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Understanding CERCLA Through Webster's New World Dictionary and State Common Law: Forestalling the Federalization of Property Law

Shelby D. Green

Elisabeth Haub School of Law at Pace University

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UNDERSTANDING CERCLA THROUGH *WEBSTER'S NEW WORLD* *DICTIONARY* AND STATE COMMON LAW: FORESTALLING THE FEDERALIZATION OF PROPERTY LAW

SHELBY D. GREEN*

Abstract: The Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") was hastily enacted in 1980 in the wake of the Love Canal disaster, where vast amounts of toxic wastes were found buried beneath a residential community. The contours of this legislation, though comprehensive in its outward scope, have been difficult to discern, largely as a consequence of vague and confusing expression. Though often the first tool resorted to for interpretation is the dictionary, the courts have looked beyond the literal terms, in an effort to determine the intended and sensible limits, consistent with both the congressional aim to reach broad categories of responsible parties and conduct, as well as with long-settled principles on the burdens that come with land ownership and enterprise. The most recent Supreme Court decision interpreting CERCLA, *Burlington Northern & Santa Fe Railway Co. v. United States*, recognized the challenges of applying the statute and seemed to affirm the approach taken by the lower courts. That approach stands in clear contrast to what appears in other areas to be a determined march by federal courts toward the federalization of property law—either by redefining or reshaping well-settled common law concepts or by devising a federal concept calculated to serve particular federal interests. These maneuvers, where they are not principled and ignore historical rationales for the state law concept, threaten to undermine the

* Associate Professor of Law, Pace University School of Law. J.D., Georgetown University Law Center. B.S., Towson State University.

law's validity and legal theory. The approach taken in interpreting CERCLA should guide federal courts in preserving the historical importance of common law concepts. Understanding CERCLA teaches us about purposive decisionmaking.

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INTRODUCTION

Purposive legislation. Purposive acts. Purposive decisionmaking. This framework for statutory understanding may be discerned in a decision by the United States Supreme Court last term, *Burlington Northern & Santa Fe Railway Co. v. United States*,¹ where the Court was called upon to determine what it means to be an "arranger" for the disposal of hazardous wastes, within the meaning of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA").² Congress enacted CERCLA in 1980 in the wake of the Love Canal disaster, where it was discovered that a residential community had been built atop a toxic waste dump.³ Though the conduct of the polluters could have been

1. 129 S. Ct. 1870 (2009).

2. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601-9675 (2006)).

3. Molly J. Walker Wilson & Megan P. Fuchs, *Publicity, Pressure, and Environmental Legislation: The Untold Story of Availability Campaigns*, 30 CARDOZO L. REV. 2147, 2195-96 (2009) (stating CERCLA was enacted just over sixteen months after the Love Canal disaster climaxed). In the late 1940s and early 1950s, Love Canal, an area located in New York, was filled with over twenty-thousand tons of liquid chemical wastes. Schools and homes were then constructed on this dump site. The original developer of the area envisioned a dream community, but economic conditions diverted the use for industry. The harmful externalities were ignored; indeed, literally covered up with a thin veneer of soil. Later, the dream of a community was again pursued, but with horrific results. When the grim tale emerged, scores of different compounds (many carcinogenic) had begun percolating upwards through the soil, drum containers rotting and leaching their contents

addressed by existing state common law, such as nuisance and negligence,⁴ Congress stepped in with comprehensive federal legislation. It seems easy to characterize the act of dumping, then burying toxins so negligently, so wantonly as an offense to the nation and our posterity. But, Congress's intent with CERCLA can be described in many respects as schizophrenic—on the one hand, it states that in applying the act, courts should embrace common law principles; on the other, it is a broad, comprehensive measure, which by its terms seem to extend, if not overrule, state common law principles by identifying broad categories of potentially responsible parties (starting with owners) and wide ranges of actionable conduct.⁵ But, the statute is rife with vagueness and omission—it does not define “owner” or clearly state what “disposal” means.⁶

In interpreting CERCLA, it seems that the main task of the courts has been to mediate between its aggressive agenda and upsetting settled common law notions about liability, reliance, and expectations that come from ownership of property. They have employed the usual canons of construction; they have looked to *Webster's*, the ordinary dictionary, to explain ordinary words, but then they have looked, responsibly, to state law

into the backyards and basements. Eckardt C. Beck, *The Love Canal Tragedy*, EPA JOURNAL, Jan. 1979, <http://www.epa.gov/history/topics/lovecanal/01.htm>.

4. RESTATEMENT (SECOND) OF TORTS §§ 432, 821D (1977).

5. “Potentially responsible parties,” include landowners where the wastes are discovered; operators of a facility disposing of such wastes; arrangers of the disposal of such wastes; and transporters of such wastes. 42 U.S.C. § 9607(a) (2006).

6. Many courts have criticized the statute for vagueness and confusing language. See, e.g., *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 677 (5th Cir. 1990) (stating that CERCLA has “‘acquired a well-deserved notoriety for vaguely-drafted provisions and an indefinite, if not contradictory, legislative history.’” (quoting *United States v. Mottolo*, 605 F. Supp. 898, 902, 905 (D.N.H. 1985))); *HRW Sys., Inc. v. Wash. Gas Light Co.*, 823 F. Supp. 318, 327 (D. Md. 1993) (“[T]he legislative history of CERCLA gives more insight into the ‘Alice-in-Wonderland’-like nature of the evolution of this particular statute than it does helpful hints on the intent of the legislature.”); *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. Gov’t of 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) (complaining of the “difficulty of being left compassless on the trackless wastes of CERCLA”); *United States v. Wade*, 577 F. Supp. 1326, 1331 (E.D. Pa. 1983) (noting that the legislative history of CERCLA is “unusually riddled by self-serving and contradictory statements”). While a subsequent substantial amendment to CERCLA attempted to clarify some points, see, for example, H.R. REP. NO. 99-253, pt. I, at 59, 79 (1985), reprinted in 1986 U.S.C.C.A.N. 2835, 2841, 2861; S. REP. NO. 99-11, at 44 (1985), there remains much uncertainty about what CERCLA does and does not cover. William D. Araiza, *Text, Purpose and Facts: The Relationship Between CERCLA Sections 107 and 113*, 72 NOTRE DAME L. REV. 193, 224 (1996).

to identify and heed underlying societal interests. As suggested in the beginning and as will be developed in this Article, “purposiveness” seems to be the approach taken by most courts as they strive to give meaning to various terms and concepts in CERCLA. While CERCLA presents unique issues of interpretation, I propose that this framework should guide courts in identifying the contours of a federal statute where a literal application of its language threatens to upset established notions of state law. In Part I, I will describe CERCLA itself as purposive legislation, aimed to achieve specific goals. In Part II, I will examine various terms to determine whether they contemplate purposive acts, considering the tools that the courts have employed toward rational construction. In Part III, I will discuss the notion of purposive decisionmaking, exploring what should guide the courts in their rulings. In Part IV, I show how in recent times, decisionmaking by federal courts (at least in the realm of property law) has become less principled and more driven to further some particular federal government interest, thereby undermining well-settled state law principles. Finally, I offer conclusions on how this movement threatens the law’s validity and legal theory’s ability to interpret law and why the approach taken with CERCLA is the right one.

I. Purposive Legislation: The Aims and Language of CERCLA

CERCLA was designed to promote the “timely cleanup of hazardous waste sites.”⁷ It is “sweeping” in its aims and is designed to ensure that “*everyone* who is potentially responsible for hazardous-waste contamination may be forced to contribute to the costs of cleanup.”⁸ Absent a showing that one of CERCLA’s affirmative defenses⁹ applies, liability for owners and operators is strict.¹⁰ While these words seem eminently clear, CERCLA’s coverage has been quite vividly described as a “black hole that

7. *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 483 (1996); *Consol. Edison Co. v. UGI Utils., Inc.*, 423 F.3d 90, 94 (2d Cir. 2005); *see also* *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986).

8. *United States v. Bestfoods*, 524 U.S. 51, 56 n.1 (1998) (quoting *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 21 (1989) (Brennan, J., plurality opinion)).

9. *See* 42 U.S.C. § 9607(b) (2006) (enumerating three statutory defenses to CERCLA liability: “(1) an act of God; (2) an act of war; and (3) an act [of an independent, intervening] third party”); *see also* § 9601(35)(A) (providing that the innocent landowner defense precludes liability upon showing that “the real property on which the facility concerned is located was acquired by the defendant after the disposal or placement of the hazardous substance on, in, or at the facility”).

10. *See* *B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192, 1198 (2d Cir. 1992).

indiscriminately devours all who come near it.”¹¹ The core legislative purposes of the statute, though, are relatively clear. The final version was a compromise among three competing bills then under consideration by Congress: House of Representatives Bill 85 (“H.R. 85”),¹² House of Representatives Bill 7020 (“H.R. 7020”),¹³ and Senate Bill 1480 (“S. 1480”).¹⁴ H.R. 85 targeted oil pollution by establishing a comprehensive system of liability and compensation for oil-spill damage and clean-up costs.¹⁵ H.R. 7020 was intended to regulate inactive waste sites by establishing reporting, monitoring and clean-up schemes.¹⁶ By its terms, it applied only to hazardous waste sites, and did not purport to address all hazardous releases.¹⁷ The third bill, S. 1480, was by far the broadest and most ambitious of the three competing measures, covering “all releases of hazardous chemicals into the environment, not merely spills or discharges from abandoned waste disposal sites.”¹⁸

II. Purposive Acts

How have the courts gone about discerning the reach of CERCLA? Some have been highly formalistic in their approach, employing a textual analysis, with the concerns about CERCLA’s impact being of secondary consideration. Others have carefully considered the impact of CERCLA on broader notions of fairness and responsibility. In all cases, the courts seem to begin with the general rule that the starting point is the language of the statute;¹⁹ clear and explicit statutory language is to be applied as written²⁰

11. *Long Beach Unified Sch. Dist. v. Dorothy B. Godwin Cal. Living Trust*, 32 F.3d 1364, 1366 (9th Cir. 1994) (quoting Jerry L. Anderson, *The Hazardous Waste Land*, 13 VA. ENVTL. L.J. 1, 6-7 (1993)).

12. Oil Pollution Liability and Compensation Act, H.R. 85, 96th Cong. (2d Sess. 1980).

13. Hazardous Waste Containment Act of 1980, H.R. 7020, 96th Cong. (2d Sess. 1980).

14. Environmental Emergency Response Act, S. 1480, 96th Cong. (2d Sess. 1980); see generally SUPERFUND: A LEGISLATIVE HISTORY: THE EVOLUTION OF SELECTED SECTIONS OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT xiii (Helen Needham & Mark Menefee eds., 1982) [hereinafter “SUPERFUND”]; Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability (“Superfund”) Act of 1980*, 8 COLUM. J. ENVTL. L. 1, 1-6 (1982).

15. See Grad, *supra* note 14, at 3.

16. *Id.* at 4.

17. *Id.*

18. 125 CONG. REC. S17,989 (1979) (comments of Sen. Culver, co-sponsor of S. 1480); see also 126 CONG. REC. S14,964-65 (1980).

19. *Bailey v. United States*, 516 U.S. 137, 144 (1995); *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992); *Greyhound Corp. v. Mt. Hood Stages, Inc.*, 437 U.S. 322, 330 (1978); *Coronado-Durazo v. I.N.S.*, 123 F.3d 1322, 1324 (9th Cir. 1997).

20. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999).

and construed according to its ordinary or natural meaning absent clearly expressed congressional intent to the contrary.²¹ However, if that meaning leads to absurd or futile results, or one “‘plainly at variance with the policy of the legislation as a whole,’ [courts must] follow[] that purpose, rather than the literal words.”²²

Long ago, Justice Oliver Wendell Holmes declared for the Court, “[w]e [the Court] do not inquire what the legislature meant; we ask only what the statute means.”²³ More recently, in the context of CERCLA, Justice Clarence Thomas, in *Cooper Industries, Inc. v. Aviall Services, Inc.*,²⁴ seemed to embrace Justice Holmes’s view when he stated that “[g]iven the clear meaning of the text, there is no need to resolve this dispute or to consult the purpose of CERCLA at all. [Instead,] ‘[i]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.’”²⁵ But, sometimes, the legislative intent is poorly expressed; sometimes, the operative language is at odds with the statute’s stated purposes and aims. Sometimes, the operative terms are words of common parlance but are being used within the peculiar context of the statute, in which case they should be given a particular meaning in that context.

Legislative history, a tool of last resort in construing a statute,²⁶ has proven to be of little value in interpreting CERCLA.²⁷ In varying degrees, courts have found an authoritative (even dispositive) source for guidance in the plain old *Webster’s Dictionary*. But, for most, it is just the starting point.

21. *Williams v. Taylor*, 529 U.S. 420, 431 (2000); *Beck v. Prupis*, 529 U.S. 494, 500-01 (2000); *Field v. Mans*, 516 U.S. 59, 69 (1995); *United States v. Alvarez-Sanchez*, 511 U.S. 350, 356-57 (1994); *United States v. Shabani*, 513 U.S. 10, 13 (1994).

22. *United States v. Am. Trucking Ass’n*s, 310 U.S. 534, 543 (1940) (quoting *Takao Ozawa v. United States*, 260 U.S. 178, 194 (1922)).

23. OLIVER WENDELL HOLMES, *The Theory of Legal Interpretation*, in COLLECTED LEGAL PAPERS 207 (Peter Smith ed., 1952) (1920).

24. 543 U.S. 157 (2004) (failing to find a section 113(f) contribution claim against potentially responsible party absent either a section 106 or 107 suit against claimant).

25. *Id.* at 167-68 (citing *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998)).

26. *United States v. Smith*, 795 F.2d 841, 845-46 (9th Cir. 1986). Courts are not free to substitute legislative history for the language of the Act, and legislative history is not an adequate substitute for congressional action. *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 772 (1984) (citing *North Dakota v. United States*, 460 U.S. 300, 312 (1983); *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)).

27. *Aviall Servs., Inc. v. Cooper Indus., Inc.*, 312 F.3d 677, 684 (5th Cir. 2002) (citing *In re Bell Petroleum Servs.*, 3 F.3d 889, 901 n.13 (9th Cir. 1993)).

A. “Owner”

As the Fourth Circuit long ago pointed out, “the trigger to liability under § 9607(a)(2) is ownership or operation of a facility at the time of disposal, not culpability or responsibility for the contamination.”²⁸ Should “owner” mean something different under CERCLA than it does under state law?²⁹ The definition contained in the statute is a tautology: “owner” is “any person owning or operating [a] facility” where a disposal of hazardous substances occurred.³⁰ The Ninth Circuit has stated that this definition “is a bit like defining ‘green’ as ‘green.’”³¹ The courts have taken this circularity in the statutory language to mean that “the statutory terms have their ordinary meanings rather than unusual or technical meanings.”³² They have also taken the generality of the term to suggest that Congress intended courts to employ “common law analogies.”³³ In other words, this tautological definition of “owner” opens up the question whether to apply or incorporate common law definitions of “owner” or to craft one that appears specifically to serve the ends of the statute.³⁴

While in *Burlington*, the Court seemed to suggest that liability attaches solely by virtue of the status of ownership,³⁵ the lower courts have not taken that view. Instead, many have held that “bare legal title”—without more—is insufficient for purposes of liability under CERCLA.³⁶ In

28. *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 846 (4th Cir. 1992).

29. Under common law notions, ownership is described as those six sticks in a bundle of rights giving the right to possess, use, enjoy the fruits and profits, destroy, alienate and to exclude. The sticks can be owned at different times and by different persons jointly. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982).

30. 42 U.S.C. § 9601(20)(A)(ii) (2006).

31. *Long Beach Unified Sch. Dist. v. Dorothy B. Godwin Cal. Living Trust*, 32 F.3d 1364, 1368 (9th Cir. 1994).

32. *Sidney S. Arst Co. v. Pipefitters Welfare Educ. Fund*, 25 F.3d 417, 419 n.1 (7th Cir. 1994) (citing *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 861 F.2d 155, 156 (7th Cir. 1988)).

33. *See Edward Hines Lumber*, 861 F.2d at 157.

34. *But see* 42 U.S.C. § 9601(20)(A)(iii) (exempting from liability persons who merely hold a security interest in the property).

35. *Burlington N. & Santa Fe Ry. Co. v. United States*, 129 S. Ct. 1870, 1878 (2009) (although not ruling on the question, the Court stated that the “Railroads qualify as PRPs under both §§ 9607(a)(1) and 9607(a)(2) because they owned the land leased [out] at the time of contamination and continue to own it.”).

36. *See, e.g., Ameripride Servs., Inc. v. Valley Indus. Serv., Inc.*, No. Civ. S-00-113 LLK/JFM, 2007 U.S. Dist. LEXIS 18806, at *19 (E.D. Cal. Feb. 28, 2007) (stating that a person holding title for less than twenty-four hours, who never exercised any control or exclusive use over the property, was not liable as owner); *United States v. Friedland*, 152 F. Supp. 2d 1234, 1241-44 (D. Colo. 2001) (holding legal title not enough to show owner

every case, the courts have pointed out that the starting point in determining whether one is an owner is state law.³⁷ The inevitable consequence of this starting point, though, is that a determination may vary from state to state.³⁸ In some cases, merely identifying the nature of the property interest held, leads to the determination whether one is an owner. For instance, courts have considered the nature of an easement or mineral servitude and concluded that holders of these interests, though they own these limited interests, do not become owners of a contaminated site merely because these interests give rights to use or profit from the underlying estate.³⁹ This ruling that "owner" means owner of the estate is compelled by the fact that many easements, such as the right to plant utility poles, lay railroad tracks, build irrigation systems, pass on foot, and preserve scenic and historical values of the land, are beneficial and non-polluting,⁴⁰ and no good would be served by imposing liability upon the holders, inasmuch as they generally lack the right to interfere with activities occurring on the land.⁴¹

The courts seem in general agreement that a lessee can be an "owner," depending upon the extent to which that person exercises the powers and

liability); *Castlerock Estates, Inc. v. Markham*, 871 F. Supp. 360, 366 (N.D. Cal. 1994) (finding bare legal title was not enough to make one liable as an owner). *But see* *City of Phoenix v. Garbage Servs. Co.*, 816 F. Supp. 564, 566-68 (D. Ariz. 1993) (deeming trustee bank as an "owner" of contaminated site, despite absence of involvement in the site's day-to-day operations, but limited to exercising an option to buy the contaminated site; legal title, coupled with paying property taxes and procuring liability insurance were requisite indicia of ownership for liability).

37. *See, e.g., Canadyne-Georgia Corp. v. NationsBank, N.A.*, 183 F.3d 1269, 1273 (11th Cir. 1999).

38. *See id.*

39. *Long Beach Unified Sch. Dist. v. Dorothy B. Godwin Cal. Living Trust*, 32 F.3d 1364, 1366-68 (9th Cir. 1994) (rejecting the imposition of liability on the holders of an easement to run pipelines across the land where the pipeline was in no way connected to the pollution because, under state law "an easement conveys rights in or over the land of another," but does not mean ownership of the burdened land) (citing, *inter alia*, *Camp Meeker Water Sys., Inc. v. Public Utils. Comm'n*, 799 P.2d 758, 770 (Cal. 1990); 12 B. WITKIN, SUMMARY OF CALIFORNIA LAW § 434 (9th ed. 1987) (stating an easement is an "interest in the land of another, which entitles the owner of the easement to a limited use or enjoyment of the other's land"))).

40. *Long Beach*, 32 F.3d at 1369 (citing *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 7 (1989) (finding that CERCLA "imposes the costs of the cleanup on those responsible for the contamination")); *United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100, 1112 (D. Minn. 1982) (agreeing that Congress "intended those responsible for problems caused by disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created").

41. *Long Beach*, 32 F.3d at 1369 n.6.

rights of a fee holder.⁴² In *Commander Oil Corp. v. Barlo Equipment Corp.*,⁴³ the central question was whether a nominative sublease was a true sublease or merely a “bookkeeping measure.” At first, the owner/lessor leased one lot to the lessee for use as offices and a warehouse and a second lot to another party for use as a fuel depot.⁴⁴ Thereafter, the owner/lessor consolidated the two leases into one: both lots were leased to the first lessee, with the responsibility to maintain the property and to pay the taxes,⁴⁵ and that lessee in turn subleased the second lot to the other party.⁴⁶ After contamination was discovered, the lessor sought to hold the lessee liable for some of the costs of cleanup.⁴⁷

In this case of first impression, the Second Circuit began its analysis bemoaning having yet again to resolve “another ambiguity within CERCLA’s miasmatic provisions.”⁴⁸ Despite the broad remedial purposes of the statute, the court believed that CERCLA should not be read to impose absolute liability upon all persons with any connection with the facility.⁴⁹ The two opposing assertions were that “owner” meant on the one hand, “record owner”; and on the other, one with the right to control property, whether that right stemmed from the right to possess or from formal legal title.⁵⁰ The court resorted to the dictionaries; one of the English language and the other of the language of law. *Webster’s* seemed to confirm the second meaning: an owner is “one that has the legal or rightful title whether the possessor or not.”⁵¹ However, *Black’s Law Dictionary* seemed to embrace both meanings, defining an owner as “one who has the right to possess, use, and convey something,” and as “one who has the

42. See, e.g., *United States v. Monsanto Co.*, 858 F.2d 160, 166-68 (4th Cir. 1988); *Scarlett & Assocs. v. Briarcliff Ctr. Partners, LLC*, No. 1:05-CV-0145-CC, 2009 U.S. Dist. LEXIS 90483, at *25-26 (N.D. Ga. Sept. 30, 2009); *Delaney v. Town of Carmel*, 55 F. Supp. 2d 237, 258 (S.D.N.Y. 1999); *Nestle USA Beverage Div. v. Overmyer Co.*, No. C-96-1207(VRW), 1998 U.S. Dist. LEXIS 4257, at *8 (N.D. Cal. Mar. 27, 1998); *Burlington N. R.R. v. Woods Indus., Inc.*, 815 F. Supp. 1384, 1391 (E.D. Wash. 1993); *United States v. A & N Cleaners and Launderers, Inc.*, 788 F. Supp. 1317, 1333 (S.D.N.Y. 1992); *United States v. S.C. Recycling and Disposal, Inc.*, 653 F. Supp. 984, 1002-03 (D.S.C. 1984).

43. 215 F.3d 321 (2d Cir. 2000).

44. *Id.* at 324.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 326.

49. *Commander Oil*, 215 F.3d at 327.

50. *Id.*

51. *Id.* (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1612 (1981)).

primary or residuary title to property.”⁵² The court remarked that the ambiguity seemed to reflect the long-standing view held among scholars that the meaning of ownership, and consequently “property,” was not readily intuitive, but was a concept bound up with social policy and political philosophy;⁵³ that in finding property, the law seeks to mediate competing claims between persons to enable security and the development of expectations necessary for investment and productive activities.⁵⁴

While at least under the *Black's* definition—“ownership” signifying control—imposing owner liability on the basis of site control alone would threaten to define all owners as operators and render most of the operator-liability language in the statute superfluous.⁵⁵ But, what beyond mere site control is relevant?

It seems the most compelling consideration for the court was the overall intent of Congress when it provided for strict liability of the potentially responsible parties:⁵⁶ those that “enter into a business or activity for his own benefit, and that benefit results in harm to others, should bear the responsibility for that harm.”⁵⁷ But this justification wanes when it is offered to support liability upon lessees/sublessors; whereas here, it was the relationship between the record owner and the sublessee that was responsible for the release of hazardous waste, and not the relationship between the sublessee and the lessee/sublessor.⁵⁸ Here, the lessee’s interposition between the record owner and the sublessee was merely formal and not at all substantive in terms of determining power, responsibility and benefit. The court expressed concern about disturbing settled common law notions and expectations of persons as they assess the wisdom of acquiring varying interests in real property. That is, inasmuch as a prospective buyer of property would perform an environmental assessment before purchasing, and whereas a lessee would only look to see that the land was suitable for its purposes, it would be wrong to hold the

52. *Id.* (quoting BLACK’S LAW DICTIONARY 1130 (7th ed. 1999)).

53. *Id.* at 327.

54. *Id.* at 327-28.

55. *See* Castlerock Estates, Inc. v. Estate of Markham, 71 F. Supp. 360, 367 (N.D. Cal. 1994) (“The test for ‘ownership’ liability under CERCLA . . . has become similar to [the] test for ‘operator’ liability under CERCLA.”).

56. *Commander Oil*, 215 F.3d at 329 (citing *Rylands v. Fletcher*, [1868] 3 L.R.E. & I. App. 330 (H.L.)).

57. *Id.* at 330 (quoting *United States v. FMC Corp.*, 572 F.2d 902, 907 (2d Cir. 1978)).

58. Richard D. Jones & Ivan S. DeVoren, *Managing Environmental Risks in Commercial Real Estate Leases*, 1996 A.L.I.-A.B.A. CONTINUING LEGAL EDUC. 121, 126.

lessee/sublessor liable for the conditions on the land, which he did not investigate, nor bargain for.⁵⁹

In *United States v. Capital Tax Corp.*,⁶⁰ the Seventh Circuit considered whether to apply the state common law principle—equitable conversion, under which a purchaser is regarded as owner of the land—or to adopt a new federal rule for finding liability during a contract’s executory period. Though ultimately the court found that the facts did not establish the predicate for equitable conversion under state law, the importance of state law in the origins and development of property in the common law could not be discounted.⁶¹ Indeed, given Congress’s direction to use traditional, common law meanings of ownership, “to invent out of whole cloth a distinctly federal law of property would be inappropriate, if not impossible.”⁶² This was so because the contours of the doctrine of equitable conversion among the states was largely the same and it seemed “highly unlikely that states would alter core principles of property law . . . in order to affect their impact on pollution liability.”⁶³ Significantly, the court believed that not adopting state law might produce inequitable rights, inasmuch as “citizens naturally look to state law to determine their relative rights and obligations with respect to the issue of property” and “it would seem unfair for a party who was not an ‘owner’ under state law to face liability under a federal statute based on ownership.”⁶⁴

While the court intelligently explained why resorting to state law principles to understand the concept of how equitable title arose made sense, it did not explain why equitable ownership should suffice for purposes of CERCLA liability.⁶⁵ Equitable conversion is based upon the maxim that “equity considers as done that which [ought] to be done.”⁶⁶ This is said to mean that because the parties have signed a contract, then it is appropriate to view the purchaser as owner for the purposes of giving him an equitable remedy of specific performance on the contract. The

59. *Commander Oil*, 215 F.3d at 330. While no doubt there may be instances where a lessee could be treated as an owner, such as where the lessee holds full control over the activities that can be carried on without interference from the lessor, those facts were not present in the case. *Id.* at 330-31; *cf.* *Bedford Affiliates v. Sills*, 156 F.3d 416, 425 (2d Cir. 1998) (noting that the innocent owner exception to liability under CERCLA is not determined by an entity’s involvement in those activities relating to contamination but is founded on the entity’s status).

60. 545 F.3d 525 (7th Cir. 2008).

61. *Id.* at 532.

62. *Id.*

63. *Id.* at 532 n.6.

64. *Id.*

65. *Id.* at 532-34.

66. 17 RICHARD A. LORD, WILLISTON ON CONTRACTS § 50:42 (4th ed. 2009).

equitable title otherwise gives the purchaser no rights in or about the property; it does not entitle him to possession before legal title is conveyed, nor the right to interfere with what the legal owner does on the property. If the idea behind putting liability on "owners" is that they have the power and interest to control activities on the land, then finding an equitable owner a potentially responsible party fails to serve the purposes of CERCLA.

B. "Operator"

To "operate," on its face, seems to require some intentional, purposive act. This presupposes authority and ability to control activities. Yet, no universal formula for determining such liability has emerged. The one recurring theme is that courts have broadly construed "operating" "in order to effectuate the perceived intent of Congress to extend liability [for clean up] to all who profit from the treatment or disposal of hazardous substances."⁶⁷ At the same time, courts have been careful not to read CERCLA as creating unlimited liability for those only tangentially or remotely involved with hazardous substances.⁶⁸

Some courts have fashioned specific definitions of "operator." In *Kaiser Aluminum & Chemical Corp. v. Catellus Development Corp.*, the Ninth Circuit stated that "'operator' liability . . . only attaches if the defendant had authority to control the cause of the contamination at the time the hazardous substances were released into the environment."⁶⁹ Other courts have focused on actual participation in the management of a facility.⁷⁰ The Supreme Court made clear in *United States v. Bestfoods* that state common law should determine "operator" liability in the context of a corporate parent and subsidiary relationship.⁷¹ Under well-established

67. THE LAW OF HAZARDOUS WASTE: MANAGEMENT, CLEANUP, LIABILITY, AND LITIGATION § 14.01[4][c][ii] (Susan M. Cooke & Mathew Bender eds., 2006).

68. See *Reading Co. v. City of Philadelphia*, No. 91-2377, 1993 U.S. Dist. LEXIS 2930, at *18, *55 (E.D. Pa. Mar. 9, 1993).

69. 976 F.2d 1338, 1341-42 (9th Cir. 1992) (finding that a contractor who was hired to excavate land and who contaminated soil in the process could be an operator under CERCLA because the contractor had sufficient control over this phase of the development) (citing *CPC Int'l Inc. v. Aerojet-Gen. Corp.*, 731 F. Supp. 783, 788 (W.D. Mich. 1989) (finding that control over the activity causing the pollution is the most important metric)).

70. See *Levin Metals Corp. v. Parr-Richmond Terminal Co.*, 781 F. Supp. 1454, 1457 (N.D. Cal. 1991) (holding that liability requires a showing of actual participation in the operation of the facility—control over, or intrinsic involvement in, the entity directly responsible for operations); see also *Redland Soccer Club, Inc. v. Dep't of the Army*, 801 F. Supp. 1432, 1437 (M.D. Pa. 1992) ("[T]o be held liable as an operator, a party must currently participate in decisions regarding the overall operations at a facility.").

71. 524 U.S. 51, 62-64 (1998). There, the parent corporation, CPC International Inc., of

principles, mere ownership or control of the operating entity without more is not sufficient to make another entity an owner.⁷² Instead, in order for a parent corporation to be held liable for the acts of its subsidiary corporation, the corporate veil must be pierced under state common law.⁷³ The instances in which the corporate veil can be pierced are generally limited to cases where the parent has not maintained sufficient separation from the subsidiary or where adherence to the corporate form would be a perversion of justice.⁷⁴

At the same time, a parent corporation that actually operates the subsidiary can be liable as an “operator” under CERCLA. The Court thought that in the “organizational sense obviously more intended by CERCLA,” to operate means “[to direct] the workings of, manage[, or conduct[] the affairs of [the] facility[,] . . . specifically related to . . . the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations.”⁷⁵

C. “Disposal”

CERCLA provides that the meaning of “disposal” shall have the meaning provided in the Solid Waste Disposal Act, which defines “disposal” as:

[T]he discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.⁷⁶

Almost from the enactment of the statute, there arose a split among the circuit courts as to whether the statutory definition of “disposal” encompassed passive migration of hazardous substances or whether an affirmative act, involving some casting off or placement of substances, is

the Ott Chemical Co. had selected the subsidiary’s board of directors and appointed the executives. It also had a significant role in developing the subsidiary’s environmental compliance policy. *Id.* at 59.

72. *Id.* at 62-63.

73. *Id.* at 61-62. This was a bedrock principle at common law. *Id.* at 63.

74. *Id.* at 62-63.

75. *Id.* at 66 (The Court first looked to the *American Heritage Dictionary*, finding “to control the functioning of; run,” then to *Webster’s New International Dictionary*, finding “to work; as to operate a machine.”) (alteration omitted) (citation omitted).

76. Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 6901(29) (2006); Solid Waste Disposal Act, 42 U.S.C. § 6903(3) (2006).

required. On one side of the issue stands the Third⁷⁷ and Sixth⁷⁸ Circuits, which read “disposal” as requiring affirmative human conduct. On the other side, the Fourth⁷⁹ and Fifth⁸⁰ Circuits believe that passive migration of waste is contemplated by “disposal.” Then there are those circuits that seem to straddle the line, the Second⁸¹ and Ninth⁸² Circuits.

In *United States v. CDMG Realty Co.*,⁸³ finding the meaning of the statutory definition not readily intuitive, the Third Circuit looked up two words in *Webster's Third New International Dictionary, Unabridged*: “leak” (“to permit to enter or escape through a leak”) and “spill” (“to cause or allow to pour, splash, or fall out”).⁸⁴ The court also employed an established canon of construction, *noscitur a sociis*, requiring the two terms to be read together with the surrounding words in the definition (“discharge, deposit, injection, dumping and placing”), all of which “envision[ed] a human actor.”⁸⁵ Moreover, the court found that treating passive migration as disposal would nullify the innocent-landowner defense since no one could show acquisition of the property *after* disposal, as there would generally be no such point in time;⁸⁶ it would create the anomalous result that prior owners who had no knowledge that their land was contaminated would fall within the statute's liability provisions, while current owners could assert the innocent owner defense.⁸⁷

In *Nurad, Inc. v. William E. Hooper & Sons Co.*,⁸⁸ the Fourth Circuit read certain words in the definition of disposal (leaking or spilling) as readily admitting of a passive component, that did not suggest the need for active human participation for liability to arise.⁸⁹ It believed that an interpretation requiring affirmative human conduct would frustrate the statutory policy of encouraging voluntary private acts to remedy

77. *United States v. CDMG Realty Co.*, 96 F.3d 706, 713-18 (3d Cir. 1996).

78. *United States v. 150 Acres of Land*, 204 F.3d 698, 705-06 (6th Cir. 2000).

79. *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 844-46 (4th Cir. 1992).

80. *Tanglewood E. Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568, 1573 (5th Cir. 1988).

81. *ABB Indus. Sys., Inc. v. Prime Tech., Inc.*, 120 F.3d 351, 357-59 (2d Cir. 1997) (expressing “no opinion” on whether “prior owners are liable if they acquired a site with leaking barrels [and] the prior owner's actions are purely passive.”).

82. *Carson Harbor Village, LTD, v. Unocal Corp.*, 270 F.3d 863 (9th Cir. 2001).

83. 96 F.3d 706 (3d Cir. 1996).

84. *Id.* at 714 (citing WEBSTER'S THIRD INTERNATIONAL DICTIONARY UNABRIDGED 1285 (Philip Babcock Gove ed., 1986)).

85. *Id.* at 714.

86. *Id.* at 716.

87. *Id.* at 717.

88. 966 F.2d 837 (4th Cir. 1992).

89. *Id.* at 845.

environmental hazards and would create the anomalous situation where a current owner would have full liability to clean-up whereas a former owner who sat by allowing hazards to fester would not be liable. Such a regime, Congress could not have intended.⁹⁰

In *Carson Harbor Village, Ltd. v. Unocal Corp.*,⁹¹ the Ninth Circuit took the position that passive migration of contaminants is not actionable under CERCLA. But it did not adopt a categorical rule. Rather, the words of the statute were applied to the facts of the case.⁹² When the facts only present “the gradual passive migration of contamination through the soil” it cannot be regarded as a “discharge, deposit, injection, dumping, spilling, leaking or placing” of substances.⁹³ None of these terms described the activity sought to be addressed—the gradual, subtle spread through the soil of contaminants. Nothing was deposited by a human actor; nothing spilled out of or over anything; nor leaked out of any container.⁹⁴ The court thus rejected the “absolute binary ‘active/passive’ distinction used by other courts.”⁹⁵ Further, examining the statute as a whole, construing “disposal” as not including passive soil migration alone, but allowing for instances in which passive migration might be actionable was consistent with CERCLA’s purposes. That is, passive owners who are responsible for the migration of contaminants that results from their conduct and for passive migration will ensure prompt clean up and efforts aimed at preventing spills and leaks.⁹⁶ This reason seemed to be compelled by another important consideration—imposing liability upon all owners for passive migration would entirely confuse the categories of responsible parties as disposal would become a “perpetual process” and every landowner after the first disposal would be liable. At the same time, a purely active meaning would nullify the strict liability scheme embraced by the statute.⁹⁷

Either view can be seen as requiring a purposive act before imposing liability. If the end is to cause the landowner to become vigilant about monitoring activities occurring on the land, that is, to become a good steward, then the Fourth Circuit’s view should prevail. If, on the other

90. *Id.* at 845-46.

91. 270 F.3d 863 (9th Cir. 2001). There, Carson Harbor Village owned and operated a mobile home park on the land, that had previously been leased to Unocal for petroleum production, using oil wells, pipelines, above-ground storage tanks, and other production facilities. The runoff from these operations made its way into the wetlands. *Id.* at 868.

92. *Id.* at 875-77.

93. *Id.* at 879.

94. *Id.* at 879.

95. *Id.* at 879.

96. *Id.* at 881.

97. *Carson Harbor*, 270 F.3d at 883.

hand, the aim is simply to impose the burdens of the injury caused by unwise, harmful activities on those responsible, then the Third Circuit's view should control. The latter view seems more in line with common-law landowner tort liability as it had evolved when CERCLA was enacted.⁹⁸ However, the nuanced view taken by the Ninth Circuit, to the extent it imposes liability upon one who put the migration in motion, but not upon one who merely purchases a property after the fact, seems a sensible medium between the two ends.

D. "Arranger"

CERCLA imposes liability on any person who arranges "by contract, agreement, or otherwise" for the "disposal or treatment . . . [or] for transport for disposal or treatment" of "hazardous substances" that are "owned or possessed" by that person.⁹⁹ On the face of it, the phrase "to arrange . . . for the disposal" is clear and straightforward. But does it contemplate a formal agreement or plan to discard waste, or are mere transfers to others who later discard sufficient? Before *Burlington*, this question arose quite often but was not always resolved on consistent or coherent principles.

In *GenCorp, Inc. v. Olin Corp.*, the court determined the meaning of "arranger," by reference to *Webster's*,¹⁰⁰ which defined "arrange" as meaning to "'plan or prepare' for it, though not necessarily to implement the plan."¹⁰¹ This conception of arrange "d[id] not require a formal disposal agreement, as the statute provides that a person may arrange for hazardous waste disposal 'by contract, agreement or otherwise.'"¹⁰² Moreover, "neither must the arrangements for waste disposal stem from a discrete

98. See *Carson Harbor Village, Ltd. v. Unocal Corporation*, 227 F.3d 1196, 1207 (9th Cir. 2000); see also *Elf Altochem N. Am., Inc. v. United States*, 868 F. Supp. 707 (E.D. Pa. 1994) (noting that the disposal occurred at a facility where owner discharged hazardous substances through a pipe to be carried to a waste pond); *Prudential Ins. Co. v. U.S. Gypsum Co.*, 711 F. Supp. 1244, 1253 (D.N.J. 1989) (relying on *Webster's*, disposal means "giving away, transfer, bestowal . . . a disposing of, getting rid of"); *United States v. Hardage*, CIV-86-1401, 1989 U.S. Dist. LEXIS 17877, *10, 15 (W.D. Okla. 1989) (relying on *Webster's* definition of "application" to conclude that disposal of used pesticides did not fall within the "pesticide application" exception).

99. 42 U.S.C. § 9607(a)(3) (2006).

100. 390 F.3d 433, 445 (6th Cir. 2004). In the 1960s, GenCorp, Inc. and Olin Corporation entered into an agreement under which Olin built a manufacturing plant to produce urethane foam, which generated hazardous wastes that were eventually deposited offsite into a landfill. *Id.* at 437.

101. *Id.* at 445 (citing WEBSTER'S II NEW COLLEGE DICTIONARY 62 (2001)); see WEBSTER'S NEW COLLEGE DICTIONARY 63-64 (3d ed. 2008).

102. *GenCorp, Inc.*, 390 F.3d at 445 (citing 42 U.S.C. § 9607(a)(3)).

event; they may arise from a broader ‘transaction.’”¹⁰³ Therefore, a construction agreement that contemplated the handling of waste generated by the plant created arranger liability.¹⁰⁴

In setting the limits of arranger liability, the courts have created the useful-product exception.¹⁰⁵ One who is merely selling a useful, albeit hazardous, product to an end user is not liable as an arranger for what the purchaser does with the product, simply by virtue of the sale.¹⁰⁶ But, an entity “that manufactures, sells, or installs a useful product that is intended to direct, and when used as designed, directs a hazardous substance into the environment,” can be liable as an arranger.¹⁰⁷

Even if a useful product is involved, the courts have looked beyond the mere formal relationship of the parties to examine their ultimate objectives as well as their respective involvement with the substances’ use and disposal. In *United States v. Cello-Foil Products, Inc.*,¹⁰⁸ the court found that by leaving significant amounts of solvents in the drums containing them—from one-half tea cup to one-half gallon—knowing that the producers would remove the solvents when reclaiming the drums, an inference was raised that the purchaser intended a disposal of the product.¹⁰⁹ This inference of intention was appropriate even though CERCLA contemplates strict liability because of the language used—“otherwise arranged for disposal.”¹¹⁰ This general term, “following in a series [of] two specific terms and embrac[ing] the concepts similar to those of ‘contract’ and ‘agreement,’”¹¹¹ instructed the court to inquire “into what transpired between the parties and what the parties had in mind with regard

103. *Id.*

104. *Id.* at 446.

105. *See, e.g.,* *Freeman v. Glaxo Wellcome, Inc.*, 189 F.3d 160, 164 (2d Cir. 1999); *Uniroyal Chem. Co. v. Deltech Corp.*, 160 F.3d 238, 257 (5th Cir. 1998); *Fla. Power & Light Co. v. Allis Chalmers Corp.*, 893 F.2d 1313, 1317 (11th Cir. 1990).

106. *Gen. Elec. Co. v. AAMCO Transmissions, Inc.*, 962 F.2d 281, 286-87 (2d Cir. 1992) (concluding that an “obligation to exercise control over hazardous waste disposal . . . makes an entity an arranger under CERCLA’s liability provision”).

107. *Berg v. Popham*, 412 F.3d 1122, 1129 (9th Cir. 2005) (adopting the rule declared by Alaska Supreme Court in *Berg v. Popham*, 113 P.3d 604, 612 (Alaska 2005)); *see also* *AM Int’l v. Int’l Forging Equip. Corp.*, 982 F.2d 989, 992, 999 (6th Cir. 1993) (finding that a sale of an industrial facility on an “as is, where as” basis, where certain solutions had been left in place, was a sale of a useful asset and not an arrangement for disposal of wastes).

108. 100 F.3d 1227 (6th Cir. 1996).

109. *Id.* at 1230, 1233.

110. *Id.* at 1231 (citing *United States v. R.W. Meyer, Inc.*, 889 F.2d 1497, 1507 (6th Cir. 1989); *J.V. Peters & Co. v. Adm’r, EPA*, 767 F.2d 263, 266 (6th Cir. 1985)).

111. *Id.* (citing 2A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 47.17, at 188 (5th ed. 1992); *Woods v. Simpson*, 46 F.3d 21, 23 (6th Cir. 1995)).

to disposition of the hazardous substance.”¹¹² With this intent factor in mind, the court concluded that a trier of fact could conclude that the parties did not intend by this “deposit arrangement [a] sale of a useful hazardous substance for its original intended purpose” or as “transactions [in] matters involving only the drums.”¹¹³ Instead, getting rid of the contents of the drums (i.e., hazardous substances) was a critical part of the arrangement.¹¹⁴

What if the producer/seller of hazardous substances is aware of actionable conduct by the purchaser? That was the scenario presented in *Burlington* during the 2008-2009 Term.¹¹⁵ In that case, in 1960, Brown & Bryant, Inc. (“B&B”) operated a chemical distribution facility on land owned by others.¹¹⁶ B&B purchased chemicals, including pesticides, from Shell Oil Company and stored them on the land.¹¹⁷ The chemicals were delivered to B&B by tanker trucks, then transferred to other containers on the site.¹¹⁸ During the transfer, chemicals would invariably spill to the ground.¹¹⁹ Shell tried to help B&B avoid the spills through instruction and discounts for safe transfers.¹²⁰ The EPA and the California Department of Toxic Substances Control sued B&B, as an operator; the land owner, as an owner; and Shell, as an arranger for the disposal of wastes.¹²¹ Shell argued that it should not be liable as an arranger under CERCLA because it was merely delivering a useful product to the operator, not arranging for disposal.¹²² However, the Ninth Circuit found the company liable largely because spills were routine and Shell was aware of them.¹²³

Examining the statute to understand what “arrange” meant, the Court identified the two clear cases at either end of the inquiry: on the one end, an entity that enters into a “transaction for the sole purpose of discarding a used and no longer useful hazardous substance;” and on the other, an entity that merely sells “a new and useful product and the purchaser of that product later, and unbeknownst to the seller, disposed of the product in a way that led to contamination.”¹²⁴ In the former case, liability as an

112. *Cello-Foil Prods., Inc.*, 100 F.3d at 1231.

113. *Id.* at 1232 n.1.

114. *Id.* at 1232.

115. *Burlington N. & Santa Fe Ry. Co. v. United States*, 129 S. Ct. 1870 (2009).

116. *Id.* at 1874.

117. *Id.*

118. *Id.* at 1875.

119. *Id.*

120. *Id.*

121. *Burlington N.*, 129 S. Ct. at 1876.

122. *Id.* at 1877.

123. *Id.*

124. *Id.* at 1878.

“arranger” is clear and in the latter, non-liability is equally clear.¹²⁵ The difficult area includes those where “the seller has some knowledge of the buyers’ planned disposal or whose motives for the ‘sale’ of a hazardous substance are less than clear.”¹²⁶ Resolution of cases in the gray area require close examination of the facts, by looking beyond the label the parties have attached to their relationship.¹²⁷ Heeding the canon of construction that ordinary words be given their ordinary meanings, the Court looked to *Merriam-Webster’s Collegiate Dictionary* and found that it defines “arrange” as “to make preparations for: plan[;] . . . to bring about an agreement or understanding concerning: settle.”¹²⁸ The obvious understanding of these terms is that some intentional acts are necessary for liability as an arranger.

While it is true in some instances an entity’s knowledge that its product will be leaked, spilled, dumped, or otherwise discarded may provide evidence of the entity’s intent to dispose of its hazardous wastes, knowledge alone is insufficient to prove that an entity “planned for” the disposal, particularly when the disposal occurs as a peripheral result of the legitimate sale of an unused, useful product.¹²⁹

Indeed, the Court concluded, in order to satisfy the definition of arranger, Shell needed to agree to the sale of hazardous substances with the intention that a small portion would be disposed during transfer by either discharging, depositing, injection, dumping, spilling, leaking, or placing as described in § 6903(3).¹³⁰ Here, no facts showed that Shell intended for the spills to occur when the product was delivered. Indeed, Shell tried, though unsuccessfully, to reduce the spills.¹³¹

Although at first blush *Burlington* seems to have narrowed “arranger” liability under CERCLA, on closer examination, and inasmuch as the decision did not rest entirely upon a literal dictionary definition, it leaves a considerable opening for liability. The gray area of difficult cases identified

125. *Id.*; see also *Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746, 751 (7th Cir. 1993), *cert. denied*, 510 U.S. 1044 (1994) (concluding that the term “arranged for” implies “intentional action”).

126. *Burlington N.*, 129 S. Ct. at 1879.

127. See *id.*

128. *Id.* (internal quotations omitted). The Court also cited with approval, *Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746 (7th Cir. 1993) and *United States v. Cello-Foil Prods., Inc.*, 100 F.3d 1227 (6th Cir. 1996).

129. *Burlington N.*, 129 S. Ct. at 1880.

130. *Id.*

131. See *United States v. Burlington N. & Santa Fe Ry. Co.*, 520 F.3d 918, 960 (9th Cir. 2008).

by the Court seemed to describe the scenario of *Cello-Foil*, which the Court cited with approval.¹³² Under the reasoning there, one can be an “arranger” notwithstanding the absence of a formal contract or agreement for the disposal of wastes and absent communication between the producer of the hazardous substances and one who takes control over the disposal, if the logical result of such relationship is disposal of wastes. What does seem clear though, is that the Court intended that CERCLA should not be read to impose liability merely on the basis of a seller/buyer relationship, not even with knowledge that the purchaser of a useful product may be unlawfully disposing that product. Instead, some purposive act by the would-be responsible party is required.

III. Purposive Decisionmaking

The objective of any court ruling is to do justice—to the law, the parties and to the public. What is the just course or result is not easy to discover and is often burdened or clouded by the politics of the decisionmakers and/or the subject of the case. It is a fallacy to think that law is deductively decided through the operation of an exact, consistent and complete system; rather, it is the case that common law judges do legislate, they decide cases by reference to their beliefs about what is expedient for the community, using their own judgment as to the worth of competing values.¹³³

132. *Burlington N.*, 129 S. Ct. at 1879. Many other cases decided before *Burlington* ruled on the various permutations of “arranger” liability without resorting to the dictionary. *See, e.g.*, *American Cyanamid Co. v. Capuano*, 381 F.3d 6 (1st Cir. 2004) (stating that while mere brokering the disposal of hazardous waste, without more, will not give rise to liability, where that broker does so by exercising control over the waste, such as finding a site and arranging to pick up the waste and for it to be dumped at the site, that control can amount to constructive possession for purposes of liability); *S. Fla. Water Mgmt. Dist. v. Montalvo*, 84 F.3d 402 (11th Cir. 1996) (holding that landowners who merely contracted for the aerial spraying of their crops were not arrangers for purposes of clean-up of the site where pesticides spilled on the airstrip during the mixing and loading into the application tanks of the planes); *United States v. Vertac Chem. Corp.*, 46 F.3d 803 (8th Cir. 1995) (precluding liability merely because of statutory and regulatory authority over the activities absent showing of supervision or responsibility for the transportation or disposal of substances or supplying raw materials); *United States v. Atlas Lederer Co.*, 282 F. Supp. 2d 687 (S.D. Ohio 2001) (selling junk batteries to a scrap lead company that extracted the lead and never resold as whole batteries was an arrangement for disposal); *Cal. Dept. of Toxic Substs. Control v. Interstate Non-Ferrous Corp.*, 298 F. Supp. 2d 930 (E.D. Cal. 2003) (taking spent battery parts to smelting plant for recovery of lead).

133. OLIVER WENDELL HOLMES, JR., *THE PATH OF THE LAW AND ITS INFLUENCE* 140 (Steven J. Burton ed., 2000). Holmes believed that judges should be upfront about the fact of legislating. Such an admission would leave them freer to openly consider competing policies that really determined their decisions and more likely adopt the best rule as opposed

Usually the process of resolving legal issues is a gradual one, but sometimes the courts see fit to make a stark break with existing rules, by sharply expanding or establishing new rules. But, the new law must be viewed as having evolved from existing law as judges strive to follow analogies and anchor their decisions in existing principles.¹³⁴ This process may be ignored in the case of a federal court ruling on claims involving individual state common law rights and federal claims where the case is resolved upon the facile assertion by the government: federal preemption, thereby ignoring all conventions and customs bound up with the state common law rights.

The most significant impacts of CERCLA are on the common law meanings of ownership of property, landowner liability and the right to contribution from joint tortfeasors. The Supremacy Clause¹³⁵ provides unambiguously, “that if there is any conflict between federal and state law, federal law shall prevail.”¹³⁶ Preemption may be implied (where the federal regulatory scheme is pervasive) or express.¹³⁷ But, it is not categorical; it is disfavored and should not occur “in the absence of persuasive reasons—either that the nature of the related subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.”¹³⁸ Nonetheless, even when matters of special concern to states are at issue, such as real property, this circumstance does not preclude preemption.¹³⁹

to one driven by their peculiar political and economic sympathies. *See id.*

134. *See, e.g.,* *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1077 (D.C. Cir. 1970) (requiring landlords to repair property while rejecting concept of independent covenants); *Johnson v. Davis*, 480 So. 2d 625, 629 (Fla. 1985) (rejecting *caveat emptor*); *Ellsworth Dobbs, Inc. v. Johnson*, 236 A.2d 843, 857 (N.J. 1967) (rejecting old rule as to when broker's commission is earned).

135. “[T]he Laws of the United States . . . shall be . . . the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. CONST., art. VI, cl. 2.

136. *Gonzales v. Raich*, 545 U.S. 1, 29 (2005).

137. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

138. *Chicago & Nw. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981).

139. *Free v. Bland*, 369 U.S. 663, 666 (1962); *see also* *Mansell v. Mansell*, 490 U.S. 581, 587 (1989); *Rose v. Rose*, 481 U.S. 619, 625 (1987); *Ridgway v. Ridgway*, 454 U.S. 46, 54-55 (1981) (discussing that even in areas of law typically left to the states, like domestic relations, federal law still may preempt state law; federal anti-attachment provisions regarding serviceman's life insurance policies preempted state law property family settlement rules); *McCarty v. McCarty*, 453 U.S. 210, 235-36 (1981) (holding that military-retirement pay provisions preempted state community property laws); *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 590 (1979); *Ablamis v. Roper*, 937 F.2d 1450, 1460 (9th Cir. 1991) (holding Employee Retirement Income Security Act of 1974 preempts any state community property law which arguably provides a predeceasing nonemployee spouse with a testamentary interest in a fully vested surviving employee spouse's pension benefits).

Yet, the federal courts assert a stricter inquiry where these kinds of matters are at issue.¹⁴⁰

But, what is a conflict? In *United States v. Kimbell Foods, Inc.*,¹⁴¹ the Court observed that it had consistently held that federal law governs questions involving the rights of the United States arising under nationwide federal programs.¹⁴² When the federal government is asserting claims no different from those an individual might assert, is preemption appropriate? Even where federal courts do not explicitly speak the language of preemption, they avoid the application of state rules, such as of property, often on the mere finding of some federal interest.

While CERCLA provides that it applies “[n]otwithstanding any other provision or rule of law,”¹⁴³ it does not provide for a complete preemption of otherwise applicable state law,¹⁴⁴ and does not anticipate that all responsible parties will be held accountable in all circumstances.¹⁴⁵ As the Supreme Court has stated, “there is no federal policy that the fund should always win,” and “more money arguments” alone are insufficient to justify displacement of state law.¹⁴⁶

One consequence of preemption is that sometimes it is necessary for federal courts to craft federal common law. When Congress has not spoken on a particular issue, and when there exists a “significant conflict between some federal policy or interest and the use of state law,”¹⁴⁷ federal courts

140. *Hines v. Davidowitz*, 312 U.S. 52, 68 n.22 (1941) (stating that evidence of a congressional intent to preempt state law should be even clearer when federal law fails to address a subject matter that is “peculiarly adapted to local regulation”).

141. 440 U.S. 715 (1979). There, the Court addressed the issue “whether contractual liens arising from certain federal loan programs take precedence over private liens, in the absence of a federal statute setting priorities.” *Id.* at 718.

142. *See id.* at 726 (“When the United States disburses its funds or pays its debts, it is exercising a constitutional function or power. . . . In [the] absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards.” (quoting *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366-67 (1943))).

143. 42 U.S.C. § 9607(a) (2006).

144. *Marsh v. Rosenbloom*, 499 F.3d 165, 177 (2d Cir. 2007); *Bedford Affiliates v. Sills*, 156 F.3d 416, 426 (2d Cir. 1998); *see generally* *B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192, 1198 (2d Cir. 1992).

145. *Commander Oil Corp. v. Barlo Equip. Corp.*, 215 F.3d 321, 327 (2d Cir. 2000) (“[N]either does CERCLA automatically assign liability to every party with any connection to a contaminated facility.”). In other words, CERCLA’s cost-recovery objective, while strong, is not absolute and may yield to countervailing considerations.

146. *O’Melveny & Myers v. FDIC*, 512 U.S. 79, 86-88 (1994) (discussing federal common law in the context of the Financial Institutions Reform, Recovery, and Enforcement Act).

147. *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966); *see City of Milwaukee*

have found it necessary, in a “few and restricted” instances,¹⁴⁸ to develop federal common law.¹⁴⁹ Indeed, said the Court in *United States v. Little Lake Misere Land Co.*:

At the very least, effective Constitutionalism requires recognition of power in the federal courts to declare, as a matter of common law or judicial legislation, rules which may be necessary to fill in interstitially or otherwise effectuate the statutory patterns enacted in the large by Congress. In other words, it must mean recognition of federal judicial competence to declare the governing law in an area comprising issues substantially related to an established program of government operation.¹⁵⁰

That is to say that it is a “necessary expedient”¹⁵¹ but may be used even if not explicitly authorized by Congress.¹⁵² In *O’Melveny & Myers v. FDIC*, the Court noted that “cases in which judicial creation of a special federal rule would be justified[] . . . [are] ‘few and restricted’ . . . , limited to situations where there is a ‘significant conflict between some federal policy or interest and the use of state law.’”¹⁵³ Matters left unaddressed by a comprehensive federal statutory scheme are presumably left subject to the disposition provided by state law—there must exist a discrete conflict with an important federal policy before a court should consider resorting to federal common law.¹⁵⁴ In determining whether such a conflict exists, the

v. Illinois, 451 U.S. 304, 314 n.7 (1981) (“In this regard we note the inconsistency in Illinois’ argument and the decision of the District Court that both federal and state nuisance law apply to this case. If state law can be applied, there is no need for federal common law; if federal common law exists, it is because state law cannot be used.”).

148. *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963).

149. *See, e.g., Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943).

150. 412 U.S. 580, 593 (1973) (citing Paul J. Mishkin, *The Variousness of “Federal Law”: Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797, 800 (1957)).

151. *See Comm. for Consideration of Jones Falls Sewage Sys. v. Train*, 539 F.2d 1006, 1008 (4th Cir. 1976).

152. *See Clearfield Trust Co.*, 318 U.S. at 366-67. The Court pointed out that even without an explicit statutory grant of authority, the fashioning of federal common law may still be appropriate when duties and rights of the United States are at issue. The Court went on to rule that a uniform federal rule should apply in an action by the United States on a guaranty made on a federal check. *See Little Lake Misere Land Co.*, 412 U.S. at 593-94 (explaining that the right to seek legal redress for duly authorized proprietary transactions was “a federal right”).

153. 512 U.S. 79, 87 (1994) (quoting *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966)).

154. *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 726, 728 (1979).

Court has identified three factors: the need for uniformity of law across the nation; “whether application of state law would frustrate specific objectives of the federal programs”; and “the extent to which application of a federal rule would disrupt commercial relationships predicated upon state law.”¹⁵⁵

As shown above, CERCLA left much unsaid, undefined and unexplained. Yet, courts have been reluctant to craft a new language of liability, out of whole cloth. This reluctance stands in contrast to what seems to be a determined march of federal law into the realm of property rights and a broadening of the notion of federalism, particularly through exercise of the Commerce Clause.¹⁵⁶ The original division of power between state and federal governments contemplated that only matters of national importance would be reserved to the federal government. Yet, over the last few decades, the federal presence in areas traditionally viewed as being within the province of the states has grown at a remarkable pace. The responsibility for educating our children,¹⁵⁷ the essential requirement for an enforceable contract for land,¹⁵⁸ and how much interest a lender may charge on a mortgage loan,¹⁵⁹ were matters traditionally reserved to the states, but are now subject to pervasive and sometimes burdensome federal prescriptions.¹⁶⁰

155. *Id.* at 728-29.

156. See Sam Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1365 (2006) (discussing the increasingly broad reach of the federal government through the Commerce Clause to preempt many state laws).

157. See, e.g., No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (codified as amended in scattered sections of 20 U.S.C.).

158. See, e.g., Electronic Signatures in Global Commerce and National Commerce Act, Pub. L. No. 106-229, 114 Stat. 464 (2000) (codified as amended in scattered sections of 15 U.S.C.).

159. See, e.g., 12 U.S.C. § 3801 (2006); see also *Fid. Fed. Sav. & Loan Ass’n v. De Le Cuesta*, 458 U.S. 141, 159 (1982) (upholding preemption of state laws limiting operation of due-on sale clauses in mortgages).

160. Many states have challenged the No Child Left Behind Act and have lost. See Michael Dobbs, *NEA, States Challenge ‘No Child Program,’* THE WASH. POST, Apr. 21, 2005, at A21, available at <http://www.washingtonpost.com/wp-dyn/articles/A4741-2005Apr20.html>; Pauline Vu, *No Child Law Faces Medley of Changes*, KANSAS CITY INFOZINE, Mar. 28, 2007, <http://www.infozine.com/news/stories/op/storiesView/sid/21900/>. States are still grappling with the E-Sign legislation, as many trial courts have refused to accept its provisions. See, e.g., *Vista Developers Corp. v. VFP Realty LLC*, 847 N.Y.S. 2d 416 (Sup. Ct. Queens Co. 2007) (holding that signed e-mail did not satisfy the statute of frauds in a real estate transaction).

A. The Virtues of State Common Law

This march of federal law is a marked departure from common law. In the generic sense of the term, the “common law” has been defined as “the ancient unwritten law of England”: “the body of those principles and rules of action relating to the government and security of persons and property, which derive their authority solely from usages and customs of immemorial antiquity, or from the judgments and decrees of the courts recognizing, affirming and enforcing such usages and customs.”¹⁶¹ A.W.B. Simpson once noted that if the common law’s existence is thought of as a set of rules, “it is in general the case that one cannot say what the common law is.”¹⁶² This is because it is impossible to demark conclusively such a rule set that corresponds to the common law. “As a system of legal thought the common law . . . is inherently incomplete, vague and fluid”¹⁶³ Professor Simpson writes:

The ideas and practices which comprise the common law are customary . . . in that their status is thought to be dependent upon conformity with the past, and they are traditional in the sense that they are transmitted through time as a received body of knowledge and learning. . . . Such rules . . . serve also as guides to proper practice, since the proper practice is in part the normal practice.¹⁶⁴

The noted jurist Roscoe Pound believed the common law was a mode of decisionmaking—guided by past judicial precedents.¹⁶⁵ Despite the chaos and fluidity identified by Simpson, there is yet unity in the common law, which has been attributed to the “fact that law is grounded in, and logically derived from, a handful of general principles.”¹⁶⁶ For Blackstone, law is “fraught with the accumulated wisdom of ages”;¹⁶⁷ it embodies an ancient wisdom, which may be timeless and yet continually evolving

161. *W. Union Tel. Co. v. Call Pub. Co.*, 181 U.S. 92, 102 (1901) (citing BLACK’S LAW DICTIONARY 232 (1st ed. 1891)).

162. Brian Simpson, *The Common Law and Legal Theory*, in *LEGAL THEORY AND COMMON LAW* 8, 16 (William Twining ed., 1986).

163. *Id.* at 17.

164. *Id.* at 20-21.

165. ROSCOE POUND, *THE SPIRIT OF THE COMMON LAW* 182 (1921). He goes on to identify the spirit of the common law as residing in among other things, “judicial empiricism” (pragmatic case-by-case decision-making guided by past judicial precedents; a method of working that “combines certainty and power of growth [of law] as no other doctrine has been able to do”). *Id.*

166. ROGER COTTERRELL, *THE POLITICS OF JURISPRUDENCE: A CRITICAL INTRODUCTION TO LEGAL PHILOSOPHY* 24 (1989).

167. *Id.*

through collective experience.¹⁶⁸ A system based in custom can function only if it is able to insist upon continuity and cohesion in traditional ideas and adherence to these ideas.¹⁶⁹

Property law factors prominently within the common law. Decades ago, the Supreme Court declared: "Property interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules and understandings that stem from an independent source such as state law."¹⁷⁰ Property issues arise not only when the question is whether to recognize an asserted interest as property, but also when there is a question of the extent and contours of that interest, such as how the interest may be created, when rights expire, when the interest can be attached and how it passes to heirs.¹⁷¹

Property does more than simply protect what people have; it also protects what they might acquire, that is, their "expectations"—the right to realize any future value arising out of that present ownership.¹⁷² Protecting

168. *Id.* at 28.

169. SHIRLEY ROBIN LETWIN, *ON THE HISTORY OF THE IDEA OF LAW* 337-38 (Noel B. Reynolds ed., 2005).

170. *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972); *see also* *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984) (citation omitted); *Hughes v. Washington*, 389 U.S. 290, 295 (1967) (Stewart, J., concurring) ("[A]s a general proposition[,] the law of real property is, under [the] Constitution, left to the individual States to develop and administer."). The Court has also stated: "The great body of law in this country which controls acquisition, transmission, and transfer of property, and defines the rights of its owners in relation to the state or to private parties, is found in the statutes and decisions of the state." *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 155 (1944). This is particularly true with respect to real property, for "[e]ven when federal [common] law was in its heyday [under the teachings of *Swift v. Tyson*] an exception was carved out for local laws of real property." *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 591 (1973).

171. Any of the rights inhering in property can be transferred separately (wholly, partially, or temporally) and subdivided (several people can simultaneously hold rights in the same thing). In such cases, the task becomes determining the particular limited rights each transferee or co-owner holds. *See* *United States v. Gen. Motors Corp.*, 323 U.S. 373, 378 (1945) (stating that property includes "the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it"); THOMAS C. GREY, *LIBERTY, PROPERTY AND THE LAW* 69-70 (2000). Ownership gives power and sovereignty over oneself, things and other persons. *See* *Morris Cohen, Property and Sovereignty*, 13 CORNELL L. Q. 8, 12 (1928). That is because, if "somebody . . . wants to use the food, the house, the land, or the plow which the law calls mine, he has to get my consent." *Id.* Fundamentally, the law of property thus enables an owner to exclude others from using what is determined to be hers. But as Professor Cohen explains, "it by no means follows that [an owner] may use [his property] arbitrarily or that his rule shall prevail indefinitely after his death." *Id.* at 15.

172. "[P]rotecting . . . rights of a landlord means giving him the right to collect rent,

expectations allows intelligent choices about investment, consumption and saving.¹⁷³

B. Social Construct Through Conventions

Those expectations are bounded by what a state chooses to recognize as entitled to protection. This means that certain private expectations, or desires, of property owners may not be supported by the state and therefore are not recognized as property. The prevailing conception is that property is a social instrument; it exists to serve human needs.¹⁷⁴ This means that while there are some bedrock principles that protect property, those same principles are not etched in that bedrock. Instead, as human needs change, so do property rights. Communities created property, and communities can curtail it.¹⁷⁵ In other words, property is a creation of law.¹⁷⁶

David Hume, in *A Treatise of Human Nature*,¹⁷⁷ described property rights as “conventions”¹⁷⁸ that arise spontaneously from:

a general sense of common interest; which sense all the members of the society express to one another, and which induces them to regulate their conduct by certain rules. . . . [T]he actions of each of us have a reference to those of the other, and are perform[ed] upon the supposition, that something is to be perform[ed] on the other part.¹⁷⁹

A convention is generally a shared understanding or implicit agreement, adhered to because of a general expectation that others will follow.¹⁸⁰ Conventions arise in response to a felt need, then as routinely

protecting the property of a railroad or a public service corporation means giving it the right to make certain charges. Hence . . . ownership . . . determines what share of . . . goods various individuals shall acquire.” Cohen, *supra* note 171, at 13.

173. Richard A. Epstein, *How to Create—or Destroy—Wealth in Real Property*, 58 ALA. L. REV. 741, 748 (2007).

174. See *State v. Shack*, 277 A.2d 369, 372 (N.J. 1971).

175. For example, the duration of real covenants and possibility of reverters have been limited to thirty years, unless recorded or renewed by the interested parties, and then they are only enforced by damages and not an injunction. See, e.g., N.Y. REAL PROP. LAW § 345 (McKinney 2006); MASS. GEN. LAWS ch. 184, §§ 27, 30 (2008).

176. Bentham wrote that property “is entirely the work of law,” “[p]roperty and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases.” JEREMY BENTHAM, *THEORY OF LEGISLATION* 68-69 (Richard Hildreth trans., 1975).

177. Book 3, Part 2, §2 (Oxford, Clarendon Press 1965) (1740).

178. *Id.* at 490.

179. *Id.*

180. THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 454 (Peter Newman

practiced, take on the force of law. They guide behavior and set the contours of rights and obligations.¹⁸¹

Should CERCLA aim to overrule common law principles? Does it aim to ensure justice for those injured by dangerous activities? Ensure that the burdens of remedying the effects of these dangerous activities fall upon the actors? Encourage honest and good behavior? Punish bad? Such questions are part of the debate among the circuits on whether "disposal" of hazardous wastes encompasses passive migration resulting in liability to all who happen to own contaminated land or instead requires active human conduct¹⁸² and whether a mere titular owner is an "owner" for purposes of CERCLA liability.¹⁸³

By the twentieth century, natural law as a legal philosophy¹⁸⁴ had become eclipsed by legal positivism. The legal system was described in terms of its normative functions, that is, of "'ought propositions,' which could be, within [their] own terms, valid and illuminating, regardless of the moral quality of those norms, and indeed independent of all extraneous ethical, social, economic, or political values."¹⁸⁵ Roscoe Pound stated that:

[T]he law is an attempt to reconcile, to harmonize, [or] to compromise . . . overlapping or conflicting interests, either through securing them directly and immediately, or through securing certain individual interests . . . so as to give effect to the greatest number of interests or to the interests that weigh most in our civilization, with the least sacrifice of other interests.¹⁸⁶

ed., Stockton Press 1998).

181. See, e.g., *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (standing for the view that conventions are seen in the pervasive presence of land use regulations); *Javins v. First Nat'l Realty Co.*, 428 F.2d 1071, 1081-82 (D.C. Cir. 1970) (requiring landlords to keep rented premises habitable); *Johnson v. Davis*, 480 So. 2d 625, 629 (Fla. 1985) (establishing a movement away from *caveat emptor* and requiring sellers of real property to disclose dangerous conditions in the premises).

182. See discussion, *supra* at text accompanying notes 76-98.

183. See discussion, *supra* at text accompanying notes 28-66.

184. Natural law is "[a] philosophical system of legal and moral principles purportedly deriving from a universalized conception of human nature or divine justice rather than from legislative or judicial action" BLACK'S LAW DICTIONARY 1127 (9th ed. 2009).

185. JOHN MAURICE KELLY, A SHORT HISTORY OF WESTERN LEGAL THEORY 356 (1992). In other words, the legal "ought," the norm, was viewed as of a purely formal character, subject to evaluation of its own terms and logic, not of any other scientific or sociological standards.

186. Roscoe Pound, *A Theory of Social Interests*, in READINGS IN JURISPRUDENCE 238, 245-46 (Jerome Hall ed., 1938).

The law can legitimately impose liability on conduct without any pretense that such conduct is morally wrong or otherwise blameworthy. Law operates by either the threat of “the bayonet” in one’s back or “the rope.”¹⁸⁷ The great legal pragmatist Oliver Wendell Holmes¹⁸⁸ suggested that rules we apply contemporaneously may have little to do with accomplishing any particular social purpose. Instead, the “purpose” of law may simply reflect the power and will of the majority backed up by “the club and the bayonet ready to drive you to prison or to the rope if you go beyond the established lines.”¹⁸⁹

How legal principles are derived is found in Holmes’s most famous aphorism that “[t]he life of the law has not been logic: it has been experience.”¹⁹⁰ It seems that by this phrase Holmes meant that there are often no general principles available to resolve various disputes.¹⁹¹ Instead, he pointed out that the “[c]ommon law [is] the result of courts using the doctrine of precedent to create a body of rules out of individual decisions, and using fiction and equity to adapt those rules to gradual social change.”¹⁹²

But this cynical view cannot be entirely embraced, for as Habermas pointed out, the “[l]aw’s validity, . . . [as] a matter of its normative character, its nature as a coherent system of meaning, as prescriptive ideas and values[, rests upon its] capacity to make claims supported by reason, in a discourse that aims at and depends on agreement between citizens.”¹⁹³ This means that the legal system must be “socially effective” and “ethically justified.” Habermas argued that in order for law to retain its claim to authority, legal philosophy must be cognizant of fundamental changes in

187. OLIVER WENDELL HOLMES, JR., *THE OCCASIONAL SPEECHES OF JUSTICE OLIVER WENDELL HOLMES* 109 (Mark DeWolfe Howe ed., 1962).

188. Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 *STAN. L. REV.* 787, 788 (1989).

189. HOLMES, *supra* note 187.

190. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 3 (John Harvard Library 2009) (1881).

191. Holmes sought to expose the legal reasoning of judges for what it was—bound up with personal or political biases, while attempting to cast the decision as the result of pure deduction.

192. Thomas C. Grey, *Holmes on the Logic of the Law*, in *THE PATH OF THE LAW AND ITS INFLUENCE: THE LEGACY OF OLIVER WENDELL HOLMES, JR.* 137 (Steven J. Burton ed., 2000). “When change accelerated under conditions of modernity, explicit forward-looking legislation became the main instrument of rule specification and legal reform.” *Id.*

193. ROGER COTTERRELL, *LAW, CULTURE AND SOCIETY: LEGAL IDEAS IN THE MIRROR OF SOCIAL THEORY* 31 (2006); see generally Jürgen Habermas, *Between Facts and Norms: An Author’s Reflections*, 76 *DENV. U. L. REV.* 937 (1999) (describing the relationship between the form of modern law and the moral conscience of society).

the world of social beliefs and values.¹⁹⁴ In sum, “the only law that counts as legitimate is one that could be rationally accepted by all citizens in a discursive process of opinion and will-formation.”¹⁹⁵

IV. The Federalization of State Law Through Preemption and Federal Common Law

While the breadth of the language of CERCLA seemed to suggest a radical departure from common law, as discussed above, it has not been interpreted that way. Indeed, the construction and application of CERCLA seems to resist a movement that I call the “federalization of property,” occurring in other areas of law. By this, I mean the increasing introduction of federal preemptive laws and preemptive interpretation of federal laws that overwhelm well-grounded common law principles. This is occurring in a host of different contexts: determinations as to when an interest is cognizable;¹⁹⁶ when an interest terminates;¹⁹⁷ what rights a transferee receives;¹⁹⁸ the effect of recording statutes;¹⁹⁹ the nature of a tenancy by the entirety;²⁰⁰ when rights can be disclaimed²⁰¹ and when an interest can

194. COTTERRELL, *supra* note 193, at 32.

195. JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS* 135 (William Rehg trans., 1996).

196. *United States v. Murray*, 217 F.3d 59, 63 (1st Cir. 2000) (acknowledging that federal law determines whether a state law property interest existed).

197. *Barclay v. United States*, 443 F.3d 1368, 1373 (Fed. Cir. 2006) (holding that upon issuing a Notice of Interim Trail Use or Abandonment, the National Trail System Act dictates when abandonment or railway easements occur).

198. *United States v. MacInnes*, 223 F. App'x 549, 553 (9th Cir. 2007) (holding that the transferee who received property from the government that was taken by forfeiture received title unburdened by prior liens).

199. *AA Am. Dev. Corp. v. United States*, No. CIV 06-2450-PHX-SMM, 2007 U.S. Dist. LEXIS 59692, at *10-11 (D. Ariz. Aug. 14, 2007) (finding that the government need not record notice of impending taking of property).

200. *United States v. Craft*, 535 U.S. 274, 288 (2002). There, the Court redefined the state law concept of a tenancy by the entirety by ruling that the Internal Revenue Service could attach property held as tenancy by the entirety, based upon the husband's sole tax liability; whereas under the common law, creditors of one spouse could not attach property under those circumstances. *See Sawado v. Endo*, 561 P.2d 1291, 1296-97 (Haw. 1997) (discussing the history of this type of tenancy and finding that the interest could not be attached based upon the liability of just one spouse). About one-third of the states still recognize the tenancy by the entirety in its classical form. *Id.* at 1294. On the other hand, many states today allow a lien arising from the debts of one spouse to attach to entireties property, but the lien cannot be levied upon during the marriage. *Id.* At most, the creditor recovers if the husband and wife divorce (and the tenancy becomes a tenancy in common) or if the debtor spouse survives the other. *See, e.g., V.R.W., Inc. v. Klein*, 503 N.E.2d 496, 500 (N.Y. 1986). In not yielding to the common law limits and concerns, it became necessary for the Court to recast the nature of the common law interest, ignoring its most

terminate.²⁰² The law's validity is threatened as courts cast off or reconfigure long-held conventions and understandings in favor of some presumed dominant federal interest. This movement is occurring in areas, to be sure, where a federal interest is present, but also in many cases where that federal interest would not necessarily be frustrated by observing state law limitations.

This recharacterization of property results not only from the assertion of the preeminence of federal interests,²⁰³ but also from the insistence of "background principles." In *Lucas v. South Carolina Coastal Council*, determining whether a landowner had the right to construct a dwelling along the waterfront notwithstanding land use regulations that prohibited construction, Justice Scalia explained that such a right existed unless there was a limitation that inhered in the title that was found in some "background principle" under the common law.²⁰⁴ That pronouncement became the new measure of ownership rights and has expanded to include not only principles from state common law but any federal law. In *American Pelagic Fishing Co. v. United States*, no taking of property occurred by the revocation of a permit to engage in fishing in the national waters pursuant to regulations adopted long after the permit was issued.²⁰⁵ The court found that a pervasive regime of regulation was in place when the plaintiff purchased its ship, that there was an "existing rule" or "background principle" of federal law that inhered in plaintiff's title and

important characteristic.

201. *Drye v. United States*, 528 U.S. 49, 52 (1999) (ruling that even though under state law an heir could disclaim an inheritance, this would not preclude the Internal Revenue Service from collecting taxes owed by that heir against the disclaimed interest; notwithstanding that under state law, the disclaimer created the legal fiction that the disclaimant predeceased the decedent and consequently the disclaimant's share of the estate passed to the person next in line to inherit. *Id.* at 52, 54.

202. *United States v. Locke*, 471 U.S. 84, 108-09 (1985) (upholding the Federal Land Policy Management Act ("FLPMA"), 43 U.S.C. § 1744 (2006)). The FLPMA required all mining claims to be recorded with the Bureau of Land Management within three years of passage of the Act and thereafter, on an annual basis, a filing of notice of intention to hold a claim, along with an affidavit of assessment of work done on the claim, the claim was otherwise extinguished; explaining that "[e]ven with respect to vested property rights, a legislature generally has the power to impose new regulatory constraints on the way in which those rights are used, or to condition their continued retention on performance of certain affirmative duties." *Id.* at 104.

203. *See, e.g., United States v. Stadium Apartments*, 425 F.2d 358 (9th Cir. 1970), *cert. denied*, 400 U.S. 926 (1970) (denying a mortgagor a state right to redeem where the foreclosing mortgagee is the federal government).

204. *See* 505 U.S. 1003, 1029-30 (1992).

205. 379 F.3d 1363, 1374 (Fed. Cir. 2004).

therefore burdened it.²⁰⁶ As a result, an owner can never be certain of the contours of his property if the government could at any time adopt regulations under a regulatory scheme limiting his ownership in ways that were not plain at the time the interest was acquired.

In *Bair v. United States*, “background principles” were employed to defeat the interests of claimants who were prior in time, in favor of the United States, under a federal loan program which conferred super-lien status.²⁰⁷ The court determined that the statute created “a pre-existing limitation on the property rights that the [claimants] could acquire under state law.”²⁰⁸ The claimants challenged the government’s assertion of priority on the ground, among other things, that the statute purported to create property rights in contravention of the principle that only states can create and define property rights.²⁰⁹ If Congress could create these property rights, the claimants argued, the result would be an end-run around the Takings Clause.²¹⁰ The Federal Circuit took the opposite view that a federal statute can serve as a “background principle” in categorical takings decisions. It noted that the Supreme Court previously held that federal law can limit state-created property interests.²¹¹ However, by the inclusion of

206. *Id.* at 1379. The Magnuson Act was enacted to take immediate action to conserve and manage the fishery resources found off the coast of the United States; the rights created by the Act necessarily included the right to fish, and nothing in the act purported to grant to owners of fishing privileges a property right to fish. *See id.*

207. 515 F.3d 1323, 1325, 1327 (Fed. Cir. 2008).

208. *Id.* at 1326.

209. *Id.* at 1327.

210. *Id.* at 1327 n.1.

211. *Id.* at 1327-28 (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992)); *see also Maritrans Inc. v. United States*, 342 F.3d 1344, 1352 (Fed. Cir. 2003) (“‘[B]ackground principles’ derived from an independent source, such as state, federal, or common law, define the dimensions of the requisite property rights for purposes of establishing a cognizable taking.” (citing *Lucas*, 505 U.S. at 1030)). But *see Cienega Gardens v. United States*, 331 F.3d 1319 (Fed. Cir. 2003), where that same court seemed to have reached the limits of its indulgence in this theory. It rejected the federal government’s assertion of the concept in an effort to impose specific limitations on rights of parties who had received government benefits. *Id.* at 1330-31. Through new regulations, the government sought to preclude owners from prepaying loans it had guaranteed, which would have permitted the owners to charge market rents for the housing built with the guaranteed funds. The court found that despite the existence of a set of regulations governing the program when the loans were taken out, the power of the agency to adopt new regulations was not a “background principle” as would enable it to redefine the property held by the owners. *Id.* at 1331. The new regulations would have changed the interest from one in which the owner could expect free and unfettered control after twenty years, to one in which the original burdens would continue indefinitely. *Id.* at 1323-24. The court rejected the notion that the existence of a regulatory scheme gives rights to adopt regulations, even if they are not

provisions such as the innocent landowner defense,²¹² the burdens of clean up under CERCLA would not fall upon all new owners by way of background principles.

CONCLUSION

Incursions into the realm of state property law, altering settled meanings in order to achieve very narrow federal interests, is an assault on legal theory and frustrates its historical role. Legal theory seeks specifically to develop a theoretical understanding of the nature of law as a social phenomenon. It aims at rationality in legal doctrine—necessary for its understanding and forecasting outcomes and for seeing how legal rules and regulations fit within a rational structure, their linkages and relationships.²¹³ It may involve a search for “purposive unity of law, so that all its elements are to be interpreted and evaluated in terms of some fundamental objective (for example social, moral, economic, or political) which they are thought to serve.”²¹⁴

To some, unity as a practical matter entails two forms of predictability:

[P]redictably consistent internal relationships of elements (rules, principles, concepts, decisions, . . .) within a legal system. . . . [and] predictably consistent external relationships between the system and what lies outside it, so that the determination of the legal from the non-legal (for example, legal rules from moral rules; judicial decisions from political decisions) can be a reliable one.²¹⁵

But the rationality of law disintegrates when the application of concepts are pragmatic rather than principled.²¹⁶

CERCLA is at once sweeping in its aims, yet imprecise in its expression. This circumstance could have been taken as a blank slate by courts, enabling a wholesale crafting of a new rights and liability regime with broad aims and draconian results. But the courts have been cautious,

reasonably foreseeable, or that participants in government programs could not have reasonable investment-backed expectations. *Id.* at 1347-48.

212. See *supra* note 9; *Montana v. Atlantic Richfield Co.*, 266 F. Supp. 2d 1238 (D. Mon. 2003) (discussing section of CERCLA precluding recovery of natural resource damages occurring before passage of the statute). For a discussion of the innocent landowner defense, see also *United States v. CDMG Realty Co.*, 96 F.3d 706 (3d Cir. 1996) and *Carson Harbor Village, Ltd v. Unocal Corp.*, 270 F.3d 863 (9th Cir. 2001).

213. See COTTERRELL, *supra* note 166, at 6.

214. *Id.* at 9.

215. *Id.* at 10.

216. See *id.* at 6.

finding preemption of state common law principles sparingly²¹⁷ and otherwise yielding to those principles that serve the ends of fairness and predictability.²¹⁸ The courts have taken pains to ensure that CERCLA does not apply indiscriminately, too harshly, or to persons who cannot fairly be said to share any responsibility for the harm sought to be remedied. In setting these contours, courts have resorted to tools of interpretation most likely to yield sensible and rational applications. While the ordinary dictionary is often the first tool they employ, they have endeavored to moor their interpretations to existing state law principles, particularly since property interests are at stake. Property relations have historically been governed by state law, and the expectations and understandings derived therefrom urge that the federal standard should be rooted in an adoption of state property law. As recent cases show, a federal common law of property is unsettling; it subjects citizens to two regimes where rights and definitions are at variance and dispute outcomes depend largely on the regime in which the citizen happens to find herself and between whom the contest arises, that is, individual *versus* individual or individual *versus* the federal government. If it is individual *versus* the federal government, it may mean that the federal government will win, not because it has the more meritorious case, but because it is the federal government. Understanding CERCLA teaches us about purposive decisionmaking.

217. See *United States v. General Battery Corp.*, 423 F.3d 295, 299 (3d Cir. 2005) (discussing the caution courts must employ before adopting a federal rule).

218. *Canadyne-Georgia Corp. v. NationsBank, N.A.*, 183 F.3d 1269, 1273 (11th Cir. 1999) ("The question of whether a particular defendant can be deemed an 'owner' under CERCLA . . . turns on application of state law . . ."); *United States v. Bestfoods*, 524 U.S. 51, 62-64 (1998) (determining that state common law determines "owner" and "operator" liability in the context of a corporate parent and subsidiary relationship).