STUDENT ARTICLES

RETROACTIVITY REVISITED: A CRITICAL APPRAISAL OF CERCLA'S RETROACTIVE LIABILITY SCHEME IN LIGHT OF *LANDGRAF v. USI FILM PRODUCTS* AND *EASTERN ENTERPRISES v. APFEL*

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INTRODUCTION

The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)[1] is noted for its strict, joint and several, and retroactive liability scheme. CERCLA's retroactive liability implicates Potentially Responsible Parties (PRPs), which include former owners, operators, generators, or transporters of hazardous waste[2] and their descendants. Such retrospective liability seems fundamentally unfair because it implicates PRPs who may have complied with all existing environmental regulations. When retroactivity is combined with joint and several liability, CERCLA may actually hold individuals responsible for remediating damages that exceed their individual contributions. While this seems like an injustice, only one court has expressly disavowed CERCLA's constitutionality,[3] despite two other recent Supreme Court cases that reaffirm the Court's presumption against retroactivity in other contexts.[4] Although these Supreme Court decisions are not about CERCLA in par-

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1 42 U.S.C. §§ 9601-9675 (1994 & Supp. III 1997).

2 PRPs are liable for all remediation costs including natural resource damages and resulting health assessment expenses. *See* 42 U.S.C. §9607(a)(4).

3 *See* United States v. Olin Corp., 927 F. Supp. 1502 (S.D. Ala. 1996), *rev'd*, 107 F.3d 1506 (11th Cir. 1997).

4 *See* Eastern Enter. v. Apfel, 524 U.S. 498 (1998); Landgraf v. USI Film Prod., 511 U.S. 244 (1994).

ticular, the Court's reasoning transcends the particular facts of the cases to reveal a general anti-retroactivity sentiment. Thus, although the Supreme Court has never addressed CERCLA's constitutionality, these cases suggest that the Court would similarly reject CERCLA's liability scheme if given the opportunity. This Article considers CERCLA's retroactive application, examines precedent that directly addresses the issue, and evaluates CERCLA in light of these recent Supreme Court decisions. This Article concludes that CERCLA's retroactivity is not only intuitively unfair, but is also unconstitutional. Given these concerns, this Article provides alternatives to CERCLA's continued retroactive application.

CERCLA liability is strict, joint and several, and retroactive.[5] Strict liability means that PRPs are responsible for site cleanup regardless of fault, negligence, or compliance with then-existing legal standards. Joint and several liability reduces government expenditures when some contributors cannot be found or are insolvent by holding remaining PRPs responsible for funding the entire remediation, despite their individual contribution. Liability applies to hazardous conditions that were created prior to CERCLA's passage on December 11, 1980, even though such activities may have been completely legal at the time. Michael Gerrard and Deborah Goldberg summarize the implications of such extensive liability:

> Numerous parties with varied and sometimes tenuous connections to a contaminated site are potentially responsible for the costs of cleaning it up. . . .
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> • even if the PRP unknowingly succeeded to the liabilities of a former polluter who left the site decades earlier;
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> • even if the "polluter" conformed scrupulously to then-current state-of-the-art pollution control standards;
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> • even if the PRP or its predecessor operated or used the site only briefly and released only a small amount of the least toxic chemicals on the site;
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> • even if the PRP was a lawful waste generator that used a lawful transporter to haul the waste to a lawful landfill that, decades later, was declared a hazardous waste site; and

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[5] *See* Charles de Saillan, *Superfund Reauthorization: A More Modest Proposal*, 27 Envtl. L. Rep. (Envtl. L. Inst.) 10201, 10203 (May, 1997).

- even if other, more culpable PRPs could better afford the costs of remediation.[6]

This far-reaching scheme has dramatic consequences. For instance, over 200 generators were held liable for the remediation of a waste site in California, notwithstanding the fact that the state had required them to use the facility.[7]

Courts have historically disfavored retroactive liability,[8] maintaining that prospective legislation is the paradigm of the legal system.[9] If legal consequences are retroactively altered, actors are unable to anticipate the true costs of their decisions. Thus, retroactivity can "deprive citizens of legitimate expectations and upset settled transactions."[10] Presumably, acts are declared illegal to encourage desirable behavior; however, when legal consequences are changed retroactively, actors are not given the appropriate notice.[11] This is particularly significant when "unanticipated consequences" involve multi-million dollar liability claims. In such cases, predictability is vital to guide investments and insurance decisions.[12] Conversely, the uncertainty

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[6] Michael B. Gerrard & Deborah Goldberg, *Constitutional Challenges to CERCLA*, N.Y. L.J., May 23, 1997, at 3.

[7] *See* Michael B. Gerrard, *Demons and Angels in Hazardous Waste Regulation: Are Justice, Efficiency, and Democracy Reconcilable?*, 92 NW. U. L. REV. 706, 714 (1998) (book review).

[8] *See, e.g.*, *Eastern*, 524 U.S. at 501 ("Retroactive legislation is generally disfavored."); Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) ("Retroactivity is not favored in the law."); Ohio *ex rel*. Brown v. Georgeoff, 562 F. Supp. 1300, 1306 (N.D. Ohio 1983) ("As a general rule, the courts do not favor retroactive application of statutes.").

[9] *See Landgraf*, 511 U.S. at 272 ("[P]rospectivity remains the appropriate default rule. [It] accords with widely held intuitions about how statutes ordinarily operate. . . ."); Union Pac. Ry. Co. v. Laramie Stock Yard Co. (1913), 231 U.S. 190, 191, *quoted in* Greene v. United States, 376 U.S. 149, 160 (1964) ("[T]he first rule of construction is that legislation must be considered as addressed to the future, not to the past."). *See also* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1398, at 306-07 (3d ed. 1858) ("Retrospective laws are . . . generally unjust, and . . . neither accord with sound legislation nor with the fundamental principles of the social compact."), *quoted in Eastern*, 524 U.S. at 533; George Clemen Freeman, Jr., *Inappropriate and Unconstitutional Retroactive Application of Superfund Liability*, 42 BUS. LAW. 215, 218 (1986).

[10] General Motors Corp. v. Romein, 503 U.S. 181, 191 (1992), *quoted in Eastern*, 524 U.S. at 533.

[11] *See* Brief for Respondents at 21, Landgraf v. USI Film Prod., 511 U.S. 244 (1994) (No. 92-757) (quoting BENJAMIN N. CARDOZO, THE GROWTH OF THE LAW 3 (1924)) ("Law as a guide to conduct is reduced to the level of mere futility if it is unknown and unknowable.").

[12] *See* George Clemen Freeman, Jr., *A Public Policy Essay: Superfund Retroactivity Revisited*, 50 BUS. LAW. 663, 682 (1995).

associated with CERCLA has created an almost insurmountable roadblock for industry by making it virtually impossible for businesses to secure environmental liability insurance.[13] At its root, this uncertainty violates "fundamental concepts of fairness and notice."[14] In fact, CERCLA (along with its state counterparts) is the only environmental legislation without modified provisions for pre-enactment violations.[15]

Despite the apparent injustice of retroactive liability, commentators support CERCLA's liability scheme as a necessary evil.[16] Hazardous waste remediation is expensive,[17] and retroactive liability is an obvious way to reduce dependence on federal financing. In fact, one author estimates that repealing retroactivity would increase costs by two to three times current expenditures.[18] Thus, Representative Sherwood Boehlert proclaimed: "A full repeal of retroactive liability is not realistic because we simply can't afford it."[19] Another author attributes the persis-

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[13] *See* Kevin J. Slattum, Note, *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*, 25 PEPP. L. REV. 141, 176 (1997) (noting that "retroactive CERCLA liability precludes the predictability necessary to run a successful industry and attract investment" and that "environmental liability insurance is nearly non-existent in this country following the enactment of CERCLA.") (citing Freeman, *supra* note 12, at 682-83).

[14] Nicole M. McGinnis, Comment, *Reconsidering CERCLA Retroactivity after* Landgraf v. USI Film Products, 7 U. CHI. LEGAL F. 507, 523 (1997).

[15] *See* Bruce Howard, *Reforming Retroactivity and Current Owner Liability Standards in CERCLA to Increase Fairness and Efficiency*, 9 J. NAT. RESOURCES AND ENVTL. L. 325, 326-27 (1994). *See generally* Heidi Gorovitz Robertson, *If Your Grandfather Could Pollute, So Can You: "Grandfather Clauses" and Their Role in Environmental Inequity*, 45 CATH. U. L. REV. 131 (1995).

[16] *See, e.g.*, Gray B. Taylor, Comment, *A Review of the Constitutionality of CERCLA in the Wake of* United States v. Olin Corp., 6 S.C. ENVTL. L.J. 61, 81 (1997).

[17] *See* THOMAS W. CHURCH & ROBERT T. NAKAMURA, CLEANING UP THE MESS: IMPLEMENTATION STRATEGIES IN SUPERFUND 8 (1993) (estimating that the average cost of cleanup is $30 million per site).

[18] *See* Rena I. Steinzor, *The Reauthorization of Superfund: The Public Works Alternative*, 25 Envtl. L. Rep. (Envtl. L. Inst.) 10,078, 10,083 (Feb. 1995) (estimating that between $3.6 and $4.6 billion annually would be needed to finance cleanup under a revised Superfund, as compared to $1.4 billion in the 1993 Superfund). *See also* Allan Freedman, *Environment: Superfund Rewrite Focuses on Retroactive Liability*, CONG. Q. WKLY. REP. 1171, 1172 (1995) (citing a Congressional Budget Office analysis estimating that a retroactivity repeal would increase remediation costs by $1.3 billion).

[19] Allan Freedman, *New Liability Limits Proposed for Superfund Site Cleanup*, Cong. Q. Wkly. Rep. 2262 (1995) (quoting Rep. Sherwood Boehlert).

tence of CERCLA's retroactive liability scheme to society's belief that polluters are "demons."[20] Thus, unyielding liability is deemed necessary to punish "the evil polluter."[21]

Equity arguments can similarly be advanced to repudiate repeal. If retroactive liability is repealed today, twenty years after CERCLA's passage, those who promptly remediated pre-enactment hazardous sites are punished, while those who delayed cleanup through years of litigation and resistance escape with impunity.[22] This could conceivably create a moral hazard in other contexts, whereby citizens accused of violating federal law decide not to cooperate, relying on future liability reductions.

At the time of CERCLA's passage, Congress legitimately may not have realized the potential impact of retroactive liability. Indeed, in 1980, the problem of abandoned hazardous waste sites "was viewed as the malfeasance of a few reckless companies."[23] While Congress may have realized that retroactive liability was potentially unfair, it nonetheless "passed the law with the optimistic belief that wrongdoers were relatively few in number, that they could be easily identified and made to pay, and that a modest federal fund would be adequate to fill in any gaps in cleanup costs."[24] Although time has revealed the error of this argument,[25] the bias toward maintaining the status quo prevents legislators and lobbyists from altering the existing liability scheme.[26] In fact, people may be afraid to denounce retroactivity for fear that they will be perceived as opposing environmental protection.

Courts have occasionally upheld retroactivity if the challenged statute explicitly provides for it, or if there is clear con-

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[20] *See* Gerrard, *supra* note 7, at 707.

[21] *See id*.

[22] *See, e.g.*, Nancy Kubasek et al., *Retroactive Liability Under the Superfund: Time to Settle the Issue*, 13 J. LAND USE & ENVTL. L. 197, 229 (1997).

[23] Bradley C. Bobertz, *Transferring the Blame*, ENV'T F., Jan.-Feb. 1996, at 22, 22-23, *quoted in* Gerrard, *supra* note 7, at 712.

[24] *Id.*

[25] *See* Steinzor, *supra* note 18, at 10,085 (citing *Superfund Liability Issues: Hearings Before the Subcomm. on Transp. and Hazardous Materials of the House Comm. on Energy and Commerce*, 103d Cong., 16 (1994) (statement of Katherine N. Probst, Fellow, Center for Risk Mgmt., RFF) (citing a study concluding that 77.5% of remediation costs can be attributed to wastes disposed prior to 1981)).

[26] For a discussion of status quo bias in a legal context, see generally Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608 (1998).

gressional intent.[27] Most recently, *Landgraf v. USI Film Products, Inc.*[28] established that congressional intent can override the traditional presumption against retroactivity when there is legislative history establishing Congress' intent to apply a law retroactively. In fact, several Supreme Court decisions seem to suggest a presumption *in favor* of retroactivity.[29] In *Bradley v. Richmond School Board*, the Court held that it should "apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary."[30] Although Justice Anton Scalia has dubbed such decisions "really indefensible,"[31] they have not been overturned. Thus, the Supreme Court has examined numerous retroactive regulations with differing results.[32]

This varied jurisprudence, coupled with the policy arguments favoring retroactive liability, makes it somewhat difficult to anticipate how the Court would resolve CERCLA retroactivity. The Court's ultimate determination would have significant implications. For example, in the 1970s, approximately eighty billion pounds of hazardous waste were generated each year in the United States alone.[33] In 1980, the Environmental Protection Agency (EPA) estimated that there were 30,000 to 50,000 inactive and uncontrolled hazardous waste sites, with 1200 to

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[27] *See, e.g.*, Comment, *Generator Liability Under Superfund for Clean-up of Abandoned Hazardous Waste Dumpsites*, 130 U. PA. L. REV. 1229, 1239 n.54 (1982) [hereinafter *Generator Liability*] (delineating cases that consider legislative history to uphold retroactive liability).

[28] 511 U.S. 244.

[29] *See, e.g.*, Bradley v. Richmond Sch. Bd., 416 U.S. 696 (1974) (authorizing application of statutory attorney's fees provision to a prevailing party in litigation commenced before the provision's effective date); Thorpe v. Hous. Auth. of Durham, 393 U.S. 268 (1969) (enforcing a regulation requiring a local housing authority to give pre-eviction notice of reasons and opportunity to respond for an eviction initiated before approval of the regulation).

[30] *Bradley*, 416 U.S. at 711.

[31] *See Landgraf*, 511 U.S. 289. *See also* Nelson Lund, *Retroactivity, Institutional Incentives, and the Politics of Civil Rights*, 1995 PUB. INT. L. REV. 87, 111 (1995) (declaring that *Bradley* and *Thorpe* are irreconcilable with *Landgraf* and dubbing them "anomalies" that conflict with the "traditional presumption against retroactivity").

[32] *Compare* Eastern Enter. v. Apfel, 524 U.S. 498 (1998); *Landgraf*, 511 U.S. 244; *and* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988) (determining that the challenged regulations cannot be given retroactive effect) *with* Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976); *Bradley*, 416 U.S. 696; and *Thorpe*, 393 U.S. 268 (permitting retroactive application of the challenged statutes).

[33] *See* Slattum, *supra* note 13, at 166 n.150.

2000 of these posing a significant danger to public health and the environment.[34] Cleanup of each of these sites raises retroactivity concerns. Despite massive government expenditures,[35] fewer than twenty-two percent of these sites had been remediated by 1995.[36] In light of the 1995 termination of the government's Superfund tax collecting authority, the ability to confer retroactive liability is particularly significant.[37]

Although continued retroactive application of CERCLA would facilitate site remediation, it would necessitate either an explicit statement of retroactivity,[38] substantial textual inferences, or evidence of unambiguous congressional intent.[39] CERCLA does not meet these requirements. To the contrary, the only explicit mention of retroactivity provides that retroactive recovery is *not* authorized for natural resources damages.[40] Furthermore, CERCLA's legislative history is notoriously incomplete and convoluted.[41] Given this uncertainty, this Article examines CERCLA's text, legislative history, and statutory purpose to ascertain whether its continued retroactive application is legitimate. While "[t]he Justice Department has responded somewhat cavalierly to the issue of CERCLA's retroactivity,

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[34] *See Generator Liability*, *supra* note 27, at 1229-30.

[35] *See* Freedman, *supra* note 18, at 1171 (estimating that the government spent $10.4 billion to supplement Superfund between 1980 and 1995).

[36] *See id.*

[37] *See* Mark A. Hofmann, *Superfund Reform Redux: Calls to Repeal Retroactive Liability Continual, Legislators Say*, BUS. INS., Feb. 10, 1997, at 2.

[38] *See, e.g.*, Ohio *ex rel.* Brown v. Georgeoff, 562 F. Supp. 1300, 1308-09 (N.D. Ohio, 1983) (quoting Windsor v. State Farm Ins. Co., 509 F. Supp. 342, 344 (D.D.C. 1981) ("If that language is plain and unambiguous, then there is no need to enlist the rules of interpretation."); Joel Surber, *Back on Track: The Reversal of* United States v. Olin *and the Continuation of Retroactive Interpretation of CERCLA*, ENVIRONS ENVTL. L. & POL'Y J., June 1997, at 24, 25.

[39] *See, e.g.*, Brief for Respondents at 5, Landgraf v. USI Film Prod., 511 U.S. 244 (1994) (No. 92-757) ("Statutes are presumed to apply only prospectively to human conduct, unless Congress provides to the contrary using words that are clear, strong and imperative, or unequivocal and inflexible import, manifestly evidencing a Congressional intent for retroactive application and requiring that result.").

[40] *See* 42 U.S.C. § 9607(f) (1994) ("There shall be no recovery under the authority of subparagraph (C) of subsection (a) of this section where such damages and the release of a hazardous substance from which such damages resulted have occurred wholly before December 11, 1980.").

[41] *See infra* note 102 and accompanying text.

contending the matter is 'well settled,'"[42] this Article concludes that CERCLA's text, history, and purpose indicate that it may not be applied retroactively. While the arguments supporting retroactive liability may be compelling, these rationalizations cannot override the fundamental unfairness of the Act's sweeping liability scheme.

Part I considers the three principal pre-*Landgraf* cases appraising CERCLA's retroactivity. Each of these opinions upholds the retroactive liability scheme. Part II examines the *Landgraf* decision in detail, explicates its test to determine whether retroactive legislation is constitutional, and highlights several post-*Landgraf* decisions with differing interpretations of CERCLA's constitutionality. Part III applies the *Landgraf* test in the CERCLA context, concluding that the test precludes the Act's retroactive application because CERCLA lacks sufficient indicia of congressional intent required by *Landgraf* to maintain a retroactive liability scheme. Part IV then reaffirms this conclusion in light of the 1998 *Eastern Enterprises v. Apfel* decision and considers constitutional issues raised by CERCLA's retroactive application. Finally, Part V offers alternatives to retroactivity that still advance CERCLA's principle goals of site remediation.

I
Early Cases

Until 1996, every court that expressly considered CERCLA's retroactivity determined that such application was legitimate.[43] Although each of these cases purportedly considers

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[42] *See* United States v. Olin Corp., 927 F. Supp. 1502, 1508 (S.D. Ala.), *rev'd*, 107 F.3d 1506 (11th Cir. 1997) (from Plaintiff's Memorandum on the Retroactivity of CERCLA and Due Process Issues).

[43] *See* United States v. Monsanto Co., 858 F.2d 160 (4th Cir. 1988); United States v. Northeastern Pharm. & Chem. Co., 810 F.2d 726 (8th Cir. 1986); HRW Sys. Inc. v. Washington Gas, 823 F. Supp. 318 (D. Md. 1993); City of Philadelphia v. Stepan Chem., 748 F. Supp. 283 (E.D. Pa. 1990); Kelley v. Sovent Co., 714 F. Supp. 1439 (W.D. Mich. 1989); O'Neil v. Picillo, 682 F. Supp. 706 (D.R.I. 1988); United States v. Hooker Chem. & Plastics, 680 F. Supp. 546 (W.D.N.Y. 1988); United States v. Dickerson, 640 F. Supp. 448 (D. Md. 1986); United States v. Ottati & Goss, Inc., 630 F. Supp. 1361 (D.N.H. 1985); Town of Boonton v. Drew Chem., 621 F. Supp. 663 (D.N.J. 1985); United States v. Conservation Chem. Co., 619 F. Supp. 162 (W.D. Mo. 1985); United States v. Shell Oil, 605 F. Supp. 1064 (D. Colo. 1985); United States v. Conservation Chem., 589 F. Supp. 59 (W.D. Mo. 1984); Jones v. Inmont, 584 F. Supp. 984 (D.S.C. 1984); United States v. A & F Materials Co., 578 F. Supp. 1249 (S.D. Ill. 1984); United States v. Price, 577 F. Supp. 1103 (D.N.J. 1983); *Georgeoff*, 562 F. Supp. 1300;

retroactivity, only three provide an in-depth analysis of the issue: *Ohio ex rel. Brown v. Georgeoff*, *United States v. Shell Oil*, and *United States v. Northeastern Pharmaceutical & Chemical Co.* (*NEPACCO*). Part I elaborates these three decisions.[44]

A. Ohio *ex rel.* Brown v. Georgeoff

Ohio ex rel. Brown v. Georgeoff involved Ohio's efforts to remediate the Deerfield Dump, a hazardous waste disposal site, by recovering response costs from Browning-Ferris Industries of Ohio and Browning-Ferris Industries of Pennsylvania (collectively, BFI). BFI allegedly transported hazardous waste to the facility throughout the mid-1970s.[45] The company brought a motion to dismiss, contending that CERCLA was not intended to have retroactive effect and consequently could not implicate their disposal activity. The Ohio District court disagreed, finding that CERCLA's text combined with its legislative history supported retroactivity.[46]

Because of CERCLA's lack of "unequivocal statements"[47] supporting retroactive application, the court considered the Act's use of the past tense and negative inference.[48] Notably, CERCLA holds that "any person who accepts or accepted any hazardous substances for transport" may be held liable.[49] The state argued that the use of the past tense verb "accepted" implies preenactment liability, while "accepts" relates to conduct occurring after 1980, and that any other construction would violate the maxim "that a statute must be construed to give meaning and effect to each of its words."[50] The court dismissed this interpretation, noting that the words "or accepted" were incorporated

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United States v. Outboard Marine Corp., 556 F. Supp. 54 (N.D. Ill. 1982); United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100 (D. Minn. 1982); United States v. Wade, 546 F. Supp. 785 (E.D. Pa. 1982) (offsite generators of wastes disposed of before CERCLA's enactment held liable under section 107 of CERCLA)).

44 This Part presents the arguments as given, while Parts III and IV, *infra* refute much of this reasoning.

45 *See Georgeoff*, 562 F. Supp. at 1302.

46 *See id.* at 1311 ("[T]hese provisions provide some evidence that Congress intended CERCLA to apply retroactively."), 1314 ("[T]he Court concludes that Ohio has shown sufficient evidence of Congressional intent to make the liability provisions of CERCLA relating to transporters apply retroactively.").

47 *Id*. at 1309.

48 *See id.* at 1309-11.

49 *See* 42 U.S.C. § 9607(a)(4) (1994).

50 *Georgeoff*, 562 F. Supp. at 1309.

into a late draft of CERCLA absent any congressional debate; if the word transformed CERCLA's liability scheme, the change would have engendered greater controversy.[51] Further, the court noted that interpreting past tense verbs as applying to conduct that occurred prior to CERCLA's passage would produce "an anomalous result" when applied to section 107(a)(3), which assigns liability to those who "arranged," but not those who arrange, for disposal.[52] The court opined that Congress could not have intended to "provid[e] for a retroactive, but not a prospective, application of the statute."[53] To avoid this result, the court concluded that verb tense merely implicates time of release.[54] The court explained:

> [T]he word "accepted" will apply to all impositions of liability under CERCLA; the act of accepting the hazardous wastes will have always taken place before the occurrence of a release which causes the incurrence of response costs. Transporters who acted after the enactment of CERCLA will be held liable as having "accepted" hazardous wastes.[55]

Thus, PRPs will always both "accept" and have "accepted" the hazardous waste. Although this interpretation renders the present tense meaningless, the court found it preferable to an interpretation that would have defeated the purpose of CERCLA (by finding that liability could *only* be conferred retroactively).[56] Ultimately, the court recognized the weakness of this argument, highlighting the Act's hasty passage.[57]

The other key textual argument related to the prohibition on retroactive recovery for pre-enactment natural resource damages.[58] Ohio suggested that because CERCLA explicitly prohibited retroactive recovery for natural resource damages, the reverse must be true for the remainder of CERCLA. In other words, one could infer that retroactive liability was allowed whenever it was not explicitly forbidden.[59] The court did not find this argument particularly persuasive and announced that it

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[51] *See id*. at 1310 n.10.
[52] *See id.* at 1310.
[53] *Id.*
[54] *See id.*
[55] *Id.*
[56] *See id.* at 1310 n.12.
[57] *See id.*
[58] *See* 42 U.S.C. §9607(f)(1) (1994).
[59] *See id.*; *Georgeoff*, 562 F. Supp. at 1311 & nn.13-15. *See also* Michelle LeVeque, Comment, *Rationalities for Applying CERCLA Retroactively after*

would "consider these statutory terms as indicia, but not dispositive indicia, of a congressional intent to allow retroactive application of CERCLA."[60]

Absent stronger statutory support for retroactivity, the court next examined CERCLA's legislative history. Unfortunately, "[t]he precise issue of retroactivity raised by BFI's motion was not addressed in the congressional debates."[61] Nonetheless, the court determined that the enacting Congress intended CERCLA to facilitate cleanup of abandoned (i.e., pre-1980) facilities *and* to impose cleanup costs on the polluter.[62] This conclusion was based on a variety of remarks during Senate deliberations emphasizing not only the "real" and "immediate" need to "deal with abandoned waste sites,"[63] but also that "society should not bear the cost of protecting the public from hazards produced in the past by a generator, transporter, consumer, or dump site owner-operator who has profited or otherwise benefited from commerce involving these substances."[64] Thus, only the funding source for pre-enactment cleanup was controversial.[65] BFI argued that the Superfund tax was established *precisely* to clean up these retroactive sites, but the court determined that Congress must have intended to supplement the fund with alternative sources (i.e., PRP retroactive liability) because the fund was too small to effect CERCLA's goals. The court noted that CERCLA's legislative history reflects an understanding that cleanup would exceed Superfund's capacity.[66] While Congress may have intended Superfund to simply supplement federal tax revenue for cleanup, the *Georgeoff* court concluded that "[g]iven the choice between competing constructions of the statute, this Court will

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Landgraf v. USI Film Products*: Overcoming the Presumption against Retroactivity*, 59 OHIO ST. L.J. 603, 609 (1998). *But see infra* Part III. A. 3.

[60] *Georgeoff*, 562 F. Supp. at 1311.

[61] *Id*.

[62] *See id*. at 1312-13.

[63] *Id.* at 1312 (*citing* CONG. REC. S14,973, S14,977 (daily ed. Nov. 24, 1980) (statement of Sen. Danforth).

[64] *Id.* (*citing* S. REP. NO. 96-848, at 98 (1980)).

[65] *But see* Freeman, *supra* note 12, at 680 (contending that *Georgeoff*'s treatment of legislative history is incomplete because it ignores anti-retroactive remarks).

[66] *See Georgeoff*, 562 F. Supp. at 1313 (estimates of cleanup costs ranged from $7 billion to $44 billion).

select the construction . . .which will more fully implement the Congressional intent [of making polluters pay]."[67]

B. United States v. Shell Oil

Two years after the *Georgeoff* decision, the Colorado District Court reaffirmed the legitimacy of CERCLA's retroactive liability in *United States v. Shell Oil.*[68] The United States sued Shell to recover response costs for its alleged contamination of the Rocky Mountain Arsenal, a site operated by the United States Army. Shell and its predecessors had leased the property from the federal government since 1947 for the manufacture, packaging, and handling of pesticides, herbicides, and other chemicals. The challenged contamination occurred when the waste disposal systems failed, releasing the commingled wastes of Shell and the U.S. Army.[69] As in *Georgeoff*, the *Shell Oil* court recognized that there was no explicit discussion of retroactivity in CERCLA's text nor had the issue been disposed of conclusively during congressional debates.[70] Nonetheless, it found that CERCLA's "whole purpose and scheme"[71] was "unavoidably retroactive."[72]

The court's analysis began by elaborating the traditional presumption against retroactivity. The opinion then considered the history of environmental regulation in general and concluded that CERCLA was created to fill a regulatory void left by the Resource Conservation and Recovery Act (RCRA).[73] While RCRA was a prospective regulation to guide future waste disposal, CERCLA was "by its very nature backward looking."[74] As in *Georgeoff*, the court emphasized that CERCLA was intended

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[67] *Id*. at 1313 n.17. *But see* Landgraf v. USI Film Prod., 511 U.S., 244, 285-86 (1994) ("The fact 'that retroactive application of a new statute would vindicate its purpose more fully . . . is not sufficient to rebut the presumption against retroactivity.'"). Congress may have intended to fulfill CERCLA's dual purposes of cleanup and making the polluter pay by relying on the Superfund, contributions from the pre-enactment guilty (i.e., those that violated existing state law), and from all post-enactment parties.

[68] 605 F. Supp. 1064 (D. Colo. 1985).

[69] *See id.* at 1067.

[70] *See id*. at 1069.

[71] *Id*. at 1079.

[72] *Id*. at 1073.

[73] *See id*. at 1072.

[74] *Id*.

to impose liability and response costs on those responsible for creating the hazardous condition.[75]

The court next considered several textual arguments relating to verb tense, the effective date provision, and negative inference. The verb tense analysis was fairly dismissive, highlighting the textual inconsistencies recognized in *Georgeoff* along with Shell's allegation that the term "shall" in section 107(a) implies a prospective liability scheme.[76] Proclaiming that the present and past tense verbs "in effect . . . cancel each other," the court concluded that "congressional intent to either impose or withhold liability for response costs incurred before CERCLA cannot be divined from the verb tenses. . . ."[77]

The court then addressed section 152(a) which states: "Unless otherwise provided, all provisions of this Act shall be effective on the date of enactment of this Act [December 11, 1980.]"[78] While this seems to advocate prospectivity, the court found that this clause merely "indicates the date when an action can first be brought and when the time begins to run for issuing regulations and doing other future acts mandated by the statute."[79] Thus, although claims could not be brought until 1980, these claims could address earlier actions.

Finally, the court considered the natural resource damage provision. This clause, providing that Superfund may not be used to fund pre-enactment resource damages, indicated to the court that Congress was capable of expressly limiting retroactive liability. Therefore, assuming that the remainder of CERCLA was similarly limited would render the limitations in that section "mere surplusage."[80]

The *Shell Oil* court began its analysis of CERCLA's legislative history by highlighting CERCLA's convoluted beginnings and admonishing that "the Committee Reports must be read with some caution."[81] Notwithstanding this introduction, the court considered the wholesale substitution of large sections of

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[75] *Id*.

[76] *See id.* at 1073.

[77] *Id*.

[78] 42 U.S.C. § 9652(a) (1994).

[79] *Shell Oil*, 605 F. Supp. at 1073.

[80] *Id*. at 1076.

[81] *Id*. at 1077 (quoting United States v. Reilly Tar and Chem. Corp., 546 F. Supp. 1001, 1111 (D. Minn. 1982)).

the original House bill with a Senate version.[82] Significantly, these modifications removed a clause that had provided: "The provisions of this subpart . . . shall apply to releases of hazardous waste without regard to whether or not such releases occurred before, or occur on or after, the date of the enactment of [CERCLA]."[83] The court dismissed this modification in finding that virtually the entire House bill was supplanted, thus rendering changes to any particular clause relatively inconsequential. In fact, the court emphasized that retroactivity limitations *were* maintained in the natural resource damages provisions (discussed above), suggesting that the remainder of the final bill was, in fact, intended to apply retroactively.[84]

C. United States v. Northeastern Pharmaceutical & Chemical Co.

The *United States v. Northeastern Pharmaceutical & Chemical Co.* (*NEPACCO*) court upheld CERCLA's retroactive application to a chemical manufacturing company that had dumped hazardous byproducts in open trenches during the early 1970s. NEPACCO arranged for the transport and disposal of approximately eighty five fifty-five gallon drums containing toxic chemicals on a private farm site. Upon discovering "alarmingly" high concentrations of dioxin, trichlorophenol, and toluene, the EPA hired a private contractor to remediate the site. The case involved the government's request for reimbursement from NEPACCO, the generator of the hazardous substances.[85] As in *Georgeoff* and *Shell Oil,* the court's analysis focused on textual inferences and presumed congressional intentions; however, the court also considered the constitutional implications of retroactivity.

The first part of the court's discussion paralleled the analysis of *Georgeoff* and *Shell Oil*. The court dismissed section 152(a) as "merely" an effective date provision,[86] noted the general presumption against retroactivity,[87] conceded that CERCLA does

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[82] *See id.*

[83] *Id.* at 1077 (quoting H.R. 7020, 96th Cong. § 3072 (1980)).

[84] Much of this argument is significantly weakened by *Landgraf*, which places great importance on supplanted legislation. *See infra* Part III.B.1.

[85] *See* United States v. Northeastern Pharm. & Chem. Co., 810 F.2d 726, 730-31 (8th Cir. 1986).

[86] *See id*. at 732 (quoting *Shell Oil*, 605 F. Supp. at 1075).

[87] *See id*.

not expressly provide for retroactivity yet emphasized CERCLA's past tense terminology,[88] elaborated the polluter pays principle,[89] asserted that retroactivity is required for CERCLA to fill its regulatory purpose,[90] and highlighted aspects of the legislative history showing CERCLA was created to remediate abandoned and inactive waste sites (thereby necessitating its retroactive application).[91] Given these diverse arguments, the court concluded that "[i]t is manifestly clear that Congress intended CERCLA to have retroactive effect."[92]

The court then applied the rational basis test to determine whether CERCLA violated due process. Holding that CERCLA fulfilled a legitimate purpose, namely remediating abandoned hazardous waste sites, and that it was not irrational to impose liability on those who "created and profited from the sites," the court concluded that the Act did not violate the Due Process Clause.[93] The court also found that the Takings Clause was not implicated because NEPACCO did not have a property interest in the waste site.[94] Traditionally, takings claims are narrowly construed to exclude mere economic deprivations.[95] Further, by eliminating a public nuisance, the remedy actually enhanced the site's property value.[96]

While the principal CERCLA precedents uniformly find for retroactivity, these cases are not dispositive. Although all three of the aforementioned cases spend considerable time examining verb tense, they each conclude that this analysis is weak, reducing this discussion to mere dicta. *Shell Oil* and *NEPACCO*'s glib dismissal of the effective date provision seems displaced. The negative inference argument rooted in the natural resource damage exception is moot after *Landgraf*.[97] Similarly, *Shell Oil*'s summary dismissal of the modifications to CERCLA's general

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[88] *See id*. at 732-33.

[89] *See id*. at 733.

[90] *See id*. ("In order to be effective, CERCLA must reach past conduct.").

[91] *See id*.

[92] *Id*. at 732-33.

[93] *Id*. at 734.

[94] *See id.*

[95] *See id.*

[96] *See id.*

[97] *Landgraf* is extremely dismissive of such arguments. *See infra* notes 112-117 and accompanying text.

retroactivity clause may be inappropriate in light of *Landgraf*.[98] For the most part, these early cases inadequately consider constitutional claims and place undue significance on a few isolated statements from CERCLA's notoriously convoluted legislative history.[99] Unfortunately, most later courts have simply reiterated the reasoning applied in *Georgeoff*, *Shell Oil*, and *NEPACCO*, authorizing CERCLA's retroactive application absent an independent and searching review.[100]

II
Landgraf and Its Progeny

Landgraf v. USI Film Products[101] reaffirmed the Supreme Court's commitment to prospective legislation and pronounced a test based on a clear statement of congressional intent to ascertain when statutes should be afforded retroactive effect. *Landgraf*'s "clear statement rule" has significant implications for CERCLA liability. Certainly, the Act's text does not explicitly allow for retroactivity,[102] and its ambiguous legislative history does not provide a clear indication of congressional intent.

Although the Supreme Court has yet to consider CERCLA retroactivity, lower court decisions following *Landgraf* are somewhat mixed. *United States v. Olin Corp.* (*Olin* District) was the first case to reject CERCLA's retroactivity. This decision was shortly overturned by the Eleventh Circuit Court of Appeals (*Olin* Appeals).[103] However, *Olin* Appeals nonetheless suggests that the *Landgraf* test *may* be construed to preclude retroactive application. *Olin* District, reflects the minority opinion, as

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98 These arguments will be more fully explicated in Parts III (Conducting the Landgraf Test) and IV (Constitutional Challenges to CERCLA's Retroactive Application: *Eastern Enterprises v. Apfel* Strengthens the Prospectivity Presumption).

99 *See Government Defends Retroactive Liability in Appeal of District Court's* Olin *Decision*, 27 Envtl. L. Rep. (BNA) 1327, 1328 (Oct. 11, 1996) (noting that these early cases "settled for less than clear" congressional intent).

100 *See* United States v. Olin Corp., 927 F. Supp. 1502, 1509 (S.D. Ala.) ("Besides Georgeoff, only two other cases actually do analyze the issue of retroactivity; the rest of the cases basically rely on one or more of these three cases and other cases which cite these cases."), *rev'd*, 107 F.3d 1506 (11th Cir. 1997); Slattum, *supra* note 13, at 157.

101 511 U.S. 244 (1994).

102 In fact, section 107(f) explicitly *prohibits* retroactive liability for natural resource damages. *See* 42 U.S.C. § 9607(f) (1994).

103 *See Olin*, 107 F.3d 1506.

demonstrated by the fact that the District of Nevada upheld CERCLA's retroactive construction only two days later.[104]

A. *Landgraf v. USI Film Products: The* Landgraf *Test*

Landgraf involved a sexual harassment challenge under the Civil Rights Act of 1964. The plaintiff, Barbara Landgraf, an employee at USI Film Products, suffered repeated harassment from a fellow employee, John Williams. Landgraf complained about Williams' conduct to her immediate supervisor, yet was granted no relief. Thereafter, she reported the incidents to the personnel manager, who subsequently reprimanded the harasser and transferred him to another department. Apparently dissatisfied with the chosen remedy, Landgraf quit her job several days later and filed a claim under the Civil Rights Act of 1964.[105] The district court dismissed the complaint, finding that although Landgraf suffered harassment at work, USI adequately redressed the situation by relocating Williams, and that the violation had not been sufficiently severe to prompt a reasonable person to resign. While Landgraf was awaiting appeal, President Bush signed into law the Civil Rights Act of 1991.[106] Section 102 of the new Act included provisions creating a right to recover compensatory and punitive damages for violations of Title VII and provided for a jury trial if such damages were claimed. The court of appeals, however, determined that the 1991 Act did not retroactively apply to cases pending upon its enactment.[107] Recognizing that "the presumption against retroactive legislation is deeply rooted in our jurisprudence,"[108] the Supreme Court affirmed. The Court reached this decision using a multi-part test designed to determine when legislation should have retroactive effect:

> When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach.

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104 *See* Nevada *ex rel.* Dep't of Transp. v. United States, 925 F. Supp. 691 (D. Nev. 1996).

105 42 U.S.C. § 2000e-2 (1994).

106 *See Landgraf*, 511 U.S. 247-49.

107 *See, e.g.*, *id.* at 249 (noting that the court of appeals determined "that requiring the defendant to retry this case because of a statutory change enacted after the trial was completed would be an injustice and a waste of judicial resources. . . . we do not invalidate procedures followed before the new rule was adopted.") (citing Landgraf v. USI Film Prod., 968 F.2d 427, 432-33 (5th Cir. 1992)).

108 *Id.* at 265.

> If Congress has done so, of course, there is no need to resort to judicial default rules . . . . If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.[109]

Thus, *Landgraf* requires the judiciary to (1) consider whether a statute's text expressly provides for retroactive construction and, if it does not, (2) to examine legislative history and other indicators of congressional intent.[110] Recognizing the general disfavor of retroactivity, the *Landgraf* test "assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that is an acceptable price to pay for the countervailing benefits."[111]

The *Landgraf* petitioner relied on negative inference to satisfy the textual requirements for retroactivity. In doing this, she focused on three clauses. The first provides: "Except as otherwise specifically provided, this Act . . . shall take effect upon enactment."[112] Two other clauses allow for prospective application in a limited context.[113] Therefore, the plaintiff argued that to give effect to these clauses, the remainder of the Civil Rights Act of 1991 must apply retroactively.[114] The Court dismissed this argument, insisting that creating retroactivity by implication is "a surprisingly indirect route to convey an important and easily expressed message."[115] Had Congress intended the 1991 Act to apply to pending claims, it could have done so expressly. The Court suggested that the prospectivity provisions are merely a safety

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[109] *Id*. at 280.

[110] Several other authors have summarized the "*Landgraf* test." *See, e.g.*, John N. Bean, Note, *To Be or Not to Be: CERCLA Retroactivity Under* Landgraf v. USI Film Products, 27 U. MEM. L. REV. 987, 1002 (1997); Leonard Charles Presberg, Comment, *The Civil Rights Act of 1991, Retroactivity, and Continuing Violations: The Effect of* Landgraf v. USI Film Products *and* Rivers v. Roadway Express, 28 U. RICH. L. REV. 1363, 1365 (1994).

[111] *Landgraf*, 511 U.S. at 272-73.

[112] Civil Rights Act of 1991, Pub. L. No. 102-166, § 402(a), 105 Stat. 1071, *quoted in Landgraf*, 511 U.S. at 257. *See also Landgraf*, 511 U.S. at 527 ("A statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date.").

[113] *See* §§ 109(c), 402(b), 105 Stat. 1071, *quoted in Landgraf*, 511 U.S. at 258.

[114] *See* Brief for Petitioner at 10-11, Landgraf v. USI Film Prod., 511 U.S. 244 (1994) (No. 92-757)) ("If the entire Act is inapplicable to pending cases, sections 109(c) and 402(b) are 'entirely redundant.'") (internal citations omitted).

[115] *See Landgraf*, 511 U.S. at 244, 259.

measure.[116] Ultimately, the Court dismissed these clauses as "[c]omparatively minor and narrow provisions in a long and complex statute."[117]

Because the plaintiff's negative inference argument did not meet the *Landgraf* test's explicit statement criterion, the Court also considered the 1991 Act's legislative history to ascertain congressional intent.[118] This examination began with a discussion about the implications of supplanted legislation. At issue was a 1990 bill that had passed through Congress, but was subsequently vetoed by President Bush.[119] Notably, the President indicated that its "unfair retroactivity rules" contributed to his rejection of the bill.[120] Congress was unable to override the veto, and thus the retroactivity provision seemed "manifestly intentionally absent" from the final 1991 Act.[121] The Court insisted that this deletion did not reflect a congressional oversight, rather a necessary compromise to facilitate the 1991 Act's ultimate approval.[122]

The Court noted that Congress never reached consensus about the 1991 Act's applicability to pending claims: it "agreed to disagree"[123] and left the decision to the judiciary.[124] Maintaining that this abdication of responsibility violated the separation of powers, the *Landgraf* Court cautioned Congress "that it [is] not the judiciary's responsibility to fill intentional gaps regarding the temporal reach of statutes."[125] While the retroactivity clause in the 1990 bill suggests congressional approval of retrospective application, "even the will of the majority does not become law

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116 *See id*. at 260.

117 *Id*. at 258.

118 *See id*. at 255-56.

119 *See* Civil Rights Act of 1990, S. 2104, 101st Cong. (1990).

120 *See Landgraf*, 511 U.S. at 255-56.

121 *See* Brief for Respondents at 16, Landgraf v. USI Film Prod., 511 U.S. 244 (1994) (No. 92-757).

122 Ironically, the Petitioners' Brief presents the strongest argument *against* retroactivity: "[W]here Congress includes limiting language in an early version of a bill and deletes that language before the enactment, it may be presumed that the limitation was not intended." Brief for Petitioner at 6, Landgraf v. USI Film Prod., 511 U.S. 244 (1994) (No. 92-757) (citation omitted). Although the petitioners emphasized Congress' repeated rejection of language exempting pending cases from review, the same argument can apply to the deletion of the 1990 retroactivity clause prior to approval of the 1991 Act.

123 *Landgraf*, 511 U.S. at 263.

124 *See id*. at 261.

125 *Id.* at 273. *See also* Surber, *supra* note 38, at 28.

unless it follows the path charted in Article I, §7, cl. 2, of the Constitution."[126] Retroactivity cannot be de facto incorporated into a statute through inference and innuendo.

The *Landgraf* Court briefly highlighted the constitutional issues raised by retroactive legislation.[127] Because the Civil Rights Act authorizes punitive damages, retroactivity implicates the Ex Post Facto Clause and the prohibition against bills of attainder. The Court noted, however, that these prohibitions are limited to penal legislation and recognized the occasional benefits of retroactive civil laws.[128] Nonetheless, even with civil legislation, fairness and justice suggest that "prospectivity remains the appropriate default rule."[129] This presumption particularly applies to provisions affecting contractual or property rights where predictability is essential.[130]

B. *The* Landgraf *Impact:* Olin *District and* Olin *Appeals*

Landgraf's implications remain unclear. The *Olin* District court believed that *Landgraf* demanded a complete reconstruction of CERCLA jurisprudence and noted that although CERCLA precedent upheld retroactive construction, *Landgraf* "demolishes the interpretive premises on which prior cases had concluded that CERCLA is retroactive."[131] In contrast, the Department of Justice insisted that *Landgraf* did not alter CERCLA's liability scheme, maintaining that "[t]he Supreme Court's decision . . . announces no new constitutional rules, and in no way impacts this case law."[132] Although *Olin* District suggested that CERCLA's retroactive scheme was no longer tenable after *Landgraf*, *Olin* District's subsequent reversal and outright dismissal by other courts suggest that this indictment is insignificant.[133] Certainly, the opposite conclusions reached by the

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126 *Landgraf*, 511 U.S. at 263.
127 *See id.* at 266-67.
128 *See id*. at 267-68.
129 *Id*. at 272.
130 *See id*. at 271.
131 United States v. Olin Corp, 927 F. Supp. 1502, 1508-09 (S.D. Ala. 1996) (dismissing *Georgeoff* as "no longer tenable after Landgraf"), *rev'd*, 107 F.3d. 1506 (11th Cir. 1997).
132 *Id*. at 1508.
133 *See, e.g.*, Gould Inc. v. A & M Battery & Tire Serv., 933 F. Supp. 431, 436 (M.D. Pa. 1996) (finding unpersuasive "a single Alabama District Court case which is surrounded by a myriad of opinions that apply CERCLA retroactively, either directly or implicitly"). *See also* Mary Frances Palisano, United States v.

district and appellate courts in *Olin* District and Appeals (discussed below) reveal the flexibility of the *Landgraf* test.

1. *CERCLA's Constitutionality Challenged:* Olin *District*

Olin District is the sole opinion to reject CERCLA's retroactive application. Although the defendant willingly entered into a consent decree to remediate a site contaminated by pre-CERCLA wastewater release, the court insisted on examining CERCLA's constitutionality. Interestingly, the *Olin* District court denounced CERCLA retroactivity after considering virtually the same factors as all other CERCLA precedents: structure, language, legislative history, and purpose.

The *Olin* District court applied *Landgraf* by first examining CERCLA's text. After determining that CERCLA lacks express statements of retroactivity,[134] the court briefly considered non-express statutory language. The court summarily dismissed negative inference claims based on the natural resource damage provision in section 107(f): the court asserted that "the *Landgraf* Court found a remarkably similar argument to be unpersuasive."[135] Noting that verb choice was not "dispositive" in either *Georgeoff* or *Shell Oil*, the court next dismissed tense-based arguments.[136] In response, the Justice Department alternatively suggested that CERCLA does not have any retroactive effect because it alleviates a continuing, rather than past, nuisance.[137] The court noted that "[t]he fact that . . . Justice thought it necessary to argue, at least in the alternative, that CERCLA is not retroactive certainly indicates Justice's initial concern that courts might not find a clear congressional intent that CERCLA be applied 'retroactively.'"[138]

Olin Corporation: *How a Polluter Got Off Clean*, 15 PACE ENVTL. L. REV. 401, 403 (1997) (dismissing *Olin* District as "an anomaly in the law regarding CERCLA's application.").

134 *See Olin*, 927 F. Supp. at 1512.

135 *Id*. at 1509 n.36.

136 *See id*. at 1513 & n.46.

137 *See id.* at 1516 (explaining CERCLA's application invariably has retroactive effect because this case was brought to impose liability "largely on actions occurring prior to the statute's effective date. [Thereby] 'impair[ing] rights a party possessed when he acted, increas[ing] a party's liability for past conduct, or impos[ing] new duties with respect to transactions already completed.'") (quoting Landgraf v. USI Film Prod., 511 U.S. 244, 280 (1994)).

138 *See id*. at 1513.

After rejecting these statutory arguments, the court then considered indicators of congressional intent, beginning with a scathing indictment of CERCLA's history:

> Although Congress had worked on "Superfund" cleanup of toxic and hazardous waste bills, and on parallel oil spill bills for over three years, the actual bill which became Public Law No. 96-510 had virtually no legislative history at all, because the bill which became law was hurriedly put together by a bipartisan leadership group of Senators. . . . It was considered on December 3, 1980, in the closing days of the lame duck session of an outgoing Congress. It was considered and passed, after very limited debate, under a suspension of the rules, in a situation which allowed for no amendments. Faced with a complicated bill on a take-it-or-leave-it basis, the House took it, groaning all the way.[139]

Throughout this tortuous process, Congress never explicitly debated CERCLA's retroactivity. This alone, the *Olin* District court maintained, would cause CERCLA to fail the *Landgraf* test.[140] The court dismissed precedent, insisting that they "find clarity in legislative history which does not exist."[141] In fact, the enacting Congress may have intentionally left these ambiguities for the courts to resolve later.[142] Had Congress truly intended to provide for CERCLA's retroactive application, it could have easily incorporated such a provision in CERCLA.[143] Rather, the court opined, Congress opted to leave these ambiguities because of the changing political climate.[144] Certainly, such an intentionally ambiguous legislative history cannot be construed as providing the clear signal of congressional intent mandated by *Landgraf*.

The court also considered whether retroactivity is necessary to achieve CERCLA's remediation goals. Although CERCLA does have a backward focus, and costs may exceed Superfund's

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139 *Id*. at 1514 (quoting FRANK P. GRAD, TREATISE ON ENVIRONMENTAL LAW § 4A.02[2][a], at 4A-51 (1994)).

140 *See id*.

141 *Id*.

142 *See id*. at 1515; Surber, *supra* note 38, at 30. *See also Olin*, 927 F. Supp. at 1520-23 (suggesting that this abdication of congressional responsibility may violate the non-delegation doctrine).

143 *See Olin*, 927 F. Supp. at 1515 (citing Ohio *ex rel*. Brown v. Georgeoff, 562 F. Supp. 1300, 1309 (N.D. Ohio 1983)).

144 *See id.* ("The political circumstances suggest why . . . Congress left many issues deliberately ambiguous.").

capacity, prospective-only application would not, according to the court, obviate CERCLA's purpose. Certainly, Superfund would still facilitate cleanup by defraying costs of remediating pre-enactment sites. Quoting *Landgraf*, the court noted that "[t]he fact 'that retroactive application of a new statute would vindicate its purpose more fully . . . is not sufficient to rebut the presumption against retroactivity.'"[145]

Olin District turned to constitutional concerns with a warning that retroactive application of a punitive damage clause inevitably raises otherwise avoidable constitutional questions.[146] Specifically, the court highlighted section 106, allowing punitive fines for compliance failures, and section 107(c)(3), permitting punitive, treble damages. While *Olin* only involved compensatory damages, the district court suggested that these provisions may violate the Ex Post Facto Clause.[147] Although punitive damages were not demanded here, the court cautioned that "retroactive CERCLA liability is more egregious than the compensatory relief which the Court refused to apply retroactively in Landgraf."[148] Indeed, CERCLA may "require compensation for actions which when taken violated no federal or state law."[149]

The *Olin* District court represented a "thoughtful departure"[150] from fifteen years of CERCLA precedent in reaching its conclusion that liability may not be assigned to pre-enactment activities. Like its forerunners, the court considered CERCLA's text and legislative history, but it rejected the necessity argument that CERCLA's purpose would be rendered ineffective absent retroactive liability.

2. *Retroactivity Reaffirmed:* Olin *Appeals*

While *Olin* District seemed to suggest a transformation in CERCLA jurisprudence, its significance was short-lived. Before the case's reversal six months later by the Eleventh Circuit, five

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145 *Id*. at 1509 (quoting Landgraf v. USI Film Prod., 511 U.S. 244, 285-86 (1994)).

146 *See id*. at 1517.

147 *See id.*

148 *Id*.

149 *Id.*

150 McGinnis, *supra* note 14, at 516.

other district courts reaffirmed CERCLA's constitutionality, notwithstanding *Landgraf* and *Olin* District.[151]

Like the *Olin* District court, the *Olin* Appeals court recognized that CERCLA does not contain explicit language mandating retroactivity.[152] Nonetheless, the court found sufficient indicators of congressional intent in the text, legislative history, and statutory purpose to support continued retroactive application.[153] The Court of Appeals began by considering the past tense terminology.[154] While the defendant insisted that the liability scheme merely applied to "future former owners and operators" (i.e., those that became owners and operators after CERCLA's enactment), the court of appeals found that the Act targeted *both* current and former owners and operators.[155] This conclusion was based on section 103, which requires PRPs to notify the government of a hazardous condition within 180 days of CERCLA's enactment. The court, by holding that this covered pre-enactment conduct, required former owners and operators as of December 11, 1980 to make the necessary disclosures.[156]

The court also briefly discussed the negative inference argument.[157] Although *Landgraf* dismissed such inferences, *Olin* Appeals distinguished CERCLA's natural resource damage provision from the challenged sections in *Landgraf*; it held that the former is less attenuated because:

> Unlike the prospective provisions in the 1991 Civil Rights Act discussed by the *Landgraf* Court which were not connected to the specific provision that the plaintiff wanted to apply retroactively, liability for response costs, liability for natural resource damages, and the prospective limitation for natural

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151 *See* Ninth Ave. Remedial Group v. Fiberbond Corp., 946 F. Supp. 651 (N.D. Ind. 1996); Nova Chems. v. GAF Corp., 945 F. Supp. 1098 (E.D. Tenn. 1996); United States v. Alcan Aluminum Corp., Nos. 87-CV-920, 91-CV-1132, 1996 WL 637559 (N.D.N.Y. 1996); United States v. NL Indus. Inc., 936 F. Supp. 545 (S.D. Ill. 1996); Gould Inc. v. A & M Battery & Tire Serv., 933 F Supp. 431 (M.D. Pa. 1996).

152 *See* United States v. Olin Corp., 107 F.3d 1506, 1512 (11th Cir. 1997).

153 *See id.* at 1512-14.

154 *See id.* at 1513.

155 *See* 42 U.S.C. § 9603 (1994 & Supp. III 1997).

156 It is unclear why section 103 necessitates retroactive construction. It could merely reflect Congress' interest in prompt notice upon discovery of hazardous conditions.

157 *See Olin*, 107 F.3d at 1513 n.17.

> resource damages are all part of the same section in CERCLA.[158]

Although *Landgraf* diminished reliance on such inferences, "it did not preclude *all* future use of a negative inference analysis in support of retroactive intent."[159]

The court's legislative history analysis focused on congressional silence and early understandings of CERCLA's purpose. In two footnotes, the court noted that Congress twice re-authorized CERCLA without incorporating clauses to limit its retroactive application.[160] This silence was particularly significant, the court suggested, in light of the growing body of precedent supporting retroactivity.[161] The court also highlighted CERCLA's goal of remediating abandoned sites and imposing costs on those responsible for the hazardous condition.[162] Although the *Olin* District court maintained that these dual purposes were still advanced through Superfund, the court of appeals rejected this argument by its insistence that Superfund should only be used "where a liable party does not clean up, cannot be found, or cannot pay the costs of cleanup."[163] Allowing a broader conception of the Superfund, the court contended, would obviate the purposes of CERCLA.

Thus, the *Olin* Appeals court, while purportedly considering many of the same factors as the *Olin* District court, concluded that CERCLA's retroactive application was supported by congressional intent. Furthermore, the rapid reversal of *Olin* District suggests that the earlier decision was merely an "isolated disturbance in an otherwise continuous interpretation of CERCLA as capable of imposing monetary liability retroactivity."[164] Yet, while *Olin* District represents the minority viewpoint, this anomalous decision may provide the more accurate interpreta-

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158 *Id.* (quoting Ninth Ave. Remedial Group v. Fiberbond Corp., 946 F. Supp. 651, 659 (N.D. Ind. 1996)).

159 *Id*. (quoting Nevada *ex rel.* Dep't of Transp. v. United States, 925 F. Supp. 691, 693 (D. Nev. 1996)) (emphasis added).

160 *See id*. at 1512 nn.12-13.

161 *See id*.

162 *Id.* at 1514.

163 *Id*. at 1514 n.18 (quoting STAFF OF THE SENATE COMM. ON ENV'T AND PUB. WORKS, 97TH CONG., A LEGISLATIVE HISTORY OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE COMPENSATION AND LIABILITY ACT OF 1980, at 320 (Comm. Print, 1983) (available in WESTLAW, CERCLA-LH database) [hereinafter A LEGISLATIVE HISTORY]).

164 Surber, *supra* note 38, at 33.

tion of CERCLA. Parts III and IV consider the factors that are typically employed in CERCLA jurisprudence and conclude, as did the *Olin* District court, that CERCLA's complicated legislative history does not evidence the requisite congressional intent to justify retroactivity.

III
CONDUCTING THE *LANDGRAF* TEST

The *Landgraf* test is deceptively simple. The presumption against retroactivity has been difficult to overcome, as reflected in *Olin*'s procedural posture. Both the *Olin* District and *Olin* Appeals courts examined substantially the same factors, yet reached opposite conclusions. Although virtually all CERCLA jurisprudence upholds retroactivity, this Article maintains that the test suggests the opposite result. Perhaps the precedent favoring retroactivity can be attributed to stare decisis. Although each court suggests it is considering textual arguments and legislative history, the opinions are undeniably influenced by precedent.[165] This Part conducts this analysis anew. While the retroactivity arguments are admittedly persuasive, they are not determinative. *Landgraf* suggests that the Supreme Court is unlikely to uphold retroactivity absent clear congressional intent.[166] Though many argue that retroactivity is needed to complete cleanup of pre-enactment sites, *Landgraf* indicates that a "[c]ourt should look more to the text and legislative history of the statute and less to its own desire to enforce the statute's purposes most efficaciously."[167] The lack of an explicit textual commitment to retroactivity, the weakness of textual inferences, and CERCLA's conflicting and vague legislative history, coupled with its inherent injustice, suggests that the Court would not support the Act's continued retroactive application.[168]

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165 *See supra* note 100 and accompanying text.

166 *See* Lund, *supra* note 31, at 93 (noting that *Landgraf* reaffirms the Court's dislike of retroactive statutes).

167 McGinnis, *supra* note 14, at 515.

168 Perhaps the retroactivity test should be more stringent in the CERCLA context than under the Civil Rights Act. Although *Landgraf* considered a retroactive compensation scheme that would increase damages for historically illegal acts, CERCLA demands compensation for actions which, when taken, complied with all existing laws. *See* Bean, *supra* note 110, at 1012. Because CERCLA clearly fails the *Landgraf* test, further consideration of this distinction is unnecessary.

A. Landgraf *Part One: Consider the Statute's Textual Support for Retroactivity*

> "The fundamental rule of law [is] that the meaning and intent of a statute is to be sought first in the language in which it is framed. If that language is plain and unambiguous, then there is no need to enlist the rules of interpretation, and the duty of the Court is to enforce the act according to its terms . . . ."[169]

The *Landgraf* test embraces this rule by requiring the court to consider textual support for retroactivity. Applying this to CERCLA is complicated because the Act is "marred by vague terminology and deleted provisions."[170] In fact, although *Georgeoff* supported retroactivity, the court conceded that CERCLA "might not have received adequate drafting."[171] Recognizing this, it is difficult to see how any textual retroactivity claim can be maintained. Indeed, CERCLA fails the first prong of the *Landgraf* analysis.

1. *CERCLA Contains No Clear Statement of Retroactivity*

Even the principal cases recognize that CERCLA lacks an explicit statement supporting retroactivity.[172] In fact, the natural resource damage provisions explicitly *prohibit* retroactive liability.[173] Although *Landgraf* merely requires clear evidence of congressional intent to overcome the prospectivity presumption,[174] the concurrence indicates that at least three justices support a more stringent "clear statement" rule.[175] Indeed, the concurring opinion suggests that retroactivity can only be upheld if Congress spoke clearly on the subject or, perhaps, if the text creates an

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169 Ohio *ex rel*. Brown v. Georgeoff, 562 F. Supp. 1300, 1308-09 (N.D. Ohio 1983) (quoting Windsor v. State Farm Ins. Co., 509 F. Supp. 342, 344 (D.D.C. 1981)).

170 United States v. Northeastern Pharm. & Chem. Co. (NEPACCO), 579 F. Supp. 823, 838 n.15 (W.D. Mo. 1984), *aff'd* 810 F.2d 726 (8th Cir. 1986).

171 *Georgeoff*, 562 F. Supp. at 1310 n.12. *See also* Freeman, *supra* note 12, at 677 (quoting Rep. Jim Broyhill: "A cursory reading reveals hundreds of errors.").

172 *See, e.g.*, *NEPACCO*, 810 F.2d at 732; Nevada *ex rel.* Dep't of Transp. v. United States, 925 F. Supp. 691, 698 (D. Nev. 1996); United States v. Shell Oil, 605 F. Supp. 1064, 1069 (D. Colo. 1985); *Georgeoff*, 562 F. Supp. at 1309.

173 *See* 42 U.S.C. § 9607(f) (1994).

174 *See* Landgraf v. USI Film Prod., 511 U.S. 244, 280, 283 (1994).

175 *See id*. at 286-88 (Scalia, J. concurring). Justices Anthony Kennedy and Clarence Thomas joined in the opinion.

"unavoidable implication."[176] Even with the majority's "looser" standard, absent a clear statement retroactivity will only be supported if there is significant evidence of legislative intent.

2. *Tense-Based Arguments Are Not Dispositive*

Absent a clear statement, the *Landgraf* test permits some consideration of textual inferences. Typically, this analysis begins by highlighting the past tense terminology in section 107(a).[177] Although CERCLA does not explicitly address retroactivity, it imposes liability on those that "*owned* or *operated* any facility,"[178] "*arranged* for disposal or treatment,"[179] and "*accepted*" hazardous waste.[180] Retroactivity supporters suggest that these verbs refer to those who owned, operated, arranged, and accepted hazardous materials before CERCLA's passage. Presumably, the tense argument is bolstered by section 103, requiring parties to report hazardous conditions to the government within six months of CERCLA's passage. Several scholars maintain that this language provides "further evidence of Congress' intent for retroactive application of CERCLA."[181] The fact that the Supreme Court has formerly relied on a similar argument to support retroactivity, suggests that it may be amenable to such claims in the CERCLA context.[182] One could also contend that common sense supports retroactive liability: why would Congress remediate inactive sites where waste had been dumped on December 12, 1980, but not December 10?[183]

Notwithstanding these arguments, CERCLA's past tense terminology can be justified on other grounds. For instance, the fact that liability attaches to past and present owners and opera-

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176 *See id*. at 288 (Scalia, J. concurring) (quoting Murray v. Gibson, 56 U.S. 421, 423 (1854)). *See also* Lund, *supra* note 31, at 95.

177 *See, e.g.*, *supra* notes 47-47 and accompanying text.

178 42 U.S.C. § 9607(a)(2) (emphasis added).

179 42 U.S.C. § 9607(a)(3) (emphasis added).

180 42 U.S.C. § 9607(a)(4) (emphasis added).

181 Palisano, *supra* note 133, at 438. *See also* LeVeque, *supra* note 59, at 618; *Generator Liability*, *supra* note 27, at 1240; Surber, *supra* note 38, at 26 & n.28 (citing United States v. Shell Oil, 605 F. Supp., 1064, 1073 (D. Colo. 1985)).

182 *See, e.g.*, Barrett v. United States, 423 U.S. 212, 216-17 (1976) (noting that use of the present perfect tense permits application of CERCLA even if the requisite events occurred in the past), *cited in Generator Liability, supra* note 27, at 1240 n.56.

183 *See, e.g.*, *Judge's Bench Memorandum, Ninth Annual Pace Environmental Law Moot Court Competition*, 14 PACE ENVTL. L. REV. 815, 840 (1997) [hereinafter *Judge's Bench Memorandum*].

tors does not necessarily imply recovery from pre-enactment parties. Rather, one could argue that CERCLA was meant to evolve over time. Currently there are PRPs who own and operate facilities with waste that has not left the site since December 11, 1980. Thus, the past tense terminology does not imply retroactivity, but anticipates future applicability. Given the presumption against retroactivity, the existence of any alternative explanations should obviate tense-based claims. They indicate that retroactivity is not the "unavoidable implication" of CERCLA.[184]

The verb-tense argument is also weakened by CERCLA's inconsistencies. For instance, the verb "shall" in section 107(a)(4) indicates prospective-only application, whereas, the exclusive use of the past tense in section 107(a)(3) implies that one who arranged, but not one who arranges, can be held liable.[185] Thus, the past and future tense arguments "in effect . . . cancel each other."[186] One author, although supportive of retroactive liability, notes that "departure from a literal reading is justified only if such reading would lead to absurd, unreasonable, or clearly unintended results."[187] Arguably, construing verb tense to require retroactive-only application of CERCLA is "absurd" and "unintended." This unintended consequence necessitates some alternative explanation for the inconsistency. Absent such an explanation, the tense-based argument should be dismissed. Most courts recognize this weakness and hold that past tense liability language is not dispositive.[188]

3. *Negative Inference Is No Longer Adequate After* Landgraf

While CERCLA does not contain an explicit retroactivity clause, some suggest that the limitation of natural resource damages to post-enactment costs implies that the rest of CERCLA is

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184 *See supra* note 176 and accompanying text.

185 *See* McGinnis, *supra* note 14, at 510.

186 *Shell Oil*, 605 F. Supp. at 1073.

187 *Generator Liability*, *supra* note 27, at 1240 n.56.

188 *See, e.g.*, Nevada *ex rel.* Dep't of Transp. v. United States, 925 F. Supp. 691, 699 (D. Nev. 1996) ("Given the especially amorphous legislative development of this section, this Court agrees that comparing verb tenses within the statutory sections does little to advance the retroactivity analysis."); *Shell Oil*, 605 F. Supp. at 1073 (congressional intent "cannot be divined" from the verb tenses in section 107(a)); Ohio *ex rel.* Brown v. Georgeoff, 562 F. Supp. 1300, 1309-10 (N.D. Ohio 1983).

not so limited.[189] These retroactivity proponents contend that this explicit prospectivity clause indicates that the enacting Congress believed the presumption against retroactivity was not strong enough to prohibit retroactive recovery of natural resource damages.[190] If it were, they argue, the explicit provisions for prospective recovery for natural resource damages would be "mere surplusage."[191] Following this reasoning, to give meaning to these clauses the remainder of CERCLA must be given retroactive effect.

Many authorities have invoked the negative inference justification.[192] More recent retroactivity advocates have distinguished CERCLA from *Landgraf*,[193] emphasizing that the natural resource damage provisions are central to CERCLA, whereas the challenged sections in *Landgraf* were tangential.[194]

Despite repeated reference to these provisions, even the sources supporting retroactivity recognize that *Landgraf* has limited the strength of the negative inference argument.[195] Consequently, negative inference is insufficient absent additional

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189 *See* 42 U.S.C. §§ 9607(f)(1), 9611(d)(1) (1994); *supra* note 59 and accompanying text. *See, e.g.*, *Nevada*, 925 F. Supp. 693; United States v. Northeastern Pharm. & Chem. Co., 579 F. Supp. 823, 839 (W.D. Mo. 1984) *aff'd* 810 F.2d 726 (8th Cir. 1986); *Shell Oil*, 605 F. Supp. at 1079 ("Had Congress similarly intended to limit recovery of pre-enactment costs, it would have done so explicitly."); *Georgeoff*, 562 F. Supp. at 1311. *See also* Palisano, *supra* note 133, at 438; Surber, *supra* note 38, at 28 ("[I]f Congress intended for CERCLA's liability provisions to be prospectively applied, then the express limitation in section 107(f)(1) was unnecessarily redundant"); *Generator Liability*, *supra* note 27, at 1241; Freeman, *supra* note 12, at 668. *But see* Landgraf v. USI Film Prod., 511 U.S. 244, 288 (1994) (Scalia, J. concurring) ("[R]efinement and subtlety are no substitute for clear statement.").

190 *See, e.g.*, *Shell Oil*, 605 F. Supp. at 1076 ("If the presumption against retroactivity were sufficient to preclude recovery for pre-enactment response costs, it would also be sufficient to preclude recovery for pre-enactment damages to natural resources. Obviously that was not intended.").

191 *See id.*

192 *See, e.g.*, *supra* note 189.

193 *See, e.g.*, *Brief for Plaintiff, Ninth Annual Pace Environmental Law Moot Court Competition*, 14 PACE ENVTL. L. REV. 909, 930-31 (1997) [hereinafter *Brief for Plaintiff*].

194 *See Nevada*, 925 F. Supp. at 701 (citing *Landgraf*, 511 U.S. at 258); United States v. Olin Corp., 107 F.3d 1506, 1512 (11th Cir. 1997). *See also Brief for Plaintiff*, *supra* note 193, at 932 (dubbing the natural resource damage provisions "the very core of the Act's liability scheme.").

195 *See* LeVeque, *supra* note 59, at 619 ("Although the negative inference argument is stronger in the case of CERCLA, it is *not wholly persuasive in light of Landgraf*.") (emphasis added).

evidence of congressional intent.[196] Regardless of the centrality of the natural resource damage provision, *Landgraf* still indicates that negative inferences are not persuasive. The case established that key aspects of a statute, such as retroactive liability, must be stated explicitly.[197] Furthermore, the suggestion that explicit prospectivity provisions in one section indicate an intent for retroactivity elsewhere undermines the traditional presumption by effectively making retroactive liability the default rule.[198] While supporters contend that the explicit prospectivity provision would be superfluous if the rest of CERCLA applied prospectively, Congress may have incorporated the provision as an "insurance policy" to guarantee that the entire Act—and natural resource damage liability in particular—applied prospectively. After all, such damages may be extremely large and would impose a particular injustice if applied retroactively.

4. *Effective Date Provision Supports Prospective Application*

CERCLA provides: "Unless otherwise provided, all provisions of the Act shall be effective on [Dec. 11, 1980]."[199] Those who support retroactivity argue that a narrow interpretation of this provision impedes the purpose of the Act. If CERCLA was enacted to remediate inactive and abandoned waste sites, many which existed before December 11, 1980, restricting remediation to sites rendered hazardous *after* enactment would be ineffective.[200] Although no one could argue that the date provision suggests that the entire Act applies *before* the effective date, courts have insisted that it cannot be used to bolster arguments for prospective or retrospective application.[201]

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196 *See id.*

197 *See Landgraf*, 511 U.S. at 259-60. *See also* Brief for Respondents at 13, Landgraf v. USI Film Prod., 511 U.S. 244 (1994) (No. 92-757) ("Where the reader seeks a 'clear, strong and imperative' and 'unequivocal and inflexible' statement of retroactivity, use of negative inference does not suffice.").

198 *See* Rick Haberman, Comment, *Much Ado About Nothing?: Retroactive CERCLA Liability After* Landgraf, 15 TEMP. ENVTL. L. & TECH. J. 209, 220 (1996).

199 42 U.S.C. § 9652(a) (1994).

200 *See, e.g.*, Nevada *ex rel.* Dep't of Transp. v. United States, 925 F. Supp. 691, 695 (D. Nev. 1996); Surber, *supra* note 38, at 26.

201 *See Nevada*, 925 F. Supp. at 695 (citing *Landgraf*, 511 U.S. at 280). *See also* United States v. Shell Oil, 605 F. Supp. 1064, 1075 (D. Colo. 1985) (stating that the effective date provision cannot "seriously be considered to negate CERCLA's overriding statutory scheme of retroactive liability.").

It is interesting to note that the same courts that dismiss CERCLA's effective date provision support an expansive reading of the natural resource damage inference. It is unclear why two clauses providing for *prospective* natural resource damage liability imply that the remainder of CERCLA authorizes *retrospective* liability, yet one clause explicitly providing for prospective liability of the *entire* Act cannot be taken at face value to support a prospective liability scheme. Contrary to Surber's suggestion[202] that given the purpose of the Act, prospective application only would render CERCLA ineffective, reading the provision in this way does *not* necessarily obstruct the Act's purpose. The provision may only apply to the liability scheme, and the Superfund could be used to finance pre-enactment remediation. Indeed, *Landgraf* provides a reason to reject the argument that "all the diverse provisions of CERCLA must be treated uniformly."[203] The Court opines that, "the instruction that the provisions are to 'take effect upon enactment' . . . mean[s] that courts should evaluate each provision of the Act in light of ordinary judicial principles concerning the application of new rules to pending cases and pre-enactment conduct."[204] Ordinary judicial principles suggest that prospective liability be retained wherever possible.

In sum, CERCLA does not satisfy the first prong of the *Landgraf* test. Arguments relating to verb tense, negative inference, and effective date do not support pre-enactment application. Had Congress intended CERCLA to operate retroactively, it should contain "an unequivocal statement"[205] to that effect. Instead, the existing statute contains an explicit commitment to prospectivity.[206] Because the first prong does not conclusively support CERCLA's retroactivity, *Landgraf* next requires inquiry into legislative history and congressional intent.

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202 *See supra* note 200 and accompanying text.

203 *Landgraf*, 511 U.S. at 280.

204 *Id*.

205 *See* Slattum, *supra* note 13, at 154.

206 *See* 42 U.S.C. § 9601(32) (1994 & Supp. III 1997) (providing that "[t]he terms 'liable' or 'liability' under this subchapter shall be construed to be the standard of liability which obtains under section 1321 of Title 33.") Title 33, the Clean Water Act, provides for prospective strict liability, applying only to current owners or operators of vessels or onshore or offshore facilities. *See* 33 U.S.C. § 1321 (1994).

B. Landgraf *Part Two: Non-textual Indicators of Congressional Intent*

Absent a clear textual statement, the *Landgraf* test requires consideration of other indicators of congressional intent, an analysis recognized in CERCLA jurisprudence.[207] Unfortunately, given CERCLA's hurried review and ambiguous legislative history, the quality of these indicia is questionable.[208] In fact, *Olin* District declares that "CERCLA itself has almost no legislative history."[209] Although *Georgeoff* determined that the Act could legitimately apply retroactively, the court conceded that, "[t]he precise issue of retroactivity was not addressed in congressional debates."[210] Given this overt recognition of CERCLA's flaws, it is unclear how the Act could possibly pass *Landgraf*'s test. Although *Landgraf* does not establish a clear statement rule, it does require clear evidence of congressional intent.[211] CERCLA's legislative history lacks this requisite clarity.

1. *Supplanted Legislation Supports CERCLA's Prospective Application*

The *Landgraf* court placed considerable emphasis on the proposal, subsequent veto, and deletion of an explicit retroactivity provision in the Civil Rights Act of 1991.[212] A CERCLA precursor contained a comparable retroactivity provision which read: "The provisions of this subpart and subpart C shall apply to releases of hazardous waste without regard to whether or not such releases occurred before, or occurred on or after, [date of enactment]."[213] This provision was deleted before passage of the final Act.

Retroactivity proponents downplay the significance of this deletion by noting that it coincided with the wholesale rejection

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[207] *See, e.g*., Ohio *ex rel*. Brown v. Georgeoff, 562 F. Supp. 1300, 1308-09 (N.D. Ohio 1983).

[208] *See supra* note 139 and accompanying text.

[209] United States v. Olin Corp., 927 F. Supp. 1502 (S.D. Ala 1996), *rev'd*, 107 F.3d 1506 (11th Cir. 1997).

[210] *Georgeoff*, 562 F. Supp. at 1311.

[211] *See* Landgraf v. USI Film Prod., 511 U.S. 244, 286-87 (1994) (Scalia, J., concurring).

[212] *See supra* notes 116-23 and accompanying text.

[213] H.R. 7020, 96th Cong., § 3072 (1980), *quoted in* Nevada *ex rel.* Dep't of Transp. v. United States, 925 F. Supp. 691, 694 (D. Nev. 1996).

of the House bill.[214] Thus, in light of these large-scale changes, proponents maintain that the deletion of the proposed retroactivity provision cannot be attributed to a conscious rejection of the principle.[215] Rather, the House substituted the Senate version for the House Bill and happened to forego the retroactivity clause in the process.[216] As a result, while the presidential veto at issue in *Landgraf* explicitly highlighted the difficulty of supporting retroactive legislation,[217] the substitution that occurred in CERCLA's legislative history cannot be as clearly attributed to a single cause.

This rationale sharply contrasts with traditional understandings of supplanted legislation. Certainly, the "explicit deletion of a provision the only purpose of which was to provide for retroactive enforcement is strong evidence that Congress intended only prospective application."[218] *Landgraf* reveals that removal of an explicit retroactivity clause is strong evidence of congressional intent for prospectivity.[219] The case is even stronger in the CERCLA context: although the retroactive provision in the Civil Rights Act of 1991 passed through both the House and Senate, the provision at issue in CERCLA never received a majority vote in either house. While both provisions were deleted from the respective Acts, one could argue that there was a stronger indication of congressional support for retroactivity in the Civil Rights Act. After all, the retroactivity rejection at issue in the Civil Rights Act occurred after the proposed legislation had been approved by the House and Senate, whereas the retroactivity provision in the precursor to CERCLA was rejected long before presidential ratification. Notwithstanding this evidence of bicameral support, the *Landgraf* Court still determined that there was not clear evidence of congressional intent for the Civil Rights Act's retroactive application.[220] This argument is much stronger in the CERCLA context, where *neither* the House nor Senate

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214 Although both H.R. 7020 and S. 1480, The Environmental Emergency Response Act, S. REP. NO. 848, 37 (1980), were simultaneously proceeding through both the House and Senate, the House later adopted the Senate version.

215 *See* LeVeque, *supra* note 59, at 620 n.101, 630.

216 *See id.*

217 *See id.* at 623; *supra* notes 122-25 and accompanying text (discussing supplanted legislation in the Civil Rights Act).

218 United States v. $814,254.76, 51 F.3d 207, 212 (9th Cir. 1995).

219 Landgraf v. USI Film Prod., 511 U.S. 244, 255-56 (1994).

220 *See id.*

could secure a majority in favor of an explicit retroactivity provision at any point in the legislative process.

The fact that the clause was proposed and subsequently rejected further indicates that Congress *had* considered retroactivity during CERCLA's legislative history. Thus, its absence in the final Act cannot be attributed to legislative oversight. The provision was not in the final Act because Congress *chose* not to include it.

2. *Floor Debates Do Not Reveal Unanimous Support of Retroactivity*

To support CERCLA's retroactive construction, *Landgraf* requires clear evidence of congressional intent.[221] Presumably, such "clear evidence" would require consensus during the legislative process. As one author argued: "If there is ambiguity in the statutory language . . . and any ambiguity at all in the legislative history, then retroactive construction is not permissible even if on balance it appears it was intended."[222] CERCLA's statutory language is certainly ambiguous.[223]

Despite this ambiguity, courts have almost unanimously found clear congressional intent.[224] Precedent emphasizes the understanding that CERCLA was intended to "initiate and establish a comprehensive response and financing mechanism to abate and control the vast problems associated with abandoned and inactive hazardous waste disposal sites."[225] Presumably, this early emphasis on inactive sites demands retroactive liability.[226] This understanding is supported by evidence that the enacting

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[221] *See id.* at 280 ("If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result."). *See also supra* notes 109-33 and accompanying text.

[222] *Generator Liability*, *supra* note 27, at 1239.

[223] *See supra* Part III.A.

[224] *See, e.g.*, United States v. Northeastern Pharm. & Chem Co., 810 F.2d 726, 732-33 (8th Cir. 1985); Nevada *ex rel*. Dep't of Transp. v. United States, 925 F. Supp. 691, 695 (D. Nev. 1996).

[225] H.R. Rep No. 96-1016, at 22 (1980), *reprinted in* 1980 U.S.C.C.A.N., 6125. *See also Nevada*, 925 F. Supp. at 695 n.8 (quoting remarks of Rep. Bruce Vento in House debate on S. 1480, stating that the bill is designed "to clean up our environment from past improperly disposed of hazardous waste"); *Generator Liability, supra* note 27, at 1244.

[226] *But see infra* Part III.B.4. (reconciling this seeming backwards looking purpose with a prospective liability scheme).

Congress should have realized that the 1.6 billion dollar Superfund would not adequately remedy then-known inactive sites.[227]

Retroactivity advocates also highlight several congressmen's concerns that CERCLA's apparent retroactive application would be unfair and potentially unconstitutional.[228] This early skepticism supposedly shows that the Act was understood as having retroactive effect. CERCLA's ultimate passage, they argue, reveals consensus on the retroactivity issue. Others dismiss this skepticism as reflecting "additional views" that are not needed to establish intent.[229] While these explanations suggest some support for retroactivity, the opposing evidence is stronger.

Although *Landgraf* requires consideration of congressional intent, the Court has shown decreased reliance on legislative history.[230] This decline may be based on a belief that legislative history "is unconstitutional, necessarily relies upon a fiction of legislative intent, and is easily manipulated by legislators, staffers and lobbyists."[231] In fact, *Landgraf* itself reflects the diminished reliance on history. Although the *Landgraf* test considers indicia of congressional intent, the Court never discusses legislative his-

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227 *See Generator Liability*, *supra* note 27, at 1230 (citing H.R. Rep. No. 96-1016, at 20, *reprinted in* 1980 U.S.C.C.A.N. at 6123). By the time of CERCLA's passage, the EPA had estimated that it would cost from $13.1 to $22.1 billion to remediate the 1200 to 2000 inactive sites posing the greatest danger to public health and the environment. *See id.*

228 *See, e.g.*, A LEGISLATIVE HISTORY, *supra* note 163, at 427 (Sens. Pete Domenici, Lloyd Bentsen, and Howard Baker note that "[t]he issue of applying the new standards retroactively remains a troubling one . . . To expect individual businesses to absorb the costs imposed by a doctrine not consistent with American standards or jurisprudence is not only unreasonable, but may be unconstitutional."). *See also Generator Liability*, *supra* note 27, at 1244 (citing 126 CONG. REC. H9466-67 (Daily Ed. Sept 23, 1980) (remarks of Rep. Stockman) and 126 CONG. REC. H9465-66 (daily ed. Sept 23, 1980) (remarks of Rep. Madigan)).

229 *See* Nova Chems. v. GAF Corp., 945 F. Supp. 1098, 1105 n.12 (E.D. Tenn. 1996).

230 *See* Haberman, *supra* note 198, at 222 ("The Court heard 66 cases involving statutory construction between 1988-89. In over 75 percent (53) of these cases, the Court relied substantially on legislative history to reach its conclusion. In contrast, in the 1992-93 term, the Court heard 70 cases dealing with statutory interpretation, and relied on legislative history in less than half (30) of them"). *See also id.* at 223 & n.116 (citing authors that argue against continued reliance on legislative history).

231 *Id.* at 222 (quoting Nathan Coco, Comment, *Has Legislative History Become History: A Critical Examination of* Central Bank of Denver NA v. First Interstate Bank of Denver, 20 J. CORP. L. 555, 563 (1995)).

tory independent of statutory language.[232] Thus, the Court may only consider legislative history to substantiate conclusions that also have textual support.[233] The Court's reduced reliance on history is evident in Justice Scalia's concurrence which declared that "only the text of the statute itself" can support retroactive application of a statute that affects substantive rights.[234]

Although the *Landgraf* majority *did* note that clear evidence of congressional intent could override the prospectivity presumption, it is hard to imagine how anything "clear" can be extracted from CERCLA's "murky" legislative history.[235] Representative Harsha of the enabling Congress recognized these ambiguities:

> [N]umerous questions have been raised as to what we are doing to common law with this new statute . . . and the courts are going to have a field day in ridiculing the Congress on passing laws that are vague, internally inconsistent, and using tools such as superceding laws which are in conflict without any further guidance. This bill is not a Superfund bill—it is a welfare and relief act for lawyers.[236]

Similarly, Senator Robert Stafford conceded that "the floor statements which are most relevant are those of the bill's drafters, including myself . . . . Frankly, in the confusion which surrounded those final days, I may have slipped up once or twice."[237] Not only was the legislative history hurried and inconsistent, but analysis is further impeded because neither a conference report nor hearing transcript were released on the final bill.[238] Given these inadequacies, one author bemoans "[the] cu-

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[232] *See* Landgraf v. USI Film Prod., 511 U.S. 244, 262 (1994). After dismissing the textual arguments, the Court declared that "[t]he relevant legislative history of the 1991 Act reinforces our conclusion." *Id.*

[233] *See* Haberman, *supra* note 198, at 223.

[234] *See Landgraf*, 511 U.S. at 287.

[235] *See* Freeman, *supra* note 12, at 223, 669 ("[A] case for retroactivity cannot be made from Superfund's murky legislative history.").

[236] *Administration Testimony to the Subcomm. on Env't Pollution and Resource Protection, Comm. on Env't and Pub. Works*, 96th Cong. (1980), *reprinted in* A LEGISLATIVE HISTORY, *supra* note 163, at 788-89 (remarks of Rep. Harsha).

[237] McGinnis, *supra* note 14, at 521 (quoting 127 CONG. REC. 19,778 (Sept. 9, 1981) (statement of Sen. Stafford)). *See also supra* note 139 and accompanying text.

[238] *See* Haberman, *supra* note 198, at 225; John R. Jacus & Jan G. Laitos, *Specialty Law Column: May CERCLA Apply Retroactively?*, 2 COLO. LAW. Oct. 1996, at 103, 104.

rious circle of logic [that] results whereby many courts find congressional intent for retroactive application while acknowledging that the legislative history is incomplete."[239]

Although the *Landgraf* court noted that "constitutional impediments to retroactive civil legislation are now modest," Congress must still "affirmatively consider[ ] the potential unfairness of retroactive application and determine[ ] it is an acceptable price to pay for the countervailing benefits."[240] CERCLA's ambiguous history fails this basic requirement. Retroactivity was never explicitly discussed in the floor debates.[241] Conclusions based on inference and innuendo can hardly be deemed "affirmative consideration" of the issue. To the extent retroactivity was acknowledged, it was in the form of skepticism about its constitutionality and legitimacy.[242] Although advocates construe the passage of CERCLA as an indication of congressional consensus, this reasoning makes a tremendous leap of faith. Certainly, while the eventual support from senators who opposed CERCLA's perceived retroactive impact earlier *could* indicate newfound support, it could also suggest that they either realized that CERCLA did not apply retroactively or believed that their concerns were addressed by amendments alleviating its retroactive impact. Perhaps the clearest indication that the enabling Congress did not reach consensus on retroactivity is the belief that an express provision would have precluded passage.[243]

Admittedly, even CERCLA's scant legislative history suggests that some congresspersons recognized, or feared, that CERCLA had retroactive effect. In fact, CERCLA's basic goal of remediating inactive and abandoned sites[244] supports this inference. After all, at the time of CERCLA's passage, any liability assigned to such sites would *have* to be assigned retroactively. However, *Landgraf* does not merely require some indication of legislative intent, it requires "clear intent."[245] When considering

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239 Slattum, *supra* note 13, at 177.

240 Landgraf v. USI Film Prod., 511 U.S. 244, 272-73 (1994).

241 *See* Ohio *ex rel*. Brown v. Georgeoff, 562 F. Supp. 1300, 1311 (N.D. Ohio 1983).

242 *See supra* note 236 and accompanying text.

243 *See, e.g.*, Slattum, *supra* note 13, at 154.

244 *But see infra* Part III.B.4. (reconciling this seeming backwards-looking purpose with a prospective liability scheme).

245 *See Landgraf*, 511 U.S. at 272.

the legislative history of the Civil Rights Act of 1991, the *Landgraf* plaintiffs noted:

> It is only by attempting, erroneously, to derive meaning by "fashioning a mosaic" out of "the innuendoes of disjointed bits of a statute" or snippets of legislative dialogue that even a negative inference of retroactivity can be postulated. This is not the stuff of which the retrospective editing of the regulation of human conduct and the resulting rights, obligations and liabilities should be made.[246]

Certainly, the arguments favoring CERCLA's retroactive application are no stronger.

3. *Silence Reflects Indecision, Not Ratification*

The legislature's continued silence, despite CERCLA's retroactive application, is the greatest indicator of congressional support for retroactive liability. In fact, precedent has linked silence with acquiescence.[247] Although CERCLA has twice been reauthorized, Congress has never incorporated amendments explicitly precluding retroactivity.[248] Had Congress been frustrated with CERCLA jurisprudence, some argue, the issue could have been addressed explicitly during re-authorization.[249] Nonetheless, silence is not tantamount to ratification.

Silence merely "reflects indecision"—not ratification.[250] Indecision hardly indicates unambiguous support. Although Congress has missed opportunities to amend CERCLA to preclude retroactive liability, it has not taken these opportunities to expressly provide for it either.[251] To the contrary, the near quadrupling of the Superfund (from 1.6 billion dollars to 8.5 billion dollars over five years)[252] is notable and suggests that Congress hoped to eliminate contributions from pre-enactment responsible parties.[253] By permitting silence to substitute for support, the

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[246] Brief for Respondents at 17, Landgraf v. USI Film Prod., 511 U.S. 244 (1994) (No. 92-757).

[247] *See, e.g.*, Bob Jones Univ. v. United States, 461 U.S. 574 (1983), *cited in* LeVeque, *supra* note 59, at 627-28.

[248] *See, e.g.*, United States v. Olin Corp., 107 F.3d 1506, 1512 (11th Cir. 1997); LeVeque, *supra* note 59, at 629 & n.144.

[249] *See* Kubasek et al., *supra* note 22, at 208-09.

[250] *See* McGinnis, *supra* note 14, at 525.

[251] *See supra* note 222 and accompanying text.

[252] *See* Kubasek et al., *supra* note 22, at 208 n.67.

[253] Kubasek does not suggest this interpretation and would likely not support it.

courts are effectively creating a presumption of retroactivity, which can only be overridden by an express statement to the contrary. This is counter to statutory construction doctrine.[254] Finally, regardless of the intent of recent legislatures, congressional silence at present is hardly indicative of the intent of the enacting Congress, presumably the relevant indicator in the *Landgraf* analysis. It only makes sense that "just as an earlier Congress cannot bind a future Congress, a future Congress should not be presumed to undo the work of earlier Congresses absent explicit statutory language . . . ."[255]

4. *Prospectivity Does Not Preempt CERCLA's Purpose*

Legislative history suggests that CERCLA was enacted to advance two goals: (1) to remediate inactive hazardous waste disposal sites, and (2) to impose the costs associated with such cleanup on the polluter.[256] Arguably, CERCLA's third purpose is to dissuade parties from creating hazardous conditions. Some have tried to infer congressional intent by showing that these purposes would be stymied under a prospective-only liability scheme.[257] *Landgraf* invites this analysis by defending its prospective reading of the Civil Rights Act of 1991 by stating that "[s]ection 102 is plainly not the sort of provision that must be understood to operate retroactively because a contrary reading would render it ineffective."[258] In contrast, CERCLA retroactivity proponents argue that prospective liability would emasculate CERCLA.[259]

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254 *See* Greene v. United States, 376 U.S. 149, 160 (1964) ("[T]he first rule of construction is that legislation must be considered as addressed to the future, not to the past."). *See also supra* notes 8-18 and accompanying text.

255 Brief for Respondents at 37, Landgraf v. USI Film Prod., 511 U.S. 244 (1994) (No. 92-757).

256 *See* PUB. L. NO. 96-510, 94 Stat. 2767 (1980) (elaborating CERCLA's purpose); United States v. ACETO Agric. Chems. Corp., 872 F.2d 1373, 1380 (8th Cir. 1989) (delineating CERCLA's dual goals). *See also* Palisano, *supra* note 133, at 437-39; LeVeque, *supra* note 59, at 621 (providing evidence of these goals from CERCLA's legislative history).

257 *See, e.g.*, Palisano, *supra* note 133 at 439 (noting that CERCLA was specifically passed to "address the environmental degradation that occurred in the past."); LeVeque, *supra* note 59, at 631 & n.159 ("without a retroactive reading, CERCLA is rendered entirely ineffective").

258 *Landgraf*, 511 U.S. at 286.

259 *See, e.g.*, LeVeque, *supra* note 59, at 631 & n.159.

Perhaps, the polluter pays principle indicates that the public should not be responsible for any part of cleanup. The Senate Report supports this construction:

> [S]ociety should not bear the costs of protecting the public from hazards produced in the past by a generator, transporter, consumer, or dumpsite owner or operator who has profited or otherwise benefited from commerce involving these substances and now wishes to be insulated from any continuing responsibilities for the present hazards to society that have been created.[260]

To the extent that prospective liability requires tax contributions, one could argue, CERCLA fails one of its chief purposes.

Advocates also consider CERCLA in the context of other environmental legislation. The enabling Congress viewed CERCLA as a logical, backwards-looking counterpart to RCRA.[261] Thus, while RCRA would address future hazardous waste disposal, CERCLA would facilitate retrospective remediation.[262] If, in fact, CERCLA was enacted to complement RCRA, some argue, prescribing a prospective-only liability scheme may be superfluous, and counter to its initial purpose.[263]

Although retroactive liability would advance CERCLA's goals better than prospective relief, *Landgraf* recognizes that "compromises necessary [to enact a statute] may require adopting means other than those that would most effectively pursue the main goal."[264] Thus, unless CERCLA's purposes are entirely

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[260] S. REP. NO. 96-848, at 98 (1980), *quoted in* LeVeque, *supra* note 61, at 625.

[261] *See* Surber, *supra* note 38, at 26 (quoting statements of Rep. James J. Florio) ("Now we have RCRA which provides for the remediation of hazardous waste sites that occur from this point forward, and of course CERCLA is the second part which goes back to cover the sites which RCRA cannot reach."). *See also* A LEGISLATIVE HISTORY, *supra* note 163, at 239 (quoting remarks of Rep. James Lent on S. 1480, 96th Cong. (1980)).

[262] *See* LeVeque, *supra* note 59, at 626 ("CERCLA was enacted after RCRA to fill the gaps RCRA left. CERCLA was to look in the opposite direction of RCRA—backwards.").

[263] *See id.* ("If CERCLA is not to apply retroactively to impose liability on PRP's then for all practical purposes CERCLA is superfluous because RCRA covers most liability for prospective dumping."). *See also* David Seidman, *Questioning the Retroactivity of CERCLA in Light of* Landgraf v. USI Film Products, 52 WASH. U.J. URB. & CONTEMP. L. 437, 437 (1997) ("[A] notable loophole of the RCRA, however, was its failure to address the problem of inactive sites in need of cleanup.").

[264] Landgraf v. USI Film Prod., 511 U.S. 244, 286 (1994). *See also id.* at 285 ("It will frequently be true . . . that retroactive application of a new statute

obviated, the prospectivity presumption prevails. Because CERCLA can still advance its twin purposes of remediation and polluter responsibility absent pre-enactment liability, *Landgraf* does not require retroactive liability.

The Superfund was created to reduce retroactive liability. Although the initial fund was not large enough to fully remediate all pre-enactment sites,[265] its existence indicates that Congress recognized a need to supplement PRP contributions. The legislature may have intended to increase the fund to facilitate continued cleanup.[266] Parties could also be held responsible for cleanup expenses if their pre-enactment conduct violated then-existing state laws, was negligent, or spanned pre-enactment and post-enactment eras.[267] This interpretation would further reduce the burden imposed on a limited Superfund.

The perceived compatibility of federal reliance on Superfund for pre-enactment cleanup and the "polluter pays" principle depends upon how one interprets that precept. Perhaps making the polluter pay only implicates current and post-enactment polluters.[268] Alternatively, it may only require payment from negligent or pre-enactment guilty polluters. After all, retroactive liability does not *truly* impose the cost on the polluter. The original polluter may no longer be alive or financially solvent. Thus, liability is imposed retroactively on distant relatives who did not create the hazardous condition in the first place.

Early consumers who paid too little for environmentally harmful goods were the *true* beneficiaries of pre-enactment disposal. Had the original polluters realized they would be responsible decades later, they would have internalized this cost by raising prices and reducing sales and profits; however, retroactive liability penalizes them for long-forgotten profits that did not reflect these eventual costs. In a competitive market, the original polluter would not have retained this "surplus profit." Thus, CERCLA imposes costs on the companies while savings were long ago transferred to the original consumers. It seems funda-

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would vindicate its purpose more fully. That consideration, however is not sufficient to rebut the presumption against retroactivity.").

[265] *See supra* note 227 and accompanying text.

[266] *See* Kubasek et al., *supra* note 22, at 208 n.67 (Superfund was increased from $1.6 billion to $8.5 billion in 1986). Kubasek would probably not support this interpretation of CERCLA.

[267] *See* Freeman, *supra* note 12, at 681.

[268] *See* McGinnis, *supra* note 14, at 523.

mentally unfair to declare that "the polluter pays" when the general public actually benefited.[269] Gerrard considers this perverse cost imposition: "It is challenging indeed to find an ethical justification for forcing individuals (as opposed to society at large) in the 1990s to pay to protect hypothetical people in the 2090s from actions taken lawfully in the 1890s."[270] Noting that the government disproportionately targets a few deep-pocket offenders, others complain that retroactive liability does not make polluters pay evenly.[271]

Those who contend that prospective liability would obviate CERCLA's purpose emphasize that program costs would exceed Superfund's capabilities. Yet the greatest costs of the existing program can be attributed to the retroactive liability scheme. Litigation represents over one third of all Superfund expenditures[272] and delays cleanup.[273] Eliminating retroactivity could actually advance CERCLA's purpose by facilitating remediation at a reduced cost.[274]

The compliance incentives of strict liability are attenuated in the CERCLA context because the pre-enactment polluter may have been complying with all existing disposal laws.[275] In certain situations, the government may have mandated a particular method of waste disposal that was subsequently declared ille-

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[269] *See* Bruce Howard, *A New Justification for Retroactive Liability in CERCLA: An Appreciation of the Synergy Between Common and Statutory Law*, 42 ST. LOUIS U. L.J. 847, 852-53. *See also* Gerrard, *supra* note 7, at 742 (citing KATHERINE N. PROBST ET AL., FOOTING THE BILL FOR SUPERFUND CLEANUPS 11, 66-67 (1995)) (noting that the current liability scheme "leaves a windfall gain to earlier consumers who paid low prices for goods that were produced too cheaply, and imposes a windfall loss on new shareholders who paid a normal price for shares of a firm that did not expect the discovery of a Superfund site."). See also Howard, *supra* note 15, for general background.

[270] Gerrard, *supra* note 7, at 742.

[271] *See, e.g.*, Slattum, *supra* note 13, at 173.

[272] *See* Freedman, *supra* note 18, at 1172 (citing a 1994 RAND study estimating that 36% of the $11.3 billion spent on Superfund cleanups through 1991 went toward legal fees); Howard, *supra* note 269, at 854 (noting that another RAND study estimates that 44% of the expenditures at a multi-party Superfund site can be attributed to transaction costs).

[273] *See* Gerrard, *supra* note 7, at 722 & nn.82-83. Early estimates indicated that the average time between site identification and cleanup was eight years. More recent numbers suggest that the average cleanup time per site is approaching twenty years. *See id.*

[274] *But see* Steinzor, *supra* note 18, at 10,084 (noting that prospective liability would not eliminate costs associated with determining the appropriate liability cutoff point).

[275] *See* Slattum, *supra* note 13, at 171.

gal.[276] Thus, retroactive strict liability does not create proper incentives because the actions have already occurred. Instead, retroactive strict liability "merely dislocates certain workers and capital from the older companies to the newer ones."[277]

CERCLA clearly fails the *Landgraf* test. The Act lacks any explicit statement authorizing its retroactive application and textual deductions based on tense, negative inference, and effective date are inadequate. Similarly, there is no indication of congressional intent supporting retroactivity that can override the traditional prospectivity presumption. In fact, the legislative history is ambiguous and "murky." Congressional silence does not constitute endorsement, nor does CERCLA's purpose necessitate such a construction. Thus, under *Landgraf*, CERCLA cannot be given retroactive construction. Although the *Landgraf* test does not require consideration of constitutional issues raised by a retroactive liability scheme, these issues were examined by the Supreme Court in *Eastern Enterprises v. Apfel*, and will be addressed in Part IV. This analysis provides further support for the contention that CERCLA's liability scheme must be modified.

IV
CONSTITUTIONAL CHALLENGES TO CERCLA'S RETROACTIVE APPLICATION: *EASTERN ENTERPRISES V. APFEL* STRENGTHENS THE PROSPECTIVITY PRESUMPTION

Although the Constitution evidences a general distrust of retroactive legislation, these limitations are generally restricted to penal law.[278] In fact, some have summarily concluded that the "Court currently has no constitutional doctrine that [addresses] penal statutes."[279] Given this limitation, constitutional arguments against CERCLA's retroactive liability scheme are unlikely to prevail:

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[276] *See id.* at 172 nn. 185-86.

[277] Howard, *supra* note 269, at 855.

[278] *See, e.g.*, U.S. CONST. art. I, §9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed."). *But see* COLO. CONST. art. II, §11; MONT. CONST. art. XIII, § 1, cl. 3; N.H. CONST. pt. 1 art. 23; OHIO CONST. art. II, § 28; Alfred R. Light, *New Federalism, Old Due Process, and Retroactive Revival: Constitutional Problems with CERCLA's Amendment of State Law*, 40 U. KAN. L. REV. 365, 390 nn. 194-95 and accompanying text (1992) (noting that many state constitutions expressly forbid retroactive civil legislation).

[279] Lund, *supra* note 31, at 89.

> Given the policy considerations and the great weight of authority on this issue, the rabble-rouser's assertion of a constitutional argument in the CERCLA context proved in most circumstances to be a waste of time and money . . . the great bulk of authority supports the conclusion that constitutional challenges will in almost all circumstances be rejected.[280]

The constitutional claims against CERCLA *are* weaker than the statutory claims, highlighted in Part III. Recognizing this, CERCLA jurisprudence has historically eschewed constitutional inquiry.[281] Because the statutory challenges are so strong, constitutional claims may be unnecessary. Indeed, constitutional challenges are generally avoided by federal courts when there is an alternative legal theory.[282] Yet, notwithstanding this precautionary introduction, retroactive regulations, even retroactive civil regulations, may "signal a court to scrutinize legislation more closely."[283]

Although the Supreme Court has historically discouraged constitutional challenges, a recent decision suggests that the current Court may be amenable to such claims. In an opinion with potentially enormous ramifications for CERCLA jurisprudence, the Supreme Court determined on June 25, 1998 that retroactive civil liability may violate the Takings Clause.[284] The case involved a challenge to the Coal Industry Retiree Health Benefit Act (Coal Act),[285] a medical benefits act that required Eastern Enterprises, a coal mining company that had ceased operations in 1965, to provide health benefits to workers that had not been employed by the company for over thirty years. Years after Eastern left the industry, the Coal Act was passed in order to supplement funding shortfalls for injured miners.[286] Presumably, it was

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[280] ALLAN J. TOPOL & REBECCA SNOW, SUPERFUND LAW AND PROCEDURE § 2.1, at 47 (1992).

[281] *See, e.g.*, Ohio *ex rel.* Brown v. Georgeoff, 562 F. Supp. 1300, 1302 (N.D. Ohio 1983).

[282] *See, e.g.*, New York v. Ferber, 458 U.S. 747, 769 n.24 (1982) ("When a federal court is dealing with a federal statute challenged as overbroad, it should, of course, construe the statute to avoid constitutional problems, if the statute is subject to such a limiting construction.").

[283] Light, *supra* note 278, at 390 n.193 (citing Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 16-17 (1976)).

[284] *See* Eastern Enter. v. Apfel, 524 U.S. 498 (1998).

[285] *See* 26 U.S.C. §§ 9701-9722 (1994 & Supp. III 1997).

[286] *See Eastern*, 524 U.S. at 503-18.

designed to impose costs upon those that "were most responsible for . . . liabilities."[287]

The Supreme Court rejected Eastern's liability. It observed that "legislation might be unconstitutional if it imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience."[288] In contrast, retroactive liability may be justified if it is "confined to the short and limited periods required by the practicalities of producing national legislation."[289] The thirty year, multi-million dollar retroactive liability created by the Coal Act was too severe, unpredictable, and disproportionate to Eastern's former experiences to withstand constitutional challenge. The same rationale could apply to a constitutional challenge under CERCLA. Disposal often occurred more than thirty years before enactment, and liability is often comparable to the 50 to 100 million dollars at issue in *Eastern.* Part IV considers potential constitutional challenges to CERCLA in light of this recent decision.

A. *Immediate* Eastern *Aftermath*

In the year following the *Eastern* decision, at least three district courts have heard cases attempting to apply its expansive reading of the Takings Clause to challenge CERCLA's retroactive liability scheme.[290] These arguments have been rejected, with the courts maintaining that *Eastern* has limited precedential value because it is a plurality decision.[291] In particular, the

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[287] *Id.* at 512-15.

[288] *Id.* at 528.

[289] *Id.* at 500 (quoting Pension Benefit Guar. Corp. v. R.A. Gray Co., 467 U.S. 717, 731 (1984)).

[290] *See* Combined Properties v. Morrow, 58 F. Supp. 2d 675 (E.D. Va. 1999); United States v. Alcan Aluminum Corp., 49 F. Supp. 2d. 96 (N.D.N.Y. 1999); United States v. Vertac Chem. Corp., 33 F. Supp. 2d 769 (W.D. Ark. 1998).

[291] *Eastern* was decided by a four justice plurality. A concurring opinion by Justice Kennedy found that the challenged Act violated the Due Process Clause, rather than the Takings Clause. Justices John Paul Stevens, David Souter, Ruth Bader Ginsburg and Stephen Breyer filed two separate dissenting opinions, each joined by all four justices. A plurality decision is not binding precedent. *See, e.g.*, *Morrow*, 58 F. Supp. 2d at 68; *Alcan*, 49 F. Supp. 2d at 99. *See also* Association of Bituminous Contractors, Inc. v. Apfel, 156 F.3d 1246, 1255 (D.C. Cir. 1998) ("[T]he only binding aspect of [the *Eastern* plurality decision] is its specific result—holding the Coal Act unconstitutional as applied to Eastern Enterprises"); Anker Energy Corp. v. Consolidated Coal Co., 177 F.3d 161, 170 (3d Cir. 1999), *cited in Morrow*, 58 F. Supp. 2d at 680.

Court's due process argument has been dismissed as meaningless in the CERCLA context because it was raised in a concurring opinion filed by a single justice.[292] One court dismissed CERCLA constitutional challenges entirely, insisting that the Act's constitutionality has long been established, and can no longer be disputed.[293] Substantively, the *United States v. Alcan* court attempted to distinguish CERCLA from the Coal Act by emphasizing that whereas Eastern Enterprises did not directly contribute to the "funding crisis created by industry commitments to expanded benefits" under the Coal Act, CERCLA liability is "predicated on the link between [defendants'] waste disposal activities and the environmental harms caused."[294] This distinction is dubious. Although Eastern Enterprises may not have participated in the negotiations leading to retroactive liability under the Coal Act and the corresponding funding crisis, Eastern contributed to that crisis by employing the beneficiaries during the time when they likely incurred the health effects that necessitated expanded liability.[295] Similarly, CERCLA PRPs likely played no role in CERCLA's development; however, their earlier actions led to the waste crisis necessitating such expansive liability. In both instances, the defendant's harmful action terminated prior to passage of the respective act. If the Supreme Court found Eastern's connection to the ultimate harm too attenuated to assign liability, CERCLA PRPs should be similarly shielded.

Alcan also distinguished the case before it from *Eastern* by highlighting the disparity between the economic impact of the two actions.[296] Although this distinction may have been persuasive under *Alcan*, where the defendant's damages were estimated at five million dollars, it may be less persuasive in other CERCLA actions, where cleanup costs and defendant liability averages thirty million dollars per site.[297] Thus, notwithstanding *Eastern*'s limited precedential value, the distinctions between the

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[292] *See Alcan*, 49 F. Supp. 2d at 100-01.

[293] *See Vertac*, 33 F. Supp. 2d at 785.

[294] *Alcan*, 49 F. Supp. 2d at 100.

[295] *See, e.g.*, Eastern Enter. v. Apfel, 524 U.S. 498, 517 (1998) (recounting that Eastern was assigned liability for "over 1,000 retired miners who had worked for the company before 1966, based on Eastern's status as the pre-1978 signatory operator for whom the miners had worked for the longest period of time.").

[296] *See id*.

[297] *See* CHURCH & NAKAMURA, *supra* note 17, at 8.

Coal Act and CERCLA are largely unpersuasive. Although the *Eastern* plurality opinion may not provide binding precedent, the Court's arguments could similarly be advanced in the CERCLA context. These arguments are considered in detail below.

B. *Retroactive Liability and the Takings Clause*

The Fifth Amendment is meant to prevent the government "from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[298] In determining whether the Coal Act violated these basic principles, the *Eastern* Court considered the three factors that are generally applied to regulatory takings analysis: "the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action."[299] The economic impact of the Coal Act was considered substantial.[300] The Court further determined that the Coal Act interfered with the plaintiff's investment-backed expectations by imposing liability thirty to fifty years after Eastern had employed the beneficiaries.[301] Had Eastern foreseen this liability, the cost could have been deducted from their employees' salaries. Absent such internalization, the employees would, in effect, be getting a double windfall. Finally, although the government action was imposed on Eastern Enterprises, the company did not participate in the decision-making process.[302] Coal Act negotiations were initiated after the plaintiff's retirement.[303] The Court determined that when a chosen solution "singles out certain employers to bear a burden that is substantial in amount, based on the employers' conduct far in the past, and unrelated to any commitment that the employers made or to any injury they caused, the governmental action implicates fundamental principles of fairness underlying the Takings Clause."[304]

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298 *Eastern*, 524 U.S. at 522 (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

299 *Id.* (quoting Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979)).

300 *See id.* at 527.

301 *See id.*

302 *See id.* at 531.

303 *See id.* (noting that Eastern ceased mining operations in 1965).

304 *Id*.

A parallel analysis can be applied to CERCLA. Certainly, CERCLA's economic impact is similarly substantial.[305] As with the Coal Act, CERCLA PRPs could not have anticipated their future liability. Indeed, pre-enactment parties not only may have disposed of their waste in a legal manner, the government may have mandated the disposal method. Alternatively, the generator may have sent materials to a municipal solid waste site that was implicated decades later. CERCLA's liability web would capture the original generator, even if its particular waste could not be linked to the problem. In other instances, foreseeability may be completely obscured because the responsible party is a descendant of the initial actor. In fact, the PRP may not have any knowledge of the chemicals used at the facility fifty years earlier and certainly would not know about the former operator's disposal methods. Finally, as with the Coal Act, the responsible party likely played no role in CERCLA negotiations. Thus, in terms of "character of the government action," CERCLA creates a substantial imposition on past conduct.[306]

Some suggest that CERCLA imposes obligations that are disproportionate to the harm created by the responsible party.[307] When no other financially solvent parties can be found, CERCLA's joint and several liability scheme imposes costs exceeding a single individual's contribution.[308] This imposition violates the idea of "rough proportionality" between benefits and exactions.[309] Although this argument sounds persuasive, its applicability to CERCLA is dubious.[310] Indeed, courts have generally held that the right of contribution authorized by section 113 of CERCLA shields any individual from bearing a disproportionate burden.[311]

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[305] *See* CHURCH & NAKAMURA, *supra* note 17, at 8 (estimating that the average CERCLA cleanup cost is $30 million per site).

[306] *See supra* notes 6-7 and accompanying text.

[307] *See, e.g.*, Gerrard & Goldberg, *supra* note 6.

[308] *See, e.g.*, Charter Township of Oshtemo v. American Cyanamid Co., 896 F. Supp. 506, 509 (W.D. Mich. 1995) (determining that "orphan shares should be apportioned among all of the solvent PRPs that are parties in this litigation, including plaintiffs, in amounts corresponding to their relative equitable responsibility for any indivisible harm for which joint and several liability otherwise applies.").

[309] *See* Dolan v. City of Tigard, 512 U.S. 374 (1994).

[310] TOPOL & SNOW, *supra* note 280, at 49.

[311] *See, e.g.*, *id.* (citing Combined Properties v. Morrow, 58 F. Supp. 2d 675, 680 (E.D. Va. 1999); United States v. Stringfellow, 661 F. Supp. 1053 (C.D. Cal. 1987); United States v. Conservation Chem. Co., 619 F. Supp. 162 (W.D. Mo.

Courts are generally hesitant to find that economic regulation constitutes a taking.[312] This aversion is evident in Justice Stephen Breyer's dissent in *Eastern Enterprises*[313] and Justice Anthony Kennedy's concurrence.[314] These opinions insist that the Fifth Amendment applies to the taking of property (i.e., land), but not money. Fearing a slippery slope, the dissent queried: "If the Clause applies when the government simply orders A to pay B, why does it not apply when the government simply orders A to pay the government, i.e., when it assesses a tax?"[315] To the extent that a constitutional challenge contends that retroactive liability causes bankruptcy, the claimant must convince five members of the Court that the Fifth Amendment anticipates this type of economic liability. This may be easier in the case of owners who have a vested interest in the land; however, it may be more tenuous in the context of generators, operators, arrangers, and transporters. Certainly, most regulatory takings precedents involve a claimant with a personal interest in the land.[316]

Most commentators believe that a Takings Clause claim will fail.[317] In reaching this conclusion, Amy Blaymore considered CERCLA in light of four traditional takings tests. She inter-

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1985) ("[I]n a CERCLA action the defendant has the opportunity to lessen its damages by proving during an apportionment hearing that it had not made a significant contribution to the environmental harm."). *See also* Saillan, *supra* note 5, at 10204 n.24 (noting that 42 U.S.C. § 9613(f)(2) (1994) allows PRPs to seek contributions from other liable parties for any costs in excess of their fair share). Yet, section 113's shield is doubtful in situations where only one PRP is financially solvent.

312 *See, e.g.*, Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) (noting that takings claims are more often initiated when "the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.").

313 *See Eastern*, 524 U.S. 554-68 (Breyer, J., dissenting). Justice Breyer was joined by Justices Stevens, Souter and Ginsburg.

314 *See id.* at 554-32 (Kennedy, J., concurring).

315 *See id.* at 555.

316 *See, e.g.*, Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) (land use restrictions may constitute a taking if they deprive an owner of all property value); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) (regulation may constitute a taking if it goes "too far"). *See also Eastern*, 524 U.S. at 540-51 (Kennedy, J., concurring) (indicating takings jurisprudence generally applies to real estate).

317 *See, e.g.*, Amy Blaymore, *Retroactive Application of Superfund: Can Old Dogs Be Taught New Tricks?*, 12 B.C. ENVTL. AFF. L. REV. 1, 40-46 (1985); Saillan, *supra* note 5, at 10204 n.24.

preted *Pennsylvania Coal Co. v. Mahon*[318] as requiring a balancing test to compare the public benefit of the regulation with the private loss.[319] Blaymore argued that the private loss—investment-backed expectations—was weak when balanced against the public's interest in a clean and safe environment.[320] CERCLA similarly failed the "*Lucas* test" because the "prior use of land as a dump site in and of itself will usually render the property useless for any other purpose."[321] Although *Loretto v. Teleprompter Manhattan CATV Corp.*[322] prohibits permanent physical invasions, Blaymore argued that in light of the extreme public health threats, such an invasion (presumably by remediation equipment) "would probably be considered not only justifiable, but necessary."[323] Finally, she considered the "noxious-use or harm-benefit approach," which allows the government to regulate public nuisances without compensation.[324] Arguably, a Superfund site constitutes a public nuisance.

Although Blaymore's analysis maintained that a takings claim would fail, the decision in *Eastern Enterprises* suggests the Court may be willing to consider such challenges. While Blaymore dismissed the PRPs' expectations when balanced against the public's interest in a clean environment,[325] one could argue that the public's interest should be protected by the public fisc. This argument is strengthened by the three factors considered by the *Eastern Enterprises* Court: economic impact, investment-backed expectations, and character of the government action.[326] Indeed, the case against CERCLA seems at least as strong as the takings threat imposed by the Coal Act. Nonetheless, in light of the Court's cautionary approach to regulatory takings analysis, success is by no means guaranteed.

C. *Retroactive Liability and the Due Process Clause*

The *Eastern* plurality noted that economic regulation may violate substantive due process if it is "arbitrary and irra-

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318 260 U.S. 393 (1922).
319 *See* Blaymore, *supra* note 317, at 42.
320 *See id.* at 43.
321 *Id.* at 44.
322 458 U.S. 419 (1982).
323 Blaymore, *supra* note 317, at 45.
324 *See id.*
325 *See id.* at 43.
326 *See* Eastern Enter. v. Apfel, 524 U.S. 498, 529-38 (1998).

tional."[327] However, the Court did not elaborate on these requirements because it had already concluded that the Coal Act violated the Takings Clause.[328] In his concurrence, Justice Kennedy rejected the plurality's takings analysis, noting that "[t]he liability imposed on Eastern no doubt will reduce its net worth and its total value, but this can be said of any law which has an adverse economic effect."[329] Instead, he determined that the Coal Act is unconstitutional because it violates due process.[330] In cautioning against retroactive laws that alter "legal consequences of transactions long closed," he stated that "due process protection for property must be understood to incorporate our settled tradition against retroactive laws of great severity."[331] Thus, the constitutionality of retroactive civil legislation can be determined by the "degree of retroactive effect."[332] The Coal Act, he concluded, violates this norm, because, by imposing liability on events that occurred thirty-five years prior, it "has a retroactive effect of unprecedented scope."[333] In dissent, Justice Breyer, joined by Justices John Paul Stevens, David Souter, and Ruth Bader Ginsburg, similarly recognized that "retrospective civil legislation may offend due process if it is particularly harsh and oppressive."[334] Nonetheless, the dissent concluded that the Coal Act did not violate due process because it only extends liability to miners whom Eastern itself employed.

Justice Kennedy's reasoning is particularly illuminating in the CERCLA context. If a thirty-five year retroactive liability scheme is "unprecedented" in scope, how much more so is CERCLA's limitless liability? CERCLA's far-reaching liability scheme is unlikely to violate the dissent's standard for regulations that are "particularly harsh and oppressive." However, the dissent ultimately supported the Coal Act because of a presumed nexus between the beneficiaries and their former employer. Sim-

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327 *Id.* at 538 (quoting Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976)).

328 *See id.* ("Because we have determined that the third tier of the Coal Act's allocation scheme violates the Takings Clause as applied to Eastern, we need not address Eastern's due process claim.").

329 *Id.* at 543 (Kennedy, J. , concurring).

330 *See id.* at 539 (Kennedy, J., concurring).

331 *Id.* at 550.

332 *Id.*

333 *Id*.

334 *Id.* at 557 (Breyer, J., dissenting) (quoting Pension Benefit Guar. Corp. v. R.A Gray & Co., 467 U.S. 717, 733 (1984)).

ilarly, CERCLA purportedly links liability to those who were responsible for creating the hazardous condition. However, to the extent that CERCLA implicates descendants of the original generator, the link may be more attenuated than under the Coal Act. If one could prove that contemporary PRPs are unconnected to the original act,[335] the dissenting justices may support a due process claim. Because the plurality never explicitly considered the due process challenge, it is unclear how they would decide such an issue.

Unfortunately, precedent indicates that the Court does not typically expose retroactive civil legislation to searching review. In fact, the Supreme Court has said that it will reject retroactive civil regulation only if it is "arbitrary and irrational" or unsupported by a "rational legislative purpose."[336] Thus, to uphold CERCLA, a court must only find that it has a rational purpose that advances a legitimate government objective.[337]

A court could foreseeably hold that retroactive liability rationally maximizes limited funds to advance the government purpose of waste remediation. Imposing liability on those who supposedly created the problem cannot easily be discredited as "arbitrary and capricious."[338] In fact, in a post-*Eastern* decision, the *Alcan* court reaffirmed CERCLA's rational basis in dismissing Alcan's reliance on *Eastern*.[339] Certainly, the current liability scheme may be more rational than distributing liability to the public through an "across-the-board tax scheme," as the public may have had no connection to the condition.[340] Precedent supports this application of rational basis review to CERCLA.[341]

Nachman Corp. v. Pension Benefit Guaranty Corp. formulated a somewhat different test to determine the legitimacy of

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[335] *See, e.g.*, *supra* notes 6-7, 306 and accompanying text.

[336] Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15, 18 (1976) (holding that due process was satisfied because the black lung compensation scheme presented a "rational measure to spread the costs of the employee's disabilities to those who have profited from the fruits of their labor.").

[337] *See generally* TOPOL & SNOW, *supra* note 280, at 8; *Judge's Bench Memorandum*, *supra* note 183, at 822.

[338] *See generally* Surber, *supra* note 38, at 28-29; *Judge's Bench Memorandum*, *supra* note 183, at 843.

[339] *See* United States v. Alcan Aluminum Co., 49 F. Supp. 2d 96, 100 (N.D.N.Y. 1999) (citations omitted).

[340] *See Generator Liability*, *supra* note 27, at 1250.

[341] *See, e.g.*, United States v. Monsanto Co., 858 F.2d. 160, 173 (4th Cir. 1988); United States v. Northeastern Pharm. & Chem. Co., 810 F.2d 726, 736 (8th Cir. 1986).

retroactive civil legislation. *Nachman* involved a due process challenge to the Employee Retirement Income Security Act (ERISA), which required employers to provide pension benefits to workers who had completed employment prior to ERISA's passage. The court concluded that ERISA satisfied due process requirements after comparing "the problem to be remedied with the nature and scope of the burden imposed to remedy that problem."[342] To facilitate this comparison, the court developed a test involving four factors: (1) the reliance interests of the parties affected, (2) whether the area had previously been subjected to regulatory control, (3) the equities of imposing the legislative burdens, and (4) the existence of statutory provisions to ameliorate the regulatory impact. The *Nachman* test captures the "factors relevant to a judicial assessment of rationality."[343] This test is indeterminate in the CERCLA context.

In terms of the first factor, CERCLA PRPs surely never anticipated incurring massive liability damages years after their actions. Had they foreseen this liability, prices could have been raised to reflect these future costs. On the other hand, Blaymore argues that this reliance interest is marginal when compared to the public's reliance on a clean and safe environment.[344]

Second, to the extent that CERCLA imposes retroactive liability on parties who not only complied with all then-existing environmental laws, but may have specifically followed government mandates for disposal, CERCLA clearly attaches liability to an area not formerly subjected to regulatory control. However, to the extent that CERCLA is simply codifying common law nuisance principles, hazardous waste *has* previously been regulated.[345]

Third, one could argue that it is more equitable to impose remediation costs on past waste generators than on the general public or new companies who may have no connection to the hazardous condition.[346] This rationale is apparently supported by CERCLA's legislative history which maintains that "it is wholly appropriate and equitable for the industries which have

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342 Nachman Corp. v. Pension Benefit Guar. Corp., 592 F.2d 947, 960 (7th Cir. 1979).

343 Blaymore, *supra* note 317, at 25.

344 *See id.* at 27.

345 *See id.* at 29 (citing a letter from Douglas Costle, EPA Administrator, to Hon. Jennings Randolph in S. REP. NO 848, at 100).

346 *See Generator Liability*, *supra* note 27, at 1250.

benefited most directly from cheap, inadequate disposal practices, and which have generated the wastes which imposed the risks on society to contribute a substantial portion of the response costs."[347] While this argument seems sound, the original generators, owners, and operators seldom accrued the benefits of cheap disposal. Rather, the competitive market transferred these benefits to consumers in the form of lower prices.[348] It could be argued that it is most equitable to impose liability on the general public through increased taxes. Thus, CERCLA could be said to violate the third *Nachman* factor.

The final *Nachman* factor requires consideration of moderating provisions. Although the Act's retroactive burden appears limitless because there is no statute of limitations, CERCLA nonetheless incorporates several limiting factors. For instance, the right of contribution theoretically shields individual PRPs from bearing a disproportionate share of the burden.[349] A PRP can also avoid joint and several liability by showing that she is only partially responsible for a divisible harm. Similarly, generators may seek indemnification from transporters in a separate cause of action.[350] The Act also includes exemptions for acts of god, war, and third party omissions.[351] On balance, these statutory provisions moderate CERCLA's burden in accordance with the *Nachman* test.

The test is ultimately inconclusive in this context. Compelling arguments can be made both for and against the constitutionality of CERCLA's liability scheme. The success of a due process claim will likely depend on the depth of the Court's rational basis scrutiny and the influence of Justice Kennedy's position against retroactive legislation of "great severity." The Act's retroactive scheme seems to be supported by rational means. After all, remediating hazardous conditions to protect public health and welfare is a legitimate regulatory goal. Theoretically, imposing liability on those closest to the waste facilities provides a funding source for the necessary remediation. Yet, to the ex-

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[347] *Administration Testimony to the Subcomm. on Envtl. Pollution and Resource Protection of the Senate Comm. on Env't and Pub. Works*, 96th Cong. 93, 229 (1980) (statement of Thomas Jorling, Ass't Administrator, Water and Waste Mgt., EPA).

[348] *See supra* notes 269-73 and accompanying text.

[349] *See supra* notes 299-299 and accompanying text.

[350] *See* 42 U.S.C. § 9607(e)(1)(2) (1994).

[351] *See* 42 U.S.C. § 9607(b) *See also* Blaymore, *supra* note 317, at 34.

tent that past polluters could not have predicted that their honest conduct would create future liability, these parties did *not* actually benefit from cheap disposal. These actors cannot retroactively internalize the costs they created. To the extent that PRPs relied on existing regulations, the public was the true beneficiary of cheap disposal. Thus, a broad public tax may be the more rational means for the government to achieve its legitimate goals. However, as *Usery v. Turner Elkhorn Mining Co.* provides: "It is enough to say that the Act approaches the problem of cost spreading rationally; whether a broader cost-spreading scheme would have been wiser or more practical under the circumstances is not a question of constitutional dimension."[352] Given this lax reading and CERCLA precedent rejecting due process challenges, the Supreme Court would be unlikely to hold that the Act violates due process. Still, *Eastern* suggests a contrary conclusion. Justice Kennedy's concurrence indicates that retroactive civil legislation may violate due process if there is a substantial time lag between the challenged action and the new liability rule. Ultimately, the strength of a due process claim depends on how the Court chooses to reconcile this reading with rational basis review.

D. *Retroactive Liability and the Ex Post Facto Clause*

Although *Eastern* is based primarily on the Fifth Amendment, Justice Clarence Thomas wrote a separate concurrence to emphasize the relevance of the Ex Post Facto Clause.[353] The Clause reflects a general belief that "[a]ll laws should be . . . made to commence, in futuro, and [those affected should] be notified before their commencement."[354] Although it is generally construed to prohibit the retroactive application of penal legislation, Justice Thomas indicated that he has "never been convinced of the soundness of this limitation."[355] This stance, however, seems to be the minority position, and while retroactive penal legislation raises a "serious constitutional question,"[356] nonpunitive retroactive legislation is only restricted if it is arbitrary and

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[352] Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 19 (1976).

[353] *See* Eastern Enter. v. Apfel, 524 U.S. 498, 544 (1998).

[354] Freeman, *supra* note 8, at 219 (internal citations omitted).

[355] *Eastern*, 524 U. S. 544.

[356] *See* Landgraf v. USI Film Prod., 511 U.S. 244, 281 (1994).

irrational.[357] Thus, an ex post facto Superfund claim must emphasize CERCLA's punitive elements.

CERCLA contains several punitive elements. For instance, section 103(b)(3) imposes a fine or imprisonment for failure to provide notice of unpermitted releases, section 106(b) issues fines to parties who do not comply with an executive branch abatement order, and section 107(c)(3) authorizes punitive, treble damages for failure to comply with government orders. "Given the very real threat of punitive damages," the *Olin* District court concluded that "CERCLA retroactivity poses very nearly the same 'ex post facto' danger referred to in *Landgraf.*"[358]

Blaymore dismissed this argument, insisting that the Court had formerly held that the Ex Post Facto Clause was violated when "the legislative aim was to punish [an] individual for past activity" but not when "the restriction . . . comes about as a relevant incident to a regulation of a present situation."[359] Under this construction, the questionable clauses in CERCLA are not meant to punish, but merely to facilitate cleanup of an existing hazardous condition. In this way, any punitive elements of CERCLA liability are a consequence of a legitimate legislative goal—hazardous waste remediation—and not the independent purpose of CERCLA. Alternatively, one could argue that CERCLA's liability scheme is based on theories of strict tort liability, rather than blameworthiness.[360] Thus, liability is not meant to be punitive.

Notwithstanding CERCLA's clear non-punitive remediation goals, the liability scheme *can* be construed as having punitive effect. *Cummings v. Missouri* established over a century ago that nonpenal retroactive legislation may be unconstitutional if it is punitive in nature. *Cummings* involved a successful challenge against a state constitutional provision foreclosing certain careers to those who had engaged in rebellion. Although this provision was not penal, the Court concluded that it still implicated the Ex Post Facto Clause because the preclusion against retroactive legislation "cannot be evaded by making that civil in form which is

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[357] *See, e.g.*, Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976).

[358] United States v. Olin Corp., 927 F. Supp. 1502, 1516 (S.D. Ala. 1996), *rev'd*, 107 F.3d 1506 (11th Cir. 1997).

[359] Blaymore, *supra* note 317, at 47-49 (quoting DeVeau v. Braisted, 363 U.S. 144, 160 (1960)).

[360] *See, e.g.*, *Generator Liability, supra* note 27, at 1247.

essentially criminal in character."[361] The Court then characterized the Ex Post Facto Clause as prohibiting any regulation which "renders an act punishable in a manner in which it was not punishable when it was committed."[362] Of most relevance to the CERCLA context, the Court adopted an expansive vision of punishment:

> What is punishment? The infliction of pain or privation. To inflict the penalty of death, is to inflict pain and deprive of life. To inflict the penalty of imprisonment, is to deprive of liberty. To impose a fine, is to deprive of property. To deprive of any natural right, is also to punish. And so it is punishment to deprive of a privilege.[363]

The *Cummings* opinion captures the foundation of CERCLA's liability scheme. To the extent that response costs can be deemed a fine, retroactive liability constitutes punishment. Similarly, CERCLA renders acts punishable that were not illegal when committed. The joint and several liability scheme may also impose a greater punishment on PRPs than their acts would have earned when committed. Gerrard supports this conception of CERCLA in highlighting the similarity between the term "PRP" and police shorthand for "perpetrator."[364] He also emphasizes that PRP is used interchangeably with the word polluter. "'Polluter' is a word of opprobrium, and the concept that the 'polluter pays' is common to much environmental regulation."[365] Following this logic, making the 'polluter pay' is tantamount to punishment, and CERCLA liability may therefore be construed as imposing a fine on responsible parties.

While CERCLA precedent dismisses these constitutional claims,[366] Justice Thomas' *Eastern* concurrence shows that at least one member of the Court is amenable to expanding traditional ex post facto jurisprudence to retroactive civil legislation. The strength of such a claim relies on analogizing CERCLA to penal legislation. This may be difficult because CERCLA's ultimate purpose is not penal, although it does create new conse-

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361 Cummings v. Missouri, 71 U.S. 277, 285 (1866).
362 *Id.* at 286.
363 *Id.*
364 *See* Gerrard, *supra* note 7, at 715.
365 *Id*.
366 *See, e.g*., United States v. Alcan Aluminum Corp., 49 F. Supp. 2d 96, 100 (N.D.N.Y. 1999) ("Liability for response costs under CERCLA is not penal under the Ex Post Facto Clause.") (citations omitted); TOPOL & SNOW, *supra* note 280, at 12 & nn.35-37 (citing cases denying CERCLA's punitive effect because it advances a "legitimate and important non-punitive purpose").

quences for actions that were not actionable when committed. Arguably, an alternative plan could reach the same ends with reduced private costs. It is unclear whether the Ex Post Facto Clause requires that the chosen strategy be one with the *least* punitive effect, or, as Blaymore suggests, whether the effect is irrelevant assuming that the ends are constitutional.[367]

Eastern raises the very real possibility that retroactive civil legislation may create constitutional concerns.[368] As the above discussion reveals, however, constitutional challenges must overcome significant hurdles. Economic legislation is seldom regarded as a taking, civil legislation is generally subjected to mere rational basis review, and the Ex Post Facto Clause is restricted to legislation with a clear punitive effect, and perhaps a clear purpose. These challenges may not be insurmountable; however, to the extent that a CERCLA challenge can rely on statutory claims, those claims may be preferable.

V
Alternatives to Retroactivity

The foregoing discussion reveals the complications of retroactive liability. Part V proffers recommended responses to these problems. These recommendations include amending CERCLA

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[367] *See supra* note 359 and accompanying text.

[368] In addition to the arguments advanced in *Eastern*, CERCLA may also violate separation of powers. Regardless of Congress' intent, by not including an explicit retroactivity provision, the legislature may have eschewed its constitutional responsibilities, by leaving statutory decisions to the judiciary. *See, e.g.*, McGinnis, *supra* note 14, at 517 (cautioning against "judicial wanderings into the margins of the legislative arena"). As Freeman notes, "to leave Superfund's key provisions for completion by the judiciary is totally incompatible with separation of powers principles, under which policy decisions are to be made by representatives and senators who can be reelected or voted out of office at the next election." *See* Freeman, *supra* note 9, at 227. Thus, Congress avoids difficult decisions and "evad[es] the political accountability to the people that is essential for the legitimacy of legislative power. And if the federal courts, insulated from the winds of popular opinion, accept and exercise that legislative power, they will undermine their own role in the constitutional scheme as neutral arbiters." *Id.* at 234. Although this argument is intuitively compelling, the nondelegation doctrine is really an empty formalism that is seldom enforced by the Court. In fact, the Supreme Court has only twice held that legislation violates this basic constitutional principle. *See* Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935). For evidence that this trend may be changing, however, see *American Trucking Ass'ns, Inc. v. EPA*, 175 F.3d 1027 (D.C. Cir. 1999) (holding that aspects of the Clean Air Act violate the nondelegation doctrine).

to incorporate an explicit retroactivity provision; modifying the retroactive scheme by creating "carve-outs" or restricting liability to pre-enactment negligent parties; and eliminating all retroactive liability, with cutoff dates ranging from 1980 to 1986. The latter policies will necessitate some alternative funding mechanism, which may include a general tax, an increase in the existing Superfund tax, or a waste-end tax on RCRA producers. Ultimately, this Article supports a modified retroactive liability scheme restricting liability to pre-enactment negligent or illegal actions. The revenue shortfall should be provided through a waste-end tax on RCRA producers.

A. *Possible Reforms*

1. *Retain CERCLA's Retroactive Liability Scheme*

Notwithstanding its obvious problems, many support CERCLA's existing liability scheme. Advocates view retroactivity as "a necessary evil," noting that "[w]ithout retroactive liability, the Superfund program would rarely reach enough parties with sufficient assets to clean up contaminated sites."[369] This position is supported by studies from the Congressional Budget Office estimating that a full repeal would cost the federal government 1.3 billion dollars annually.[370] Advocates also suggest that modifying CERCLA's liability scheme after nearly twenty years of retroactive application would create more equity issues than the repeal would solve. It *does* seem unfair to penalize parties that responded early to CERCLA's mandate to remediate pre-enactment hazardous conditions while rewarding recalcitrant landowners for their delay.[371] A retroactivity repeal creates additional equity issues because parties who acted in substantially the same manner will be treated differently, solely because of the date of disposal. In contrast, the existing scheme imposes the same burdens on everyone who handles hazardous waste, regardless of timing. Others argue that repeal is "just a smoke screen for the abdication of the public responsibility to clean up

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[369] Taylor, *supra* note 16, at 81.

[370] *See* Freedman, *supra* note 18, at 1172.

[371] *See, e.g.*, Kubasek et al., *supra* note 22, at 229; Saillan, *supra* note 5, at 10256. *But see* McGinnis, *supra* note 14, at 526 ("[T]o continue a wrong for the sake of those punished in the past would only sacrifice the rights of innumerable parties in the future.").

waste."[372] In this sense, retroactive liability is perceived as merely one of the many burdens that citizens must face to protect their interest in a clean environment. By permitting PRPs to eschew this responsibility, the public is told that they can pass the buck to the federal government.[373] Furthermore, one could argue that eliminating CERCLA's retroactive liability scheme may counterintuitively *increase* transaction costs by prompting PRPs to litigate about the precise date of disposal.[374]

While retaining a retroactive liability scheme endorses the status quo, this proposal would still necessitate some amendments to CERCLA. *Landgraf* provides that the presumption against retroactivity can be overcome by incorporation of an explicit retroactivity clause or through other indicia of congressional intent. The Act's legislative history will always be ambiguous: clarity cannot be imparted on a haphazard and hasty legislative process nearly two decades after CERCLA's passage. Thus, pursuant to *Landgraf*, retroactive liability can only be maintained by adding an explicit retroactivity provision.[375]

2. *Repeal Retroactivity*

Many industry representatives and insurance groups advocate a completely prospective liability scheme.[376] Similar policies have drawn bipartisan political support.[377] Prospectivity proponents insist that reducing the number of PRPs involved in hazardous waste liability will reduce transaction costs and eliminate the incentive to litigate for shared contributions.[378] While a pro-

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372 Freedman, *supra* note 18, at 1171 (quoting Sen. Max Baucus).

373 *See* Kubasek et al., *supra* note 22, at 229.

374 *See* Saillan, *supra* note 5, at 10256 (citing Lois J. Schiffer, *Keep Superfund Liability Intact*, ENVTL. F., Sept./Oct. 1995, at 24).

375 *See, e.g.*, Kubasek et al., *supra* note 22, at 228 ("Congress needs to settle the issue of retroactive liability by amending the act with language such as: 'Liability under this Act is retroactive."); Seidman, *supra* note 263, at 450-51.

376 *See, e.g.*, Kubasek et al., *supra* note 22, at 198 (citing *Insurers Have Their Say*, HAZARDOUS WASTE NEWS, Sept. 16, 1996) (noting that the Washington Legal Foundation, the American Insurance Association, the National Association of Independent Insurers, and the Reinsurance Association of America expressed strong support of the *Olin* District decision and its implications for CERCLA's retroactive application).

377 *See infra* notes 375-85 and accompanying text.

378 *See, e.g.*, Slattum, *supra* note 13, at 164 ("On the positive side, eliminating retroactive application lowers transaction costs. Because retroactivity enlarges the pool of PRPs outward in concentric proportions, its elimination would immediately limit the numbers of litigants at any given site.") (citing Daniel Abuhoff et al., *Superfund Reform Now Rests in Hands of GOP*, NAT'L L.J.,

spective scheme places an obvious burden on the public fisc, proponents insist that tax breaks and voluntary cleanups can alleviate this impact.[379] These incentives, combined with increased efficiency from reduced transaction costs, will ultimately diminish CERCLA's financial imposition on the public.[380] One author suggests that the federal financial burden can be ameliorated by transferring funding and administrative responsibilities to the states.[381]

Multiple constituencies have advanced retroactivity repeals. One coalition of insurance companies, manufacturers, and local governments drafted "A Superfund Reform '95" which would have lifted liability for all pre-1987 claims.[382] The Executive Director of that reform justifies this late cutoff because it "cover[s] the bulk of the sites that have sparked extensive litigation, suggesting that ending such disputes would save money and get the sites cleaned up faster."[383] Katherine Probst and Paul Portney consider a possible pre-1981 liability release with pre-enactment site cleanup provided through an augmented Trust Fund managed by the EPA.[384] The authors estimate that this proposal would require federally funded remediation of 580 sites on the existing National Priorities List in addition to any newly discovered pre-enactment sites.[385] They defend the 1981 cutoff because it represents the point after which PRPs were legally obligated to comply with CERCLA.[386]

These divergent proposals indicate that determining the appropriate cutoff date is one of the complexities of a retroactivity repeal. Regardless of the date, repeal will engender controversy about whether or not the amended act applies to a particular

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Dec. 5, 1994, at C10; John Shanahan, *Superfund Status Quo: Why The Reauthorization Bills Won't Fix Superfund's Fatal Flaws*, THE HERITAGE FOUND. ISSUE BULL., Oct. 3, 1994 (visited Feb. 3, 2000) <http://www.heritage.org/library/categories/enviro/ib204.html>.

379 *See, e.g.*, Slattum, *supra* note 13, at 163 n.132 (citing comments of Sen. Robert C. Smith and Rep. Michael B. Oxley).

380 *See id.*

381 *See* Freedman, *supra* note 18, at 1171.

382 *See id.* at 1172.

383 *Id.*

384 *See* KATHERINE N. PROBST & PAUL R. PORTNEY, ASSIGNING LIABILITY FOR SUPERFUND CLEANUPS: AN ANALYSIS OF POLICY OPTIONS, 35-39 (1992).

385 *See id* at 37.

386 *See id* at 38-39. *See also* Alfred R. Light, "*The First Thing We Do . . .": The ABA's Resolution on CERCLA Reauthorization*, 9 J. NAT. RESOURCES & ENVTL. L. 371, 379 (1993-1994).

party. The amendment would have to specify whether the date corresponds to the time the party sent the waste to a site, the time of transport, the time of ownership or operation, or the time of closure. Once this rule is established, borderline candidates will likely litigate to challenge liability judgments.

A retroactivity repeal seems to have gained moderate bipartisan support. For instance, Representative Sam Gibbons of Florida, the ranking Democrat on the House Ways and Means Committee, declared that retroactive liability is "fundamentally, basically unfair" and resolved not to support Superfund reauthorization absent a repeal.[387] Representative Bud Shuster echoed this sentiment, proclaiming that retroactivity is "fundamentally un-American."[388] Similarly, Representative Bill Archer, a Republican from Texas, conditioned continued financing on "total elimination of retroactivity and elimination of joint and several liability."[389] These views were reflected in several bills introduced in both the House and the Senate.[390] While these bills indicate some congressional activism to repeal retroactivity, they were subsequently defeated. Despite the evidence of some Democratic support for a repeal, Nancy Kubasek maintains that such proposals are unlikely to survive general Democratic opposition.[391]

The defeat of these bills can likely be attributed to their revenue impact. In fact, one author estimates that a pre-1980 retroactivity repeal would cost an estimated 1.3 billion dollars per

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387 Mark Hoffman, *Superfund Reform Redux: Calls to Repeal Retroactive Liability Continue, Legislators Say*, 2 BUS. INS., Feb. 10, 1997 at 2. See also Freedman, *supra* note 18, at 1173, who notes that Rep. Sam Gibbons has also proclaimed that retroactivity "shocks [his] legislative sense of justice. It's unfair. It's un-American. It's a wrong public policy to go back and impose that kind of liability." *Id.*

388 Hoffman, *supra* note 387.

389 *House Committee Leaders Push for Repeal of Retro, Joint and Several Liability*, 25 Env't Rep. (BNA) No. 41, 1999, 1999 (Feb. 17, 1995). *See also* Hoffman, *supra* note 387 (citing additional comments of Rep. Archer).

390 *See, e.g.*, Kubasek et al., *supra* note 22, at 222-28 (including detailed discussion of the Smith Bill, S. 1285, 104th Cong. (1995), and the Oxley Bill, H.R 2500, 104th Cong. (1995), which aimed to eliminated pre-1980 and pre-1987 liability respectively); Steinzor, *supra* note 18, at 10,084-85 (discussing Reps. Smith and Zeliff's proposals, S. 1994, 103d Cong. (1994) and H.R. 4161, 103d Cong. (1994), respectively, which eliminate response cost liability for all pre-enactment activities "unless such actions were 'contrary to law' when they occurred.").

391 *See* Kubasek et al., *supra* note 22, at 227.

year.[392] Although the congressmen who introduced two of the repeals (Senator Robert C. Smith and Representative William Zeliff) projected that a pre-1981 liability repeal would only affect about 15% of the sites on the National Priorities List, Resources for the Future actually projects that such a proposal would affect 77.5% of such sites, with obvious financial implications.[393] Given these enormous costs, a partial repeal may be more viable.

3. *Limited Repeal*

Some advocate more modest reform to avoid the inevitable financial implications of a full repeal. Proponents highlight the financial benefits of such modifications.[394] These reforms include a retroactivity discount, limited "carve-outs," and enforcement of a pre-enactment negligence standard.[395] A discount would avoid some of the inherent unfairness of the existing scheme by reducing the burden for those that could not have anticipated liability.[396] Liability carve-outs for PRPs who are particularly hurt by the attachment of liability may also reduce the inequities of retroactivity. These parties may include municipalities and lenders who own the property through foreclosure.[397] Some criticize this

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[392] *See* Freedman, *supra* note 18, at 1172 (citing a Congressional Budget Office analysis estimating that a pre-1987 repeal would cost $1.6 billion annually). *See also* Steinzor, *supra* note 18, at 10,087 (reporting estimates that Superfund would have to increase two to three times in order to finance continued remediation absent retroactive liability).

[393] *See* Steinzor, *supra* note 18, at 10,087 (basing this conclusion on data reporting 55% of sites ceased waste disposal before 1981, with 50% of the waste at the remaining sites deposited before that time).

[394] *See* Freedman, *supra* note 19, at 2262 (comments of Rep. Boehlert).

[395] *See* Slattum, *supra* note 13, at 164-65, 178.

[396] *See id*. at 164 n.141 and accompanying text (citing a letter from Carol Browner suggesting that the EPA may support such a proposal). This type of retroactivity discount was embodied in H.R. 2500, cited *supra* note 390.

[397] *See, e.g.*, Slattum, *supra* note 13, at 178. *See generally* Freedman, *supra* note 19 (discussing a proposal by Rep. Boehlert to eliminate pre-1980 liability for PRPs that dumped waste at municipal sites that received waste from more than one party). *See also Recent Developments in the Congress*, 28 Envtl L. Rep. (Envtl. L. Inst.) 10,097 (Feb. 1998); (discussing S. 8, "The Superfund Cleanup Acceleration Act of 1997," a Republican proposal introduced by Sens. Robert K. Smith (a Republican from New Hampshire), John H. Chafee (a Republican from Rhode Island) and Trent Lott (a Republican from Mississippi)). S. 8 exempts all co-disposal landfill generators, arrangers and transporters for pre-1987 activities, relieving about 75% of the parties connected with disposal. *See Recent Development in the Congress*, 27 Envtl L. Rep. (Envtl. L. Inst.) 10,128 (Mar. 1997). Sen. Chafee formerly voted to uphold retroactive liability. *See* Freedman, *supra* note 18, at 1173.

proposal, however, contending that "[w]hittling away at the edges of CERCLA unfairness will not solve the problem."[398] Perhaps the best retroactivity compromise would restrict pre-enactment liability to negligent conduct.[399] This option would amount to more than mere "whittling away," while still adhering to CERCLA's guiding polluter pays principle.

A negligence-based liability scheme would increase CERCLA's efficiency by reducing transaction costs, facilitating remediation, and reducing the unfairness of the current scheme. Limited retroactive liability would not circumvent the polluter pays principle. Rather, a negligence standard would "grant equity to those who acted reasonably" in light of existing regulation, while preventing "unconscionable polluters [from] elud[ing] liability."[400] Whereas a complete retroactivity repeal would impose a massive financial burden on the government while permitting irresponsible polluters to escape liability, a limited form of prospective application would "by no means eviscerate the act."[401]

B. *Financing a Partial Retroactivity Repeal*

While a pre-enactment negligence standard will not transfer *all* financial responsibility to the government, any reform will have an undeniable impact on available resources. Without proper planning, this revenue shortfall could impede the already inefficient program. The burden of finding alternative funding sources is a likely reason for the failure of so many legislative proposals. As Representative Fred Upton (Republican, Michigan) declared: "You can't have a repeal of retroactivity without solving the fantasy of who pays for it."[402] While any funding solution will undoubtedly encounter political opposition, there *are* several alternatives—all of which are more equitable than the status quo.

Increasing the existing Superfund tax scheme is the most obvious funding option. The existing program raised approximately

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398 Slattum, *supra* note 13, at 178 & n.221 (quoting Jerry L. Anderson, *The Hazardous Waste Land*, 13 VA. ENVTL. L.J. 1, 48 (1993)).

399 *See, e.g.*, Slattum, *supra* note 13, at 179-80; *Strict Liability Should Be Replaced by Negligence Standard, Industry Group Says*, 24 Env't Rep. (BNA) No. 193 (May 28, 1993).

400 Freedman, *supra* note 19, at 2262.

401 Freeman, *supra* note 8, at 1173.

402 Freedman, *supra* note 18, at 1171.

1.46 billion dollars in 1993, with contributions from the petroleum industry (560 million dollars), chemical feedstocks (260 million dollars), and a broad-based corporate tax (630 million dollars).[403] Presumably, the fact that these groups already contribute to Superfund indicates that the public supports their role in cleanup. However, to the extent that any retroactivity limitation will increase CERCLA's financial impact, it may be inequitable to impose the entire burden on so few constituencies. Thus, this policy may not adequately spread responsibility for cleanup.

A public works alternative, requiring a broad-based general tax, would certainly alleviate concerns about imposing too much liability on one individual. In fact, because every citizen has helped create Superfund sites through purchase decisions, one could argue that the public should similarly share the burden of cleanup. To the extent that the benefits of cheap disposal were transferred to pre-enactment consumers through cheaper prices,[404] a general tax may actually be the best way to compel cost internalization. Members of insurance companies and industry have long-supported this diffuse tax burden; unfortunately, it is unlikely to garner the support of the public or many environmentalists.[405] The public would likely resent a public works alternative because of a skepticism about increasing taxes. Many environmentalists may oppose the broad-based funding scheme as circumventing CERCLA's guiding mission—making the polluter pay. Even though the public has long benefited from lax hazardous waste policy through cheaper prices, most Americans would insist that the polluter retained these benefits. These groups would further contend that a general tax does not compel industry groups to internalize cleanup costs, thereby reducing incentives to develop innovative technologies.

Of course, these fears could be ameliorated by limiting the public works proposal to retroactive cleanup, while the existing program, relying on Superfund and PRP contributions, would continue to fund post-1980 remediations. A mixed-funding program would reduce the public tax burden of Superfund reform. This alternative would still make most polluters pay and en-

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403 *See* Steinzor, *supra* note 18, at 10,086.

404 *See supra* notes 269-73 and accompanying text.

405 *See, e.g.*, Steinzor, *supra* note 18, at 10,088 (asserting that a public works program is unlikely to "achieve anything but divided support from industry and vehement opposition from the environmental community.").

courage development of new remediation technologies. Nonetheless, any program that necessitates a tax increase and that demands forgiveness to the perceived "demons" of hazardous waste production is unlikely to secure complete public support.

A tax on waste generation by RCRA producers would address these concerns. Such a waste-end tax would not impose a burden on the general public and would therefore reduce a primary source of opposition. Further, by taxing those that generate hazardous substances, CERCLA would still capture funds from polluters, advancing the polluter pays policy. Finally, by taxing production, a waste-end tax would create incentives for waste minimization and encourage development of non-taxed (i.e., non-hazardous) alternatives, thus reducing long-term risks. Providing tax breaks to industry groups that install particular preventative technologies could further expand this incentive. A waste-end tax is essentially an expanded version of the existing Superfund; however, by taxing all RCRA producers, rather than a narrow group of constituents from the petroleum industry, the burden is shared by those that are most likely to contribute to hazardous conditions.

Industry groups could challenge this proposal, insisting that they did not create the pre-1980 sites; however, CERCLA's broad-reaching joint and several retroactive liability scheme did little better at assigning responsibility to those that created the challenged site. This is certainly true to the extent that retroactive liability captures descendants of pre-1980 polluters.[406] While this alternative may merely replace one imperfect system with another, a general industry wide waste-end tax at least diffuses the burden of site cleanups.

None of the proposed funding alternatives is ideal; however, a waste-end tax will be most likely to garner public support while advancing CERCLA's dual goals of making the polluter pay and facilitating hazardous waste remediation. The existing retroactive joint and several liability scheme imposes costs that can be grossly disproportionate to pre-enactment polluters' contribution. The clear inequities of this system have stonewalled site cleanup by creating costly legal delays.[407] In fact, Probst and Portney estimate that a pre-1980 liability repeal will save 4.6 bil-

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[406] *See, e.g.*, *supra* notes 6-7, 306 and accompanying text.

[407] *See, e.g.*, Slattum, *supra* note 13, at 174 (stating site cleanup under the current liability scheme does not begin until eight years after EPA learns of the

lion dollars in transaction costs.[408] A waste-end tax will also reduce future hazardous waste burdens by creating incentives for less-risky alternatives.

Conclusion

Courts have long declared that "retroactivity is not favored in the law." Retroactive liability violates fundamental notions of fairness and justice by dismissing settled expectations and imposing liability without giving responsible parties an opportunity to seek alternatives. CERCLA's retroactive liability scheme is particularly disturbing because it is limitless in its reach. Indeed, CERCLA may create a multi-million dollar cleanup responsibility for waste management that was not only legal, but federally mandated at the time of disposal—decades earlier.

Although courts have repeatedly upheld CERCLA's retroactive liability scheme, the Supreme Court has never addressed the issue. Furthermore, while CERCLA liability has been approved in dozens of lower court decisions, only three cases evidence a truly searching analysis, reducing the precedential impact of these decisions. Recent Supreme Court decisions also indicate that the Court is becoming increasingly skeptical of retroactive legislation. *Landgraf* rejected the retroactive interpretation of civil legislation absent clear textual support or unambiguous legislative intent. The latter may be increasingly more difficult to prove in light of the Court's skepticism about the legitimacy of legislative history. The reasoning underlying *Landgraf* suggests that the Court would similarly reject CERCLA's liability scheme: the Act contains no explicit textual support for its retroactive application. Further, CERCLA's ambiguous and convoluted legislative history hardly provides clear evidence of legislative intent. To the contrary, it seems that Congress simply decided to defer this crucial decision to the judiciary. The Supreme Court should not permit such a blatant abdication of congressional responsibility. It is not the Court's duty to legislate.

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problem). *See also* Gerrard, *supra* note 7, at 722 & nn.82-83 (citing more recent estimates that suggest average cleanup time per site is approaching 20 years).

408 *See* Probst & Portney, *supra* note 384, at 14 (basing a calculation on the assumption that the liability release would apply to 580 sites, with an average cleanup cost of $40 million per site, 20% of which can be attributed to litigation expenses).

Retroactive liability also raises several constitutional objections. *Eastern Enterprises v. Apfel* suggests that retroactive civil liability may violate the Constitution's prohibition against taking property without just compensation. Members of the Court also believe that such liability may breach the due process clause. To the extent that CERCLA has penal effect, the liability scheme may also implicate the Ex Post Facto Clause. While these complaints are weaker than the statutory claims relating to CERCLA's text and legislative history, they nonetheless suggest additional uncertainty of the existing liability scheme.

Even if CERCLA's history could be construed to support retroactivity, prospective liability is clearly the preferred alternative given the problems associated with the status quo. A pre-1980 negligence based liability release resolves many of the equity issues raised by the existing Act. This proposal could be funded by a waste-end tax on RCRA producers. As this Article shows, CERCLA's twin goals of hazardous waste remediation and advancing the polluter pays principle can still be achieved absent retroactive liability. In fact, prospective liability with a limited retroactive negligence based liability scheme would not only advance CERCLA's purpose, but also avoid complex equity and constitutional issues.