THE LEGISLATION OF UNINTENDED CONSEQUENCES

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Doreen Merlino's troubles began last October when an inch-thick lawsuit was delivered to the two-table takeout where she sells pizza and spicy chicken wings. It accused her of sending hazardous waste to a landfill. . . .

The 603 defendants named in the suit represent 399 different entities including an Elks club, an exercise gym, a donut shop, a sausage factory, a pair of nursing homes and at least two small-business owners who died before their garbage got them sued. . . .

"I have seen people sued—and settle—for waste no more hazardous than cardboard," New Jersey Deputy Attorney General John MacDonald says. "The strategy is to make the entire Superfund system so ineffective that one way or another, Congress is going to be forced to scrap it."[1]

INTRODUCTION

This Colloquium proceeds on the fundamental premise that legislation can be explained as the deliberate, if not always rational, resolution of clashes between economic interests. Without intending to demean my colleagues' search for analytical frameworks that depict the role of interest groups in writing legislation, the premise of this paper is that some extraordinarily significant facets of modern environmental law are instead the result of Congress's failure to foresee the consequences of its actions.

Using the application of Superfund liability to the disposal of ordinary garbage as an example, this paper argues that those unintended consequences can have negative repercussions that far exceed their immediate impact, undermining the goals that Congress intended to achieve.[2] It is not an overstatement to suggest that this one

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1. Robert Tomsho, *Pollution Ploy: Big Corporations Hit by Superfund Cases Find Way to Share Bill*, WALL ST. J., April 2, 1991, at A1 [hereinafter Tomsho].

2. "Superfund liability" refers, of course, to liability imposed under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) or, as it is more commonly known, "Superfund," 42 U.S.C. §§ 9601-9675 (1994). In this article, all references to Superfund or CERCLA apply to the statute first enacted in 1980, Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended in scattered sections of the I.R.C. and 33, 42, and 49 U.S.C.), as

example of the legislation of an unintended consequence almost brought the Superfund program to its knees. Nearly a decade after that consequence was manifested and despite several abortive efforts to avert it, Congress has yet to address the issue of that unintended consequence.

Congressional paralysis on major issues is nothing new, of course. The acute polarization of environmental issues at the national level means that congressional policymaking, to borrow the vivid language of Professor McGarity, is ossified.[3] Because Congress is frequently unable to enact circumscribed "fixes" for the problems caused by its legislation of unintended consequences, those consequences become enshrined in practice, obscuring their genesis as a simple mistake. This state of affairs exacts a high price from the full range of interest groups at one time or another. Industry suffers when inadvertent consequences chip away at its bottom line; environmentalists suffer when the Environmental Protection Agency's (EPA) implementation of important statutory mandates is derailed by unintended consequences; and even the army of contractors created by environmental programs suffers when unintended consequences obstruct the most effective way to get the work of cleanup done.

Obviously, legislative gridlock is not confined to environmental issues and is the inevitable byproduct of divided government, internally fractious political parties, interest groups with antithetical goals and evenly matched resources, the electronic age, and a slew of other factors. However, to the extent that we insist on viewing all aspects of legislation as the intentional—and inevitable—result of interest group dynamics, we exacerbate that gridlock. Admitting that some provisions have had consequences that were not intended should hasten the day when targeted legislative remedies are possible, giving Congress the flexibility to fine-tune public policy before such mistakes become entrenched and contribute to further gridlock.

I feel compelled by my choice of illustrative example to acknowledge that I came to academia relatively late in life, after spending my salad days as staff counsel to the House subcommittee with primary jurisdiction over the 1986 reauthorization of Super-

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amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1615 (codified in scattered sections of the I.R.C. and 10, 29, 33, and 42 U.S.C.).

3. Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1391-92 (1992).

fund.[4] I then spent several years lobbying my former colleagues on behalf of one particularly hapless interest group: cities and other entities held liable for cleanup costs at sites where ordinary garbage was disposed at the same site as industrial hazardous waste. Over the last decade, I have written extensively on this subject, although never from the perspective I take here in this paper.[5] Hopefully, whatever bias I bring to this account is offset by the perspective that living through these events allows me to provide.

This paper examines the implications of unintended liability for the disposal of household garbage through three phases of its development: its genesis in the 1980 enactment of the original statute; its manifestation between 1989 and 1992; and its implications for the Superfund program as a whole.

GENESIS

Acceptance of the assertion that a given application of a statutory provision is a consequence that was not intended by Congress is not only necessary to this discussion, but is a great deal easier said than done. Two basic approaches suggest themselves. First, we could apply a kind of "reverse *Chevron*" test that divines congressional goals by analyzing the plain meaning of the statute, its legislative history, and its overall purpose to determine whether the consequence is inconsistent with what Congress obviously intended.[6] Or we could resort to a more subjective test: if the results are really out of line, to the point where one suspects that had Congress foreseen them, the

4. At the time, it was called the Subcommittee on Commerce, Transportation, & Tourism of the Committee on Energy & Commerce of the U.S. House of Representatives. The subcommittee is now called the Subcommittee on Finance & Hazardous Materials of the Committee on Commerce.

5. *See, e.g.*, Rena I. Steinzor & Linda Greer, *In Defense of the Superfund Liability System*, 27 Envtl. L. Rep. (Envtl. L. Inst.) 10,286 (1998); Rena I. Steinzor, *The Reauthorization of Superfund: The Public Works Alternative*, 25 Envtl. L. Rep. (Envtl. L. Inst.) 10,078 (1995) [hereinafter *Superfund Public Works*]; Rena I. Steinzor, *The Reauthorization of Superfund: Can the Deal of the Century Be Saved?*, 25 Envtl. L. Rep. (Envtl. L. Inst.) 10,016 (1995) [hereinafter *Superfund Deal*]; Rena I. Steinzor & David Kolker, *To Pay or Not to Pay: Local Governments' Stake in Legislation to Reauthorize Superfund*, 25 URBAN LAWYER 627 (1993) [hereinafter Steinzor & Kolker]; Rena I. Steinzor & Matthew F. Lintner, *Local Governments and Superfund, 1992 Update: Who Is Paying the Tab?*, 24 URBAN LAWYER 51 (1992) [hereinafter Steinzor & Lintner]; and Rena I. Steinzor, *Local Governments and Superfund: Who Will Pay the Tab?*, 22 URBAN LAWYER 79 (1990) [hereinafter Steinzor].

6. Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 859-65 (1984) (establishing a three-step test for statutory interpretation that looks to the plain meaning of the statute, its legislative history, and its overall purpose, in that order of importance).

legislation never would have passed, the results of the provision represent an unintended consequence.

The disadvantage of the first approach is that it may sweep too broadly, picking up consequences that Congress should fairly have anticipated and are better characterized as "morning after" regrets or "sleeper" provisions. The downside of the second approach is that it may function too narrowly, limiting our consideration to only the most blatantly disastrous applications of the statutory provisions. The best bet may be an amalgam of the two approaches—a reverse *Chevron* test that targets provisions that are either gravely unwise or sharply inconsistent with the statutes in which they appear, as measured by a consideration of their political feasibility had their consequences been recognized at the time when they were passed. Superfund liability for Mrs. Merlino, proprietor of a two-table pizza stand whose mistake was to send pizza boxes, soda bottles, and an occasional can of bug spray to a local landfill, fails under all three approaches.

The congressional debate that led to passage of the original Superfund law in 1979 was dominated by passionate speeches about the dire threats posed by toxic waste sites[7] and, particularly on the House side, intricate explanations of how liability for the costs of cleaning up such sites should operate.[8] In a non-negotiable power play, the Senate dropped an explicit reference to "strict, joint and several" liability, sending the bill over to the House with a replacement provision that alluded to the "same standard of liability which obtains under section 1321 of Title 33 [the Federal Water Pollution Control Act]" and the message that the ultimate fate of the legislation depended on House acceptance of the Senate bill without any modification.[9] The House accepted the Senate's ultimatum and passed the bill

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7. *See* ARNOLD & PORTER, A LEGISLATIVE HISTORY OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980 (SUPERFUND), PUBLIC LAW 96-510, Comm. Print 1983 (7B) [hereinafter CERCLA LEGISLATIVE HISTORY]. "It is apparent we are practically drowning in our own toxic waste." *Id.* at 255 (statement of Mr. Biaggi). "Two million people on Long Island are potentially at risk because of the hazardous dumping that has gone on over the last 20 years." *Id.* at 259 (statement of Mr. Downey). "Almost daily another clandestine chemical dump is discovered and another threat to our health and the environment is known . . . Federal assistance in this area, therefore, is necessary if we are to make our Earth safe again." *Id.* at 265 (statement of Mr. Volkmer).

8. *See, e.g.*, CERCLA LEGISLATIVE HISTORY, *supra* note 7, Comm. Print (7A) at 776-80 (statement of Mr. Florio).

9. CERCLA § 9601(32). The Federal Water Pollution Control Act explicitly refers to imposition of strict liability, and the courts have consistently applied joint and several liability in conjunction with that standard. 33 U.S.C. § 1321 (1994); *see, e.g.*, United States v. M/V Big

without changes.[10] This veiled approach worked out far better than the bill's primary sponsors, Senator Robert Stafford (R-Vt.) and Congressman James Florio (D-N.J.) dared hope, with the federal courts following the lead of the legislative history and dutifully reading strict, joint and several liability into the new statute.[11]

Congressional preoccupation with the liability standard distracted attention from the even more important fact that the scope of the liability scheme was incredibly broad. To this day, the law imposes liability for "releases or threatened releases" of a "hazardous substance" into the "environment" from a "facility." It is no overstatement to suggest that it covers any conceivable spill, leak, or on-ground disposal of any solid or liquid mixture that contains even trace amounts of toxic chemicals at any location, except a release explicitly permitted under federal law.[12] Or, to put it more provocatively, a spill involving a cup of household ammonia in your mother's driveway theoretically qualifies her as a potentially liable party under Superfund. Move the location of the spill to a landfill that accepted both ordinary garbage and industrial hazardous waste, and your

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Sam, 681 F.2d 432, 439 (5th Cir. 1982); United States v. Tex-Tow, Inc., 589 F.2d 1310, 1314 (7th Cir. 1978). Senate committee leaders Robert Stafford (R-VT) and Jennings Randolph (D-W.VA) explained the non-negotiable compromise in a letter to the House's chief sponsor, Rep. James Florio (D-NJ):

> That the bill passed at all is a minor wonder. Only the frailest, moment-to-moment coalition enabled it to be brought to the Senate floor and considered. Indeed, within a matter of hours that fragile coalition began to disintegrate to the point that, in our judgment, it would now be impossible to pass the bill again, even unchanged. We say this not in the spirit of ultimatum, but with the hope that you and your Members will appreciate the difficult situation here in the Senate . . . .

CERCLA LEGISLATIVE HISTORY, *supra* note 7, Comm. Print 1983 (7A) at 774.

10. *See* CERCLA LEGISLATIVE HISTORY, *supra* note 7, Comm. Print 1983 (7A) at 774.

11. For a discussion of this early caselaw, *see* David E. Jones & Kyle E. McSlarrow, . . . *But Were Afraid to Ask: Superfund Case Law, 1981-1989*, 19 Envtl. L. Rep. (Envtl. L. Inst.) 10,430 (1989).

12. The provision imposing liability for releases of hazardous substances and specifically exempting "federally permitted releases" is CERCLA § 9607. The statute's broad scope is implemented through its definitional section. That section defines (1) "release" as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping or disposing into the environment . . . ," § 9601(22); (2) "hazardous substance" as any "element, compound, mixture, solution, or substance" regulated under one of the major federal environmental statutes, a group that includes some 700-800 common chemicals and metals, § 9601(14)(B) and 40 C.F.R. § 302.4; (3) "environment" as "navigable waters, . . . ocean waters, . . . any other surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air within the United States or under the jurisdiction of the United States," § 9601(8); (4) "facility" as "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located . . . ," § 9601(9)(B); and (5) "federally permitted release" as "discharges in compliance with a permit," § 9601(10)(A).

mother could become a full-fledged target of the Superfund liability scheme.

In sum, the plain meaning of the law indicates that the statute's liability scheme does cover your mother's "arrangement for" the disposal of her ordinary garbage, as the federal courts that have considered the issue have concluded.[13] But the task posited by this paper is not simply to determine whether the consequence is valid legally. Rather, our inquiry focuses on whether Congress foresaw the consequence and intended it to occur. To answer that question, we must move on to the second and third steps set forth in *Chevron*: considering the overall framework of the statute to determine congressional intent and exploring the legislative history for contemporaneous interpretations of the statute's meaning.

The heart of the Superfund program is the National Priorities List (NPL) established under section 105 of the statute.[14] Even though Superfund liability applies to an extraordinarily broad universe of property and conduct, the sites that make it onto the NPL command the lion's share of resources and attention by EPA and state programs. Section 105, as originally crafted, instructed EPA to compile a list of 400 of the nation's "priority" sites on the basis of reports received from the states and "any" person.[15] Incidents like your mother spilling ammonia in her driveway number in the thousands, even millions, and would not be included in such select company under any conceivable reading of the statute. Rather, Congress clearly thought it was passing a law to deal with the most acute manifestations of the toxic waste site problem that are caused by large industrial "polluters," as opposed to minor incidents of the disposal of relatively benign wastes by ordinary people.[16]

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13. *See* B.F. Goodrich Co. v. Murtha, 958 F.2d 1192, 1201 (2d Cir. 1992) (holding that Superfund liability attaches to the disposal of municipal solid waste, even if the waste only contains minimal amounts of hazardous substances); *see also* Transportation Leasing Co. v. California, 861 F.Supp. 931 (C.D. Cal. 1992).

14. CERCLA § 9605.

15. CERCLA, Pub. L. 96-510, 94 Stat. 2767 (1980). The NPL is now composed of 1,251 final and proposed sites. National Priorities List for Uncontrolled Hazardous Waste Sites, 63 Fed. Reg. 11,332, 11,335 (1998) (to be codified at 40 C.F.R. § 300.425).

16. *See, e.g.*, CERCLA LEGISLATIVE HISTORY, *supra* note 7, Comm. Print 1983 (7B) at 258 (statement of Mr. Downey) ("Who should pay . . . . That, of course, centers around who is responsible. . . . It is clear, from the Commerce Committee's work, that the Fortune 500 companies are as responsible and probably more responsible than the small ones."); 266-67 (statement of Mr. Ambro) ("[T]he chemical industry as a whole has been guilty of callous disregard for the health and very lives of citizens . . . . Until recently, these same industrial polluters were asking this body to vote down a measure which will require them to assume a part of the fiscal burden of cleaning up the heritage of their blatant disregard for the health and safety

The counterargument, of course, is that liability for disposal of ordinary garbage was triggered not by small spills, but by the intentional disposal of garbage and industrial hazardous waste in large landfills where they mixed together, causing severe environmental degradation.[17] The National Priorities List is not intended to limit liability to big companies and bad actors, but instead represents a practical test for which *sites*—as opposed to which *people*—would be priorities. Still, given the extreme results at stake—dragging Mrs. Merlino and her ilk into the costly and dreadfully slow litigation triggered by Superfund cleanups, this position is not satisfactory, and we must move on to the legislative history.

The only reference to the implications of the law's broad coverage in the context of ordinary citizens and household waste was a clipped exchange between Representative Florio, House floor manager for the bill, and Representative David Stockman (R-Mich.), its most vehement opponent.[18] At the time, Florio and Stockman were arguing over a substitute bill Stockman had offered that would have replaced the Florio legislation with a program that did not provide funding either for cleanup or liability, but instead urged the states to tackle toxic waste sites on their own. Stockman evoked the specter of a "regulatory monster with unlimited powers to dig up every landfill taking ordinary household garbage in the country," pointing out that several hundred household products ("Mole Death," "Rat-B-Gone," or "Rats-No-More") might qualify as hazardous substances under the legislation, thereby triggering potential coverage of every municipal dump in the country.[19]

In response, Florio cited a letter from the National Conference of State Legislatures endorsing the application of Superfund's liability provisions to states and localities "when circumstances merit."[20] The letter concluded, "No one disputes the principle that those who contribute to the problem should share in the cost of cleanup."[21]

Of course, both Representatives couched the issue as a question of whether to impose liability on local governments, relatively robust, albeit politically sensitive, targets of the Superfund liability scheme.

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of citizens . . . .").

17. For a description of such disposal sites from both a legal and technical perspective, *see* Steinzor & Lintner, *supra* note 5, at 90-130; Steinzor, *supra* note 5, at 102-16, 121-31.

18. *See* CERCLA LEGISLATIVE HISTORY, *supra* note 7, Comm. Print 1983 (7B) at 295 (statements of Mr. Florio and Mr. Stockman).

19. *Id.* at 300.

20. *Id.* at 309-10.

21. *Id.*

Their exchange never reached the question of whether Superfund liability could or would apply to individuals, very small and environmentally benign businesses like pizza stands, and nonprofit organizations like the Elks Club. Instead, this fragmentary conversation leaves to future generations to divine whether: (a) Florio thought such an interpretation was ridiculous; (b) Florio intended the law to be interpreted in that way but refused to admit as much; (c) Florio was distracted because he had bigger fish to fry; or (d) some combination of all of these circumstances. The legislation passed the House by a vote of 274 to 94,[22] and it is difficult to imagine that the Stockman warning penetrated the consciousness of any but a very small number of legislators and their aides.

Indeed, the vindication of Representative Stockman's Cassandra-like warning a decade later suggests an alternative standard for defining an "unintended consequence." If the consequence translates into a politically suicidal proposition, it is "unintended," whether or not that proposition is mentioned during the legislative debate. Unless the political implications are extensively debated, to the point that the ultimate vote represents a conscious decision to either ignore or accept them, the sheer outrageousness of the proposition is evidence enough that Congress could not have intended the result.

Putting aside the question of imposing liability on local governments and private corporations for the management of garbage—or, in technically correct parlance, "municipal solid waste,"[23] it is impossible to imagine that Congress would intentionally enact a law holding individual householders, the proprietors of very small businesses such as refreshment stands, flower shops, and bridal boutiques, or nonprofit entities like the Elks club, churches, and even the Girl Scouts, strictly, jointly, and severally liable for throwing out the trash.[24] Whatever the merits of the polemics that dominated the 1980 debate, it is clear that the vast majority of legislators took the oppo-

22. CERCLA LEGISLATIVE HISTORY, *supra* note 7, Comm. Print 1983 (7A) at vii.

23. Although the term "municipal solid waste" is not used in the Solid Waste Disposal Act, 42 U.S.C. §§ 6901-6992k (1994), it is common parlance in the debate over municipal liability under Superfund. *See, e.g.*, *Superfund: Industry Groups Challenge EPA on Policy Offering Municipal Solid Waste Settlements*, 29 Env't Rep. (BNA) 264 (1998) (reporting that industry groups had filed a challenge to an EPA policy suggesting how to allocate cleanup costs to entities that sent municipal solid waste to Superfund sites in the context of settlement agreements).

24. For descriptions of instances where litigation was filed or threatened against such entities, *see* Ted Cillwick, *Big Polluters Find Way to Clean Up Balance Sheet: Soak the Little Guy*, SALT LAKE TRIBE., Nov. 8, 1992, at A10; Tomsho, *supra* note 2.

site tack and touted their populist commitment to making the "polluter," as opposed to the average citizen, pay.[25] Had the legislation been characterized as a vehicle to turn that formula around, allowing corporate polluters to drag average citizens into the net of one of the most stringent liability schemes ever enacted, it is inconceivable that it would have passed one, much less both, houses.

As for the issue of municipal and corporate liability for accumulating ordinary garbage and sending—or taking—it to a landfill that becomes a Superfund site, the outcome of the analysis is much less clear. Florio and his supporters clearly understood that the legislation applied to state and local governments, as his response to Stockman indicates. But they did not acknowledge, much less resolve, the question of whether household garbage collected by municipal trucks, as opposed to traditional industrial waste generated by state or municipal operations, would trigger liability.

Congress obviously understands how to exempt categories of people and things, and did not do so in this instance. On the other hand, had the legislation's sponsors announced, as later turned out to be true, that one-fifth of the Superfund sites would be so-called "municipal" landfills, groups like the National League of Cities and the Conference of Mayors might well have blocked passage.[26] However, in the context of *municipal*—as opposed to *individual* liability—this last argument may well prove too much. The legislative process is replete with examples of organized interest groups failing to achieve their goals in a legislative debate. Suggesting that they should be allowed to cry foul later would undermine the stability and finality of the entire process. However, as discussed further below, while the cities' case may appear significantly less sympathetic than

25. *See* CERCLA LEGISLATIVE HISTORY, *supra* note 7, Comm. Print 1983 (7B). "Since the close of World War II, the chemical and petrochemical industries have enjoyed incomparable growth. Unfortunately, there has not been a parallel development of preventive safeguards against oil and chemical spillages and sites where potentially hazardous wastes are located." *Id.* at 254 (statement of Mr. Weiss). "[W]hile I understand the claims of the chemical industry that society has benefited from their products and should pay the cost of cleaning up the wastes, I believe that the burden of cleanup must be placed on that industry." *Id.* at 265 (statement of Mr. Volkmer). "The threat of protracted litigation and large financial liability will force waste disposers to implement more stringent safeguards for disposal in the future." *Id.* at 266 (statement of Mr. Stangeland).

26. "Municipal" landfill is defined loosely to include dumps where municipal solid waste was disposed along with industrial hazardous waste. Some, but not all, of these sites were owned or operated by local governments. *See* HAZARDOUS SITE EVALUATION DIV., U.S. E.P.A., NATIONAL PRIORITIES LIST, SITES HAVING MUNICIPAL LANDFILL AS A SITE ACTIVITY, *cited in* Steinzor & Kolker, *supra* note 5, at n. 13.

Mrs. Merlino's, a more productive way to address the cities' concerns is to limit the relief they are afforded, rather than refusing to address the consequences of their unmitigated—and, to some extent at least, unintended—liability.

MANIFESTATION

Interpretations of what Florio and Stockman were thinking in 1979 and what would have happened had Stockman convinced his colleagues that he was right are admittedly based on rank speculation. It may be more productive to examine what did happen when these allegedly unintended consequences made the transition from theory to practice. Four factors set the stage: the inevitable maturation of the program, clumsy efforts to narrow the scope of the program during the 1986 reauthorization, addition of a statutory cause of action for contribution among jointly liable parties in the reauthorization legislation ultimately enacted, and smoldering resentment of the liability scheme by large corporations and their insurers. Whatever Congress may have intended at the outset of the program, these factors combined to produce a state of affairs that pulled the program far afield of its central mission.

As any student of modern American environmental history knows, Superfund was among the last progeny of the Carter Administration, and almost immediately entered hostile foster care at a drastically altered Reagan EPA.[27] The scandals that eventually drove EPA Administrator Ann Gorsuch Burford out of office were closely related to the implementation of the program, which accomplished little in its initial four years other than the compilation of the first National Priorities List.[28] But by the mid-eighties, under effective new leadership at EPA, enforcement had begun. In the first instance, EPA targeted the largest, richest corporations connected with some of the more notorious sites.[29]

Pressure on major manufacturers produced pressure on other industrial sectors, and this period also marked the emergence of the insurance industry as the potential guarantor of billions in cleanup

27. For a general description of the atmosphere and policies that afflicted Superfund during this period, *see* JONATHAN LASH ET AL., A SEASON OF SPOILS: THE STORY OF THE REAGAN ADMINISTRATION'S ATTACK ON THE ENVIRONMENT 82-130 (1984).

28. *See id.* at 83-92.

29. *See, e.g.*, United States v. Monsanto Co., 858 F.2d 160 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989); United States v. A & F Materials Co., 578 F. Supp. 1249 (S.D. Ill. 1984); United States v. Chem-Dyne Corp., 572 F. Supp. 802 (S.D. Ohio 1983).

costs.[30] As the decade wore on, a critical mass of the most powerful insurers was mobilized by the prospect of choosing between defending the litigation against their customers in virtually every state or paying costs they had neither anticipated nor underwritten. The first wave of litigation by the government against major players in the manufacturing sector was soon followed with a second wave of corporate lawsuits against insurance companies that refused to pay their claims.[31]

By 1986, when Congress reauthorized Superfund, the corporate "deep pocket" lobby was mustered enough to insist that Congress add a statutory provision sanctioning efforts by such large parties to collect cleanup costs from smaller joint tortfeasors at the sites, under the same standard of strict liability as applied to the first targets of EPA enforcement.[32] That provision facilitated the subsequent outbreak of third, fourth, and fifth party litigation involving Superfund sites by removing the need to argue over whether state common law permitted contribution in such circumstances.[33]

Ironically, the wide range of industry groups participating in the 1986 reauthorization did not identify amendments to narrow the scope of the program as a priority. The subject was discussed because EPA raised it.[34] But the Agency's suggestions never captured either the imagination or the attention of Congress, in large measure because influential committee counsel in the Senate were adamantly opposed to any restrictions on EPA's broad authority.[35] Last but not least, the courts continued to work on the development of doctrine to define the scope of Superfund liability, deciding in one landmark case that even trace amounts of toxic chemicals contained in waste dumped at a site could trigger liability.[36] In a particularly memorable

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30. *See* Richard L. Revesz & Richard B. Stewart, *The Superfund Debate*, *in* ANALYZING SUPERFUND: ECONOMICS, SCIENCE, AND LAW 3, 9-10 (Richard L. Revesz & Richard B. Stewart eds., 1995).

31. *See id.*

32. *See* CERCLA § 9613.

33. *See, e.g.*, B.F. Goodrich Co. v. Murtha, 958 F.2d 1191 (2d Cir. 1992).

34. *See, e.g.*, ARNOLD & PORTER, A LEGISLATIVE HISTORY OF THE SUPERFUND AMENDMENTS AND REAUTHORIZATION ACT OF 1986, PUBLIC LAW 99-499, part 23, "Superfund," Hearings before the Subcommittee on Commerce, Transportation, and Tourism, House Energy and Commerce Committee, 99th Congress, March 7, 21, April 2, and June 29, 1985, at 26-28 (1986).

35. Personal recollection of the author. From 1983-1987, I served as staff counsel to the Subcommittee on Commerce, Transportation, and Tourism of the Committee on Commerce of the U.S. House of Representatives, which was then chaired by James Florio (D-NJ).

36. *See* United States v. Wade, 577 F. Supp. 1326, 1340-41 (E.D. Pa. 1983).

passage, the court explained that it had no statutory basis for a different result:

> I believe the defendants' fears of draconian liability are overstated. Given my ruling on joint and several as opposed to apportioned liability, a defendant whose sole contribution to a hazardous waste dump site was a copper penny would not be responsible for the *entire* cost of cleaning up the site.[37]

With the stage set for a legal dragnet that ranged far beyond manufacturers that dumped industrial hazardous waste, it was only a matter of time before litigation broke out at the municipal sites on the National Priorities List. Superfund cases based on the disposal of garbage emerged at the tail end of the program's first decade.[38] Although they involve many legal and factual nuances peculiar to the sites where they occurred, their overall profile is remarkably similar. The plaintiffs are large, nationally recognized corporations that are major players in the Superfund program. The defendants, typically numbering in the hundreds, included a wide range of municipal entities, from the largest cities to the smallest towns, as well as very small businesses, non-profit organizations, and even the occasional individual. The sites at issue in such cases were known euphemistically as "co-disposal" sites because large quantities of garbage had been deliberately dumped with large quantities of liquid industrial waste, eventually forming an enormous sponge that leaked into the ground if it became saturated.[39] This method of disposal was deliberate in an earlier, more naive era, when it was thought preferable to pouring such liquids directly into the ground.

Complaints in cases involving co-disposal sites were often accompanied by settlement demands proposing an overall allocation of cleanup costs based on the *volume* of waste each party had contributed, with the result that those who sent garbage containing as little as half a percent of household hazardous waste would pay nine times as much as generators of far more toxic industrial waste.[40]

It was not long, of course, before targeted cities organized to protest this treatment, ultimately splitting into two groups. The largest group, comprised of the National League of Cities, the U.S. Con-

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37. *See id.* at 1341.

38. For a description of such cases, *see* Steinzor & Kolker, *supra* note 5, at 627-32.

39. *See id.*

40. For a description of a case in which such a formula was proposed, *see* Kevin Murphy, *A Funny Thing Happened on the Way to the Landfill, or How 29 California Cities Discovered Superfund*, WESTERN CITY, April 1991, at 3-5.

ference of Mayors, and the National Association of Counties, made an alliance with the environmental community, arguing that the litigation over garbage was an opportunistic effort to discredit the Superfund liability scheme and that the best way to get the program back on track was rapid amendment of the statute.[41] The other group joined forces with the insurance industry, arguing that the plight of Mrs. Merlino and her ilk illustrated the fundamental unfairness of liability as a tool to fund cleanup and that the only way to save Superfund was to repeal the entire liability scheme.[42]

The cities' protests spurred inconclusive confrontations on Capital Hill. Senator Frank Lautenberg (D-N.J.) attempted to pass a quick fix, but was opposed by the full range of industry interest groups on the grounds that such "special treatment" would be fundamentally unfair to the full range of potentially responsible parties.[43] Industry lobbyists also argued behind-the-scenes that "piecemeal" reform would defeat the momentum for more comprehensive legislation.[44] In retrospect, the claim that comprehensive reform would occur if Congress resisted targeted amendments was as wrong as it was audacious. Shortly before the end of Superfund's second decade, reauthorization legislation remains mired in controversy, although

41. *See Reform of Superfund Act of 1995: Hearing Before the Subcomm. on Commerce, Trade, & Hazardous Materials of the House Commerce Comm.*, 104th Cong., 1st Sess., 239-42 (1995) (statement of Boyd G. Condie, Council Member, City of Alhambra, C.A., on behalf of American Communities for Cleanup Equity). I represented this group during my career as a private sector lobbyist in 1989-95.

42. *See, e.g., Financing Provisions of H.R. 3800, Superfund Reform Act of 1994: Hearing Before the House Comm. on Ways & Means*, 103d Cong., 2nd Sess. 48 (1995) (statement of W. Lawrence Wallace, Executive Director, Alliance for Superfund Action Partnership); *Superfund Reauthorization: Hearing Before the Subcomm. on Water Resources & Env't of the House Transportation and Infrastructure Comm*, 104th Cong., 2d Sess. 264 (1997) (statement of John Weichsel, Town Manager, City of Southington, Connecticut).

43. Senator Lautenberg's bill, the Toxic Cleanup Equity Act, capped the aggregate liability of those who arranged for the disposal or transported municipal solid waste that ended up at a Superfund site at 4 percent of total cleanup costs; it was approved twice on the Senate floor as part of a banking bill considered in the summer of 1992. *See* S. 2733, 102d Cong., 2d Sess. § 1065 (1992). *See also Superfund: Municipalities, Industry Spar over Bill to "Fine Tune" CERCLA Liability*, 22 Env't Rep. (BNA) 827, 828 (1991) (quoting a spokesman for the Chemical Manufacturers' Association as saying that "the only thing that is fair about Superfund liability is that it treats everyone unfairly").

44. Personal recollection of the author. In addition to writing extensively on the subject (*see* Steinzor, *supra* note 5), from 1989-95, I represented a coalition of local governments organized to obtain relief under Superfund for the disposal of municipal solid waste. This work involved extensive discussions with members of Congress, federal officials, and representatives of the chemical and insurance industries.

some frustrated members of Congress have once again raised the possibility of piecemeal reform.[45]

Although opposition to a quick legislative fix was primarily explained in strategic terms, some members of the chemical industry framed the issue as a more straightforward matter of competing economic interests.[46] Garbage may be benign in relationship to industrial hazardous waste, they argued, but large amounts of it spread the toxic waste around, polluting a far bigger area and increasing the cost of cleanup by several orders of magnitude.[47] This contention invoked the central premise of the statute's liability scheme: either all who contributed to the problem would pay, as Florio had claimed, or the burden would shift unfairly to large companies. In essence, the chemical industry maintained that it had a vested economic right in a system that tolerated no exemptions.

Not incidentally, this argument undercuts the idea that liability for garbage is an unintended consequence of the statutory scheme. The vested economic "right" to a "fair" allocation is too large a concept to have escaped notice when Superfund was first enacted. To offer relief, Congress must reverse an established public policy. A change of that magnitude should await comprehensive reauthorization because it is so intertwined with other liability issues that it cannot be addressed in isolation.

As compelling as this argument is at first blush, taken to its logical extreme, it becomes tautological. Virtually any unintended consequence will create economic winners and losers; the longer the consequence remains in effect, the more entrenched such interests will become. Eliminating an unintended consequence will inevitably have effects perceived as unfair by those who obtained such benefits. It is also worth noting that the Superfund trade press has been virtually devoid of stories about the initiation of new garbage lawsuits for the last several years, providing circumstantial evidence for the conclusion that corporate plaintiffs found such cases far more expensive and aggravating than they were worth.

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45. *See* Jennifer Silverman, *Superfund: Inability to Produce Comprehensive Bill in 1998 May Trigger Narrower Legislation*, 28 Env't Rep. (BNA) S-12, S-13 (1998).

46. *See Superfund: Proposal on Municipal Liability Issue Draws Industry Fire, White House Intervention*, 22 Env't Rep. (BNA) 2869 (1992) ("A CMA official told BNA that the policy would 'shift billions of dollars in cleanup costs onto industry . . . .'").

47. For a discussion of the technical arguments made with respect to the allocation of cleanup costs between generators of industrial hazardous waste and municipal solid waste, *see* Steinzor & Linter, *supra* note 5, at 115-30.

Of course, most debates over policy do not boil down to irreconcilable alternatives. Rather, it is almost always possible to ameliorate the impact of rectifying a genuine legislative mistake through the content of the fix itself. Thus, Congress rapidly concluded that a Solomonic solution to the garbage problem was to exempt so-called *de minimis* parties like Mrs. Merlino from the Superfund system, while capping at some reasonable percentage point the contribution of counties, cities, and town that represent the aggregate liability of their individual citizens.[48] This approach, which was incorporated in the leading legislative proposals during the 103d Congress, exempts the parties that Congress could not have intended as liability targets, avoids the gross unfairness of a purely volumetric allocation, and—once again, not incidentally—softens the blow to chemical industry interests by requiring municipalities to pay some amount rather than exempting them from any liability.

But still comprehensive legislation did not pass and, in all but one instance, efforts to implement piecemeal changes were defeated.[49] Under heavy pressure from municipal groups, EPA ultimately issued an administrative policy strongly recommending a formula for allocating municipal cleanup costs when garbage triggers liability, although the policy was immediately challenged by the Chemical Manufacturers Association.[50] Unless it is overturned by the courts, this administrative relief will further destroy the economic utility of massive third and fourth party cases. But it does not eliminate the most egregious aspects of the unintended consequence: the prospect that Mrs. Merlino and her ilk will be sued with no recourse.

IMPLICATIONS

It is certainly possible to conclude from this sad saga that there are effective alternatives to congressional action when an unintended consequence is manifested. As I have just acknowledged, the litigation ran its course, many of the cases were settled, and EPA finally took administrative action that should serve as inoculation against a further outbreak. The problem with this ostensibly "happy" ending is twofold. In retrospect, Superfund paid an inordinately high price for

48. *See, e.g.*, H.R. 4916, 103d Cong., 2d Sess. §§ 403, 412 (1994); S. 1834, 103d Cong., 2d Sess. §§ 403, 407 (1994).

49. The one exception was legislation to limit the liability of the banking industry, which passed both houses and was signed into law in 1995. CERCLA § 9601(20)(E).

50. *See Superfund: Industry Groups Challenge EPA on Policy Offering Municipal Solid Waste Settlements*, 29 Env't Rep. (BNA) 264, 264-65 (1998).

the delays in addressing this particular consequence, and arguably continues to pay that price today. Further, there is no good reason to excuse Congress from the responsibility of fine-tuning its laws on a continuous basis. The notion that only comprehensive reauthorization of existing statutes is possible because carefully targeted amendments would inevitably attract a raft of undesirable changes on the floor of the House and Senate does similar damage to the reputation of Congress as an institution without any modicum of self-control.

The one example of piecemeal reform that did pass demonstrates that Congress can exert self-control when committee chairmen provide strong leadership. An amendment exempting banks and other financial institutions from Superfund liability unless they exert "control" over the site was enacted during the 103d Congress, at the insistence of Senate Finance Committee chairman Alfonse D'Amato (R-N.Y.).[51] It attracted no excess baggage and was voted on with relatively little controversy. It is Superfund's most important tragedy that the committee chairmen responsible for overseeing its implementation did not feel commensurate resolve to correct some of its obvious and unnecessary pitfalls.

Superfund is the federal environmental program that everyone loves to hate. It is virtually impossible to find praise of the program, much less a spirited defense, in the popular media. It is easy to find descriptions of its many faults, which are inevitably accompanied by calls for radical restructuring of the program.[52] Allegations that the liability scheme is fundamentally unfair have done more to undercut the program's reputation and credibility than any other factor, except perhaps the painfully slow progress in cleaning up sites on the National Priorities List.[53]

Had critics been confined to arguments about Superfund's unfair impact on the manufacturing sector, especially corporations with deep pockets and familiar names, the program's credibility would have suffered only glancing blows in the popular media. It was the

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51. *Superfund: Provisions to Shield Lenders Included in Banking Regulatory Relief Legislation*, 26 Env't Rep. (BNA) 1056, 1056 (1995). The provision appears at CERLCA § 9601(20)(E).

52. *See, e.g.*, *Superfund: Any Reform Is Better than No Reform, Congressman Tells Chemical Makers*, Daily Env't Rep. (BNA) No. 40, at D-16 (Mar. 2, 1994); *Superfund: Ruckelshaus Says Superfund Reform Critical, Hits EPA for Alienation of Concerned Citizens*, 25 Env't Rep. (BNA) 278 (1994).

53. *See, e.g.*, *Superfund: GAO's New Evidence of Cleanup Delays Fails to Discourage EPA Official at Hearing*, Daily Env't Rep. (BNA) No. 24, at A-9 (Feb. 5, 1998).

popularization of the problem, defined as the sense that no organized entity could escape the liability dragnet, that infected the program with a political virus from which it may never recover. Indeed, retroactive liability might well have been repealed by now if Republican leaders in Congress could find a respectable way to raise revenues for cleanup of the sites currently on the National Priorities List without raising taxes on industry. The single unintended consequence of affirmatively covering (or, put another way, failing to exempt) people who take their trash to the curb was the indisputable "patient zero" in this epidemic, which continues to this day.

Whatever one thinks of large public works projects as an approach to toxic waste cleanup, reauthorization is immobilized because Congress is unable to compromise its way out of this dilemma. For those who think the continuation of the program is throwing good money after bad as a practical matter, this outcome is acceptable, although the conspicuous absence of any serious legislative proposals to dismantle the program demonstrates that the covert wish to simply walk away from the problem is not viable as a political matter.

Superfund's bad reputation also obscures the larger implications of congressional paralysis. There are undoubtedly other examples in federal environmental programs of consequences that are so absurd they could not have been intended. EPA's efforts to interpret the definitions of "solid" and "hazardous" waste under the Resource Conservation and Recovery Act (RCRA), especially in the context of the so-called "mixture" and "derived from" rules, spring immediately to mind, because industry has long argued that aspects of those policies capture wastes of such low toxicity that Congress could not have intended to encompass them in the RCRA regulatory scheme.[54] While it is certainly debatable which institution bears responsibility for that particular morass—EPA or Congress— an active effort to debate the desirability of a quick legislative fix might well be a more productive use of all of the relevant parties' time than the litigation those policies have spawned. In any event, if any reasonably informed group of environmental professionals spent an hour together, we undoubtedly could compile a much longer list.

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54. For an excellent exposition of this perspective, *see* Van Carson et al., *Rebuttal: The Mixture Rule and the Environmental Code*, 25 Envtl. L. Rep. (Envtl. L. Inst.) 10,244 (1995). For an equally insightful contrary perspective, *see* James E. Satterfield, *EPA's Mixture Rule: Why the Fuss?*, 24 Envtl. L. Rep. (Envtl. L. Inst.) 10,712 (1994); James E. Satterfield, *EPA's Continuing Jurisdiction Regulation: A Response to the Mixture Rule and the Environmental Code*, 25 Envtl. L. Rep. (Envtl. L. Inst.) 10,262 (1995).

The beauty of the RCRA example is that it involves many of the same industry players as the Superfund garbage controversy, with the companies that took full advantage of Superfund's debilitating weakness on the receiving end of RCRA's equally fatal flaw. This contrast suggests that, over the long-run, acknowledging that unintended consequences are an important but undesirable product of the legislative process has advantages for our system of government as a whole.

Justice Scalia and his followers aside, commentators expend a great deal of energy exploring the rational basis for legislative action. However much they may decry the consideration of factors they view as extraneous to sound public policy, the underlying assumption of most such analyses is that, as a group, legislators are conscious of what they are doing, however inappropriate their motivations. It may well take a sea change in attitude for Congress and its constituencies to admit to inadvertence and mistake. But we pay a price for the *hubris* that closes our eyes to such possibilities.