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United States v. Olin Corporation:[1] How a Polluter Got Off Clean

MARY FRANCES PALISANO*

> [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 those substances and now wishes to be insulated from any continuing responsibility for the present hazards to society that have been created.[2]

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1. 927 F. Supp. 1502 (S.D. Ala. 1996).

* The author would like to thank Francis, Maryalice and Buddy Palisano for their unwavering love and support. She would also like to thank Notes and Comments Editor Kerri Dellert and her group, as well as Managing Editor Andrew Provence.

2. S. REP. NO. 96-848, at 98 (1980), *reprinted in* ENVIRONMENTAL LAW INSTITUTE, SUPERFUND: A LEGISLATIVE HISTORY, Vol. II, at 525 (Helen Cohn Needham ed., 1982) (reprinting Letter from Douglas M. Costle, U.S. Environmental Protection Agency to Randolf Jennings, Chairman, Senate Committee on Environment and Public Works (Sept. 25, 1979)) [hereinafter LEGISLATIVE HISTORY].

I. Introduction

Until May 20, 1996, no court in the United States that directly addressed the issue of retroactivity had ever rejected the Comprehensive Environmental Response, Compensation, and Liability Act's (CERCLA)[3] retroactive[4] application.[5] Additionally, no court had held that CERCLA's reach was beyond Congress' Commerce Clause authority.[6] However, in *United States v. Olin Corp.* (*Olin*), the Southern District of Alabama ignored fourteen years of precedent and refused to apply CERCLA retroactively.[7] Moreover, the court held

3. Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980 §§ 101-405, 42 U.S.C. §§ 9601-75 (1988 & Supp. V 1993). CERCLA was amended by Superfund Amendments and Reauthorization Act (SARA) of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (1986). Section 6301 of the Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388-314 (1990) (codified at 42 U.S.C. § 9611(a)) reauthorizes CERCLA until Sept. 30, 1994, and grants $5.1 billion of funding.

4. A retroactive law "create[s] new obligations, impose[s] a new duty, or attach[es] a new disability in respect to the transactions or considerations already past." BLACK'S LAW DICTIONARY 1317 (6th ed. 1990).

5. *See Olin*, 927 F. Supp. at 1507.

6. *See* United States v. NL Indus., Inc., 936 F. Supp. 545 (S.D. Ill. 1996).

7. *See Olin*, 927 F. Supp. at 1507 n.25 (citing 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. v. Washington Gas, 823 F. Supp. 318 (D. Md. 1993); City of Phila. 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.

CERCLA to be unconstitutional[8] because its application exceeds Congress' Commerce Clause[9] authority in regulating the disposal[10] of hazardous substances.[11]

Adopted in 1980,[12] CERCLA authorizes the federal government to "provide for liability, compensation, cleanup, and emergency response for hazardous substances released into the environment and the cleanup of inactive hazardous waste

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Supp. 448 (D. Md. 1986); United States v. Ottati & Gross, 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. Northeastern Pharm. & Chem. Co., 579 F. Supp. 823 (W.D. Mo. 1984); United States v. Conservation Chem. Co., 589 F. Supp. 59 (W.D. Mo. 1984); United States v. Shell Oil Co., 605 F. Supp. 1064 (D. Colo. 1985); Jones v. Inmont, 584 F. Supp. 1425 (S.D. Ohio 1984); United States v. South Carolina Recycling & Disposal Inc., 653 F. Supp. 984 (D.S.C. 1984); United States v. Price, 577 F. Supp. 1103 (D.N.J. 1983); State of Ohio *ex rel.* Brown v. Georgeoff, 562 F. Supp. 1300 (N.D. Ohio 1983); 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); United States v. A & F Materials Co., 578 F. Supp. 1249 (S.D. Ill. 1984)).

8. *See id.* at 1533. *See* Appellant's Brief at 1, United States v. Olin Corp., 927 F. Supp. 1502 (S.D. Ala. 1996) (No. 96-6645) [hereinafter Brief].

9. *See* U.S. CONST. art. I, § 8, cl. 3.

10. *See* Resource Conservation and Recovery Act (RCRA) of 1976 §§ 1001-1102, 1004(3), 42 U.S.C. §§ 6901-6992k, 6903(3) (1976 & Supp. IV 1994). RCRA defines the term "disposal" as the

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

Id. § 1004(3), 42 U.S.C. § 6903.

11. Section 101(14) of CERCLA defines hazardous substances broadly by encompassing those substances that are designated as hazardous or toxic under other environmental statutes, including "hazardous substances" defined under the Clean Water Act (CWA) of 1972 § 311(14), 33 U.S.C. § 1321(14) (1994), "toxic pollutants" under section 307(a) of the CWA, 33 U.S.C § 1317(a), "hazardous air pollutants" listed in the Clean Air Act Amendments (CAA) of 1990 § 112(6), 42 U.S.C. § 7412(b) (1994), and "hazardous wastes" listed under section 1004(5) of RCRA, 42 U.S.C. § 6903(5). *See* CERCLA § 101(14), 42 U.S.C. § 9601(14). Additionally, substances are listed by the EPA in 40 C.F.R. pt. 302.4 (1996).

12. *See* CERCLA §§ 101-405, 42 U.S.C. §§ 960-75.

disposal sites."[13] The fundamental goal of CERCLA is to hold those parties who improperly dispose of hazardous substances liable for subsequent cleanup costs.[14] Although CERCLA was intended to attain this goal, it was passed as a "last minute compromise,"[15] and is often criticized for its statutory framework and language.[16]

Since its inception, CERCLA has remained controversial because it does not explicitly mention the term "retroactivity" in its text.[17] This holds true despite the fact that

> courts have determined unanimously that CERCLA imposes retrospective liability-that is, even where the underlying conduct occurred prior to CERCLA's passage. Additionally, the courts have had little trouble in upholding the constitutionality of this retrospectivity, finding that it passes the rationality test established by the Supreme Court.[18]

Over 35,000 sites are known to be contaminated by past disposal actions.[19] Those sites deemed by the United States En-

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13. Nevada *ex rel.* Dep't of Transp. v. United States, 925 F. Supp. 691, 697 (D. Nev. 1996).

14. *See* United States v. Fleet Factors Corp., 901 F.2d 1550, 1553 (11th Cir. 1990).

15. *See* Brief, *supra* note 8, at 12.

16. *See* WILLIAM H. RODGERS, JR., 14 ENVIRONMENTAL LAW: HAZARDOUS WASTE AND SUBSTANCES at 514-15 (1988).

> Vagueness, contradiction, and dissembling are familiar features of environmental statutes, but CERCLA is secure in its reputation as the worst drafted of the lot. In CERCLA judicial opinions, denunciations of the text and origin have reached the level of compulsory ritual, more frequent even than contaminations of the polluted landscapes that gave rise to the law in the first place.

Id.

17. *See, e.g., id.*

18. JEFFREY G. MILLER & CRAIG N. JOHNSTON, THE LAW OF HAZARDOUS WASTE DISPOSAL AND REMEDIATION 58 (1996) [hereinafter MILLER]. Jeffrey G. Miller is a Professor of Law at Pace University School of Law.

19. *See id.* at 9. A 1996 report prepared by the Environmental Law Institute for the United States Environmental Protection Agency identified approximately 54,000 contaminated sites in the United States, including sites contaminated after 1980. UNITED STATES GENERAL ACCOUNTING OFFICE, SUPERFUND: STATE VOLUNTARY PROGRAMS PROVIDE ALTERNATIVES TO ENCOURAGE CLEANUPS, GAO/RCED-97-66 20 (1997) (citing ENVIRONMENTAL LAW

vironmental Protection Agency (EPA)[20] to "pose [a] sufficient danger to health or the environment" are placed on the National Priority List (NPL).[21] The NPL site cleanups average over $26 million in remediation costs and six to ten years to complete.[22]

Prior to the *Olin* decision, if a party improperly disposed of a hazardous substance on a site before 1980, the year of CERCLA's enactment, the EPA would first use government money to clean up the site, and then seek reimbursement from the responsible party.[23] However, under the *Olin* rationale, CERCLA only applies prospectively; thus, that party would not be held liable.[24] As a result, the financial burden of

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INSTITUTE, AN ANALYSIS OF STATE SUPERFUND PROGRAMS: 50-STATE STUDY (1995)).

20. The EPA is an administrative agency that is part of the executive branch. *See* Miller, *supra* note 18, at 85. It was created by an executive order that consolidated environmental responsibility previously held by cabinet level departments. *See id.* The EPA is the primary environmental regulator of the federal government, and is responsible for implementing environmental statutes, including RCRA and CERCLA. *See id.* at 9.

21. The NPL is a part of CERCLA's response procedures. CERCLA requires the EPA to develop criteria based on risks to public health, welfare, or the environment. Based on the criteria, EPA ranks the various sites for listing on the NPL. *See* CERCLA § 105(a)(8)(A)-(B), 42 U.S.C. § 9605(a)(8)(A)-(B) (1988 & Supp. V 1993). SARA was revised in 1990. *See* Hazard Ranking System, 55 Fed. Reg. 51,532 (1990) (codified at 40 C.F.R. pt. 300 App. A (1996)). The NPL is part of the National Contingency Plan (NCP) and must be updated annually. *See* 40 C.F.R. pt. 300 (1996). The NCP was last amended in 1994. *See* National Oil and Hazardous Substances Pollution Contingency Plan, 59 Fed. Reg. 47, 384 (1994) (codified at 40 C.F.R. § 300.425(c)(4) (1996)).

22. *See* MILLER, *supra* note 18, at 9.

23. Section 122(a) of CERCLA provides:

> The President, in his discretion, may enter into an agreement with any person (including the owner or operator of the facility from which a release or substantial threat of release emanates, or any other potentially responsible person), to perform any response action (including any action described in section 9604(b) of this title) if the President determines that such action will be done properly by such person. Whenever practicable and in the public interest, as determined by the President, the President shall act to facilitate agreements under this section that are in the public interest and consistent with the National Contingency Plan in order to expedite effective remedial actions and minimize litigation.

CERCLA § 122(a), 42 U.S.C. § 9622(a).

24. *See Olin*, 927 F. Supp. 1502 (S.D. Ala. 1996).

a site's cleanup costs would shift to taxpayers and the responsible party would profit from its improper disposal.

With this in mind, the *Olin* decision had the potential to adversely affect the future of all Americans and the environment, including the deterioration of health and welfare, environmental degradation, and unwarranted tax increases. This is evident from the fact that defendants in other jurisdictions attempted to use the "*Olin* argument" in their efforts to avoid paying for their pre-CERCLA polluting a mere six months after the *Olin* decision.[25]

Congress has legislated that all Americans "should enjoy a healthy environment and that each person has a responsibility to contribute to the preservation and enhancement of our environment."[26] However, the *Olin* opinion controverts this premise by providing a loophole for those parties who unlawfully disposed of hazardous substances and benefited from that disposal at the expense of the American people and the environment.

This Case Note will examine whether the decision in *Olin* had any merit. Part II provides background information on CERCLA's enactment, including its legislative history and an overview of case law prior to the *Olin* decision. Part III discusses the facts and the procedural history of *Olin*. Part IV analyzes the court's reasoning regarding CERCLA's retroactivity and unconstitutionality by focusing on the language of the statute and case law. Part V discusses the recent appeal and reversal of the *Olin* decision. Part VI concludes, as shown in the appeal, that the *Olin* court was erroneous in holding that CERCLA is merely prospective and unconstitutional under the Commerce Clause.

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25. *See, e.g.,* Nova Chem., Inc. 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); Ninth Ave. Remedial Group v. Fiberbond Corp., 946 F. Supp. 651 (N.D. Ind. 1996).

26. National Environmental Policy Act (NEPA) of 1969 §§ 101-209,101(c), 42 U.S.C. §§ 4321-4370d, 4331(c) (1994). *See also Alcan Aluminum Corp.,* 1996 WL 637559.

II. Background

A. The Evolution and Reauthorization of CERCLA

Stringent federal environmental regulations began with the Clean Air Act Amendments of 1970[27] and the Federal Water Pollution Control Act Amendments of 1972.[28] However, Congress soon recognized that "no federal statute regulated the disposal of environmental pollutants, including solid wastes and hazardous wastes, on land."[29] By the mid-1970s, the amount of discarded hazardous waste[30] had accumulated to an exorbitant amount; approximately four billion tons of waste had been produced yearly.[31]

In response, Congress enacted a national policy mandating that "hazardous waste . . . be treated,[32] stored,[33] and disposed[34] of so as to minimize the present and future threat to

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27. Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended at 42 U.S.C. § 7401-7671a (1994)).

28. 33 U.S.C. § 1251-1376 (1994).

29. United States v. Shell Oil Co., 605 F. Supp. 1064, 1070 (D. Colo. 1985).

30. "Hazardous waste" encompasses

> a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may—(A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

RCRA § 1004(a), 42 U.S.C. § 6903(5) (1976 & Supp. IV 1994).

31. *See* MILLER, *supra* note 18, at 44.

32. RCRA states:

> [W]hen used in connection with hazardous waste, [treatment] means any method, technique, or process, including neutralization, designed to change the physical, chemical, or biological character or composition of any hazardous waste so as to neutralize such waste or so as to render such waste nonhazardous, safer for transport, amenable for recovery, amenable for storage, or reduced in volume.

RCRA § 1004(34), 42 U.S.C. § 6903(34).

33. "[W]hen used in connection with hazardous waste, [storage] means the containment of hazardous waste, either on a temporary basis or for a period of years, in such a manner as not to constitute disposal of such hazardous waste." *Id.* § 1004(33), 42 U.S.C. § 6903(33).

34. CERCLA adapted the RCRA definition of disposal.

See R. CRAIG ANDERSON ET AL., ENVIRONMENTAL HANDBOOK 406 (Thomas F.P. Sullivan ed., 13th ed. 1996). *See also supra* note 10.

human health and the environment."[35] To implement this policy, Congress created the Resource Conversation and Recovery Act (RCRA), which provides regulations establishing requirements for "record keeping practices, labeling practices, use of appropriate containers, use of a manifest system,[36] and the design, construction, operation and maintenance of facilities."[37] RCRA was "designed as a 'cradle to grave' regulation that imposed requirements on the generator, transporter, and owner and operator of the treatment and disposal facilities for hazardous waste."[38]

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35. In its report on RCRA, the House Committee on Interstate and Foreign Commerce stated:

> The Committee believes that the approach taken by this legislation eliminates the last remaining loophole in environmental law, that of unregulated land disposal of discarded materials and hazardous wastes. Further, the Committee believes that this legislation is necessary if other environmental laws are to be both cost and environmentally effective. At present the federal government is spending billions of dollars to remove pollutants from the air and water, only to dispose of such pollutants on the land in an environmentally unsound manner. The existing methods of land disposal often result in air pollution, subsurface leachate and surface run-off, which affect air and water quality. This legislation will eliminate this problem and permit the environmental laws to function in a coordinated and effective way.

H.R. REP. NO. 94-1491, at 4, *reprinted in* 1976 U.S.C.C.A.N. 6238, 6241-42 (1976).

36. A "manifest system" means "the form used for identifying the quantity, composition, and the origin, routing, and destination of hazardous waste during its transportation from the point of generation to the point of disposal, treatment, or storage." RCRA § 1004(12), 42 U.S.C. § 6903(12).

37. United States v. Shell Oil Co., 605 F. Supp. 1064, 1070 (D. Colo. 1985).

> RCRA provides for the promulgation of regulations by the Environmental Protection Agency applicable to generators of hazardous waste, transporters of hazardous waste, and owners and operators of hazardous waste treatment, storage and disposal facilities. The regulations establish requirements respecting, among other things, record keeping practices, labeling practices, use of appropriate containers, use of a manifest system, and the design, construction, operation and maintenance of facilities (42 U.S.C. §§ 6921-34; 40 C.F.R. Parts 260, 261, 262, 263, 264, 265, 266, 267 and 270).

Shell Oil, 605 F. Supp. at 1070.

38. ANDERSON, *supra* note 35, at 44. For the "standards applicable to owners and operators of hazardous waste treatment, storage and disposal facilities," *see* RCRA § 3004, 42 U.S.C. § 6924.

However, Congress soon realized that RCRA was ineffective in remedying environmental degradation that occurred from past disposal of hazardous substances.[39] Shortly after RCRA's enactment, it was discovered that hazardous wastes disposed of prior to 1976, were not dispersing in safe concentrations.[40] This problem became more complex when a site was found to be either inactive or abandoned.[41] For example, two disposal sites in particular focused the attention of the American public on the issue of its health and environment: "Love Canal"[42] in Niagara Falls, New York, and "Valley of the Drums"[43] in Shepardsville, Kentucky.[44] Consequently,

> Congress discovered . . . that its work was not complete. Land pollution presented a problem not encountered with air and water pollution. Air and navigable waters are, generally speaking, self-cleansing through time. Carbon monoxide in air and phosphates in water can thus be abated by limiting or eliminating present sources of pollution. But hazardous wastes deposited on land do not simply disperse into harmless concentrations. They can percolate through the soil and infiltrate ground water; and

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39. *See* MILLER, *supra* note 18, at 9.

40. *See Shell Oil*, 605 F. Supp. at 1070.

41. ANDERSON, *supra* note 35, at 407.

42. *See* Snyder v. Hooker Chem. & Plastic Corp., 429 N.Y.S.2d 153 (Sup. Ct. 1980). "In September, 1979, plaintiffs commenced th[is] . . . action in the form of a class action, alleging that they became 'sick, sore, lame, and disabled' due to exposure to hazardous waste while residents of the 'Love Canal Site.'" *Id.* at 154. *See also* S. REP. NO. 96-848, pt. I, at 8-10 (1980), *reprinted in* LEGISLATIVE HISTORY, *supra* note 2, at Vol. II, 480-81. This site received national attention, including then President Jimmy Carter declaring the Love Canal Site a disaster area, as well as national coverage by the press. *See, e.g.*, Kathy Trost, *Love Canal: I've Had More Sleepless Nights Than I Can Count: Despite Warning Signs, Some Residents Stay On*, WASH. POST, June 23, 1980, at A1; Robert D. McFadden, *Love Canal: A Look Back*, N.Y. TIMES, Oct. 30, 1984, at B6; *Chemical Firm Held Liable for Cleanup of Love Canal*, L.A. TIMES, Feb. 23, 1988, at 2.

43. *See* S. REP. NO. 96-848, at 4 (1980), *reprinted in* LEGISLATIVE HISTORY, *supra* note 2, at Vol. II, 478. Like Love Canal, discussed *supra* note 43, Valley of the Drums also received national press coverage. *See, e.g.*, Bill Richards, *U.S. to Sue Hazardous Waste Dumping, Companies Face Action 100 Sites*, WASH. POST, Feb. 3, 1979, at A2; David F. Salisbury, *Superfund Set to Start Cleaning Up Abandoned Hazardous Waste Sites*, CHRISTIAN SCI. MONITOR, Dec. 8, 1980, at 7.

44. *See* MILLER, *supra* note 18, at 52.

> they can persist over long periods of time. Congress, faced with sites such as Love Canal, clearly understood that the mere regulation of current land disposal would not adequately protect the public health and welfare or the environment.[45]

CERCLA, enacted in 1980, "was designed to respond to situations involving the past disposal of hazardous substances."[46] Accordingly, Congress established Superfund,[47] which comprised $1.6 billion in order to facilitate the EPA's remediation of hazardous substances.[48] Moreover, CERCLA required the EPA to create a National Contingency Plan (NCP)[49] to be read in conjunction with CERCLA section 104(a)(1), which establishes the framework for remedial action and expenditure of Superfund money.[50]

CERCLA "compliments [RCRA] which regulates an ongoing hazardous waste handling and disposal."[51] The goal of CERCLA is to "cleanup leaking, inactive or abandoned sites and provide emergency response to spills."[52] In short,

> CERCLA is not a traditional 'command and control' regulatory program; its focus is not on establishing rules governing future behavior. CERCLA authorizes remediation of contamination and imposes liability for past actions associated with it, even if those actions were consistent with all then-existing laws and standards of care. That liability can be enormous.[53]

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45. *Shell Oil*, 605 F. Supp. at 1070-71.

46. ANDERSON, *supra* note 35, at 225.

47. One of the most important aspects of CERCLA, used by EPA to clean up hazardous waste sites, is Superfund. Superfund is made up of taxes imposed on industrial companies, industry, and general tax revenue. *See id.* at 226.

48. *See* MILLER, *supra* note 18, at 56.

49. The NCP creates a framework for analyzing the procedural and substantive elements of the CERCLA cleanup process. *See id.* at 56-57. The NCP authorizes the expenditure of Superfund money at sites on the NPL; however, CERCLA activities can occur at sites not on the NPL. *See id.* at 57.

50. *See id.* at 56. *See* 40 C.F.R. pt. 300 (1996) (the EPA's guidance for CERCLA § 104(a)(1), 44 U.S.C § 9604(a)(1)).

51. ANDERSON, *supra* note 35, at 225.

52. JOHN C. CRUDEN, ALI-ABA CONTINUING EDUCATION, ENVIRONMENTAL LITIGATION 519 (1996).

53. MILLER, *supra* note 18, at 52.

At the time of CERCLA's enactment, Congress was not aware of the powerful mechanism it had created.[54] In fact, CERCLA's liability scheme has an impact on "virtually every industrial real estate transaction" in the Nation.[55] For liability to attach, the EPA merely has to show a release[56] or a threatened release of a hazardous substance from the site, caused by a potentially responsible party (PRP).[57] Moreover, a PRP is defined broadly by the EPA[58] and will be held strictly liable[59] for problems caused by its disposal activities.[60] Under CERCLA, those owners, generators, and transporters found responsible are liable for

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54. *See id.* at 55.

55. *See id.*

56. The term "release" includes:

> any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant) . . . .

CERCLA § 101(22), 42 U.S.C. § 9601(22) (1988 & Supp. V 1996).

57. A "PRP" is defined as

> (1) the owner and operator of a vessel or a facility,
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
>
> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
>
> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person . . . .

CERCLA § 107(a), 42 U.S.C. § 9607(a).

58. *See* MILLER, *supra* note 18, at 57.

59. Under CERCLA, there is little reference to the scope of the term "liability"; however, the legislative history clarifies Congress's intention to hold the statute strictly liable without regard to fault or culpability. *See* S. REP. NO. 96-848 (1980), *reprinted in* LEGISLATIVE HISTORY, *supra* note 2, at Vol. II, 492-93. CERCLA provides for broad liability, including strict, joint, and several and retroactive liability. CERCLA § 113(f), 42 U.S.C. § 9613(f). *See, e.g.*, United States v. Chem-Dyne Corp., 572 F. Supp. 802 (D. Ohio 1983) (discussing the scope of CERCLA liability).

60. *See* Brief, *supra* note 8, at 3. The only defenses against liability in CERCLA are narrowly drawn and include: acts of God, acts of war, and acts or

> (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan; (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan; (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction or loss resulting from such a release; and (D) the costs of any health effects study carried out under section 9604(I) of this title.[61]

Although CERCLA was more powerful than anticipated, Congress reauthorized and amended CERCLA through the Superfund Amendments and Reauthorization Act (SARA) in 1986.[62] SARA "reflect[s] [an] overwhelming [c]ongressional satisfaction with CERCLA's original scope and liability scheme, as interpreted by the courts in the intervening years."[63] SARA did not change the original structure of CERCLA, but introduced new concepts that acknowledged congressional dissatisfaction with the "EPA's administration of CERCLA, particularly [its] slow pace of remediation."[64] In short, SARA provided the EPA with guidance in exercising its authority.[65] For example, Congress developed "a schedule to assess, study and remediate contaminated sites."[66] Congress also increased Superfund to $8.5 billion dollars and, in 1990, added another $5.1 billion, providing the EPA with more money to expedite Superfund cleanups.[67]

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omissions of a third party not in contractual privity with the party asserting the defense. CERCLA § 107(b), 42 U.S.C. § 9607. SARA created a third party defense called the "innocent purchaser" defense. *See id.* § 101(35), 42 U.S.C. § 9601(35).

61. *See id.* § 107(a)(4), 42 U.S.C. § 9607(a)(4).

62. Pub. L. No. 99-499, 100 Stat. 1615 (1986). The statute in total is still referred to as CERCLA, despite the 1986 SARA amendments. *See* ANDERSON, *supra* note 35, at 472.

63. MILLER, *supra* note 18, at 55.

64. *Id.*

65. *See id.* at 55-56.

66. *Id.* at 56.

67. *See id.*

B. Case Law

1. Retroactivity

Prior to the *Olin* decision, courts throughout the United States consistently held that CERCLA applied retroactively.[68] This occurred even though CERCLA's statutory language does not explicitly mention the term retroactivity.[69]

a. *State of Ohio ex rel Brown v. Georgeoff (Georgeoff)*[70]

In 1983, the *Georgeoff* court held that the congressional intent of CERCLA was sufficient evidence to compel a retroactive application of CERCLA.[71] In analyzing CERCLA, the court applied the Supreme Court's ruling in *Greene v. United States*,[72] which stated that

> the first rule of construction is that legislation must be considered as addressed to the future, not to the past . . . [and] a retroactive operation will not be given to a statute which interferes with antecedent rights . . . unless such be 'the unequivocal and inflexible import of the terms, and manifest intention of the legislature.'[73]

Using a presumption against retroactivity, the *Georgeoff* court examined the statutory language, noting that CERCLA's statutory language does not explicitly indicate an intent to apply CERCLA retroactively.[74]

The state presented a twofold argument to persuade the court that Congress did, in fact, intend a retroactive effect.[75] The state's chief argument[76] was made pursuant to section

68. *See supra* note 7. The Supreme Court has not directly addressed this subject. Search of WESTLAW, SCT Library (Nov. 1, 1996).

69. *See supra* note 17 and accompanying text.

70. 562 F. Supp. 1300 (N.D. Ohio 1983).

71. *Id.* at 1314.

72. *See id.* at 1308.

73. *Id.* at 1306 (quoting Union Pacific R. Co. v. Laramie Stock Yards Co., 231 U.S. 190, 199 (1913)).

74. *See id.* at 1308.

75. *See id.* at 1311-12.

76. There are three arguments not addressed by the court that support the theory that CERCLA is retroactive. First, CERCLA commonly refers to "inac-

107(a), particularly subsection (4), which provides provisions for civil liability.[77] The state demonstrated its argument by using the date of the enactment of CERCLA, 1980, as a point of reference.[78] The state focused its argument on subsection (a)(4), which extends liability to "any person who accepts or accepted any hazardous substances for transport,"[79] arguing that the past tense verb "accepted" indicates liability for conduct following CERCLA's enactment.[80] However, the court was not convinced that the terms in the statutory provisions provided the "imperative character" required to defeat a presumption against retroactivity.[81]

The court stated that prior to CERCLA's enactment, subsection (a)(4) read "any person who accepts any hazardous substances for transport."[82] When the change "or accepted" was eventually incorporated in the text, the court found that because it was not mentioned in the legislative history, Con-

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tive" waste disposal sites, indicating Congress's intent to center on past, rather than future, acts. *See id.* at 1310. Additionally, CERCLA permits reimbursements from the Superfund for response costs for conduct pre-CERCLA, implying that some provisions of CERCLA are retroactive. *See id.* Lastly, section 9607(f) regarding recovery for injuries to natural resources occurring pre-CERCLA implies that a comparable prohibition does not apply to other response costs. *See id.* The court noted that this provision "only serves to support Ohio's attempt to override the presumption." *See id. See also* CERLCA § 101, 42 U.S.C. § 9601(20)(A)(iii) (1988 & Supp. V 1993) ("in the case of any abandoned facility . . . "); H. REP. No. 1016, 96th Cong., 2d Sess., pt. I, at 22 (1980), *reprinted in* 1980 U.S.C.C.A.N. at 6119, 6125 ("It is the intent of the Committee . . . [to] establish a comprehensive response and financing mechanism to abate and control the vast problems associated with abandoned and inactive hazardous waste disposal sites").

"BFI, in response, argues that these provisions only authorize state action to clean up existing dump sites. They do not authorize suits against individuals responsible for creating the hazard, nor does such a reading necessarily have to follow from CERCLA." *Georgeoff*, 562 F. Supp. at 1310 n.14. The court explained that it only consider these statutory terms as indicia of a congressional intent to apply CERCLA retroactively. *See id.* at 1311-12.

77. *See* CERCLA § 107(a), 42 U.S.C. § 9607(a).

78. *See Georgeoff*, 562 F. Supp. at 1310.

79. *Id.* at 1309-10.

80. *See id.* at 1310.

81. *See id.* at 1311. However, the court did conclude that the provisions argued provided some evidence of congressional intent. *See id.* at 1311-12.

82. *Id.* at 1310 n.10 (citing S. REP. No. 96-848 (1980)).

gress did not intend to attach significance to the addition.[83] The court determined that under the state's theory, a past tense verb would suggest application to pre-enactment acts, whereas a present or future tense verb would only apply to post-enactment acts.[84] The court demonstrated that if this were true, "this provision would only apply to generators who arranged for disposal before the enactment of CERCLA, and not those who arrange for disposal after the enactment of CERCLA."[85] Accordingly, the court held that this "construction produces the anomalous result of providing for a retroactive, but not a prospective, application of the statute, a result which Congress could not have intended."[86]

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83. *See id.* (citing 126 CONG. REC. S14, 719 (daily ed. Nov. 19, 1980)). At oral argument, Ohio and Justice also argued that the words 'selected by such person' in § 9607(a)(4) also indicate a congressional intent to apply CERCLA retroactively. Upon review, this Court finds that argument unpersuasive. The word 'selected' applies equally to future, as well as past, applications of the statute. In fact, no other form of the verb 'select' would make sense in this position.

Id. at 1310 n.11.

84. *See id.* at 1310.

85. *Id.*

86. *Id.* The court suggested that a more logical interpretation of the language is

> to read the phrase 'accepts or accepted' from the perspective of the time of a release or threatened release, a view supported by the language of § 9607. Under § 9607, two events must take place before any liability accrues. The individual must fall within one of the categories specified by subsections 1-4 of § 9607(a) and a release or threatened release must occur. It therefore makes sense to interpret the former event, the act by the individual, in the context of the latter event, the release or threatened release. Construing the phrase 'accepts or accepted' from the time of a release, the 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. It will be unnecessary to construe the word 'accepted' to apply to pre-enactment conduct to give it effect. 'Accepted' may apply to pre-enactment conduct, but the statute does not require such an application.

Id. at 1310 n.12.

> This construction of § 9607(a)(4) makes the word 'accepts' virtually meaningless. At most, 'accepts' will apply to transporters who ac-

Next, the state argued that the congressional debates demonstrated an unequivocal intent by Congress to make the industry pay for the cleanup costs.[87] In response, the defendant, Georgeoff, argued that Congress only intended industry to pay for cleanups through the special tax industry is required to pay to finance the Superfund.[88] In its analysis, the court noted that when CERCLA was enacted, the total amount in the Superfund was merely $1.6 billion.[89] At that time, the average cost of a cleanup exceeded $3 million per site.[90] Accordingly, the court held that this amount obviously was not intended to clean up the thousands of hazardous sites without any responsible parties supplementing a majority of the cleanup costs.[91] The court reasoned that the insufficient funds in the Superfund indicated that "Congress did not intend for the fund to be depleted, rather that the fund would be maintained as a revolving fund for advancing the costs of these clean up operations while litigation progressed."[92] Thus, the court concluded that the legislative history demonstrated a clear congressional intent to have industry pay for cleanups, including retroactive liability.[93]

b. *United States v. Shell Oil Co. (Shell Oil)*[94]

Two years later, the *Shell Oil* court determined that CERCLA did, in fact, authorize the recovery of government pre-enactment response costs from the industry.[95] To determine if Congress overrode the presumption against retroac-

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cept hazardous substances for transport to facilities from which a release is presently occurring.

Id.

87. *See id.* at 1311.

88. *See id.* at 1312.

89. *See id.* at 1312-13.

90. *See id.* at 1313. When CERCLA was enacted, the highest cost estimated for cleanup of all known contaminated sites was approximately $44 billion. *See* 126 CONG. REC. H9177 (daily ed. Sept. 19, 1980) (remarks of Rep. Railsback).

91. *See Georgeoff*, 562 F. Supp. at 1312.

92. *Id.* at 1313.

93. *See id.*

94. 605 F. Supp. 1064 (D. Colo. 1985).

95. *Id.* at 1079.

tivity, the court first examined the statutory language in CERCLA's liability section.[96] Ultimately, the court determined that there was no explicit statement of congressional intent.[97] As previous courts have found, this court failed to ascertain Congress' intent regarding retroactivity from the verb tenses in section 107(a).[98]

The court next focused on other statutory provisions of CERCLA and its legislative history, assessing the general purpose and overall scheme of CERCLA.[99] In its analysis, the court examined CERCLA in an historical context, specifically in light of its place among prior environmental statutes.[100] Since no pre-CERCLA law addressed environmental problems resulting from hazardous waste disposed of in the past, the court found that CERCLA was enacted by Congress to solve the deficiencies that left regulatory gaps with inactive hazardous waste disposal sites.[101]

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96. *See id.* at 1069. CERCLA's liability provision, section 107(a), 42 U.S.C. § 9607(a), is discussed *supra* Part II.A.

97. *See Shell Oil*, 605 F. Supp. at 1069.

98. *See Georgeoff*, 502 F. Supp. at 1309-10. In *Georgeoff* the court analyzed the verb tenses in section 107(a) to determine whether Congress intended responsible parties to be liable for their acts pre-CERCLA. *See id.* The court noted that the "awkwardness of this phrase may be explained by the context of CERCLA's passage. CERCLA was rushed through a lame duck session of Congress, and therefore, might not have received adequate drafting." *Id.* at 1310 n.12.

99. *See Shell Oil*, 605 F. Supp. at 1069-70.

100. *See id.* at 1070. Congress, in 1976, enacted RCRA, Pub. L. No. 94-580, 90 Stat. 2795 (1976), subsequently codified as an amendment to the Solid Waste Disposal Act, 42 U.S.C. §§ 6901-6992k (1976 & Supp. IV 1994). *See Shell Oil,* 605 F. Supp. at 1070.

101. *See Shell Oil,* 605 F. Supp. at 1070. The background and need for CERCLA are explained in House Report 1016 as follows:

> Over the past two decades, the Congress has enacted strong environmental legislation in recognition of the danger to human health and the environment posed by a host of environmental pollutants. This field of environmental legislation has expanded to address newly discovered sources of such danger as the frontiers of medical and scientific knowledge have been broadened. After having previously focused on air and water pollutants, the Congress, in the Resource Conservation and Recovery Act of 1976, provided a prospective cradle-to-grave regulatory regime governing the movement of hazardous waste in our society. Since enactment of that law, a major new source of environmental concern has surfaced:

Thereafter, the two issues the *Shell Oil* court addressed were: (1) whether, under CERCLA, responsible parties are liable for acts committed prior to CERCLA's enactment; and (2) whether responsible parties should pay for government costs in addressing the pre-enactment conduct.[102] Agreeing with prior courts' analyses, this court dismissed the first issue as settled law.[103]

> the tragic consequences of improperly, negligently, and recklessly [sic] hazardous waste disposal practices known as the 'inactive hazardous waste site problem.' The unfortunate human health and environmental consequence of these practices has received national attention amidst growing public and congressional concern over the magnitude of the problem and the appropriate course of response that should be pursued. Existing law is clearly inadequate to deal with this massive problem.

Shell Oil, 605 F. Supp. at 1071 (citing H.R. REP. No. 96-1016, 17-18, 1980 U.S.C.C.A.N. 6119, 6120 (1980)).

> The Report went on to detail the inadequacies of existing law. Of particular significance to this discussion is the following observation:
>
> '(c) Deficiencies in RCRA have left important regulatory gaps.
>
> (1) The Act is prospective and applies to past sites only to the extent that they are posing an imminent hazard. Even there[,] the Act is of no help if a financially responsible owner of the site cannot be located.'

Id. (citing H.R. REP. No. 96-1016, at 22, 1980 U.S.C.C.A.N. at 6125).

> After recounting a number of environmental disasters, including Love Canal, the [Senate] report concluded
>
> 'There is limited authority to solve these problems. Regulations promulgated in May under subtitle C of the Solid Waste Disposal Act [RCRA], which impose tough new standards for operating toxic waste disposal facilities, are expected to greatly upgrade the Nation's active toxic waste disposal sites. But the regulations do not address those situations where an owner is unknown or is unable to pay the cleanup costs, nor do they address the cleanup of spills, illegal dumping, or releases generally.'

Id. (citing S. REP. No. 96-848, 10-11 (1980)).

102. *Id.*

103. *See id.* at 1072 (citing United States v. South Carolina Recycling & Disposal, Inc., 653 F. Supp. 984 (D.S.C. 1984); United States v. Conservation Chem. Co., 589 F. Supp. 59 (W.D. Mo. 1984); United States v. Northeastern Pharm. & Chem. Co., 810 F.2d 726 (8th Cir. 1986); 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 (N.D. Ohio 1983); 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);

As to the second issue, the court concluded that there was congressional intent to hold responsible parties liable for acts prior to CERCLA's enactment because Congress formerly imposed cleanup costs on industry,[104] rather than taxpayers.[105] The court commented on several controversial aspects of CERCLA's legislative history,[106] including a last minute amendment by the Senate to remove the provision imposing liability for personal injury caused by hazardous waste disposal. The Senate amendment was struck down by the House. As a result, House Bill 7020 (H.R. 7020) was crafted.[107] Section 3072 of H.R. 7020, as introduced, provided: "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 occur on or after, the date of the enactment of the Hazardous Waste Containment Act of 1980."[108] The government argued "that H.R. 7020, as introduced, authorized the recovery of pre-enactment response costs."[109] Since this retroactivity provision was struck from H.R. 7020,[110] Shell Oil argued that its deletion weighs heavily against a retroactive application of CERCLA.[111]

However, the court refused to agree with Shell Oil's argument because the language did not become law.[112] The version enacted by Congress substituted the House language with that of Senate Bill 1480 (S. 1480).[113] Therefore, it is un-

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United States v. Wade, 546 F. Supp. 785 (E.D. Pa. 1982) (offsite generators of wastes disposed of before CERCLA's enactment liable under section 107)).

104. For purposes of this discussion, "industry" encompasses any entity that is involved in the production, storage, treatment and disposal of hazardous substances.

105. *See Shell Oil*, 605 F. Supp. at 1073.

106. *See id.* at 1077. The two significant bills which passed through the House and Senate were Senate Bill 1480, S. 1480, 96th Cong. (1980), and House Bill 7020, H.R.7020, 96th Cong. (1980). *See id.*

107. House Bill 7020 exhibited the House file number because of a requirement that appropriations measures originate in the House. *See id.* at 1076.

108. H.R. 7020 § 3072.

109. *Shell Oil*, 605 F. Supp. at 1077.

110. *See id.*

111. *See id.*

112. *See id.*

113. *See id.* *See* 126 CONG. REC. 31,950 (1980).

clear whether the House's liability scheme was incorporated in the final version of the bill or whether the House accepted the Senate's liability language.[114]

This provision, cited by Shell Oil, only addressed the time when the releases occurred.[115] It did not distinguish between costs incurred pre-enactment and post-enactment.[116] Yet, Shell Oil argued that S. 1480 subsection 4(n) was struck from the enacted compromise bill to indicate an intent not to authorize recovery for pre-enactment response costs.[117]

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114. *See Shell Oil*, 605 F. Supp. at 1077.

115. *See id.*

116. *See id.* at 1077 n.5.

> CERCLA's liability provisions originated from the original Senate Bill, S.1480. S.1480, which contained a liability provision for costs of removal (§ 4(a)(1)) and for natural resources, property and personal injury damages (§ 4(a)(2)). During discussions of S.1480 in the Senate Committee on Environment and Public Works, the issue retroactive appiication of the bill was addressed.

Transcript of Senate Committee on Environment and Public Works Mark-up Session of S. 1480, June 26-27, 1980.

117. *See Shell Oil*, 605 F. Supp. at 1076. Senate Bill 1480's liability provision, as introduced, read as follows:

> [T]he owner or operator of a vessel or an onshore or offshore facility from which a hazardous substance is discharged, released, or disposed of in violation of section 3(a) of this Act . . . shall be jointly, severally, and strictly liable for—(1)(A) all costs of removal, containment, or emergency response incurred by the United States Government or a State and (B) any other costs or expenses incurred by any person to remove a hazardous substance as the terms 'remove' or 'removal' are defined in section 311(a)(8) of the Clean Water Act; and (2) all damages for economic loss or loss due to personal injury or loss of natural resources resulting from such a discharge, release, or disposal, including—(A) any injury to, destruction of, or loss of any real or personal property, including relocation costs; (B) any loss of use of real or personal property; (C) any injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss; (D) any loss of use of any natural resources, without regard to the ownership or management of such resources; (E) any loss of income or profits or impairment of earning capacity resulting from injury to or destruction of real or personal property or natural resources, without regard to the ownership of such property or resources; (F) all out-of-pocket medical expenses, including rehabilitation costs, due to personal injury; and (G) any direct or indirect loss of tax, royalty, rental, or net profits share revenue by the Federal Government or any State or political subdivision thereof, for a period of not to exceed one year.

However, the time limitations on damages supplemented by S. 1480 section 4(n) were sustained in the final version of CERCLA as the limitations on recovery of natural resource damages.[118] The additional time limitations of section 4(n) were struck down because the substantive liability provisions for property and personal injury damages were removed from the statute.[119] Therefore, the scheme of section 4(n) in minimizing recovery for pre-enactment damages, not including response costs, was maintained in the final version.[120] Accordingly, the court determined that the legislative history of section 4(n) included retroactive effects.[121]

Next, the court in *Shell Oil* cited the following passage from the Senate Report:

> Removal and remedial actions to protect public health, welfare, and the environment should begin without delay and prior to full implementation of the programs, regulations, plans, and procedures required by this Act. The many pressing problems which have led to enactment of legislation should not continue unabated pending such ad-

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Shell Oil, 605 F. Supp. at 1077 n.5. The liability section introduced to limit recovery for pre-enactment damages recoverable read as follows:

> No person (including the United States, the Fund, or any State) may recover under the authority of this section, nor may any money in the Fund be used under Section 6 of this Act for the payment of any claim, for damages specified under subsection (a)(2)(A), (B), (C), (D), (G), or (E) (other than for loss resulting from personal injury) of this section, nor may any money in the Fund be used under section 6(a)(1)(E) or (F) of this Act, where such damages and the release of a hazardous substance from which such damages resulted have occurred wholly before the enactment of this Act.
>
> In addition, commenting on the provision of § 4(n) (4) that 'the costs of temporary or permanent relocation of residences . . . shall be deemed costs of removal and not damages,' Senator Domenici stated that the purpose of this provision was 'that those kinds of damages become part of causes of action for costs of removal and, therefore, are not affected by the retroactive limitations.'

Id. at 1079 (citing Transcript of Senate Committee on Environment and Public Works Mark-up Session of S. 1480, 194-95, June 26, 1980).

118. *See id. See* CERCLA §§ 107(f), 110(d), 42 U.S.C. §§ 9607(f), 9611(d) (1988 & Supp. V 1993).

119. *See Shell Oil,* 605 F. Supp. at 1079.

120. *See id.*

121. *See id.*

> ministrative actions. Therefore, actions necessary to protect public health, welfare or the environment should begin as soon as feasible. The non-regulatory authorities for response provided in this Act and other laws should be exercised prior to completion of any necessary planning, administrative, and rulemaking responsibilities. However, once completed, such statutorily required planning, administration and final rulemaking shall govern subsequent government response actions.[122]

Shell Oil claimed that this passage indicates that actions prior to CERCLA's enactment were not "response actions" for which recovery can be awarded.[123] The court found that the Senate intended government response actions to commence as quickly as feasible because the hazardous waste problem is immediate and severe.[124] Thus, where Congress intends a liability provision to have only prospective execution, like natural resources damages, Congress uses explicit language.[125] Here, because Congress did not explicitly restrict liability for response costs incurred prior to enactment, the court concluded that consistent with the statutory scheme, CERCLA authorizes recovery of pre-enactment response costs.[126]

c. *United States v. Northeastern Pharmaceutical & Chemical Co. (Northeastern)*[127]

In *Northeastern*, the court examined the language of the statute in concluding that CERCLA is retroactive.[128] The court conceded that CERCLA's language does not expressly provide for retroactivity.[129] However, the court used CERCLA's statutory language to support two conclusions: (1)

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122. *Id.* (citing Transcript of Senate Committee on Environment and Public Works Mark-up Session of S. 1480, 62, June 26-27, 1980).

123. *See id.*

124. *See id.*

125. *See* CERCLA §§ 107(f), 111(d), 42 U.S.C. §§ 9607(f), 9611(d) (1988 & Supp. V 1993).

126. *See Shell Oil*, 605 F. Supp. at 1079.

127. 810 F.2d 726 (8th Cir. 1986).

128. *Id.* at 731.

129. *See id.* at 732.

Congress intended CERCLA to have a retroactive effect;[130] and (2) the statutory scheme of CERCLA is both remedial and retroactive.[131]

Unlike *Georgeoff* and *Shell Oil*, the *Northeastern* court cited specific language used in the relevant liability provision that refers to actions and conditions in the past tense.[132] For example, section 107 of CERCLA reads, in part, "any person who at the time of disposal of any hazardous substance owned or operated,"[133] "any person who . . . arranged with a transporter for transport for disposal,"[134] and "any person who . . . accepted any hazardous substances for transport to . . . sites selected by such person."[135]

Second, the court found that CERCLA has a general scheme that is remedial and retroactive, thereby authorizing the EPA under section 106 of CERCLA to force responsible parties to clean up inactive hazardous waste sites.[136] Furthermore, the court concluded that CERCLA authorizes federal, state, and local governments, as well as private parties to clean up the sites, and subsequently seek cleanup costs.[137]

d. *Landgraf v. USI Film Products (Landgraf)*[138]

Recently, there has been skepticism regarding the retroactivity of CERCLA due to the Supreme Court's decision in *Landgraf*.[139] The *Landgraf* decision significantly relates to

130. *See id.* at 732-33.
131. *See id.* at 733.
132. *See id.* at 732. *See, e.g., Shell Oil*, 605 F. Supp. 1064, 1069-73 (D. Colo. 1985); United States v. Conservation Chem. Co., 619 F. Supp. 162, 220 (W.D. Mo. 1985); United States v. South Carolina Recycling & Disposal, Inc., 653 F. Supp. 984 (D.S.C. 1984); United States v. A & F Materials Co., 578 F. Supp. 1249, 1259 (S.D. Ill. 1989); United States v. Price, 577 F. Supp. 1103, 1111-12 (D.N.J. 1983); *Georgeoff*, 562 F. Supp. 1300, 1312 (N.D. Ohio 1983); United States v. Outboard Marine Corp., 556 F. Supp. 54, 57 (N.D. Ill. 1982); United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1113-14 (D. Minn. 1982).
133. CERCLA § 107(a)(2), 42 U.S.C. § 9607(a)(2) (1988 & Supp. V 1993).
134. *Id.* § 107(a)(3), 42 U.S.C. § 9607(a)(3).
135. *Id.* § 107(a)(4), 42 U.S.C. § 9607(a)(4).
136. *See Northeastern*, 810 F.2d at 733.
137. *See id.* at 733. *See* CERCLA §§ 104, 107, 42 U.S.C. § 9604, 9607.
138. 114 S. Ct. 1483 (1994).
139. *See generally Olin*, 927 F. Supp. 1502 (S.D. Ala. 1996).

the Court's conclusion in *Olin*[140] because the Court confirmed the approach for determining the retroactive effect of a statute.[141]

Landgraf involved the 1991 Civil Rights Act[142] that created a right to recover compensatory[143] and punitive[144] damages for certain violations of Title VII, and provided for a jury trial if such damages were claimed.[145] The Court held that if a Title VII case was pending on appeal when the 1991 Civil Rights Act was enacted, the statute did not apply.[146] As stated in *Landgraf*, "when a case implicates a federal statute enacted after the events in a suit, the Court's first task is to determine whether Congress expressly prescribed the statute's proper reach."[147]

If Congress has not explicitly prescribed retroactivity, courts must determine if the new statute is in fact retroactive.[148] Under *Landgraf*, if the legislative intent and the language do not clearly indicate retroactivity, then the presumption against it must be applied.[149] The suggested criteria included whether retroactive application would impair rights of a party possessed when the action occurred, expand a party's liability for prior conduct, or compel new duties to transactions already concluded.[150] If the statute

140. *See id.*

141. *See, e.g.*, United States v. NL Indus., Inc., 936 F. Supp. 545 (S.D. Ill. 1996).

142. Title VII of Civil Rights Act of 1964, 42 U.S.C. §§ 1971, 1975a-d (1964), *amended by* 42 U.S.C. §§ 2000e to -e-17. (1991).

143. "Compensatory damages" "compensate the injured party for the injury sustained, and nothing more; such as will simply make good or replace the loss caused by the wrong or injury." BLACK'S LAW DICTIONARY 390 (6th ed. 1990).

144. "Punitive" or "exemplary damages" are "damages on an increased scale, awarded to the plaintiff over and above what will barely compensate him for his property loss, where the wrong done to him was aggravated by circumstances of violence, oppression, malice, fraud, or wanton and wicked conduct on the part of the defendant, and are intended to solace the plaintiff . . . ." *See id.*

145. *Landgraf*, 114 S. Ct. at 1483 (1994).

146. *See id.*

147. United States v. Alcan Aluminum Corp., Nos. 87-CV-920, 91-CV-1132, 1996 WL 637559, at 3 (N.D.N.Y. 1996).

148. *Landgraf*, 114 S. Ct. at 1504.

149. *Id.* at 1483.

150. *See id.* at 1505.

was applied retroactively, the traditional presumption was that it did not govern absent distinct congressional intent in favor of such a result.[151]

Landgraf provided a test for determining whether retroactivity should be applied.[152] The test is as follows:

> (1) to determine (a) whether Congress has expressly stated the statutes reach and (b) if not, whether the text and the legislative history have clearly prescribed Congress' intent to apply the provision retroactively; (2) if not, to determine whether the provision actually has 'retroactive effect on the party or parties in the litigation'; and (3) if so, to apply the traditional presumption against retroactivity—absent a clear congressional intent to the contrary.[153]

Thus, the *Landgraf* decision not only relied on express retroactivity, but the Court looked to clear congressional intent.[154] The Court concluded that "requiring clear intent assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for countervailing benefits."[155]

The majority did not limit its analysis to express language; rather, the Court included legislative history and the statute's text to define clear congressional intent.[156] To satisfy the *Landgraf* criteria, a successful argument must consist of both textual and structural arguments because CERCLA does not have express language.[157]

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151. *See id.*

152. *See Olin*, 927 F. Supp. at 1511.

153. *Id.*

154. *Landgraf*, 114 S. Ct. at 1500.

155. *Id.*

156. *See* Nevada *ex rel.* Dep't of Transp. v. United States, 925 F. Supp. 691, 702 (D. Nev. 1996).

157. *See id.*

2. Commerce Clause[158]

There has been some discrepancy among decisions as to the extent of Congress' power under the Commerce Clause.[159] The Commerce Clause of the United States Constitution empowers Congress to "regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes . . . ."[160] Until 1937, the Commerce Clause had only been interpreted to allow Congress to regulate interstate commerce.[161] However, in *NLRB v. Jones & Laughlin Steel Corp.*[162] (*Jones & Laughlin*), the Court held that "intrastate activities [that] have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions" are within Congress' power to regulate.[163]

a. *Wickard v. Filburn* (*Wickard*)[164]

In 1937, the Court applied this new standard in *Wickard*.[165] The Court clarified the power of the Commerce Clause and held that

> the commerce power is not confined in its exercise to the regulation of commerce among the states. It extends to

158. *See* U.S. CONST. art. I, § 8, cl. 3. *See also* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

159. *See* United States v. Lopez, 115 S. Ct. 1624 (1995).

160. U.S. CONST. art. I, § 8, cl. 3.

161. *See Gibbons*, 22 U.S. at 1.

162. 301 U.S. 1 (1937).

163. *Id.* at 37. In an attempt to assist employees, Congress enacted the National Labor Relations Act to prevent unfair hiring practices and lockouts. *See id.* at 22-23. Jones & Laughlin Steel Corporation refused to comply with the Act, arguing that: (1) it is not a regulation of interstate commerce; (2) production employees ate not regulated by the federal government; and (3) sections of the Act violate the Constitution of the United States. *See id.* at 24. In rejecting the first argument, the Supreme Court held that where a subject matter affects commerce, it is a national matter within Congress' power to regulate. *See id.* at 37. Thereafter, in holding that production is the mechanism that allows a commodity to enter the stream of commerce, the Court upheld the Act because "it presents in a most striking way the close and intimate relation which a manufacturing industry may have to interstate commerce and . . . Congress had [the] constitutional authority to safeguard [employees' rights] . . . ." *Id.* at 43.

164. 317 U.S. 111 (1942).

165. *Id.*

> those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce.[166]

In *Wickard*, Congress set a quota for the amount of wheat grown on every farm in the United States, by creating the Agricultural Adjustment Act of 1938.[167] Pursuant to the Act, the wheat raised in excess of the quota was subject to a penalty per bushel.[168] The defendant, a farmer, challenged Congress' right to set a quota on wheat, which he raised for personal consumption, on the grounds that it was a purely local activity.[169] The Court held that Congress' power "over interstate commerce is plenary and complete in itself, [and] may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution."[170]

b. *United States v. Lopez* (*Lopez*)[171]

In 1995, the Supreme Court decided *Lopez*.[172] Here, the Court again addressed the issue of Congress' Commerce Clause authority.[173] In *Lopez*, a twelfth grade student arrived at high school with a concealed .38 caliber handgun and five bullets.[174] Lopez was charged with violating the Gun-Free School Zone Act of 1990 (Act),[175] which made knowingly possessing a firearm in a school zone a federal offense.[176] Lopez claimed that Congress exceeded its power to legislate under the Commerce Clause[177] because the Act neither regu-

166. *Id.* at 124 (quoting United States v. Wrightwood Dairy Co., 315 U.S. 110, 119 (1942)).
167. *Id.* at 115.
168. *See id.* at 114-15.
169. *See id.* at 114.
170. *Id.* at 123.
171. 115 S. Ct. 1624 (1995).
172. *Id.*
173. *See id.* at 1625.
174. *See id.* at 1626.
175. Pub. L. No. 101-647, 104 Stat. 4844 (1990).
176. *See Lopez*, 115 S. Ct. at 1626.
177. *See id.*

lated a commercial activity, nor contained a requirement that the firearm possession be connected in any way to interstate commerce.[178]

The issue in *Lopez* was whether Congress could regulate gun possession under the Commerce Clause even though gun possession is not a commercial activity, nor does it relate to interstate commerce.[179] The Court enunciated three categories of acceptable congressional Commerce Clause regulation: (1) use of channels of interstate commerce; (2) regulation and protection of the instrumentality of interstate commerce, or persons, or things in interstate commerce even though the threat may come from intrastate activities; and (3) regulation of those activities having a substantial effect on interstate commerce.[180]

In light of this framework, the Court found that the Act did not fit into the first two categories because there was neither use of interstate commerce, nor an attempt to prohibit an item to travel in interstate commerce.[181] Therefore, the Court analyzed the final category: whether interstate commerce was substantially affected.[182]

The Court determined that the Act was a criminal statute and, thus, did not relate to commerce or economic enterprise.[183] Therefore, the Court reasoned that "it [the Act] cannot be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce."[184]

Next, the Court found that the statute did not contain a jurisdictional element showing that firearm possession affected commerce.[185] Although the jurisdictional element is

178. *See id.*
179. *Id.*
180. *See id.* at 1629.
181. *See id.* at 1630.
182. *See id.*
183. *See id.* at 1630-31.
184. *Id.*
185. *See id. See also* United States v. Bass, 404 U.S. 336, 349 (1971) (holding that the possession component of the statute in question required an additional nexus to interstate commerce).

not a part of the test enunciated in *Lopez*, the Court found it persuasive in relation to this criminal Act.[186] Ultimately, the Court determined that the possession of a gun in a school zone was not an economic activity.[187] Furthermore, even if this activity occurred elsewhere, it still would not have any concrete relation to interstate commerce.[188] Therefore, the Gun-Free School Zone Act was declared unconstitutional because it exceeded Congress' Commerce Clause authority.[189]

III. *United States v. Olin Corp. (Olin)*[190]

In light of the recent Supreme Court decisions in *Landgraf* and *Lopez*, the *Olin* court evaluated whether CERCLA should still be upheld.[191]

A. Facts and Procedural History

The United States filed a complaint under CERCLA against Olin Corp., a Virginia corporation operating a chemical plant.[192] Along with the complaint, the parties filed a consent decree.[193] The government sought to recover cleanup costs due to mercury[194] and chloroform[195] (hazardous substances)[196] that were allegedly released.[197]

186. *See Lopez*, 115 S. Ct. at 1631. The Government conceded that neither the statute nor the legislative histories contain any evidence regarding the statute's affect on interstate commerce. *See id.*

187. *See id.* at 1634.

188. *See id.*

189. *See id.*

190. 927 F. Supp. 1502 (S.D. Ala. 1996).

191. *Id.*

192. *See id.* at 1503.

193. *See id.* A consent decree is "a judgment entered by consent of the parties whereby the defendant agrees to stop alleged illegal activity without admitting guilt or wrongdoing .... Upon approval of such agreement by the court the government's action against the defendant is dropped." BLACK'S LAW DICTIONARY 410-11 (6th ed. 1990).

194. Mercury is listed as a hazardous waste in 40 C.F.R. § 261.33 (1996). *See id.*

195. Chloroform is listed as a hazardous waste in 40 C.F.R § 261, App. VIII. (1996). *See id.*

196. *See supra* note 11.

197. *See Olin*, 927 F. Supp. at 1504.

The government alleged that there were two actionable sites at the Olin property; however, this action only involved Site 1.[198] The government asserted that from 1952-1974, Site 1 was used as a mercury-cell chloralkali plant, which released water containing mercury into Site 2.[199] Then, in 1955, the plant operated a crop-protection-chemicals plant that was responsible for discharging wastewater into Site 2 until 1974.[200] Due to the plant's operations, mercury and chloroform were allegedly released into Site 1.[201] Both plants ceased operating in 1982.[202] Thereafter, in 1984 the EPA placed the Olin Site on the NPL.[203]

Both parties signed the proposed consent decree and jointly moved for the court to enter the decree.[204] Although, Olin was willing to enter into the decree, the court asserted that it had a duty to "not only to determine whether its factual and legal determinations are reasonable, but also to ensure that the decree does not violate the Constitution, a federal statute or the controlling jurisprudence."[205] Accordingly, the court required the parties to file briefs discussing whether CERCLA, as applied to this case, followed the Supreme Court's decision in *Lopez* regarding the Commerce Clause.[206] After the court directed the parties to file briefs on the Commerce Clause issue, the defendant then raised the issue of CERCLA's retroactivity, claiming that "Congress did not intend for CERCLA to be retroactive and that if it did, CERCLA violates the Due Process Clause and unconstitutionally delegates legislative power to the EPA."[207]

198. *See id.*
199. *See id.*
200. *See id.*
201. *See id.*
202. *See id.*
203. *See id.*
204. *See id.*
205. *Id.* at 1506-07.
206. *See id.* at 1507.
207. *See id.*

B. Reasoning and Holding

According to precedent, a court should dispose of a case on non-constitutional grounds before deciding a constitutional issue whenever possible.[208] Therefore, the court reviewed the statutory question of whether Congress intended CERCLA to apply retroactively before considering constitutional issues.[209] The precedent regarding the proper test to be applied in determining if a retroactive application of a statute is permissible is contradictory.[210] The *Olin* court agreed that in the past a retroactive application of CERCLA was permissible.[211] However, in light of the Supreme Court's decision in *Landgraf*, which addressed and resolved the discrepancy of retroactive application,[212] the court held that CERCLA must no longer be applied in this manner.[213]

First, the *Olin* court explained that *Landgraf* "demolishes the interpretive premise on which prior cases had concluded CERCLA is retroactive."[214] The *Landgraf* decision was viewed as reaffirming "the traditional presumption against retroactiv[ity]."[215] Thus, the court dismissed the earlier influential case *Georgeoff*, asserting that *Georgeoff* did exactly what *Landgraf* rejected.[216] That is, the court explained

208. *See, e.g.*, Ashwander v. TVA, 297 U.S. 288, 347 (1936).

209. *See, e.g., Olin*, 927 F. Supp. at 1507 (citing *Ashwander*, 297 U.S. at 347). The Eleventh Circuit has never squarely addressed whether CERCLA is retroactive, but in *Virginia Properties Inc. v. Home Ins. Co.*, 74 F.3d 1131 (11th Cir. 1996), in dicta, the court suggested that CERCLA was retroactive. *See id.* at 1132. However, in *Redwing Carriers, Inc. v. Sarland Apartments, Ltd.*, 875 F. Supp 1545 (11th Cir. 1995), although the parties did not argue the issue of retroactivity, the court did not apply certain regulations retroactively. *See id.* at 1564.

210. *See* Thorpe v. Housing Auth. of Durham, 393 U.S. 268 (1969); Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988); Bradley v. School Bd. of Richmond, 416 U.S. 696 (1974); Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976).

211. *See Olin*, 927 F. Supp. at 1507.

212. *See id.* at 1508.

213. *See id.* at 1519.

214. *Id.* at 1508.

215. *Id.*

216. *See id.* at 1509.

that *Georgeoff* seemed to apply a presumption in favor of retroactivity.[217]

The court also asserted that two other cases, *Shell* and *Northeastern*, enunciated their own analyses and gave "little regard for the presumption" against retroactivity.[218] The court concluded that *Landgraf* clarifies the analysis of retroactivity and impacts *Olin* significantly; thus, the government's argument that *Landgraf* is unremarkable was found to be credible.[219]

The *Olin* court considered the test enunciated in *Landgraf*.[220] In *Landgraf*, the Supreme Court held that if a statute does not explicitly state that it should be applied retroactively, the court must determine if the statute should be retroactive with non-express text and legislative history.[221] Here, the *Olin* court found that there was no express language in the statute;[222] therefore, a presumption against retroactivity was applied.[223]

Next, to determine if this presumption could be lifted, the court looked at non-express statutory language, focusing on sections 106(a)[224] and 107(a).[225] The court found that under *Landgraf*, the government's argument that section 106

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217. *See id.*
218. *See id.*
219. *See id.* at 1508.
220. *Id.* at 1512.
221. *See id.* at 1511.
222. *Id.* at 1512.
223. *See id.* at 1516.
224. CERCLA provides:

> In addition to any other action taken by a State or local government, when the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat, and the district in which the threat occurs shall have jurisdiction to grant such relief as the public interest and the equities of the case may require. The President may also, after notice to the affected State take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and welfare and the environment.

CERCLA § 106(a), 42 U.S.C. § 9606(a) (1988 & Supp. V 1993).

contains language that demonstrates congressional intent to authorize retroactivity fails.[226] The government's brief relied on *Northeastern's* finding that "the language used in the key liability provision, CERCLA § 107 . . . refers to actions and conditions in past tense."[227] The *Olin* court, however, highlighted the *Georgeoff* analysis that explained that the use of past tense was not dispositive.[228]

Then, the court analyzed the legislative history of CERCLA.[229] The court refused to follow prior holdings from other jurisdictions rejecting the body of case law promoted by the government regarding retroactivity.[230] The court emphasized the fact that the prior decisions were not considered in light of *Landgraf*.[231] Moreover, the court suggested that the failure of Congress not to expressly include retroactive effect was deliberate.[232] Additionally, the court addressed the limit on retroactive recovery of response costs whether incurred before or after CERCLA's enactment.[233]

Second, the court attempted to distinguish between the effect of the statute and the intent of Congress.[234] In comparing the compensatory damages analysis of the *Landgraf* opinion with the financial liabilities of CERCLA, the court claimed that "the new damages remedy in Section 102 . . . is the kind of provision that does not apply to events antedating

225. *See supra* note 61 and accompanying text. *See generally* CERCLA § 107(a), 42 U.S.C. § 9607(a).

226. *See Olin*, 927 F. Supp. at 1513. This may be due to the fact that the right arguments were not made. The *Olin* court noted: "The Justice Department devotes little attention to statutory language as evidence of congressional intent." *Id.*

227. *Id.* (citing *Northeastern*, 810 F.2d 726, 773 (8th Cir. 1986)).

228. However, the *Georgeoff* court did not assert that the language was not evidence of congressional intent, it merely claimed that the statutory argument was not enough to overcome the presumption [against] retroactivity. *Id.* at 1513.

229. *See id.*

230. *See id.* at 1514.

231. *See id.*

232. *See id.*

233. *See* Nevada *ex rel.* Dep't of Transp. v. United States, 925 F. Supp. 691, 702 (D. Nev. 1996).

234. *See Olin*, 927 F. Supp. at 1516.

its enactment in the absence of clear congressional intent."[235] Third, the court determined that the presumption against retroactivity should apply.[236] In interpreting *Landgraf*, this court determined that "a provision for punitive damages should not be construed as retroactive unless the language forces that conclusion because the court must then confront substantial constitutional questions which follow."[237]

The *Olin* court concluded that CERCLA contains no explicit language of retroactivity and no language that clearly indicates a congressional intent of retroactivity that is required by *Landgraf*.[238] The court rejected the government's attempt to argue that the key provisions of CERCLA contain language that refers to the past tense.[239] Next, the court looked to legislative history of CERCLA and determined that the issue of retroactivity was not precisely addressed.[240] The court concluded that

> [n]othing presented in the Justice Department['s] brief or pre-*Landgraf* cases concerning the statutory language of CERCLA or its legislative history demonstrated that Section 107(a) (and/or Section 106(a) as related to it in this case) is 'the sort of provision that *must* be understood to operate retroactively because a contrary reading would render it ineffective.'[241]

Next, the court addressed the constitutionality of the statute in light of the Supreme Court's decision in *United States v. Lopez*.[242] In *Lopez*, the Court held that "the federal gun statute at issue attempted to exercise police power over matters historically falling within the jurisdiction of local government."[243] The *Olin* court claimed that *Lopez* requires: "(1) that the statute itself regulate economic activity, which

235. *Id.* (citing *Lopez*, 114 S. Ct. 1624 (1995)).
236. *See id.* at 1518 (citing *Landgraf*, 114 S. Ct. 1483, 1507-08 (1994)).
237. *Id.* at 1517.
238. *See id.* at 1513.
239. *See id.*
240. *See id.* at 1514.
241. *Id.* at 1519 (citing *Landgraf*, 114 S. Ct. at 1507-08) (emphasis added).
242. 115 S. Ct. 1624 (1995).
243. *Olin*, 927 F. Supp. at 1522.

activity 'substantially affects' interstate commerce, and (2) that the statute include a 'jurisdictional element which would ensure, through case-by-case inquiry, that the [statute] in question affects interstate commerce.'"[244]

In applying *Lopez* to the present case, the *Olin* court similarly believed that the object of regulation was not economic activity or commerce[245] because the plants at issue had not been in operation since 1982.[246] The court held that an activity must not only have a substantial affect on interstate commerce, but must also be an economic activity; thus, the "application of CERCLA to this case exceeds the power given to Congress under the Commerce Clause."[247] Moreover, the court claimed that: (1) CERCLA regulates in the area of national police power, which *Lopez* forbids;[248] and (2) the statute does not allow for a case-by-case inquiry.[249] Ultimately, the court determined that like the Gun-Free School Zone Act in *Lopez*, CERCLA exceeded Congress' Commerce Clause authority.[250]

IV. Analysis

First, CERCLA clearly passes the *Landgraf* test[251] for three reasons: (1) language; (2) structure; and (3) legislative history. Although there is no express retroactive language in CERCLA, it is clear that CERCLA was intended by Congress to be retroactive.[252] Second, CERCLA is not an abuse of Con-

244. *Id.* at 1532.
245. *Id.*
246. *See id.*
247. *See id.* at 1523.
248. *See id.* at 1533.
249. *See id.*
250. *See id.*
251. In *Landgraf*, a test was developed that solved the retroactivity quandary. *Landgraf*, 114 S. Ct. at 1505. First, the Court examines any statutory language that specifically describes the statute's reach. *See id.* If none can be found, the Court must decipher whether applying the statute would result in a retroactive effect. *See id.* If so, the Court applies a presumption against Congress intending such a result. *See id.* Lastly, the Court examines the statutory construction and legislative history to ascertain whether Congress clearly intended a retroactive effect. *See id.*
252. *See, e.g., supra* notes 16-17 and accompanying text.

gress' Commerce Clause authority.[253] CERCLA passes the *Lopez* "substantial affects" test, and is not in any way analogous to the Gun-Free School Zone Act in *Lopez*.

A. Retroactivity

Although the Supreme Court recently addressed the issue of retroactivity in *Landgraf*,[254] the Court has not addressed this issue in the context of CERCLA.[255] Prior to *Landgraf*, there was a discrepancy among Supreme Court decisions concerning the proper test to determine when a statute could be applied retroactively.[256] In *Landgraf*, the Court recognized this problem and explained that the Court has uniformly held that a presumption against retroactivity should apply.[257] Thus, if there is no express language, clear congressional intent governs.[258]

In applying the *Landgraf* retroactivity test, the *Olin* court asserted that the pre-*Olin* decisions holding CERCLA retroactive were obsolete because these opinions did not apply the requirements for retroactivity established in *Landgraf*.[259] However, no court has agreed with the *Olin* decision.[260] Consequently, the *Olin* court's interpretation of *Landgraf* created an anomaly in the law regarding CERCLA's application.

Prior to *Olin*, federal courts applied a presumption against retroactivity, and then rebutted that presumption with an examination of statutory language and legislative history to determine if there was a clear congressional intent to apply CERCLA retroactively.[261] The *Olin* court attempted to illustrate how past retroactive arguments now fail under

253. *See, e.g.*, United States v. Alcan Aluminum Corp., Nos. 87-CV-920, 91-CV-1132, 1996 WL 937559 (N.D.N.Y. 1996); United States v. NL Indus., Inc., 936 F. Supp. 545 (S.D. Ill. 1996).
254. *See Olin*, 927 F. Supp. at 1507.
255. *See id.* at 1507.
256. *See supra* Part II.B.1.
257. *Landgraf*, 114 S. Ct. at 1496.
258. *See id.*
259. *Id.*
260. *See supra* notes 7, 25 and accompanying text.
261. *See Georgeoff*, 562 F. Supp. 1300, 1302 (N.D. Ohio 1983).

Olin by using three leading cases: *Georgeoff*,[262] *Shell Oil*,[263] and *Northeastern*.[264] Although these cases hold that CERCLA is retroactive, the analysis to achieve retroactivity varies because the courts focused on different elements of the statute and legislative history to rebut the presumption of retroactivity.

Since the *Landgraf* decision, the only court in the Nation to conclude that the retroactivity test has changed is the *Olin* court. As an initial matter, *Landgraf* did not set forth a new rule of law regarding retroactive application of a statute. Rather, it clarified the traditional presumption against retroactivity. Thus, the substantive examination in the pre-*Olin* cases is analogous to the *Landgraf* test. Therefore, the *Olin* court improperly dismissed *Georgeoff* and its progeny.

Although there is no express language to verify CERCLA's retroactivity, it is evident from the language, structure, and legislative history that Congress intended CERCLA to operate retroactively. Retroactivity is consistent with the purpose of CERCLA, which is "t[o] provide for liability, compensation, cleanup, and emergency response for hazardous substances released into the environment and the cleanup of inactive hazardous waste disposal sites."[265] CERCLA was created to clean up hazardous waste sites and allocate financial responsibility to achieve these goals.[266] Congress intended liability to attach to improper disposal actions occurring before the enactment date of 1980.[267]

CERCLA itself provides numerous examples of clear evidence of congressional intent. CERCLA's civil liability provi-

262. *Id.* at 1300.

263. 605 F. Supp. 1064 (D. Colo. 1985).

264. 810 F.2d 726 (8th Cir. 1986). In *Northeastern*, the court concedes that CERCLA does not expressly provide for retroactivity, however, the court uses the statutory language argument in two ways: (1) "it is manifestly clear that Congress intended CERCLA to have retroactive effect"; and (2) "the statutory scheme itself is overwhelmingly remedial and retroactive." *Id.* at 732-33.

265. Pub. L. No. 96-510, at 1, 94 Stat. 2767 (1980).

266. *See* S. REP. No. 96-848 (1980), *reprinted in* LEGISLATIVE HISTORY, *supra* note 2, at 13.

267. *See, e.g.*, Cooper Indus. v. Agway, Inc., No. 92-CV-0748, 1996 WL 550128 (N.D.N.Y. 1996) (holding that the language, structure, purpose and legislative history establish clear congressional intent).

sion, section 107,[268] sets out three distinct forms of liability: (1) "all costs of removal or remedial action";[269] (2) "any other necessary costs of response";[270] and (3) natural resource damages.[271] In contrast, CERCLA provides two natural resource damages provisions:[272] (1) section 107(f)(1) provides that "there shall be no recovery . . . [where] such damages resulted have occurred wholly before December 11, 1980";[273] and (2) section 111(d)(1) provides that "[n]o money in the Fund may be used . . . where the injury, destruction, or loss of natural resources and the release of a hazardous substance from which such damages resulted have occurred wholly before December 11, 1980."[274] Thus, CERCLA specifically limits natural resources damages to a prospective application, but fails to limit response costs in the same manner. This provides evidence that Congress intended a retroactive application of response costs.

Furthermore, the above mentioned liability provision is in past tense. Section 107 contains language such as: (1) "owned or operated any facility" at the time of hazardous waste disposal;[275] (2) "arranged for disposal or treatment" of hazardous waste;[276] and (3) "accepted" hazardous waste for transport.[277] Thus, this language is further evidence of Congress' intent for a retroactive application of CERCLA.[278]

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268. CERCLA § 107, 42 U.S.C. § 9607 (1988 & Supp. V 1993).

269. *Id.* § 107(a)(4)(A), 42 U.S.C. § 9607(a)(4)(A).

270. *Id.* § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B).

271. *Id.* § 107(a)(4)(C), 42 U.S.C. § 9607(a)(4)(C).

272. *See* Nevada *ex rel.* Dep't. of Transp. v. United States, 925 F. Supp. 691, 701 (D. Nev. 1996).

273. CERCLA § 107(f)(1), 42 U.S.C. § 9607(f)(1).

274. *Id.* § 111(d)(1), 42 U.S.C. § 9611(d) (1).

275. *Id.* § 107(a)(2), 42 U.S.C. § 9607(a)(2).

276. *Id.* § 107(a)(3), 42 U.S.C. § 9607(a)(3).

277. *Id.* § 107(a)(4), 42 U.S.C. § 9607(a)(4).

278. The *Olin* court completely discarded the negative implication argument because the Court in *Landgraf* addressed a similar negative inference argument and it was rejected. However, *Landgraf* is distinguishable because the provisions emphasized were merely a minor part of the statute. *See* Nevada ex rel. Dep't of Transp. v. United States, 925 F. Supp. 691 (D. Nev. 1996). Additionally, the Civil Rights Act of 1991 and CERCLA are starkly different. The statutory construction and the historical background are especially important due to the political circumstances surrounding the enactment of CERCLA. *See*

Additionally, section 103(c) provides that "[w]ithin one hundred and eighty days after December 11, 1980, any person who owns or operates or who at the time of disposal owned or operated . . . [a facility must] . . . notify the Administrator of the Environmental Protection Agency of the existence of such facility . . . ."[279] It is reasonable to infer from this language that Congress intended for CERCLA's retroactive application. As shown, there are no time limitations in CERCLA's language restricting CERCLA to a prospective application, except in the above mentioned natural resources liability section.

Moreover, the general scheme of environmental statutes implicates retroactive effect due to the void CERCLA was enacted to fill.[280] RCRA operates prospectively, to prohibit environmental catastrophes such as Love Canal.[281] Congress specifically intended to create a mechanism to address the environmental degradation that occurred in the past.[282] In light of the background in which CERCLA was created, to interpret CERCLA in a prospective manner would clearly be ineffective.

B. The Constitutionality of CERCLA

The Commerce Clause is fully applicable to CERCLA.[283] However, the *Olin* court ruled that "CERCLA cannot be applied to regulate intrastate groundwater contamination under the Commerce Clause."[284] The court's main constitu-

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id. (citing J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 48.03 (5th ed. 1992)).

279. CERCLA § 103(c), 42 U.S.C. § 9603(c).

280. *See* H.R. REP. NO. 96-1016, at 22, *reprinted in* LEGISLATIVE HISTORY, *supra* note 2, at Vol. II, 53. *See also Nevada*, 925 F. Supp. at 702; United States v. Wade, 546 F. Supp. 785, 792-93 (E.D. Pa. 1982) (finding that CERCLA was "designed to plug in the gaps" in existing anti-pollution laws) (citing *Nevada*, 925 F. Supp. 691).

281. *See supra* notes 35-38 and accompanying text.

282. *See supra* notes 46-53 and accompanying text.

283. *See* Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 282 (1981) (holding that the Commerce Clause is broad enough to permit congressional findings demonstrating the effects of unregulated surface mining on interstate commerce). *See* Brief, *supra* note 8, at 17.

284. Brief, *supra* note 8, at 17-18.

tional argument relies on the Supreme Court's decision in *Lopez*.[285]

The *Lopez* Court narrowly read Congress' Commerce Clause authority.[286] This narrow reading is limited in focus and does not reach CERCLA. The *Lopez* Court premised its argument on the three factors[287] that it enumerated regarding the regulatory power of Congress. First, it must be remembered that the Act in *Lopez* was a criminal gun control statute.[288] The *Lopez* Court found that the Act was "a criminal statute that by its terms has nothing to with commerce . . . ."[289] CERCLA does not include any mention of commerce in its text or legislative history.[290] Unlike the Act at issue in *Lopez*, CERCLA is a comprehensive mechanism for responding to releases of hazardous waste and for assessing liability against those responsible for the pollution.[291] Additionally, CERCLA sets standards and creates schedules for cleanups, and deters improper disposals through its liability provisions.[292] Moreover, the activities that CERCLA affects have an impact on the economy (i.e. fishing industry, agriculture, domestic and industrial water supplies, livestock protection and recreation).[293]

Second, the issue in *Olin* was that groundwater was released which contained mercury, thereby contaminating other sites.[294] The Supreme Court has concluded that

285. *Lopez*, 115 S. Ct. at 1624, 1630 (1995).

286. Interview with Bennett Gershman, Professor of Law at Pace University School of Law (Nov. 1, 1996).

287. *Lopez* articulates the principles necessary for Congress to regulate commerce: (1) "the use of channels of interstate commerce"; (2) when regulating and protecting the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities; (3) authority includes the power to regulate those activities having a substantial relationship to interstate commerce. Brief, *supra* note 12, at 18 (citing *Lopez*, 155 S. Ct. at 1629-30).

288. *Lopez*, 115 S. Ct. at 1624.

289. *Id.*

290. *See* Brief, *supra* note 11, at 17-18.

291. *See id.* at 18.

292. United States v. NL Indus., Inc., 936 F. Supp. 545, 562 (S.D. Ill. 1996).

293. *See id.*

294. *Olin*, 927 F. Supp. 1502, 1504 (S.D. Ala. 1996).

groundwater is an article of interstate commerce.[295] Therefore, groundwater is subject to congressional regulation.[296] As shown, the Gun-Free School Zone Act in *Lopez* is completely different than CERCLA; thus, it is unreasonable to apply the analysis of *Lopez* to *Olin*.

Additionally, the *Olin* court claimed that the activities being regulated must be economic;[297] however, the *Lopez* Court did not indicate that the activities need be purely economic.[298] The Supreme Court has held that solid or liquid waste is an item of commerce, which is clearly economic activity.[299] Thus, the wastewater from the Olin Site, which contained hazardous waste, is an item of commerce.

Third, the *Lopez* argument does not apply because, unlike CERCLA, that Act did not have a "widespread" affect on economic activity. Clearly, CERCLA falls within this criterion because, as in *Wickard*, the activity in *Olin* had a substantial affect on interstate commerce. The *Olin* court ignored that "the Supreme Court consistently looks to the 'class of activities' regulated by the legislation in the aggregate, rather than the individual activities in the particular case."[300]

Finally, the *Olin* court held that CERCLA fails the jurisdictional requirement of the *Lopez* test.[301] However, *Lopez* does not require that every statute pass the jurisdictional element in order to pass constitutional muster.[302] Moreover, unlike the Act in *Lopez*, CERCLA is a civil statute, which clearly does not impose criminal liability.[303] Pursuant to the *Lopez* test, it is enough that a statute pass the "substantially

295. *See* Sporhase v. Nebraska, 485 U.S. 941 (1982).
296. *See id.*
297. *See Olin*, 927 F. Supp. at 1531.
298. *See id.* at 1532-33.
299. *See* City of Phila. v. New Jersey, 437 U.S. 617 (1978).
300. Brief, *supra* note 8, at 20-21.
301. *See supra* Part II.B.2.b. *See also* Brief, *supra* note 8, at 19-20.
302. *See* Brief, *supra* note 8, at 19-20.
303. *See* United States v. Bass, 404 U.S. 336 (1971).

affects" element.[304] Therefore, if the *Lopez* test is applied properly, CERCLA would be deemed constitutional. Thus, the *Olin* court misinterpreted the *Lopez* decision and analysis. Accordingly, the district court's opinion was reversed in March of this year.

V. The Appeal

On March 25, 1997, the United States Court of Appeals for the Eleventh Circuit overturned the United States District Court for the Southern District of Alabama in *United States v. Olin Corp.* (*Olin II*).[305] The court reviewed de novo whether applying CERCLA to onsite contamination was in violation of the Congress' Commerce Clause authority and whether CERCLA can be applied retroactively.[306] To review, the district court dismissed the government's complaint against Olin holding that the Constitution prohibits enforcement of CERCLA against a party whose conduct was limited to its own property.[307] Additionally, the court held that CERCLA's liability cleanup provisions apply only prospectively.[308]

On appeal, Olin again characterized the CERCLA enforcement action as being beyond the reach of Congress' Commerce Clause authority.[309] Olin asserted that CERCLA enforcement was not justified because there was no evidence that its onsite disposal activities affected interstate commerce.[310] Additionally, Olin argued that its disposal activities were not economic in nature and, therefore, escaped congressional authority under the Commerce Clause.[311] Accordingly, Olin asserted that the district court's decision should be upheld.[312]

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304. *See id. See also* Cheffer v. Reno, 55 F.3d 1517, 1520 (11th Cir. 1995) (holding that legislation regulates activity that substantially affects interstate commerce and is therefore within Congress' constitutional power).

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

306. *See id.* at 1509.

307. *See id.* at 1508.

308. *See id.*

309. *See id.* at 1511.

310. *See id.*

311. *See id.*

312. *See id.*

Next, Olin argued that the district court's ruling on retroactivity should be affirmed.[313] Olin asserted that under *Landgraf*, no statute can be applied in a retroactive manner without a showing of clear intent by Congress.[314] Olin argued that CERCLA does not contain explicit language that provides for retroactive liability for cleanup liability provisions.[315] To the contrary, Olin stated that Congress intended to impose liability merely on "future former owners and operators"; that is, those parties that would become "former" after December 11, 1980.[316] Olin conceded that CERCLA applied to sites contaminated prior to this date; however, costs incurred for the cleanup of such sites would be borne by industry and private taxpayers.[317] Furthermore, Olin argued that CERCLA's legislative history concerning retroactivity should be disregarded because a compromise bill was passed.[318] For these reasons, Olin maintained that the district court's holding in regard to retroactivity should be affirmed.

The government argued that the Commerce Clause can be used to regulate hazardous waste site cleanups regardless of whether hazardous substance migration has occurred.[319] The government stated, "Congress' determination that contamination from hazardous waste sites as a class substantially affects interstate commerce allows regulation of any activity that falls within that class without further proof of an effect on commerce."[320]

Additionally, the government contended that Congress expressed the intent to apply response costs retroactively.[321] The government asserted that the express limitation on the recovery of natural resources would have no purpose unless Congress intended that a similar limitation would not apply

313. *See id.* at 1512.
314. *See id.*
315. *See id.*
316. *See id.* at 1513.
317. *See id.* at 1514.
318. *See id. See supra* note 117 and accompanying text.
319. *See Olin II*, 107 F.3d at 1510.
320. *11th Cir. Finds CERCLA Retroactive, Constitutional*, 10 MEALEY'S LITIG. REP.: SUPERFUND 3, Apr. 14, 1997.
321. *See Olin II*, 107 F.3d at 1512.

to the recovery of response costs.[322] Furthermore, the government argued that the instant dispute was distinguishable from *Landgraf* because the retroactive sections of the Civil Rights Act were "comparatively minor and narrow provisions in a long and complex statute."[323] In comparison, the government argued that the liability provisions of CERCLA are clearly of "central importance to the statute."[324]

The court found that hazardous waste disposal is the type of activity that substantially affects interstate commerce.[325] Accordingly, the court held that "although Congress did not include in CERCLA either legislative findings or a jurisdictional element, the statute remains valid as applied in this case because it regulates a class of activities that substantially affects interstate commerce."[326] Furthermore, the court rejected Olin's claim regarding a lack of harm to interstate commerce.[327] The court concluded that the regulation of onsite waste disposal is consistent with Congress' objective to protect interstate commerce from pollution.[328]

Secondly, the court held that the language[329] and legislative history of CERCLA[330] "confirms that Congress intended to impose retroactive liability for cleanup."[331] The court found that Congress "targeted both current and former owners and operators of contaminated sites" as a result of specific language in the statute.[332] Additionally, the court found that legislative history indicates that CERCLA was intended to be applied retroactively.[333] The court concluded that although a

322. *See id.* (referring to CERCLA § 111(d)(1), 42 U.S.C. § 9611(d)(1) (1988 & Supp. V 1993).

323. *See Olin II*, 107 F.3d at 1512.

324. *Id.*

325. *See id.* at 1510.

326. *Id.*

327. *See id.* at 1511.

328. *See id.*

329. *See id.* at 1513.

330. *See id.* at 1514.

331. *See id.*

332. *Id.*

333. *See id.*

compromise bill existed, the compromise did not relate to the retroactive cleanup of contaminated sites.[334]

VI. Conclusion

No court since *Olin* has followed the *Olin* court's analysis or findings. As shown on appeal,[335] the *Olin* court incorrectly held that according to the decisions in *Landgraf* and *Lopez*, CERCLA is not retroactive nor unconstitutional. The *Olin* court misconstrued both Supreme Court holdings. First, Congress did not exceed its power under the Commerce Clause because CERCLA regulates economic activity that substantially affects interstate commerce. Second, CERCLA's text, structure, and legislative history reveal a clear legislative intent to apply the response costs liability section retroactively.

The *Olin* decision was a major departure from existing case law. As a result, the *Olin* decision had the potential to allow those who jeopardize the lives of humans and the environment to reap the benefits of their conduct without contributing to rectifying the affliction. Parties that have polluted should not be able to benefit from their wrongdoing merely because at the time there was no statute forbidding their heinous acts.

334. *See id.*
335. *See generally id.*