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Is the *United States v. Olin* Decision Full of Sound and Fury Signifying Nothing?: The Future of Retroactive Liability of the Comprehensive Environmental Response, Compensation, and Liability Act

I. INTRODUCTION

"This land is your land, this land is our land, from California to the New York Island"¹

Modern hazardous waste statutes have a prodigious reach.² For example, selling a bag of dog chow to the wrong client has actually engendered liability under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), a major environmental statute.³ Despite the obvious absence of a realistic connection between hazardous waste and dog food, a five dollar bag of dog food ultimately cost the seller over three thousand dollars. For this feed business owner, the connection proved all too real.

To be sure, liability emanating from a dog food sale is an oddity transcending even CERCLA's broad liability scheme. Therefore, by way of instruction, this Comment will utilize the following hypothetical, but more common, CERCLA situation.⁴ In 1975, Girl Scout Troop 1313 buys

1. WOODY GUTHRIE, *This Land is Your Land* (Ludlow Music, Inc. 1956).

2. Besides CERCLA, these statutes include the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6992k (1994); the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. § 136 (1994); and the Toxic Substances Control Act (TSCA), 15 U.S.C. §§ 2601-2629 (1994). See Jerry L. Anderson, *The Hazardous Waste Land*, 13 VA. ENVTL. L.J. 1, 6-7 (1993) (noting that the scope of CERCLA liability has grown increasingly broader since the statute's enactment in 1980).

3. 42 U.S.C. §§ 9601-9675 (1994); see Jack Anderson & Michael Binstein, *Superfund Inadvertently Forces Innocents to Pay*, PORTLAND OREGONIAN, Mar. 7, 1994, at B7, available in 1994 WL 4558097. Russ Zimmer settled with the Environmental Protection Agency (EPA) for \$3500 after being named in a hazardous waste lawsuit merely because he accepted third-party checks from a plant that salvaged used batteries. See *id.* The checks constituted payment for a bag of dog food and a bag of seed. See *id.*

4. The following example utilizing the fictitious Girl Scout Troop 1313 is, by no

a piece of property from chemical conglomerate Toxluv Corporation, hoping to turn it into a permanent camp site for use by troops in the surrounding area. A few months later troop leaders determine that lack of funding will preclude them from building the campsite. Girl Scout Troop 1313 immediately re-sells the property to a local developer intending to build a business park on the plot. Unbeknownst to the Girl Scout troop leaders, the prior owner, Toxluv, had buried several drums filled with hazardous chemicals on a remote section of the site. Girl Scout Troop 1313 never discovered the existence of the barrels during their brief, transient ownership of the site.

A few years later in 1980, Congress enacts CERCLA,⁵ vowing to clean up the calamitous hazardous waste problem nationwide. CERCLA defines four distinct classes of liable parties, otherwise known as potentially responsible parties (PRPs),⁶ and courts unanimously find that the statutory scheme applies retroactively.⁷ As a result, once a party is defined as a PRP it is potentially liable for any acts or omissions committed prior to the CERCLA's enactment. The innocuous Troop 1313, who committed no "act" other than transitory ownership of this site, will be classified as a PRP.⁸ Moreover, because CERCLA simply requires a "release or substantial threat of release" to trigger liability,⁹ the Girl Scout troop could be

means, an uncommon one. See Anderson & Binstein, *supra* note 3, at B7; John J. Lyons, Comment, *Deep Pockets and CERCLA: Should Superfund Liability Be Abolished?*, 6 STAN. ENVTL. L.J. 271, 308 n.172 (1987) (noting a case which held that an owner of property for *one hour* could be held liable as a matter of law) (citing *United States v. Carolawn Co.*, 21 Env't Rep. Cas. (BNA) 2124, 2128 (1991)).

5. The terms CERCLA and Superfund will be used interchangeably throughout this discussion.

6. CERCLA classifies four categories of potential defendants: (1) current owners and operators of hazardous waste disposal facilities; (2) past owners and operators; (3) generators of hazardous waste; and (4) transporters of hazardous waste. See 42 U.S.C. § 9607(a)(1)-(4) (1994).

7. See, e.g., *Ohio ex rel. Brown v. Georgeoff*, 562 F. Supp 1300, 1313-14 (N.D. Ohio 1983).

8. See 42 U.S.C. § 9607(a). Girl Scout Troop 1313 would be classified as a "past owner" PRP. See *id.* § 9607(a)(2); see *infra* note 65 and accompanying text.

9. See 42 U.S.C. § 9604(a)(1). CERCLA defines a release very liberally to include "spilling, leaking . . . emptying, discharging, . . . escaping, leaching." See *id.* § 9601(22). "Disposal may occur without any volitional human participation. All that is required is that the hazardous substance has been released into the environment at some point during a party's control of the facility." *HRW Sys., Inc. v. Washington Gas Light Co.*, 823 F. Supp. 318, 339 (D. Md. 1993) (citing *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837 (4th Cir. 1992) (citations omitted); see also *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1045 (2d Cir. 1985) (holding that "leaking tanks and pipelines, the continuing leaching and seepage from the earlier spills, and the leaking drums" were all releases and that defendant's inexpert handling of the hazardous waste was a threat of release).

liable for millions of dollars in site cleanup costs resulting from their brief term of ownership. Despite its barely-traceable involvement with the site and lack of knowledge regarding any waste disposal committed by prior owner ToxLuv, the troop will be drawn into a lawsuit or forced to settle¹⁰—either option costing them sums of money well beyond their causal culpability.¹¹ Moreover, the Girl Scout troop in 1975 had no way of foreseeing its post-1980 CERCLA liability and thus no opportunity to spread or otherwise internalize the costs.¹²

10. CERCLA specifically defines and limits possible defenses. See Michael P. Healy, *Direct Liability For Hazardous Substance Cleanups Under CERCLA: A Comprehensive Approach*, 42 CASE W. RES. L. REV. 65, 96-99 (1992) (analyzing the available defenses and commenting that their limited natures reflect congressional intent to give CERCLA wide-ranging liability). The statute promulgates three available defenses: "(1) an act of God; (2) an act of war; (3) an act or omission of a third party other than an employee or agent of the defendant." See 42 U.S.C. § 9607(b). While the third enumerated defense would seem to be the only practical defense to liability, it asks a great deal and places significant constraints on those defendants who would claim it. For a discussion of this so-called "innocent landowner" defense, see Joseph R. Dancy & Victoria A. Dancy, *Oil and Gas Issues Involved in CERCLA Reauthorization*, 27 ST. MARY'S L.J. 103, 109 & nn.24-26 (1995). In interpreting language regarding the requisite inquiry a third party must make the courts have applied the standards "in effect at the time of the purchase." See *HRW Systems*, 823 F. Supp. at 348 (adding that it is a "question of what the [purchaser] knew"). In the scenario offered by this Comment, the Girl Scouts will be held to the standards of inquiry of 1975 with particular weight given to any knowledge that may have caused them to make an inquiry, particularly given the fact they were purchasing from a chemical company. See *id.* But see George Van Cleve, *Would the Superfund Response Cost Allocation Procedures Considered by the 103D Congress Reduce Transaction Costs?*, 25 ENVTL. L. REP. (ENVTL. L. INST.) 10134 (March 1995), available in WESTLAW, 25 ELR 10134 (asserting that intermediate landowners who purchase after 1980 and contribute no contamination could be considered not liable or be allocated a part of liability depending upon the federal circuit in which the case is heard).

11. The mere act of being named a PRP triggers considerable transaction costs. See Van Cleve, *supra* note 10, at 10134 nn.4-7 (analyzing the debilitating Superfund transaction costs); see also William N. Hedeman et al., *Superfund Transaction Costs: A Critical Perspective On The Superfund Liability Scheme*, 21 ENVTL. L. REP. (ENVTL. L. INST.) 10413 (July 1991), available in WESTLAW, 21 ELR 10413 (asserting that the substantial transaction costs are innate to CERCLA's liability scheme and thus unavoidably provide serious obstacles to CERCLA site cleanup success); Lyons, *supra* note 4, at 271-72 (commenting on the overwhelming transaction costs of CERCLA and the ways in which it hinders cleanups).

12. The concept of internalizing costs theorizes that a polluter must bear the weight of the true cost of his actions, otherwise he will exercise little or no care in handling the hazardous wastes. See Michael J. Gergen, *The Failed Promise of the "Polluter Pays" Principle: An Economic Analysis of Landowner Liability for Hazard-*

Despite its attenuated nexus to the hazardous waste disposal, Girl Scout Troop 1313 faces staggering liability costs resulting from CERCLA's potent triumvirate of strict liability,¹³ joint and several liability¹⁴, and retroactive liability.¹⁵ Additionally, the frequent presence of so-called "orphan shares"—PRPs who have declared bankruptcy or otherwise cannot pay—compounds the liability burden.¹⁶ Thus, because

ous Waste, 69 N.Y.U. L. REV. 624, 627-28 (1994); Lynda J. Oswald, *Strict Liability of Individuals Under CERCLA: A Normative Analysis*, 20 B.C. ENVTL. AFF. L. REV. 579, 594-95 (1993). If the polluter is not required to pay for his waste disposal then his pollution becomes an "external cost" which is borne by others in society. See Gergen, *supra*, at 627. Additionally, the polluter adopts an irresponsible attitude about hazardous waste disposal because he does not have to factor into his gains the internalized costs of his pollution. See *id.* at 627-28. CERCLA promulgates a "polluter pays" principle to force landowners to internalize the costs of their pollution. See *infra* notes 154-55 and accompanying text. The polluter pays principle of CERCLA loses force when applied retroactively because the polluter had no way to internalize the costs. See Anderson, *supra* note 2, at 36; Gary T. Schwartz, *New Products, Old Products, Evolving Law, Retroactive Law*, 58 N.Y.U. L. REV. 796, 825 (1983).

13. CERCLA defines liability by reference to "the standard of liability which obtains under section 1321 of Title 33," the Clean Water Act. See 42 U.S.C. § 9601(32). Legislative history shows that Congress was aware in promulgating this statutory language that courts had interpreted section 1321 of CWA to impose strict liability. See *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 805 (S.D. Ohio 1983); see also *General Elec. Co. v. Litton Indus. Automation Sys., Inc.*, 920 F.2d 1415, 1418 (8th Cir. 1990) (stating that CERCLA is a strict liability statute).

14. See *United States v. Monsanto Co.*, 858 F.2d 160, 171 (4th Cir. 1988) (finding that "[w]hile CERCLA does not mandate the imposition of joint and several liability, it permits it in cases of indivisible harm"); *Chem-Dyne*, 572 F. Supp. at 810-11 (holding that CERCLA presumptively imposed joint and several liability requiring a defendant to show a reasonable basis to apportion the harm). But see *United States v. A & F Materials Co.*, 578 F. Supp. 1249, 1254 (S.D. Ill. 1984) (holding that courts may impose strict liability but also may consider the "Gore factors" in dividing the harm).

15. See 42 U.S.C. § 9607(a); *Ohio ex rel. Brown v. Georgeoff*, 562 F. Supp. 1300, 1313-14 (N.D. Ohio 1983) (concluding that Congress intended CERCLA to apply retroactively to transporters). In summary, CERCLA triggers strict liability, joint and several liability, and retroactive liability. This liability "trifecta" has engendered the gross inequity that so many perceived, whereby a PRP (like Troop 1313) with a tenuous connection to a hazardous waste disposal site can ultimately shoulder the bulk of the liability. See Anderson, *supra* note 2, at 6 (noting that "cleanup costs are often borne by those who are not responsible for the problem at all, and that many other parties are held liable to an extent far exceeding their actual responsibility."); see also 132 CONG. REC. E1353-54 (daily ed. April 23, 1986) (statement of Rep. Ritter) ("[A]ny generator, any transporter, any waste-site owner or operator can be held responsible for full costs even if what it did was totally without fault and had only the most trivial consequences.").

16. See William D. Evans, Jr., *The Continuing Problem of Allocating Orphan Shares in CERCLA Litigation*, WEST'S LEGAL NEWS, Oct. 22, 1996, available in 1996 WL 600021 (stating that "the request to solvent PRPs to carry insolvent parties cre-

CERCLA is retroactive, it draws many more PRPs within the scope of the orphan share effect, the inequitable impact of CERCLA stems from this cumulative effect of the liabilities.¹⁷ The foregoing scenario, while fictional in this instance, is nightmarishly real for the thousands of parties, like Troop 1313, who somehow find their names attached to a waste site.¹⁸

Because multitudes of Troop 1313s exist, a host of reformers from all levels of government and law urge major restructuring of CERCLA.¹⁹

ates controversy, to say the least, within the PRP group," and citing *United States v. Atlas Minerals and Chems., Inc.*, Civ. A. No. 91-5118, 1995 WL 510304 (E.D. Pa. Aug. 22, 1995) in which the court noted that about 19% of a \$25 million cleanup was attributable to orphan shares).

17. See John Shanahan, *Superfund Status Quo: Why The Reauthorization Bills Won't Fix Superfund's Fatal Flaws*, The Heritage Foundation Issue Bulletin No. 204, Oct. 3, 1994 (visited Jan. 30, 1997) <<http://www.heritage/library/categories/enviro/ib204.html>>. If CERCLA applies retroactively to a minor player such as Troop 1313, that PRP can be brought within the web of strict liability and be potentially responsible for the entire cost of cleanup under joint and several liability. This disparate impact results from the controversial nexus initiated by retroactive liability. See Anderson, *supra* note 2, at 6-8 (characterizing the entire process as "an extremely irrational distribution of liability" and terming it a "liability lottery").

18. These parties have included churches, Girl Scouts, and widows. See Dancy & Dancy, *supra* note 10, at 117 n.65 (listing unusual parties who have been the subject of PRP suits) (citing Ridgway M. Hall et al., *Superfund Response Cost Allocations: The Law, the Science, and the Practice*, 49 BUS. LAW. 1489, 1491 (1994)). In 1993, several members of Congress attempted to exclude certain parties, such as municipal landfills and small businesses, from liability through an amendment to Superfund called the Toxic Cleanup Equity and Acceleration Act of 1993. See 139 CONG. REC. S5947-53 (statements of Senators Lautenberg and Wellstone) (daily ed. 1993); 139 CONG. REC. E277-78 (daily ed. Feb. 4, 1993) (statement of Rep. Torricelli). Members of Congress urged the reform because of what they perceived as inequitable results flowing out of CERCLA litigation and enforcement. A sense of injustice permeates their introductory comments to the legislation. "[T]housands of local governments, small businesses, and individual citizens across the country have learned that the simple act of taking out the garbage can result in multimillion dollar lawsuits." 139 CONG. REC. E277 (daily ed. Feb. 4, 1993) (statement of Rep. Torricelli). "The Girl Scouts and Boy Scouts, churches, pizza parlors, and other innocent parties have been faced with extortionate claims by the real polluters." 139 CONG. REC. S5947 (daily ed. May 13, 1993) (statement of Sen. Lautenberg). "Among the small businesses being extorted for having their waste brought to the Oak Grove Municipal Landfill are a donut shop and travel agent." 139 CONG. REC. S5953 (daily ed. May 13, 1993) (statement of Sen. Wellstone).

19. Government officials on both sides of the debate call for CERCLA reform. See Dancy & Dancy, *supra* note 10, at 105 n.5 (citing Bernard J. Reilly, *Stop Superfund*

While some support for maintaining the status quo exists, the more pervasive notion holds that CERCLA falls woefully short of its original and most fundamental charge—to clean up hazardous waste sites across the country—and ushers in a new urgency for the statute's reform.²⁰ Instead of marshaling and funding cleanups, CERCLA has left a bitter trail of broken promises and bankrupt Troop 1313s.²¹ Many tab CERCLA's retroactivity as a primary cause of this disappointment.²² Following several

Waste, ISSUES IN SCI. AND TECH., Spring 1993, at 57). Several members of Congress made provocative statements regarding CERCLA reform: "Why are we not moving ahead with Superfund reform? We should be. Now is the opportunity." 142 CONG. REC. H6767, H6771 (daily ed. June 25, 1996) (statement of Rep. Boehlert); "I would say the 'Nightmare on Elm Street' has been running for the last 15 years, and it is called the existing Superfund law" 142 CONG. REC. H6767, H6778 (daily ed. June 25, 1996) (statement of Rep. Oxley). "We can just continue on our merry way and pour money down a rat hole instead of really solving the problem." 142 CONG. REC. H6779 (daily ed. June 25, 1996) (statement of Rep. Oxley). Legal scholars have joined the chorus urging CERCLA reform. See, e.g., Anderson, *supra* note 2, at 67 (calling CERCLA "a black hole that indiscriminately devours all who come near it"); Jerome M. Organ, *Superfund and the Settlement Decision: Reflections On The Relationship Between Equity And Efficiency*, 62 GEO. WASH. L. REV. 1043, 1043-44 (1994) (arguing that Congress should "amend CERCLA"); Jonathan I.J. Goldberg, Note, *An Uncertain Future: Retroactivity, Insurance, and the EC's Attempts at Environmental Liability*, 33 VA. J. INT'L L. 685, 714 (1993) ("CERCLA's 'draconian environmental liability' regime has been much more effective at generating law suits than it has at cleaning up pollution.") (quoting *The Object Lesson at Wheel Jane*, ENERGY ECONOMIST, Jan. 1, 1992); Lyons, *supra* note 4, at 271-73 (urging a "radical alteration" of CERCLA funding through taxation).

20. The site remediation pace shows some signs of quickening; the EPA recently announced that it has cleaned up its 400th site since the statute's enactment. See *EPA Is Making Progress on Speeding Up Superfund Cleanups*, WEST'S LEGAL NEWS, October 17, 1996, available in 1996 WL 592354. Tellingly, over 75% of the worst toxic sites on the National Priorities List (NPL) await clean up. See *id.* Moreover, the cleanup cost has reached the \$20 billion plateau and still rises, unimpeded. See Dancy & Dancy, *supra* note 10, at 105 n.7. Perhaps the most troubling fact is that new dump sites continue to emerge; some estimate that the eventual number of sites needing cleanup will exceed 10,000 and will cost up to \$120 billion. See *id.* (citing Dennis Wamsted, *CBO Study Sees Costly Future for Superfund*, ENV'T WK., Feb. 3, 1994, at 1, 12).

21. In one case, a limited partnership had spent \$1.2 million on a project and then was compelled to declare bankruptcy following the discovery that the development land it had purchased was contaminated. See *NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 897 (9th Cir. 1986).

22. See, e.g., Dancy & Dancy, *supra* note 10, at 109-110; Dale A. Oesterle, *Viewing CERCLA as Creating an Option on the Marginal Firm: Does it Encourage Irresponsible Environmental Behavior?*, 26 WAKE FOREST L. REV. 39, 47 & n.27 (1991) (calling retroactivity "unconscionable"); Goldberg, *supra* note 19, at 713. But see *Development in the Law—Toxic Waste Litigation: V. Liability Issues in CERCLA Cleanup Actions*, 99 HARV. L. REV. 1511, 1540-41 (1986) [hereinafter *Development*] (stating that courts are "correct" for finding CERCLA retroactive); Healy, *supra* note 10, at 82-83

uninterrupted years of retroactive application, a 1996 Alabama District Court in *United States v. Olin Corp.*, became the first court to hold that CERCLA should not apply retroactively.²³ In addition, several congressional leaders have recently conditioned CERCLA reauthorization on the elimination of the retroactive element of CERCLA's liability scheme.²⁴ As criticism of CERCLA mounts, retroactivity draws much fire.²⁵ Given the atmosphere of reform already hovering in the air, these recent developments warrant a renewed look at the viability and fairness of CERCLA retroactivity. *Olin's* reversal on appeal does not minimize the underlying CERCLA policy debate which continues to be waged, and *Olin* continues to be a lightning rod for discussion of CERCLA retroactivity. This Comment will further that discussion by addressing whether

(claiming that through its retroactive impact "CERCLA ensures that those parties [who were responsible and profited] ultimately bear the full cost of their activities"); Amy Blaymore, Comment, *Article and Comment: Retroactive Application of Superfund: Can Old Dogs Be Taught New Tricks?*, 12 B.C. ENVTL. AFF. L. REV. 1, 336 (1985) (concluding that CERCLA retroactive application is constitutional and fundamental to Congress's desire to clean up waste sites).

23. See *United States v. Olin Corp.*, 927 F. Supp 1502 (S.D. Ala. 1996), *rev'd*, 107 F.3d 1506 (11th Cir. 1997). In March 1997, *Olin* was overturned on appeal. See *United States v. Olin Corp.*, 107 F.3d 1506 (11th Cir. 1997). Judge Kravitch, writing for the panel, held that contrary to Judge Hand's lower court ruling, Congress manifested a clear intent for CERCLA to be retroactive and stated that the district court's ruling was unsoundly based upon the argument that CERCLA was a compromise bill which lacked that intent. See *id.* at 1514. Judge Kravitch added that the compromise did not turn upon retroactivity and that the legislative history clearly revealed an intent on the part of Congress for CERCLA to reach retroactive conduct. See *id.*

24. See *Ways-Means Leaders Say Retroactive Liability Under CERCLA Must Be Repealed*, 40 Banking Rep. (BNA) No. 8, at 365 (Feb. 20, 1995) [hereinafter *Ways-Means*]; see also Dancy & Dancy, *supra* note 10, at 110 (citing *Exception for Federal Facilities Sought in Call to Eliminate Retroactive Liability*, 25 Env't Rep. (BNA) No. 39, at 1870 (Feb. 3, 1995) (stating that members of both political parties propose eliminating CERCLA retroactivity)). Superfund's taxing authority was set to expire on December 31, 1995 and the re-authorization funding bill remains stalled in committee. See *Ways-Means*, *supra*, at 365. For a discussion of the ongoing reauthorization battles see *infra* notes 71-77 and accompanying text.

25. See, e.g., Dancy & Dancy, *supra* note 10, at 109; *Ways-Means*, *supra* note 24, at 365; *House Committee Leaders Push For Repeal of Retroactive, Joint and Several Liability*, 25 Env't Rep. (BNA) No. 41, at 1999 (Feb. 17, 1995) [hereinafter *House Committee Leaders*]; see also Mark D. Tucker, 'Retroactive Liability' Is Challenged, NAT'L L. J., Oct. 14, 1996, at C1 (discussing the effect that eliminating retroactive liability will have on corporations).

CERCLA retroactivity should continue and what form it should ultimately adopt.

Section II of this Comment frames the statute in its impetus and legislative history.²⁶ First, this section traces the congressional actions and social outcry which triggered CERCLA's passage.²⁷ More particularly, this section measures the congressional intent behind retroactivity, given its central role in any judicial ruling on the question. This section will then examine the early line of court cases which established the retroactive liability.²⁸ Finally, Section II looks to recent events culminating in the *United States v. Olin Corp.* decision denying CERCLA retroactivity and its subsequent reversal on appeal.²⁹ Section III documents the arguments supporting CERCLA retroactivity as imperative to the bill's purpose.³⁰ Section IV presents the fundamental arguments in opposition to CERCLA retroactive application, focusing on fairness.³¹ Section V lays out several viable proposals for CERCLA modification and reform.³² Section VI concludes that, in order to both remain true to its site clean-up mission and to avoid egregious inequities, CERCLA should adopt a negligence standard for pre-enactment PRPs—thereby applying retroactivity only to culpable parties.³³

II. BACKGROUND & HISTORY: CERCLA ENACTMENT & CASE HISTORY

A. Legislative History of CERCLA

During the 1970s, a wave of legislation crashed through Congress, forcefully impelled by the public's outrage over environmental damage from toxic wastes.³⁴ Pre-CERCLA, the two dominant pieces of legislation were the 1972 Clean Water Act (CWA)³⁵ and the 1976 Resource

26. See *infra* notes 34-143 and accompanying text.

27. See *infra* notes 34-77 and accompanying text.

28. See *infra* notes 78-97 and accompanying text.

29. See *infra* notes 98-143 and accompanying text.

30. See *infra* notes 144-68 and accompanying text.

31. See *infra* notes 169-214 and accompanying text.

32. See *infra* notes 215-33 and accompanying text.

33. See *infra* notes 234-42 and accompanying text.

34. See Healy, *supra* note 10, at 68-69. The most widely publicized toxic incidents that motivated CERCLA's passage were Love Canal, "Valley of the Drums," and the James River discharges. See *id.*; see also William D. Evans, Jr., *The Chaotic Quality of Superfund Contribution Litigation*, WEST'S LEGAL NEWS, Sept. 13, 1996, at 7, available in 1996 WL 516196 ("CERCLA was the product of disturbing media reports in the late 1970s on hazardous waste sites, such as New York State's Love Canal, that focused public attention on the national toxic waste disposal problem."); Organ, *supra* note 19, at 1046 n.17; Blaymore, *supra* note 22, at 1.

35. 33 U.S.C. §§ 1251-1387 (1983 & Supp. 1997). The Clean Water Act gave the

Conservation and Recovery Act (RCRA).³⁶ RCRA sections 7002 and 7003, in particular, ignited a substantial amount of litigation because they granted the Environmental Protection Agency (EPA) authority to sue in order to "restrain persons from contributing to any waste activities which may present an imminent and substantial endangerment to health or the environment."³⁷ RCRA, a largely prospective statute, proved incapable of meeting the remedial needs of catastrophic environmental events such as Love Canal, the infamous toxic waste disaster of the late 1970s which sparked the public demand for tougher legislation.³⁸ Sensing danger, Congress quickly responded with the remedially-focused CERCLA to combat past hazardous waste problems which would only later reveal their true toxic natures.³⁹

CERCLA's legislative journey is a rough tale incompletely told.⁴⁰ Several predecessor bills never reached legislative adulthood,⁴¹ CERCLA it-

EPA the ability to act when hazardous substances were released. *See id.* § 1321(b)(1).

36. 42 U.S.C. §§ 6901-6987 (Supp. 1981). RCRA is primarily a regulatory statute which charges generators of hazardous wastes and others with tracking the wastes from "cradle to grave." *See* Blaymore, *supra* note 22, at 4 (discussing the purposes of RCRA).

37. *See* 42 U.S.C. § 6973 (1994); Blaymore, *supra* note 22, at 5; *see also* Dancy & Dancy, *supra* note 10, at 111 (commenting that Congress passed RCRA in order to regulate waste activities occurring post-enactment); Oswald, *supra* note 12, at 603-04 n.94 (noting the forward-looking nature of RCRA while underscoring CERCLA's remedial purpose).

38. *See* Healy, *supra* note 10, at 68-69 & n.10; Blaymore, *supra* note 22, at 1-3.

39. CERCLA was a fundamentally retrospective bill. *See* Dancy & Dancy, *supra* note 10, at 106; Healy, *supra* note 10, at 68; Oswald, *supra* note 12, at 603 n. 94; Blaymore, *supra* note 22, at 1-3; *see also* Organ, *supra* note 19, at 1046 (stating that present regulatory statutes were "incapable" of dealing with environmental waste evils from "past waste disposal practices").

40. With CERCLA, Congress rushed a complex piece of legislation to maturity ahead of its time. *See* Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1, 1 (1982).

41. The 95th Congress twice attempted to handle the oil and toxic spill problem. *See, e.g.*, Hazardous Waste Containment Act, H.R. 7020, 96th Cong. (1980), *reprinted in* 1980 U.S.C.C.A.N.; the Comprehensive Oil Pollution Liability and Compensation Act, H.R. 85, 96th Cong. (1979); and the Environmental Emergency Response Act, S. 1480, 96th Cong. (1979); S. 2900, 95th Cong. (1978) (toughening the oil and hazardous substance provisions of the Clean Water Act); S. 2083, 95th Cong. (1978); H.R. 6803, 95th Cong. (1978) (attempting to create oil pollution liability and compensation). *See also* George Clemon Freeman, Jr., *A Public Policy Essay: Superfund Retroactivity Revisited*.

self was a compromise bill formulated out of the remains of three previous attempts to deal with the hazardous waste fiascos.⁴² The Congressional debates reveal great stress over several elements of Superfund—most notably its liability scheme.⁴³ Unfortunately, the actual political machinations and behind-the-scene maneuverings which propelled the bill's enactment have escaped proper telling; the statute's legislative history is an abnormally lean one for a major bill.⁴⁴ We do know that a "lame duck" Congress, in the waning days of a power shift from the Carter Administration to the Reagan Administration, quickly herded the bill through a narrow opening.⁴⁵ Several key Senators, who had objected to prominent aspects of the bill including its latent retroactivity,⁴⁶ were suddenly "persuaded" to change their minds and came out in support of the bill.⁴⁷ The fairly abrupt philosophical reversals on fundamental issues like retroactivity suggested the determinist mood of these hold-out Senators to enact a hazardous waste law in some form, no matter how premature, to meet the emerging crisis.⁴⁸

ed, 50 BUS. LAW. 663, 673 (Feb., 1995) (highlighting the bills which preceded CERCLA); Grad, *supra* note 40, at 1-7 (analyzing the predecessor bills).

42. See, e.g., S. 1480, 96th Cong. (1980); H.R. 7020, 96th Cong. (1980); H.R. 85, 96th Cong. (1979). See generally STAFF OF SENATE COMM. ON ENV'T & PUB. WORKS, 97TH CONG., 2D SESS., A LEGISLATIVE HISTORY OF THE COMPREHENSIVE ENVT'L RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980 (SUPERFUND), PUBLIC LAW 96-510 V (Comm. Print 1983) [hereinafter COMMITTEE PRINT], available in WESTLAW, CERCLA-LH database (presenting the history and related documents pertinent to the passage of CERCLA); Freeman, *supra* note 41, at 672-78 (summarizing the journey of the bill through Congress).

43. See generally Grad, *supra* note 40, at 14-35 (tracing the battles in Congress over CERCLA). CERCLA's potential retroactivity garnered a considerable amount of concern in Congress. See S. REP. NO. 848, at 119-22 (1980).

44. See *infra* notes 46-48 and accompanying text; see also United States v. Olin Corp., 927 F. Supp. 1502, 1513 (S.D. Ala. 1996), *rev'd*, 107 F.3d 1506 (11th Cir. 1997) (commenting that CERCLA's legislative history is devoid of substance); *Development*, *supra* note 22, at 151 (calling CERCLA's legislative history "unhelpful"); Grad, *supra* note 40, at 1 (detailing the rushed nature of the bill's passage).

45. See Ohio v. Georgeoff, 562 F. Supp. 1300, 1310 n.12 (N.D. Ohio 1983); Freeman, *supra* note 41, at 673; Grad, *supra* note 40, at 1.

46. See Grad, *supra* note 40, at 14 (discussing the concerns of Senators Domenici, Bentsen, and Baker about potential retroactivity of the bill).

47. See Freeman, *supra* note 41, at 673-75. These apparent reversals occurred without the detailed record of the legislative history upon which legal scholars typically rely. See Grad, *supra* note 40, at 1 (noting debate was limited, rules done away with, and amendments disallowed because of the time pressures and lame duck nature of this Congress).

48. See Freeman, *supra* note 41, at 676. The letter from Senators Stafford and Randolph which accompanied the bill to the House stated:

That the bill passed at all is a minor wonder. Only the *frailest, moment-to-moment coalition* enabled it to be brought to the Senate floor and consid-

During the debates over CERCLA, several members of Congress pointedly raised fears about the potency of retroactive liability.⁴⁹ Senator Domenici went so far as to openly propose an amendment to limit the scope of CERCLA's retroactivity.⁵⁰ Such firm opposition by Domenici and other key Senators boded poorly for CERCLA passage as the last days of that Congress wound down.⁵¹ Several compromise bills were quickly brought to the forefront in the hopes that some type of bill could survive.⁵² Unfortunately, "[n]othing resembling the usual open process of congressional debate occurred. All discussions and negotiations took place behind closed doors."⁵³ Thus, CERCLA analysts and courts are left with a significant void in the bill's legislative history.⁵⁴ This vacuum in the record has proved crucial because so much of the bill's liability impact has been left to judicial interpretation, which has proceeded without

ered. Indeed, within a matter of hours that fragile coalition began to disintegrate to the point, in our judgment, *it would now be impossible to pass the bill again, even unchanged*. . . . Had we changed a comma [sic] or a period, the bill would have failed. With the evaporation of the balance of interests which permitted us to go to the floor in the first place, *amendments to the bill will kill it* if it is returned to the Senate.

126 CONG. REC. at H11,772 (daily ed. Dec. 3, 1980) (emphasis added), *reprinted in* COMMITTEE PRINT, *supra* note 42, at 774-75.

49. See Freeman, *supra* note 41, at 672. Senators Domenici, Bentsen and Baker openly expressed reservations about any CERCLA retroactivity prior to the Bill's enactment. See COMMITTEE PRINT, *supra* note 42, at 427 ("The issue of applying the new standards retroactively remains a troubling one. While the Committee accepted a Domenici amendment to limit the scope of the retroactivity, the issue remains unresolved."). The Senators also expressed concerns about the enforcement motivations of the Justice Department regarding CERCLA, noting that a Department employee had stated that "government is perfectly prepared to *punish the innocent for the sins of the guilty*." See *id.* at 428 (emphasis added). But see *Nova Chems., Inc. v. GAF Corp.*, 945 F. Supp. 1098, 1105 n.12 (E.D. Tenn. 1996) (discounting the Senators' statements because they are "additional views" and thus are "unpersuasive" as support of congressional intent disfavoring retroactivity).

50. See Freeman, *supra* note 41, at 673 (quoting S. REP. NO. 848, at 427 (1981)).

51. See *id.*

52. See *id.* at 673-74.

53. *Id.* at 674. Several have noted the "stealth" character of CERCLA's legislative journey. See *United States v. Olin Corp.*, 927 F. Supp. 1502, 1513-14 (S.D. Ala. 1996), *rev'd*, 107 F.3d 1506 (11th Cir. 1997); Freeman, *supra* note 41, at 675-78; Grad, *supra* note 40, at 1.

54. See *supra* notes 44-48 and accompanying text; see also *Nova*, 945 F. Supp. at 1104 n.9 (stating that the journey of the bill through Congress produced "no conference report").

a detailed roadmap of legislative history.⁵⁵ Additionally, the bill's final language lacks the sharpness and polish of most bills, fostering much unnecessary ambiguity.⁵⁶ The twin effects of an incomplete legislative history and ambiguous bill language has left the courts with a great deal of discretion in interpreting CERCLA retroactivity.⁵⁷ So far, courts have foisted retroactivity onto CERCLA application and have unanimously found the necessary legislative history or intent.⁵⁸ Judicial analysis has centered on finding the requisite congressional intent.⁵⁹ Still, many courts have found "clear intent" on the part of Congress and empowered CERCLA with retroactivity, despite the sparse record on the issue.⁶⁰

55. See Freeman, *supra* note 41, at 674 ("Neither transcripts of committee hearings or bill mark-ups or any report of these informal gatherings, which might be analogous to a committee or a conference report, issued along with the compromise bill, are available for examination.").

56. See *id.* Senator Randolph claimed that "backroom negotiators had deliberately created ambiguity and equivocation in the statute by deleting provisions." *Id.* In fact, Congress apparently intended for the Courts to shoulder the burden of interpreting many elements of CERCLA using common law guidelines. See *id.*; see also Oswald, *supra* note 12, at 579 & n.41, 599-600 & n.77 (noting this intent regarding the strict liability aspect which is not explicitly laid out in the statute). Compounding the problem for courts, the bill did not receive the requisite and usual editing attention. See Ohio ex rel. Brown v. Georgeoff, 562 F. Supp. 1300, 1310 n.12 (N.D. Ohio 1983) (noting that CERCLA was "rushed through a lame duck session of Congress, and therefore, might not have received adequate drafting").

57. Congress could have mooted all discussion of retroactive application by inserting an express retroactivity clause, but chose not to do so. See Georgeoff, 562 F. Supp. at 1309 ("It would have been a simple matter for Congress to have included a provision within the Act providing that liability would be imposed retroactively. . . . Yet, Congress failed to make this statement.").

58. See, e.g., United States v. Northeastern Pharm. & Chem. Co., 810 F.2d 726, 732-34 (8th Cir. 1986); Georgeoff, 562 F. Supp. at 1313-14.

59. See *Northeastern*, 810 F.2d at 732-33; United States v. Olin Corp., 927 F. Supp. 1502, 1512-16 (S.D. Ala. 1996), *rev'd*, 107 F.3d 1506 (11th Cir. 1997).

60. See *Northeastern*, 810 F.2d at 733; Georgeoff, 562 F. Supp. at 1310-14. Some courts have found the necessary congressional intent in what has been called a "negative inference." Nova Chems., Inc. v. GAF Corp., 945 F. Supp. 1098, 1103 (E.D. Tenn. 1996); see also Ninth Ave. Remedial Group v. Fiberbond Corp., 946 F. Supp. 651, 655 (N.D. Ind. 1996) (finding that the "negative inference" logic was persuasive as to CERCLA being retroactive). This line of reasoning flows from the fact that Congress expressly excluded retroactive application for natural resource damages under CERCLA. See 42 U.S.C. § 9607(f)(1) (1994) ("There shall be *no recovery* . . . where such damages and the release of a hazardous substance from which such damages resulted *have occurred wholly before December 11, 1980.*" (emphasis added)). Therefore, this argument asserts that because Congress did *not* expressly exclude retroactive application for PRP liability that by "negative inference," it intended CERCLA to operate retroactively in this area of liability. See *Nova*, 945 F. Supp. at 1103.

While not expressly promulgating retroactive liability, CERCLA's statutory language apparently allows for such an interpretation.⁶¹ The Act's preamble, for example, announces that Congress enacted CERCLA for the purpose of cleaning up "inactive hazardous waste disposal sites."⁶² Several courts have found in this avowed statutory purpose a designation of congressional intent, arguing that the use of the word "inactive" could only indicate sites damaged prior to CERCLA's 1980 enactment.⁶³ Somewhat more broadly, courts also have pointed to this preamble as generally indicative of a retroactive statutory scheme because of the remedial tone established by its language.⁶⁴

Going beyond the preamble, the statutory interpretations have focused primarily on the language of 42 U.S.C. § 9607(a), which identifies a PRP as:

- (1) the owner and operator of a vessel or a facility,
- (2) any person who at the time of disposal of any hazardous substance *owned or operated* any facility at which such hazardous substances were disposed of,
- (3) any person who by contract, agreement, or otherwise *arranged* for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances *owned or possessed* by such person, by any other party or entity, at any facility or incineration vessel *owned or operated* by another party and containing such hazardous substances, and
- (4) any person who *accepts or accepted* any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites *selected* by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable. . . .⁶⁵

61. See 42 U.S.C. § 9607(a).

62. See *id.* § 9601; see also *Georgeoff*, 562 F. Supp. at 1311 & n.13 (referencing CERCLA's preamble as support for retroactive application).

63. See *Northeastern*, 810 F.2d at 732-33 (claiming the statutory scheme is "overwhelmingly remedial and retroactive"); *United States v. Alcan Aluminum Corp.*, Nos. 87-CV-920 & 91-CV-1132, 1996 U.S. Dist. LEXIS 16358, at *12-14 (N.D. N.Y. 1996) (arguing that use of the word "inactive" in a House Report concerning CERCLA establishes Congress's retroactive intent); *Cooper Indus., Inc. v. Agway, Inc.*, No. 92-CV-0748, 1996 U.S. Dist. LEXIS 14196, at *25-27 (N.D. N.Y. 1996) (highlighting the use of the term "inactive" in congressional reports as in *Alcan*); *United States v. Shell Oil Co.*, 605 F. Supp. 1064, 1071 (D. Colo. 1985) (discussing various House Reports which evidence the retroactive intent of congress in passing CERCLA); *Georgeoff*, 562 F. Supp. at 1311 & n.13 (noting CERCLA's repeated references to "inactive" waste sites "indicating Congressional intent to focus on past . . . conduct").

64. See *Northeastern*, 810 F.2d at 732-33; *Georgeoff*, 562 F. Supp. at 1311.

65. 42 U.S.C. § 9607(a) (emphasis added).

The language that pertains to CERCLA retroactivity is, of course, the noticeable past tense language of several clauses within this liability section.⁶⁶ Some courts perceive this past tense language as a manifestation of Congress' intent for retroactivity, while others find the statutory language to be non-determinative on the issue.⁶⁷ Certainly, the 96th Congress could have eliminated the judicial guesswork by including an unequivocal statement of retroactive application in the statute.⁶⁸ This vacuum has led to dual interpretations of CERCLA's language; some believe that omission of a clause indicates a lack of retroactive intent on the part of Congress, while others maintain that the scheme clearly intends retroactivity and that no retroactivity clause is needed to clarify that purpose.⁶⁹ The statute's hurried passage and troubled legislative journey, as a practical matter, suggest that an express retroactivity clause would have precluded passage of any CERCLA-type legislation.⁷⁰

With many of the 1980 congressional concerns resurfacing, CERCLA currently faces a pitched reauthorization battle.⁷¹ CERCLA's tangible problems have intensified and hardened these initial concerns during the intervening seventeen years.⁷² In fact, these concerns stretch down

66. *See id.*

67. *See Northeastern*, 810 F.2d at 732-33 (finding the "statutory scheme" retroactive). *But see Shell Oil Co.*, 605 F. Supp. at 1073 (finding that congressional intent "cannot be divined" from the verb tenses in § 9607(a)); *Georgeoff*, 562 F. Supp. at 1311 (finding the past tense language to be non-dispositive).

68. *See supra* note 57; *see also* *United States v. Olin Corp.*, 927 F. Supp. 1502, 1515 (S.D. Ala. 1996), *rev'd*, 107 F.3d 1506 (11th Cir. 1997) (noting "that it would have been a simple matter for Congress to have" expressly included retroactivity in the statute and that Congress was aware "that the issue of retroactivity could arise").

69. *See Georgeoff*, 810 F.2d at 733 (stating that "the statutory scheme itself is overwhelmingly remedial and retroactive").

70. *See Freeman*, *supra* note 41, at 676 (quoting a letter from Senators Stafford and Randolph to the House urging them not to alter the Superfund bill in even the most minimal sense).

71. *See Ways-Means*, *supra* note 24, at 365. These concerns primarily focus on a grossly inequitable allocation of cleanup costs created by the combination of retroactive and strict liability. *See id.* Secondary concerns include protection of certain segments, such as lenders, from unnecessary and unfair liability. *See id.* Overarching all concerns is the worry about footing the bill for the cleanups because, as always, Congress declares that new taxes will not be part of the funding mix. *See id.*

72. Chief among those problems are the delay in cleanup, the eye-popping costs, and the apparent lack of fairness in some elements of the liability scheme. *See Anderson*, *supra* note 2, at 20; *Dancy & Dancy*, *supra* note 10, at 105 (stating that "[e]ven though private and public entities have already spent \$20 billion on the CERCLA program since its inception, only around ten to twenty percent of the sites designated for cleanup under that program have been remediated"); *Healy*, *supra* note 10, at 67 (noting that "estimated hazardous substance cleanup costs [rival] the costs of bailing out the nation's savings and loan institutions").

Pennsylvania Avenue to the White House, where President Clinton has characterized CERCLA as a "disaster."⁷³ Despite an increasing sense of urgency and the apparent need for action, the reauthorization bills remain bogged down in congressional committees as sparks fly over eliminating retroactivity.⁷⁴ Several congressional leaders have called openly for elimination of judicially-entrenched retroactivity.⁷⁵ Other members of Congress have decried the shift in the Republican Congress to a stance favoring the polluters, with one Congressman labeling an appropriations bill as the "Ed McMahon Polluter's Clearinghouse Sweepstakes" because it pays the polluters rather than forcing the polluter to pay.⁷⁶ The outcome of future elections may ultimately determine the congressional direction of CERCLA retroactivity and materially affect the already fragile balance between economics and the environment.⁷⁷

*B. Early Cases Establishing Retroactive Liability:
Georgeoff & Its Progeny*

Because the statute did not expressly grant CERCLA retroactivity, the courts were soon forced to step into the breach and interpret the statute in this area.⁷⁸ The early cases set a tone which remains largely unchanged and was unquestioned until 1996.⁷⁹ Some have argued that the

73. See Dancy & Dancy, *supra* note 10, at 105 (quoting Reilly, *supra* note 19, at 57).

74. See H.R. 2500, 105th Cong. (1997).

75. See *Ways-Means*, *supra* note 24, at 365 (reporting that House Ways-Means Committee Co-Chairs Archer and Gibbons warn that CERCLA will not be reauthorized unless retroactivity is expressly repealed).

76. See 142 CONG. REC. H6778-01 (daily ed. June 25, 1996) (statement of Rep. Markey).

77. See Tucker, *supra* note 25, at C1 (stating that "[t]he Superfund retroactivity liability issue is more likely to be resolved through a legislative re-examination by Congress than by the courts"). Because Republicans have led the onslaught on CERCLA reform, the 1996 election which ended with Republican majorities in House and Senate, may impact CERCLA reauthorization going forward. See *id.* (commenting that "Congressional Republicans [have] . . . proclaimed that the [*Olin* decision] was a watershed event.").

78. See, e.g., *United States v. Northeastern Pharm. & Chem. Co.*, 810 F.2d 726 (8th Cir. 1986); *Ohio ex rel. Brown v. Georgeoff*, 562 F. Supp. 1300 (N.D. Ohio 1983).

79. No case prior to *Olin* has failed to find retroactivity in CERCLA liability. See *United States v. Olin Corp.*, 927 F. Supp. 1502, 1507 (S.D. Ala. 1996), *rev'd*, 107 F.3d 1506 (11th Cir. 1997); *United States v. Alcan Aluminum Corp.*, Nos. 87-CV-920 & 91-CV-1132, 1996 U.S. Dist. LEXIS 16358, at *7 (N.D.N.Y. Oct. 28, 1996).

early judicial precedents establishing CERCLA retroactivity have carried too much weight and, to a certain degree, have precluded a more thorough judicial analysis of the issue because a mass of cases have simply relied on the "pathfinder" cases without giving the arguments against retroactivity a full and proper consideration.⁸⁰

Ohio ex rel. Brown v. Georgeoff, a 1983 CERCLA case, proved to be the influential father of CERCLA retroactivity.⁸¹ The *Georgeoff* court in the Northern District of Ohio, first found that CERCLA liability required retroactive application of the statute.⁸² While duly noting the general rule disfavoring retroactivity, the court pointed out that two Supreme Court cases have "arguably. . . changed [this] to a presumption in favor of retroactivity," and nevertheless held that CERCLA had overcome any presumption against retroactivity.⁸³ To reach this finding, the court first examined the language of the statute and, while they found no "unequivocal statements" indicating a clear intent for retroactivity, they did find "indicia" of congressional intent.⁸⁴ Next, the court analyzed the legislative history of the bill and discovered congressional intent to make responsible industries pay for waste site cleanup of both active and inactive sites.⁸⁵ Accordingly, the court concluded that CERCLA retroactive liability was authorized and held that CERCLA could be applied retroactively to conduct prior to 1980.⁸⁶

The *Georgeoff* ruling cast a shadow over the CERCLA retroactivity analysis which followed.⁸⁷ While most cases simply marched into line behind *Georgeoff*, two cases stand out because they made more than a superficial inquiry into the question and found CERCLA to apply retroactively.⁸⁸ *Northeastern*, an Eighth Circuit Court of Appeals case, found the entire "statutory scheme" to be indicative of retroactive intent on the

80. See *Olin*, 927 F. Supp. at 1507; see also *Government Defends Retroactive Liability in Appeal of District Court's Olin Decision*, BNA NAT'L ENV. DAILY, Oct. 8, 1996 (presenting Attorney Michael W. Steinberg's view that a large body of pre-*Landgraf* cases "settled for less than clear [congressional] intent").

81. 562 F. Supp. 1300 (N.D. Ohio 1983).

82. See *id.* at 1306 (denying the Department of Justice's argument that continuing ownership did not require such an application).

83. See *id.* at 1308 (citing *Bradley v. School Bd. of the City of Richmond*, 416 U.S. 696 (1974); *Thorpe v. Housing Auth. of the City of Durham*, 393 U.S. 268 (1969)).

84. See *id.* at 1309-11.

85. See *id.*

86. See *id.* at 1313-14.

87. See *United States v. Olin Corp.*, 927 F. Supp. 1502, 1509 (S.D. Ala. 1996), *rev'd*, 107 F.3d 1506 (11th Cir. 1997) (discussing the precedential impact of *Georgeoff*).

88. See, e.g., *United States v. Northeastern Pharm. & Chem. Co.*, 810 F.2d 726 (8th Cir. 1986); *United States v. Shell Oil Co.* 605 F. Supp 1064 (D. Colo. 1985).

part of Congress,⁸⁹ while *Shell*, a Colorado District Court case, noted a similar scheme supporting CERCLA retroactivity.⁹⁰ A groundswell of cases followed the analysis laid out by these leading cases, with no more than a passing analysis, and further entrenched the judicial view that CERCLA required retroactive application to pre-1980 conduct.⁹¹ *United States v. Olin Corp.*, a 1996 Alabama District Court case, stands apart as the sole decision refusing to apply CERCLA retroactively.⁹²

Judicial opinions since *Olin* have not only regarded *Olin* as renegade, but have distanced themselves from its reasoning and continue to invoke the *Georgeoff* logic in maintaining retroactivity.⁹³ Typical of other jurisdictions, a Pennsylvania District Court openly declared that "we are unpersuaded by a single Alabama District Court case."⁹⁴ *Cooper v. Agway*, in holding CERCLA to apply retroactively, added that "[i]t is clear that the expectations and preparations of the parties . . . have changed because of the *Olin* case, not because of a change in the law."⁹⁵ Most sig-

89. *Northeastern*, 810 F.2d at 732-33.

90. *Shell Oil Co.*, 605 F. Supp. at 1075-76.

91. See *In re Penn Cent.*, 944 F.2d 164 (3rd Cir. 1991); *United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988); *Nevada ex rel. Dep't of Transp. v. United States*, 925 F. Supp. 691 (D. Nev. 1996); *In re Acushnet River & New Bedford Harbor Proceedings re Alleged PCB Pollution*, 716 F. Supp. 676, 679 n.3 (D. Mass. 1989); *United States v. South Carolina Recycling and Disposal Inc.*, 653 F. Supp. 984 (D. S.C. 1984). See also *United States v. R.W. Meyer, Inc.*, 889 F.2d 1497, 1506 (6th Cir. 1989); *O'Neil v. Picillo*, 883 F.2d 176, 183 n.12 (1st Cir. 1989); *Organ*, *supra* note 18, at 1046 n.19 (noting that many courts have cited the *Northeastern* decision in finding retroactivity in CERCLA) (citing *Monsanto*, 858 F.2d at 173-74)).

92. See *Gould Inc. v. A&M Battery & Tire Serv.*, 933 F. Supp. 431, 438 (M.D. Pa. 1996).

93. See *Nova Chems., Inc. v. GAF Corp.*, 945 F. Supp. 1098, 1100-07 (E.D. Tenn. 1996); *Gould*, 933 F. Supp. at 438; *United States v. NL Indus., Inc.*, 936 F. Supp. 545, 556-63 (S.D. Ill. 1996); *Ninth Ave. Remedial Group v. Fiborbond Corp.*, 946 F. Supp. 651, 664 (N.D. Ind. 1996).

94. *Gould*, 933 F. Supp. at 438.

95. *Cooper Indus., Inc. v. Agway, Inc.*, No. 92-CV-0748 1996 U.S. Dist. LEXIS 14196, at *23 (N.D.N.Y. Sept. 23, 1996); see also *United States v. Alcan Aluminum Corp.*, Nos. 87-CV-970 & 91-CV-1132, 1996 U.S. Dist. LEXIS 16358, at *7 (N.D.N.Y. Oct. 28, 1996) (noting that "one recent decision has created a bevy of motion practice throughout the nation"). The lasting significance of *Olin* may be its impact on the legislature's reauthorization of CERCLA rather than on the judiciary's interpretation of retroactivity. See Mary Powers, *U.S. Judge's Superfund Ruling Could Prod Congress to Speed Reform*, HAZARDOUS WASTE BUS. June 5, 1996, at 1. Powers points out that the ruling could pressure Democrats to, in the words of one party member, "negotiat[e] in good faith." See *id.* at 2. Republicans have been much more supportive

nificantly, the Eleventh Circuit's recent reversal of *Olin* has effectively muzzled this solitary judicial attack on CERCLA retroactivity.⁹⁶ Still, the underlying problems with retroactive application endure.⁹⁷

C. United States v. Olin: A Lone Wolf Howling in the Wind?

Judge Hand's *Olin* decision controverted an established body of law which undergirded CERCLA retroactivity.⁹⁸ To accomplish this, the Alabama District Court borrowed its primary framework from a 1994 Supreme Court decision declining to find retroactivity in a Civil Rights statute.⁹⁹ Rather than overturning prior judicial precedent on their own reasoning, and in effect turning their swords upon themselves, Judge Hand went to a higher source, the United States Supreme Court.¹⁰⁰ Piggybacking *Landgraf*, *Olin* resurrected the traditional rule against presumptions of retroactivity and found that CERCLA could not withstand those presumptions when applied forcefully.¹⁰¹

1. *Landgraf* Framework

The 1994 Supreme Court holding of *Landgraf v. USI Film Products*¹⁰² provided the structural framework enabling the *Olin* court to

of a CERCLA compromise but are still pushing for an overturn of retroactivity. *See id.* at 3.

96. Some argued that because of its Constitutional foundations, *Olin* might be upheld. *See Powers, supra* note 95, at 2. Of course, *Olin*'s reversal revealed that view to be somewhat hopeful. *See United States v. Olin Corp.*, 107 F.3d 1506 (11th Cir. 1997).

97. *See infra* Sections III and IV.

98. *See Alcan*, 1996 U.S. Dist. LEXIS 16358, at *7 ("Although the retroactive effect of CERCLA has been upheld by the vast majority of Courts that have addressed the issue, one recent decision has created a bevy of motion practice throughout the nation.") (footnote omitted).

99. *Olin*, 927 F. Supp. at 1508 (citing *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994)). The fact that the court did not decide *Landgraf* until 1994 may explain the noticeable omission of any serious attempt by prior courts to question retroactivity. *See id.* at 1508 (asserting that *Landgraf* undercuts the justifications used by prior cases finding CERCLA retroactivity).

100. *See id.* at 1517 (calling pre-*Landgraf* cases "unreliable").

101. *Landgraf* "reaffirm[ed] the traditional presumption against retroactive legislation." *Id.* at 1508. In so doing, the Court apparently restored this presumption and called into question other cases which had blurred the rule. *See id.* at 1508-09.

102. In *Landgraf*, the plaintiff charged a co-worker with sexual harassment under Title VII of the Civil Rights Act of 1964, which only authorized equitable relief. *Landgraf*, 511 U.S. at 249. The case was originally dismissed by the District Court. *See id.* While her appeal pended, the Civil Rights Act of 1991 became law. *See id.* The Act included a right to recover compensatory and punitive damages. *See id.* The

ignore the prior findings of CERCLA retroactivity.¹⁰³ The *Landgraf* Court first focused on the traditional presumption against retroactive application of statutes.¹⁰⁴ According to the Court, the initial level of analysis must construe the language of the statute with an eye to this presumption.¹⁰⁵ If the language of the statute fails to unequivocally express retroactivity, then the analysis must turn to an inquiry into congressional intent.¹⁰⁶ According to *Landgraf*, absent a clear indication of congressional intent, the presumption against statute retroactivity must govern.¹⁰⁷ The Court held that there was no clear congressional intent regarding the particular Civil Rights statute in question.¹⁰⁸ Thus, the heavy traditional presumption against retroactive application of a statute carried the day.¹⁰⁹ In so holding, the Court appeared to rectify past

Supreme Court held that the Act did not apply retroactively and that *Landgraf* could not bring an action for such damages. *See id.* at 286.

103. *See Olin*, 927 F. Supp. at 1511-19. Judge Hand summarized the Court's analysis as follows:

[It] requires a court 1) to determine a) whether Congress has expressly stated the statute[']s reach and b) if not, whether the text and legislative history have "clearly prescribed" Congress' [sic] intent to apply the provision retroactively; 2) if not, to determine whether the provision actually has "retroactive effect on the party or parties in the litigation;" and 3) if so, to apply the traditional presumption against retroactivity—absent a clear congressional intent to the contrary.

Id. at 1511.

104. *See Landgraf*, 511 U.S. at 265 ("[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic.") (citing *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 842-44, 855-56 (1990) (Scalia, J., concurring)). *Landgraf* then highlighted some of the fundamental rationales for such a presumption. The Court first noted fairness. *See id.* ("[I]ndividuals should have an opportunity to know what the law is and to conform."). Then it mentioned the legitimate expectations of individuals in knowing the law and conforming conduct to it. *See id.* (citing *General Motors Corp. v. Romein*, 503 U.S. 172 (1992)). Finally, the Court delineated the concept of creativity in "commercial and artistic endeavors [which] is fostered by a rule of law that gives people confidence about the legal consequences of their actions." *Id.* at 266.

105. *See id.* at 270-73.

106. *See id.* at 272, 280.

107. *See id.* at 280.

108. *See id.* at 286.

109. *See id.* ("[W]e have found no clear evidence of Congressional intent that section 102 . . . should apply to cases arising before its enactment."). The Court noted that a prior 1990 version of this civil rights statute had included a retroactivity clause, but it was vetoed by President Clinton primarily because of the clause. *See*

Court holdings which seemed to call the traditional rule into question and which, according to some interpretations, turned the presumption on its head.¹¹⁰ In restoring order, the Court laid the groundwork for a court to overrule the retroactivity of other statutes which did not have the concomitant clarity of congressional intent.¹¹¹ The *Olin* court soon alighted upon the potential Constitutional weakness of CERCLA retroactivity resulting from the *Landgraf* holding and took advantage of this weakness by denying CERCLA liability for Olin Corporation's actions prior to 1980.¹¹²

2. *Olin* Analysis

The *Olin* court borrowed the *Landgraf* framework to deny retroactive application of CERCLA.¹¹³ In *Olin*, the parties filed a proposed consent decree concerning Olin's corporate property in Alabama on which a mercury-cell chloralkali plant had released mercury into groundwater until 1974 and a drop-protection chemicals plant had discharged wastewater until 1974.¹¹⁴ The district court found prior CERCLA retroactivity to be misapplied by the courts in light of *Landgraf*.¹¹⁵ Specifically, the court

id., at 255-57. The Court added, however, that this fact was not dispositive. *See id.* at 256. After a thorough flushing out of the bill's language and history, the Court concluded that "the history of the 1991 Act conveys the impression that legislators agreed to disagree about whether and to what extent the Act would apply to preenactment conduct." *See id.* at 263. The Court thus perceived that the legislative history evinced no clear intent for retroactivity and that ultimately the default rule disfavoring it would take effect. *See id.* at 265.

110. *See Thorpe v. Housing Auth. of the City of Durham*, 393 U.S. 268 (1969); *Bradley v. School Bd. of the City of Richmond*, 416 U.S. 696 (1974); *see also Ohio ex rel. Brown v. Georgeoff*, 562 F. Supp. 1300, 1308 n.9 (N.D. Ohio 1983) ("[T]he presumption against retroactivity has arguably been changed to a presumption in favor of retroactivity.").

111. *See Freeman*, *supra* note 41, at 664 (asserting that after *Landgraf* "it is . . . clear that eight justices believe there must be a 'clear statement' of congressional intent for a federal statute to be interpreted as applying new liability retroactively"). *But see James Cable v. Jamestown*, 43 F.3d 277 (6th Cir. 1995) (claiming that the Court ruling in *Landgraf* was a "reiteration . . . not a radical reformulation" of the approach towards retroactivity).

112. *United States v. Olin Corp.*, 927 F. Supp. 1502 (S.D. Ala. 1996), *rev'd*, 107 F.3d 1506 (11th Cir. 1997). Prior to the *Olin* ruling one commentator predicted that if a federal court were to face the issue of Superfund retroactive liability "§ 107(a) could not meet the test of statutory construction set forth in Justice Stevens's majority opinion in *Landgraf*." *See Freeman*, *supra* note 41, at 664.

113. *See Olin*, 927 F. Supp. at 1508-20.

114. *See id.* at 1504-05.

115. *See id.* at 1519.

transposed the *Landgraf* analytical structure onto CERCLA.¹¹⁶ In doing so, it determined that CERCLA contained no unequivocal expression of retroactivity, although it did discover non-dispositive "indicia" of such an intent.¹¹⁷ The court then surveyed the legislative history of the Act and found no clear congressional intent favoring retroactivity.¹¹⁸ The court concluded by applying the presumption against retroactivity while ignoring the pre-*Landgraf* cases which injected CERCLA with its retroactive power.¹¹⁹ The court held that CERCLA § 107(a)¹²⁰ was "not retroactive."¹²¹

3. *Olin's* Reversal by the Eleventh Circuit

Olin's "mini-revolution" ended before it reached the streets.¹²² In March 1997, the Eleventh Circuit overruled *Olin*; Judge Kravitch, writing for a unanimous Court of Appeals, held that CERCLA supported retroactive application to pre-CERCLA conduct.¹²³ Contravening the district court, Judge Kravitch asserted that CERCLA met the Commerce Clause

116. See *id.* at 1511.

117. See *id.* at 1513 (quoting *Ohio ex rel. Brown v. Georgeoff*, 562 F. Supp. 1300, 1311 (N.D. Ohio 1983)).

118. See *id.* at 1512-19.

119. See *id.* at 1519.

120. CERCLA § 107(a) identifies the PRPs and provides the controversial past tense language. See *supra* note 66 and accompanying text.

121. *Olin*, 927 F. Supp. at 1519. Although the court did not need to reach the question, *Olin* also overturned liability on Commerce Clause grounds. See *id.* at 1533. Utilizing another recent Supreme Court decision, *United States v. Lopez*, 514 U.S. 549 (1995), *Olin* found that the Commerce Clause prohibited Congress from regulating this waste. See *id.* at 1523. According to *Olin*, *Lopez* required that the statute must itself "regulate economic activity which 'substantially affects' interstate commerce" and that the statute include "a jurisdictional element which would ensure, through case by case inquiry, that the statute affects interstate commerce." See *id.* at 1532 (quoting *Lopez*, 514 U.S. at 559-60). *Olin* found that CERCLA did not contain the necessary jurisdictional element and moreover, even if it did, that the "activity in question has virtually no effect on interstate commerce." See *id.* at 1533. Thus, *Olin* held that CERCLA exceeded Congress' Commerce Clause power. See *id.* Several other courts have strongly disagreed with the *Olin* holding regarding the Commerce Clause. See, e.g., *Nova Chems. Inc. v. GAF Corp.*, 945 F. Supp. 1098 (E.D. Tenn. 1996); *United States v. Alcan Aluminum Corp.*, No. 92-CV-0748 1996 WL 637559 (N.D.N.Y. 1996); *United States v. NL Indus.*, 936 F. Supp. 545 (S.D. Ill. Oct. 28, 1996).

122. See *United States v. Olin Corp.*, 107 F.3d 1506 (11th Cir. 1997).

123. See *id.* at 1514.

challenge and, more significantly, the retroactivity challenge.¹²⁴ Agreeing with the district court that the presumption against retroactivity remained in force, Judge Kravitch still found that CERCLA's language, structure, and legislative history sufficed in the absence of an express retroactivity clause in the statute.¹²⁵ The court held that the requisite congressional intent was in place to override the traditional disfavoring of retroactive statutory application.¹²⁶

4. A CERCLA World Without Retroactivity: The Potential Impact

Olin's reversal by the Eleventh Circuit does not dim the controversy over CERCLA retroactivity; the underlying issues remain. That decision simply halts, for now, the wholesale elimination of retroactivity by the courts.¹²⁷ Congress may still reform CERCLA to wholly eradicate retroactivity or dampen its impact on "innocent" PRPs.¹²⁸

Any alteration of CERCLA retroactivity will impact the act's liability scheme more than its clean-up purpose; hazardous waste site remediation and clean-ups will continue to plod forward.¹²⁹ The health and safety hazards are clearly too serious and the environmental and human costs are clearly too high to end remediation entirely.¹³⁰ Furthermore, eliminating site clean-up and remediation would essentially vaporize the fundamental purpose of CERCLA.¹³¹

124. *See id.* at 1511, 1514.

125. *See id.* at 1512-14.

126. *See id.* at 1514.

127. Generally, the courts must decide the whole issue of retroactivity; they cannot "legislate" a middle ground as this Comment proposes with a negligence standard of culpability for pre-enactment PRPs. *See infra* notes 228-32, 236-41 and accompanying text. Thus, if a court concludes that Congress intended retroactivity, then the court must hold in favor of such a statutory application. *See, e.g., id.* (finding clear congressional intent for retroactive application of CERCLA).

128. *See supra* notes 71-77 and accompanying text.

129. Some disagree that any realistic move forward on clean-up has occurred under the retroactive liability scheme anyway. *See Lyons, supra* note 4, at 272-73 & nn.9-10 (arguing that billions of dollars have been wasted on transaction costs in CERCLA litigation which could have been utilized for cleanups). By the mid-1980s, it was estimated that because of immense transaction costs, 400-450 sites on the National Priorities List (NPL) remained unremediated which otherwise may have been cleaned up. *See id.* at 272 & n.9 (citing *Senate Hearing in Insurance Issues and Superfund: Hearing Before the Senate Comm. on Env't and Pub. Works*, 99th Cong., 134 (1985) (statement of John Butler)).

130. About 75% of sites remain to be cleaned up. *See EPA Is Making Progress On Speeding Up Superfund Cleanups*, WEST'S LEGAL NEWS, Oct. 17, 1996, available in 1996 WL 592354.

131. *See Healy, supra* note 10, at 77 (noting "CERCLA's paramount objective of facilitating the cleanup of hazardous waste sites that pose a threat to public health or

The probable impact, then, of wholly or partially eliminating CERCLA retroactivity would be a revenue shortfall.¹³² The revenue lost from pre-1980 PRPs who would no longer be liable must necessarily be found elsewhere.¹³³ This revenue burden could default to several groups such as post-1980 PRPs, industry (by way of Superfund taxes), the states, or taxpayers.¹³⁴ Certainly, the cost burden of going forward stands as the

the environment”).

132. One study claims that financing would have to increase two to three times over the present standards were the elimination of retroactive liability the only reform to the statute. See Dancy & Dancy, *supra* note 10, at 122 n.89 (citing Rena I. Steiner, *The Reauthorization of Superfund: The Public Works Alternative*, 25 *Env't. L. Rep.* (Env't. L. Inst.) 10, 78-79 (Feb. 1995)); see also *Current Owners Could Foot CERCLA Bill If Olin Decision Holds Up*, Attorney Asserts, *ENV'T REP.* (BNA) 1207, Sept. 25, 1996 [hereinafter *Current Owners*] (noting Barry Breen's argument that prospective application would “gut the ‘polluter pays’ principle” and potentially create monetary shortfalls for both state and federal governments); *Retroactivity, Funding, Allocation Issues Dominate Reform Discussion at ABA Session*, *BNA NAT'L ENV'T DAILY*, Aug. 10, 1995 (citing concerns by lawyers about “revenue shortfall” where CERCLA liability was to be eliminated by Congress). In contravention of this view, Senator Robert C. Smith and Representative Michael B. Oxley commented that a raise in taxes is not likely if retroactive liability were to be eliminated. See *Exception for Federal Facilities Sought in Call to Eliminate Retroactive Liability*, 25 *Env't Rep.* (BNA) at 1870 (Feb. 3, 1995). These influential congressmen imply that certain types of tax breaks as incentives for voluntary cleanups and several efficiency changes could reinvigorate CERCLA in the face of any loss of revenue due to retroactivity elimination. See *id.*

133. See Dancy & Dancy, *supra* note 10, at 122-23 & n.90 (noting that Congress may be forced to place heavier tax burdens on the general public, businesses, or industry groups) (citing a study concluding that maintaining the current cleanup standards would require “more trust fund revenues”) (citing *See Costs Similiar for Five Funding Schemes Proposed for Program, Joint Study Finds*, 25 *Env't Rep.* (BNA) No. 39, at 1872 (Feb. 3, 1995)).

134. The Superfund Amendments and Reauthorization Act of 1986 (SARA) modified the CERCLA funding scheme, which had been primarily financed by taxes on the petroleum and chemical industries, to add a general tax on business. See 26 U.S.C. §§ 59A, 4611, 4661 (1994); Healy, *supra* note 10, at 99-102 & n.137. Superfund primarily taxes feedstock chemicals and petroleum companies. Other Superfund revenues come from a corporate environmental income tax and a small amount is generated from general tax revenues. See Healy, *supra* note 10, at 100 n.137; Hedeman, *supra* note 11; see also Lyons, *supra* note 4, at 273-74 (arguing that Superfund funding should come solely from taxation). The potential impact on the states is considerable if retroactive liability (or joint and several liability) is radically altered. See *Superfund: Elimination of Retroactive Liability Would Hurt the States*, *NAAG Attorney Says*, *DAILY ENV'T REP. NEWS*, Dec. 10, 1993, available in WESTLAW BNA-DEN File (discussing comments of counsels who believe that state standards cannot be

defining issue of the CERCLA world *sans* retroactivity.¹³⁵

On the positive side, eliminating retroactive application lowers transaction costs.¹³⁶ Because retroactivity enlarges the pool of PRPs outward in concentric proportions, its elimination would immediately limit the numbers of litigants at any given site.¹³⁷ Narrowing the pool of potential PRPs will materially reduce the revenues upon which Superfund currently draws.¹³⁸

Scholars and members of Congress have promoted compromise in the form of "carveouts," excluding liability for certain groups of PRPs perceived to be only tenuously responsible for the hazardous waste damage at the particular site.¹³⁹ These carveouts would protect unfairly vulnerable groups such as small businesspersons, innocent transporters of hazardous substances, lenders, and municipalities.¹⁴⁰ Others have clamored

separated from CERCLA standards and that such an impact could be disastrous in terms of cleanup because a substantial number of waste sites cannot be cleaned up by the EPA and thus will default to the state programs). States have, thus far, footed little of the remediation tab. See Wamsted, *supra* note 20, at 1, 12 (noting that states have paid less than one percent of CERCLA costs).

135. This is particularly true because Congress chose to create a far-reaching, inclusive liability scheme which encompassed all who touch a site. In doing so, Congress consciously chose to shift the financial burden of clean-up away from the taxpaying public and onto those potentially culpable parties, the PRPs. See Lyons, *supra* note 4, at 310-11 & n.181. See generally Dancy & Dancy, *supra* note 10, at 120-23 (discussing the issue of increased funding for CERCLA were retroactive liability to be eliminated).

136. See Daniel Abuhoff et al., *Superfund Reform Now Rests in Hands of GOP*, NAT'L L.J., Dec. 5, 1994, at C10 (noting that CERCLA's liability scheme results in repeated litigation); Shanahan, *supra* note 17, at 5 (arguing that retroactive liability creates an endless cycle of lawsuits).

137. One noted Connecticut case included over 1200 third parties before the judge radically pared it down to a manageable number. See *B.F. Goodrich v. Murtha*, 815 F. Supp. 539 (D. Conn. 1993); see also Mark Mininberg & Katharine S. Goodbody, *The Superfund Crisis in the Federal Courts: A Case Study*, 25 Env't Rep. (BNA) 139 (May 20, 1994). The 1200 parties included Josephine Kriz, whose deceased husband had simply discarded an old couch in a dumpster owned by Harold Murtha, the prime defendant and owner of a waste disposal company. *Id.* at 140.

138. Estimating the Superfund revenue shortfall from the elimination of retroactivity is difficult at best. See Dancy & Dancy, *supra* note 10, at 122-23 & nn.89-90. Some argue that because of "wasted" transaction costs which inevitably result in every CERCLA action, the revenues the EPA receives may not be affected as much as most think. See *id.* at 123 n.90; Shanahan, *supra* note 17, at 4.

139. The EPA, while not favoring carveouts per se, has headed in that direction by setting out policies in favor of settlements for de minimis and de micromis PRPs (small-volume waste contributors). See *CERCLA Settlements With De Micromis Waste Contributors*, 24 Env't Rep. (BNA) 1939 (1994) [hereinafter *CERCLA Settlements*]. CERCLA expressly authorizes such settlements. See 42 U.S.C. § 9622(a)-(m) (1994).

140. 142 CONG. REC. H6772-74 (daily ed. June 25, 1996) (letters of Commerce Com-

for a more drastic 50% "retroactivity discount."¹⁴¹ These exclusions and liability caps would likely result in large corporations with the historical "deep pockets" shouldering the bulk of the cost.¹⁴² Ultimately, Congress must re-formulate the retroactivity rules in the brave new CERCLA world or the courts will be forced to step into the void once again.¹⁴³

III. THE CONTROVERSY REVISITED: ARGUMENTS FAVORING RETROACTIVITY

CERCLA retroactivity supporters arduously defend the statute along several lines.¹⁴⁴ First, they point to the statute's role in stemming environmental disasters.¹⁴⁵ Second, they argue that the polluter must pay for his act, regardless of when he committed it or how legal it was at the time.¹⁴⁶ Third, the supporters claim that eliminating retroactivity will

mittee Ranking Member John Dingell and EPA Administrator Carol M. Browner); see also Anderson, *supra* note 2, at 5-6 (classifying the different proposals for CERCLA reform). In 1993 several in Congress made a serious attempt to severely limit liability for municipal landfills. See 139 CONG. REC. S5947 (daily ed. May 13, 1993) (introducing the Toxic Cleanup Equity Act of 1993 which requires the EPA to limit the amount of its settlements with local governments) (comments of Sen. Lautenberg). The Clinton administration itself has proposed liability exclusions for small businesses with fewer than 25 employees and under \$2 million in revenues. See Elliott P. Laws, *EPA's Perspective: Measuring Superfund Success*, 11 (No. 12) ENVTL. COMPLIANCE & LITIG. STRATEGY 4, 4-5 (1996). The administration has also pushed for municipal liability limits. See *id.* at 5. The EPA has proposed exemptions for businesses with fewer than 100 employees, homeowners, and small nonprofit organizations. See *id.* at 5. Underlying all of these concerns and leading to such proposals are four principles which Laws, an assistant administrator, says the EPA has now focused on: "(1) cleanups must be faster, fairer and more efficient; (2) we must promote economic development in our communities; (3) less money should go to lawyers and more money should go to cleanups; and (4) the party responsible for the pollution, not taxpayers, should pay for the cleanup." *Id.* at 4.

141. 142 CONG. REC. H6773-74 (daily ed. June 25, 1996) (letter of EPA Administrator Carol M. Browner).

142. See Anderson, *supra* note 2, at 34; Goldberg, *supra* note 19, at 708 (quoting Gordon Humphreys, *EC: Insurers Face Large Clean-Up Bills If Commission's Environmental Liability Proposals Are Adopted*, Reuters Textline, Mar. 9, 1992, available in LEXIS, Europe Library, Alleur file).

143. See Anderson, *supra* note 2, at 56; Dancy & Dancy, *supra* note 10, at 149; Evans, *supra* note 16.

144. In the midst of their strenuous defenses, many supporters confess to the statute's questionable success at properly cleaning up sites and allocating costs fairly. See Healy, *supra* note 10, at 84; Blaymore, *supra* note 22, at 4.

145. See *infra* notes 148-53 and accompanying text.

146. See *infra* notes 154-58 and accompanying text.

severely hamstringing the necessary funding for site clean-ups.¹⁴⁷ Lastly, they assert that Congress intended CERCLA to be retroactive.¹⁴⁸

A. *Environmental Degradation*

Certainly, eliminating CERCLA retroactivity may impair the unfinished cleanup of waste sites across the country. Many of the serious problem sites remain unremediated; at least one study estimates that only 237 of the 1292 worst sites have been cleaned up.¹⁴⁹ Apparently, a great deal of the damage occurred at sites prior to 1980.¹⁵⁰ While this has not been adequately proven, statistical data warrants caution about eliminating all retroactive application because so much of the site damage was carried out prior to CERCLA's enactment.¹⁵¹ Proponents of retroactivity maintain that its elimination would contradict CERCLA's intended purpose to remediate waste sites through the "polluter pays" vehicle.¹⁵² Moreover,

147. See *infra* notes 158-63 and accompanying text.

148. See *infra* notes 164-67 and accompanying text.

149. See Dancy & Dancy, *supra* note 10, at 105 n.7 (citing Shanahan, *supra* note 17).

150. See Gergen, *supra* note 12, at 689 n.203 (claiming that 27% of the National Priorities List (NPL) sites received contamination from their current owners and operators exclusively, while noting that it is unclear whether the other 73% of sites were primarily contaminated by their current owners alone); Lyons, *supra* note 4, at 301 & n.145 (stating that by the late 1970s the yearly amount of hazardous waste generated in the United States was around 80 billion pounds) (citing S. EPSTEIN ET AL., HAZARDOUS WASTE IN AMERICA 7 (1982)) (emphasis added). More tragically for those who have been harmed is the fact that the serious danger of the hazardous waste threat was not fully comprehended until it was far too late. See Lyons, *supra* note 4, at 278 & n.27 (noting that uncertainty about the dangers of trace elements of a hazardous waste are particularly troublesome).

151. See Lyons, *supra* note 4, at 278. On the other side, many assert that retroactive application of CERCLA has only contributed to unconscionable delays and bungled clean-up jobs. See Hedeman, *supra* note 11, at 17-18 (citing the Sasser Report which found that only 4% of NPL sites had been cleaned up by 1990). For example, the site ranked number one on the NPL and remained on the list for eight years before material work began on the site. See *id.*

152. See *Current Owners*, *supra* note 132. There is a great deal of contention over whether the "polluter pays" concept of CERCLA fundamentally works to clean up sites. In fact, many advocate the position that the current CERCLA liability scheme serves only to delay cleanups rather than accomplish them. See Hedeman, *supra* note 11, at 3. Critics contend that the liability scheme, because it fosters so much litigation, only serves to inhibit the necessary environmental remediation of the sites and that it will require a great deal of streamlining in order to bring the statute in line with its purpose. See *id.* at 17 & n.75 (referring to a Rand report finding that an average site cleanup under the current scheme does not begin, on average, until eight years after EPA learns of the problem). More critically, according to the Sasser Report, only 4% of sites on the NPL have been remediated. See *id.* (citing The Sasser

the fear exists that any site left untouched could, over time, become another Love Canal, and that eliminating retroactive liability altogether could produce such a bitter result.¹⁵³ While retroactive liability is not a panacea, it is medicine that, at the very least, halts the onset of further diseased waste sites.¹⁵⁴

B. Who Will Pay for Cleanup: Making the Polluter Pay

CERCLA retroactivity directly provides a sizeable part of the substantial remediation and clean-up tab needed for waste sites across the country.¹⁵⁵ CERCLA's avowed purpose is to make the polluter pay.¹⁵⁶ This intent was largely derived from the belief that, as between innocent taxpayers and "guilty" polluters who benefited from their harmful behavior, it was the polluters who should bear the economic responsibility for their acts, regardless of whether the acts were legal at the time.¹⁵⁷ Proponents argue that ending CERCLA retroactivity will unfairly shift the revenue burden to present owners or taxpayers alone.¹⁵⁸ Without reve-

Report). The delays and incomplete cleanups are largely due to the inbred over-litigation of every case. *See id.* at 3 (analyzing the innumerable incremental steps that result in every CERCLA action and the stall tactics and challenges which have become ingrained in the process of identifying and pursuing PRPs).

153. *See supra* note 34.

154. *See* Anderson, *supra* note 2, at 19 (pointing out that retroactive liability for CERCLA is comparable to that of car makers in that the parties are required to fix modern problems created by old actions). *But see* Lyons, *supra* note 4, at 292 (noting that retroactive liability like that found under CERCLA has been uncommon in modern tort law, and comparing it to asbestos litigation).

155. *See* Lyons, *supra* note 4, at 311-12 (asserting that CERCLA compensation from PRPs is primarily a scheme for paying for hazardous waste threats and serves no other realistic purpose).

156. *See* Anderson, *supra* note 2, at 7; Dancy & Dancy, *supra* note 10, at 116 n.61; Organ, *supra* note 19, at 1046-48; Lyons, *supra* note 4, at 306.

157. *See Development*, *supra* note 22, at 1540. Of course, this theory is based upon the premise that a benefit accrued to the particular PRP. *See id.* at 1541-42; Lyons, *supra* note 4, at 303-04. In many cases, that benefit may never have occurred, particularly given some PRPs' minimal connections to a waste site. *See* Dancy & Dancy, *supra* note 10, at 116-17 (asserting that parties who did not benefit or only intangibly benefited can be entirely liable because more responsible PRPs have vanished); Lyons, *supra* note 4, at 303-04 (claiming that no "necessary correspondence" between a PRP's gain and its financial responsibility for a site needs to be shown). The case of Troop 1313 is another example of a case where a PRP received no benefit from ownership of the land and certainly was not the cause of the waste problems.

158. *See Current Owners*, *supra* note 132. *But see* Anderson, *supra* note 2, at 28-29

nue there is no cleanup; the very existence of the Superfund shows the critical nature of cost in enacting environmental change.¹⁵⁹

C. CERCLA Revenue Problems

The CERCLA reauthorization battles in the 105th Congress reveal the scope of the revenue concerns in the face of potential retroactivity elimination.¹⁶⁰ In June 1996, a Republican-led Congress attempted to pass a Superfund revenue bill piggybacked on an appropriations bill for Veterans Affairs.¹⁶¹ Democrats charged that the appropriation would include rebates to polluters for past payments and thus “pay the polluter,” flaunting CERCLA’s purpose.¹⁶² Beyond such “rebate” attempts, leaders in both political parties have pledged their determination not to increase taxes to fill a CERCLA funding shortfall created by the elimination of retroactive liability.¹⁶³ Thus, ending CERCLA retroactivity will fundamentally alter the economic landscape of waste site cleanup.¹⁶⁴

(arguing that the burden of funding will fall on those who finance Superfund, which is supported by taxes on industry and thus the “public” will not necessarily foot the bill for the lost revenue); Dancy & Dancy, *supra* note 10, at 121-22, 122-23 n.90 (noting that the states, who pay very little of the burden, may face an increase, and highlighting the comments of several Congressmen who doubt taxes would increase if retroactive liability were to end); Hedeman, *supra* note 11, at 4 n.5 (stating that Superfund financing largely comes from taxes on the petroleum and chemical industries). Furthermore, the current liability scheme may not be as fair as it appears because the EPA and other PRPs often single out “deep pocket” PRPs for attack and these parties end up footing a substantial portion of the liability bill under the threat of joint and several liability. See Van Cleve, *supra* note 10, at 2 n.13 (arguing that the EPA targets “deep pockets” and thus pressures them to clean up the sites).

159. Estimates of the average cost to clean up a single site range between \$20 million and \$50 million. See Gergen, *supra* note 12, at 628 n.16. The Congressional Budget Office has estimated that 2300 to 10,100 future sites still need to be cleaned up at a present cost of \$42 billion to \$120 billion. See Wamsted, *supra* note 20, at 12. As of 1994, \$10.8 billion Superfund dollars had been spent: See Shanahan, *supra* note 17, at 2.

160. CERCLA was set to expire Dec. 31, 1995. See *House Committee Leaders*, *supra* note 25. The arguments over an extension of CERCLA funding proved to be acerbic. See 142 CONG. REC. H6770-H6779 (daily ed. June 25, 1996).

161. See 142 CONG. REC. H6770-81 (daily ed. June 25, 1996).

162. See 142 CONG. REC. H6771-72 (daily ed. June 25, 1996) (statement of Rep. Dingell).

163. See Dancy & Dancy, *supra* note 10, at 123 n.90; *House Committee Leaders*, *supra* note 25.

164. For example, states may be required to fund a materially higher percentage of clean-ups than they currently do. See Dancy & Dancy, *supra* note 10, at 121-22 (stating that states currently fund less than 1% of total cleanup costs under CERCLA).

D. CERCLA Has the Requisite Congressional Intent to Apply Retroactively

Contrary to its detractors, retroactivity supporters find open declarations of intent in the sparse legislative history of the statute, the statutory language, and the scheme of the statute.¹⁶⁵ In fact, while the legislative history is relatively limited, there are some fairly significant indications that CERCLA should have retroactive application.¹⁶⁶ Moreover, supporters say, the statute indicates a retroactive intent in its language, particularly in its past tense usage.¹⁶⁷ On balance, they argue that enough momentum exists to override any presumption against retroactive application of the statute.¹⁶⁸

IV. THE CONTROVERSY REVISITED: ARGUMENTS RENOUNCING RETROACTIVITY

CERCLA retroactivity detractors, who rail against its egregious effects, attack with an increased enthusiasm now that one court has sided with them.¹⁶⁹ As the fundamental prongs of their attack, opponents of

165. See, e.g., *United States v. Northeastern Pharm. & Chem. Co.*, 810 F.2d 726, 732-33 (8th Cir. 1986). *But see* *Landgraf v. USI Film Prods.*, 511 U.S. 244, 285-86 (1994) (noting the justification that "retroactive application of a new statute would vindicate its purpose more fully" is inadequate to overcome the general presumption against retroactivity).

166. See, e.g., H.R. REP. NO. 96-1016, pt. 1, at 63 (1980), *reprinted* in 1980 U.S.C.C.A.N. 6119, 6140 (statement of then-Rep. Gore stressing that chemical companies should have known what they were doing and that they benefited from their practices).

167. Some argue that the past tense language is clear evidence of congressional intent in favor of retroactivity. See *United States v. Alcan Aluminum Corp.* Nos. 87-CV-920 & 91-CV-1132, 1996 U.S. Dist. LEXIS 16358, at *7-8 (N.D.N.Y. Oct. 28, 1996); *Northeastern*, 810 F.2d at 732-33. Others argue that the language is temporal, only applying to polluters after 1980, with no indication of congressional intent authorizing retroactivity. See *United States v. Olin Corp.*, 927 F. Supp. 1502, 1513 (S.D. Ala. 1996), *rev'd*, 107 F.3d 1506 (11th Cir. 1997). Still a third argument asserts that the statutory language covers both pre-enactment and post-enactment conduct in that the pre-enactment conduct is continuing to cause a post-enactment "release" or "threatened release." *United States v. South Carolina Recycling & Disposal, Inc.*, 653 F. Supp. 984, 996 (D.S.C. 1984).

168. See *The Ninth Ave. Remedial Group v. Fiberbond Corp.*, 946 F. Supp. 651, 664 (N.D. Ind. 1996); *Nova Chems., Inc. v. GAF Corp.*, 945 F. Supp. 1098, 1103 (E.D. Tenn. 1996).

169. Representative Michael Oxley (R-Ohio), sponsor of Superfund reform legislation in the House, has said that this case engenders "a whole new ballgame" as far as

CERCLA retroactivity articulate several justifications for its defeat: the specific lack of Constitutional Due Process and general lack of fairness, the costly vagaries of economic uncertainty it produces, and the unfair allocation of cleanup costs due to a potent CERCLA liability scheme of retroactivity, strict liability, and joint and several liability.¹⁷⁰

A. Due Process

CERCLA's questionable due process elicits the most vehement challenges from the varied opponents of retroactivity.¹⁷¹ Their overarching argument, based primarily upon the Fifth Amendment,¹⁷² underscores the temporal legality of PRP conduct at the time it occurred, emphasizing that retroactive application of CERCLA to conduct that was legal before 1980 eradicates a PRPs' fundamental due process rights.¹⁷³ Moreover, the presence of strict liability and joint and several liability magnifies the problems inherent in the retroactive application of CERCLA, because this retroactivity also necessarily draws a wider web of blameless conduct into a rubber-stamped predetermined liability scheme against which a PRP has no defense.¹⁷⁴

CERCLA liability goes. *Hazardous Waste: Justice Department, GOP Congressman Disagree on Impact of Superfund Ruling*, BNA NAT'L ENV'T DAILY, May 29, 1996.

170. One commentator has called CERCLA's liability structure an "octopus-like" liability scheme" because of lack of fairness inherent in its powerful reach. *See Evans, supra* note 34, at 2.

171. *See Dancy & Dancy, supra* note 10, at 112; Blaymore *supra* note 22, at 20-36.

172. "No person shall be . . . deprived of life, liberty, or property without due process of law . . ." U.S. CONST. amend. V. In addition to the Fifth Amendment, some justify elimination of retroactivity on the basis that it is an ex post facto law and, as such, is unconstitutional. *See Shanahan, supra* note 17, at 4. The Constitution states that "No . . . ex post facto Law shall be passed." U.S. CONST. art. I, § 9, cl.3. An ex post facto law punishes an act which was innocent at the time it was performed. *See Shanahan, supra* note 17, at 4. *But see* Blaymore, *supra* note 22, at 46-49 (underscoring the concept that the ex post facto doctrine applies to *criminal laws*) (citing *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798) (emphasis added)). Of course, the doctrine could apply if CERCLA was deemed a criminal statute. *See id.*

173. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994) (noting that the "Due Process Clause also protects interests in fair notice and repose that may be compromised by retroactive legislation . . ."); *see also* Dancy & Dancy, *supra* note 10, at 111-12 (claiming that acts "perfectly legal and in conformity with industry custom" at the time are now causing liability); Hedeman, *supra* note 11, at 4 (stating that liability occurs even though the acts were lawful at the time); Blaymore, *supra* note 22, at 20 (noting the due process claims of those who performed legal acts now being found liable); Lyons, *supra* note 4, at 291-93 (lamenting the fact that those who properly disposed of their waste following current legal guidelines can now be found liable under CERCLA retroactivity).

174. *See supra* notes 2-12 and accompanying text. Opponents of retroactivity point to the liability of parties like Troop 1313 or the seller of dog food, Russ Zimmer. *See*

Proponents of retroactivity, while agreeing that due process goes astray, assert that much case law stands for the proposition that, in instances of furthering a "public purpose"¹⁷⁵ or where the legislation rationally spreads costs to those who profited (the so-called "rational means test"), as long as the means are rationally related to its purpose, retroactivity is constitutionally acceptable.¹⁷⁶ Thus, they argue that hazardous waste disposal seminate a significant societal harm whose tremendous cost must be spread out among the evil-doers (those who benefited should pay) and that the resulting due process concerns fail to override the necessary retroactivity of CERCLA.¹⁷⁷ Opponents of retroactivity reply that cost-spreading is irrelevant to past CERCLA violations and that this class of PRPs could not plan or budget for such contingencies because they had no ability to predict that their legal and honest conduct would later create substantial liability.¹⁷⁸

This cost spreading concept of strict liability loses its attractiveness when applied retroactively because the polluter often had no real choice as to a course of action because he understood his actions at the time to be completely legal.¹⁷⁹ In fact, because they often met the highest dis-

supra notes 2-3 and accompanying text. See also *O'Neil v. Picillo*, 883 F.2d 176, 178, 183 (1st Cir. 1989) (holding liable for \$1.4 million dollars a party who was responsible for only a trace of the contamination).

175. *Nachman Corp. v. Pension Benefit Guar. Corp.*, 592 F.2d 947, 958 (7th Cir. 1979). *Nachman* concerned the constitutionality of the Employee Retirement Income Security Act (ERISA) requiring employers to provide pension benefits to workers who had terminated employment in the year immediately preceding its passage. See *id.* at 950.

176. See *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 18 (1976) (creating the rational means test to measure retroactivity against the loss of due process). In *Usery* the Court upheld a statute which imposed liability on the coal industry to compensate former employees harmed by black lung disease. See *id.* at 19-20.

177. See *United States v. Northeastern Pharm. & Chem. Co.*, 810 F.2d 726, 733-34 (N.D. Ohio 1983) ("Congress acted in a rational manner in imposing liability for the cost of cleaning up such sites upon those parties who created and profited from the sites and upon the chemical industry as a whole.") (citation omitted).

178. See *infra* notes 204-05 and accompanying text. The general concept is the tort concept of strict liability, that whoever gains from their conduct should also shoulder the costs to society of their behavior. See *Oswald*, *supra* note 12, at 593 n.52.

179. See *Anderson*, *supra* note 2, at 35 (noting retroactive liability is "difficult to pass forward to consumers and is difficult to avoid by altering behavior or eliminating risk-producing inputs"); see also *Schwarz*, *supra* note 12, at 825 (claiming that retroactive liability will not promote risk-spreading). But see *Healy*, *supra* note 10, at 81-86 (retroactive liability may, in fact, impact and deter future behavior because "the

posal standards at the time, the polluter was spreading the costs in the best manner available.¹⁸⁰ In addition, a related cost-spreading issue reveals some poignant irony: because of a massive hazardous waste insurance void, post-1980 PRPs drawn into the CERCLA liability scheme at any given site cannot spread the costs through insurance and pay for the retroactively liable insolvent or unavailable PRPs for whom that same insurance was readily available.¹⁸¹ Thus, retroactive application of CERCLA undercuts both the strict liability cost-spreading rationale and insurance availability to present owners of hazardous waste sites—a particularly unfortunate result for those who never benefited from ownership of the land in question.¹⁸²

Compounding the inequities of CERCLA retroactivity is the scientific inadequacy of the pre-CERCLA cleanup conduct; many polluters were only following the scientific protocol, as archaic as it may now seem, at the time.¹⁸³ These polluters argue, with considerable justification, that their actions fell within the standard of care required at the time.¹⁸⁴ In fact, many waste disposers utilized “cutting edge” practices.¹⁸⁵ Govern-

expectation that future evolution in the law will be made applicable to harms arising . . . prior to the announcement of new rules will have a desirable effect on behavior”). *Id.* at 84 n.68 (quoting Louis Kaplow, *An Economic Analysis of Legal Transitions*, 99 HARV. L. REV. 509, 599-600 (1986)).

180. In other words, the polluter was choosing to spend the most money possible to safeguard the hazardous waste. See Anderson, *supra* note 2, at 25.

181. See *infra* note 205 and accompanying text.

182. See Dancy & Dancy, *supra* note 10, at 116-17.

183. See Oswald, *supra* note 12, at 603 n.94 (noting that “liability under CERCLA is determined by current scientific knowledge and understanding of what is hazardous,” and adding that “an activity that was considered safe and acceptable in 1979, for example, could give rise to liability in 1992 if scientific advances were now to demonstrate its hazardousness”). Compounding this problem is that, while CERCLA’s chief purpose is to charge those who benefit with the cost of cleanup, those who do not benefit, or those who only benefit in a very minute way, often end up paying. See Dancy & Dancy, *supra* note 10, at 116-17.

184. See Anderson, *supra* note 2, at 25. Moreover, as several scholars and some members of Congress have pointed out, we are essentially adjudging past actions by modern advanced scientific standards—a process which could endlessly regenerate itself. See *id.* at 26 (citing H.R. REP. NO. 96-1016, pt. 1, at 17 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6120); Lyons, *supra* note 4, at 293.

185. See Anderson, *supra* note 2, at 25-26. In the 1950s, landfill operators dug trenches and then covered the waste placed therein on a daily basis with “six inches of fly ash or dirt and . . . a two-foot layer of dirt when the trench was full.” See *id.* at 25. Even more telling is the fact that many of these so-called “disposal practices” were “explicitly” okayed by the government or were followed by the local government landfill. See *id.* at 26. It is particularly ironic that land disposal was presented as preferable to sewage disposal, yet those who bucked the norm (perhaps dishonestly?) now face no liability problems while land disposers confront massive liability for honest and legal acts. See *id.* But see Lyons, *supra* note 4, at 275 n.15 (highlighting

ment officials often permitted, and even encouraged, a multitude of pre-1980 disposal efforts.¹⁸⁶ Now, these same law abiders have become law breakers; the science they relied upon has spurned them.¹⁸⁷

B. Inequitable Allocation of Costs

The unfair allocation of cleanup costs among PRPs elicits measured and harsh responses from opponents of retroactivity.¹⁸⁸ In theory, CERCLA intends to make the polluter pay while allocating the liability to those parties who most benefited from the use of the site.¹⁸⁹ Yet, the potency of the CERCLA liability scheme repeatedly holds parties with barely traceable connections to the waste site (such as Troop 1313) financially responsible for cleanup.¹⁹⁰ Moreover, CERCLA's liability scheme has a unique equilibrium: it similarly attacks the deep pocket offenders, who repeatedly pay more than their fair share of liability simply because they are able to.¹⁹¹ Both ends of the liability spectrum—the “deep pocket” corporate PRP and the smaller “empty pocket” party with barely traceable links to the site—suffer from the frequent presence of

a 1978 EPA study noting that 90% of hazardous wastes were probably not being adequately taken care of) (citing Fed. Reg. 58,948 (1978)).

186. See Anderson, *supra* note 2, at 26 n.117 (giving examples of situations where government officials expressly okayed disposal techniques) (citing Joel A. Tarr, *Historical Perspectives on Hazardous Wastes in the United States*, 3 WASTE MGMT. & RES. 95, 99 (1985)).

187. Extreme examples include corporate officers who followed appropriate scientific guidelines at the time they directed disposal, yet who suddenly find themselves personally liable for their honest and legal actions. See Oesterle, *supra* note 22, at 67 n.27.

188. See Anderson *supra* note 2, at 6-7; Dancy & Dancy, *supra* note 10, at 116-18.

189. See Anderson, *supra* note 2, at 7 (“The idea behind the CERCLA liability system is deceptively simple: make the polluter pay.”).

190. 132 CONG. REC. E1327-43 (daily ed. April 23, 1986) (stating that those liable “can be held responsible for full costs even if what it did was totally without fault and had only the most trivial consequences”) (quoting Robert D. Kilpatrick, *Superfund Insurance Problems Symptom of Flaws in Tort System*, FINANCIER, Dec. 1985); see Anderson, *supra* note 2, at 6, 8, 19 (noting that “costs are often borne by those who are not responsible for problem at all” and adding that CERCLA has become a “Liability Lottery”); Dancy & Dancy, *supra* note 10, at 116 (commenting that retroactivity does not influence PRP acts because they have already occurred).

191. See Gergen, *supra* note 12, at 673, 676 (claiming that PRPs with the financial foundations should be ready to confront claims because the less financially capable parties are not as attractive); Van Cleve, *supra* note 10, at 2 n.13 (asserting that the EPA strategically targets the few “deep pockets”).

the "orphan share."¹⁹² These orphan shares hinder equitable cleanups because they often represent the most culpable party, yet will not have to shoulder any of the liability and their cost share gets consumed by other, often less culpable, parties.¹⁹³

Clearly, Congress was aware of these dangerous allocation inequities from the beginning. Then-Representative Albert Gore, Jr. proposed what have become known as the "Gore Factors" for courts to weigh when adjudicating liability allocation for a given site.¹⁹⁴ As the original enactment date of CERCLA fades, its inequitable allocation of liability draws increased focus.¹⁹⁵ For example, in recent years the EPA has moved noticeably towards excluding the smaller parties (*de minimis* and *de micromis*) from the liability maelstrom.¹⁹⁶ Other attempts to streamline the litigation process have included the use of non-binding allocations of responsibility (NBARs), covenants not to sue, settlements with *de minimis* and *de micromis* parties, and model consent decrees.¹⁹⁷ Despite

192. The liability deepens with the existence of "orphan shares"—the shares of parties who have gone bankrupt, become insolvent or in some other way are unable to pay cleanup costs. See Evans, *supra* note 16 and accompanying text.

193. See Evans, *supra* note 16; see also Anderson *supra* note 2, at 23-24 (arguing that orphan share allocation may not be fair); Tucker, *supra* note 25, at C1.

194. The six Gore Factors are as follows: (1) the ability of the parties to distinguish their contribution; (2) the amount of the hazardous waste; (3) the degree of toxicity; (4) the degree of the parties' involvement in generation, transportation, treatment, storage, or disposal; (5) the degree of care; and (6) the degree of cooperation with federal and state officials. See 126 CONG. REC. 26,781 (1980); see also *Development*, *supra* note 22, at 1533-34 (discussing the Gore Factors and their applicability). Gore's factors were not adopted by Congress in CERCLA, but a House Judiciary Report posited that they would be fair guidelines for allocating costs in contribution actions. See H.R. REP. NO. 99-253(iii) (1985), reprinted in 1986 U.S.C.C.A.N. 3038, 3042. CERCLA provides that "[i]n resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate." 42 U.S.C. § 9613(f)(1) (1994). Courts have frequently utilized the Gore Factors in their Superfund allocation decisions. See, e.g., *United States v. A & F Materials Co., Inc.*, 578 F. Supp. 1249, 1256 (S.D. Ill. 1984). Often the poorly kept or missing records make liability shares difficult to determine, or commingled waste makes it fruitless to determine the level of harm caused by each PRP. See Anderson, *supra* note 2, at 24; Organ, *supra* note 19, at nn.27, 80.

195. See Van Cleve, *supra* note 10 (discussing the congressional debate over Superfund reauthorization and the proposed bill's attempts to improve the process).

196. *De minimis* parties are small volume waste contributors to a given site. SARA expressly allowed for *de minimis* settlements (early settlements with the minimal PRPs at a hazardous waste site). See 42 U.S.C. § 9622(g) (1994). *De micromis* parties are extremely small contributors of waste. The EPA has set up guidelines for settling with these minimal contributors in order to facilitate cleanups. See *CERCLA Settlements*, *supra* note 139. *De micromis* settlements are open only to generators and transporters—not to site owners or operators. *Id.*

197. See 42 U.S.C. § 9622(d), (e)(3), (f), (g) (1994). See generally Hedeman, *supra*

these recent moves to minimize the liability scheme's inequities, the CERCLA allocation system continues, in an unfair manner, to economically shackle many PRPs while failing in its statutory mandate to hasten and fund hazardous site clean-ups.¹⁹⁸ Superfund retroactivity enables this dangerous inequity because it engenders a liability potency nearly impossible for the innocent to fully elude.¹⁹⁹ As a practical matter, CERCLA's retroactive application creates serious evidentiary problems; in particular, disposal records are often lost, incomplete or missing.²⁰⁰ Furthermore, retroactivity, in its very nature, creates situations in which potential PRPs from the past are dead or insolvent.²⁰¹ Thus, those truly innocent or minimally culpable of hazardous waste disposal have almost no available evidentiary defense.²⁰²

*C. Ability to Internalize & Spread the Costs:
Budget & Insurance Issues*

Opponents of CERCLA retroactivity further argue that it promotes severe economic uncertainty, asserting that successful business demands predictability and the ability to spread the costs.²⁰³ In particular, busi-

note 11, at 18-19 (analyzing the different methods of creating a fairer allocation scheme).

198. See *Superfund Attorneys Discuss Flaws in CERCLA Liability System at Law Conference*, DAILY ENVTL. REP. NEWS (BNA) at D14 (Feb. 16, 1996). Some have argued that the EPA has not effectively used the tools at their disposal. See Van Cleve *supra* note 10, at 2 n.12, 13 (noting that the EPA has only entered into five NBARS and 128 de minimis settlements at 1074 NPL sites) (citing: *Superfund: Further EPA Management Action Is Needed to Reduce Legal Expenses*, U.S. Gen. Acct. Office No. B-253857, at 6 (1994) (emphasis added).

199. See Anderson, *supra* note 2, at 12-13 (noting the difficulties occurring when evidence has been destroyed or lost); Shanahan, *supra* note 17, at 5 (providing the example of a business owner from the 1950s to the 1970s who would not, as a matter of course, have kept his records for such a lengthy period of time).

200. See Anderson, *supra* note 2, at 12-13; Shanahan, *supra* note 17, at 5.

201. See Anderson, *supra* note 2, at 12-13.

202. In allocating liability courts may consider evidence to determine if there is any third party defense under 42 U.S.C. § 9607(b)(3), or if the waste contribution percentage of the defendant can be approximated. Thus, the lack of evidentiary materials impacts both threshold liability and liability allocation. See Anderson, *supra* note 2, at 24; *supra* note 10 and accompanying text.

203. See Freeman, *supra* note 41, at 682. Senators Domenici and others had similar concerns during the passage of CERCLA in 1980. See COMMITTEE PRINT, *supra* note 42, at 426. Retroactive liability does not allow for efficient cost spreading. See Anderson, *supra* note 2, at 35. In particular, retroactivity does not enable a company to

nesses brood over two problems created by CERCLA—the loss of predictability and the difficulty of finding adequate insurance.²⁰⁴ One commentator notes that the “foreseeability of legal consequences is one of the most important elements in predicting economic consequences” and that retroactive CERCLA liability precludes the predictability necessary to run a successful industry and attract investment.²⁰⁵ Secondly, CERCLA retroactivity materially affects business’s ability to properly insure against loss; in fact, environmental liability insurance is nearly non-existent in this country following the enactment of CERCLA.²⁰⁶ Both of these issues address a PRPs’ ability to internalize the cost of pollution.²⁰⁷ Retroactive application of CERCLA does not permit such internalizing and inequitably foists the cost burden onto parties who had no real ability to make choices by weighing the costs of polluting against the benefits.²⁰⁸

D. CERCLA Retroactivity is not Supported by the Requisite Congressional Intent

Beyond matters of environmental policy and statutory purpose, opponents of CERCLA retroactivity argue that there is little evidence of Congress’s intent to apply CERCLA retroactively and thus such application should not be judicially favored.²⁰⁹ This reasoning flows from the dearth of evidence available to measure congressional intent.²¹⁰ As noted above, CERCLA’s pilgrimage to enactment lacks the usual formal re-

pass the costs of the pollution onto its customers and, more critically, it does not permit the company to change its behavior or end the activity because the damage has already been done. *See id.* If retroactivity were to be eliminated (in effect creating more orphan shares), those elements would be more effectively cost shifted to the Superfund where the taxes could be raised in a parallel manner and the risk fairly spread. *See id.*

204. *See* Dancy & Dancy, *supra* note 10, at 116.

205. *See* Freeman, *supra* note 41, at 682.

206. *See id.* at 683. Freeman also notes that this insurance void has harmed small businesses as well as American competitiveness in a world where other countries do not have to confront environmental retroactive liability. *Id.* Other commentators also acknowledge the debilitating impact on economic competitiveness. *See, e.g.,* Dancy & Dancy, *supra* note 10, at 104-05 & n.6. *See also* COMMITTEE PRINT, *supra* note 42, at 428 (expressing concerns of several senators about insurance issues which CERCLA would produce).

207. *See supra* note 12 and accompanying text.

208. *See* Gergen, *supra* note 12, at 629-30 (arguing that CERCLA’s current liability structure has provided no incentives to act responsibly primarily because no real internalization of costs have taken place).

209. *See supra* notes 40-60 and accompanying text.

210. *See id.*

cord necessary for adequate statutory interpretation, and the patchy record that does exist does not reveal clear congressional intent regarding retroactivity.²¹¹ A curious circle of logic results whereby many courts find congressional intent for retroactive application while acknowledging that the legislative history is incomplete.²¹² Opponents couple this lack of requisite congressional intent with the statute's failure to expressly promulgate retroactivity in advocating that such an application of CERCLA disregards judicial precedent establishing a presumption against retroactivity.²¹³ In sum, lower courts rely on shaky grounds to find the necessary congressional intent to buttress CERCLA retroactivity.²¹⁴

V. PROPOSALS MODIFYING CERCLA RETROACTIVITY: THE REFORM MOVEMENT GENERALLY

CERCLA reform awaits. As more commentators analyze the endangerment of CERCLA, they advocate a broad range of cures for the statute's evident ills.²¹⁵ These prescriptions tend to follow one of two approaches—either they call for minor operations or they advocate major surgery.²¹⁶

A. *Minor Reforms: Carveouts*

Some have proffered a restructuring in the form of carve-outs for certain PRPs to provide greater fairness in the way that CERCLA is currently administered.²¹⁷ These carveout proposals tend to focus on PRPs in-

211. For example, no hearings were transcribed. See Freeman, *supra* note 41, at 18.

212. See, e.g., Ohio ex rel. Brown v. Georgeoff, 562 F. Supp. 1300, 1311-14 (N.D. Ohio 1983) (noting that retroactivity was not raised in congressional debates, but still finding the necessary congressional intent for it).

213. See United States v. Olin Corp., 927 F. Supp. 1502, 1519 (S.D. Ala. 1996), *rev'd*, 107 F.3d 1506 (11th Cir. 1997); Freeman, *supra* note 41, at 666.

214. See generally Freeman, *supra* note 41, at 671-78. (arguing that the legislative history of CERCLA is too incomplete to warrant a finding of adequate congressional intent to override the pervasive judicial presumption against retroactive application of a statute).

215. See *Ways-Means*, *supra* note 24, at 365; Anderson, *supra* note 2, at 4-6; Dancy & Dancy, *supra* note 10, at 104-06; see also Evans, *supra* note 16 (describing the EPA's administrative reforms regarding the problem of "orphan shares"); Powers, *supra* note 95.

216. See Anderson, *supra* note 2, at 5-6 & nn.22-23, 47.

217. See *id.* at 5-6 nn.22-23, 47 (noting carveout proposals for lenders, landowners,

directly linked to hazardous waste problems at the site.²¹⁸ Among the groups targeted for possible carveouts are lenders who own the property only in transition or as the result of foreclosure.²¹⁹ Other groups include municipalities and innocent landowners.²²⁰ While seeking to rectify situations which often produce inequitable results, such limited proposals ignore the systemic problems of the CERCLA scheme, and, instead, only rescue certain groups from liability.²²¹

B. Major Reforms: Re-structuring the Liability Scheme

Much of the dialogue on reform advocates major surgery on CERCLA, claiming that carveouts only serve to prolong the pain.²²² Professor Jerry Anderson has proposed that the EPA administratively assign liability, in a cost allocating manner, rather than relying on strict liability and joint and several liability.²²³ Still others, including influential Congressman Michael Oxley, sponsor of the CERCLA reform bill H.R. 2500, and House Ways and Means Committee Chairman Bill Archer, have called for reform through elimination of all or most of the statute's retroactivity.²²⁴ Additionally, CERCLA reformers have promoted substituting strict liability

and municipalities); *see also* Oswald, *supra* note 12, at 635-36 (arguing that CERCLA liability should not be extended to corporate individuals because it does not further the goals of CERCLA).

218. *See* Anderson, *supra* note 2, at 6 (describing many of the proposals as seeking efficiency and equity). As a cautionary note, Anderson warns that some of these proposals have built-in biases favoring a particular special interest group. *See id.*

219. *See id.* at 5-6 nn.21-22.

220. *See id.*

221. *See id.* at 48. ("Whittling away at the edges of CERCLA unfairness will not solve the problem.")

222. *See, e.g., id.*

223. *See id.* at 48-56 (proposing that identified PRPs would have "an affirmative requirement . . . to establish where and how [their] waste was disposed of" and that all of the information would be given to an Administrative Law Judge who would then, based on a formula, make an assignment of shares in the liability).

224. *See Ways-Means, supra* note 24, at 365; Freeman, *supra* note 41, at 673; *see also* Goldberg, *supra* note 19, at 713 (arguing that the European Community should "articulate a clear policy against retroactive liability"). Republicans have pushed bills in Congress attempting to abolish retroactivity either before 1980, or, in the alternative, 1987, and to make Superfund clean the waste up. *See Powers, supra* note 95; Tucker, *supra* note 25.

with a fairer negligence standard.²²⁵ The palpable intensity of the calls for reform indicates the seriousness of CERCLA's statutory ills; the elimination of retroactivity tops the list of potential reforms.²²⁶

C. *Reforming Retroactivity: A Negligence Standard for Retroactive PRPs*

Several reformers have focused on altering CERCLA's retroactivity.²²⁷ Their proposals include an elimination of retroactivity entirely or alternatively, a retroactivity discount.²²⁸ To achieve the goal of fairness without gutting CERCLA's fundamental purpose, the most viable proposal is one which would utilize a negligence standard for retroactive PRPs.²²⁹ This negligence standard would apply solely to retroactive PRPs and leave in place the strict and joint and several liability standards for other PRPs as well as negligent retroactive PRPs.²³⁰ As a result, pre-enactment PRPs who can show that they "played by the rules" will not pay, while pre-enactment negligent PRPs who benefited in an ill-gotten manner from their hazardous waste disposal will continue to pay their fair share or more.²³¹ Most importantly, a negligence standard for retroac-

225. See Anderson, *supra* note 2, at 5 n.22 (citing *Strict Liability Should Be Replaced By Negligence Standard, Industry Group Says*, 24 Env't Rep. (BNA) 193 (May 28, 1993); see also Oswald, *supra* note 12, at 584-85 (advocating negligence standard for corporate individuals).

226. Typical of the comments is that of Professor Anderson: "Not only is the system of assigning liability for cleanup costs manifestly unfair, it simply is not working." Anderson, *supra* note 2, at 4 (citations omitted).

227. See *supra* notes 140, 223 and accompanying text.

228. See *supra* note 140 and accompanying text.

229. See Dennis E. Eckart, *Superfund, the Environment and Fair Taxation*, WASH. TIMES, Nov. 12, 1996, at A23 (arguing that the cost of eliminating retroactivity would be reconstituted by the Superfund corporate taxes which are a much fairer and more efficient method of funding waste cleanup); see also *supra* note 226 and accompanying text.

230. See Eckart, *supra* note 229, at A23.

231. Fundamental to CERCLA's polluter pays principal is the concept that the PRPs who benefited from their evils should not escape liability. See *supra* notes 154-56 and accompanying text. Utilizing a negligence standard will still ensnare this category of polluters while granting a modicum of equity to those who acted reasonably and fairly at the time of the disposal. See *supra* notes 178-80 and accompanying text. In essence, a negligence standard, unlike an elimination of all retroactive application, does not permit unconscionable polluters to elude liability and thus rewards conscionable behavior. See Eckart, *supra* note 229, at A23.

tive liability will not severely undermine Superfund revenues because shortfalls can be recouped through the following two financing channels: (1) incremental Superfund tax increases on the beneficiaries of hazardous waste disposal—the chemical and oil industries;²³² and (2) the potential elimination of the government's transaction costs incurred in pursuing any available PRP.²³³ CERCLA reform under a negligence standard for pre-enactment PRPs upholds CERCLA integrity while largely negating its inherent flaws.

VI. CONCLUSION

CERCLA's effectiveness remains open to question from supporters and opponents alike.²³⁴ Certainly, CERCLA's judicially sanctioned retroactivity has substantially impacted the statute's ability to clean up sites and fairly partition the costs.²³⁵ This retroactivity has engendered serious fairness questions, caused inequitable liabilities among PRPs, and unnecessarily endangered economic competitiveness.²³⁶ Eliminating retroactivity without requisite culpability²³⁷ would re-direct CERCLA to its fundamental purpose and further streamline cost recovery and clean-up at existing sites by eliminating transaction costs associated with PRPs who lack practical connection to and real responsibility for hazardous waste.²³⁸ Unaware pre-1980 PRPs, like Troop 1313, would thus evade a retroactive liability over which they had no power to avoid through internalization of costs and to which they did not actively contribute. On the other hand, such PRPs may have negligibly contributed to the problem by failing to investigate the property's potential waste problems. This omission, however, does not square with the massive costs they may be forced to bear under CERCLA retroactivity—particularly given that, prior to CERCLA, a purchaser of land had no duty to inquire into hazardous waste problems.²³⁹

The negligence standard for retroactive PRPs advocated above places the burden on those who directly caused the waste and may have benefited from it, and goes far toward ending the sting of inequity felt by so

232. See *supra* notes 131-33 and accompanying text.

233. See Eckart, *supra* note 229, at A23.

234. See Dancy & Dancy, *supra* note 10, at 104.

235. See *supra* notes 15, 17 and accompanying text.

236. See *supra* notes 170-207 and accompanying text.

237. See Gergen, *supra* note 12, at 683-86 (arguing that "Indirectly Involved Landowners" should be subject to a negligence rule accompanied by fair apportionment of liability).

238. See *id.*; see *supra* note 16 and accompanying text.

239. See, e.g., *supra* note 21 and accompanying text.

many who innocently owned the land prior to CERCLA enactment.²⁴⁰ Those pre-1980 PRPs eliminated by this standard would become “orphan shares” and the potential funding shortfall would be shifted to the Superfund, which is appropriately supported by the chemical, petroleum and feedstock industries.²⁴¹ Ending retroactive liability without culpability would also materially downsize the enormous transaction costs spent pursuing potential contributors and speed site remediation without a complete eradication of the necessary revenue streams and without a freeing of the culpable.²⁴² In such an environment, we may be able to get back to the matter at hand—cleansing the land of toxic waste—and ignore the frantic pursuit of innocent pre-1980 owners of infected land.

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240. *See supra* notes 2-21 and accompanying text.

241. *See supra* notes 131-33 and accompanying text.

242. *See supra* notes 135-37 and accompanying text.

