ARTICLES

THE SUN SETS ON FEDERAL COMMON LAW: CORPORATE SUCCESSOR LIABILITY UNDER CERCLA AFTER O'MELVENY & MEYERS

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I. Introduction

Liability under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)1 "has been described as 'a black hole that indiscriminately devours all who come near it.'"2 Once a party "is ensnared in the web of CERCLA liability, escape is near impossible."3 With an expansive liability regime of strict liability, retroactive application, and joint and several liabil-

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2 Long Beach Unified Sch. Dist. v. Godwin Cal. Living Trust, 32 F.3d 1364, 1366 (9th Cir. 1994) (quoting Jerry L. Anderson, The Hazardous Waste Land, 13 VA. ENVTL. L.J. 1, 6-7 (1993)).
3 Roslyn K. Myers, Note, Advanced Chemical Fingerprinting in Hazardous Waste Liability Under CERCLA, 6 FORDHAM ENVTL. L.J. 253, 271 (1995); see also United States v. Alcan Aluminum Corp., 990 F.2d 711, 721-22 (2d Cir. 1993) (observing that "one would suppose there is no limit to the scope of CERCLA liability" and seeking to avoid "such a harsh result" by allowing a defendant to avoid full liability when it can establish a reasonable basis for apportioning liability).
imposed with no clear requirement of causation and the exclusion of equitable defenses—CERCLA has been eroding an ever deeper channel in the law, sparing few traditional limitations on liability.

Indeed, in an unceasing eagerness to further augment the pool of parties potentially liable for a hazardous waste site, several courts reached beyond the language of the statute to formulate new judge-made rules when they deemed established legal principles insufficiently generous. In particular, some federal courts set aside state law rules developed over the past century to govern corporate successorship and instead instituted a new federal common-law regime for determining when a purchaser of corporate assets should be held to succeed to the liabilities of the selling entity. These courts displaced traditional rules to impose liability under a novel “continuity of enterprise” theory that seemed to rest, not on a solid conception of the corporate form or genuine responsibility for prior disposal of hazardous substances, but on the desire to find more deep pockets to pay for environmental cleanup. The roundhouse swing of CERCLA liability thus threatened to topple care-

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5 See John Copeland Nagle, CERCLA, Causation, and Responsibility, 78 Minn. L. Rev. 1493, 1504-16 (1994) (explaining that CERCLA imposes liability upon certain categories of persons and requires that the defendant have some connection to the plaintiff’s incurrence of cleanup costs, but does not directly require a plaintiff to “establish that the defendant’s action caused—either in fact or proximately—the contamination at the site”).

6 Those circuit courts to have addressed the issue have ruled that equitable defenses such as laches, unclean hands, and caveat emptor are unavailable in CERCLA actions, although equitable considerations may be mitigating factors. Town of Munster v. Sherwin-Williams Co., 27 F.3d 1268, 1270-71 (7th Cir. 1994) (denying laches defense in CERCLA action); Veliscol Chem. Corp. v. Enenco, Inc., 9 F.3d 524, 530 (6th Cir. 1993) (denying laches defense in CERCLA action); General Elec. Co. v. Litton Indus. Automation Sys., Inc., 920 F.2d 1415, 1418 (8th Cir. 1990) (denying unclean hands defense in CERCLA action); Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86, 89-90 (3d Cir. 1988) (denying caveat emptor defense in CERCLA action).

7 See, e.g., United States v. Carolina Transformer Co., 978 F.2d 832, 837 (4th Cir. 1992) (stating that “even legitimate resort to state law” may constitute an “evasion by a responsible party” of CERCLA liability, thus justifying a broader federal common-law rule of corporate successorship); Kleen Laundry & Dry Cleaning Servs., Inc. v. Total Waste Mgmt. Corp., 817 F. Supp. 225, 233 (D.N.H. 1993) (stating that adherence to traditional state law rules for corporate successor liability would not “further the goals of CERCLA”); United States v. Western Processing Co., 751 F. Supp. 902, 905 (W.D. Wash. 1990) (adopting a broader rule of corporate successor liability than traditional state law because a “more expansive view of successor liability under CERCLA fosters a more equitable sharing of remediation costs”).

8 See infra Part III.A.1 (discussing the rise of the “continuity of enterprise” theory).
fully balanced and long established state law principles of corporate successor liability.

But then came the Supreme Court’s decision in *O'Melveny & Myers v. Federal Deposit Insurance Corp.* 9 In that landmark decision, the Court ruled that judicial creation of a federal rule of decision is warranted only in “extraordinary cases.”10 The Court firmly rejected formulation of a federal common-law rule to enhance the ability of the Federal Deposit Insurance Corporation, acting in its capacity as receiver for a savings and loan corporation, to recover losses from legal counsel of the failed institution for alleged malpractice.11 Before a federal court may resort to judge-made law, the Court held, a compelling showing must be made that a federal common-law rule is essential to achieve a federal statutory objective.12

The thesis of this Article is that federal common lawmaking under CERCLA in the context of corporate successor liability was illegitimate from its inception and has now been thoroughly undermined by the Supreme Court’s decision in *O'Melveny & Myers.*13 Federal courts should not deviate from the straight and narrow path of limited federal jurisdiction and enter into the unfamiliar territory of common-law judging, except in the most unusual of circumstances, and subject to clear statutory authorization and meaningful legislative guidance. When a court assumes common lawmaking powers, it departs from the circumscribed federal judicial role and engages in a policy analysis outside the scope of its proper prerogative of statutory adjudication. In a manner akin to a federal court’s duty to be assured of its own subject matter jurisdiction, the question of common lawmaking authority goes to the essence of the federal judicial power.14

Federal common law is especially inappropriate when its effect is to displace organic state law in an area of traditional state concern, such as the creation, status, successorship, and dissolution of corporations. “Congress has never indicated that the entire corpus of state corporation law is to be replaced simply because a plaintiff's

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10 Id. at 89.
11 Id. at 83-89.
12 Id. at 87-88.
13 See generally infra Parts IV and VI (discussing corporate successor liability before and after *O'Melveny & Meyers*).
14 See Northwest Airlines, Inc. v. Transportation Workers Union, 451 U.S. 77, 95 (1981) (holding that federal courts “unlike their state counterparts, are courts of limited jurisdiction that have not been vested with open-ended lawmaking powers”).
cause of action is based upon a federal statute." Fabrication of a new federal common law regime regarding a matter grounded in corporation law would disrupt existing commercial relationships and prove unfair to those who had legitimately relied upon longstanding state law principles.

In adopting the traditional standards of corporate successor liability, the states have made a considered policy decision to balance the equitable end of preserving the responsibility of a true corporate successor—that is, a mere continuation of a predecessor corporation in another form—against the goal of promoting the free transferability of assets in a dynamic economy through a general rule of non-liability for the bona fide purchaser. Thus, determination of the proper test for corporate successorship entails a weighing of conflicting interests and contrasting policies. Our system of government reserves this role either for the policymakers of the legislative and executive branches of the federal government or for the several states:

Federal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision. The enactment of a federal rule in an area of national concern, and the decision whether to displace state law in doing so, is generally made not by the federal judiciary, purposefully insulated from democratic pressures, but by the people through their elected representatives in Congress.

Although federal law as specified in the express provisions of the statute ultimately controls the issue of liability under CERCLA, "[c]ontroversies . . . governed by federal law[ ] do not inevitably require resort to uniform federal rules." Frequently, state law is adopted to provide the interstitial rules that a federal statute leaves unresolved. Indeed, under the Rules of Decision Act the "laws of the several states" are to be "regarded as rules of decision in

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16 See infra Part VI.B.3 (describing how adoption of a new federal common-law rule unsettles legitimate expectations).
17 See generally infra Part II.C (discussing law of corporate successorship).
civil actions in the courts of the United States” unless a federal statute, treaty, or constitutional provision “otherwise require[s] or provide[s].” Congress has not acted in CERCLA to displace state corporation law nor indicated that this is one of those “few and restricted” instances in which federal common law may be used to formulate a uniform federal rule of decision.

Prior to the Supreme Court’s decision in O’Melveny & Myers, the federal courts of appeals were divided on whether federal common law may be created to supply a rule of decision on corporate successor liability. Those decisions adopting judge-made rules were vulnerable when rendered, as courts failed to support this conclusion with relevant legislative authority, neglected to apply the governing judicial test for determining the propriety of federal common law (as articulated by the Supreme Court in United States v. Kimbell Foods, Inc.), and departed from the otherwise careful pattern of judicial deference to state corporation and con-

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22 See Wheelin v. Wheeler, 373 U.S. 647, 651 (1963) (“The instances where we [the Court] have created federal common law are few and restricted.”). See generally infra Part VI.B.1-2 (discussing the absence of support in the language or objectives of CERCLA for implying a federal common-law rule of corporate successor liability).
23 Compare United States v. Carolina Transformer Co., 978 F.2d 832, 837-38 (4th Cir. 1992) (adopting federal common law for determining corporate successor liability under CERCLA), Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86, 91 (3d Cir. 1988) (same), and Louisiana-Pacific Corp. v. Asarco, Inc., 909 F.2d 1260, 1263 (9th Cir. 1990) (same), with Anspec Co. v. Johnson Controls, Inc., 922 F.2d 1240, 1245, 1248 (6th Cir. 1991) (denying need to fashion a federal common law rule for corporate successor liability), and John S. Boyd Co. v. Boston Gas Co., 992 F.2d 401, 406-09 (1st Cir. 1993) (adopting, for use in a CERCLA case arising in Massachusetts, the Massachusetts successor liability rule as stated in an earlier diversity of citizenship case, after discussing the federal common-law issue). See generally infra Part III.A (discussing the pre-O’Melveny & Myers circuit split on whether to adopt state law or federal common law as the rule for corporate successor liability under CERCLA). Subsequent to O’Melveny & Myers, two other circuits have weighed in on the issue. Compare B.F. Goodrich v. Betkoski, 99 F.3d 505, 519 (2d Cir. 1996) (holding, with citation to earlier decisions, that a “number of courts have recognized the importance of national uniformity and applied traditional rules of successor liability, rather than the successor liability law of a given state”), with Redwing Carriers, 94 F.3d at 1499-1502 (holding, with reliance on Anspec, that state law is appropriately adopted as the rule of decision regarding responsibility of limited partners for liability of a partnership under CERCLA). See generally Part V (discussing post-O’Melveny & Myers decisions in lower courts regarding federal versus state common law under CERCLA).
24 See infra Part III.B.1 (discussing the lack of support for a federal common-law rule in either the statutory text or legislative history).
25 See infra Part III.B.2 (discussing the circuit courts’ failure to apply the Kimbell Foods test).
tract law in other CERCLA contexts. Moreover, those courts overreached their authority because the exercise in federal common lawmaking was unnecessary to reach the result in those particular cases.

In any event, those decisions creating federal common law under CERCLA have been superseded by the Supreme Court’s intervening decision in *O’Melveny & Myers.* Since that authoritative decision, most federal courts have heeded the Supreme Court’s teaching, and the tide has turned against inference of federal common law under CERCLA. In *O’Melveny & Myers*, a unanimous Supreme Court emphasized the clear presumption against creation of federal common law, and in favor of adopting state law, as the rule of decision when a federal statute is silent on the matter.

In sum, the Supreme Court’s decision in *O’Melveny & Myers* has swept away the underpinnings of federal common-law claims in the CERCLA corporate successor liability context. *O’Melveny & Myers* signals the dawn of a new day for federal common law, or more accurately, the setting of the sun on federal common law under CERCLA. In light of that decision, the issue of the proper source of law for corporation issues under CERCLA must be examined afresh, with vigor, and with a jaundiced eye toward a “‘federal common law’ untethered to a genuinely identifiable (as opposed to judicially constructed) federal policy.”

II. CERCLA LIABILITY AND THE CORPORATE SUCCESSIONSHIP QUESTION

A. CERCLA Liability

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) was enacted as a response to “the vast problems associated with abandoned and inactive hazardous

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27 See infra Part III.B.3 (discussing the conflict between federal common law and prior decisions applying state law in the absence of express provision in CERCLA).
28 See infra Part III.B.4 (explaining how successor liability might have been imposed in each case under traditional rules).
30 See infra Part V (surveying post-O’Melveny & Myers court decisions on federal common law under CERCLA).
31 See O’Melveny & Myers, 512 U.S. at 87-89.
32 Id. at 89.
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waste disposal sites.”34 Congress’ goal in passing CERCLA was to facilitate the prompt cleanup of these sites and to make those responsible for the pollution pay for the costs of the cleanup.35 Liability under CERCLA is triggered when there is a release, a threatened release, or a disposal of a hazardous substance into the environment.36

Under CERCLA, four categories of covered “persons” are strictly liable for the response costs: (1) current owners and operators of the hazardous waste facility,37 unless they meet the requirements for attaining “innocent purchaser” status;38 (2) owners and operators of the hazardous waste facility at the time of the disposal of the hazardous waste;39 (3) those who “arranged for disposal” of the hazardous substances, usually the generators of the waste;40 and (4) transporters of the hazardous substances who selected the disposal site.41 “The theory behind CERCLA is that everyone who had some hand in the creation of this dangerous situation must now pay to remedy it.”42

B. CERCLA and Corporate Liability

As outlined immediately above, CERCLA prescribes the type of “persons” who are liable for the costs of cleaning up a hazardous waste disposal site.43 The statute defines a “person” as “an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity,” or governmental entity.44 CERCLA, however, does not define “corporation,” nor does the legislative history contain any reference to corporations or their successors.45 Thus, there is no indication that Congress intended the term to possess anything other than its universally accepted meaning as an

35 Meghrig v. KFC W., Inc., 116 S. Ct. 1251, 1254 (1996) (stating that “the ‘two . . . main purposes of CERCLA’ are ‘prompt cleanup of hazardous waste sites and imposition of all cleanup costs on the responsible party’”) (quoting General Elec. Co. v. Litton Indus. Automation Sys., Inc., 920 F.2d 1415, 1422 (8th Cir. 1990)).
36 See United States v. CDMG Realty Co., 96 F.3d 706, 712 (3d Cir. 1996).
38 Id. §§ 9607(b)(3), 9601(35).
39 Id. § 9607(a)(2).
40 Id. § 9607(a)(3).
41 Id. § 9607(a)(4).
42 Anderson, supra note 2, at 11.
44 Id. § 9601(21).
45 See infra Part III.B (discussing the legislative history of CERCLA and the issue of corporate successor liability).
entity defined by state corporation law, since corporations are creatures entirely of state law.

As the word "corporation" presumably refers to that entity created and defined by state law, state law rules governing the change or evolution of that entity should be regarded as incorporated by implicit reference. Thus, the word "corporation," by its own terms, would encompass a corporate successor as defined by state law. Indeed, general principles of statutory construction confirm this understanding. Section 5 of Title 1 of the United States Code provides that "[t]he word '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.'" Citing this general definition of terms for the federal statutory code, the United States Court of Appeals for the Ninth Circuit has held that "the existence and status of corporations . . . should be determined by reference to the law of the state of their incorporation, unless the application of that law would conflict with federal policy."

C. Corporate Successorship Law

The traditional rule in the vast majority of states, "which is well settled, is that where one company sells or otherwise transfers all its assets to another company, the latter is not liable for the debts

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\footnote{See Long Beach Unified Sch. Dist. v. Godwin Cal. Living Trust, 32 F.3d 1364, 1368 (9th Cir. 1994) (holding that since CERCLA provides no definition of "owner," the term would be given its ordinary meaning under state law). See generally Part VI.B.1 (discussing statutory text of CERCLA as relevant to meaning of "corporation" and successor liability).}
\footnote{1 U.S.C. § 5 (1994); see also B.F. Goodrich v. Betkoski, 99 F.3d 505, 518 (2d Cir. 1996) (holding, in the context of successor liability under CERCLA, with quotation of 1 U.S.C. § 5, that "federal law provides a rule of construction that when the word 'company' or 'association' is used, it 'embrace[s] the words 'successors and assigns of such company or association'"); United States v. Mexico Feed & Seed Co., 980 F.2d 478, 486 (8th Cir. 1992) ("Congress must have considered the word 'corporation' [in CERCLA] to inherently include corporate successors.") (citing 1 U.S.C. § 5). One district court briefly held that corporate successors, whether determined by state or federal law, were wholly outside the scope of CERCLA liability because they were not specifically listed within the categories of potentially responsible parties. Anspec Co. v. Johnson Controls, Inc., 734 F. Supp. 793, 795-96 (E.D. Mich. 1989). The decision was reversed by the Sixth Circuit, which interpreted the term "corporation" in light of its ordinary and generally accepted meaning, applied the rule of construction stated in 1 U.S.C. § 5, looked to the remedial objectives of CERCLA, and held Congress had included successor corporations, as determined by state law, within the description of entities potentially liable under CERCLA. Anspec Co. v. Johnson Controls, Inc., 922 F.2d 1240, 1245-47 (6th Cir. 1991). No other court has followed the Anspec district court down its interpretive dead-end and excluded corporate successors from the statute.}
\footnote{United States v. Polizzi, 500 F.2d 856, 907 (9th Cir. 1974); see also infra Part VI.B.2 (rebutting the argument that state law conflicts with federal policy under CERCLA).}
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and liabilities of the transferor."\textsuperscript{49} This rule of non-liability for asset acquisitions, established at a time when the courts were first grappling with the corporate form itself, arose out of the bona fide purchaser rule, which provides that one who takes assets for value and in good faith takes them free of the claims of creditors.\textsuperscript{50} The rule promoted the free alienability of property; without it, "commercial transactions could not go on at all."\textsuperscript{51}

The courts recognized early, however, that corporations might also use the corporate form fraudulently to escape their debts and liabilities.\textsuperscript{52} Accordingly, the courts quickly developed exceptions that balanced the desire to encourage transfers of assets in a dynamic economy with the need to protect creditors from fraudulent transactions.\textsuperscript{53} Thus, the purchaser of assets will be liable to a predecessor’s creditors when: (1) there is an express or implied agreement of assumption of debts; (2) the transaction amounts to a merger or consolidation of the two corporations; (3) the purchasing corporation is a mere continuation of the seller; or (4) the transfer of assets to the purchaser is for the fraudulent purpose of escaping liability for the seller’s obligations.\textsuperscript{54}

\begin{itemize}
  \item \textsuperscript{50} See, e.g., Graham v. Railroad Co., 102 U.S. 148, 153 (1880); Mattingly v. Nye, 75 U.S. (8 Wall.) 370 (1869).
  \item \textsuperscript{51} \textit{Ex Parte} Ruffin, 31 Eng. Rep. 970, 975, 6 Ves. 119, 128 (Eng. Ch. 1801); see also Hoard v. Chesapeake & Ohio Ry., 123 U.S. 222, 226-27 (1887) (asserting that successor liability for asset purchases "would put an end to purchases of railroads").
  \item \textsuperscript{52} Anderson, \textit{supra} note 2, at 36.
  \item \textsuperscript{53} Id.
  \item \textsuperscript{54} 15 William M. Fletcher, \textit{supra} note 49, § 7122. For one of the earliest statements of the general rule and its exceptions, see Austin v. Tecumseh Nat'l Bank, 68 N.W. 628, 629-30 (Neb. 1896). For more recent discussions, see Wallace v. Dorsey Trailers Southeast, Inc., 849 F.2d 341, 343 (8th Cir. 1988); Phillips v. Cooper Labs., Inc., 264 Cal. Rptr. 311, 314 (Cal. 1989).

A handful of states, including California, have “created, in effect, a fifth exception to the general rule which imposes liability under certain circumstances for the manufacture of defective products.” Gee v. Tenneco, Inc., 615 F.2d 857, 863 (9th Cir. 1980) (citing Ray v. Alad Corp., 136 Cal. Rptr. 574 (Cal. 1977)); see also Martin v. Abbott Labs., 689 P.2d 368, 388 (Wash. 1984) (adopting the \textit{Ray} rule in product liability cases). This “product-line” exception has no relevance in the CERCLA liability context. As the Sixth Circuit recently ruled, a state product-line successorship rule is, by its nature and purpose, limited to products liability cases and does not extend to CERCLA environmental liability cases. City Management Corp. v. U.S. Chem. Co., 43 F.3d 244, 251-53 (6th Cir. 1994). In any event,
These exceptions to the rule of non-liability for asset acquisition developed historically for the primary purpose of preventing fraud.\textsuperscript{55} Accordingly, these exceptions are narrow in scope. The mere continuation exception, for example, attempts to distinguish a bona fide sale of assets between two distinct corporations from a fraudulent reorganization by a single corporation.\textsuperscript{56} As one court put it, the mere continuation case is one where the predecessor attempts to "escape liability by merely changing hats."\textsuperscript{57} Thus, the important factor in a mere continuation case is not whether the business operations of the seller are carried on by a new enterprise, but whether the corporate identity remains the same due to a continuation of the same ownership and management.\textsuperscript{58} Likewise, under the "de facto" merger exception, courts require an exchange of stock for the assets purchased, thereby merging the ownership of the two companies; otherwise, the two corporate entities "remain distinct and intact."\textsuperscript{59} Similarly, the fraudulent transfer exception applies only when the party asserting the purchaser's liability as a corporate successor can establish by clear and convincing evidence that inadequate consideration was paid for the selling corporation's

\textsuperscript{55} See, e.g., Blair v. St. Louis, H. & K. R. Co., 22 F. 36, 37 (E.D. Mo. 1884) ("[C]orporations are . . . often formed for the mere purpose of enabling an old corporation . . . to escape liabilities, and at the same time transfer all assets to a new corporation. . . ."); Hibernia Ins. Co. v. St. Louis & New Orleans Transp. Co., 13 F. 516, 520 (E.D. Mo. 1882) ("The evidence is clear enough that there was a hidden purpose in the change [of organization] to escape possible liabilities which equity does not tolerate. A mere change of name cannot avoid obligations.").

\textsuperscript{56} Anderson, \textit{supra} note 2, at 37.

\textsuperscript{57} Baltimore Luggage Co. v. Holtzman, 562 A.2d 1286, 1293 (Md. Ct. Spec. App. 1989).\textsuperscript{58} See, e.g., Carstedt v. Grindeland, 406 N.W.2d 39, 41 (Minn. Ct. App. 1987) (holding that even though the purchasing corporation used the same equipment, location, and operations, there was no mere continuation where the ownership changed); Cashar v. Redford, 624 P.2d 194, 196 (Wash. Ct. App. 1981) (holding that retention of trade name and good will did not constitute continuation where management and ownership changed).

\textsuperscript{59} Bud Antle, Inc. v. Eastern Foods, Inc., 758 F.2d 1451, 1458 (11th Cir. 1985); see also Travis v. Harris Corp., 565 F.2d 443, 447 (7th Cir. 1977) ("[A]bsent continuity of shareholder interest, the two corporations are strangers, both before and after the sale.").
assets. In essence, the fraud exception "is merely an application of the law of fraudulent conveyances." In sum, the traditional exceptions to the rule of asset purchaser non-liability are based upon a careful balance between protection of bona fide purchasers and prevention of abuse of the corporate form. These principles have been relied upon in countless legitimate business transactions for decades by those seeking to transfer assets to those who can better use them. The desire to increase the number of parties available to cover cleanup costs in CERCLA cases does not justify disregard of these established rules of state corporation law.

III. Successor Liability Under CERCLA in the Courts Before O'Melveny & Myers

A. The State of the Law on Successor Liability Under CERCLA

1. The Rise of the "Continuity of Enterprise" Theory

In the CERCLA successor liability context, several federal courts have become impatient with the traditional rules that have evolved in the states and have declared their independent authority as a matter of public policy to adopt more expansive rules of corporate successorship. As a way to enlarge the pool of parties available to pay cleanup costs, these courts have become enamored with a newly fashioned "continuity of enterprise" exception to the general rule of non-liability for asset purchasers. Because this approach has been rather uniformly rejected among the states,

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61 Grand Labs., Inc. v. Micon Labs, 32 F.3d 1277, 1281 (8th Cir. 1994).

62 See, e.g., United States v. Carolina Transformer Co., 978 F.2d 832, 837 (4th Cir. 1992) (stating that "even legitimate resort to state law" may constitute an "evasion by a responsible party" of CERCLA liability, thus justifying a broader federal common-law rule of corporate successorship); Hunt's Generator Com. v. Babcock & Wilcox Co., 863 F. Supp. 879, 883 (E.D. Wis. 1994) (ruling that a "broadened test of successorship is used in situations in which public policy dictates that traditional notions of successor liability should be overridden").

63 See, e.g., Carolina Transformer Co., 978 F.2d at 837.

these federal courts have had to assume federal common lawmaking powers to escape the bounds of state corporation law. Invoking the rationale that expanding liability will further the remedial goals of CERCLA, these courts have boldly imposed responsibility upon purported successors that would not have been liable under traditional state law rules.\textsuperscript{65}

This "continuity of enterprise" exception\textsuperscript{66} threatens to engulf the traditional rule of non-liability for asset purchasers. Instead of focusing upon whether the seller's corporate entity continued in the buyer, as the traditional exceptions do,\textsuperscript{67} the continuity of enterprise theory focuses on whether the buyer continued the successor's business operation with the same work force.\textsuperscript{68} Thus, liability will be imposed if the purchaser used the same location as the seller, retained the same employees, produced the same product, kept the same name, held itself out as a continuation of the previous enterprise, or manifests some combination of these factors.\textsuperscript{69} Continuity of ownership, so crucial under the traditional mere continuation exception,\textsuperscript{70} is dispensable, or at least sharply diminished in importance, as an element under this theory.\textsuperscript{71} Instead, liability

\textsuperscript{65} See Atlantic Richfield Co. v. Blosenski, 847 F. Supp. 1261, 1286 (E.D. Pa. 1994) (stating "that CERCLA's broad remedial goals will be served by application of the substantial continuity test to determine successor liability of an asset purchaser"); Kleen Laundry & Dry Cleaning Servs., Inc. v. Total Waste Mgmt. Corp., 817 F. Supp. 225, 233 (D.N.H. 1993) (stating that adherence to the traditional state law rules for successor liability would not "further the goals of CERCLA"); United States v. Western Processing Co., 751 F. Supp. 902, 905 (W.D. Wash. 1990) (adopting a broader rule of corporate successor liability than traditional state law after concluding a "more expansive view of successor liability under CERCLA fosters a more equitable sharing of remediation costs").

\textsuperscript{66} This new exception is also known as the "continuity of business enterprise" or the "substantial continuity" exception. B.F. Goodrich v. Betkoski, 99 F.3d 505, 515 (2d Cir. 1996); Western Processing Co., 751 F.Supp at 904.

\textsuperscript{67} See supra Part II.C (discussing traditional exceptions to the general rule that a successor is not liable for the debts and liability of a transferee).

\textsuperscript{68} The continuity of enterprise theory considers not only whether there is an identity of stock, stockholders, and directors, but also whether the successor: (i) retains the same employees; (ii) retains the same supervisory personnel; (iii) retains the same production facilities in the same location; (iv) continues producing the same products; (v) retains the same name; (vi) maintains continuity of assets and general business operations; and (vii) holds itself out to the public as the continuation of the previous corporation.

Mark F. Rosenberg, Parent, Successor, and Alter Ego Liability Concerns in the Transactional Setting, THE BRIEF 29, 60 (Summer 1996).


\textsuperscript{70} See supra Part II.C (discussing the traditional rules of corporate successor liability).

\textsuperscript{71} See Mexico Feed & Seed Co., 980 F.2d at 488 n.10 ("The test considers an identity of stock, stockholders, and officers, but not determinatively.").
is imposed under a supposed "common sense" approach that examines a multitude of factors and assigns little weight to the traditional restrictions on passing liability to an asset purchaser.\textsuperscript{72}

2. Mistaken Reliance on the Supreme Court's Golden State Bottling Decision for Successor Liability Rule

Some courts have professed to rely upon the Supreme Court's decision in \textit{Golden State Bottling Company v. National Labor Relations Board}\textsuperscript{73} as authority for the adoption of an expansive continuity of enterprise theory for successor liability under CERCLA.\textsuperscript{74} In \textit{Golden State Bottling}, the Supreme Court held that an employer's liability under the National Labor Relations Act (NLRA)\textsuperscript{75} for wrongful discharge of an employee extended to a new entity that had continued the business enterprise and retained the same unit of employees.\textsuperscript{76} For several reasons, this decision is inapposite authority for enlarging corporate successor liability under CERCLA.


First, the \textit{Golden State Bottling} Court simply was not enunciating a corporate successor liability rule. The foundational question underlying \textit{Golden State Bottling} was whether an employee unit organized under the federal labor laws survives beyond the sale of the business and into the continued operation of that business with the same work force by another employer.\textsuperscript{77} This is a very different inquiry from that of corporate successor liability for the general debts and obligations of a predecessor corporation. The \textit{Golden State Bottling} ruling was animated by a desire to preserve an organized employee work force as a statutorily-created constituency unit

\textsuperscript{72} \textit{See Distler, 741 F. Supp. at 642 n.4.}
\textsuperscript{73} 414 U.S. 168 (1973).
\textsuperscript{74} \textit{See, e.g., Mexico Feed & Seed Co., 980 F.2d at 487-89; Washington v. United States, 930 F. Supp. 474, 478 (W.D. Wash. 1996); United States v. Western Processing Co., 751 F. Supp. 902, 905 (W.D. Wash. 1990); Distler, 741 F. Supp. at 642-43; see also B.F. Goodrich v. Betkoski, 99 F.3d 505, 519 (2d Cir. 1996) (citing Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 43 (1987), the latest in the \textit{Golden State Bottling} line of cases involving successor employers for purposes of the federal labor laws, in support of an expansive "continuity of enterprise" rule); United States v. Carolina Transformer Co., 978 F.2d 832, 838 (4th Cir. 1992) (same).}
\textsuperscript{75} 29 U.S.C. §§ 141-197 (1994).
\textsuperscript{76} \textit{Golden State Bottling, 414 U.S. at 174-85.}
\textsuperscript{77} \textit{See id. at 182-83 n.5.}
in the labor-management bargaining process.\textsuperscript{78} By ensuring the continued integrity of the employment unit, the Court was able to protect statutory employee rights despite a change in the identity of the employer.\textsuperscript{79}

The content of the continuing enterprise test articulated in the \textit{Golden State Bottling} opinion further reveals its singular labor-relations essence. For labor-relations purposes, the identification of a successor employer naturally focuses upon such factors as the continuation of the same business and retention of the same employees and managers\textsuperscript{80}—which are to be viewed from the perspective of the employee and in terms of the continuation of the employment relationship.\textsuperscript{81} Because of the defining labor-relations purpose behind the decision, the “paramount criterion” for determining employer successorship under \textit{Golden State Bottling} “is the continuity of the work force.”\textsuperscript{82} This central focus upon the continuity of the work force becomes misplaced when the subject changes from the responsibility of a new employer to an established employee unit to the question of third-party claims against a

\textsuperscript{78} Under the NLRA, “[t]he bargaining unit provides the formal arena of the entire collective bargaining process.” \textit{I THE DEVELOPING LABOR LAW} 448 (Patrick Hardin, ed., 3d ed. 1992). Section 9(a) of the NLRA, 29 U.S.C. § 159(a), provides that “[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining.” Consequently, an employee bargaining unit organized under the federal labor laws is an electoral, constituency unit, similar to that represented by an elected official in the political realm, and thus has a meaningful degree of independent existence. \textit{See} Idaho Statesman v. NLRB, 836 F.2d 1396, 1398 n.1 (D.C. Cir. 1988) (“[A]n appropriate bargaining unit is more precisely an electoral unit; it demarcates those employees or classes of employees that form a union's constituency.”).

\textsuperscript{79} \textit{Golden State Bottling}, 414 U.S. at 183-84; \textit{see also id.} at 182 n.5 (explaining that, for purposes of imposing continuing statutory labor-relations responsibilities, the crucial fact is “a continuity in the 'employing industry'”). The Court relied upon its earlier decision in NLRB v. Burns Int'l Sec. Servs., Inc., 406 U.S. 272 (1972), which held that a new company hiring a majority of the employees of the old employer was obliged to bargain with the existing certified bargaining representative “since the bargaining unit remained essentially unchanged.” \textit{Golden State Bottling}, 414 U.S. at 183.

\textsuperscript{80} \textit{See id.} at 170-71 (observing that the successor maintained the same business in operation with the same employees and supervisors).

\textsuperscript{81} \textit{See id.} at 184.

\textsuperscript{82} \textit{I THE DEVELOPING LABOR LAW, supra} note 78, at 781. \textit{See also} B. Glenn George, \textit{Successorship and the Duty to Bargain}, 63 \textit{NOTRE DAME L. REV.} 277, 287 (1988) (stating that the NLRB “has never found successor liability unless a majority of the new employer's work force had been employed by the predecessor” and that “the work force continuity factor seems to be not only necessary, but almost determinative in establishing the successor's obligations”).
purported successor. The latter is directly and appropriately addressed by the traditional rules of successor liability.\textsuperscript{83}

In sum, the Court designed the \textit{Golden State Bottling} rule to protect the specific statutory rights of employees in a continuing labor unit adopted by a new employer, and not to formulate a general standard of corporate successor liability. Accordingly, the continuing enterprise standard for extending certain labor-practice obligations to a new employer under federal labor law cannot be translated to the context of corporate successorship under CERCLA.

Subsequent Supreme Court decisions confirm that \textit{Golden State Bottling} should be understood as a structural labor-relations decision and not as a general rule of corporate successor liability. Even in the labor-relations context, a successor employer is not responsible for the contractual obligations of the predecessor employer to the employees. In \textit{Fall River Dyeing & Finishing Corp. v. NLRB},\textsuperscript{84} the Court clarified this, stating that while successor employers were bound to recognize the employees’ union representative, new employers were entitled “independently to rearrange their businesses.”\textsuperscript{85} Thus, “although the successor has an obligation to bargain with the union, it is ordinarily free to set initial terms on which it will hire the employees of a predecessor, and it is not bound by the substantive provisions of the predecessor’s collective-bargaining agreement.”\textsuperscript{86} If the continuing enterprise rule originating in \textit{Golden State Bottling} were a true successor liability rule, then the new entity would fully succeed to the obligations of the predecessor, and especially to the collective bargaining agreement between the union and the prior employer.

In \textit{Howard Johnson Co. v. Detroit Local Joint Executive Board},\textsuperscript{87} the Court, in discussing the discrete obligations of successor employers, contrasted the “case where the successor corporation is the ‘alter ego’ of the predecessor, where it is ‘merely a disguised

\begin{footnotes}
\item[83] See \textit{supra} Part II.C (discussing the traditional rules of corporate successorship law).
\item[84] 482 U.S. 27 (1987).
\item[85] \textit{Id.} at 40 (quoting John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 549 (1966)).
\item[86] \textit{Id.} (emphasis added and internal quotation marks omitted); see also Southward v. South Cent. Ready Mix Supply Corp., 7 F.3d 487, 493 (6th Cir. 1993) (“A successor employer cannot be bound by the substantive terms of a collective bargaining agreement negotiated and entered into by its predecessor merely because the successor’s business is a ‘substantial continuation’ of the predecessor’s business.”).
\item[87] 417 U.S. 249 (1974).
\end{footnotes}
continuance of the old employer.’”

When a successor is an “alter ego”—that is, when there is no “substantial change in its ownership or management”—“then the courts have had little difficulty holding that the successor is in reality the same employer, and is subject to all the legal and contractual obligations of the predecessor.”

In sum, before a corporation will be held subject to the expansive legal obligations of a predecessor, the corporation must be a true successor by virtue of perpetuated ownership and management. Thus, properly understood, the Supreme Court’s labor-relations cases affirmatively support, rather than undermine, the traditional rule demanding continuity of ownership and management before imposition of general successor liability upon a corporation.

b. Golden State Bottling Preserved Legitimate Expectations of Parties Involved

Second, the Golden State Bottling decision was specifically designed to preserve existing relationships and uphold legitimate expectations. The Court observed that when a new employer “has acquired substantial assets of its predecessor and continued, without interruption or substantial change, the predecessor’s business operations, those employees who have been retained will understandably view their job situations as essentially unaltered.”

The employees are likely to identify the new employer’s labor policies with those of the old employer, such that the successor’s failure to

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88 Id. at 259-60 n.5 (quoting Southport Petroleum Co. v. NLRB, 315 U.S. 100, 106 (1942)).

89 Id.; see also NLRB v. Hospital San Rafael, Inc., 42 F.3d 45, 50 (1st Cir. 1994) (noting the substantial distinction between the “alter ego” doctrine and the “narrower” and “far less reaching” successor employer rule in labor relations cases); NLRB v. Fullerton Transfer & Storage, Ltd., 910 F.2d 331, 336 n.6 (6th Cir. 1990) (noting that “the successorship doctrine is often confused with the alter ego doctrine” and explaining the difference: whereas under the alter ego theory the new corporation “will be held to all of the prior employer’s agreements and obligations,” the successor employer rule is used to determine whether the new employer has an obligation to bargain with the employee unit representative even when there has been a substantial change in ownership or management).

90 Even in a federal labor-relations context, the Supreme Court has considered state corporate successor law in determining whether a new employer has succeeded to particular obligations of the predecessor. In Howard Johnson, the Court distinguished an earlier decision in which a successor employer had been held bound to a collective bargaining agreement’s arbitration clause. See Howard Johnson, 417 U.S. at 253-59 (discussing John Wiley & Sons v. Livingston, 376 U.S. 543 (1964)). The Court explained the case as involving a merger of two corporations, which “was conducted against a background of state law that embodied the general rule that in merger situations the surviving corporation is liable for the obligations of the disappearing corporation.” Id. at 257 (quoting NLRB v. Burns Int’l Sec. Servs., 406 U.S. 272, 286 (1972)).

91 Golden State Bottling, 414 U.S. at 184.
remedy the predecessor's wrongful actions will be understood as a continuation of unfair labor practices. 92  

By contrast, as discussed in detail later in this article, 93 interposition of newly formed corporate successor liability rules under CERCLA will destroy commercial expectations, grounded in state law principles, between asset sellers and purchasers. As one commentator has concluded:

In the labor area, the Supreme Court has acted to preserve expectations which would otherwise be disrupted by the sale of an ongoing business. In the CERCLA area, [advocates of an expanded rule of successor liability are] asking for a retroactive abrogation of business arrangements, which would disrupt rather than continue settled expectations. 94

c. Golden State Bottling Arised in the Exclusively Federal Field of Labor Relations

Finally, the Golden State Bottling case arose in the unique context of labor relations, an area governed exclusively by federal law. The Supreme Court has broadly construed the preemptive force of the NLRA, ruling that when a matter is even "arguably subject" to regulation under the federal labor statutes, states must defer "to the exclusive competence of the [National Labor Relations Board]." 95 In enacting the NLRA, Congress quite deliberately intended to alter the traditional employment relationship, previously governed by state contract law, and created federal protec-

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92 Id.
93 See infra Part VI.B.3. (discussing ways in which a new federal common law would interfere with commercial relationships and transactions).
94 Light, supra note 49, at 83.
95 San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 245 (1959). In Golden State Bottling, the Court emphasized the National Labor Relations Board's (NLRB's) broad remedial powers under the NLRA. See Golden State Bottling, 414 U.S. at 175-77. By specific provision, the NLRA authorizes the NLRB "to take such affirmative action . . . as will effectuate the policies of this [Act]." 29 U.S.C. § 160(c) (1994). Thus, as explained recently by one circuit, the Golden State Bottling Court "was not attempting to define or create a continuity of enterprise rule; rather it was determining whether the issuance of a reinstatement and backpay order against a bona fide successor exceeded" the exceptionally broad remedial powers of the NLRB expressly conferred by the labor-relations statute. City Management Corp. v. U.S. Chem. Co., 43 F.3d 244, 253 (6th Cir. 1994) (rejecting federal common law for successor liability under CERCLA). In the labor-relations context, holding that a new employer operating the same enterprise inherits the statutory responsibilities arising out of an ongoing employment relationship falls comfortably within Congress' stated objectives for protection of employee rights under the NLRA.
tion for employee rights to engage in concerted labor activity.\textsuperscript{96} By contrast, there is no evidence in the text or legislative history of CERCLA that Congress desired to alter or displace state corporation law.\textsuperscript{97}

3. The Circuit Split Regarding Federal Common Law

In order for a federal court to formulate and impose a continuity of enterprise theory of successor liability under CERCLA, it must assume common law powers. Thus, rather than the wisdom of a particular rule of liability, the threshold question is the validity of judicially-devised rules of substantive liability. Before the Supreme Court's decision in \textit{O'Melveny & Myers v. Federal Deposit Insurance Corp.},\textsuperscript{98} the circuits were divided on whether federal judges possessed an undefined power of common lawmaking in the context of CERCLA corporate successor liability.

In 1988, the Third Circuit, in \textit{Smith Land & Improvement Corp. v. Celotex Corp.},\textsuperscript{99} first endorsed federal common law, but then cautiously suggested that successor liability standards in most states should guide the analysis.\textsuperscript{100} Two years later, in \textit{Louisiana-Pacific Corp. v. Asarco, Inc.},\textsuperscript{101} the Ninth Circuit suggested in one

\textsuperscript{96} See generally I \textsc{The Developing Labor Law}, \textit{supra} note 78, at 27-30 (discussing enactment of the NLRA in 1935 and the declaration of employee rights as the key provision of the statute); \textsc{Douglas L. Leslie, Labor Law in a Nutshell} 4-6 (2d ed. 1986) (same).

\textsuperscript{97} See \textit{infra} Part III.B.1 and Part VI. (discussing the absence of support for a federal common law rule in statutory text or legislative history, and explaining why the presumption in favor of state law as the rule of decision precludes creation of federal common law regarding successor liability under CERCLA).

\textsuperscript{98} 512 U.S. 79 (1994). See \textit{generally infra} Part IV (discussing the \textit{O'Melveny & Myers} decision).

\textsuperscript{99} 851 F.2d 86 (3d Cir. 1988).

\textsuperscript{100} \textit{Id.} at 91-92. For similar reasons, the Third Circuit subsequently determined that federal common law, and not state law, also governs when the corporate veil may be pierced to impose CERCLA liability upon the owner of a corporation, such as the parent of a subsidiary. Lansford-Coaldale Joint Water Auth. v. Tonolli Corp., 4 F.3d 1209, 1225 (3d Cir. 1993). \textit{But see} United States v. Cordova Chem. Co., 113 F.3d 572, 579 (6th Cir. 1997) (en banc) (rejecting a more expansive standard for holding a parent corporation financially responsible for pollution on a site owned by a subsidiary corporation, and instead applying state law, saying that, "[w]hile some may wish to extend the reach of CERCLA to maximize the impact of its remedies, nothing in the statute or its legislative history warrants the invocation by courts of vague, expansive concepts . . . which threaten the efficacy of time-honored limited liability protections afforded by the corporate form"); Joslyn Mfg. Co. v. T.L. James & Co., 893 F.2d 80, 82-83 (5th Cir. 1990) (concluding that holding parent corporations directly liable under CERCLA for their subsidiaries' activities "would dramatically alter traditional concepts of corporation law" without statutory support, and that the question of parent liability should be left to common law principles of corporation law).

\textsuperscript{101} 909 F.2d 1260 (9th Cir. 1990).
sentence that a federal common-law rule should apply to the CERCLA successor liability issue, accepting the Third Circuit's rationale that "Congress expected the courts to develop a federal common law to supplement the [CERCLA] statute."\textsuperscript{102} The Ninth Circuit agreed with the Third Circuit that the common-law rule should be drawn from "the traditional rules of successor liability in operation in most states" and declined to decide in that case whether a more expansive rule should be adopted.\textsuperscript{103} A uniform national rule was necessary, the Ninth Circuit argued, because CERCLA's purposes could be thwarted by the application of state law that unduly limited successor liability.\textsuperscript{104} The Asarco court feared that restricting the EPA's ability to obtain reimbursement would shift cleanup costs to the taxpayer, contrary to CERCLA's policy.\textsuperscript{105}

In 1992, the Fourth Circuit, in United States v. Carolina Transformer Co.,\textsuperscript{106} agreed that successor liability under CERCLA should be divined through federal common law and then more aggressively adopted the expansive continuity of enterprise theory as the federal rule.\textsuperscript{107} The Eighth Circuit, in United States v. Mexico Feed and Seed,\textsuperscript{108} declined to decide the federal common-law issue.\textsuperscript{109} However, the court suggested in dicta that the district court below was "probably correct" in applying federal law, given "the national application of CERCLA and fairness to similarly situated parties."\textsuperscript{110} Moreover, despite denying adoption of a federal common-law rule, the Eighth Circuit applied the continuity of enterprise theory because it wanted to "prevent[] those responsible for the wastes from evading liability through the structure of subsequent transactions."\textsuperscript{111}

By contrast, in Anspec Co. v. Johnson Controls, Inc.,\textsuperscript{112} decided in 1991, the Sixth Circuit held that it was inappropriate to adopt a federal common-law rule regarding CERCLA successor liability

\textsuperscript{102} Id. at 1263 (quoting Smith Land, 851 F.2d at 91-92).
\textsuperscript{103} Id. at 1263, 1265-66 (citing Smith Land, 851 F.2d at 92).
\textsuperscript{104} Id. at 1263 n.2.
\textsuperscript{105} Id.
\textsuperscript{106} 978 F.2d 832 (4th Cir. 1992).
\textsuperscript{107} Id. at 837-38.
\textsuperscript{108} 980 F.2d 478 (8th Cir. 1992).
\textsuperscript{109} Id. at 487 n.9.
\textsuperscript{110} Id.
\textsuperscript{111} Id. at 488.
\textsuperscript{112} 922 F.2d 1240 (6th Cir. 1991).
and applied state law to the question. Judge Kennedy, concurring in Anspec, discussed at length her conclusion that "the existence and status of a 'corporation' allegedly liable under [CERCLA] section 907 should be determined by reference to the law under which the 'corporation' was created." Thus, even prior to the Supreme Court's O'Melveny & Myers decision, the courts did not uniformly endorse a federal common-law regime of corporate successor liability under CERCLA.

B. The Vulnerability of Circuit Decisions Adopting Federal Common Law for Successor Liability Under CERCLA

Even without the intervention of the Supreme Court's decision in O'Melveny & Myers v. Federal Deposit Insurance Corp., the decisions of those circuits adopting federal common law for corporate successor liability under CERCLA have been vulnerable since their inception. As explained below, these opinions did not support their assumption of federal common-law powers with valid authority from the text or legislative history of CERCLA. They failed to apply the governing judicial test for determining the propriety of federal common law, a test which has since been reaffirmed and given additional force in O'Melveny & Myers. Moreover, the purported adoption of federal common law in this area cannot be reconciled with the general pattern of the lower courts in deferring to state law in other CERCLA contexts.

113 Id. at 1245, 1248 (holding that Michigan law applies). The First Circuit also appears to have adopted state law as the rule for successor liability under CERCLA. See John S. Boyd Co. v. Boston Gas Co., 992 F.2d 401, 408-09 (1st Cir. 1993) (adopting for use in a CERCLA case arising in Massachusetts, the Massachusetts successor liability rule as stated in an earlier diversity of citizenship case) (citing Dayton v. Peck, Stow & Wilcox Co., 739 F.2d 690, 692 (1st Cir. 1984)). The First Circuit did not expressly address the question of federal common law in its decision. Id.

114 Anspec, 922 F.2d at 1248 (Kennedy, C.J., concurring).

115 As discussed below (see infra Part V) the division in the circuits has continued beyond O'Melveny & Myers, with new decisions on both sides.


117 See infra Part III.B.1. (discussing the absence of support for a federal common-law rule in the statutory text or the legislative history of CERCLA).

118 See infra Part III.B.2. (describing the circuit courts' failure to apply the Kimbell Foods test for determining the availability of federal common law).

119 See infra Part VI.B (applying the Kimbell Foods test, in light of O'Melveny & Myers, to determine the propriety of federal common law for corporate successor liability under CERCLA).

120 See infra Part III.B.3. (discussing the conflict between circuit court decisions adopting federal common law on successor liability and prior decisions applying state law in the absence of express provision in CERCLA).
Finally, an expansive rule of successor liability different from traditional state law was unnecessary to the outcome in any of the circuit court decisions, which suggests that the purported adoption of federal common law might be regarded as non-binding dicta.\textsuperscript{121}

As the forthcoming discussion reveals, the rather audacious step of setting aside the longstanding corporate law of the fifty states and assuming the authority to judicially devise a federal regime of corporation law has been accomplished with surprisingly little thought. These decisions typically announced the adoption of federal common law in an abrupt paragraph or two, with little reference to meaningful authority and a paucity of analysis.\textsuperscript{122} The abbreviated reasoning of these decisions cannot survive exacting scrutiny.

1. The Absence of Support for a Federal Common Law Rule in Statutory Text or Legislative History of CERCLA

Circuit courts formulating a federal corporate successorship rule under CERCLA assumed lawmaking power with little more legislative support than the conclusory declaration that "Congress expected the courts to develop a federal common law to supplement the statute."\textsuperscript{123} These opinions fail to identify anything in the text of the statute or the legislative history that leads to the conclusion that "Congress expected" the courts to invent a federal rule.\textsuperscript{124} Indeed, despite its assertion of congressional expectations, the Ninth Circuit, in the very next sentence of its \textit{Aasarco} opinion, acknowledged that "Congress has not addressed the issue of successor liability."\textsuperscript{125} The Third Circuit, unwilling to be stymied by the absence of textual support, insisted that "[i]t is not surprising that, as a hastily conceived and briefly debated piece of legislation, CERCLA failed to address many important issues, including corporate successor liability."\textsuperscript{126}

In fact, nothing on the face of the statute - even hints that Congress intended to displace state corporation law. Beyond the Act’s

\textsuperscript{121} See infra Part III.B.4 (discussing the unnecessary adoption of federal common law in three circuit court cases to decide corporate successor liability under CERCLA where traditional state law would have produced the same results).
\textsuperscript{122} See, e.g., Louisiana-Pacific Corp. v. Aasarco, Inc., 909 F.2d 1260, 1263 (9th Cir. 1990); Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86, 91 (3d Cir. 1988).
\textsuperscript{123} Aasarco, 909 F.2d at 1263 (quoting Smith Land, 851 F.2d at 91).
\textsuperscript{124} See id.
\textsuperscript{125} Id. at 1263.
\textsuperscript{126} Smith Land, 851 F.2d at 91.
definition of "person" as including "corporation," CERCLA is silent. Congress deliberately chose a term, "corporation," that describes a state-created legal entity, and thus presumably anticipated that the organic state law shaping corporations would apply to matters involving the corporate form. As Judge Kennedy of the Sixth Circuit wrote in rejecting federal common law for corporate successor liability under CERCLA, "[a]ll [corporations] are artificial creations, wholly dependent on state law for their existence. Those state laws define their powers, rights and liabilities, prescribe their procedures, govern their continued existence, and define the terms upon which mergers may occur and the effect to be given to mergers."

As the only support for its conclusion that Congress intended creation of federal common law for corporate successor liability under CERCLA, the Third Circuit in its Smith Land decision offered the following unexplained statement, which was quoted and followed by the Ninth Circuit in Asarco: "The meager legislative history available indicates that Congress expected the courts to develop a federal common law to supplement the statute." Even if legislative history were sufficient to overcome the silence of the statute—a dubious proposition for a statute like CERCLA that is notorious for its ambiguous, incomplete, and contradictory legislative history—neither the Third nor the Ninth Circuits even refers

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128 See infra Part VI.B.1 (arguing that unlike the special rules enunciated in section 101(20) of CERCLA defining the term "owner," nothing in CERCLA denotes distinctive rules or a specialized federal meaning for the term "corporation," indicating that Congress did not intend to displace state law governing corporate successorship with federal law).
130 Smith Land, 851 F.2d at 91. See also Asarco, 909 F.2d at 1263 (quoting Smith Land, 851 F.2d at 91).
131 "CERCLA was a compromise bill hastily enacted by an outgoing Congress in the closing days of a lame-duck session after Ronald Reagan defeated President Carter in 1980." Michael V. Hernandez, Cost Recovery or Contribution?: Resolving the Controversy Over CERCLA Claims Brought by Potentially Responsible Parties, 21 Harv. Envtl. L. Rev. 83, 83 (1997). Because of the circumstances surrounding its enactment, the legislative history of CERCLA is notoriously "indeterminate, if not contradictory." Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1080 (1st Cir. 1986) (quoting United States v. Mottolo, 605 F. Supp. 898, 902 (D.N.H. 1985)). For that reason, the statutory text should be the primary, probably the sole, referent in CERCLA cases, and the legislative history should be used, if at all, with extreme caution. See Town of Bedford v. Raytheon Co., 755 F. Supp. 469, 475 (D. Mass. 1991) ("The legislative history of CERCLA, cobbled together to suggest that Congress meant something that it didn't say, is entirely unsatisfactory as a tool for statutory construction. . . . "). See generally John Copeland Nagle, CERCLA's Mistakes, 38 WM. & MARY L. REV. 1405, 1406-12 (1997) (observing that due to hasty enactment by a lame-duck Congress, poor legislative drafting, sparse and contradictory
to, much less discusses, the legislative history that supposedly authorized this expanded federal judicial power. 132 Instead, the Third Circuit cited two district court cases, 133 only one of which discusses CERCLA’s legislative history. That decision, United States v. Chem-Dyne Corp., 134 after a painstaking review of legislative history, found one reference to “federal common law.” 135

In that one reference, a single member of Congress in floor debate expressed his individual opinion that federal common law should govern the issue of joint and several liability under CERCLA. Representative Florio, one of the sponsors of the CERCLA legislation, offered the following remarks on the floor:

The liability provisions of this bill do not refer to the terms strict, joint and several liability . . . . I have concluded that despite the absence of these specific terms, the strict liability standard already approved by this body is preserved. Issues of joint and several liability not resolved by this shall be governed by traditional and evolving principles of common law. The terms joint and several have been deleted with the intent that the liability of joint tortfeasors be determined under common or previous statutory law . . . .

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 a Federal common law in this area. 136

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legislative history, and ambiguous expression of congressional intent regarding policy goals, CERCLA is replete with errors and confounds every theory of statutory interpretation).

132 See Asarco, 909 F.2d at 1263; Smith Land, 851 F.2d at 91.


134 572 F. Supp. at 802.


136 126 Cong. Rec. 31,965 (1980). Senator Randolph, another sponsor of the bill, also stated that “we have deleted any reference to joint and several liability, relying on common-law principles to determine when parties should be severally liable,” that “issues of liability not resolved by this act, if any, shall be governed by traditional and evolving principles of common law,” and that an “example is joint and several liability.” 126 Cong. Rec. 30,932 (1980). Unlike Representative Florio, Senator Randolph made no reference to a federal common law, and in any event remained similarly focused on the question of joint and several liability. Clearly Congress was not of one mind on the anticipated development of federal common law to implement CERCLA. For example, then-Representative (now-Vice President) Gore, another key sponsor of the legislation, observed in the context of a limitations period for bringing suit that the courts use federal common law
The personal conclusions of one member of Congress, even a sponsor, are not owed weight in the absence of any support in the statutory text or authoritative committee reports.

Even joint and several liability under CERCLA—the actual subject of this passage from the legislative floor debate—does not rest on the slender reed of an isolated remark by a legislator, nor does its existence as a rule of liability depend on wholesale invention by federal common law. In 1986, Congress amended CERCLA through the Superfund Amendments and Reauthorization Act (SARA) by adding an express statutory right for potentially responsible parties to seek contribution from one another. Contribution among tortfeasors, of course, has meaning as a concept only in the context of joint and several liability, because it allows one tortfeasor held liable for more than its proportionate share to seek reimbursement from others jointly responsible for the harm. The express provision for a right of contribution among potentially responsible parties confirms that liability under CERCLA is joint and several in nature under at least some circumstances. In sum, joint and several liability is now firmly

infrequently, and thus development of a common law approach to CERCLA was “improbable.” 126 Cong. Rec. 24,343 (1980).

137 See Duplex Printing Press Co. v. Deering, 254 U.S. 443, 474 (1921) (stating that legislative debates are “expressive of the views and motives of individual members . . . . and hence may not be resorted to in ascertaining the meaning and purpose of the lawmaking body”). The passage at issue begins with Representative Florio’s statement: “I have concluded” that strict and joint and several liability have been preserved and will be determined by common law. 126 Cong. Rec. 31,965 (1980) (emphasis added).


140 Id. § 113, 100 Stat. at 1647 (codified at 42 U.S.C. § 9613(f)); (1994)). Section 9613(f)(1) provides that “[a]ny person may seek contribution from any other person who is liable or potentially liable under section 9607(a) [the basic CERCLA liability provision] of this title.” See generally Key Tronic Corp. v. United States, 511 U.S. 809, 816-17 (1994) (discussing the SARA amendment creating an express cause of action for contribution).

141 See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 51, at 341 (5th ed. 1984) (stating that contribution allows the loss to be distributed among tortfeasors “by requiring others each to pay a proportionate share to one who has discharged their ‘joint’ liability” by fully compensating the plaintiff for damages).

142 See Environmental Transp. Sys., Inc. v. ENSCO, Inc., 969 F.2d 503, 508 (7th Cir. 1992) (stating, in context of a CERCLA contribution claim, “[t]here can be no right to contribution unless there is joint and several liability”); see also Gregory C. Sisk, Interpretation of the Statutory Modification of Joint and Several Liability: Resisting the Deconstruction of Tort Reform, 16 U. PUGET SOUND L. REV. 1, 114 (1992) (“[I]n a system of pure comparative fault [that is, a rule of several only liability], the ‘equitable need for contribution vanishes’ because no defendant will be obliged to pay more than its own percentage share of the fault.”) (quoting Teepak, Inc. v. Learned, 699 P.2d 35, 40 (Kan. 1985)).
grounded in the actual language of the environmental code, although the circumstances under which joint and several liability should be applied necessarily remains subject to some case-by-case development.\footnote{See generally Anderson, supra note 2, at 20-36 (arguing that joint and several liability is imposed too broadly and that liability should be imposed according to relative responsibility in most CERCLA cases).}

In any event, this short passage from the legislative debate on the subject of joint and several liability is not on point for our present inquiry. This "meager"\footnote{Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86, 91 (3d Cir. 1988) (referring to the CERCLA legislative history on point as "meager"); see also Louisiana-Pacific Corp. v. Asarco, Inc., 909 F.2d 1260, 1263 (9th Cir. 1990) (quoting Smith Land to make the same point).} piece of legislative history says nothing about the legal status of corporations and thus is not relevant to the issue of successor liability under CERCLA. It cannot support displacement of state law on a matter of such traditional state concern as corporation law. In sum, the entire house of federal-common-law-for-corporate-successorship under CERCLA has been built on a foundation of sand.

2. *The Failure to Apply the Kimbell Foods Test for Determining the Availability of Federal Common Law*

When a statute does not specify a standard, the classic test for determining whether to judicially develop a uniform federal rule, or instead to adopt state law as the rule of decision, is set forth in the Supreme Court's decision in *United States v. Kimbell Foods, Inc.*\footnote{440 U.S. 715 (1979).} Under *Kimbell Foods*, the courts are directed to consider three factors in deciding whether to fashion federal common law and displace applicable state law: (1) the need for uniformity; (2) whether state law conflicts with federal statutory objectives; and (3) how a federal rule would impact existing relationships based on state law.\footnote{Id. at 728-29.} In a subsequent section of this article,\footnote{See infra Part VI.B (after applying the test set forth by the Supreme Court in *Kimbell Foods* it becomes clear that: (1) Congress did not intend, nor is there a need, to create a "nationally uniform body of law" regarding corporate successorship under CERCLA; (2) the application of state corporation law will not frustrate the specific objectives of CERCLA; and (3) a new federal common law would interfere with commercial relationships and transactions).} the *Kimbell Foods* test, which was reaffirmed and strengthened in *O'Melveny & Myers v. Federal Deposit Insurance Corp.*,\footnote{512 U.S. 79, 87-89 (1994).} is applied to the specific issue of corporate successorship under CERCLA.

\footnote{143 See generally Anderson, supra note 2, at 20-36 (arguing that joint and several liability is imposed too broadly and that liability should be imposed according to relative responsibility in most CERCLA cases).
144 Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86, 91 (3d Cir. 1988) (referring to the CERCLA legislative history on point as "meager"); see also Louisiana-Pacific Corp. v. Asarco, Inc., 909 F.2d 1260, 1263 (9th Cir. 1990) (quoting Smith Land to make the same point).
146 Id. at 728-29.
147 See infra Part VI.B (after applying the test set forth by the Supreme Court in *Kimbell Foods* it becomes clear that: (1) Congress did not intend, nor is there a need, to create a "nationally uniform body of law" regarding corporate successorship under CERCLA; (2) the application of state corporation law will not frustrate the specific objectives of CERCLA; and (3) a new federal common law would interfere with commercial relationships and transactions).
148 512 U.S. 79, 87-89 (1994).}
Surprisingly, the three circuit court decisions adopting a federal common-law rule for corporate successor liability under CERCLA failed to mention, much less carefully apply, this governing judicial test for determining the availability of a federal common law.\footnote{149}

3. Conflict With Prior Decisions Applying State Law in the Absence of Express Provision in CERCLA

Although decisions under CERCLA have not followed a perfectly even line,\footnote{150} the three circuit court decisions adopting federal common law on successor liability cut against the grain of fairly consistent adherence to state contract and corporation law absent clear contrary indication in the CERCLA statute. Thus, for example, in United States v. Northeastern Pharmaceutical & Chemical Co.,\footnote{151} and in Levin Metals Corp. v. Parr-Richmond Terminal Co.,\footnote{152} the Eighth and Ninth Circuits respectively applied state corporation law to determine the capacity of a dissolved corporation to be sued under CERCLA.\footnote{153} On the essential question whether an entity was legally cognizable and thus whether any

\footnote{149} See United States v. Carolina Transformer Co., 978 F.2d 832, 837-38 (4th Cir. 1992); Asarco, 909 F.2d at 1263; Smith Land, 851 F.2d at 91-92. For a pointed critique of this failure in analysis, see Anspec Co. v. Johnson Controls, Inc., 922 F.2d 1240, 1249 n.5 (6th Cir. 1991) (Kennedy, J., concurring) ("Inexplicably, neither the Third Circuit [in Smith Land] nor the Ninth Circuit [in Asarco] mentioned the Kimbell Foods test. Both of those courts concluded, almost without analysis, that a federal common law of successor liability was required by CERCLA."). The one additional circuit court decision adopting federal common law for CERCLA successor liability since the O'Melveny & Myers decision also neglected to cite or apply the Kimbell Foods analysis in its initial opinion. See B.F. Goodrich v. Betkoski, 99 F.3d 505, 518-20 (2d Cir. 1996), reh'g denied, 112 F.3d 88 (2d Cir. 1997). The court only added a reference to Kimbell Foods in response to a petition for a rehearing, and then made a conclusory and unexplored assertion that each of the factors supported adoption of federal common law. See B.F. Goodrich v. Betkoski, 112 F.3d 88, 90-91 (2d Cir. 1997) (denying petition for rehearing).

\footnote{150} In addition to its ruling in Smith Land, 851 F.2d 86, in favor of federal common law in the context of successor liability, the Third Circuit has also held that federal common law applies when determining whether the corporate veil may be pierced in order to impose CERCLA liability upon the owner of a corporation, such as the parent of a subsidiary. Lansford-Coaldale Joint Water Auth. v. Tonolli Corp., 4 F.3d 1209, 1224-25 (3d Cir. 1993). But see Joslyn Mfg. Co. v. T.L. James & Co., 893 F.2d 80, 82-83 (5th Cir. 1990) (concluding that holding parent corporations directly liable under CERCLA for their subsidiaries' activities "would dramatically alter traditional concepts of corporation law" without statutory support, and that the question of parent liability should be left to common law principles of corporation law).

\footnote{151} 810 F.2d 726, 746 (8th Cir. 1986).
\footnote{152} 817 F.2d 1448, 1450-51 (9th Cir. 1987).

\footnote{153} Subsequent to the Supreme Court's decision in O'Melveny & Myers v. Federal Deposit Insurance Corp., 512 U.S. 79 (1994), the Seventh Circuit joined these courts in holding that the capacity of a corporation to be sued under CERCLA is determined by reference to state law. Citizens Elec. Corp. v. Bituminous Fire & Marine Ins. Co., 68 F.3d
claim could be asserted against that entity, the courts have consistently deferred to state law principles.

In suggesting a rule of federal common law for successor liability in its Asarco decision, the Ninth Circuit was forced to distinguish its earlier ruling in Levin Metals. In a footnote, the Asarco court maintained that Levin Metals had dealt with "capacity to be sued" rather than with "imposition of liability." The capacity to be sued, however, is obviously a prerequisite to any liability under CERCLA, and thus raises the same issue of corporate responsibility for CERCLA costs and damages. In addition, capacity to be sued, like corporate successorship, is a question that goes to the character of the corporate entity, a creature of state law. Indeed, neither capacity to be sued nor corporate successorship should be understood as a substantive issue of imposition of liability under CERCLA. Both instead address the preliminary question of legal cognizability, that is, "who" is amenable to suit for a particular claim, rather than the elements of conduct that must be proven against a party to establish CERCLA liability.

As another example, circuit courts consistently have looked to state law in determining the validity or meaning of contractual releases of CERCLA liability. Under CERCLA, potentially responsible parties may enter into contracts by which one party agrees to indemnify or hold harmless the other from liability for response costs for a hazardous waste site, although such agreements are not enforceable against the government. Significantly, state law, not a federal common law of contracts, has been adopted in this context.

The Ninth Circuit in its Asarco decision also purported to distinguish this line of cases in a footnote. The court suggested that

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1016, 1019 (7th Cir. 1995). See also infra Part V (discussing the post-O'Melveny & Myers trend in the circuits regarding federal common law under CERCLA).

154 Louisiana-Pacific Corp. v. Asarco, Inc., 909 F.2d 1260, 1263 n.1 (9th Cir. 1990).

155 See, e.g., John S. Boyd, Co. v. Boston Gas Co., 992 F.2d 401, 406 (1st Cir. 1993); Olin Corp. v. Consolidated Aluminum Corp., 5 F.3d 10, 15 (2d Cir. 1993); United States v. Hardage, 985 F.2d 1427, 1433 & n.2 (10th Cir. 1993); Mardan Corp. v. C.G.C. Music, Ltd., 804 F.2d 1454, 1458-60 (9th Cir. 1986). Subsequent to O'Melveny & Myers, the Third Circuit agreed that "it is better to look to state law in interpreting or construing a contract's indemnification provisions vis-à-vis CERCLA." Beazer East, Inc. v. Mead Corp., 34 F.3d 206, 212 (3d Cir. 1994). See also infra Part V (discussing the post-O'Melveny & Myers trend in the circuits regarding federal common law under CERCLA).


157 Beazer East, Inc., 34 F.3d at 211; Hardage, 985 F.2d at 1433 n.2.

158 Louisiana-Pacific Corp. v. Asarco, Inc., 909 F.2d 1260, 1263 n.2 (9th Cir. 1990) (discussing Mardan, 804 F.2d 1454).
uniformity was not necessary in the contractual release context, but was required in the corporate successorship context to enhance the Environmental Protection Agency's "ability to seek reimbursement from responsible parties for cleaning up a hazardous waste site." The distinction does not hold up. While a private contractual release does not affect the interests of the federal government, it most assuredly does limit the liability of a party to other private parties under CERCLA and thus alters the responsibility of that party for environmental harm. Given that the corporate successor liability issue, like the contractual release issue, frequently (perhaps typically) arises in the context of a CERCLA dispute among private parties, the case for applying state law to successor liability issues is as strong as state law governance of liability release contracts.

4. Adoption of Federal Common Law was Unnecessary to the Result in These Cases

Before a federal court takes the audacious step of crossing the line from adjudication to lawmaking, the court should at least be certain that this passage is crucial to the outcome of the litigation. Although the mere fact that adoption of a novel and expansive rule would alter the result is hardly sufficient in itself to justify formulation of a federal common law, a court should not even contemplate such a move unless the matter is unavoidably placed before it. Unfortunately, the three circuit decisions adopting federal common law for successor liability under CERCLA in the years pre-

159 Id.

160 In seven of the eight circuit court cases that have decided the issue of whether federal common law or state law should be adopted with regard to corporate successor liability (or analogously for liability of limited partners of a limited partnership) under CERCLA, a private party was seeking to hold a purported successor liable. See B.F. Goodrich v. Betkoski, 99 F.3d 505 (2d Cir. 1996), reh'g denied, 112 F.3d 88 (2d Cir. 1997); Redwing Carriers, Inc. v. Saraland Apartments, 94 F.3d 1489 (11th Cir. 1996); City Management Corp. v. U.S. Chem. Co., 43 F.3d 244 (6th Cir. 1994); Anspect Co. v. Johnson Controls, Inc., 922 F.2d 1240 (6th Cir. 1991); Louisiana-Pacific Corp. v. Asarco, Inc., 909 F.2d 1260 (9th Cir. 1990); Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86 (3d Cir. 1988). (Although the United States was a party to the B.F. Goodrich appeal, the most recent of these decisions, the assertion of successor liability arose in the context of third-party claims between private parties. See B.F. Goodrich, 99 F.3d at 511-13, 518-20.) In the eighth case, United States v. Carolina Transformer Co., 978 F.2d 832 (4th Cir. 1992), resort to a novel federal common-law rule was not necessary to reach the result and protect the government's interest. See infra Part III.B.4 (discussing the unnecessary adoption of federal common law in three circuit court cases to decide corporate successor liability under CERCLA where traditional state law would have produced the same result).
ceeding *O'Melveny & Myers v. Federal Deposit Insurance Corp.* was overreached unnecessarily, in that the same results in those cases could have been comfortably attained on traditional state law grounds. Moreover, a re-examination of these three cases in light of traditional rules of successor liability demonstrates that invention of a new federal common-law regime of corporations is unnecessary to ensure that truly responsible parties are held accountable under CERCLA.

The Third Circuit, in *Smith Land & Improvement Corp. v. Celotex Corp.*, was the first circuit to adopt federal common law as the rule of decision for successor liability under CERCLA. In *Smith Land*, the owner of a hazardous waste site sought indemnification of cleanup costs from the alleged corporate successor of the former site owner, who had created the waste problem. Although the court’s analysis of successor liability was largely divorced from the actual facts of the case, the court noted that “nothing other than statutory mergers or consolidations” among the corporate entities appeared in the record. Therefore, the case came directly within the traditional successor liability rules in force in every state. Under Pennsylvania law, where the mergers and consolidations apparently occurred, and where the hazardous waste site was located, a successor corporation after a consolidation or statutory merger is plainly liable by force of statute and case law for the predecessor’s obligation.

For some reason, however, the *Smith Land* court was not content to hold defendants liable under applicable state law. Instead, in order to avoid “the excessively narrow statutes which might apply in . . . a few states,” the court thought it necessary to adopt a federal common law on the issue. The court identified no such corporate safe harbor from environmental liability nor did it consider whether Pennsylvania law was adequate for the task at hand. The court did say, however, that the federal rule should follow “the

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162 851 F.2d 86 (3d Cir. 1988).
163 Id. at 90.
164 Id. at 91-92.
165 Id. at 91.
166 Id. at 87-88, 90-91.
167 See 15 PA. CONS. STAT. ANN. § 1929(b) (West 1995) (providing that, after statutory merger or consolidation, the surviving corporation “shall thenceforth be responsible for all the liabilities of each of the corporations so merged or consolidated”). See, e.g., Hill v. Trailmobile, Inc., 603 A.2d 602, 606-07 (Pa. Super. Ct. 1992).
168 *Smith Land*, 851 F.2d at 91-92.
general doctrine of successor liability in operation in most states, which returns the court to the same place as Pennsylvania law. The court exerted substantial effort for no real gain. In any event, the Third Circuit’s reliance on general doctrines of successor liability law among the states appears to preclude the novel “continuity of enterprise” theory.

The Ninth Circuit, in *Louisiana-Pacific Corp. v. Asarco, Inc.*, was the next circuit to embrace a federal common-law approach, again in a case where federal judicial lawmaking was unnecessary to the result. As had the Third Circuit, the Ninth Circuit defined the content of the federal common law as “the traditional rule of successor liability in operation in most states,” which is no different in content than Washington state corporation law. Indeed, the court immediately proceeded to describe the “traditional rules of successor liability” with citation to a decision by the Washington State Supreme Court. The newly minted federal common-law rule accorded precisely with that of the state law that otherwise would have applied.

On the merits, the Ninth Circuit’s analysis tracked the analysis that would have occurred under Washington state law. The court concluded that the asset purchase in the case was not a de facto merger because there was no continuity of shareholders between the entities. Washington law dictated the same result. The court declined to “adopt a more expansive version of the mere continuation exception, known as the continuing business enterprise

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169 *Id.*

170 As discussed earlier, most states have rejected the “continuity of enterprise” theory for corporate successor liability. *See generally supra* Part III.A.1 (discussing the rise of the continuity of enterprise theory).

171 909 F.2d 1260 (9th Cir. 1990).

172 *Id.* at 1263.

173 *See, e.g.,* Martin v. Abbott Labs., 689 P.2d 368, 384 (Wash. 1984) (holding that asset purchasers are not liable as successors unless the purchaser agrees to assume liability, the transaction amounts to a de facto merger, the purchaser is a mere continuation of the selling corporation, or the transaction was fraudulent); Haribison v. Garden Valley Outfitters, Inc., 849 P.2d 669, 674 (Wash. Ct. App. 1993). *See generally supra* Part II.C (discussing the traditional rules of corporate successor liability).


175 *Asarco*, 909 F.2d at 1264-65.

176 Uni-Com Northwest, Ltd. v. Argus Pub. Co., 737 P.2d 304, 312 (Wash. Ct. App. 1987) (holding that the de facto merger doctrine did not apply where “no shares changed hands” and that the “theory behind the requirement of a stock transfer is that the shareholders of the seller corporation retain an interest in the business transferred”).
exception,” holding that it would be inapplicable in the case in any event.\footnote{Asarco, 909 F.2d at 1265.} The court observed that the purported successor did not have actual notice of potential CERCLA liability and, perhaps more importantly, had not continued the business that created the environmental hazard.\footnote{Id. at 1265-66.} Accordingly, the court ultimately affirmed the ruling of the district court, which had applied Washington state law to reach the identical conclusion.\footnote{Id. at 1262; Louisiana-Pacific Corp. v. Asarco, Inc., 29 Env't Rep. Cas. (BNA) 1450, 1452-53 (W.D. Wash. 1989) (district court decision).} The court’s digression about federal common law thus appears to be unnecessary to the result, and hence dictum.\footnote{See Sanders v. City of San Diego, 93 F.3d 1423, 1432 (9th Cir. 1996) (holding that statements not necessary to the decision are dicta and thus do not create binding precedent); Export Group v. Reef Indus., Inc., 54 F.3d 1466, 1472 (9th Cir. 1995) (same).}

The third circuit court decision adopting federal common law requires a somewhat more involved discussion, although the result seems foreordained on the facts, even under traditional successor liability doctrine.\footnote{This case, United States v. Carolina Transformer Co., 978 F.2d 832 (4th Cir. 1992), arose in North Carolina, which had already announced its adherence to the rule of non-liability for asset purchasers, subject to the four traditional exceptions. Budd Tire Corp. v. Pierce Tire Co., 370 S.E.2d 267, 269 (N.C. 1988). On the traditional rule of successor liability, see generally supra Part II.C.} In the Fourth Circuit’s decision in United States v. Carolina Transformer Co.,\footnote{978 F.2d 832 (4th Cir. 1992).} the owner of the predecessor corporation basically sold the business to his children, who became the shareholders of the successor corporation created to operate the business; the prior owner also continued to be heavily involved in running the operation.\footnote{Id. at 835, 839-41; United States v. Carolina Transformer Co., 739 F. Supp. 1030, 1034-35, 1039 (E.D.N.C. 1989) (district court decision below).} At first glance, the case appears to fall outside of the de facto merger exception because there was no continuity of stock ownership between the buyer and seller, a requirement in most jurisdictions.\footnote{See, e.g., Howard v. Apac-Georgia, Inc., 383 S.E.2d 617, 619 (Ga. Ct. App. 1989) (stating that a "merger always involves a transfer of the assets and business of one corporation to another in exchange for its securities") (quoting Good v. Lackawanna Leather Co., 233 A.2d 201, 208 (N.J. Super. Ct. 1967)); Uni-Com Northwest Ltd. v. Argus Publishing Co., 737 P.2d 194, 196 (Wash. Ct. App. 1981) (holding that de facto merger occurs only when stock is exchanged for assets).} In addition, the mere continuation doctrine cites continuity of ownership as a factor, and typically a crucial one.\footnote{See, e.g., Carstedt v. Grindeland, 406 N.W.2d 39, 41 (Minn. Ct. App. 1987) (ruuling that, even though the purchasing corporation used the same equipment, location, and business operation, the "continuation" exception did not apply where the ownership changed);} However, courts have not hesitated to find con-

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\footnotemark{177} Asarco, 909 F.2d at 1265.
\footnotemark{178} Id. at 1265-66.
\footnotemark{179} Id. at 1262; Louisiana-Pacific Corp. v. Asarco, Inc., 29 Env't Rep. Cas. (BNA) 1450, 1452-53 (W.D. Wash. 1989) (district court decision).
\footnotemark{180} See Sanders v. City of San Diego, 93 F.3d 1423, 1432 (9th Cir. 1996) (holding that statements not necessary to the decision are dicta and thus do not create binding precedent); Export Group v. Reef Indus., Inc., 54 F.3d 1466, 1472 (9th Cir. 1995) (same).
\footnotemark{181} This case, United States v. Carolina Transformer Co., 978 F.2d 832 (4th Cir. 1992), arose in North Carolina, which had already announced its adherence to the rule of non-liability for asset purchasers, subject to the four traditional exceptions. Budd Tire Corp. v. Pierce Tire Co., 370 S.E.2d 267, 269 (N.C. 1988). On the traditional rule of successor liability, see generally supra Part II.C.
\footnotemark{182} 978 F.2d 832 (4th Cir. 1992).
\footnotemark{185} See, e.g., Carstedt v. Grindeland, 406 N.W.2d 39, 41 (Minn. Ct. App. 1987) (ruuling that, even though the purchasing corporation used the same equipment, location, and business operation, the "continuation" exception did not apply where the ownership changed);
continuity of ownership or a de facto merger in situations where the two corporations are closely related, as they were here.\textsuperscript{186}

The mere continuation doctrine seems to be designed to reach precisely the type of transaction present in Carolina Transformer, where those in control of a corporation attempt to avoid liability "by merely changing hats."\textsuperscript{187} The crucial requirement of common identity of ownership\textsuperscript{188} may be satisfied when a peculiarly close relationship exists between the buyer and seller, and the seller maintains a large degree of proprietary control over the purchasing company's operations. In Carolina Transformer, the purchasing corporation was nominally owned by the seller's son (who had been president of the selling corporation) and daughter, but the seller was still employed by the new corporation, "continued to have personal influence over and involvement with the new company," was authorized to write corporate checks, and received a hefty salary while the nominal owners received no dividends.\textsuperscript{189}

The Carolina Transformer case also falls under the mere continuatio-
tion exception because the purchaser paid inadequate consideration for the assets transferred and the seller soon went out of business, presenting the classic scenario of a reorganization to avoid liability.¹⁹⁰

The incestuous relationship between the selling and purchasing corporations and the suspicious timing and circumstances of the transactions in Carolina Transformer also implicate the fraudulent transfer rule for successor liability. The selling corporation ceased doing business and disposed of all its assets to the purchasing corporation within a few months after the state imposed penalties and the Environmental Protection Agency ordered cleanup of the hazardous waste site.¹⁹¹ The assets were also transferred for inadequate consideration,¹⁹² which the parties apparently tried to conceal by creating false invoices for purchase of parts never sold.¹⁹³ Courts have often found successor liability under this exception when the sale of assets was outside the “usual course of business” and for inadequate consideration.¹⁹⁴ Consistent with the traditional rule, North Carolina law, which should have governed in Carolina Transformer, imposes successor liability when a purchasing corporation pays inadequate consideration for assets “under circumstances indicating a purpose to avoid the claims of creditors.”¹⁹⁵

¹⁹⁰ Carolina Transformer, 978 F.2d at 839; Carolina Transformer, 739 F. Supp. at 1035. Compare Carolina Transformer, with Carstedt v. Grindeland, 406 N.W.2d 39, 41-42 (Minn. Ct. App. 1987) (rejecting continuation liability when assets were sold from father to son where adequate consideration paid), and Baltimore Luggage, 562 A.2d at 1294 (rejecting continuation liability when selling corporation remained viable and received sufficient consideration for the assets transferred).

¹⁹¹ Carolina Transformer, 978 F.2d at 835-36; Carolina Transformer, 739 F. Supp. at 1034-35.

¹⁹² Carolina Transformer, 978 F.2d at 839; Carolina Transformer, 739 F. Supp. at 1035. Indeed, a creditor of the selling corporation successfully attacked as fraudulent in state court a second transfer of assets to another corporation formed to take over part of the seller's operations. Carolina Transformer, 978 F.2d at 836; Carolina Transformer, 739 F. Supp. at 1035.

¹⁹³ Carolina Transformer, 978 F.2d at 839.

¹⁹⁴ See 15 Fletcher, supra note 49, § 7125 (citing cases). See, e.g., Dayton v. Peck Stow & Wilcox Co., 739 F.2d 690 (1st Cir. 1984); Explosives Corp. of Am. v. Garlam Enters. Corp., 615 F. Supp. 364 (D.P.R. 1985), appeal dismissed, 782 F.2d 1023 (1st Cir. 1985). While not labeling it “fraud,” other courts have found successor liability where the transaction is not in “good faith” and lacks adequate consideration. See, e.g., Peterson v. Harville, 445 F. Supp. 16 (D. Or. 1977), aff'd, 623 F.2d 611 (9th Cir. 1980).

¹⁹⁵ Dublin v. UCR, Inc., 444 S.E.2d 455, 463 (N.C. Ct. App. 1994); see also Budd Tire Corp. v. Pierce Tire Co., 370 S.E.2d 267, 270-71 (N.C. 1988); Morgan v. Cavalier Acquisition Corp., 432 S.E.2d 915, 925-26 (N.C. Ct. App. 1993) (ruling that plaintiff had made a sufficient evidentiary showing for trial regarding whether a transfer of assets was made
In sum, as with the other circuit court decisions adopting successor liability under CERCLA, the Carolina Transformer case could have been decided by modest resort to the traditional successor liability exceptions. Instead, the Fourth Circuit assumed common-law powers and formulated a new continuity of enterprise theory for purposes of imposing liability.\footnote{196 Carolina Transformer, 978 F.2d at 837-41.} In so doing, the court reached beyond what was necessary and, more importantly, without proper warrant, exceeded its authority as a federal court of limited jurisdiction. The proposition that the adoption of federal common law is the exception, not the rule, and is permissible only under narrow and exceptional circumstances has since been confirmed by the Supreme Court in its landmark decision in O'Melveny & Myers v. Federal Deposit Insurance Corp.\footnote{197 Id.}

IV. THE SUPREME COURT'S DECISION IN O'MELVENY & MYERS DEMANDS A FRESH EXAMINATION OF THE ISSUE OF FEDERAL COMMON LAW UNDER CERCLA

The Supreme Court's decision in O'Melveny & Myers v. Federal Deposit Insurance Corp.\footnote{198 See Bradford R. Clark, Federal Common Law: A Structural Reinterpretation, 144 U. Pa. L. Rev. 1245, 1368 (1996) ("The Supreme Court's unanimous decision in O'Melveny & Myers may signal heightened sensitivity to the constitutional concerns raised by federal common law."); Paul Lund, The Decline of Federal Common Law, 76 B.U. L. Rev. 895, 915 (1996) (recognizing that recent Supreme Court opinions have "signalled a substantial decline in the common law making powers of the federal courts," although criticizing this development for threatening federal power and leaving federal interests unprotected).} signals the dawn of a new day for federal common law, or more accurately, the setting of the sun on federal common law under CERCLA.\footnote{199 Id. at 83-89.} In O'Melveny & Myers, the Supreme Court emphatically and unanimously rejected a federal common-law regime displacing such a traditional matter of state concern as corporate governance and the effect of knowledge of corporate directors.\footnote{200 Id. at 89.} The Court admonished that resort to federal common law is warranted only in "extraordinary cases."\footnote{201 Id. at 89.} In light of that decision, the issue of the proper source of law for corporate issues under CERCLA must be examined afresh, with vigor, and with a jaundiced eye toward a "federal common law"
untethered to a genuinely identifiable (as opposed to judicially constructed) federal policy.\footnote{190}

In O'Melveny & Myers, the Federal Deposit Insurance Corporation (FDIC), in its capacity as receiver for a failed savings and loan corporation, brought an action against the corporation’s former legal counsel for professional malpractice and breach of fiduciary duty.\footnote{191} The law firm of O'Melveny & Myers had represented the savings and loan in two real estate offerings and had failed to inquire into the institution’s financial status.\footnote{192} After the FDIC took control of the savings and loan as receiver, investors demanded refunds and alleged they had been deceived in those real estate syndications.\footnote{193} The FDIC’s action against O'Melveny & Myers sought recovery for the losses suffered by the institution by reason of its liability to those investors.\footnote{194}

O'Melveny & Myers moved for summary judgment on the ground that, under California state law, the corporate officers’ knowledge of the improper conduct must be imputed to the corporation and, since the FDIC stood in the shoes of the institution as receiver, it was therefore estopped from pursuing its claims against the law firm.\footnote{195} The FDIC argued that, because it was acting as receiver of a federally insured financial institution, a federal common-law rule should determine whether knowledge of corporate officers should be imputed to the corporation.\footnote{196} The Supreme Court disagreed.\footnote{197}

Under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA),\footnote{198} the FDIC as receiver succeeds to the rights, including the right to maintain litigation, of the insured financial institution.\footnote{199} Because FIRREA contained no explicit provision displacing applicable state corporation law,\footnote{200} the Court refused to ignore the silence of the statute and take it upon itself to formulate a rule of liability. The Court stated that it would not “adopt a court-made rule to supplement federal statutory regu-

\begin{footnotes}
\footnote{190}{Id.}
\footnote{191}{Id. at 82.}
\footnote{192}{Id. at 81-82.}
\footnote{193}{Id. at 82.}
\footnote{194}{Id. at 80-82.}
\footnote{195}{Id. at 82.}
\footnote{196}{Id. at 83.}
\footnote{197}{Id. at 83-89.}
\footnote{200}{O'Melveny & Myers, 512 U.S. at 85-87.}
\end{footnotes}
lation that is comprehensive and detailed; matters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law."\textsuperscript{213} Because Congress had expressly established several principles of federal law in the statute that prevailed over state law, Congress must have intended for state law to apply to other issues that might arise.\textsuperscript{214} For the Court to "create additional 'federal common-law' exceptions" to the extensive framework of a statute expressly creating limited federal law rules would not "'supplement' this scheme, but . . . alter it."\textsuperscript{215}

The Court explained that it is the rare case that warrants judicial creation of a federal rule.\textsuperscript{216} Before judicial formulation of federal law will be contemplated, there must be a "significant conflict between some federal policy or interest and the use of state law."\textsuperscript{217} The Court concluded that the FDIC had failed to concretely demonstrate that the use of state law would produce a conflict with any identifiable federal policy or interest.\textsuperscript{218} The Court specifically rejected the argument that uniformity of law under a federal rule of decision would speed litigation and eliminate uncertainty, declaring that if this argument were to succeed, "we would be awash in 'federal common-law' rules."\textsuperscript{219} Additionally, the Court refused to hold that sparing the federal deposit insurance fund from depletion was a sufficiently weighty justification for developing federal common law, stating "there is no federal policy that the fund should always win."\textsuperscript{220}

Finding even more disfavor was the FDIC's argument that application of state law would "disserv[e] the federal program" by imposing the cost of the law firm's legal malpractice on the taxpayers rather than upon the attorneys.\textsuperscript{221} As the Court appreciated, the FDIC sought to place courts in the uncomfortable position of deciding what constitutes malpractice in a sensitive area, a question that implicates a host of policy considerations that must be weighed

\textsuperscript{213} Id. at 85.
\textsuperscript{214} Id. at 86-87 (observing that FIRREA extends the statute of limitations beyond that under state law, permits claims of gross negligence regardless of whether state law requires greater culpability, and precludes state law claims against FDIC under certain contracts that it is entitled to repudiate).
\textsuperscript{215} Id. at 87.
\textsuperscript{216} Id.
\textsuperscript{217} Id. (quoting Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63, 68 (1966)).
\textsuperscript{218} Id. at 88-89.
\textsuperscript{219} Id. at 88 (quoting United States v. Yazell, 382 U.S. 341, 347 n.13 (1966)).
\textsuperscript{220} Id.
\textsuperscript{221} Id. at 89 (quoting Brief for Respondent at 32, O'Melveny & Meyers, 512 U.S. 79 (No. 93-489)).
and appraised. The Court refused to usurp the policymaking role of those who enact the laws, fearing "the runaway tendencies of 'federal common law' untethered to a genuinely identifiable (as opposed to judicially constructed) federal policy." Justice Stevens, joined by three other Justices, "emphasize[d] an important difference between federal courts and state courts" when he observed that "[i]t would be entirely proper for a state court of general jurisdiction to fashion a rule" with respect to corporation law and wrongdoing by corporate officers. However, Justice Stevens explained, "[f]ederal courts, . . . unlike their state counterparts, are courts of limited jurisdiction that have not been vested with open-ended lawmakering powers."

Justice Stevens also stated that "[b]ecause state law provides the basis for [the FDIC's] claim, that law also governs both the elements of the cause of action and its defenses." This statement should not be misunderstood to suggest that the Court's negative attitude toward federal common law or its rejection of judicial lawmaking in this case turned upon the nature of the cause of action, that is, one created by state law rather than federal law. Instead, Justice Stevens simply described the nature of this claim as a preface to his further observation that application of state law may raise special problems for federal judges when legal issues have "not . . . been definitively settled in the state jurisdiction in which the case is brought," because federal judges then must struggle with thorny state law issues without clear direction. Precisely because they are so uneasy in the robes of common-law judges, Justice Stevens appreciated the difficulties that federal judges encounter when trying to "estimate how the relevant state courts would perform their lawmakering task, and then emulate that sometimes purely hypothetical model." To ease that burden, Justice Stevens suggested that Congress might expressly provide a uniform federal rule to apply, and, further remarked that the Court should defer on questions of state law to federal judges who regularly deal with state law in their respective circuits and districts.

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222 Id.
223 Id.
224 Id. at 90 (Stevens, J., concurring).
225 Id.
226 Id. (quoting Northwest Airlines, Inc. v. Transp. Workers, 451 U.S. 77, 95 (1981)).
227 Id.
228 Id.
229 Id.
230 Id. at 90-91.
The Court, in its unanimous opinion, gave no sign that the presentation of a state law cause of action in the FDIC's lawsuit, rather than a federal statutory claim, was a factor in its analysis.\textsuperscript{231} At no point in its opinion does the Court hint that the source of law for the cause of action even influences, much less controls, the availability of federal common law. In fact, the Court relied directly upon prior decisions rejecting federal common law in the context of federal statutory causes of action.\textsuperscript{232}

For example, in explaining its reluctance to engage in judicial policymaking, the Court repeatedly cited and quoted from its prior decision in \textit{Northwest Airlines, Inc. v. Transport Workers}.\textsuperscript{233} In \textit{Northwest Airlines}, the Court unanimously declined to formulate a federal common-law right of contribution in actions under federal employment discrimination statutes.\textsuperscript{234} In addition, the Court marshaled its decision in \textit{Kamen v. Kemper Fin. Services, Inc.},\textsuperscript{235} in support of the proposition that a significant conflict between federal policy and state law must be adduced "as a precondition for recognition of a federal rule of decision."\textsuperscript{236} In \textit{Kamen}, the Court, again unanimously, refused to "fashion a federal common-law rule obliging the representative shareholder in a derivative action founded on the Investment Company Act of 1940, to make a demand on the board of directors even when such a demand would be excused as futile under state law."\textsuperscript{237}

\textsuperscript{231} See Lund, \textit{supra} note 199, at 995 ("The Court now made clear [in \textit{O'Melveny & Myers}] that there will be a very strong presumption of incorporating state law as the federal common law rule of decision, irrespective of the subject or issue before the courts."). Lest there be any doubt, the Supreme Court's most recent decision on point makes clear that the Court's negative attitude toward federal common law does not turn upon the federal or state source of law for the cause of action. In \textit{Atherton v. Federal Deposit Ins. Corp.}, 117 S. Ct. 666 (1997), the Court ruled that state law, and not federal common law, sets the standard of conduct for officers and directors of federally-insured financial institutions as long as the state standard is stricter than that of the federal statute. \textit{Id.} at 669-76. Thus, even though the institutions involved had been chartered by the federal government, the Court refused to create a federal common law of corporate governance and turned instead to the ready-made body of state corporation law to determine the liability of officers and directors for alleged misconduct. \textit{Id.} Significantly, the Court thereby overturned more than a century of precedent allowing a federal common-law cause of action for wrongdoing by officers and directors of federally-chartered institutions. \textit{Id.} at 669-674 (overruling Briggs v. Spaulding, 141 U.S. 132 (1891)).

\textsuperscript{232} \textit{O'Melveny & Myers}, 512 U.S. at 85, 89.
\textsuperscript{233} 451 U.S. 77 (1981).
\textsuperscript{234} \textit{Id.} at 98.
\textsuperscript{236} \textit{O'Melveny & Myers}, 512 U.S. at 87-88.
\textsuperscript{237} \textit{Kamen}, 500 U.S. at 92 (describing the question raised in the case) (citation omitted); see also \textit{id.} at 97-109 (rejecting the federal common-law rule).
The *O'Melveny & Myers* Court also cited its landmark decision in *United States v. Kimbell Foods, Inc.*, which articulated the classic and stringent test for the availability of a federal common law. In *Kimbell Foods*, the Court emphasized that federal law "governs questions involving the rights of the United States arising under nationwide federal programs," such as the federal government loan programs involved in that case. Nonetheless, the Court unanimously ruled that "absent a congressional directive, the relative priority of private liens . . . arising from these federal government lending programs is to be determined under nondiscriminatory state laws." In sum, even when the financial interests of the United States government were directly at stake, absent a clear conflict with federal statutory policy, the Court preferred to incorporate state law as the federal rule of decision rather than engage in judicial invention of a new federal regime of secured transactions and lien priority.

Most important, the crucial premise of the Court's analysis—that federal judges should not be formulating policy, a role reserved to "those who write the laws, rather than . . . those who interpret them"—applies with full force to judicial inventiveness in supplementing a federal cause of action. The Court's antipathy to federal judge-made law is unmistakable in *O'Melveny & Myers*. Justice Stevens confirmed this attitude in his concurrence, explaining that, unlike their state court peers, federal judges are not as competent in common-law judging because they "have not been vested with open-ended lawmaking powers."

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238 *O'Melveny & Myers*, 512 U.S. at 85, 87, 88.
240 *See infra* Part VI.B (applying the *Kimbell Foods* test, in light of *O'Melveny & Myers*, to the issue of corporate successor liability under CERCLA).
241 *Kimbell Foods*, 440 U.S. at 726.
242 *Id.* at 740.
243 *See id.* at 727-40.
245 Lund, *supra* note 199, at 998 ("Unmistakably, Justice Scalia [writing for the Court in *O'Melveny & Myers*] was hostile to any situation in which federal courts were asked, in any sense, to 'make' law.").
246 *O'Melveny & Myers*, 512 U.S. at 90 (Stevens, J., concurring) (quoting *Northwest Airlines*, 451 U.S. at 95). In making this observation, Justice Stevens quoted from an earlier opinion (which he had authored) that rejected federal common law in the context of a federal cause of action. *Id.*
V. Successor Liability Under CERCLA in the Courts After O'Melveny & Myers

Before 1994, the circuits were divided on whether the federal courts possessed an undefined power of common lawmaking in the context of CERCLA corporate successor liability.\(^{247}\) With one exception,\(^{248}\) every circuit decision suggesting the availability of federal common-law powers under CERCLA was rendered before the Supreme Court's recent decision in *O'Melveny & Myers*.\(^{249}\) The Supreme Court's careful reservation of federal common law for the rare case should now resolve the split in the federal appellate courts. Indeed, since the date of the Supreme Court's ruling in *O'Melveny & Myers*, several circuits have relied upon that decision to hold that state law must govern issues of business or contractual law under CERCLA when the statute does not provide an express rule of decision.\(^{250}\) The tide has plainly turned in the wake of *O'Melveny & Myers* as the federal courts properly follow the command of the Supreme Court to eschew judicial invention of common law absent the most compelling of circumstances.

A. General CERCLA Cases Post-O'Melveny & Myers

Outside of the specific context of corporate successor liability, the circuit courts have been unified in their deference to state law and avoidance of federal common law in CERCLA cases decided after *O'Melveny & Myers*. For example, in *Citizens Electric Corp. v. Bituminous Fire & Marine Insurance Co.*,\(^{251}\) the Seventh Circuit ruled that Illinois law governed the question of whether and when a CERCLA suit may be commenced against a corporation that has been dissolved.\(^{252}\) Citing *O'Melveny & Myers* as controlling authority, the court said that "federal law [should be] deemed to track state law" on this issue.\(^{253}\) Accordingly, the Seventh Circuit refused to develop federal law and abided by the Illinois statute

\(^{247}\) See supra Part III.A.2 (discussing the pre-*O'Melveny & Myers* division between circuits on the issue of federal common lawmaking in the context of CERCLA corporate successor liability).

\(^{248}\) See infra Part V.B (discussing the Second Circuit decision in B.F. Goodrich v. Betkoski, 99 F.3d 505 (2d Cir. 1996)).

\(^{249}\) 512 U.S. 79 (1994).

\(^{250}\) See infra Parts V.A-B (discussing post-*O'Melveny & Myers* cases and the presumption against federal common law).

\(^{251}\) 68 F.3d 1016 (7th Cir. 1995).

\(^{252}\) Id. at 1018-19.

\(^{253}\) Id. at 1019.
that permitted a lawsuit against a dissolved corporation if brought within five years of the dissolution.\textsuperscript{254}

Similarly, in \textit{Beazer East, Inc. v. Mead Corp.},\textsuperscript{255} the Third Circuit, which had been the first circuit to formulate a federal rule for corporate successor liability,\textsuperscript{256} backed away from assumption of common-law powers in the CERCLA context. In \textit{Beazer East}, the owner of a manufacturing facility brought an action for contribution of cleanup costs against the successor of the entity that had sold the facility.\textsuperscript{257} The defendant, as successor to the original owner, filed a counterclaim asserting that the facility purchase contract had obliged the buyer to indemnify the seller for any liabilities associated with the facility.\textsuperscript{258} Relying upon the teaching of \textit{O'Melveny & Myers}, the Third Circuit decided to apply state law to the issue of whether a contractual indemnification provision would be construed to include CERCLA liability.\textsuperscript{259} In distinguishing its earlier decision adopting federal common law for CERCLA successor liability,\textsuperscript{260} the Third Circuit prefaced that discussion by stating in a footnote that "[i]t is perhaps material to note that these [federal common-law] standards do not spring full formed and grown from the heads of federal judges as Athena did from Zeus nor does any Delphic oracle whisper uniformly in each judge's ear."\textsuperscript{261} The court's comment illustrates its trepidation of judicial lawmaking.

One district court within the Third Circuit has viewed \textit{Beazer East} as effectively overturning the circuit court's earlier adoption of federal common law for corporation successor liability under CERCLA. In \textit{SmithKline Beecham Corp. v. Rohm & Haas Co.},\textsuperscript{262} the district court considered a claim for apportionment of liability for an environmental cleanup under CERCLA between two corpo-

\textsuperscript{254} \textit{Id.} at 1019-20.
\textsuperscript{255} 34 F.3d 206 (3d Cir. 1994).
\textsuperscript{256} \textit{See Smith Land \\ & Improvement Corp. v. Celotex Corp.}, 851 F.2d 86, 90-92 (3d Cir. 1988); \textit{see also supra} Part III.A (discussing circuit decisions on corporate successor liability under CERCLA).
\textsuperscript{257} \textit{Beazer East}, 34 F.3d at 209-10.
\textsuperscript{258} \textit{Id.} at 210.
\textsuperscript{259} \textit{Id.} at 214-15.
\textsuperscript{260} \textit{Id.} at 214 (distinguishing \textit{Smith Land}, 851 F.2d 86). The Third Circuit distinguished \textit{Smith Land} by saying that a uniform federal standard of corporate successor liability was necessary so that CERCLA goals could not be evaded by resort to unduly narrow laws applying in a few states. \textit{Id.} Noting that the other circuits had uniformly adopted state law to interpret indemnification clauses, the Third Circuit found "no need to create a circuit conflict" and thus fell in line with those decisions. \textit{Id.}
\textsuperscript{261} \textit{Id.} at 214 n.3.
ations which had successively owned a site.\textsuperscript{263} Although each corporation accepted responsibility for contamination occurring during its respective period of ownership, the question remained whether the prior owner was also responsible for contamination by its purported corporate predecessor, which had been the original owner of the site.\textsuperscript{264}

The district court observed that the Third Circuit in \textit{Beazer East} had "declin[ed] to apply the principle" of its earlier decision in \textit{Smith Land & Improvement Corp. v. Celotex Corp.}\textsuperscript{265} to the case before it.\textsuperscript{266} Moreover, the district court pointed to the \textit{Beazer East} court's recognition that "the Supreme Court's recent decision in \textit{O'Melveny & Myers v. F.D.I.C.} 'teaches us that special federal rules are justified only in situations where there is a significant conflict between some federal policy or interest and the use of state law.'"\textsuperscript{267} The \textit{SmithKline} district court noted that the determination of corporate successorship controlled only the division of liability between the private parties to that case and would not affect the clean up of the site or the joint liability of the parties to the government.\textsuperscript{268} Accordingly, the district court found "no conflict between federal policy or interest and the application of state law with respect to successor liability[,]" and concluded that it would "follow \textit{Beazer} rather than \textit{Smith Land} by applying state law."\textsuperscript{269}

On appeal in \textit{SmithKline}, the Third Circuit reversed the district court's decision, concluding that an indemnification agreement controlled the outcome and that its express provisions could not be modified by application of successor liability rules.\textsuperscript{270} However, the Third Circuit, even while discussing the corporate successor doctrine, did not disavow the district court's reference to state law rather than federal common law.\textsuperscript{271} Nor did the court deny the

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\item \textsuperscript{263} \textit{Id.} at *1.
\item \textsuperscript{264} \textit{Id.} In addition, the case involved a question of whether, and to what extent, an indemnification clause entered into as part of the sale of the site between the two parties dictated the allocation of liability for the original owner's contamination. \textit{Id.} As discussed below, the Third Circuit on appeal found that the indemnification clause resolved the entire question of respective liability, making it unnecessary to consider principles of successor liability. See \textit{SmithKline Beecham Corp. v. Rohm & Haas Co.}, 89 F.3d 154, 158-64 (3d Cir. 1996).
\item \textsuperscript{265} 851 F.2d 86 (3d Cir. 1988).
\item \textsuperscript{266} \textit{SmithKline Beecham}, 1995 WL 117671, at *4.
\item \textsuperscript{267} \textit{Id.} (quoting \textit{Beazer East}, 34 F.3d at 214).
\item \textsuperscript{268} \textit{Id.}
\item \textsuperscript{269} \textit{Id.}
\item \textsuperscript{270} \textit{SmithKline Beecham Corp. v. Rohm & Haas Co.}, 89 F.3d 154, 158-64 (3d Cir. 1996).
\item \textsuperscript{271} \textit{Id.} at 162-64. The court cited its \textit{Smith Land} decision for the basic proposition that a successor corporation is liable for a prior corporation's CERCLA liability absent an
\end{itemize}
identified tension between its post-*O'Melveny & Myers* analysis in *Beazer East* and its pre-*O'Melveny & Myers* holding in *Smith Land*. Indeed, the court accepted the question before it as being whether the application of Pennsylvania’s version of the de facto merger doctrine altered or supplemented the allocation of liabilities under the contractual indemnification clause. In sum, the door seems to be open, or at least ajar, in the Third Circuit for reexamination of the source of law for corporate successor liability.

Finally, in *United States v. Cordova Chemical Company*, the Sixth Circuit, sitting en banc, rejected a new, more expansive standard for holding a parent corporation financially responsible for pollution on a site owned by a subsidiary corporation. The court therefore reversed the district court’s proposed “new middle ground” rule, which relaxed the traditionally strict standard for piercing the corporate veil and holding a parent corporation liable for the conduct of a subsidiary. The majority opinion, joined by seven judges, stated:

> While some may wish to extend the reach of CERCLA to maximize the impact of its remedies, nothing in the statute or its legislative history warrants the invocation by courts of vague, expansive concepts, such as the district court’s ‘new middle ground,’ which threaten the efficacy of time-honored limited liability protections afforded by the corporate form.

Accordingly, the court held that state law determines the circumstances under which a piercing of the corporate veil is warranted.

Most of the dissenting judges in *Cordova Chemical* also eschewed reliance on federal common law in determining the standard for liability under CERCLA of a parent corporation under these circumstances. The primary dissent, joined in full by four judges, relied instead upon a different interpretation of the text of CERCLA to conclude that a parent corporation involved in the indemnification clause, but intriguingly with no mention of the rule of law for determining successorship. *Id.* at 163. In addition, the court cited *Smith Land* in support of general statements about CERCLA providing for fair apportionment of remedial costs. *Id.* at 163 n.7.

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272 *Id.* at 162 & nn.5-6.
273 113 F.3d 572 (6th Cir. 1997) (en banc).
274 *Id.* at 577-81.
275 *See id.* at 578-80.
276 *Id.* at 579.
277 *Id.* at 580.
278 *Id.* at 586-90 (Ryan, J., dissenting).
management of a facility owned by a subsidiary could be liable as an "operator" under section 107(a)(2).\footnote{Id. (discussing 42 U.S.C. 9607(a)(2) (1994) which imposes liability upon an "operator" of a facility).} The dissenters viewed the question of direct liability of a parent for operating a facility as distinct from the question of derivative liability (through piercing the corporate veil) of a parent for the ownership or operation of a facility by a subsidiary.\footnote{Id. at 583-86 (Merritt, J., concurring in part and dissenting in part).} Only one of the twelve judges participating in the decision found federal common-lawmaking appropriate and proposed adoption of a judicially-crafted standard of liability.\footnote{Id.}

B. Corporate Successor Liability Cases Post-O'Melveny & Myers

Three circuits have spoken directly or indirectly since O'Melveny & Myers on the specific question of successor liability: (1) one to reaffirm its rejection of federal common law;\footnote{City Management Corp. v. U.S. Chem. Co., 43 F.3d 244 (6th Cir. 1994).} (2) one to join that conclusion in light of O'Melveny & Myers;\footnote{Redwing Carriers, Inc. v. Saraland Apartments, 94 F.3d 1489 (11th Cir. 1996).} and (3) one to embrace federal common-law powers with only a belated and cursory mention of O'Melveny & Myers and with scant attention to the merits of the issue.\footnote{B.F. Goodrich v. Betkoski, 99 F.3d 505 (2d Cir. 1996), denying petition for rehe’g, 112 F.3d 88 (2d Cir. 1997).}

First, the Sixth Circuit had declined to assume common-law powers under CERCLA even prior to O'Melveny & Myers.\footnote{Anspec Co., Inc. v. Johnson Controls, Inc., 922 F.2d 1240, 1245, 1248 (6th Cir. 1991).} In the 1994 decision of City Management Corporation v. U.S. Chemical Company,\footnote{43 F.3d 244 (6th Cir. 1994).} the Sixth Circuit confirmed its earlier conclusion that "the liability of a successor corporation for CERCLA obligations is determined by reference to state corporation law, rather than federal common law."\footnote{Id. at 250.}

Second, in 1996, the Eleventh Circuit weighed in on the issue through a decision in the closely analogous context of liability for CERCLA response costs by members of a limited partnership created under state law. In Redwing Carriers, Inc. v. Saraland Apartments,\footnote{94 F.3d 1489 (11th Cir. 1996).} the court held that, while federal law governs issues of
liability under CERCLA, state law should be adopted as the federal standard for determining when a limited partner may be held accountable for the CERCLA liability of the partnership.\textsuperscript{289} The decision whether to disregard state law limitations on the liability of a state-created entity like a limited partnership involves precisely the same considerations as the decision whether to displace state corporate successor liability rules with judicially-created federal common law. Indeed, the Eleventh Circuit in \textit{Redwing Carriers} immediately turned to case authority on liability for corporations under CERCLA as directly instructive in analyzing CERCLA’s interaction with state partnership law.\textsuperscript{290}

In reaching its conclusion that state partnership law should be followed, the Eleventh Circuit relied heavily upon, and quoted extensively from,\textsuperscript{291} the concurring opinion of Judge Kennedy in the Sixth Circuit’s decision in \textit{Anspec Co., Inc. v. Johnson Controls, Inc.}\textsuperscript{292} In \textit{Anspec}, the Sixth Circuit refused to create federal common law to determine corporate successor liability under CERCLA.\textsuperscript{293} In its \textit{Redwing Carriers} decision, the Eleventh Circuit quoted Judge Kennedy’s observation that federal common law was not necessary “to guard against the risk that states will create safe havens for polluters” through unduly generous corporation laws.\textsuperscript{294} The Eleventh Circuit declared that this observation applies “with equal force in the context of state partnership rules governing the liability of limited partners.”\textsuperscript{295} In sum, when the issue is presented in a future case, the Eleventh Circuit’s resolution of the corporate successor liability question is foreordained and controlled by the \textit{Redwing Carriers} precedent.\textsuperscript{296}

Third, the sole discordant note in this harmonious ode to \textit{O'Melveny & Myers} and its admonition against federal common law was sounded by the Second Circuit in \textit{B.F. Goodrich v.}

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\item \textsuperscript{289} \textit{Id.} at 1499-1502.
\item \textsuperscript{290} \textit{Id.} at 1499-1500.
\item \textsuperscript{291} \textit{Id.} at 1501-02.
\item \textsuperscript{292} 922 F.2d 1240 (6th Cir. 1991).
\item \textsuperscript{293} \textit{Id.} at 1245, 1248-51.
\item \textsuperscript{294} \textit{Redwing Carriers}, 94 F.3d at 1502 (quoting \textit{Anspec Co.}, 922 F.2d at 1250 (Kennedy, J., concurring)).
\item \textsuperscript{295} \textit{Id.}
\item \textsuperscript{296} See also infra notes 378-82 and accompanying text (discussing how the Eleventh Circuit’s analysis in \textit{Redwing Carriers} of the undefined term “owner” in CERCLA, by express reference to state law, applies with equal force to an analysis of the undefined term “corporation”).
\end{itemize}
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Betkoski in 1996. After concluding, unremarkably, that CERCLA does impose liability upon corporate successors, the Second Circuit adopted federal common law with no more analysis than a citation to other circuit decisions. The court then moved swiftly past the traditional successor liability doctrine to embrace the expansive substantial continuity test. Despite its recognition that the circuits have been divided on the proper rule of decision for corporate successor liability, the court did not pause to evaluate the competing arguments or to answer the powerful critique of the federal common law approach presented by the Sixth Circuit in Anspec Co., Inc. v. Johnson Controls, Inc. The court simply asserted “the importance of national uniformity” and declared that the novel substantial continuity test was “superior to the older and more inflexible ‘identity’ rule.”

Moreover, in its initial opinion, the Second Circuit failed even to acknowledge the Supreme Court’s recent landmark decision on federal common law in O’Melveny & Myers v. Federal Deposit Insurance Corporation, failed to mention or apply the stringent test for adoption of federal common law articulated in United States v. Kimbell Foods, Inc., and failed to cite the Rules of Decision Act, which provides that the “laws of the several states” shall be the rules of decision in federal courts in the absence of a constitutional or statutory directive. After being prompted by a petition for rehearing, the court issued a second short opinion, briefly acknowledging O’Melveny & Myers and Kimbell Foods. The

297 99 F.3d 505 (2d Cir. 1996).
298 See supra Part II.B (discussing application of CERCLA liability to corporate successors).
300 Id. at 519 (citing, inter alia, Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86, 92 (3d Cir. 1988); United States v. Mexico Feed & Seed Co., 980 F.2d 478, 487 n.9 (8th Cir. 1992); Louisiana-Pacific Corp. v. Asarco, Inc., 909 F.2d 1260, 1263 & n.2 (9th Cir. 1990); Anspec Co., Inc. v. Johnson Controls, Inc., 922 F.2d 1240, 1248 (6th Cir. 1991)).
301 Id. See generally supra Part III.A (discussing the continuity of enterprise theory of corporate successor liability).
302 B.F. Goodrich, 99 F.3d at 519 (citing conflicting circuit decisions on whether to adopt a federal common law rule or to apply state law on successor liability).
303 922 F.2d 1240 (6th Cir. 1991).
304 B.F. Goodrich, 99 F.3d at 519.
court then denied the petition for rehearing with the unsupported conclusion that "there is a significant need for a uniform rule, allowing lenient state law rules to control would defeat federal policy, and [the court] perceive[d] no danger that [its] decision to adopt a federal rule of 'substantial continuity' will unduly upset existing corporate relationships."\(^{309}\) Unfortunately, the Second Circuit's decision indicates that Supreme Court review will likely be required to lay to rest judicial inventiveness through federal common law under CERCLA.

VI. THE PRESUMPTION IN FAVOR OF STATE LAW AS THE RULE OF DECISION PRECLUDES CREATION OF FEDERAL COMMON LAW FOR SUCCESSOR LIABILITY UNDER CERCLA

A. The Presumption in Favor of State Law as the Rule of Decision Applies to CERCLA Successor Liability

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.\(^{310}\)

CERCLA imposes liability for the response costs of a hazardous waste site upon "persons,"\(^{311}\) who in turn are defined to include "an individual, firm, corporation, association, partnership, consortium, joint venture, [or] commercial entity."\(^{312}\) By choosing the term "corporation," and failing to define it in any special manner, Congress presumably intended to describe that entity created and regulated by the corporation laws of the several states.\(^{313}\) Congress surely understood that corporations proceed from state law and thus must have intended for the organic state laws creating and shaping corporations to apply.\(^{314}\) As Judge Kennedy of the Sixth

\(^{309}\) Id. at 91.


\(^{312}\) Id. § 9601(21). See generally supra Part II.B (discussing the liability of corporations and corporate successors under CERCLA).

\(^{313}\) See Long Beach Unified Sch. Dist. v. Godwin Cal. Living Trust, 32 F.3d 1364, 1368 (9th Cir. 1994) (holding that, since CERCLA provides no definition of "owner," the term would be given its ordinary meaning under state common law).

\(^{314}\) See Green, supra note 54, at 935 ("Absent some contrary indication, interpretation of Congress' use of the term 'corporation' would seem best accomplished within the state
Circuit wrote when rejecting federal common law for corporate successor liability under CERCLA:

[Corporations] are artificial creations, wholly dependent on state law for their existence. Those state laws define their powers, rights and liabilities, prescribe their procedures, govern their continued existence, and define the terms upon which mergers may occur and the effect to be given to mergers.\textsuperscript{315}

State law regularly is adopted to provide the interstitial rules that a federal statute leaves unresolved.\textsuperscript{316} As a matter of comity with the states, the Supreme Court has consistently refused to create a federal rule of decision that displaces state law in an area of traditional state concern.\textsuperscript{317} As demonstrated by the quotation that introduces this part of the article, state corporation law manifestly is one of those areas. The Court has explained that it "is an accepted part of the business landscape in this country for States to create corporations, to prescribe their powers, and to define the rights that are acquired by purchasing their shares."\textsuperscript{318} Indeed, "no principle of corporation law and practice is more firmly established than a State's authority to regulate [its] domestic corporations. . . ."\textsuperscript{319} A state's power to create and define a corporation

statutory and common-law framework that creates it.

\textsuperscript{315} Anspec Co., Inc. v. Johnson Controls, Inc., 922 F.2d 1240, 1248-49 (6th Cir. 1991) (Kennedy, J., concurring). Even when a corporation is chartered by the federal government, the Supreme Court has declined to judicially create a federal body of corporation law and has instead relied upon state corporation law to provide the rule of decision. Atherton v. Federal Deposit Ins. Corp., 117 S. Ct. 666, 669-76 (1997) (holding that state law, and not federal common law, sets the standard of conduct for officers and directors of federally-chartered financial institutions).

\textsuperscript{316} Wilson v. Omaha Indian Tribe, 442 U.S. 653, 672 (1979).

\textsuperscript{317} See United States v. Yazell, 382 U.S. 341, 352 (1966) ("Both theory and the precedents of this Court teach us solicitude for state interests . . . ."); see also Reconstruction Fin. Corp. v. Beaver County, 328 U.S. 204, 210 (1946) (holding that state law should be applied to a matter that is "deeply rooted in state traditions, customs, habits, and laws").

\textsuperscript{318} CTS Corp. v. Dynamics Corp., 481 U.S. 69, 91 (1987).

\textsuperscript{319} Id. at 89.
necessarily encompasses the determination of what constitutes a succession to or continuation of that corporation, as the corporation’s “very existence and attributes are a product of [that state’s] law.”

Congress has long mandated that state law be regarded as the rule of decision unless Congress has declared otherwise. The Rules of Decision Act, presently codified at 28 U.S.C. § 1652 and derived from Section 34 of the Judiciary Act of 1789, states: “The 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.”

Law students are introduced to the Rules of Decision Act, and the presumption against federal common law, in the venerable case of *Erie Railroad v. Tompkins*. In *Erie*, the Supreme Court overturned a century of federal court experimentation in common law-making and ruled that a federal district court sitting in diversity of citizenship jurisdiction must apply both the statutory and the common law rules of the state in which it sits. The Court relied for its decision upon both the Rules of Decision Act, as properly interpreted, and constitutional limitations upon the powers of the federal courts to fashion legal principles.

While the command of the Rules of Decision Act is most commonly recognized and applied in the context of diversity of citizenship actions, the statute by its terms is not so constrained. By its plain language, the Act creates a presumption that the “laws of the several states” are to govern in “civil actions in the courts of the United States” unless a federal statute, treaty, or constitutional provision “otherwise require[s] or provide[s].” This directive applies in all federal court cases, not only in diversity of citizenship cases. The *Erie* Court itself did not limit its holding to diversity

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320 See id.
322 1 Stat. 92 (1789).
323 304 U.S. 64 (1938).
324 Id. at 69-80.
325 Id. at 72-73.
326 Id. at 78-80. See also Clark, supra note 199, at 1255 (“*Erie* established the general rule—based on mutually reinforcing principles of federalism and separation of powers—that federal courts must apply the substantive law of the state in which they sit in the absence of positive federal law to the contrary.”).
328 See Morgan v. South Bend Community Sch. Corp., 797 F.2d 471, 474 (7th Cir. 1986) (holding that the Rules of Decision Act is not limited to diversity cases); see also Thomas
cases, stating that "[e]xcept in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State" and further denying the existence of a "federal general common law." Not incidentally, the Supreme Court in its recent decision in O'Melveny & Myers v. Federal Deposit Insurance Corporation began its analysis of whether to formulate a federal common-law rule with the foundational Erie doctrine that "[t]here is no federal general common law."

W. Merrill, The Common Law Powers of Federal Courts, 52 U. Chi. L. Rev. 1, 28-29 (1985) (observing that from the date of its original enactment, the Rules of Decision Act "was not limited to cases brought under the diversity jurisdiction"). As Professor Stephen Burbank concludes:

[The Rules of Decision Act speaks directly to the circumstances in which federal courts can fashion or apply federal judge-made rules, however they are characterized. When state law is found to apply, in a federal question case as well as in a state law diversity case, that result follows not because of judicial grace or borrowing, but because Congress has directed it.


The Supreme Court's footnote comment in Del Costello v. International Bhd. of Teamsters, 462 U.S. 151, 159 n.13 (1983), should not be understood to confine the application of the Rules of Decision Act to diversity cases. In that footnote, the Court maintained that "[s]ince Erie, no decision of this Court has held or suggested that [the Rules of Decision Act] requires borrowing state law to fill gaps in federal substantive statutes." Id. (emphasis added). However, as Professor Burbank suggests, the Del Costello majority was reacting to a rigid view of the Rules of Decision Act presented by the dissent (id. at 172-74 (Stevens, J., dissenting)), and the footnote thus may best be understood as rejecting an absolutist view that the Act requires resort to state law even when application of state law would undermine the federal statutory purpose. See Burbank, supra, at 704; Stephen B. Burbank, Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach, 71 Cornell L. Rev. 733, 758-61 (1986).

Indeed, the Del Costello Court indicated as much by concluding that "neither Erie nor the Rules of Decision Act can now be taken as establishing a mandatory rule that we apply state law in federal interstices." Del Costello, 462 U.S. at 161 n.13. When a federal statutory scheme would be threatened by application of inconsistent state law, the Rules of Decision Act does not establish a "mandatory rule" that would require application of state law, since under such circumstances, an Act of Congress would "otherwise require or provide" for a federal rule to save the statute. See 28 U.S.C. § 1652 (1994) (providing that the laws of the states shall be regarded as rules of decision, "except where . . . Acts of Congress otherwise require or provide"). However, the Del Costello Court did not address the question of whether the Rules of Decision Act applies when judicial adoption of a federal rule is not necessary to enforcement of a federal statutory regime. See Burbank, supra, at 759. The Supreme Court had previously made clear that the Rules of Decision Act is not limited in application to diversity cases. Campbell v. Haverhill, 155 U.S. 610, 614-16 (1895).

329 Erie, 304 U.S. at 78.
331 Id. at 83 (quoting Erie, 304 U.S. at 78); see also Atherton v. Federal Deposit Ins. Corp., 117 S. Ct. 666, 670 (1997) (holding that federal common-law corporate governance rules for federally-chartered institutions did not survive Erie, and quoting the Erie Court's statement that "[t]here is no federal general common law").
Professor Thomas Merrill has described the Rules of Decision Act as "essentially derived from [the] constitutional principles" of federalism, separation of powers, and electoral accountability.\textsuperscript{332} As Professor Martin Redish reminds us, fundamental principles of American political and constitutional theory, grounded in our identity as a democratic society, direct that policy judgments be made by the representative branches of the federal government rather than an unaccountable judiciary.\textsuperscript{333} He explains that Congress, through the Rules of Decision Act, has specifically acted "to reduce the pervasive reach of federal substantive law or, at the very least, to limit the situations in which federal substantive law displaces state law to those specific instances in which Congress—rather than the federal judiciary—chooses to do so."\textsuperscript{334}

Read literally, the Rules of Decision Act "unambiguously precludes the judiciary's authority to establish federal common law" under nearly any circumstance.\textsuperscript{335} At a minimum, the Act creates a presumption in favor of state law, akin to a "clear statement" rule.\textsuperscript{336} In other words, Congress must unmistakably authorize for-

\textsuperscript{332} Merrill, \textit{supra} note 328, at 8, 27-32.

\textsuperscript{333} \textsc{Martin H. Redish, The Federal Courts in the Political Order: Judicial Jurisdiction and American Political Theory} 9 (1991).

\textsuperscript{334} \textit{Id.} at 30; \textit{see also} Merrill, \textit{supra} note 328, at 31 (stating that the Rules of Decision Act "operate[s] as an independent statutory barrier to lawmaking by federal courts").

\textsuperscript{335} \textsc{Redish, supra} note 333, at 31; \textit{see also id.} at 43 ("[T]he Rules of Decision Act does not authorize a federal court to fashion a common law rule simply on the basis of a finding of an overriding federal interest. On the contrary, it quite explicitly prohibits the federal courts from creating their own free-standing substantive common law principles."). \textit{But see} Louise Weinberg, \textit{The Curious Notion That the Rules of Decision Act Blocks Supreme Court Federal Common Law}, 83 Nw. U. L. Rev. 860, 860-61, 865-68 (1989) (criticizing Professor Redish's argument that "the Rules of Decision Act somehow prevents courts from fashioning federal answers to federal questions;" arguing that the Act is an historical anachronism enacted by the first Congress which had no understanding of an independent federal common law which it could have intended to reject; and broadly contending that the Supremacy Clause of the Constitution authorizes general creation of federal common law on federal matters, thereby overcoming the literal language of the Act); Louise Weinberg, \textit{Federal Common Law}, 83 Nw. U. L. Rev. 805, 805, 818, 851-52 (1989) (declaring that "[i]t is time to pay final respects to the Rules of Decision Act" as having no "modern meaning;" asserting that "there are no fundamental constraints on the [judicial] fashioning of federal rules of decision," and concluding that the courts, including federal courts, have "proven themselves uniquely thoughtful expositors of evolving policy," such that federal common law should be created whenever "carefully considered national substantive policy" is best served).

\textsuperscript{336} A "clear statement" rule is a canon of statutory interpretation that requires a clear and unambiguous expression by Congress of an intent to accomplish a particular purpose before the courts will construe a statute as extending to a certain point. For example, several commentators have described the Supreme Court's sovereign immunity decisions as adopting a "clear statement" rule, that is, demanding a plain and unequivocal expression by Congress in the text of a statute concerning the scope of its consent to a suit against the
mulation of judge-made law before a court may supersede state law principles.\footnote{337} When Congress has not spoken to a matter, either directly by declaring a federal standard or indirectly by creating a statutory regime that is squarely incompatible with state law,\footnote{338} then state law continues to govern.\footnote{339} When the federal statute is silent on the particular point in question, the presumption in favor of state law as the rule of decision is particularly difficult to overcome.

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\footnote{338} Professor Merrill refers to this indirect congressional authorization of judge-made rules as “preemptive lawyermaking” by the judiciary, which he explains is a form of textual interpretation rather than unguided judicial inventiveness:

Preemptive lawyermaking may be invoked when a court, although it can discern no specific intention on the part of the enacting body with respect to the question before it, finds that the adoption of state law as the rule of decision would unduly frustrate or undermine a federal policy as to which there is a specific intention on the part of the enacting body.

Merrill, \textit{supra} note 328, at 36.

\footnote{339} As the Supreme Court has recently stated, asking whether state law is viewed as governing by its own force or through incorporation as the rule of decision under a federal statutory regime “does not much advance the ball.” O’Melveny & Myers v. Federal Deposit Ins. Corp., 512 U.S. 79, 85 (1994). Rather, the crucial question is whether state law is to be applied or displaced, “and if it is applied it is of only theoretical interest whether the basis for that application is [the state’s] own sovereign power or federal adoption of [the state’s] disposition.” \textit{Id}. 
Although judicial adoption of a federal rule occasionally may be justified when there is an unavoidable conflict between state law and federal statutory policy, "federal courts [should be] scrupulous about confining such lawmaking to cases where it is truly necessary either to oust state law or to supplement federal law in order to protect specifically intended federal policies.\textsuperscript{340}\textsuperscript{341}\textsuperscript{342} Moreover, honoring the separation of powers\textsuperscript{341} and federalism principles\textsuperscript{342} animating the Rules of Decision Act, the courts should be chary of formulating federal common law when invited by litigants to shape fundamental policy, especially when it trespasses upon a matter of traditional state concern.

Federal common law has persisted, largely of necessity, in certain discrete enclaves where no other source of law is readily available or when uniquely federal concerns demand a uniform legal standard, such as admiralty law,\textsuperscript{343}\textsuperscript{344} international relations,\textsuperscript{344} federal

\textsuperscript{340} Merrill, \textit{supra} note 328, at 37.
\textsuperscript{341} The Supreme Court, recognizing that separation of powers principles circumscribe the formulation of federal common law, has stated that "the usual and important concerns of an appropriate division of functions between the Congress and the federal judiciary" are fully applicable to the process of federal common-lawmaking. \textit{See} City of Milwaukee v. Illinois, 451 U.S. 304, 313 (1981); \textit{see also} O'Melveny & Myers, 512 U.S. at 89 ("Within the federal system, at least, we have decided that the function of weighing and appraising [policy considerations] is more appropriately for those who write the laws, rather than for those who interpret them.") (quoting Northwest Airlines, Inc. v. Transp. Workers, 451 U.S. 77, 98 n.41 (1981)); Clark, \textit{supra} note 199, at 1261-62 (arguing that "even if the Constitution authorizes the federal government to adopt rules of decision" to govern a matter, "unilateral lawmaking by federal courts in this context violates the Constitution's separation of powers").

\textsuperscript{342} The federal courts are courts of limited jurisdiction; they are not to function as the general megacourts for the entire country. A deference to state private law reflects the federalistic value of nonuniform approaches and permits the several states to serve as laboratories. The political accountability of Congress and its perceived concern for state interest make it the preferred body for any displacement of state private law. Brown, \textit{supra} note 337, at 259; \textit{see also} Clark, \textit{supra} note 199, at 1259 ("Judicial federalism posits that the federal courts unconstitutionally invade 'the autonomy and independence of the states whenever they unilaterally apply a rule of their own choosing in lieu of substantive state law—that is, in the absence of a controlling federal constitutional, statutory, or treaty provision requiring application of that rule.") (quoting Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938)).


\textsuperscript{344} See, e.g., Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 425 (1964). Professor Bradford Clark suggests that rules of decision derived from the traditional principles of the law of nations—such as that adopted in \textit{Banco Nacional de Cuba}—are not, in fact, judge-made common law, but rather flow from the structure of the Constitution. Clark, \textit{supra} note 199, at 1272, 1292-1305. Because foreign relations are beyond the legislative competence of the states, these rules raise few, if any, federalism concerns. \textit{id.} at 1294-99. Moreover, rather than violating separation of powers through court lawmaking, "judicial
government contract law,\textsuperscript{345} and enforcement of collective bargaining agreements between labor unions and employers.\textsuperscript{346} However, these are the exceptions. As the Court has explained:

[A]bsent some congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases. In these instances, our federal system does not permit the controversy to be resolved under state law, 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 it inappropriate for state law to control.\textsuperscript{347}

Corporate successor liability law does not fit comfortably in this company, even in the context of a federal environmental action. CERCLA uses the unadorned and undefined term “corporation,” thus failing to suggest any reference other than that creature of state law, as defined by state law. The sovereign interests of the United States are not intimately involved,\textsuperscript{348} nor are relations

adherence to rules of this nature is arguably necessary to ensure that the judiciary does not encroach on the exclusive constitutional authority of the political branches to conduct foreign relations." \textit{Id.} at 1272.


\textsuperscript{346} See, e.g., Textile Workers Union of Am. v. Lincoln Mills of Alabama, 353 U.S. 448, 451-52 (1957). Professor Merrill has described cases such as \textit{Lincoln Mills} as involving “delegated lawmaking” to the federal courts, whereby Congress has directly conferred upon the judiciary the power to formulate substantive law. Merrill, \textit{supra} note 328, at 40. He regards this “delegated lawmaking” as consistent with federalism and separation of powers, and with the Rules of Decision Act, if “the enacting body specifically intended to delegate lawmaking power to the federal courts, and . . . the textual provision . . . circumscribes or ‘frames’ with reasonable specificity the area in which judicial lawmaking is to take place.” \textit{Id.} at 41.


\textsuperscript{348} By cases “concerned with the rights and obligations of the United States,” the Supreme Court appears to mean matters that directly impact upon the federal government in its sovereign capacity, such as immediate claims upon the public treasury. In \textit{Texas Industries}, 451 U.S. at 641, the Court cited by way of example to decisions involving commercial paper issued by the Treasurer of the United States (Clearfield Trust Co. v. United States, 318 U.S. 363 (1943)), and construction of a written agreement by the United States to acquire real property pursuant to express congressional authorization (United States v. Little Lake Misere Land Co., 412 U.S. 580 (1973)). \textit{See generally} \textit{19 Charles Alan Wright, et al., Federal Practice and Procedure § 4515} (1996) (describing this category of federal common law cases as involving “the legal relationships and the proprietary interests of the United States”). \textit{But see Clark, supra} note 199, at 1361-68 (arguing that
among the various states or with foreign nations. The presumption in favor of state law, codified in the Rules of Decision Act and confirmed by precedent, therefore stands unrebutted.

B. The Presumption Against Federal Common Law Has Not Been Overcome for CERCLA Successor Liability

As the Rules of Decision Act states a positive presumption in favor of state law as the governing rule absent a federal statutory provision to the contrary, the Supreme Court’s *Kimbell Foods* test enforces a negative presumption against federal common law absent a compelling showing of “a significant conflict between some federal policy or interest and the use of state law.” In *United States v. Kimbell Foods*, the Court set forth three considerations the courts must weigh to determine whether a federal rule of decision should be formulated: (1) whether the vindication of federal interests requires a “nationally uniform body of law;” (2) “whether application of state law would frustrate specific objectives of the federal programs;” and (3) “the extent to which appli-

federal court displacement of state law in cases involving “the rights and obligations of the United States” raises substantial separation of powers concerns, but that the O’Melveny & Myers decision “may signal heightened sensitivity to the constitutional concerns raised by federal common law”). Moreover, the *Texas Industries* Court further qualified the power to create federal common law by demanding that the sovereign interests of the United States be “intimately” involved (Texas Ind., 451 U.S. at 641), thus suggesting that an incidental or indirect effect upon the federal government or the federal purse is an insufficient basis for formulation of a judicial rule displacing state law. For example, in *United States v. Kimbell Foods*, Inc., 440 U.S. 715, 740 (1979), the Court declined to create a uniform federal rule, supplanting state law, to govern the relative priority of liens, notwithstanding the effect upon a federal government loan program.

Thus, the mere fact that the United States may be a potential claimant in a CERCLA action is not the kind of intimate sovereign interest that demands judicial invention of a federal rule unauthorized in the statute. In any event, the interests of the sovereign United States in recovering its costs for an environmental cleanup under CERCLA are, at most, tangentially implicated by the successor liability question. As discussed below, CERCLA provides for joint and several liability to the United States; the ancillary issue of corporate successor liability typically only arises in an intramural dispute between private parties concerning proper allocation of that liability; and, even if no private entity were available to bear the costs, the burden would shift to the Superfund financed largely by industry and not to the public treasury. See infra notes 412-16 and accompanying text; see also Mire v. DeKalb County, 433 U.S. 25, 29-30 (1977) (rejecting creation of federal common law when the resolution of the claim “will have no direct effect upon the United States or its Treasury” and “only the rights of private litigants are at issue”).

349 See supra Part VI.A (discussing the presumption in favor of state law created by the Rules of Decision Act).


cation of a federal rule would disrupt commercial relationships
predicated on state law."\textsuperscript{352}

As suggested by the successful petitioners in \textit{O'Melveny & Myers v. Federal Deposit Insurance Corporation},\textsuperscript{353} "[t]hese standards are
framed to minimize significantly the likelihood that the courts will
create federal rules of decision."\textsuperscript{354} A uniform body of law must be
truly necessary; the interference of state law must be with discrete
federal interests and must be concretely demonstrated. The
\textit{O'Melveny & Myers} opinion clarifies that the heavy burden of
proving a conflict between state law and federal statutory policy
rests squarely upon the party soliciting judicial creation of federal
common law.\textsuperscript{355} Even then, state law ought to be employed when
the effect of a federal rule would be to frustrate commercial expecta-
tions grounded in state law. Only when all these considerations
are satisfied would a case qualify as "one of those extraordinary
cases in which the judicial creation of a federal rule of decision is
warranted."\textsuperscript{356}

Although the \textit{Kimbell Foods} decision did not address the posi-
tive presumption in favor of state law under the Rules of Decision
Act, the stringent examination that the decision articulates effec-
tively establishes a corresponding negative presumption against
federal common law. Indeed, the \textit{Kimbell Foods} test for scrutiniz-
ing any entreaty to formulate federal common law is the opposite
side of the same coin as the Rules of Decision Act directive in
favor of state law as the rule of decision. In any event, the \textit{Kimbell
Foods} inquiry, sharpened by the antipathy toward judicial lawmak-
ing expressed in \textit{O'Melveny & Myers},\textsuperscript{357} provides a compelling
independent basis for rejecting federal common law in determining
corporate successor liability under CERCLA.

1. \textbf{Congress Did Not Intend and There is No Need to Create a
"Nationally Uniform Body of Law" on Corporate
Successorship Under CERCLA}

Nothing on the face of CERCLA, or in the authoritative legisla-
tive reports, even hints that Congress intended to displace state

\textsuperscript{352} Id. at 728-29.
\textsuperscript{353} 512 U.S. 79 (1994).
\textsuperscript{354} Brief for Petitioner, 1994 WL 190961, at *33, \textit{O'Melveny & Myers}, 512 U.S. 79 (No.
93-489).
\textsuperscript{355} See \textit{O'Melveny & Myers}, 512 U.S. at 88 (discussing the FDIC's failure to "identify[ ]
a specific, concrete federal policy or interest that is compromised by [state] law").
\textsuperscript{356} Id. at 89.
\textsuperscript{357} See generally Part IV (discussing the \textit{O'Melveny & Myers} decision).
corporation law.\textsuperscript{358} Beyond the Act's definition of "person" as including "corporation,"\textsuperscript{359} CERCLA is silent. Moreover, in enacting CERCLA, Congress deliberately left room for the operation of state law in several respects, thus disavowing the need for nationwide uniformity in all interstitial decisional rules to be applied under the statute. The Supreme Court has held that where an express provision of a statutory scheme relies on state law, the "assumption" that uniformity is necessary cannot be sustained.\textsuperscript{360} Furthermore, as the Court recently stated in \textit{O'Melveny \& Myers}, a court-made federal rule should not be adopted "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."\textsuperscript{361}

As examples, Section 107(1)(1) of CERCLA establishes a lien in favor of the United States on real property subject to or affected by a CERCLA cleanup to secure repayment of costs.\textsuperscript{362} However, this section makes the priority of that lien against other creditors, and thus the United States' potential ability to recover its costs, subject to determination under state law.\textsuperscript{363} In Section 107(e), Congress expressly preserved the efficacy of private indemnification agreements.\textsuperscript{364} The courts have uniformly recognized that Congress thereby preserved the associated body of state contract law under which indemnity agreements are to be interpreted.\textsuperscript{365} Section 113(f)(1) provides that claims for contribution shall be brought "in accordance with . . . the Federal Rules of Civil Procedure."\textsuperscript{366} Those Rules, in turn, provide that "[t]he capacity of a corporation to sue or be sued shall be determined by the law under which it was organized."\textsuperscript{367} The courts agree that a corporation's

\textsuperscript{358} See supra Parts II.A, II.B, III.B.1 (discussing the text and legislative history of CERCLA as relevant to corporations and successor liability).


\textsuperscript{360} See Reconstruction Fin. Corp. v. Beaver County, 328 U.S. 204, 209 (1946).

\textsuperscript{361} \textit{O'Melveny \& Myers}, 512 U.S. at 85.


\textsuperscript{363} Id. § 9607(l)(3).

\textsuperscript{364} Id. § 9607(e).

\textsuperscript{365} See, e.g., Beazer East, Inc. v. Mead Corp., 34 F.3d 206, 212 (3d Cir. 1994); Olin Corp. v. Consolidated Aluminum Corp., 5 F.3d 10, 15 (2d Cir. 1993); John S. Boyd, Co. v. Boston Gas Co., 992 F.2d 401, 406 (1st Cir. 1993); United States v. Hardage, 985 F.2d 1427, 1433 & n.2 (10th Cir. 1993); Mardan Corp. v. C.G.C. Music, Ltd., 804 F.2d 1454, 1458-60 (9th Cir. 1986).


\textsuperscript{367} \textit{Fed. R. Civ. P.} 17(b).
amenability to suit under CERCLA is governed by state law, not by federal common law.\textsuperscript{368}

A comparison between congressional treatment of the terms "owner" and "corporation" in CERCLA demonstrates that Congress knew how to create a specialized federal meaning for common terms when it so intended. By contrast, when Congress did not intend to formulate a federal standard, it left familiar legal terms to be fleshed-out by reference to the ready-made body of state law.

Under Section 107(a), a current "owner" of a facility at which hazardous substances were disposed or any person who previously "owned" such a facility at the time of a disposal of hazardous substances is liable for cleanup costs.\textsuperscript{369} As discussed further below,\textsuperscript{370} because the meaning is not specified in the statute, the definition of "owner" as a general term is self-referential and thus must be given content by state property law.\textsuperscript{371} However, Congress did depart from the common legal understanding of "owner" to create particular ownership rules to be applied to secured creditors and to state governments taking title involuntarily in their status as sovereigns. Section 101(20)(A) of CERCLA provides that the term "owner or operator" "does not include a person who without participating in the management of a... facility holds indicia of ownership primarily to protect his security interest in the... facility."\textsuperscript{372}


\textsuperscript{370} See infra notes 374-82 and accompanying text (discussing cases that turn to state law when defining the term "owner" under CERCLA).

\textsuperscript{371} The definition of "owner" in CERCLA is self-referential because section 101(20)(A) defines "owner" as any person "owning" a vessel or facility, with no further elaboration or explanation. 42 U.S.C. § 9601(20)(A) (1994).

\textsuperscript{372} 42 U.S.C. § 9601(20)(A) (1994). See, e.g., Northeast Doran, Inc. v. Key Bank, 15 F.3d 1, 2-3 (1st Cir. 1994) (holding that a mortgagee which obtained title to property through foreclosure and promptly sold it at a foreclosure sale was not an "owner" of the property because of CERCLA's "security interest holder" exception); United States v. McLamb, 5 F.3d 69, 71-73 (4th Cir. 1993) (holding that a bank was exempt from CERCLA liability when, although it owned the property for a period of time, it held ownership "primarily to protect its security interest" within the meaning of the CERCLA exception, it almost immediately sold the property, and took no steps to use or manage the property); In re Bergsøe Metal Corp., 910 F.2d 668, 670-72 (9th Cir. 1990) (holding that the port authority was not an "owner" liable under CERCLA when it held the deed to the site of a lead recycling plant for the sole purpose of providing financing for the plant). The EPA has promulgated a rule concerning the "secured creditor" exemption, 40 C.F.R. § 300.1100, which Congress recently declared had been "validly issued." Pub. L. No. 104-208 (1996).
101(20)(D) creates a safe harbor for states by excluding from the category of "owners or operators" those state governments that "acquired ownership or control involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign." Thus, in these particular circumstances, Congress expressly displaced state property law to place federal limiting rules on the consequences of "ownership."

Congressional treatment of the term "corporation" in CERCLA stands in marked contrast. Unlike the special rules enunciated in Section 101(20) for "owner," there is nothing in the reference to "corporation" or elsewhere in CERCLA that specifies distinctive rules on the nature of the corporate entity or corporate successorship. As demonstrated by its deliberate alteration of the meaning of "owner" in certain defined circumstances, Congress was fully capable of writing its own particularized standard of corporate successorship if it had intended to displace state law.

Outside of the special contexts of secured creditors and involuntary accession to property by state governments, the courts have recognized that the term "owner" in CERCLA should be governed by its ordinary meaning under state common law. For example, in Long Beach Unified School District v. Godwin California Living Trust, the Ninth Circuit addressed whether the holder of an easement, who had not actively contributed to a hazardous waste site as an "operator," nonetheless should be treated as an "owner" of land subject to CERCLA liability. Observing that "CERCLA gives no definition of 'owner,'" the court applied the maxim of statutory construction that "statutory terms have their ordinary meanings.

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The EPA's "lender liability" rule outlines the activities in which a foreclosing lender may engage without being deemed a responsible owner and specifies that the lender must make efforts to sell or otherwise divest itself of the property. 40 C.F.R. § 300.1100(d). See generally Steven L. Humphreys, Environmental Policy Alert: Congress Reinstates EPA's Lender Liability Rule, 44 Fed. Lawyer 34 (March/April 1997).

373 42 U.S.C. § 9601(20)(D) (1994). See, e.g., Auto-Ion Litig. Group v. Auto-Ion Chems., 910 F. Supp. 328, 331-32 (W.D. Mich. 1994) (holding that a state was immune from CERCLA liability when it involuntarily acquired a hazardous waste site due to tax delinquency and actively participated at the site only to regulate and manage cleanup). See also Pennsylvania v. Union Gas Co., 491 U.S. 1, 7-8 (1989) (stating that exclusion of states from the category of "owners and operators" when they acquire ownership or control of a site involuntarily as sovereign evidences congressional intent to hold states liable for damages in federal court under CERCLA, as the provision would be unnecessary unless suits against states were otherwise permitted), overruled on other grounds, Seminole Tribe of Fla. v. Florida, 116 S. Ct. 1114 (1996).

374 32 F.3d 1364 (9th Cir. 1994).

375 Id. at 1366-70.
rather than unusual or technical meanings."\textsuperscript{376} The Court then relied upon California common law to conclude that the easement holder is not regarded "as the owner of the property burdened by it."\textsuperscript{377} The same analysis leads ineluctably to the conclusion that the term "corporation," which is also a term of general understanding not specifically defined in CERCLA, should also be defined by state law.

Likewise, in \textit{Redwing Carriers, Inc. v. Saraland Apartments},\textsuperscript{378} the Eleventh Circuit refused to regard limited partners as "owners" because of their stake in a partnership that owned a hazardous waste site.\textsuperscript{379} Finding that the terms "owner or operator" under CERCLA "have their ordinary meanings rather than any unusual or technical meaning," the court recognized "the settled principle that property interests and rights are defined by state law."\textsuperscript{380} Accordingly, "in the absence of any unique definition of 'ownership' in CERCLA," the Eleventh Circuit "look[ed] to Alabama law to define the ownership interest of the limited partners in the [site]."\textsuperscript{381} Under Alabama law, title to the site rested with the partnership, not the limited partners, and thus they were not "owners" of the site within the meaning of CERCLA.\textsuperscript{382} Again, this same approach would compel interpretation of the undefined term "corporation" under CERCLA by reference to state law.

Moreover, the question of corporate successor liability under CERCLA can properly be decided under state law without the need for a uniform federal rule. State law already imposes liability on truly responsible successor corporations through established rules of successorship. "The law in the fifty states on corporate dissolution and successor liability is largely uniform."\textsuperscript{383} No court or commentator has identified any state as providing a safe haven

\textsuperscript{376} \textit{Id.} at 1368 (quoting Edward Hines Lumber Co. v. Vulcan Materials Co., 861 F.2d 155, 156 (7th Cir. 1988)).

\textsuperscript{377} \textit{See Long Beach Unified Sch. Dist.}, 32 F.3d at 1368. Although the court cited to decisions from other states as well as California, the opinion placed primary reliance upon California law by priority of citation order and emphasis. \textit{See id.} Moreover, there is nothing in the opinion to suggest that the court was formulating its own rule of general federal common law untested to the law of the state wherein the property was located. \textit{See id.}

\textsuperscript{378} 94 F.3d 1489 (11th Cir. 1996).

\textsuperscript{379} \textit{Id.} at 1498.

\textsuperscript{380} \textit{Id.} (quoting Butner v. United States, 440 U.S. 48, 55 (1979)).

\textsuperscript{381} \textit{Id.}

\textsuperscript{382} \textit{Id.}

\textsuperscript{383} \textit{Anspec Co. v. Johnson Controls, Inc.}, 922 F.2d 1240, 1249 (6th Cir. 1991) (Kennedy, J., concurring). \textit{See generally} Parts II.C & III.A (discussing general uniformity of state law on successor liability, including overwhelming rejection by the states of expansive theories of successor liability).
for companies liable under CERCLA by allowing them to fraudulently shield their assets. Thus, state law imposes no obstacle to reasonably consistent enforcement of CERCLA.\(^{384}\) Courts have assumed common lawmaking powers under CERCLA, not because of a demonstrable lack of uniformity among the states, but rather because they have not been satisfied with traditional rules of state law and prefer a more expansive standard for successor liability.\(^{385}\) Thus, in a practical and concrete sense, "[t]here is not even at stake that most generic (and lightly invoked) of alleged federal interests, the interest in uniformity."\(^{386}\)

The incorporation of existing state law has an important advantage over the creation of new federal common law. State law, evolved over decades and frequently codified in state statutes, is well developed.\(^{387}\) It can easily be discovered and applied. By contrast, the creation of new federal common law is a difficult, open-ended, and long-term task. Courts creating new federal common law would be faced with the complicated, confusing, and continuing burden of fashioning the appropriate rule to be adopted under varying circumstances and as each new element of corporation law comes before the courts.\(^{388}\)

In fact, the federal courts' recent adventure in federal common lawmaking for corporate successorship under CERCLA has been

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\(^{384}\) One commentator has argued for a uniform federal common-law rule of successor liability, albeit one defined by traditional principles, on the ground that the states' varying approaches to successor liability, combined with conflict-of-law issues, creates uncertainty. L. De-Wayne Layfield, CERCLA, Successor Liability, and the Federal Common Law: Responding to an Uncertain Legal Standard, 68 Tex. L. Rev. 1237, 1248-49 (1990). However, in O'Melveny & Myers v. Federal Deposit Ins. Corp., 512 U.S. 79 (1994), the Supreme Court stated that "[u]niformity of law might facilitate ... nationwide litigation of ... suits, eliminating state-by-state research and reducing uncertainty—but if the avoidance of those ordinary consequences qualified as an identifiable federal interest, we would be awash in "federal common-law" rules." Id. at 88.

\(^{385}\) See generally supra Part III.A (discussing the rise in the federal courts of the "continuity of enterprise" theory for corporate successor liability under CERCLA).

\(^{386}\) O'Melveny & Myers, 512 U.S. at 88 (1994). Moreover, the Supreme Court suggested that the uniformity interest justifies federal common law only when "the primary conduct of the United States or any of its agents or contractors" is at issue (id.) which of course is not the case in the CERCLA context. Rather, CERCLA liability involves only "primary conduct on the part of private actors that has already occurred," which the O'Melveny & Myers Court found defeated an argument for federal common law on uniformity grounds. Id.

\(^{387}\) See De Sylva v. Ballentine, 351 U.S. 570, 580-81 (1956) (drawing upon "the ready-made body of state law" to define the term "children" of a copyright owner under federal copyright statute, "because there is no federal law of domestic relations, which is primarily a matter of state concern").

\(^{388}\) See Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63, 68 (1966) (stating that the Court must consider "the feasibility of creating a judicial substitute" for state law).
an unhappy tale.\textsuperscript{389} Rather than promoting uniformity, the result has been a Tower of Babel, with a singularly unmusical cacophony of voices and the inharmonious noise of conflicting policies. Among those federal courts assuming common-law powers, there are disturbing conflicts and uncertainties over a myriad of critical issues that typically would be decided under existing state law;\textsuperscript{390} (1) whether to adopt an expanded “continuity of enterprise” theory for successor liability beyond traditional corporation law;\textsuperscript{391} (2) whether continuity of ownership is an absolute pre-condition to successor liability, even under traditional rules;\textsuperscript{392} (3) whether a purchasing corporation’s knowledge of the seller’s CERCLA liabilities is a requirement to successor liability under expansive theories;\textsuperscript{393} and (4) whether the asset purchaser must have a

\textsuperscript{389} See United States v. Cordova Chem. Co., 113 F.3d 572, 579 (6th Cir. 1997) (en banc) (observing, in the context of parent-subsidiary derivative liability, that “confusion” in the articulation of the standard of liability “underscores the inevitable difficulty that arises when courts attempt to erect new concepts of corporate liability within the framework of CERCLA in the absence of direction from Congress”).

\textsuperscript{390} See generally Rosenberg, supra note 68, at 60-61 & nn.61-76 (surveying the diverse court decisions on successor liability under CERCLA).

\textsuperscript{391} Compare United States v. Carolina Transformer Co., 978 F.2d 832, 838 (4th Cir. 1992) (imposing successor liability under the substantial continuity test), with City Management Corp. v. U.S. Chem. Corp., 43 F.3d 244, 251-53 (6th Cir. 1994) (applying state law to hold that an expanded version of successor liability should be limited to product liability cases), and John S. Boyd Co. v. Boston Gas Co., 992 F.2d 401, 408 (1st Cir. 1993) (limiting successor liability to the traditional rules).


\textsuperscript{393} Compare New York v. Panex Ind., Inc., 1996 WL 378172, at *8 (W.D.N.Y. June 24, 1996) (holding that the applicability of the continuing enterprise theory “is significantly limited to instances where the circumstances indicate that the asset purchaser had actual notice or knowledge of the potential CERCLA liability”), United States v. Atlas Minerals & Chems., Inc., 824 F. Supp. 46, 50 (E.D. Pa. 1993) (holding that continuity of enterprise theory applied only to prevent “strategic behavior by corporate actors who know of or anticipate CERCLA problems), and Allied Corp. v. Acme Solvents Reclaiming, Inc., 812 F. Supp. 124, 129 (N.D. Ill. 1993) (holding the continuing enterprise theory applies “only when it has been shown that the asset purchaser has knowledge of the potential liability and responsibility for that liability”), with Gould, Inc. v. A & M Battery & Tire Servs., 950 F. Supp. 653, 657-60 (M.D. Pa. 1997) (disagreeing with other courts and holding that knowledge of potential liability by a successor is not a necessary factor for the continuity of enterprise theory to apply), Washington v. United States, 930 F. Supp. 474, 482 (W.D. Wash. 1996) (“The idea that a successor must have knowledge of a potential for CERCLA liability before liability may attach to it, is illogical considering CERCLA’s policies of strict liability and retroactive liability.”), United States v. Peirce, 1995 WL 356017, at *3 (N.D.N.Y. Feb. 21, 1995) (rejecting the reasoning of Atlas Minerals and Allied Corp.
“causal link to the harm” before being subjected to successor liability.394

“[C]reation of a federal rule, as opposed to incorporating a ready-made and fully fleshed out body of state law, would, during the development of that federal rule, leave parties very uncertain about what rule governed . . .”395 Unless the courts follow the Supreme Court’s teaching in O’Melveny & Myers by deferring to state law as the rule of decision, every CERCLA case involving corporate successor liability allegations could give rise to yet another articulation of a governing test and still another weighing and refinement of governing factors. Not only would the goal of uniformity thereby be defeated, the prevailing disunity in the federal courts would be perpetuated.

2. Application of State Corporation Law Will Not Frustrate Specific Objectives of CERCLA

One of the primary purposes of CERCLA is to “impose[] the costs of the cleanup on those responsible for the contamination.”396 However, to state this statutory objective is to beg the question of who is “responsible.” “[M]erely identifying imposition of liability on responsible parties as an objective of CERCLA does not provide much help in determining whether state rules should be adopted.”397 The issue of successorship arises only when the corporation under consideration has committed no acts of ownership, operation, generation, or transportation with respect to the waste

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394 Compare Atlas Minerals, 824 F. Supp. at 51 (holding that the substantial continuity theory applies only when “there is a causal link between the CERCLA defendant and the environmental harm”), with Atlantic Richfield Co., 847 F. Supp. at 1287 (rejecting cases holding that there must be a causal link between alleged successor and the environmental harm).

395 Mardan Corp. v. C.G.C. Music, Ltd., 804 F.2d 1454, 1460 (9th Cir. 1986) (adopting state law, rather than federal common law, as the rule for interpreting indemnification clauses as applied to CERCLA liability).


site at issue—that is, when the ordinary meaning of “responsibility” fails to suggest liability. CERCLA does not purport to be a source of authority for corporate existence, corporate continuation, corporate successorship, or corporate dissolution.

There is no evidence that application of state corporation law will frustrate the objectives of CERCLA in fastening liability upon those contributing to or otherwise responsible for a hazardous waste disposal. In applying the test of “consistency” of state law with a federal statutory regime, the Supreme Court has refused to accept “generalized pleas for uniformity as substitutes for concrete evidence that adopting state law would adversely affect [federal interests].” In response to the purely speculative argument that states might adopt corporation laws that unduly limit successor liability, Judge Kennedy’s concurrence in the Sixth Circuit decision of *Anspec Co. v. Johnson Controls, Inc.* provides the rejoinder:

Any fears that states will engage in a “race to the bottom” in their effort to attract corporate business and enact laws that limit vicarious liability are in my opinion groundless. States have a substantial interest in protecting their citizens and state resources. Most states have their own counterparts to CERCLA and the EPA and they share a complementary interest with the United States in enforcement of laws like CERCLA that are used to remedy environmental contamination. I see no necessity to create federal common law in this area to guard against the risk that states will create safe havens for polluters.

Moreover, the “race to the bottom” accusation turns on the unfounded notion that states could or would manipulate general

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398 See Light, *supra* note 49, at 78-79 (“If the successor itself contributed to the hazardous waste problem, then it would face independent liability as a responsible party under CERCLA § 107(a).”).


400 922 F.2d 1240 (6th Cir. 1991).

401 *Id.* at 1250 (Kennedy, J., concurring); see also Redwing Carriers, Inc. v. Saraland Apartments, 94 F.3d 1489, 1502 (11th Cir. 1996) (quoting Judge Kennedy’s statement from *Anspec* and holding that this “observation applies with equal force in the context of state partnership rules governing the liability of limited partners”); Dennis, *supra* note 397, at 1488 (“None of the CERCLA opinions refer to testimony or other evidence to support the claims that state liability rules will, in fact, interfere with federal cleanup efforts, or create ‘safe havens’ for polluters or threaten the Superfund.”).
principles of corporate law, applicable in all other contexts, to ease the environmental liabilities of a few.\textsuperscript{402}

In the end, the contentions for a federal common law of successor liability under CERCLA disintegrate into the "more money arguments" the Supreme Court has repeatedly rejected.\textsuperscript{403} Several courts have become enamored with federal common law under CERCLA and potentially broader successorship rules as a way to enlarge the pool of parties available to pay cleanup costs.\textsuperscript{404} This "more money" plea is \textit{identical} to that rejected by the Court in \textit{O'Melveny & Myers}.\textsuperscript{405} The FDIC contended in that case that federal common law was necessary to ensure private, rather than taxpayer, funding of bank bailouts.\textsuperscript{406} In response to the contention that state law rules might limit liability of private parties and thereby deplete the deposit insurance fund, the Court stated:

\begin{quote}
[\textit{W}hat respondent must mean by "depletion" is simply the foregoing of \textit{any} money which, under any \textit{conceivable} legal rules, might accrue to the fund. That is a broad principle indeed, which would support not just elimination of the defense at issue here, but judicial creation of new, "federal-common-law" causes of action to enrich the fund. Of course we have no authority to do that, because there is no federal policy that the fund should always win.\textsuperscript{407}
\end{quote}

The FDIC further contended "that it would disserve the federal program to permit California to insulate the attorney's or accountant's malpractice, thereby imposing costs on the nation’s taxpayers, rather than on the negligent wrongdoer."\textsuperscript{408} The rationale of circuit court decisions adopting federal common law for corporate successor liability under CERCLA successor liability is remarkably similar in structure and content to this unsuccessful FDIC argu-

\textsuperscript{402} And, if a state were to become peculiarly hospitable to polluters through an idiosyncratic rule of successor immunity, that particular deviant rule could be overturned as contrary to the purposes of CERCLA, without any need to formulate a general federal common-law regime of corporate law. As the Supreme Court held in \textit{O'Melveny & Myers}, "[n]ot only the permissibility but also the scope of judicial displacement of state rules turns upon" a significant conflict between federal policy or interest and state law. 512 U.S. at 87-88.


\textsuperscript{404} See generally supra Part III.A (discussing the rise of the "continuity of enterprise" theory of successor liability in CERCLA cases).

\textsuperscript{405} 512 U.S. 79 (1994).

\textsuperscript{406} Id. at 89.

\textsuperscript{407} Id. at 88.

\textsuperscript{408} Id. at 89 (quoting the FDIC's brief).
ment: "A state law which unduly limits successor liability could cut off the EPA’s ability to seek reimbursement from responsible parties for cleaning up a hazardous waste site . . . . This would result in great expense to the taxpayer, which is contrary to CERCLA’s purposes." 409

In *O’Melveny & Myers*, the Supreme Court said this type of argument was "positively probative of the dangers of [a] facile approach to federal-common-law-making." 410 By presuming to judge what constitutes malpractice," the Court observed, the FDIC’s "argument demonstrates the runaway tendencies of federal common law’ untethered to a genuinely identifiable (as opposed to judicially constructed) federal policy." 411 Substitute "corporate successorship" for "malpractice," and the Court’s admonition stands as a warning against the same "runaway tendencies of ‘federal common law’" when federal courts attempt to construct corporation successorship law in CERCLA cases.

The adoption of novel theories of vicarious liability is not essential to protection of the truly federal interest, that is, the interest of the federal government in recovering its costs. CERCLA provides a regime of both strict and joint and several liability. 412 This ensures in nearly all cases that private resources will be tapped for the costs of cleaning up despoiled sites. That is the federal interest. The ancillary issue of successor liability typically arises where there is a dispute among private parties concerning the proper allocation of the financial obligations. 413 Even in the rare case where there are no responsible parties available to bear the cleanup costs, the burden will shift to the Superfund, not the general taxpayer. The Superfund is funded principally by a tax on chemical and petroleum feedstocks and by a corporate environmental tax. 414 Con-

409 *Louisiana-Pacific Corp. v. Asarco, Inc.*, 909 F.2d 1260, 1263 n.2 (9th Cir. 1990); see also *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 91-92 (3d Cir. 1988) (arguing that Congress “emphasized funding by responsible parties,” rather than by the taxpayers through federal monies; that this “[c]ongressional intent supports the conclusion that, when choosing between the taxpayers or a successor corporation, the successor should bear the cost;” and that federal common law was necessary because “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”).

410 *512 U.S.* at 89.

411 *Id.*

412 See *supra* note 4 and accompanying text.

413 See *supra* note 160 and accompanying text.

gress intended that the Superfund would occasionally be called upon to pay for some cleanup costs—indeed, that is its primary purpose. Congress surely did not expect that CERCLA liability would be so far expanded, especially by judicial construction, that the Superfund would never be drawn upon. Indeed, the Superfund’s financing mechanism—an excise tax targeted at the chemical and petroleum industries—is essentially a proxy for, or approximation of, the “polluter pays” concept, when solvent responsible parties cannot be identified or located.


In United States v. Kimbell Foods, Inc., the Supreme Court refused to displace state law on the relative priority of property liens by a special rule for federal lending programs, explaining that, “[b]ecause the ultimate consequences of altering settled commercial practices are so difficult to foresee, we hesitate to create new uncertainties, in the absence of careful legislative deliberation.” Likewise, a federal rule of corporate successor liability would disrupt existing commercial relationships predicated on state law and would paralyze future corporate transactions.

Corporations negotiated numerous acquisitions and asset purchases long before CERCLA was enacted and, even afterward, continued to structure such transactions in reliance on state law. “The prices paid by the buyers to the sellers in those transactions undoubtedly reflected, in part, the parties’ understanding concerning who retained the seller’s liabilities.” The interposition of a new federal common-law rule would upset settled expectations and unfairly deprive commercial actors of their justified reliance on

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415 See generally Dennis, supra note 397, at 1473-74 (discussing the legislative history of the Superfund aspect of CERCLA).
416 See 126 CONG. REC. 30,932 (1980) (statement of Sen. Randolph) (“[T]he bill would provide that the fund be financed largely by those industries and consumers who profit from products and services associated with the hazardous substances which impose risks on society.”) (describing an earlier version of the Superfund legislation).
418 Id. at 739-40.
419 The successor liability problem is particularly ubiquitous in CERCLA cases because of the statute’s retroactive effect. By extending to hazardous substance disposals that occurred decades ago, CERCLA introduces liability into a context in which the responsible entities may no longer exist, have undergone numerous transitions, or transferred assets a number of times during the intervening years.
state law governing corporations, mergers, transfer of liabilities, etc. By expanding successor liability beyond the traditional rules of state law upon which corporate transactions are predicated, federal courts would transform "CERCLA [into] a gun-toting lunatic who randomly fires financial bullets at those unfortunate enough to stray in the vicinity."\footnote{421} The unfair consequences of this change in the rules of the game would radiate out from the corporate buyers and sellers to shareholders, lenders, suppliers, and customers of the corporate entities.

In addition, "the creation of federal common law in this area will create uncertainty in future commercial transactions."\footnote{422} As described above, the current state of federal common law on corporate successor liability is unsettled and therefore unsettling.\footnote{423} Parties structuring business transactions thus cannot know what the "federal common law" in a particular district or circuit will require and how it may differ from the state law that will continue to govern all other aspects of the transaction. Ad hoc creation of federal common law would introduce paralyzing uncertainty. Commerce would be slowed. Like any unknown or contingent liability on the part of a selling business, the unstable state of the law here would "raise the prospect of stymied business transfers, with assets caged in the hands of a demoralized and disabled management that is unable to sell its operations to a higher-valuing and perhaps more capable user."\footnote{424}

Ironically, the uncertainty would chill asset sales by ailing entities that could generate revenues to cover environmental cleanup costs.\footnote{425} Moreover, as larger, sophisticated corporations shun the purchase of potentially "tainted" assets, the prospect of expanded successor liability would "create[ ] an environment that causes ["shallow pocket" or impecunious entities] to become owners or operators of facilities and transporters and generators of hazardous

\footnote{422} Anspec, 922 F.2d at 1250 (Kennedy, J., concurring).
\footnote{423} See supra notes 390-94 and accompanying text.
\footnote{425} See Layfield, supra note 384, at 1256-57 (explaining that, under a regime of expansive successor liability rules, it will be "sheer folly" for a corporation to purchase the assets of another corporation when it may thereby "subject itself to CERCLA liability in excess of the value of the assets," with the consequence that entities with potential CERCLA liability will be stranded with "valueless and unusable assets" and the Environmental Protection Agency will be "left to pursue an impecunious" party).
materials.” As a result, the “devaluation of assets and accumulation of small undercapitalized corporations in the hazardous-materials generating and handling industries” would severely hinder the responsiveness of private parties for the costs of cleaning-up hazardous waste sites.

By contrast, the traditional rules of corporate successor liability prevailing in the states “provide a desirable balance between the interest in compensating [those with claims against the predecessor], and the interest of fairness involved in shielding a successor corporation from the fallout created by its predecessor’s acts.” Moreover, the rule of non-liability for purchase of assets promotes the “goal of free transferability of assets to their best user.”

Under the traditional rules prevailing in each state, properly applied in the CERCLA context, a “purchaser of assets who has paid full value in cash, in good faith, to an unrelated seller in an arms-length transaction should not be held liable for the seller’s past waste disposal activities.” In such a case, the real beneficiaries of improper waste disposal activities in the past, as well as the recipients of the profits from the sale of assets that may have appreciated in value by virtue of past wrongful conduct, are the stockholders of the selling corporation. Indeed, “[i]t is only because the law limits suits against dissolved corporations or their stockholders that courts have had to seek a surrogate for the responsible party.” If we wish to better ensure that responsible parties are held fully accountable, a more equitable alternative would be to expand the liability of dissolved corporations and their shareholders.

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426 Id. at 1259-60.
427 Id. at 1260; see also United States v. Cordova Chem. Co., 113 F.3d 572, 580 (6th Cir. 1997) (en banc)(observing, in the context of parent-subsidiary derivative liability, that “the threat of unlimited liability will likely deter private sector participation in the cleanup of existing sites,” and that an unpredictable liability standard “would actually contravene the public interest by discouraging businesses from being involved in such projects”).
429 Roe, supra note 424, at 1572.
430 Anderson, supra note 2, at 38; see also Green, supra note 54, at 916 (“[T]he cash-for-assets successor qua successor is a distinct entity with no involvement in hazardous waste disposal, other than its purchase of assets that belonged to the responsible party.”).
431 See Anderson, supra note 2, at 38.
432 Id. at 38-39.
433 Professor Michael Green proposes, as an alternative to expanded successor liability under CERCLA, “federal preemption of state dissolution statutes that govern suit against dissolved corporations and their shareholders.” Green, supra note 54, at 918.
In any event, the dangers associated with an uncertain shift in the legal paradigm for successor liability counsels leaving the matter to resolution by Congress, which is better equipped to investigate and evaluate the potential consequences. In *Leannais v. Cincinnati, Inc.* a tort suit under diversity of citizenship jurisdiction, the Seventh Circuit refused to anticipate Wisconsin courts and judicially create a new "far-reaching exception to the non-liability of assets purchasers, so long the basis of economic decisions by its citizens." The court stated:

Courts are ill-equipped . . . to balance equities among future plaintiffs and defendants. Such forays can result in wide-ranging ramifications on society, the contemplation of which is precluded by the exigencies of deciding a particular case presented on a limited record developed by present parties.

Congress, and not the courts, "can study the societal and economic impacts that would result from the imposition of [CERCLA] liability on additional parties." As the Supreme Court stated in rejecting a federal common-law approach in *O'Melveny & Myers*, "[w]ithin the federal system, at least, we have decided that that function of weighing and appraising 'is more appropriately for

The preemption alternative would permit, as a matter of federal law, suit against a dissolved corporation and its shareholders for CERCLA obligations of the corporation. State law limitations on such suits would be nullified. Since dissolved corporations rarely retain any assets once they have completed the winding-up process, suit against the company's shareholders would also be permitted. Stockholders would be severally liable to a maximum amount equal to the amount received when the corporation was dissolved. Each shareholder's liability would be limited to the same percentage of the distribution received as the proportion of CERCLA liability to total assets distributed. In essence, this proposal would reestablish the common-law trust fund doctrine of shareholder liability for CERCLA response costs of a dissolved corporation. The alternative would be exclusive. Liberal successor liability would not be available.

*Id.* at 919. However, Professor Green recognizes that such a solution could not be "judicially imposed given the current language and structure of CERCLA." *Id.* at 933-36. He concludes that "a truly comprehensive and satisfactory solution to long-tail CERCLA claims and corporate deaths will require congressional action." *Id.* at 936.

434 565 F.2d 437 (7th Cir. 1977).
435 *Id.* at 441.
436 *Id. See also* DeLapp v. Xtraman, Inc., 417 N.W.2d 219, 221 (Iowa 1987) (describing a proposed expanded successor liability rule in a products liability case as "essentially a radical change in the principles of corporation law" which "should be left to legislative action").
437 Kathryn A. Barnard, **EPA's Policy of Corporate Successor Liability Under CERCLA**, 6 STAN. ENVTL. L.J. 78, 102 (1986-87).
those who write the laws, rather than for those who interpret them."\textsuperscript{438}

VII. Conclusion

In light of the Supreme Court's decision in \textit{O'Melveny & Myers v. Federal Deposit Insurance Corporation},\textsuperscript{439} the courts should examine afresh the question of federal common law under CERCLA and affirm that state law provides the rule of decision for corporate successor liability. Under the teaching of \textit{O'Melveny & Myers}, the courts should eschew the temptation toward judicial inventiveness by improperly invoking ill-defined and unlimited federal common-law powers. The Supreme Court has pointedly warned against "the runaway tendencies of 'federal common law' untethered to a genuinely identifiable (as opposed to judicially constructed) federal policy."\textsuperscript{440}

Congress, and not the courts, should make the policy determination whether to create far-reaching exceptions to the traditional rule of non-liability for asset purchasers, a rule that has long been the basis of economic decisions and that has promoted the free transferability of assets in a dynamic economy. Otherwise, state corporation law, evolved over decades and well-developed within each state, should govern the question of successorship liability under CERCLA.


\textsuperscript{439} 512 U.S. 79 (1994).

\textsuperscript{440} \textit{Id.} at 89.