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What Happened?: U.S. District Court Rules CERCLA Not Retroactive and Unconstitutional under the Commerce Clause. United States v. Olin Corp.

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WHAT HAPPENED?: U.S. DISTRICT COURT RULES CERCLA NOT RETROACTIVE AND UNCONSTITUTIONAL UNDER THE COMMERCE CLAUSE

United States v. Olin Corp.[1]

by Mitch Burgess

I. Introduction

The Constitution gives Congress great power to enact legislation that determines the rights and obligations of people in a wide variety of areas. A first consideration with any new legislation is whether Congress intended the statute to apply to conduct completed before the statute's enactment.[2] There exists a strong presumption against applying statutes retroactively absent a clear statement from Congress.[3] Courts have not required an affirmative statement in a statute before applying the statute retroactively.[4] Instead, courts have relied on factors including the statute's purpose and scheme, express and non-express statutory language, and legislative history to infer congressional intent that a statute is to be applied retroactively.[5]

A second consideration when Congress enacts a statute is whether Congress has the authority under the Constitution to regulate a specific area of law. Congress often relies on its broad grant of Commerce Clause[6] power to enact legislation covering intrastate conduct which substantially affects interstate commerce.

A federal district judge in Alabama recently exercised his authority to examine an act of Congress to determine its retroactivity and its validity under the Constitution.[7] He exercised this authority as he examined an important and often controversial statute, the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA").[8]

II. Facts and Holding

The United States brought a CERCLA action against the Olin Corporation ("Olin"),[9] which operates a chemical plant in McIntosh, Alabama.[10] The complaint alleged that there were two actionable sites on 1500 acres of land at Olin's McIntosh plant site.[11] The action, however, involved only the first of the two sites located on the Olin property.[12] The government alleged that the operation of the plants located on the site resulted in the release of two hazardous substances, mercury and chloroform.[13] Most of the contamination occurred prior to the effective date of CERCLA, December 11, 1980.[14]

The parties signed a proposed

[1]927 F. Supp. 1502 (S.D. Ala. 1996), *rev'd*, 107 F.3d 1506 (11th Cir. 1997).

[2]For an excellent discussion of the retroactivity doctrine and a proposal for a new framework for retroactivity analysis, *see* Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055 (1997).

[3]Landgraf v. USI Film Products, 114 S. Ct. 1483, 1497 (1994). *See also* Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827 (1990); Dash v. Van Kleeck, 7 Johns. *477, *503 (N.Y. 1811) (stating that "[i]t is a principle of the English common law, as ancient as the law itself, that a statute, even of its omnipotent parliament, is not to have a retrospective effect"); Smead, *The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence*, 20 MINN. L. REV. 775 (1936).

[4]*Landgraf*, 114 S. Ct. at 1501. *See also* Bradley v. Richmond School Bd., 416 U.S. 696, 711 (1974).

[5]Ohio v. Georgeoff, 562 F. Supp. 1300 (N.D. Ohio 1983); Nevada v. United States, 925 F. Supp. 691 (D. Nev. 1996).

[6]U.S. CONST. art. I, § 8.

[7] *Olin*, 927 F. Supp. 1502.

[8]*See* United States v. Shell, 605 F. Supp. 1064, 1068 (D. Colo. 1985). CERCLA was enacted in 1980 to establish a system of liability to promote the clean up of hazardous substances in the environment, and provide for compensation costs incurred in responding to the damage of natural resources.

[9]*Olin*, 927 F. Supp. at 1503.

[10]*Id.*

[11]*Id.* at 1504. "Site 1" includes 20 acres on the southern edge of the property on which an active chemical production facility operates. "Site 2" includes 62 acres which forms a natural basin east of the plant.

[12]*Id.* The government plans to file a separate action for the alleged violations at Site 2. It contended that Olin directed surface runoff containing hazardous materials into Site 2 which discharges in the Tombigbee River.

[13]*Id.* To the extent the plants operated after CERCLA's effective date and to the extent that the threat of continuing releases from Site 1 continued, the government also sought to recover cleanup costs from Olin for post-enactment conduct. In 1978, Olin built a diaphram-cell caustic-soda/chlorine plant which it currently operates. There is no allegation in the complaint that this plant is responsible for the contaminants in Site 1.

[14]*Id.* To the extent the plants operated after CERCLA's effective date and to the extent that the threat of continuing releases from Site 1 continued, the government also sought to recover cleanup costs from Olin for post-enactment conduct. In 1978, Olin built a diaphram-cell caustic-soda/chlorine plant which it currently operates. There is no allegation in the complaint that this plant is responsible for the contaminants in Site 1.

consent decree which was filed with the complaint.[15] The consent decree held the defendant liable for all expenses associated with cleaning up the site.[16] The defendant indicated to the trial court it had entered into the consent decree with reservations concerning its legality, but felt the most pragmatic solution to the problem was to go along with what the EPA wanted.[17] The court stressed its duty to examine the consent decree: "Notwithstanding the initial willingness of the defendant to enter into a "consent" decree, this court has a duty to examine a consent decree 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."[18]

The defendant also raised the issue of CERCLA's retroactivity,[19] arguing that Congress did not intend for CERCLA to be retroactive, and that if it did, it is a violation of the Due Process Clause and is unconstitutional because it delegates legislative power to the EPA.[20] In addition, the court requested briefs from the parties to address whether CERCLA, as applied in the present case, was consistent with the Supreme Court's interpretation of the Commerce Clause.[21]

The court dismissed the action holding that Congress did not express its intent that the liability provision of CERCLA be retroactive,[22] and that the application of CERCLA to the facts of the present case violated the Commerce Clause.[23]

III. Legal Background

A. CERCLA's Retroactivity

1. Retroactivity of CERCLA prior to *Landgraf*

One of the earliest decisions addressing CERCLA's retroactivity was *Ohio v. Georgeoff*.[24] The main question facing the court was whether Congress had overridden the presumption against applying CERCLA retroactively.[25] The court began its analysis by recognizing that as a general rule courts do not favor the retroactive application of statutes because of problems associated with fairness and lack of notice.[26] The court, however, stressed that if the language of a statute is plain and unambiguous, the duty of the court is to enforce it according to its terms.[27]

Ohio argued that CERCLA's retroactivity could be inferred from certain statutory language.[28] Specifically, Ohio directed the court's attention to the phrase in § 9607(a)(4) that liability extends to "any person who accepts or accepted any hazardous substances for transport."[29] Ohio argued that the future tense verb "accepts" referred to conduct after CERCLA's enactment,[30] and that the past tense verb "accepted" must apply to conduct before enactment.[31]

The court disagreed with Ohio's analysis. The court noted that

[15] *Id.* at 1505.

[16] *Id.* The court noted that the EPA estimated the cost of compliance at $10,339,000. The EPA, in its record of decision, set forth additional requirements that Olin must perform: "(1) pump and treat additional ground water, (2) upgrade and extend the existing caps over closed portions of Site 1, (3) increase monitoring of ground water, and (4) establish certain institutional controls."

[17] *Id.*

[18] *Id.* at 1506. The court also noted that Olin had committed itself to satisfying the requirements of the consent decree regardless of the court decision. However, Olin wished to fulfill those requirements under the direction of the Alabama Department of Environmental Management, rather than the EPA.

[19] *Id.*

[20] *Id.*

[21] *Id.* The court was referring to the Supreme Court's holding in *United States v. Lopez*.

[22] *Id.* at 1503.

[23] *Id.*

[24] 562 F. Supp. 1300 (N.D. Ohio 1983). Ohio brought an action under CERCLA to collect costs related to cleaning up a hazardous waste site. One of the defendants, Browning-Ferris Industries (BFI) argued that a presumption against the retroactive application of statutes exists and nothing in the language or legislative history of CERCLA overcame that presumption. *Id.* at 1302. For articles discussing CERCLA, retroactivity, and *Georgeoff*, *see* Stephan B. Presser, *Thwarting The Killing of the Corporation: Limited Liability, Democracy, and Economics*, 87 Nw. U. L. Rev. 148 (1992); 70 A.L.R. Fed. 329 (1984).

[25] *Georgeoff*, 562 F. Supp. at 1308. The court noted that procedural and remedial statutes have always been exempted from the general rule and have been applied retroactively. Ohio sought to bring CERCLA within this exception. The court rejected the cases cited by Ohio in support of this argument including *Howard v. Allen*, 368 F. Supp. 310 (D.S.C. 1973), *aff'd without opinion* 487 F.2d 1397 (5th Cir. 1973), *cert. denied*, 417 U.S. 912 (1974); *Bagsarian v. Parker Metal Co.*, 282 F. Supp. 766 (N.D. Ohio 1968).

[26] *Id.* (citing J. Sutherland, Statutes and Statutory Construction, § 41.04 (4th ed. 1975)).

[27] *Id.* at 1309. (citing Judge Sirica from *Windsor v. State Farm Insurance Co.*, 509 F. Supp. 342 (D.D.C. 1981)).

[28] *Id.* at 1309.

[29] *Id.* at 1309-1310.

[30] *Id.* at 1310.

[31] *Id.* The court noted in n.10 that "[t]he somewhat confused legislative development of the phrase "accepts or accepted" weakens the force of Ohio's argument." *Id.* In the Senate report on S.1480, the Senate version of CERCLA, this provision of the statute read "any person

there is no future tense verb in § 9607(a)(3), only past tense.[32] Thus, the court concluded that under Ohio's analysis § 9607(a)(3) could not apply to present or future conduct, a result which Congress could not have intended.[33] The court held that a more proper view was to read "accepts or accepted" from the perspective of a release.[34] By "construing the phrase accepts or accepted from the time of release, the word "accepted" will apply to all impositions of liability under CERCLA."[35]

In addition, the court reviewed other provisions to determine whether CERCLA applied to pre-enactment conduct.[36] The court stated, "CERCLA frequently refers to 'inactive' waste disposal sites, thereby indicating Congressional intent to focus on past, rather than future conduct."[37] The court also noted that, "CERCLA authorizes reimbursements from the Superfund for response costs arising before CERCLA's enactment, indicating that at least some of the provisions of CERCLA apply retroactively."[38] Finally, the court stressed that, "§ 9607(f)'s prohibition on recovery for injuries to natural resources occurring before CERCLA's enactment suggests, by implication that a similar prohibition does not apply to other response costs."[39] Despite these provisions, the court was still unwilling to declare that the presumption against retroactivity had been overcome.[40]

The court then examined the legislative history of CERCLA.[41] The court held that a general examination of the debates indicated Congressional intent to effect the complete clean up of existing hazardous waste facilities.[42] After considering all of the indications of legislative intent, the court concluded there was sufficient evidence of Congressional intent to make CERCLA's liability provisions apply

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who accepts any hazardous substances for transport." S.Rep. No. 848, 96th Cong., 2d. Sess. 31 (1980). The words "or accepted" do not appear in this report and do not appear in the Senate version of CERCLA until much later, when they were incorporated into a substitute form of the bill. *See* Cong.Rec. S14,719 (daily ed. Nov. 19, 1980). At that time, the addition of the words "or accepted" passed unnoticed—hardly the response which would be expected if Congress attached any significance to the addition." *Id.*

[32]*Georgeoff*, 562 F. Supp. at 1310.

[33]*Id.*

[34]*Id.*

[35]*Id.*

[36]*Id.* at 1311.

[37]*Id.* at n. 13. The court offered other support: *See e.g.* Preamble to CERCLA (purpose of CERCLA is "to provide for... the clean up of inactive hazardous waste disposal sites"); 42 U.S.C. 9601(20)(a)(iii) ("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.S.C.A.N. at 6119, 6125 ("It is the intent of the Committees...[to] establish a comprehensive response and financing mechanism to abate and control the vast problems associated with abandoned and inactive hazardous waste disposal sites."). *Id.*

[38]*Id.*

[39]*Id.* The court discussed this provision in n.15. In relevant part, 42 U.S.C. § 9607(f) provides that "[t]here shall be no recovery...[for damages to natural resources] where such damages and the release of a hazardous substance from which such damages resulted have occurred wholly before December 11, 1980." Ohio argued that, by implication, the reverse is true; liability will be imposed for other damages which occur wholly before the enactment of this act. *See* Note, 130 U. Pa. L. Rev. at 1241. As further support for its position, Ohio argued that its reading of this provision is in accordance with the general policy of the CERCLA to provide for liability among those individuals responsible for releases of hazardous substances. *Id.*

[40]*Id.*

[41]*Id.* at 1312. In n.16 the court noted that the most relevant statements on this issue took place during a colloquy on the floor of the House involving then Congressman David Stockman and Congressman Albert Gore, one of CERCLA's sponsors. In opposition to an amendment broadening the liability provisions of CERCLA, Congressman Stockman said, "I would like to suggest to the members of this House that some day down the road about a year from now they are going to receive a letter from a company in their district that has just received a $5 or $10 million liability suit from EPA that was triggered by nothing more than a decision of a GS-14 that some landfill, some disposal site somewhere, needed to be cleaned up and, as a result of an investigation that his office did, he found out that company in your district contributed a few hundred pounds of waste to that site thirty years ago. [And once EPA has] found that deep pocket, they will immediately go to court and sue that deep pocket, and then all the onus of the law, all of the burden will be on him to prove that he was not responsible for an outcome that occurred thirty years later as a result of this retroactive liability." Cong. Rec. H. 9466 (daily ed. Sept. 23, 1980). Congressman Stockman's position, which was also cited in the Senate debates, *Id.* at S.14,979 (daily ed. Nov. 24, 1980), and the popular press, *see Id.*, proved unpersuasive with the Members of Congress. *Id.*

[42]*Id.* "Senator Tsongas stated that "[t]he need for an emergency Federal response to deal with abandoned waste sites and chemical spills is real, and it is immediate." Cong. Rec. S.14,973 (daily ed. Nov. 24, 1980). Senator Danforth also stated that "[w]e have no time to lose. Hazardous wastes are produced daily; we cannot put them on hold while we dally through deliberation...I believe the clear consensus is that we must clean up abandoned hazardous dump sites as soon as possible..." *Id.* at S.14,977. *See also Id.* at S.14,971 (remarks of Sen. Bradley); *Id.* at S.14,977 (remarks of Sen. Dole): *Id.* at S.15,003 (remarks of Sen. Leahy and Chaffee): *Id.* at S.15,007 (remarks of Sen. Reigle); Cong. Rec. H.11,793 (daily ed. Dec. 3, 1980) (remarks of Rep. Vento); *Id.* at 11,798 (remarks of Rep. Eckhardt). *Id.*

retroactively, overcoming the traditional presumption against such an application.[43]

The court in *United States v. Shell Oil Company*[44] reached a similar conclusion favoring CERCLA's retroactive application. The defendant in *Shell* argued that CERCLA does not apply retroactively to allow for recovery of response costs incurred before CERCLA's enactment.[45] The *Shell* court adopted the same principles regarding retroactivity stated in *Georgeoff* and also reached similar conclusions regarding CERCLA's retroactivity based on an examination of its statutory provisions and legislative history.[46] The *Shell* court added to the analysis of CERCLA's retroactivity by noting that "CERCLA must be construed in light of previous statutes relating to environmental pollution, notably the Resource Conservation and Recovery Act of 1976("RCRA")."[47]

The *Shell* court noted that Congress adopted RCRA to deal with loopholes in environmental law regarding the disposal of hazardous wastes on land, but soon discovered that RCRA failed to solve all of the environmental problems.[48] The court found that CERCLA was enacted in response to these shortcomings and to provide for "the cleanup of inactive hazardous waste disposal sites."[49] The court stressed that part of the problem with RCRA was that "the Act is prospective and applies to past sites only to the extent that they are posing an imminent hazard."[50] In other words, pre-CERCLA law could not stop the ongoing environmental deterioration from waste dumps already in existence.[51] The court concluded that "the unavoidable retroactive nature of CERCLA, and Congress' decision in CERCLA to impose the cost of cleaning up hazardous waste sites on the responsible parties rather than on taxpayers, strongly indicates Congressional intent to hold responsible parties liable for pre-enactment government response costs."[52]

In addition to *Georgeoff* and *Shell*, a number of other federal decisions have directly addressed CERCLA's retroactivity, none of which have declined to apply CERCLA on retroactivity grounds.[53]

2. Retroactivity Under *Landgraf*

[43]*Id.* at 1314.

[44]605 F. Supp. 1064 (D. Colo. 1985). The United States filed an action against Shell under sections 104 and 107 of CERCLA to recover costs associated in responding to hazardous waste contamination allegedly caused by Shell at the Rocky Mountain Arsenal near Denver, Colorado. The U.S. also sought damages for the destruction and loss of natural resources at the arsenal. *Id.* at 1067.

[45]*Id.* at 1068. The court noted that three district courts had reached results supporting Shell's position: United States v. Northeastern Pharmaceutical and Chemical Co., 579 F. Supp. 823, 841-843(W.D. Mo. 1984); United States v. Wade, 20 E.R.C. 1849, 1850-51 (E.D. Pa. March 23, 1984); United States v. Morton-Thiokol, Inc., No. 83-4787 (D. N.J. July 2, 1984). The court stressed that the Supreme Court nor any other federal appellate court had addressed the retroactivity issue. *Id.* at 1069.

[46]*Id.*

[47]*Id.* at 1070. *See also* Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6901 et seq. The court quotes a report on RCRA from the House Committee on Interstate and Foreign Commerce to explain its purpose:

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 results 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, 94th Cong., 2d Sess. 4, reprinted in 1976 U.S.C.C.A.N. 6238, 6241-42.

[48]*Shell*, 605 F. Supp. at 1070.

[49]*Id.* at 1071. The court quotes from the Preamble to CERCLA. The court also quotes from the House Committee on Interstate and Foreign Commerce that is was their intent "to initiate and establish a comprehensive response and financing mechanism to abate and control the vast problems associated with abandoned and inactive hazardous waste disposal sites." (H.R. REP. No. 96-1016, 96th Cong., 2d. Sess. 22, reprinted in 1980 U.S.C.C.A.N. 6119, 6125 [to accompany H.R. 7020].

[50]*Shell*, 605 F. Supp. at 1071. *See* H. R. at 22, 1980 U.S.C.C.A.N. at 6125. For other cases that recognize CERCLA was enacted in response to the inadequacies of RCRA, *see* United States v. Northeastern Pharmaceutical and Chemical Co., 579 F. Supp. at 839; United States v. A & F Materials Company, Inc., 578 F. Supp. 1249, 1252 (S.D.Ill. 1984); United States v. Price, 577 F. Supp. 1103, 1109 (D. N.J. 1983); United States v. Reilly Tar & Chemical Corp., 546 F. Supp. 1100, 1112 n. 2 (D. Minn. 1983).

[51]*Shell*, 605 F. Supp. at 1072.

[52]*Id.* at 1073. The court noted that there are two separate, but related issues regarding CERCLA's retroactivity. The first issue is whether parties are liable for acts committed before CERCLA's enactment. The second issue, presented in *Shell*, was whether parties are liable for government response costs incurred before CERCLA's enactment. The court determined that once is was established that liability based on pre-CERCLA conduct does not offend due process, it was irrelevant, from a due process perspective, whether the government commenced cleanup before or after CERCLA's enactment.

[53]*Olin*, 927 F. Supp. at 1507. *See* United States v. Monsanto Co., 858 F.2d 160 (5th Cir. 1988); United States v. Northeastern Pharmaceutical & Chemical Co., 810 F.2d 726 (8th. Cir. 1986); HRW Systems v. Washington Gas, 823 F. Supp. 318 (D. Md. 1993); City of Philadelphia v. Stepan Chemical, 748 F. Supp. 283 (E.D. Pa. 1990); Kelly v. Solvent Col., 714 F. Supp. 1439 (W.D. Mich. 1989); O'Neil v. Picillo, 682

One of the most recent discussions of retroactivity came in response to questions regarding the Civil Rights Act of 1991.[54] In *Landgraf v. USI Film Products*, the Court stressed that, in dealing with the retroactivity of a statute, there are often apparent tensions between different canons of statutory construction.[55] The Court recognized that federal courts have struggled to reconcile two apparently contradictory statements found in the Court's decisions concerning the effect of intervening changes in the law.[56] Each statement is set forth as a general rule for "interpreting statutes that do not specify their temporal reach."[57] The first rule is that, "a court is to apply the law in effect at the time it renders its decision."[58] The second rule is that "retroactivity is not favored in the law" and that "Congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result."[59] The Court found it unnecessary to resolve this conflict in cases where the Congressional intent is clear.[60]

In the *Landgraf* case, the Court concluded that the Civil Rights Act of 1991 did not indicate any clear expression of intent so the Court was forced to focus on the apparent tension between the rules set forth for dealing with problems in the absence of Congressional instruction.[61] The Court began its discussion in *Landgraf* by noting that there was no tension between the holdings in *Bradley v. Richmond School Board* and *Bowen v. Georgetown University Hospital*.[62] In *Bradley*, the Court held that a statute authorizing the award of attorney's fees to civil rights plaintiffs applied to a case that was pending on appeal when the statute was enacted.[63] In *Bowen*, the Court held that the Department of Health & Human Services did not have authority to institute a rule that required hospitals to refund Medicare payments for services rendered before the enactment of the rule.[64] The *Landgraf* Court noted that its opinion in *Bowen* did not purport to overrule *Bradley* or limit its reach.[65]

Next, the Court noted that a presumption against retroactive legislation is deeply rooted in American jurisprudence.[66] Indeed, the anti-retroactivity principle is expressed in several provisions of the Constitution.[67] The *Landgraf* Court stressed, however, that the Constitution's restrictions are

F. Supp. 706 (D. R.I. 1988); United States v. Hooker Chemicals and Plastics, 680 F. Supp. 546 (W.D. N.Y. 1988); United States v. Dickerson, 640 F. Supp. 448 (D. Md. 1986); United States v. Ottati and Goss, Inc., 630 F. Supp. 1361 (D. N.H. 1985); Town of Boonton v. Drew Chemical, 621 F. Supp. 663 (D. N.J. 1985); United States v. Conservation Chemical Co., 619 F. Supp. 162 (W.D. Mo. 1985); United States v. Shell Oil, 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 Co., 653 F. Supp. 984 (D. S.C. 1984); United States v. Price, 577 F. Supp. 1103 (D. N.J. 1983); Ohio v. Georgeoff, 562 F. Supp. 1300 (N.D. Ohio 1983); United States v. Wade, 546 F. Supp. 785 (E.D. Penn. 1982). *Cf.* Aetna Cas & Sur. Co., Inc. v. Pintlar Corp., 948 F.2d 1507 (9th Cir. 1991); O'Neil v. Picillo, 883 F.2d 176 (1st. Cir. 1989); In the Matter of Penn Central, 944 F.2d 164 (3rd. Cir. 1991); United States v. Kramer, 757 F. Supp. 397 (D. N.J. 1991).

[54]*Landgraf*, 114 S. Ct. 1483 (1994).

[55]*Id.* at 1496.

[56]*Id.*

[57]*Id.*

[58]*Id.* (quoting Bradley v. Richmond School Bd., 416 U.S. 696, 711 (1974)).

[59]*Id.* (quoting Bowen v. Georgetown Univ. Hospital, 488 U.S. 204, 208 (1988)).

[60]*Id. See* Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827, 837 (1990) (where the Court held that the prejudgment interest statute in that case evinced clear Congressional intent that it was not applicable to judgment entered before its effective date).

[61]*Landgraf*, 114 S. Ct. at 1496.

[62]*Id.*

[63]*Id.*

[64]*Id.*

[65]*Id.*

[66] *Id.* at 1497. *See also supra* note 2 and accompanying text. The Court has applied the presumption against retroactivity to a wide range of cases, the largest group being those affecting contractual or property rights where predictability and stability are of prime importance. *See, e.g.*, United States v. Security Industrial Bank, 459 U.S. 70 (1982); Claridge Apartments Co. v Commissioner, 323 U.S. 141 (1944), *rev'd.*, 321 U.S. 759 (1942); United States v. St. Louis, S.F. & T.R. Co., 270 U.S. 1 (1926); Holt v. Henley, 232 U.S. 637 (1914); Union Pacific R. Co. v Laramie Stock Yards Co., 231 U.S. 190 (1913); Twenty Percent Cases, 20 Wall. 179 (1874); Sohn v. Waterson, 17 Wall. 596 (1873); Carroll v. Carroll's Lessee, 16 How. 275 (1854). The notion that statutes will not have retroactive effect absent language which requires that result is supported by a long line of cases. *See e.g.* Greene v. United States, 376 U.S. 149 (1964); White v. United States, 191 U.S. 545 (1903); United States v. Moore, 95 U.S. 760 (1878); Murray v. Gibson, 15 How. 421 (1854); Ladiga v. Roland, 2 How. 581 (1849).

[67]*Landgraf*, 114 S. Ct. at 1497. The Ex Post Facto Clause prohibits retroactive application of penal legislation. Article I, § 10 cl. 1 prohibits the States from passing retroactive legislation that impairs the obligations of contracts. The Takings Clause of the Fifth Amendment prevents government actors from taking private property unless for public use and for just compensation. Article 1, § 9-10 prohibits "Bills of Attainder" which prohibits legislatures from singling out persons for punishment of past conduct. Finally, the Due Process Clause protection of fair notice may be compromised by retroactive legislation. *Id.*

of a limited scope.[68] The Court noted that a requirement that Congress make its intention clear helps to establish that Congress has determined that the benefits of retroactivity outweigh any potential unfairness.[69] When deciding if a statute operates retroactively, the Court must ask whether the new provision attaches legal consequences to events that were completed before the new provision was enacted.[70] "The conclusion that a new rule operates retroactively comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event."[71]

The petitioner in *Landgraf* relied primarily on *Bradley*[72] and *Thorpe v. Housing Authority of Durkham*[73] to support her argument that the Court's ordinary interpretive rules support application of § 102 of the Civil Rights Act of 1991 to her case.[74] The Court rested its decision in *Bradley* "on the principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary."[75] Although this language seems to favor a presumption in favor of applying all new rules of law retroactively, the Court in *Landgraf* made it clear that *Bradley* did not alter the well-settled presumption against retroactivity.[76] The Court stressed that the attorney's fees provision in *Bradley* and the new hearing requirement in *Thorpe* did not resemble the cases in which the Court had applied the presumption against retroactivity.[77] In none of the Court's decisions that have relied upon *Bradley* or *Thorpe* has the Court expressed doubt of the traditional presumption against retroactivity.[78]

The *Landgraf* Court set forth a general rule for determining retroactivity: if a case implicates a federal statute enacted after the events in the suit, the court's first task is to determine whether Congress has expressly defined the statute's reach.[79] If Congress has done so, there is no need to look to judicial default rules.[80] If, however, the statute does not contain express language, the court must determine whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new rules with respect to transactions already completed.[81] If the statute would operate retroactively, the traditional presumption is that it does not govern absent clear Congressional intent that would favor such a result.[82]

The *Landgraf* Court recognized, as the petitioner argued, "that retroactive application of a new statute would vindicate its purpose more fully."[83] However, this consideration is not sufficient to rebut the presumption against retroactivity.[84] It is possible that a legislator who supported a bill might have opposed its retroactive application.[85] There was reason for the Court to believe that the omission from the 1990 version of the Civil Rights Bill of the express retroactivity provisions was a factor in the 1991 bill's passage.[86] The *Landgraf* Court concluded that there was no clear evidence of Congressional intent that § 102 of the Civil Rights Act should be applied

[68] *Id.* at 1498.

[69] *Id.*

[70] *Id.* at 1499.

[71] *Id.*

[72] 416 U.S. 696 (1974).

[73] 393 U.S. 268 (1969). In *Thorpe*, the Court held that an agency circular requiring a local housing authority to give notice and an opportunity to respond before evicting a tenant was applicable to an eviction commenced before the regulation was issued.

[74] *Landgraf*, 114 S. Ct. at 1502.

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

[76] *Landgraf*, 114 S. Ct. at 1503.

[77] *Id.* at 1504.

[78] *Id.*

[79] *Id.* at 1505.

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] *Id.* at 1507.

[84] *Id.* at 1508.

[85] *Id.*

[86] *Id.*

retroactively.[87]

B. The Validity of CERCLA under the Commerce Clause

1. The Commerce Clause pre-*Lopez*.[88]

Article I, § 8 of the Constitution provides that Congress shall have the power "[t]o regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes."[89] The Supreme Court's interpretations of the Commerce Clause have helped define the scope of federal power and the extent to which the federal government can dictate law and policy for the country.[90] In general, the interpretation of the Commerce Clause is examined by focusing on specific time periods in our history.[91] The period of 1888-1936 began with few restraints on federal power.[92] However, as case law evolved, the Court crept toward a concept of dual federalism.[93] The Tenth Amendment was used to define and limit the powers of Congress by reserving the regulation of some activities for the states.[94] In the early 1930's. the Supreme Court battled against the New Deal legislation and struck down major regulations and programs because the Court felt the Tenth Amendment committed the regulation of such activities to the states.[95] The Court felt these laws were not regulations of interstate transportation or the "stream" of commerce, and conclude that there must be a direct connection between regulated activity and interstate commerce.[96]

By the early 1940s, however. the Supreme Court began to interpret the Commerce Clause as a broad grant of power.[97] The Court accepted the proposition that the possible impact of an activity on commerce among the states brings it within this power.[98] The Court defines commerce among the states as what concerns more states than one.[99] The Justices defer to legislative choices so long as there is a rational basis upon which Congress could find a reasonable relation between its regulation and commerce.[100]

In 1978, in *City of Philadelphia v. New Jersey*,[101] the Supreme Court specifically addressed the Commerce Clause in relation to solid waste.[102] The Court began its analysis by noting that all objects of interstate trade merit Commerce Clause protection and none can be excluded from the definition of "commerce" as a preliminary matter.[103] In striking down a New Jersey statute prohibiting the importation of solid or liquid waste originated outside of New Jersey's borders. the Court held that the banning of even valueless waste implicates Constitutional protection.[104] In response to the New Jersey Supreme Court's question of whether the interstate movement of wastes was commerce within the meaning of the Commerce Clause the Court stated that "[a]ny doubts on that score should be laid to rest at the outset."[105]

2. The Commerce Clause under *Lopez*[106]

[87]*Id.* For recent cases discussing CERCLA's retroactivity in light of *Landgraf, see* The Ninth Ave. Remedial Group v. Fiberbond Corp., 946 F. Supp. 651 (N.D. Ind. 1996); Nova Chemicals, Inc. v. GAF Corp., 945 F. Supp. (E.D. Tenn. 1996); State of Nev. ex rel. Dept. of Transp. v. U.S., 925 F. Supp. 691 (D. Nev. 1996); Gould Inc. v. A & M Battery & Tire Service, 933 F. Supp. 431 (M.D. Pa. 1996); United States v. Alcan Aluminum Corp., 1996 WL 637559 (N.D.N.Y. 1996); Cooper Industries, Inc. v. Agway, Inc., 1996 WL 550128 (N.D.N.Y. 1996).

[88]*Lopez*, 115 S. Ct. 1624 (1995).

[89]U.S. CONST. Art. I § 8.

[90]NOWAK, JOHN E. & ROTUNDA RONALD D., CONSTITUTIONAL LAW, Hornbook Series, 5th ed. (St. Paul West 1995).

[91]*Id.* at 144.

[92]*Id.*

[93]*Id.*

[94]*Id.*

[95]*Id.* at 145.

[96]*Id. See, e.g.*, Panama Refining Co v. Ryan, 293 U.S. 388 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940).

[97]NOWAK, *supra* note 90, at 145. *See also supra* note 8 and accompanying text.

[98]NOWAK, *supra* note 90, at 145.

[99]*Id.*

[100]*Id.* There are three ways for something to come under federal commerce power. First, Congress can set the regulations regarding the permissibility of interstate travel if the law does not contravene a specific constitutional guarantee. Second, Congress can regulate any activity, including "single state" if it has a close relationship or effects commerce. Finally, Congress can regulate single state activities which otherwise have no effect on commerce if the regulation is necessary and proper to regulating commerce.

[101]437 U.S. 617 (1978).

[102]*Id.*

[103]*Id.*

[104]*Id.*

[105]*Id.* at 621.

[106]For a broad discussion of *Lopez*, *see* Donald H. Regan, *How to Think About the Federal Commerce Power and Incidentally Rewrite*

In *Lopez*, the Court once again faced a question concerning the scope of the Commerce Clause and the extent to which Congress can regulate activities of the states.[107] The Court noted that the modern-era precedents which have expanded Congressional power under the Commerce Clause confirm that Congressional authority is subject to outer limits.[108] The Court concluded that Congress may regulate intrastate activity if it has a substantial effect on interstate commerce.[109] The Court noted that is has identified three broad categories of activities that Congress may regulate under the Commerce Clause.[110] First, Congress has the authority to regulate the use of channels of interstate commerce.[111] Second, Congress may "regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities."[112] Finally, Congress has the authority to regulate those activities that have a substantial relation to interstate commerce.[113] The Court admitted in reference to the third category that case law had been unclear whether an activity must "affect" or "substantially affect" interstate commerce in order to be valid under the Commerce Clause.[114] The Court concluded that the proper test was to require an analysis of whether the activity "substantially affects" interstate commerce.[115] As part of the evaluation of constitutionality under the Commerce Clause the Court considered legislative findings regarding the effect on interstate commerce.[116] Based on this analysis, the Court concluded that Congress had exceeded its constitutional authority under the Commerce Clause by enacting the Gun-Free Schools Zone Act.[117]

IV. Instant Decision

1. CERCLA's Retroactivity

In *United States v. Olin*, the district court stressed that the issue of CERCLA's retroactivity had not been directly addressed by the Eleventh Circuit.[118] The court acknowledged that other federal courts have applied CERCLA retroactively, but noted that these decisions were handed down prior to the Court's decision in *Landgraf*.[119] The *Landgraf* analysis was set forth by the district court as the controlling standard for determining retroactivity.[120]

Therefore, the Olin court began by determining whether Congress had expressly defined CERCLA's reach. The court found that CERCLA contains no language explicitly stating that it is retroactive.[121] The court also stressed that CERCLA contains almost no legislative history from which an intent could be inferred.[122] The court felt that the lack of legislative history was attributable to the delicate nature of the compromise that lead to the bill's passage.[123] The court also concluded that the precise issue of retroactivity had not been addressed in Congressional

United States v. Lopez, 94 MICH. L. REV. 554 (1995).

[107]*Lopez*, 115 S. Ct.. at 1626. At issue in *Lopez* was the Gun-Free School Zones Act of 1990, in which Congress made it a federal offense "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone." *Id.* at 1626. (citing 18 U.S.C. § 922(q)(1)(A) (1988 ed., Supp. V). The Court held that Congress had exceeded its authority to regulate commerce because the Act did not regulate a commercial activity nor did it contain a requirement that the possession be connected in any way to interstate commerce. *Id.* at 1625.

[108]*Id.* at 1628.

[109]*Id. See, e.g.*, Hodel v. Virginia Surface Mining & Reclamation Ass'n., Inc., 452 U.S. 264 (1981); Perez v. United States, 402 U.S. 146 (1971); Katzenback v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

[110]*Lopez*, 115 S. Ct. at 1629.

[111]*Id.*

[112]*Id.*

[113]*Id.*

[114]*Id.* at 1630.

[115]*Id.*

[116]*Id.* at 1631. The Court noted that Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce.

[117]*Id.* at 1634. The Court concluded that § 922(q) of the Act was a criminal statute that had nothing to do with commerce. The court also noted that "§ 922(q) contained no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession affects interstate commerce." *Id.* at 1631.

[118]*Olin*, 927 F. Supp. at 1507. The Eleventh Circuit in dicta in *Virginia Properties Inc. v. Home Ins. Co.*, 74 F.3d 1131, 1132 (11th Cir. 1996) did refer to CERCLA as being retroactive.

[119]*Id.*

[120]*Id.*

[121]*Id.* at 1512.

[122]*Id.* at 1513.

[123]*Id.* at 1514.

debate.[124] "Given that the language—express or otherwise—and the legislative history—broadly and narrowly understood—fail to demonstrate a clear congressional intent for retroactivity, *Landgraf* requires that the presumption against retroactivity be applied if the statute is one to which that presumption applies."[125]

Thus, the court next determined whether CERCLA would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new rules with respect to transactions already completed. The court felt that applying CERCLA liability retroactively was more egregious than the compensatory liability which the Court refused to extend in *Landgraf*.[126] The court stressed that there was nothing in the legislative history that demonstrated that § 107(a) and 106(a) of CERCLA were the sorts of provisions that must be interpreted as retroactive to render them effective.[127] The court stated that the decision in *Georgeoff* did exactly what *Landgraf* disapproved.[128] In addition, the *Shell* and *Northeastern Pharmaceutical* cases, which cite *Georgeoff* with approval, demonstrated little regard for the presumption against retroactivity.[129] For these reasons, the court felt CERCLA, as connected to the present case, was not retroactive.[130]

2. Validity of CERCLA under the Commerce Clause

The second issue that the court addressed was the extent of Congressional power in relation to the Commerce Clause. The court recognized that the Supreme Court's interpretation of the Commerce Clause had greatly expanded over the last two centuries.[131] The impetus for the court's analysis was a focus on the Supreme Court's recent decision in *United States v. Lopez*.[132]

The *Olin* court began its discussion of *Lopez* by noting that the majority had reopened a debate once thought foreclosed.[133] The court agreed with members of the dissent in *Lopez* that the majority's holding was radical.[134] The court restated *Lopez's* categorization of the Commerce Clause cases into three areas:[135]

> First, Congress may regulate the use of the channels of interstate commerce... Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities...Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relationship to interstate commerce.[136]

Like *Lopez*, the *Olin* case involved only the third category of cases.[137] The court stressed that in discussing the third category, the Supreme Court was not focusing on activities which have a substantial effect on interstate commerce, but rather regulating economic activity which has a substantial effect on interstate commerce.[138]

The court stressed that the *Lopez* Court rejected the government's argument that the "cost of crime" and "national productivity" placed the Gun-Free Schools Act of 1990 within Congress' commerce power.[139] The

[124] *Id.* (quoting *Georgeoff*, 562 F.Supp. at 1311).

[125] *Id.* at 1516.

[126] *Id.* at 1517.

[127] *Id.* at 1519.

[128] *Id.* at 1509. "The premises for the decision in *Georgeoff* were disapproved in and are no longer tenable after *Landgraf*. As a result, Georgeoff and the cases which rely on its analysis, —and which do not do their own analysis—cannot be considered persuasive." *Id.*

[129] *Id.* at 1509. The court felt that the *Shell* court's conclusion that CERCLA is "unavoidably retroactive" based on the general purpose and scheme of CERCLA was not sufficient to rebut the presumption against retroactivity. "Other than its discussion of 'general purpose and scheme,' *Shell Oil* does not explain precisely what overrides the presumption against retroactivity." In regards to the *Northeastern* case the court stated, "the case treats the presumption itself rather lightly, devotes only one sentence to the statutory language, relies on *Shell Oil* and *Georgeoff* among other cases, and offers one paragraph about the statutory scheme."

[130] *Id.*

[131] *Id.*

[132] *Id.* at 1530.

[133] *Id.*

[134] *Id.*

[135] *Id.* at 1531.

[136] *Id.* (quoting *Lopez*, 115 S. Ct. at 1629-30).

[137] *Id.*.

[138] *Id.* "In requiring that the object of the regulation, which "substantial affects" interstate commerce, must itself be "economic activity," (i.e., commerce) rather than merely "activities," the Court is being more faithful to Chief Justice Marshall's explanation in *Gibbons v. Ogden*."

[139] *Id.*

Supreme Court rejected these theories because under such rationale Congress could regulate any activity, regardless of how tenuously the activities related to interstate commerce.[140] The court also felt that *Lopez* was noteworthy for what it did not say.[141] The court noted that the Supreme Court easily could have upheld the Gun-Free Schools Act of 1990 by holding that guns were articles of commerce, or that Congress had a rational basis for concluding that the activity sufficiently affected interstate commerce.[142] The fact that the Supreme Court did not enforce the act on these grounds was significant to the *Olin* court.[143]

In applying *Lopez* to CERCLA, the court stressed that Lopez requires, "1) that the statute itself regulate economic activity, which 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."[144] The court found it doubtful that the object of regulation at issue in *Olin* was "economic activity" or commerce, as the terms were used in *Lopez*.[145]

The court also focused on the fact that the present suit was seeking costs associated with the clean-up of real property.[146] The court stated, "It is clear to this court that the law regulating real property has been traditionally a local matter falling under the police power of the states."[147] The court noted that Congress may regulate economic activity that falls within local police power, but may not exercise a general police power.[148] Consequently, the court concluded, "It appears to this court that CERCLA generally represents an example of the kind of national police power rejected by *Lopez*."[149] However, the court felt that it was unnecessary to reach this conclusion because CERCLA, as applied in the present case, failed to meet the second criteria of *Lopez*.[150]

The court held that even if CERCLA met the first test of regulating intrastate economic activity which substantially affected interstate commerce, it must also be shown that the statute included a "jurisdictional element which would ensure, through case-by-case inquiry, that the statute in question affects interstate commerce."[151] The court determined that nothing in CERCLA provided for such an inquiry, but even assuming there was such a provision, the inquiry in the present case demonstrated that the activity at issue had virtually no effect on interstate commerce.[152] The court stated:

> As demonstrated in the remedial investigative report, any contaminants at Site 1 affect groundwater mostly by migrating through the locally-contained alluvial aquifer. This aquifer lies atop a miocene aquifer. The remedial-investigation report indicates there is little or no migration between the two aquifers, and there is no evidence that contaminants at Site 1 travel across state lines.[153]

On these grounds, the court held that the federal government had no constitutional authority to do what it proposed at the site.[154] Therefore, the court declined to sign or enter the proposed consent decree and dismissed the government's action with prejudice.[155]

V. Comment

The decision by the district judge in the *Olin* case has created a wealth of interest and controversy. The *Olin* decision stands as the lone case declaring both that CERCLA is not retroactive and that it is unconstitutional in that it violates the Commerce Clause.[156]

Although the *Olin* court applied *Landgraf* and *Lopez* in order to reach his conclusions, the cases were misapplied and the analysis of the issues

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[140] *Id.*

[141] *Id.* at 1532.

[142] *Id.*

[143] *Id.*

[144] *Id.*

[145] *Id.*

[146] *Id.* at 1533.

[147] *Id.*

[148] *Id.*

[149] *Id.*

[150] *Id.*

[151] *Id.* (quoting *Lopez*, 115 S. Ct. at 1631).

[152] *Id.*

[153] *Id.*

[154] *Id.*

[155] *Id.*

[156] At the conclusion and submission of this article the Eleventh Circuit decided the appeal of the Olin case, reversing the decision of the district court, United States v. Olin Corp., 107 F.3d 1506 (11th Cir. 1997). The Eleventh Circuit held that: (1) there was no Commerce Clause violation in application of CERCLA and (2) CERCLA's response cost liability scheme applies retroactively to disposals occurring

was selective and narrow.

The *Olin* court made much of the fact that the case law upholding CERCLA was handed down before the Supreme Court's decisions in *Landgraf* and *Lopez*.[157] However, the issue of CERCLA's retroactivity, in light of the Supreme Court's decision in *Landgraf*, was directly addressed in *Nevada v. United States*.'[158] The decision in *Nevada* was decided a week prior to *Olin*.[159] In addition, CERCLA's constitutionality in light of the *Lopez* case was evaluated in *United States v. NL Indus., Inc.*[160] A comparison of these two cases with *Olin* provides an excellent framework for examining and commenting on the weaknesses of *Olin*.

1. Retroactivity

In regard to retroactivity, the major reasoning behind the *Olin* opinion was a belief that CERCLA's express and implied statutory language did not demonstrate clear legislative intent for retroactivity as required by *Landgraf*.[161] A major argument for CERCLA's retroactivity has been that Congress did implicitly authorize retroactive application of CERCLA by affirmatively limiting retroactive application of damages to natural resources.[162] This negative implication argument was adopted in *Shell* and by the *Nevada* court.[163] The *Nevada* court conceded that in *Landgraf* the Supreme Court rejected the negative implication argument asserted in that case; however, the *Nevada* court stressed that *Landgraf* did not preclude all future uses of a negative inference analysis in support of retroactive intent.[164] The *Nevada* Court also stressed that cases like *Shell* applied the traditional presumption against retroactivity, but found sufficient evidence of Congressional intent that outweighed the presumption.[165]

The *Olin* court rejected the analysis set forth in *Georgeoff*, *Shell* and *Northeastern*.[166] The court dismissed the arguments that the legislative history and non-express statutory language of CERCLA provided enough evidence to overcome the traditional presumption against retroactivity.[167] In regard to legislative history, the *Olin* court simply declared that CERCLA had almost no legislative history.[168] However, this conclusion ignored the number of references made by members of both political parties as highlighted in *Georgeoff* and *Shell*, which do support the conclusion that CERCLA was intended to be applied retroactively.

Furthermore, the *Olin* court ignored the importance of the reasons behind CERCLA's enactment. Both the

prior to CERCLA's enactment. In regards to the Commerce Clause challenge, the court stated that *Lopez* did not alter the constitutional standard for federal statutes regulating intrastate activities. The proper test is whether the regulated activity substantially affects interstate commerce. The court also noted that Congress can maintain the constitutionality of its statutes by including a jurisdictional element which would ensure that the activity in question affects interstate commerce; however, when Congress fails to do so, the courts must determine independently whether the statute regulates "activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affect interstate commerce." *Id.*, (citing *Lopez*, 115 S. Ct. at 1631). The court criticized the district court's Commerce Clause analysis for two reasons. First, the district court indicated that *Lopez* requires a statute to regulate economic activity directly to satisfy the Commerce Clause. However, under *Lopez*, a statute will satisfy the Constitution if it regulates an activity, whatever its nature, "that arise[s] out of or [is] connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." 115 S. Ct. at 1631. The court also rejected the district court's conclusion that *Lopez* requires every statute to contain a jurisdictional statement. Under *Lopez*, a statute without such a statement still would stand under the Commerce Clause, if the law satisfied the substantial effects test. The court held that CERCLA is valid as applied in this case, because it regulates a class of activities that substantially affects interstate commerce. "In our view, the disposal of hazardous waste at the site of production, or "on-site," constitutes the narrowest, possible class." *Olin Corp.*, 107 F.3d at 1510.

In addressing the retroactivity issue, the court stated that the district court's ruling not only conflicts with the Eleventh Circuit's recent description of CERCLA, but also is contrary to all other decisions on point. The court conducted an analysis of CERCLA's language, structure and legislative history, and found clear Congressional intent that the statute impose retroactive liability for cleanup. *Id.*

For these reasons, the Eleventh Circuit Court of Appeals reversed the trial court, and remanded for further proceedings consistent with its opinion. *Id.*

[157]*Olin*, 927 F. Supp. at 1507.

[158]925 F. Supp. 691 (D. Nev. 1996). In *Nevada*, the Nevada Department of Transportation and others brought an action under CERCLA against the owners of property whose predecessors in interest were allegedly responsible for dumping hazardous materials on property which Plaintiff had acquired as a highway right-of-way. The alleged contamination occurred many years before CERCLA's effective date, therefore, a retroactive application of CERCLA was required to establish liability against the Defendants. *Id.* at 691-692.

[159]*Id.* at 691.

[160]936 F. Supp. 545 (S.D. Ill. 1996). It should be noted that this opinion was handed down after the *Olin* decision.

[161]*Olin*, 927 F. Supp. at 1512.

[162]*Nevada*, 925 F. Supp. at 693.

[163]*Id.*

[164]*Id.*

[165]*Id.* at 695.

[166]*Olin*, 927 F. Supp. at 1509.

[167]*Id.*

[168]*Id.*

Shell and *Nevada* courts stressed the importance of CERCLA in responding to the problems associated with existing hazardous waste dumps which were not addressed by RCRA. The *Nevada* court concluded that "consistent with CERCLA's statutory scheme and embedded in the statute is the undeniable purpose of reaching past conduct and imposing liability, in the form of response costs, against those parties responsible for past environmental contamination."[169]

A fair and objective analysis of CERCLA with regard to its statutory language, legislative history and indeed its entire purpose indicates that it is to have retroactive effect. The *Olin* court selectively addressed the evidence in favor of retroactivity and reached a conclusion based on a narrow view of *Landgraf*.

It is important, as the *Landgraf* court stressed, to apply the presumption against the retroactive application of statutes. If Congress intends for a statute to affect conduct completed in the past, then Congress should specify the statute's reach. The failure of Congress to provide for clarifying language in CERCLA has been rightly criticized.[170] However, as noted in *Landgraf*, where there is clear evidence of Congressional intent, the traditional presumption against retroactivity can be overcome. Based on the evidence set forth in cases both before and after *Landgraf*, there is sufficient evidence to establish Congressional intent to apply CERCLA retroactively.

2. Commerce Clause

The *Olin* court devoted most of its analysis to the retroactivity issue. However, the court dealt a second blow by holding that under the present set of facts, CERCLA violated the Commerce Clause under the Supreme Court's interpretation in *Lopez*.

The *Olin* court's decision that CERCLA violated the Commerce Clause was based on the fact that CERCLA contained no jurisdictional element which would ensure through a case-by-case inquiry that the statute affects interstate commerce.[171] In addition, the *Olin* court found it doubtful that the object of the regulation in the *Olin* case was economic activity as referred to by *Lopez*. In contrast, the *NL Industries* court felt that improper disposal of hazardous substances is an economic activity.[172] The *Olin* court based its conclusion on the fact that the issue in *Olin* was a real property question falling under the police power of the states.[173] The court also felt that the contamination was confined to a local area and would not cause any contamination affecting interstate commerce.[174]

The *Olin* court focused on the significance of the *Lopez* decision as evidence that the Supreme Court is ready to halt the expansion of Congressional commerce power. Although *Lopez* may be a dramatic opinion, the Supreme Court specifically reviewed its prior commerce clause jurisprudence and upheld a variety of Congressional Acts as having substantially affected interstate commerce.[175]

In addition, the *Olin* court's conclusion that CERCLA is unconstitutional because it does not contain a jurisdictional statement, which would ensure through a case-by-case inquiry that the statute affects interstate commerce, is a misconstruction of *Lopez*. The *Lopez* court specifically stated that, "Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce."[176] If such a jurisdictional statement had been required, the *Lopez* court would not have made an inquiry into the legislative findings related to interstate commerce.[177] As previously noted, the Supreme Court has specifically dealt with the issue of solid waste as an article of commerce and has specifically held that even valueless waste implicates Constitutional protection.[178] The disposal of waste, even if generated entirely within the borders of one state, affects interstate commerce, and thus is subject to the Commerce Clause.[179]

[169] *Nevada*, 925 F. Supp. at 704

[170] *Id.* at 702. The *Nevada* court noted that CERCLA had received well-deserved criticism for the absence of an express retroactivity provision.

[171] *Olin*, 927 F. Supp. at 1532.

[172] *NL Indus.*, 936 F. Supp. at 563. "Pollution of surface water and groundwater affects the fishing industry, agriculture, livestock production, recreation, and domestic and industrial water supplies. The consequences of clandestine waste dumps have been dramatically demonstrated in places such as Love Canal and Times Beach, Missouri. In sum, CERCLA regulates economic activities which have a substantial affect on interstate commerce."

[173] *Olin*, 927 F. Supp. at 1532.

[174] *Id.*

[175] *NL Indus.*, 936 F. Supp. at 556. *See e.g.*, Hodel v. Virginia Surface Mining and Reclamation Assoc., 452 U.S. 264 (1981) (regulation of coal mining); Perez v. United States, 402 U.S. 146 (1971) (intrastate extortionate credit transactions - loan sharking); Katzenback v. McClung, 379 U.S. 294 (1964) (restaurants utilizing substantial interstate supplies); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (inns and hotels catering to interstate guests); Wickard V. Filburn, 317 U.S. 111 (1942) (production and consumption of home-grown wheat).

[176] *Lopez*, 115 S. Ct. at 1631.

[177] *NL Industries*, 936 F. Supp. at 560.

[178] *City of Philadelphia*, 437 U.S. at 617.

Based on the findings of Congress regarding CERCLA, the comprehensive nature of CERCLA's statutory scheme, and prior Supreme Court decisions upholding environmental legislation as substantially affecting interstate activity, I do not think it can be said that Congress has clearly exceeded its commerce power.[180]

VI. Conclusion

The decision in *Olin* has created much interest in the validity of CERCLA. CERCLA is an important piece of legislation in the overall scope of federal environmental legislation. Therefore, it is frightening to many that it could be destroyed or limited in its application. The concerns raised by the *Olin* court regarding retroactivity and the Commerce Clause could have far reaching implications on a variety of federal statutes beyond CERCLA. The stage has been set for perhaps the Supreme Court to clarify the issues of retroactivity and the reach of Congressional power under the Commerce Clause.

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[179] *Id.*

[180] For another recent case specifically rejecting the Olin court's analysis, *see* Cooper Indus., Inc. v. Agway, Inc. 1996 WL 550128 (N.D.N.Y. Sept. 23, 1996). For further criticism of the Olin opinion, *see* MEALEY'S LITIGATION REPORT: SUPERFUND, June 27, 1996, *House Commerce Committee Democrats Criticize U.S. v. Olin Decision.*