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Reconsidering CERCLA Retroactivity After
_Landgraf v USI Film Products_

_Nicole M. McGinnis†_

Congress hurriedly enacted the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA")\(^1\) in the closing days of a lame-duck Congress and in the wake of the Love Canal and Valley of the Drums scandals. Unfortunately, the haste led to more than much-needed legislation: it led to the enactment of a confusing bill whose provisions would be hotly contested and difficult to interpret. After a decade and a half of interpretation and application of CERCLA, new confusion exists concerning the reach of the statute's provisions mandating the cleanup of hazardous waste sites and recovery of response costs from polluters. Until recently, courts agreed that the government and private parties could use CERCLA to impose liability retroactively.\(^2\) Lower federal courts consistently held that Section 107(a),\(^3\) which makes individuals involved in the release of hazardous substances liable for response costs of the cleanup, applies to the disposal of toxic waste prior to CERCLA's enactment.\(^4\)

In 1994, the Supreme Court articulated its standards for retroactive application of statutes in _Landgraf v USI Film Products_,\(^5\) arguably changing the accepted analytical framework for determining whether to apply a statute retroactively. _Landgraf_ requires a second look at CERCLA's application. The principles enunciated in _Landgraf_ may leave CERCLA vulnerable to important challenges as to its previously assumed retroactive application. On this basis, a federal district court in Alabama recently

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\(^2\) See _Gould, Inc. v A & M Battery & Tire Service_, 933 F Supp 431, 438 (M D Pa 1996) (stating that only one federal district court in the history of CERCLA's existence had not applied CERCLA provisions retroactively).

\(^3\) 94 Stat at 2781, codified at 42 USC § 9607(a). Commentators commonly refer to CERCLA provisions by their sections in the original act. To maintain consistency, I will do so as well in the text. Hereinafter, all citations in the notes will be to the codification for ease of reference.

\(^4\) See, for example, _Brown v Georgeoff_, 562 F Supp 1300, 1302-14 (N D Ohio 1983).

\(^5\) 511 US 244 (1994).
declined to apply CERCLA liability retroactively.\(^6\) Although the Eleventh Circuit recently overturned the Alabama district court's decision,\(^7\) the lower court's retroactivity analysis presented compelling arguments that may foster new confusion and dissensus among the courts.

Retroactive statutes are disfavored in the United States, as evidenced by constitutional provisions such as the Due Process Clause,\(^8\) the Takings Clause,\(^8\) and the prohibition of ex post facto laws.\(^10\) When no clear evidence of congressional intent exists to the contrary, courts must presume that laws do not apply retroactively.\(^11\) CERCLA contains no express provision requiring retroactive application of response costs, and the legislative history is ambiguous, with no committee or conference reports to guide interpreters.\(^12\) While the Alabama district court decision was an outlier and has been reversed by the Eleventh Circuit, it raises serious issues that the courts need to address. Courts should not sidestep their judicial obligation under \textit{Landgraf} to scrutinize retroactive statutory provisions.

This Comment will argue that courts may not apply CERCLA retroactively. Part I outlines the caselaw applying Section 107 prior to the 1994 \textit{Landgraf} decision. Part II explains the holding of \textit{Landgraf} and recent judicial opinions that consider CERCLA liability in light of \textit{Landgraf}. Finally, Part III discusses the implications of \textit{Landgraf} for interpreting CERCLA in the future.

I. CERCLA CASELAW PRIOR TO \textit{LANDGRAF v USI FILM PRODUCTS}

Until recently, federal courts consistently have applied CERCLA liability retroactively, imposing liability upon those

\(^6\) \textit{United States v Olin Corp.}, 927 F Supp 1502 (S D Ala 1996).

\(^7\) \textit{United States v Olin Corp.}, 107 F3d 1506 (11th Cir 1997).

\(^8\) US Const, Amend V; US Const, Amend XIV, § 1.

\(^9\) US Const, Amend V.

\(^10\) US Const, Art I, § 9, cl 3; US Const, Art I, § 10, cl 1.


\(^12\) See \textit{United States v Price}, 577 F Supp 1103, 1109 (D NJ 1989); \textit{Georgeoff}, 562 F Supp at 1311 (stating that "the precise issue of retroactivity . . . was not addressed in the Congressional debates"); Blake A. Watson, \textit{Liberal Construction of CERCLA Under the Remedial Purpose Canon: Have the Lower Courts Taken a Good Thing Too Far?}, 20 Harv Envr L Rev 199, 272 (1996).
involved with the disposal of hazardous wastes long before the enactment of the statute in 1980. While courts consistently have applied CERCLA retroactively, their rationales for doing so have been inconsistent. Courts have articulated multiple reasons, in different combinations, for applying CERCLA retroactively.

A. Liability for Parties Responsible for Waste Sites Created Prior to the Enactment of CERCLA is Not Retroactive Liability.

One rationale adopted in support of pre-enactment liability is that CERCLA response costs may be imposed retroactively because the costs are not, in fact, retroactive. While the conduct that leads to the liability may have occurred before the enactment, the harm still exists post-enactment, much like a case of a continuing nuisance. CERCLA is not retroactive because it governs, in a sense, current wrongs. As one court put it, "A statute that attaches liability to present conditions stemming from past acts does not necessarily have retroactive effects..." The argument that CERCLA is not retroactive because it remedies current and continuing harms has not been widely followed. Only one court has adopted this view.

B. CERCLA'S Language Evidences Congressional Intent to Reach Pre-Enactment Conduct

Courts use two textual arguments to support the retroactive application of CERCLA. First, courts argue that the language of CERCLA includes past tense verbs and conditions, and therefore covers past actions. Second, courts offer an argument based on negative implication: because the CERCLA provisions dealing with natural resources contain express statements that they do not apply retroactively, the remainder of the CERCLA provisions which lack such prospective-only statements cannot be similarly limited.

The first textual argument courts make in support of retroactive application of CERCLA is that the use of the past tense in

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13 See United States v South Carolina Recycling & Disposal, Inc., 653 F Supp 984, 997-98 (D SC 1984) (holding, in the alternative, that even if the statute were considered to be retroactive, the statute would satisfy the constitutional requirements of due process).
14 Id at 996.
15 Id at 984.
16 42 USC §§ 9607(f), 9611(d)(1).
the statute shows congressional intent to reach pre-enactment conduct. The Eighth Circuit has noted,

it is manifestly clear that Congress intended CERCLA to have retroactive effect. The language used in the key liability provision, CERCLA § 107, . . . refers to actions and conditions in the past tense: ‘any person who at the time of disposal of any hazardous substances owned or operated,’ ‘any person who . . . arranged with a transporter for transport for disposal,’ and ‘any person who . . . accepted any hazardous substances for transport . . .’.18

Courts have been ambivalent regarding how much weight to accord the past-tense verbs, however, and Section 107(a)(4) seems to require prospective-only application through its use of the verb “shall.”20 Furthermore, Section 107(a)(3) indicates retroactive-only application, making one who “arranged” but not “arranges” for disposal liable for response costs, an effect Congress surely did not intend. Due to the inconsistency of verb tenses in Section 107’s language, courts are uncomfortable relying on verb tense to decide whether to apply CERCLA retroactively. As one court noted, the past-tense and future-tense verb arguments “in effect [] cancel each other.”22 The court thus concluded that “congressional intent to either impose or withhold liability for response costs incurred before CERCLA cannot be divined from the verb tenses in § 107(a).”23 Ultimately, courts tend to de-emphasize the verb-tense argument, but they like to mention it nonetheless.

Courts also make a textual argument based on negative implication in order to justify imposing retroactive liability despite the lack of an express provision in the statute. Section

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17 See, for example, United States v Northeastern Pharmaceutical & Chemical Co., Inc., 810 F 2d 726, 732-33 (8th Cir 1986).
18 Id (citations omitted).
20 Section 107(a)(4) provides that “any person who accepts or accepted any hazardous substances . . . shall be liable . . . ” 42 USC § 9607(a)(4). See also Shell Oil, 605 F Supp at 1073.
21 Section 107(a)(3) holds liable “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 . . . .” 42 USC § 9607(a)(3).
22 Shell Oil, 605 F Supp at 1073.
23 Id.
107(a) mentions no time limitations on recovery of response costs, while Sections 107(f) and 111(d) allow liability for natural resource damages to attach only to acts occurring after the enactment of CERCLA. Because Section 107(a) includes no such limiting provision, courts argue that Congress did not intend to limit its reach to post-enactment conduct. If CERCLA provisions that are silent as to retroactivity are already limited in their application, then "the limiting provisions of Sections 107(f) and 111(d) would be mere surplusage. In order to give meaning to these provisions, one must assume that liability for other damages... is not so limited." Similarly, Congress, knowing of the presumption against retroactivity in statutory interpretation, included the prospective-only limitation in Sections 107(f) and 111(d) because the presumption against retroactivity had been rebutted in the remainder of the statute's provisions.

C. Retroactivity by Reason of CERCLA's Legislative History and Purpose

When references to the textual provisions of the statute do not resolve ambiguity, courts often turn to legislative history. Looking at the stated purpose and scheme of CERCLA, the courts typically find clear congressional intent that the statute be applied retroactively. Nevertheless, courts admit that "[t]he legislative history of CERCLA is very difficult to follow." Relatedly, courts also claim that applying CERCLA retroactively more fully vindicates the remedial purpose behind the statute. Considering the amount of money in the Superfund established to clean up disposal sites, courts argue that congressional intent to clean up sites already in existence could not be satisfied only by using Superfund money; therefore, private party pre-enactment liability is required. According to this argument, CERCLA's underlying purpose would not be fulfilled unless courts impose retroactive liability upon private parties.

24 Compare 42 USC § 9607(a) with 42 USC §§ 9607(f), 9611(d).
25 Shell Oil, 605 F Supp at 1076.
26 Id at 1075-76.
27 Northeastern Pharmaceutical, 810 F2d at 737.
28 See 42 USC § 9604(c)(3). The "Superfund" is a trust fund, initially totalling $1.6 billion, designated to pay cleanup costs where responsible parties could not.
29 See Georgeoff, 562 F Supp at 1313 ("At the time CERCLA was enacted, Congress was aware that the costs of the clean up [sic] it envisioned would greatly exceed the amount of the Superfund.")
30 Id.
II. Landgraf v USI Film Products and Its Effect on Judicial Interpretation of CERCLA Liability

A. The Reasoning of Landgraf v USI Film Products

In 1994, the Supreme Court decided Landgraf v USI Film Products, a Title VII sexual harassment suit. While dismissal of the plaintiff's Title VII claim was pending on appeal before the Fifth Circuit, President Bush signed the Civil Rights Act of 1991, which allowed new remedies for Title VII plaintiffs. Now, besides equitable relief, plaintiffs could recover punitive and compensatory damages for a Title VII violation, as well as have their suit heard before a jury. In Landgraf, the Supreme Court had to decide between two competing canons of construction: "the rule that 'a court is to apply the law in effect at the time it renders its decision';" or the interpretive axiom that "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires the result." The Court admitted that earlier Supreme Court precedent may have been ambiguous on what interpretive default rule to apply when there is no express congressional guidance in either a statute's text or legislative history. With the hope of providing better guidance, however, the Court set out a clear default rule for courts to follow when there exists no clear evidence of congressional intent for retroactive application of a statute: a presumption in favor of non-retroactivity.

The petitioner in Landgraf relied on the effective date provision of the 1991 Act as one indicator of congressional intent to apply the statute retroactively. The effective date provision of the 1991 Act, Section 402(a), states, "Except as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment." The petitioner pointed to Sections 109(c) and 402(b) that specifically provide for prospective application. Relying upon two canons of construction, expressio unius est exclusio alterius and the canon against surplusage, the peti-

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51 511 US 244 (1994).
54 Id, quoting Bowen v Georgetown University Hospital, 488 US 204, 208 (1988).
55 Id at 261.
56 Id at 280.
57 105 Stat at 1099.
58 § 109(c), 105 Stat at 1078; § 402(b), 105 Stat at 1099.
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The petitioner argued that the clause "[e]xcept as otherwise specifically provided" must refer to Section 109(c) and 402(b), or else it would be mere surplusage. Moreover, because Congress carved out specific instances when the statute would apply prospectively, the petitioner urged the court to assume that the remainder of the provisions would apply retroactively.

The Court found both of the petitioner's arguments unpersuasive. First, the Court found that the effective date provision is "most unlikely... to carry the critically important meaning petitioner assigns to it," because Congress has demonstrated in the past that it knows how to specifically reach pre-enactment conduct when it chooses to do so. The Court cited Congress's amendment of Title VII in the Equal Employment Opportunity Act of 1972, where Congress provided, "The Amendments... shall be applicable with respect to charges pending with the Commission on the date of enactment..." The Court found it more likely that the "except as otherwise specifically provided" clause was inserted as a precaution to "avoid the risk of an inadvertent conflict in the statute.

Second, regarding the expressio unius argument, the Court looked to legislative history and found that statements made by legislators "cannot plausibly be read as reflecting any general agreement." Furthermore, a previous bill introduced in the House contained express retroactivity provisions, but the provisions were taken out in the Senate substitute bill. In the wake of such "positive inaction" in the legislature, the fact that Congress included prospective-only provisions does not evince any general agreement about the retroactivity issue.

*Landgraf* held that without clear evidence or expression of intent, federal statutes shall not be applied retroactively. The majority opinion looked for a clear expression of intent in both the express language of the statute and the legislative history. The Court stated that "a requirement that Congress first make its intention clear helps ensure that Congress itself has deter-

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39 511 US at 259-60.
40 Id.
42 Id at 260.
43 511 US at 262.
44 Id.
45 Id at 280.
46 See id at 263 n 15, for an example of the *Landgraf* Court's consideration of legislative history as a source for finding congressional intent.
mined that the benefits of retroactivity outweigh the potential for disruption or unfairness.\textsuperscript{47}

The Court reconciled its prior ambiguous caselaw by drawing some distinctions between procedural rights and private, vested, substantive rights. In the case of procedural rights, the Court stated that there are “diminished reliance interests” and the procedural rule will only affect “secondary conduct,” and therefore the presumption against retroactivity does not apply.\textsuperscript{48} A rule affecting secondary conduct lacks the inherent unfairness of a rule affecting primary conduct, so there is less need for a presumption against retroactivity. In order for a statute to trigger the presumption against retroactivity, it must be retroactive in its effect; a statute is not considered retroactive “merely because it is applied in a case arising from conduct antedating the statute’s enactment.”\textsuperscript{49}

The \textit{Landgraf} Court defined retroactive effect as a situation where the statute “would impair rights a party possessed when he acted, increase a party’s liability for past conduct, or impose new duties with respect to transactions already completed.”\textsuperscript{50} The Court found that despite the fact that the 1991 Act “does not make unlawful conduct that was lawful when it occurred,” the Act does “attach an important new legal burden,” thus invoking the presumption against retroactivity.\textsuperscript{51}

Three justices would make the standard for applying a statute retroactively even more stringent, thus heightening the presumption against retroactivity. In a concurring opinion, three justices disagreed with the relaxed majority standard and instead would have required that the statutory text itself evince a “clear statement” of retroactive application.\textsuperscript{52}

The Supreme Court recently clarified \textit{Landgraf} in \textit{Lindh v. Murphy}.\textsuperscript{53} \textit{Lindh} held that courts first must use traditional rules of statutory construction to determine whether a statute applies to pending cases and has retroactive effect.\textsuperscript{54} If, after employing canons of construction and other tools of interpreta-

\begin{verbatim}
47 511 US at 268.
48 Id at 275.
49 Id at 269.
50 Id at 280.
51 511 US at 281-82.
52 Id.
53 Id at 286-88 (Scalia concurring).
54 117 S Ct 2059 (1997).
55 Id at 2063.
\end{verbatim}
tion, a court finds a statute to have a retroactive effect, then the Landgraf default rule applies.

B. Landgraf v USI Film Products in the CERCLA Context

In the wake of Landgraf, there have been numerous challenges in federal district courts to the retroactive application of CERCLA\(^\text{57}\) liability. While one case simply relies upon pre-existing caselaw and omits any independent analysis,\(^\text{58}\) other courts have acknowledged the importance of Landgraf for judicial interpretation and have employed a Landgraf-based analysis in reaching their decision that CERCLA still applies retroactively.\(^\text{59}\) These courts, however, followed without much modification the same textual and legislative history rationales as the pre-Landgraf courts.

CERCLA retroactivity caselaw since Landgraf mirrors the pre-Landgraf caselaw: courts almost unanimously conclude that retroactive application is appropriate, but they are unable to agree upon a rationale for that conclusion. A federal district court in Nevada based its decision to apply CERCLA retroactively on the negative implication argument, holding that the express requirement that Sections 107(f) and 111(d) be applied prospectively would be wasted verbiage unless the other provisions were to be applied retroactively.\(^\text{60}\) The Nevada court discounted the past tense language argument and brushed aside the remedial purpose canon.\(^\text{61}\) An Eastern District of Tennessee court referred to CERCLA's past tense language, the negative inference argument, and, as the dispositive factor, the necessity of retroactivity to vindicate Congress's intent to clean up inactive waste sites.\(^\text{62}\) Another district court opinion referred to past tense language and to congressional intent to clean up inactive sites but failed to

\(\text{Id.}\)

\(\text{42 USC § 9601 et seq (1994).}\)

\(\text{See Gould Inc. v A & M Battery & Tire Service, 933 F Supp 431, 438 (M D Pa 1996) (stating that, although in May 1996, one district court decided that retroactive application is incorrect, "we are unpersuaded by a single... case which is surrounded by a myriad of opinions that apply CERCLA retroactively, either directly or implicitly").}\)

\(\text{See Cooper Industries, Inc. v Agway, Inc., 1996 WL 550128, *6-*10 (N D NY); Nova Chemicals, Inc. v Gaf Corp., 945 F Supp 1098, 1100-05 (E D Tenn 1996); Nevada Department of Transportation v United States, 925 F Supp 691, 693-96 (D Nev 1996) ("Nevada DOT").}\)

\(\text{Nevada DOT, 925 F Supp at 701-02.}\)

\(\text{Id at 699-700.}\)

\(\text{Nova Chemicals, 945 F Supp at 1103-05.}\)
mention the negative implication argument. Landgraf requires clear evidence of intent from Congress before a statute will apply retroactively, but these district court decisions demonstrate that judges are unclear as to which approach provides the requisite evidence of congressional intent to apply CERCLA retroactively.

In a thoughtful departure from the traditional rationales, one recent federal district court decision, United States v Olin Corp., disagreed with all earlier CERCLA precedents and refused to apply CERCLA retroactively. The Olin district court dismissed the pre-Landgraf cases as outdated under the new Landgraf analysis. The court pointed to parallels between CERCLA and the Civil Rights Act of 1991, including: the lack of a clear statutory expression of retroactivity, the confusing and contradictory legislative histories, and the necessarily retroactive impact of the statutes if applied to pre-enactment conduct. Using the Landgraf test, the Olin district court could not find clear evidence of congressional intent that CERCLA's Section 107 be applied retroactively. The district court therefore concluded that the presumption against retroactive application still controlled.

A unanimous panel of three judges reversed the Olin district court. The Eleventh Circuit agreed that CERCLA "contains no explicit statement regarding retroactive application of its cleanup liability provisions," but found clear congressional intent favoring retroactive application based upon the following factors: past-tense verbs in Section 107(a)(2); language in Section 103 providing that those who owned or operated a hazardous waste facility prior to CERCLA's effective date notify the Environmental Protection Agency of pre-enactment conduct or forfeit any defenses to liability; the need for retroactivity in order to vindicate

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64 927 F Supp 1502 (S D Ala 1996).
65 Id at 1512-13.
66 Id at 1513-15.
67 Id at 1515-16.
68 927 F Supp at 1516.
69 Id.
70 United States v Olin Corp., 107 F3d 1505 (11th Cir 1997).
71 Id at 1513.
72 Id at 1513.
73 Id at 1513. Section 103(c) provides, Within 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, or who accepted hazardous substances for transport and selected, a facility at which hazardous substances... are or have been stored, treated, or disposed of shall,
the statute's purpose,\textsuperscript{74} and legislative history in the form of a Senate bill referring to pre-enactment liability, whose cleanup provisions were later adopted into CERCLA.\textsuperscript{75}

The Eleventh Circuit did, in fact, find congressional evidence supporting retroactive liability; the Eleventh Circuit did not, however, find clear congressional evidence. For example, if the Eleventh Circuit wishes to accord such importance to verb tenses in the liability provisions, then it must address the fact that Section 107(a)(3) imposes liability upon those who “arranged” for disposal or treatment of hazardous waste, but not those who arrange to do so in the future.\textsuperscript{76} In fact, the Nevada DOT court, which agreed with the Eleventh Circuit in its conclusion, stated that “the occasional use of past verb tenses . . . is a thin reed on which to support congressional intent to apply CERCLA retroactively.”\textsuperscript{77} Furthermore, the Eleventh Circuit failed to address aspects of CERCLA’s legislative history that indicate Congress did not intend liability to apply retroactively, such as the deletion of an express retroactivity provision from an early version of CERCLA.\textsuperscript{78}

III. LOOKING AT CERCLA LIABILITY AFTER \textit{LANDGRAF}: BACK TO THE BASICS OF STATUTORY INTERPRETATION AND THE END OF JUDICIAL LEGISLATING

The best judicial construction of CERCLA liability, in light of the recent \textit{Landgraf} opinion, denies retroactive application. \textit{Landgraf} breathes new air into the traditional presumption against retroactivity and checks judicial wanderings into the margins of the legislative arena. Courts should look more to the text and legislative history of the statute and less to its own desire to enforce the statute’s purposes most efficaciously.

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\textsuperscript{74} 107 F3d at 1514.  \\
\textsuperscript{75} Id at 1514.  \\
\textsuperscript{76} See text accompanying note 21.  \\
\textsuperscript{77} 925 F Supp at 699.  \\
\textsuperscript{78} See text accompanying notes 93-94.
\end{flushleft}
The judiciary can only enforce laws that have undergone the legislative process laid out in Article I, Section 7 of the Constitution, and should not enforce a purpose that is not written into such duly-enacted legislation. When a court reads retroactivity into a statute in order to vindicate what it perceives to be the statute's purpose, the court enters the realm of legislating that is constitutionally reserved for Congress. To enforce a law, Congress may allow a federal agency to promulgate regulations pursuant to legislation, but courts lack such authority and may not act as pseudo-administrative agencies, creating their own framework for vindicating a congressional purpose. Doing so would violate the principle of separation of powers.79

A. The Application of Landgraf's Analytical Framework to CERCLA's Provisions

Landgraf articulated a framework for courts to follow in deciding whether to apply a statute retroactively, once a court makes the initial determination that a statute potentially has a retroactive effect.80 First, courts should determine whether an express textual provision describes the statute's reach. If no express provision does so, then, under Lindh v. Murphy, the court must use canons of statutory construction and other interpretive aids.81 Using these tools of statutory construction, the court should determine whether the statute has a retroactive effect. If the statute unavoidably has retroactive effect, the court should find against retroactivity unless there is clear congressional intent in favor of such a result.

As explained below, all agree that CERCLA would have a retroactive effect if applied to pre-enactment conduct. Courts then must decide whether to enforce retroactive application. Applying a Landgraf analysis, as the Olin district court did, leads to the conclusion that Congress only arguably intended CERCLA to be retroactive, and an arguable intent is not "clear congressional intent." CERCLA lacks an express retroactivity provision, so the courts must determine if other congressional sources indicate a clear expression of intent to apply Section 107 retroactively.

79 See Baron de Montesquieu, The Spirit of the Laws 163 (George Bell and Sons 1909) ("Were the [judiciary] joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator.")
80 511 US 244, 280 (1994).
81 117 S Ct 2059, 2063 (1997).
CERCLA RETROACTIVITY

1. CERCLA is a retroactive statute and therefore the Landgraf framework for interpreting statutes applies.

As a threshold determination, a court first must decide whether CERCLA may have a retroactive effect. While the court in *United States v South Carolina Recycling & Disposal* argued that CERCLA may not be retroactive, no other courts have followed *South Carolina Recycling*'s premise that CERCLA is prospective in its application. The lack of support may be because following this approach would render all laws prospective in the same sense. CERCLA has retroactive effect because the statute increases a party's liability ex post. A party who arranged for disposal of hazardous waste before the enactment of CERCLA, when such disposal was entirely legal, must now pay damages for that pre-enactment conduct. In fact, CERCLA offends the presumption against retroactivity even more than the 1991 Civil Rights Act at issue in *Landgraf*. While the 1991 Act merely attached new damages to already illegal acts, CERCLA, if applied retroactively, would make previously legal conduct illegal. Moreover, the *Landgraf* Court's distinction between procedural and substantive legislation would work in favor of prospectivity in this case, because new liability is not even arguably procedural.

2. The past tense language in CERCLA fails to provide clear evidence of congressional intent to apply Section 107 retroactively.

Because the text does not contain an express provision that CERCLA be applied retroactively, courts should first look to other textual evidence for clear indications of congressional intent. The use of past tense verbs, although frequently cited for support, has also been found largely inconclusive by courts. As the *Nevada Department of Transportation v United States* ("Nevada DOT") court explained, "the better view is to ignore verb tenses within CERCLA's test for purposes of discerning congressional intent." The court went on to explain that a change in the

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653 F Supp 984, 996 (D SC 1984).

62 See *United States v Alcan Aluminum Corp.*, 1996 US Dist LEXIS 16358, at *7 (N D NY) (noting CERCLA's reputation as a "leviathan," mostly due to the "seemingly boundless retroactive effect that the statute presents to a party").

64 See text accompanying notes 51-52.


925 F Supp 691, 699 (D Nev 1996).
phrase “any person who accepts any hazardous substances,” late in the Senate’s crafting of the bill, to “accepts or accepted” went “unnoticed—hardly the response which would be expected if Congress attached any significance to the addition.”  

3. The negative implication argument parallels a similar argument rejected by the Landgraf Court. 

The negative implication argument provides another textual ground for the imposition of retroactive liability: because Congress specifically limited damages to natural resources to prospective-only liability, one can infer that Congress intended the other liability provisions to be unlimited. This argument is difficult to maintain in light of Landgraf, however, since the Landgraf court rejected a similar argument. In Landgraf, the plaintiff argued that “because Congress provided specifically for prospectivity in two places, we should infer that it intended the opposite for the remainder of the statute.” The Court responded that if Congress had intended such a “determinate meaning,” it could have spelled it out with express language to that effect.  

The Nevada DOT court distinguished between the prospective-only sections of the two statutes, suggesting that, 

[w]hile the Supreme Court in Landgraf ‘would be surprised’ if Congress had intended the 1991 Act to apply retroactively through negative inference . . . it is not at all surprising that CERCLA’s liability provisions would [be] limited to prospective application as to natural resource damages, without being so limited as to response costs.  

Natural resource damages are arguably distinct from response costs because they apply to stable sites that are not continuing to deteriorate. On the other hand, the two provisions in the Civil Rights Act of 1991 providing for prospectivity were also distinct from the rest of the bill. Congress meant one section “to exempt a single disparate impact lawsuit against the Wards Cove Packing

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87 Id., quoting Georgeoff, 562 F Supp at 1309-10 and referring to 42 USC § 9607(aX4). 
88 42 USC §§ 9607(f), 9611(d). 
89 511 US at 259 (citations omitted). 
90 Id. 
91 925 F Supp at 702. 
92 Id.
Company" and the other section referred only to overseas employ-
ers.93

4. The removal of an express retroactivity provision in a
CERCLA draft evinces a lack of congressional intent to apply
liability retroactively.

Another argument, based upon the legislative history of
CERCLA, provides another Landgraf parallel and tends to sup-
port non-retroactive application of CERCLA liability. Like the
Civil Rights Act of 1991, a draft version of the CERCLA bill con-
tained an express retroactivity provision that later was deleted.
Section 3072 of the original version of HR 7020, provided an
express retroactivity provision applicable to the entire statute.94
The deletion of this provision supports the proposition that Con-
gress did not intend for the statute to be retroactive, or at least
that it was not sure it wanted such an effect.

In Landgraf, an explicit retroactivity provision found in the
original House bill was deleted from the agreed-upon Senate
substitute bill. The Landgraf court stated, referring to the Civil
Rights Act, that "the history of the 1991 Act conveys the impres-
sion that legislators agreed to disagree about whether and to
what extent the Act would apply to pre-enactment conduct.5
The deletion of Section 3072 from CERCLA seems to indicate, at
minimum, a similar lack of clear congressional intent regarding
retroactivity.

5. The legislative history is ambiguous and unreliable.

A further look at legislative history provides no clear evi-
dence in favor of retroactive application. The last-minute enact-
ment of the statute makes its legislative history untrustworthy.
Furthermore, there are no committee reports, which usually
provide a determinative indicator of legislative history. As Sena-
tor Stafford explained after the passage of CERCLA, "[T]he floor
statements which are most relevant are those of the bill's draft-
ers, including myself .... Frankly, in the confusion which sur-
rounded those final days, I may have slipped up once or twice.95

93 Landgraf, 511 US at 257-58.
94 HR 7020, § 3072, 96th Cong, 2d Sess (April 2, 1980) (original slip bill), read, "The
provisions of this subpart ... shall apply to releases of hazardous waste without regard to
whether or not such releases occurred before, or occur on or after, the date of the enact-
ment ...."
95 511 US at 262-63.
Senator Stafford went on to admit that, in the case of joint and several liability, the statute intentionally was left with gaps for the courts to fill in, "We left development of the [liability] concept and its application to the courts and the common law." Under a dynamic statutory interpretation, courts might view CERCLA as a common law type of statute, designed for judicial gap-filling.

On the other hand, if the legislators admit that they left gaps, then the amount of legislative deliberation and decision becomes suspect. A statute with a legislative history that openly admits ambiguity and a desire for courts to resolve acknowledged and anticipated interpretive problems cannot speak with resonating authority on the important issue of retroactivity. To rely upon a rushed legislative process with a confusing legislative history is to rely upon something other than "clear evidence of congressional intent" and would be untrue to Landgraf.

Court's have overlooked a final indicator of congressional ambiguity: the presence of a legislative veto in CERCLA as originally enacted. The veto provided that if the legislature did not approve of the regulations promulgated pursuant to CERCLA, then one house of Congress could veto the regulations. When the Supreme Court found the legislative veto unconstitutional in INS v Chadha, the veto was severed from CERCLA. The presence of a legislative veto in CERCLA may provide some insight into Congress' intent at the time of enactment. The enacting Congress, thinking that it would have leeway to tailor the enforcement of CERCLA according to its developing intent, might have been more specific in drafting its legislation if it knew that it would not have such discretion in the future. A one-house legislative veto provided the enacting Congress with room to leave gaps in the statute, because legislators thought they could "fix" anything later.

6. Relying upon CERCLA's remedial purpose is not sufficient to impose liability retroactively.

The remedial, backward-looking nature of CERCLA and the fact that retroactive application best effectuates the purpose of the statute do not justify the imposition of retroactive liability on private parties. That the statute arguably is remedial in its purpose is not conclusive. Even if the statute could be classified as

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97 Id.
98 42 USC § 9655.
‘remedial,’ such a classification does not indicate clear congressional intent that the statute be retroactive, especially when the remedy involves damages for a previously legal act.

Moreover, CERCLA is far from unequivocally being remedial. While Nevada DOT allowed retroactive application, it explained that “CERCLA... is not merely ‘remedial.’”¹⁰⁰ The district court in United States v Olin Corp. stated the situation more emphatically, “Legislation cannot be remedial if the conduct being ‘remedied’ was lawful at the time of its occurrence.”¹⁰¹ While the response costs are not technically punishment, thereby sidestepping any constitutional claim a party might make regarding ex post facto laws, they still violate fundamental concepts of fairness and notice. The retroactive application of CERCLA liability disrupts “settled expectations” by disallowing individuals “an opportunity to know what the law is and to conform their conduct accordingly.”¹⁰² CERCLA punishes those who, at the time of its enactment, had committed no legal wrong. There exists no case “in which Congress had not clearly spoken,” where the Supreme Court has “read a statute substantially increasing the monetary liability of a private party to apply to conduct occurring before the statute’s enactment.”¹⁰³ If the Supreme Court adheres to this line of precedent, then it will not read CERCLA to apply to pre-enactment conduct, as CERCLA unquestionably imposes significant monetary liability.

The underlying purpose of CERCLA should not be dispositive of whether to impose retroactive liability. As the Court said in Landgraf, “It will frequently be true... that retroactive application of a new statute would vindicate its purpose more fully. That consideration, however, is not sufficient to rebut the presumption against retroactivity.”¹⁰⁴ Congress did not necessarily intend CERCLA to impose liability on polluters retroactively. An alternative intent, such as the desire to impose liability upon those who were improperly disposing of hazardous wastes at the time of CERCLA’s enactment and thereafter, is entirely plausible. Making the polluter pay may very reasonably mean requiring only current and post-enactment polluters pay.

¹⁰⁰ 925 F Supp at 700.
¹⁰² Landgraf, 511 US at 265.
¹⁰³ Id at 284.
¹⁰⁴ Id at 285-86.
B. The Judiciary Must Conform to Its Role as Interpreter and not Maker of the Laws

The Landgraf Court, in warning courts to refrain from construing a statute retroactively merely to vindicate its purpose more fully, made a statement about judicial legislation. A judge should not decide the purpose of legislation, only to then interpret the statute so as to effect his or her idea of the statute's purpose; to do so would violate of the constitutional doctrine of separation of powers. Delegating to the judiciary the decision whether to apply CERCLA retroactively might have fallen within the constitutionally allowable framework if Congress first had established a general standard and then allowed courts to tailor the liability on a case-by-case, fact-dependent basis. Courts are in the best position to resolve issues based on fact-intensive inquiries, not to decide levels of liability that will apply across many fact situations. Courts may have honorable intentions in their desire to punish those who harm the country's environmental welfare, but if those acts were entirely legal when committed, and Congress has not clearly declared that liability will be imposed retroactively, then courts have no choice but to only apply liability prospectively. A court that chooses otherwise sits as a super-legislature and violates the principle of separation of powers, in express disregard of the Landgraf Court's instructions.

That Congress did not include an express retroactive liability provision in CERCLA, and, in fact, deleted such a provision from a House version of the bill, provides legislative history for the courts to interpret. Laurence Tribe points out that silence may function as a part of the historical context of the legislation's enactment, and suggests that "Congress' prior or contemporaneous rejection of... legislation that would have enacted the very interpretation of a statute that a litigant later claims a statute did enact" is a "[c]ontextual silence[] that may well be relevant to statutory construction..."\(^{105}\) Courts should not lightly read into CERCLA the imposition of retroactive liability, especially when such a provision was considered and omitted from the final version of the bill. To do so disregards how congressional silence at the time of CERCLA's enactment informs historical context. In a 1983 Supreme Court case, the Court "found significance in just

such a congressional rejection of proposed legislation. . . . \textsuperscript{106}

Justice White, in his opinion for the Court in that case, stated that "[w]hile we are correctly reluctant to draw inferences from the failure of Congress to act, it would, in this case, appear improper for us to give a reading to the Act that Congress considered and rejected."\textsuperscript{107}

Congressional failure to change the language of CERCLA to expressly approve or disapprove of retroactive liability, following judicial interpretations requiring such retroactive liability, should also be evaluated. Critics may suggest that congressional silence is akin to ratification; at best, however, silence reflects indecision. Congress has numerous reasons to remain silent: there may be dissensus among members of Congress about whether or not retroactivity is desirable, such that Congress lacks enough momentum to either override judicial decisions or enact new legislation; Congress may prefer to stay out of a hotly contested area of law where incremental decisionmaking on a case-by-case basis is better than a sweeping rule of law regarding retroactive liability; or perhaps Congress is afraid of being politically accountable for a decision on the matter, and simply prefers to let judges take responsibility. For courts to interpret silence decisively as approval of retroactive liability, would be to speak where Congress has refused to do so and to ignore the presumption against retroactivity.

The judiciary should be cautious in its interpretation of legislation. It should only enforce rules that have gone through the constitutionally mandated procedure for enacting legislation in Article I, Section 7, Clause 2.

CONCLUSION

The Olin district court opinion raised serious arguments against the retroactive application of CERCLA that the Eleventh Circuit did not entirely refute in their opinion reversing the district court. Debates surrounding CERCLA are not new, and courts, including the Eleventh Circuit, continue to emphasize different explanations for applying CERCLA retroactively. The presence of such differing rationales suggests that Congress was not clear in expressing its intent. The Supreme Court's 1994


\textsuperscript{107} 461 US at 220.
decision in *Landgraf v. USI Film Products* clarified confusing precedent regarding retroactive liability provisions and stated that only upon evidence of clear congressional intent would it apply statutes retroactively. In light of the *Landgraf* holding, courts should reconsider the retroactive application of CERCLA liability, and should not place emphasis on the earlier cases that relied upon pre-*Landgraf* analysis. Rubber-stamping retroactivity based upon a string cite of cases from the 1980s that impose retroactive liability, as one court did recently, is an abdication of judicial duty. Courts should not reward legislative defaults regarding important issues such as retroactivity by construing statutes to best achieve what the courts think the legislature intended.

While it may both be difficult and impractical to change CERCLA's application from a retroactive to prospective viewpoint, due to the number of persons who are in the process of paying CERCLA response costs or who have formulated insurance contracts in light of CERCLA's retroactive interpretation by the courts, to continue a wrong for the sake of those punished in the past would only sacrifice the rights of innumerable parties in the future. Furthermore, to allow retroactive liability in the face of the *Landgraf* decision might lead to even more difficulties in the future. One unintended and undesirable consequence would be the erosion of the presumption against retroactivity, an effect *Landgraf* was designed to prevent. Congress, if it intends retroactive application, must provide clear evidence of retroactive intent in the enactment of its legislation. To allow Congress to delegate legislative responsibility to the courts would reward ambiguity in statutory construction. Courts perform better when relying upon clear congressional evidence or statements rather than clear congressional indecision.

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