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The Ultimate Independence of the Federal Courts: Defying the Supreme Court in the Exercise of Federal Common Law Powers

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I. INTRODUCTION

A. *Defining Federal Court Functions.*

What does a federal court do and what makes a federal court “federal?” When a federal court properly obtains subject matter jurisdiction over a dispute, where does it find the legal rules for its decision? These seemingly straight-forward and fundamental questions have existed throughout the nation’s history and they rest at the heart of modern questions analyzing the legitimacy of certain contemporary federal court decisions. As we know, federal courts in the American constitutional system differ from their state counterparts in a number of significant ways—not the least of which is their lawmaking power. This judging authority operates within limits. Although federal legislative power may be expansive, federal judicial authority under mainstream theory has its restrictions imposed by considerations of the separation of powers or those related to federalism.¹ While federal judges may decide cases within their jurisdiction on the basis of statutes, constitutions and treaties, they, generally, may not create law

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¹ The Constitution provides that the judicial power of the United States shall be vested in the Supreme Court and “in such inferior courts as the Congress may from time to time ordain and establish.” U.S. CONST. art. III, § 1. From this textual base it has been argued that Congress is provided with sweeping discretion whether or not 1) to create any lower federal courts and 2) to define the jurisdiction of any such court it does establish. This view finds support in a long line of Supreme Court decisions running back as far as 1850. See *Yakus v. United States*, 321 U.S. 414, 429-31 (1944) (upholding a restriction on federal forum to hear challenges to wartime price controls); *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 325, 327 (1938) (upholding a restriction on federal court’s ability to issue injunctions in labor disputes); *Kline v. Burke Constr. Co.*, 260 U.S. 226, 229 (1922) (upholding preclusion of federal injunction of a simultaneous state court proceeding for breach of contract); *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 448, 450 (1850) (upholding a restriction on diversity jurisdiction). Taking this approach, Congress would certainly have the power to define the rules of decision for the federal courts.

themselves using the common law methodology available to state court judges.² Following the Supreme Court's 1938 decision in *Erie Railroad Co. v. Tompkins*,³ the proposition has become axiomatic that "[t]here is no federal general common law."⁴ This broad statement sprang from Justice Brandeis's holding that the federal Rules of Decision Act required federal courts to apply all forms of state law as their rule of decision in the absence of specific federal law. Under the U.S. Constitution, federal courts are not granted open-ended lawmaking powers and they, "unlike their state counterparts, are courts of limited jurisdiction."⁵ Such a view of "limited jurisdiction" has been the position of widely-held legal theory regarding the extent of the federal judicial power, at least in cases brought under diversity jurisdiction. Increasingly, this has also been the direction given by the United States Supreme Court in a number of *non-diversity* cases—like those brought under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)⁶—which arise under federal law. The degree of adherence to this "limited jurisdiction" vision is the subject of this article.

Most generalizations are subject to exception and the restricted description of federal judicial authority is no different. While it is true that federal courts are *not* courts of general jurisdiction, the Supreme Court has also held that they may create and apply a federal common law in a limited

² The vesting of federal jurisdiction in courts does not create the authority to formulate federal common law. See *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640-41 (1981). The definition of the term "federal common law" can be said to refer "to the development of legally binding federal law by the federal courts *in the absence of* directly controlling constitutional or statutory provisions." ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* 331 (2d ed. 1994) (emphasis added). Professor Thomas W. Merrill has defined federal common law as "any federal rule of decision that is not mandated on the face of some authoritative federal text—whether or not that rule can be described as the product of 'interpretation' in either a conventional or an unconventional sense." Thomas Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 5 (1985).

³ *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

⁴ *Id.* at 78. *Erie* overruled *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18-19 (1842) and reversed a long-standing practice in the federal courts to recognize a general federal common law, at least in cases involving a court's diversity jurisdiction. This development had seemingly been at odds with the earliest Congressional policy defining the boundaries of federal court decisional rules. The Rules of Decision Act, derived from the Judiciary Act of 1789 and currently found at 28 U.S.C. § 1652 (2000), provides that "[t]he laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." This statute would appear to form a mandate requiring that federal courts must use state law as rules of decision in the absence of treaty, federal statute or constitutional provision. See Martin Reddish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An "Institutionalist" Perspective*, 83 NW. U. L. REV. 761, 766 (1989) (discussing the rule and indicating that it "is not free from ambiguity in either language or history . . .").

⁵ *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 95 (1981). See generally U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States."); *id.* art. III, § 2 (enumerating the extent of the judiciary's powers).

⁶ 42 U.S.C. §§ 9601-9675 (1994).

number of areas in order to effectuate Congressional intent or "to protect uniquely federal interests."⁷ Providing an example of this principle, in another case decided on the same day as *Erie Railroad Co. v. Tompkins*, Justice Brandeis held that the apportionment of an interstate stream was a question for federal common law rather than the law of the adjoining states.⁸ Therefore, federal common law has been recognized as a source of legitimate and necessary rules of decision in certain enumerated areas, standing as a necessary exception to the *Erie* rule which describes a much more limited federal judicial power. The phrase "federal common law" represents those circumstances when federal courts may fashion legal rules in a common law way. But when, in theory, can federal courts exercise this "special" judicial power and when, in reality, do they actually create their rules of decision?

Since the 1938 *Erie* decision, this authority to "find" federal common law has been increasingly restricted by the Supreme Court. This is especially true in recent years. The clear trend in Supreme Court pronouncements over the last quarter century has been to confine, not expand, the common law powers of federal judges.⁹ Undoubtedly, this contraction reflects the Court's changing views regarding the "appropriate" judicial role. However, one situation where court-made common law *has* been found to be appropriate is where a federal court has been asked to fill the "interstices" of federal legislation or to create law "[i]n absence of an applicable Act of Congress."¹⁰ In these instances, the courts have been implored by litigants to consider and to decide federal questions "which cannot be answered from federal statutes alone."¹¹ Obtaining a legislative amendment to clarify or "fill in" the missing law apparently is not practical or politically possible. Therefore, establishing a federal common law rule of decision in this context is a "necessary expedient" to the lawmaking process in certain limited situations.

⁷ *Texas Indus.*, 451 U.S. at 64 (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426 (1964)). The Court has identified certain areas as being appropriate for the creation of federal common law rules. They include:

- a) federal proprietary interests, *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366 (1943);
- b) international relations, *Sabbatino*, 376 U.S. at 425 (1964);
- c) admiralty, *Kossick v. United Fruit Co.*, 365 U.S. 731, 742 (1961);
- d) interstate disputes, *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110-11 (1938);
- e) interstate pollution, *City of Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981), and
- f) enforcement of constitutional rights, *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 392 (1971).

⁸ *Hinderlider*, 304 U.S. at 110-11.

⁹ See CHARLES A. WRIGHT & MARY KAY KANE, *LAW OF FEDERAL COURTS* 419 (6th ed. 2002) ("The Court . . . more recently has taken a cautious course toward the recognition of federal common law.").

¹⁰ *Clearfield Trust*, 318 U.S. at 367.

¹¹ *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 469 (1942) (Jackson, J., concurring).

All too often, federal legislation is not a model of clarity and specificity. Important statutory omissions and unanticipated issues frequently arise and are brought before federal courts for resolution. These courts must then determine the meaning of federal statutes within the context of highly contested, high-stakes litigation. The CERCLA litigation that is the focus of this article presents an example of this phenomenon. In undertaking this common lawmaking judicial function, these courts are asked to "create law" in order to fill the interstices or silences of statutory schemes and to implement Congressional objectives. While it is possible to say there is no law that applies to the matter at hand, courts find it irresistibly attractive to answer the questions presented to them by litigants and to resolve the disputes. Congress cannot anticipate every statutory consequence, implication, or nuance and there must be some means of deciding conflicts that arise in implementing these statutes.¹² To do this, the judging process requires courts to determine a rule of decision applicable to the dispute coming before the court—often when comprehensive Acts of Congress fail to address certain issues or are ambiguous.¹³ The creation of "interstitial federal common law" has been upheld in circumstances where it is necessary to carry out an apparent yet not clearly specified federal purpose.¹⁴ Assuming that a court should fashion federal common law in these situations, where should it look for guidance as to the substance or content of the rule when federal statute itself fails to supply the answers?¹⁵ How much independence should a federal court have to fashion a rule of decision?

On these questions, the Supreme Court has given specific guidance. In 1979, the Court set the backdrop for these decisions when it held in *United States v. Kimbell Foods, Inc.*, that in the absence of a congressionally

¹² *Id.* at 469-70 (Jackson, J., concurring) ("Were we bereft of the common law, our federal system would be impotent.").

¹³ *Clearfield Trust*, 318 U.S. at 367 ("In absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards.").

¹⁴ The function of this kind of federal common law rule is to effectuate a Congressional plan or program. Professor Linda Mullenix has expressed the rationale for interstitial federal common law in the following terms:

In enacting federal statutory law, Congress often expressly delegates federal law-making authority to the courts, or implicitly does so by creating a general regulatory scheme with gaps or general language. In both instances, federal courts have created and applied interstitial federal common law to fill in the gaps in federal statutory provisions.

17A JAMES W. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* §124.41[1] (3d ed. 1997). In certain instances, Congress may specify that state law should be used as the substantive law for decisions in a federal scheme like the Federal Tort Claims Act. See 28 U.S.C. §§ 1346(b), 2672 (2000). However, in other cases, the Supreme Court has upheld the judicial development of a federal common law rule structure to give meaning to a statutory gap. See *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 356-57 (1957) (Justice Douglas finding Congressional intent for federal courts to develop a body of common law principles to resolve labor disputes).

¹⁵ Henry S. Friendly, *In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383, 410 (1964) (articulating this two-stage inquiry).

mandated rule, federal courts must “fill the interstices of federal legislation according to their own standards.”¹⁶ As expansive as this statement might sound, this pronouncement did *not* mean that in designing the “substance” of the federal common law, courts would always develop applicable federal rules of decision in every case. Rather, in the Court’s way of thinking, courts could adopt either state decisional rules or fashion their own uniquely federal rules. In either case, they would be creating federal law using a common law or non-statutory method. To do this, the Supreme Court in *Kimbell Foods* recommended that federal courts should choose their rules of decision by using a three-part balancing test which would consider whether: (1) the federal program at issue must be uniformly applied nationwide to effectuate its purpose, (2) the application of the state rule would frustrate specific objectives of the federal program, and (3) the application of a uniform federal rule of decision would disrupt existing relationships based upon state law.¹⁷ This tripartite test was later reinforced by the Supreme Court in 1994 in *O’Melveny & Myers v. FDIC*, where it further restricted the instances in which the creation of a uniform, federal body of common law would be permissible.¹⁸ After *O’Melveny & Myers*, a federal law-based common law rule of decision would be appropriate in the “few and restricted” situations where there is both a uniquely federal interest at stake and “a *significant conflict* between [the] federal policy or interest and the use of state law.”¹⁹ Therefore, state law would generally provide the rule of decision.

This decision, and others handed down during the 1990s,²⁰ reflected a substantial narrowing of the situations when federal courts would be free to fashion a truly “federal” common law—that is, non-statutory and non-constitutional—rules of decision. The significance of this emergent trend is threefold: 1) to reinforce the primary function of legislation as the original source of federal, non-constitutional law, 2) to emphasize the primacy of state law as the rule of decision in the absence of an explicit federal

¹⁶ 440 U.S. 715, 729 (1979). The Court’s pronouncements in *Kimbell Foods* were directed at cases involving “controversies directly affecting the operations of federal programs” *Id.* at 727 (citing *Clearfield Trust*, 318 U.S. at 367).

¹⁷ *Id.* at 728-29.

¹⁸ 512 U.S. 79, 85 (1994).

¹⁹ *Id.* at 87 (emphasis added) (internal quotations omitted).

²⁰ See, e.g., *Atherton v. FDIC*, 519 U.S. 213, 215-16 (1997) (holding that in a negligence action brought by a federally insured bank, state law sets the standard when it is stricter than federal law); *Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90, 108 (1991) (holding that when there is a gap in federal law concerning “the allocation of governing powers within the corporation, federal courts should incorporate *state* law into federal common law” unless the state law is inconsistent with the federal statute’s underlying policies).

statutory provision,²¹ and 3) to limit the power of federal judges to “improvise” federal common law solutions to problems presented by federal statutes and programs. The Supreme Court’s message to the lower federal judiciary was clear: instances of true common law rule development would be the exception and not the rule. Federal courts would be more restrained judicial actors. As this article demonstrates, the Supreme Court’s directives have *rarely* been followed in the CERCLA context. A serious and perplexing question resulting from this fact is: why has this been so?

B. *Choice of Law and Environmental Law—Interpreting CERCLA’s Liability Provisions*

Four years after its decision in *O’Melveny & Myers*, the Supreme Court addressed the question of selecting an appropriate rule of decision in the context of an environmental statute—the Comprehensive Environmental Response, Compensation and Liability Act²² or CERCLA. CERCLA was a hurriedly enacted and poorly drafted statute, whose main purpose was to cleanup hazardous waste sites and to allocate the costs of doing so to “responsible parties.” As a statute assessing potentially significant cleanup liability, CERCLA constituted a specialized federal tort statute operating under the minimalist guidance of section 107.²³ In the years following its 1980 enactment, federal courts have been presented with innumerable questions unanswered by the statute and they were asked to improvise solutions to many knotty legal questions. In the 1998 case of *United States v. Bestfoods*,²⁴ Justice David Souter, writing for a unanimous Court, considered the issue of how to determine the liability of parent corporations for CERCLA-imposed hazardous waste site cleanup expenses carried out at the site of one of its corporate subsidiaries. The *Bestfoods* case concluded that a parent corporation’s liability under CERCLA could be founded either 1) upon *direct action* as an “operator” of the polluting facility or 2) upon *indirect or derivative* liability based upon “general” and “fundamental” principles of corporate law permitting a “piercing of the corporate veil,” thereby making the parent corporation responsible for the conduct of its subsidiary.²⁵ On this second point of “veil piercing” or derivative liability, would state law or a CERCLA-based federal common law

²¹ In *O’Melveny & Myers*, Justice Scalia stressed that a clear federal statute should be followed when it provides the answer. However, he anticipated the situation of statutory omission or oversight. He wrote:

Nor would we adopt a court-made [federal common law] rule to supplement federal statutory regulation that is comprehensive and detailed; matters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law.

512 U.S. at 85.

²² 42 U.S.C. §§ 9601-9675 (1994).

²³ *Id.* § 9607.

²⁴ 524 U.S. 51, 55 (1998).

²⁵ *Id.* at 63-64, 70-72.

determine liability? Justice Souter strongly suggested, but did not clearly confirm,²⁶ that state corporate law principles should serve as the rule of decision for determining this type of CERCLA liability. His opinion stated that state corporate law provided a presumptive starting point for this inquiry and he concluded that CERCLA gives "no indication that 'the entire corpus of state corporation law is to be replaced simply because a plaintiff's cause of action is based upon a federal statute.'"²⁷

Going even further in this direction, Justice Souter stated that in order for a federal statute to reject "bedrock principle[s] . . . against this venerable common-law backdrop," a law must speak "directly" on the question.²⁸ CERCLA, being silent on the topic of corporate successor liability, did not "directly" provide an alternative to state corporate law and consequently, the decision suggested that state law should govern.²⁹ The *Bestfoods* decision strongly reinforces the Supreme Court's recently promoted idea that state law should serve as the guide of crucial meaning for federal statutory law in the absence of legislative language to the contrary. This view reflects and reinforces the increasing preference or presumption in Supreme Court opinions running in favor of state legal concepts serving as the fundamental meaning of "silent" federal statutes.³⁰ The Court's *Kimbell Foods*, *O'Melveny & Myers*, and *Bestfoods* decisions represent a continuous and an unmistakable message discouraging judicial improvisation in the name of creating federal common law.

²⁶ CERCLA is silent on the question of how to determine whether a parent corporation is liable for waste site cleanup expenses and the *Bestfoods* court refused to directly resolve the choice of law dilemma. Justice Souter wrote:

[T]here is significant disagreement among courts and commentators over whether, in enforcing CERCLA's indirect liability, courts should borrow state law, or instead apply a federal common law of veil piercing Since none of the parties challenges the Sixth Circuit's holding that CPC and Aerojet incurred no derivative liability, the question is not presented in this case, and we do not address it further.

Id. at 63 n.9.

²⁷ *Id.* at 63 (citing *Burks v. Lasker*, 441 U.S. 471, 478 (1979)).

²⁸ *Id.* at 62-63.

²⁹ On remand, the district court ruled that the parent corporation, CPC, was not liable for CERCLA cleanup costs either as an "operator" or as a successor corporation under a theory of *de facto* merger. *Bestfoods v. Aero-Jet Gen. Corp.*, 173 F. Supp. 2d 729, 759 (W.D. Mich. 2001). Of special note was the fact that the court felt bound by the Sixth Circuit's rule that "state law provides the standard for determining the liability of successor corporations under CERCLA." *Id.* at 757. As a result, it applied Michigan law to determine the successor liability question. *Id.* at 757-759.

³⁰ It is not always clear from Supreme Court and Court of Appeals opinions just how the courts conceive of the choice of law question. Are they merely implementing the preference for state law, in the absence of a clear federal command, expressed in the Rules of Decision Act? Or are they assigning substantive content or meaning in a federal common law-making activity? If the final choice of a rule for decision is state law, then it does not matter which route the courts take. However, if the decisional principle is a newly developed federal (and not state) common law position, then the method for reaching this decision is important. Lower court opinions spurning state corporate law guidance for the freedom of establishing their own "common law" view not only ignore Supreme Court direction but also choose to set their own policy in a direct lawmaking way.

The *Bestfoods* holding has potential significance in many other CERCLA contexts. Beyond the limited issues of parent/subsidiary liability presented in the *Bestfoods* case, CERCLA contains numerous crucial, definition and liability issues; many lacking specific statutory answers. The statute's far-reaching liability scheme was designed to further the Act's purpose of "initiat[ing] and establish[ing] a comprehensive response and financing mechanism to abate and control the vast problems associated with abandoned and inactive hazardous waste disposal sites."³¹ However, CERCLA is not a model of legislative clarity, and the federal courts frequently have been called upon to determine significant liability issues raised by the Act. One question—the liability of corporate asset purchasers—has been frequently litigated in the courts of appeal. This litigation has reflected substantial confusion over the proper method for determining the appropriate rule of decision. It has also produced inconsistent standards for imposing liability that vary from circuit to circuit all over the country.³² While the courts have consistently recognized that CERCLA's legislative scheme generally provides for successor-in-interest liability, they have also ruled that asset purchasers generally are *not* liable for the conduct of predecessors-in-interest under state corporate law.³³ However, there are exceptions to this general rule of *non-liability* for asset purchasers under prevailing state corporate law rules. The interesting question that arises from an examination of these cases is how are courts selecting their rules of decision in these asset purchaser fact situations? The federal circuit courts are evenly split regarding this fundamental choice of law question; some adhering to state law and others fashioning a more expansive rule under their presumed federal common law powers.³⁴ After the *Best-*

³¹ *Anspec Co. v. Johnson Controls, Inc.*, 922 F.2d 1240, 1241 (6th Cir. 1991). "Liability under CERCLA has been described as a black hole that indiscriminately devours all who come near it." Gregory C. Sisk & Jerry L. Anderson, *The Sun Sets on Federal Common Law: Corporate Successor Liability Under CERCLA After O'Melveny and Myers*, 16 VA. ENVTL. L.J. 505, 505 (1997) (internal quotations omitted).

³² See Bradford C. Mank, *The Demise of CERCLA's Federal Common Law*, 68 U. CIN. L. REV. 1157-58 (2000); Lawrence P. Schnapf, *CERCLA and the Substantial Continuity Test: A Unifying Proposal for Imposing CERCLA Liability on Asset Purchasers*, 4 ENVTL. LAW. 435 (1998).

³³ See Sisk & Anderson, *supra* note 31, at 512-13.

³⁴ For those circuits that apply state law to determine asset purchasers' CERCLA liability, see *United States v. Davis*, 261 F.3d 1, 54 (1st Cir. 2001); *Atchison, Topeka & Santa Fe Ry. Co. v. Brown & Bryant, Inc.*, 159 F.3d 358, 383 (9th Cir. 1998); *Anspec*, 922 F.2d at 1248. For circuit court decisions adopting federal common law principles, see *B.F. Goodrich v. Betkoski*, 99 F.3d 505, 519 (2d Cir. 1996); *United States v. Mexico Feed & Seed Co.*, 980 F.2d 478, 487 n.9 (8th Cir. 1992); *United States v. Carolina Transformer Co.*, 978 F.2d 832, 837-38 (4th Cir. 1992); *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 91-92 (3d Cir. 1988). The Eleventh Circuit, faced with an analogous issue, has held that absent a showing that the *Kimbell Food* factors show the need for a federal common law rule, state law should be adopted as the federal standard for determining whether a limited partner may be held accountable for the CERCLA liability of the partnership. See *Redwing Carriers, Inc., v. Saraland Apartments*, 94 F.3d 1489, 1501-02 (11th Cir. 1996).

foods, *Atherton*, and *O'Melveny & Myers* decisions of the 1990s, it would seem as though the federal courts would only rarely establish and enforce a truly federal common law rule of decision in the limited circumstances described by the Supreme Court. This has not been the case with asset purchaser liability.

The principal focus of this article is the way federal courts choose a rule of decision in cases of statutory silence. As a specific example of this inquiry, this article examines the decisional issue faced by federal courts attempting to determine whether corporate asset purchasers should be liable for response costs under CERCLA—how they have interpreted the Act's silence with respect to asset purchaser liability and how they have ruled. As this introduction reveals, federal courts have been confronted with the question of selecting an appropriate rule of decision in a large number of these cases. Importantly, this choice of law issue arose with an established backdrop of Supreme Court precedent strongly suggesting a method for making these decisions. As this article's analysis will indicate, the lower federal courts have largely ignored the Supreme Court's direction. Part II of this article will discuss the federal courts' limited power to apply federal common law in instances of statutory omission. This important inquiry focuses upon federal court authority to choose a rule of decision and the general approach to statutory interpretation with respect to the application of federal common law. How should a court select its rule of decision—should it incorporate state law as the rule or should it exercise its limited legislative powers to fashion a common law rule? The framework for evaluating the merits of a federal rule articulated by the Supreme Court in *Kimbell Foods* and further refined in *O'Melveny & Myers* and *Atherton* will be discussed in greater detail in this part.

Part III examines the precise legal matter at issue in the cases under review—does CERCLA liability apply to corporate successors who have been asset purchasers? After analyzing the threshold question of whether the statutory liability applies to corporate successors at all, the discussion then analyzes the general corporate law norms that are available for selection as the “appropriate” rule of decision in these CERCLA cases. Part IV of this article then turns to the issue of how federal courts have acted in choosing the appropriate rule of decision in this highly important CERCLA context—the assignment of CERCLA liability for purchasers of corporate assets. The varying positions taken by the U.S. Courts of Appeal with respect to this question are analyzed, revealing a range of different approaches to this significant choice of law issue. The Part ends with the main conclusion that there has been virtually no appellate court consideration of the Supreme Court's recent precedents. Beyond that, the review concludes that these courts appear uncertain about what their proper role is in a case such as this. Only a few decisions analyze the question before them as a proposition to create federal common law to fill statutory gaps or

to provide "interstitial meaning." Finally, Part V evaluates the judicial opinions under review and suggests a number of explanations for answering the question of why the federal appellate courts do not obediently follow Supreme Court mandate.

II. IDENTIFYING RULES OF DECISION USING FEDERAL COMMON LAW POWER

A. *When Does the Authority Exist?*

Federal courts are courts of limited jurisdiction and, generally, they must apply federal statutory, constitutional, or state law when resolving disputes that properly come before them. However, in certain circumstances, they may act as courts of general jurisdiction and fashion a rule of decision under their federal common lawmaking authority—one having a non-statutory or non-constitutional basis. The exercise of this lawmaking power, being the product of rather unconstrained federal court initiative, has been the subject of serious academic dispute in the last two decades.³⁵ Federal jurisdiction alone does not convey authority to create common law—the issue in dispute must implicate a uniquely federal interest or the court must have been granted authority to create common law under the statutory scheme at issue for the court to exercise its limited lawmaking powers.³⁶ In recent times, the Supreme Court has approved of the application of federal common law rules in six specific areas.³⁷ These include suits (1) based on federal statutes that contain gaps in the applicable law, which requires courts to create interstitial federal common law;³⁸ (2) by or against the United States, or between private parties involving federal proprietary interests;³⁹ (3) involving controversies between states;⁴⁰ (4) involv-

³⁵ Numerous academic articles have been published examining the emerging federal common law doctrine in various areas of the law. Some views have been tolerant, even encouraging, assessments of federal court's presumptive lawmaking powers while others have considered this kind of court action to be both a violation of the Rules of Decision Act and politically illegitimate. See George D. Brown, *Federal Common Law and the Role of the Federal Courts in Private Law Adjudication—A (New) Erie Problem?*, 12 PACE L. REV. 229, 260-61 (1992).

³⁶ *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640-41 (1981).

³⁷ These categories are not mutually exclusive and certain cases may fall under multiple categories. For instance, in *O'Melveny & Myers v. FDIC*, the suit at issue was brought by the FDIC under the Financial Institutions Reform, Recovery and Enforcement Act of 1989 and the questions brought to the Court implicated both findings of "interstitial meaning" and matters involving federal proprietary interests. 512 U.S. 79, 85, 88 (1994).

³⁸ *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 450-51 (1957).

³⁹ *Boyle v. United Techs. Corp.*, 487 U.S. 500, 512 (1988).

⁴⁰ *E.g.*, *New Jersey v. New York*, 283 U.S. 336, 342-43 (1931). In the absence of a relevant statute, the Supreme Court has original jurisdiction over suits between states, and applies federal common law to resolve the dispute because neither states' laws can be applied to resolve the dispute fairly. 28 U.S.C. § 1251(a) ("The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States.").

ing international relations or international law;⁴¹ (5) involving admiralty jurisdiction;⁴² and (6) involving Indian relations.⁴³ This list reinforces the idea that, at least in *non-diversity* cases,⁴⁴ there is a well-developed common law tradition in the federal courts reaching at least to these six categories.⁴⁵

These categories of cases found suitable for federal common law treatment exhibit traits of necessity and fragility. Regarding need, they all appear to reflect the necessity of identifying some form of federal law to resolve important disputes touching significant federal interests.⁴⁶ For instance, it is hard to imagine the resolution of interstate, international, admiralty, or Indian cases without such legal doctrine. Concerning the fragile nature of federal common law, this doctrine is clearly a "temporary fix" pending a possible, more permanent legislative solution provided by Congress. Federal common law is "subject to the paramount authority of Congress"⁴⁷ and is pre-empted when federal statutes or regulations address the specific question decided by the federal court.⁴⁸ With these two principles

⁴¹ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426 (1964).

⁴² *Fitzgerald v. United States Lines Co.*, 374 U.S. 16, 20-21 (1963).

⁴³ *Wilson v. Omaha Indian Tribe*, 442 U.S. 653 (1979).

⁴⁴ *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 77-78 (1938) (holding that federal judge-made law is unconstitutional when applied to diversity cases).

⁴⁵ The fortunes of the federal common law doctrine seem to ebb and flow with changing perceptions of the appropriate role of the federal courts. *See* discussion *supra* Part I.A (discussing how the court's views regarding the appropriate judicial role have changed over time). In *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 472 (1942), Justice Jackson set forth a strong statement endorsing federal common law as a legitimate form of federal law when he wrote in his concurring opinion that, [Federal law] is found in the federal Constitution, statutes, or common law. Federal common law implements the federal Constitution and statutes, and is conditioned by them. Within these limits, federal courts are free to apply the traditional common-law technique of decision and to draw upon all the sources of the common law in cases such as the present.

Id. at 471-72 (citations omitted). Although not explicitly attempting to "fill gaps" in the statute under consideration, the case identifies a federal rule to resolve the conflict over which defenses would apply to block the payment of a note currently held by a federal agency. *See id.* at 456-57, 459 (discussing how the federal statute informed the court's decision). In finding that the "no consideration" defense would not be applicable, the Court effectively used its common law powers to amend the statute before it. *See id.* at 459-60 (holding that the Court would not allow the defense in these circumstances).

⁴⁶ *See, e.g., New Jersey v. New York*, 283 U.S. 336, 344 (1931) (discussing the United States Army's interest in the case because the decision effected potentially navigable waters); *Sabbatino*, 376 U.S. at 410 (discussing how severance of the federal government's diplomatic relations with Cuba could effect the outcome of the case).

⁴⁷ *New Jersey*, 283 U.S. at 348.

⁴⁸ *See City of Milwaukee v. Illinois*, 451 U.S. 304, 314 (1981) ("[W]hen Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears."). The availability of federal common law theory can depend upon a determination that federal statutory law has or has not extinguished it. *Id.* Often the answer given to this question depends upon the Court's attitude about implied federal judicial power. *See id.* at 315 (discussing how federal common law implicates separation of powers concerns in certain circumstances (quoting *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 195 (1981))). The *City of Milwaukee*

in mind, it is the judicial “gap-filling” or interstitial interpretive function of the first category of cases that is the subject of inquiry in this article. When exercising their “common law” powers in this context, the federal courts function in the closest analogy to legislative lawmaking by providing decisional rules which give meaning to an incomplete statute.⁴⁹ It is this law-making function that holds with it the broadest judicial power—the creation of critical legal principles in the absence of specific statutory guidance. In recent decades, the potential breadth of this authority has given rise to Supreme Court doctrinal directives discouraging this behavior.⁵⁰

1. *Interstitial Gap Filling by Federal Courts Pursuant to Congressional Grants of Lawmaking Authority*

As stated above, the Supreme Court has ruled that federal courts may create “interstitial federal common law” when Congress has enacted a regulatory scheme and has granted, implicitly or explicitly, the federal courts the authority to create substantive rules to effectuate the scheme.⁵¹ Congress may delegate such authority by express statutory direction.⁵² Apparently, it can achieve the same result indirectly by creating a statutory scheme replete with gaps or one using generalized language without a clear solution to specific problems.⁵³ In these instances, the federal courts conclude, sometimes disingenuously, that Congress intended for them to fill the “interstices” of the legislation.⁵⁴ When this implied grant of lawmaking

case provides a good example of this phenomenon. This 1981 ruling concluded that Congress, by enacting the 1972 Federal Water Pollution Control Act, had impliedly displaced the federal common law in interstate water pollution conflicts. *Id.* at 317. This litigation had previously reached the Supreme Court and resulted in a decision holding that federal common law principles applied to such cases. *See Illinois v. City of Milwaukee*, 406 U.S. 91, 103 (1972) (discussing the applicability of federal common law to air and water disputes).

⁴⁹ *See* discussion *infra* Part II.A.1 (discussing courts’ legislative function when they engage in “gap-filling”).

⁵⁰ *See, e.g., O’Melveny & Myers v. FDIC*, 512 U.S. 79, 87 (1994) (confining the development of federal common law to situations where there is a significant conflict between a federal policy or interest and state law); *WRIGHT & KANE, supra* note 9, at 419 (discussing the Supreme Court’s recent reluctance to recognize federal common law).

⁵¹ *Textile Workers Union v. Lincoln Mills of Ala.*, 353 U.S. 448, 450-51 (1957).

⁵² *See* 17 JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* ¶ 124.41[1] (3d ed. 2003) (“In enacting federal statutory law, Congress often expressly delegates federal law-making authority to the courts”).

⁵³ *See, e.g., Clearfield Trust Co. v. United States*, 318 U.S. 363, 366-67 (1943) (discussing how the Court must devise its own rules of law when there is no applicable act of Congress).

⁵⁴ For example, in *Textile Workers Union*, a union sued an employer under § 301 of the Labor Management Relations Act of 1947 (“LMRA”) to compel arbitration required by a collective bargaining agreement. 353 U.S. at 449. Section 301(a) grants federal subject matter jurisdiction over suits involving contract violations between unions and employers. *Id.* at 449-50. After an exhaustive review of the LMRA’s legislative history, the Court held, however, that § 301(a) “authorizes federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements and includes within that federal law specific performance of promises to arbitrate grievances under collective

authority is found by courts, it is as a convenient explanation or legal fiction justifying their intervention in cases that they believe need resolution.

As a matter of perceived necessity, the federal courts find the common law power to fill the gaps in an incomplete statute.⁵⁵ Although sometimes confusingly similar to statutory interpretation, the exercise of federal common lawmaking power is different in that it does just that—it makes new law.⁵⁶ As the Court has said, the authority of the courts to construe or interpret statutes is “fundamentally different from the authority to fashion a new rule or to provide a new remedy which Congress has decided not to adopt.”⁵⁷ However, there are clear limits on the fashioning of an expansive federal common law.⁵⁸ For instance, courts generally are not free to supplement the rights and remedies provided for by congressional enactments.⁵⁹ Furthermore, this common law power to fill statutory interstitial gaps has been further restricted by stated policies *reinforcing* traditional legal understandings represented by general or common law rules.⁶⁰ Statutes that “invade the common law [however] are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.”⁶¹ To abrogate a common law principle, Congress must draft a statute that speaks directly

bargaining agreements.” *Id.* at 450-52. Federal courts have followed the reasoning and approach taken by the Court in *Textile Workers Union* to create and apply federal common law to multiple federal statutory schemes. *E.g.*, *Firestone Tire & Rubber Co. v. Brunch*, 489 U.S. 101, 110 (1989) (finding that “given [the] language and history [of ERISA] courts are to develop a federal common law of rights and obligations under ERISA-regulated plans.”); *Herman & MacLean v. Huddleston*, 459 U.S. 375, 379-80 (1983) (finding a private right of action under § 10(b) of the Securities Exchange Act of 1934). The inquiry into whether a congressional grant is present involves examining (1) the text of the statute for express grants and (2) the statute’s legislative history for implied grants. *See Textile Workers Union*, 353 U.S. at 451-52 (discussing the “force of the Act” and going on to examine the legislative history).

⁵⁵ *See, e.g.*, *Textile Workers Union*, 353 U.S. at 455-57 (indicating that the court *must*, out of necessity, fashion a remedy in order to achieve the statute’s goals).

⁵⁶ *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 97 (1981).

⁵⁷ *Id.*

⁵⁸ *See, e.g.*, *O’Melveny & Myers*, 512 U.S. at 87 (outlining the limits on courts’ power to fashion federal common law).

⁵⁹ This has been especially true in recent efforts to identify an implied right of action for damages in federal statutes. *See, e.g.*, *Kraholios v. Nat’l Fed’n of Fed. Employees*, 489 U.S. 527 (1989) (no implied right of action for breach of a duty of fair representation in Title VII of the Civil Service Reform Act); *see also United States v. Texas*, 507 U.S. 529, 537-38 (1993) (holding that the Court cannot alter a common law remedy regime that Congress implicitly adopted when it enacted the statute).

⁶⁰ *See, e.g.*, *O’Melveny & Myers*, 512 U.S. at 86-87 (discussing how the long standing common law policy acknowledged by 12 U.S.C. § 1821 (2000) directs courts to use traditional, state common law rules when Congress does not say otherwise).

⁶¹ *Texas*, 507 U.S. at 534 (citing *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952)). This presumption applies to both federal and state common law. *Id.* In considering whether a federal statute pre-empts state common law however, courts start with the assumption that “the historic police powers of the States were not to be superceded by the Federal Act unless that was the clear and manifest purpose of Congress.” *City of Milwaukee v. Illinois*, 451 U.S. 304, 316 (1981).

to the question addressed by the common law.⁶² Federal courts are to assume that Congress legislates with the expectation that common law principles will remain valid, unless the statute or its legislative history evidences a contrary purpose;⁶³ congressional silence generally does not evidence intent to supplant the existing common law.⁶⁴

The effect of Congress's legislating against a common law background is that the federal courts' limited authority to create common law is further restrained. Federal courts must refrain from filling gaps in statutes that were drafted in recognition of firmly established common law principles.⁶⁵ The onus is on the federal courts, when faced with such statutes, to conduct a thorough investigation of the statute's legislative history and the common law setting in which it was drafted to determine whether Congress intentionally omitted a right or remedy, relying instead on established state law principles.⁶⁶ It is only when there is either a grant of authority to legislate

⁶² *Texas*, 507 U.S. at 534. When a statute has spoken directly to a question historically determined by reference to federal common law, the courts' "commitment to the separation of powers is too fundamental to continue to rely on federal common law by judicially decreeing what accords with common sense and the public weal when Congress has addressed the problem." *City of Milwaukee*, 451 U.S. at 315 (internal quotation omitted).

⁶³ *Texas*, 507 U.S. at 534. For example, the Court has held that the "absence of any reference to contribution in the legislative history [of the Sherman and Clayton Antitrust Acts] or of any possibility that Congress was concerned with softening the blow on joint wrongdoers in this setting makes examination of other factors unnecessary." *Texas Indus., Inc., v. Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981). The Court concluded that "Congress neither expressly nor implicitly intended to create a right to contribution." *Id.* at 640. The Court then examined whether a contribution right was available to parties liable for anti-trust violations under federal common law. *Id.* Contribution was held to be unavailable in anti-trust actions because Congress had not authorized the federal courts to fashion such a common law right, and because no uniquely federal interests are implicated as contribution actions involve private litigants. *Id.* at 642-43.

⁶⁴ *Texas*, 507 U.S. at 535. The *Texas* Court held that the Debt Collection Act of 1982 ("DCA") left in place the longstanding common law obligation of States' to pay prejudgment interest on debts owed to the United States government. *Id.* at 539. Texas incurred the debts at issue through its participation in the Food Stamp Program, under which states must reimburse the federal government for a portion of the replacement cost for any lost or stolen coupons above a certain "tolerance level." *Id.* at 530-31. Texas argued that the DCA precluded imposition of prejudgment interest on any amounts owed by states to the federal government. *Id.* at 532. The Court held that the DCA's silence as to states' prejudgment interest obligations was not reason to conclude that the DCA was meant to abrogate Texas's common law obligations. *Id.* at 537.

⁶⁵ See *id.* at 533 (discussing limits on judicial gap-filling when there is a common law background).

⁶⁶ See generally *id.* at 534; *Radcliff Materials*, 451 U.S. 630. Separation of powers and federalism concerns are implicated when a federal rule that would displace state law in an area of national concern is enacted, and therefore, it is generally the province of the elected representatives in Congress, and not of the federal courts (which are insulated from the political process) to fashion such rules. See *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966) (discussing why the Court must be cautious about formulating federal common law). These concerns dictate the presumption against fashioning a federal common law rule when a federal statute or state law addresses the issue in dispute. See *id.* (finding that the presumption against formulating federal common law was not overcome because there was no significant conflict between "a federal policy or interest and the use of state law"). Federal courts must heed comprehensive and clear Acts of Congress that expressly or impliedly address dis-

or a uniquely federal interest at stake, a gap or ambiguity in the applicable statutory scheme, and no existing and applicable state law with which to answer the question left unaddressed by statute, that federal courts may apply federal common law.⁶⁷ These principles, echoed by Justice Souter's *Bestfoods* opinion, suggest a much less free-wheeling federal common law gap-filling power in these situations.⁶⁸

2. Cases Implicating "Uniquely Federal Interests"

Federal common law may also be applied when a case implicates uniquely federal interests.⁶⁹ "Uniquely federal interests" are present if there is an overriding federal interest in the need for a uniform rule of decision or if the controversy implicates the basic interests of federalism.⁷⁰ In such cases, state law, which presumptively would apply to resolve the issues left untouched by federal statute,⁷¹ cannot resolve the controversy either because the authority and duties of the United States as sovereign are intimately involved, or because the interstate or international nature of the controversy makes disposition under state law inappropriate.⁷² This is hardly surprising as a general proposition yet the difficulty exists in identifying those cases where "uniquely federal interests" are or should be paramount. Federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States,⁷³ interstate and international disputes implicating the conflicting rights of states, or national relations with foreign nations,⁷⁴ and in admiralty cases.⁷⁵ Federal courts may not create new federal common law outside of these few areas. In all other cases, state law or federal Constitutional or statutory law applies.⁷⁶ But what about the many government programs authorized by fed-

puted issues, and only fashion new federal rules in the absence of such. *E.g.*, *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943); *City of Milwaukee*, 451 U.S. at 314 ("[F]ederal common law applies '[u]ntil the field has been made subject of comprehensive legislation or authorized administrative standards.'") (quoting *Texas v. Pankey*, 441 F.2d 236, 241 (10th Cir. 1971)).

⁶⁷ *WRIGHT & KANE*, *supra* note 9, at 413-14; see discussion *supra* Part II.A.1, *infra* Part II.A.2.

⁶⁸ See discussion *infra* Part II.B.3.

⁶⁹ *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988).

⁷⁰ *E.g.*, *id.* at 508, 511.

⁷¹ *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 94-95 (1981).

⁷² *Texas Indus., Inc., v. Radcliff Materials*, 451 U.S. 630, 641 (1981).

⁷³ *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366-67 (1943). Civil liabilities arising out of defense procurement contracts, obligations and rights of the United States under contracts, and liability of federal officers for official acts are included within this class of actions determined under federal common law. *Boyle*, 487 U.S. at 504-06.

⁷⁴ *Illinois v. City of Milwaukee*, 406 U.S. 91, 98-100 (1972); *Banco Nacional de Cuba v. Sabatino*, 376 U.S. 398, 400 (1964).

⁷⁵ *Fitzgerald v. United States Lines Co.*, 374 U.S. 16, 20 (1963).

⁷⁶ "State laws 'should be overridden by the federal courts only where clear and substantial interests of the National Government, which cannot be served consistently with respect for such state inter-

eral legislation yet missing crucial statutory guidance? When should the resolution of these programmatic issues be found to present "uniquely federal interests" justifying a court-made rule of decision? These questions are found in the CERCLA issues presented below.

B. *Finding the Substance of Federal Common Law Rules of Decision*

A court's determination that federal common law should apply to a disputed issue, because the issue implicates a uniquely federal interest or Congress has been found to have granted authority to fill legislative gaps, does not automatically grant the court license to establish a rule as it sees fit. Once the threshold decision has been made to identify federal common law, the court must next determine whether the rule of decision should be incorporated from the existing state law or fashioned by the judge.⁷⁷ This has been an interesting and complicated question. In a series of decisions reaching back to the 1970s, the Supreme Court has established a near-presumption in favor of incorporating state law as the rule of decision in cases attempting to "fill the gaps" in federal programmatic statutes.⁷⁸ The central case creating this preference was *United States v. Kimbell Foods, Inc.*, which articulated a three-pronged inquiry for courts to undertake when deciding whether to adopt state law or fashion the applicable rule ostensibly under its common law powers.⁷⁹ The Supreme Court, however, consistently has held that federal law governs questions involving the rights of the United States that arise under nationwide federal programs.⁸⁰

ests, will suffer major damage if the state law is applied." *Boyle*, 487 U.S. at 518 (Brennan, J., dissenting).

⁷⁷ See discussion *infra*, this Part (discussing the rules governing the Court's decision regarding which law it applies). In some cases the federal legislation will indicate that state law should serve as the rule of decision for cases arising under the federal statute. The Federal Tort Claims Act, 28 U.S.C. § 1346(b), 2674 (2000) is the prime example of this phenomenon.

⁷⁸ See *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 87 (1994) (discussing how cases from the time of *Kimbell Foods* to the present have held that the instances when the Court should develop a special federal rule are "few and restricted").

⁷⁹ See discussion *infra* Part II.B.1. *Kimbell Foods* does not speak of the issue as a federal common law matter. See generally *United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979). Clearly, the Court was filling in the interstitial meaning of the Small Business Act which did not specify the priority rules to govern Small Business Administration security interests as against private creditors. *Id.* at 727. It was not interpreting the meaning of the federal law in a conventional sense. In the end, it specified a federal rule of decision on the issue of security interest priorities from Texas law, *id.* at 740, and this must be the finding of federal common law. As stated by well-regarded scholars,

Whether state law or federal law controls on matters not covered by the Constitution or an Act of Congress is a very complicated question, which yields to no simple answer in terms of the parties to the suit, the basis of the jurisdiction, or the source of the right that is to be enforced. Whenever the federal court is free to decide for itself the rule to be applied, and there are many such situations, it is applying, or making, "federal common law."

WRIGHT & KANE, *supra* note 9, at 414-15.

⁸⁰ E.g., *O'Melveny & Myers*, 512 U.S. 79 (Financial Institutions Reform, Recovery, and Enforcement Act of 1989); *United States v. Texas*, 507 U.S. 529, 530 (1993) (Debt Collection Act of

Federal courts are directed to "fill the interstices of federal legislation by their own standards" when Congress has failed to speak to areas that comprise "issues substantially related to an established program of government operation."⁸¹ But what is "federal law" in these contexts? Controversies that directly affect the operation of such federal programs, however, do not inevitably require a resort to uniform federal rules.⁸² State law, as *Kimbell Foods* holds, can admirably serve as the federal rule of decision.⁸³ When well-established commercial rules that have proven workable over time govern an area of federal concern, the uncertainties of altering such settled commercial practices dictate that courts refrain from creating new uncertainties and "adopt the readymade body of state law as the federal rule of decision until Congress strikes a different accommodation."⁸⁴ The Rules of Decision Act,⁸⁵ as interpreted by *Erie Railroad Co. v. Tompkins*,⁸⁶ provides that state laws impart the rule of decision in federal court cases, unless the matter in litigation is governed by the Constitution or by a federal statute. *Kimbell Foods* and subsequent Supreme Court decisions consistently agree with this statement.⁸⁷ Curiously, this view has only been occasionally followed in the CERCLA holdings under consideration below.

1982); *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 89-90 (1981) (Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964); *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 67 (1966) (Mineral Leasing Act for Acquired Lands).

⁸¹ *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 727 (1979) (citing *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943)), accord *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 594 (1973) (holding that interstitial federal lawmaking is a basic responsibility of the federal courts).

⁸² *Kimbell Foods*, 440 U.S. at 727-28.

⁸³ *Id.* at 740.

⁸⁴ *Id.* at 739-40.

⁸⁵ 28 U.S.C. § 1652 (2000). But see *Clearfield Trust*, 318 U.S. at 367 (holding that federal law, rather than state law, applies to disputes involving the rights and liabilities of the federal government). At issue in *Clearfield Trust* was whether federal common law or state law rules determined *Clearfield Trust Co.*'s liability to the federal government for collecting on a forged check issued by the Federal Reserve Bank of Philadelphia. *Id.* at 364-65. The Court found that federal law governed the dispute because the United States exercises a constitutional function or power when it disburses its funds or pays its debts. *Id.* at 366. The authority to issue the check in question originated in the Constitution and federal statutes, and therefore the duties imposed on, and the rights acquired by, the federal government should come from the same source. *Id.* Where no explicit congressional directive exists, the court must consider whether state law should apply, or whether the application of state law would subject the rights and duties to exceptional uncertainty. *Id.* at 367. The Rule of Decision Act, therefore, is inapplicable where rights and duties of the United States are drawn from federal statute or the Constitution.

⁸⁶ *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

⁸⁷ See *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 87-88 (1994) (discussing how cases from the time of *Kimbell Foods* to the present have held that the instances when the Court should develop a special federal rule instead of applying state law are "few and restricted").

1. Kimbell Foods

The case of *United States v. Kimbell Foods, Inc.* sets forth the Supreme Court's modern template for deciding when federal courts may fashion federal common law rules. The Court, in this 1979 decision, devised a three-factor test to determine when federal courts should ignore the "readymade body of state law" and create new common law rules of decision.⁸⁸ It found that federal programs that by their "nature are and must be uniform in character throughout the Nation necessitate formulation of controlling federal rules," however, "when there is little need for a national uniform body of law, state law may be incorporated as the federal rule of decision."⁸⁹ The Court articulated that federal courts' first inquiry when deciding whether to incorporate a state law rule of decision into federal common law should be whether the federal program at issue required uniform national rules to effectuate its purpose.⁹⁰ Whether application of a state law rule of decision would frustrate specific objectives of federal programs,⁹¹ and whether application of a federal rule would disrupt commercial relationships predicated on state law were two other factors set forth by the Court as framing the decision.⁹² In the twenty-three years following the *Kimbell Foods* case, these three elements have continued to serve as the

⁸⁸ *Kimbell Foods*, 440 U.S. at 728-29.

⁸⁹ *Id.* at 728 (citing *Miree v. DeKalb County*, 433 U.S. 25, 28-29 (1977)). The Court in *Miree* held that state law, rather than federal common law, applied in determining whether representatives of passengers killed in an airplane crash could recover as third-party beneficiaries to contracts between the defendant county and the Federal Aviation Administration. 433 U.S. at 32-33. The Court found that only the rights of private litigants were at issue and resolution of the plaintiffs' breach of contract claim did not directly affect the United States. *Id.* at 29. No duties, interests, liabilities, or substantial rights of the federal government hinged on the outcome of the litigation, and, therefore, a uniform federal common law rule was unnecessary. *See id.* at 32-33 (discussing the federal government's very limited and speculative interest in the case).

⁹⁰ *Kimbell Foods*, 440 U.S. at 728.

⁹¹ *Id.* (citing *United States v. Allegheny County*, 322 U.S. 174, 183 (1944)). The *Allegheny* Court held that a Pennsylvania tax law violated the United States Constitution insofar as it purported to authorize taxation of United States' property interests in the Commonwealth of Pennsylvania. 322 U.S. at 192. The Court found that state law could not defeat or limit government actions when the federal government properly exercised a constitutional grant of power. *Id.* at 189-91. Exercise of such constitutional functions presented questions of federal concern that could not be controlled by laws of any state. *Id.* at 183. The Supremacy Clause, the purpose of which was to avoid the introduction of disparities, conflicts, and confusions, would be violated if state laws did control the federal government's constitutionally authorized functions. *Id.*

⁹² *Kimbell Foods*, 440 U.S. at 728 (citing *United States v. Brosnan*, 363 U.S. 237, 241-42 (1960)). As a matter of federal law, state law was held to govern divestitures of federal tax liens, except to the extent that federal statutes had entered the field. *Brosnan*, 363 U.S. at 240-42. The Court recognized that tax liens form part of the machinery for collecting federal taxes, but that Congress "came into an area of complex property relationships long since settled and regulated" when it resorted to the use of liens. *Id.* at 241-42. The need for a uniform federal rule was outweighed "by the severe dislocation to local property relationships which would result from [the Court] disregarding state procedures" that governed enforcement of the liens. *Id.* at 242.

Supreme Court's standard setting the judicial policy for federal courts grappling with the difficult question of whether they should enter upon the field of federal common law rule development and adjudication.⁹³ The application of this three-part decision making structure over the years has indicated the Supreme Court's decreasing tolerance of the lower federal courts' exercise of common law rulemaking powers. It reinforces the theme of judicial restraint in the federal courts and a more limited view of the legitimate function of federal courts as "law-makers."

The issue before the Supreme Court in *Kimbell Foods* was whether contractual liens which arose out of federal loan programs took precedence over private liens in the absence of a federal statute setting priority for creditors.⁹⁴ The Court first held that the priority of liens stemming from federal lending programs was to be determined by reference to federal law.⁹⁵ Both the Small Business Administration ("SBA") and the Farmers Home Administration ("FHA") had derived their authority to enter into loan transactions from specific federal statutes that had been enacted by an exercise of "constitutional function or power;" the Court therefore reasoned that the agencies' rights in those transactions also should derive from a federal source.⁹⁶

The question remaining for the *Kimbell Foods* Court was whether the federal rule of decision regarding the priority of liens should be determined under existing state law or a judicially-created federal rule.⁹⁷ The Court applied the three-factor analysis it had set out and held that the relative priority of federal and private liens was to be determined pursuant to non-discriminatory state laws.⁹⁸ The agencies' operating practices, which recognized that states' commercial laws control the Government's security interests, undercut the assertion that "a federal rule of priority [was] needed to avoid the administrative burdens created by disparate state commercial rules."⁹⁹ In addition, the unforeseeable consequences of "altering settled

⁹³ See, e.g., *Central Pines Land Co. v. United States*, 274 F.3d 881, 890 (5th Cir. 2001) (exemplifying a federal court's recent application the *Kimbell Foods* test).

⁹⁴ 440 U.S. at 718. The Court consolidated two appeals from the Fifth Circuit in *Kimbell Foods*. *Id.* at 718, 723. *Kimbell Foods, Inc. v. Republic Nat. Bank*, 557 F.2d 491 (5th Cir. 1977), involved a United States' contractual lien that was guaranteed by the SBA. *Id.* at 493. The Court affirmed the circuit court's decision. 440 U.S. at 740. *United States v. Crittenden*, 563 F.2d 678 (5th Cir. 1977), involved a security interest taken by the FHA in a borrower's farm equipment and crops for loans obtained under the Consolidated Farmers Home Administration Act of 1961. *Id.* at 679-80. The Court vacated and remanded the circuit court's decision to fashion a special federal common law rule giving priority to a private repairman's lien over the FHA's lien. 440 U.S. at 740.

⁹⁵ *Kimbell Foods*, 440 U.S. at 726-27.

⁹⁶ *Id.* at 726 (citing *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943)).

⁹⁷ 440 U.S. at 718.

⁹⁸ *Id.*

⁹⁹ *Id.* at 732.

commercial practices"¹⁰⁰ and the states' relatively uniform laws concerning commercial transactions¹⁰¹ deterred the Court from adopting a federal rule regarding loan priorities. With this decision, the Court set out an extremely narrow course for federal judges ruling in cases involving federal programs lacking clear statutory guidance. The emphasis in *Kimbell Foods* was placed on the maintenance of stable and predictable rules of decision even if they were to be derived from the laws of states. Justice Marshall's opinion cast a skeptical eye towards federal agency arguments favoring the development of uniform, court-determined rules and found them wanting. Apparently, the Court's position has been that Congress must act clearly to set forth statutory rules favoring federal interest to a greater degree. Following the *Kimbell Foods* decision, the freedom of federal judges to control the development of new legal doctrine under their common law powers seemed significantly curtailed. Further Supreme Court opinions would reinforce this view, but, as the following analysis of CERCLA decisions will reveal, the Court has found very little support in the decisions of the lower federal courts, which have largely ignored it.

2. *Post-Kimbell Foods Supreme Court Jurisprudence Regarding the Source of Federal Common Law Rules of Decision*

a. *Pre-O'Melveny & Myers Cases*

Justice Marshall's opinion in the unanimous *Kimbell Foods* case set the benchmark for finding rules of decision in "interstitial meaning" federal common law cases. Several other Supreme Court holdings rendered between 1979 and 1991 reinforced the same view. This principle may be stated in the following terms: With the exception of the relatively few cases in which a federal common law rule of decision is mandated by the federal statute or right at issue,¹⁰² the general presumption has been that in the absence of a statutorily provided rule, if state law may be applied to resolve a dispute, there would be no need for federal courts to fashion a different

¹⁰⁰ *Id.* at 739. The Court found that "[i]n structuring financial transactions, businessmen depend on state commercial law to provide the stability essential for reliable evaluation of the risks involved." *Id.* (citing *Nat'l Bank v. Whitney*, 103 U.S. 99, 102 (1881)). Creditors who rely on state law to ensure lien priority would have had their expectations thwarted whenever a federal contractual security interest appeared and took precedence had the Court created a federal rule of decision in *Kimbell Foods*. *Id.*

¹⁰¹ *Id.* at 732 n.28. The Government failed to assert any concrete conflicts between the interests promoted by the SBA and FHA loan programs and existing state laws. *Id.* at 740. The Court did acknowledge that a federal rule would have been justified if the Government had shown that formulating special rules to govern priority of federal liens was necessary to "vindicate important national interests." *Id.*

¹⁰² Generally, there must exist a "significant conflict between some federal policy or interest and the use of state law" for federal courts to legitimately fashion common law rules of decision. *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966).

common law rule.¹⁰³ This view of judicial authority appeared to rein in the federal judge's discretion and force courts to presumptively start from a position of using state law as the relevant rule of decision.

After *Kimbell Foods*, a federal court's decision whether to adopt state law or to fashion nationwide federal rules become a "matter of judicial policy dependent upon a variety of considerations always relevant to the nature of the specific governmental interests and to the effects upon them of applying state law."¹⁰⁴ In the case of *Wilson v. Omaha Indian Tribe*, decided in the same year as *Kimbell Foods*, the Supreme Court applied the *Kimbell Foods* three-part test to determine whether a nationwide rule was necessary to decide whether changes in a river's course affecting riparian land owned or possessed by the United States or an Indian tribe had been avulsive or accretive.¹⁰⁵ *Wilson* involved consolidated actions to quiet title to land originally granted to the Omaha Indian Tribe under an 1854 treaty.¹⁰⁶ The eastern boundary of the reservation land was fixed as the center of the main channel of the Missouri River, into which a peninsula protruded.¹⁰⁷ Over time, the river changed its course, and certain tribal land was separated from the bulk of the reservation by the river.¹⁰⁸ Petitioners asserted that the river's movements washed away part of the reservation and the soil accreted to the Iowa side of the river, vesting title in them as riparian owners.¹⁰⁹

The *Wilson* court held that Nebraska state law, and not a judicially created federal common law rule, should provide the rule of decision in this matter. Even though the case involved a matter concerned with Indian tribal property rights, the Court concluded that there was no need to develop a uniform national rule to determine whether changes in a river's course affecting riparian ownership rights of an Indian tribe or the United States had been accretive or avulsive, so long as the applicable state stan-

¹⁰³ *City of Milwaukee v. Illinois*, 451 U.S. 304, 313 n.7 (1981). The strength of the *Kimbell Foods* view was so strong that it even prompted Justice White to dissent from the Supreme Court's denial of certiorari in a case raising the issue in a factual context similar to *Kimbell Foods*. In *Missouri Farmers Ass'n v. United States*, 475 U.S. 1053 (1986), the Court was asked to review the Eighth Circuit's ruling that a federal agency regulation provided the appropriate rule for deciding whether the Farmers Home Administration retains a continuing security interest in certain collateral following sale. For Justice White, making the federal regulation the controlling source of a decisional rule was difficult to reconcile with *Kimbell Foods*, which preferred "non-discriminatory state law" in the absence of a "congressional directive." *Id.* at 1054 (White, J., dissenting). Due to the denial of certiorari, the Supreme Court never addressed his concerns.

¹⁰⁴ *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 672 (1979) (internal quotes omitted).

¹⁰⁵ *Id.* at 672-73.

¹⁰⁶ *Id.* at 658-60.

¹⁰⁷ *Id.* at 658-59.

¹⁰⁸ *Id.* at 659.

¹⁰⁹ *Id.* at 657.

dard was applied evenhandedly to particular disputes.¹¹⁰ Given the Court's belief that state law was being equitably applied, the Court found that there would be little likelihood of injury to federal trust responsibilities or tribal possessory interests.¹¹¹ Referring back to an element of the *Kimbell Foods* test, it concluded that the likelihood of injury to tribal interests did not pose an actual and significant conflict that would mandate fashioning a federal rule. Finally, the Court recognized that states have a substantial interest in having their own real property laws resolve such controversies, in that there was merit "in not having the reasonable expectations of . . . private landowners upset by the vagaries of being located adjacent to or across from Indian reservations . . ."¹¹² The *Wilson* holding showed that, at least in 1979, the judicial policy of emphasizing established state law principles held sway and this view would control the federal courts until extremely strong evidence of countervailing federal interests could be demonstrated.

However, in 1987 a federal rule of decision was recognized in *West Virginia v. United States*, a case that allowed the federal government, as a matter of right, to collect prejudgment interest in breach-of-contract actions where the amount due was liquidated, ascertained, or agreed to.¹¹³ After suffering two natural disasters in 1972, the State of West Virginia had contracted with the Army Corps of Engineers for the federal agency to prepare sites for mobile homes.¹¹⁴ Under the Disaster Relief Act of 1970 ("DRA"), the federal government was authorized to prepare mobile home sites "without charge to the United States."¹¹⁵ West Virginia acknowledged the bills for services rendered by the Corps, but it failed to make payments.¹¹⁶ As a result, the United States brought suit against the state to recover amounts due on the contract as well as prejudgment interest.¹¹⁷

The Court analyzed the *Kimbell Foods* factors in light of the circumstances and held that a federal common law rule allowing for recovery of prejudgment interest by the United States was preferable to incorporation of state law on this issue.¹¹⁸ More specifically, the rule "governing the interest to be recovered as damages for delayed payment of a contractual obligation to the United States" was found not to be controlled by state

¹¹⁰ *Id.* at 673. The Court cited *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 730 (1979), for the proposition that courts should not accept "generalized pleas for uniformity as substitutes for concrete evidence that adopting state law would adversely affect [federal interests]." *Wilson*, 442 U.S. at 673.

¹¹¹ *Wilson*, 442 U.S. at 673.

¹¹² *Id.* at 674.

¹¹³ 479 U.S. 305, 308 (1987).

¹¹⁴ *Id.* at 307.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 309.

statutory or common law.¹¹⁹ Reminiscent of the well-known decision in *Clearfield Trust Co. v. United States*,¹²⁰ the Court ruled in a way favorable to the federal government's financial interest. In its view, incorporation of state law would not give due regard to the federal interest in maintaining the apportionment of responsibility for payment that Congress devised in the DRA.¹²¹ Also, alluding to the *Kimbell Foods* test, application of a federal rule would not disrupt commercial relationships predicated on state law because a state law would not (of its own force) govern contracts between a state and the federal government.¹²² The Court recognized in applying the federal rule that no state policy compelled deviation from the common law rule allowing the federal government to collect prejudgment interest and that federal policy called for an interest award.¹²³ Seemingly, in this case the Court considered that the federal interest was great and the state interest much less substantial.

Finally, in the 1991 case of *Kamen v. Kemper Financial Services, Inc.*,¹²⁴ the Court refused to fashion a federal rule of decision that would oblige the representative shareholder in a derivative action brought under the Investment Company Act of 1940 ("ICA")¹²⁵ to make a precomplaint demand¹²⁶ on the board of directors, even when the demand would be futile under state law.¹²⁷ *Kamen* was decided under federal common law because

¹¹⁹ *Id.* at 308 (internal citation omitted).

¹²⁰ 318 U.S. 363 (1943). *Clearfield Trust* involved the payment of a United States government check that had been stolen and was cashed on the basis of a forged endorsement. *Id.* at 364-65. The federal government had delayed in notifying the bank that had paid the check of its forged endorsement. *Id.* at 365. Under Pennsylvania law, this delay would bar the United States from suing the bank. *Id.* at 366. The exact question before the Court was whether state law or a federal rule of decision would control the question of delay. *Id.* A unanimous Court ruled in favor of a uniform federal rule as more appropriate. The Court noted, "The application of state law . . . would subject the rights and duties of the United States to exceptional uncertainty. It would lead to great diversity in results by making identical transactions subject to the vagaries of the laws of the several states. The desirability of a uniform rule is plain." *Id.* at 367.

¹²¹ *West Virginia v. United States*, 479 U.S. 305, 309 (1987).

¹²² *Id.*

¹²³ *Id.* at 310.

¹²⁴ 500 U.S. 90 (1991).

¹²⁵ 15 U.S.C. § 80a-20(a) (2000).

¹²⁶ The demand requirement obligates the representative shareholder in a planned derivative suit against the board of directors to state its complaint to the board and allow the board either to take over the litigation or oppose the suit. *Kamen*, 500 U.S. at 96. Usually, the board's decision to assume control of the suit ends the shareholder's involvement in the action. *Id.* at 101. The futility exception to the demand rule allows the shareholder to forgo making the demand when a majority of directors are financially interested in the challenged transaction or have participated in or approved the alleged wrongdoing. *Id.*

¹²⁷ *Id.* at 92. See also *Burks v. Lasker*, 441 U.S. 471 (1979) (examining whether disinterested directors can terminate a stockholders' derivative suit under federal statutory law).

the cause of action was provided for under the ICA, a federal statute;¹²⁸ however, the rule of decision was derived from state law.¹²⁹ The Court found that the structure of the demand requirement—that is, when it is required or excused—actually determines who has the power to control corporate litigation. Therefore, such a basic matter of corporate organization relates to the fundamental allocation of governing powers within the corporation, a traditional state-law matter.¹³⁰

In *Kamen*, application of the *Kimbell Foods* factors led Justice Marshall, writing for a unanimous Court, to hold that the states' laws regarding whether a demand was required before a shareholder initiates a corporate derivative suit, and whether a futility exception to the requirement existed, should control the outcome of the case.¹³¹ He reasoned that fashioning a universal demand rule would upset the balance of power that state corporate doctrines had struck between the power of shareholders and corporate directors to control corporate litigation.¹³² Furthermore, the futility exception recognized by a majority of states did not impede the regulatory objectives of the ICA because both the exception and the ICA function primarily to "impose controls and restrictions on the internal management of investment companies."¹³³ The Court affirmed that "where a gap in the federal securities laws must be bridged by a rule that bears on the allocation of governing powers within the corporation, federal courts should incorporate state law into federal common law unless the particular state law in question is inconsistent with the policies underlying the federal statute."¹³⁴ Obviously, the Court believed that state corporate law was compatible with these federal statutory policies.

Throughout this period, the Court's consistent application of the *Kim-*

¹²⁸ *Kamen*, 500 U.S. at 97.

¹²⁹ "The presumption that state law should be incorporated into federal common law is particularly strong in areas in which private parties have entered legal relationships with the expectation that their rights and obligations would be governed by state-law standards. . . . Corporation law is one such area." *Id.* at 98. The Court recognized that corporations "are creatures of state law, . . . and it is state law that is the font of corporate directors' powers," *id.* at 98-99 (quoting *Burks v. Lasker*, 441 U.S. 471, 478 (1979)), and discerned nothing in the ICA's regulatory objectives that "evidenced a congressional intent that federal courts . . . fashion an entire body of federal corporate law out of whole cloth." *Kamen*, *id.* at 99 (internal citations omitted).

¹³⁰ *Id.* at 101.

¹³¹ *Id.* at 108-09.

¹³² *Id.* at 103.

¹³³ *Id.* at 107. Although the Court held that the futility exception did not conflict with the purposes of the ICA, the Court did state that it would "be constrained to displace state law in this area were [it] to conclude that the futility exception to the demand requirement is inconsistent with the policies underlying the ICA." *Id.* This statement indicates that the Court places greater emphasis on the second prong of the *Kimbell Foods* test, whether state law conflicts with the purposes and intent of the federal statutory scheme at issue, than on the need for a uniform national rule, or whether a federal rule would disrupt commercial relationships predicated on state law.

¹³⁴ *Id.* at 108.

bell Foods test indicates that the three-part test's applicability extends to all cases in which federal common law might apply. In these instances, the question before the Court was whether to create a federal common law rule of decision or to incorporate a pre-existing state law rule. In making that decision, the *Kimbell Foods* holding has established a durable test requiring the federal court to evaluate (1) whether a uniform national rule is required to effectuate the federal program's purpose; (2) whether application of a state law rule would conflict with a policy underlying the federal program; and (3) whether application of a uniform federal rule would upset existing relationships predicated on state law. The Court used this approach to evaluate judicial choice of law during the fifteen year period following *Kimbell Foods*. Rather than waning over the years, the emphasis on the *Kimbell Foods* test has been reinforced by the Supreme Court's more recent pronouncements in *O'Melveny & Myers v. FDIC*¹³⁵ and *Atherton v. FDIC*.¹³⁶ These two decisions in the mid-1990s strengthen the notion that federal courts should fashion federal common law when necessary but that they should use state rules of decision as their starting point. As the discussion concerning CERCLA decision-making indicates, federal judges have been reluctant to hear the Supreme Court's message.

b. *O'Melveny & Myers and Atherton*

In these two decisions over a three-year span, the Supreme Court restricted the common lawmaking powers which had been asserted by a number of the federal circuits and affirmed its prior holding in *Kimbell Foods*. In *O'Melveny & Myers*, the Court unanimously rejected a federal common law scheme that displaced traditional matters of state concern, such as issues of corporate governance and whether the knowledge of corporate directors may be imputed to the corporation,¹³⁷ and it held that resort to federal common law is warranted only in "extraordinary cases."¹³⁸ If anything, the *O'Melveny & Myers* case emphatically stressed the basic

¹³⁵ 512 U.S. 79 (1994).

¹³⁶ 519 U.S. 213 (1997).

¹³⁷ *O'Melveny & Myers*, 512 U.S. at 83-89.

¹³⁸ *Id.* at 89. In constitutional law battles occurring during the latter part of the 1990s, some more conservative justices argued that *Kimbell Foods* represented a limitation in expansive judicial power to fashion non-statutory legal principles. In a commerce power case, several dissenting members of the Court even emphasized the limited power of federal courts to create federal common law to cases which involve "uniquely federal issues or the rights and responsibilities of the United States or its agents." *Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564, 615 (1997) (Thomas, J., dissenting). Joined by Justice Scalia and Chief Justice Rehnquist, Justice Thomas identified *Kimbell Foods* as standing for the idea that "where a federal rule is not essential, or where state law already operates within a particular field, we have applied state law rather than opting to create federal common law." *Id.* But even conservative justices can identify "uniquely federal issues" in cases presenting state law based challenges to federal military procurement activities. See *Boyle v. United Techs. Corp.*, 487 U.S. 500, 503-507 (1988).

policy of *Kimbell Foods* and reinforced the notion that a federal common law rule was presumptively to be selected from applicable state law principles absent an extraordinary conflict with extremely important federal interests. At issue in the *O'Melveny & Myers* case was whether, in a suit brought by the Federal Deposit Insurance Corporation ("FDIC") as the receiver for a federally insured bank, federal law or state law provided the proper rule of decision to determine the malpractice liability of attorneys who had provided services to the bank.¹³⁹

FDIC asserted that a federal common law rule should determine the outcome of the adjudication of its claims, which were based upon California state law.¹⁴⁰ FDIC further contended that the "content of the federal common law rule corresponds to the rule that would independently be adopted by most jurisdictions."¹⁴¹ Justice Scalia, writing for the Court, forcefully admonished the FDIC, stating that its first assertion was "so plainly wrong," that "[t]here is no federal general common law,"¹⁴² and even if "there were a federal common law on such a generalized issue (which there is not), we see no reason why it would necessarily conform to that independently . . . adopted by most jurisdictions."¹⁴³ The Court held that "California law, not federal law, governs the imputation of knowledge to corporate victims of alleged negligence, and that is so whether or not California chooses to follow the majority rule."¹⁴⁴ The key point on this first issue was that state—and not federal—law governed the general issue of the imputed knowledge of corporate officers acting against the corporation's interest.

At issue under FDIC's second cause of action was a narrower issue—whether California law was "displaced" of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA").¹⁴⁵ This federal statute directs that the FDIC, as receiver, "step into the shoes" of the failed savings and loan institution and obtain the rights of the insured depository

¹³⁹ *O'Melveny & Myers*, 512 U.S. at 80-81.

¹⁴⁰ The FDIC asserted claims based on two California causes of action: The first required the Court to decide whether federal common law or California state law determines "whether the knowledge of corporate officers acting against the corporation's interest will be imputed to the corporation"; and the second required the Court to decide whether federal common law determined "whether knowledge by officers so acting will be imputed to the FDIC when it sues as a receiver of the corporation." *Id.* at 83. It may be notable that FDIC brought suit as receiver for the failed savings and loan, and not in its capacity as the United States government. Arguably, FDIC's case for a federal rule would have been stronger if the United States was a party to the action; the litigation otherwise was between two private parties.

¹⁴¹ *Id.* at 84 (quoting Brief for Respondent 15 n.3).

¹⁴² *Id.* at 83 (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938)).

¹⁴³ *O'Melveny & Myers*, 512 U.S. at 84 (internal quote omitted).

¹⁴⁴ *Id.* at 84-85 (internal quote omitted).

¹⁴⁵ *Id.* at 85-86.

institution that existed prior to receivership.¹⁴⁶ The FDIC claimed that this authority under FIRREA included a nonexclusive grant of rights to the FDIC receiver that could be “supplemented” by federal common law because of the high federal interest in such an area of law.¹⁴⁷ Justice Scalia concluded that FIRREA embodied a comprehensive and detailed federal regulatory scheme containing specific federal rules of decision on enumerated issues relevant to the FDIC’s role as a receiver.¹⁴⁸ Employing the Latin phrase *inclusio unius, exclusio alterius*, Justice Scalia read the statute as providing a limited and exclusive list of federal rules which existed against the backdrop of state law.¹⁴⁹ Matters left unaddressed by the FIRREA were left subject to the disposition of state law.¹⁵⁰

The *O’Melveny & Myers* Court emphasized an important principle of federal common law rulemaking—that cases justifying the establishment of a “special federal rule” are “few and restricted” and limited to situations where there is a “significant conflict between some federal policy or interest and the use of state law.”¹⁵¹ The record in the case before it failed to indicate such an interest or conflict.¹⁵² Without the requisite “significant conflict” serving as the “precondition for recognition of a federal rule of decision,”¹⁵³ judicial lawmaking would be considered illegitimate and state law would apply. *O’Melveny & Myers* represents a strong statement by the Supreme Court substantially restricting courts’ ability to fashion federal common law. Even the federal value of “uniformity of law” was rejected as an appropriate ground for federal common law rule.¹⁵⁴ The “significant conflict” requirement strengthens the Court’s prior holding in *Kimbell Foods*, and reiterates the Court’s preference for legislatively-created law at either the federal or the state level.¹⁵⁵ In some disputes since *O’Melveny &*

¹⁴⁶ *Id.* at 86 (internal citation omitted).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 86.

¹⁴⁹ *Id.* at 86-87.

¹⁵⁰ *Id.* at 85.

¹⁵¹ *Id.* at 87 (quoting *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966)).

¹⁵² FDIC argued that the federal deposit insurance fund may be depleted if state law were adopted as the rule decision, and such depletion would create a conflict between a “specific, concrete” federal policy and state law. *Id.* at 88. The Court rebuked FDIC’s argument by finding that neither FIRREA nor prior law set an anticipated level for the deposit insurance fund and that there was no federal policy that the fund should always win. *Id.*

¹⁵³ *Id.* at 87.

¹⁵⁴ Justice Scalia rejected the idea that the efficiency of federal agency procedure or work effort was an adequate federal policy or interest. *Id.* at 88. He wrote that “uniformity of law might facilitate the FDIC’s nationwide litigation of these suits, eliminating state-by-state research and reducing uncertainty—but if the avoidance of those ordinary consequences qualified as an identified federal interest, we would be awash in ‘federal common-law rules.’” *Id.*

¹⁵⁵ Formulating policy is a role reserved to those “who write the laws, rather than those who interpret them.” *Id.* at 89. Justice Stevens’s concurring opinion added further support to this notion when he explained that while state courts may engage in judicial rulemaking, federal courts are “courts of

Myers between private parties, federal courts have been reluctant to displace state law by finding a significant conflict with a federal interest.¹⁵⁶ However, it is curious that reference to this case has been conspicuously absent from the CERCLA appellate case decisions under review in this article.

The *O'Melveny & Myers* holding was soon restated and reinforced in *Atherton v. FDIC*,¹⁵⁷ where the Court held that absent a significant conflict between some federal policy or interest and state law, courts must refrain from fashioning rules of federal common law.¹⁵⁸ At issue was whether courts should look to state law, a federal statute,¹⁵⁹ or federal common law to find the applicable standard to measure the legal propriety of a bank's officer's actions.¹⁶⁰ Justice Breyer, writing for the Court, rejected the FDIC's assertion that the need for uniformity mandated a federal common law rule of decision, thereby reaffirming one of *Kimbell Foods'* central premises by stating, "to invoke the concept of uniformity . . . is not to prove its need."¹⁶¹ The Court held that the federal statute provided a liability floor (gross negligence), and that state law would provide the rule of decision if the state liability standard exceeded that of gross negligence.¹⁶² The crux of the opinion was that a significant conflict between a federal policy and state law did not exist, making reliance on or creation of federal common law improper.¹⁶³

limited jurisdiction that have not been vested with open-ended lawmaking powers." *Id.* at 90 (Stevens, J., concurring) (citing *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 95 (1981)).

¹⁵⁶ See, e.g., *Woodward Governor Co. v. Curtiss-Wright Flight Sys., Inc.*, 164 F.3d 123, 127 (2d Cir. 1999).

¹⁵⁷ *Atherton v. FDIC*, 519 U.S. 213 (1997).

¹⁵⁸ *Id.* at 225. As in *O'Melveny & Myers*, FDIC was not acting in its capacity as the United States government, but as receiver for a federally chartered savings association. *Id.*

¹⁵⁹ The statute at issue was 12 U.S.C. § 1821(k) (2000), which provides that a "director or officer of a federally insured bank may be held personally liable for monetary damages in an [FDIC]-initiated civil action . . . for gross negligence or similar conduct . . . that demonstrates a greater disregard of a duty of care (than gross negligence)." *Id.* at 216 (citing 12 U.S.C. § 1821(k) (2000)) (internal quotation marks omitted).

¹⁶⁰ *Atherton*, 519 U.S. at 215-16.

¹⁶¹ *Id.* at 220.

¹⁶² *Id.* at 216.

¹⁶³ The FDIC invoked two arguments to allege a significant conflict between application of a state law standard of conduct and the federal policies that underlie the banking system: (1) a common law standard must be applied because the banks in question were federally chartered, and (2) an analogy to the conflict of laws "internal affairs doctrine." *Id.* at 221-26. The Court rejected the first argument by reminding FDIC that federally chartered banks are governed more by state law than federal law and to "point to a federal charter by itself shows no conflict, threat, or need for federal common law." *Id.* at 223. FDIC's second argument, an analogy to the internal affairs doctrine, which was described as "a conflict of laws principle which recognizes that only one State should have the authority to regulate a corporation's internal affairs" was similarly rebuffed. *Id.* at 224. The Court held that the internal affairs doctrine seeks to prevent conflict by requiring that there be only one point of legal reference for an entity, but that nothing in the doctrine indicated that the single source of law must be

The Supreme Court's holdings from *Kimbell Foods* up through *Atherton* exemplify a clear attitude of restraint in federal court lawmaking almost to the point of demonstrating a general hostility towards federal judges fashioning common law rules of decision when state law might apply to the dispute. Perhaps this view is based upon an attitude that federal courts should have more circumscribed and specifically identified sources of power. Absent a showing that an action involves uniquely federal concerns and that there is an actual and significant conflict between the applicable state law and the purpose underlying the federal statute at issue, the recent Court has insisted that federal courts' hands are tied with respect to creating new common law.¹⁶⁴ By emphasizing a predominant legislative role in the creation of law and rules of decision, the Court has indicated that, especially after *O'Melveny & Myers* and *Atherton*, the task is not one to be undertaken frequently by the federal judiciary.¹⁶⁵ It has also suggested with the rhetoric employed in its decisions that the burden is on both the party arguing for a federal common law rule and the court implementing it. As the review of the CERCLA cases demonstrates, this clear expression of judicial restraint has been ignored by certain lower federal courts.

3. *Extending the Kimbell Foods Principle to the CERCLA Context—the Bestfoods Case*

In *United States v. Bestfoods*,¹⁶⁶ the Supreme Court addressed the issue of whether a parent corporation could have derivative liability for response costs due to its participation in or exercise of control over a subsidiary firm liable under CERCLA.¹⁶⁷ The Court held that: (1) a parent corporation may be charged with derivative CERCLA liability as an "owner" for its subsidiaries' actions in operating a polluting facility only when state law allows the "corporate veil to be pierced";¹⁶⁸ (2) the "participation and control" test employed by the district court to evaluate a parent corporation's

federal. *Id.* "To find a justification for federal common law in [FDIC's] argument, however, [was] to substitute analogy or formal symmetry for the controlling legal requirement . . . the existence of the need to create federal common law arising out of a significant conflict or threat to a federal interest." *Id.* (citing *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 85, 87 (1994)).

¹⁶⁴ See *id.* at 224-25.

¹⁶⁵ The FDIC, in both *O'Melveny & Myers* and *Atherton*, was not litigating in its government capacity, but in its capacity as a receiver for failed institutions. *Atherton*, 519 U.S. at 225. The FDIC was not, in either case, pursuing purely federal interests. *Id.* If the FDIC were litigating in its governmental capacity, the federal interests advanced may have warranted creation of federal common law rules of decision in both cases. *Id.* at 225.

¹⁶⁶ 524 U.S. 51 (1998).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 55.

control of a subsidiary may not be used to impose CERCLA liability;¹⁶⁹ and (3) a parent corporation may be held liable as an "operator" under CERCLA in instances other than the parent's sole operation of, or joint venture with, a subsidiary.¹⁷⁰ The first of these holdings bears directly on the issue of defining CERCLA liability for corporate conduct by reference to state corporate law concepts. The Court did not expressly decide the issue of whether federal courts should use new federal common law or state law to determine CERCLA liability for parent corporations,¹⁷¹ but it clearly indicated a preference that courts should not use statutory gaps as a basis for rejecting fundamental corporate law principles and creating federal common law.¹⁷² If anything, the *Bestfoods* opinion reinforced the principles espoused in the earlier line of cases stemming from the *Kimbell Foods* case.

The *Bestfoods* Court's preference for making fundamental corporate law doctrine the rule of decision to determine CERCLA liability appears to indicate that the Supreme Court favors adopting state law rules as a matter of federal statutory interpretation or as the substantive legal rule under the federal common law.¹⁷³ The Court's reasoning focused on two points. First, it followed the general principle of corporate law that parent corporations are not liable for the acts of their subsidiaries, and that since that principle had not been explicitly rejected by the text of CERCLA, it was presumed to apply to the case at hand.¹⁷⁴ A second traditional corporate law principle supplemented the first one with the Court's additional holding that if a court "pierced the corporate veil" or ignored the parent corporation's legal form, there could be derivative liability for the acts of the subsidiary company.¹⁷⁵

The important point to be taken from the *Bestfoods* decision is that

¹⁶⁹ *Id.* at 59. Justice Souter, writing for the Court, held that the district court's focus on the "relationship between the parent and subsidiary . . . erroneously, even if unintentionally, treated CERCLA as though it displaced or fundamentally altered common law standards of limited liability." *Id.* at 70. If the participation-and-control test was adopted in the CERCLA context, a relaxed CERCLA-specific rule of derivative liability "would banish traditional standards and expectations from the law of CERCLA liability." *Id.* Such a rule, however, cannot arise from congressional silence and the Court found CERCLA's silence on the matter "dispositive." *Id.*

¹⁷⁰ *Id.* at 55. A parent corporation could incur direct liability if it actually managed, directed, or conducted operations specifically related to the pollution, because such activities fall directly within the reaches of CERCLA's § 107(a) liability provisions. *Id.* at 66.

¹⁷¹ *Id.* at 64 n.9. The Court did not address the question of whether state law or federal common law rules should determine liability under CERCLA because it had not been challenged by the parties. *Id.* This lack of clarity has influenced later federal court decisions to adhere to their own decisions favoring and employing the federal common law methodology. See, e.g., *United States v. Exide Corp.*, No. 00-CV-3057 2002 U.S. Dist. LEXIS 3303, at *18-19 (E.D. Pa. Feb. 27, 2002).

¹⁷² *Bestfoods*, 524 U.S. at 70.

¹⁷³ Mank, *supra* note 32, at 1190-91.

¹⁷⁴ *Id.* at 1191.

¹⁷⁵ *Id.*

bedrock state corporate law concepts would not be easily cast aside solely because the issue arose in federal CERCLA litigation. Justice Souter expressed this point by noting that CERCLA's failure to deal with the particular issue of parent/subsidiary liability did not mean that the "entire corpus of state corporation law is to be replaced simply because a plaintiff's cause of action is based upon a federal statute."¹⁷⁶ Congressional silence regarding "a matter as fundamental as the liability implications of corporate ownership demands application of the rule that in order to abrogate a common-law principle, the statute must speak directly to the issue addressed by the common law."¹⁷⁷ This statement suggests that CERCLA's broad remedial purposes alone do not justify displacing fundamental corporate law principles and imposing new, federal common law rules for corporations assessing liability for response costs. Instead, explicit statutory language contrary to such fundamental principles is required.

The *Bestfoods* Court's view of congressional silence on liability questions would also seem to be relevant with respect to the question of asset purchaser liability under CERCLA and it would suggest that current state corporation law provides the rule of decision for actions brought under sections 107 and 113.¹⁷⁸ The Court failed to explicitly resolve whether federal common law or state law should serve as the rule of decision in *Bestfoods*. The Court, however, held that federal courts could not invoke CERCLA's silence as to liability of parent corporations to displace or fundamentally alter common law standards of limited liability.¹⁷⁹ A well-developed body of state corporation law existed with respect to corporate parent/subsidiary liability prior to CERCLA's enactment.¹⁸⁰ With CERCLA's failure to speak directly to the issue, the *Bestfoods* decision indicates that federal courts should defer to that body of state law as the rule of decision when determining liability for response costs.

A similarly well-developed body of state corporation law exists regarding asset purchaser liability.¹⁸¹ Nearly every state recognizes that asset purchasers do not incur successor-in-interest liability unless one of four common law exceptions is met, and there is no "reason to think that states

¹⁷⁶ *Bestfoods*, 524 U.S. at 62-63 (quoting *Burks v. Lasker*, 441 U.S. 471, 478 (1979)).

¹⁷⁷ *Id.* at 63 (quoting *United States v. Texas*, 507 U.S. 529, 534 (1993)) (internal quotation marks omitted).

¹⁷⁸ State corporation laws must yield to federal common law when they directly conflict with the underlying policies of CERCLA. *E.g.*, *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 80 (1994). *But see* Mank, *supra* note 32, at 1194-95 (discussing whether *Bestfoods* suggests a limited federal common law based upon a majority of states' laws).

¹⁷⁹ *Bestfoods*, 524 U.S. at 70.

¹⁸⁰ 1 JAMES D. COX & THOMAS LEE HAGEN, COX & HAGEN ON CORPORATIONS § 7.16 (2d ed. 2003).

¹⁸¹ *See, e.g.*, *Anspec Co. v. Johnson Controls, Inc.*, 922 F.2d 1240, 1250 (6th Cir. 1991) (Kennedy, J., concurring).

will alter their existing successor liability rules in a race to the bottom to attract business.”¹⁸² CERCLA’s silence regarding asset purchaser liability, it follows, should receive similar treatment to that given parent corporations in *Bestfoods*—Congress’ silence should be dispositive and federal courts should defer to state corporation law rules. When read in conjunction with *Kimbell Foods*, *O’Melveny & Meyers* and *Atherton*, *Bestfoods* strongly suggests that federal courts are quite limited in using federal common lawmaking power to fashion *new* rules of decision that deviate from background state law concepts. The four circuit courts which have addressed the issue of asset purchaser liability under CERCLA after the *Bestfoods* decision have deferred to state corporation law as the rule of decision.¹⁸³ On the surface, these results appear to indicate that *Bestfoods* choice of law reasoning has been extended to apply to the asset purchaser CERCLA liability context. As the discussion in Part III will indicate, these courts have reached a result consistent with *Bestfoods* in extremely inconsistent ways. With *Bestfoods*, the Supreme Court has made it clear that in these statutory “gap filling” situations, the federal courts should have limited autonomy to make law in the common law fashion.

III. CERCLA: FEDERAL LAW CREATES A LIABILITY SCHEME FOR THE CLEANUP OF HAZARDOUS WASTE SITES

A. Statutory Structure

CERCLA was enacted in response to the serious environmental and health risks posed by industrial pollution.¹⁸⁴ This comprehensive statute grants the President broad power to command both government agencies and private parties to clean up hazardous waste sites, with the desired result being that those who are “responsible for any damage, environmental harm, or injury from chemical poisons may be tagged with the cost of their actions.”¹⁸⁵ CERCLA’s purpose, therefore, is fourfold: (1) to make those

¹⁸² *Atchison, Topeka & Santa Fe Ry. Co. v. Brown & Bryant, Inc.*, 159 F.3d 358, 364 (9th Cir. 1998) (citing *Anspec Co.*, 922 F.2d at 1250).

¹⁸³ *United States v. Davis*, 261 F.3d 1, 54 (1st Cir. 2001); *IBC Mfg. Co. v. Velsicol Chem. Corp.*, No. 97-5340, 1999 WL 486615, at *3 (6th Cir. July 1, 1999); *Atchison*, 159 F.3d at 358; *North Shore Gas Co. v. Salomon Inc.*, 152 F.3d 642, 650 (7th Cir. 1998). After *Bestfoods*, the Sixth Circuit addressed the issue of whether the corporate veil could be pierced and a sole shareholder be held jointly and severally liable under CERCLA as an “arranger.” See *Carter-Jones Lumber Co. v. Dixie Distrib. Co.*, 166 F.3d 840 (6th Cir. 1999). The court followed *Bestfoods* and held that the shareholder could have arranger liability if under Ohio law (the forum state) the corporate veil could be “pierced” because of his “intimate participation in the arrangement for disposal” of the waste. *Id.* at 846. The appellate court then held that Ohio law should be applied to resolve the CERCLA liability issues relating to corporations and officers, and it remanded the case back to the district court to determine whether Ohio law mandated piercing the corporate veil under the facts. *Id.* at 847-48.

¹⁸⁴ *Bestfoods*, 524 U.S. at 55.

¹⁸⁵ S. REP. NO. 96-848, at 13 (1980).

who release hazardous substances into the environment strictly liable for response costs, mitigation, and third-party damages; (2) to establish broad Federal response authority and a fund to remediate contaminated sites and mitigate damages where a liable party cannot be found; (3) to provide an opportunity for victims to be compensated for their losses and injuries; and (4) to provide that the fund be financed, in large part, by the industries and consumers who profit from products and services associated with hazardous substances.¹⁸⁶

CERCLA differs substantially from most other federal environmental statutes in that it does not establish a regulatory regime for an ongoing activity or for a particular industry. It is purely a remedial statute that looks backward to affect the cleanup of locations contaminated by *prior* conduct. CERCLA can be compared to the Resource Recovery and Conservation Act ("RCRA") which regulates the treatment, storage, and disposal of solid and hazardous wastes.¹⁸⁷ But CERCLA is more than a statute authorizing hazardous waste site cleanup. Passed by Congress in the wake of the Love Canal episode, CERCLA also attempts to allocate the financial costs of cleanup and natural resource damage to those actors believed to be responsible for the past dumping.¹⁸⁸ Unlike many other environmental enforcement statutes, there is no statutory limit to the amount of CERCLA-imposed cleanup costs.¹⁸⁹ The Act's broad remedial goals and the urgent public purposes underlying its adoption have been invoked by courts to justify their extremely broad interpretation of its liability provisions.¹⁹⁰ As a result, CERCLA liability has, in fact, been far reaching and has resulted in the assignment of substantial cleanup and natural resource damage costs.¹⁹¹

CERCLA contains a broad array of tools for securing the cleanup of hazardous waste disposal sites. Both governmental and private party rights of action exist under § 107(a) of the Act to provide a strong incentive for private remediation actions.¹⁹² Increasingly, the government has used its

¹⁸⁶ 126 CONG. REC. 30,932 (1980) (statement of Sen. Randolph).

¹⁸⁷ FRANK P. GRAD, TREATISE ON ENVIRONMENTAL LAW § 4A.01(2) (2003).

¹⁸⁸ *Id.* § 4A.02(1)(a).

¹⁸⁹ 42 U.S.C. § 9607(a) (1994).

¹⁹⁰ For example, in *United States v. Fleet Factors Corp.*, 901 F.2d 1550 (11th Cir. 1990), *cert. denied*, 498 U.S. 1046 (1991), the appeals court held that a lender would be considered to be an "operator" potentially responsible party merely by holding a security interest and "by participating in the financial management of a facility to a degree indicating a capacity to control the corporation's treatment of hazardous wastes." *Id.* at 1557.

¹⁹¹ See generally Blake A. Watson, *Liberal Construction of CERCLA Under the Remedial Purpose Canon: Have the Lower Courts Taken a Good Thing Too Far?*, 20 HARV. ENVTL. L. REV. 199 (1996).

¹⁹² 42 U.S.C. § 9607(a) (1994). A private party may recover "any other necessary costs of response . . . consistent with the national contingency plan." *Id.* § 9607(a)(4)(B). The purpose of the National Contingency Plan ("NCP") "is to provide the organizational structure and procedures for

authority under § 106 to order one or more potentially responsible parties ("PRPs") to clean up a site, leaving it to them to locate other PRPs with whom to share the costs. Joint and several liability principles apply under CERCLA,¹⁹³ and PRPs have the right to seek contribution from other persons who are liable, or potentially liable, under § 107(a).¹⁹⁴ Contribution claims are barred, however, against parties that have entered into settlement agreements with the government.¹⁹⁵ In short, CERCLA's liability provisions encourage rapid remediation of hazardous waste sites and allocation of the resulting financial responsibility for the cleanup.

CERCLA has been held to impose strict liability for the recovery of response costs associated with hazardous waste cleanups on four categories of PRPs.¹⁹⁶ These include: (1) current owners or operators of the hazardous waste facility, unless the PRP meets the requirements for the "innocent purchaser defense;" (2) any person who at the time of disposal of any hazardous substance owned or operated the site at which such disposals occurred; (3) any person who by contract, agreement, or otherwise arranged for disposal or arranged with a transporter for transport for disposal or treatment of hazardous substances owned or possessed by such person; and (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities or sites selected by such person.¹⁹⁷ Congress attempted to cast a wide net in designing the four PRP categories, reflecting a general theory that "everyone who had some hand in the creation of the [hazardous waste disposal] must . . . pay to remedy it."¹⁹⁸ Consequently, CERCLA liability depends on identification of an actor as being included in one or more of these four PRP categories, not on whether the PRP has actually caused the problem in a linear, causation-in-fact way. With potential, multi-million dollar cleanup liability and the attendant negative publicity, it is not surprising that many potential targets of CERCLA cost recovery and contribution actions have strenuously attempted to convince courts that they should be *excluded* from any one of

preparing for and responding to discharges of oil and releases of hazardous substances, pollutants, and contaminants." 40 C.F.R. § 300.1 (1994).

¹⁹³ Joint and several liability is *not* mandated by CERCLA, but when applicable, its application is permitted under principles of federal common law. *United States v. Monsanto Corp.*, 858 F.2d 160, 171 (4th Cir. 1988); *see also* 126 CONG. REC. 30,897 (1980) (statement of Sen. Randolph) (stating that reference to the terms joint and several liability "has been deleted, and the liability of joint tortfeasors will be determined under common or previous statutory law").

¹⁹⁴ 42 U.S.C. § 9613(f) (2000).

¹⁹⁵ *Id.* § 9613(f)(2).

¹⁹⁶ THOMAS J. SCHOENBAUM ET AL., *ENVIRONMENTAL POLICY LAW: PROBLEMS, CASES, AND READINGS* 633-35 (4th ed. 2002).

¹⁹⁷ 42 U.S.C. § 9607(a) (1994). References to CERCLA in the text will refer to section numbers included in the Congressionally-enacted bill and not the codified section numbers included in the footnotes.

¹⁹⁸ Jerry L. Anderson, *The Hazardous Waste Land*, 13 VA. ENVTL. L.J. 1, 11 (1993).

these four liability-inducing classifications. On the other hand, governmental environmental agencies and private parties who have spent substantial sums of money funding site cleanups have the opposite incentives.

Although Congress clearly set forth CERCLA's general remedial purpose, its drafting tended to skimp on the important details of assessing and allocating liability. On one hand, CERCLA's broad liability provisions and its sweeping references to those who are subject to liability could reflect Congress's intent to leave refinement of the Act's liability provisions to the courts.¹⁹⁹ Alternatively, the statutory silences and other omissions could merely reflect the rushed development of the final legislation.²⁰⁰ Regardless, there is some legislative history indicating Congressional intent to have the federal courts develop a "common law" to supplement the Act's limited and incomplete textual provisions.²⁰¹ Since its original passage in 1980, courts have struggled with the statute's inadequacies by exercising substantive lawmaking powers to fill in the gaps left by the hurried, incomplete drafting of the CERCLA legislation.²⁰² Most notably, the 1983 decision of *United States v. Chem-Dyne Corp.*, found in the CERCLA legislative history support for courts using a federal common law approach to

¹⁹⁹ Watson, *supra* note 191, at 291-94 (discussing the circularity and vagueness of § 107(a)). This characteristic of the CERCLA legislation could also reflect the twin possibilities that Congress either a) hastily moved to enact the statute but it never resolved these crucial issues during the legislative process or b) tried but failed to reach resolution on these important questions. Rather than reflecting an intentional choice of drafting style, it could merely indicate legislative desperation in the face of an impending deadline and no clear consensus.

²⁰⁰ CERCLA, as finally enacted by Congress, represents a compromise between three different bills presented on the floors of the House and Senate. As such, there is no committee report for the Act. Nevertheless, the floor debates and colloquies regarding the final form of the legislation provide some insight into the federal courts' role in interpreting and applying the liability provisions. See, e.g., 126 CONG. REC. 31,965 (1980) (statement of Rep. Florio) ("To insure the development of a uniform rule of law, and to discourage business dealing in hazardous substances from locating primarily in States with more lenient laws, the bill will encourage the further development of Federal common law in this area."); *c.f. supra* note 186 (statement of Sen. Randolph); 126 CONG. REC. 24,337 (Sept. 4, 1980) (statement of Rep. Albert Gore, Jr.) (stating that federal courts should interpret the Superfund bill to create a federal cause of action to impose liability on PRPs). These quotations suggest a role for the federal courts in shaping the meaning of the new statute. However, they do not necessarily reveal the Congressional intention to establish a new, federal rule of decision separate from state law rules. See John Copeland Nagle, *CERCLA's Mistakes*, 38 WM. & MARY L. REV. 1405, 1444-45 (1997) (discussing the improbability of the development of a federal common law interpreting CERCLA).

²⁰¹ Watson, *supra* note 191, at 291.

²⁰² See, e.g., *United States v. Bestfoods*, 524 U.S. 51 (1998); *Anspec Co. v. Johnson Controls, Inc.*, 922 F.2d 1240, 1246 (6th Cir. 1991).

We agree . . . that § 9607(a) is not ambiguous. However, it may be textually incomplete in the sense that it fails to spell out in so many words the universally accepted rule that a reference to liability of corporations includes successors—a rule that we conclude Congress intended to apply to the definition it used.

Id.

establish the basic liability questions of the federal statute.²⁰³ Numerous academic arguments have been raised challenging the accuracy of this conclusion as a general matter.²⁰⁴ Suffice it to say, courts faced with complex CERCLA litigation issues have turned to the *Chem-Dyne* rationale as a justification providing them flexibility in reaching their rulings. *Chem-Dyne*, a district court opinion, has provided the authority for broad claims of federal common law rulemaking.

After the fundamental issues of CERCLA liability had been addressed in the first decade of litigation, the federal courts were then asked to answer a second round of questions—often involving questions of indirect or corporate successor's liability for CERCLA cleanup expenses. During the last fifteen years, federal courts have frequently been asked to rule upon a narrow, yet highly important liability issue—when are successor corporations liable for their predecessor's CERCLA obligations? This, in turn, has led to a more narrowly-focused question of when a company purchasing the assets of a firm also acquires that firm's CERCLA liabilities. This legal issue—setting the standard for assigning the CERCLA liability of a company purchasing the assets of a PRP—raises important liability issues. However, beyond this question of defining substantive law, it implicates even more significant questions of judicial methods and the legitimacy of rules of decision.²⁰⁵ How should federal courts select the appropriate rule of decision for a question such as this? The discussion that follows sets forth the nature of the choice of rules in the asset purchaser context, and then it turns to the more general issue of determining how a federal court should give a federal statute meaning in a situation such as this.

B. *Successor-in-Interest Liability Under CERCLA*

The “persons” who are liable under section 107(a), as a general rule, are jointly and severally liable for response costs.²⁰⁶ A “person,” under CERCLA is defined as “an individual, firm, corporation, association, partnership, consortium, commercial entity,” or government entity.²⁰⁷ CERCLA, however, does not define the term “corporation,” and the statute's

²⁰³ 572 F. Supp. 802, 805-07 (S.D. Ohio 1983) (citing the statement by Rep. James Florio that issues of joint and several liability “shall be governed by traditional and evolving principles of common law”).

²⁰⁴ See, e.g., Nagle, *supra* note 200, at 1443-44; Sisk & Anderson, *supra* note 30, at 526.

²⁰⁵ Watson, *supra* note 191, at 293 n.387 (“The only real issue that has arisen is whether, in creating common law rules to supplement the text of CERCLA, courts should adopt state law rules or fashion nationwide federal rules.”); discussion *infra* Parts III.B-C.

²⁰⁶ See *Chem-Dyne*, 572 F. Supp. at 808.

²⁰⁷ 42 U.S.C. § 9601(21) (2000). It is clear that the express language of CERCLA does not 1) identify corporate successors as a separate category of PRP or 2) specifically list corporate successors as a sub-category of “person.” Finding that such successors are to be included as part of the definition of “corporation” would require some external rationale for reading this additional meaning into the term.

legislative history fails to shed light on the legislative intent concerning the meaning of the term.²⁰⁸ There is no indication, therefore, that Congress intended "corporation" to mean anything other than a business entity defined by state corporation law.²⁰⁹ Following this reasoning, if state law governs the definition of "corporation" for CERCLA purposes, the state laws regarding corporate successorship should also be incorporated by implicit reference.²¹⁰ The meaning of the term "corporation" should include all corporate successors recognized under state law. In addition to this argument, the general principles of statutory construction provided within the United States Code support such an interpretation. These uniform rules of federal statutory construction state that "'company' or 'association' when used in reference to a corporation, shall be deemed to embrace the words 'successors and assigns of such company or association.'"²¹¹ Following this line of thought, corporate successors in interest, therefore, could be PRPs under CERCLA solely by virtue of their status as a successor and not as a result of their own conduct.

This argument has been extremely persuasive to the federal courts. Every circuit that has confronted the issue of successor-in-interest liability has found that Congress implicitly intended for CERCLA response cost liability to attach to corporate successors-in-interest.²¹² The Eighth Circuit has suggested that corporate successor liability

is so much part and parcel of corporate doctrine, [that] it could be argued that Congress would have to explicitly exclude successor corporations if it intended its use of a legal term of art, "corporation," not to include established conceptions of the extent, life span, and path of corporate liabilities.²¹³

Successor liability furthers CERCLA's two primary goals of providing swift and effective responses to hazardous waste sites and placing the costs

²⁰⁸ Sisk & Anderson, *supra* note 30, at 511-12.

²⁰⁹ *See id.*

²¹⁰ *See* Anspec Co. v. Johnson Controls, Inc., 922 F.2d 1240, 1248 (6th Cir. 1991) (Kennedy, J., concurring) ("[T]he existence and status of a 'corporation' . . . should be determined by reference to the law under which the 'corporation' was created.").

²¹¹ 1 U.S.C. § 5 (2000).

²¹² *See* North Shore Gas Co. v. Salomon Inc., 152 F.3d 642, 649 (7th Cir. 1998) (citing cases). In the early 1980s, this was the position adopted by the EPA and the Department of Justice in an EPA enforcement memorandum. EPA Memorandum from Courtney M. Price, Assistant Administrator for Enforcement and Compliance Monitoring, Liability of Shareholders and Successor Corporations for Abandoned Sites Under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) 11-16 (June 13, 1984) reprinted in CAROLE STERN ET AL., CERCLA ENFORCEMENT: A PRACTITIONER'S COMPENDIUM OF ESSENTIAL EPA GUIDANCE AND POLICY DOCUMENTS (1996) at Tab 1 [hereinafter EPA Memorandum].

²¹³ *United States v. Mexico Feed & Seed Co.*, 980 F.2d 478, 486 (8th Cir. 1992).

of such responses on those responsible for creating or maintaining the hazardous conditions.²¹⁴ Absent successor liability, corporations would be able to escape CERCLA liability for response costs that were triggered by releases of hazardous substances by dying mere "paper deaths, only to rise phoenix-like from the ashes, transformed, but free of their former liabilities."²¹⁵

With this threshold issue resolved in favor of finding that the meaning of the term "corporation" under CERCLA included corporate successors, the subordinate, and more difficult, question became: When would existing liabilities of the predecessor transfer to the successor? This technical, corporate law question would be addressed and decided as a choice of law question: Should existing state corporate law or newly-developed federal common law principles control this indirect assignment of liability? Federal courts approached this issue with some regularity as CERCLA litigation progressed over the last fifteen years. This appellate jurisprudence was formed against a backdrop of varied corporate law principles, each having different levels of successor liability exposure. As a result, the selection of one successor liability rule or another was considered to be instrumental in establishing greater or lesser "flow-through" CERCLA liability within the particular circuit or district. A review of these fundamental corporate law concepts follows.

C. *General Corporate Law Norms for Successor-in-Interest Liability*

1. *The Tension Between the Dynamism of Corporate Form and the Continuation of Corporate Liability*

As a general matter, individuals may be held liable for their actions under a wide variety of civil and criminal law doctrines. Within this general statement, it can be said that corporations and other business organizations can be subjected to liability as well. However, businesses such as corporations are not static entities: they acquire subsidiaries and assets, they merge with other companies, they undertake joint ventures, and they dissolve when there is no continuing reason for their existence. American corporate law tradition has long acknowledged this dynamic nature of business firms and it has created doctrines to deal with the difficult questions surrounding corporate successors. One of the thorniest of these is the highly-significant question of when does the successor of a corporation exist free of the liabilities of its predecessor? Over the years, American corporate law has developed answers to this and other questions—carefully balancing the need for business development and innovation with the goal of minimizing fraudulent conduct undertaken solely for the purpose of

²¹⁴ *Anspec*, 922 F.2d at 1247.

²¹⁵ *Mexico Feed & Seed*, 980 F.2d at 487.

avoiding prior liability. In this process, such difficult line-drawing has been the exclusive province of the states in their fashioning of the corporate law of each jurisdiction.

State law on successor liability has established patterns that are surprisingly consistent from state to state. In certain situations, successor corporations do assume the prior liabilities of their predecessors. For example, the surviving entity of two, merged corporations will remain liable for the debts of the predecessor corporations in most jurisdictions.²¹⁶ The purpose of this extension of corporate successor liability is to prevent corporations from evading their previous responsibilities through ownership changes effectuated by mergers and buy-outs.²¹⁷ The fundamental concept underlying this rule is that the exchange of corporate stock should not relieve a corporation from liability for its misdeeds. However, not all corporate recombinations and transitions result in continuing legal liability. One major exception to the successor liability principle is that "in the vast majority of states, . . . where one company sells or otherwise transfers *all its assets* to another company, the latter is *not liable* for the debts and liabilities of the transferor."²¹⁸ This rule of non-liability for asset acquisitions arose out of the *bona fide* purchaser rule,²¹⁹ and was designed to promote the free alienability of property and to enhance the efficiency of commercial transactions. Mere succession to the property of a corporation does not subject the buyer to the seller's liabilities.²²⁰ Buying a firm's paper clips does not subject it to the seller's general legal liabilities.

The asset purchaser rule—with its widespread and uniform acceptance—has become a well-understood principle for structuring corporate activities. However, the rule has the potential for manipulation and abuse by actors wishing to benefit from its immunity features without genuinely engaging in a property purchase. If the asset purchaser immunity were too broadly available, corporate existence might be manipulated to secure frequent and unjustified escape from real corporate debts and liabilities.²²¹ A

²¹⁶ E.g., *Turner v. Bituminous Cas. Co.*, 244 N.W.2d 873, 875 (Mich. 1976).

²¹⁷ See *Mexico Feed & Seed*, 980 F.2d at 487.

²¹⁸ Sisk & Anderson, *supra* note 30, at 512-13 (emphasis added).

²¹⁹ See *id.* at 513 (citing *Graham v. R.R. Co.*, 102 U.S. 148, 153 (1880)). The *bona fide* purchaser rule provides that one who in good faith pays reasonable value for assets takes such assets free of creditors' claims. *Id.*

²²⁰ 15 W.M. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS, § 7122 at 227 (Perm. Ed. 1999) ("[T]he purchasing or transferee company is not liable on the other company's obligations merely by reason of its succession to such company's property.").

²²¹ There is anecdotal evidence that transactions have been designed to employ the asset sale principles of state corporate law to eliminate creditors' claims against predecessor corporations. See, e.g., J. Maxwell Tucker, *The Clash of Successor Liability Principles, Reorganization Law, and the Just Demand that Relief Be Afforded Unknown and Unknowable Claimants*, 12 BANKR. DEVS. J. 1, 8-9 (1995).

well-advised company might undergo a mandated change in its form, not substantially alter its basic business operation and emerge from this process having shed legitimate, previously-incurred debts and liabilities. In order to prevent this form of abuse, over the years state corporate law throughout the United States has developed exceptions to the general rule of asset purchaser non-liability to prevent companies from fraudulently using the corporate form to evade liability. Each state's corporate law set the norms for business conduct by setting out asset purchaser liability rules. The doctrine which has developed has become remarkably uniform and settled, identifying a number of discrete situations where the substance of a transaction, not its form, is of central importance. These four, universally-recognized, common law exceptions impose successor liability on corporations when: (1) the purchasing corporation expressly or impliedly agrees to assume the liability; (2) the transaction amounts to a *de facto* consolidation or merger; (3) the purchasing corporation is merely a continuation of the selling corporation; or (4) the transaction was fraudulently entered into to escape liability.²²²

Although each of these four situations admit some flexibility allowing for argument, they set forth a relatively stable standard of corporate successorship liability under the law of most states. As the Seventh Circuit phrased it in *North Shore Gas Co. v. Salomon, Inc.*, these exceptions to the general rule of asset purchaser immunity seek to identify only those transactions "where the essential and relevant characteristics of the selling corporation survive the asset sale," thus rendering it equitable to hold the purchaser liable for the seller's obligations.²²³ The underlying idea in the de-

²²² *Louisiana-Pacific Corp. v. Asarco*, 909 F.2d 1260, 1263 (9th Cir. 1990). The third of these exceptions—the mere continuation principle—applies when the successor company seems to merely be a reorganized copy of the predecessor corporation. See *North Shore Gas Co. v. Salomon Inc.*, 152 F.3d 642, 654 (7th Cir. 1998). The mere continuation exception to non-liability of asset purchasers allows recovery when the purchasing corporation is substantially the same as the selling corporation. *Id.* It attempts to distinguish *bona fide* sales of assets between two distinct corporations from fraudulent reorganizations of a single corporation. *Id.* The inquiry under this exception focuses on whether the purchaser continues the corporate entity of the seller, regardless of whether the seller's operations are continued. *Id.*

Application of the exception is based upon equitable factors, though courts generally consider five elements in deciding whether to impose successor liability: (1) the divesting corporation's transfer of assets; (2) payment by the buyer of less than fair market value for the assets; (3) continuation by the buyer of the divesting corporation's business; (4) a common officer of the buyer and divesting corporations who was instrumental in the transfer; and (5) inability of the divesting corporation to pay its debts after the asset transfer. *United States v. Davis*, 261 F.3d 1, 53 (1st Cir. 2001); see also *Mexico Feed & Seed*, 980 F.2d at 487 (stating that the elements of the mere continuation exception emphasize an identity of officers, directors and stock between the selling and purchasing corporations). No single factor is determinative, and courts generally employ a "common sense" approach to decide whether the seller's corporate entity has continued after the asset sale. As the Seventh Circuit noted, the exception "requires close scrutiny of corporate realities, not mechanical application of a multi-factor test." *North Shore Gas Co.*, 152 F.3d at 654.

²²³ *Id.* at 651.

velopment of these exceptions is one of an equitable concept of fairness—that it would be unfair if a corporate successor were able to dodge liability while maintaining the essence of the prior enterprise. But state law over a lengthy period of time has established legal norms for distinguishing equitable from inequitable conduct.

2. *Adding a Fifth Exception to Expand Asset Purchaser Liability*

Drawing the line between legitimate, non-liability producing asset transfers and formally correct, yet essentially manipulative corporate transformations has not proved easy for some states. In these jurisdictions, corporate law has evolved to broaden the scope of “pass-through” liability for asset purchasers. Some state courts have created a small number of additional exceptions to the general rule of asset purchaser immunity²²⁴ with the most significant “fifth exception” being the “substantial continuity” or “continuity of enterprise” test. The “substantial continuity” test exists as a slightly modified variant of the “mere continuation” test listed above with the primary difference being that liability may be imposed under this exception *without* requiring a continuity of shareholders.²²⁵ Originating in a line of Michigan products liability cases, the substantial continuity standard has been advanced as a way of restricting the immunity granted by asset purchasing and expanding the liability of participants in such a structured transaction. Not surprisingly, this theory, with its wider liability net, was suggested in an EPA memorandum in 1984 as a preferred litigation theory for assigning CERCLA cleanup liability.²²⁶ Perhaps EPA feared at this early stage in the administration of CERCLA that PRPs would successfully use existing corporate successorship rules to evade CERCLA cleanup liability. To achieve important CERCLA cleanup goals, the EPA pressed this aggressive, non-mainstream view of successor corporation liability.

There is little debate regarding the applicability of the traditional four exceptions to the asset purchaser non-liability principle. However, there is disagreement whether the federal courts should expand these four conventional categories of exceptions to include a fifth—the “substantial continu-

²²⁴ In *Ray v. Alad Corp.*, 560 P.2d 3 (Cal. 1977), the California Supreme Court imposed successor liability on asset purchasers in what has come to be known as the “product line” exception to asset purchaser immunity. See Alfred R. Light, “Product Line” and “Continuity of Enterprise” Theories of Corporate Successor Liability under CERCLA, 11 MISS. C. L. REV. 63, 68 (1990). Under this rule, a successor corporation will be liable for defects in products that a predecessor company manufactured if the asset purchaser continues to make the same product even without a continuity of ownership of the prior firm. *Id.* Justified under a theory that the successor company destroyed the plaintiff’s remedy and because it was in the best position to spread the risk of injury, the doctrine finds liability in the absence of any direct causation. See *Alad Corp.*, 560 P.2d at 10; Light, *supra*, at 68. Not surprisingly, many states have explicitly rejected the theory as have many federal courts. *Id.* at 69 n.32. This theory has not emerged in CERCLA successor liability cases.

²²⁵ Schnapf, *supra* note 32, at 451-52.

²²⁶ EPA Memorandum, *supra* note 212, at 11-16.

ity" test. These federal courts have resolved this difficult issue of assigning asset purchaser liability for CERCLA response costs with an inconsistent mixture of decisions applying the narrower "mere continuation" exception in some circuits, with others adopting the broader and more recently-created "substantial continuity" exception.²²⁷ The practical importance of determining whether creation of the federal common law "substantial continuity" test is permissible judicial lawmaking is that the test substantially increases an asset purchaser's exposure to liability. A purchaser, under the mere continuation doctrine, generally will be free from liability if there is a *bona fide* change in ownership. That same purchaser, under the substantial continuity exception, however, is not protected from CERCLA liability if, despite a true ownership change, the business operates in substantially the same fashion as it did prior to the asset sale. Theoretically, a court's choice of one rule of decision or the other could have a significant impact on successor corporation liability and, as such, could affect a substantive change in the assignment of financial responsibility for the site cleanup.

3. *Examining the "Substantial Continuity" View*

In the first few years following CERCLA's enactment, EPA sought to convince courts to expand CERCLA liability for asset purchasers by broadening the scope of the traditional mere continuation exception to asset purchaser immunity. It had recommended the adoption of a federal common law standard imposing CERCLA liability if "the new corporation continues substantially the same business operations as the [predecessor] corporation."²²⁸ This "substantial continuity" exception, pushed by EPA in early days of CERCLA, attempted to impose successor liability whenever the purchaser's business operations retained substantial continuity with those of the seller, regardless of whether there was a significant ownership change.²²⁹ EPA's concern was to find solvent PRPs and to extract government cleanup costs from them. It did not want to let them melt away through the process of corporate reorganization, regardless of the liability limitations provided by state corporate law. The agency's intention was to attach CERCLA liability to a solvent party whenever it could find one and its advocacy of this broader liability standard initially found favor in several federal circuit courts.

²²⁷ Ironically, the courts finding for the more sweeping "substantial continuity" position in this judicial debate often do so in an effort to obtain "national uniformity" on the crucial question of successorship legal liability. This article demonstrates that the move to this liability standard has had just the opposite effect by recognizing a diversity of liability rules within the federal system that vary according to each federal judicial circuit. Also, the "substantial continuity" is an extreme minority rule, thereby making the "national uniformity" argument even more difficult to make.

²²⁸ Mank, *supra* note 32, at 1166 (citing EPA Memorandum, *supra* note 212, at Tab 1).

²²⁹ See *United States v. Carolina Transformer Co.*, 978 F.2d 832, 838 (4th Cir. 1992).

The use of the substantial continuity test in the context of CERCLA cost recovery or contribution actions required the courts to reason by analogy and to transfer legal doctrine from one subject matter to another. The Supreme Court of Michigan is credited with first articulating the test in *Turner v. Bituminous Casualty Co.*, but it is probably correct to identify a line of federal labor relations and products liability cases as earlier roots of this expanded liability concept.²³⁰ Courts generally consider a series of eight factors to determine whether a successor corporation will be held liable for response costs under the substantial continuity test: (1) retention of the same employees; (2) retention of the same supervisory personnel; (3) retention of the same production facilities in the same location; (4) manufacture of the same product; (5) retention of the same name; (6) continuity of assets; (7) continuity of general business operations; and (8) public representations as a continuation of the seller's previous enterprise.²³¹

Not surprisingly with such a multi-factor test, courts have adopted a "totality of the circumstances" approach when determining whether to impose liability. This approach takes into account the individual characteristics of a particular transaction and attempts to ensure that the public policy of fairness is afforded to the affected parties. The policy of fairness actually inserts a ninth factor into the substantial continuity test: knowledge.²³² "[K]nowledge or notice ensures that 'substantial continuation' corporations not only would be able to protect themselves through purchase price adjustments or satisfactory indemnity provisions, but would be in some way responsible for the [hazardous waste discharges] remedied."²³³

Those circuit courts that have chosen to apply this as a federal common law test in the CERCLA context have reasoned that the "substantial continuity" theory was warranted 1) because of the need for national uniformity with respect to CERCLA and 2) the possibility that parties "would frustrate

²³⁰ See *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 180 (1973); *Mozingo v. Correct Mfg. Corp.*, 752 F.2d 168, 175-76 (5th Cir. 1985); *Turner v. Bituminous Cas. Co.*, 244 N.W.2d 873, 883-84 (Mich. 1976).

²³¹ See *Carolina Transformer Co.*, 978 F.2d at 838.

²³² *United States v. Mexico Feed & Seed Co.*, 980 F.2d 478, 488 (8th Cir. 1992) (citing *Golden State Bottling*, 414 U.S. at 180).

²³³ *Id.* The element of knowledge has been accepted as a prerequisite for imposing liability for CERCLA response costs under the substantial continuity test. See *id.* (refusing to impose liability because successor corporation did not have notice that the predecessor was identified as a PRP); *Carolina Transformer*, 978 F.2d at 840-41 (imposing liability under the substantial continuity test when there was no colorable question of knowledge of and benefit from the predecessor's conduct for which CERCLA liability attached); *Louisiana-Pacific Corp. v. Asarco, Inc.*, 909 F.2d 1260, 1265-66 (9th Cir. 1992) (refusing to apply the substantial continuity test because the successor corporation did not have notice of the predecessors PRP status when the offending business practice was discontinued nine months before the asset sale).

the aims of CERCLA by choosing to merge or consolidate under the laws of states which unduly restrict successor liability."²³⁴ At least one commentator has argued that uniformity and a relaxed liability threshold, as found under the substantial continuity test, would further the purposes and goals of acts such as CERCLA, which attempt to establish uniform, far-reaching, national standards for imposing liability.²³⁵ Curiously, although the expanded liability standard has been adopted or recognized by four circuits, it has not become a uniform rule of decision in the federal courts, as more recent decisions have moved away from the expanded liability theory. With the current trend in decisions, these earlier appellate court decisions run the risk of actually becoming an isolated "minority" position on the issue. Prior to the *O'Melveny & Myers* and *Bestfoods* decisions, federal courts had been willing to apply the substantial continuity test for the sake of "uniformity."²³⁶ In the wake of these more recent Supreme Court decisions which emphasize the use of state law norms, the future of the substantial continuity test as a federal common law model would seem to be seriously in doubt.

IV. COURTS IN ACTION: JUDICIAL INNOVATION IN CHOOSING LAW— ASSET PURCHASER LIABILITY UNDER CERCLA

Litigation is one of the unfortunate hallmarks of CERCLA. Due to the substantial financial liability associated with being a PRP in a hazardous waste site cleanup, significant incentives exist to litigate liability questions and to resist expansive theories of responsibility. During CERCLA's first decade, the federal and state governments actively sought to find solvent parties to pay for the hazardous waste site cleanups that were mandated under the act. Due to the size of the costs and the limited economic capacity of current site owners and operators, government attempted to cast its liability net broadly, attempting to reach other business entities and individuals related to defunct or insolvent parties. Not surprisingly, successors of firms directly involved in site-polluting activities were targeted as PRPs in CERCLA cost recovery and contribution actions. But the term "succes-

²³⁴ *North Shore Gas Co. v. Salomon Inc.*, 152 F.3d 642, 650 (7th Cir. 1998) (citing *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 91 (3d Cir. 1988)) (internal quotations omitted). *But see* *Anspec Co. v. Johnson Controls, Inc.*, 922 F.2d 1240, 1249 (6th Cir. 1991) (arguing that the laws on successor liability in the fifty states are largely uniform).

²³⁵ *See Schnapf, supra* note 32, at 439. On the other hand, some critics have rejected the substantial continuity test as excessive and unfair.

²³⁶ Choosing the "substantial continuity" liability rule represents an unusual impulse if the aim is to establish national "uniformity" in CERCLA asset purchaser liability determinations. The "substantial continuity" rule has been recognized in a handful of non-CERCLA cases and only in a distinct minority of states. To suggest that a federal appellate court's adoption of this liability principle is being done to achieve national "uniformity" really means that this rule "should" be the national law as a matter of normative policy. Its selection would certainly *not* be choosing a majority, uniform state corporate law principle.

sor” has many legal meanings and consequences and these definitions have traditionally been established under state corporate law. The wide variety of state corporate law traditions provided for a number of kinds of corporate successors. Importantly, this doctrine also defined the legal rules for “passing through” liability to various kinds of successors. Not surprisingly, this question of transferred liability has been encountered in a wide range of corporate situations and the law has developed over the years according to the policy preferences of each state. The crucial policy question presented by this legal question is, when should liabilities of prior legal entities be recognized as continuing debts or obligations of corporate successors? In every jurisdiction state law has answered this legal and normative question.

What about liabilities that are created by federal law? More specifically, what about CERCLA liability for the recovery of hazardous waste site cleanup expenses? Without a general federal corporate law and in the absence of a clear statutory directive in CERCLA, the issue of successor liability remained an open question awaiting resolution in cleanup cost recovery litigation. In fact, many questions existed. How would federal courts allocate CERCLA liability in cases where corporate successors were listed among the identified PRPs? How should they rule? Would state corporate law principles guide their judgment or would they be free to create their own corporate successorship rules of decision under an application of federal common law rulemaking? These issues were brought to the federal courts as the federal government and private PRPs sought to find more solvent liable parties to help pay cleanup costs.

Ultimately, a sub issue of the larger corporate CERCLA successor liability issue—that of corporate asset purchasers—rose to the attention of the federal circuit courts beginning in the late 1980s and these courts were required to select a rule of decision for their circuits. This issue carried with it significant financial consequences since the CERCLA-mandated cleanup expenses would often run into many millions of dollars. Equally important was the fact that clearly responsible PRPs would frequently be dissolved or otherwise become non-existent businesses, in financial terms unavailable for site cleanup cost recovery. After having spent these millions of dollars in undertaking remedial action, government and private parties began to look for more “indirect” PRPs including corporate successors, waste facility owners as well as waste disposers. These “indirect” PRPs, including asset purchasers, became natural targets of opportunity when more “directly responsible” PRPs were not available.

This effort to secure payment of cleanup expenses from asset purchasing successors ran into an interesting and confusing legal conundrum. Measured by traditional, stable and largely-consistent state corporate law, many asset purchase transactions were properly structured so as to insulate the “buyer” of the corporate assets from the predecessor “seller’s” CER-

CLA liabilities. Since CERCLA did not contain any specific language extending cleanup liability to a broader range of corporate successors than provided for by state law, there was no way to argue that CERCLA had affected an express preemption of state law principles. Beginning in the late 1980s, federal courts were asked to find a way to circumvent the limitations imposed by state law, not by way of recognizing an implied preemption in CERCLA, but rather by exercising their federal common lawmaking powers. This they did in a number of decisions. By employing this analytical approach to the significant asset purchaser liability question, the federal appellate courts have adopted a range of positions on this choice of law problem with a wide range of justifications. As the prior discussion indicates, the United States Supreme Court had decided the pivotal *Kimbell Foods* case in 1979 and that decision should have provided lower courts with the analytical framework for determining when to rely on state law and when to develop federal common law rules. Curiously, the discussion which follows will reveal that prior to 1994, federal courts failed to apply the *Kimbell Foods* three-part test to help them to determine whether to create federal common law rules of decision concerning corporate successor and asset purchasers' liability for CERCLA-imposed response costs. The circuits that have decided this issue in the post-1994 *O'Melveny & Myers* era generally have adopted state law as the rule of decision after consideration of the *Kimbell Foods* test. This indicates that a circuit split exists regarding the propriety of a federal common law exception to the general rule of non-liability for asset purchasers. The following discussion analyzes each of these decisions and finally comes to some conclusions about why a federal court would choose to ignore existing Supreme Court precedent and venture into the untethered world of federal common lawmaking.

A. *Stage One: The Early Appellate Cases Struggling to Give CERCLA Meaning by Choosing Federal Common Law as the Law From the States*

1. *Smith Land & Improvement Corp. v. Celotex Corp.*

In the mid and late 1980s, the courts had yet to define the statutory parameters of CERCLA. Even basic liability concepts were yet to be established. Section 107 stated that certain categories of parties were "liable" for cleanup costs and natural resource damages, but it gave no specific guidance on what legal principles would determine how liability was to be assigned. Several case decisions during this period formulated crucial legal standards in several areas, relying on a supposed implicit federal common law authority imbedded within the new statute and contained within the act's legislative history. The idea that some conception of the federal common law applies to define corporate successor liability stems, in large part, from the Third Circuit's 1988 holding in *Smith Land & Improvement*

*Corp. v. Celotex Corp.*²³⁷ In this case, the present owner of a parcel of contaminated land, Smith Land & Improvement Corp., spent over \$218,000 remediating pollution caused by an asbestos waste pile that had been placed there by a prior land owner, the Philip Carey Company ("Carey").²³⁸ Carey had sold the land to another party in 1963 and by the 1980s, Smith Land & Improvement Corporation was the current owner.²³⁹ Rather than bring a contribution action against Carey, the plaintiff sought "indemnification"²⁴⁰ from the defendants Celotex Corporation and Rapid-American Corporation (collectively, "Celotex") who were described by the plaintiff as "corporate successors" of Philip Carey Company.²⁴¹ Under this theory of the case, Celotex would not be liable under any conventional CERCLA liability theory since it did not fit into any of the statute's four statutory PRP categories. Any possible CERCLA liability would have to be based solely upon corporate law theory having the legal effect of transferring the cleanup cost responsibility from the predecessor corporation (Carey) to its successor (Celotex).²⁴² This case is especially significant since it confronted the issue of when to extend CERCLA liability to a company on the basis of its legal relationship to another, usually defunct, business that is clearly a PRP yet is financially unavailable.

Smith Land presented the United States Court of Appeals for the Third Circuit, and the federal appellate courts in general, with a case of first impression on the issue of corporate successor-in-interest liability under CERCLA. The court came to the unsurprising conclusion that in enacting CERCLA, Congress "intended to impose successor liability on corporations which either have merged with or have consolidated with a corporation that is a responsible party as defined in the Act."²⁴³ Writing for the panel, Judge Weis did not explain, in a clear way, why such a result was in line with the Congressional intent other than to suggest that "the costs associated with clean-up must be absorbed somewhere."²⁴⁴ This pragmatic statement reflected a blunt admission that the court believed that cleanup expenses should not be borne by the Superfund or by PRPs when another

²³⁷ 851 F.2d 86 (3d Cir. 1988).

²³⁸ *Id.* at 87-88.

²³⁹ *Id.*

²⁴⁰ *Id.* at 88. The court probably meant to say that the plaintiffs were attempting to obtain contribution from the defendants for their equitable share of the cleanup costs under CERCLA's § 113.

²⁴¹ *Id.*

²⁴² As Judge Weis stated, "plaintiff argues that defendants are responsible for Carey's derelictions on the theory of corporate successor liability." *Id.* at 90. Although a novel legal proposition at that time, the court was aware of the position taken by EPA in its 1984 enforcement memorandum arguing in favor of successor liability under the expanded "continuity of business" or substantial continuity theory. *Id.* at 91 n.2. Even though EPA was not a party to the present lawsuit, its views were noted by the court.

²⁴³ *Id.* at 92.

²⁴⁴ *Id.* at 91.

solvent actor related in some way to the polluted waste site was in range. On a superficial level, this opportunistic view could be justified by the court's belief that corporate successors were, in reality, the same business or individuals who had been the PRPs and that to think otherwise was to permit legal form to overwhelm actual substance.

However, the conclusion that Congress intended CERCLA liability to reach corporate successors did not answer the question of what the law should be. In a confusing process of reasoning, the court concluded that 1) the concept of corporate successor liability was "neither completely novel nor of recent vintage,"²⁴⁵ 2) the policy reasons for making successors liable for torts applied with equal force in the CERCLA context, and 3) Congress expected the courts to develop a federal common law to supplement the CERCLA statute.²⁴⁶ This largely unsupported syllogism led the court to its conclusion that Congress implicitly intended for successor corporate liability to be read into the law by federal courts exercising common law powers. Curiously absent from the court's discussion was any mention of a rationale for selecting a common law rule of decision or any reference to the Supreme Court's *Kimbell Foods* decision which had been issued nine years earlier. Also, while the court could have done so, its decision lacked any significant policy analysis of which successor corporations should bear the cleanup costs caused by its predecessor.

By fashioning this new federal common law, the court in *Smith Land* indicated that the general doctrine of successor liability would be added to the meaning of CERCLA, although only in the context of corporate consolidations and mergers. The opinion specifically disavowed a more general application of its ruling in other contexts. It did note, in passing, that successorship situations involving the purchase of assets were to be governed in a way that "the successor will not be saddled with the seller's liability except under certain conditions."²⁴⁷ This decision reflected a strong policy position intent on finding a non-governmental "deep pocket" to pay the cleanup costs imposed by CERCLA.²⁴⁸ The *Smith Land* court dealt with the source of its authority in a casual way, stating that it recognized a new corporate successor rule governed by "traditional concepts" and "gen-

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.* (citing *Polius v. Clark Equip. Co.*, 802 F.2d 75, 77 (3d Cir. 1986)). In *Polius* the court said: "[u]nder the well-settled rule of corporate law, where one company sells or transfers all of its assets to another, the second entity does not become liable for the debts and liabilities, including torts, of the transferor." 802 F.2d at 77.

²⁴⁸ The only policy-based rationale for imposing the costs of hazardous waste site cleanup on a successor corporation was the vaguely-expressed concept of unjust enrichment benefiting the corporate purchaser. The *Smith Land* case states that as between the Superfund or a successor, the successor should bear the costs. "Benefits from use of the pollutant as well as savings resulting from the failure to use non-hazardous disposal methods inured to the original corporation, its successors, and their respective shareholders and accrued only indirectly, if at all, to the general public." 851 F.2d at 92.

eral doctrine.”²⁴⁹ Unmistakably, though, the court emphasized that state law should be the substance of its rule, especially if it presented a national uniformity not easily manipulated by forum shopping.²⁵⁰ The *Smith Land* case does reflect the attitude that it is the judicial role to resolve litigated conflicts, and in so doing, it is the appropriate role of the federal courts to choose rules of decision consistent with their view of the underlying statutory policies. In this case, however, the Third Circuit’s holding did not carefully analyze its decision-making as either statutory interpretation or the creation of a federal common law. It did not acknowledge the limited role in judicial lawmaking that the Supreme Court had articulated in *Kimbell Foods*. The *Smith Land* court left the clarification of this point for later courts.

2. Louisiana-Pacific Corp. v. Asarco, Inc.

Two years after the Third Circuit’s *Smith Land* decision, the Ninth Circuit faced a similar issue in *Louisiana-Pacific Corp. v. Asarco, Inc.*²⁵¹ In this case, Asarco produced slag as a by-product of its copper smelting activities in Ruston, Washington.²⁵² Over a period of nearly fifteen years, Asarco transferred the slag to Industrial Mineral Products (IMP) to be marketed as a filler material to stabilize the ground at log sorting yards.²⁵³ Louisiana-Pacific was one of IMP’s customers who used the slag and was later forced by the government to clean up its yards when it was found that heavy metals from the slag had leached into the soil and the groundwater.²⁵⁴ In the mid-1980s, L-Bar Products, Inc. bought substantially all of the assets of IMP.²⁵⁵ Louisiana-Pacific then brought a CERCLA action against Asarco for recovery of the costs it incurred in cleaning up the slag pollution at its facility.²⁵⁶ In an attempt to deflect or reduce its own potential CERCLA liability, Asarco then filed a third-party lawsuit against L-

²⁴⁹ *Id.* A year later, a district court in Massachusetts would adopt the traditional rules of successor liability in the context of an asset purchaser following the reasoning of the *Smith Land* holding. *In re Acushnet River & New Bedford Harbor Proceedings*, 712 F.Supp. 1010, 1012-13 (D. Mass. 1989).

²⁵⁰ *Smith Land*, 851 F.2d at 92. In remanding the case to the district court for further consideration, the Third Circuit directed the lower court to “consider national uniformity; otherwise, CERCLA aims may be evaded easily by a responsible party’s choice to arrange a merger or consolidation under the laws of particular states which unduly restrict successor liability.” *Id.*

²⁵¹ 909 F.2d 1260 (9th Cir. 1990).

²⁵² *Id.* at 1262.

²⁵³ *Id.*

²⁵⁴ *Id.* The exact relationship between Asarco and IMP was unclear in the appellate court’s description of the facts of the case.

²⁵⁵ *Id.*

²⁵⁶ *Id.*

Bar Products seeking contribution from it based on L-Bar's status as a corporate successor of IMP through the purchase of IMP's assets.²⁵⁷ In its defense, L-Bar asserted that it was not responsible for IMP's CERCLA liability as an asset purchaser under principles of existing Washington State corporate law.²⁵⁸ The district court agreed and it granted L-Bar's motion for summary judgment.²⁵⁹

The Ninth Circuit affirmed the lower court and in so doing it agreed, without discussion, with the *Smith Land* conclusion that Congress intended, as a general matter, to impose CERCLA liability on corporate successors.²⁶⁰ For the reasons stated above, courts have consistently come to this conclusion, reasoning that any other CERCLA interpretation would lead to massive evasion of the statute's cost-shifting rationale. The court adopted the Third Circuit's conclusion without analysis, but apparently it did so by way of interpreting the meaning of the federal statute at issue.²⁶¹ But where would the substance of corporate successorship law be found? Judge Wright stated that, in agreement with the *Smith Land* court, "the issue of successor liability under CERCLA is governed by federal law"²⁶² and by this, he meant federal common law.²⁶³ By taking this approach, the Ninth Circuit fell into the common judicial pattern of giving CERCLA meaning by resorting to the "federal common law." To these courts, common law meant cases of non-statutory and non-constitutional interpretation, that is, cases where the federal court develops a rule of decision through its autonomous rulemaking power. This approach accepted the view first expressed in the influential 1983 district court decision of *United States v. Chem-Dyne Corp.*, which held that CERCLA's legislative history

²⁵⁷ *Id.* Asarco actually was asking the Ninth Circuit to employ its federal common law powers to adopt the "substantial continuity" or "continuing business enterprise" exception to the non-liability principles of traditional corporate successorship law. *Id.* at 1265. This suggested expansion of liability, derived from the *Turner v. Bituminous Casualty Co.* case, 244 N.W.2d 873 (Mich. 1976), was declined by the *Louisiana-Pacific* court on the ground that it would not be applicable under the facts. *Louisiana-Pacific*, 909 F.2d at 1265-66. The court used unusual analogical reasoning to reach its conclusion that the expanded continuing business enterprise exception did not apply to this case. It concluded that the current facts were not as egregious as those in an earlier FIFRA case, *Oner II, Inc. v. EPA*, 597 F.2d 184 (9th Cir. 1979), where the court had found the doctrine to be applicable. See *Louisiana-Pacific*, 909 F.2d at 1265-66 (explaining the factual differences that make *Oner II* a more egregious case).

²⁵⁸ *Louisiana-Pacific Corp. v. Asarco, Inc.*, 29 Env't Rep. Cas. (BNA) 1450, 1452 (W.D. Wash. 1989).

²⁵⁹ *Id.* at 1453. District Court Judge Bryan applied state law—Washington State—to the question of successor liability concluding, inexplicably, that there was not a significant difference between federal and Washington law. *Id.* at 1452.

²⁶⁰ 909 F.2d at 1262.

²⁶¹ *Id.* at 1263.

²⁶² *Id.*

²⁶³ *Id.* at 1263 n.1. This is a curious conclusion since the *Smith Land* court never clearly specified that it was fashioning federal common law.

reflected the view that the federal courts were expected to create common law to supplement the statute, and that such rules would be acceptable if they furthered the policies underlying CERCLA.²⁶⁴ Springing from this limited authority, the *Louisiana-Pacific* court took this charge as a broad grant of authority to create federal law from whatever sources it wished to use. But what sources would be consulted and what methods would be used?

The *Louisiana-Pacific* court made absolutely no reference to the Supreme Court's *Kimbell Foods* decision or the methodology that case set out for deciding these kinds of cases. Without explanation, the court ruled that it "must look to other circuits and the states for guidance in fashioning the federal law."²⁶⁵ Mirroring the Third Circuit's *Smith Land* holding, the *Louisiana-Pacific* court decided that the "traditional rules of successor liability in operation in most states should govern."²⁶⁶ Why choose these state rules of decision? Perhaps the Ninth Circuit believed that the corporate successorship liability rules were substantially similar from state to state thereby creating "national uniformity" and, as a result, preventing forum or jurisdiction-shopping by corporations seeking favorable legal rules. Establishing such a consistent pattern of state law would suit a federal system of hazardous waste cleanup liability and would also result in a predictable and easy-to-implement liability scheme for courts. In its drive for universally-consistent legal rules, the *Louisiana-Pacific* court believed that it retained considerable flexibility within its federal common law rulemaking powers to craft non-uniform and non-traditional legal rules when the purposes of CERCLA would be "frustrated by state law."²⁶⁷ Finding this frustration of statutory purpose was held by the court to be within its discretion as it "found" the common law.²⁶⁸ In this way, the Ninth Circuit preserved for itself a broad role in identifying federal statutory goals and great autonomy in selecting the federal common law that would advance those goals.²⁶⁹

²⁶⁴ See *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802, 808 (S.D. Ohio 1983) (explaining that the policy of CERCLA was to provide nationwide uniformity due to the fact that the pollution of land, groundwater, surface water and air presents potentially interstate problems).

²⁶⁵ 909 F.2d at 1263. The court did say that it was looking elsewhere for guidance because Congress had not addressed the issue of CERCLA successor liability.

²⁶⁶ *Id.* (emphasis added).

²⁶⁷ *Id.* at 1263 n.2.

²⁶⁸ See *id.* (finding that a state law that unduly limits successor liability could "cut off the EPA's ability to seek reimbursement from responsible parties . . . [which] would result in great expense to the taxpayer, which is contrary to CERCLA's purposes").

²⁶⁹ As a demonstration of this judicial freedom to determine federal common law, the *Louisiana-Pacific* court felt that potentially it could expand the reach of the asset purchaser liability beyond the limits of traditional Washington State corporate law. Asarco had asked the court to embrace the more expansive "continuing business enterprise" position in an effort to hold L-Bar liable even though an asset purchaser would not be liable under traditional principles. *Id.* at 1265. While the court did not reject Asarco's request, it did hint that it could have adopted the expanded exception. *Id.* at 1265-66.

Interestingly, the court reached a similar result to that which would have been obtained following the *Kimbell Foods* analysis. As with other decisions in the circuits, however, that Supreme Court precedent does not appear to have influenced the analysis in the case.

B. *Stage Two: Widening the Net for Corporate Successor Liability by Announcing Federal Rules of Decision to Achieve CERCLA's Purposes*

1. *United States v. Mexico Feed & Seed Co.*²⁷⁰

The Eighth Circuit encountered the issue of CERCLA successor liability in *United States v. Mexico Feed & Seed*. The facts in this case gave a federal appellate court the first opportunity to consider the asset purchaser fact pattern. As with many of the early CERCLA decisions, EPA had spent over \$1 million in cleaning up a rural Missouri site contaminated with waste oil containing PCBs being stored for later reprocessing.²⁷¹ EPA then sought a recovery of costs from the owners of the land, the waste oil company that owned the storage tanks which had been filled with the PCB-laced oil, and the corporate successor of the tanks' owners.²⁷² The principal defendant in *Mexico Feed & Seed*, Moreco Energy Co., had purchased a competitor's assets, including tanks that contained and leaked contaminated waste oil.²⁷³ Under the facts before it, the district court apparently believed that it could not impose successor liability against Moreco Energy under the traditional corporate asset purchaser doctrine known as the "mere continuation" rule.²⁷⁴ However, it found for the federal government and imposed joint and several liability for the \$1 million

²⁷⁰ 980 F.2d 478 (8th Cir. 1992). For convenience, the Eighth Circuit's decision will be styled in the footnotes as *Mexico Feed & Seed II* and the District Court's opinion in the case, *United States v. Mexico Feed & Seed Co.*, 764 F.Supp. 565 (E.D. Mo. 1991), as *Mexico Feed & Seed I*.

²⁷¹ *Mexico Feed & Seed II*, 980 F.2d at 482-83.

²⁷² *Id.* at 483.

²⁷³ *Id.* The asset purchaser Moreco Energy operated a pre-existing waste oil refining business and purchased the assets at issue to gain access to the seller's waste oil trucking operation. *Id.* The purchaser primarily was interested in obtaining the trucks, routes, drivers and collective expertise that the seller had accumulated. *Id.* at 483. The court applied the mere continuation exception and found that the purchaser could not be liable for response costs. *Id.* at 489 (discussing Moreco's liability under the mere continuation and substantial continuation exceptions). Acquiring the trucking network could not render the purchaser a mere continuation of the successor because the purchaser was a pre-existing competitor, already engaged in the business of the seller. *Id.*

²⁷⁴ *Id.* at 487. The district court appeared determined to find a theory that would support its finding of the joint and several liability of Moreco Energy. In fact, it is not clear that the United States even argued that Moreco Energy should be liable as a corporate successor under the legal theory adopted by District Judge Gunn. *Mexico Feed & Seed I*, 764 F. Supp. at 572 n.3 (rejecting the government's argument under the consolidation or de-facto merger exceptions to asset purchaser immunity). Perhaps, the court believed that Moreco Energy was the only solvent "deep pocket" remaining and upon whom the sizable cleanup liability could be imposed. Also, it did not help Moreco Energy that its counsel failed to appear on the first day of trial without requesting a motion for continuance. *Id.* at 568.

upon Moreco Energy based upon an expanded "substantial continuity" theory²⁷⁵ which extended successor liability in a wider range of situations.²⁷⁶ Moreco Energy took its appeal to the court of appeals.²⁷⁷ The appellate court considered two issues: 1) whether a corporate successor was a PRP under § 107 of CERCLA and 2) what theory of successorship liability would be applied in CERCLA cost recovery cases.²⁷⁸ Both of these issues were questions of first impression in the Eighth Circuit, and the court eagerly ruled on both questions.

The threshold issue was whether CERCLA's use of the term "corporation" included corporate successors within its meaning.²⁷⁹ Judge Beam, writing for the court, agreed with all of the previous federal court decisions finding that "successor corporations are within the meaning of 'persons' for the purposes of CERCLA liability."²⁸⁰ He approached this question as a matter of statutory interpretation attempting to fix the meaning of the term to both capture the implied congressional intent and to effectuate the purposes of the statute.²⁸¹ In terms of implied meaning, the court turned to the general statutory rule of construction contained in Title 1 of the United States Code that deemed references to corporations to "inherently include corporate successors."²⁸² Other courts had reached the same conclusion that in enacting CERCLA, Congress implicitly intended for this more extended definition of "corporation" to be read into the narrower definition actually written into the statute.²⁸³ To buttress this view, Judge Beam echoed the Sixth Circuit's view in *Anspec* that corporate successor liability was a traditional legal understanding presumptively to be included into the term "corporation."²⁸⁴ So long-settled was this concept in his view that Congress would have had to "explicitly exclude successor corporations if it

²⁷⁵ *Mexico Feed & Seed I*, 764 F. Supp. at 572 (citing *United States v. Distler*, 741 F. Supp. 637, 641 (W.D. Ky. 1990)). The district court spent absolutely no time analyzing the question of what law should determine the rules of decision for the successor liability question. Judge Gunn concluded that Moreco Energy was liable as a successor corporation under the "substantial continuity" or "continuity of enterprise" exception to the asset purchaser non-liability rule. *Id.* at 573. Unfortunately, the court did not elucidate its reasons for complete adoption of the *Distler* test or its rationale for finding that it was satisfied.

²⁷⁶ Moreco Energy, the corporate successor to the waste oil re-processor, was particularly motivated to appeal this judgment since the entire (or a substantial portion) of the \$1 million award was likely to fall on its shoulders. The predecessor corporation, Pierce Waste Oil Service, had been dissolved years earlier and it had ceased to exist as a corporate entity. *Id.* at 572.

²⁷⁷ *Mexico Feed & Seed II*, 980 F.2d 478 (8th Cir. 1992).

²⁷⁸ *Id.* at 486.

²⁷⁹ *Id.*

²⁸⁰ *Id.* at 487.

²⁸¹ *Id.* at 486.

²⁸² *Id.*

²⁸³ *E.g.*, *Anspec Co. v. Johnson Controls, Inc.*, 922 F.2d 1240, 1246 (6th Cir. 1991).

²⁸⁴ *Mexico Feed & Seed II*, 980 F.2d at 486.

intended its use of the legal term of art, 'corporation,' not to include established conceptions of the extent, life span, and path of corporate liabilities."²⁸⁵ To finally reinforce this opinion, the court held that CERCLA's fundamental purpose of assigning cleanup costs to "those responsible for creating or maintaining the hazardous condition" would be defeated if polluting corporations could reinvent themselves and "rise phoenix-like from the ashes [of their prior corporate forms], transformed, but free from their former liabilities."²⁸⁶ Thus, the meaning given to "corporation" should effectuate this basic statutory purpose so as to avoid easy circumvention and evasion of cleanup liability.

Up to this point in the analysis, the *Mexico Feed & Seed* court followed the general pattern of prior federal appellate decisions by broadly interpreting CERCLA's use of the term "corporation" to include corporate successors. On the second issue before it, the court ruled consistently with the Fourth Circuit in *Carolina Transformer Co.* that a firm purchasing the assets of another should be liable for the obligations of the seller when it represented a "substantial continuation" of the prior company's business.²⁸⁷ This represented an expansion of the prevalent state corporate law "mere continuation" rule which the Eighth Circuit thought was "justified" under its view of the fundamental purposes of CERCLA.²⁸⁸ Bringing this CERCLA issue within two previous lines of decision in the labor and products liability fields, the court believed that the broader liability rule was necessary to avoid statutory evasion.²⁸⁹ Notably, the court did not clearly or thoroughly address the strictly legal question of why this more "liability-friendly" test would be selected as its circuit rule in CERCLA cases. Without a clear source of federal statutory or constitutional law to guide it, the court awkwardly maneuvered to justify its choice not with reference to prevailing corporate law standards but rather with the policy goal of achieving the CERCLA purpose of finding a party to shoulder site cleanup costs.²⁹⁰ Once again, rather than employing the choice of law analysis directed by the Supreme Court's *Kimbell Foods* decision, the Eighth Circuit struggled to improvise a rule of decision on this crucial issue based upon

²⁸⁵ *Id.*

²⁸⁶ *Id.* at 486-87.

²⁸⁷ *See id.* at 487-90 (discussing Moreco's liability under the "substantial continuation" test). The appellate court's inability to use either the "mere continuation" and the "substantial continuity" tests to find successorship liability due to the specific facts of the case reinforces the Fourth Circuit's finding that successor liability is justified only where the facts so indicate. *See United States v. Carolina Transformer Co.*, 978 F.2d 832, 837 (4th Cir. 1992). In *Mexico Feed & Seed*, the Eighth Circuit did not discuss whether federal common law or state law should provide the rule of decision because the parties failed to raise the issue. *Mexico Feed & Seed II*, 980 F.2d at 487 n.9.

²⁸⁸ *Mexico Feed & Seed II*, 980 F.2d at 488.

²⁸⁹ *Id.*

²⁹⁰ *See id.*

its own view of the overarching CERCLA policy rather than any systematic view of appropriate federal court lawmaking authority. After affirming the district court's use of the "substantial continuation" rule,²⁹¹ the appellate court reversed on its application the finding that the asset purchaser, Moreco Energy, did not substantially continue the prior business.²⁹²

The *Mexico Feed & Seed* decision is significant for at least three reasons. First, the appellate court did not identify the source of its substantive legal choices. Nowhere was it clearly stated whether the court was acting to fashion federal common law or merely interpreting congressional intent in enacting CERCLA. Needless to say, the suggested guidance incorporated in the *Kimbell Foods* decision was not even mentioned in the Eighth Circuit's opinion. In fact, Judge Beam appeared to be genuinely confused about whether state or federal law properly applied to the issues at hand.²⁹³ To the extent that he believed he was using federal law, Judge Beam's purpose was to establish nationally-uniform CERCLA rules that would treat similarly-situated parties fairly. Ironically, the court adopted an asset purchaser liability test that generally did not find any resonance in any state's corporate law and would create liability in an entirely unequal fashion.

Second, the *Mexico Feed & Seed* opinion specifically described the purpose of traditional corporate successorship law as providing rules "to prevent corporate successors from adroitly slipping off the hook"²⁹⁴ or evading "debt through transactional technicalities."²⁹⁵ This characterization of state corporate law rules viewed them mainly as devices assisting in the achievement of CERCLA cost recovery policies. However, the court overlooked the fact that these rules do more than prevent fraudulent evasion of pre-existing and enforceable liabilities; they set the legal boundaries between lawful and illicit transactions. In fact, the widespread adherence to the general "mere continuation" exception to the asset purchaser non-liability rule reflected a remarkable consistency on the normative policy question of where this boundary should be. Not all corporate transactions would be collapsed under the traditional principles—in fact, asset purchasers are presumptively exempt from successorship liability unless they fall into one of four articulated exceptions.²⁹⁶

²⁹¹ *Id.* at 489.

²⁹² *Id.* at 489-90.

²⁹³ This confusion is best revealed by a footnote comment of Judge Beam. He stated that: [t]he issue of whether federal or state law should be used in analyzing successor liability was not raised by the parties and we do not decide it. However, considering the national application of CERCLA and fairness to similarly situated parties, the district court was *probably correct* in applying federal law.

Id. at 487 n.9 (emphasis added). The court did not amplify its reasoning.

²⁹⁴ *Id.* at 487.

²⁹⁵ *Id.*

²⁹⁶ *Id.* Applying this mainstream corporate successorship law to the facts at hand would not have made Moreco Energy, the asset purchaser, liable for the site cleanup costs. Surprisingly, the Eighth

Third, the court aggressively expanded the reach of the traditional successorship rules that have been recognized in nearly all jurisdictions by affirming the district Court's adoption of the "substantial continuity" test for the asset purchaser liability in the CERCLA context. Judge Beam ruled that the "substantial continuity" test was "justified" in this area as a means of preventing the evasion of CERCLA cleanup liability.²⁹⁷ In reaching this result, the court seemed determined to establish a principle that would deny a "responsible party" the opportunity of using corporate successorship rules as a means of negating CERCLA liability through careful transactional design. Apparently, the panel believed that new legal barriers had to be constructed which would prevent well-advised actors from escaping their otherwise legitimate financial responsibilities. Nowhere does the court explain why pre-existing and stable corporate asset purchaser doctrine was inadequate to the task of drawing the line between continuing and terminating liability in asset purchaser situations.

The only justification suggested for this expansive ruling was that "corporate successor liability [should] be imposed in such a way to further CERCLA's essential purpose of holding responsible parties liable."²⁹⁸ But this is an entirely circular statement since determining who is "responsible" depends entirely upon the legal theory establishing who is liable as a corporate asset purchaser successor. The asset purchaser is not liable based upon its acts or status as a waste site owner or operator, arranger for hazardous waste disposal or transporter. Rather, liability stems from a vicarious form of liability based solely upon its corporate successor status. The court in *Mexico Feed & Seed* appears to have selected a broader, more expansive liability doctrine in order to make it easier for the federal government to shift cleanup expenses to an available, solvent party having some successorship relationship to the actual PRPs. Under this interpretation of CERCLA, the court has ascribed a legal meaning to the concept of CERCLA liability based upon its own view of "responsibility" under the statute. In its eagerness to find a way to shift costs, the court has not only ignored available state corporate law as a rule of decision under the *Kimbell Foods* rule but also has articulated an interpretation of CERCLA purposes that finds little actual support in the text or the legislative history of the statute.

Circuit ruled that even utilizing the expanded reach of the "substantial continuity" exception to the general asset purchaser non-liability principle would still *not* have led the court to find Moreco Energy liable. *Id.* at 490. The Eighth Circuit's opinion in *Mexico Feed & Seed* is notable in suggesting that the achievement of CERCLA's cost recovery purposes demanded that a broader liability rule than that imposed under mainstream state corporate law be adopted by the courts. Nowhere is there evidence in the record of this case indicating that abusive CERCLA evasions had taken place. The court seemed to adopt its legal conclusion as a preventative measure.

²⁹⁷ *Id.* at 488.

²⁹⁸ *Id.* at 489.

2. United States v. Carolina Transformer Co.²⁹⁹

In *Carolina Transformer*, the Fourth Circuit was presented with the familiar fact situation of the federal government seeking to identify solvent PRPs from whom they could recover cleanup costs.³⁰⁰ Here, the EPA had sued a number of PRPs in an effort to recover nearly a million dollars in cleanup costs for work it had done in the remediation of the PCB-contaminated site where Carolina Transformer had salvaged and repaired used electrical transformers.³⁰¹ The group of PRPs facing this potential multi-million dollar liability included Carolina Transformer Co., two individual directors and stockholders, and FayTranCo, a corporate purchaser of most of Carolina Transformer's assets.³⁰² The district court granted EPA's motion for summary judgment and it found all defendants jointly and severally liable for all of EPA's response costs³⁰³ and, in addition, imposed treble punitive damages for their refusal to comply with EPA's cleanup order.³⁰⁴ Interestingly, the trial court reached its conclusion on FayTranCo's asset purchaser liability by accepting the government's argument that it possessed a federal common law-making power and that CERCLA demanded that it develop a nationally-uniform rule of decision.³⁰⁵ Not only did District Court Judge Boyle assume that CERCLA created liability for corporate successors in general, he felt it within his power to apply a "substantial continuity" or "continuity of enterprise" test for asset purchaser liability to attach liability to FayTranCo.³⁰⁶ While this choice of substantive law was made in the name of securing "national uniformity," the district court's opinion cited no CERCLA case or legislative authority for its choice.

The Fourth Circuit affirmed the lower court's ruling on the basic questions of statutory meaning.³⁰⁷ Not surprisingly, Judge Widener's opinion joined the three other circuits in holding that CERCLA liability of "persons" reaches the successors of corporations or other business entities as a

²⁹⁹ 978 F.2d 832 (4th Cir. 1992).

³⁰⁰ *Id.* at 834.

³⁰¹ *Id.* at 834, 841. The district court had awarded EPA response costs of over \$977,000 and, in addition, punitive damages of three times that amount (\$2.9 million) for a grand total of \$3.9 million. *Id.* at 841. The Fourth Circuit affirmed this judgment in its *Carolina Transformer* ruling. *Id.*

³⁰² See *United States v. Carolina Transformer Co.*, 739 F. Supp. 1030, 1033-35, 1040 (E.D.N.C. 1989) (explaining the relationship between the co-defendants and their liability for the cleanup).

³⁰³ *Id.* at 1036, 1040.

³⁰⁴ *Id.* at 1040.

³⁰⁵ See *id.* at 1038-39 (stating that, because "CERCLA is a federal statute which is designed to promote an overriding federal interest[,] . . . [but] does not address the issue of successor liability[,] . . . the court must fashion federal rules of decision which further the interests of CERCLA").

³⁰⁶ *Carolina Transformer*, 978 F.2d at 840.

³⁰⁷ *Id.* at 837.

matter of congressional intent.³⁰⁸ However, this inferred conclusion of statutory coverage did not contain any particular legal theory of successor liability. Where should the appellate court look? One thing is certain, the *Carolina Transformer* court did not consider the decision making methodology set forth by the Supreme Court's *Kimbell Foods* decision. Grounding his opinion on "traditional and evolving principles of federal common law," Judge Widener suggested that federal courts possessed a broad discretion in fashioning rules of decision in individual cases.³⁰⁹ In the Fourth Circuit's view, Congress intended for federal courts to supply these rules "interstitially" to achieve CERCLA's purposes and it was up to federal judges to determine when this was necessary.³¹⁰

Judge Widener elaborated his major point by holding that this general successorship liability principle extended CERCLA liability to asset purchasers under certain situations.³¹¹ In a more careful discussion of corporate law theory than undertaken by the district court, the appeals court approved of the lower Court's decision to adopt and apply the broadened liability-extending "substantial continuity" test.³¹² Curiously, Judge Widener suggested that CERCLA did not require any fixed liability theory but rather, federal courts possessed great contextual flexibility to choose the rules "justified by the facts of each case."³¹³ In the truest common law style, the court reserved for itself federal common lawmaking powers to supply the missing links in statutory design. But what policy emphasis would discipline such broad discretion? The *Carolina Transformer* court was persuaded that it should select a liability theory that would implement its view that "CERCLA is a remedial statute [and] its provisions should be construed broadly to avoid frustrating the legislative purpose."³¹⁴ In its view, the pre-eminent legislative purpose was finding a "responsible party" to shoulder the cleanup costs that had been incurred by the government.³¹⁵

But who should be "responsible" for CERCLA costs when a corporate successor had purchased the assets of a polluting predecessor? Certainly, CERCLA did not answer this fundamental liability question. Resorting to the norms of traditional and highly-consistent state corporate law theory apparently would not suffice because a legally well-advised party could

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ *Id.* at 837-38.

³¹¹ See *id.* at 838 (explaining that asset purchasers take on liabilities of the predecessor corporation when one of four exceptions are met: (1) the successor expressly or impliedly agrees to assume the liabilities of the predecessor; (2) the transaction may be considered a de facto merger; (3) the successor may be considered a "mere continuation" of the predecessor; or (4) the transaction is fraudulent).

³¹² *Id.*

³¹³ *Id.* at 837.

³¹⁴ *Id.* at 838 (citing *Anspec Co. v. Johnson Controls, Inc.*, 922 F.2d 1240, 1247 (6th Cir. 1991)).

³¹⁵ *Id.* at 837.

structure a transaction that would confine CERCLA liability in the predecessor company and insulate the asset purchaser. In fact, this had probably occurred in the FayTranCo transaction in the case. The Fourth Circuit felt justified in ignoring state corporate law principles because the application of those concepts would have resulted in the avoidance of CERCLA response costs.³¹⁶ The court examined the record and found the “unmistakable impression that the transfer of the [predecessor] business to [the successor] was part of an effort to continue the business in all material respects yet avoid the environmental liability arising from the PCB contamination at the . . . site.”³¹⁷

The *Carolina Transformer* court apparently believed that it was necessary to create its own “federal common law” corporate successor liability principles to prevent an otherwise “lawful” evasion of CERCLA. In this way of thinking, the Court’s formulation of broad successorship concepts that would find more solvent “responsible parties” would be justified in the name of achieving the basic purposes of CERCLA. Judge Widener believed that it was legitimate to manipulate corporate successorship doctrine in order to replenish cleanup funds that had been spent on site remediation. Finding the asset purchasing successors liable would both fill gaps in statutory meaning as well as permit the courts to assign costs to those it believed were “responsible” for them. Traditional concepts of asset purchaser liability apparently were inadequate to achieve this objective. Thus, *Carolina Transformer* represents the high point of judicial intervention in the name of federal common lawmaking: the court identifies the statute’s goal and then creates a legal rule to achieve the purpose. Once again, the *Kimbell Foods* decision was not a factor in the decision and the *O’Melveny & Meyers* case would not come down for two more years.

3. *Anspec Co. v. Johnson Controls, Inc. and City Management Corp. v. U.S. Chemical Company, Inc.*

The issue of successor corporate liability under CERCLA initially reached the Sixth Circuit in 1991 in *Anspec Company v. Johnson Control, Inc.*³¹⁸ The fundamental legal approach taken in *Anspec* to the choice of law problem would dictate the result three years later in *City Management*

³¹⁶ See *id.* at 837 (stating that, under the facts of the case, the defendant could not be liable under the prevailing “mere continuation” doctrine applicable under state corporate successorship principles).

³¹⁷ *Id.* at 841. After reviewing a seemingly tailor made set of facts with which to apply the substantial continuity test, the court found that the successor corporation satisfied seven of the eight enumerated elements of the test. *Id.* at 840-41. The factors are: (1) retention of the same employees; (2) retention of the same supervisory personnel; (3) retention of the same production facilities in the same location; (4) production of the same product; (5) retention of the same name; (6) continuity of assets; (7) continuity of general business operations; and (8) whether the successor holds itself out as the continuation of the previous enterprise. *Id.* at 838.

³¹⁸ 922 F.2d 1240, 1243 (6th Cir. 1991).

Corp., an asset purchaser successorship situation.³¹⁹ In *Anspec*, a federal district court had dismissed a CERCLA action brought by an existing landowner, Anspec, who had cleaned up a parcel of industrial land that had been contaminated by a prior owner and operator, Ultraspherics.³²⁰ As in most of these cases, the facts describe a tangled web of corporate behavior. After selling the property to Anspec, Ultraspherics was formally merged into the Hoover Group, a subsidiary of a larger firm, Johnson Controls.³²¹ Upon completing the site assessment and portions of the cleanup, Anspec filed suit under CERCLA and state law to recover the costs associated with the remedial work.³²² After being rebuffed in the district court, Anspec was successful in convincing the appellate court to join the Third and the Ninth Circuits in ruling that CERCLA imposes transfer cleanup liability on corporate successors in a merger situation.³²³

The most interesting feature of the *Anspec* court's holding was that it reached its conclusion purely as a matter of statutory construction and not as an exercise of federal common lawmaking power.³²⁴ In fact, the court took great pains to argue that its interpretive approach did *not* involve the court in "creating or fashioning" federal common law.³²⁵ Without citing or mentioning *Kimbell Foods*, Judge Lively cited the Supreme Court decision in *Texas Industries, Inc. v. Radcliff Materials, Inc.*, for the proposition that a federal court was only empowered to create federal common law when Congress had left it to the courts to "flesh out" a statute by fashioning substantive rules or when a federal rule of decision was needed to protect uniquely federal interests.³²⁶ The *Anspec* court stated a clear view that it wished to avoid venturing into the realm of federal common law decision-making—a position that stands in stark contrast to other appellate holdings very willing to embark into federal common lawmaking.³²⁷ The Sixth Circuit in *Anspec* refused to characterize its action in this case as "judicial

³¹⁹ *City Mgmt. Corp. v. U.S. Chem. Co.*, 43 F.3d 244, 246 (6th Cir. 1994).

³²⁰ *Anspec Co. v. Johnson Controls, Inc.*, 734 F. Supp. 793, 793-94, 796 (E.D. Mich. 1989). In this decision, District Judge Zatkoff granted motions to dismiss for all of the corporate defendants including Ultraspherics, which had actually disposed of the hazardous sludge and liquids from a metal and plastic grinding process and degreaser wastes into an underground storage tank and two above-ground tanks which were spilled onto the ground and into the groundwater. *Anspec*, 922 F.2d at 1243. In its ruling, the trial court found no CERCLA liability because Ultraspherics no longer existed as a corporate entity and the two corporate successors were not to be considered PRPs under the statute. *Anspec*, 734 F. Supp. at 795.

³²¹ *Anspec*, 922 F.2d at 1243.

³²² *Id.*

³²³ *Id.* at 1245.

³²⁴ *Id.* at 1245-47.

³²⁵ *Id.* at 1245-46.

³²⁶ *Id.* at 1245 (citing *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 631, 640 (1981)).

³²⁷ *Id.* at 1246.

lawmaking," rather choosing to describe its function as mere statutory interpretation.³²⁸ CERCLA, the court said, was a law that was not "ambiguous" but rather, "textually incomplete."³²⁹ Therefore, the court's task was to discern Congress's intent in enacting § 107(a), the principal liability provision in CERCLA. Acting with this purpose, Judge Lively had little difficulty in deciding that Congress had intended to include successor corporations within the meaning of the term "corporation" when it passed CERCLA.³³⁰

After reaching this conventional conclusion on the question of CERCLA liability for corporate successors, the Sixth Circuit remanded the case back to the district court with a brief instruction.³³¹ As almost an afterthought, the appeals court ordered the lower federal court to follow Michigan law in its application of successor liability.³³² By deciding the threshold "interpretive" issue that Congressional use of the term "corporation" in CERCLA's § 107 impliedly included corporate successors, Judge Lively did not explain how federal courts in his circuit should determine successor liability. There was no consideration of the choice of law question and no discussion of the reasoning behind his limited instruction to employ state law.³³³ Curiously, the appellate court gave no attention to the question of

³²⁸ *Id.* at 1245-46. The Sixth Circuit's determination that the state law definition of "corporation" should be followed under CERCLA to impose liability on successors-in-interest overturns what was considered a persuasive Sixth Circuit district court case. See *United States v. Distler*, 741 F. Supp. 637 (W.D. Ky. 1990). The *Distler* court held that because the language in CERCLA §§ 101 and 107 was ambiguous, that Congress "intended [for] the courts to develop common law" to interpret the two sections. *Id.* at 640. Citing *Smith Land*, the *Distler* court stated that "courts applying the doctrine of successor liability in CERCLA cases are to apply it in such a fashion as to further the goals of the Act whether that be done by applying the traditional rule [mere continuation] or some variation [substantial continuity]." *Id.* at 642. The court adopted and applied the substantial continuity test and imposed successor-in-interest liability for response costs. *Id.* at 642-43. The court's analysis is contrary to that in *Anspec*, and presumably superceded.

³²⁹ *Anspec*, 922 F.2d at 1246.

³³⁰ This conclusion resulted from an analysis combining factors including 1) the "universal acceptance" of the usual meaning of the term "corporation," 2) the United States Code's general constructional rules defining the words "company" and "association," and 3) the overall legislative purposes of CERCLA emphasizing swift and effective site cleanup and the "polluter pays" principle. *Id.* at 1246-47. This third element, the legislative purposes of the statute, resulted in the Sixth Circuit ruling that "the remedial nature of CERCLA's scheme requires the courts to interpret its provisions broadly to avoid frustrating the legislative purposes." *Id.* at 1247. Such an interpretive emphasis would seemingly provide courts with a basis for attaching the broadest possible meaning to any liability-related provision within CERCLA.

³³¹ *Id.* at 1247-48.

³³² *Id.* at 1248.

³³³ Judge Kennedy's concurring opinion in *Anspec* differed from that of the majority opinion in that it directly applied the *Kimbell Foods* factors to determine whether the court should create federal common law to resolve the issue of successor liability. *Id.* at 1249-51. However, even while employing the *Kimbell Foods* analysis, the conclusion mirrored that of the majority by looking to state law. *Id.* at 1251. The issues in *Anspec* were not seen by Judge Kennedy as requiring a national common law resolution, and the states' laws regarding successor liability were found to be generally uniform. *Id.* at

why state law should govern this issue of federal law or why federal courts should be bound by state law rules. Again, conspicuous in its absence was any reference to the Supreme Court's holding in *Kimbell Foods* or the rest of its federal common law jurisprudence. Since the facts in *Ansbec* presented only a corporate merger and a parent/subsidiary relationship, the issue of successor liability in the asset purchaser setting was never considered. Three years later, the circuit decided *City Management Corp. v. U.S. Chemical Co.*,³³⁴ which presented that precise question.

City Management Corp., like many CERCLA disputes, involved a highly convoluted fact pattern. City Management attempted to purchase a Michigan-based solvent reclamation business known as U.S. Chemical Co. or USC.³³⁵ After extensive negotiation between the parties, the two firms entered into an "asset purchase and sale agreement" for all of the tangible and intangible assets of USC's business operations.³³⁶ City Management agreed to pay \$720,000 over a fifteen year period and to assume any hazardous waste cleanup liability on USC's Roseville, Michigan property.³³⁷ City Management did not know that at the same time it was working to acquire USC's assets, USC had already been notified by EPA that it had been labeled a PRP for contributing hazardous wastes to the Metamora Landfill in Lapeer County, Michigan.³³⁸ EPA had initiated a cleanup of that landfill and the agency had spent \$44 million in response costs up to that point.³³⁹ It was now identifying PRPs—like USC—who would be allocated shares of the cleanup expenses.³⁴⁰ The initial EPA Allocation Report had assessed USC a minimum share of \$5.3 million for cleaning up the site.³⁴¹ During its negotiations with USC, City Management was not informed by USC about the Metamora landfill cleanup liability.³⁴² This news would come to it after the deal had been closed when a group of

1249. The relevant state corporate laws were not found to frustrate CERCLA's "polluter pay" policies, because in adopting "state corporate law on the issue of who is a liable 'corporation' under § 9607, specific state rules that are unreasonable, aberrant, or hostile to federal interests will not be applied." *Id.* at 1250 (citing *Burks v. Lasker*, 441 U.S. 471, 479 (1979)). Judge Kennedy also stated that application of a federal common law rule would "disrupt commercial relationships predicated on state law" and "create uncertainty in future commercial transactions." *Id.* (citing *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 729 (1979)). Judge Kennedy reasoned that state corporate law has "evolved over decades and [is] frequently codified in state statutes, is well developed and easily discovered and applied. By contrast, at least in the near term, there is no established body of federal common law on the issues presented in this case." 922 F.2d at 1250-51.

³³⁴ 43 F.3d 244 (6th Cir. 1994).

³³⁵ *Id.* at 247-48.

³³⁶ *Id.* at 248.

³³⁷ *Id.*

³³⁸ *Id.* at 247.

³³⁹ *Id.*

³⁴⁰ *Id.* at 248.

³⁴¹ *Id.*

³⁴² *Id.* at 247.

PRPs contacted City Management informing it that the PRPs expected it to pay USC's share of the cleanup expense.³⁴³

Rather than wait for the PRPs to come after it in a CERCLA cost recovery action, City Management sought a declaratory judgment stating that, as the purchaser of USC's assets, it was not liable as a successor corporation to USC for any of USC's environmental liabilities.³⁴⁴ The district court granted summary judgment to City Management, finding that it did not have successor liability under any of the exceptions to the mainstream asset purchaser non-liability rule.³⁴⁵ On appeal to the Sixth Circuit, the appellate court began its analysis by stating flatly that the *Anspec* decision dictated the resolution of the case.³⁴⁶ In Judge Milburn's opinion, the earlier *Anspec* holding provided controlling precedent in two ways: 1) it directed that CERCLA liability contains successor corporations within the meaning of "person," and 2) it stated that successor liability would be determined by state law rather than federal common law.³⁴⁷ This latter conclusion—that state law established the operative rule of decision—was stated as the circuit rule and the sole issue for the court was deciding what Michigan corporate law was as it applied to asset purchasers.³⁴⁸ After carefully reviewing the applicable state law, the Sixth Circuit decided that Michigan law followed the mainstream "mere continuation" exception to the asset purchaser non-liability principle.³⁴⁹ Having *Anspec* as the governing circuit opinion, the court did not feel compelled to explain why it should apply state law in this situation. It was just following precedent.³⁵⁰

³⁴³ *Id.* at 248.

³⁴⁴ *Id.* at 249.

³⁴⁵ *Anspec Co. v. Johnson Controls, Inc.*, 814 F. Supp. 624, 638-39, 641-42 (E.D. Mich. 1993).

³⁴⁶ *City Mgmt.*, 43 F.3d at 250.

³⁴⁷ *Id.*

³⁴⁸ *Id.* at 250-53.

³⁴⁹ *Id.* at 252-53.

³⁵⁰ The court did make a confusing comment in drawing this conclusion. Judge Milburn distinguished *City Management* from *Mexico Feed & Seed* by stating that since *Mexico Feed & Seed* was "decided by applying federal law rather than state law, it is clearly inapplicable to this case." *Id.* at 253. This comment suggests that the *City Management* court thought that state law could not serve as the rule of decision in a federal common lawmaking ruling. In this way, its decision was clearly wrong. The Sixth Circuit has reiterated its support for the *Anspec/City Management* line of cases in later opinions by citing them for the proposition that questions of corporate successorship liability rules are to be derived from state law. See, e.g., *IBC Mfg. Co. v. Velsicol Chem. Corp.*, 1999 WL 486615, at *2 (6th Cir. July 1, 1999) (citing *Anspec* for the proposition that "[i]n determining whether one corporation is a successor of another, we apply state law"); *Cytec Indus., Inc. v. B.F. Goodrich Co.*, 196 F. Supp. 2d 644, 654 (S.D. Ohio 2002) (citing *City Mgmt.* for the proposition that "[t]he liability of a successor corporation for CERCLA liability is determined by reference to state corporation law, rather than federal common law").

4. B.F. Goodrich v. Betkoski³⁵¹

The Second Circuit finally reached the issue of CERCLA successorship liability in *B.F. Goodrich v. Betkoski*, which was one component of an exceedingly long and complex series of federal court cases initially styled *B.F. Goodrich v. Murtha*.³⁵² This case involved the cleanup of two Connecticut landfills whose remedial costs had been resolved by consent decree for nearly \$5.4 million.³⁵³ At this point, two PRP coalitions, mostly composed of large corporate waste disposers that had been included in the settlement, sought to shift part of their liability to other generators and transporters which had not been included in the earlier consent decree.³⁵⁴ In addition, the federal government and the State of Connecticut also pursued additional cleanup costs against non-settling parties.³⁵⁵ Curiously, the district court was particularly unsympathetic to all of these plaintiffs and it had granted summary judgment in favor of most of the defendants.³⁵⁶ The Second Circuit heard the appeal from the district court's disposition and it considered the corporate successorship issue as one of a large number of CERCLA questions.³⁵⁷

Without formulating any particular theory, the district court had granted summary judgment in three corporate successor situations where the business and assets had been sold and the buyer was being targeted by the government as a PRP solely on the basis of successorship status.³⁵⁸ Apparently the success of *Mexico Feed & Seed* and *Carolina Transformer* had emboldened the federal government into making this kind of legal argument in later cases such as this one. The Second Circuit in *Betkoski* addressed the threshold question of whether CERCLA assessed liability to successor corporations in the conventional manner previously adopted by

³⁵¹ 99 F.3d 505 (2d Cir. 1996).

³⁵² See *B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192 (2d Cir. 1992); *B.F. Goodrich Co. v. Murtha*, 855 F. Supp. 545 (D. Conn. 1994); *B.F. Goodrich Co. v. Murtha*, 840 F. Supp. 180 (D. Conn. 1993); *B.F. Goodrich Co. v. Murtha*, 815 F. Supp. 539 (D. Conn. 1993).

³⁵³ *Betkoski*, 99 F.3d at 512.

³⁵⁴ *Id.* at 512-13.

³⁵⁵ *Id.* at 512.

³⁵⁶ The industrial coalition attempted to add 1151 PRPs as third party defendants but Judge Boyle only allowed 41 parties to be joined. *Id.* at 511. Beyond this, summary judgment was granted to every third party defendant that had requested that relief and the court later dismissed, on its own motion, nearly all of the remaining defendants including many who had never moved for summary judgment. *Id.* at 513. The governmental plaintiffs did not fare much better with the court finding that they had failed to adequately prove their additional cleanup costs. *Id.*

³⁵⁷ *Id.* at 515-20 (discussing component parts, releasability, negligible amounts, EPA designation, successor liability and transporter site selection in its analysis of the district court's CERCLA interpretation).

³⁵⁸ *B.F. Goodrich Co. v. Murtha*, 840 F. Supp. 180, 185, 190-91 (D. Conn. 1993).

the *Anspec*, *Carolina Transformer* and *Mexico Feed & Seed* courts.³⁵⁹ Interpreting the statute as had all the previous courts of appeal, the Second Circuit concluded that "CERCLA's statutory language, properly read, provides for successor liability."³⁶⁰ By embracing this position, Judge Cardamone did nothing out of the ordinary; but merely joined every other appellate court that had considered the point.

But what was to be the substantive law implementing the concept of successor corporate liability? And how should the federal court fashion this rule of decision? As had been the case in prior decisions, the *Betkoski* court emphasized the advancement of CERCLA "goals" as the primary policy rationale for selecting its legal standard.³⁶¹

The *Betkoski* court found that "because the substantial continuity test is more consistent with the Act's goals, it is superior to the older and more inflexible 'identity' [or "mere continuity"] rule."³⁶² However, Judge Cardamone did not articulate which of CERCLA's goals made the substantial continuity rule superior. Instead, he emphasized that CERCLA is a "broad remedial statute" and that it should be construed liberally to give effect to its purposes.³⁶³ Once again, the rhetoric of "holding *responsible* parties liable for the costs of the cleanup" was employed without any inquiry into why and under what circumstances an asset purchaser should be considered "responsible."³⁶⁴ The *Betkoski* court knowingly selected the "substantial continuity" liability theory as the "appropriate legal test for successor liability under CERCLA"³⁶⁵ because it believed this standard would capture more responsible parties and allocate more liability. Viewing its function as selecting a legal liability principle consistent with its own view of statutory purposes, the court apparently believed that it had wide discretion to fashion the law.

One thing that was clear from *Betkoski* was that the Second Circuit did not mention or adopt the decisional methodology of either *Kimbell Foods* or *O'Melveny & Myers*, which had been issued by the United States Supreme Court two years before. There was nothing unusual about this omission. However, the court seemed to intentionally isolate itself from the Supreme Court's direction. So certain was the *Betkoski* court of its decision that it refused a subsequent request to reconsider the matter specifi-

³⁵⁹ *Betkoski*, 99 F.3d at 518 (noting that *Anspec*, *Carolina Transformer* and *Mexico Feed* all held that CERCLA makes "successor corporations liable, in certain circumstances, for their predecessors' acts").

³⁶⁰ *Id.*

³⁶¹ *Id.* at 519.

³⁶² *Id.*

³⁶³ *Id.* at 514.

³⁶⁴ *Id.* (emphasis added).

³⁶⁵ *Id.* at 519.

cally in light of these two, relevant, Supreme Court precedents.³⁶⁶ The main *Betkoski* opinion did not cite the *O'Melveny & Myers* decision nor its explicit statement that cases justifying the creation of a special federal common law rule of decision were "few and restricted" and limited to situations where there is a "significant conflict between some federal policy or interest and the use of state law."³⁶⁷ The demanding tone of the Supreme Court policy reflected in the *Kimbell Foods*, *O'Melveny & Myers*, and *Atherton* line of decisions, and the policy of judicial restraint they espoused, was completely sidestepped by the Second Circuit in *Betkoski*.³⁶⁸

³⁶⁶ Two of the losing parties in *Betkoski* petitioned the Second Circuit for a rehearing due to the court's failure to cite *Kimbell Foods* and *O'Melveny & Myers*. See *B.F. Goodrich v. Betkoski*, 112 F.3d 88 (2d Cir. 1997) (denying petition for rehearing). The petitioners suggested that the court's choice of a federal common law rule of decision was inconsistent with another contemporaneous decision, *Pescatore v. Pan Am. World Airways, Inc.*, 97 F.3d 1 (2d Cir. 1996). In a *per curiam* order denying the petition, the court recognized *Kimbell Foods* and *O'Melveny & Myers*, but insisted that their lawmaking was justified in light of these cases. *Betkoski*, 112 F.3d at 90-91. Explaining its action, the court's order stated that "[its] primary reason for adopting a federal common law rule was the concern that allowing state law rules such as the inflexible and easily evaded 'identity' rule to control the question of successor liability would defeat the goals of CERCLA." *Id.* at 91. Clearly minimizing the strength and direction of the two Supreme Court opinions, the Second Circuit continued to stress its empirically-untested proposition that state rules were "lenient" and that they would result in a "defeat" of federal CERCLA policy. *Id.* Clearly, the court had been convinced during the prior appeal that this was true and no petition for rehearing would reverse this idea.

³⁶⁷ *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 87 (1994) (quoting *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963) and *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966)).

³⁶⁸ Not all federal appeals courts ignored the Supreme Court's *Kimbell Foods* decisional methodology in CERCLA cases at the time of the *Betkoski* decision. For instance, in *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489 (11th Cir. 1996), the Eleventh Circuit confronted a similar choice of law issue in a case raising the issue of whether a limited partner may be held liable for the partnership's CERCLA liability. That court identified the central problem when it noted that "[o]ne of the more significant gaps in CERCLA's scheme arises where the right to recovery created by the Act confronts state law governing business entities like corporations and partnerships." *Id.* at 1499. While admitting that federal courts had reached differing conclusions on whether state or federal common law provides the appropriate rule of decision, the court held that ultimately federal law determines the issue of CERCLA liability. *Id.* at 1500.

However, with that conclusion the *Redwing Carriers* court employed the *Kimbell Foods* analysis to determine whether "federal law" should be a uniform common law rule or the applicable state law rule. *Id.* at 1501. Its conclusion was that the *Kimbell Foods* factors directed it to select a rule of decision "according to the applicable state law rule." *Id.* The third *Kimbell Foods* factor, "the potentially unsettling effect of a federal common law rule on relationships grounded on state law," provided the strongest support for applying state law as the rule of decision. *Id.* at 1502. At issue was limited partner liability, a concept created and defined by state statute. The court found that existing state law limited-partnership statutes define the breadth of limited liability, and "[g]iven the popularity of the limited-partnership structure . . . [the court] hesitate[d] to upset the expectations investors have under current state law rules by adopting a federal common law rule." *Id.* In conclusion, the court found that there was "no imperative need to develop a general body of federal common law to decide cases such as this." *Id.* at 1501 (quoting *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 673 (1979)). The court's carefully-crafted opinion stands in stark contrast to the asset purchaser decisions ignoring the Supreme Court's direction, basing decisions upon the court's own view of the appropriate achievement of CERCLA goals through broad federal common law rules for decision, and the willingness to recognize stable commercial expectations.

Rather, the appellate court concluded that it had the authority to fashion a rule of decision imposing CERCLA liability on asset-purchasing corporate successors that exceeded the stringency of the consensus corporate law theory all in the name of furthering CERCLA's statutory purposes and limiting avoidance.³⁶⁹ The decision bore the hallmark of the Fourth Circuit's ruling in *Carolina Transformer*. Regardless of the limited, law-creating role described in the *Kimbell Foods* series of decisions, the *Betkoski* court viewed its judicial function as one of shoring up deficiencies in an important remedial statute—CERCLA. Once again, the court considered its function as reinforcing its own view of CERCLA's fundamental purposes and developing legal liability principles to effectuate those purposes.

C. *Stage Three—Shifting the Choice of Law Rules after the Bestfoods Decision—Beginning to Recognize the Limits of Judicial Authority*

1. *Atchison, Topeka & Santa Fe Railway Co. v. Brown & Bryant, Inc.*³⁷⁰

In the aftermath of *O'Melveny & Myers* and *Atherton*, the Ninth Circuit was presented with an opportunity to revisit its earlier holding in *Louisiana-Pacific Corp. v. Asarco, Inc.*³⁷¹ that the parameters of successor liability under CERCLA are to be fashioned by federal common law.³⁷² In that prior case, the *Louisiana-Pacific* court had joined the Third Circuit's position in *Smith Land & Improvement* that recognized judicial authority to employ federal common law rulemaking to establish a rule of decision in the asset purchase corporate successorship context.³⁷³ Exercising its com-

³⁶⁹ There was no clear evidence that these successors were attempting to "game the system" by structuring transactions in a manner to limit vicarious liability. The court, perhaps influenced by the possibility that parties would use conventional, state corporate asset purchaser rules in ways that would avoid continuing CERCLA liability, exercised its common law powers to announce a rule that would deter this practice. The *Betkoski* court believed that it was justified in creating federal law to guard against the possibility of such a manipulative result in the name of furthering CERCLA goals. No empirical data, analysis or particular statutory language supported such an interpretation. *Betkoski*, 99 F.3d at 519.

³⁷⁰ 159 F.3d 358 (9th Cir. 1998).

³⁷¹ 909 F.2d 1260 (9th Cir. 1992). The *Louisiana-Pacific* court held that federal common law applied to determine an asset purchaser's CERCLA liability, and upheld a district court's grant of summary judgment to an asset purchaser from whom contribution was sought under state law successor-in-interest theory. *Id.* at 1262-63. The court adopted state successor liability laws as the rule of decision because they mirrored those of most states, and refused to extend asset purchaser liability by adopting the substantial continuity test. *Id.* at 1265. The court found that the asset purchaser had no knowledge of the predecessor's CERCLA liability or of the waste generated by the predecessor's discontinued business practices, and the Ninth Circuit reserved its decision on whether to adopt the substantial continuity test because of the lack of knowledge. *Id.*

³⁷² *Atchison*, 159 F.3d at 361.

³⁷³ *Louisiana-Pacific*, 909 F.2d at 1263.

mon law powers in *Louisiana Pacific*, the Ninth Circuit adopted a rule based upon prevalent state corporate law norms. Within the context of that case, this meant that the court selected the mainstream “mere continuation” principle to serve as the common law rule in CERCLA asset purchaser situations within the Ninth Circuit.³⁷⁴

In *Atchison*, PureGro, a purchaser of assets from a defunct owner/operator, was sued in a private cost recovery and contribution action as a successor-in-interest under CERCLA by another PRP wishing to employ the “substantial continuity” exception to asset purchaser nonliability.³⁷⁵ The district court had been willing to apply this expanded liability test but it concluded that the facts did not justify a finding of successor liability and granted summary judgment for PureGro.³⁷⁶ On appeal, the Ninth Circuit was asked to reassess its prior *Louisiana-Pacific* decision from two, self-interested perspectives. First, the appellant PRP railroad desired for the court to exercise its federal common law powers to expand CERCLA liability by adding an additional successor liability exception—the “substantial continuity” test—and applying it to the facts at hand.³⁷⁷ Second, the respondent, PureGro, argued that “recent Supreme Court decisions” had undermined the *Louisiana-Pacific* holding that federal common law governs the CERCLA successor liability issue and that this more recent precedent required the application of state law to the question.³⁷⁸ In *Atchison*, then, the appeals court was asked by a party to reinterpret its prior federal common law rule of decision to embrace the more expansive “substantial continuation” exception to the general non-liability principle applicable to asset purchasers.³⁷⁹ The court refused to do this, but in reaching this conclusion it considered and struggled with the method of analysis that was expressed by the Supreme Court in *O’Melveny & Myers* and *Atherton*. Most unusual in this case was the fact that the Ninth Circuit ruled twice, issuing two opinions: one “original opinion,”³⁸⁰ followed ten months later by an “amended opinion.”³⁸¹ A comparison of the two *Atchison* decisions vividly demonstrates just how hard it is for federal judges to

³⁷⁴ *Id.* at 1265-66.

³⁷⁵ *Atchison*, 159 F.3d at 361.

³⁷⁶ *Id.*

³⁷⁷ *Id.* at 361-62.

³⁷⁸ *Id.* at 362.

³⁷⁹ *Id.* at 364. In fact, the railroad PRPs had convinced the district court to adopt the “substantial continuation” exception. *Id.* at 361. However, even applying this more generous standard, the district court had found the “substantial continuation” exception inapplicable under the facts of the case and granted summary judgment to the asset purchaser, PureGro. *Id.*

³⁸⁰ *Atchison, Topeka & Santa Fe Ry. Co. v. Brown & Bryant Inc.*, 132 F.3d 1295 (9th Cir. 1997) Hereinafter, this opinion will be styled as *Atchison I*.

³⁸¹ *Atchison, Topeka & Santa Fe Ry. Co. v. Brown & Bryant Inc.*, 159 F.3d 358 (9th Cir. 1998). Hereinafter, this opinion will be styled as *Atchison II*.

relinquish their discretionary control over the formulation of common law.

In the first or "original" Atchison opinion, the Ninth Circuit directly considered the appeal from PureGro's point of view that the Supreme Court's *O'Melveny & Myers* and *Atherton* decisions challenged the earlier *Louisiana-Pacific* ruling that had easily assumed that federal courts could fashion a rule of decision from their common lawmaking powers.³⁸² It did so only after the issue was raised for the first time on appeal by PureGro.³⁸³ In fact, Judge Daly Hawkins titled this section of his opinion "Revisiting Louisiana-Pacific" and began it with a statement that PureGro had made a "persuasive argument that the Supreme Court's decisions . . . call into question the ease with which *Louisiana-Pacific* created a set of federal rules for successor liability under CERCLA."³⁸⁴ The court then reiterated the main points made in *O'Melveny & Myers* and *Atherton* that federal common law rulemaking was needed only in "few and restricted" instances and that the party requesting such a rule has a "heavy burden" to prove that there is a need for uniformity or that state rules conflict with federal policy.³⁸⁵

Beyond stating the policy of the Supreme Court's recent decisions, this first opinion adopted and applied the three-part *Kimbell Foods* analytical methodology, finding: 1) no need for federally-imposed uniformity in an already largely uniform, state corporate law and 2) no conflict between state rules and federal policy.³⁸⁶ Interestingly, on this second point, Judge Daly Hawkins directly debunked the frequently-suggested "conflict with CERCLA" justification for federal courts exercising common law powers to expand asset purchaser liability. He wrote that:

[S]ince states already have rules in place to prevent the use of the corporate form to avoid liability, the only possible justification for a new, federal (and more expansive) rule is to "enrich the fund" by imposing liability on more asset pur-

³⁸² *Atchison I*, 132 F.3d at 1299-1302.

³⁸³ *Id.* at 1299 n.2. Reflecting the court's ambivalence towards the entire issue of the Supreme Court-mandated restraint in fashioning federal common law rules, Judge Daly Hawkins added the following introduction to his consideration of the question: "Although we do not have to entertain it, we exercise our discretion to do so since it is a purely legal question of considerable significance." *Id.* With this comment, the judge suggested that the lower federal courts possessed the option of deciding whether or not to follow the pronouncements of the Supreme Court on matters of federal jurisdiction. More likely, this remark reflects the difficulty with which federal courts have in declining the opportunity to "make law."

³⁸⁴ *Id.* at 1299.

³⁸⁵ *Id.*

³⁸⁶ *Id.* at 1300-01. These are: 1) whether federal interests require a nationally uniform body of law, 2) whether application of state law would frustrate or conflict with specific objectives of federal programs, and 3) the extent to which application of a federal rule would disrupt commercial relationships predicated on state law. *Id.* at 1300 (citing *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728-29 (1979)).

purchasers As the Court pointed out in *O'Melveny*, these "more money" arguments are unavailing.³⁸⁷

With this language, the Ninth Circuit had finally expressed the unstated reality that federal court manipulation of common law doctrine actually constituted illicit, judicial lawmaking that was clearly outside the bounds of recent Supreme Court doctrine. The actual policy choice of finding more entities "responsible," the court observed, was more appropriate for Congress rather than the federal judiciary.³⁸⁸ The prior justification of implementing CERCLA policy goals which had been offered in the earlier appellate cases was not to be found in *Louisiana-Pacific*. In addition, in a separate part of the opinion, the judge left no doubt about the impact of the *O'Melveny* and *Atherton* decisions on the present legitimacy of the Ninth Circuit's *Louisiana-Pacific* decision. He wrote, "While we are reluctant to question the essential holding of *Louisiana-Pacific*, *O'Melveny* and *Atherton*, intervening decisions by the Supreme Court, *squarely refute* the wisdom of fashioning a federal common law on this issue [of asset purchaser liability under CERCLA]."³⁸⁹

Finally, this original *Atchison* opinion reached the inescapable conclusion, derived from the Supreme Court's methodology, that "state law dictates the parameters of successor liability under CERCLA."³⁹⁰ With resounding force, the Ninth Circuit both swore fidelity to the Supreme Court's federal common law precedent and it defined the CERCLA liability rules in asset purchaser situations.

In an unusual step, Judge Daly Hawkins issued an "amended opinion" approximately ten months after releasing the "original opinion."³⁹¹ While the amended ruling did not alter the specific outcome in the case, it did edit the language of the prior decision in several significant ways. Most importantly, his opinion deleted all of the previously quoted material from the "original opinion," especially that which suggested that the appropriate rule of decision was to be determined with reference to state law. The appellate court retained its references to the *Kimbell Foods*, *O'Melveny* and *Atherton* decisions, however, it did not mention the Supreme Court's decision in *Bestfoods* that had been handed down merely four months earlier. After

³⁸⁷ *Id.* at 1301.

³⁸⁸ With reference to the *O'Melveny & Myers* case, the *Atchison I* court stated that, "The imposition of liability under any statute 'involves a host of considerations that must be weighed and appraised. . . . Within the federal system, at least, we have decided that that function of weighing and appraising is more appropriate[] for those who write the laws, rather than for those who interpret them.'"

Id. (citing *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 88 (1993)).

³⁸⁹ *Id.* (emphasis added).

³⁹⁰ *Id.*

³⁹¹ *Atchison II*, 159 F.3d 358 (9th Cir. 1998).

analyzing the substantive corporate successorship issue in a manner consistent with the *Kimbell Foods* preference for state law, Judge Daly Hawkins inserted a new paragraph into the amended opinion which confused the final analysis of the choice of law issue.³⁹² He stated that it was not necessary to determine whether state law dictated the parameters of CERCLA successor liability "as we would reach the same result under federal common law."³⁹³ By so doing, the court retained its *Louisiana-Pacific* conclusion based on federal common law decision making despite the fact that the court had reasoned that state law should be the source of the decisional rule. This is a curious conclusion since it entirely ignores the *Kimbell Foods*, *O'Melveny* and *Atherton* analysis which preceded it in the opinion and clings to the Court's desire to determine a federal common law rule.³⁹⁴ Perhaps all it does is establish state corporate law as the substantive basis for the federal common law rule. This outcome reveals just how hard it is for a federal court to "let go" of the power to interpret statutes and to announce operative legal rules. It also indicates how difficult it is for these same courts to explain the basis for their holdings.

2. North Shore Gas Co. v. Salomon, Inc.³⁹⁵

This case involved a familiar fact pattern with a current hazardous waste site owner—Salomon, Inc.—seeking other parties who could share part of the \$20 million CERCLA cleanup costs for a contaminated, Denver, Colorado mineral ore processing plant.³⁹⁶ It discovered that the Coke Company had mined vanadium and uranium ores in the mid-1930s and had regularly transported "radium slimes" to the Denver site for processing and disposal.³⁹⁷ Further research had indicated that under a 1941 reorganization plan, the Coke Company had sold most of its assets to North Shore Gas in exchange for gas company stock.³⁹⁸ As it turned out, North Shore Gas was the only corporation still in existence and solvent when Salomon looked for other parties to help pay for the cleanup.³⁹⁹ However, exercising

³⁹² *Id.* at 364.

³⁹³ *Id.*

³⁹⁴ The Ninth Circuit explains this retention of its control over the selection of the appropriate rule of decision in terms that emphasize the similarity of legal outcomes under the state law and the federal common law tests. However, it is unmistakable that the court wishes to stress the fact of its control by stating that "we choose not to extend the 'mere continuation' exception to include the broader notion of a 'substantial continuation.'" *Id.* In spite of its recognition of *O'Melveny* and *Atherton*, the *Atchison II* court refused to cede authority over the choice of legal doctrine in the corporate successorship context.

³⁹⁵ 152 F.3d 642 (7th Cir. 1998).

³⁹⁶ *Id.* at 645.

³⁹⁷ *Id.*

³⁹⁸ *Id.* at 646.

³⁹⁹ *Id.* at 647.

what it considered to be its "federal common law" authority, the federal district court granted North Shore Gas's motion for summary judgment ruling that the company was not liable under any of the traditional exceptions to the general asset purchaser non-liability principle.⁴⁰⁰ Salomon, Inc. appealed this result and the case moved on to the Seventh Circuit for resolution.⁴⁰¹

Strangely, before the Seventh Circuit, neither party briefed the choice of law question—should the court apply federal common law or state law to the asset purchaser issue?⁴⁰² Even with the benefit of the then-contemporaneous *Atchison* and *Bestfoods* decisions, the *North Shore Gas* court refused to undertake a *Kimbell Foods* analysis of the corporate successorship issue. Judge Cudahy's opinion revealed that he was aware of the issue but he opted to apply what he considered to be federal common law, thinking "it prudent to reserve the choice-of-law question until we are confronted with a case in which the parties have argued the issue."⁴⁰³ The court seemed most interested in joining the "crowd" of other circuits that had employed their federal common law powers in earlier cases to identify a rule of decision.

Not surprisingly, the appeals court took the unexceptional first step and joined six other circuits by finding that Congress intended to extend CERCLA liability to corporate successors.⁴⁰⁴ It then parroted the reasoning of the Third Circuit in the *Smith Land* case that resort to federal common law was warranted because of the need for national uniformity in rules and the need to prevent parties from "frustrat[ing] the aims of CERCLA" by taking action under protective state law.⁴⁰⁵ This mantra was repeated without any careful analysis or empirical justification. There appeared to be no evidence that the successor corporation had attempted to manipulate the transaction in order to avoid CERCLA liabilities. In fact, the entire asset sale transaction had been undertaken in 1941 as the result of an effort to comply with the Public Utility Holding Company Act of 1935 which required utilities to eliminate non-utility investments.⁴⁰⁶ The resulting reorganization and later corporate disintegrations led to the fact that North Shore Gas was the only currently solvent business entity having any connection to the 1941 events.⁴⁰⁷ This, of course, led Salomon Inc. to pursue North Shore Gas as a successor who would be responsible for a portion of the defunct

⁴⁰⁰ *Id.* at 651.

⁴⁰¹ *Id.*

⁴⁰² *Id.* at 650.

⁴⁰³ *Id.* at 650-51.

⁴⁰⁴ *Id.* at 649.

⁴⁰⁵ *Id.* at 650 (citing *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 92 (3d Cir. 1988)).

⁴⁰⁶ *Id.* at 646 (citing 15 U.S.C. § 79k (2000)).

⁴⁰⁷ *Id.* at 647.

Coke Company's CERCLA cleanup costs.⁴⁰⁸

Despite its awareness of the recent *Atchison* decision which had referred to the *Kimbell Foods* line of cases and the analytical method required by the Supreme Court, the Seventh Circuit refused to follow the reasoning of *O'Melveny & Myers* and *Bestfoods*.⁴⁰⁹ In light of the explicit rejections of such arguments in *O'Melveny & Myers* and *Atherton*, the Sixth Circuit's earlier decision in *Anspec* and the Ninth Circuit's recent decision in *Atchison*, the Seventh Circuit in *North Shore Gas* assumed that "federal common law supplies the rule of decision"⁴¹⁰ without undertaking a *Kimbell Foods* or other kind of analysis. Feeling free to fashion its own rule of decision, it referred exclusively to general treatise authority and earlier federal decisions in devising its rules for deciding the successor liability question. State court decisions were not a factor, at least in terms of reference. In the end, the *North Shore Gas* court decided to analyze the successor liability issue under the "mere continuation" exception to the general, state-law asset purchaser rule.⁴¹¹ Judge Cudahy took the matter a step beyond announcing the applicable legal rule. After an extensive analysis, he found that, under the facts developed at trial, an identity of ownership existed sufficient to impose successor liability on the asset purchaser.⁴¹² The opinion reflected a thorough evaluation of the case but, significantly, the appellate court reversed the trial judge's ruling on the successor liability question.⁴¹³

3. *United States v. Davis*⁴¹⁴

The latest circuit court to address this CERCLA issue has been the

⁴⁰⁸ *Id.*

⁴⁰⁹ *North Shore Gas Co.*, 152 F.3d at 642. See *supra* Part II.B.3 for a discussion of *United States v. Bestfoods, Inc.*

⁴¹⁰ *Id.* See *Atherton v. FDIC*, 519 U.S. 213, 220 (1997) ("To invoke the concept of 'uniformity,' however, is not to prove its need."); *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 87 (1994) (stating that creation of a federal rule of decision is "limited to situations where there is a 'significant conflict between some federal policy or interest and the use of state law'" (citing *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966)); *Atchison II*, 159 F.3d at 364 (overruling *Louisiana-Pacific* and stating that "[t]he imposition of liability under any statute involves a host of considerations that must be weighed and appraised Within the federal system, at least, we have decided that that function of weighing and appraising is more appropriately for those who write the laws, rather than for those who interpret them.") (citing *O'Melveny & Myers*, 512 U.S. at 89) (internal quotations omitted).

⁴¹¹ Interestingly, later federal court decisions in the Seventh Circuit interpreted *North Shore Gas* as a case indicating that state law should govern asset purchaser liability determinations in federal litigation. See, e.g., *Ryan Beck & Co. v. Campbell*, No. 02 C 7016, 2002 WL 31696792, at *5 (N.D. Ill. Dec. 2, 2002); *Fararo v. Sink LLC*, Nos. 01 C 6956, 01 C 6957, 2002 WL 31687671, at *5 (N.D. Ill. Nov. 27, 2002).

⁴¹² The court did not discuss whether the substantial continuity test would result in liability because the issue was not briefed by the parties. *North Shore Gas*, 152 F.3d at 654 n.8.

⁴¹³ *Id.* at 658.

⁴¹⁴ 261 F.3d 1 (1st Cir. 2001).

First Circuit, which in *United States v. Davis* held that state law provides the rule of decision in suits brought to impose CERCLA liability on asset purchasers.⁴¹⁵ The *United States v. Davis* case involved the \$55 million groundwater and soil cleanup of a ten acre waste disposal site in Smithfield, Rhode Island.⁴¹⁶ After the main PRP—United Technologies Corporation—had settled with the government, it sought to recover part of its liability from non-settling defendants including Black and Decker and Electroformers as corporate successors to Gar Electroforming Division, an electroplating company that had arranged to dispose of its wastes at the Davis site.⁴¹⁷ The district court adopted the ruling of the magistrate judge who had found that Black and Decker was liable under either state law or federal common law successorship rules.⁴¹⁸ On appeal, the court was asked to choose between these two approaches as a fundamental choice of law question.⁴¹⁹

Undertaking consideration of the choice of law question *de novo*, the appeals court surveyed the current circuit split regarding whether federal common law or state law should govern asset purchasers' CERCLA liability and found the *Kimbell Foods* and *O'Melveny & Myers* approach controlling, going so far as to describe it as the majority rule.⁴²⁰ Interestingly, the First Circuit had previously established the practice of turning to state law in similar CERCLA choice of law situations. For instance, in its 1993 *John S. Boyd Co.* decision, the court had set forth a circuit rule that federal courts should turn "to state contract law to provide the substantive rule, so long as it is not hostile to the federal interests animating CERCLA."⁴²¹ This "not hostile to the federal interest" rule was expressed in the *John S. Boyd Co.* case solely by reference to holdings in other federal courts but

⁴¹⁵ *Id.* at 54.

⁴¹⁶ *Id.* at 15, 17.

⁴¹⁷ *Id.* at 14, 17, 18 & n.12. Gar had operated an electroplating business in Danbury, Connecticut, producing wastes containing nitric acid, copper, nickel and cyanide. *Id.* at 35. CWR, a waste transporter, had picked up five drums from Gar and the court concluded that these five drums containing 275 gallons of waste were delivered to the Davis site for disposal. *Id.*

⁴¹⁸ *Id.* at 52.

⁴¹⁹ *Id.* at 52-53.

⁴²⁰ This position was consistent with prior First Circuit decisions interpreting CERCLA. Curiously, the court had held in previous cases that although federal law governed the validity of liability agreements under CERCLA, state law would provide the substantive decisional principles in the absence of specific federal statutory guidance. For instance, in *John S. Boyd Co. v. Boston Gas Co.*, 992 F.2d 401, 406 (1st Cir. 1993), the appellate court had ruled that a "majority of courts have turned to state contract law to provide the substantive rule, so long as it is not hostile to the federal interests animating CERCLA." The First Circuit reached this conclusion without any reference to the *Kimbell Foods* decision.

⁴²¹ *John S. Boyd Co.*, 992 F.2d at 406 (using Massachusetts law for guidance in interpreting a separation agreement between two corporate parties). See also *Am. Policyholders Ins. Co. v. Nyaol Prods., Inc.*, 989 F.2d 1256, 1263 (1st Cir. 1993) (rejecting the use of a uniform federal rule of decision to govern interpretation of an insurance policy's scope of coverage regarding CERCLA liability).

without regard or reference to the Supreme Court's earlier *Kimbell Foods* precedent. What this suggests is that courts will be persuaded to accept a particular line of reasoning from analogous federal decisions as a matter of devising their own sense of judicial policy and not as an issue of consistency with Supreme Court direction. This is not to say that the Supreme Court is totally irrelevant to the lower federal courts. When a decision of the Supreme Court confirms a prior appellate position, the holding will be recognized.

The *United States v. Davis* court interpreted the Supreme Court's *Bestfoods* decision as confirming the First Circuit's earlier CERCLA choice of law holding in the *John S. Boyd Co.* case and by referring to Justice Souter's *Bestfoods* opinion which noted that the statute gives "no indication that the entire corpus of state corporation law is to be replaced simply because a plaintiff's cause of action is based upon a federal statute."⁴²² In its view, the First Circuit combined the *Bestfoods* and the *O'Melveny & Myers* approaches by concluding that state law would presumptively apply in these cases unless there was a "specific, concrete federal policy or interest that is compromised by the application of state law."⁴²³ After spending considerable time in explaining its choice of law methodology, the court concluded in one sentence that the application of state law would not frustrate any federal objective and by so doing, upheld the use of state law.⁴²⁴ Apparently, once the circuit established the *John S. Boyd Co.* rule on choice of law matters, the issue was largely settled thereafter.⁴²⁵

V. CONCLUDING THOUGHTS ON JUDICIAL BEHAVIOR IN THE ABSENCE OF CONCRETE LAW

What is a federal court and what should it do? These fundamental questions lie at the heart of this article. The general and conventional answer to this question is that the federal judiciary exists to announce and implement federal law—that is, federal constitutional, statutory and treaty law for the most part. Under this view, the scope of federal court authority is bounded by the bodies of law they are charged to apply. In theory, this circumscribed notion of federal judicial power presents a restrained vision of federal judges and denies them the freewheeling authority of general jurisdiction that state court jurists have to create common law when the

⁴²² *Davis*, 261 F.3d at 54 (quoting *United States v. Bestfoods*, 524 U.S. 51, 63 (1998)).

⁴²³ *Id.* (quoting *Atchison II*, 159 F.3d at 363-64).

⁴²⁴ *Id.* The commonly-stated rationales for creating a federal common law rule of decision which were so persuasive in cases adopting the "substantial continuity" test were never mentioned in *United States v. Davis*. These reasons—the need for national uniformity and the avoidance of responsibility—received no attention from the court.

⁴²⁵ *Id.*

situation requires. At least, that is one theory of federal judicial power. Another view considers federal judges in a more dynamic way, effectuating their view of the law to implement federal statutory or constitutional policy. Obviously not as constrained as the first vision, this latter approach employs the flexibility of statutory interpretation and the potential expansiveness of federal common law doctrinal development to announce the meaning of federal law. These competing ideas about the appropriate role of federal judges reflects a serious disagreement over the allocation of power in American society.

The specific focus of this article has been on the behavior of federal courts in defining the legal rules for assigning CERCLA-based liability in the corporate asset purchase situation. Although a narrow sub issue of the more general corporate successor liability issue, the asset purchase scenario is significant because it presents an important legal liability question without a clear statutory answer. CERCLA does not expressly provide for the imposition of cleanup liability on corporate successors. In this instance, the federal court is being asked to make highly consequential decisions in the absence of a clearly identifiable congressional policy preference. Perhaps this kind of question is just an attenuated form of statutory interpretation, which asks the court to determine or infer "what would Congress have done with this issue" had it addressed it at the time of CERCLA's enactment or revision? On the other hand, the resolution of this issue could be viewed as judicial excess. This view of the issue sees judges going beyond the limits of statutory interpretation and venturing into the area of explicit judicial lawmaking, filling in legal rules without any idea of how Congress would have wanted to act. Undoubtedly, identifying the border between interpretation and lawmaking is an elusive pursuit—with the boundary being more imagined than real. It also presents profound questions about the limits on judicial authority—a more political than legal question.

This research has examined how federal courts of appeal respond to this most concrete question—when is a corporate asset purchaser liable for CERCLA cleanup costs?—in the face of statutory silence. The following discussion draws salient conclusions about this federal court litigation—litigation that has spanned the past fifteen years.

A. The Findings of a Review of CERCLA Asset Purchaser Liability Cases

1. Ubiquitousness of the Asset Purchaser Issue

Not surprisingly, this issue has come to the attention of all circuits except the Fifth Circuit, the Tenth Circuit and the D.C. Circuit over the past fifteen years. Throughout the life of CERCLA, there has always been a desire on the part of government or private PRPs to identify other PRPs to share the cleanup costs or to cover unaccounted-for orphan shares. As the initial government-led hazardous waste site cleanups of the 1980s gave

way to the government-ordered private PRP site remediation, the hunt for other solvent PRPs became more intense. This occurred at a time when the cost of cleanups was rising into the multi-million dollar level. With this backdrop, it is understandable that existing liable parties would try to cast the liability net more broadly to reach corporate successors with CERCLA liability. Existing corporate law doctrine in most states, which had developed over the years, recognized a range of situations where liabilities of predecessor corporations would actually "pass through" to bind their successors. In the late 1980s, the federal government attempted to use these theories to make CERCLA liabilities attach to a larger number of corporate successors. In this litigation, federal courts uniformly held that as a general matter, Congress intended, through an implied reference, for CERCLA to impose liability on corporate successors. This conclusion did not answer the more complicated question of deciding what legal principles would determine when an asset purchaser would be saddled with the CERCLA liability of its seller. The courts would grapple with this issue for more than a decade, reaching a range of outcomes following a number of analytical approaches.

2. The Clarity and Invisibility of the Supreme Court's Message Regarding Federal Court Choice of Law

In the world of perfect federal court theory, things are straightforward and orderly. In this way of thinking, the twin hallmarks of the American federal court system are its hierarchical structure and precedential effect. The United States Supreme Court stands atop that hierarchy with the regional courts of appeal enjoying a localized supremacy over the district courts within their geographical areas. This is a judicial system of perfect symmetry in its structural design. As Justice Sandra Day O'Connor has recently written, "The Supreme Court's focus is, and must be, broader, for our primary purpose is to guide and shape the development of federal law generally, so as to enable lower courts to perform their responsibilities more effectively and fairly and to guarantee equal justice to all citizens."⁴²⁶

When the Supreme Court speaks on a matter pertaining to federal law, its rulings are generally treated as controlling precedent in the lower federal courts. For instance, a court of appeals would look for relevant Supreme Court precedent in deciding a case before it. At the very least, the legal pronouncements of the high court are ones that must be distinguished or confined by judges who wish to reach different results.

As the discussion in Part II indicates, the Supreme Court has clearly expressed its policy regarding the freedom of the lower federal courts to

⁴²⁶ SANDRA DAY O'CONNOR, *THE MAJESTY OF THE LAW: REFLECTIONS OF A SUPREME COURT JUSTICE* 212 (2003).

announce rules of decision under their federal common lawmaking powers.⁴²⁷ Originating in the *Kimbell Foods* case decided in 1979 and concluding with the *Bestfoods* decision of 1998, the unmistakable policy is one of judicial restraint and presumptive reliance on state law theory in the absence of an alternate federal statutory direction or a significant conflict with federal law. The Court's rhetoric over the years has become increasingly severe in its tone and less open to improvisation in the name of federal common law. These cases have emphasized that statutory gap-filling exercises do not routinely authorize federal courts to develop specialized federal rules of decision. As Justice Scalia wrote in the *O'Melveny & Meyers* case, "matters left unaddressed in . . . a scheme [of federal statutory regulation] are presumably left subject to the disposition provided by state law."⁴²⁸ State law is to fill the gap in all cases except those truly exceptional, "few and restricted" ones where there is a "significant conflict between some federal policy or interest and the use of state law."⁴²⁹ These are strong words that greatly tip the balance towards the use of state law in federal cases.

Throughout this twenty-four year period, the clear message to federal courts being asked by litigants to employ the federal common law to fill the statutory gaps or omissions was to use state law first and to leave legislative judgments to Congress. The Supreme Court's policy direction has opposed federal courts using their untethered initiative to develop legal principles without a clearer link to statutory guidance. With this firm and highly-detailed Supreme Court guidance regarding the methodology for selecting rules for deciding cases such as those involving the CERCLA liability of asset purchasers, the results and reasons should have been predictable and should have consistently applied the mainstream state corporate law. Strangely, this did not happen. In six of the court of appeals decisions previously discussed, there was absolutely no reference to any of the Supreme Court's decisions in the *Kimbell Foods* line of cases. In fact, even in the 1998 *North Shore Gas* case, the Seventh Circuit acknowledged

⁴²⁷ See *supra* Part III.

⁴²⁸ *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 85 (1994).

⁴²⁹ *Id.* at 87. The Court has not been particularly clear about the theory behind its direction to choose state law as the rule of decision. In these "gap-filling" situations it has been vague about whether state law is selected 1) as state law, 2) as the interpreted federal statutory rule or 3) as the federal common law. As Justice Scalia remarked in *O'Melveny & Meyers*:

The issue in the present case is whether California rule of decision is to be applied to the issue of imputation or displaced, and if it is applied it is of only *theoretical interest* whether the basis for that application is California's own sovereign power or federal adoption of California's disposition.

Id. at 85 (emphasis added). It would seem as though this question would be more than just one of "theoretical interest" and would represent the selection of a state law principle as the substantive federal rule. Perhaps the nicety of classification is not that important since state law controls as the rule of decision and the most important point is that the federal court is prohibited from fashioning its own legal theory to decide the case.

the existence of these decisions, but it refused to analyze the choice of law issue in light of them because the question had not been briefed by the parties. Oddly, the Seventh Circuit did not order the briefing and rehearing or consider the legal issue *de novo*. It was not until the later Ninth Circuit opinion in *Atchison* and the First Circuit's decision in *United States v. Davis* that the Supreme Court's analytical directive became part of any court of appeals decision in a CERCLA asset purchaser case.

Why has the Supreme Court been substantially ignored for nearly twenty years? The answer could be a practical one. It could be that no party has briefed the issue arguing Supreme Court precedent and no judicial clerk has ever discovered these cases through independent research. While these rationales are possible, they do not seem probable. What seems more plausible is that federal courts appear determined to resolve the litigation brought to them. Whether claiming to act under their federal common law powers or just jumping at the chance to find the "appropriate" rule to decide the matter before them, these courts appear to be more interested in applying the legal principles that they believe fit the case at hand than in automatically applying available state law. Federal judges want to judge. Until the recent *Atchison* and *Davis* cases, the Supreme Court's call for limited judicial authority has been largely ignored and avoided by the lower federal courts.⁴³⁰

3. *How Do Federal Courts Select a Rule of Decision in the Absence of Statutory Guidance?*

Supreme Court precedent is not perfect and it is also not self-executing. In fact, as this article indicates, these ponderous expressions live lives of selective impact. As much as the Court would like to restrain federal court activism and initiative, it actually has less effect than many would believe. The fact that so few cases actually reach the Supreme Court for consideration means that the federal courts of appeal, in reality, have the last word on the selection of legal principles and analytical approaches to common problems.⁴³¹ An examination of the cases under review in this article would confirm this continuing authority of appellate courts. But how did they approach the purely legal question of selecting the rule of decision for asset purchasers under CERCLA? The analysis reveals a good deal of confusion and an eclectic group of approaches to the

⁴³⁰ It is interesting to note that the Supreme Court has not been consistent in applying its *Kimbell Foods* decisional methodology even in its own opinions. In *Bestfoods v. United States*, even though the Court emphasized the use of state law to answer questions related to corporate parent/subsidiary liability, it did not cite or otherwise refer to the *Kimbell Foods*, *O'Melveny & Meyers*, and *Atherton* cases.

⁴³¹ Of all of the cases analyzed in this article, Supreme Court review was sought in only two of them, and in both cases it was denied. See *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86 (3d Cir. 1988), *cert. denied*, 488 U.S. 1029 (1989) and *B.F. Goodrich v. Betkoski*, 99 F.3d 505 (2d Cir. 1996), *cert. denied sub nom. Zollo Drum Co. v. B.F. Goodrich*, 524 U.S. 926 (1998).

issue.

While each decision presents unique facts, all of the cases approach the same, essentially legal question—does “pass through” CERCLA liability attach to an asset purchaser of a prior corporation? The pre-existing firm is usually a clearly-liable PRP; but often not solvent or even operating. On the other hand, the asset purchasing company is being confronted with the prior firm’s liability under legal theories that do not respect the asset purchase form of the transaction. Is the asset purchaser immunized from its seller’s liabilities under the presumptive traditional rule or is it liable under an equity-based exception to the rule? At base, each case represents a practical attempt to find another liable party to bear part of the CERCLA cleanup expense. This important liability question should be answerable from the statute that established the legal liability in the first place—CERCLA. But, unfortunately, it is not. As the prior discussion indicates, there is no direct, statutory answer to the general question of successor corporation liability. Sensing the potential for a gaping hole in the liability of “responsible” parties under CERCLA, all of the court opinions under consideration here found that Congress intended for CERCLA liability to extend to corporate successors. This result, they reasoned, was justified both by analysis of the statute’s text as well as by the policy goal of discouraging the easy evasion of the cleanup law.

These appellate cases easily concluded that under CERCLA, the term “corporation” includes successors. As a result of this reasoning, the courts established the principle that successor entities could be liable under the statute for shares of the sizable cleanup costs mandated by the law. A second, and considerably more difficult question, presents itself in these cases. It is the question that asks judges to give legal meaning to the corporate successor label and to devise rules assigning financial liability in the CERCLA context. This represents the heart of the matter—determining who must pay and under what circumstances. Liability assignment represents a fundamental judicial role for the state court judge announcing tort or contract rules of decision in a common law or statutory system. Where do federal judges look to answer these questions in the CERCLA asset purchaser situation? The case analysis reveals several general conclusions about the behavior of the appellate courts: 1) they do not approach the “rules of decision” question in a unified or consistent way, 2) their action reflects a strong sense of obligation to decide the cases before them and to advance CERCLA’s statutory goals, 3) they generally do not follow Supreme Court guidance on the appropriate method for choosing their rules, and 4) they often do not have a clear idea of how to select the operative legal principle to apply in the asset purchaser cases before them.

When examining the cases from the perspective of understanding what the courts, themselves, believe they are doing in identifying a rule of decision, four distinct patterns emerge. *First*, one court—the Sixth Circuit—

considers its function to be solely interpreting a federal statute. In *Anspec*, the court makes a strong point that it is not fashioning a federal common law rule but rather, interpreting § 107(a)—the central liability provision—consistently with CERCLA's main purposes.⁴³² The court goes to great pains to avoid the characterization that it is "making" new federal common law. In this way, the appeals court can perform the statutory "gap filling" function of providing missing substantive provisions in the name of legislative interpretation.

Second, several courts describe their holdings as establishing federal common law with the approval of CERCLA's legislative history. An example of this approach can be found in the *Smith Land* case, where the Third Circuit found its authority for this point in the 1983 district court opinion in *Chem-Dyne* and that decision's citation to the floor comment by Representative James Florio. Cases taking this view, such as *Smith Land*, *Louisiana Pacific* and *Carolina Transformer*, all view themselves as having a highly flexible power to fashion circuit rules finding successor liability in such a way to achieve what they consider to be fundamental CERCLA purposes. In the name of creating federal common law rules that provide for a smooth, national uniformity of application, most of these courts look to "traditional" or "general" doctrine developed in the states to serve as their own rules of decision.⁴³³ However, at least one court in this group—the Fourth Circuit in *Carolina Transformer*—did not feel bound by prevailing state corporate law norms and considered its common law power to be highly fact-sensitive and contextual.⁴³⁴ Acting as a true "common law" court, the Fourth Circuit believed that it could develop a rule structure from the facts of cases that would come to it.

Third. In this category of decisions, courts appears genuinely confused about what their opinions accomplish. These cases are striking in their lack of clarity, with statements as varied as they are "probably" deciding

⁴³² *Anspec Co. v. Johnson Controls, Inc.*, 922 F.2d 1240, 1242, 1245-46 (6th Cir. 1991).

⁴³³ In *Louisiana Pacific*, the Ninth Circuit's view was that it was establishing federal common law for asset purchaser liability and that law just happened to be the same as the state corporate law in California. Later in the *Atchison* decision, the court reaffirmed its previous position but concluded that "we choose not to extend the 'mere continuation' exception to include the broader notion of a 'substantial continuation.'" *Atchison, Topeka & Santa Fe Ry. Co. v. Brown & Bryant Inc.*, 159 F.3d 358, 364 (9th Cir. 1998). This comment appeared to reflect the idea that the appeals court could revise the federal common law at some later point but that it chose not to do so in *Atchison* due to the adequacy of the existing rule.

⁴³⁴ The *Carolina Transformer* case reviewed asset purchaser liability rules applied by the district court and it upheld the trial court's adoption of the more liability-producing "substantial continuity" test. *United States v. Carolina Transformer Co.*, 978 F.2d 832, 840 (4th Cir. 1992). Curiously, Judge Widener believed that flexible, common law rules would advance the CERCLA goals of 1) deterring evasion of cleanup liability and 2) promoting uniformity in liability rules. These two goals appear in tension if not inconsistent with each other. *Id.* at 837.

federal law,⁴³⁵ they are choosing a "common law" test based on "traditional" rules rather than that of a given state,⁴³⁶ and they approach cases "on the assumption that federal common law supplies the rule of decision."⁴³⁷ Although unclear about exactly what kind of judicial action they are taking and not referring to the Supreme Court's directives on common law decision making, these courts broadly construe their powers, finding in a number of instances that the substantial continuity exception—not a majority rule—should or could be the rule of decision.⁴³⁸ These courts appear to be willing to set the asset purchaser liability rules according to their views of what justice and CERCLA policies demand. Frequently, they cite the fair and equitable administration of the law⁴³⁹ as well as the need to foster national uniformity in rules and the blocking of forum shopping by PRPs. These courts also feel free to make and change the rules as their perception of the needs change. The conclusion to be drawn from these case decisions is that many federal appellate courts have been willing to function as common law decision makers even if they did not admit to doing so.

Fourth. The final category of decisions is represented by the most recent cases and they, at least, mention the federal common law decisional methodology established by the Supreme Court in the *Kimbell Foods* line of cases. The most prominent example of this viewpoint is the First Circuit's decision in *United States v. Davis*. *Davis* represents a court directly acknowledging the choice of law issue before it and employing the Supreme Court's suggested technique without regret. This view accepts the fact that federal courts are making common law or non-statutory rules of decision, but it is presumptively using state law to fill in the substantive rule. While recognizing the autonomy that a number of other circuits had demonstrated in using their common law powers to find a non-state law "federal substantial continuity test" applying to asset purchase fact situations, Judge Lipez stayed close to the First Circuit's decisional methodology previously announced in the *John S. Boyd Co.* case and concluded that "the majority rule is to apply state law 'so long as it is not hostile to the

⁴³⁵ *United States v. Mexico Feed & Seed Co.*, 980 F.2d 478, 487 n.9 (8th Cir. 1992).

⁴³⁶ *Betkoski*, 99 F.3d at 519.

⁴³⁷ *North Shore Gas Co. v. Salomon, Inc.*, 152 F.3d 642, 651 (7th Cir. 1998).

⁴³⁸ *Mexico Feed & Seed*, 980 F.2d at 488 (adopts the "substantial continuity" test by concluding that under CERCLA that test is "justified" to attach liability to responsible parties); *Betkoski*, 99 F.3d at 519-20 (adopts the "substantial continuity" test at a party's urging after concluding that the test is *more consistent* with CERCLA's goals); *North Shore Gas*, 152 F.3d at 654 n.8 (adopts "mere continuity" test after noting that the "substantial continuity" test had not been argued but suggesting that it might apply in the right circumstances). No court ever explains the reasoning behind any of these assertions or conclusions.

⁴³⁹ *North Shore Gas*, 152 F.3d at 650.

federal interests animating CERCLA.”⁴⁴⁰ This “majority rule” was drawn from the *Kimbell Foods* tradition as well as the more recent *Bestfoods* decision, which the court characterized as leaving little room for the creation of a federal rule of liability under CERCLA.⁴⁴¹ Under *Davis*, the federal court’s main task was twofold: 1) to identify the relevant state law principle and 2) to decide whether its use “would frustrate any federal objective.”⁴⁴² Finding no evidence of such “frustration,” the court summarily concluded that the Connecticut state law was the “correct test for determining successor liability.”⁴⁴³ The Supreme Court would be pleased to know that at least one federal circuit was heeding its direction.

B. *The Surprising Case of “Judicial Amnesia” in the CERCLA Asset Purchaser Cases*

1. *What Decisional Methods Don’t the Federal Courts Follow?*

If one only read the opinions of the United States Supreme Court and assumed lower federal court fidelity, one would believe that all courts encountering the CERCLA asset purchaser liability question would carefully and cautiously apply the *Kimbell Foods/O’Melveny & Meyers* prescription for interstitial common law development. By this it is meant that they would first look to the rules provided under state corporate successorship law to set the presumptive benchmark and then they would decide whether these rules “substantially” conflicted with the policies contained in CERCLA. If there was no such conflict, the state law would serve as the federal common law based rule of decision. On the other hand, if these state rules did seriously interfere with the achievement of CERCLA policies, the judges would be permitted under their common law powers to fashion another rule of decision more consistent with the statutory goals. Lawsuits would presumably focus on the questions of whether interstitial common law was warranted and whether a “substantial conflict” with federal law existed. At least, this would be the world view under a pristine vision of lower court obedience to Supreme Court mandate. As the prior discussion reveals, this ideal of a restrained federal judiciary operating within narrow bounds of decisional authority plainly does not exist. Federal courts desire to judge controversies and to choose their own rules of decision unhindered by constraining principles announced from above.

⁴⁴⁰ United States v. Davis, 261 F.3d 1, 54 (1st Cir. 2001).

⁴⁴¹ *Id.*

⁴⁴² *Id.* In *Davis*, the asset purchaser corporate law principle was derived from Connecticut law based on a provision in the asset purchase agreement between the buyer and seller of the assets. *Id.* at 53 n.48. In a more contested case on this issue, the selection of which state law controls could be extremely important should there be a variation between law of the different states. The federal court must also determine what the law of the state actually is and this requires a degree of discretion as well.

⁴⁴³ *Id.* at 54.

What explains this general avoidance of Supreme Court direction in this area of choice of law? Is this an act of poor case briefing by parties, inadequate research by law clerks or straightforward judicial defiance? It is difficult to assign a clear, singular reason for the observed phenomena. While it is true that parties have failed to brief and present the *Kimbell Foods* argument, it is also correct to note that courts possess a *de novo* power to announce what the relevant principles of law are in a given case. Courts have also ignored this precedent when it has been brought to their attention. Federal judges can also instruct their clerks to research a particular line of reasoning or authority and they can direct the parties to brief issues that were not presented to the courts in the first place. But with the exception of the First Circuit in the *United States v. Davis* litigation, this formal approach has largely been the "road not taken" and an explicit example of intentional judicial avoidance.⁴⁴⁴

2. Explaining "Judicial Amnesia"

There are several plausible explanations for this fact. *First*, courts and litigants may be confused by the conceptual complexity of the federal common law approach of giving interstitial meaning to federal statutes. The doctrine in this area may be hard to fathom and more difficult to mold into a successful argument. It may be commonly believed that federal common law is only available in narrow situations and that it is not readily available for "filling in" statutory meaning in cases such as the asset purchaser litigation. *Second*, perhaps because they are so used to disputing matters of statutory interpretation, parties may tend by intellectual habit or past practice to argue that a statute should be "interpreted" in a certain way even if there is no specific congressional guidance on the particular outcome. Arguing for a particular interpretation of a "silent" statute may actually give litigants the opportunity to persuade a willing court to "make law" in the name of "interpretation." From the Court's point of view, taking this supposed "interpretive approach" may allow them to feel comfortable in doing what they might consider to be a traditional judicial function—interpreting existing legal principles. By embracing this interpretive characterization, judges could then avoid the criticism that they were usurping the legislative function of Congress and legislating from the bench.

Third, courts, even federal courts, like to judge matters coming before them. This simple statement has particular resonance in liability-assigning

⁴⁴⁴ It is worth noting that the United States Supreme Court has *itself* forgotten to follow the decisional methodology that it set out for the lower federal courts to follow in *Kimbell Foods* and its progeny. In fact, a careful review of the *Bestfoods* decision, where Justice Souter indicated that state law should provide the rule of decision, does not even make reference to the *Kimbell Foods* case as support for the direction. See *United States v. Bestfoods*, 524 U.S. 51 (1998). Apparently, even the Supreme Court can fall prey to the same practices followed by the other federal courts.

cases such as the CERCLA asset purchaser litigation that has been the subject of this article. They wish to weigh the evidence and give a "fair" judgment for one party or the other. Expressed in reverse, courts want to prevent inequitable results from happening especially when there is an important policy value at stake. Functioning this way, federal courts, like their state counterparts, desire to independently sort through the relevant facts and to arrive at a just solution. By following this "judging impulse," federal judges apparently behave much the same as the state judiciary despite their narrower decisional focus.

Fourth, federal courts may view their role as being "implementers" of an important federal public health and safety law having a high degree of social, environmental, and financial significance. This is especially true since the statute at issue—CERCLA—was so poorly drafted, leaving so many critical legal questions unanswered. Stepping into this role of furthering Congress' intent would appear natural since CERCLA is viewed by many courts as a necessary, "make the polluter pay" law whose goals should be reinforced. Within the context of the asset purchaser liability issue, federal judges might not want (what they believe to be) "responsible" parties to escape hazardous waste site cleanup costs through the tactical use of corporate succession theories and transactional structuring devices. With this outlook, these courts may be willing to identify legal theory that will provide powerful support for the policies underlying the CERCLA statute.

Fifth, and finally, these courts might actually be demonstrating judicial defiance of the Supreme Court's directive to employ state law as the rule of decision in this kind of case. Although this may sound like heresy in a court system designed in a hierarchical fashion, this may actually represent the reality. The lower federal courts do *not* conceive of themselves as merely automatons mindlessly applying state law in federal cases. Federal judges, usually no shrinking violets, want to judge cases and they wish to apply their own judicial discretion in reaching their results. Having a convenient case of "judicial amnesia" in these instances also carries little risk of reversal since the Supreme Court is extremely unlikely to hear such a case and as yet has not heard one. In the end, it is clear that, at least in this area of federal environmental law, the federal courts act more like state general jurisdiction courts exercising broad lawmaking powers, largely unrestrained by the limiting doctrines announced by the Supreme Court. The highest court might be the drummer, but the lower federal courts appear to be dancing to their own beat.