sacks's legal process approach to statutory interpretation was an attempt in the 1950s to construct an interpretive theory that would acknowledge the contributions of legal realism, yet legitimatize judicial lawmaking by "provid[ing] meaningful rules that could constrain judges and establish objective ways to critique judicial behaviour."[61] Hart and Sacks made pur-

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interpretive process, but as manipulative devices invoked by judges to conceal their untethered, result-oriented views on statutory interpretation. *See* Blatt, *supra* note 46, 826–27; Llewellyn, *supra* note 27, at 396–400; Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 869–81 (1930) [hereinafter Radin, *Statutory Interpretation*] (questioning validity of plain meaning rule and criticizing canons of construction); *see also* Frickey, *Big Sleep*, *supra* note 46, at 248; Aleinikoff, *supra* note 46, at 27. Radin, however, subsequently retreated somewhat from his criticism of the canons. *See* Radin, *Short Way with Statutes*, *supra* note 39, at 423 ("Evidently, 'canons of interpretation' cannot always be rejected.").

58. Llewellyn, *supra* note 27, at 401. Included in the list of opposing canons were the remedial purpose canon and its counterpart, the canon that statutes in derogation of common law shall be narrowly construed. *Id. See also infra* notes 142–147 and accompanying text (discussing tension between remedial purpose canon and derogation canon).

59. Llewellyn, *supra* note 27, at 401; *see also* SUNSTEIN, AFTER THE RIGHTS REVOLUTION, *supra* note 23, at 148; Martineau, *supra* note 46, at 31, 35; David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 936–38 (1992); Eskridge & Frickey, *Legislation Scholarship*, *supra* note 46, at 695.

60. *See* Eskridge, *Spelunkean Explorers*, *supra* note 46, at 1738–39.

61. Frickey, *Big Sleep*, *supra* note 46, at 249; *see also* Eskridge & Frickey, *Legislation Scholarship*, *supra* note 46, at 698.

posivism the organizing principle of their "legal process" approach to statutory interpretation.[62] Legal process was legitimatizing because statutory interpretation looked to the purposes of a democratically elected legislature, and purposivism in turn was rational and objective because judges were constrained by the objectively identifiable goals of "reasonable [legislators] pursuing reasonable purposes reasonably."[63]

But what if legislators are *not* reasonable persons pursuing reasonable purposes reasonably? This central assumption of the legal process approach has been effectively challenged in the "post legal process" era, a time period which encompasses the present and which has spawned new approaches and responses to the foundationalist theories of intentionalism, purposivism, and textualism.

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62. The "legal process" variant of purposivism was developed by Hart and Sacks in their unpublished casebook entitled The Legal Process: Basic Problems in the Making and Application of Law (tentative ed. 1958). An edited version of the legal process materials is now available. *See* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994). Legal process purposivism contends that the primary interpretive task of the judge is to construe textual ambiguities so as to further the underlying goals the legislature had in mind when it passed the statute:

> Hart and Sacks emphasized the role of statutes in modern public law, but of course viewed them as "purposive act[s]." For legal process, moreover, enactment of a statute was merely the beginning, and not the end, of lawmaking. In the modern regulatory state, statutes are not just directives to citizens, but are directives to governmental officials charged with implementing the statutory scheme . . . . Because "every statute and every doctrine of unwritten law developed by the decisional process has some kind of purpose or objective," the statute or doctrine can be applied to specific problems or controversies by a rational process in which the decisionmaker first identifies the purpose of the statute or doctrine and the "policy or principle" it embodies and then reasons toward the result most consistent with that policy or principle.

Eskridge & Peller, *supra* note 46, at 718–19 (citations omitted).

63. HART & SACKS, *supra* note 62, at 1378 (1994 ed.). As noted by Eskridge and Peller:

> The legal process position represented a victory over opposing legal ideologies, particularly the common law formalists, who represented a conservatism repudiated by the New Deal, as well as the critical legal realists, who argued that all law is politics and thereby impugned the neutrality and legitimacy of law. Like the realists, for example, the process theorists viewed law as purposive and dynamic, but protected the legitimacy and objectivity of law by focusing on the process and institutions by which law evolved.

Eskridge & Peller, *supra* note 46, at 710.

3. Public Choice Theory

Public choice theory, in its various permutations, has been perhaps the most notable response to legal process purposivism to date. Public choice theory applies the methodology of economics to describe conduct in the "marketplace" of the legislature.[64] This model of legislation rejects the Hart and Sacks's "reasonable legislator" and instead theorizes that "legislation simply reflects the conflicting interactions of interest groups; the resulting law sometimes reflects their private, selfish interests and sometimes serves no purpose at all."[65]

Public choice theory thus serves as a somewhat sardonic countervision to Hart and Sacks's sanguine view of the legislative process as a rational and purposive activity.[66] The public choice theorist warns that the statute in question may *not* embody any "public" purpose but may simply have been the end product of special interest group lobbying and "log-rolling" legislative compromises.[67] Although they acknowledge that some statutes are public-oriented, public choice adherents counsel that "most laws . . . should be thought of as 'private,' because their goal is to ratify deals struck by private interests."[68]

Public choice political theory has compelled reevaluations of intentionalism, purposivism, and textualism, as well as the efficacy

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64. *See* Frickey, *Big Sleep*, *supra* note 46, at 250; *see also* David Williams, *Legitimation and Statutory Interpretation: Conquest, Consent, and Community in Federal Indian Law*, 80 VA. L. REV. 403, 441–42 (1994); Eskridge, *Dynamic Interpretation*, *supra* note 46, at 1511 (using economic theory of legislative process, "'legislation is "sold" by the legislature and "bought" by the beneficiaries of the legislation'" and statutes therefore "are essentially 'contracts' between interest groups and Congress" (quoting William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 877 (1975))).

65. Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 864 (1992).

66. *See* Eskridge & Frickey, *Legislation Scholarship*, *supra* note 46, at 706. Rejection of Hart and Sacks's view of the legislative process is not universal. *See* Eric Lane, *Legislative Process and Its Judicial Renderings: A Study in Contrast*, 48 U. PITT. L. REV. 639, 642 (1987) ("Legislators are for the most part what Hart and Sacks asked the courts to assume, 'reasonable persons pursuing reasonable purposes reasonably.'").

67. *See* Frickey, *Big Sleep*, *supra* note 46, at 250–51; Michael E. Solimine & James L. Walker, *The Next Word: Congressional Response to Supreme Court Statutory Decisions*, 65 TEMP. L. REV. 425, 436–37 (1992); Eskridge & Frickey, *Practical Reasoning*, *supra* note 25, at 334–35; Eskridge & Frickey, *Legislation Scholarship*, *supra* note 46, at 702–10.

68. Reynolds, *supra* note 46, at 934. Professor Reynolds' discussion of public choice theory is prefaced with the heading "Public Choice Theory, or Cynicism Run Amok." *Id.* at 933.

of the canons of construction. Richard Posner in the 1980s relied on the public choice model to contend that a judge should be "wary about too readily assuming a congruence between his conception of the public interest and the latent purposes of the statutes he is called upon to interpret."[69] Responding to this new version of the legislative process, Posner proposed that courts should enforce the bargains reached between the legislature and interest groups by first discovering (pursuant to his "imaginative reconstruction" variant of intentionalism) and then giving effect to the political compromises embedded in statutes.[70] Not surprisingly, Posner has little use for the canons of construction.[71]

Jonathan Macey, on the other hand, has argued that public choice theory can be reconciled with the Hart and Sacks's approach of legal process purposivism.[72] Macey's defense of purposivism stems from his revision of public choice theory, "which posits as

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69. RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 289 (1985) [hereinafter POSNER, THE FEDERAL COURTS].

70. *See* Eskridge & Frickey, *Legislation Scholarship*, *supra* note 46, at 707–08; POSNER, THE FEDERAL COURTS, *supra* note 69, at 286–93; *see also* Williams, *supra* note 64, at 442–43; Blatt, *supra* note 46, at 835–36.

71. Posner's negative view of the canons combines the legal realists' misgivings regarding the manipulability of the canons with insights about the legislative process taken from public choice theory. Posner agrees with Karl Llewellyn that, since "two inconsistent canons can usually be found for any specific question of statutory construction," Richard A. Posner, *Statutory Interpretation—In the Classroom and In the Courtroom*, 50 U. CHI. L. REV. 800, 807 (1983) [hereinafter Posner, *Statutory Interpretation*], "the canons do not constrain judicial decision making but [instead] enable a judge to create the appearance that his decisions are constrained." *Id.* at 816. *See also* POSNER, THE PROBLEMS OF JURISPRUDENCE, *supra* note 29, at 58 ("The canons of statutory construction are the main props of formalistic reasoning in statutory cases."); POSNER, THE FEDERAL COURTS, *supra* note 69, at 276 ("[T]here is a canon to support every possible result."); *id.* at 286 ("[T]he canons conceal the extent to which the judge is making new law in the guise of interpreting a statute.").

Posner has gone further than Llewellyn and contended that "most of the canons are just plain wrong." Posner, *Statutory Interpretation*, *supra* note 71, at 806. However, although Posner has stated that the canons "have no value even as flexible guideposts or rebuttable presumptions," POSNER, THE FEDERAL COURTS, *supra* note 69, at 277, he has apparently retreated somewhat from this absolute rejection of the canons. *See* POSNER, THE PROBLEMS OF JURISPRUDENCE, *supra* note 29, at 279–80 ("The soundest criticism is not that the canons are wrong, although some are . . . . It is that they are just a list of relevant considerations, at best of modest utility. They are things to bear in mind . . . ."); *see also* Sokaogon Chippewa Community v. Exxon Corp., 2 F.3d 219, 224 (7th Cir. 1993) (Posner, J.) (invoking Indian canon of construction); Hale v. Marsh, 808 F.2d 616, 621 (7th Cir. 1986) (Posner, J.) (acknowledging remedial purpose canon can make difference "in a close case"). See *infra* part III.D.2 for Posner's specific views on the remedial purpose canon.

72. *See* Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986).

the goal of government the creation of public-seeking policy, not the ratification of private deals."[73] Recognizing that private interest legislation often masquerades as public interest legislation, Macey argues that judges should *not* enforce the "hidden-implicit" bargain reached between the legislature and the interest group, but instead should utilize the Hart and Sacks's purposivism approach and give such a statute "its public rather than private meaning, . . . [thereby reaching] a result that serves the public interest, but fails to honor the terms of the original deal between the legislature and the interest group."[74] Thus, Macey criticizes the judicial employment of any interpretive principle that tends to serve private rather than public interests.[75]

A third leading figure, Judge Frank Easterbrook, has invoked public choice theory to argue that legislatures cannot have either intents or purposes.[76] Moving in a different direction than Posner and Macey, Easterbrook has called for a renewed emphasis on literalism, arguing that "private interest" statutes should be narrowly confined to their express terms.[77] With respect to the canons of construction, Easterbrook, both as a jurist and as a scholar, has for the most part expressed his agreement with the disapproving critiques of Radin, Llewellyn, and Posner.[78]

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73. Eskridge, *Dynamic Interpretation*, *supra* note 46, at 1512; *see also* Frickey, *Big Sleep*, *supra* note 46, at 260 n.75; Eskridge & Frickey, *Legislation Scholarship*, *supra* note 46, at 709.

74. Macey, *supra* note 72, at 252; *see also* Williams, *supra* note 64, at 445–46.

75. Macey, *supra* note 72, at 265 (noting that "some . . . canons enhance the efficacy of hidden special interest bargains by increasing the probability that the bargains will be enforced in the courts"). See *infra* part III.D.2 for Macey's specific views on the remedial purpose canon.

76. Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 546–48 (1983) [hereinafter Easterbrook, *Statutes' Domains*]; *see also* Frickey, *Big Sleep*, *supra* note 46, at 252–53; Eskridge, *Dynamic Interpretation*, *supra* note 46, at 1512; Eskridge, *The New Textualism*, *supra* note 46, at 643.

77. *See* Easterbrook, *Statutes' Domains*, *supra* note 76, at 544; Frank H. Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 14–17 (1984) [hereinafter Easterbrook, *The Supreme Court*]. In the case of public interest legislation, Easterbrook notes that "it is more likely that the legislature would authorize blank filling, but the extent of this preference is far from certain." Easterbrook, *Statutes' Domains*, *supra* note 76, at 541. However, he does countenance the judicial extension of a "statute's domain" when the legislature has "charge[d] the judiciary with the task of creating remedies for whatever new problems show up later on." *Id.* at 544; *see also* Williams, *supra* note 64, at 444–45; *infra* part III.D.2.

78. *See, e.g.*, Continental Can Co. v. Chicago Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Pension Fund, 916 F.2d 1154, 1159 (7th Cir. 1990); *In re* Erickson, 815 F.2d 1090, 1094 (7th Cir. 1987); Walton v. United Consumers Club, Inc.,

4. New Textualism

Undercurrents of textualism are evident in Easterbrook's position that, "unless the statute plainly hands courts the power to create and revise a form of common law, the domain of the statute should be restricted to cases anticipated by its framers and *expressly* resolved in the legislative process."[79] Adherents of the "new textualism" reject anew intentionalism and purposivism (in part due to the recent insights of public choice theory) and continue to stress the plain meaning rule and its concomitant principle that "judicial interpreters can and should be tightly constrained by the objectively determinable meaning of a statute."[80] Justice Antonin Scalia has revitalized textualist theory by combining, in his interpretive approach, a reliance on the plain meaning of the statutory text with an avoidance of legislative history.[81] Scalia promotes literalism along the lines of Judge Easterbrook as a means to further the formalistic values of legislative supremacy and judicial restraint.[82]

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786 F.2d 303, 311 (7th Cir. 1986); Mercado v. Calumet Fed. Sav. & Loan Ass'n, 763 F.2d 269, 271 (7th Cir. 1985); Easterbrook, *Statutes' Domains*, *supra* note 76, at 540. See *infra* part III.D.2 for Easterbrook's specific views on the remedial purpose canon.

79. Easterbrook, *Statutes' Domains*, *supra* note 76, at 544 (emphasis added).

80. Eskridge, *The New Textualism*, *supra* note 46, at 646. Eskridge sees the new textualism as an evolutive response to the legal realism and legal process critiques of the foundationalist theories:

> The legal realists and legal process thinkers discredited intentionalism as a grand strategy for statutory interpretation; in its place they suggested purposivism. That theory has in turn been extensively criticized, especially by scholars influenced by the law and economics movement. As argued above, the recent trend is to view the legislature as not necessarily purposive; "attributing" purposes to ad hoc statutory deals is nothing if not judicial lawmaking. Accordingly, several judges of the law and economics school have responded to the critique of purposivism by urging as a grand theory the return to some version of the old "plain meaning rule": The beginning, and usually the end, of statutory interpretation should be the apparent meaning of the statutory language.

Eskridge, *Practical Reasoning*, *supra* note 25, at 340; *see also* Eskridge, *The New Textualism*, *supra* note 46, at 623 n.11 ("What is 'new' about the new textualism is its intellectual inspiration: public choice theory, strict separation of powers, and ideological conservatism.").

81. *See, e.g.*, Green v. Bock Laundry Machine Co., 490 U.S. 504, 527–30 (1989) (Scalia, J., concurring). Justice Scalia's views on statutory interpretation are discussed at length in Eskridge, *The New Textualism*, *supra* note 46. *See also* Martineau, *supra* note 46, at 12–13; Zeppos, *supra* note 46, at 1084–88.

82. *See* Frickey, *Big Sleep*, *supra* note 46, at 254; Eskridge & Frickey, *Practical Reasoning*, *supra* note 25, at 340.

As a reactive theory, new textualism on one hand clearly rejects intentionalism, with the most avid new textualists claiming that legislative history should not even be consulted as a secondary source to confirm the apparent meaning of statutory text. On the other hand, in contrast with legal realism, Justice Scalia and other proponents of new textualism advocate reliance on text-oriented canons of construction (such as the plain meaning rule) and clear statement rules to clarify textual ambiguities.[83]

5. Dynamism and Public Values

The new textualists are not the only contemporary interpretive theorists that have responded to the public choice critique of legal process purposivism by refining one of the foundationalist approaches to statutory interpretation. Other commentators, variously described as "new legal process" scholars,[84] "new public law" scholars,[85] or "new maximists,"[86] have made substantial contributions to interpretive theory in the post legal process era. Rather than readjusting textualism in light of the teachings of public choice theory, these scholars for the most part have focused on the contextual approaches of intentionalism and purposivism.[87] In particular, these post legal process scholars have "upgraded" the contextual foundationalist theories with two related observations: (1) courts should interpret statutes dynamically "in light of their current as well as historical context";[88] and (2) judges should openly acknowledge that statutory interpretation "is decisively influenced by background assumptions and values, often controversial, held by the interpreter."[89]

The dynamic model of statutory interpretation rejects the "archeological" notion that "the meaning of a statute is set in stone

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83. *See* Williams, *supra* note 64, at 429; Eskridge, *The New Textualism*, *supra* note 46, at 623–24; Martineau, *supra* note 46, at 13–14. For a specific examination of Scalia's use of the plain meaning rule, literalism, grammatical and structural canons, and clear statement rules, see Karkkainen, *supra* note 53, at 432–56.

84. *See* Eskridge & Frickey, *Legislation Scholarship*, *supra* note 46, at 717–25.

85. *See* Eskridge & Peller, *supra* note 46.

86. *See* Reynolds, *supra* note 46, at 937–38.

87. "Contextualists contend that a statute's true meaning cannot be gleaned by looking at only the statute's words. Rather, the judge must look at the context in which the statute arose." Martineau, *supra* note 46, at 15.

88. Eskridge, *Dynamic Interpretation*, *supra* note 46, at 1554.

89. Eskridge & Peller, *supra* note 46, at 752.

on the date of its enactment."[90] Dynamic construction is "the process of understanding a text created in the past and applying it to a present problem."[91] According to William Eskridge, the dynamic interpretation model recognizes that—in addition to the statutory text and the "original legislative expectations surrounding the statute's creation"—the interpreter should appropriately be cognizant of "the subsequent evolution of the statute and its present context, especially the ways in which the societal and legal environment of the statute has materially changed over time."[92] Thus, under a dynamic approach to interpretation, judges "focus on the current needs or values of society . . . [since the] views, beliefs, or values of a Congress long gone and unaware of the current structure of society are unlikely to provide a useful or meaningful guide for decision."[93]

The current needs and values of society are also deemed an essential part of the interpretive process by theorists who promote the notion that public values are, and should be, important influences in statutory interpretation.[94] The public values theorists agree with the legal realists that "judges mask their policy decisions in originalist rhetoric in an attempt to legitimate [their] decisions."[95] However, public values proponents endorse the importance of background norms in interpretation and urge courts to openly acknowledge the appropriate role played by public values in statutory construction.[96]

Public values theorists also differ from the legal realists with respect to the utility of the canons of construction. Whereas the legal realists exposed and derided the malleability of text-oriented

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90. Aleinikoff, *supra* note 46, at 21. As noted *supra* at note 48 and accompanying text, this historical approach to statutory interpretation has also been referred to as "originalism" and "creationism."

91. WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 616 (1st ed. 1988) (describing Eskridge's theory of dynamic statutory interpretation).

92. Eskridge, *Dynamic Interpretation, supra* note 46, at 1483; *see also* Aleinikoff, *supra* note 46 (contrasting static, "archeological" approach with dynamic, "nautical" model); Martineau, *supra* note 46, at 19–22 (noting connection between dynamism and Eskridge and Frickey's "practical reasoning" approach to statutory interpretation).

93. Zeppos, *supra* note 46, at 1081.

94. *See, e.g.*, Eskridge, *Public Values, supra* note 43; Sunstein, *Interpreting Statutes, supra* note 23.

95. Zeppos, *supra* note 46, at 1082.

96. *See* Zeppos, *supra* note 46, at 1081–83; Eskridge & Frickey, *Legislation Scholarship, supra* note 46, at 702, 718.

canons, scholars such as Cass Sunstein have challenged the proposition that "canons of construction, or background interpretive norms, are an outmoded and unhelpful guide to the courts."[97] Noting that "[d]ebates over statutory meaning are often disputes over interpretive principles,"[98] Sunstein has examined the underlying normative values of commonly invoked canons and has proposed a set of "interpretive principles for the regulatory state."[99] As Nicholas Zeppos has observed, Sunstein's approach to statutory interpretation weds elements of dynamism with the recognition of the role of public values:

> Sunstein urges the rejection of originalism and argues that courts should adopt a hierarchy of background norms—tied to important public values—to be used as presumptive canons of interpretation to decide statutory cases.[100]

D. Classification of the Canons by Function

Although criticism of the canons has continued virtually unabated since the advent of Legal Realism,[101] the canons "continue to be a prominent feature in the federal and state courts . . . [a]nd there is no sign that canons are decreasing in importance."[102] The continued vitality of the canons is due in part to the fact that judges

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97. SUNSTEIN, AFTER THE RIGHTS REVOLUTION, *supra* note 23, at 111.

98. Sunstein, *Interpreting Statutes*, *supra* note 23, at 413.

99. SUNSTEIN, AFTER THE RIGHTS REVOLUTION, *supra* note 23, at 111–92; Sunstein, *Interpreting Statutes, supra* note 23, at 462–508; *see also* Reynolds, *supra* note 46, at 937–38.

100. Zeppos, *supra* note 46, at 1082. Eskridge and Peller also view the dynamic approach to interpretation and reliance on public values as interconnected, if not inseparable. *See* Eskridge & Peller, *supra* note 46, at 752 (arguing that new public law scholars "endorse the importance of [background values and] assumptions (usually expressed as presumptions, clear statement rules, and canons of statutory interpretation) *if and only if they are updated* to reflect the economic and social needs of the modern regulatory state") (emphasis added).

101. *See* SUNSTEIN, AFTER THE RIGHTS REVOLUTION, *supra* note 23, at 148 ("[The Legal Realists'] view of the canons of construction has deeply penetrated modern legal culture. Almost no one has had a favorable word to say about them in many years").

102. *Id.* at 149; *see also* Miller, *supra* note 32, at 1190–91 ("Their very ability to endure, and, indeed, to proliferate suggests that maxims do add something of value and importance."). The current casebooks on statutory interpretation devote considerable attention to the canons of construction. *See, e.g.*, WILLIAM N. ESKRIDGE, JR., AND PHILLIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 634–716 (2d ed. 1995) [hereinafter ESKRIDGE AND FRICKEY, CASES AND MATERIALS ON LEGISLATION (2d ed.)]; OTTO J. HETZEL ET AL., LEGISLATIVE LAW AND PROCESS: CASES AND MATERIALS 389–91, 622–702 (2d ed. 1993).

utilize different maxims of interpretation for different reasons. In some instances, a court may invoke a "text-oriented" canon, either to assist in deciphering an ambiguous statutory provision, or to aid in assessing the proper relationship between different statutes. In other cases, a judge may utilize a "substantive" canon not only to ascertain statutory meaning, but also to further a policy objective or background norm that may or may not be found in the text itself. This dichotomy of text-oriented and substantive canons is not the only way in which to categorize the canons of construction by function,[103] but it serves the purposes of this Article by underscoring the fact that certain canons such as the remedial purpose canon serve not as neutral guides to statutory meaning, but rather as directives to construe ambiguous statutes "liberally" or "strictly" in order to advance substantive goals.

1. Text-Oriented Canons

Text-oriented canons of construction are interpretive rules "designed as short-cuts to the discovery of the legislature's 'true' intent."[104] Such canons attempt to effectuate legislative intent by uncovering the "true" meaning of ambiguous text. Stephen Ross describes text-oriented canons (under the nomenclature of "descriptive canons") as "principles that involve predictions as to what the legislature must have meant, or probably meant, by employing particular statutory language."[105]

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103. *Cf.* ESKRIDGE & FRICKEY, CASES AND MATERIALS ON LEGISLATION (2d ed.), *supra* note 102, at 634–705; SUNSTEIN, AFTER THE RIGHTS REVOLUTION, *supra* note 23, at 150–57; DICKERSON, *supra* note 38, at 228; Daniel B. Rodriguez, *The Presumption of Reviewability: A Study in Canonical Construction and its Consequences*, 45 VAND. L. REV. 743, 743–44 (1992); Stephen F. Ross, *Where Have You Gone, Karl Llewellyn? Should Congress Turn its Lonely Eyes to You?*, 45 VAND. L. REV. 561, 563 (1992); David L. Shapiro, *supra* note 59, at 927–41.

104. Rodriguez, *supra* note 103, at 743. These canons have also been referred to as "statute-defining" canons. *See* Denise W. DeFranco, Chevron *and Canons of Statutory Construction*, 58 GEO. WASH. L. REV. 829, 839 (1990).

105. Ross, *supra* note 103, at 563; *see also* DICKERSON, *supra* note 38, at 228 (describing text-oriented canons as "lexicographical judgments of how legislatures tend to use language and its syntactical patterns"); David L. Shapiro, *supra* note 59, at 927 (saying that certain canons are "strictly 'linguistic' or 'syntactic' in the sense that they do not, on their face at least, express any policy preference, but simply purport to be helpful ways of divining the nature and limits of what the drafters of the legislation were trying to achieve").

Examples of text-oriented canons include such venerable maxims of word meaning as *noscitur a sociis*,[106] *ejusdem generis*,[107] and *expressio unius est exclusio alterius*.[108] Other text-oriented canons created by courts include the "ordinary meaning" and "whole act" rules of interpretation.[109] An example of a text-oriented canon that originates from Congress is the grammatical directive that, "unless the context indicates otherwise, words importing the singular include and apply to several persons, parties or things; [and] words importing the plural include the singular . . . ."[110]

The text-oriented canons described above are linguistic or syntactic guides "for finding meaning from the words of the statute and nothing else."[111] When an issue of statutory construction cannot be resolved directly by these canons, other text-oriented canons may be employed as a "second-best strategy."[112] These canons of construction have evolved to guide courts in divining the legislature's preferred resolution of issues that remain unanswered after

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106. Under the principle of statutory construction known as *noscitur a sociis* ("it is known from its associates"), a general term in a list should be interpreted narrowly "in order to avoid the giving of unintended breadth to the Acts of Congress." Jarecki v. G.D. Searle & Co., 367 U.S. 303, 307 (1961); *see also* Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 115 S. Ct. 2407, 2415, 2424 (1995); Gustafson v. Alloyd Co., Inc., 115 S. Ct. 1061, 1069–70, 1075 (1995).

107. A variant of *noscitur a sociis*, *ejusdem generis* "suggests that where general words follow a specific enumeration, the general words should be limited to persons or things similar to those enumerated." SUNSTEIN, AFTER THE RIGHTS REVOLUTION, *supra* note 23, at 152; *see also* PUD No. 1 of Jefferson County v. Washington Dep't of Ecology, 114 S. Ct. 1900, 1917 (1994) (Thomas, J., dissenting) (applying canon); David L. Shapiro, *supra* note 59, at 929–31.

108. This maxim "means 'inclusion of one thing indicates exclusion of the other.' The notion is one of negative implication: the enumeration of certain things in a statute suggests that the legislature had no intent of including things not listed or embraced." ESKRIDGE & FRICKEY, CASES AND MATERIALS ON LEGISLATION (2d ed.), *supra* note 102, at 638; *see also* Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 113 S. Ct. 1160, 1163 (1993) (applying canon); David L. Shapiro, *supra* note 59, at 927–29.

109. The "ordinary meaning" canon directs that words are to receive their general, everyday meaning unless it is clear that a more specialized meaning was intended in view of the technical nature of the statute. *See* David L. Shapiro, *supra* note 59, at 931–34. The "whole act" rule states that statutory provisions should be interpreted in the context of the entire statute. *See* United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 371 (1988) (stating that statutory interpretation is "holistic endeavor"); ESKRIDGE & FRICKEY, CASES AND MATERIALS ON LEGISLATION (2d ed.), *supra* note 102, at 635–45; and SUNSTEIN, AFTER THE RIGHTS REVOLUTION, *supra* note 23, at 151.

110. 1 U.S.C. § 1 (1994). *See* Wilson v. Omaha Indian Tribe, 442 U.S. 653, 664–65 (1979) (applying statutory canon).

111. ESKRIDGE & FRICKEY, CASES AND MATERIALS ON LEGISLATION (2d ed.), *supra* note 102, at 634; *see also* Frickey, *Marshalling Past and Present*, *supra* note 51, at 413.

112. Rodriguez, *supra* note 103, at 744.

resort to grammatical truisms. For example, interpretive questions often arise regarding the interplay between the statute at issue and other statutory enactments. In such cases, a court might invoke the canon that implied repeals are disfavored[113] or the canon that the specific statute prevails over the more general one.[114] These canons are text-oriented insofar as their focus is not the furthering of a particular policy objective; rather, it is determining how the legislature would want the interpretive issue to be decided.[115]

It should be noted that certain, primarily text-oriented canons of construction also further policy objectives and substantive goals. For example, the plain meaning rule is clearly text-oriented insofar as it counsels that the judicial inquiry into a statute's meaning should end with the text whenever the statute "speaks with clarity to an issue."[116] The plain meaning rule, however, also furthers the objectives of the separation of powers doctrine in that it prods Congress to fulfill its constitutionally prescribed role as the legislating branch of government by being more precise when enacting laws.[117]

2. *Substantive Canons*

In contrast to text-oriented canons, the substantive canons "do *not* purport to describe accurately what Congress actually intended or what the words of a statute mean, but rather direct courts to construe any ambiguity in a particular way in order to further some policy objective."[118] For example, when a judge invokes the substantive canon that federal statutes must be interpreted liberally in favor of Indians,[119] the result will quite likely *not* be the enacting Congress' preferred construction. In fact, the canon may produce

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113. *See, e.g.*, County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 502 U.S. 251, 259–64 (1992) (citations ommitted).

114. *See, e.g.*, Morton v. Mancari, 417 U.S. 535, 550–51 (1974).

115. *See* SUNSTEIN, AFTER THE RIGHTS REVOLUTION, *supra* note 23, at 153–54; DICKERSON, *supra* note 38, at 228.

116. Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 475 (1992).

117. *See* SUNSTEIN, AFTER THE RIGHTS REVOLUTION, *supra* note 23, at 154–55; Healy, *supra* note 13, at 20 n.106; Eskridge, *The New Textualism*, *supra* note 46, at 648–49.

118. Ross, *supra* note 103, at 563 (emphasis added). Professor Ross refers to substantive canons as "normative canons." *See also* Frickey, *Marshalling Past and Present*, *supra* note 51, at 414 (describing substantive canons as "policy-based canons" that "implicate certain important values"); DeFranco, *supra* note 104, at 839–40 (describing substantive canons as "statute-applying" canons).

119. *See, e.g.*, Hagen v. Utah, 114 S. Ct. 958, 971–72 (1994) (Blackmun, J.,

"anti-intentional" results in cases involving statutes that were meant by the enacting Congress to benefit non-Indians—such as the allotment acts which opened up tribal lands for settlement.[120] A court applying the Indian canon is not seeking to ascertain precisely what Congress intended; rather, it is weaving into the interpretive process a policy objective (redress of historical mistreatment of Native Americans) that is found neither in the statute itself nor in its legislative history.[121]

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dissenting); South Dakota v. Bourland, 113 S. Ct. 2309, 2324 (1993) (Blackmun, J., dissenting); Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985).

120. In the latter half of the 19th century, Congress enacted a series of statutes, culminating in the General Allotment Act of 1887, 24 Stat. 388 (1887) (current version at 25 U.S.C. §§ 331–358 (1988)), which authorized the sale of communal tribal lands to individual Indians. *See* Blake A. Watson, *State Acquisition of Interests in Indian Land: An Overview*, 10 AM. INDIAN L. REV. 219, 224–26 (1982). Although the stated objective was to "assimilate" the Indian into the dominant white culture, the allotment statutes also provided that "surplus" unallotted lands—those reservation lands remaining after allotment—could be opened up for purchase and settlement by non-Indians. *Id.* at 224 n.27.

Congressional enactment of the allotment acts was clearly driven in part by "the desire of non-Indians to settle upon reservation lands." DeCoteau v. District County Court, 420 U.S. 425, 431–32 (1975). When Congress passed such laws, the anticipated consequence was the imminent demise of the reservation system. Nevertheless, the Supreme Court has "never been willing to extrapolate from this expectation a specific congressional purpose of diminishing reservations with the passage of every surplus land Act." Solem v. Bartlett, 465 U.S. 463, 468–69 (1984). To the contrary, the Court requires "substantial and compelling evidence of a congressional intention" to diminish before it will hold that the boundaries of an Indian reservation were reduced by legislation authorizing entry and settlement by non-Indians. *Id.* at 472. This imposition of a heightened burden of proof—which in some circumstances may thwart, not advance, the intent of the enacting Congress—dovetails nicely with the substantive canon that statutes are to be construed liberally in favor of Indians. *See, e.g.*, Duncan Energy Co. v. Three Affiliated Tribes of the Fort Berthold Reservation, 27 F.3d 1294, 1297 (8th Cir. 1994) ("Throughout the inquiry, ambiguities are to be resolved in favor of the Indians, and diminishment should not be found lightly."), *cert. denied*, 115 S. Ct. 779 (1995); Ute Indian Tribe v. Utah, 521 F. Supp. 1072, 1154 (D. Utah 1981) (noting that court's holdings on present territorial extent of Uintah and Ouray Indian Reservation are "fortified" by canon that statutes passed for benefit of dependent Indian tribes are to be liberally construed, with doubtful expressions being resolved in favor of Indians), *aff'd in part and rev'd in part*, 716 F.2d 1298 (10th Cir. 1983), *on rehearing en banc*, 773 F.2d 1087 (10th Cir. 1985), *cert. denied*, 479 U.S. 994 (1986). Canons of statutory construction favoring Indians, of course, are not outcome determinative. *See, e.g.*, Hagen v. Utah, 114 S. Ct. 958, 965–71 (1994) (acknowledging canon that doubtful expressions should be construed in favor of Indians, yet holding Congress had manifested definite intent to diminish boundaries of Uintah and Ouray Indian Reservation); Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 586–87 (1977) (acknowledging canon, yet finding intent to diminish reservation boundaries).

121. *See* SUNSTEIN, AFTER THE RIGHTS REVOLUTION, *supra* note 23, at 156–57 ("There is no reason to think that [the Indian canon] will tend accurately to capture statutory meaning in particular cases."); Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CAL. L. REV. 1137, 1142 (1990) [hereinafter Frickey, *Congressional Intent and Federal Indian Law*] (conlcuding after surveying important Indian law cases involving interpretation of federal statutes and treaties that "congressional intent was only weakly related to the outcomes of these

The substantive canons fall into two groups. A few of the substantive canons are subject-specific directives regarding the interpretation of statutes relating to particular areas of the law. The Indian canon noted above falls into this category, as do the other canons for construing treaties and statutes affecting Indians.[122] Other subject-specific canons call for the strict construction of particular types of statutes, such as tax laws and certain kinds of public grants.[123]

The second category of substantive canons includes those rules of interpretation that are not directed at particular fields of law, but which are designed to promote constitutional principles or advance other generalized legal policies and goals.[124] Substantive canons with a constitutional basis include the maxim that statutes should be construed so as to avoid constitutional concerns[125] and the notion that Congress must display "a clear and manifest purpose" to preempt state laws in traditional fields of state regulation.[126] These "meta-canons" are not statute-specific, but apply across-the-board, as does the substantive policy presumption of reviewability of administrative agency decisions,[127] and the presumption that Congress will not withdraw the traditional equitable discretion of the courts.[128] Most "clear statement" principles of interpretation, which have

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disputes"); Eskridge & Frickey, *Practical Reasoning*, *supra* note 25, at 374–75 (noting use by courts of "evolutive considerations" when interpreting legislation enacted at time when federal policy was to force assimilation of Native Americans into mainstream society).

122. *See infra* text accompanying notes 494–498.

123. *See* ESKRIDGE & FRICKEY, CASES AND MATERIALS ON LEGISLATION (2d ed.), *supra* note 102, at 653–54. The Supreme Court has also called for expansive readings of federal statutes relating to members of the armed forces. *See, e.g.*, Mansell v. Mansell, 490 U.S. 581, 597–604 (1989) (O'Connor, J., dissenting) (Uniformed Services Former Spouses' Protection Act); Coffy v. Republic Steel Corp., 447 U.S. 191, 196 (1980) (Vietnam Era Veteran's Readjustment Assistance Act).

124. *See generally* SUNSTEIN, AFTER THE RIGHTS REVOLUTION, *supra* note 23, at 155–57; ESKRIDGE & FRICKEY, CASES AND MATERIALS ON LEGISLATION (2d ed.), *supra* note 102, at 654–55.

125. *See, e.g.*, Concrete Pipe & Prod. of Cal., Inc. v. Construction Laborers Pension Trust for S. Cal., 113 S. Ct. 2264, 2282–83 (1993).

126. *See, e.g.*, CSX Transp., Inc. v. Easterwood, 113 S. Ct. 1732, 1737 (1993).

127. *See* Abbott Lab. v. Gardner, 387 U.S. 136, 141 (1967) (quoting Rusk v. Cort, 369 U.S. 367, 379–80 (1962)) (stating that when review of agency decision is sought under Administrative Procedure Act, "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review"); *see generally* Rodriguez, *supra* note 103, 751–65.

128. *See, e.g.*, Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 544 (1987) (finding no "clear indication" in statute at issue "that Congress intended to deny federal district courts their traditional equitable discretion"); Weinberger v. Romero-Barcelo, 456 U.S. 305, 320 (1982).

been increasingly relied upon by the Supreme Court, fall into this category.[129]

Also included in this second category are the following three broad-based substantive canons: the rule of lenity; the canon that statutes in derogation of the common law should be narrowly construed; and the remedial purpose canon. The rule of lenity, which instructs courts to strictly construe criminal statutes, is "rooted in notions of due process, which require clear notice before the imposition of criminal liability."[130] The derogation canon and remedial purpose canon—which go hand-in-hand and usually appear in cases construing civil legislation[131]—are considered together below.

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129. *See* William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 68–69 (1994) ("Some of the substantive canons, however, have now been developed as more powerful 'clear statement rules,' which are presumptions that can only be rebutted by clear statements in the statutory text."). Clear statement principles have been developed by courts "to ensure an unambiguous statement from Congress before allowing certain results to be reached." Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2110–11 (1990). For example, "waivers of federal sovereign immunity must be 'unequivocally expressed' in the statutory text." United States v. Idaho *ex rel.* Director, Idaho Dep't of Water Resources, 113 S. Ct. 1893, 1896 (1993) (citing Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 95 (1990)). Unequivocal statements from Congress are also required to abrogate the immunity of States under the Eleventh Amendment, *see, e.g.*, Pennsylvania v. Union Gas Co., 491 U.S. 1, 7 (1989), and to give federal statutes extraterritorial effect, *see, e.g.*, Smith v. United States, 113 S. Ct. 1178, 1183 (1993).

The clear statement principles seek to further their underlying policy objectives by ensuring that, before the courts will give effect to statutes that invade constitutional or other sensitive areas, Congress must fulfill its legislative role and speak directly and unmistakably on the issue. *See* ESKRIDGE & FRICKEY, CASES AND MATERIALS ON LEGISLATION (2d ed.), *supra* note 102, at 687–705; Frickey, *Marshalling Past and Present*, *supra* note 51, at 415 (stating that primary justification of clear statement rules "is to guard against erosion of constitutional structures that are difficult to protect by more direct forms of judicial review"); David L. Shapiro, *supra* note 59, at 940–41 (noting differences between clear statement principles and plain meaning rule).

130. SUNSTEIN, AFTER THE RIGHTS REVOLUTION, *supra* note 23, at 156; *see also* ESKRIDGE & FRICKEY, CASES AND MATERIALS ON LEGISLATION (2d ed.), *supra* note 102, at 655–75; POSNER, THE FEDERAL COURTS, *supra* note 69, at 283; Sarah Newland, Note, *The Mercy of Scalia: Statutory Construction and the Rule of Lenity*, 29 HARV. C.R.-C.L. L. REV. 197, 199–212 (1994); David L. Shapiro, *supra* note 59, at 935–36; Craig W. Palm, *RICO and the Liberal Construction Clause*, 66 CORNELL L. REV. 167, 176 (1980).

131. The remedial purpose canon, however, has on occasion been invoked to interpret statutes containing both civil and penal provisions. *See, e.g.*, SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344, 353 (1943) (Securities Act of 1933); Johnson v. Southern Pac. Co., 196 U.S. 1, 16–17 (1904) (railroad safety act); United States v. Boldt, 929 F.2d 35, 41 (1st Cir. 1991) ("[F]ederal water pollution laws, including their penal provisions, are construed in a broad, rather than a narrow fashion.").

III. The Remedial Purpose Canon

The remedial purpose canon came into being at a time when the common law was the predominant source of law. As a rule of statutory construction, the canon was initially utilized by judges who were faced with the task of integrating a relatively small number of statutory enactments into a preexisting common law system. By the early part of the twentieth century, however, statutes were replacing the common law as the primary source of law in the United States. As noted below, this "statutorification"[132] of American law had consequences for both the remedial purpose canon and its competing principle, the canon that statutes in derogation of the common law should be narrowly construed.

A. The Origins and Evolution of the Canon

The remedial purpose canon grew out of the "mischief rule" of *Heydon's Case*. According to Sir Edward Coke, statutes were enacted in order to deal with "mischief[s] and defect[s] for which the common law did not provide."[133] In order to properly integrate a statute into the common law, courts were instructed to ascertain two things: why the existing common law was deemed by the Parliament to be lacking, and "[w]hat remedy the Parliament hath resolved and appointed to cure the disease . . . ."[134] Only after identifying both the problem perceived by the legislature and its proposed solution was a court ready to discharge its judicial function of construing the statutory enactment in a manner "as shall suppress the mischief, and advance the remedy . . . ."[135]

Although Coke instructed in *Heydon's Case* that legislation be construed in a manner consistent with its purpose,[136] he did not

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132. The term comes from Guido Calabresi, A Common Law for the Age of Statutes 1 (1982). *See also* Frickey, *Big Sleep*, *supra* note 46 at 242 ("[W]hat Calabresi meant was that statutes, not the common law, provide the boundaries for most legal inquiry.").

133. 3 Co. Rep. 7a, 7b, 76 Eng. Rep. 637, 638 (Ex. 1584).

134. *Id.* at 76.

135. *Id.*; *see generally* L.H. LaRue, *Statutory Interpretation: Lord Coke Revisited*, 48 U. Pitt. L. Rev. 733 (1987).

136. *See* 3 Co. Rep. at 7b, 76 Eng. Rep. at 638 ("[T]he office of all the Judges is . . . to add force and life to the cure and remedy, according to the true intent of the makers of the Act . . . .").

expressly admonish judges to engage in an "expansive" or "liberal" reading of statutory terms.[137] Nevertheless, the "mischief rule" of *Heydon's Case* served in the eighteenth century as the basis for the canon that remedial statutes shall be liberally construed. According to William Blackstone, statutes are "either *declaratory* of the common law, or *remedial* of some defects therein."[138] Blackstone agreed with Coke that, in construing "remedial" statutes, judges should strive to suppress the mischief caused by the preexisting common law and advance the remedy provided by the legislature. Blackstone, however, superimposed a liberal/strict interpretive methodology on the purposivism of *Heydon's Case*. Consequently, in order to effectuate legislative purpose, statutory enactments of a "remedial" nature were to receive an expansive or liberal construction.[139]

William Blatt, in his article on the history of statutory interpretation, notes that the Blackstonian choice between liberal and strict interpretation of statutes was adopted and amplified by American jurists and commentators in the nineteenth and early twentieth centuries.[140] During this same period courts began to examine the

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137. In fact, it has been suggested that Coke's mischief rule was intended "to make sure that the statute fitted into the common-law system and disturbed it as *little* as possible." Radin, *Short Way with Statutes*, *supra* note 39, at 421 (emphasis added). In Radin's view, statutes in 16th-century England were enacted for one of three reasons: (1) to restate and emphasize the common law; (2) to supplement the common law by dealing with new situations that the common law did not know; and (3) to correct the common law. *Id.* at 390. According to Radin, the assumption behind the "mischief rule" of *Heydon's Case* was that the statute in question was enacted neither in aid of the common law, nor in derogation of the common law, but rather to address problems for which the common law did not provide. *Id.* at 388. Since the common law was deemed "an almost complete and wholly rational system," a supplemental statute should be construed to "suppress *only* the mischief it was intended to cure." *Id.* (emphasis added).

138. 1 BLACKSTONE, *supra* note 40, at *86. Blackstone defined remedial statutes as those enactments "which are made to supply such defects and abridge such superfluities in the common law as arise either from the general imperfection of all human laws, from change of time and circumstances, from the mistakes and unadvised determinations of unlearned (or even learned) judges, or from any other cause whatsoever . . . ." *Id.*

139. Blackstone did not include the remedial purpose canon in his list of ten "rules to be observed with regard to the construction of statutes . . . ." 1 BLACKSTONE, *supra* note 40, at *87. He did, however, expressly state that statutes against frauds—one type of remedial legislation—"are to be liberally and beneficially expounded." *Id.* at *88. Edward Christian of Cambridge University, one of the first annotators of Blackstone's *Commentaries*, made the connection between the specific rule of liberal construction of statutes against frauds and the more generalized remedial purpose canon. *Id.* at *88 n.19 ("It is a fundamental rule of construction, that . . . remedial Statutes [such as are mentioned in the next paragraph for prevention of frauds] 'shall be construed liberally'."); *see generally* Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 583–84 (1989–1990).

140. *See* Blatt, *supra* note 46, at 806–08. For examples of treatises of the period

relationships between the remedial purpose canon and the two other broad-based substantive canons: the rule of lenity (i.e., strict construction of penal statutes) and the canon that statutes in derogation of the common law should be narrowly construed.

Proponents of the liberal remedial purpose canon had few theoretical qualms with the strict rule of lenity, since the two canons ostensibly operated in mutually exclusive spheres of law.[141] However, a tension was apparent in the dichotomy between statutes in derogation of common law, which are to be strictly construed, and remedial statutes, which are to be given a liberal construction.[142] Whereas the "mischief rule" of *Heydon's Case* was concerned with interpreting statutes that supplemented the common law, the remedial purpose canon applied not only to statutes that supplemented preexisting judge-made law, but also to "corrective" legislation.[143] A statute designed to "correct" the common law, however, was not only a "remedial" statute, but also a statute enacted "in derogation" of the common law.[144]

This tension between the remedial purpose and derogation canons was for the most part resolved by the "statutorification" of American law, a process that was well underway by the mid-twen-

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which adopted the liberal/strict methodology, see BEAL, *supra* note 44; J. G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION (John Lewis ed., 2d ed. 1904); 1 BOUVIER, *supra* note 44.

141. However, as discussed *infra* note 154 and accompanying text, co-existence became more precarious when courts were faced with "remedial" statutes containing "penal" provisions.

142. The dichotomy, and resulting tension, is noted in ESKRIDGE & FRICKEY, CASES AND MATERIALS ON LEGISLATION (2d ed.), *supra* note 102, at 652–53. *See also* Llewellyn, *supra* note 27, at 401.

143. As noted above, whereas Radin set forth three purposes for statutory enactments in a common law system (to restate, correct, or supplement the common law), Blackstone characterized statutes as either declaratory of the common law or remedial of defects therein. Thus, the canon of liberal construction of remedial statutes encompassed both supplementary and corrective statutes. Blackstone's broadening of the application of the "mischief rule" of *Heydon's Case*—and his concomitant superimposition of a liberal/strict interpretive methodology—caused the remedial purpose canon to conflict with the derogation canon. *Cf.* Radin, *Short Way with Statutes*, *supra* note 39, at 390 (concluding that "mischief rule" of *Heydon's Case* applied only to statutes which supplemented common law, since "correction of the law was to be undertaken with circumspection").

144. *See* ESKRIDGE & FRICKEY, CASES AND MATERIALS ON LEGISLATION (2d ed.), *supra* note 102, at 653 ("But what remedial statute is not in derogation of the common law?"); DICKERSON, *supra* note 38, at 206 (stating that derogation canon "makes little sense, because most statutes that affect the common law are enacted for the very purpose of changing it"); Jefferson B. Fordham & J. Russell Leach, *Interpretation of Statutes in Derogation of the Common Law*, 3 VAND. L. REV. 438, 445 (1950) ("[A] statute may be said to be at once remedial and in derogation of the common law.").

tieth century.[145] The derogation canon served as ammunition for judges fighting a rear guard action against the ascendence of statutory law over common law.[146] However, as statutes began to occupy the field and heralded the rise of the regulatory state, the canon strictly construing statutes in derogation of the common law lost much of its force and became subordinate to the remedial purpose canon.[147]

The statutorification of American law and the demise of the derogation canon had consequences for the continued legitimacy and application of the remedial purpose canon. The original justification for the remedial purpose canon—to guide courts faced with the task of integrating statutory enactments into a system of judge-made law—became less relevant in an era where statutory regulation was no longer the exception to the common law rule. The connection between the "mischiefs" and "defects" of the common law and the "remedial" aspect of the statutory enactment likewise was given less emphasis. Instead, the courts began to selectively apply the canon based on the intrinsic "remedial" nature of a statute. In an *ad hoc* manner, certain types of statutes were deemed to be "remedial" and therefore deserving of a liberal construction. This evolution of the remedial purpose canon raised a definitional issue: if the remedial purposes of statutes are no longer judged in reference to the common law, what then are the defining characteristics of a "remedial" statute?

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145. *See* Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 527 (1947) ("[E]ven as late as 1875 more than 40% of the controversies before the Court were common-law litigation, fifty years later only 5%, while today cases not resting on statutes are reduced almost to zero."). While Frankfurter's report of the "death" of common law has turned out to be exaggerated, his observation regarding the increasing importance of statutes was prescient in light of the enactment in subsequent decades of far-reaching federal legislation, including civil rights, health and safety, and environmental laws.

146. Martineau, *supra* note 46, at 9; *see also* Blatt, *supra* note 46, at 818; SUNSTEIN, AFTER THE RIGHTS REVOLUTION, *supra* note 23, at 6; Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383 (1908).

147. *See* ESKRIDGE & FRICKEY, CASES AND MATERIALS ON LEGISLATION (2d ed.), *supra* note 102, at 716–17. The subordinate derogation canon, however, is not completely moribund. *See, e.g.*, United States v. Texas, 113 S. Ct. 1631, 1634 (1993); Robert C. Herd & Co. v. Krawill Mach. Corp., 359 U.S. 297, 304–05 (1959); David L. Shapiro, *supra* note 59, at 936–37.

B. What Is Meant by "Remedial"?

In order to make use of the remedial purpose canon, a court must first decide whether the statute before it is "remedial" in nature. Although "remedial legislation" is "a vague and loosely applied term,"[148] courts and commentators have attempted general definitions. A leading American treatise on statutory construction offers the following guidance:

> Every statute that makes any change in the existing body of law, excluding only those enactments which merely restate or codify prior law, can be said to "remedy" some flaw in the prior law or some social evil. The mere fact that a statute is characterized as "remedial," therefore, is of little value in statutory construction unless the term "remedial" has for this purpose a more discriminate meaning . . .
>
> An examination of decisions shows that courts have assumed that the term "remedial" has a limited meaning in two respects: (1) Usually "remedial" is used in connection with legislation which is not penal or criminal in nature, in that such laws do not impose criminal or other harsh penalties. (2) The term "remedial" is often employed to describe legislation which is procedural in nature[;] i.e., it does not affect substantive rights. One general definition of a remedial statute is a statute which gives rise to a cause of action to recover compensation suffered by an injured person.[149]

Three main points can be drawn from this statement. First, for purposes of applying the remedial purpose canon, the term "remedial" has become a term of art. Even though "all sound legislation is intrinsically remedial,"[150] all laws are *not* deemed "remedial" for purposes of applying the liberal construction canon.[151]

Second, in applying the canon that remedial legislation should be liberally construed in order to effectuate the beneficial purposes for which it was enacted, the term of art "remedial" is intended "to mean the converse of legislation imposing criminal or other

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148. Rudolph H. Heimanson, *Remedial Legislation*, 46 MARQ. L. REV. 216, 216 (1962).

149. 3 SUTHERLAND, *supra* note 1, § 60.02, at 152–53.

150. Heimanson, *supra* note 148, at 218.

151. *See* David L. Shapiro, *supra* note 59, at 938 ("Though a comprehensive study of all the decisions remains to be done, my own reading in the field suggests that the 'remedial' canon has been given far less scope than its broad wording would suggest . . . ."); Scalia, *supra* note 139, at 583.

severe penalties."[152] Courts must therefore determine whether a statutory provision is penal in nature,[153] and whether to apply the remedial purpose canon when interpreting statutes that contain both penal and remedial provisions.[154]

The final point is that, as in the case of obscenity,[155] a precise definition of the term "remedial" has proved impossible. Most generalized efforts to supply "a more discriminate meaning" to the term "remedial" have succeeded only in providing some limited

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152. 3 SUTHERLAND, *supra* note 1, § 60.03, at 159.

153. In Huntington v. Attrill, 146 U.S. 657, 673–74 (1892), the Supreme Court said that the test of whether a statute is remedial or penal "depends upon the question whether its purpose is to punish an offense against the public justice of the state, or to afford a private remedy to a person injured by the wrongful act."

The remedial/penal characterization issue has frequently arisen in cases interpreting securities and antitrust legislation. *See, e.g.*, United States v. United States Gypsum Co., 438 U.S. 422, 443 n.19 (1978) (Sherman Act); SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344, 353 (1943) (1933 Securities Act); Northern Sec. Co. v. United States, 193 U.S. 197, 358 (1904) (Sherman Act); Ethicon, Inc. v. Aetna Casualty & Surety Co., 737 F. Supp. 1320, 1335-36 (S.D.N.Y. 1990) (Sherman Act); SEC v. Starmont, 31 F. Supp. 264, 267 (E.D. Wash. 1940) (1933 Securities Act).

The remedial/penal distinction may implicate constitutional questions as well. *See, e.g.*, United States v. Halper, 490 U.S. 435, 448–49 (1989) (holding that "under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution.").

154. The general response, when a statute is penal in part and remedial in part, is that "the remedial provisions may be liberally construed and the penal sections and clauses dealt with strictly . . . ." Fordham & Leach, *supra* note }, at 445; *see also* 3 SUTHERLAND, *supra* note 1, § 60.04, at 162–64; Bruce A. Markell, *Bankruptcy, Lenity, and the Statutory Interpretation of Cognate Civil and Criminal Statutes*, 69 IND. L.J. 335, 366 (1994) (noting cases holding that strict construction on penal clause, and liberal construction on remedial clause, in same act, is not proper); Bryan T. Camp, *Dual Construction of RICO: The Road Not Taken in* Reves, 51 WASH. & LEE L. REV. 61, 62 (1994) (asserting that, since "RICO has both a remedial and punitive purpose to it", it should be "interpreted narrowly in some cases and broadly in others, depending on the nature of the issue before the court"). *But see* United States v. Rivera, 884 F.2d 544, 546 (11th Cir. 1989) (noting that rule of lenity inapplicable when criminal statute at issue, 21 U.S.C. § 853, contains "clear legislative directive to the contrary" by stating that its provisions shall be liberally construed to effectuate its remedial purposes), *cert. denied*, 494 U.S. 1018 (1990); Mark J. Dorval, Note, *Discharge of Pollutants Into the Nation's Waters: What Does the CWA Prohibit—* United States v. Plaza Health Laboratories, Inc., 13 TEMP. ENVTL. L. & TECH. J. 121 (1994) (arguing that rule of lenity should not require court to deviate, in criminal case, from trend of broadly construing Clean Water Act to effectuate its remedial goals); Livingston Hall, *Strict or Liberal Construction of Penal Statutes*, 48 HARV. L. REV. 748, 760–62 (1935) (outlining argument for liberal construction of penal statutes).

155. Justice Stewart, in his concurring opinion in Jacobellis v. Ohio, 378 U.S. 184, 197 (1964), offered the famous "I know it when I see it" test not so much as a criticism of the Supreme Court's efforts to describe what constitutes obscenity, but rather more as an acknowledgement that the Court "was faced with the task of trying to define what may be indefinable." *Id.* (Stewart, J., concurring).

guidance in demarcating the canon's boundaries.[156] As a result, the remedial purpose canon has been criticized for being imprecise in terms of its coverage by proponents of legal realism,[157] public choice theory,[158] new textualism,[159] and public values.[160] Despite

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156. *See, e.g.*, 3 SUTHERLAND, *supra* note 1, § 60.02, at 152 ("[R]emedial statutes are those which provide a remedy, or improve or facilitate remedies already existing for the enforcement of rights and the redress of injuries. They also include statutes intended for the correction of defects, mistakes, and omissions in the civil institutions and the administration of the state."); Heimanson, *supra* note 148, at 217 ("[A] remedy is cure for an ill, the improvement of a situation, the filling of a gap."); United States v. Kairys, 782 F.2d 1374, 1381 (7th Cir. 1986) ("In order for a statute to be considered remedial it must be one that neither enlarges nor impairs substantive rights but relates to the means and procedures for enforcement of those rights."), *cert. denied*, 476 U.S. 1153 (1986); SEC v. Starmont, 31 F. Supp. 264, 267 (E.D. Wash. 1940) ("A remedial enactment is one that seeks to give a remedy for an ill.").

157.

> When we read that laws enacted "in the interest of the public welfare or convenience, for the construction of works of great public utility, for the protection of human life or in regard to the rights of citizenship; for the prevention of fraud; or providing remedies against public or private wrongs, should be liberally construed," we are not aided much by an enumeration which includes almost every type of legislation we can imagine . . . .

Radin, *Statutory Interpretation*, *supra* note 57, at 880.

158. *See* POSNER, THE FEDERAL COURTS, *supra* note 69, at 278–79 (noting that term "remedial" applies "nowadays [to] almost every statute that does not prescribe penal sanctions"); *see also* Lane, *supra* note 66, at 657; Ian Shapiro, *Richard Posner's Praxis*, 48 OHIO ST. L.J. 999, 1019 (1987); Posner, *Statutory Interpretation*, *supra* note 71, at 808–09.

159. Although Justice Scalia, as a proponent of the new textualism, supports the employment of text-oriented canons to resolve questions of statutory construction, *see* Martineau, *supra* note 46, at 13; Eskridge, *The New Textualism*, *supra* note 46, at 663–66, the same cannot be said about the substantive remedial purpose canon. In fact, Scalia has stated that the remedial purpose canon "is surely among the prime examples of lego-babble," and has gone so far as to include the maxim in a list of "my most hated legal canards." Scalia, *supra* note 139, at 581; *see also* David Boling, *The Jurisprudential Approach of Justice Antonin Scalia: Methodology Over Result?*, 44 ARK. L. REV. 1143, 1193 n.294 (1991); Director v. Newport News Shipbuilding & Dry Dock Co., 115 S.Ct. 1278, 1288 (1995) (referring to remedial purpose canon as "that last redoubt of losing causes").

Like Max Radin, Scalia faults the canon for being imprecise both in its coverage and its application. In terms of the scope of the remedial purpose canon, Scalia grandly declares "that there is not the slightest agreement on what its subject—the phrase 'remedial statutes'—consists of." Scalia, *supra* note 139, at 583. Scalia rejects the all-encompassing literal definition of the term "remedial" since "if *all* statutes were liberally construed *none* would be—the norm having been gobbled up by the exception." *Id.* In the same fashion, the distinction between "remedial" and "penal" statutes is deemed illusory and unhelpful. *Id.* at 583–86.

160. *See* SUNSTEIN, AFTER THE RIGHTS REVOLUTION, *supra* note 23, at 156 ("The frequently invoked idea that 'remedial statutes should be broadly construed' is another largely useless canon. All statutes are in a sense remedial; it would be odd to suggest that

this problem of indeterminacy, certain categories of statutes have consistently been held to be appropriate candidates for the employment of the remedial purpose canon.[161]

C. When Is the Canon Most Often Invoked?

In practice, the remedial purpose canon has most often been invoked when the statute at issue is protective in nature.[162] For

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all statutes should be broadly construed."); *see also* Sunstein, *Interpreting Statutes*, *supra* note 23, at 459 n.201, 507.

161. Cass Sunstein's renunciation of the remedial purpose canon, for example, should not be seen as a rejection of the idea that *particular* types of statutes should receive liberal constructions in order to further their underlying remedial objectives. Indeed, Sunstein has devoted considerable energy towards developing his own set of "interpretive principles for the regulatory state" which advocate liberal readings of certain statutes. *See* SUNSTEIN, AFTER THE RIGHTS REVOLUTION, *supra* note 23, at 237–38; Sunstein, *Interpreting Statutes*, *supra* note 23, at 507–08. For example, in order to counteract the problem of implementation failure, Sunstein proposes that courts should broadly construe statutes that protect traditionally disadvantaged groups. *See* SUNSTEIN, AFTER THE RIGHTS REVOLUTION, *supra* note 23, at 183, 238; Sunstein, *Interpreting Statutes*, *supra* note 23, at 483–85, 508. Thus, Sunstein endorses both the notion of liberally interpreting civil rights legislation and the "well-established idea that statutes should be interpreted in favor of Indian tribes . . . ." Sunstein, *Interpreting Statutes*, *supra* note 23, at 483; *see also* SUNSTEIN, AFTER THE RIGHTS REVOLUTION, *supra* note 23, at 183. *But see* Frickey, *Marshalling Past and Present*, *supra* note 51, at 425 (arguing that Indian canon "is essentially structural and institutional and was not established to promote equality or to combat political powerlessness").

More significant for this Article's purposes is the fact that Sunstein advocates that statutes protecting nonmarket values should receive a liberal construction by the courts. *See* SUNSTEIN, AFTER THE RIGHTS REVOLUTION, *supra* note 23, at 172, 183–85, 238; Sunstein, *Interpreting Statutes*, *supra* note 23, at 478, 485–86, 508. Because environmental statutes "are frequently designed to protect aspirations or noncommodity values that the marketplace undervalues," SUNSTEIN, AFTER THE RIGHTS REVOLUTION, *supra* note 23, at 183, Sunstein supports the judicial adoption of a background interpretive norm favoring an aggressive construction of statutes protecting the environment. *See* Sunstein, *Principles, Not Fictions*, *supra* note 23, at 1253. *But see* Daniel A. Farber, *Playing the Baseline: Civil Rights, Environmental Law, and Statutory Interpretation*, 91 COLUM. L. REV. 676 (1991) (reviewing SUNSTEIN, AFTER THE RIGHTS REVOLUTION, *supra* note 23) (criticizing Sunstein's approach to interpreting environmental legislation); Eben Moglen & Richard J. Pierce, Jr., *Sunstein's New Canons: Choosing the Fictions of Statutory Interpretation*, 57 U. CHI. L. REV. 1203 (1990) (same). Consequently, while Sunstein takes issue with the remedial purpose canon in the abstract, he does not find fault with courts for engaging in expansive readings of environmental statutes such as CERCLA.

162. The protections provided by remedial legislation in some instances are procedural, as opposed to curative. *See, e.g.*, Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786, 2794 (1993) (Federal Rules of Evidence); Smith v. Barry, 502 U.S. 244, 248 (1992) (Federal Rules of Appellate Procedure); Torres v. Oakland Scavenger Co., 487 U.S. 312, 316–17 (1988) (same); Clarke v. Securities Indus. Ass'n, 479 U.S. 388, 395 (1987) (Administrative Procedure Act); Peyton v. Rowe, 391 U.S. 54, 64–65 (1968) (habeas corpus statute); State Farm Fire & Casualty Co. v. Tashire, 386 U.S. 523, 533 (1967) (interpleader statute); Stewart v. Kahn, 78 U.S. 493, 504 (1870) (regarding statute which

example, the remedial purpose canon has been utilized by courts when construing laws enacted to protect the work force by providing for, or regulating, worker benefits and compensation,[163] safe work place conditions,[164] and labor-management relations.[165] Likewise, in order to effectuate the legislative intent of protecting the public against business practices that run counter to the social good, courts have deemed "remedial"—and liberally construed—antitrust,[166] securities,[167] and unfair competition legislation.[168]

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suspended the running of statute of limitations because of Civil War); *see also* Edward P. Gilbert, Comment, *We're All in the Same Boat:* Carnival Cruise Lines, Inc. v. Shute, 18 BROOK. J. INT'L L. 597, 615 (1992) (discussing remedial nature of statute regulating forum selection clauses); David L. Shapiro, *supra* note 59, at 938; 3A SUTHERLAND, *supra* note 1, § 67, at 57–89.

163. *See, e.g.*, Consolidated Rail Corp. v. Gottshall, 114 S. Ct. 2396, 2407 (1994) (Federal Employers' Liability Act); King v. St. Vincent's Hosp., 502 U.S. 215, 220 n.9 (1991) (Veterans' Reemployment Rights Act); Bowen v. City of New York, 476 U.S. 467, 486 n.14 (1986) (Social Security Disability Benefits Reform Act); Morrison-Knudsen Constr. Co. v. Director, OWCP, 461 U.S. 624, 646–47 (1983) (Marshall, J., dissenting) (Longshoremen's and Harbor Workers' Compensation Act); Director, OWCP v. Perini North River Assocs., 459 U.S. 297, 322 (1983) (same); Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 628 (1978) (Marshall, J., dissenting) (Death on the High Seas Act); Jefferson v. Hackney, 406 U.S. 535, 554 n.3 (1972) (Douglas, J., dissenting) (Social Security Act); The Arizona v. Anelich, 298 U.S. 110, 123 (1936) (Jones Act); Skukan v. Consolidation Coal Co., 993 F.2d 1228, 1236 (6th Cir. 1993) (Black Lung Benefits Act), *vacated*, 114 S. Ct. 2732 (1994); Kross v. Western Electric Co., 701 F.2d 1238, 1242 (7th Cir. 1983) (Employee Retirement Income Security Act); *see also* 3A SUTHERLAND, *supra* note 1, § 73.02, at 324–42.

164. *See, e.g.*, Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607, 712 (1980) (Marshall, J., dissenting) (Occupational Safety and Health Act); Whirlpool Corp. v. Marshall, 445 U.S. 1, 13 (1980) (OSHA); Lilly v. Grand Trunk Western R.R. Co., 317 U.S. 481, 486 (1943) (Boiler Inspection Act); Atchison, Topeka & Santa Fe Ry. v. United States, 244 U.S. 336, 343 (1917) (Hours of Service Act); Johnson v. Southern Pac. Co., 196 U.S. 1, 16–17 (1904) (1893 railroad safety act); St. Marys Sewer Pipe Co. v. Director, United States Bureau of Mines, 262 F.2d 378, 381 (3d Cir. 1959) (Federal Coal Mine Safety Act).

165. *See, e.g.*, Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 740 (1983) (National Labor Relations Act); Int'l Brotherhood of Elec. Workers v. Foust, 442 U.S. 42, 52 (1979) (Railway Labor Act); Falk v. Brennan, 414 U.S. 190, 205 n.3 (1973) (Brennan, J., concurring and dissenting) (Fair Labor Standards Act); Phillips Co. v. Walling, 324 U.S. 490, 493 (1945) (same); *see also* 3A SUTHERLAND, *supra* note 1, § 73.01, at 319–24.

166. *See, e.g.*, California v. American Stores Co., 495 U.S. 271, 287 (1990) (Clayton Act); Jefferson County Pharmaceutical Ass'n, Inc. v. Abbott Lab., 460 U.S. 150, 159 (1983) (Robinson-Patman Act); Northern Sec. Co. v. United States, 193 U.S. 197, 358–60 (1904) (Sherman Act).

167. *See, e.g.*, Central Bank of Denver v. First Interstate Bank, 114 S. Ct. 1439, 1457–58 (1994) (Stevens, J., dissenting) (1934 Securities Exchange Act § 10(b)); Gollust v. Mendell, 501 U.S. 115, 126 (1991) (same); Merrill Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353, 387 (1982) (Commodities Futures Trading Commission Act of 1974); SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 195 (1963) (Investment Advisers Act of 1940); SEC v. Ralston Purina Co., 346 U.S. 119, 126–27 (1953) (1933 Securities Act); *see also* 3A SUTHERLAND, *supra* note 1, § 70.04, at 216–20.

168. *See, e.g.*, Warner Bros., Inc. v. Gay Toys, Inc., 658 F.2d 76, 79 (2d Cir. 1981)

The remedial purpose canon is also frequently found in cases interpreting legislation designed to protect and promote public health[169] and public safety.[170] In addition, the canon has supported liberal readings of statutes enacted to further the social well-being of the general public by protecting individuals against race, age, gender, and disability discrimination.[171]

In determining to apply the remedial purpose canon when interpreting these classes of statutes, courts have looked both to the intrinsic nature of the legislation and to the enacting body for confirmation that the statute was indeed intended to be remedial and liberally construed. Thus, judges have sometimes invoked the canon on the grounds that the statute in question is, by its nature, "ameliorative,"[172] humane,[173] "for the good of the pub-

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(Section 43(a) of the Lanham Trademark Act of 1946); CBS Inc. v. Springboard Int'l Records, 429 F. Supp. 563, 566 (S.D.N.Y. 1976) (same).

169. *See, e.g.*, United States v. Bacto-Unidisk, 394 U.S. 784, 798–99 (1969) (Federal Food, Drug, and Cosmetic Act); Hull Co. v. Hauser's Foods, Inc., 924 F.2d 777, 782 (8th Cir. 1991) (Perishable Agricultural Commodities Act); *see also* 3A SUTHERLAND, *supra* note 1, § 71.02, at 235–43.

170. *See, e.g.*, Gregg Cartage Co. v. United States, 316 U.S. 74, 83 (1942) (Motor Carrier Act); McDonald v. Thompson, 305 U.S. 263, 266 (1938) (Motor Carrier Act); Piedmont & Northern Ry. Co. v. ICC, 286 U.S. 290, 311–12 (1932) (Transportation Act); United States v. Chicago, Burlington & Quincy R.R. Co., 237 U.S. 410, 413 (1915) (Safety Appliance Act); United States v. One Hazardous Product Consisting of a Refuse Bin, 487 F. Supp. 581, 588 (D.N.J. 1980) (Consumer Product Safety Act); *see also* 3A SUTHERLAND, *supra* note 1, § 71.04, at 255–70.

171. *See, e.g.*, Chisom v. Roemer, 501 U.S. 380, 403 (1991) (Voting Rights Act); West Virginia Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 107–08 (1991) (Stevens, J., dissenting) (42 U.S.C. § 1988); Dennis v. Higgins, 498 U.S. 439, 443 (1991) (42 U.S.C. § 1983); EEOC v. Commercial Office Prods. Co., 486 U.S. 107, 124 (1988) (Title VII); Arizona Governing Comm. v. Norris, 463 U.S. 1073, 1090 (1983) (Title VII); Zipes v. TWA, Inc., 455 U.S. 385, 398 (1982) (Title VII); Owen v. City of Independence, 445 U.S. 622, 635–36 (1980) (42 U.S.C. § 1983); Oscar Mayer & Co. v. Evans, 441 U.S. 750, 765–66 (1979) (Blackmun, J., concurring) (Age Discrimination in Employment Act ("ADEA")); Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 399–400 (1979) (42 U.S.C. § 1983); Monell v. New York City Dep't of Social Servs., 436 U.S. 658, 684 (1978) (42 U.S.C. § 1983); United Air Lines, Inc. v. McMann, 434 U.S. 192, 217–18 (1977) (Marshall, J., dissenting) (ADEA); Corning Glass Works v. Brennan, 417 U.S. 188, 208 (1974) (Equal Pay Act); Kinney v. Yerusalim, 812 F. Supp. 547, 551 (E.D. Pa. 1993) (Americans with Disabilities Act), *aff'd*, 9 F.3d 1067 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 1545 (1994); Dartt v. Shell Oil Co., 539 F.2d 1256, 1260 (10th Cir. 1976) (ADEA), *aff'd*, 434 U.S. 99 (1977); *see also* 3A SUTHERLAND, *supra* note 1, § 74, at 351–404.

172. Mobil Oil Corp. v. Higginbotham, 436 U.S. 619, 628 (1978) (Marshall, J., dissenting) (applying canon to Death on the High Seas Act).

173. *See, e.g.*, Consolidated Rail Corp. v. Gottshall, 114 S. Ct. 2396, 2404 (1994) (stating that Federal Employers' Liability Act has "humanitarian purposes" and "remedial goal"); Phillips Co. v. Walling, 324 U.S. 490, 493 (1945) (finding Fair Labor Standards Act to be humanitarian legislation); Dartt v. Shell Oil Co., 539 F.2d 1256, 1260 (10th Cir. 1976) (finding Age Discrimination in Employment Act to be humanitarian legislation),

lic,"[174] or protective of particular persons.[175] In other cases, the remedial nature of the legislation is "confirmed" in the statute's text, legislative history, or structure. For example, judges have relied on the codification of the remedial purpose canon by Congress in RICO[176] and other federal statutes,[177] and state legislatures have statutorily mandated liberal construction of workers' compensation laws.[178]

Judges have also looked to, and relied upon, legislative histories that characterize statutes as remedial and deserving of aggressive interpretation.[179] For example, during the congressional de-

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aff'd, 434 U.S. 99 (1977); St. Marys Sewer Pipe Co. v. Director, United States Bureau of Mines, 262 F.2d 378, 381 (3d Cir. 1959) (noting that Federal Coal Mine Safety Act has humane purpose).

174. Northern Sec. Co. v. United States, 193 U.S. 197, 359 (1904) (referring to Sherman Act).

175. *See, e.g.*, Irwin v. Veterans Admin., 498 U.S. 89, 102 (1990) (Stevens, J., dissenting and concurring) (persons subject to employment discrimination); Mansell v. Mansell, 490 U.S. 581, 595–604 (1989) (O'Connor, J., dissenting) (former spouses of persons in military service); Tcherepnin v. Knight, 389 U.S. 332, 336 (1967) (investors); The Arizona v. Anelich, 298 U.S. 110, 123 (1936) (seamen); Johnson v. Southern Pac. Co., 196 U.S. 1, 17 (1904) (railroad workers and travelers). Bankruptcy statutes and usury laws—which both aim to protect debtors—have also been given liberal readings in light of their remedial nature. *See* City Bank Farmers Trust Co. v. Irving Trust Co., 299 U.S. 433, 444 (1937) (applying to bankruptcy); 3A SUTHERLAND, *supra* note 1, §§ 69.07–.08, at 182–94 (discussing bankruptcy and usury).

176. See Palm, *supra* note 130; *infra* part VIII.B.

177. *See, e.g.*, United States v. Lester, 992 F.2d 174, 176 (8th Cir. 1993) (noting that Congress commanded that 18 U.S.C. § 3731, which governs the government's right to appeal certain district court orders in criminal cases, "shall be liberally construed to effectuate its purposes"); United States v. Woolard, 981 F.2d 756, 757 (5th Cir. 1993) (noting requirement that 18 U.S.C. § 3731 be liberally construed); United States v. Harris, 903 F.2d 770, 777 (10th Cir. 1990) (stating that expansive interpretation of federal drug forfeiture statute, 21 U.S.C. § 853, was supported by § 853(o), wherein Congress "explicitly stated that the statute is to be liberally construed").

178. *See* Thomas S. Cook, *Workers' Compensation and Stress Claims: Remedial Intent and Restrictive Application*, 62 NOTRE DAME L. REV. 879, 881 n.14 (1987) (citing Cal. Labor Code § 3202 (West 1971 & Supp. 1987)). The codification of the remedial purpose canon is discussed *infra* part VIII.B.

179. *See, e.g.*, Director, Office of Workers' Compensation Programs v. Greenwich Collieries Director, 114 S. Ct. 2251, 2267 (1994) (Souter, J., dissenting) (quoting S. REP. No. 743, 92d Cong., 2d Sess. 11 (1972), *reprinted in* 1972 U.S.C.C.A.N. 2305, 2315, which noted that Black Lung Benefits Act "is intended to be a remedial law"); Merrill Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353, 387 n.85 (1982) (quoting statement by conferees that Futures Trading Commission Act of 1974 "is remedial legislation designed to correct certain abuses which Congress found to exist"); Falk v. Brennan, 414 U.S. 190, 205 n.3 (1973) (Brennan, J., concurring and dissenting) (citing House Report which noted with approval judicial invocation of remedial purpose canon and characterization of Fair Labor Standards Act as remedial and humanitarian legislation); *see also* H.R. REP. No. 40, 102d Cong., 1st Sess., pt. 1 (1991) 87–88 ("For more than a century, it has been a widely accepted principle of American law that remedial statutes, such as civil rights law, are to be broadly construed."); J.R. Franke, *The Civil Rights Act*

bates surrounding the passage of section 1 of the Civil Rights Act of 1871—now codified as 42 U.S.C. § 1983—the author and manager of the bill in the House, Representative Shellabarger, described the breadth of construction that the Act was to receive: "This act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficently construed."[180] The Supreme Court has repeatedly quoted this statement by Representative Shellabarger and held that the legislative history of 42 U.S.C. § 1983 confirms both the remedial nature of the legislation and "the expansive sweep of the statutory language."[181]

Finally, courts have noted that the structures of certain statutes support the conclusion that utilization of the remedial purpose canon is appropriate. In particular, a statute may be structured in a manner which leads to the conclusion that Congress implicitly delegated expansive interpretive authority to the courts to fill in gaps in the statutory scheme and make new law.[182] For example, the Sherman Act contains introductory language which has been construed to authorize courts to create new lines of common law and to construe its provisions broadly to effectuate their remedial purposes.[183] As noted by Andrew Gavil,

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of 1991: Remedial Civil Rights Policies Prevail, 17 S. ILL. U. L.J. 267, 298 (1993) (discussing how 1991 amendments provided "clear indication of Congressional intent to continue to support liberal interpretation and application of remedial legislation such as the civil rights laws"); Elizabeth Flagg, Note, *Insurance Agents Slip Through the "Good Hands" of ERISA: "Employee" Agency Principles in* Nationwide Mutual Insurance Company v. Darden, 28 WAKE FOREST L. REV. 1099, 1125–26 (1993) (discussing how legislative history of ERISA reveals congressional intent that coverage under Act be construed liberally to provide maximum degree of protection to working men and women covered by private retirement programs).

180. CONG. GLOBE, 42d Cong., 1st Sess. 68 (1871).

181. Owen v. City of Independence, 445 U.S. 622, 635–36 (1980); *see also* Dennis v. Higgins, 498 U.S. 439, 442 (1991); Briscoe v. LaHue, 460 U.S. 325, 348–49 (1983) (Marshall, J., dissenting); Allen v. McCurry, 449 U.S. 90, 109 (1980) (Blackmun, J., dissenting); Gomez v. Toledo, 446 U.S. 635, 638–39 (1980); Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 399–400, 400 n.17 (1979); Monell v. New York City Dep't of Social Servs., 436 U.S. 658, 684 (1978).

182. *See* Eskridge & Frickey, *Legislation Scholarship*, *supra* note 46, at 708 n.48 (noting that one situation where Judge Richard Posner favors judicial lawmaking is when legislature has implicitly delegated expansive authority to courts to fill in statutory gaps); Lane, *supra* note 66, at 651 n.31 (explaining that planned vagueness may be delegation to court of power to make law).

183. *See* Christine B. Hickman, *Rethinking the Proportional Reduction Rule in the Settlement of Multiparty Securities Actions: Judicial Overreaching or a Neat Solution?*, 32 SANTA CLARA L. REV. 649, 680 (1992); Easterbrook, *Statutes' Domains*, *supra* note 76, at 544; *see also* Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 732 (1988)

> One of Senator Sherman's oft-quoted statements of the purposes of the broadly worded first section of the bill emphasized its common law ties and declared that, "being a remedial statute," it should "be construed liberally, with a view to promote its object." Indeed, Judge Bork concluded his controversial study of the legislative history by asserting that, because of its incorporation of a "principle of change" that would permit it to advance as our understanding of economics progressed, the "rule of reason" first declared in *Standard Oil Co. v. United States*, as a guide to interpreting the "restraint of trade" prohibition of Section 1 of the Sherman Act, constituted "the most faithful judicial reflection of Senator Sherman's and his colleagues' policy intentions."[184]

The Sherman Act is not the only statute where one finds a connection between the utilization of the remedial purpose canon and legislative authorization for courts to fill statutory gaps on the basis of evolving common law principles.[185] Specifically, the legislative history of CERCLA reveals that Congress intended the courts to develop common law principles to supplement its statutory provisions.[186] In addition, as discussed in Part IV below, courts have utilized the remedial purpose canon when construing environmental legislation, including CERCLA.

(Scalia, J.) (noting that Sherman Act "invokes the common law itself, and not merely the static content that the common law had assigned to the term ["restraint of trade"] in 1890"); Eskridge, *The New Textualism*, *supra* note 46, at 668 n.190, 674 (discussing Justice Scalia's endorsement of dynamic interpretation of Sherman Act); Jack M. Beermann, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 STAN. L. REV. 51, 57 (1989) (discussing Eskridge's endorsement of dynamic approach to statutory interpretation).

184. Andrew I. Gavil, *Reconstructing the Jurisdictional Foundation of Antitrust Federalism*, 61 GEO. WASH. L. REV. 657, 694 n.164 (1993) (citations omitted) (italics added) (quoting Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 47 (1966)).

185. *See* Lawrence C. Marshall, *Construction and Judicial Constraints: A Response to Macey and Miller*, 45 VAND. L. REV. 673, 677 (1992) ("Ever since the *Lincoln Mills* decision, which rightly or wrongly interpreted section 301 of the Taft-Hartley Act as giving federal courts the power to create a federal common law of labor relations, the federal courts have engaged in a basically noninterpretive, policy-driven enterprise of common law adjudication in this area."); Hickman, *supra* note 183, at 680 (noting that securities laws contain introductory language which has been interpreted to give courts power to construe their provisions broadly to effect their remedial purposes).

186. *See infra* part VI.B.

D. Judicial Recognition of the Limits of the Remedial Purpose Canon: Principles to Guide its Application

The remedial purpose canon has been faulted not only for its indeterminate scope, but also for being imprecise in terms of its application. Noting that the canon simply directs that "remedial" statutes are to receive "liberal" constructions, Max Radin criticized the canon for its failure to provide guidance to judges on the critical issue of *how* liberally a remedial statute should be read.[187] As an appellate judge, Frank Easterbrook has displayed the same skepticism expressed by Radin in the utility of the remedial purpose canon as an interpretive aid.[188] Antonin Scalia, both as a scholar and as a jurist, has echoed the views of Radin and Easterbrook.[189]

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187. *See* Radin, *Statutory Interpretation*, *supra* note 57, at 879–81. Radin did note that "the rule that remedial measures are to be liberally construed has the qualification that this construction is never to be applied so as to extend the application of statutes to cases not within the contemplation of the legislature." *Id.* at 880. However, in light of his rejection of the notion of legislative intent, this restriction on the use of the remedial purpose canon was of little help to Radin. *See also* Blatt, *supra* note 46, at 827.

It should be noted that Radin subsequently acknowledged that the canons "cannot always be rejected." Radin, *Short Way with Statutes*, *supra* note 39, at 423. However, the context of his later remarks suggests that he was referring to text-oriented canons, and not to substantive canons such as the remedial purpose canon. *Id.*

188.

> This [canon] tells us the direction to move but does not help us figure out how far to go . . . . Finding the meaning of a statute is more like calculating a vector (with direction and length) than it is like identifying which way the underlying "values" or "purposes" point (which has direction alone) . . . . Too much "liberality" will undermine a statute as surely as too literal an interpretation would.

In re Erickson, 815 F.2d 1090, 1094 (7th Cir. 1987); *see also* Mercado v. Calumet Fed. Sav. & Loan Ass'n, 763 F.2d 269, 271 (7th Cir. 1985) (Easterbrook, J.) ("The fact that Congress has pointed in a particular direction does not authorize a court to march in that direction without limit.").

189. *See* Scalia, *supra* note 139, at 582 ("How 'liberal' is liberal, and how 'strict' is strict?"); *see also* Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 115 S. Ct. 2407, 2413, 2426 (1995) (Scalia, J., dissenting) ("Deduction from the 'broad purpose' of a statute begs the question if it used to decided by what means (and hence to what length) Congress pursued that purpose.").

Justice Scalia goes further, however, and questions the very notion of advocating strict or liberal interpretations. *See* Scalia, *supra* note 139, at 582 ("I should think that the effort, with respect to *any* statute, should be neither liberally to expand nor strictly to constrict its meaning, but rather to get the meaning precisely right."); *see also* Torres v. Oakland Scavenger Co., 487 U.S. 312, 319 (1988) (Scalia, J., concurring) ("[W]e should seek to interpret the rules [of procedure] neither liberally nor stingily, but only, as best we can, according to their apparent intent."); DICKERSON, *supra* note 38, at 212.

Although the remedial purpose canon itself provides no instruction as to *how* liberally courts should construe remedial statutes (other than to "effectuate" the beneficial purposes for which they were enacted), a "canonical common law" has nevertheless emerged to guide and constrain judges who invoke the canon. In sum, the courts have recognized the limits of the remedial purpose canon by circumscribing its use in four situations: (1) when it is "plain" (from the text or otherwise) that Congress did not desire an expansive reading of the remedial statute; (2) when a liberal construction would either upset a legislatively crafted compromise or conflict with other statutory goals; (3) when reliance on the canon clashes with other extrastatutory goals, meta-principles, or interpretive rules; and (4) when an expansive interpretation might actually hinder—rather than serve—the remedial objectives of the statute in question.

1. Plain Meaning

It is well-accepted that the remedial purpose canon has little utility when an expansive interpretation would contradict the plain meaning of the statute.[190] Even those who disagree with a textualist approach to statutory construction acknowledge that there is a hierarchy among interpretive principles, and that the prevailing view is "that the statutory text is the most authoritative interpretive criterion."[191] Thus, when deciding whether to apply the remedial purpose canon, the courts have made it clear that a judge charged with interpreting a statute must respect the primacy of the

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190. *See* Miller, *supra* note 32, at 1219 ("[M]ere generalized references to remedial purposes will not support an interpretation at odds with the statutory language and scheme."); Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 288 (1990) ("Canons operate as default rules, directing the court's decision . . . in the absence of a clear statement to the contrary.").

191. Eskridge & Frickey, *Practical Reasoning*, *supra* note 25, at 354; *see also* Frickey, *Marshalling Past and Present*, *supra* note 51, at 408 n.119 (noting that, while not all judges subscribe to textualism as an interpretive theory, all judges are "presumptive textualists" insofar as "they follow relatively clear statutory language absent some strong reason to deviate from it").

The notion that there exists a hierarchy of interpretive principles upon which a court may legitimately rely is at the heart of Eskridge and Frickey's "practical reasoning" alternative to the foundationalist theories of statutory interpretation. *See* Eskridge & Frickey, *Practical Reasoning*, *supra* note 25, at 353 (stressing primacy of text by graphically depicting hierarchical ordering of textual, historical, and evolutive considerations as "funnel of abstraction").

text.[192] It is also acknowledged (at least outside the realm of "pure" textualism) that the canons of statutory construction—including the remedial purpose canon—should not be employed to produce results that are contrary to clear indications of congressional intent found in a statute's legislative history.[193]

The plain meaning limitation on the use of the remedial purpose canon can be reduced to a simple tautology: since its purpose is to "resolve[ ] ambiguities in remedial statutes in favor of those whom the legislation was designed to protect,"[194] the remedial purpose canon "only applies where there is an ambiguity to be resolved."[195] Statements to this effect, however, fail to address the

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192. *See, e.g.*, Central Bank of Denver v. First Interstate Bank, 114 S. Ct. 1439, 1453 (1994) ("Policy considerations cannot override our interpretation of the text and structure of the Act, except to the extent that they may help to show that adherence to the text and structure would lead to a result 'so bizarre' that Congress could not have intended it."); Ardestani v. INS, 502 U.S. 129, 138 (1991) (stating that although "the broad purposes of the [Equal Access to Justice Act] would be served by making the statute applicable to deportation proceedings . . . we cannot extend the EAJA . . . when the plain language of the statute, coupled with the strict construction of waivers of sovereign immunity, constrain us to do otherwise"); Andrus v. Glover Constr. Co., 446 U.S. 608, 618–19 (1980) (explaining that canon that remedial legislation benefiting Indians should be liberally construed is not license to disregard plain meaning of statute); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 198–99 (1976) (rejecting "effect-oriented approach" of SEC to § 10(b) of 1934 Securities Exchange Act because it "would add a gloss to the operative language of the statute quite different from its commonly accepted meaning"); MacEvoy Co. v. United States, 322 U.S. 102, 107 (1944) (holding fact that Miller Act is "highly remedial in nature" and "entitled to a liberal construction" nevertheless "does not justify ignoring plain words of limitation"); Mercado v. Calumet Fed. Sav. & Loan Ass'n, 763 F.2d 269, 271 (7th Cir. 1985) (Easterbrook, J.) ("The objective of a statute is not a warrant to disregard the terms of the statute.").

193. *See* 3 SUTHERLAND, *supra* note 1, § 60.01, at 148 ("The rule of liberal construction will not override other rules where its application would defeat the intention of the legislature or the evident meaning of an act.").

In Lubrizol Corp. v. EPA, 562 F.2d 807 (D.C. Cir. 1977), the court of appeals was faced with the question of whether a statutory directive to restrict the sale of environmentally dangerous "fuels and fuel additives" authorized the EPA to regulate motor oil. In support of its assertion of regulatory authority, EPA argued that its position furthered the broad purposes of the Clean Air Act. *Id.* at 811. The court, however, held that the term "fuel" was clear and that the presumption in favor of its ordinary usage was not rebutted by either the statute itself or its legislative history, which suggested that Congress intended the term "fuel" to have its commonly accepted meaning. *Id.* at 816–19. With respect to the relationship between EPA's "purpose" argument and the countervailing legislative history, the court held that "such legislative history . . . deserves priority over the canons of construction advocating dependence on the broad purposes of an act and favoring expansive interpretation of remedial legislation." *Id.* at 819.

194. Laffey v. Northwest Airlines, Inc., 567 F.2d 429, 475 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978).

195. School Dist. of Hatboro-Horsham v. Alexander, 981 F.2d 1265, 1267 (D.C. Cir. 1992); *see also* Reves v. Ernst & Young, 113 S. Ct. 1163, 1172 (1993) (dismissing RICO's liberal construction provision because it "only serves as an aid for resolving an ambiguity" (quoting Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 492, n.10 (1985))); King v. Dole,

more difficult question of the role, if any, that the remedial purpose canon should play in determining whether the disputed text is in fact ambiguous.

This latter question can be recast as the temporal inquiry of whether substantive canons such as the remedial purpose canon should be invoked "as tiebreakers at the end of the basic interpretive analysis or as rebuttable presumptions at the outset of the interpretive process."[196] If one adopts the first approach, the remedial purpose canon will be employed only *after* it has been *independently* determined that the statute is ambiguous, and will be utilized simply to "break the tie" in favor of the more liberal of competing interpretations of the equivocal statutory text.[197] In the second, more aggressive use of the canon, judges *begin* with the presumption that—given the remedial nature of the statute in question—a liberal construction of its terms is appropriate, and then proceed to determine whether this presumption is "rebutted" by unambiguous text that plainly mandates a contrary, more restrictive reading.[198] Under both scenarios, however, the plain meaning of the statute provides a check on the use of the canon.

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782 F.2d 274, 276 (D.C. Cir. 1986) ("[G]iven the unambiguous nature of the language Congress chose . . . we do not have the luxury of using the general policy associated with remedial statutes."), *cert. denied*, 479 U.S. 856 (1986).

196. Frickey, *Marshalling Past and Present*, *supra* note 51, at 414; *see also* Stephen F. Williams, *Review, Background Norms in the Regulatory State*—AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE, *By Cass R. Sunstein*, 58 U. CHI. L. REV. 419, 434 (1991) ("[A] canon can range in force from a 700-pound gorilla to a humble tie-breaker or the source of a default position").

197. For example, in County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 502 U.S. 251 (1992), the Supreme Court first found ambiguity in the statute in question—which authorized some state taxation of fee-patented Indian lands—and then employed an Indian canon of construction as a tie-breaker, holding that "[w]hen we are faced with these two possible constructions, our choice between them must be dictated by a principle deeply rooted in this Court's Indian jurisprudence: 'statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.'" *Id.* at 269 (quoting Montana v. Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985)). *See also* Reves v. Ernst & Young, 113 S. Ct. 1163, 1174, 1175 (1993) (Souter J., dissenting) (arguing that text in dispute is "at the very least hazy" and that "Congress has given courts faced with uncertain meaning a clear tie-breaker in RICO's 'liberal construction' clause, which directs that the 'provisions of this title shall be liberally construed to effectuate its remedial purposes'"). In the same fashion, Judge Posner discussed the remedial purpose canon in Mechmet v. Four Seasons Hotels, Ltd., 825 F.2d 1173, 1177 (7th Cir. 1987), stating that "generalizations about interpretation, such as that exemptions from remedial statutes should be narrowly construed, are at best tie-breakers . . . [and w]e do not think we face a tie in this case." *Id. See also* Hale v. Marsh, 808 F.2d 616, 621 (7th Cir. 1986) (Posner, J.) (arguing that remedial purpose canon "can make the difference only in a close case, which we do not conceive this to be").

198. Employed in this sense, the remedial purpose canon operates somewhat like a

2. Compromises and Conflicting Goals

A second situation where courts have recognized the limits of the remedial purpose canon is when a liberal construction would either upset a legislatively crafted compromise or cause conflict with other goals of the statute. As Judge Easterbrook has pointed out, by its very nature "legislation is compromise" and has "a stopping point."[199] In addition, legislative enactments often attempt to further multiple objectives. The courts are aware that, in instances where a remedial statute contains compromised or conflicting interests, a liberal reading may be unfaithful not only to the text and the intent of the enacting body, but also to the underlying legislative goals and objectives.

The presence of compromises and conflicting goals in legislative enactments is of particular concern to public choice theorists, as is the effect that the remedial purpose canon can have when judges interpret such statutes. Public choice theorists, however, have reached significantly different conclusions with respect to the efficacy of employing the canon when a statute reflects compromises and contains conflicting goals.

Richard Posner's primary objection is that the remedial purpose canon errs by naively ignoring the role of interest groups "whose clashes blunt the thrust of many legislative initiatives"[200] and, more fundamentally, the role of legislative compromise in the legislative process:

(reverse) "clear statement" principle of statutory interpretation. *See supra* note 129 and accompanying text. For instance, in Central Bank of Denver v. First Interstate Bank of Denver, 114 S. Ct. 1439 (1994), Justice Stevens utilized the canon in this fashion in his dissent from the Court's holding that a private plaintiff may not maintain an aiding and abetting suit under § 10(b) of the 1934 Securities Exchange Act. The Court held that the Act did not expressly mention aiding and abetting liability, and that policy considerations favoring recognition of such a private right of action "cannot override our interpretation of the text and structure of the Act . . . ." *Id.* at 1453–54. Justice Stevens, however, took a different interpretive approach, noting that § 10(b) was "enacted against a backdrop of liberal construction of remedial statutes," *id.* at 1457 (Stevens, J., dissenting), and concluding that "[i]n light of the encompassing language of § 10(b), and its acknowledged purpose to strengthen the anti-fraud remedies of the common law, it was certainly no wild extrapolation for courts to conclude that aiders and abettors should be subject to the private action under § 10(b)." *Id.* at 1459. The employment of canons as presumptions—rather than as tie-breakers—has been criticized as "a substitute for careful analysis" and as being overly outcome-determinative. *See* David L. Shapiro, *supra* note 59, at 956.

199. Walton v. United Consumers Club, 786 F.2d 303, 311 (7th Cir. 1986).

200. Posner, *Statutory Interpretation*, *supra* note 71, at 809.

> Another very popular canon, "remedial statutes are to be construed broadly," goes wrong by being unrealistic about legislative objectives. The idea behind this canon is that since the legislature is trying to remedy some ill, it would want the courts to construe the legislation in such a way as to make it a more rather than a less effective remedy for that ill. This would be a sound working rule if every statute—at least every statute that could fairly be characterized as "remedial" (nowadays, almost every statute that does not prescribe penal sanctions and so comes under another canon)—were passed because a majority of the legislators wanted to stamp out some practice they considered to be an evil. But if, as is often true, the statute is a compromise between one group of legislators that has a simple remedial objective but lacks a majority and another group that has reservations about the objective, a court that construed the statute broadly would upset the compromise that the statute was intended to embody.[201]

Frank Easterbrook has joined Posner, his fellow jurist, in employing public choice insights in judicial opinions, stressing the fact that legislation is the product of compromise and noting that "[e]ven if all the legislative history points in one direction, it is still necessary to find the compromise to learn the meaning of the statute."[202] In his scholarship, however, Easterbrook provides a perspective on public choice theory and statutory interpretation which can be viewed as providing a limited defense for the remedial purpose canon. According to Easterbrook, there are two basic styles of statutory construction.[203] Under the first approach, a judge identifies the underlying purposes of a statute and then "interprets omissions and vague terms in the statute as evidence of want of time or foresight and fills in these gaps with more in the same vein."[204] In contrast, under the second approach, a judge "treats the statute as a contract," implementing "as a faithful agent" the bargain struck by the relevant parties and subscribing to the view that

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201. POSNER, THE FEDERAL COURTS, *supra* note 69, at 278–79; *see also* Lane, *supra* note 66, at 657; Ian Shapiro, *supra* note 158, at 1019; Posner, *Statutory Interpretation*, *supra* note 71, at 808–09.

202. Walton v. United Consumers Club, 786 F.2d 303, 311 (7th Cir. 1986). *See also* Continental Can Co. v. Chicago Truck Drivers, Helpers and Warehouse Workers Union (Indep.) Pension Fund, 916 F.2d 1154, 1159 (7th Cir. 1990); Easterbrook, *Statutes' Domains*, *supra* note 76, at 540.

203. *See* Easterbrook, *The Supreme Court*, *supra* note 77, at 14.

204. *Id.*

"[w]hat the parties did not resolve, the court should not resolve either."[205]

In Easterbrook's view, the remedial purpose canon sums up the first approach, whereas the canon that statutes in derogation of common law should be narrowly construed sums up the second approach.[206] Thus, if the first approach to statutory construction constitutes a legitimate method of interpretation, then it logically follows that the remedial purpose canon has value. As noted above,[207] Easterbrook has taken the position—consistent with public choice theory—that most statutes are in fact "private interest" statutes, and that the domain of such statutes should be restricted by focusing on text and confining the statutes to their express terms. However, Easterbrook also recognizes that legislatures sometimes pass public interest laws. In such cases, "it makes sense to use the remedial approach to the construction of statutes—or at least most of them."[208] Thus, as other commentators have noted, when legislation is in the public interest, Easterbrook can be read as endorsing the idea of broadly construing the text in order to achieve the underlying remedial purposes.[209] In particular, Easterbrook appears to suggest that the remedial purpose canon would be most appropriately applied in instances where the legislature has enacted "public interest laws that, stopping well short of the point where they produce too much of a good thing, charge the judiciary with the task of creating remedies for whatever new problems show up later on."[210]

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205. *Id.* at 15. In a similar fashion, Karl Llewellyn suggested that there are two styles of statutory interpretation: the "Grand Style"—where "statutes [are] construed 'freely' to implement their purpose"—and the "Formal Style" of interpretation, where "statutes tend[ ] to be limited or even eviscerated by wooden and literal reading, in a sort of long-drawn battle between a balky, stiff-necked, wrong-headed court and a legislature which had only words with which to drive that court." Llewellyn, *supra* note 27, at 400.

206. Easterbrook, *The Supreme Court*, *supra* note 77, at 14–15.

207. *See supra* notes 76–79 and accompanying text.

208. Easterbrook, *The Supreme Court*, *supra* note 77, at 15.

209. *See* Linda R. Hirshman, *Postmodern Jurisprudence and the Problem of Administrative Discretion*, 82 NW. U. L. REV. 646, 662–63 (1988); Cheryl D. Block, *Overt and Covert Bailouts: Developing A Public Bailout Policy*, 67 IND. L.J. 951, 1009 n.254 (1992).

210. Easterbrook, *Statutes' Domain*, *supra* note 76, at 544. As an example of such a statute, Easterbrook nominates the Sherman Act. *Id.*

Jonathan Macey subscribes to the public choice view that there exists both private-regarding and public-regarding legislation, and that "[t]oo often the [legislative] process seems to serve only the purely private interests of special interest groups at the expense of the broader public interests it was ostensibly designed to serve." Macey, *supra* note 72, at 223. However, unlike Posner and Easterbrook, Macey responds to the public choice

The concern over the misuse of the remedial purpose canon when construing statutes containing compromises and/or conflicting goals, while sound in theory, appears to be overstated. The courts for the most part are aware that in instances where a remedial statute contains compromised or conflicting interests, a liberal reading may be unfaithful not only to the text and the intent of the enacting body, but also to the underlying legislative goals and objectives.

This limitation on the use of the remedial purpose canon is tied, of course, to the presence of identifiable compromises and conflicts. The use of the canon is most appropriate when the remedial statute is not the product of legislative compromise, and contains clearly stated goals that do not conflict.[211] Such unadulturated "public-regarding" enactments are rare, however, and courts have become accustomed to identifying situations where compromises and conflicting goals limit—if not proscribe—the use of the remedial purpose canon of construction.

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model of legislation by contending that the traditional approaches to statutory interpretation should continue to be employed to the extent that they cause judges "to interpret statutes based on what the statutes actually say, rather than on what the judges believe the bargain was between the interest group and the legislature." *Id.* at 227; *see also* Frickey, *Marshalling Past and Present*, *supra* note 51, at 407 n.113 ("Benevolent assumptions may be counterfactual in a given case, but an interpreting court might embrace them anyway in order to promote the overall coherence and normative attractiveness of the law." (citing Macey, *supra* note 72, at 250–56)). Macey, who is critical of the remedial purpose canon, *see supra* note 72, at 265–66, does acknowledge the contention, posited by both Posner and Easterbrook, that the remedial purpose canon "would be a 'sound working rule' if every statute were public-regarding." *Id.* at 266 n.195 (quoting POSNER, THE FEDERAL COURTS, *supra* note 69, at 278 and citing Easterbrook, *The Supreme Court*, *supra* note 77, at 15). Rather than disagreeing, Macey responds by merely observing that "judges do not need much help to interpret [truly] public-regarding statutes, because in such statutes the nature of the legislature's objective is plain." Macey, *supra* note 72, at 266 n.195.

211. The absence of legislative compromise was one factor cited by Judge Posner in support of his holding that expert witness fees are recoverable under the Civil Rights Attorney's Fees Awards Act of 1976, amending 42 U.S.C. § 1988. *See* Friedrich v. City of Chicago, 888 F.2d 511, 518 (7th Cir. 1989) ("There would be a reason [for accepting the more narrow reading] if the civil rights fees statute had been a hard-fought compromise . . . for then the court's duty would be to give effect to the compromise, not to give proponents a victory that had eluded them in the legislative arena . . . . But there is no indication of compromise on any issue relevant to this case . . . ."), *vacated*, 499 U.S. 933 (1991). The Supreme Court, in a literal-minded decision by Justice Scalia, reached the opposite result in West Virginia Univ. Hosps., Inc. v. Casey, 499 U.S. 83 (1991). *See generally* T. Alexander Aleinikoff & Theodore M. Shaw, *The Costs of Incoherence: A Comment on Plain Meaning*, West Virginia University Hospitals, Inc. v. Casey, *and Due Process of Statutory Interpretation*, 45 VAND. L. REV. 687, 705 n.78 (1992) (suggesting that "the only plausible reason for reading § 1988 as the Court does in *Casey*" would have been that 1976 amendment was in fact "compromise" allowing certain fees but not expert fees).

Where a statute is a product of compromise, the presence and nature of the compromise might be found only in the statute's legislative history. Alternatively, the compromise may be evidenced by the fact that the statute not only contains substantive provisions which aim to further a particular goal, but also includes express exceptions to the attainment of the goal. The presence of exceptions in a statutory scheme show that the purpose to be furthered was not one the legislature "was willing to implement at any price."[212] In either case, it is readily apparent that a court faced with ambiguous text that is the product of compromise is less likely to rely on the statute's remedial objectives.[213] In sum, the courts have acknowledged that, in such situations, uncritical reliance on the remedial purpose canon may lead to interpretive errors.[214]

Reliance on the remedial purpose canon may also upend carefully crafted legislation if the promotion of a particular goal comes at the expense of other statutory objectives. Again, the courts have recognized this limitation and have cabined their use of the canon when conflicting goals are present. Such conflicts tend to fall into

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212. Eskridge & Frickey, *Practical Reasoning*, *supra* note 25, at 336.

213. *See, e.g.*, Morrison-Knudsen Constr. Co. v. Director, OWCP, 461 U.S. 624, 636 (1983) (stating that Longshoremen's and Harbor Workers' Compensation Act "was not a simple remedial statute intended for the benefit of the workers" but rather "was designed to strike a balance" between concerns of workers and employers, a balance that would be significantly altered by suggested expansive construction); Mohasco Corp. v. Silver, 447 U.S. 807, 818–19 (1980) (although Civil Rights Act of 1964 was remedial legislation enacted to combat discriminatory employment practices, "the ultimate product reflects other, perhaps countervailing, purposes that some Members of Congress sought to achieve" and disputed language "was clearly the result of a compromise"); National Wildlife Fed'n v. Lujan, 950 F.2d 765, 770 (D.C. Cir. 1991) (upholding government's narrow interpretation of Surface Mining Control and Reclamation Act because Act "was a compromise, designed both to protect the environment and to ensure an adequate supply of coal to meet the nation's energy requirements," and government "struck a reasonable balance between these competing interests").

214. Although the application of the remedial purpose canon is limited when statutes contain compromises and conflicting goals, it does not automatically follow that ambiguous text in such statutes must be strictly construed. In United States v. Bacto-Unidisk, the Supreme Court noted that, while it is true that a court charged with interpreting a federal statute should take care not to "'extend the scope of the statute beyond the point where Congress indicated it would stop,'" it is equally true that the court should not "narrow the coverage of a statute short of the point where Congress indicated it should extend." 394 U.S. 784, 800–01 (1969) (quoting 62 Cases of Jam v. United States, 340 U.S. 593, 600 (1951)). In determining the breadth of the term "drug" in the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 321, the Court in *Bacto-Unidisk* held that "the legislative history, read in light of the statute's remedial purpose, directs us to read the classification 'drug' broadly, and to confine [the statutory exceptions]." *Id.* at 799. The remedial nature of the legislation thus was a factor considered in determining the extent of the statute's domain.

two subcategories: (1) statutes containing aspirational goals and conflicting implementing provisions; and (2) statutes embracing multiple objectives, which in particular factual situations may come into conflict.

In *Board of Governors of the Federal Reserve System v. Dimension Financial Corp.*,[215] the Supreme Court recognized the interpretive difficulties that arise when the broad purposes of legislation conflict with the statute's specific provisions:

> Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its Members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard-fought compromises. Invocation of the "plain purpose" of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent.[216]

This internal conflict between aspirational and implementing language is commonplace in environmental legislation, where detailed statutory schemes are often prefaced with sweeping declarations of congressional goals and policies.[217] For example, in *National Wildlife Federation v. Gorsuch*,[218] the district court held that—in light of the remedial nature of the Clean Water Act and its expressed goal to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters,"[219]—the statutory

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215. 474 U.S. 361 (1986).

216. *Id.* at 374.

217. *See infra* note 275 and accompanying text; *see also* McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705, 739 (1992) ("Most regulatory legislation contains conflicts between a broad, public-regarding, and unqualified mandate and implementing sections that introduce qualifications."). Martin Shapiro has observed the following:

> [Health, safety, and environmental statutes] typically contain high aspirational general language that appears to demand the achievement of an absolutely healthy, safe, and beautiful working and living environment with no consideration at all of costs. More deeply buried in the same statutes are vague language, exceptions and fudges of myriad sorts that allow some balancing of benefits and costs and some amelioration of impacts.

Id. at 739–40 n.69 (quoting Martin Shapiro, The Court of Justice 35 (1990) (unpublished manuscript, on file with *Georgetown Law Journal*)).

218. 530 F. Supp. 1291 (D.D.C. 1982), *rev'd*, 693 F.2d 156 (D.C. Cir. 1982).

219. 33 U.S.C. § 1251(a) (1988).

phrase "discharge of a pollutant"[220] should be read broadly to encompass water quality changes induced by dams.[221]

The court of appeals, however, recognized the perils of liberal construction when aspirational language exceeds or conflicts with substantive text:

> it is one thing for Congress to announce a grand goal, and quite another for it to mandate full implementation of that goal . . . . Caution is always advisable in relying on a general declaration of purpose to alter the apparent meaning of a specific provision. Here, Congress' expressed goal to eliminate "the discharge of pollutants" does not necessarily require that we expansively construe the term "pollutant," which Congress itself specifically defined.[222]

Aside from the possible conflict between aspirational and implementing text, internal conflicts can arise whenever a statute seeks to further multiple objectives.[223] A liberal construction to effectuate a remedial purpose may be inappropriate in such situations, since it is possible that "[a] judicial emphasis on one purpose at the expense of another will produce interpretive blunders."[224] The diminished utility of the remedial purpose canon in such instances was recognized by the Supreme Court in *Mansell v. Mansell*.[225]

The civilian divorced spouse in *Mansell* argued that, under the Uniformed Services Former Spouses' Protection Act,[226] military retirement pay that had been waived by the retiree in order to receive veterans' disability benefits should be deemed community

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220. 33 U.S.C. § 1362(12) (1988).

221. 530 F. Supp. at 1303–12.

222. 693 F.2d at 178; *see also* United States v. Plaza Health Labs., Inc., 3 F.3d 643, 647 (2d Cir. 1993) (acknowledging that "[t]he broad remedial purpose" of Clean Water Act is restoration and maintenance of the integrity of nation's waters, but holding that "[t]he narrow questions posed by this case, however, may not be resolved merely by simple reference to this admirable goal"), *cert. denied*, 114 S. Ct. 2764 (1994); McNollgast, *supra* note 217, at 732–36 (discussing interpretive difficulties presented by 1970 Clean Air Act Amendments, which stated that Act's purpose was to protect and enhance air quality, but also contained statutory provision that appeared to permit deterioration of air quality in areas where air quality was above national standards).

223. *See* HART & SACKS, *supra* note 62, at 1414 ("Purposes . . . may exist in hierarchies or constellations."); DICKERSON, *supra* note 38, at 89 ("There may even be a congeries of purposes.").

224. SUNSTEIN, AFTER THE RIGHTS REVOLUTION, *supra* note 23, at 124.

225. 490 U.S. 581 (1989).

226. 10 U.S.C. § 1408 (1994).

property divisible upon divorce. Although Justice O'Connor argued in her dissent that this interpretation of the statute furthered the main purpose of protecting former spouses,[227] the majority determined that the invocation of the Act's remedial purposes was of little interpretive assistance, since Congress was concerned not only with the economic plight of military spouses after divorce, but also with protecting the interests of military members.[228]

3. Meta-Principles

The third situation where courts have recognized the limits of the remedial purpose canon and circumscribed its use is when other interpretive principles, or extrastatutory goals, counsel against a liberal construction of the remedial statute at issue. This is the problem "of colliding and conflicting norms"[229] or, more quaintly, the "crossfire of canons."

In general, judges have hesitated to broadly construe ambiguities in remedial statutes if an applicable "meta-principle"—such as the notion that waivers of sovereign immunity are to be narrowly construed—suggests the opposite course of action.[230] Likewise, the presence of conflicting "extrastatutory" goals may caution against an aggressive reading of a remedial statute.[231] Finally, when a "clear

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227. Justice O'Connor characterized the Act as "primarily a remedial statute," 490 U.S. at 597 (O'Connor, J., dissenting), and argued that the majority opinion "thwart[ed] the main purpose of the statute, which is to recognize the sacrifices made by military spouses and to protect their economic security in the face of a divorce." *Id.* at 602.

228. *Id.* at 594 (Marshall, J., for the majority) (noting "Congress' mixed purposes" in enacting statute).

229. Eskridge & Peller, *supra* note 46, at 754; *see also* Sunstein, *Principles, Not Fictions*, *supra* note 23, at 1253 (acknowledging that, with respect to his proposed set of interpretive principles, there "is a serious potential for conflict among the norms").

230. *See, e.g.*, Ardestani v. INS, 502 U.S. 129, 145–48 (1991) (Blackmun, J., dissenting) (noting tension between two interpretive principles); Hale v. Marsh, 808 F.2d 616, 621 (7th Cir. 1986) (same); Monark Boat Co. v. NLRB, 708 F.2d 1322, 1326–27 (8th Cir. 1983) (same); *see also* Central Bank of Denver v. First Interstate Bank, 114 S. Ct. 1439, 1455 (1994) (holding § 10(b) of 1934 Securities Exchange Act should not be construed to allow private plaintiff to maintain aiding and abetting suit in part because "[t]his approach, with its far-reaching consequences, would work a significant shift in settled interpretive principles regarding implied causes of action"); Keith Werhan, *The Neoclassical Revival in Administrative Law*, 44 ADMIN. L. REV. 567, 602–03 (1992) (noting reluctance by Supreme Court to rely on remedial purposes of statute as justification for implying causes of action).

231. In Jefferson County Pharmaceutical Ass'n v. Abbott Lab., 460 U.S. 150 (1983), an expansive interpretation of the Robinson-Patman Act, 15 U.S.C. § 13, was buttressed by an invocation of the remedial purpose canon. *Id.* at 159 (quoting Abbott Lab. v. Portland Retail Druggists Ass'n, Inc., 425 U.S. 1, 12 (1976)) ("Because the Act is remedial, it is

statement" rule applies, the courts have recognized that the unequivocal statement required from Congress must be found in the text—not gleaned from the statute's remedial objectives.[232]

Perhaps the most common "crossfire of canons" occurs when a governmental agency advocates a narrow reading of a remedial statute entrusted to its administration—thus creating tension between the remedial purpose canon and the *Chevron*[233] rule of deference to agency interpretations.[234] The courts have generally agreed

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to be construed broadly to effectuate its purposes"). Justice O'Connor—noting the presence of conflicting extrastatutory goals—criticized the employment of the remedial purpose canon in her dissent:

> Nor do I find persuasive the majority's invocation of presumptions regarding the liberal construction and broad remedial purposes of the antitrust laws generally . . . . [A] certain tension [exists] between the Robinson-Patman Act, on the one hand, and the Sherman Act and other antitrust statutes, on the other. The Court frequently has recognized that strict enforcement of the anti-price-discrimination provisions of the former may lead to price rigidity and uniformity in direct conflict with the goals of the latter . . . . At the very least, this recognition raises doubts that the Court should liberally construe the Robinson-Patman Act in favor of broader coverage.

Id. at 178–79 (O'Connor, J., dissenting).

232. Justice White made this point in a concurring opinion in Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989), which raised the issue of whether CERCLA, as amended by SARA, unequivocally expresses Congress' intent to abrogate the States' Eleventh Amendment immunity. The majority held that the statutory language was sufficiently clear, *id.* at 7–13, but Justice White failed to find the "unmistakably clear language" required to abrogate the Eleventh Amendment. *Id.* at 45–49 (White, J., concurring). In addition, Justice White rejected the respondent's contention that a finding of abrogation could be supported by references to the *purposes* of CERCLA:

> [T]he entire purpose of our "clear statement" rule would be obliterated if this Court were to imply Eleventh Amendment abrogation from our sense of what would best serve the general policy ends Congress was trying to achieve in a statute . . . . If Congress believes that making the States liable to private parties is critical to the scheme it has created in CERCLA, it is up to Congress to say so in unmistakable language. Since it has not, I believe that our "clear statement" precedents bar us from implying such a policy choice—even if it is "latent" in the statutory scheme, or an advisable means of achieving the statute's ends.

Id. at 50.

233. Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

234. The first step in the *Chevron* analysis is to determine whether Congress spoke to the precise question at issue. If the traditional tools of statutory construction yield a clear answer to the interpretive question, then no deference is due to the agency's views, and the court must give effect to the unambiguously expressed intent of Congress. However, if the statute is silent or ambiguous with respect to the specific issue, then the court must defer to the agency's interpretation if it is a permissible construction of the statute. *See Chevron*, 467 U.S. at 842–45.

that, in such circumstances, the *Chevron* rule constrains judicial reliance on the remedial purpose canon.[235] Some courts have viewed the interpretive force of the remedial purpose canon as simply "offset" or negated whenever *Chevron* calls for deference to the agency's narrow interpretation.[236] Other courts have asked whether the remedial purpose canon has an interpretive role to play *within* the *Chevron* two-step framework. For example, in *Wagner Seed Co. v. Bush*,[237] the District of Columbia circuit court deferred to EPA's narrow construction of language added to section 106 of CERCLA by the 1986 Superfund Amendments and Reauthorization Act ("SARA").[238] The section was amended to provide for reimbursement from the Superfund for costs incurred by any person who "receives and complies" with a clean-up order issued by EPA.[239] Wagner Seed's request for reimbursement was rejected by EPA on the ground that Congress intended the 1986 amendment to apply

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The Supreme Court, in *Chevron* itself, did not address the possibility that the rule of deference to agency interpretations could come into conflict with the remedial purpose canon. The Court's silence on this point is especially interesting in light of the fact that the remedial nature of the Clean Air Act was raised by the respondent Natural Resources Defense Council, Inc. in support of the appellate court's rejection of the agency's narrow view of the Act. *See infra* note 253.

235. *But see* West v. Bowen, 879 F.2d 1122, 1137 n.5 (3d Cir. 1989) (Mansmann, J., concurring and dissenting) (noting "a line of cases which indicate that when benefits under a humanitarian (or remedial) statute are at issue, ambiguities in interpretation of the statute will be resolved in favor of the intended beneficiaries, despite the presence of a contrary agency interpretation").

236. *See, e.g.*, Mechmet v. Four Seasons Hotels, Ltd., 825 F.2d 1173, 1177–78 (7th Cir. 1987) (noting offsetting canons negate value of remedial purpose canon as tiebreaker); Hale v. Marsh, 808 F.2d 616, 621 (7th Cir. 1986) (noting utility of remedial purpose canon as interpretive aid is nullified by presence of "countercanons" such as *Chevron* rule of deference).

In National Wildlife Fed'n v. Gorsuch, 693 F.2d 156 (D.C. Cir. 1982), the court of appeals reversed the district court's expansive interpretation of the Clean Water Act, which had been justified primarily by reference to the Act's broad remedial goals. *See supra* notes 218–222 and accompanying text. The court of appeals criticized the district court's approach of viewing the interpretive question in terms of which construction would best further the remedial purposes of the Act, instead of asking the (*Chevron*) question of whether or not EPA's interpretation would constitute a frustration of those purposes. 693 F.2d at 170–71. Likewise, in National Wildlife Fed'n v. Hodel, 839 F.2d 694 (D.C. Cir. 1988), the court of appeals held that the district court erred when it declined to defer to the agency's construction of the Surface Mining Control and Reclamation Act on the grounds that the agency's reading led to a reduction of coverage of the remedial statute. The court of appeals concluded that, since the agency had not engaged in an irrational reading of the statute, deference was due to the officials entrusted to implement and enforce the Act. *Id.* at 765–66.

237. 946 F.2d 918 (D.C. Cir. 1991), *cert. denied*, 503 U.S. 970 (1992).

238. 42 U.S.C. § 9606(b)(2)(A) (1988).

239. *Id.*

only to persons who both received and complied with a clean-up order after the effective date of SARA.[240]

Although the court agreed that Wagner Seed could invoke "traditional tools of statutory construction" to argue that the intent of Congress was clear (and deference to EPA was therefore inappropriate), the court held that reliance on the remedial purpose canon "cannot supply the specific congressional intent that *Chevron* requires."[241] In contrast, some scholars have argued that substantive canons—such as the remedial purpose canon—can play a limited role in the two-step *Chevron* test.[242]

Another effort to reconcile the canons of construction with *Chevron* has produced the following thesis: "statute-defining" (or text-oriented) canons may be appropriately employed in step one of *Chevron*, while "statute-applying" (or substantive) canons may be utilized only when the court proceeds to the second prong of *Chevron*.[243] The court in *Wagner Seed*, which agreed that text-oriented canons may be employed in step one, did not address the applicability of substantive canons in step two. The argument for employment of substantive canons—such as the remedial purpose canon—in step two of the *Chevron* process is that a substantive

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240. 946 F.2d at 919–20. Wagner Seed received its clean-up order in December 1985. *Id.* at 919.

241. 946 F.2d at 925. The court viewed the company's assertion that the statute plainly supported its position and its concomitant invocation of the remedial purpose canon as mugwumpery:

> If the language of the statute were plain enough, of course, Wagner would not be invoking a canon of liberal construction . . . . The "rule" of construction upon which Wagner relies . . . is little more than a "thumb on the scale" in the uncertain category of cases to which it applies; unlike, for example, the rule of *ejusdem generis*, it cannot supply a precise meaning to an otherwise ambiguous text.

Id. at 924–25.

242. It has been contended that the substantive canon favoring Indians can be applied to both the first step (did Congress speak to the question?) and to the second step (is this a reasonable interpretation?) of the *Chevron* process. Peter S. Heinecke, Comment, Chevron *and the Canon Favoring Indians*, 60 U. CHI. L. REV. 1015, 1040 (1993). The applicability of substantive canons—including the remedial purpose canon—in the first step of the *Chevron* process may depend on whether the canon is viewed as a tiebreaker or a rebuttable presumption. *See* notes 196–198 *supra* and accompanying text. If the canon is to be employed only after it has been independently determined that the statute is ambiguous, then the court in *Wagner Seed* is correct in holding that the canon has no role to play in the first step of *Chevron*. If the canon serves as a rebuttable presumption at the outset of the interpretive analysis, however, the reasoning in *Wagner Seed* becomes less convincing. .

243. *See* DeFranco, *supra* note 104, at 839–44.

canon is a legitimate factor to consider when determining the reasonableness of an agency's interpretation of an ambiguous statute.[244]

4. Side Effects

Finally, courts have acknowledged that, in some instances, an expansive interpretation of ambiguous text may unintentionally frustrate—instead of effectuate—the underlying remedial objectives of the statute. In *Central Bank of Denver v. First Interstate Bank of Denver*,[245] the Supreme Court held that private civil liability under section 10(b) of the 1934 Securities Exchange Act does not extend to persons who do not engage in the manipulative or deceptive practice but who aid and abet the violation. In so doing, the Court noted that expanding liability under the statute in the manner proposed by the respondents (and the Securities and Exchange Commission) would *not* further the remedial objectives of the Act:

> Extending the 10b-5 cause of action to aiders and abettors no doubt makes the civil remedy more far-reaching, but it does not follow that the objectives of the statute are better served. Secondary liability for aiders and abettors exacts costs that may *disserve* the goals of fair dealing and efficiency in the securities markets.[246]

Courts in other cases have likewise challenged the simplistic premise "that *whatever* furthers the statute's primary objective must be the law."[247] The fundamental point made by such cases is that the

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244. *Id.* at 843–44.

245. 114 S. Ct. 1439 (1994). *See supra* note 198.

246. *Id.* at 1454 (emphasis added). The Court noted that expansive interpretation would cause "uncertainty and excessive litigation," which in turn could create "ripple effects" such as the passing on of increased litigation and settlement costs incurred by defendants to client companies and, ultimately, the companies' investors who are the intended beneficiaries of the statute. *Id.*

247. Rodriguez v. United States, 480 U.S. 522, 526 (1987); *see, e.g.*, Holmes v. Securities Investor Protection Corp., 503 U.S. 258, 274 (1992) ("[W]e fear that RICO's remedial purposes would more probably be hobbled than helped by SIPC's version of liberal construction . . . ."); Morrison-Knudsen Constr. Co. v. Director, OWCP, 461 U.S. 624, 636–37 (1983) ("An expanded definition of wages would also undermine the goal [of the Longshoremen's and Harbor Workers' Compensation Act] of providing prompt compensation to injured workers and their survivors."); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 198 (1976) (rejecting SEC's expansive, purpose-oriented approach to § 10(b) of 1934 Securities Exchange Act since it "would impose liability for wholly faultless conduct

remedial purpose canon should always be employed with caution, and in particular with an awareness of potential undesired side-effects.

IV. The Canon and Environmental Legislation

Since the focal point of environmental legislation is to protect and conserve natural resources for the common good, it is not surprising that the courts have included environmental statutes in the category of remedial legislation. The acknowledgement that environmental laws are protective in nature can be traced as far back as 1905, when Justice Brown, dissenting in *United States v. United Verde Copper Co.*,[248] argued that the purposes behind the creation by Congress of national forests called for a more narrow construction of an exception to a statutory prohibition against removing timber from national forest lands.[249]

Despite this early recognition of the remedial nature of environmental legislation, the Supreme Court has *not* employed the remedial purpose canon when construing the numerous environmental statutes enacted during the "modern" environmental era.[250] In fact, the last time the Court came close to acknowledging and applying the canon in any environmental case was in the 1960 decision in *United States v. Republic Steel Corp.*,[251] when the Rivers and Harbors Act of 1899 was read "charitably in light of the purpose to be served."[252] Although the remedial purpose canon has

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where such conduct results in harm to investors, a result the Commission would be unlikely to support.").

248. 196 U.S. 207 (1905).

249. *See id.* at 216 (Brown, J., dissenting) ("I am unable to concur in the construction put by the court upon the statute of June 3, 1878. Bearing in mind that the policy of the Government has been to preserve its rapidly diminishing areas of forest lands for the benefit of the whole people, any statute which permits timber to be cut by individuals should be narrowly construed.").

250. It is generally agreed that the "modern" era of environmental law began in 1970 with the creation of the Environmental Protection Agency and the congressional enactment of the National Environmental Policy Act ("NEPA"), Pub. L. No. 91-190, 83 Stat. 852 (codified as amended at 42 U.S.C. §§ 4321–4370d (1988 & Supp. V 1993)), and the Clean Air Act, Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended at 42 U.S.C. §§ 7401–7671q (1988 & Supp. V 1993)); *see generally* Thomas J. Schoenbaum & Ronald H. Rosenberg, Environmental Policy Law: Problems, Cases, and Readings 1–6 (2d ed. 1991).

251. 362 U.S. 482 (1960).

252. *Id.* at 491. The Court in *Republic Steel Corp.* never actually characterized the

been invoked on several occasions since 1960 by parties urging liberal interpretations of environmental statutes, the Court has declined to apply the canon.[253] In addition, the Supreme Court has refrained from utilizing the remedial purpose canon in environmental cases where the canon was employed by the lower courts as an aid to statutory construction. In *Key Tronic Corp. v. United States*,[254] the

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1899 Rivers and Harbors Act as "remedial" legislation and did not explicitly invoke the remedial purpose canon. *See supra* note 5.

253. In EPA v. National Crushed Stone Ass'n, 449 U.S. 64 (1980), the United States supported its argument for a liberal construction of the Clean Water Act by contending that "any doubts on this point must be resolved in favor of the remedial purposes of the statute and the agency's reasonable interpretation." Petitioners' Brief at 42 (No. 79-770). The Court, without mentioning the remedial nature of the Clean Water Act, agreed with the government that the court of appeals "erred in not accepting EPA's interpretation of the Act." 449 U.S. at 85.

In Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), the NRDC attempted to defend the appellate court's interpretation of the Clean Air Act by asserting that "[t]he court followed settled principles for construing a remedial statute which seeks to protect public health from hazards over which people have no personal control." Respondents' Brief at 38–39 (No. 82-1005) (citing Whirlpool Corp. v. Marshall, 445 U.S. 1, 13 (1980); United States v. Bacto-Unidisk, 394 U.S. 784, 798 (1969); United States v. Dotterweich, 320 U.S. 277, 280 (1943)). The Supreme Court, however, made no reference to the remedial nature of the Clean Air Act and instead deferred to the EPA's interpretation of the statute. *See Chevron*, 467 U.S. at 842–66.

In Hallstrom v. Tillamook County, 493 U.S. 20 (1989), the petitioners unsuccessfully argued that the lower court's strict interpretation of the notice requirements contained in the citizen suit provision of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6972(b) (1988), "ignore[d] the general remedial purposes of federal environmental law to protect the environment and encourage citizen enforcement." Petitioner's Opening Brief at 28 (No. 88-42). The Supreme Court's decision—which instead found the strict construction of the notice requirements to be consistent with a literal reading of the statute—makes no mention of the remedial nature of either RCRA or federal environmental statutes in general. *See Hallstrom*, 493 U.S. 20 at 25–33. Justice Marshall, in his dissent, did accept the argument that a broader reading of the statute would better serve Congress' purposes in adopting RCRA. *See id.* at 33–37. However, even Justice Marshall refrained from expressly adopting the petitioners' characterization of RCRA as remedial legislation, despite his frequent reliance on the remedial purpose canon when construing other protective statutes such as worker benefits, safety, and civil rights legislation. *See supra* notes 163, 164, and 171.

Finally, in City of Chicago v. Environmental Defense Fund, 114 S. Ct. 1588 (1994), the parties disputed the role of the remedial purpose canon in determining whether Congress exempted hazardous ash generated by municipal solid waste resource recovery facilities from the stringent requirements of Subtitle C of RCRA. *Compare* Respondents' Brief at 8, 39 (No. 92-1639) (stating argument by Environmental Defense Fund that Subtitle C regulation is supported by canon that exemptions from remedial legislation must be narrowly construed) *with* Petitioners' Reply Brief at 6 (No. 92-1639) (contending that remedial purpose canon "is of no aid here"). Once again, the Supreme Court reached its decision—construing 42 U.S.C. § 6921(i) (1988 & Supp. V 1993) in favor of the "liberal" view calling for more stringent environmental regulation—without addressing either the remedial nature of RCRA or the applicability of the remedial purpose canon. *City of Chicago*, 114 S. Ct. at 1590–94.

254. 114 S. Ct. 1960 (1994).

Supreme Court addressed the question of whether private parties may recover their attorney fees for work associated with bringing a cost recovery action under section 107(a) of CERCLA.[255] As noted by the Court, the district court had employed the remedial purpose canon in support of its conclusion that a private party may recover attorney fees incurred in bringing an action to recover the costs of cleaning up hazardous wastes.[256] The Supreme Court, however, affirmed the contrary holding of the court of appeals and held that Congress had not explicitly authorized private litigants to recover their legal expenses incurred in a private cost recovery action.[257] At no point in its decision did the Supreme Court respond either to the district court's characterization of CERCLA as a remedial statute or to the lower court's assertion that courts "must construe the provisions of § 107 and § 101(25) liberally to achieve the overall objectives of the statute."[258]

The failure of the Supreme Court in the last thirty years to acknowledge and apply the remedial purpose canon when constru-

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255. 42 U.S.C. § 9607(a) (1988). A private party, if successful in establishing liability under § 107, may recover from the liable party "necessary costs of response . . . consistent with the national contingency plan." *Id.* at § 9607(a)(4)(B). In CERCLA's definitional section, the terms "respond" or "response" are defined to mean "remove, removal, remedy, and remedial action . . . *[and] enforcement activities related thereto.*" 42 U.S.C. § 9601(25) (1988) (emphasis added). While CERCLA does not define "enforcement activities," some lower courts had construed the phrase broadly to encompass attorney fees incurred in litigating cost recovery actions. *See supra* note 16; *see also* Heather M. Harvey, *The Availability of Attorneys' Fees as a Necessary Cost of Response in Private Cost-Recovery Actions Under CERCLA*, 26 U. RICH. L. REV. 213 (1991); Janet Morris Jones, *Attorney Fees: CERCLA Private Recovery Actions*, 10 PACE ENVTL. L. REV. 393 (1992); Michael B. Jones, *The Recovery of Attorneys' Fees Under CERCLA: Are They "Costs Of Response" For Private Litigants?*, 11 TEMP. ENVTL. L. & TECH. J. 261 (1992); Eric D. Kaplan, Note, *Attorney Fee Recovery Pursuant to CERCLA § 107(a)(4)(B)*, 42 WASH. U. J. URB. & CONTEMP. L. 251 (1992).

256. *See Key Tronic*, 114 S. Ct. at 1964. The government took the position in the case that attorney fees are unavailable not only because of a lack of explicit congressional authorization in § 107, but also because private parties cannot incur costs of "enforcement activities." The district court rejected both contentions, in large part based on its characterization of CERCLA as "a remedial statute designed by Congress to protect and preserve public health and the environment" and its application of the canon that courts are obligated to liberally construe provisions of remedial statutes. Key Tronic Corp. v. United States, 766 F. Supp. 865, 871 (E.D. Wash. 1991), *rev'd*, 984 F.2d 1025 (9th Cir. 1993), *aff'd*, 114 S. Ct. 1960 (1994).

257. *See Key Tronic*, 114 S. Ct. at 1964–68.

258. *Key Tronic*, 766 F. Supp. at 872. In addition to *Key Tronic*, the Supreme Court has construed CERCLA on three other occasions. *See* Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989); Exxon Corp. v. Hunt, 475 U.S. 355 (1986); Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection, 474 U.S. 494 (1986). The Court did not address either the remedial nature of CERCLA or the applicability of the remedial purpose canon in any of these cases.

ing environmental legislation is surprising in light of the fact that the Court—during this same time period—has utilized the canon as an interpretive aid in connection with many other types of protective legislation.[259] The Supreme Court's disinclination to invoke the remedial purpose canon in environmental cases, however, is even more striking when contrasted with the corresponding interpretive practices of the federal district and appellate courts.[260]

The lower courts have invoked the remedial purpose canon, with varying degrees of regularity, when construing virtually every major federal environmental statute, including the Clean Air Act,[261] the Clean Water Act,[262] the National Environmental Policy Act,[263]

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259. *See supra* notes 162–171 and accompanying text.

260. Although the focus of this Article is on the use of the remedial purpose canon by federal district and appellate courts when construing CERCLA and other federal environmental legislation, it should be noted that state courts have also employed the canon when interpreting state environmental laws. *See, e.g.*, People v. Jackson, 440 N.W.2d 39, 42 n.3 (Mich. Ct. App. 1989) (finding that remedial portions of Michigan's Pesticide Control Act are to be liberally construed); Exxon Corp. v. Mack, 566 A.2d 828, 832 (N.J. Super. Ct. App. Div. 1989) (explaining that New Jersey's Spill Compensation and Control Act "is remedial in nature and therefore should be liberally construed for the purpose of accomplishing its remedial purpose"); Big Fork Mining Co. v. Tennessee Water Quality Control Bd., 620 S.W.2d 515, 519–20 (Tenn. Ct. App. 1981) (finding that state Water Quality Control Act is remedial and is to be liberally construed); *see also* 3A SUTHERLAND, *supra* note 1, § 75.01, at 405–10, and § 75.06, at 430–39.

261. 42 U.S.C. §§ 7401–7671q (1988 & Supp. V 1993). *See, e.g.*, National Lime Ass'n v. EPA, 627 F.2d 416, 454 (D.C. Cir. 1980); Sierra Club v. Public Serv. Co. of Colo., 849 F. Supp. 1455, 1459 (D. Colo. 1995).

262. 33 U.S.C. §§ 1251–1387 (1988 & Supp. V 1993). *See, e.g.*, United States v. Boldt, 929 F.2d 35, 41 (1st Cir. 1991); Scott v. City of Hammond, Ind., 741 F.2d 992, 998 (7th Cir. 1984); United States v. Aluminum Co. of America, 824 F. Supp. 640, 645–46 (E.D. Tex. 1993); United States v. Windward Properties, Inc., 821 F. Supp. 690, 694 (N.D. Ga. 1993); Hudson River Fishermen's Ass'n v. City of New York, 751 F. Supp. 1088, 1100 (S.D.N.Y. 1990), *aff'd*, 940 F.2d 649 (2d Cir. 1991); PIRG v. Powell Duffryn Terminals, Inc., 720 F. Supp. 1158, 1168 (D.N.J. 1989), *rev'd in part*, 913 F.2d 64 (3d Cir. 1990), *cert. denied*, 498 U.S. 1109 (1991); Legal Envtl. Assistance Found., Inc. v. Hodel, 586 F. Supp. 1163, 1169 (E.D. Tenn. 1984). The courts have split on whether the penal provisions of the Clean Water Act should receive an expansive construction. *Compare* United States v. Borowski, 977 F.2d 27, 32 n.9 (1st Cir. 1992) (applying rule of lenity in finding for defendants); *and* United States v. Plaza Health Lab., Inc., 3 F.3d 643, 647–48 (2d Cir. 1993) (viewing with skepticism government's advocation of broad construction of Clean Water Act's penal provisions), *cert. denied*, 114 S. Ct. 2764 (1994); *with* United States v. Boldt, 929 F.2d at 41 (1st Cir. 1991) ("[F]ederal water pollution laws, including their penal provisions, are construed in a broad, rather than a narrow fashion."); *and* United States v. Hamel, 551 F.2d 107, 112–13 (6th Cir. 1977) (stating that water pollution legislation should be given "generous" construction).

263. 42 U.S.C. §§ 4321–4370d (1988 & Supp. V 1993). *See, e.g.*, County of Josephine v. Watt, 539 F. Supp. 696, 705 (N.D. Cal. 1982). *But see* Metropolitan Edison Co. v. People Against Nuclear Energy, 460 U.S. 766, 779 (1983) ("NEPA is not directed at the effects of past accidents and does not create a remedial scheme for past federal actions.").

the Oil Pollution Act of 1990,[264] the Resource Conservation and Recovery Act,[265] the Rivers and Harbors Appropriation Act of 1899,[266] the Surface Mining Control and Reclamation Act,[267] and the Toxic Substances Control Act.[268] The environmental statute, however, that most frequently triggers the employment of the remedial purpose canon by federal district and appellate courts is CERCLA.[269] Although the courts only began construing CERCLA in the early 1980s, every circuit that has considered the Act has produced decisions in which the canon has played an interpretive role.[270] More-

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264. 33 U.S.C. §§ 2701–2761 (1988 & Supp. V 1993). *See, e.g.*, W.H. Avitts v. Amoco Prod. Co., 840 F. Supp. 1116, 1122 (S.D. Tex. 1994).

265. 42 U.S.C. §§ 6901–6992k (1988 & Supp. V 1993). *See, e.g.*, United States v. MacDonald & Watson Waste Oil Co., 933 F.2d 35, 49–50 (1st Cir. 1991); United States v. Sellers, 926 F.2d 410, 416 n.2 (5th Cir. 1991); United States v. Aceto Agric. Chems. Corp., 872 F.2d 1373, 1383 (8th Cir. 1989); United States v. Valentine, 856 F. Supp. 627, 631–32 (D. Wyo. 1994); Acme Printing Ink Co. v. Menard, Inc., 812 F. Supp. 1498, 1512 (E.D. Wis. 1992); United States v. Laughlin, 768 F. Supp. 957, 965 (N.D.N.Y. 1991); United States v. Production Plated Plastics Inc., 742 F. Supp. 956, 960 (W.D. Mich. 1990), *aff'd*, 955 F.2d 45 (6th Cir. 1992), *cert. denied*, 113 S. Ct. 67 (1992); United States v. Allegan Metal Finishing Co., 696 F. Supp. 275, 295 (W.D. Mich. 1988), *appeal dismissed*, 867 F.2d 611 (6th Cir. 1989); Middlesex County Bd. of Chosen Freeholders v. New Jersey Dep't of Envtl. Protection, 645 F. Supp. 715, 722 (D.N.J. 1986); United States v. Solvents Recovery Serv., 496 F. Supp. 1127, 1140 (D. Conn. 1980). However, a few courts have distinguished RCRA from CERCLA by stressing the remedial nature of CERCLA. *See infra* note 360 and accompanying text.

266. 33 U.S.C. §§ 401, 403–404, 406–409, 411–415 (1988 & Supp. V 1993). *See, e.g.*, United States v. Pollution Abatement Servs., 763 F.2d 133, 135 (2d Cir. 1985), *cert. denied*, 474 U.S. 1037 (1985).

267. 30 U.S.C. §§ 1201, 1202, 1211, 1221–1230a, 1231–1243, 1251–1279, 1281, 1291–1309, 1311–1316, 1321–1328 (1988 & Supp. V 1993). *See, e.g.*, National Wildlife Fed'n v. Hodel, 839 F.2d 694, 765 (D.C. Cir. 1988); United States v. Spring Ridge Coal Co., 793 F. Supp. 124, 129 (N.D. W.Va. 1992); United States v. Ringley, 750 F. Supp. 750, 757 (W.D. Va. 1990), *aff'd*, 985 F.2d 185 (4th Cir. 1993); Drummond Coal Co. v. Hodel, 610 F. Supp. 1489, 1498–1505 (D.D.C. 1985), *aff'd*, 796 F.2d 503 (D.C. Cir. 1986), *cert. denied*, 480 U.S. 941 (1987).

268. 15 U.S.C. §§ 2601–2692 (1994). *See, e.g.*, School District of Allentown v. Marshall, 657 F.2d 16, 19 (3d Cir. 1981).

269. As of November 25, 1995, the Westlaw computer search request "((CAA CERCLA CWA CZMA ESA FIFRA FLPMA RCRA SMCRA TSCA) & (remedial w/5 (act or legislation or purpose or statute)))" in the ALLFEDS database unearthed 176 federal decisions that expressly invoke the remedial purpose canon either to focus on CERCLA's remedial nature or to construe CERCLA. In contrast, the search has yielded just thirty-six cases in which federal courts have explicitly relied on the remedial purpose canon when construing *all* of the following environmental statutes: Clean Air Act ("CAA"); Clean Water Act ("CWA"); Coastal Zone Management Act; Endangered Species Act; Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"); Federal Land Management Policy Act; Resource Conservation and Recovery Act ("RCRA"); Surface Mining Control and Reclamation Act ("SMCRA"); and Toxic Substances Control Act.

270. *See, e.g.*, United States v. Kayser-Roth Corp., 910 F.2d 24, 26 (1st Cir. 1990) (citing remedial purpose canon to support holding that parent corporation is directly liable for cleanup costs, under CERCLA, as "operator" of its subsidiary's facility), *cert. denied*,

over, the courts construing CERCLA not only agree that it is remedial in nature;[271] but have consistently gone further and characterized the federal statute as being "overwhelmingly remedial" in nature and deserving of a liberal construction.[272]

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498 U.S. 1084 (1991); B.F. Goodrich Co. v. Murtha, 958 F.2d 1192, 1202 (2d Cir. 1992) (refusing to extend RCRA's "municipality liability" exemption to CERCLA on ground that such action would frustrate CERCLA's broad remedial purposes); Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86, 91 (3d Cir. 1988) (stating that expansive interpretation of CERCLA, which held successor corporation liable for cleanup costs, was supported in part by observation that "[t]he Act views response liability as a remedial, rather than a punitive, measure whose primary aim is to correct the hazardous condition"), *cert. denied*, 488 U.S. 1029 (1989); United States v. Carolina Transformer Co., 978 F.2d 832, 838 (4th Cir. 1992) (holding that because CERCLA is remedial, it should be construed broadly to impose cleanup liability on successor corporation); Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 669 (5th Cir. 1989) (defining term "release" broadly to avoid frustrating CERCLA's "beneficial legislative purposes"); Anspec Co. v. Johnson Controls, 922 F.2d 1240, 1247 (6th Cir. 1991) ("Moreover, the remedial nature of CERCLA's scheme requires the courts to interpret its provisions broadly to avoid frustrating the legislative purposes."); United States v. Mexico Feed & Seed Co., 980 F.2d 478, 484 (8th Cir. 1992) (holding that remedial nature of CERCLA supports broad reading of Act and determination that successor corporation is liable for costs of remediation even if unaware of contamination); Idaho v. Hanna Mining Co., 882 F.2d 392, 396 (9th Cir. 1989) (determining that CERCLA should be given liberal construction and "[e]xceptions to CERCLA liability should, therefore, be narrowly construed"); Colorado v. Idarado Mining Co., 916 F.2d 1486, 1492 (10th Cir. 1990) ("CERCLA is a remedial statute and its provisions should be construed liberally . . . ."), *cert. denied*, 499 U.S. 960 (1991); Florida Power & Light Co. v. Allis Chalmers Corp., 893 F.2d 1313, 1318 (11th Cir. 1990) (rejecting proposed per se rule that narrows "arranger" liability under CERCLA § 107(a)(3) as such a rule would "frustrate CERCLA's broad remedial purpose"); Wagner Seed Co. v. Bush, 946 F.2d 918, 924–25 (D.C. Cir. 1991) (acknowledging potential applicability of remedial purpose canon in CERCLA cases, but holding EPA's more restrictive construction is entitled to deference), *cert. denied*, 503 U.S. 970 (1992). Although the Seventh Circuit has not yet directly invoked the remedial purpose canon in a CERCLA case, district courts within the circuit have relied upon the canon. *See, e.g.*, United States v. Petersen Sand & Gravel, Inc., 824 F. Supp. 751, 755 (N.D. Ill. 1991) ("[T]he remedial intent of CERCLA requires a liberal statutory construction in order to avoid frustrating its purpose."). The remaining circuit, the Federal Circuit, will likely not be called upon to construe CERCLA in light of its special and limited subject-matter jurisdiction. *See* 28 U.S.C. §§ 1295, 1491–1509 (1988 & Supp. V 1993).

271. *But see* Ohio *ex rel.* Brown v. Georgeoff, 562 F. Supp. 1300 (N.D. Ohio 1983), where the court addressed the question of whether CERCLA is a procedural or remedial statute for purposes of coming within the exception to the rule against retroactive application. The court noted that, if a remedial statute is defined as one which neither enlarges nor impairs substantive rights, but rather relates to the means and procedure for enforcing substantive rights, then "it can hardly be contended . . . that this statute involves remedial legislation of this type" since CERCLA "creates an entirely new procedure for enforcing substantive rights." *Id.* at 1306 n.7. Although the court declined to characterize CERCLA as remedial for purposes of applying the exemption against retroactivity, both the district court and the Sixth Circuit have applied the remedial purpose canon in CERCLA cases. *See, e.g.*, United States v. Summit Equip. & Supplies, Inc., 805 F. Supp. 1422, 1430–31 (N.D. Ohio 1992); United States v. R.W. Meyer, Inc., 889 F.2d 1497, 1503 (6th Cir. 1989), *cert. denied*, 494 U.S. 1057 (1990).

272. *See, e.g.*, United States v. Fleet Factors Corp., 901 F.2d 1550, 1557 (11th Cir. 1990), *cert. denied*, 498 U.S. 1046 (1991); Florida Power & Light Co. v. Allis Chalmers

Just as in the case of other classes of protective statutes, courts construing environmental legislation have justified the use of the remedial purpose canon either by referring to the intrinsic remedial nature of the statute itself or by noting legislative "signals" found in the text, legislative history, or structure of the statute which confirm its remedial nature. For example, most environmental statutes have been deemed inherently remedial in light of their primary objectives of protecting human health, welfare, and the environment.[273] In addition, Congress has directly "confirmed" the remedial nature of environmental legislation either by explicitly instructing courts to give statutory provisions an expansive interpretation,[274] or by providing courts with a recitation of the remedial

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Corp., 893 F.2d 1313, 1317 (11th Cir. 1990); United States v. Aceto Agric. Chems. Corp., 872 F.2d 1373, 1380 (8th Cir. 1989); United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726, 733 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987); KN Energy, Inc. v. Rockwell Int'l Corp., 840 F. Supp. 95, 98 (D. Colo. 1993); Courtaulds Aerospace v. Huffman, 826 F. Supp. 345, 350 (E.D. Cal. 1993); United States v. Arrowhead Ref. Co., 829 F. Supp. 1078, 1090 (D. Minn. 1992); United States v. Summit Equip. & Supplies, Inc., 805 F. Supp. 1422, 1431 (N.D. Ohio 1992); United States v. Pesses, 794 F. Supp. 151, 157 n.21 (W.D. Pa. 1992); CPC Int'l, Inc. v. Aerojet-General Corp., 759 F. Supp. 1269, 1276 (W.D. Mich. 1991); *see also In re* Acushnet River & New Bedford Harbor, 722 F. Supp. 893, 897 (D. Mass. 1989) (noting "CERCLA's extraordinarily broad remedial purpose").

273. *See, e.g.*, United States v. Sellers, 926 F.2d 410, 416 n.2 (5th Cir. 1991) (noting criminal penalty provision of RCRA is entitled to liberal construction to effectuate purpose of protecting public health); Cumberland Reclamation Co. v. Secretary, United States Dep't of the Interior, 925 F.2d 164, 167 (6th Cir. 1991) (finding that liberal interpretation furthers SMCRA's purpose of redressing any deleterious environmental effects of surface coal mining); Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1081 (1st Cir. 1986) ("CERCLA is essentially a remedial statute designed by Congress to protect and preserve public health and the environment . . . [and courts] are therefore obligated to construe its provisions liberally to avoid frustration of the beneficial legislative purposes."); United States v. Waste Industries, Inc., 734 F.2d 159, 165 (4th Cir. 1984) (finding that purpose of RCRA is "to abate gross dangers to a community"); W.H. Avitts v. Amoco Prod. Co., 840 F. Supp. 1116, 1122 (S.D. Tex. 1994) ("The [Oil Pollution Act] is a remedial statute broadly designed to address the nationwide and pernicious threat to coastal waters posed by unnecessary pollution resulting from oil exploration activities."); United States v. Aluminum Co. of America, 824 F. Supp. 640, 645 (E.D. Tex. 1993) ("The objective of the CWA is to protect human health, welfare, and the environment . . . [and the Act] is entitled to a broad construction to implement its purpose."); United States v. Laughlin, 768 F. Supp. 957, 965 (N.D.N.Y. 1991) (holding that RCRA is public welfare statute and should be broadly construed); Mobay Corp. v. Allied-Signal, Inc., 761 F. Supp. 345, 350 (D.N.J. 1991) (stating that courts must construe CERCLA's provisions liberally "[t]o achieve CERCLA's remedial goals of protecting public health and the environment"); General Elec. Co. v. Litton Business Sys., Inc., 715 F. Supp. 949, 961 (W.D. Mo. 1989) ("Statutes such as CERCLA which were enacted for the protection and preservation of public health are to be given an extremely liberal construction for the accomplishment of their beneficial objectives."), *aff'd*, 920 F.2d 1415 (8th Cir. 1990), *cert. denied*, 499 U.S. 937 (1991).

274. Congress, in enacting the National Environmental Policy Act ("NEPA"), ex-

purposes of a statute in a broadly worded declaration of congressional goals and policies.[275]

If the text of the statute and its underlying purposes do not suffice to justify the invocation of the remedial purpose canon, a court may look further to the legislative history or the structure of a statute. When enacting various environmental laws, Congress has communicated its intent that a particular term, or grant of jurisdiction, should be given an expansive interpretation.[276] In the case of

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pressly directed that its provisions be complied with "to the fullest extent possible." 42 U.S.C. § 4332 (1988). The Ninth Circuit has interpreted the congressional mandate to apply NEPA to the fullest extent possible "as a direction to 'make as liberal an interpretation as we can to accommodate the application of NEPA.'" LaFlamme v. FERC, 852 F.2d 389, 398 (9th Cir. 1988) (quoting Jones v. Gordon, 792 F.2d 821, 826 (9th Cir. 1986)). *But see* Sylvester v. Army Corps of Eng'rs, 884 F.2d 394, 399 (9th Cir. 1989) (agreeing that phrase "to the fullest extent possible" means that agency shall not use excessively narrow construction of its statutory authorizations to avoid compliance with NEPA, but holding that "[e]ven expansive language has some limits").

275. With the exception of CERCLA and FIFRA, all major federal environmental statutes begin with a statement of congressional findings and/or a declaration of the statute's policies, purposes, and goals. *See supra* note 10 (listing statutes). The courts have relied on such preambles and explications of statutory goals to characterize environmental laws as remedial and to justify the use of the remedial purpose canon. *See, e.g.*, Sierra Club v. Colorado Refining Co., 838 F. Supp. 1428, 1434 (D. Colo. 1993) ("[T]he Tenth Circuit has chosen to interpret the terminology of the Clean Water Act broadly to give full effect to Congress' declared goal and policy . . . ."); Atlantic States Legal Found. v. Simco Leather Corp., 755 F. Supp. 59, 60 (N.D.N.Y. 1991) (describing CWA's statement of congressional objectives as declaration of "broad remedial goals"); United States v. Ringley, 750 F. Supp. 750, 757 (W.D. Va. 1990) (citing SMCRA's statement of congressional purposes, 30 U.S.C. § 1202(e) (1988), to support conclusion that Act is remedial statute that "the court must liberally construe"), *aff'd*, 985 F.2d 185 (4th Cir. 1993); South Carolina Wildlife Fed'n v. Alexander, 457 F. Supp. 118, 133 (D.S.C. 1978) (describing CWA's "national goal that discharge of pollutants into navigable waters be eliminated by 1985," 33 U.S.C. § 1251(a)(1) (1988), as "broad remedial purpose"). *But see* United States v. Plaza Health Lab., Inc., 3 F.3d 643, 647 (2d Cir. 1993) (citing § 101 of CWA, 33 U.S.C. § 1251 (1988), as evidence of "broad remedial purpose of the CWA" but noting that interpretive issues "may not be resolved merely by simple reference to this admirable goal"), *cert. denied*, 114 S. Ct. 2764 (1994); National Wildlife Fed'n v. Gorsuch, 693 F.2d 156, 178 (D.C. Cir. 1982) ("[I]t is one thing for Congress to announce a grand goal, and quite another for it to mandate full implementation of that goal."); Frankfurter, *supra* note 145, at 542 ("It is to be noted that Macaulay, a great legislative draftsman, did not think much of preambles. He believed that too often they are jejune because legislators may agree on what ought to be done, while disagreeing about the reasons for doing it.").

276. *See, e.g.*, S. REP. No. 172, 96th Cong., 1st Sess. 5 (1979), *reprinted in* 1980 U.S.C.C.A.N. 5019, 5023 (stating that statutory term "contributing to" in § 7003(a) of RCRA, 42 U.S.C. § 6973(a), is meant to be more liberal than common law counterparts); H.R. REP. No. 294, 95th Cong., 1st Sess. 309 (1977), *reprinted in* 4 A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1977, at 2776 (stating that terms "fuel" and "fuel additives" in § 211 of Clean Air Act, 42 U.S.C. § 7545, are to be construed broadly); S. REP. No. 583, 94th Cong., 1st Sess. 72 (1975) (stating that "who rely" clause in § 505(b)(iv) of Federal Land Policy and Management Act, 43 U.S.C. § 1765(b)(iv), "being remedial, is to be broadly construed"); S. REP. No. 307, 93d Cong., 1st Sess. 7 (1973) (stating that term "take" in § 9(a)(1)(B) of Endangered Species Act, 16 U.S.C.

CERCLA, both the Act's legislative history and its structural scheme have been cited to support the view that use of the remedial purpose canon furthers the intent of Congress that courts aggressively construe CERCLA in order to fill in gaps in its statutory scheme.[277] In addition, as discussed in more detail in Part VI below, the employment of the remedial purpose canon in CERCLA cases has been justified not only in light of the statute's legislative history and underlying purposes, but also because of the fact that Congress—as in the case of the Sherman Antitrust Act—intended for the courts to develop a federal common law that would supplement CERCLA's provisions.[278]

V. ASSESSMENT

As the preceding materials demonstrate, significant differences of opinion exist regarding the legitimacy and use of the remedial purpose canon. The debate, which has heated up in recent years, is focused on three aspects of the canon: (1) its coverage; (2) its application; and (3) its pedigree. Although most of the scholarly commentary on the remedial purpose canon is negative in nature, it is possible to glean from the various critiques a "best case scenario" for the application of the canon.

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§ 1538(a)(1)(B), is defined "in the broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife"); H.R. CONF. REP. No. 765, 91st Cong., 1st Sess. 10 (1969), *reprinted in* 1969 U.S.C.C.A.N. 2751, 2770 (no agency shall "utilize an excessively narrow construction of its existing statutory authorizations to avoid compliance" with NEPA).

As noted in the preceding footnote, FIFRA lacks a statement of congressional purpose. In Oner II, Inc. v. EPA, 597 F.2d 184, 186 (9th Cir. 1979), the Ninth Circuit relied on the legislative history of FIFRA to identify the protection of the national environment as the underlying purpose behind the Act's regulation of pesticides. The court then cited this broad purpose as the sole authority for the extension of liability under FIFRA to successor corporations, holding that "[a] contrary holding might unnecessarily hamper enforcement of the Act's mandates." *Id.* at 187.

277. The seminal cases are United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100 (D. Minn. 1982), and United States v. Northeastern Pharmaceutical & Chem. Co. ("NEPACCO"), 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987). In *Reilly Tar & Chemical*, the district court advocated an aggressive reading of CERCLA for the first time by holding that CERCLA "should be given a broad and liberal construction" in order to give effect to Congress' desire for a prompt and effective remediation of hazardous waste sites, with those responsible bearing the cost and responsibility for the cleanup. 546 F. Supp. at 1112. In *NEPACCO*, the Eighth Circuit provided a structural justification for the use of the remedial purpose canon in CERCLA cases by concluding that "the statutory scheme itself is overwhelmingly remedial." 810 F.2d at 733.

278. *See infra* part VI.B.

A. Coverage

In terms of coverage, legislation scholars uniformly complain that the remedial purpose canon suffers from indeterminacy; by literally encompassing all statutory enactments "remedial" in nature, the canon is deemed "useless" at best. At worst, it is seen as a tool of manipulation wielded by judges desirous of cloaking judicial willfulness in formalistic verbiage.

Such criticisms, while valid, are at the same time overstated. The indeterminate nature of the remedial purpose canon has *not* prevented the judiciary from approaching a consensus as to the types of statutes that trigger the canon. As demonstrated above, there are specific and well-defined categories of statutes where judicial recognition of the applicability of the remedial purpose canon is firmly established.[279] As to such established categories of statutes, the indeterminacy objection falters. If approached on a subject-specific basis, the question of coverage loses relevancy, and the remedial purpose canon in effect is transformed into a series of distinctive substantive canons; e.g., the "civil rights" canon, the "worker safety" canon, and the "environmental" canon. Thus, it is possible for a scholar (such as Cass Sunstein) to criticize the remedial purpose canon as hopelessly indeterminate, yet at the same time advocate—in particular situations—that courts proceed precisely as the canon would suggest and impart a liberal construction to a statute to achieve its underlying objective.[280]

While it is true, as Justice Scalia points out, that all non-penal statutes are in some sense "remedial" in nature, his statement that there is consequently "not the slightest agreement" as to the boundaries of the remedial purpose canon must be rejected. One need not subscribe to Orwellian logic to conclude that some non-penal statutes are inherently "more remedial" than others.[281] Moreover, it is possible to have assurance that the remedial purpose canon is being

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279. *See supra* part III.C. *See also* ESKRIDGE & FRICKEY, CASES AND MATERIALS ON LEGISLATION (2d ed.), *supra* note 102, at 653 ("More modern typologies of the liberal-versus-strict construction canons have emerged. Certain statutes (such as civil rights, securities, and antitrust statutes) are to be liberally construed—in other words, applied expansively to new situations").

280. See *supra* note 161.

281. *Cf.* GEORGE ORWELL, ANIMAL FARM 118 (Harcourt Brace Jovanovich ed., 1990) (1946) ("ALL ANIMALS ARE EQUAL, BUT SOME ARE MORE EQUAL THAN OTHERS"). *See also supra* part III.C.

appropriately applied to a particular remedial statute. Explicit legislative confirmation may be found in either the text or the statute's enactment history. In addition, the structure of a statutory scheme—as in the case of CERCLA—may confirm that it is "overwhelmingly remedial" in nature.[282] Thus, the lack of a precise definition of the term "remedial" should not fatally condemn the remedial purpose canon.

B. Application

With regard to the actual employment of the remedial purpose canon, the scholars have unvaryingly faulted the canon for its failure to provide guidance on the issue of *how* liberally a remedial statute should be read. In addition, legal realists have derided the canon as being a "cover" for judicial willfulness, and public choice theorists have further criticized the canon for failing to recognize that—in situations where the legislature has not enacted truly "public-regarding" legislation—an aggressive construction could upset the legislative compromises that the statute was intended to embody.

Again, while these points of criticism are well-founded, they appear to trouble scholars more than the jurists who actually apply the remedial purpose canon. In fact, it is arguable that the canons "present no greater opportunity for judicial willfulness than do other techniques of statutory interpretation."[283] It is certainly apparent from their handiwork that judges are aware—if not always respectful—of the limits of the remedial purpose canon. In particular, as explored in Part III.D of this Article, the courts have recognized that the canon must be applied with circumspection—if at all—when (1) an aggressive construction is in tension with the plain meaning of the text; (2) the statute is the product of legislative compromise and/or contains conflicting goals; or (3) there are offsetting extra-statutory goals or interpretive "meta-principles" in-

282. *See supra* note 272 and accompanying text.

283. Jonathan R. Macey & Geoffrey P. Miller, *The Canons of Statutory Construction and Judicial Preferences*, 45 VAND. L. REV. 647, 650 (1992). *See generally* POSNER, THE FEDERAL COURTS, *supra* note 69, at 287 ("[T]he irresponsible judge will twist any approach to yield the outcomes that he desires, and the stupid judge will do the same thing unconsciously.").

volved.[284] The courts have also recognized that the canon, when applied, should be utilized with an awareness of potential undesired side-effects. These judicial qualifications, interestingly, are not unlike the general principles set forth by Cass Sunstein to guide the application of his own suggested canons.[285]

C. Pedigree

The critics have also taken issue, in varying degrees depending on their own interpretive orientations, with the origins and continued legitimacy of the remedial purpose canon. The remedial purpose canon is a substantive canon whose original justification was to assist judges with the integration of statutory enactments into the preexisting and pervasive common law regime. As noted above in Part III.A, once integration (indeed, dominance) was achieved, the theoretical basis for the canon necessarily shifted. Today, the canon is utilized only with respect to particular categories of statutes; i.e., statutes that have been deemed by the courts to be "remedial" and deserving of expansive constructions.

This pedigree, as discussed above, troubles some scholars more than others. As a textualist, Justice Scalia disfavors reliance on interpretive signals that are not found in the words or structure of the statute itself. Richard Posner is troubled by the "politicizing of the interpretive process"[286] through the use of substantive canons.[287]

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284. *See supra* part III.D.

285. Sunstein qualifies his interpretive principles by providing accompanying "generic principles" of application, as well as "meta-principles" for prioritizing and harmonizing canons that could otherwise conflict. *See* SUNSTEIN, AFTER THE RIGHTS REVOLUTION, *supra* note 23, at 170–89, 237–38; Sunstein, *Interpreting Statutes*, *supra* note 23, at 476–500, 507–08. Of particular importance to the issue of interpreting environmental legislation is Suntstein's "generic principle" that statutes should be construed with an awareness that expansive interpretations may produce unanticipated (and undesirable) systemic side-effects. *See* SUNSTEIN, AFTER THE RIGHTS REVOLUTION, *supra* note 23, at 178–79; Sunstein, *Interpreting Statutes*, *supra* note 23, at 480.

286. POSNER, THE PROBLEMS OF JURISPRUDENCE, *supra* note 29, at 292; *see also* Richard A. Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827, 852 (1988).

287. Posner has criticized the remedial purpose canon because it is not an interpretive (or text-oriented) canon "in the sense of helping a court figure out what the legislature meant," but is instead a substantive canon that "establish[es] presumptions, based on substantive policy, for resolving indeterminate statutory cases." POSNER, THE PROBLEMS OF JURISPRUDENCE, *supra* note 29, at 280. In his view, such substantive canons "cannot be defended by reference to concepts of interpretation," but are simply "political principles used to decide cases when interpretation fails . . . ." *Id.*

Cass Sunstein, on the other hand, has no difficulty with the employment of value-laden substantive canons, but contends that the remedial purpose canon lacks specific background normative values, and that it lost its legitimacy when it no longer served as a corrective to the derogation canon.[288] Sunstein, however, would presumably not object to subject-specific uses of the remedial purpose canon, if accompanied by consciously articulated and agreed-upon background assumptions and values.[289]

D. Best-Case Scenario

Rather than tilt at windmills and attempt a comprehensive defense of the remedial purpose canon, its defenders are better off in the face of the multi-faceted and largely negative scholarly critiques to construct a "best-case scenario" for the application of the canon. Reliance on the remedial purpose canon is most appropriate when most or all of the following circumstances are present:

* The statute in question is, by its nature, "more remedial" than other non-penal statutes;
* The statute falls in a category that is historically associated with the remedial purpose canon;
* The statute—through signals found in its text, legislative history, and/or structure—confirms that the legislature deems use of the remedial purpose canon to be appropriate;
* The statute is "public-regarding" and is less the product of legislative compromise;
* The statute contains clearly stated goals that do not conflict;

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288. Cass Sunstein is prominent among scholars who argue "that the substantive canons represent a way for 'public values' drawn from the Constitution, federal statutes, and the common law to play an important role in statutory interpretation." ESKRIDGE AND FRICKEY, CASES AND MATERIALS ON LEGISLATION (2d ed.), *supra* note 102, at 710. In his view, "[b]ecause statutory meaning is a function of interpretive principles and cannot exist without them, something like 'canons' of construction, far from being obsolete, must occupy a prominent place in the theory and practice of statutory interpretation." Sunstein, *Interpreting Statutes*, *supra* note 23, at 503. Sunstein, however, does not place all substantive canons on equal footing and has singled out the remedial purpose canon for criticism. *See* SUNSTEIN, AFTER THE RIGHTS REVOLUTION, *supra* note 23, at 156 (describing the canon as "largely useless"). *See also* Sunstein, *Interpreting Statutes*, *supra* note 23, at 459 n.201, 507.

289. *See supra* note 161.

* The legislature, when enacting the statute, authorized the courts to fill in the statutory gaps on the basis of evolving common law principles; and
* The statute's goals do not conflict either with the goals of other statutes or with other canons of construction or interpretive principles.

It is not necessary—or at all likely—that every one of the aforementioned circumstances will be present when a court is called upon to apply the remedial purpose canon. In the case of the Superfund statute, however, many of these conditions *are* present. As noted in Part VI below, CERCLA is—for several reasons—an unusually strong candidate for the employment of the remedial purpose canon.

VI. Judicial Application of the Remedial Purpose Canon in CERCLA Cases

The remedial purpose canon has been employed by the federal appellate and district courts in CERCLA cases with a remarkable frequency.[290] It is submitted that the reason that CERCLA is such a strong candidate for the employment of the remedial purpose canon is because the statute so closely approximates the "best-case scenario" for the canon's application.[291] In particular, CERCLA is a "public-regarding" statute that is inherently "more remedial" than other non-penal statutes. Moreover, Congress has provided confirmation—in the statute's legislative history and its structure—that CERCLA should receive a liberal construction by the courts in

290. *See supra* note 269. It is commonplace for CERCLA decisions to proceed as follows: the court (1) begins with discussion of the facts, procedural history, and particular issue(s) presented; (2) follows with a general statement regarding CERCLA's remedial nature and the applicability of the remedial purpose canon of statutory construction; (3) turns to the analysis and resolution of the interpretive issue; and (4) ends with the observation that the result reached furthers (or avoids frustrating) the remedial purposes of the statute. *See, e.g.*, B.F. Goodrich Co. v. Murtha, 958 F.2d 1192 (2d Cir. 1992); Florida Power & Light Co. v. Allis Chalmers Corp., 893 F.2d 1313 (11th Cir. 1990); Atlantic Richfield Co. v. Blosenski, 847 F. Supp. 1261 (E.D. Pa. 1994); United States v. DiBiase Salem Realty Trust, No. CIV.A.91-11028-MA, 1993 WL 729662 (D. Mass. Nov. 19, 1993); CPC Int'l, Inc. v. Aerojet-General Corp., 777 F. Supp. 549 (W.D. Mich. 1991), *rev'd in part sub nom.* United States v. Cordova Chem. Co., 59 F.3d 584 (6th Cir. 1995), *vacated and reh'g en banc granted*, 67 F.3d 586 (6th Cir. 1995).

291. *See supra* part V.

order to effectuate its remedial goals, especially by fleshing out the Act's liability provisions on the basis of evolving federal common law. In short, the remedial purpose canon is appropriately invoked in CERCLA cases because the statute is one of those instances where—to borrow the words of Frank Easterbrook—a legislature has enacted "public interest laws that, stopping well short of the point where they produce too much of a good thing, charge the judiciary with the task of creating remedies for whatever new problems show up later on."[292]

A. CERCLA'S Goals and the Remedial Purpose Canon

CERCLA is "oft-criticized for its hasty passage and lack of clarity."[293] It was enacted in December 1980, in the waning days of both the 96th Congress and the Carter Administration, "as a legislative response to the growing problem of toxic wastes, many of which were disposed of before their dangers were widely known and had contaminated precious land and water resources."[294] Because of its "eleventh-hour" enactment, there is no committee report on the final version of the Act, which was a "blending of three separate bills."[295]

Despite CERCLA's arduous enactment history and its inartful drafting, the general purposes of the Act are not in dispute. CERCLA's overriding purpose is to protect human health and the environment from the dangers posed by hazardous substances.[296] This ultimate objective prompted Congress to create a statutory scheme with two principal remedial goals:

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292. Easterbrook, *Statutes' Domains*, *supra* note 76, at 544.

293. Rhodes v. County of Darlington, 833 F. Supp. 1163, 1174 (D.S.C. 1992).

294. Artesian Water Co. v. New Castle County, 659 F. Supp. 1269, 1276 (D. Del. 1987), *aff'd*, 851 F.2d 643 (3d Cir. 1988). CERCLA's enactment history is widely chronicled. *See, e.g.*, New York v. Shore Realty Corp., 759 F.2d 1032, 1039–42 (2d Cir. 1985); *Rhodes*, 833 F. Supp. at 1172–76 (D.S.C. 1992); United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1111–12 (D. Minn. 1982); WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW 680–85 (2d ed. 1994); *see also supra* note 8 and accompanying text.

295. Rhodes v. County of Darlington, 833 F. Supp. 1163, 1174 (D.S.C. 1992).

296. *See* Healy, *supra* note 13, at 42; S. REP. No. 848, 96th Cong., 2d Sess. 56 (1980) (stating "paramount purpose" for response authority provided by S. 1480 is protection of health, welfare, and environment).

> CERCLA's primary purpose is remedial: to clean up hazardous waste sites . . . . Because it is a remedial statute, CERCLA must be construed liberally to effectuate its two primary goals: (1) enabling the EPA to respond efficiently and expeditiously to toxic spills, and (2) holding those parties responsible for the releases liable for the costs of the cleanup. In that way, Congress envisioned the EPA's costs would be recouped, and the taxpayers not required to shoulder the financial burden of nationwide cleanup.[297]

In order to accomplish its objectives, CERCLA contains provisions relating to the investigation and cleanup of hazardous waste sites, as well as provisions concerning the imposition of liability for the costs of investigation and remediation. As seen below, the remedial purpose canon has been regularly invoked by courts to construe CERCLA broadly in order to effectuate the twin goals of prompt remediation and making the polluters pay (to the extent possible) for the costs of the cleanup.

1. Cleaning Up Quickly

Ensuring prompt and efficient cleanup of hazardous waste sites has been deemed "the fundamental purpose of CERCLA."[298] As discussed below, in order to accomplish this goal, CERCLA provides the United States Environmental Protection Agency ("EPA") with extensive authority to undertake or direct remediation activities. In addition, CERCLA's goal of ensuring prompt action led

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297. United States v. Witco Corp., 865 F. Supp. 245, 247 (E.D. Pa. 1994); *see also* B.F. Goodrich Co. v. Murtha, 697 F. Supp. 89, 94 (D. Conn. 1988) (citing facilitation of prompt and effective cleanup and allocation of cost to those responsible for harm as "twin goals of CERCLA").

298. United States v. Kramer, 770 F. Supp. 954, 958 (D.N.J. 1991); *see also* Mobay Corp. v. Allied-Signal, Inc., 761 F. Supp. 345, 349 (D.N.J. 1991) ("CERCLA's principal goal is decisive action to begin remediation of the nation's major hazardous waste sites"). The legislative history of CERCLA contains statements underscoring the perceived need to act quickly:

> [T]he need for an emergency Federal response to deal with abandoned waste sites and chemical spills is real, and it is immediate . . . We have no time to lose. Hazardous wastes are produced daily; we cannot put them on hold while we dally through deliberation . . . . I believe the clear consensus is that we must clean up abandoned hazardous waste sites as soon as possible.

CONG. REC. S14,973, 14,977 (daily ed. Nov. 24, 1980) (statements of Senators Tsongas and Danforth, respectively) (*quoted in* Rhodes v. County of Darlington, 833 F. Supp. 1163, 1174–75 (D.S.C. 1992)).

courts—even prior to the 1986 addition of an explicit timing of review provision—to hold that judicial review of remediation decisions should be postponed until the government files suit to recover the costs of the cleanup. Furthermore, the creation of a federal cause of action, available to private entities engaged in their own remediation efforts, for the recovery of incurred response costs from other responsible parties, aids timely cleanups by giving private parties incentives to be the first to respond.

a. Extensive Governmental Cleanup Authority

Congressional delegation to EPA of response authority is found primarily in sections 104, 106, 107, and 111 of CERCLA.[299] Section 104(a) authorizes EPA to undertake response actions whenever there is a release or threatened release of hazardous substances into the environment.[300] In order to assess the need for action, Congress granted EPA extensive information gathering, access, and inspection authority in section 104(e) of CERCLA.[301] In construing the breadth of this delegation of investigatory powers, the courts have invoked the remedial purpose canon and have broadly construed the statutory provision.[302]

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299. 42 U.S.C. §§ 9604, 9606, 9607, 9611 (1988).

300. 42 U.S.C. § 9604(a) (1988); *see generally* Healy, *supra* note 13, at 5–10. The key terms "facility" and "release" have received liberal constructions. *See infra* notes 324–325 and accompanying text.

Congress, in § 111(a) of CERCLA, "authorized to be appropriated from the Hazardous Substance Superfund . . . not more than $8,500,000,000 for the 5-year period beginning on October 17, 1986, and not more than $5,100,000,000 for the period commencing October 1, 1991, and ending September 30, 1994, and such sums remain available until expended." 42 U.S.C. § 9611(a) (1988 & Supp. V 1993). The Superfund is used, *inter alia*, to finance EPA cleanup activities undertaken pursuant to the authority granted in § 104.

301. 42 U.S.C. § 9606(e) (1988).

302. For example, in New Jersey Dep't of Envtl. Protection v. Briar Lake Dev. Corp., 736 F. Supp. 62 (D.N.J. 1990), *aff'd mem.*, 961 F.2d 210 (3d Cir. 1992), the court held that an authorized state agency was entitled under § 104(e) of CERCLA to immediate access to property adjacent to a landfill for purposes of completing the cleanup of the landfill. After observing that "CERCLA is a remedial statute which must be liberally construed," the court supported its holding that the agency need not show irreparable injury to obtain an access order by noting that its broad interpretation furthered CERCLA's "primary purpose" of "prompt cleanup of hazardous waste sites." *Id.* at 66; *see also* United States v. Charles George Trucking Co., 682 F. Supp. 1260, 1268 (D. Mass. 1988) (rejecting contention that government must issue administrative order before seeking court-ordered access because "the crabbed construction of § 9604(e)(5) urged by defendants would constrict broad efforts of Congress to assure hazardous waste cleanups proceed as expeditiously as feasible").

In addition to the response authority provided in section 104, Congress in section 106(a) authorized the President, in certain situations, to issue administrative orders directing others to take such action "as may be necessary to protect public health and welfare and the environment."[303] The statutory precondition for taking action under section 106 is the determination "that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility . . . ."[304] In the influential decision of *United States v. Conservation Chemical Co.*,[305] the court held that phrase "'imminent and substantial endangerment'" should be given "'an extremely liberal construction'" in order to effectuate the "'beneficent objectives'" of CERCLA.[306]

b. Limited Judicial Review

The remedial goal of ensuring prompt cleanups caused courts to construe CERCLA, as originally enacted in 1980, to implicitly foreclose access to the federal courts prior to the completion of a government cleanup and an action to recover the costs of remediation.[307] In 1986, Congress amended section 113 of CERCLA by adding subsections concerning both the timing and scope of judicial review. Section 113(h) of CERCLA now expressly limits the

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303. 42 U.S.C. § 9606(a) (1988). Section 106(a) also authorizes the federal government to file suit in district court "to secure such relief as may be necessary to abate such danger or threat."

The authority of the government to direct others to engage in remediation activities is bolstered by § 107(c)(3) of CERCLA, which provides that the failure "without sufficient cause" to comply with cleanup orders may cause a person to "be liable to the United States for punitive damages in an amount at least equal to, and not more than three times, the amount of costs incurred by the Fund as a result of such failure to take proper action." 42 U.S.C. § 9607(c)(3) (1988).

304. 42 U.S.C. § 9606(a) (1988).

305. 619 F. Supp. 162 (W.D. Mo. 1985).

306. *Id.* at 192 (quoting 3 SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION, § 71.02 at 313). In particular, the district court held that an "endangerment" (1) need not be actual harm, but may be a threatened or potential harm; (2) need not be either immediate or an emergency in order for it to be "imminent and substantial;" and (3) is "imminent" if factors giving rise to it are present, even though the harm may not be realized for years. *Id.* at 192–94.

307. *See* Healy, *supra* note 13, at 12–17. For example, the Sixth Circuit, in J.V. Peters & Co. v. Administrator, EPA, 767 F.2d 263, 264 (6th Cir. 1985), reasoned that "[b]ecause the Act's primary purpose is the prompt cleanup of hazardous waste sites," allowing immediate judicial review of EPA's decision to proceed with a response action "would debilitate the central function of the Act."

availability and timing of judicial review of section 106 cleanup orders and response actions selected under section 104.[308] With respect to the scope of judicial review, section 113(j) states that judicial review of issues concerning the adequacy of response actions taken or ordered by the President "shall be limited to the administrative record" and shall be upheld unless shown "that the decision was arbitrary and capricious or otherwise not in accordance with law."[309]

The timing and scope of review provisions of section 113 have been the subject of numerous CERCLA decisions since their enactment in 1986.[310] In many of these cases, courts have justified liberal constructions of section 113 by reference to CERCLA's underlying remedial goal of ensuring prompt cleanups.[311]

c. Private Cleanups and Cost Recovery Suits

A third means by which the goal of cleaning up hazardous waste sites quickly is furthered is through the encouragement of

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308. 42 U.S.C. § 9613(h) (1988). The section specifies five circumstances in which judicial review is available. Most significantly, Congress postponed judicial review until (1) an action is filed under § 107 to recover response costs or damages or for contribution, and (2) an action is filed to enforce an order issued under § 106(a) or to recover a penalty for violation of a § 106(a) cleanup order. 42 U.S.C. § 9613(h)(1)–(2) (1988).

309. 42 U.S.C. § 9613(j)(1)–(2) (1988). Section 113(k) governs the creation of, and public access to, the administrative record upon which the government bases the selection of a response action. 42 U.S.C. § 9613(k) (1988).

310. With regard to § 113(h), the primary interpretive issue has centered on whether immediate judicial review should be available, in certain circumstances, notwithstanding the section's broadly worded provisions. *See supra* notes 12–13 and accompanying text, and *infra* note 433. The chief issues involving § 113(j) have been whether its scope of review provisions should apply to cases commenced prior to its effective date and to cases where the court is requested by the government pursuant to § 106(a) to grant injunctive relief. *See, e.g.*, United States v. Akzo Coatings of America, Inc., 949 F.2d 1409, 1423–26 (6th Cir. 1991); United States v. Ottati & Goss, 900 F.2d 429, 432–36 (1st Cir. 1990); United States v. Hardage, 663 F. Supp. 1280, 1283–86 (W.D. Okla. 1987).

311. *See, e.g.*, Barmet Aluminum Corp. v. Reilly, 927 F.2d 289, 292–96 (6th Cir. 1991) (holding § 113(h) encompasses and bars pre-enforcement review of constitutional challenges); United States v. Cordova Chem. Co., 750 F. Supp. 832, 836 (W.D. Mich. 1990) (rejecting attempt to evade restrictions of § 113(h) in part because "[a]llowing challenges to EPA actions prior to their implementation . . . is contrary to the central function of the Act."); United States v. Seymour Recycling Corp., 679 F. Supp. 859, 865 (S.D. Ind. 1987) (finding § 113(j)'s limitation of judicial review of EPA's remedy selection to administrative record "serve[s] the overall purpose of CERCLA as remedial statute designed by Congress to give federal government 'the tools necessary for a prompt and effective response to the problems of national magnitude resulting from hazardous waste disposal . . .'") (quoting Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1081 (1st Cir. 1986)).

private remediation activities. CERCLA, both as originally enacted and as amended in 1986, contains provisions which provide incentives for private response actions. The first and foremost such provision is the creation in section 107(a) of a right of action for the recovery of cleanup costs incurred not only by the United States, a State, or an Indian tribe, but also "by any other person" engaging in remediation.[312] Here again, the remedial purpose canon has been employed by courts to support interpretations of CERCLA that have eased—or removed—procedural obstacles to bringing a private cost recovery action under section 107.[313]

In addition to the creation of a private right of action in section 107(a), Congress has expressly sanctioned, in section 113(f) of CERCLA, the right of a private party to seek contribution from other persons who are liable or potentially liable under section 107(a).[314] However, the statute also provides that any person "who

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312. 42 U.S.C. § 9607(a) (1988). Pursuant to the right of action provided in § 107(a), a private party that has incurred response costs may recover "necessary costs of response" that are "consistent with the national contingency plan . . . ." *Id.* at § 9607(a)(4)(B). The purpose of the National Contingency Plan ("NCP") "is to provide the organizational structure and procedures for preparing for and responding to discharges of oil and releases of hazardous substances, pollutants, and contaminants." RODGERS, *supra* note 294, at 700 (internal quotation marks omitted); *see also* 42 U.S.C. § 9605 (1988) and 40 C.F.R. Part 300 (1994).

In addition to demonstrating the other elements of CERCLA liability, the burden is on the private party to show that the incurred response costs were consistent with the procedural and substantive requirements of the NCP. *See infra* note 344 and accompanying text.

313. For example, courts have invoked the remedial purpose canon in support of the conclusion that a private party seeking to recover costs under § 107 need not comply with the 60-day waiting period found in § 112(a) of CERCLA, 42 U.S.C. § 9612(a) (1988). *See* Dedham Water Co. v. Cumberland Farms Diary, Inc., 805 F.2d 1074, 1081 (1st Cir. 1986); Idaho v. Bunker Hill Co., 634 F. Supp. 800, 804–05 (D. Idaho 1986); Colorado v. ASARCO, Inc., 616 F. Supp. 822, 824–27 (D. Colo. 1985). Likewise, the canon has supported holdings that the inclusion of a hazardous waste site on the National Priorities List is not a prerequisite to a private § 107 cost recovery action, *see* Interchange Office Park, Ltd. v. Standard Indus., Inc., 654 F. Supp. 166, 168–70 (W.D. Tex. 1987), and that a private party suing under § 107 need not first obtain governmental approval before commencing a remedial action. *See* Allied Towing v. Great Eastern Petroleum Corp., 642 F. Supp. 1339, 1349 (E.D. Va. 1986); City of New York v. Exxon Corp., 633 F. Supp. 609, 616 (S.D.N.Y. 1986). In a related vein, a district court recently rejected an argument that the court lacked personal jurisdiction over the defendants in a § 107 suit in part because "to permit defendants . . . to interpose jurisdictional defenses to liability would frustrate the remedial goals of CERCLA." Chatham Steel Corp. v. Brown, 858 F. Supp. 1130, 1149 (N.D. Fla. 1994).

314. 42 U.S.C. § 9613(f) (1988). Section 113(f) was added by the Superfund Amendments and Reauthorization Act of 1986 ("SARA"). Even prior to SARA, the courts "had little difficulty in deriving contribution rights as compatible with the statutory purposes of promoting rapid cleanup and encouraging careful handling of wastes." RODGERS, *supra* note 294, at 787. In resolving contributions claims, "the court may

has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall *not* be liable for claims for contribution regarding matters addressed in the settlement."[315] This contribution protection provision "encourages settlement by preventing non-settlors from seeking contribution from settlors."[316] Courts have cited CERCLA's remedial purposes as reason for eschewing restrictive constructions which "would frustrate the statute's goal of promoting expeditious resolution of harmful environmental conditions."[317]

Finally, Congress acted in 1986 to encourage private remediation activities by providing in section 106(b)(2) of CERCLA that persons who receive and comply with section 106 cleanup orders may "petition the President for reimbursement from the Fund for the reasonable costs of such action, plus interest."[318] At least one court has held that this provision was added to furnish "an incentive for expeditious cleanup" and that, "[b]ecause Congress passed § 106(b)(2) as remedial legislation, . . . we must read § 106(b)(2) broadly to accomplish its goals."[319]

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allocate response costs among liable parties using such equitable factors as the court determines are appropriate." 42 U.S.C. § 9613(f)(1) (1988).

In Town of Wallkill v. Tesa Tape Inc., 891 F.Supp. 955 (S.D.N.Y. 1995), the question presented was whether the plaintiff, a municipality, could maintain claims simultaneously under §§ 107 and 113. In answering the question in the affirmative, the district court relied upon Companies For Fair Allocation v. Axil Corp., 853 F.Supp. 575 (D. Conn. 1994), and noted that "[t]he district court therein analyzed the logic of CERCLA's broad remedial purposes and allowed a plaintiff PRP to maintain concurrent Section 107 and 113 actions against other PRPs." *Town of Wallkill*, 891 F. Supp. at 960.

315. 42 U.S.C. § 9613(f)(2) (1988) (emphasis added).

316. *In re* Acushnet River & New Bedford Harbor, 712 F. Supp. 1019, 1029 (D. Mass. 1989); *see also* City & County of Denver v. Adolph Coors Co., 829 F. Supp. 340, 343–44 (D. Colo. 1993); United States v. SCA Servs. of Indiana, Inc., 827 F. Supp. 526, 530–32 (N.D. Ind. 1993). In United States v. Cannons Eng'g Corp., 720 F. Supp. 1027 (D. Mass. 1989), *aff'd*, 899 F.2d 79 (1st Cir. 1990), the court was faced with the related question of whether an equitable right to indemnity could be implied in the context of a CERCLA settlement. The court, after noting that the Act must be construed liberally to avoid frustration of its beneficial purposes, held that implying an equitable right of indemnity would undermine the contribution protection provision and its "important function of encouraging early settlements." *Id.* at 1051; *see also* Central Illinois Pub. Serv. Co. v. Industrial Oil Tank & Line Cleaning Serv., 730 F. Supp. 1498, 1505–08 (W.D. Mo. 1990).

317. 712 F. Supp. at 1029.

318. 42 U.S.C. § 9606(b)(2)(A) (1988).

319. Dico, Inc. v. Diamond, 35 F.3d 348, 353 (8th Cir. 1994). *But see* Wagner Seed Co., Inc. v. Bush, 709 F. Supp. 249, 252 (D.D.C. 1989) (rejecting broad interpretation of § 106(b)(2), despite invocation of remedial purpose canon, in light of competing interpretive principles counseling narrower construction), *aff'd*, 946 F.2d 918 (D.C. Cir. 1991),

2. *Making the Polluter Pay*

The second principal remedial goal underlying CERCLA is to ensure, to the extent possible, that the costs of cleaning up hazardous waste sites are borne by those responsible for the problem, rather than by the general public. In order to effectuate this goal, and to stop producers of hazardous substances from externalizing the costs of waste disposal by shifting control and cleanup costs to the public, Congress enacted the sweeping liability provisions of CERCLA. In turn, the courts have cited the remedial purpose canon to support expansive views of the statute in terms of the elements of CERCLA liability, the scope and nature of CERCLA liability, and the types of costs that may be recovered upon the determination of liability.

a. Elements of CERCLA Liability

In order to establish a prima facie case of liability under CERCLA, the plaintiff must first demonstrate that there was a "disposal" of "hazardous substances" at a "facility" which led to a "release" or "a threatened release" of hazardous substances from the facility into the environment that caused the plaintiff to incur "response costs."[320] The plaintiff must then establish that the defendant falls within one of the four categories of responsible persons described in section 107(a).[321]

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cert. denied, 503 U.S. 970 (1992). For a more detailed discussion of *Wagner*, see *supra* notes 237–244 and accompanying text.

320. 42 U.S.C. § 9607(a) (1988); *see also* United States v. Alcan Aluminum Corp., 964 F.2d 252, 258–59 (3d Cir. 1992); United States v. Aceto Agric. Chems. Corp., 872 F.2d 1373, 1378–79 (8th Cir. 1989). If the plaintiff is the United States, a State, or an Indian tribe, the burden is placed on the defendant to overcome the presumption that the costs incurred were "not inconsistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(A) (1988). All other plaintiffs bear the burden of proving that the cleanup and the costs incurred were "consistent with the national contingency plan." *Id.* at § 9607(a)(4)(B).

321. Section 107(a) is broadly worded to encompass present and past owners and operators, persons who arranged for disposal or treatment of hazardous substances, and persons involved in the transportation of hazardous substances. The four categories are as follows:

> (1) the owner and operator of a vessel or a facility,
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

The remedial purpose canon has been employed most often by courts in CERCLA cases in the context of construing the elements of liability. For example, to effectuate the underlying "polluter pays" principle, courts have regularly invoked the canon in cases liberally construing the key terms "disposal,"[322] "hazardous substances,"[323] "facility,"[324] and "release."[325] Most significant, however, is the fact that the federal appellate and district courts have repeatedly cited the remedial purpose canon as justification for broadly

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> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
>
> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person . . . .

42 U.S.C. § 9607(a)(1)–(4) (1988).

322. *See, e.g.*, Catellus Development Corp. v. United States, 34 F.3d 748, 751–52 (9th Cir. 1994); New York v. Almy Brothers, Inc., 866 F. Supp. 668, 674–77 (N.D.N.Y. 1994); CPC Int'l, Inc. v. Aerojet-General Corp., 777 F. Supp. 549, 571, 576 (W.D. Mich. 1991), *rev'd in part sub nom.* United States v. Cordova Chem. Co., 59 F.3d 584 (6th Cir. 1995), *vacated and reh'g en banc granted*, 67 F.3d 586 (6th Cir. 1995). The most frequently litigated issue regarding disposal has been whether, for purposes of liability under § 107(a)(2), leaking, leaching, and other forms of passive migration of hazardous substances should be deemed to constitute "disposal." Although many courts have rejected this notion (*see, e.g.*, United States v. Petersen Sand & Gravel, Inc., 806 F. Supp. 1346, 1350–51 (N.D. Ill. 1992); Ecodyne Corp. v. Shah, 718 F. Supp. 1454, 1456–57 (N.D. Cal. 1989)), other courts have invoked the remedial purpose canon to reach the opposite, more expansive result. *See, e.g.*, Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp., 976 F.2d 1338, 1342–43 (9th Cir. 1992); Stanley Works v. Snydergeneral Corp., 781 F. Supp. 659, 662–64 (E.D. Cal. 1990); *see generally* Brian I. Sopinsky, Casenote, Kaiser Aluminum and Chemical Corp. v. Catellus Development Corp.: *Broad Remedial Powers of CERCLA Take No Prisoners*, 6 VILL. ENVTL. L.J. 181 (1995).

323. *See, e.g.*, Arizona v. Motorola, Inc., 774 F. Supp. 566, 573 (D. Ariz. 1991) ("CERCLA's broad remedial purposes . . . make it clear that . . . there simply is no quantitative requirement under CERCLA"); City of New York v. Exxon Corp., 766 F. Supp. 177, 184–85 (S.D.N.Y. 1991); City of New York v. Exxon Corp., 744 F. Supp. 474, 487 (S.D.N.Y. 1990).

324. *See, e.g.*, Westfarm Assocs. Ltd. Partnership v. Washington Suburban Sanitary Comm'n, 66 F.3d 669, 679 (4th Cir. 1995) (noting that "Congress's remedial purposes in enacting CERCLA are best served by including POTWs [publicly owned treatment works] within the term 'facilities'").

325. *See, e.g.*, Kamb v. United States Coast Guard, 869 F. Supp. 793, 798 (N.D. Cal. 1994); Courtaulds Aerospace, Inc. v. Huffman, No. CV-F-91-518, 1994 WL 508168 at *4 (E.D. Cal. Jun. 9, 1994); Kowalski v. Goodyear Tire & Rubber Co., 841 F. Supp. 104, 108 (W.D.N.Y. 1994); Rhodes v. County of Darlington, 833 F. Supp. 1163, 1178 (D.S.C. 1992); Lincoln Properties, Ltd. v. Higgins, 823 F. Supp. 1528, 1536 (E.D. Cal. 1992); *In re* Acushnet River & New Bedford Harbor, 722 F. Supp. 893, 896 n.6 (D. Mass. 1989).

interpreting the scope of the four categories of responsible persons set forth in section 107(a) of CERCLA. Thus, the statutory references in sections 107(a)(1) and (2) to "owners" and "operators" of hazardous waste sites have been aggressively construed to encompass, among others, parent corporations;[326] successor corporations;[327] dissolved corporations;[328] lending institutions;[329] trustees;[330] lessees and sublessors;[331] governments and governmental agencies;[332] shareholders, officers, and directors;[333] and even deceased individuals.[334]

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326. *See, e.g.*, United States v. Kayser-Roth Corp., 910 F.2d 24, 26–27 (1st Cir. 1990), *cert. denied*, 498 U.S. 1084 (1991); *In re* Tutu Wells Contamination Litigation, 846 F. Supp. 1243, 1270–71 (D.V.I. 1993); CPC Int'l, Inc. v. Aerojet-General Corp., 777 F. Supp. 549, 571–74 (W.D. Mich. 1991), *rev'd in part sub nom.* United States v. Cordova Chem. Co., 59 F.3d 584 (6th Cir. 1995), *vacated and reh'g en banc granted*, 67 F.3d 586 (6th Cir. 1995); Mobay Corp. v. Allied-Signal, Inc., 761 F. Supp. 345, 352–54 (D.N.J. 1991).

327. *See, e.g.*, United States v. Mexico Feed & Seed Co., 980 F.2d 478, 486–87 (8th Cir. 1992); United States v. Carolina Transformer Co., 978 F.2d 832, 836–38 (4th Cir. 1992); Anspec Co. v. Johnson Controls, 922 F.2d 1240, 1245–47 (6th Cir. 1991); Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86, 90–92 (3rd Cir. 1988), *cert. denied*, 488 U.S. 1029 (1989); New York v. N. Storonske Cooperage Co., 174 B.R. 366, 387 (N.D.N.Y. 1994); Kleen Laundry & Dry Cleaning Services, Inc. v. Total Waste Management, Inc., 867 F. Supp. 1136, 1141, 1144 (D.N.H. 1994); Atlantic Richfield Co. v. Blosenski, 847 F. Supp. 1261, 1283–87 (E.D. Pa. 1994); United States v. Atlas Minerals & Chems., Inc., 824 F. Supp. 46, 49–52 (E.D. Pa. 1993); Chesapeake & Potomac Tel. Co. v. Peck Iron & Metal Co., 814 F. Supp. 1266, 1268–69 (E.D. Va. 1992) (sole proprietorship).

328. *See, e.g.*, Chatham Steel Corp. v. Brown, 858 F. Supp. 1130, 1150–53 (N.D. Fla. 1994); AM Properties Corp. v. GTE Products Corp., 844 F. Supp. 1007, 1011–12 (D.N.J. 1994); *In re* Tutu Wells Contamination Litigation, 846 F. Supp. 1243, 1275–78 (D.V.I. 1993); United States v. SCA Servs. of Indiana, Inc., 837 F. Supp. 946, 952–55 (N.D. Ind. 1993); United States v. Sharon Steel Corp., 681 F. Supp. 1492, 1494–99 (D. Utah 1987).

329. *See, e.g.*, United States v. Fleet Factors Corp., 901 F.2d 1550, 1557 (11th Cir. 1990), *cert. denied*, 498 U.S. 1046 (1991).

330. *See, e.g.*, United States v. Burns, No. C-88-94-L, 1988 WL 242553 at *1–*2 (D.N.H. Sept. 12, 1988); *see also* Castlerock Estates, Inc. v. Estate of Walter S. Markham, 871 F. Supp. 360, 364–66 (N.D. Cal. 1994) (holding that issues of material fact remain as to whether defendant—who was conservator of estate while decedent was ill and executor of estate after decedent's death—was an "owner" or "operator" for CERCLA liability purposes).

331. *See, e.g.*, United States v. A & N Cleaners and Launderers, Inc., 788 F. Supp. 1317, 1330–34 (S.D.N.Y. 1992).

332. *See, e.g.*, FMC Corp. v. Department of Commerce, 29 F.3d 833, 838–46 (3d Cir. 1994) (United States); B.F. Goodrich Co. v. Murtha, 958 F.2d 1192, 1197–99 (2d Cir. 1992) (municipality); New Jersey Dep't of Envtl. Protection & Energy v. Gloucester Envtl. Management Services, Inc., 821 F. Supp. 999, 1003–09 (D.N.J. 1993) (municipality); CPC Int'l, Inc. v. Aerojet-General Corp., 731 F. Supp. 783, 787–91 (W.D. Mich. 1989) (state agency).

333. *See, e.g.*, Truck Components Inc. v. Beatrice Co., No. 94 C 3228, 1994 WL 520939 at *2–*3 (N.D. Ill. Sep. 21, 1994); Columbia River Serv. Corp. v. Gilman, 751 F. Supp. 1448, 1453–54 (W.D. Wash. 1990); Kelley v. Thomas Solvent Co., 727 F. Supp. 1554, 1559–63 (W.D. Mich. 1989).

334. *See, e.g.*, United States v. Martell, 887 F. Supp. 1183, 1188 (N.D. Ind. 1995); State v. Peele, 876 F. Supp. 733, 743 (E.D.N.C. 1995); Steego Corp. v. Ravenal, 830 F.

Likewise, courts have invoked the remedial purpose canon to support liberal constructions of section 107(a)(3) "arranger" liability[335] and section 107(a)(4) "transporter" liability.[336]

b. Scope and Nature of CERCLA Liability

The "polluter pays" principle also supports the interpretation of CERCLA as "a strict liability statute to which the concepts of joint and several liability may be applied in appropriate cases."[337] The connection between the remedial nature of the statute and the broad scope and character of CERCLA liability has been recognized by the courts.[338] Thus, in construing the defenses to liability set forth in section 107(b) of CERCLA, the courts have consistently held that such defenses are to be "narrowly construed to effectuate the statute's broad remedial purposes."[339] Likewise, courts

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Supp. 42, 46–48 (D. Mass. 1993); Bowen Eng'g v. Estate of Reeve, 799 F. Supp. 467, 474–75 (D.N.J. 1992), *aff'd*, 19 F.3d 642 (3d Cir. 1994).

335. *See, e.g.*, Cadillac Fairview/California, Inc. v. United States, 41 F.3d 562, 565 n.4 (9th Cir. 1994); Florida Power & Light Co. v. Allis Chalmers Corp., 893 F.2d 1313, 1317–18 (11th Cir. 1990); United States v. Aceto Agric. Chems. Corp., 872 F.2d 1373, 1380–82 (8th Cir. 1989); United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726, 743–44 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987); United States v. TIC Inv. Corp., 866 F. Supp. 1173, 1179 (N.D. Iowa 1994); Chatham Steel Corp. v. Brown, 858 F. Supp. 1130, 1138–40 (N.D. Fla. 1994); KN Energy, Inc. v. Rockwell Int'l Corp., 840 F. Supp. 95, 98 (D. Colo. 1993).

336. *See, e.g.*, Tippins Inc. v. USX Corp., 37 F.3d 87, 95 (3d Cir. 1994); New York v. SCA Services, Inc., 844 F. Supp. 926, 927–29 (S.D.N.Y. 1994) (transporter can be held liable under § 107(a)(3) as one who "arranged for the transport" of hazardous waste).

337. United States v. Witco Corp., 853 F. Supp. 139, 141 (E.D. Pa. 1994); *see also* S. REP. No. 848, 96th Cong., 2d Sess. 13 (1980) ("To establish provisions of liability any less than strict, joint, and several liability would be to condone a system in which innocent victims bear the burden of releases, while those who conduct commerce in hazardous substances which cause such damage benefit with relative impunity."); Adam Babich, *Understanding the New Era in Environmental Law*, 41 S.C. L. REV. 733 (1990) (describing strict, joint, several, and retroactive liability of CERCLA as new approach in environmental law).

338. *See, e.g.*, Westfarm Assocs. Ltd. Partnership v. International Fabricare Inst., 846 F. Supp. 422, 428 (D. Md. 1993) (noting, after invocation of remedial purpose canon, that CERCLA imposes strict liability on responsible parties as "part of its remedial scheme").

339. Reichhold Chems., Inc. v. Textron, Inc., 888 F. Supp. 1116, 1129 (N.D. Fla. 1995); Lincoln Properties, Ltd. v. Higgins, 823 F. Supp. 1528, 1539 (E.D. Cal. 1992) (citing Kelley v. Thomas Solvent Co., 727 F. Supp. 1532, 1540 n.2 (W.D. Mich. 1989)).

Section 107(b) of CERCLA provides that a party otherwise liable for cleanup costs under § 107(a) may avoid liability by establishing that the release or threat of release of a hazardous substance, and the damages resulting therefrom, were caused solely by (1) an act of God; (2) an act of war; (3) an act or omission of a third party in specified circumstances; or (4) a combination of the foregoing defenses. 42 U.S.C. § 9607(b) (1988). Most courts have construed these three explicitly recognized defenses narrowly.

have held that other provisions of CERCLA interposed to avoid liability should be interpreted in a manner that effectuates, rather than frustrates, CERCLA's remedial goal of holding those responsible for the releases of hazardous substances liable for the costs of cleanup.[340]

c. Recoverable Response Costs

The final step in a cost recovery action brought under section 107(a) of CERCLA is proving that the "response costs" incurred were consistent with the procedural and substantive requirements of the national contingency plan ("NCP"). In order to effectuate the remedial goal of making polluters—and not taxpayers—pay for the costs of cleanup, the courts have invoked the remedial purpose canon to construe CERCLA broadly with respect to (1) procedural hurdles to seeking recovery of response costs; (2) the required degree of "consistency" with the NCP; and (3) the types of response costs that may be recovered.

In order to pursue a cost recovery action, the plaintiff must first satisfy the applicable statute of limitations provisions.[341] In

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See, e.g., New York v. Shore Realty Corp., 759 F.2d 1032, 1048 (2d Cir. 1985) (referring to the "third party" defense of § 107(b)(3) as "a limited exception to liability"); United States v. Shell Oil Co., 841 F. Supp. 962, 970–72 (C.D. Cal. 1993) (construing § 107(b)(2) narrowly and rejecting asserted "act of war" and "third party" defenses to liability).

340. In addition to the defenses set forth in § 107(b), CERCLA contains definitional and other provisions which have been seized upon by parties seeking to avoid liability. For example, § 101(20)(A) exempts from the definition of the term "owner or operator" persons who, "without participating in the management of a vessel or facility, hold[ ] indicia of ownership primarily to protect [their] security interest in the vessel or facility." 42 U.S.C. § 9601(20)(A) (1988). In United States v. Fleet Factors Corp., 901 F.2d 1550, 1557 (11th Cir. 1990), *cert. denied*, 498 U.S. 1046 (1991), the court of appeals rejected the district court's construction of the "lender liability" statutory exemption as "too permissive" and held that, "[i]n order to achieve the 'overwhelmingly remedial' goal of the CERCLA statutory scheme, ambiguous statutory terms should be construed to favor liability . . . ." *See also* FMC Corp. v. Department of Commerce, 29 F.3d 833, 840 (3d Cir. 1994) (rejecting the United States' interpretation of scope of sovereign immunity waiver in § 120(a)(1) of CERCLA, 42 U.S.C. § 9620(a)(1), as "inconsistent" with CERCLA's broad remedial purposes and its remedial goal of making those responsible bear the costs of cleanup); United States v. DiBiase Salem Realty Trust, No. CIV. A. 91-11028-MA, 1993 WL 729662 at *8 (D. Mass. Nov. 19, 1993) (narrow construction of "innocent landowner defense," as set forth in § 101(35) of the Act, 42 U.S.C. § 9601(35), justified by reference to CERCLA's remedial goals).

341. Section 113(g) of CERCLA sets forth separate limitation periods for asserting claims for the recovery of natural resource damages and for response costs. *See* 42 U.S.C. § 9613(g) (1988). In the same fashion, § 112(d) sets forth limitation periods for asserting claims against the Superfund for the recovery of natural resource damages and response costs. *See* 42 U.S.C. § 9612(d) (1988).

"[l]iberally construing" such provisions in CERCLA, courts have been "mindful of Congress's intent that those responsible for the creation of hazardous waste sites bear the cost of clean-up of those sites . . . ."[342] Aside from the question of when a cost recovery suit is time-barred, the courts construing CERCLA have also grappled with the question of whether the procedural advantages granted to federal, state, and tribal governments should be extended to municipal governments as well. Despite the apparent plain language of the Act, a few courts have held that, in light of CERCLA's broad remedial purposes, municipalities should be deemed "states" in order to receive the procedural advantages that Congress provided other governmental plaintiffs.[343]

Although the costs of response are recoverable only when the incurrence of such costs was in compliance with the requirements of the NCP, the courts have held that "substantial" compliance is all that is necessary, since a "strict" compliance standard would frustrate the remedial goals of encouraging prompt remediation and making the polluters pay for the cleanup.[344] In addition, the courts

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342. Kelley v. E.I. duPont de Nemours & Co., 786 F. Supp. 1268, 1277 (E.D. Mich. 1992), *aff'd*, 17 F.3d 836, 840–44 (6th Cir. 1994) (construing broadly words "removal action" in § 113(g)(2)(A) and holding that clean-up, monitoring, assessment, and evaluation activities were not discrete acts but instead constituted single "removal action"); *see also* One Wheeler Road Associates v. Foxboro Co., 843 F. Supp. 792, 795–96 (D. Mass. 1994); United States v. Petersen Sand & Gravel, Inc., 824 F. Supp. 751, 755 (N.D. Ill. 1991) (remedial purpose canon supports holding that limitations period began when EPA issued Record of Decision, not when RI/FS report was issued); United States v. Moore, 698 F. Supp. 622, 626 (E.D. Va. 1988) (retrospective application of § 113(g) to bar cost recovery action by United States would subvert Congress' intent to hold responsible parties liable); United States v. Mottolo, 605 F. Supp. 898, 902 (D.N.H. 1985) (pre-SARA decision holding that statute of limitations in § 112(d) does not apply to actions under § 107(a) to recover response costs).

343. *See* City & County of Denver v. Adolph Coors Co., 829 F. Supp. 340, 343–44 (D. Colo. 1993); City of New York v. Exxon Corp., 112 B.R. 540, 545 (Bankr. S.D.N.Y. 1990), *aff'd on other grounds*, 932 F.2d 1020 (2d Cir. 1991); City of New York v. Exxon Corp., 697 F. Supp. 677, 685 (S.D.N.Y. 1988); City of New York v. Exxon Corp., 633 F. Supp. 609, 618–19 (S.D.N.Y. 1986); Mayor & Board of Aldermen of Boonton v. Drew Chem. Corp., 621 F. Supp. 663, 666–68 (D.N.J. 1985). Other district courts, however, have declined to stretch the language of CERCLA to this extent. *See infra* notes 419–422 and accompanying text.

344. Hatco Corp. v. W.R. Grace–Conn. & Co., 801 F. Supp. 1309, 1332–33 (D.N.J. 1992) (employing remedial purpose canon to support holding that substantial compliance with NCP is sufficient), *vacated*, 59 F.3d 400 (3d Cir. 1995); Amcast Industrial Corp. v. Detrex Corp., 779 F. Supp. 1519, 1537–38 (N.D. Ind. 1991) (determining that "'extremely liberal construction'" of public participation requirements of NCP was appropriate given remedial nature of CERCLA (quoting General Elec. Co. v. Litton Business Sys., Inc., 715 F. Supp. 949, 961 (W.D. Mo. 1989)), *aff'd*, 920 F.2d 1415, (8th Cir. 1990), *cert. denied*, 499 U.S. 937 (1991)), *rev'd in part*, 2 F.3d 746 (7th Cir. 1993), *cert. denied*, 114 S. Ct.

have been quite lenient with regard to the types of recoverable costs, allowing plaintiffs to receive repayment not only for direct remediation expenditures, but also for investigatory expenses, indirect costs, prejudgment interest, governmental oversight costs and—until the Supreme Court's 1994 decision in *Key Tronic Corp. v. United States*[345]—attorney fees incurred in litigating private cost recovery actions.[346] As succinctly noted by one district court, "the broad remedial purpose of CERCLA[ ] supports a liberal interpretation of recoverable costs."[347]

B. Why Is the Remedial Purpose Canon Employed So Often in CERCLA Cases?

As previously noted,[348] in determining when to apply the remedial purpose canon, courts have generally looked both to the intrinsic nature of the legislation at issue and to the enacting body for confirmatory signals that the statute was intended to be considered as remedial and to be liberally construed. This holds true for

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691 (1994). *But see* Channel Master Satellite Sys., Inc. v. JFD Elec. Corp., 748 F. Supp. 373, 382–94 (E.D.N.C. 1990) (denying recovery of cleanup costs due to non-compliance with NCP, even as judged by more liberal "substantial compliance" standard).

345. 114 S. Ct. 1960 (1994).

346. *See, e.g.*, United States v. R.W. Meyer, Inc., 889 F.2d 1497, 1502–03 (6th Cir. 1989) (allowing EPA to recover indirect costs), *cert. denied*, 494 U.S. 1057 (1990); United States v. Lowe, 864 F. Supp. 628, 631–32 (S.D. Tex. 1994) (allowing EPA to recover oversight costs); HRW Sys., Inc. v. Washington Gas & Light Co., 823 F. Supp. 318, 342–43 (D. Md. 1993) (allowing recovery of pre-litigation investigatory expenses); United States v. Bell Petroleum Services, Inc., 734 F. Supp. 771, 782–85 (W.D. Tex. 1990), *rev'd in part*, 3 F.3d 889 (5th Cir. 1993) (allowing government to recover indirect costs and prejudgment interest); *see also* Mildred Jacob, Note, *Government Reimbursement of Costs to Oversee Private Party Clean Up Actions: An Analysis of* United States v. Rohm & Haas Co., 57 ALB. L. REV. 1255, 1276 (1994) (criticizing court's denial of EPA oversight costs as inconsistent with fact that CERCLA is remedial statute that should be liberally construed); Jeffrey C. Dobbins, Note, *The Pain and Suffering of Environmental Loss: Using Contingent Valuation to Estimate Nonuse Damages*, 43 DUKE L.J. 879, 932 (1994) (arguing that in CERCLA suits seeking nonuse damages, in light of remedial purpose canon, "the standards governing the admissibility of CV [contingent valuation] should be relatively lenient.").

For a discussion of the use of the remedial purpose canon to justify the recovery of attorney fees incurred by private parties litigating cost recovery actions—and the rejection by the Supreme Court in *Key Tronic* of this interpretation of CERCLA—see *supra* notes 254–258 and accompanying text.

347. United States v. Northernaire Plating Co., 685 F. Supp. 1410, 1419 (W.D. Mich. 1988), *aff'd sub nom.* United States v. R.W. Meyer, Inc., 889 F.2d 1497 (6th Cir. 1989), *cert. denied*, 494 U.S. 1057 (1990).

348. *See supra* parts III.C and IV.

CERCLA. Appellate and district courts have uniformly observed that CERCLA, by its nature and focus, is "overwhelmingly remedial."[349] In addition, the courts have noted that the remedial nature of CERCLA is confirmed by the statute's legislative history and structure.[350]

1. Is CERCLA Simply "More" Remedial?

CERCLA is not only more remedial than most legislative enactments, it is arguably the most remedial of all federal environmental statutes, since its controlling focus is to remedy the harmful effects of previously disposed hazardous wastes in order to preserve the public health and the environment. As noted by the authors of a leading environmental law casebook:

> The Act is *distinctive* in the spectrum of federal environmental protection legislation in that the principal focus is remedial and corrective rather than regulatory. CERCLA does not set standards for prospective compliance by industry but essentially is a tort-like, backward-looking statute designed to cleanup expeditiously abandoned hazardous waste sites and respond to hazardous spills and releases of toxic wastes into the environment.[351]

The Eighth Circuit, in *United States v. Northeastern Pharmaceutical & Chemical Co. ("NEPACCO")*,[352] cited the backward-looking nature of CERCLA as the chief reason for characterizing the Superfund statute as "overwhelmingly remedial": "Further, the statutory scheme itself is overwhelmingly remedial and retroactive . . . . In order to be effective, CERCLA must reach past conduct."[353]

In *Smith Land & Improvement Corp. v. Celotex Corp.*,[354] the Third Circuit deemed CERCLA to be intrinsically remedial due to its tort-like approach to liability:

> The concerns that have led to a corporation's common law liability of a corporation for the torts of its predecessor are

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349. *See* United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726, 733 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987).

350. *See infra* part VI.B.2.

351. WILLIAM MURRAY TABB & LINDA A. MALONE, ENVIRONMENTAL LAW: CASES AND MATERIALS 637 (1992) (emphasis added).

352. 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987).

353. *Id.* at 733.

354. 851 F.2d 86 (3d Cir. 1988), *cert. denied*, 488 U.S. 1029 (1989).

> equally applicable to the assessment of responsibility for clean-up costs under CERCLA. The Act views response liability as a remedial, rather than a punitive, measure whose primary aim is to correct the hazardous condition. Just as there is liability for ordinary torts or contractual claims, the obligation to take necessary steps to protect the public should be imposed on a successor corporation.[355]

In addition, the creation and central role of the Superfund itself underscores the remedial nature of CERCLA. In fact, a state statute creating an analagous fund, the New Jersey Sanitary Landfill Facility Closure and Contingency Fund Act,[356] has been described as "a *quintessentially* remedial statute."[357]

In determining that CERCLA is "more" remedial—and hence a more frequent candidate for the invocation of the remedial purpose canon—the courts have contrasted the Act with other environmental statutes that possess a regulatory focus. For example, in *New York v. Shore Realty Corp.*, the Second Circuit noted that "CERCLA is *not* a regulatory standard-setting statute such as the Clean Air Act."[358] The statute that is often compared with CERCLA is the Resource Conservation and Recovery Act ("RCRA"),[359] which is also concerned with hazardous substances. However, the federal district and appellate courts have employed the remedial purpose canon in far more CERCLA cases than RCRA cases, in large part due to the frequent observation that RCRA's "primary purpose is regulatory: to regulate the storage, transportation, and disposal . . . of hazardous wastes through a permit system," while

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355. *Id.* at 91; *see also* United States v. Mexico Feed & Seed Co., 980 F.2d 478, 484 (8th Cir. 1992) ("CERCLA is a remedial strict liability statute. As such, its focus is on responsibility, not culpability.").

356. N.J. STAT. ANN. § 13:1E-100 to -116 (West 1991 & Supp. 1995).

357. New Jersey Dep't of Envtl. Protection & Energy v. Gloucester Envtl. Management Servs., Inc. 866 F. Supp. 826, 833 (D.N.J. 1994) (emphasis added). CERCLA is not the only federal environmental statute to authorize or utilize a fund for remediation activities. *See, e.g.*, 30 U.S.C. § 1231 (1988 & Supp. V 1993) (Surface Mining Control and Reclamation Act ("SMCRA") and Abandoned Mine Reclamation Fund); 33 U.S.C. § 1321(s) (1988 & Supp. V 1993) (Clean Water Act and Oil Spill Liability Trust Fund); 33 U.S.C. § 2712 (1988 & Supp. V 1993) (Oil Pollution Act and Oil Spill Liability Trust Fund). In Drummond Coal Co. v. Hodel, 610 F. Supp. 1489, 1498 (D.D.C. 1985), *aff'd*, 796 F.2d 503 (D.C. Cir. 1986), *cert. denied*, 480 U.S. 941 (1987), the district court noted that the abandoned mine reclamation fund provisions of SMCRA "were designed to be remedial in purpose and function."

358. 759 F.2d 1032, 1041 (2d Cir. 1985) (emphasis added).

359. 42 U.S.C. §§ 6901–6992(k) (1988 & Supp. V 1993).

"CERCLA's primary purpose is remedial: to clean up hazardous waste sites."[360]

2. Is This What Congress Wanted?

Congress can confirm its desire that a remedial statute should be broadly construed in several ways. Consequently, as noted by Richard Posner, a judge must

> be alert to any sign of legislative intent regarding the freedom with which he should exercise his interpretive function. Sometimes a statute will state whether it is to be broadly or narrowly construed; more often the structure and language of the statute will supply a clue. If the legislature enacts into statute law a common law concept, . . . that is a clue that the courts are to interpret the statute with the freedom with which they would construe and apply a common law principle . . . .[361]

In the case of CERCLA, the "clues" are found not in the text, but in the legislative history and structure of the statute.

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360. United States v. Rohm and Haas Co., 2 F.3d 1265, 1269, 1270 (3d Cir. 1993); *see also* United States v. Alcan Aluminum Corp., 964 F.2d 252, 263 n.19 (3d Cir. 1992) (noting that CERCLA is remedial while RCRA is regulatory); B.F. Goodrich Co. v. Murtha, 958 F.2d 1192, 1202 (2d Cir. 1992) (explaining that "RCRA is preventative; CERCLA is curative."); Greenpeace, Inc. v. Waste Technologies Indus., No. 4:93CV0083, 1993 WL 134861 at *21 n.4 (N.D. Ohio Mar. 5, 1993) (finding CERCLA is remedial statute, while RCRA is regulatory statute); California v. Summer Del Caribe, Inc., 821 F. Supp. 574, 580 (N.D. Cal. 1993) (noting that CERCLA is curative while RCRA is preventative); New Jersey Dep't of Envtl. Protection v. Gloucester Envtl. Management Servs., Inc., 821 F. Supp. 999, 1006 (D.N.J. 1993) (stating that CERCLA's purpose is remedial, while RCRA is intended as regulatory framework).

In fact, a chief reason for the passage of CERCLA was that RCRA—with its focus on regulating the use and disposal of hazardous substances—was ill-suited for responding to the related but distinct problem of remediating abandoned and inactive waste sites. *See* 1 LEGISLATIVE HISTORY OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980 (SUPERFUND) 97 (Comm. Print 1983) [hereinafter CERCLA LEGISLATIVE HISTORY] ("RCRA is not well suited to remedying the effects of past disposal practices which are unsound—it is focused instead on the equally critical problem of preventing more problems by controlling present and future hazardous waste disposal.") (statement of Thomas C. Jorling, EPA Assistant Administrator, before Senate Committee on Environment and Public Works, June 20, 1979).

361. Posner, *Statutory Interpretation*, *supra* note 71, at 818 (footnote omitted); *see also* Martineau, *supra* note 46, at 17.

a. Textual Guidance

CERCLA does not contain an explicit liberal construction command in its text. Moreover—in contrast to most environmental legislation—the statutory scheme is unaccompanied by any aspirational statement of congressional goals and policies.[362] Hence, the text of CERCLA provides little or no confirmation that Congress intended the statute to be viewed as remedial legislation and to be liberally construed.[363]

b. Legislative Guidance

On the other hand, there are signals in the legislative history of CERCLA that indicate that Congress intended the statute to be viewed as remedial legislation. To be sure, the statute's status as a "hastily conceived and briefly debated piece of legislation"[364] has led courts to conclude that CERCLA's legislative history is often unhelpful in resolving specific interpretive issues.[365] But the need for—and focus of—the statute is clearly gleaned from legislative

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362. *See supra* note 275.

363. Many courts have invoked the remedial purpose canon *because* CERCLA is a vaguely drafted statute. *See, e.g.*, CP Holdings v. Goldberg-Zoino & Assocs, 769 F. Supp. 432, 435–36 (D.N.H. 1991); *In re* Acushnet River & New Bedford Harbor, 722 F. Supp. 893, 896 n.6 (D. Mass. 1989); *see also* Harvey, *supra* note 255, at 221 (noting that CERCLA's hasty drafting may have led courts to construe statute liberally); John A. Maher & Kathryn C. Hoefer, *Federal Superlien: An Alternative to Lender Liability Under CERCLA*, 6 ST. JOHN'S J. LEGAL COMMENT. 41, 43–44 n.11 (1990).

The text itself, however, does not tell us that this is what Congress intended; rather, legislative confirmation that CERCLA should be liberally construed must be found in non-textual sources.

364. Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86, 91 (3d Cir. 1988), *cert. denied*, 488 U.S. 1029 (1989).

365. *See, e.g.*, HRW Sys., Inc. v. Washington Gas Light Co., 823 F. Supp. 318, 327 (D. Md. 1993) ("the 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"); Rhodes v. County of Darlington, 833 F. Supp. 1163, 1174 (D.S.C. 1992) ("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.'") (quoting Artesian Water Co. v. New Castle County, 851 F.2d 643, 648 (3d Cir. 1988)); *In re* Acushnet River & New Bedford Harbor, 716 F. Supp. 676, 681 n.6 (D. Mass. 1989) (bemoaning "difficulty of being left compassless on the trackless wastes of CERCLA"); Chemical Waste Management v. Armstrong World Indus., 669 F. Supp. 1285, 1291 n.6 (E.D. Pa. 1987) (refusing to accept argument based on CERCLA's legislative history as dispositive because that history "is sparse and generally uninformative"); United States v. Mottolo, 605 F. Supp. 898, 902 (D.N.H. 1985) (noting that "CERCLA has acquired a well-deserved notoriety for vaguely drafted provisions and an indefinite, if not contradictory, legislative history").

materials: to remedy (promptly) the problems associated with the disposal of hazardous wastes.

CERCLA was a blending of separate bills under consideration during the final days of the Carter Administration.[366] One bill, H.R. 7020, proposed to create a "superfund" to help finance the cleanup of hazardous waste dumps.[367] The House Report accompanying H.R. 7020 begins with a detailed discussion of the need for legislation to respond to "the tragic consequences of improper[ ], negligent[ ], and reckless[ ] hazardous waste disposal practices . . . ."[368] In particular, the Report documents in detail "the nature and magnitude of the problem and the inadequacy of existing law to properly control it."[369] This legislative history was cited by the Eighth Circuit, in *United States v. Aceto Agricultural Chemicals Corp.*,[370] in support of its observation that CERCLA "was enacted in 1980 in an effort to eliminate unsafe hazardous waste sites."[371] More to the point, the district court in *United States v. Fleet Factors Corp.* relied on the House Report to support its conclusion that "CERCLA is a comprehensive remedial statute."[372]

In the same fashion, the leading Senate bill under consideration, S. 1480, was expressly characterized as "remedial legislation" in its legislative report.[373] The Senate bill did not encompass oil spills, but was otherwise quite broad, proposing a no-fault victim compensation scheme and a federal cause of action for those injured by poisonous chemicals.[374] Because of its breadth, S. 1480 was deemed too far-reaching, and was ultimately jettisoned by Senator Stafford and other Senate sponsors in favor of substitute versions which deleted the bill's most controversial features:

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366. *See supra* notes 294–295 and accompanying text.

367. *See* 1 CERCLA LEGISLATIVE HISTORY, *supra* note 360, at v–vii. A second House bill, H.R. 85, also proposed to establish a fund to clean up oil and chemical spills. *Id.*

368. H.R. REP. No. 1016, 96th Cong., 2d Sess., pt. 1, 17 (1980), *reprinted in* 2 CERCLA LEGISLATIVE HISTORY, *supra* note 360, at 48.

369. *Id.* at 18, *reprinted in* 2 CERCLA LEGISLATIVE HISTORY, *supra* note 360, at 49.

370. 872 F.2d 1373 (8th Cir. 1989).

371. *Id.* at 1377.

372. 821 F. Supp. 707, 712, n.6 (S.D. Ga. 1993).

373. S. REP. No. 96-848, 96th Cong., 2d Sess. 36, 37 (1980), *reprinted in* 1 CERCLA LEGISLATIVE HISTORY, *supra* note 360, at 343, 344.

374. *See* 1 CERCLA LEGISLATIVE HISTORY, *supra* note 360, at vi.

> As I said last Friday, I believe that S. 1480 is the best bill for the task at hand . . . . However, in consideration of the urgent need for remedial legislation to respond to the problems caused by the release of chemical poisons into our environment, I am putting forward a compromise. This compromise incorporates those parts of S. 1480, H.R. 7020 and H.R. 85 on which there is broad consensus.[375]

Ultimately, the Senate agreed to reduce the Superfund by several billion dollars and to delete provisions compensating persons for medical expenses incurred because of exposure to hazardous wastes.[376] What clearly survived, however, was the remedial focus of the enacted legislation: "The basic concept of creating response authority and a response fund to prevent and remedy health and environmental threats from releases or threatened releases of hazardous substances is the same in both the House and Senate version of H.R. 7020."[377] Thus, as noted by the district court in *Fleet Factors*, courts "[c]iting [CERCLA's] legislative history . . . have found the statute's goal to be 'overwhelmingly remedial' and, on that basis, interpreted its provisions liberally in favor of liability."[378]

c. Structural Guidance (Signals That Congress Intended the Courts to Supplement CERCLA)

Employment of the remedial purpose canon is justified not only in light of CERCLA's underlying purposes and its legislative history, but also because of the fact that Congress intended for the courts to develop a federal common law that would supplement CERCLA's textual provisions.[379] CERCLA differs from other environmental statutes insofar as Congress consciously empowered courts

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375. 126 CONG. REC. 30113 (Nov. 18, 1980) (statement of Sen. Stafford), *reprinted in* 3 CERCLA LEGISLATIVE HISTORY, *supra* note 360, at 199.

376. *See* 1 CERCLA LEGISLATIVE HISTORY, *supra* note 360, at vii.

377. 126 CONG. REC. 31965 (Dec. 3, 1980) (statement of Rep. Florio), *reprinted in* 1 CERCLA LEGISLATIVE HISTORY, *supra* note 360, at 779; *see also* 126 CONG. REC. 30114 (Nov. 18, 1980) (statement of Sen. Mitchell), *reprinted in* 3 CERCLA LEGISLATIVE HISTORY, *supra* note 360, at 201 ("The [substitute] bill mandates remedial Government response to releases of hazardous substances without regard to the medium in which it occurs, as does S. 1480.").

378. United States v. Fleet Factors Corp. 819 F. Supp. 1079, 1083–84 (S.D. Ga. 1993).

379. *See supra* notes 182–186 and note 277 and accompanying text.

to develop substantive law when interpreting the liability provisions of CERCLA.

In the case of CERCLA, both its structure and legislative history indicate that Congress intended that the courts develop rules of CERCLA liability on the basis of evolving common law principles.[380] "Courts may formulate federal common law where either 'a federal rule of decision is "necessary to protect uniquely federal interests"' or 'Congress has given the courts the power to develop substantive law.'"[381] To make this determination, a court must inquire whether "a statute, its legislative history or the overall regulatory scheme 'suggest[s] that Congress intended courts to have the power to alter or supplement the remedies enacted'. . . ."[382]

Section 107 of CERCLA is both broad and vague: its liability net encompasses "owners" and "operators" of sites containing hazardous substances, as well as those who "arranged" for the disposal of such substances or accepted such substances for "transport" to disposal or treatment sites.[383] In light of such sweeping language, it is evident that—as in the case of section 1 of the Sherman Act[384]—Congress did not intend for the text of CERCLA "to delineate the full meaning of the statute or its application in concrete situations."[385]

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380. *See* Comment, Payson R. Peabody, *Taming CERCLA: A Proposal To Resolve The Trustee 'Owner' Liability Quandary*, 8 ADMIN. L.J. AM. U. 405, 430–32 (1994); Michael P. Healy, *Direct Liability For Hazardous Substance Cleanups Under CERCLA: A Comprehensive Approach*, 42 CASE W. RES. L. REV. 102–04 (1992). One commentator has noted a direct connection between the command to interpret CERCLA in accordance with an evolving common law and the utilization of the remedial purpose canon. *See* Case Comment, *Third Circuit Review: Environmental Law—Third Circuit Ruling May Foreclose Imposition of Joint and Several Liability on Summary Judgment Under CERCLA*—United States v. Alcan Aluminum Corp. (1992), 38 VILL. L. REV. 1241, 1246 and 1246 n.22 (1993).

381. United States v. Valentine, 856 F. Supp. 627, 632 (D. Wyo. 1994) (quoting Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981)).

382. *Id.* (quoting Texas Indus., Inc., 451 U.S. at 645); *see also* United States v. Kimbell Foods, Inc., 440 U.S. 715, 727–28 (1979).

383. 42 U.S.C. § 9607(a) (1988).

384. 15 U.S.C. § 1 (1994).

385. National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 688 (1978) (construing § 1 of the Sherman Act). As evidence of the fact that Congress did not intend for the text of CERCLA to delineate its full meaning or its application in concrete situations, consider that § 101(20)(A) of CERCLA circuitously defines "owner or operator" to mean, "in the case of an onshore facility or an offshore facility, any person owning or operating such facility." 42 U.S.C. § 9601(20)(A) (1988).

386. The same is true in the case of § 1 of the Sherman Act. *See* National Soc'y of Professional Eng'rs v. United States, 435 U.S. at 688 ("The legislative history [of the

This fact is confirmed in CERCLA's legislative history.[386] The point was clearly made by Rep. Florio during the final debates on the Superfund legislation:

> This [substitute] bill sets forth the classes of persons (for example, owners, operators, generators) who are liable for all costs of removal or remedial action, other necessary costs of response, and damages to natural resources. Rather than announce the standard [of liability], and then cut back on its applicability, this bill refers to section 311 of the Clean Water Act and to traditional and evolving principles of common law in determining the liability of such joint tortfeasors. To insure the development of a uniform rule of law, and to discourage business dealing in hazardous substances from locating primarily in States with more lenient laws, *the bill will encourage the further development of a Federal common law in this area.*[387]

Consequently, the courts have had no trouble concluding that "CERCLA's legislative history reveals that Congress intended that the courts should develop federal common law to fill in the gaps in the statute."[388] Not surprisingly, the courts have viewed the

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Sherman Act] makes it perfectly clear that [Congress] expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition"); *see also supra* notes 183–185 and accompanying text.

387. 126 CONG. REC. 31965 (Dec. 3, 1980) (statement of Rep. Florio), *reprinted in* 1 CERCLA LEGISLATIVE HISTORY, *supra* note 360, at 778 (emphasis added). For a similar statement from the Senate side, see 126 Cong. Rec. 30932 (Nov. 24, 1980) (statement of Sen. Randolph), *reprinted in* 1 CERCLA LEGISLATIVE HISTORY, *supra* note 360, at 686 ("It is intended that issues of liability not resolved by this act, if any, shall be governed by traditional and evolving principles of common law").

388. Mobay Corp. v. Allied-Signal, Inc., 761 F. Supp. 345, 350 (D.N.J. 1991); *see also* Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86, 91 (3rd Cir. 1988), *cert. denied*, 488 U.S. 1029 (1989); City of Phoenix v. Garbage Servs. Co., 827 F. Supp. 600, 602–03 (D. Ariz. 1993); State v. Verticare, Inc., No. C-92-1006 MHP, 1993 WL 245544 at *3 (N.D. Cal. Mar. 1, 1993).

The only real issue that has arisen is whether, in creating common law rules to supplement the text of CERCLA, courts should adopt state law rules or fashion nationwide federal rules. Most courts have cited CERCLA's legislative history and/or the need for national uniformity in support of the concept of federal common law. *See, e.g.*, HRW Sys., Inc. v. Washington Gas Light Co., 823 F. Supp. 318, 326–28 (D. Md. 1993); and Mobay Corp. v. Allied Signal, Inc., 761 F. Supp. at 350–52. The Sixth Circuit, however, has held that a federal common law of liability is *not* required by CERCLA. *See* Anspec Co. v. Johnson Controls, Inc., 922 F.2d 1240 (6th Cir. 1991) (finding it "not necessary to fashion a federal common law rule" to include successor corporations among entities potentially liable under CERCLA because law of private corporations answers question); United States v. Distler, 865 F. Supp. 398 (W.D. Ky. 1991) (following court in *Anspec* in using state law to determine if successor corporation is liable under CERCLA).

389. The confluence of the congressional desire that CERCLA be supplemented by an evolving common law and the judicial utilization of the remedial purpose canon is

employment of the remedial purpose canon as an appropriate means by which to discharge the delegated duty to "fill gaps" and supplement CERCLA on the basis of "evolving" common law principles.[389]

3. Is CERCLA a "Best Case Scenario"?

CERCLA is a very close (but not perfect) fit to the "best-case scenario" for the application of the remedial purpose canon.[390] First of all, there should be no question that CERCLA, by its nature, is "more remedial" than other statutes; as noted, it has been consistently described as an "overwhelmingly remedial" statutory scheme.[391] Second, as an environmental statute, CERCLA is in a category of legislative enactments that has been historically associated with the remedial purpose canon.[392] Even more important is the fact that CERCLA's legislative history and structure confirm the Act's remedial focus and Congress' desire that the statute be aggressively construed.[393]

Less evident, perhaps, is the fact that CERCLA is a "public-regarding" statute that is—at least in critical areas—not the product of compromise. Because the statute was the blending of three bills, it has been characterized as legislation "[b]orn of compromise."[394] But on the core issues—cleaning up sites quickly and making the polluters pay if at all possible—there was little dissen-

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evident in a decision of the Fourth Circuit on the question of CERCLA liability of successor corporations:

> [T]he statute is silent as to whether successor corporations may be held liable . . . . In adopting a rule of successor liability in this case we "must consider traditional and evolving principles of federal common law, which Congress has left to the courts to supply interstitially." United States v. Monsanto, 858 F.2d 160, 171 (4th Cir. 1988), cert. denied, 490 U.S. 1106 (1989). We are reminded that since CERCLA is a remedial statute, its provisions should be construed broadly to avoid frustrating the legislative purpose.

United States v. Carolina Transformer Co., 978 F.2d 832, 837–38 (4th Cir. 1992). The court of appeals rejected a restrictive view of successor liability, noting that it "would not serve the remedial purposes of CERCLA . . . ." *Id.* at 840.

390. *See supra* part V.

391. *See supra* note 272 and accompanying text and part VI.B.1.

392. *See supra* part IV.

393. *See supra* part VI.B.2.

394. Edward Hines Lumber Co. v. Vulcan Materials Co., 861 F.2d 155, 157 (7th Cir. 1988); *see also* Rhodes v. County of Darlington, 833 F. Supp. 1163, 1173 (D.S.C. 1992) ("The Act that emerged as CERCLA was the result of compromise.").

sion or wavering of purpose, as noted by the Second Circuit in *New York v. Shore Realty Corp.*:

> The compromise contains many provisions closely resembling those from earlier versions of the legislation, and the House and Senate sponsors sought to articulate the differences between the compromise and earlier versions. One of the sponsors claimed that the version passed "embodie[d] those features of the Senate and House bills where there has been positive consensus" while "eliminat[ing] those provisions which were controversial."[395]

As previously noted,[396] what was jettisoned during the final days of debate was, among other things, the no-fault victim compensation scheme, a federal cause of action for those injured by

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395. New York v. Shore Realty Corp., 759 F.2d 1032, 1040 (2nd Cir. 1985) (quoting 126 CONG. REC. 30,932 (Nov. 24, 1980) (statement of Sen. Randolph), *reprinted in* 1 CERCLA LEGISLATIVE HISTORY, *supra* note 360, at 685).

396. *See supra* notes 374–376 and accompanying text.

397. *See* 126 CONG. REC. 30113 (Nov. 18, 1980) (statement of Sen. Stafford), *reprinted in* 3 CERCLA LEGISLATIVE HISTORY, *supra* note 360, at 199 ("I am putting forward a compromise. This compromise incorporates those parts of S. 1480, H.R. 7020 and H.R. 85 on which there is broad consensus."); 126 CONG. REC. 30945 (Nov. 24, 1980) (statement of Sen. Danforth), *reprinted in* 1 CERCLA LEGISLATIVE HISTORY, *supra* note 360, at 721 ("I believe the clear consensus is that we must clean up abandoned hazardous dump sites as soon as possible."); *see also supra* note 211.

398. Public choice theory posits that many statutes—including some environmental statutes—can be best explained as "deals" between private groups and Congress. *See, e.g.*, National Wildlife Fed'n v. Lujan, 950 F.2d 765, 770 (D.C. Cir. 1991) (describing Surface Mining Control and Reclamation Act as "a compromise, designed both to protect the environment and to ensure an adequate supply of coal to meet the nation's energy requirements"); McNollgast, *supra* note 217, at 727–36 (describing deals underlying 1977 amendments to the Clean Air Act); SUNSTEIN, AFTER THE RIGHTS REVOLUTION, *supra* note 23, at 85 (noting claims that portions of Clean Air Act protected Eastern high-sulfur coal producers). However, as noted by William Eskridge and Philip Frickey,

> [other] scholars . . . argue that many statutes cannot be explained as mere deals between private groups and the legislature. For example, public choice theory is a poor explanation for the civil rights revolution in legislation during the 1960's . . . . Similarly, the environmental protection statutes of the late 1960's and early 1970's . . . are better explained by public-seeking theories of politics than by interest group theory.

Eskridge & Frickey, *Legislation Scholarship*, *supra* note 46, at 718–19 (footnote omitted). Because CERCLA lacks a regulatory focus, and has a "public interest" rather than "special interest" orientation, it appears to be "more" public-regarding than most environmental legislation, which is perhaps simply another way to state (again) that CERCLA is "more" remedial than other environmental statutes.

The conclusion reached above—that CERCLA is "truly" public-regarding legislation—is premised on the notion that CERCLA's liability provisions and other critical components of the statute were the product of consensus, not compromise. However, even if one were to reject this view, and argue that CERCLA instead merely ratified "deals

hazardous substances, and the size of the Superfund. What remained was the product of consensus, not compromise.[397] This degree of consensus on the critical components of the statute is a distinguishing feature of CERCLA, and is the chief basis for characterizing CERCLA as public-regarding legislation.[398]

CERCLA contains clearly stated goals that infrequently conflict. The twin goals of "cleaning up quickly" and "making polluters pay" are—except in rare circumstances—mutually reinforcing.[399] Moreover, the absence of any statement of congressional findings and/or textual declaration of goals helps CERCLA avoid the internal conflict between aspirational and implementing language that is commonplace in other environmental statutes.[400]

The penultimate factor listed in the "best-case scenario"—whether the legislature authorized the courts to fill in the statutory gaps on the basis of evolving common law principles—is easily met in the case of CERCLA. As Frank Easterbrook has noted, "some statutes support judicial gap filling more than others do,"[401] and for the reasons outlined in the preceding section,[402] CERCLA is such a statute.

The final factor to consider is the extent to which CERCLA's goals conflict with extra-statutory goals, other canons of construction, and the meta-principles of statutory interpretation. The existence and degree of conflict will depend, of course, upon the factual and legal context of each case. As discussed both above[403] and below,[404] a court utilizing the remedial purpose canon in instances where such conflicts are present must be aware of such countervailing factors and directives.

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struck by private interests," Reynolds, *supra* note 46, at 934, it does not necessarily follow that employment of the remedial purpose canon is inappropriate. As first suggested by Jonathan Macey, judges can "[transform] statutes designed to benefit narrow interest groups into statutes that in fact further the public's interests" by interpreting such statutes "based on what [they] actually say, rather than on what the judges believe the bargain was between the interest group and the legislature." Macey, *supra* note 72, at 227.

399. One situation where the potential exists for the twin goals of CERCLA to come into conflict is when a court must determine the extent of the contribution protection afforded settling parties under § 113(f) of the statute. 42 U.S.C. § 9613(f) (1988); *see infra* notes 431–432 and accompanying text.

400. *See supra* notes 215–222 and accompanying text.

401. Easterbrook, *Statutes' Domains*, *supra* note 76, at 545.

402. *See supra* notes 379–389 and accompanying text.

403. *See supra* part III.D.

404. *See infra* parts VII.A and B.

In sum, there is an explanation for the frequent invocation of the remedial purpose canon in CERCLA cases by the federal district and appellate courts: the Superfund statute is an excellent candidate for the employment of the canon. However, even in the case of CERCLA, a court applying the remedial purpose canon must be sensitive to the reasons which justify its use, and must acknowledge and respect its limits as an interpretive aid. Consequently, as in the case of other remedial statutes, courts that rely on the remedial purpose canon in CERCLA cases must be cognizant of the principles set forth in Part III.D of this Article which guide and temper the canon's application. The extent to which the federal district and appellate courts have made appropriate—and inappropriate—use of the remedial purpose canon in particular CERCLA cases is addressed in Part VII below.

VII. Observations Regarding the Use of the Remedial Purpose Canon in CERCLA Cases

In view of the congressional command that the courts develop rules of CERCLA liability on the basis of evolving common law, as well as the concomitant prominence accorded by Congress to the "polluter pays" principle, it follows that the invocation of the remedial purpose canon in CERCLA cases is most appropriate when construing the elements of section 107(a) liability and the types of response costs recoverable from liable parties.[405] On the other hand, the canon's utility ebbs when courts are called upon to interpret provisions of CERCLA that clearly reflect compromise.

This Part begins with an examination of specific instances where the remedial purpose canon was either incorrectly or insensitively invoked in a CERCLA case. The employment of the canon in these cases was made without due regard for one or more of the following constraints: the plain meaning of the statute; the presence of compromises and conflicting goals; the countering effects

405. The remedial purpose canon is also appropriately invoked to effectuate CERCLA's other principal remedial goal: to clean up hazardous waste sites as quickly as possible. *See supra* part VI.A.1. However, Congress was focusing on the scope and nature of cleanup liability when it directed that CERCLA should be supplemented by judicial "gap-filling" based on evolving common law principles, and hence it is in this area that liberal constructions of the statutory text are most fitting.

of other interpretive principles; or the unintended consequences of an expansive construction.

For the most part, however, the courts have properly invoked and applied the remedial purpose canon in CERCLA cases. As seen below, use of the remedial purpose canon has contributed to the judicial development of "secondary" CERCLA liability—encompassing, *inter alia*, successor corporations, dissolved corporations, parent corporations, corporate officers, and shareholders. By aggressively construing the words "owner" and "operator," the courts have heeded Congress' call to fill the gaps of CERCLA and have appropriately given the Superfund statute a liberal (but not unbounded) interpretation that effectuates its remedial purposes.

A. Situations Where Use of the Canon in CERCLA Cases Is Inappropriate or Less Appropriate

1. The Constraint of Plain Meaning

Perhaps the most egregious use of the remedial purpose canon is found in a handful of district court decisions which have held that municipalities should be deemed to be "states" for the purpose of receiving the procedural advantages provided to states in CERCLA cases.[406] These cases, which rely heavily on the canon to overcome contrary textual signals, fail to acknowledge the simple—but controlling—fact that "[t]he plain language of CERCLA's definition of 'state' does not encompass political subdivisions such as municipalities."[407]

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406. *See supra* note 343 and accompanying text.

407. Town of Bedford v. Raytheon Co., 755 F. Supp. 469, 470 (D. Mass. 1991). Congress defined the term "State" in § 101(27) of CERCLA as follows:

> The terms "United States" and "State" include the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the United States Virgin Islands, the Commonwealth of the Northern Marianas, and any other territory or possession over which the United States has jurisdiction.

42 U.S.C. § 9601(27) (1988).

408. 42 U.S.C. § 9607(a)(4)(A) (1988). When the plaintiff is "any other person," the burden is on the plaintiff to show that the response costs incurred were "necessary" and "consistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(B) (1988). It is noteworthy that municipalities are expressly included in the definition of "person," but

The question of whether a city can invoke the procedural advantages afforded state governments under CERCLA has arisen in three contexts. First, under section 107(a)(4)(A), the burden of proof is placed on the defendant to show that response costs were inconsistent with the national contingency plan (NCP) when the plaintiff is the "United States Government or a State or an Indian tribe . . . ."[408] Second, in section 107(f) of CERCLA, Congress provided that in cases involving "an injury to, destruction of, or loss of natural resources . . . liability shall be to the United States Government and to any State . . . and to any Indian tribe" that has dominion over such natural resources.[409] Finally, section 113(f)(2) of CERCLA provides that persons who have resolved their liability "to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement."[410]

In *Mayor and Board of Aldermen of Boonton v. Drew Chemical Corp.*,[411] the district court was faced with the question of whether a municipality should be considered to be a "state" for purposes of invoking sections 107(a)(4)(A) and 107(f). Although the CERCLA definition of "State" does not mention municipalities, the district court seized on the word "include" in the statutory definition to hold that the listing of entities in section 101(27) was not intended to be conclusive, and that the "illustrative list" should be expanded "where to do so would be consistent with the remedial intent of the Act."[412] Equating cities with states, the *Drew Chemical* court concluded, furthers the goals of CERCLA and is justified by the remedial purpose canon of construction:

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are not mentioned in the definition of "State." *See id.* §§ 9601(21) ("person") and (27) ("State").

409. *Id.* § 9607(f) (1988).

410. *Id.* § 9613(f)(2) (1988).

411. 621 F. Supp. 663 (D.N.J. 1985).

412. *Id.* at 666. When Congress did not want a listing of items in a CERCLA definitional section to be deemed exclusive, it said so in the text. *See* 42 U.S.C. § 9601(33) (1988) ("The term 'pollutant or contaminant' shall include, but not be limited to . . ."); § 9601(34) ("The term 'alternative water supplies' includes, but is not limited to . . ."); § 9601(35)(A) ("The term 'contractual relationship' . . . includes, but is not limited to . . .").

413. 621 F. Supp. at 668. To date, only one other district court has agreed with *Drew Chemical* that cities are states for purposes of §§ 107(a)(4)(A) and (f). *See* City of New York v. Exxon Corp., 633 F. Supp. 609, 618–19 (S.D.N.Y. 1986) (city could maintain action for damages to natural resources although § 107(f) states that liability for injury, destruction, or loss of natural resources "shall be to the United States Government and to

> I find that . . . by liberally construing the language of CERCLA in light of its broad remedial purposes . . . a municipality is a state or authorized representative thereof for purposes of invoking the provisions of CERCLA. I believe that such a construction of the Act is consistent with its purpose to encourage and facilitate the cleanup and treatment of hazardous wastes in order to protect and preserve natural resources and the public health.[413]

Similar reasoning has been employed by two district courts to conclude that a municipality may be a "state" under section 113(f)(2) of CERCLA. In *City of New York v. Exxon Corp.*,[414] the court—after invoking the remedial purpose canon—concluded that "allowing the City to . . . settle under § 113(f)(2) would certainly advance the Act's remedial purposes by encouraging early and complete settlements."[415] In *City and County of Denver v. Adolph Coors Co.*,[416] the district court likewise concluded "that to deny the § 113(f)(2) bar to the city would be 'unduly formalistic' and contrary to the remedial purpose of CERCLA."[417]

This "Platonic" equation of city and state is flatly inconsistent with the text of CERCLA. It has been firmly established that the fact that a statute is "highly remedial in nature" and "entitled to a liberal construction" nevertheless "does not justify ignoring plain

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any State") (quoting 42 U.S.C. § 9607(f)(1) (1988)); City of New York v. Exxon Corp., 112 B.R. 540, 545 (Bankr. S.D.N.Y. 1990) (city has standing as governmental plaintiff under § 107(a)(4)(A) as a "state"), *aff'd on other grounds*, 932 F.2d 1020 (2d Cir. 1991).

414. 697 F. Supp. 677 (S.D.N.Y. 1988).

415. *Id.* at 685.

416. 829 F. Supp. 340 (D. Colo. 1993).

417. *Id.* at 344 (quoting City of New York v. Exxon Corp., 697 F. Supp. at 686).

418. MacEvoy Co. v. United States, 322 U.S. 102, 107 (1944); *see also supra* part III.D.1.

419. Sherwin-Williams Co. v. City of Hamtramck, 840 F. Supp. 470, 474 (E.D. Mich. 1993) ("Municipalities are not considered states under the CERCLA definition"); City of New York v. Chem. Waste Disposal Corp., 836 F. Supp. 968, 978 (E.D.N.Y. 1993) (city's position is "unsupported by the language of the statute"); City of Heath v. Ashland Oil, Inc., 834 F. Supp. 971, 977 (S.D. Ohio 1993) (cities are not states under "a plain reading of the definition of state"); City of Toledo v. Beazer Materials and Servs., Inc., 833 F. Supp. 646, 652 (N.D. Ohio 1993) (equating cities with states "would unnecessarily contradict the plain meaning of CERCLA"); Mayor and Council of Rockaway v. Klockner & Klockner, 811 F. Supp. 1039, 1049 (D.N.J. 1993) ("CERCLA clearly differentiates between the United States and the states, on the one hand, and any other person, on the other"); Town of Bedford v. Raytheon Co., 755 F. Supp. 469, 475 (D. Mass. 1991) ("The language and structure of CERCLA make clear that a municipality is not a 'State'"); Werlein v. United States, 746 F. Supp. 887, 910 (D. Minn. 1990) ("the plain language of section 9607(f)(1) controls"), *vacated in part*, 793 F. Supp. 898 (D. Minn. 1992); City of Philadelphia v. Stephan Chem. Co., 713 F. Supp. 1484, 1488 (E.D. Pa. 1989) ("plainly, CERCLA's definition of the term 'state' does not include the word 'municipality'").

words of limitation."[418] Thus, the majority of courts that have addressed the city/state issue have acknowledged the constraint of plain meaning and have refused to employ the remedial purpose canon to reach a result that conflicts with the clear language of CERCLA.[419] As succinctly stated by one court:

> Although I agree with the district court in *Drew Chemical* that the provisions of CERCLA must be liberally construed so as to effectuate the statute's broad remedial purpose, nonetheless, . . . I cannot construe section 107(a)(4)(A) to allow a municipality to proceed as a state when there is no support in either the statutory language or the legislative history of CERCLA for such a result.[420]

Even if viewed as a presumption favoring aggressive interpretation, as opposed to a "tiebreaker" in close cases,[421] the reliance on the remedial purpose canon in *Drew Chemical* and like-minded cases was an inappropriate use of the canon.[422]

2. *The Constraint of Compromise*

For the most part, the federal district and appellate courts have properly recognized that the remedial purpose canon has diminished utility when the interpretive issue focuses on provisions of CERCLA that are the product of compromise. Such compromises can be found in both CERCLA's text and its enactment history. For

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420. *City of Philadelphia*, 713 F. Supp. at 1488.

421. *See supra* notes 196–198 and accompanying text.

422. In fact, the author of *Drew Chemical* re-examined the city/state issue in a subsequent decision and determined that the plain meaning approach to the interpretive issue "is the better one." Mayor and Council of Rockaway v. Klockner & Klockner, 811 F. Supp. 1039, 1049 (D.N.J. 1993).

423. 42 U.S.C. § 9601(14) (1988).

424. 42 U.S.C. § 9607(i) (1988).

425. POSNER, THE FEDERAL COURTS, *supra* note 69, at 279. Thus, in Wilshire Westwood Assoc. v. Atlantic Richfield Corp., 881 F.2d 801 (9th Cir. 1989), the court acknowledged the frequent invocation of the remedial purpose canon in CERCLA cases, but refused to include unrefined and refined gasoline in CERCLA's definition of hazardous substances because such a construction would render "the petroleum exclusion a nullity." *Id.* at 804.

426. Section 104(a)(3)(B) is the only provision in CERCLA where Congress directly addressed the removal of substances which are part of the structure of buildings. 42 U.S.C. § 9604(a)(3)(B) (1988). Section 104(a)(3)(B) limits the authority of the federal government to respond "to a release or threat of release . . . from products which are part of the structure of, and result in exposure within, residential buildings or business or community structures." *Id.* The statute, by contrast, does not address the question of

example, since Congress expressly removed petroleum products[423] and registered pesticide products[424] from CERCLA liability, an application of the remedial purpose canon when construing the scope of these exceptions would quite likely "upset the compromise that the statute was intended to embody."[425] Likewise, because Congress expressly limited CERCLA's scope with respect to asbestos,[426] it is less appropriate to invoke the remedial purpose canon in cases seeking recovery under CERCLA for the costs of removing asbestos materials.[427]

On the other hand, the issue of whether "medical monitoring" or "medical surveillance" costs are recoverable costs in a section

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whether private parties who respond to the release or threat of release of asbestos in buildings may recover their costs of response under § 107 of CERCLA.

427. In 3550 Stevens Creek Associates v. Barclays Bank, 915 F.2d 1355 (9th Cir. 1990), *cert. denied*, 500 U.S. 917 (1991), the purchaser of a commercial building sought to recover from its vendor the costs incurred for asbestos removal during a voluntary remodeling of the building. The Ninth Circuit acknowledged that CERCLA "is to be given a broad interpretation to accomplish its remedial goals," *id.* at 1363, but characterized the purchaser's contention that the private right of action in § 107(a)(2) encompasses asbestos removal from private structures as "a construction that the statute on its face does not permit, and the legislative history does not support." *Id.* In support of its holding, the court noted Congress' unwillingness to respond fully to the far-reaching asbestos problem in CERCLA. *Id.* at 1363–65.

In contrast, the dissenting opinion in *3550 Stevens Creek Associates* asserts that "[t]he purposes underlying this remedial statute should not be frustrated by the narrow interpretations inflicted on it by the majority opinion." *Id.* at 1365 (Pregerson, J., dissenting). Whereas the majority cites the widespread problem of asbestos in private structures as the reason why Congress chose *not* to provide a private right of action in CERCLA for recovery of asbestos removal costs, the dissent contends that the extensive use of asbestos materials in commercial properties is the reason why § 107(a)(2) of CERCLA *should* be broadly construed to encompass private asbestos cost recovery actions:

> Precisely because of the widespread nature of the problem, government Superfund resources are not sufficient to deal with these clean-up costs. Thus, without recognition of a statutory remedy of a private cause of action under section 107(a)(2), there will be no effective remedy for the damage and injury caused by the existence of asbestos in private structures.

Id. at 1366–67. This focus on furthering the underlying purposes of CERCLA, however, undervalues and upsets the congressional compromise on the asbestos issue. *See* S. REP. No. 11, 99th Cong., 1st Sess. 16 (1985) ("CERCLA response authorities are extremely broad, but there are nevertheless situations, some of which may be life-threatening, which are not within the law's scope.").

428. The argument, distilled to its essence, is that (1) CERCLA authorizes the recovery of "necessary costs of response" in 42 U.S.C. § 9607(a)(4)(B) (1988); (2) "response" is defined in CERCLA to encompass removal and remedial actions, 42 U.S.C. § 9601 (25) (1988); (3) "removal" actions and "remedial" actions are defined, in part, as actions taken to prevent or minimize damage to "public health or welfare," 42 U.S.C. § 9601 (23), (24) (1988) ("removal" and "remedial action," respectively); and (4) the phrase "public health or welfare" in the statutory definitions of "removal" and "remedial

107 action presents a situation where the presence of legislative compromise is found not in the text, but in the enactment history of CERCLA. Litigants have offered a plausible argument—ostensibly bolstered by the remedial purpose canon—that expenses incurred for medical surveillance and related health effect assessments can be recovered as response costs under CERCLA.[428] The clear trend in the courts, however, is to reject the offer and hold that—based largely on CERCLA's enactment history—expenses incurred as a result of medical testing and screening conducted to assess the effect on the public health of the release or discharge of hazardous substances do not constitute recoverable response costs under CERCLA.[429]

3. The Constraint of Conflicting Goals

In the same fashion, the courts should be reluctant to rely on the remedial purpose canon in situations where CERCLA's goals are either in conflict or clash with goals of other statutes. One of the few situations where CERCLA's twin goals of "quick cleanups" and "polluter pays" may conflict—and lessen the appropriateness of invoking the remedial purpose canon—is when a court must delineate the scope of the contribution protection furnished in section 113(f) of CERCLA to a party "who has resolved its liability to the United States or a State in an administrative or judicially approved settlement . . . ."[430] On one hand, it has been noted that the protections afforded settling parties should be construed ag-

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action" should be broadly construed (given CERCLA's remedial purposes) to encompass medical monitoring and related costs. *See, e.g.*, Daigle v. Shell Oil Co., 972 F.2d 1527, 1533–34 (10th Cir. 1992) (summarizing above argument); Brewer v. Ravan, 680 F. Supp. 1176, 1179 (M.D. Tenn. 1988) (accepting argument).

429. *See, e.g.*, Price v. United States Navy, 39 F.3d 1011, 1016 (9th Cir. 1994) (citing *Daigle* with approval and rejecting argument that definitional sections "should be read broadly to cover any type of monitoring that would mitigate health problems"); Daigle v. Shell Oil Co., 972 F.2d at 1535 ("[W]e think Plaintiffs and the *Brewer* court go awry in affording a broad sweep to the 'public health and welfare' language in the definitions."). The disinclination to construe liberally the pertinent definitional sections of CERCLA to bring medical monitoring into the category of recoverable response costs is due to the fact that Congress, as part of the last-minute compromise which secured the passage of CERCLA, deleted from the legislation "any provision for recovery of private damages unrelated to the cleanup effort, including medical expenses." *Id. See also supra* notes 364–386 and accompanying text.

430. 42 U.S.C. § 9613(f)(2) (1988).

431. *In re* Acushnet River & New Bedford Harbor, 712 F. Supp. 1019, 1029 (D. Mass. 1989).

gressively, because a restrictive construction of a settlement "which overemphasizes the importance of its potential effect on the non-settlors . . . would frustrate the statute's goal of promoting expeditious resolution of harmful environmental conditions."[431] On the other hand, "blanket immunity from contribution 'would create a situation where persons settling with the United States who are later responsible for an unrelated act of improper disposal of hazardous waste would find themselves immune from liability under CERCLA or state laws—a result clearly not envisioned by CERCLA.'"[432] Thus, when the statute's goals are at cross-purposes, effectuating the remedial purposes of CERCLA becomes problematic and the remedial purpose canon loses its value as an interpretive aid.[433]

The constraint of conflicting goals, of course, extends beyond CERCLA, and the utility of the remedial purpose canon is diminished whenever an aggressive reading of CERCLA would in turn undermine the legislative goals of other statutes. Thus, one situ-

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432. United States v. Witco Corp., 865 F. Supp. 245, 248 (E.D. Pa. 1994) (quoting United States v. Union Gas Co., 743 F. Supp. 1144, 1153 (E.D. Pa. 1990)).

433. Another emerging internal conflict is between CERCLA's remedial goal of prompt remediation and the underlying concern that animates this goal: "the central CERCLA purpose of protecting human health and the environment from the dangers posed by hazardous substances." Healy, *supra* note 13, at 43. As discussed *supra* notes 307–311 and accompanying text, the remedial purpose canon has been invoked to support liberal constructions of § 113(h) of CERCLA, 42 U.S.C. § 9613(h), which bars "pre-enforcement" judicial review of CERCLA response actions and liability issues in order to further the prompt cleanup of hazardous waste sites. Litigants and commentators have argued that such an aggressive application of CERCLA's judicial review preclusion provision is inappropriate when the reason for seeking pre-enforcement judicial review is to contend that the cleanup remedy itself will endanger human health and the environment. *See, e.g.*, Neighborhood Toxic Cleanup Emergency v. Reilly, 716 F. Supp. 828, 834 (D.N.J. 1989) (noting but rejecting plaintiff's claim that pre-enforcement review is warranted because "Congress's ultimate goal in enacting CERCLA/SARA is to safeguard the public from hazardous waste and . . . an unsafe cleanup would subvert that goal"); Healy, *supra* note 13, at 55 ("In the case of a citizen wishing to assert a health-based claim, . . . the claimant will likely have to convince the court that CERCLA's broad policy to protect human health and the environment outweighs the intent that there be no delay in cleanups."). Recently, courts have started to question the propriety of liberally interpreting § 113(h) in cases where plaintiffs raise bona fide allegations that the implementation of a remediation project will cause irreparable harm to the public health and/or the environment. *See, e.g.*, United States v. Princeton Gamma-Tech, Inc., 31 F.3d 138, 144–45 (3d Cir. 1994) ("In circumstances where irreparable environmental damage will result from a planned response action, forcing parties to wait until the project has been fully completed before hearing objections to the action would violate the purposes of CERCLA.").

434. Another situation where courts must consider a competing extra-statutory goal is when the congressional directive to interpret aggressively CERCLA's liability provisions conflicts with the policy concerns that animate the well-established principle of limited liability in corporate law. *See infra* part VII.B.

ation where the employment of the canon is less appropriate is when a court is required to interpret CERCLA in a bankruptcy proceeding.[434] This is because, as noted by the Seventh Circuit,

> CERCLA and the Bankruptcy Act are two sweeping statutes both with very important purposes. The problem is that the goals underlying these statutes do not always coincide . . . . [B]ankruptcy's goal of giving debtors a fresh start would be frustrated if creditors who failed to file timely claims tried to bring claims against a reorganized company after the close of bankruptcy . . . . [On the other hand, p]rematurely cutting off a party's ability to recover for CERCLA cleanup costs could impede CERCLA's cost-distribution scheme. And for this reason, the bankruptcy court's interest in having all claims before it as early as possible sometimes conflicts with the cleanup process envisioned in CERCLA.[435]

Consequently, the presence of conflicting extrastatutory goals constrain the argument that the remedial purposes of the Superfund statute justify special treatment of CERCLA cleanup claims in bankruptcy proceedings.[436]

4. The Constraint of Competing Interpretive Meta-Principles

Prior to the Supreme Court's 1994 decision in *Key Tronic Corp. v. United States*,[437] the question of whether private parties may recover their attorney fees for work associated with bringing

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435. *In re* Chicago, Milwaukee, St. Paul & Pac. R.R., 974 F.2d 775, 779 (7th Cir. 1992). This conflict is exacerbated by the fact that the bankruptcy statutes, like CERCLA, have been deemed appropriate candidates for the employment of the remedial purpose canon. *See supra* note 175.

436. The First Circuit, in *In re* Hemingway Transport, Inc., 993 F.2d 915 (1st Cir. 1993), *cert. denied*, 114 S. Ct. 303 (1993), after initially acknowledging the "discordant legislative approaches embodied in CERCLA and the Bankruptcy Code," *id.* at 921, declined to accept a suggested reconciliation of the two statutes which emphasized the remedial goals of CERCLA and sought to create an exception for CERCLA claims from the Bankruptcy Code's normal claim procedures:

> [N]otwithstanding the purposive liberality with which courts are to construe CERCLA's remedial provisions, . . . Bankruptcy Code § 502(e)(1)(B) obliges a construction consistent with its plain terms . . . .
>
> Accordingly, we conclude that Congress did not exempt CERCLA claims from disallowance under section 502(e)(1)(B).

Id. at 924–25.

437. 114 S. Ct. 1960 (1994).

438. Eskridge & Peller, *supra* note 46, at 754.

a cost recovery action under section 107(a) of CERCLA created one of the largest splits of authority among the federal district and appellate courts over a CERCLA issue. The best explanation for the pre-*Key Tronic* division of the lower courts into two camps is the problem "of colliding and conflicting norms."[438] On one hand, the courts that allowed the recovery of attorney fees stressed the remedial purposes of CERCLA and relied on the remedial purpose canon as justification for liberally construing the statute.[439] On the other hand, the courts that held that attorney fees are not recoverable response costs under CERCLA invoked a competing interpretive principle: the "American Rule" that a prevailing litigant is not entitled to collect attorney fees from the losing party absent explicit legislative authorization.[440] As previously noted,[441] the Supreme Court—while holding that Congress had not explicitly authorized private litigants to recover their legal expenses incurred in private cost recovery actions—failed to respond to the lower courts' reliance on the remedial purpose canon, and hence failed to address (at least directly) the tension between the canon and the American Rule.[442] Whether or not the Court chose to deliberately omit any discussion of the remedial purpose canon is unknowable; however,

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439. *See, e.g.*, Chesapeake and Potomac Tel. Co. v. Peck Iron & Metal Co., 826 F. Supp. 961, 962–65 (E.D. Va. 1993); HRW Sys., Inc. v. Washington Gas Light Co., 823 F. Supp. 318, 345–46 (D. Md. 1993); Key Tronic Corp. v. United States, 766 F. Supp. 865, 869–72 (E.D. Wash. 1991), *rev'd*, 984 F.2d 1025 (9th Cir. 1993), *aff'd*, 114 S. Ct. 1960 (1994); Pease & Currin Ref., Inc. v. Spectrolab, Inc., 744 F. Supp. 945, 949–52 (C.D. Cal. 1990).

440. *See, e.g.*, Stanton Road Assoc. v. Lohrey Enter., 984 F.2d 1015, 1017–20 (9th Cir. 1993), *cert. dismissed sub nom.*, Key Tronic Corp. v. United States, 114 S. Ct. 652 (1993); Fallowfield Dev. Corp. v. Strunk, 766 F. Supp. 335, 336–38 (E.D. Pa. 1991). *See also* Dennis J. Byrne, Comment, Stanton Road Associates v. Lohrey Enterprise: *The American Rule Precludes an Award of Attorneys' Fees in Private-Party CERCLA Cost Recovery Actions*, 24 GOLDEN GATE U. L. REV. 577 (1994); Janet Morris Jones, *supra* note 255.

441. *See supra* notes 254–258 and accompanying text.

442. Although the Court did not directly discuss the remedial purpose canon, it was aware that the district court had liberally construed the statute, in light of CERCLA's remedial objectives, to hold that attorney's fees are recoverable response costs. *Key Tronic*, 114 S. Ct. at 1964. The Court, however, declined to "stretch" the language of CERCLA, and instead continued to adhere to the "general practice of not awarding fees to a prevailing party absent explicit statutory authority." *Id.* at 1967.

Even the dissenting Justices declined to invoke the remedial purpose canon. Justice Scalia, who authored the dissenting opinion, instead asserted that CERCLA's "plain language" satisfies the requirement that Congress explicitly authorize the recovery of attorney's fees. 114 S. Ct. at 1968–69. In light of Scalia's previously stated views of the remedial purpose canon, it is not surprising that the canon failed to play even a supporting role in his dissent. *See supra* note 159 and accompanying text.

the reasoning and holding of *Key Tronic* suggest that the lower courts construing CERCLA should be wary of an uncritical endorsement of the canon in situations that involve competing interpretive "meta-principles."

The appropriateness of invoking the remedial purpose canon in such situations depends in part on the strength of the competing interpretive principle. For example, in recent years the Supreme Court has vigorously applied the principle that a waiver of sovereign immunity must be construed narrowly in favor of the government.[443] Given the vigor of this competing canon, CERCLA cases involving federal defendants are less appropriate situations for em-

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443. *See, e.g.*, United States v. Idaho, 113 S. Ct. 1893, 1896 (1993); United States v. Nordic Village, Inc., 503 U.S. 30, 34 (1992); Department of Energy v. Ohio, 503 U.S. 607, 615 (1992).

444. In FMC Corp. v. Department of Commerce, 29 F.3d 833 (3d Cir. 1994) (en banc), the United States argued that the waiver of sovereign immunity in § 120(a)(1) of CERCLA, 42 U.S.C. § 9620(a)(1), should be narrowly construed to apply to only non-regulatory activities, and that consequently the waiver does not extend to federal wartime regulatory activities. 29 F.3d at 38–40. In rejecting this narrow reading of the statutory waiver of sovereign immunity, the Third Circuit placed primary emphasis on CERCLA's remedial nature:

> First of all, the government's contention is inconsistent with our previous recognition that . . . CERCLA is a remedial statute which should be construed liberally to effectuate its goals . . . . In practice, the "regulatory" exception suggested by the government would be inconsistent "with CERCLA's broad remedial purposes, most importantly its essential purpose of making those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created." Lansford-Coaldale Joint Water Auth. v. Tonolli Corp., 4 F.3d 1209, 1221 (3d Cir. 1993) (internal citation omitted).

Id. at 840. Thus, instead of approaching the waiver question in terms of whether CERCLA contains an "'unequivocal expression' of elimination of sovereign immunity," *United States v. Nordic Village, Inc.*, 503 U.S. at 37, the majority in *FMC Corp.* favored a result-oriented approach and concluded that "our result . . . is neither untoward nor inconsistent with the policy underlying CERCLA." *FMC Corp.*, 29 F.3d at 846.

In contrast, Chief Judge Sloviter's dissenting opinion stressed that "the government waives only so much of its sovereign immunity as it has chosen to waive in clear and express language." *Id.* For the purposes of this Article, what is most significant is Chief Judge Sloviter's additional observation that "[t]his rule of strict construction applies *even if the statute as a whole is remedial in nature*." *Id.* at 850 (emphasis added).

445. The Supreme Court has held that "Congress must indicate clearly its intention to delegate to the Executive the discretionary authority to recover administrative costs not inuring directly to the benefit of regulated parties by imposing additional financial burdens, whether characterized as 'fees' or 'taxes,' on those parties." Skinner v. Mid-America Pipeline Co., 490 U.S. 212, 224 (1989) (construing National Cable Television Ass'n v. United States, 415 U.S. 336, 342 (1974)). In United States v. Rohm and Haas Co., 2 F.3d 1265 (3d Cir. 1993), the court of appeals held that oversight costs—costs incurred by the government in monitoring private parties' compliance with their legal obligations—were not recoverable by the United States in a § 107 cost recovery suit because CERCLA's text

ployment of the remedial purpose canon.[444] On the other hand, there are situations where the competing interpretive principle is either less weighty or not directly on point, and reliance on the remedial purpose canon remains appropriate.[445] In cases construing the scope of Superfund liability, for instance, the *Chevron* principle of deference has been deemed inapplicable, and hence unavailable as a "counter" to the remedial purpose canon.[446]

5. The Constraint of Unintended Side-Effects

Finally, reliance on the remedial purpose canon is less appropriate in situations where an expansive interpretation of CERCLA may actually frustrate—rather than effectuate—the statute's remedial purposes. In *United States v. Fleet Factors Corp.*,[447] the Eleventh Circuit was faced with the issue of "lender liability," that is,

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lacked the "clear statement of intent" required by the *National Cable Television Ass'n* doctrine. 2 F.3d at 1276.

Subsequent courts, however, have found the reasoning of *Rohm and Haas Co.* to be misguided both with regard to its heavy reliance on *National Cable* and in terms of its failure to acknowledge that CERCLA is a remedial statute that should be construed liberally. *See, e.g.*, California Dep't of Toxic Substances Control v. Celtor Chem. Corp., 1995 WL 574679 at *7 (N.D. Cal. 1995); United States v. Lowe, 864 F. Supp. 628, 630–32 (S.D. Tex. 1994); California Dep't of Toxic Substances Control v. Snydergeneral Corp., 876 F. Supp. 222, 223–25 (E.D. Cal. 1994); Jacob, *supra* note 346, at 1276 ("The Third Circuit's reliance on *National Cable* also overlooked the broad interpretation generally given to remedial statutes."). It is evident that not all courts and commentators deem the *National Cable* doctrine to be so weighty as to negate the interpretive value of the remedial purpose canon. *But see* Karyn M. Schmidt, Rohm and Haas *Was Right: Recovery of Government Oversight Costs in Private Party Response Actions*, 19 WM. & MARY ENVTL. L. & POL'Y REV. 253, 268–69 (1995) (maintaining Third Circuit properly "recognized the tension between a broadly worded remedial statute necessitating broad agency powers and the principle of statutory construction that agency power is limited by statutory delegation").

446. In Kelley v. EPA, 15 F.3d 1100 (D.C. Cir. 1994), *reh'g denied*, 25 F.3d 1088 (D.C. Circuit 1994), *cert. denied*, 115 S. Ct. 900 (1995), the court of appeals refused to defer to EPA's regulation defining the scope of the "secured creditor" exemption found in § 101(20)(A) of CERCLA, holding that *Chevron* deference is inappropriate "[w]hen Congress treats an agency only as a prosecutor without specific authority to issue regulations bearing on the questions prosecuted"), 25 F.3d at 1092. Similarly, the district court found that "[i]f Congress meant the judiciary, not EPA, to determine liability issues—and we believe Congress did—EPA's view of statutory liability may not be given deference." 15 F.3d at 1108. See 42 U.S.C. § 9601(20)(A) (1988); Dico, Inc. v. Diamond, 35 F.3d 348, 351–52 (8th Cir. 1994) (stating that court will not accord *Chevron* deference to EPA's views on liability issues).

447. 901 F.2d 1550 (11th Cir. 1990), *cert. denied*, 498 U.S. 1046 (1991).

448. Section 101(20)(A), which defines the term "owner or operator," states that "[s]uch term does not include a person who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility." 42 U.S.C. § 9601(20)(A) (1988).

the question of when secured creditors should be deemed "owners" or "operators" for purposes of imposing CERCLA liability.[448] The court of appeals found the district court's construction of the secured creditor exemption "too permissive towards secured creditors" and held that "to achieve the 'overwhelmingly remedial' goal of the CERCLA statutory scheme, ambiguous statutory terms should be construed to favor liability."[449] As a result, the court set forth an expansive view of lender liability:

> Under the standard we adopt today, a secured creditor may incur section 9607(a)(2) liability, without being an operator, by participating in the financial management of a facility to a degree indicating a *capacity to influence* the corporation's treatment of hazardous wastes . . . . [A] secured creditor will be liable if its involvement with the management of the facility is sufficiently broad to support the *inference* that it *could* affect hazardous waste disposal decisions *if it so chose*.[450]

This restrictive reading of the secured creditor exemption purports to further CERCLA's remedial goal of shifting the costs of cleanup away from the public to those responsible for the problem. The utility of the remedial purpose canon, however, is diminished by the fact that a strong argument exists that expanding lender liability will impede—not further—the objectives underlying CERCLA.[451] Briefly stated, the Eleventh Circuit's "capacity to control" approach may actually have the detrimental effect of causing a shift in the area of hazardous waste management and disposal to undercapitalized firms because the risks of expansive liability are less costly for firms with fewer assets at risk. In addition, the costs of financing could rise since entities extending credit will likely undertake an extensive environmental audit of the borrower, or charge a premium to account for the increased risk of liability, under a "capacity to control" theory. In short, an overly expansive interpre-

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449. 901 F.2d at 1557.

450. *Id.* at 1557–58 (emphasis added).

451. The utility of the remedial purpose canon is also diminished by the fact that the secured creditor exemption—an express exception to owner/operator liability—is subject as well to the "constraint of compromise." *See supra* notes 434–436 and accompanying text.

452. *See* Carol vanBergen, Note, *The Economic Implications Of Increased Lender Liability For Hazardous Waste Cleanup*, 1 GEO. MASON L. REV. 93 (1994); Maher & Hoefer, *supra* note 363, at 51–53; John M. Church, *Lender Liability for Hazardous Waste: An Economic Analysis*, 59 U. COLO. L. REV. 659, 676–77 (1988).

tation of the secured creditor exemption may *not* further the purpose of shifting the costs of cleanup away from the public, since the end result may be a concentration of undercapitalized firms in the hazardous waste business.[452] As one district court has noted,

> It appears ironic . . . that the [expansive] standard of liability the State seeks to impose upon the lender in this case may well result in increasing the number of abandoned and inactive hazardous waste disposal sites. If banks are held liable under CERCLA for actions such as occurred in this case . . . it is reasonable to assume that banks will quickly react to such judicial reasoning by refusing to extend additional credit or otherwise continue to work with troubled borrowers . . . . This anticipated response virtually guarantees an increase in the country's inventory of abandoned and inactive hazardous waste disposal sites.[453]

B. Appropriate Use of the Remedial Purpose Canon in CERCLA Cases

For the reasons previously set forth, the invocation of the remedial purpose canon is most appropriate in cases interpreting CERCLA's liability scheme, both in terms of who should be liable for incurred costs of response, and with regard to the types of costs that are recoverable. Hence, the canon has been consistently employed by the federal appellate and district courts to justify—through a liberal, purpose-infused construction of the words "owner" and "operator" in sections 107(a)(1) and (2) of the statute[454]—the development of categories of "secondary" CERCLA liability.

The appropriateness of using the remedial purpose canon when determining the CERCLA liability of (1) parent corporations;

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453. Kelley v. Tiscornia, 810 F. Supp. 901, 909 (W.D. Mich. 1993). EPA's Lender Liability Rule, which was promulgated after *Fleet Factors*, stated that participation in the management of a facility, for purposes of the secured creditor exemption, "does not include the mere capacity to influence, or ability to influence, or the unexercised right to control facility operations." *Kelley*, 810 F. Supp. at 905 (quoting 40 C.F.R. 300.1100(c)(1)). See *supra* note 16 for a discussion of how the Lender Liability Rule was vacated in Kelley v. EPA, 15 F.3d 1100 (D.C. Cir. 1994), *reh'g denied*, 25 F.3d 1088 (D.C. Cir. 1994), *cert. denied*, 115 S. Ct. 900 (1995).

454. 42 U.S.C. § 9607(a)(1) and (2) (1988).

455. With respect to the utilization of the canon to support broad constructions of CERCLA regarding the types of response costs that may be recovered from liable parties, see *supra* notes 346–347 and accompanying text.

(2) successor corporations; and (3) dissolved corporations is discussed below.[455] In these situations, the courts have sought not only to effectuate CERCLA's remedial purposes, but also to develop rules of CERCLA liability on the basis of evolving common law. At the same time, the courts have proceeded—for the most part—with awareness that overly aggressive interpretations may produce unintended consequences and may impermissibly undermine competing extrastatutory goals, such as the principle of limited corporate liability and the objective of finality underlying corporate dissolution and "capacity to sue" statutes.

1. CERCLA Liability for Parent Corporations

In the leading case of *United States v. Kayser-Roth Corp.*,[456] the First Circuit affirmed the determination that the parent corporation was directly liable, under section 107(a)(2) of CERCLA, as a person who "operated" a facility at the time hazardous substances were disposed at the facility. The decision is prefaced by a reference to both the remedial nature of CERCLA and the remedial purpose canon.[457] After establishing that CERCLA should be liberally construed to effectuate its remedial purposes, the court goes on to hold that entities which actually are in control of hazardous waste generation and disposal activities should not be protected from CERCLA liability "by the legal structure of ownership."[458] Turning to the facts of the case, the court of appeals agreed with the district court that the parent corporation was directly liable as an operator because it was actively involved in the affairs of the subsidiary and had exercised pervasive control over both environmental and non-environmental matters.[459]

The First Circuit's succinct opinion in *Kayser-Roth* firmly established that—despite the absence of any textual reference to

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456. 910 F.2d 24 (1st Cir. 1990), *cert. denied*, 498 U.S. 1084 (1991).

457. *See id.* at 26.

458. *Id.*

459. *See id.* at 27–28.

460. Section 107(a)(2) refers to a "person" who, at the time of disposal of any hazardous substance, owned or "operated" any facility at which such hazardous substances were disposed of. *See* 42 U.S.C. § 9607(a)(2) (1988). The term "person" is defined to include "an individual, firm, corporation, association, [and] partnership." 42 U.S.C. § 9601(21) (1988). The term "operator" is circularly defined as a person "operating" a facility. *See* 42 U.S.C. § 9601(20)(A) (1988).

461. *See, e.g., In re* Tutu Wells Contamination Litigation, 846 F. Supp. 1243,

parent corporations[460]—such entities could be directly liable under CERCLA when actively involved in the affairs of their subsidiaries. Other courts which have addressed the parent corporation liability issue have either followed *Kayser-Roth* or have expanded the test for parent liability.[461] While the precise limits of parent liability have engendered a great deal of debate,[462] what is significant for purposes of this Article is the fact that this debate regarding the appropriate test for parent corporation liability assumes three basic points: (1) CERCLA is a remedial statute that should be liberally construed; (2) Congress intended the courts to develop "a federal common law to determine a parent corporation's CERCLA liability for the actions of its subsidiary";[463] and (3) courts construing CERCLA should broaden "the potential for liability of parent corporations without discarding entirely the traditional concept of limited liability that is central to corporate law."[464]

Consequently, it is appropriate to employ the remedial purpose canon when faced with the issue of parent corporation liability under CERCLA. What is inappropriate, however, is to assume that the applicability of the canon leads inexorably to the conclusion that the most liberal test of parent liability is necessarily the proper interpretive result. For example, in *Lansford-Coaldale Joint Water Authority v. Tonolli Corp.*,[465] the Third Circuit noted that the reme-

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1270–71 (D.V.I. 1993); CPC Int'l., Inc. v. Aerojet-General Corp., 777 F. Supp. 549, 571–76 (W.D. Mich. 1991), *rev'd in part sub nom.* United States v. Cordova Chem. Co., 59 F.3d 584 (6th Cir. 1995), *vacated and reh'g en banc granted*, 67 F.3d 586 (6th Cir. 1995); Mobay Corp. v. Allied-Signal, Inc., 761 F. Supp. 345, 350–54 (D.N.J. 1991). In each of these cases, the court invoked the remedial purpose canon. *See Tutu Wells*, 846 F. Supp. at 1270; *CPC Int'l.*, 777 F. Supp. at 571; *Mobay Corp.*, 761 F. Supp. at 350.

Courts have expanded on the *Kayser-Roth* test for parent corporation liability by holding that, in addition to direct liability, parent corporations may be derivatively liable for CERCLA cleanup costs through the "piercing of the corporate veil." *See, e.g., CPC Int'l.*, 777 F. Supp. at 572–73. In addition, some courts have gone beyond the "active involvement" test announced in *Kayser-Roth* and have held that a parent corporation is directly liable under CERCLA whenever it had the capacity to control or prevent the release of hazardous substances. *See, e.g.*, Kelley v. ARCO Indus., 723 F. Supp. 1214, 1220 (W.D. Mich. 1989); Idaho v. Bunker Hill Co., 635 F. Supp. 665, 672 (D. Idaho 1986).

462. *See, e.g.*, Douglas A. Henderson, *Environmental Law as Corporate Law: Parent Subsidiary Liability Under CERCLA: the Kayser-Roth Aftermath*, 7 J. MIN. L. & POL'Y 293 (1991/92); James A. King, Kayser-Roth, Joslyn, *and the Problem of Parent Corporate Liability Under CERCLA*, 25 AKRON L. REV. 123 (1991).

463. *Mobay Corp.*, 761 F. Supp. at 351. A few courts, while accepting that Congress desired the development of a common law of CERCLA liability, have disagreed that such common law should be federal, rather than state, in origin. *See supra* note 388.

464. *CPC Int'l.*, 777 F. Supp. at 573.

465. 4 F.3d 1209 (3d Cir. 1993).

dial nature of CERCLA required that section 107(a)(2) be liberally construed to encompass parent corporation liability, yet rejected as "too broad" the plaintiff's suggested test for determining when parent corporations should be found liable:

> Congress [in CERCLA] has expanded the circumstances under which a corporation may be held liable for the acts of an affiliated corporation such that, when a corporation is determined to be the operator of a subsidiary or sister corporation, traditional rules of limited liability for corporations do not apply. This expansion of liability is consistent with CERCLA's broad remedial purposes . . . .
>
> We [however] reject the [plaintiff's] contention that the authority-to-control standard should govern. We believe that test sweeps too broadly and we thus adopt the actual control standard, which appears to strike the appropriate middle ground, balancing the benefits of limited liability with CERCLA's remedial purposes.[466]

Thus, it is appropriate for courts to invoke the remedial purpose canon to "var[y] the configuration of traditional corporate principles"[467] and fashion a common law of CERCLA section 107(a) liability in a manner which furthers CERCLA's remedial goals, yet remains sensitive to the competing principle of limited liability.

2. *CERCLA Liability for Successor Corporations*

In *Smith Land & Improvement Corp. v. Celotex Corp.*,[468] a purchaser of contaminated land, who was itself liable under CERCLA by virtue of its status as the current landowner, sought contribution from the corporate successors of a company which

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466. *Id.* at 1221. *See also* Richard B. Stewart & Bradley M. Campbell, *Lessons From Parent Liability Under CERCLA*, 6 NAT. RESOURCES & ENV'T 7 (1992) (discussing courts' attempts to retain salutary effects of limited liability in interpreting liability under CERCLA).

467. Kelley v. Thomas Solvent Co., 727 F. Supp. 1554, 1560 (W.D. Mich. 1989). *Thomas Solvent* was concerned with the question of whether corporate officers may be individually liable under CERCLA. As in the case of parent corporation liability, courts delineating the scope of individual liability for corporate officers (as well as corporate directors and shareholders) have held that the remedial objectives of CERCLA mandate that such individuals should not be automatically shielded by the corporate veil. *See, e.g.*, Columbia River Serv. Corp. v. Gilman, 751 F. Supp. 1448, 1454 (W.D. Wash. 1990); United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726, 743 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987).

468. 851 F.2d 86 (3d Cir. 1988), *cert. denied*, 488 U.S. 1029 (1989).

had manufactured asbestos products on the site. The successor corporations asserted that they did not fall within any of CERCLA's enumerated classes of liable parties, pointing out that they never owned or operated the facility. The plaintiff, however, argued that the defendants should be held liable for contribution under a theory of corporate successor liability.[469]

In the same fashion, in *Anspec Co. v. Johnson Controls, Inc.*,[470] the plaintiff sought to impose CERCLA liability on the defendants based on a theory of successor corporation liability. The defendants, who never owned, occupied, or stored chemicals at the site in question, argued that they were not within the classes of persons potentially liable under CERCLA.[471]

The appropriateness of invoking the remedial purpose canon in cases involving the issue of successor liability is best illustrated by comparing the results in these cases. In *Smith Land*, the Third Circuit concluded that "our study of CERCLA persuades us that Congress intended to impose successor liability on corporations which either have merged with or have consolidated with a corporation that is a responsible party as defined in the Act."[472] In support of its holding, the court of appeals noted that (1) Congress "expected the courts to develop a federal common law to supplement the statute"; (2) the Act "views response liability as a remedial, rather than a punitive, measure whose primary aim is to correct the hazardous condition"; and (3) Congress intended that, "when choosing between the taxpayers or a successor corporation, the successor should bear the [cleanup] cost."[473]

In contrast, the district court in *Anspec* declined to liberally construe the text of section 107(a):

> Even though this Court may agree that successor liability is desirable, that is a legislative policy decision to be made by Congress. Congress specifically limited liability under CERCLA to past and present owners or operators in addition to generators and transporters . . . . Successor corporations are not listed as one of the potentially responsible parties under CERCLA . . . .

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469. *See id.* at 90.
470. 734 F. Supp. 793 (E.D. Mich. 1989), *rev'd*, 922 F.2d 1240 (6th Cir. 1991).
471. *See id.* at 794.
472. 851 F.2d at 92.
473. *Id.* at 91–92.

> The decision in *Smith Land* was based on the false assumption that Congress intended courts to develop federal common law regarding all the provisions in CERCLA. In fact, Congress only intended that the courts develop federal common law for those CERCLA provisions that were ambiguous. The provision concerning those persons potentially liable under CERCLA is not ambiguous. Therefore, the development of federal common law in that area of CERCLA is unnecessary.[474]

The district court in *Anspec* took a narrow, textualist approach to discerning the meaning of section 107(a), failed to acknowledge the remedial nature of CERCLA (and the accompanying applicability of the remedial purpose canon), and chose to circumscribe the judiciary's role in developing common law principles to fill the gaps of CERCLA. In each instance, the opinion stands in stark contrast to the approach taken by other courts which have addressed the question of successor liability. In fact, in virtually every other case involving this issue—including the Sixth Circuit's decision reversing the district court in *Anspec*—the court has deemed it appropriate to employ the remedial purpose canon in interpreting the scope of corporate successor liability under CERCLA.[475]

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474. 734 F. Supp. at 795–96.

475. The Sixth Circuit, after holding that the word "corporation" embraces successor corporations, noted that "the remedial nature of CERCLA's scheme requires the courts to interpret its provisions broadly to avoid frustrating the legislative purposes." Anspec Co., Inc. v. Johnson Controls, Inc., 922 F.2d 1240, 1247 (6th Cir. 1991). Other courts that have invoked the remedial purpose canon in support of the conclusion that successor corporations may be liable under CERCLA include United States v. Mexico Feed & Seed Co., 980 F.2d 478, 486–87 (8th Cir. 1992); United States v. Carolina Transformer Co., 978 F.2d 832, 838 (4th Cir. 1992); Kleen Laundry & Dry Cleaning Services, Inc. v. Total Waste Management, Inc., 867 F. Supp. 1136, 1141 (D.N.H. 1994); GRM Indus., Inc. v. Wickes Mfg. Co., 749 F. Supp. 810, 814–15 (W.D. Mich. 1990).

It would be interesting to imagine the result if Judge Frank Easterbrook had sat on the *Anspec* panel by designation and had been assigned the responsibility of authoring the opinion of the court. If Judge Easterbrook deemed CERCLA a "private interest" statute, it should follow that he would restrict the "domain" of the statute, confine the meaning of § 107(a) to its express terms, and affirm the district court. On the other hand, if Judge Easterbrook viewed CERCLA as "public regarding" legislation, it is likely that he would use the remedial approach to the construction of statutes and reverse the district court. *See generally supra* notes 202–210 and accompanying text.

476. Under traditional corporate successor liability principles, the purchaser of a corporation's assets does not assume the liabilities of the seller unless (1) the purchaser expressly or impliedly agrees to assume the seller's obligations; (2) there is a consolidation or merger of the corporations; (3) the purchaser is merely a continuation of the selling corporation; or (4) the transaction is entered into fraudulently. *See* Golden State Bottling Co. v. NLRB, 414 U.S. 168, 182 n.5 (1973); Ronald R. Janke & Matthew L. Kuryla, *Environmental Liability Risks for Asset Purchasers*, 24 ENV'T REP. (BNA) 2237 (Apr. 29, 1994).

Assuming that it is appropriate to use the canon, the courts are still faced with the question of the extent to which the remedial objectives of CERCLA warrant displacement of the traditional rules of corporate successor liability.[476] As in the case of parent corporation liability, the courts have applied the remedial purpose canon with an awareness of the competing principle of limited corporate liability. Thus, the courts have held that traditional exceptions to the rule against successor liability should be altered "only when the application of [the] traditional corporate law principles would frustrate the remedial goals of CERCLA."[477] However, when the application of the traditional rules would impede attainment of CERCLA's remedial goals, courts have deemed it appropriate to invoke the remedial purpose canon and expand the common law exceptions to the rule against successor liability.[478]

3. CERCLA Liability for Dissolved Corporations

Rule 17(b) of the Federal Rules of Civil Procedure provides that "[t]he capacity of a corporation to sue or be sued shall be determined by the law under which it was organized."[479] Most states have enacted statutes which permit suits against dissolved

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477. United States v. Atlas Minerals & Chemicals, Inc., 824 F. Supp. 46, 50 (E.D. Pa. 1993); *see also* Sylvester Bros. Dev. Co. v. Burlington Northern R.R., 772 F. Supp. 443, 449 (D. Minn. 1990) (declining to adopt continuing business enterprise version of mere continuance exception since it "has not [been] shown that application of the traditional mere continuation exception would frustrate CERCLA's remedial purpose in this case").

478. Thus, in Atlantic Richfield Co. v. Blosenski, 847 F. Supp. 1261 (E.D. Pa. 1994), the district court, after concluding that the application of the traditional narrow rules of successor liability would frustrate CERCLA's purposes, held that the statute's "broad remedial goals will be served by application of the substantial continuity test to determine successor liability of an asset purchaser." *Id.* at 1286; *see also* United States v. Peirce, Nos. 83-CV-1623, 91-CV-0039, 92-CV-0562, 1995 WL 356017 at *2 (N.D.N.Y. Feb. 21, 1995); Kleen Laundry & Dry Cleaning Servs., Inc. v. Total Waste Management, Inc., 867 F. Supp. 1136, 1141, 1144 (D.N.H. 1994) (holding that factors regularly used to determine questions of corporate successorship can be construed more flexibly to promote broad remedial policies of CERCLA); State v. N. Storonske Cooperage Co., 174 B.R. 366, 377, 378, 381, and 387 n.38 (N.D.N.Y. 1994) (permitting flexible interpretations of successor liability in CERCLA context).

479. FED. R. CIV. P. 17(b).

480. For example, the dissolution of a corporation organized under Washington law "shall not take away or impair any remedy available against such corporation, its directors, officers, or shareholders . . . if action or other proceeding is commenced within two years after the date of dissolution." WASH. REV. CODE § 23B.14.340 (*quoted in* Columbia River Serv. Corp. v. Gilman, 751 F. Supp. 1448, 1450 (W.D. Wash. 1990)).

481. 42 U.S.C. § 9607(a) (1988).

corporations for a limited period of time after formal dissolution.[480] Congress, however, provided in CERCLA that the liability scheme set forth in section 107(a) applies "[n]otwithstanding any other provision or rule of law . . . ."[481] In cases where CERCLA actions against dissolved corporations are filed beyond the time period provided by state law, courts have been faced with the question of whether CERCLA preempts "state capacity" statutes. As noted by one court,

> This [issue] highlights the clash of two important policy concerns. On the one hand, CERCLA must be construed liberally in order to deal effectively with the problem of hazardous wastes. On the other hand, the life of a corporation may not be extended indefinitely.[482]

The Ninth Circuit, in *Levin Metals Corp. v. Parr-Richmond Terminal Co.*,[483] held that "CERCLA does not preempt California law determining capacity [of a dissolved corporation] to be sued."[484] However, as noted by a subsequent court, the Ninth Circuit "did not discuss the language of CERCLA, the policies of CERCLA, or the legislative intent of Congress in passing CERCLA."[485] In addition, the *Levin Metals* decision fails to acknowledge the remedial nature of CERCLA and the applicability of the remedial purpose canon to the interpretive issue at hand.

In contrast to *Levin Metals*, the majority of courts addressing this issue have held that, in order to effectuate CERCLA's broad remedial purposes, CERCLA "must be read as superseding Rule 17(b) and preempting state statutes that would frustrate CERCLA's purpose."[486] In the leading case favoring preemption, *United States v. Sharon Steel Corp.*,[487] the court held that a dissolved corporation that was still in the process of dissolution could be held liable under CERCLA even if a state statute limited the corporation's

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482. Onan Corp. v. Industrial Steel Corp., 770 F. Supp. 490, 494 (D. Minn. 1989), *aff'd*, 909 F.2d 511 (8th Cir. 1990) (table), *cert. denied*, 498 U.S. 968 (1990).

483. 817 F.2d 1448 (9th Cir. 1987).

484. *Id.* at 1451.

485. Columbia River Serv. Corp. v. Gilman, 751 F. Supp. 1448, 1450 (W.D. Wash. 1990).

486. *In re* Tutu Wells Contamination Litigation, 846 F. Supp. 1243, 1276 (D.V.I. 1993); *see also* Am Properties Corp. v. GTE Products Corp., 844 F. Supp. 1007, 1011 (D.N.J. 1994) (listing cases addressing issue).

487. 681 F. Supp. 1492 (D. Utah 1987).

capacity to be sued. In particular, the *Sharon Steel* court declared that when a dissolved corporation is "dead" but not yet "buried"—that is, corporate assets that might be used to pay cleanup costs have not yet been distributed to shareholders—"CERCLA overrides the general capacity provisions of [R]ule 17(b) to the extent the rule might otherwise shield a dissolved corporation from liability."[488]

In reaching this decision, the district court in *Sharon Steel* noted that CERCLA "must be construed broadly and liberally to effect its purposes."[489] The employment of the remedial purpose canon was appropriate in this situation, and the distinction drawn between dissolved corporations that are only "dead"—as opposed to dissolved corporations that are both "dead and buried"—is an example of a judicial rule "developed as part of the federal common law of CERCLA."[490] By recognizing that the remedial purposes of CERCLA require that state capacity statutes be deemed preempted to the extent that they limit recovery of cleanup costs against dissolved corporations that are "dead," but not yet "buried," the common law rule announced in *Sharon Steel* "properly defines when a dissolved corporation should be subject to suit under CERCLA."[491]

VIII. CERCLA AND THE REMEDIAL PURPOSE CANON: SUGGESTIONS FOR THE FUTURE

The remedial purpose canon is an established interpretive tool that is employed by courts construing a wide range of remedial legislation. In particular, the federal appellate and district courts have found the canon to be an especially useful interpretive aid in CERCLA cases. Nevertheless, many scholars (and some jurists) question the pedigree and legitimacy of the remedial purpose canon.

This Part of the Article presents two means by which to address such normative concerns and "legitimize" the notion that CERCLA should be liberally construed to effectuate its remedial objectives. The first option is for the courts to replace the un-

488. *Id.* at 1498.
489. *Id.* at 1495.
490. Chatham Steel Corp. v. Brown, 858 F. Supp. 1130, 1150 (N.D. Fla. 1994).
491. *Id.* at 1152.

tethered remedial purpose canon with a statute-specific, substantive "CERCLA" canon. As an alternative to the judicial creation of a CERCLA canon, Congress could directly endorse the normative judgment that the Superfund statute deserves an aggressive interpretation by inserting a liberal construction clause into the text of CERCLA itself.

A. Following the Trail of the Indian Canons: Judicial Creation of the "CERCLA" Canon

The idea that the judiciary should recognize a canon of construction especially for CERCLA is in some respects simply an exercise in formalism: the courts have already created a *de facto* CERCLA canon through their frequent use of the remedial purpose canon in CERCLA cases. Formal acknowledgement of the existence of a CERCLA canon—as opposed to the continued use of the remedial purpose canon in CERCLA cases—is advantageous, however, insofar as it responds to the "problem" of pedigree and to the criticisms by scholars that the remedial purpose canon is indeterminate in scope and lacking in specific, agreed-upon background assumptions and normative values.

But is it permissible for the courts to create a CERCLA canon?[492] Most substantive canons (as well as text-oriented canons) are judge-made, including canons of construction that are subject-specific directives regarding the interpretation of statutes or other textual materials relating to particular areas of law.[493] The Indian canons of construction are perhaps the best examples of judicially originated, subject-specific substantive canons, and are worthy of discussion in light of some parallels which exist between the Indian canons and the proposed CERCLA canon.

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492. The fact that a CERCLA canon would be tied to a relatively recent enactment should not be disqualifying. *See* Sunstein, *Law and Administration After* Chevron, *supra* note 129, at 2108 ("The category of substantive norms is not fixed but changes over time, with new assessments of what norms are well adapted to the functions and failures of government.").

493. *See supra* part II.D.2.

494. 31 U.S. (6 Pet.) 515, 582 (1832).

495. Hagen v. Utah, 114 S. Ct. 958, 971 n.1 (1994) (Blackmun, J., dissenting); *see also* Sokaogon Chippewa Community v. Exxon Corp., 2 F.3d 219, 224 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 1304 (1994); Mille Lacs Band of Chippewa Indians v. Minnesota,

The maxim that ambiguous provisions in treaties should be construed in favor of the Indians was first articulated by Justice McLean in his concurring opinion in *Worcester v. Georgia*.[494] This rule of interpretation is premised on "the Indians' unequal bargaining power when agreements were negotiated."[495] Although the "unequal bargaining power" rationale is inapplicable in the case of statutory enactments, the courts have held that—in light of "the unique trust relationship between the United States and the Indians"[496]—the canon requiring interpretation of doubtful expressions in favor of Indians applies in cases involving statutes as well as treaties.[497] Of course, as in the case of the remedial purpose canon,

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861 F. Supp. 784, 822 (D. Minn. 1994), *appeal dismissed*, 48 F.3d 373 (8th Cir. 1995); ROBERT N. CLINTON ET AL., AMERICAN INDIAN LAW: CASES AND MATERIALS 229–31 (3d ed. 1991).

A variation of this canon—based on the assumption that the Indians signing treaties were a "weak and dependent people" and were "wholly unfamiliar with all the forms of legal expression"—calls for courts to construe treaties "not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." Jones v. Meehan, 175 U.S. 1, 11 (1899). Similar substantive canons—calling for a strict construction of a deed against the drafter or a liberal reading of an adhesion contract in favor of the "weaker" party—are found in private law. *See* Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows Upon the Earth"—How Long a Time Is That?*, 63 CAL. L. REV. 601, 617 (1975) (analogizing Indian treaties to adhesion contracts). The rule of interpretation calling for liberalized readings of *pro se* complaints is based on comparable policy concerns. *See, e.g.*, Holt v. Caspari, 961 F.2d 1370, 1372 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 190 (1992).

496. County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 247 (1985).

497. *See Hagen*, 114 S. Ct. at 971 n.1 (Blackmun, J., dissenting) ("Because Congress' authority to legislate unilaterally on behalf of the Indians derives from the presumption that Congress will act with benevolence, courts 'have developed canons of construction that treaties and other federal action should when possible be read as protecting Indian rights and in a manner favorable to Indians'") (quoting F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 221 (1982 ed.)); Frickey, *Congressional Intent and Federal Indian Law*, *supra* note 121, at 1176–77 (stating that "the trust relationship may cast at least an aspirational aura over federal Indian law, and it provides an important basis for the canons"). *But see* Craig A. Decker, *The Construction of Indian Treaties, Agreements, and Statutes*, 5 AM. IND. L. REV. 299 (1977) (arguing that canons applicable to bilaterally arranged Indian treaties and agreements should not apply to unilaterally enacted statutes).

498. Thus, "the canon of construction favoring Indian tribes may not overcome statutory language that is unambiguous." CLINTON ET AL., *supra* note 495, at 231. *See, e.g.*, Negonsott v. Samuels, 113 S. Ct. 1119, 1125–26 (1993); Spokane Indian Tribe v. United States, 972 F.2d 1090, 1094 (9th Cir. 1992); Ute Distribution Corp. v. United States, 938 F.2d 1157, 1162 (10th Cir. 1991), *cert. denied*, 504 U.S. 940 (1992).

Likewise, "competing canons of statutory construction requiring strict construction in favor of some other interest may outweigh or obscure the possibility of application of a canon favoring Indian tribes." CLINTON ET AL., *supra* note 495, at 231. *See, e.g.*, Sohappy v. Hodel, 911 F.2d 1312, 1328–29 (9th Cir. 1990) (Kozinski, J., dissenting) (arguing that Indian canons should not apply when *Chevron* principle requires deference to agency's interpretation of statute at issue).

the Indian canons are subject to constraining factors—such as the plain meaning rule and competing interpretive principles—which reduce their efficacy as interpretive tools.[498]

The presence of constraining factors, however, does not detract from the fact that the Indian canons are (1) the product of consciously articulated normative judgments; which (2) serve not as neutral interpretive guides, but rather as directives to construe ambiguous text liberally in order to advance substantive goals. In the same fashion, the judiciary could effect a transition from the employment of the remedial purpose canon in CERCLA cases to the creation and application of a CERCLA canon by explicating the reasons why CERCLA merits a liberal construction.[499]

If a CERCLA canon eventually evolves from the frequent invocation of the remedial purpose canon in CERCLA cases, the background norms accompanying the substantive canon will parallel in some respects the justifications for the Indian canons. There is a rough correlation between the "unequal bargaining power" rationale for interpreting ambiguous treaty provisions in favor of Indians and the idea—propounded by Cass Sunstein—that statutes designed to protect nonmarket values (such as protection of the environment) should be broadly construed to protect the embodied aspirations and noncommodity values that are often jeopardized in the post-enactment political marketplace.[500] In addition, there are similarities between the "guardian/ward" rationale for the Indian canons and public trust/public steward justifications favoring aggressive regulation and protection of the environment. The presence of a "unique trust relationship" between the United States and the Indians justifies both the assertion of plenary power over Indians and the application of the Indian canons as an ameliorating force when ambiguities arise regarding the assertion of federal authority.[501] In the same vein, the notion that the federal government has a public stewardship responsibility over common resources, such as air and water, could serve as a basis for a canon

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499. For the reasons why courts are justified in liberally construing CERCLA, see *supra* part VI.B.

500. *See* SUNSTEIN, AFTER THE RIGHTS REVOLUTION, *supra* note 23, at 183–84; Sunstein, *Interpreting Statutes supra* note 23, at 478, 485–86.

501. *See* Frickey, *Congressional Intent and Federal Indian Law*, *supra* note 121, at 1140.

502. 126 CONG. REC. 30971 (Nov. 24, 1980) (statement of Sen. Chafee), *reprinted in* 1 CERCLA LEGISLATIVE HISTORY, *supra* note 360, at 756.

calling for a liberal interpretation of CERCLA, a statute which was enacted "to deal with what is fast becoming the most serious environmental problem of our time, hazardous waste sites and hazardous spills."[502]

The creation of a CERCLA canon would appease critics such as Cass Sunstein, who complain that the remedial purpose canon lacks specific background normative values.[503] In addition, the superior pedigree of a CERCLA canon—as opposed to the generalized remedial purpose canon—could cause courts to be less inclined to discount the canon's utility when "countered" by competing interpretive principles.[504]

B. Following the Example of RICO: Codification of the Remedial Purpose Canon in CERCLA Itself

Judicial recognition of a CERCLA canon is responsive to the indeterminacy objection to the remedial purpose canon, but is in turn open to both jurisprudential and practical criticisms. In terms of interpretive theory, a CERCLA canon would still be unsatisfactory to textualists and others who believe that judge-created substantive canons are suspect simply "because there is no text in the

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The public trust doctrine, and its relationship to fundamental environmental rights, is discussed at length in ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 365–412 (1992). *See also* Jill De La Hunt, Comment, *The Canons of Indian Treaty and Statutory Construction: A Proposal for Codification*, 17 MICH. J. LAW REFORM 681, 686 n.26 (1984) (noting that courts have "accepted the active trust paradigm in other areas" such as natural resources law).

503. *See supra* notes 161, 288 and accompanying text.

504. Sunstein contends that substantive canons, such as the Indian canons, "should not be overridden simply because the agency wants them to be." Sunstein, *Law and Administration After* Chevron, *supra* note 129, at 2115. *See also* Heinecke, *supra* note 242 (arguing that judicial application of Indian canon will better effectuate trust relationship between federal government and Indians than application of *Chevron* principle of deference to agency interpretations).

To the extent that a CERCLA canon will be backed by articulated background norms, courts will be able to look to the expressed norms when deciding whether a competing interpretive principle—such as *Chevron*—should diminish the utility of the CERCLA canon as an interpretive aid. *See also* Jane S. Schachter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 654 (1995) ("The basic metademocratic proposition is that there is something to be gained from acknowledging the inevitable resort to value-laden interpretive rules and from asking judges to make explicit and to defend their choices in democratic terms.").

505. POSNER, THE PROBLEMS OF JURISPRUDENCE, *supra* note 29, at 280.

506. *See supra* note 25 and accompanying text.

picture."[505] The fundamental question, for those beset with what has been termed as "counter-majoritarian anxiety,"[506] has been phrased by Daniel Rodriguez as follows: "Why should judges be able to substitute their own policy preferences through the creation and application of public values canons for the preferences of Congress as articulated in the words and history of the statute?"[507] On a pragmatic level, the concern exists that judicially originated substantive canons are more manipulable—and consequently less legitimate—than interpretive directions debated and passed by the legislative branch.[508]

An alternative to the judicial creation of a CERCLA canon that is more responsive to such concerns is for Congress to amend CERCLA and codify the remedial purpose canon. Legislative endorsement of the notion that CERCLA should be liberally construed would promote the primacy of the text and allay the "counter-majoritarian anxiety."

Codification of canons of construction has generally taken two forms. Some legislatures have enacted "general rules" of statutory construction that add to, modify, or repeal preexisting canons and other interpretive principles.[509] In other instances interpretive directions are included in—and apply only to—a particular statute.[510] Since general codification of the remedial purpose canon would do little to alleviate the problem of indeterminacy, the preferable leg-

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507. Rodriguez, *supra* note 103, at 744.

508. In fact, one commentator, concerned that "the judiciary no longer considers application of the [Indian] canons of construction to be a critical aspect of the federal-Indian trust relationship," has advocated codification of the Indian canons to "reaffirm the canons' central importance in federal-Indian relations" and to "require their application as a matter of substantive law." Hunt, *supra* note 502, at 703.

509. *See, e.g.*, MINN. STAT. §§ 645.001-.49 (1994); OHIO REV. CODE ANN. § 1.11 (Baldwin 1995); Uniform Statute and Rule Construction Act (1993). A number of states, for example, have abolished the common law rule of strict construction, "by expressly abrogating it or adopting some variation of 'fair import' or 'liberal' construction." G. Robert Blakey, *The RICO Civil Fraud Action in Context: Reflections on* Bennett v. Berg, 58 NOTRE DAME L. REV. 237, 246 n.25 (1982) (listing state statutes). *See also* Alan R. Romero, Note, *Interpretive Directions in Statutes*, 31 HARV. J. ON LEGIS. 211, 215–17 (1994). *See also* Laura Natasha Soll, *The Only Good Indian Reservation Is a Diminished Reservation? The New and Diluted Canons of Construction in Indian Law*, 41 FED. B. NEWS & J. 544 (1994).

510. *See* Romero, *supra* note 509, at 212–13 ("Hundreds of statutes contain clauses requiring that they be liberally or strictly construed.").

511. *See, e.g.*, ARK. CODE ANN. § 8-7-204 (Michie 1993) (Hazardous Waste Management Act) (historical note); TENN. CODE ANN. § 68-211-925 (1992) (Solid Waste Authority Act).

islative approach would be to insert a "liberal construction clause" into CERCLA itself.

Many state statutes—including state environmental laws—contain liberal construction clauses.[511] For example, the New Jersey Spill Compensation and Control Act—which has been described as "New Jersey's analog to CERCLA"[512]—expressly states that "[t]his act, being necessary for the general health, safety, and welfare of the people of this State, shall be liberally construed to effect its purposes."[513] Both federal and state courts have relied on the liberal construction clause in the New Jersey Spill Act to justify expansive interpretations of its provisions.[514]

Congress has also inserted liberal construction clauses into the text of statutes.[515] The most prominent example is section 904(a) of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), which directs that the "provisions of this title shall be liberally construed to effectuate its remedial purposes."[516] The interpretive directive of the RICO liberal construction clause, while not always followed, has played a prominent role in RICO cases.[517]

It is certainly within Congress' interest "to influence probabilities of how its statutes are likely to be interpreted."[518] By

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512. Elf Atochem North America, Inc. v. United States, 833 F. Supp. 488, 495 (E.D. Pa. 1993).

513. N.J. STAT. ANN. § 58:10-23.11x (1992).

514. *See, e.g.*, Analytical Measurements, Inc. v. Keuffel & Esser Co., 843 F. Supp. 920, 928 (D.N.J. 1993); State Dep't of Envtl. Protection v. Ventron Corp., 468 A.2d 150, 165 (N.J. 1983); Exxon Corp. v. Mack, 566 A.2d 828, 832 (N.J. Super. Ct. App. Div. 1989); Superior Air Products Co. v. NL Indus., Inc., 522 A.2d 1025, 1032 (N.J. Super. Ct. App. Div. 1987).

515. *See, e.g.*, 16 U.S.C. § 831dd (1994) (Tennessee Valley Authority); 18 U.S.C. § 1467(m) (1994) (criminal forfeiture for conviction of obscenity laws); 18 U.S.C. § 2253(n) (1994) (criminal forfeiture for conviction of child obscenity laws); 18 U.S.C. § 3731 (1994) (appeal by the United States from decision involving Sentencing Guidelines); 21 U.S.C. § 853(o) (1988) (criminal forfeiture for violation of Comprehensive Drug Abuse Prevention and Control Act); 25 U.S.C. § 2414 (1988) (programs dealing with Indian alcohol and substance abuse prevention and treatment); 45 U.S.C. § 159(c) (1988) (arbitration awards under the Railway Labor Act); *see also supra* note 177 and accompanying text.

516. Organized Crime Control Act of 1970, Pub. L. 91-452, tit. IX, 84 Stat. 922, 947 (codified as note to 18 U.S.C. § 1961 (1994)).

517. *See, e.g.*, Reves v. Ernst & Young, 113 S. Ct. 1163, 1172 (1993); H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 248–49 (1989); Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 497–98 (1985); Russello v. United States, 464 U.S. 16, 20 (1983); United States v. Turkette, 452 U.S. 576, 587 n.10 (1981); *see generally* Camp, *supra* note 154; Palm, *supra* note 130.

518. Anthony D'Amato, *Can Legislatures Constrain Judicial Interpretation of Statutes?*, 75 VA. L. REV. 561, 562 (1989); *see also* Romero, *supra* note 509, at 243.

519. Posner, *Statutory Interpretation*, *supra* note 71, at 818. As an example of when

adding a liberal construction clause to CERCLA (or to a particular provision of CERCLA, such as section 107), Congress would provide judges with textual guidance regarding "the freedom with which [they] should exercise [their] interpretive function."[519] This would reinforce the present directive—found in CERCLA's structure and legislative history—to "fill the gaps" of the Superfund statute by creating a common law of CERCLA. In addition, the codification approach would enhance the canon's legitimacy[520] and would cause courts—as in the case of a judge-made CERCLA canon—to be less inclined to "defer" to competing interpretive principles.[521]

The codification approach, however, is not a panacea. There are practical, and perhaps constitutional, concerns regarding the legislative enactment of interpretive directions.[522] Moreover, it may be true that "[l]egislatures can no more solve the problems of

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Congress has provided a textual "clue" as to how courts should construe a statue, Posner cites RICO. *See id.* at 818 n.61.

520. Robert Martineau argues that canons are merely "techniques available to a judge in writing an opinion to support the decision to construe a statute in a particular way." Martineau, *supra* note 46, at 35. In Martineau's view, there is a critical distinction between "decisionmaking" and "decision justifying," and the canons are utilized by judges to justify—rather than reach—decisions. *See id.* at 23–34.

If an interpretive direction is codified, however, it becomes more than a decision justifying technique. It becomes part of—and influences—the decisionmaking process. *See* Romero, *supra* note 509, at 243 ("A court that does not always follow [enacted] interpretive directions may still be influenced by them. At the very least, if a judge is aware that an interpretive direction exists, the judge will probably feel obligated to apply it unless he or she can think of some reason for not doing so.").

521. *See* Sunstein, *Law and Administration After* Chevron, *supra* note 129, at 2109 (arguing that *Chevron* deference to agency's interpretation of statute loses force when Congress has issued interpretive instructions since, "[w]hen explicit instructions appear in the statutory text, they should prevail over contrary agency interpretations").

522. The constraining factors that limit the efficacy of the remedial purpose canon will not simply disappear if the canon is codified as part of CERCLA. For example, courts could choose to avoid the directive of a CERCLA liberal construction clause by declaring that the disputed text is unambiguous, or by deciding that competing meta-principles of interpretation are more compelling. Some scholars go so far as to assert that legislated interpretive directions "are no more likely to make the interpretive process more rational or predictable than are judicial canons of interpretation." Romero, *supra* note 509, at 247. *See also id.* at 229–45 (discussing practical problems that arise when applying RICO's liberal construction clause).

The constitutional concerns vary from the broad assertions that interpretive directions in statutes violate the principle of separation of powers to specific contentions, such as the argument that RICO's liberal construction clause is unconstitutional because due process requires strict construction of penal statutes. *See generally* Romero, *supra* note 509, at 221–28; Reynolds, *supra* note 46, at 943 n.69; Palm, *supra* note 130, at 175–81; Hall, *supra* note 154, at 757–59.

523. Frank E. Horack Jr., *Cooperative Action for Improved Statutory Interpretation*, 3 VAND. L. REV. 382, 393 (1950).

interpretation by the enactment of canons . . . than can courts."[523] Nevertheless, the codification approach is ultimately preferable to either the judicial creation of a specific CERCLA canon or continued reliance on the generic remedial purpose canon. At minimum, the addition of a liberal construction clause to CERCLA would send a clear signal to the Supreme Court that the federal appellate and district courts have not taken "a good thing too far" by liberally construing CERCLA in order to effectuate its remedial objectives.

IX. CONCLUSION

This Article presents the first in-depth examination of the employment of the remedial purpose canon in CERCLA cases. At its most elemental level, the Article has established the following points: (1) in the field of environmental law there presently exists a sharp division between the Supreme Court and the lower courts regarding the use of the remedial purpose canon; (2) the lower courts deem CERCLA to be "overwhelmingly remedial" and have invoked the remedial purpose canon more frequently in CERCLA cases than in cases involving other environmental statutes; and (3) the scholarly reaction to the employment of the remedial purpose canon when construing CERCLA (and other laws) depends in large part on interpretive orientation. In addition, it is hoped that the Article has provided a reasoned explanation for *why* the remedial purpose canon is employed so often in CERCLA cases, as well as a critical assessment of the strengths and weaknesses of the canon as an interpretive aid.

The Supreme Court did not address the role of the remedial purpose canon in CERCLA cases in its 1994 *Key Tronic* decision. Hence, it remains unclear what the Supreme Court's reaction will be to the frequent invocation of the canon by the federal appellate

524. For example, the Court appears to be moving away from its historical emphasis on the remedial purpose canon when construing securities legislation. *See generally* Douglas M. Branson & Karl S. Okamoto, *The Supreme Court's Literalism and the Definition of "Security" in the State Courts*, 50 WASH. & LEE L. REV. 1043, 1048–60 (1993); J. Christopher York, *Vicarious Liability of Controlling Persons: Respondeat Superior and the Securities Acts—A Reversible Consensus in the Circuits*, 42 EMORY L.J. 313, 345–58 (1993); Douglas E. Abrams, *The Scope of Liability Under Section 12 of the Securities Act of 1933: "Participation" and the Pertinent Legislative Materials*, 15 FORDHAM URB. L.J. 877, 917–21 (1986/1987).

and district courts. In other areas of law the Court appears to be drawing back from previous reliance on the remedial purpose canon.[524] Yet, as suggested in a news article which reviewed voting patterns in the Supreme Court's six environmental decisions of the October 1993 term, a justice's decision in an environmental case often depends on the resolution of non-environmental issues.[525] Thus, competing interpretive principles—such as the American Rule in *Key Tronic*—may carry greater weight in environmental cases.[526]

The future of the remedial purpose canon in CERCLA cases depends not only on its reception in the Supreme Court, but also on legislative actions. Congress could enhance the canon's legitimacy by amending CERCLA and including a liberal construction clause. On the other hand, Congress could undercut the efficacy of the remedial purpose canon by providing more exceptions to CERCLA's current liability and procedural provisions. As CERCLA weathers future reauthorization and reform legislation, it is possible that Congress will respond to various constituencies who are opposed to section 107's broad categories of potentially liable parties and narrowly limited defenses.[527] If such reform occurs, it could undermine CERCLA's status as public-regarding leg-

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The Court has also been increasingly reluctant to embrace and apply the liberal construction clause of RICO. *See, e.g.*, Reves v. Ernst & Young, 113 S. Ct. 1163, 1172 (1993). Justice Scalia, for one, has expressed his reluctance to be swayed by a liberal construction clause. In his dissent to Babbitt v. Sweet Home Chapter of Communities for a Great Oregon, 115 S.Ct. 2407 (1995), Scalia acknowledges that Congress stated—in the Committee Reports accompanying the 1973 Endangered Species Act—that the term "take" should be construed "in the broadest possible manner," but nevertheless declares that "[t]his sort of empty flourish—to the effect that 'this statute means what it means all the way'—counts for little *even when enacted into the law itself.*" *Id.* at 2427 (Scalia, J., dissenting) (emphasis added).

525. *See* David Sive & Daniel Riesel, *An Analysis of the Justice's Positions in Environmental Cases Demonstrates that Doctrinal Classifications Aren't Very Useful*, NATIONAL LAW J. at B12 (Oct. 3, 1994).

526. Even so, the impact this would have on the use of the remedial purpose canon in CERCLA cases is uncertain. In most environmental cases, the critical interpretive principle is *Chevron*, since often the agency's interpretation of the environmental statute is at issue. On the other hand, the remedial purpose canon is most often invoked in CERCLA to construe § 107's liability provisions, and the lower courts have deemed it inappropriate to apply *Chevron* and give deference to EPA's views on CERCLA liability issues. *See supra* note 446 and accompanying text.

527. For example, there have been suggestions that the Superfund statute should be amended to limit the liability of municipalities and to further limit lender liability by broadening the scope of the secured creditor exemption. *See, e.g.*, Richard E. Bartelt & David E. Polter, *Summary of the Proposed Superfund Reform Act of 1994*, 25 Env't Rep. (BNA) 608 (July 29, 1994).

islation and make the statute a less appropriate candidate for invocation of the remedial purpose canon.

As long as the basic features of CERCLA remain, however, the utilization of the remedial purpose canon by courts construing its ambiguous provisions will persist. To return to the observation of Frank Easterbrook once again, the remedial purpose canon is most appropriately applied in instances where the legislature has enacted "public interest laws, that stopping well short of the point where they produce too much of a good thing, charge the judiciary with the task of creating remedies for whatever new problems show up later on."[528] CERCLA is a public-regarding statute that fits Easterbrook's prescription, and it is therefore appropriate for the courts to take this "good thing" even farther by aggressively interpreting CERCLA to effectuate its remedial goals and—in particular—by supplementing CERCLA's liability provisions on the basis of evolving common law principles.

528. Easterbrook, *Statutes' Domains*, *supra* note 76, at 544.