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A Superfund Solution for an Economic Love Canal

Mehmet K. Konar-Steenberg
William Mitchell College of Law

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Mehmet K. Konar-Steenberg*

"There is simply no good reason for us to respond to one type of release of a poison, but not another. The test should not be whether poison was released into river water rather than into well water; or by toxic waste buried in the ground rather than toxic waste discharged to the ground. The test should be whether the poison was released. I assure you that the victim does not care to make those distinctions, nor should we."

Senator Robert T. Stafford[1]

Introduction

Consider this scenario: A profitable but hazardous industry's worst-case risks come to pass. Neighborhoods are boarded-up and residents dislocated. Poor and minority communities are hit particularly hard because they offered the least resistance to the industry's questionable practices—practices virtually unregulated by the government and undeterred by the tort system. The scope of the resulting disaster necessitates massive taxpayer-funded remediation and sparks popular demands for accountability on the part of those who profited while communities died.

These were the essential features of the toxic waste crisis that confronted policymakers during the 1970s. Their response, the "Superfund" legal regime, answered calls for accountability by establishing new liability rules for past risky conduct. Under Superfund, a range of businesses that

* Associate Professor of Law, William Mitchell College of Law. My thanks to Prentiss Cox, Mark Edwards, Daniel Kleinberger, Anne F. Peterson, Eileen Roberts, Thuy Vo, and the Pace symposium participants for their helpful critiques of this proposal.

1. Senator Robert T. Stafford, *Why Superfund Was Needed*, EPA JOURNAL, June 1981, *available at* http://www.epa.gov/history/topics/cercla/04.htm.

contributed to past contamination of a site became strictly, retroactively, and jointly-and-severally liable for the cost of cleaning up the mess—regardless of whether their conduct was lawful at the time it occurred. Moreover, some courts implementing this new liability regime saw fit to loosen ordinary corporate liability rules so that parent corporations and corporate officers who controlled a corporation's waste disposal activities might be held directly liable for the cleanup. Businesses criticized this reconfiguration of liability rules as unanticipated and, therefore, unfair, while environmental interests eventually complained about poor implementation and slow remediation. But despite the criticisms and implementation problems, Superfund succeeded in holding at least some polluters responsible for their actions. It also established an important precedent for imposing strict liability based on past risky commercial conduct that caused community-wide harms.

Of course, many of these same features—from boarded neighborhoods to ineffective government regulation to demands for post-hoc legal accountability—also characterize the subprime mortgage crisis. This essay argues that these striking similarities justify an analogous solution: a Superfund-style accountability regime designed to address the current subprime mortgage mess and to avoid future ones. Specifically, this essay argues that Congress should complement local, state, and federal economic cleanup that is already occurring with new legal mechanisms patterned on the essential features of Superfund liability: strict, retroactive, and joint-and-several liability coupled with broad corporate liability options for those actors sharing responsibility for the mess.

Part I compares the toxic waste and toxic asset crises, focusing on common causes, common effects, and common barriers to legal accountability, in order to make the case that an analogous response is warranted. Part II then explains how Superfund's key legal features might be adapted towards a legislative regime of accountability for the mortgage crisis.

I. Toxic Waste, Toxic Assets

In early 2007, business reporters started using the evocative phrase "toxic asset" as a metaphor for securities containing bundled mortgage loans, including subprime loans, which had begun to cause difficulties on the secondary mortgage market.[2] Despite efforts by two presidential administrations to replace this phrase with euphemisms tending to deflect attention from the poisonous impacts of these assets, the term "toxic asset" endures.[3] This section argues that this durable metaphor should be taken one step further and treated as an analogy. Specifically, the toxic lending crisis of the early twenty-first century is substantially analogous to the toxic chemical waste crisis of the later twentieth century in four key ways: causes, effects on communities, political responses, and legal barriers to accountability.

A. *Analogous Causes*

At its core, the toxic waste crisis was the byproduct of profitable commercial activities whose risks were ineffectively regulated by government administrative agencies, undeterred by existing tort liability principles, and, as a result, externalized on to society as a whole. Widespread generation and disposal of hazardous chemical wastes were necessary components of industrialization and the postwar economic boom.[4] But state and federal laws did not effectively regulate

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2. A Lexis/Nexis search on the phrase "toxic asset" in the ALLNEWS database indicates that the first usage of this phrase in connection with the subprime lending crisis appeared in an article by Chidem Kurdas in the HEDGEWORLD DAILY NEWS bearing the title, *Funds Selling Securitized Mortgages Face Buyers' Market*, on March 27, 2007.

3. The Bush Administration offered the term "troubled assets," as in, "Troubled Assets Relief Program," while the Obama Administration apparently prefers to call them "legacy assets," or, at least, "so-called legacy assets." *See, e.g.*, Timothy Geithner, Opinion, *My Plan for Bad Bank Assets*, WALL ST. J., Mar. 23, 2009, at A15 ("Many banks, still burdened by bad lending decisions, are holding back on providing credit. Market prices for many assets held by financial institutions—so-called legacy assets—are either uncertain or depressed.").

4. *See* JOHN A. HIRD, SUPERFUND: THE POLITICAL ECONOMY OF ENVIRONMENTAL RISK 4 (1994); Stafford, *supra* note 1.

hazardous waste disposal prior to the environmental awakening of the 1970s,[5] resulting in an approach to hazardous waste management that one commentator describes as "out of sight, out of mind."[6] Beginning in the 1970s the Federal Government did begin to impose prospective regulation on hazardous waste disposal.[7] But the problem of America's old and abandoned hazardous waste dumps remained essentially unaddressed by federal law. State regulation was similarly immature through this period,[8] and common-law tort liability was not up to the task of deterring dumping, as the adverse impacts of the act would not be felt for years or decades. The inadequacy of this threadbare legal regime was eventually made manifest in the form of Love Canal and other toxic waste disasters.[9]

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5. *See* EPA, Press Release, Costle Presses for Immediate Passage of Superfund (Sept. 11, 1980), *available at* http://www.epa.gov/history/topics/cercla/03.htm ("Existing statutes and programs are completely overwhelmed by the problem facing us daily from oil and hazardous substance spills and releases from hazardous waste sites.").

6. David R. Case, *Resource Conservation and Recovery Act*, *in* ENVIRONMENTAL LAW HANDBOOK 133 (Christopher L. Bell et al. eds., 19th ed. 2007). *See also* 3 FRANK P. GRAD, TREATISE ON ENVIRONMENTAL LAW § 4A-18 (2009) ("In many instances [Superfund] applies to disposal sites which go back to World War II and before, when disposal of hazardous waste was not one of the country's major priorities.").

7. *See generally* HIRD, *supra* note 4, at 9. In 1976, Congress adopted the Resource Conservation and Recovery Act (RCRA) primarily to control present and future production and disposal of hazardous wastes. Pub. L. No. 94-580, 90 Stat. 2795 (codified as amended at 42 U.S.C. §§ 6901-6992k (2006)). The RCRA also authorized the Federal Government to order responsible parties to remediate existing hazardous waste dumps, but it did not include a provision dealing with site cleanup where the responsible party could not be located. JULIAN B. ANDELMAN & DWIGHT W. UNDERHILL, HEALTH EFFECTS FROM HAZARDOUS WASTE SITES 61 (1987). Other federal laws provided authority and funding to remediate hazardous waste dumped in navigable waters. KATHLEEN SELLERS, FUNDAMENTALS OF HAZARDOUS WASTE SITE REMEDIATION 78 (1999).

8. New York, for example, where Love Canal is located, did not have a unified state environmental agency until 1970. New York State Department of Environmental Conservation, History of DEC, http://www.dec.ny.gov/about/9677.html (last visited Sept. 11, 2009).

9. "The situation concerning hazardous waste disposal sites is grim," explained EPA Administrator Douglas M. Costle in a 1980 press release urging adoption of Superfund legislation. EPA, *supra* note 5.

This same coupling of very risky commercial behavior with inadequate legal limitations helped produce the current subprime mortgage crisis. Subprime loans are, by definition, abnormally risky loans.[10] Like the production of industrial chemicals, these kinds of loans can be profitable to lenders and benefit society. Most notably, subprime loans expand opportunities for home ownership and the economic and social advantages that go along with it.[11] Unfortunately, like the

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> The past few years have brought to public attention an unforgettable series of incidents resulting from improper hazardous waste management—the continuing tragedy of Love Canal, the pollution of the water supply of over 300,000 people in Iowa, and the discovery of up to 20,000 to 30,000 discarded and leaking barrels of chemical wastes in the "Valley of the Drums" in Kentucky. In 1979, EPA estimated the number of hazardous waste sites to range between 32,000 and 50,000, and the number of sites posing a significant health or environmental problem to be between 1,200 and 2,000.

Id.; *see also* GRAD, *supra* note 6, § 4A-19 ("Indeed, the enactment of [Superfund] was in part a response to the discovery of hazardous or catastrophic consequences of earlier disposals of hazardous waste, such as, for instance, in the Love Canal situation.").

10. *See, e.g.*, Memorandum from Richard M. Riccobono, Deputy Director, Office of Thrift Supervision, to Chief Executive Officers, Expanded Guidance for Subprime Lending Programs (Feb. 2, 2001), *available at* http://files.ots.treas.gov/25137.pdf ("Subprime borrowers typically have weakened credit histories that include payment delinquencies, and possibly more severe problems such as charge-offs, judgments, and bankruptcies. They may also display reduced repayment capacity as measured by credit scores, debt-to-income ratios, or other criteria that may encompass borrowers with incomplete credit histories."). *See also* Danielle DiMartino & John V. Duca, *The Rise and Fall of Subprime Mortgages*, ECON. LETTER, Nov. 2007, *available at* http://www.dallasfed.org/research/eclett/2007/el0711.html ("Subprime mortgages are extended to applicants deemed the least creditworthy because of low credit scores or uncertain income prospects, both of which reflect the highest default risk and warrant the highest interest rates."). In 2007, the Department of the Treasury rejected industry calls for a "bright-line" definition, choosing instead to continue to rely upon its 2001 Expanded Guidance, which the Department says "provides a range of credit risk characteristics that are associated with subprime borrowers, noting that the characteristics are illustrative and are not meant to define specific parameters for all subprime borrowers." OFFICE OF THE COMPTROLLER OF THE CURRENCY, DEP'T OF THE TREASURY, STATEMENT ON SUBPRIME MORTGAGE LENDING 7-8 (2007), *available at* http://www.occ.treas.gov/ftp/release/2007-64a.pdf (footnote omitted).

11. OFFICE OF POLICY DEV. & RESEARCH, U.S. DEP'T OF HOUSING & URBAN

inadequate regulation of industrial chemical waste production in the first part of the previous century, the regulation of industrial-scale subprime lending in the first part of this century was not commensurate with the risks.

At the federal level, the dominant mortgage regulation philosophy for the past twenty-five years was, alas, to deregulate, as Professor Di Lorenzo's article elsewhere in this volume thoroughly documents.[12] Starting in 1982, Congress voted to eliminate hard-wired statutory controls that limited the mortgage lending conducted by federally chartered banks and thrifts and, instead, voted to implement a to-be-announced system of administrative agency oversight.[13] The Reagan Administration agency officials charged with implementing this new authority settled on a regulatory strategy that they described as "impos[ing] no limitations on national banks' real estate lending and rescind[ing] current regulations which do impose limitations."[14] This laissez-faire regulatory approach persisted even after Congress was forced to respond to the savings-and-loan crisis in the 1990s. For example, when Congress mandated the adoption of "uniform regulations prescribing standards for real estate lending by insured depository institutions" in 1991, regulators adopted regulations containing general principles rather than specific requirements.[15] Even as late as 2007, federal officials responding to the boom in subprime lending were issuing

DEV., UNEQUAL BURDEN: INCOME & RACIAL DISPARITIES IN SUBPRIME LENDING IN AMERICA 1 (2000), http://www.huduser.org/Publications/pdf/unequal_full.pdf ("By providing loans to borrowers who do not meet the credit standards for borrowers in the prime market, subprime lending can and does serve a critical role in the Nation's economy. These borrowers may have blemishes in their credit record, insufficient credit history or non-traditional credit sources. Through the subprime loan market, they can buy a new home, improve their existing home, or refinance their mortgage to increase their cash on hand.").

12. *See generally* Vincent Di Lorenzo, *Unsafe Loans in a Deregulated U.S. Mortgage Market*, 30 PACE L. REV. 154 (2009).

13. *See* Garn-St. Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, 96 Stat. 1469.

14. Real Estate Lending by National Banks, 48 Fed. Reg. 40,698, 40,699 (Sept. 9, 1983) (to be codified at 12 C.F.R. pt. 7 & 34).

15. Di Lorenzo, *supra* note 12, at 156-57.

"guidance" documents rather than enforceable regulations.[16]

Other federal laws offered safeguards that were too limited in their reach to be effective. For example, the promisingly titled "Home Ownership and Equity Protection Act" (HOEPA) adopted in 1994 was limited by unrealistic trigger requirements and did not even apply to home purchase loans or home equity lines of credit; as a result, relatively few loans fell within the scope of the statute's protections.[17] The result of these years of deregulation was the proliferation of loans made with unconventional terms and without serious evaluation of repayment ability or borrower equity.[18]

At the state level, self-evidently, neither regulation nor potential tort liability served to adequately deter the kind of lending behavior leading to the present crisis. In part, this was because the same deregulationist philosophy that led federal officials to adopt a hands-off approach in their own regulatory sphere led them to impose the same result on state regulation of nationally chartered lenders by means of their preemption authority.[19] State regulation of state-chartered lenders had a somewhat better record, with a few states adopting tougher predatory lending laws in response to the proliferation of

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16. Federal officials issued "guidances" relating to subprime lending and high loan-to-value residential real estate loans in 1999, 2001, 2006, and 2007. *Subprime Mortgages: Hearings Before the H. Subcomm. on Financial Institutions and Consumer Credit of the H. Comm. on Financial Services*, 111th Cong. (2007) (testimony of Sandra F. Braunstein, Director, Division of Consumer and Community Affairs), *available at* http://www.federalreserve.gov/newsevents/testimony/braunstein20070327a.htm.

17. According to the Center for Responsible Lending, few loans met the statute's thresholds for high upfront charges or high interest rates. Moreover, the law did not cover home purchase loans or home equity lines of credit at all. WEI LI & KEITH S. ERNST, THE BEST VALUE IN THE SUBPRIME MARKET 4 (2006).

18. Di Lorenzo, *supra* note 12, at 157-159.

19. For example, in a 2005 letter to Comptroller of the Currency John C. Dugan, Representative Barney Frank warned that federal officials' preemption of the application of state predatory lending laws to nationally chartered banks resulted in a "regulatory void" because federal officials lacked the authority to adopt a uniform federal definition of predatory lending. Letter from Congressman Barney Frank, Ranking Member of the House Committee on Financial Services, to Comptroller John C. Dugan, Office of the Comptroller of the Currency (Sept. 27, 2005), *available at* http://www.seattlepi.com/dayart/pdf/Barney_Frank_letter.pdf.

subprime loans and loans with novel terms.[20] Even so, the fact that Ameriquest, one of the most prominent names in the current economic crisis, was state regulated suggests that existing state regulatory structures were sometimes outmatched.[21]

B. *Analogous Effects*

The effects of these two crises are also depressingly analogous. It is difficult to distinguish photos of boarded neighborhoods in Love Canal from the more recent images emerging from neighborhoods in Minneapolis, Cleveland, New

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20. *See generally* LI & ERNST, *supra* note 17.

21. *See, e.g.*, E. Scott Reckard, *Financial Regulators Missed the Big Picture, Big Problems*, L.A. TIMES, Mar. 27, 2009, *available at* http://articles.latimes.com/2009/mar/27/business/fi-ameriquest27. As for the notorious American International Group (AIG), a finger-pointing war has broken out pitting federal and state officials against each other over who was responsible for regulating the firm's operations. On the federal side, four members of Congress opined in reference to AIG that "[c]learly, some insurers have become too complex and too interconnected world-wide for the limited resources of state regulators to handle." John E. Sununu et al., Opinion, *Insurance Companies Need a Federal Regulator*, WALL ST. J., Sept. 23, 2008, at A27. This op-ed infuriated state officials, who noted that the state-regulated insurance components of AIG were healthy and that the economic contagion originated in the part of AIG overseen by federal officials. For example, the Colorado Commissioner of Insurance wrote,

> [t]he AIG financial companies took on more risk than they could handle. But AIG's ownership of state-regulated insurance companies was not part of the risk: Proposed transactions involving the assets of insurance carriers, protected by state regulators, are closely monitored to ensure they will not threaten the ability of the insurers to pay policyholder claims. AIG's financial troubles are contained within its noninsurance holding company, which is regulated by the U.S. Office of Thrift Supervision (OTS). It is not held to the same investment, accounting and capital adequacy standards as its state-regulated insurance subsidiaries.

Marcy Morrison, Opinion, *State Regulators 'Got it Right' on AIG Crisis*, COLO. STATESMAN, Oct. 3, 2008, *available at* http://www.coloradostatesman.com/content/state-regulators-%3Fgot-it-right%3F-aig-crisis. This spat suggests that, even today, there are remaining barriers to collaboration between federal and state officials.

York, and elsewhere, which have been gutted by subprime foreclosures. Home vacancies of this sort have both an immediate adverse impact on the people who are displaced and result in a host of long-term negative consequences for neighbors who remain in affected communities. These community-wide adverse impacts include increased crime, worsened sanitary and health conditions, depressed home values, and increased insurance rates.[22]

It also appears that in both of these crises the worst impacts have been visited disproportionately on people living in poor and minority communities. A long tradition of "environmental justice" literature documents the tendency for polluters to locate their sites in lower income and minority communities.[23] As early as 2000, a HUD study warned that subprime lending was concentrated in these same areas.[24] HUD found that subprime loans were three times more common in low-income neighborhoods than in high-income neighborhoods, and five times more common in African-American neighborhoods than in white neighborhoods.[25] More recent studies confirm that these communities are now being hit particularly hard by foreclosures.[26] One observer warns

22. *See, e.g.*, Prentiss Cox, *Foreclosure Reform Amid Mortgage Lending Turmoil: A Public Purpose Approach*, 45 HOUS. L. REV. 683, 693-97 (2008).

23. See MICHAEL B. GERRARD & SHEILA R. FOSTER, THE LAW OF ENVIRONMENTAL JUSTICE (2008) and DAVID E. NEWTON, ENVIRONMENTAL JUSTICE: A REFERENCE HANDBOOK (1996), for collected essays on environmental justice issues.

24. OFFICE OF POLICY DEV. & RESEARCH, *supra* note 11.

25. *Id.*

26. The Economic Policy Institute cites a number of studies suggesting that the disparities go well beyond mortgage lending, resulting in a:

> two-tiered system of financial services . . . one featuring conventional products distributed by banks and savings institutions primarily for middle- and upper-income, disproportionately white suburban markets and the other featuring high-priced, often predatory products, offered by such "fringe bankers" as check-cashers, payday lenders, pawnshops, and others, targeted at low-income and predominantly minority communities concentrated in central cities.

Gregory D. Squires, *Do Subprime Loans Create Subprime Cities?*, EPI BRIEFING PAPER, Feb. 28, 2008, at 3, *available at* http://www.shared that "[i]f current trends continue, it is quite possible that subprime mortgages could cause the largest loss of African-American wealth in American history."[27]

C. *Analogous Political Responses*

By 1979, the sheer scale of the toxic waste crisis demanded a federally organized response.[28] Even so, the political realities of late 1979 and early 1980—namely the election of President Reagan—counseled against a legislative response that could be criticized as an expansion of "big government." In this political environment, a program to make responsible parties share response costs was more likely to garner popular support than one that burdened only the taxpayer with these expenses.[29]

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prosperity.org/bp197/bp197.pdf (citation omitted). Other reports note that the foreclosure crisis has hurt African-American neighborhoods more than others because home-ownership tends to be lower among African Americans and because home equity tends to serve as a principal source of wealth in these communities. *See, e.g.*, Jeff Kunerth, *Foreclosure Crisis Hits Hard in Black Communities*, ORLANDO SENTINEL, May 4, 2008, at B3, *available at* 2008 WLNR 8317842 (WestLaw).

27. *The Role of the Secondary Market in Subprime Mortgage Lending: Hearing before the H. Subcomm. on Financial Institutions and Consumer Credit of the H. Comm. on Financial Services*, 110th Cong. 68 (2007) [hereinafter *Hearings*] (prepared testimony of Michael D. Calhoun, Center for Responsible Lending).

28. *See generally The Environmental Emergency Response Act: Hearing Before the S. Comm. on Finance*, 96th Cong. 108 (1980) (agency testimony of Douglas M. Costle, Administrator, Environmental Protection Agency) ("In 1979, an EPA contractor estimated the total number of hazardous waste sites to range between 32,000 and 50,000, and the number of sites posing a significant health or environmental problem to be between 1,200 and 2,000").

29. Sen. Moynihan:

> May I call the committee's attention to [EPA Commissioner] Costle's statement that unlike all of the previous environmental legislation of this last decade, this legislation does not establish a new regulatory regime. It imposes costs and comes into play only where there is a specific problem. If there are no spills, there will be no expenditures. If there is no damage, there will be no liability. This is not an enterprise which will spend money regardless as if it were a program. This is a fund to respond to specific problems and specific damages.

The politics of the toxic asset crisis have a similar resonance. Once again, we are confronted by a crisis whose magnitude and scope demands large-scale government action and both the Bush and Obama administrations have supported federal "bail out" programs to aid firms sickened by subprime toxic assets. At the same time, shrill and angry demands that those responsible for the crisis, rather than taxpayers, pay the price have become commonplace.[30] It is reasonable to suppose that some satisfaction of these demands could factor into public support for additional expenditures.

D. *Similar Barriers to Legal Accountability*

In the case of hazardous waste, the principal barrier to imposing legal responsibility was that existing laws were simply inadequate to reach those responsible, meaning that the few anti-pollution laws that did exist in this area did not

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Id. at 148. This idea bears obvious relation to the broader "polluter pays" or "extended producer responsibility" principle, which holds that a product's environmental costs should be internalized and made part of the cost of the product rather than externalized to/subsidized by society. See ORG. OF ECON. COOPERATION & DEV., RECOMMENDATION OF THE COUNCIL ON GUIDING PRINCIPLES CONCERNING INTERNATIONAL ECONOMIC ASPECTS OF ENVIRONMENTAL POLICIES (1972) (Council Document no. C(72)128), *available at* http://www.ciesin.org/docs/008-574/008-574.html, for one of the first enunciations of this principle.

30. *See, e.g.*, Nicholas D. Kristoff, Op-Ed., *Save the Fat Cats*, N.Y. TIMES, Oct. 1, 2008, at A33 ("[C]ritics of the bailout have reason to be furious. It is profoundly unfair that working-class American families lose their homes, their jobs, their savings, while plutocrats who caused the problem get rescued. If the Congressional critics of the bailout want to do some lasting good, they should come back in January — after approving the bailout now — with a series of tough measures to improve governance and inject more fairness in the economy."); Ben Stein, Opinion, *In Financial Food Chains, Little Guys Can't Win*, N.Y. TIMES, Sept. 27, 2008, at BU2 ("The people whose conduct got us into this catastrophe have not only taken our money, hopes and peace of mind, but they apparently also want a trillion or so more dollars to put into their Wall Street Buddy System Fund. This may be the most dangerous attack on the law in my lifetime. What anarchists even dared consider this plan? Thank heaven that minds more devoted to the Constitution on Capitol Hill are questioning this shocking request. By the way, if we are actually thinking about tossing the Constitution out the window, why not simply annul these credit-default swap contracts? With that done, the incomprehensibly large liability of the banks would cease, and we wouldn't need this staggering bailout. Shouldn't we consider making the speculators pay some of the price?").

squarely address the problems associated with assigning liability for past dumping of hazardous wastes.[31] Put simply, dumping hazardous wastes up to that point had been, in many cases, perfectly lawful. And to the extent that laws were broken, effective enforcement actions would not only confront the ordinary barriers of litigation (political will, costly investigations, marshalling of proof adequate to meet criminal or civil standards), such actions would also have to be undertaken on a truly national scale in order to respond meaningfully and comprehensively to the nationwide problem. To complicate matters further, toxic waste dumping involved a host of potentially responsible actors—chemical feedstock manufacturers, consumers, waste haulers, dump owners—among whom accountability somehow would have to be allocated. And, given the lag time between dumping and the realization of environmental harm, even locating the potentially responsible parties wasn't ensured.

The subprime mortgage crisis presents similar barriers to accountability. First, as we have seen, the legal regime leading to the crisis has been largely permissive and non-regulatory; the lengthy period of deregulation from the 1980s to the near-present thus set the stage for the proliferation of some subprime lending practices which, while plainly destructive, did not necessarily violate laws.[32] With respect to illegal conduct, it is true that some state attorneys general have gone after abusive lenders, and in this respect the states are once again ahead of the Federal Government, much as state legislatures led with predatory lending reform laws.[33] Even so, litigation against a few readily prosecutable lenders is different from helping discrete communities recover from subprime foreclosures generated by a multitude of lenders. Second, like the toxic waste crisis, the multitude of potentially responsible

31. *The Environmental Emergency Response Act*, *supra* note 28, at 109.

32. *See* discussion *supra* Part I.A.

33. *See, e.g.*, John F. Olson, *Subprime-Related Securities Litigation: Where Do We Go From Here?*, *in* 40TH ANNUAL INSTITUTE ON SECURITIES REGULATION NOVEMBER 12-14, 2008, at 120 (PLI Corporate Law & Practice, Course Handbook Series No. 14864, 2008), *available at* http://www.gibsondunn.com/publications/Documents/Dickey-Subprime-RelatedSecuritiesLit-Insights_0408.pdf (noting several attorney general investigations and lawsuits).

actors—loan originators, borrowers, attorneys, appraisers, other support professionals, the secondary mortgage market—complicates traditional fault-based allocation of responsibility. Finally, many of these potentially responsible parties may, by now, be difficult to locate, not so much because of the passage of time as in the toxic waste crisis, but rather because under current economic circumstances many of these firms may be insolvent.

Taken together, these observations suggest that the policy challenges posed by the toxic waste crisis of the late twentieth century and the toxic lending crisis of the early twenty-first century are not very different. Unusually risky commercial conduct; the lack of a functional legal regime to curb the socially harmful aspects of that conduct; the resulting need for costly, large-scale government intervention; loud popular demands for accountability; and significant barriers to satisfying those demands—all of these characteristics are common to the two crises. In light of these similarities, the next section shows how the Superfund solution developed for the former crisis might be adapted into a solution for the latter.

II. Adapting Superfund to the Toxic Lending Crisis

The previous section identified some commonalities between the toxic waste crisis and the toxic asset crisis—in particular, common adverse impacts on communities and common barriers to effective assignment of responsibility for those impacts. This section first explains in greater detail the principal legal response to these challenges during the toxic waste crisis. Then it suggests some modifications and updates to make this framework useful in the current lending crisis context.

A. *Overview of Superfund's Key Legal Features*

New York's Love Canal, the Valley of the Drums in Kentucky, and other similar disasters eventually forced federal lawmakers to confront the problem of dangerous and unregulated hazardous chemical waste dumps.[34] In the waning days of the Carter Administration, a remarkably unified Congress adopted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), also known as "Superfund."[35] Superfund was designed to be a comprehensive solution, coupling new funding for cleanup with a new liability scheme aimed at imposing responsibility on those who created the problem.

On the funding side, Congress created the eponymous "Superfund" as a kind of environmental trust fund to pay for both emergency responses and long-term remediation of contaminated sites. The fund was derived from four sources: "taxes on crude oil and certain chemicals, as well as an environmental tax assessed on corporations based on their taxable income; appropriations from the general fund; fines, penalties, and recoveries from responsible parties; and interest accrued on the balance of the fund."[36] Over the history of the program, taxes provided about 68% of the fund until 1995, when taxing authority expired; since then, most of the funding has come from the general fund.[37] Not all of the money in this trust fund is available for cleanup; instead, Congress annually appropriates money from the trust fund to the Environmental Protection Agency (EPA) to fund EPA's Superfund activities.[38] EPA has received about $1.2 billion dollars each year on average from 1981 through 2007.[39]

Complementing this financial response was a new federal liability scheme that sought to overcome the practical barriers to legal accountability identified in Part I. This scheme has several key features, beginning with a very broad liability net[40]

34. Ronald E. Cardwell, *Comprehensive Environmental Response, Compensation, and Liability Act*, *in* ENVIRONMENTAL LAW HANDBOOK 509 (Thomas F. P. Sullivan ed., 2009).

35. Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified as amended at 42 U.S.C. §§ 9601-9675 (2006)).

36. U.S. GOV'T ACCOUNTING OFFICE, SUPERFUND: FUNDING AND REPORTED COSTS OF ENFORCEMENT AND ADMINISTRATION ACTIVITIES 3 (2008), *available at* http://www.gao.gov/new.items/d08841r.pdf.

37. *Id.*

38. *Id.*

39. *Id.*

40. Richard L. Revesz & Richard B. Stewart, *The Superfund Debate*, *in* ANALYZING SUPERFUND 3 (Richard L. Revesz & Richard B. Stewart eds., 1995).

woven from three statutory and judicially manufactured elements: an expansive statutory definition of "potentially responsible parties," or "PRPs"; judicial endorsement of joint-and-several liability; and judicial willingness to loosen the usual limitations on corporate liability.

The statutory PRP definition comprises current site owners and operators, former owners and operators who were involved with the site when hazardous wastes were disposed there, persons who arranged for disposal of their hazardous wastes at the site, and those who transported hazardous waste to the site.[41] The statute thus targets several different classes of persons and entities who shared in (and likely profited from) creating the problem.[42]

Subsequent case law interpreting the statute augmented the liability net in two ways. First, courts established that the liability of these different parties was joint and several.[43] This feature created incentives for identified PRPs to locate additional PRPs in order to share cleanup costs, furthering the accountability function of the statute. Second, some courts recognized that Superfund was meant to go beyond corporate forms and reach parent corporations and officers where they exercised control over a corporation's hazardous waste disposal activities.[44]

Another key feature of Superfund is that it imposed new liability for past conduct—even lawful conduct. Considering the importance of this feature, the Superfund statute is oddly circumspect about its retroactive application; however, the prevailing judicial construction of the Superfund statute treats its liability provisions as reaching conduct pre-dating the statute, based on the use of the past-tense ("owned," "operated," "arranged," "accepted") to describe the kinds of actions giving rise to liability, the obviously remedial nature of

41. 42 U.S.C. §§ 9607(a)(1) – (4) (2006). *See also* discussion *infra* Part II.B.2.

42. *See, e.g.*, United States v. Bestfoods, 524 U.S. 51, 55-56 & n.1 (1998) ("[T]hose actually 'responsible for any damage, environmental harm, or injury from chemical poisons [may be tagged with] the cost of their actions . . . .'").

43. *See, e.g.*, Cardwell, *supra* note 34, at 530-31, n.89 & cases cited therein.

44. *Id.*

the law, and the law's legislative history.[45] Although the United States Supreme Court has never expressly weighed in, the Eighth Circuit has upheld this retroactive application against both substantive due process and takings clause challenges.[46]

Finally, Superfund also has been consistently interpreted by courts as a strict liability statute—another key feature.[47] Thus, a waste producer has been held liable even where the court concluded that it was "clear" that the company "took every precaution in the disposal of its wastes."[48] The utility of the strict liability standard, of course, is that it makes the government's case simpler by eliminating the need to prove failure to live up to a particular standard of care.

B. *Adapting Superfund's Features to the Toxic Asset Crisis*

The Superfund regime outlined above provides a tested set of legal tools enabling the government to impose broad, after-the-fact liability on commercial actors for harms generated by their conduct. This section examines how some of these essential features might be adapted to achieve effective legal accountability for response costs arising from the toxic lending crisis. Along the way, this section also develops some initial definitions and statutory terms.

Fundamentally, this discussion involves a set of policy questions: What harms has the toxic lending crisis created for communities? Who is most responsible for these harms? And, what legal rules ought to define responsible persons' liability?

45. *See, e.g.*, United States v. Ne. Pharm. & Chem. Co., 810 F.2d 726, 733 (8th Cir. 1986) ("In order to be effective, CERCLA must reach past conduct.").

46. *Id.* at 733-34.

47. *See, e.g.*, William B. Johnson, Annotation, *Liability of Generators Pursuant to § 107(a)(3) of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 U.S.C.A. § 9607(a)(3))*, 126 A.L.R. FED 265 § 2[a] (1995).

48. O'Neil v. Picillo, 682 F. Supp. 706, 720 (D.R.I. 1988).

1. Identifying Harms: Liability for Government Response Costs

Consistent with its focus on accountability, Superfund imposed liability in part to help compensate the government for response costs initially borne by taxpayers to help clean up contaminated hazardous waste sites. An adaptation of Superfund to the toxic lending crisis similarly should focus on recovering the costs to the public fisc resulting from toxic lending practices. These costs already include many different kinds of public services at the local level, ranging from the cost of a sheriff's deputy enforcing a foreclosure to the cost of increased police and fire responses to emergencies involving vacant foreclosed buildings.[49] At the federal level, response costs might include the price of mortgage relief programs and other efforts to keep those homes involved in foreclosure occupied.[50] A definition of "response costs" that encompasses these costs might provide:

> ***Response costs defined.*** *The term "response costs" means any costs borne by local, state, and Federal Government agencies arising from (a) the enforcement of foreclosure relating to a subprime mortgage loan, (b) emergency response at property vacated as a result of subprime foreclosure, or (c) government expenditures towards maintaining occupancy at a specifically identified property encumbered by a subprime loan in foreclosure.*

49. *See* Cox, *supra* note 22, at 694-95.

50. For example, the $75 billion Homeowner Affordability and Stability Plan (HASP) provides monetary incentives to lenders to restructure the terms of potentially problematic mortgage loans in order to prevent foreclosures. U.S. DEP'T OF TREASURY, HOMEOWNER AFFORDABILITY AND STABILITY PLAN (2009), *available at* http://www.treasury.gov/initiatives/eesa/homeowner-affordability-plan/FactSheet.pdf. Pursuing recovery of these costs might be considered—to the extent that these funds are provided to lenders who are not themselves potentially liable.

2. Identifying Responsible Parties: Defining the Toxic Lending PRP Class

A definition of PRPs may be broken into two elements, one which I will call "situational" and the other "categorical." By situational, I literally mean to invoke the concept of a Superfund site, a discrete geographical area that helps to define the range of PRPs for a particular set of response costs.[51] In the case of the toxic lending crisis, a "site" might be a defined neighborhood or community which, based on measurable neighborhood-wide criteria such as property values, crime rates, and so forth, is significantly distressed as a result of subprime lending foreclosures in that neighborhood. Within such sites, there are several categories of actors who profited from the risky commercial practices that precipitated the toxic asset crisis. What follows is a brief catalog of potential candidates for liability, divided into three categories: primary market commercial actors, secondary market actors, and borrowers.

Primary market commercial actors. An obvious starting point in developing a catalog of potentially responsible parties is subprime loan originators. Individual originators were responsible for attracting and evaluating potential borrowers, crafting appropriate loan terms, and communicating those terms and their risks to borrowers.[52] As an industry, loan originators sometimes resisted state efforts towards clearer disclosures and underwriting standards.[53]

Originators were assisted by a range of professionals whose work made the subprime lending boom possible—for better and for worse. Among these, appraisers have already been singled out for questionable practices such as colluding with originators to exaggerate home values in order to permit

51. See 40 C.F.R. §§ 300.400 through 300.440 for the regulations governing the EPA's process for identifying and prioritizing sites.

52. *See generally* ROBERT J. SHILLER, THE SUBPRIME SOLUTION: HOW TODAY'S GLOBAL FINANCIAL CRISIS HAPPENED, AND WHAT TO DO ABOUT IT (2008).

53. Binyamin Appelbaum, *State Toughens Rules on Mortgages*, BOSTON GLOBE, Oct. 18, 2007, at B1.

larger loans.[54] Attorneys, closers, and other professionals[55] may have been less instrumental in developing the terms of specific loans, but they nevertheless profited from the subprime lending boom and might reasonably be included in a PRP definition.

Secondary market actors. There is widespread agreement that the advent of the secondary mortgage market fundamentally changed the incentives and behaviors of primary market actors.[56] By simultaneously creating a huge demand for mortgage loans that could be bundled together into new kinds of securities and by using this bundling mechanism to buffer the risk of any individual loan going bad, the secondary market encouraged lax primary market practices.

> Historically, mortgages have been safe investments with a commensurate rate of return for investors. But the growth of the subprime market offered mortgages that provided a higher-risk investment with potential for higher returns. Wall Street became ravenous for these loans, seeking mortgages that provide a high yield. This demand from Wall Street encouraged subprime lenders to abandon reasonable qualifying standards, to forget about standard documentation requirements, and to ignore whether borrowers could actually afford the

54. *See, e.g.*, Kenneth R. Harney, *Appraisal Changes Face Resistance*, WASH. POST, May 10, 2008, at F01.

55. How about the programmer who wrote the software that enabled mortgages to be securitized and traded? *See generally* Michael Osinski, *My Manhattan Project: How I Helped Build the Bomb that Blew Up Wall Street*, N.Y. MAG., Mar. 29, 2009.

56. *See, e.g.*, *Hearings*, *supra* note 27, at 68 (testimony of Michael D. Calhoun) ("Because loans are sold on the secondary market, the parties who actually interact with the borrowers during the loan process—mortgage brokers and lenders—have very little financial interest in whether the loan performs beyond an early payment default period."). This is not the first time someone has argued that the secondary market shapes the behaviors of the primary market. *See, e.g.*, Ronald K. Schuster, *Lending Discrimination: Is the Secondary Market Helping to Make the "American Dream" a Reality?*, 36 GONZ. L. REV. 153 (2001) (suggesting that practices in the secondary market may cause disparate impact discrimination in the primary market).

loan.[57]

Moreover, it has been argued that the secondary market *directly* benefited from some of the more problematic loan practices in the primary market, such as the imposition of prepayment penalties buried in the terms of so-called "exploding" adjustable-rate mortgages (ARMs).[58]

Determining which kinds of actors within the secondary market ought to be included in a categorical PRP definition remains a challenge, for it is clear that a range of professional disciplines participated in the "synthetic techniques" that made possible a secondary market in mortgage-backed securities.[59] I will not attempt here to more precisely define the contours of "secondary market actors" and "secondary market actions" giving rise to liability. It is clear, however, that the secondary market's role in encouraging heedless subprime lending while earning profits from that behavior warrants inclusion of some set of secondary market actors in a PRP definition.

Borrowers. It might seem regressive to include borrowers in a catalog of persons who ought to be liable for government response costs caused by subprime foreclosures. But research indicates that at least one type of borrower—the non-occupant landlord/investor—played a significant role in generating the community harms that are the focus of this proposal.

As Professor Cox points out, landlords are essentially investors who are more likely to "treat their decisions in foreclosure solely as a matter of financial interest" than

57. *Hearings*, *supra* note 27, at 67 (testimony of Michael D. Calhoun).

58. *See, e.g.*, *id.* at 70-71 (arguing that investors benefited from so-called "exploding ARMs"—adjustable rate mortgages with terms the borrower was unlikely to meet after the initial teaser period—because such loans provided short duration, predictable income streams and because investors profited from pre-payment penalties paid by borrowers seeking to escape their exploding loans).

59. *Id.* at 13 (testimony of Howard Mulligan, Partner, McDermott Will & Emery) ("The professionals—the lawyers, the accountants, the investment bankers—that structure mortgage-backed transactions have formulated innovative methods, including derivative enhancements, and other synthetic techniques, of segmenting the risks associated with investing in mortgages, and creating securities that allow investors to assume the precise level of risk to which that individual investor is comfortable.").

homeowners who may have significant nonfinancial attachments to a home or community.[60] An official of the Mortgage Bankers Association observes that

> these investors are among the first to default if they see that home prices are falling and there is little chance of recouping their money, much less making a big profit. Rather than throwing good money after bad by continuing to make payments, these borrowers will stop making payments rather abruptly.[61]

There is nothing unlawful about a landlord choosing foreclosure under these circumstances. It is perfectly rational commercial behavior under the current legal regime. But, of course, that is the problem: like hazardous waste disposal before Superfund, the costs of rational but dangerous commercial conduct are visited upon innocent bystanders and externalized to taxpayers generally. In this case, the landlord's choice to go into foreclosure rather than "throw good money after bad" generates a host of costs for society, with the landlord's displaced tenants feeling the impacts most acutely. These costs warrant considering creating a category of liability for "borrower actions."

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60. Cox, *supra* note 22, at 711 & n.171. *See also* Kristopher Gerardi, Adam Hale Shapiro & Paul S. Willen, *Subprime Outcomes: Risky Mortgages, Homeownership Experiences, and Foreclosures* 20 (Fed. Res. Bank of Boston, Working Paper No. 07-15, 2008), *available at* http://www.bos.frb.org/economic/wp/wp2007/wp0715.pdf ("Borrowers who are not owner-occupants, but who purchased the property strictly for investment purposes, are likely greater default risks [all things being equal]. Since non-owner occupants do not face mobility costs and do not have an emotional stake in the property, their cost of default is likely lower relative to the cost to owner-occupants.").

61. Jay Brinkmann, *An Examination of Mortgage Foreclosures, Modifications, Repayment Plans and Other Loss Mitigation Activities in the Third Quarter of 2007*, MORTGAGE BANKERS ASS'N, Jan. 2008, at 7, *available at* http://www.mbaa.org/files/News/InternalResource/59454_LoanModificationsSurvey.pdf.

3. Identifying Legal Rules: Adapting Superfund Legal Features to the Mortgage Crisis

The most essential features of Superfund's legal regime—retroactivity, strict and joint-and-several liability, and the rules of parent and officer liability—all flow from judicial interpretations rather than explicit statutory commands. As case law developments over the years suggest, legislators hoping to create a similar regime for the toxic lending crisis ought to make these features explicit in the statute rather than relying on courts to supply them, as they did with Superfund.

Retroactivity. In recent years, the Supreme Court has favored a "clear statement rule" approach to analyzing retroactive legislation, permitting courts to avoid confronting the constitutionality of a statute by reading away the statute's constitutionally questionable meaning. The starting point is an interpretive presumption in favor of prospective application and against retroactive application; this presumption can be overcome if Congress "expressly mandates" that the statute should apply retroactively, which rarely happens.[62] Absent such an express mandate, the statute may not be read as retroactive. Thus, to avoid any interpretive diversion of purpose, the text of a Superfund-style economic remediation statute should expressly provide for retroactive application rather than depend on the kind of searching judicial examination that managed to find retroactive intent by way of the verb tenses chosen by Superfund's authors.[63] For example:

> ***Retroactive application.*** *This chapter is intended to have retroactive effect and shall apply with equal force to primary subprime lending actions, secondary market actions, and borrower actions that occurred prior to and after the*

62. *See, e.g.*, Martin v. Hadix, 527 U.S. 343, 352-53 (1999); INS v. St. Cyr, 533 U.S. 289, 291 (2001) ("The first step in the impermissible-retroactive-effect determination is to ascertain whether Congress has directed with the requisite clarity that the law be applied retrospectively.").

63. Indeed, if not for long-standing judicial and administrative interpretations, the current Court might question whether Congress intended Superfund itself to be retroactive.

> *effective date of this legislation.*

Once this interpretive barrier is cleared, the constitutional analysis is essentially the same as it was when Superfund's retroactivity was reviewed by courts. Then, as now, retroactive civil statutes challenged under the Due Process Clause must satisfy a rational basis test which "is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose."[64] This test was applied before Superfund to uphold retroactive expansion of mine owner liability for their workers' respiratory illnesses;[65] it was applied in the 1980s by the Eighth Circuit in *NEPACCO* and by other courts, though never the Supreme Court, to uphold Superfund's retroactivity.[66] It was also applied in 1992 by the Supreme Court to uphold a Michigan workers compensation statute that had the effect of forcing some firms to provide refunds to some of their disabled employees.[67] Perhaps the most useful component of this line of case law is this observation by the Court:

> It is by now well established that legislative acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way.[68]

Against this standard, a Superfund-style economic cleanup statute likely would pass constitutional muster. Requiring the persons who caused an expensive mess to help defray the costs of cleaning it up is neither arbitrary nor irrational and has been adjudicated to be reasonable by circuit courts in the

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64. United States v. Carlton, 512 U.S. 26, 31 (1994) (quoting Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 730 (1984)).

65. Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976).

66. Cont'l Ins. Cos. v. Ne. Pharm. & Chem. Co., 842 F.2d 977 (8th Cir. 1988).

67. Gen. Motors Corp. v. Romein, 503 U.S. 181 (1992).

68. *Usery*, 428 U.S. at 15 (citations omitted).

Superfund context. Invalidating a Superfund-style economic cleanup statute thus would require a significant departure from established constitutional principles, a consideration which ought to offset such a measure's offense to some judicial sensibilities.

Strict liability and joint-and-several liability. The utility of importing Superfund's strict liability standard and joint-and-several liability allocation rules into the toxic lending setting does not require much elaboration.[69] The former would allow the government to pursue recoveries irrespective of whether fraud or other unlawful conduct can be proven or is even suspected, freeing officials to target their response efforts towards specific distressed areas ("sites") rather than the most prosecutable lenders. The latter maximizes government resources by shifting the incentive to find PRPs from government to other PRPs—a particularly important consideration given recent upheavals in the primary and secondary markets. Given the importance of these features, lawmakers ought not depend on judicial benevolence; they should make these features explicit:

> ***Strict and joint-and-several liability.*** *All primary subprime lending actors, secondary market actors, and borrower actors shall be strictly, jointly, and severally liable for response costs at a site.*

Parent and officer liability. In the absence of clear statutory guidance, courts applying Superfund developed several models of Superfund parent corporation liability.[70]

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69. Interestingly, Georgia legislators have proposed a measure that would allow borrowers and state regulators to hold banks involved in buying mortgage-backed securities responsible for violation of state predatory lending laws. *See, e.g.*, Joe Rauch, *Fair Lending Act Amendment Stirs Debate*, ATLANTA BUS. CHRON., Feb. 18, 2009, *available at* http://atlanta.bizjournals.com/atlanta/stories/2009/02/16/daily50.html. In 2002, Georgia legislators approved a similar "pass-through" liability measure but rolled it back in 2003. Robert Berner & Brian Grow, *They Warned Us About the Mortgage Crisis*, Bus. Wk., Oct. 9, 2008, *available at* http://www.businessweek.com/magazine/content/08_42/b4104036827981.htm.

70. *See, e.g.*, 14 JENNIFER L. BERGER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 6770 (perm. ed., rev. vol. 2003).

Some held that a parent was liable if it had authority to control a subsidiary, regardless of whether it exercised that control.[71] Others required that the parent actually exercise that control.[72] Still others rejected any approach other than traditional veil piercing doctrines that focused on abuse of the corporate form.[73]

In 1998, the Supreme Court sought to resolve the conflicting standards in *United States v. Bestfoods*.[74] There, the Court treated Congress's silence on parent corporation liability as a tacit affirmation of common-law corporate liability principles. Reviewing these principles, the Court drew a distinction between derivative and direct parent liability.[75] The Court observed that under the common law, a derivative suit against a subsidiary's parent required that the corporate veil be pierced.[76] The Court, however, went on to observe that the common law has long recognized direct parent liability where "the alleged wrong can seemingly be traced to the parent through the conduit of its own personnel and management [and] the parent is directly a participant in the wrong complained of."[77] The Court interpreted Superfund's "operator" liability as consistent with this notion of direct liability and held that a parent corporation that "operates" its subsidiary's hazardous waste facility may be liable under Superfund.[78] The Court lamented the "uselessness" of Congress's tautological definition of the term "operator" as "any person . . . operating" a facility, and resorted to dictionary definitions.[79] The result is a definition of operator as a person who "manage[s], direct[s], or conduct[s] operations specifically related to pollution, that is, operations having to do with the leakage or disposal of

71. *Id.*
72. *Id.*
73. *Id.*
74. 524 U.S. 51 (1998).
75. *Id.* at 64-65.
76. *Id.* at 62-64.
77. *Id.* at 64 (citation and footnote omitted).
78. *Id.* at 61.
79. *Id.* at 66 ("This much is easy to say: the difficulty comes in defining actions sufficient to constitute direct parental 'operation.' Here of course we may again rue the uselessness of CERCLA's definition of a facility's 'operator' as 'any person . . . operating a facility,' . . . which leaves us to do the best we can to give the term its 'ordinary or natural meaning.'") (citation omitted).

hazardous waste, or decisions about compliance with environmental regulations."[80]

The proliferation of different views of parent liability that was partially resolved in *Bestfoods* illustrates the need for an explicit statutory rule—and the range of possibilities open to legislators in designing that rule. Looking at these various options from those least likely to generate parental liability (e.g., insisting that the corporate veil be pierced in any action) to those more likely to lead to liability (e.g., requiring only the authority to control the subsidiary), the *Bestfoods* rule, which requires veil piercing for purely derivative actions but permits direct liability where the parent was directly involved in the harmful conduct, occupies a place in between the extremes and already meets the Court's approval, making it a good starting point for crafting more specifically tailored parent liability provisions. A provision based on the *Bestfoods* rule governing the liability of parent corporations in the primary market might provide:

> ***Primary market parent corporation liability.*** *A parent corporation is liable for response costs resulting from primary subprime lending actions by its subsidiary if the parent managed, directed, or conducted operations having to do with primary subprime lending actions, or decisions about compliance with regulations applicable to primary subprime lending actions including nonbinding guidance issued by state or federal authorities.*

Similar rules might be utilized for the other PRP categories and for the imposition of officer liability—the latter being an important concern in light of the likely insolvency of many corporate PRPs.

80. *Id.* at 66-67.

III. Conclusion

The stark reality is that taxpayers have already committed to a partial Superfund solution: billions have been invested in propping up ailing firms mixed up in the subprime mess, and doubtless more will be spent trying to get communities back on their feet. The outstanding question is whether policymakers have the courage and wisdom to couple this Superfund-style expenditure with Superfund-style accountability. The analogous causes and effects of toxic waste and toxic lending warrant looking to Superfund law's ready-made set of statutory and case law precedents as the basis for imposing strict, joint-and-several, and retroactive liability on the parties responsible for the present crisis.