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Notes

SURVIVAL OF THE FITTEST: FEDERAL LAW V. STATE LAW IN THE CONTEXT OF SUCCESSOR LIABILITY UNDER CERCLA

I. INTRODUCTION

A land ethic for tomorrow should be as honest as Thoreau's Walden*, and as comprehensive as the sensitive science of ecology. It should stress the oneness of our resources and the live-and-help-live logic of the great chain of life.*[1]

Assume that in order to attract industry and build a more robust economy, State X, in 1998, enacted lenient laws dealing with successor liability in corporate liability cases. Now assume that in 1960, John Smith, a chemist, chose to start a hazardous chemical manufacturing plant in State X and that Mr. Smith incorporated his business under the laws of State X. Due to an increased industrial interest in chemical research in the 1990s, Mr. Smith's company had enough business in State Y that he built a second facility there in 1992, also manufacturing hazardous chemicals. State Y has more stringent corporate liability laws than State X. Unbeknownst to Mr. Smith and his managers, a large amount of hazardous residue accumulated in both of his facilities and leaked into the soil beneath his hazardous chemical manufacturing plants.

In 2004, following a large corporate buyout in 2000 under the laws of State Y, Mr. Smith sold his facilities, all assets of the company, and the patents to processing the chemicals to E Corp., a company incorporated under the laws of State Y. E Corp. then decided to relocate the chemical facilities and build apartments on both facilities' sites. In 2005, Mr. Smith died. Pursuant to the proposed change in the use of land from industrial to residential, the bank from which E Corp. sought to obtain a loan demanded that E Corp. perform Phase I and Phase II Environmental Assessments of the property. As can be imagined, groundwater tests indicated that the water had been contaminated from the accumulated residue in both facilities. Pursuant to federal regulation, the environmental consultants reported the contamination to the appropriate agencies. Following the government's clean-up of the sites in both States X and Y, they now seek reimbursement from E Corp. as a

[1] STEWART L. UDALL, THE QUIET CRISIS 190 (Holt, Rinehart & Winston 1963).

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successor corporation to Smith. E Corp. denies that it is a successor in interest to Mr. Smith's facilities, and the government sues in federal court seeking to enforce the repayment of clean-up costs. The federal court is now faced with the question of whether to apply federal or state law in the case, and if state law is chosen, whether to apply the law of State X or of State Y.[2]

Foremost among the issues for E Corp. is determining whether it is a liable party in Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") violations; this is more commonly referred to as the issue of successor liability.[3] Federal circuits are split as to whether to apply state law or federal law in resolving the issue.[4] Therefore, the purpose of this Note is to explore various arguments promoting the application of state law and promoting the application of federal common law, and to advocate the creation and adoption of a uniform federal rule to resolve the issue of successor liability. Part II of this Note outlines the background of the statute and the circuit split regarding which law should govern.[5] Part III analyzes two different approaches circuits have taken to resolve the issue—the application of state law and the application of federally developed common law.[6] Part IV proposes three different methods by which the issue of successor liability could potentially be addressed: a statutory amendment to CERCLA, statutory construction by the Supreme Court to define the meaning of "successor corporation," or the Court's creation of federal common law to define how a successor corporation is to be determined for purposes of liability.[7]

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2 The foregoing hypothetical is entirely the creation of the author and completely fictional. Any resemblance of this hypothetical to real persons, entities, or facts is purely coincidental.

3 Jay W. Warren, Comment, *The Choice of Law Issue for Corporate Successor Liability Under CERCLA in* N. Shore Gas Co. v. Salmon, Inc.*: Another Opinion Sidesteps the Issue*, 16 J. NAT. RESOURCES & ENVTL. L. 321 (2001–02); *see also infra* Part II.A (discussing the issue of determining who is a liable party under CERCLA).

4 *See infra* Parts II.B–E (discussing the circuit split and various arguments for application of state law and federal law).

5 *See infra* Part II (discussing how the hasty formulation of CERCLA has led to litigation concerning how a successor corporation is to be determined for purposes of liability under CERCLA, and also explaining the opposing approaches circuits have applied in seeking to resolve the issue).

6 *See infra* Part III (analyzing the superiority and utility of applying federal common law to the less useful approach of applying state law to resolve issues of successor liability).

7 *See infra* Part IV (suggesting one of three approaches to resolve the issue, and discussing why the creation of federal common law is the most likely way to resolve the problem).

Chandler: Survival of the Fittest: Federal Law v. State Law in the Context

II. BACKGROUND OF STATUTORY, JUDICIAL, AND SCHOLARLY RESPONSES TO SUCCESSOR LIABILITY UNDER CERCLA

In the 1960s and 1970s, many acts of legislation were passed in order to combat the burgeoning concern over the danger to human health and the environment caused by hazardous pollutants.[8] Some of these acts included the Clean Air Act, the Clean Water Act, and the Resource Conservation and Recovery Act ("RCRA") of 1976.[9] RCRA created what has been called a "cradle-to-grave" system for facilitating the use of hazardous substances in society—from the time of their introduction to their disposal.[10] Through RCRA, Congress had resolved concerns regarding the life cycle of hazardous substances.[11] However, following RCRA's enactment, a new concern came to Congress's attention—the "inactive hazardous waste site problem."[12]

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8 H.R. REP. NO. 96-1016, at 17 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6120.

9 *Id. See also* DANIEL A. FARBER ET AL., CASES AND MATERIALS ON ENVIRONMENTAL LAW 528, 648, 788 (Thomson West 2006) (1981). Beginning in 1955, the federal government began to regulate air pollution through the Air Pollution Control Act. *Id.* at 529. This legislation largely tried to help states curb air pollution by providing research and technical support in addition to financial aid. *Id.* Due to this legislation's ineffectiveness, Congress enacted the Clean Air Act in 1970, which sought to curb pollution through setting National Ambient Air Quality Standards for the states. *Id.* The states were then required to achieve the air quality standards by a statutory deadline. *Id.*

The federal government sought to regulate water pollution as early as 1899; however, the government played only a minor role until after World War II. *Id.* at 646. Despite efforts to further police water pollution throughout the 1950s and 1960s, water pollution continued. *Id.* During this time, the public's awareness of water pollution's danger began to grow. *Id.* at 646–47. Finally, in 1972, Congress amended its previous water quality statutes and renamed the legislation the Clean Water Act. Congress's new policing mechanism to control water quality included a national permit system for all "point sources" of water pollution and sanctions for those that have no permit, as well as those permit holders who do not achieve mandated water quality standards. *Id.* at 648. In creating RCRA, Congress amended the Solid Waste Disposal Act, which was first enacted in 1965, to regulate landfills and dumps. *Id.* at 788. RCRA was established as Congress became more aware of toxic substances that were leaching into the groundwater, subsequently causing threats to human health and the environment. *Id.*

10 H.R. REP. NO. 96-1016, at 17; *see also* FARBER ET AL., *supra* note 9, at 790 ("RCRA is designed to provide 'cradle to grave' coverage for a large percentage of the hazardous waste generated by businesses and government. The statute covers approximately 30 million tons of hazardous wastes generated annually by more than 17,000 generators.").

11 *See id.* ("RCRA's overarching theory is that if we know where the waste is during its life cycle—from the moment of generation through transport to a disposal site, to its ultimate treatment, storage and disposal—then we can avoid the kinds of catastrophes at which CERCLA is aimed.").

12 H.R. REP. NO. 96-1016, at 17; *see also* FARBER ET AL., *supra* note 9, at 788. The authors explained the growing issue as follows:

> Not long after RCRA's passage, the issue of hazardous waste contamination made national headlines. In August 1978, President

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In 1979, the Environmental Protection Agency ("EPA") determined that between 30,000 and 50,000 inactive and uncontrolled hazardous substance waste sites existed.[13] This "inactive and hazardous waste site problem[]" was evident throughout the United States with 1,200–2,000

> Carter declared a state of emergency in the Love Canal area of Niagara Falls, New York. Investigating serious health complaints by residents, the state health department found that toxic chemicals had leaked into the basements of many houses, and into the air, water, and soil. . . . In 1947, Hooker Chemical and Plastics Corporations had purchased an uncompleted waterway and used it as a depository for an estimated 352 million pounds of industrial wastes over the following six years. The land had then been used as a school site and a housing development. As a result, three decades later, over 1000 families were evacuated, $30 million in cleanup costs were required, and over $3 billion in damage claims were filed.
>
> Love Canal was not an isolated incident. In the past, land was regarded as a "safe" repository for wastes that could not be disposed of in the air or water. Decades of uncontrolled dumping have led to contamination of land and of related ground and surface waters.

Id. at 788–89 (footnote omitted). An even greater problem that began to gain recognition was that water traveling through these sites could carry chemicals into the groundwater, thereby contaminating streams, rivers, and other sources of water. *Id.* at 788. The Love Canal incident created an increased urgency in Congress to pass CERCLA. *Id.*

[13] H.R. REP. NO. 96-1016, at 18 (explaining that "findings of the Committee's Oversight Subcommittee clearly and unequivocally document the nature and magnitude of the problem and the inadequacy of existing law to properly control it."). The House Report then went on to report an illustrative list of findings that the Committee considered in creating the proposed Act. Under CERCLA, "hazardous substance" is defined as:

> (A) any substance designated pursuant to section 1321(b)(2)(A) of Title 33, (B) any element, compound, mixture, solution, or substance designated pursuant to section 9602 of this title, (C) any hazardous waste having the characteristics identified under or listed pursuant to section 3001 of the Solid Waste Disposal Act . . . (D) any toxic pollutant listed under section 1317(a) of Title 33, (E) any hazardous air pollutant listed under section 112 of the Clean Air Act [42 U.S.C.A. § 7412], and (F) any imminently hazardous chemical substance or mixture with respect to which the Administrator has taken action pursuant to section 2606 of Title 15. The term does not include petroleum, including crude oil or any fraction thereof which is not otherwise specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of this paragraph, and the term does not include natural gas, natural gas liquids, liquefied natural gas, or synthetic gas usable for fuel (or mixtures of natural gas and such synthetic gas).

42 U.S.C. § 9601(14) (2000). The Second Circuit Court of Appeals has interpreted the statute to include any hazardous substance, and the statute does not have specific quantitative requirements, but includes even minimal amounts of pollution. United States v. Alcan Aluminum Corp., 990 F.2d 711, 720 (2nd Cir. 1993).

sites recognized as posing serious public health risks.[14] In addition to the presence of sites with heightened risk, the problem also included inadequate measures by local and state governments to combat public health threats.[15] Furthermore, some of the hazardous waste sites had already contaminated drinking water supplies, thereby damaging human health and the environment; indeed, this contamination caused great public concern.[16]

In response, the public became more curious and concerned about *past* disposal of hazardous waste that had created *present* consequences.[17] Thus, while RCRA was primarily *forward-looking* in its scope, Congress sought to enact *backward-looking* legislation that addressed problems created by the past disposal of hazardous substances.[18] Consequently, Congress drafted CERCLA.[19] Unfortunately, in their eagerness to pass a

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[14] *See* H.R. REP. NO. 96-1016, at 17, 20, 25 (explaining that the failure of entities to dispose properly of hazardous waste is costing the public millions of dollars in clean-up and that the danger to the environment and the public health is substantial); Ronald G. Aronovsky & Lynn D. Fuller, *Liability of Parent Corporations for Hazardous Substance Releases Under CERCLA*, 24 U.S.F. L. REV. 421, 425 (1990) (explaining that abandoned hazardous waste sites had already damaged the environment and human health); *see also* 126 CONG. REC. H31,968 (daily ed. Dec. 3, 1980) (statement of Rep. Florio) ("It should be made clear that without this legislation there is a *huge legislative void* that exists. There is no authority. There is no funding to deal with certain types of hazardous waste spills and hazardous waste dangers to health and to the environment.") (emphasis added).

[15] See H.R. REP. NO. 96-1016, at 18–19 for a list of specific examples that posed a significant threat to public health. The following are just three of the examples included in the House report:

> At Lathrop, California, pesticide formulation waste products placed in lagoons were allowed to percolate into the extremely permeable soil, threatening the area's drinking and irrigation water. . . . In Central Florida, hundreds of homes were built on land covered with waste containing radium and thorium from old phosphate operations; unhealthy levels of radon gas have been found in hundreds of homes. . . .
>
> . . . .
>
> The New York State Health Department has failed to assure residents of the Love Canal that the public health is being adequately protected.

Id. at 19–20.

[16] *See* Aronovsky & Fuller, *supra* note 14, at 425 (explaining that CERCLA was passed as a result of numerous widely publicized discoveries of abandoned hazardous waste sites).

[17] *Id.* at 17–18. ("The unfortunate human health and environmental consequence of these practices has received national attention amidst growing public and Congressional concern over the magnitude of the problem and the appropriate course of response that should be pursued. Existing law is clearly inadequate to deal with this massive problem.").

[18] *Id.*

[19] H.R. REP. NO. 96-1016, at 1, 17; *see also* 126 CONG. REC. H31,968 (statement of Rep. Florio) ("The overriding majority of the people in this House who passed it and the people who passed it in the other body were responding to the pressure from this Nation to

law that would address the hazardous waste site problem, members of Congress drafted a law with numerous statutory deficiencies recognized by both those members of Congress in favor of the legislation and those who opposed it.[20] As a result of the hasty enactment of CERCLA, a multitude of courts has spent countless resources seeking to resolve issues in the Act.[21]

This Part begins with a discussion of CERCLA's legislative history in Part II.A, including a discussion of the Act's basic purposes and Congress's intent in enacting it.[22] Part II.B examines the authority

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provide for a remedial action for the problem of abandoned hazardous waste sites and chemical spills.").

[20] In the House debate concerning CERCLA's passage, many representatives strongly supported it despite its recognized flaws, and many strongly opposed its enactment. *Compare id.* at H31,968-69 (statement of Rep. Florio):

> Let me just conclude by giving to you my impression that this is a good bill and those of us who overwhelmingly supported this bill when it came before the House can be happy to support it now. . . . There will be those who say that the bill is not perfect. Of course it is not. There will be those who say that we could do more and we could[] . . . . The time is now to deal with this problem. . . . The concern is whether we are going to have legislation . . . . Accordingly, I would ask for your support for this bill . . . so that we can have this bill sent to the President and have it signed into law.

with id. at H31,971 (statement of Rep. Madigan) (emphasis added):

> [T]here are some *very serious flaws* in this bill as passed by the Senate. It would have made much more sense for me to take the time to correct technical errors and to address a few of the policy concerns that are shared by Members of the House . . . . However, that was not the course of action chosen by my chairman, the chairman of my subcommittee . . . . We have been left at a take-it-or-leave it situation and I rise to recommend to the House that we leave it.

and id. at H31,969 (statement of Rep. Broyhill):

> I . . . urge the House to defeat this motion to suspend the rules and to pass this legislation. . . . it seems to me that we are being asked here to pass a bill that has dozens of defects in it when all we would have to do is to add reasonable amendments and send that back to the other body and have them pass a bill that will be administratively workable. . . . I have in my hand a three-page list of various defects and technical errors that are in this bill . . . . Here is a list of serious and technical problems with this bill. . . . Inadequate drafting.—This bill was hurriedly drafted without the use of legislative counsel and as [a] result contains a large but unknown number of drafting errors.

Id.

[21] Warren, *supra* note 3, at 321 ("Numerous issues in the Act have spawned litigation since its passage, but none, perhaps, as crucial as the determination of exactly who should be held liable for CERCLA violations. Despite its comprehensive nature, CERCLA fails to expressly address the liability of successor parent corporations for violations of subsidiaries.").

[22] *See infra* Part II.A (discussing Congress's intent for enacting the CERCLA and some of the Act's deficiencies noted by Congress).

delegated to the EPA under the Act to determine responsible parties and steps necessary to clean up hazardous waste sites.[23] This Part also focuses on factors the Supreme Court has fashioned to help determine when it is appropriate to draft federal common law.[24] Part II.C introduces CERCLA's deficiency that is at issue in this Note—the issue of successor liability—and discusses different approaches state and federal courts have used to resolve the problem.[25] Finally, Parts II.D and II.E present the circuit split that now plagues the federal circuits, specifically whether state or federal law should govern when defining a successor corporation for purposes of liability under CERCLA.[26]

A. Hasty Statutory Formulation for an Extensive Problem: CERCLA

CERCLA, also known as Superfund,[27] was hastily enacted in 1980, was signed into law at the end of the Carter administration,[28] and had essentially two purposes: 1) to enable the EPA's Administrator to pursue prompt recovery costs from parties financially responsible and liable for clean-up activities and 2) to identify and remediate contaminated sites.[29] To meet these objectives, Congress created

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[23] *See infra* Part II.C (examining the responsibilities of the Environmental Protection Agency ("EPA") under CERCLA and the public's criticisms of CERCLA).

[24] *See infra* Part II.D (focusing on the authority of courts to draft federal common law and on factors created by the Supreme Court to help determine when federal common law is necessary and appropriate).

[25] *See infra* Part II.B (introducing the issue of successor liability and the "mere continuation" and "substantial continuity" tests).

[26] *See infra* Parts II.D–II.E (presenting opposing arguments among the federal circuits as to whether state law should govern the issue of successor liability, or whether federal courts should create federal common law to resolve the issue).

[27] JOHN S. APPLEGATE & JAN G. LAITOS, ENVIRONMENTAL LAW: RCRA, CERCLA, AND THE MANAGEMENT OF HAZARDOUS WASTE 133 (Foundation Press 2006). Superfund is a trust fund that receives funding from excise taxes on companies like chemical and petroleum industries. *Id.* The money in Superfund is used to finance clean-up activities of non-liable private parties. *Id.* To help determine which sites can access Superfund money under CERCLA, the EPA creates a list of the worst hazardous waste sites in the nation, and the EPA places these sites on a National Priorities List. *Id.* Through this list and other methods, the EPA can determine what corrective actions need to be taken to clean up hazardous waste sites, and the EPA is able to decide how the government and private parties can recover the costs of the clean-up. *Id.* at 134.

[28] MICHAEL B. GERRARD & JOEL M. GROSS, AMENDING CERCLA: THE POST-SARA AMENDMENTS TO THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT 1 (2006).

[29] H.R. REP. NO. 96-1016, at 17 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6120; *see*, *e.g.*, Aronovsky & Fuller, *supra* note 14, at 421 ("In 1980, CONGRESS ENACTED [CERCLA] as a hurried measure to address the emerging problem associated with the cost of cleaning up the nation's hundreds of leaking hazardous waste disposal sites.") (footnote omitted); *see also* Anspec Co., Inc. v. Johnson Controls, Inc., 922 F.2d 1240, 1247 (6th Cir. 1991); APPLEGATE & LAITOS, *supra* note 27, at 129 ("CERCLA is not a traditional regulatory statute

defenses against liability that may be used only in rare circumstances.[30] Moreover, courts have also interpreted liability under CERCLA as strict, joint and several, and retroactive.[31]

CERCLA's liability provisions apply to four different categories of "[c]overed" parties: 1) current owners or operators of a facility; 2) past owners who owned or operated a hazardous site at the time the hazardous waste was disposed of; 3) any person who arranged for hazardous waste disposal, treatment, or transport of waste to a facility operated by another party; and 4) any person who accepted hazardous waste for transport to disposal or treatment facilities.[32] The operative word for imposing liability is "person[,]" and Congress defined person to include, inter alia, an individual, corporation, or association.[33] More

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like the Resource Conservation and Recovery Act, the Clean Water Act, and the Clean Air Act. It is a *remediation* statute designed to impose *liability* for past conduct with present effects.").

> In 1980, CERCLA was enacted in response to the serious environmental and health risks posed by industrial pollution. . . . "As its name implies, CERCLA is a comprehensive statute that grants the President broad power to command government agencies and private parties to clean up hazardous waste sites." . . . If it satisfies certain statutory conditions, the United States may, for instance, use the "Hazardous Substance Superfund" to finance cleanup efforts[.] . . . "CERCLA . . . imposes the costs of the cleanup on those responsible for the contamination." . . . "The remedy that Congress felt it needed in CERCLA is sweeping: *everyone* who is potentially responsible for hazardous-waste contamination may be forced to contribute to the costs of cleanup."

United States v. Bestfoods, 524 U.S. 51, 55, 56 n.1 (1998) (citations omitted).

30 *See* 42 U.S.C. § 9607(b) (2000). CERCLA states:

> There shall be no liability . . . for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by--(1) an act of God; (2) an act of war; (3) an act or omission of a third party other than an employee or agent of the defendant[.] . . .

Id.

31 *See* Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86, 90 (3d Cir. 1988); *see also* APPLEGATE & LAITOS, *supra* note 27, at 130.

32 42 U.S.C. § 9607(a)1–4. *See* David E. Dopf, *Federal Common Law or State Law?: The Ninth Circuit Takes on Successor Liability Under CERCLA in Atchison, Topeka & Santa Fe Railway Co. v. Brown & Bryant, Inc.*, 10 VILL. ENVTL. L.J. 171, 173–75 (1999); David C. Clarke, *Successor Liability Under CERCLA: A Federal Common Law Approach*, 58 GEO. WASH. L. REV. 1300, 1305 (1990) (explaining that these categories "and the statute's legislative history[] indicate Congress's intent to cast a broad net of liability across all parties associated with hazardous sites[.]") (footnote omitted).

33 42 U.S.C. § 9601(21) (2005). *See* Smith Land & Improvement, 851 F.2d at 91, which quoted Blackstone in describing the long-lasting vitality of a corporation:

> [A]ll the individual members that have existed from the foundation to the present time, or that shall ever hereafter exist, are but one person in

specifically, although CERCLA fails to include "successor corporation[]" in the definition of a "person[,]" courts have interpreted "corporation" to include successor corporations.[34] This interpretation reflects Congress's intent to impose liability and prevent corporations from evading liability simply by selling a corporation or merging with another corporation.[35] Unfortunately, however, while congressional intent to prevent entities from evading liability is clear, its statutory creation, CERCLA, is less clear on how liable parties should be determined in some instances.[36]

B. Liability and Steps for Remediation and the Kimbell *Factors*

In determining liability and steps for remediation, Congress allows the EPA to force responsible parties to contribute in remedial and clean-up activities either by ordering liable parties to directly clean up a site under section 106 of CERCLA, or to initiate remedial actions and then sue liable parties to recover costs.[37] Unfortunately, this authority does

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> law, a person that never dies; in like manner as the river Thames is still the same river, though the parts which compose it are changing every instant.

Id. The court explained that a corporation remains a distinct and separate entity from its shareholders, and therefore, changes in stock ownership do not affect the rights and obligations of the corporation as an individual entity. *Id.*

[34] *See Anspec Co., Inc.*, 922 F.2d at 1245 (stating that "when Congress wrote 'corporation' in CERCLA it intended to include a successor corporation").

[35] *See* Dopf, *supra* note 32, at 176. *See also* Philip G. Watson, Note, United States v. General Battery Corp.*: The Third Circuit Applies Federal Common Law Rather than State Law to Determine Successor Liability Under CERCLA, Despite Opposing Results in Other Circuits – But Are the Splitting Circuits Just Splitting Hairs?*, 20 TUL. ENVTL. L.J. 219, 221 (2006):

> CERCLA has incorporated successor liability by implication. . . . Thus, "CERCLA incorporates common law principles of indirect liability, including successor liability." This implicit recognition has led the circuit courts to hold unanimously that successor liability exists under CERCLA. Unanimity was predictable, considering that corporate successor liability is a long-standing concept that existed at common law.

Id. (footnotes omitted).

[36] *See, e.g.*, Warren, *supra* note 3, at 321 ("Numerous issues in the Act have spawned litigation since its passage, but none, perhaps, as crucial as the determination of exactly who should be held liable for CERCLA violations.").

[37] *See* United States v. Bestfoods, 524 U.S. 51, 55, 56 & n.1 (1998). The Court provides the following explanation:

> "CERCLA is a comprehensive statute that grants the President broad power to command government agencies and private parties to clean up hazardous waste sites." If it satisfies certain statutory conditions, the United States may, for instance, use the "Hazardous Substance Superfund" to finance cleanup efforts[.] . . . "[*E*]*veryone* who is potentially responsible for hazardous-waste contamination may be forced to contribute to the costs of cleanup."

not always result in the clear identification of liable individuals, and courts are again left with the choice of which law to apply to determine whether the party is truly liable.[38] Part II.B.1 begins with a further discussion of CERCLA's attempt to create provisions for remediation, and Part II.B.2 finishes with the Supreme Court's discussion of factors to consider when deciding whether to create federal common law.[39]

1. CERCLA's Attempt at Remediation

In the wake of CERCLA's enactment, commentators criticized CERCLA for its unfairness to potentially liable landowners who had little or nothing to do with contamination but could still be sued by the government for clean-up costs.[40] Additionally, the environmental community began to complain that the EPA was desperately failing to implement Superfund's enforcement measures.[41] In response to these criticisms, Congress addressed a number of issues by reauthorizing CERCLA in 1986 by enacting the Superfund Amendments and Reauthorization Act.[42]

Id. (citation omitted); *see also* Aronovsky & Fuller, *supra* note 14, at 426. The authors explain as follows:

> By enacting these broad liability provisions, Congress gave the EPA considerable latitude to shift the costs of remedial actions from the public to private responsible parties. It also ushered in an era of aggressive litigation between the government and responsible parties over the scope of many of CERCLA's provisions and the meaning of its terms.

Aronovsky & Fuller, *supra* note 14, at 426.

38 *See* Pia Dias, Note, *Raytheon Constructors, Inc. v. Asarco Inc.: The Tenth Circuit Finds a Successor in Interest Not Liable for the Cleanup Costs of a Mine Site Under CERCLA . . . But What About State Corporate Law?*, 18 TUL. ENVTL. L.J. 219, 221 (2004) (explaining that liability is determined based on four categories outlined in section 107(a) of CERCLA and that these categories have "ignited thousands of lawsuits").

39 *See infra* Parts II.B.1–2 (discussing the enduring criticisms of CERCLA's inability to provide adequate provisions for determining responsible parties and factors that courts are to consider when deciding whether to fashion federal common law).

40 GERRARD & GROSS, *supra* note 28, at 1. The authors cite the following as one hypothetical example of unfairness: "a party that had complied with the law and sent a single drum of waste to a site could be sued by the government for the entire cost of site cleanup, often in the millions or tens of millions of dollars." *Id.*

41 *Id.* Complaints—from both the environmental community and Congress—accused the EPA of failing to adequately enforce Superfund, and of entering into "sweetheart deals" that did not promulgate the purpose of Superfund with respect to potentially liable parties. *Id.*

42 For a comprehensive discussion of the Superfund Amendments, see *id.* at 2. These authors explain that the Amendment

> reshaped and reauthorized the tax that funded Superfund. It addressed some of the fairness arguments around the edges, by, for example, creating an explicit right to contribution among [Potentially

Among the enduring criticisms of CERCLA is its silence about who qualifies as a "successor corporation[]" for purposes of liability.[43] Consequently, a scholarly and judicial debate has ensued over whether state law should determine the definition, or whether the judiciary should fashion a uniform federal common law to resolve the debate.[44]

Much of the problem stems from the idea that various doctrines exist through which a successor corporation can acquire a potentially responsible party's hazardous site.[45] Foremost among these doctrines are statutory merger, stock acquisition, and the asset purchase transactions.[46] In some cases, even when liability is not allocated through one of these doctrines, courts may choose to pierce the corporate veil and impose liability on a parent corporation, an asset purchaser, or an otherwise non-liable party. [47]

> Responsible Parties] and creating an exemption from liability for so called "innocent landowners" who purchase contaminated property unaware of the contamination, and who meet their requirements.

Id. (footnote omitted); *see also* APPLEGATE & LAITOS, *supra* note 27, at 133 (discussing that "'Superfund' is a trust fund that exists to finance government-directed clean-up efforts, to pay claims arising from clean-up activities of private parties who are not liable as [Potentially Responsible Parties] under CERCLA . . . . The Superfund receives its money from excise taxes on companies such as the petroleum and chemical industries.").

43 Clarke, *supra* note 32, at 1305-06. The author explains that although CERCLA is silent about who qualifies as a successor corporation, state and common law rules generally are adequate to resolve the issue; however, other rules are unable to resolve the issue. *Id.*

44 *See infra* Parts II.D–E (discussing the arguments for which law should apply in determining successor liability).

45 Clarke, *supra* note 32, at 1306. Adding to the problem is the fact that at the time a hazardous waste site is discovered, the potentially responsible party may no longer be incorporated because of intervening corporate mergers or acquisitions; *see* Anspec Co., Inc. v. Johnson Controls, Inc. 922 F.2d 1240, 1245 (6th Cir. 1991); Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86, 91 (3d Cir. 1988).

46 *See* Clarke, *supra* note 32, at 1306. A statutory merger generally requires that the successor corporation, after the merger, be responsible for all of the disappearing corporations' liabilities under CERCLA; a merger is governed by a state's merger laws. 15 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 7122, at 185 (rev. perm. ed. 1983). A stock acquisition creates a parent-subsidiary relationship, in which liabilities are in most instances separate between entities, including liability under CERCLA. 8 Z. CAVITCH, BUSINESS ORGANIZATIONS § 161.02 (1990). Finally, in an asset purchase transaction, one company acquires all or most of a seller's assets, and in most cases, liability is not passed with the assets unless there is evidence that the transaction was fraudulent or that the transaction is merely a reorganization of the seller's business. FLETCHER, *supra*, at §§ 7122–7123.5.

47 *See* STEVEN FERREY, ENVIRONMENTAL LAW: EXAMPLES & EXPLANATIONS 430 (4th ed. Aspen Publishers) (2007). Steven Ferrey explains the factors considered when determining whether an asset purchaser assumes a seller corporation's liability:

> (1) the purchaser expressly or impliedly agrees to assume the seller's obligations, (2) the transaction is entered into fraudulently to escape liability, (3) the transaction is effectively the same as a consolidation or

Whereas CERCLA is silent on the issue of successor liability, federal circuits are split on whether to draft a federal common law defining successor liability, or whether to decide the issue giving deference to a forum state's law.[48] The Supreme Court has developed factors that should be considered when deciding whether to create federal common law or whether to simply rely on a particular state's law.[49]

2. When Is It Appropriate to Draft Federal Common Law?

First, the question is whether federal courts have the power to draft and create federal law, and the answer is "yes!"[50] "The authority [to do so] had its origin in the Constitution and the statutes of the United States

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> merger of the corporations (the de facto merger exception), or (4) the purchasing entity is merely a continuation of the selling corporation.

Id. For an example of courts piercing the corporate veil, see Ramirez v. Amsted Indus., Inc., 431 A.2d 811 (N.J. 1981).

[48] *See* Clarke, *supra* note 32, at 1306 (discussing the choice that federal courts have between applying laws of forum states or developing a federal common law of successor liability).

[49] United States v. Kimbell Foods, 440 U.S. 715 (1979).

[50] *See* Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981). Discussing whether federal courts have the authority to draft federal common law following Erie, the Supreme Court explained,

> There is, of course, "no general federal common law." Nevertheless, the Court has recognized the need and authority in some limited areas to formulate what has come to be known as "federal common law." These instances are "few and restricted," and fall into essentially two categories: those in which a federal rule of decision is "necessary to protect uniquely federal interests," and those in which Congress has given the courts the power to develop substantive law.

Id. (citations omitted); Clearfield Trust Co. v. United States, 318 U.S. 363, 366–67 (1943). This case involved an action filed by the United States against the Clearfield Trust Company to recover the amount of a forged check issued pursuant to service performed under the Federal Emergency Relief Act of 1935. *Id.* at 366. The Court held that because the authority to issue the check was rooted in the Constitution and statutes of the United States, and because there was no applicable Act of Congress, the federal courts had the duty to create a governing rule of law. *Id.* at 367; *see also* Richard G. Dennis, *Liability of Officers, Directors and Stockholders Under CERCLA: The Case for Adopting State Law*, 36 VILL. L. REV. 1367, 1440 (1991). Richard G. Dennis noted that *Clearfield* explained the Court's position as follows:

> [The Court] had occasionally applied state law to federal questions, but declared that this case was much different because of the significant, adverse effects that state law would have both on the rights and duties of the United States and on the large volume of transactions involving . . . the United States.

Dennis, *supra* at 1440–41. Although the *Clearfield* Court deemed it appropriate to fashion federal common law, the Court also made it clear that certain circumstances may make state law more appropriate than judicially created federal law. *Clearfield Trust Co.*, 318 U.S. at 367.

and was in no way dependent on the laws [of any state]."[51] However, the authority to create a new rule, or federal common law, is very different than the Court's recognized rule under *Marbury v. Madison*[52] that the judiciary has the responsibility to construe a statute and interpret the law.[53] Consequently, the Supreme Court is careful not to fashion federal common law when it is unnecessary.[54]

In *United States v. Kimbell Foods, Inc.*, nearly four decades after the Court decided that under some circumstances judicial creation of federal law might be necessary, the Court crafted three factors to guide courts in deciding whether to fashion a federal common law.[55] The *Kimbell* factors

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[51] *See Kimbell Foods, Inc.*, 440 U.S. at 726 (quoting Clearfield Trust Co. v. United States, 318 U.S. 366–67 (1943)). *Compare id.*, which explained the following:

> This Court has consistently held that federal law governs questions involving the rights of the United States arising under nationwide federal programs. "When the United States disburses its funds or pays its debts, it is exercising a constitutional function or power. . . . In absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards."

Id. (citation omitted) *and* Clarke, *supra* note 32, at 1309 (explaining that cases which arise under federal laws grant federal courts the power to create federal common laws), *with Kimbell Foods*, 440 U.S. at 728 n.21, also explaining as follows:

> Whether state law is to be incorporated as a matter of federal common law . . . involves the . . . problem of the relationship of a particular issue to a going federal program. The question of judicial incorporation can only arise in an area which is sufficiently close to a national operation to establish competence in the federal courts to choose the governing law, and yet not so close as clearly to require the application of a single nationwide rule of substance.

Id.

[52] Marbury v. Madison, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

[53] *But see* N.W. Airlines, Inc. v. Workers Union, 451 U.S. 77, 97 (1981) ("But the authority to construe a statute is fundamentally different from the authority to fashion a new rule or to provide a new remedy which Congress has decided not to adopt.").

[54] *See* O'Melveny & Myers v. Fed. Deposit Ins. Corp., 512 U.S. 79, 90 (1994) ("Federal courts, however, 'unlike their state counterparts, are courts of limited jurisdiction that have not been vested with open-ended lawmaking powers.' . . . Unless Congress has otherwise directed, the federal court's task is merely to interpret and apply the relevant rules of state law.") (citation omitted); *see also* Atherton v. Fed. Deposit Ins. Corp., 519 U.S. 213, 218 (1997) ("The Court has said that 'cases in which judicial creation of a special federal rule would be justified . . . are . . . 'few and restricted.'").

[55] *Kimbell Foods, Inc.*, 440 U.S. at 728. ("Whether to adopt state law or to fashion a nationwide federal rule is a matter of judicial policy 'dependent upon a variety of considerations always relevant to the nature of the specific governmental interests and to the effects upon them of applying state law.'"). The issue in *Kimbell* was whether contractual liens, created under federal loan programs, took precedence over private liens when no applicable Act of Congress existed. *Id.* at 715. To resolve the issue, the Court determined whether federal law or state law should decide the issue and established several factors that it considered in making its decision. *Id.* at 728–29.

are as follows: 1) whether there is a need for uniformity;[56] 2) whether the application of state law would disrupt the specific purposes of the federal law or program;[57] and 3) whether the adoption of a federal rule would frustrate commercial relationships rooted in state law.[58] More specifically, to define further *Kimbell*'s third factor, some courts consider the following three ways that a federal rule could frustrate commercial relationships in non-CERCLA liability cases:[59] 1) whether commercial

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[56] *Id.* at 728 (explaining that "when there is little need for a uniform body of law, state law may be incorporated as the federal rule of decision"). Many cases applying the *Kimbell* test have considered a variety of factors in determining the appropriate response to *Kimbell's* first factor of whether there is a need for a uniform federal law; one commentator argues that these factors create a more sophisticated analysis of the issue than the standard CERCLA cases. *See* Dennis, *supra* note 50, at 1446. The author argues that

> [f]or the purposes of this discussion, these factors can be grouped into four categories: (1) the presence or absence of express or implied congressional intent that a uniform federal rule be created; (2) the effects that diverse state laws would have on federal rights; (3) the effects that state laws would have on operations; and (4) the likelihood that a uniform law could actually be created by the federal courts.

Id. at 1445–46.

[57] *Kimbell Foods, Inc.*, 440 U.S. at 728 (arguing that when state law would frustrate a federal program's objective, "we must fashion special rules solicitous of those federal interests[]"). The Court applied these newly created factors and decided to adopt state law rather than creating a uniform federal law because the state codes were consistent with federal interests and because a uniform federal rule would only disrupt private creditors' daily transactions. *Id.* at 729–40.

[58] *Id.* at 728–29; *see also* Dennis, *supra* note 50, at 1442. The author analyzes the use and applicability of the test created in *Kimbell Foods*:

> The test created in *Kimbell Foods* has been used in a vast number of cases in numerous areas of law. At the most fundamental level, the test is actually about control: should the federal courts surrender a portion of their power to influence the growth and development of a federal statute or program, in order to accommodate the interests represented in existing law? The first two elements of the *Kimbell Foods* test measure the extent of the federal interests that are at stake. The final element gauges the possible disruption to the state interests. In essence, the question is whether the federal judiciary will allow the development of state law to dictate the direction that the federal statute or program will take, at least with respect to the issue in question.

Dennis, *supra* note 50, at 1442 (footnote omitted). The author comments that courts have held that frustration of commercial relationships established on state law may occur in the following three different ways: first, courts have considered the disruption of commercial relationships in actions taken before the adoption of a federal rule, where corporations had anticipated that the issue would be handled by state law; second, courts have considered the disruption of commercial relationships that might occur after a federal rule has become well-known and widely applied; and third, courts have considered the uncertainty caused by the adoption and application of a new federal law. *Id.* at 1503–06.

[59] *Id.* at 1502–03. The author observes as follows:

relationships are disrupted when a corporation anticipated that an issue was to be governed by state law;[60] 2) whether disruption of commercial relationships will result once a federal standard has been widely applied;[61] and 3) whether commercial relationships would be disrupted by the uncertainty that newly fashioned federal common law creates.[62]

Although the Supreme Court has never decided whether federal common law should be fashioned to resolve the issue of successor liability, in 1998 the Court briefly noted the disagreement.[63] The Court did not entertain the issue further because neither party challenged the lower court's ruling on successor liability.[64] By not addressing the problem, the Court missed the opportunity to resolve the judicial and scholarly debate concerning whether federal or state law should apply.

> [A]pplication of the law of the state of incorporation to external affairs could pose problems if the litigation involved several different corporations in an integrated corporate structure, each having a different state of incorporation. . . . [Therefore], officers, directors and stockholders of a corporation can have no reasonable or legitimate expectations that the law of the state of incorporation will protect them in CERCLA liability cases.
>
> In non-CERCLA liability cases, courts have held that disruption of commercial relationships predicated on state law may occur in several different ways.

Id. (footnote omitted).

[60] *Id.* at 1503. *See also* United States v. Brosnan, 363 U.S. 237, 241–42 (1960). In *Brosnan*, the Supreme Court did not create a federal common law rule to deal with the nullification of federal tax liens in the foreclosure proceedings of particular states. *Id*. The Court held that although a federal rule might be helpful for uniformity reasons, it would be more consistent with Congress's prior actions to allow state law to govern. *Id.*

[61] Dennis, *supra* note 50, at 1503; *see also* United States v. Hadden Haciendas Co., 541 F.2d 777, 785 (9th Cir. 1976). In *Hadden Haciendas Co.*, the Ninth Circuit Court of Appeals created a federal rule that allowed post-foreclosure actions for damages. 541 F.2d at 785. The court created the rule upon finding that the rule did not intrude on states' laws protecting debtors because the protection offered by a state's statutes could be achieved by the application of a federally uniform rule. *Id.*

[62] Dennis, *supra* note 50, at 1503; *see also* Mardan Corp. v. C.G.C. Music, Ltd., 804 F.2d 1454, 1460 (9th Cir. 1986). In *Mardan Corp*, the Ninth Circuit Court of Appeals mentioned two concerns that a federal rule might present to litigants applying a newly created federal law. 804 F.2d at 1460. One of these concerns is particularly relevant to the issue of successor liability: whether application of a new federal law, in place of an established state law, might create uncertainty as to the manner in which a rule is to be applied in different circumstances. *Id.*

[63] United States v. Bestfoods, 524 U.S. 51, 63 n.9 (1998). ("There is significant disagreement among courts and commentators regarding whether, in enforcing CERCLA's indirect liability, courts should borrow state law, or instead apply a federal common law of veil piercing."). The Court then cited a slew of court cases and scholarly articles that discuss the problem. *Id.*

[64] *Id.* ("Since none of the parties challenges the Sixth Circuit's holding that CPC and Aerojet incurred no derivative liability, the question is not presented in this case, and we do not address it further.").

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C. Determining Who Is a Successor Corporation

One difficulty courts often face in deciding liability is determining who actually is a successor corporation. In *United States v. Davis*, the First Circuit Court of Appeals considered the question of whether state or federal law should apply.[65] In deciding the issue, the court considered two tests to determine whether a corporation was truly a successor corporation under CERCLA: the "mere continuation" test and the "substantial continuation" test.[66] Several circuits have applied one of these two tests to determine whether a potentially responsible party truly is a successor corporation.[67]

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[65] United States v. Davis, 261 F.3d 1, 53 (1st Cir. 2001). A disposer of solid waste, found liable for clean-up costs under CERCLA, sought contribution from several other potentially responsible parties. *Id*. at 14–15. Five of the potentially responsible parties appealed a declaratory judgment against them made by the district court. *Id*. at 14. The court, with respect to successor liability, addressed the possible use of both the "mere continuation" and "substantial continuation" tests. *Id.* at 53. After mentioning these two tests, the court looked to the *Kimbell* factors used for deciding when it is appropriate to fashion a federal common law. *Id.* Specifically, the court referenced the "substantial continuation" test as one that many courts have referenced when arguing for the need to create a uniform federal law; the court also noted that several courts have held that the test satisfies CERCLA's remedial purposes. *Id.*

[66] *Id.* at 52–55. After considering arguments for and against the application of these tests, the Court chose to follow state law, holding that the applicable state law was not hostile to federal interests under CERCLA.

[67] *Id.* at 53. In this case, the First Circuit Court of Appeals noted that the Second and Fourth Circuits have considered the "substantial continuation" and "mere continuation" tests. *Id.* In *B.F. Goodrich v. Betkoski*, the Federal and Connecticut State governments, along with a coalition of settling defendants in a previous action, sued non-settling defendants to recover costs spent in cleaning up landfills containing hazardous waste. 99 F.3d 505, 511–13 (2d Cir. 1996). The Second Circuit, after declining to apply the "mere continuation" test, instead applied the common law "substantial continuity" test, reasoning that it is more consistent with CERCLA's goals. *Id.* at 519. In 1997, the Second Circuit clarified its 1996 holding and further supported adoption of a uniform federal rule under the *Kimbell* analysis, concluding the following in a per curiam opinion:

> [e]ach of the Kimbell Foods factors supports our decision-there is a significant need for a uniform rule, allowing lenient state law rules to control would defeat federal policy, and we perceive no danger that our decision to adopt a federal rule of "substantial continuity" will unduly upset existing corporate relationships.

B.F. Goodrich v. Betkoski, 112 F.3d 88, 91 (2d Cir. 1997). Unfortunately, the Supreme Court later denied certiorari on this case. In *United States v. Carolina Transformer, Co.*, after recognizing CERCLA's silence as to the liability of successor corporations, the Fourth Circuit held that successor liability is permitted under CERCLA if it is justified by the facts of the case. 978 F.2d 832, 837 (4th Cir. 1992). The Fourth Circuit upheld the district court's use of the federal common law "substantial continuity" test, stating "[i]n adopting a rule of successor liability in this case we 'must consider traditional and evolving principles of federal common law, which Congress has left to the courts to supply interstitially.'" *Id.* at 837–38 (citation omitted). After applying this test to the facts before them, the court found

The "mere continuation" test is designed to help protect creditors from corporations that try to avoid hazardous waste claims.[68] Courts that apply this test generally consider five factors: 1) transfer of assets; 2) a purchase by the buyer for less than the fair market value for the assets; 3) a continuation of the seller's business by the purchaser; 4) a common officer between the two corporations (buyer and seller) that was influential in the asset transfer; and 5) an inability of the selling corporation to pay its debts after the assets are transferred.[69]

The "substantial continuation" test, adopted as the federal common law by circuits in favor of uniformity, has been adopted to help resolve issues involving potential "successor corporations[.]"[70] This test incorporates eight factors:

> (1) retention of the same employees [by the buyer]; (2) retention of the same supervisory personnel; (3) retention of the same production facilities in the same location; (4) production of the same product; (5) retention of the same name; (6) continuity of assets; (7) continuity of general business operations; and (8) whether the buyer holds itself out as a continuation of the divesting corporation[.][71]

After considering the opposing arguments for application of state law versus a federal rule—such as the "substantial continuation" test—

FayTranCo. to be a liable successor corporation to Carolina Transformer under CERCLA. *Id*. at 838. The court reasoned as follows:

> We are unwilling to hold that merely by splitting-off the particular part of its operations that resulted in its environmental problems and shifting the remainder of its assets, employees, management, customers, accounts and production methods to another corporation, an otherwise responsible corporation could all but completely wash its hands of its environmental liability.

Id. at 840.

68 *Davis*, 261 F.3d at 53 (citation omitted) ("The 'mere continuation' test is an exception to the common law rule that the buyer of a corporation's assets (as opposed to its stock) does not incur liability for the divesting corporation's debts. The test is designed to protect creditors from sales that seek to evade valid claims.").

69 *Id.*

70 *Id.*; *Carolina Transformer Co.*, 978 F.2d at 838; *see also* Atchison, Topeka and Santa Fe Ry. Co. v. Brown & Bryant, Inc., 159 F.3d 358, 364 (9th Cir. 1997) (explaining that most states do not recognize the "substantial continuation" test).

71 *Davis*, 261 F.3d at 53 (citation omitted) (internal quotation mark omitted) (explaining that courts adopt the "substantial continuation" test because it meets CERCLA's "broad remedial purpose" and emphasizes the "importance of national uniformity" in determining successor liability).

the *Davis* Court chose to apply Connecticut's "mere continuation" test.[72] In deciding which law to apply, the court applied the *Kimbell* factors, and concluded, "to justify the creation of a federal rule, 'there must be a specific concrete federal policy or interest that is compromised by the application of state law.'"[73]

D. Circuits Adopting Federal Common Law

> *CERCLA enforcement should not be hampered by subordination of its goals to varying state law rules of alter ego theory and limited liability. Because of the lack of persuasive authority arguing for a contrary result, the choice of federal common law to govern this area appears likely to become a matter of settled law.*[74]

Ascertaining the scope of legislative intent in enacting CERCLA helps to understand the issues Congress desired to resolve with CERCLA.[75] In 1980, then Representative James Florio, the primary sponsor for CERCLA, argued before the House of Representatives that one of CERCLA's primary purposes was "[t]o insure [sic] the development of a uniform rule of law, and to discourage business [sic] dealing in hazardous substances from locating primarily in States with

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72 *Id.* at 54. ("We have concluded that the majority rule is to apply state law 'so long as it is not hostile to the federal interests animating CERCLA[.]'").

73 *Id.*

74 *See* Aronovsky & Fuller, *supra* note 14, at 455.

75 *See supra* note 20 (explaining various representatives' opinions concerning CERCLA's legislation); *see also* Dennis, *supra* note 50, 1473–74. Richard G. Dennis sought to establish the objectives of CERCLA through legislative history by paraphrasing Senator Randolph's, the Chairman of the Senate Committee on Environment and Public Works, description of CERCLA's purpose. Dennis, *supra* note 50, at 1473. Dennis stated that the Senate bill was aimed at the following objectives:

> First, to make those who release hazardous substances strictly liable for cleanup costs, mitigation, and third party damages. . . .
>
> Second, the bill would establish a broad Federal response authority, and a fund of $4.1 billion over 6 years to clean up and mitigate damages where a liable party does not clean up or cannot be found.
>
> Third, the bill would provide an opportunity through the courts, and a more limited opportunity through the fund, for victims to receive prompt and adequate compensation for losses and injuries.
>
> Fourth, the 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.

Id. at 1474.

more lenient laws[.]"[76] Although this statement may provide courts an immediate reason for adopting a federal rule that fills gaps in a federal statute, the Supreme Court has cautioned that controversies affecting the administration of federal programs do not require resolution by uniform federal rules.[77] In contrast, the Court has stated that "[w]hether to adopt state law or to fashion a nationwide federal rule is a matter of judicial policy 'dependent upon a variety of considerations always relevant to the nature of the specific governmental interests and to the effects upon them of applying state law.'"[78] In the controversy regarding which law to apply when determining successor liability under CERCLA, two circuits, the Third and the Fourth, have decided that creating a uniform federal rule would best serve CERCLA's purposes.[79]

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[76] 126 CONG. REC. H31,965 (daily ed. Dec. 3, 1980) (statement of Rep. Florio). For a short biographical account of Representative Florio, see BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS 1774–2005 1064 (Andrew R. Dodge & Betty K. Koed eds., U.S. Gov. Printing Office 2005):

> Florio, James Joseph, a Representative from New Jersey; born in Brooklyn, N.Y., August 29, 1937; attended the public elementary schools in Brooklyn; received high school equivalency diploma from State of New Jersey; B.A., Trenton (N.J.) State College, 1962; graduate work, Columbia University, New York, 1962–1963; J.D., Rutgers University Law School, 1967; admitted to the New Jersey bar in 1967 and commenced practice in Camden; served in United States Navy, 1955–1958, ensign; lieutenant commander, United States Navy Reserve, 1958–1975; assistant city attorney for Camden City Legal Department, 1967–1971; solicitor for the New Jersey towns of Runnemade, Wood-Lynne, and Somerdale, 1969–1974; assemblyman, New Jersey State Legislature, 1970–1974; unsuccessful candidate for the nomination for Governor of New Jersey in 1977 and unsuccessful candidate for Governor in 1981; elected as a Democrat to the Ninety-fourth and to the seven succeeding Congresses and served from January 3, 1975, until his resignation January 16, 1990; elected Governor of New Jersey in 1989 and served from January 16, 1990, to January 18, 1994; unsuccessful candidate for reelection in 1993; is a resident of Gloucester Township, N.J.

Id. (emphasis omitted).

[77] United States v. Kimbell Foods, Inc., 440 U.S. 715, 727–28 (1979).

[78] *Id.* at 728.

[79] New York v. Nat'l Serv. Indus., Inc., 460 F.3d 201, 208 (2d Cir. 2006). The court, in analyzing the choice of law question, compared the holdings and decisions of its sister circuits. *Id.* at 207–08. Specifically, the court noted that the Third and Fourth Circuits had concluded that a national rule is required by CERCLA. *Id.* at 208; *see* United States v. Carolina Transformer Co., 978 F.2d 832 (4th Cir. 1992). *Carolina Transformer Co.* was the result of the removal of polychlorinated biphenyls from a site previously owned by Defendant Carolina Transformer, Inc. 978 F.2d at 834. While the Defendants owned the site, they recovered and repaired electrical transformers on the site and carcinogenic-bearing transformer oil spilled onto the site. *Id.* Consequently, Carolina Transformer was sued along with FayTranCo and several other corporations in an action to recover the costs incurred in cleaning up the site. *Id.* After noting that CERCLA is silent as to the issue of

The Third Circuit was the first to favor creating a uniform federal rule to resolve CERCLA's silence regarding successor liability.[80] The

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successor liability, the Fourth Circuit Court of Appeals held it appropriate to "consider traditional and evolving principles of federal common law, which Congress has left to the courts to supply interstitially." *Id.* at 837–38. After adopting a federal common law approach, the court applied the "substantial continuity" approach in finding FayTranCo liable as a successor corporation to Carolina Transformer. *Id.* at 838. The Fourth Circuit found the following facts most relevant in finding substantial continuity between FayTranCo and Carolina Transformer, and consequently holding FayTranCo liable as a successor:

> In sum, we find that there was substantial continuity between Carolina Transformer and FayTranCo. FayTranCo retained most of Carolina Transformer's employees working in the same jobs, receiving the same salary, and maintaining accrued leave time. Many, if not all, of Carolina Transformer's supervisory personnel went to similar positions at FayTranCo. Dewey Strother continued to have personal influence over and involvement with the new company. Carolina Transformer's equipment, inventory and motor vehicles were transferred to FayTranCo. Moreover, the move to new premises was an integral part of an apparent attempt by those controlling FayTranCo and Carolina Transformer to distance themselves, both physically and legally, from the PCB-contaminated Middle Road site. FayTranCo produced basically the same product as Carolina Transformer, and any changes in the product were dictated by external market forces, which would have operated with equal force on Carolina Transformer had there not been a transfer of the business to FayTranCo. There was a continuity of assets, Carolina Transformer having transferred all of its assets with the exception of the buildings and land at the Middle Road site. FayTranCo held itself out as being a continuation of Carolina Transformer, informing its credit customers that their debts would become the accounts of FayTranCo. Finally, the record as a whole leaves the unmistakable impression that the transfer of the Carolina Transformer business to FayTranCo was part of an effort to continue the business in all material respects yet avoid the environmental liability arising from the PCB contamination at the Middle Road site. For these reasons, we are of opinion that the district court did not err in granting summary judgment against FayTranCo as a successor corporation.

Id. at 840–41.

[80] Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86 (3d Cir. 1988). This case involved the purchase of land containing hazardous waste. *Id.* at 87. The purchaser sued potentially responsible parties seeking contribution for expenses incurred in cleaning up the site's hazardous waste. *Id.* The defendant argued that the contract principle of caveat emptor acted as a defense to liability; the court rejected this defense, reasoning that to apply caveat emptor as a defense would completely frustrate Congress's objective for enacting CERCLA. *Id.* at 88–90. The court interpreted that CERCLA intended the expenses to be the responsibility of one of two sources: 1) those persons who had an integral part in the creation or continuation of the hazardous waste, or 2) taxpayers. *Id.* at 92. Finally, the court held that the issue should be governed by a federal rule of successor liability. *Id.* Specifically, the court held that the general doctrine of successor liability as applied in the majority of states should be applied in the case, reasoning, "[i]n resolving the successor

Circuit's first consideration of the issue came in its 1988 decision in *Smith Land & Improvement v. Celotex Corp.*; however, the Third Circuit revisited the issue in 2005 in *United States v. General Battery Corp., Inc.*[81] In *General Battery*, Exide—the undisputed successor corporation to General Battery—was sued by the United States to recover costs incurred for clean-up initiated by the government after the EPA had decided that remedial action on several properties was required to protect human health.[82] The hazardous waste found at the properties was disposed of between 1920 and 1966 by Price Battery (a now-defunct company), a manufacturer of acid batteries.[83] In 1966, General Battery purchased Price Battery.[84] In 2000, General Battery then merged with Exide Corporation, resulting in Exide being named a successor in interest to General Battery for purposes of liability under CERCLA.[85] Exide contended that although it was a successor corporation to General

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liability issues here, the district court must consider national uniformity; otherwise, CERCLA aims may be evaded easily by a responsible party's choice to arrange a merger or consolidation under the laws of particular states which unduly restrict successor liability." *Id.*

[81] United States v. Gen. Battery Corp., Inc., 423 F.3d 294, 298 (3d Cir. 2005) (noting that the court had addressed the same issue in *Smith Land*, where it held that a uniform federal law should be adopted as derived from the general doctrine of successor liability adopted by the majority of states).

[82] *Id.* at 296. A 1992 EPA study found that several properties contained excessive levels of lead. *Id.* Consequently, the United States government incurred several million dollars in response-costs to clean up and install a remedial "cap" at the properties. *Id.*

[83] *Gen. Battery Corp., Inc.*, 423 F.3d at 296; *see also* Richard A. Smolen, Note, *Get the Lead Out: Innocent Successor Corporations Responsibility Under CERCLA* – United States v. General Battery Corp., Inc., 423 F.3d 294 (3d Cir. 2005)., 25 TEMP. J. SCI. TECH. & ENVTL. L. 137, 144 (2006). Richard Smolen explained in greater detail that Price Battery was a Pennsylvania corporation that disposed "of old battery casings while reusing the lead plates from old batteries." Smolen, *supra*, at 144.

[84] *Gen. Battery Corp., Inc.*, 423 F.3d at 296. General Battery acquired Price Battery for cash and stock. *Id.* More specifically, General Battery acquired all of the company's assets—except for Price Battery's real property—for $2.95 million, 100,000 shares of General Battery stock, and a seat on General Battery's board of directors. *Id.* However, Price Battery sold their real property to a development organization, which leased the property to General Battery until 1978 when the deed was transferred to General Battery for $1. *Id.* at 297. Additionally, under the purchase agreement, General Battery acquired Price Battery's equipment, as well as all intellectual property and inventory. *Id.* General Battery also assumed responsibility of Price's contractual obligations and all of their liabilities appearing on Price's balance sheet. *Id.* Finally, General Battery continued to employee Price's three executive officers and continued to manufacture batteries at Price Battery's Hamburg plant. *Id.*

[85] *Id.* at 296 ("Exide is General Battery's successor. The disputed issue is whether General Battery, by virtue of its 1966 acquisition of Price Battery, was a successor to Price Battery.").

Battery, General Battery was not a successor corporation to Price Battery; and, therefore, Exide was not liable as a successor in interest.[86]

After considering the facts, the Third Circuit Court of Appeals reasoned that CERCLA requires a uniform federal definition of "successor corporation[.]"[87] The court focused on the idea that state law varies widely on the issue of successor liability and that this uncertainty favors federal uniformity.[88] Additionally, the court reasoned that the

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[86] *Id.* at 297.

> On cross-motions for summary judgment, the District Court held the Price/General transaction constituted a common law "de facto merger." . . . [T]he parties stipulated to past CERCLA response costs at the Hamburg site in the amount of $6,500,000. Exide retained the right to file this appeal as to liability.

Id. at 297. *See also* Smolen, *supra* note 83, at 147. The United States alleged that Exide was liable as a successor in interest and both parties sought summary judgment. *Id.* The District Court denied Exide's motion and granted the government's motion, holding that General Battery and Price Battery had engaged in a "de facto merger." *Id.* Exide then appealed, to the Third Circuit. *Id.* On appeal, the Third Circuit split their consideration of the matter into two issues: whether state or federal law should resolve the issue of successor liability, and whether Price Battery and General Battery had truly engaged in a "de facto merger[.]" *Id.*

[87] *Gen. Battery Corp., Inc.*, 423 F.3d at 300. The court held, "'[t]he resulting federal rule, based on a body of case law developed over time, is statutory interpretation pursuant to congressional direction,' not the free-wheeling creation of federal common law.'" *Id.* (quoting Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 754 (1998)).

[88] *Id.* at 302. ("A more uniform and predictable federal liability standard corresponds with specific CERCLA objectives by encouraging settlements and facilitating a more liquid market in corporate and 'brownfield' assets."); *see also* Smolen, *supra* note 83, at 148. Among other points, Smolen emphasized the following:

> The court then addressed Exide's contention that the Supreme Court in *O'Melveny* had eroded the Third Circuit's precedents because it had "cautioned against the unwarranted displacement of state law." The Third Circuit reasoned that this reasoning was inapposite because CERCLA creates its own federal cause of action. Furthermore, the court noted that recent Supreme Court decisions had indicated that gaps in the statutory language should be filled with federal common law and that a state-by-state determination of liability conflicts with the objectives of CERCLA. Moreover, the court noted with particularity the minutiae of different standards used in different jurisdictions, and advocated that that lack of uniformity was reason enough for using a set federal standard.

Smolen, *supra* note 83, at 148 (footnotes omitted). "Brownfield site" has been defined as "[a]n abandoned, idled, or underused industrial or commercial site that is difficult to expand or redevelop because of environmental contamination." BLACK'S LAW DICTIONARY 206 (8th ed. 2004). One of CERCLA's objectives is to encourage settlements among adverse litigants and to advance and facilitate a liquid market in "brownfield" assets, or, in other words, to encourage the clean-up, transfer, and redevelopment of contaminated sites. 42 U.S.C. §§ 9607(r), 9622 (2006). The Third Circuit in *General Battery* reasoned that a more uniform and predictable standard would satisfy CERCLA's goals of encouraging settlements and creating a more liquid market for "brownfield" assets. *Gen. Battery Corp.*,

purpose of the 2001 Amendments to CERCLA—"to balance the interest in cost recovery under CERCLA's liability provisions with the economic interest in a liquid market for 'brownfield' assets[]"—would be served by a uniform test for successor liability.[89] The court concluded by distinguishing the creation of a federal uniform law from statutory interpretation.[90] The court held that creating a uniform definition of "successor corporation" constitutes interpretation and not statutory construction.[91] Unfortunately, the Supreme Court denied certiorari in October of 2006, leaving the issue undecided.[92]

Courts wrestle with whether it is appropriate to create federal common law rules.[93] In 1966, the Supreme Court explained that, before federal common law can be created, a significant conflict must be present between federal interests and the application of state law.[94] Additionally, the Court has held that the creation of federal law is restricted to issues in which Congress has specifically granted courts the power to create common law and to issues where federal common law is necessary to guard particular federal interests.[95] Consequently, many courts and scholars have been in favor of the application of state law.[96]

Inc., 423 F.3d at 302. *But see* Smolen, *supra* note 83, at 151–52 (explaining that applying a uniform rule under CERCLA would not satisfy Congress's purposes, and would be contrary to Congress's desire to have state common law rules resolve the issue).

89 *Gen. Battery Corp., Inc.*, 423 F.3d at 303 n.8. The court also noted two cases from the First Circuit (a proponent of applying state law to resolve the successor liability issue) and one from the Third Circuit which explained that reducing litigation costs was a primary objective of CERCLA. *Id.* The court concluded this portion of the opinion by stating, "CERCLA's goal of minimizing litigation and transaction costs is ill-served by a case-by-case approach to the question of successor liability choice-of-law, we need not inquire whether Pennsylvania law conflicts with or mirrors the majority successor liability doctrine before holding that a federal rule applies." *Id.* at 304.

90 *Id.* ("[T]he authority to construe a statute is fundamentally different than the authority to fashion a new rule or to provide a new remedy which Congress has decided not to adopt.").

91 *Id.*

92 Exide Techs. v. United States, 127 S. Ct. 41 (2006) (The Supreme Court denied the petition for writ of certiorari).

93 Aronovsky & Fuller, *supra* note 14, at 451 ("Such confusion is not unusual in areas of substantive law where the need for a federal common law rule of veil-piercing is recognized.").

94 Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63, 68 (1966) (holding that state law should apply because no conflict existed between the federal act in question and the application of Louisiana state law) (footnote omitted).

95 Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1980).

> [T]he Court has recognized the need and authority in some limited areas to formulate what has come to be known as 'federal common law.' These instances are 'few and restricted,' and fall into essentially two categories: those in which a federal rule of decision is 'necessary

E. Argument for Application of State Law

> *State law is incorporated to govern interpretation of contractual agreements allocating CERCLA liability; there is no reason to think that [a] uniform body of law is required, application of state law would not frustrate specific objective[s] of CERCLA, and fashioning national interpretive standard[s] might interfere with reasonable commercial expectations.*[97]

If the definition of successor liability was to be decided by a majority vote among the federal circuits, the argument for application of state law would win 4-2.[98] Four circuits have favored the application of state law—the First, Sixth, Ninth, and Eleventh.[99] To give a comprehensive, but not exhaustive, consideration of the argument for application of state law, three of the circuits' holdings will be considered below.[100] The most recent circuit to hold in favor of state law is the First Circuit in *United States v. Davis*, and it is considered in Part II.E.1.[101] The Sixth and Ninth Circuits' adoptions of state law will be considered in Parts II.E.2 and II.E.3, respectively.

> to protect uniquely federal interests,' and those in which Congress has given the courts the power to develop substantive law[.]

Id. (citations omitted).

96 *See infra* Part II.E (presenting the arguments for the application of state law to determine whether a party is liable for clean-up under CERCLA).

97 P. H. Vartanian, Annotation, *Duty of Federal Courts, Since Erie R. Co. v. Tompkins, in Determining Ultimate Federal Question, to Follow State Laws or State Court Decisions of Substantive Character, Upon Questions Which Are Preliminary, Incidental, or Collateral to the Ultimate Federal Question*, 140 A.L.R. 717 (1942).

98 New York v. Nat'l Serv. Indus., Inc., 460 F.3d 201, 207–08 (2006) (citing the various circuits' current stances on the application of federal law or state law).

99 *Id.*

100 *See infra* Parts II.E.1–3 (discussing the First, Sixth, and Ninth Circuits' reasoning for application of state law to resolve the issue of successor liability).

101 United States v. Davis, 261 F.3d 1, 52–55 (1st Cir. 2001). In this case, defendant Davis operated a waste disposal site in Rhode Island in the 1970s. *Id.* at 15. In the early 1980s, the EPA placed the site on the National Priorities List, and in 1987, the EPA issued an order describing the clean-up necessary at the site. *Id.* The report indicated that the clean-up required the government to complete a water line that would supply clean drinking water to areas where the water wells had been contaminated and where other wells were threatened by possible contamination. *Id.* The report also required that the government clean up any contaminated groundwater and excavate and clean soils that had been contaminated and that were a source of contaminating the groundwater. *Id.* When the United States government filed suit in 1990, 100 homes were within one mile of the site, and approximately 3,800 residents lived within three miles of the site. *Id.*

1. The First Circuit

In *Davis*, the government brought suit against Davis as an owner-operator to collect costs incurred for the clean-up of a hazardous site.[102] On appeal, several possible responsible parties argued that they were not successors in interest to the Davis site, and were therefore not liable.[103] Black & Decker argued that the federal common law "substantial continuation" test should govern the issue of successor corporation under CERCLA, whereas Electroformers argued that the State of Connecticut's "mere continuation" test should govern.[104] In evaluating which test to apply, the *Davis* Court considered the *Kimbell* factors to be used when deciding whether to create federal rules.[105]

The *Davis* court noted that some circuits have chosen to adopt the "substantial continuation" test because it satisfies CERCLA's "broad remedial purpose" and because of the "importance of national uniformity."[106] However, the First Circuit Court of Appeals rejected this rationale and instead decided that the majority rule is to follow state law as long as it does not frustrate federal interests under CERCLA.[107] Furthermore, the *Davis* Court rebutted the argument for creating a federal rule by explaining that no specific or concrete federal policy would be compromised by applying state law.[108]

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102 *Id.*

103 *Id.* at 52.

104 *Id.* at 52–53.

105 *Id.* at 53.

> In general, before creating a federal rule courts must consider whether federal interests require a nationally uniform body of law, whether applying state law would frustrate or conflict with a specific federal objective, and the extent to which a federal rule would disrupt commercial relationships predicated on state law.

Id.; *see infra* Parts III.A–C (discussing the application of these factors to the issue of whether state or federal law should govern in the realm of successor liability).

106 *Davis*, 261 F.3d at 53. The court reconsidered the lower court's application of the "mere continuation" test and found Black & Decker to be a successor corporation, and therefore liable for clean-up costs. *Id.* at 54. In deciding this, the court looked to the following facts: "(1) MITE and Electroformers did not share a common officer or director who was involved in the transfer; (2) MITE received fair compensation for Gar; (3) MITE continued to operate its other businesses; [and] (4) MITE remained financially viable." *Id.*.

107 *Id.* at 52.

108 *Id.* at 54 (explaining that no evidence existed suggesting that the application of state law to the facts of Davis's case would frustrate federal goals).

2. The Sixth Circuit

The Sixth Circuit was one of the first to address the issue of successor liability in *Anspec Co., Inc. v. Johnson Controls, Inc*.[109] In this case, Plaintiff Anspec bought land in Michigan in 1978 from Defendant Ultaspherics.[110] After selling the property, Ultraspherics went through a series of mergers ending in 1987 when it merged with Hoover Group, the designated surviving corporation.[111] Sometime prior to selling the property to Anspec, Ultraspherics buried an underground storage tank on the property and placed two above-ground storage tanks on the site.[112] All of the tanks were filled to capacity with hazardous substances, which later leaked into the soil and groundwater.[113] Additionally, Utlaspherics further contaminated the site through various leaks and spills of toxic liquids.[114] After being charged by the government to clean up the site, Anspec contacted Ultraspherics requesting them to pay the costs for the clean-up; Ultraspherics, however, refused.[115]

After reviewing both CERCLA's language and legislative history, the Sixth Circuit Court of Appeals concluded that neither CERCLA's language nor legislative history supported the inference that Congress

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[109] Anspec Co., Inc. v. Johnson Controls, Inc., 922 F.2d 1240 (6th Cir. 1991).

[110] *Id.* at 1243.

[111] *Id.* The court cited *Fletcher*, explaining that when two corporations statutorily merge, all liabilities are the responsibility of the surviving corporation. *Id.*

> In case of merger of one corporation into another, where one of the corporations ceases to exist and the other corporation continues in existence, the latter corporation is liable for the debts, contracts and torts of the former, at least to the extent of the property and assets received, and this liability is often expressly imposed by statute.

Id. (footnotes omitted); *see also* FLETCHER, *supra* note 46, at 226. The *Anspec c*ourt argued later in the opinion that

> the law in the fifty states on corporate dissolution and successor liability is largely uniform. For example, all states agree that the surviving corporation in a statutory merger assumes the debts and liabilities of the constituent corporations. And all states have statutes providing for post-dissolution liability of corporations for liabilities existing prior to dissolution.

Anspec Co., Inc., 922 F.2d at 1249 (citations omitted).

[112] *Id.* at 1243.

[113] *Id.* The facts indicated that contamination was the result of Ultrapsheric's routine disposal of hazardous sludge and liquids that caused the hazardous materials to spill into the soil and groundwater. *Id.* In addition, toxic cleaning solvents leaked, thereby further contaminating the soil and groundwater. *Id.*

[114] *Id.*

[115] *Id.* ("The plaintiffs notified Ultraspherics that they were required to clean up the site and requested Ultraspherics to pay the costs associated with the cleanup. When Ultraspherics refused this request, the plaintiffs filed the present action.").

intended to create a uniform federal rule of successor liability.[116] After reaching this conclusion, the court reasoned that a "corporation[,]" as defined under section 9607 of CERCLA, should be determined based on the law upon which the "corporation" was formed.[117] The court held that because all of the corporations involved in the litigation were created under state law, the question of successor liability should also be determined by the law of the state under which the litigants were incorporated, unless the application of state law would interfere with federal policy.[118] Additionally, the court reasoned that application of the *Kimbell* test supported adoption of state corporation law when resolving the issue of successor liability.[119] Finally, the court disagreed with the common argument among its sister circuits that have promoted the creation of federal law, noting that adoption of state law would cause states to engage in a "race to the bottom" (passing more lenient laws limiting vicarious liability) in an effort to attract corporations.[120] The *Anspec* court instead concluded that states have an interest in protecting their resources and citizens—an interest that most states have expressed

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[116] *Id.* at 1248 n.1 ("CERCLA is *silent* rather than unambiguous on the issue of the meaning of 'corporation' generally and successor liability specifically."). *But see* Dennis, *supra* note 50, at 1445 (explaining that other considerations suggest that uniformity may have been Congress's intent; the author quoted Representative Florio stating, "[t]o insure [sic] the development of a uniform rule of law, and to discourage business [sic] 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").

[117] *Anspec Co., Inc.*, 922 F.2d at 1248. The court reached this conclusion following a discussion of which law was appropriate given CERCLA's purposes and legislative history. *Id.* at 1247.

[118] *Id.* at 1248. The court quoted several authors, noting as follows:

> The federal "command" to incorporate state law may be a judicial rather than a legislative command; that is, it may be determined as a matter of choice of law, even in the absence of statutory command or implication, that, although federal law should "govern" a given question, state law furnishes an appropriate and convenient measure of the content of this federal law.

Id. at 148 n.2 (quoting P. BATOR, D. MELTZER, P. MISHKIN, & D. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 862 (3d ed. 1988)). The *Anspec* court later concluded its opinion, quoting the Federal Rules of Civil Procedure and holding that these rules provide that whether a corporation is to sue or be sued is determined by the law under which the corporation was organized. *Anspec Co., Inc.*, 922 F.2d at 1251.

[119] *Anspec Co., Inc.*, 922 F.2d at 1249 n.5. The court also noted that two of its sister circuits had not mentioned the *Kimbell* test in holding that federal common law should govern the issue of successor liability, stating, "[b]oth of those courts concluded, almost without analysis, that a federal common law of successor liability was required by CERCLA." *Id.* The court also considered whether the application of state law is inadequate to accomplish the purposes of CERCLA, and the court held that state law is adequate. *Id.*

[120] *Id.* at 1250.

by creating statutes and administrative bodies similar to CERCLA and the EPA.[121]

3. The Ninth Circuit

Although more circuits have decided in favor of state law rather than a federal common law, arguments are fairly consistent among the circuits.[122] Among the circuits in support of state law is the Ninth Circuit, which, in a 1997 opinion, switched from supporting federal common law to adopting state law.[123] In *Atchison, Topeka and Santa Fe Railway Co. v. Brown & Bryant, Inc.*, the plaintiff railroad company leased property to the defendant agricultural chemical business.[124] The EPA ordered the defendant to clean-up contamination found on the property.[125] After learning that the defendant could not clean up the site, the EPA ordered the plaintiff to undertake clean up action.[126] Having

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[121] *Id.* ("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.").

[122] Redwing Carriers, Inc. v. Saraland Apartments, 94 F.3d 1489 (11th Cir. 1996). The Eleventh Circuit, following many of the same positions of its sister circuits supporting application of state law, stated as follows:

> Absent a showing that state partnership law is inadequate to achieve the goals of CERCLA, "we discern no imperative need to develop a general body of federal common law to decide cases such as this."
> . . . .
> . . . CERCLA does not require that federal law displace state laws governing the liability of limited partners unless these laws permit action prohibited by the Act, or unless "their application would be inconsistent with the federal policy underlying the cause of action." . . .
> . . . Consequently federal law governing liability under CERCLA should incorporate the applicable state law rule for determining when a limited partner loses its limited liability status so as to become accountable for the CERCLA liability of the partnership.

Id. at 1501–02 (citations omitted).

[123] 159 F.3d 358 (9th Cir. 1997). The court opined:

> PureGro, on the other hand, would have us reexamine existing Ninth Circuit precedent in light of intervening Supreme Court decisions and hold that there is no need for a federal common law of successor liability under CERCLA, and that state law supplies the rule of decision in this area. We have jurisdiction . . . and we affirm the district court's grant of summary judgment in favor of PureGro.

Id. at 360.

[124] *Id.*

[125] *Id.*

[126] *Id.* at 361 ("The Railroads sued PureGro as [Brown & Bryant's] successor-in-interest, seeking private cost recovery, contribution and declaratory relief under CERCLA and numerous state claims."); *see also* Dopf, *supra* note 32, at 184 (explaining that the Railroads argued that PureGro was liable under two tests: the fraudulently entered transaction exception and the mere substantial continuation exception).

realized they could not afford the clean-up, the defendant decided to sell his business to co-defendant PureGro.[127] The district court granted summary judgment in favor of PureGro, ruling that it was not liable as a successor-in-interest for clean-up actions, and the plaintiff appealed.[128]

The Ninth Circuit Court of Appeals began its discussion by noting that since 1990, when it had supported a federal rule in *Louisiana-Pacific Corp. v. Asarco, Inc.*,[129] the Supreme Court has decided that the instances for creating federal rules are "few and restricted[.]"[130] In *Atchison*, the Ninth Circuit Court of Appeals then explained that even where a federal statute is involved, federal courts should not always fashion a federal rule, especially when the application of state law will satisfy the purpose of the federal statute.[131] Finally, considering that the formation of corporations and corporate liability are normally matters of state law, the court applied the *Kimbell* test and concluded that the application of state law is appropriate.[132] Applying California State law, the court held that PureGro was not liable under the "mere continuation" test.[133]

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127 *Atchison*, 159 F.3d at 360.

> Paying the appraised value for the equipment, PureGro bought half of B & B's equipment pursuant to an Equipment Sale Agreement. The agreement specified that it was not to be construed as a purchase of B & B's business and that PureGro would not be considered de jure or de facto a successor to B & B.

Id. The agreement also contained indemnity provisions that conditioned the purchase on absolving PureGro of any environmental liability. *Id.*

128 *Id.* at 360. ("In this appeal, the Railroads ask us to exercise our powers under federal common law to expand successor corporate liability under CERCLA.").

129 909 F.2d 1260 (9th Cir. 1990).

130 *Atchison*, 159 F.3d at 362. (explaining that the Supreme "Court rejected many of the very arguments that *La.-Pac.* accepted in deciding CERCLA necessitated a set of uniform federal rules for successor liability").

131 *Id.* The court noted, "*O'Melveny* tells us that when dealing with a 'comprehensive and detailed' federal statutory regulation, a court should instead presume that matters left unaddressed in such a scheme are subject to state law." *Id.*; *see also* Dopf, *supra* note 32, at 194.

132 *See Atchison*, 159 F.3d at 363. The court reasoned as follows:

> "[T]o invoke the concept of 'uniformity' . . . is not to prove its need." Although often invoked in this context, there has been no real explanation of the need for uniformity in the particular area of successor liability—especially since state law will in many other instances determine whom the EPA may or may not look to for compensation. If state law varied widely on the issue of successor liability, perhaps the need for a uniform federal rule would be more apparent. This is not the case, however, as 'the law in the fifty states on corporate dissolution and successor liability is largely uniform.' The argued "need" for uniformity thus stems not from disarray among the various states, but from the alleged need for a more expansive view of successor liability than state law currently provides—in other

No matter which law is chosen to govern in this realm, CERCLA's legislative history makes clear that Congress's primary concern was not disruption of state law, but the threats to human health and the environment created by hazardous waste.[134]

III. ANALYSIS: WHETHER TO ADOPT STATE LAW OR FEDERAL LAW TO DECIDE THE ISSUE OF SUCCESSOR LIABILITY UNDER CERCLA

Arguably, CERCLA is an example of legislation enacted hastily to combat a serious matter of public concern; it contains gaps and defects, as is reflected in the issue of successor liability.[135] In 1944, the Supreme Court held that, in the context of limited liability, federal statutes are preferable to state common law rules.[136] As a result, some commentators

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> words, the notion that state law on this issue is inadequate for CERCLA's purposes.

Id. (citations and footnotes omitted); *see also* Dopf, *supra* note 32, at 190. Dopf agreed with the Ninth Circuit's holding that state law appropriately provides the applicable rule for successor liability. Dopf, *supra* note 32, at 190. Dopf further argued that although legislative history supports the adoption of a uniform rule, Congress has never hinted that state corporation law should be displaced. *Id.* at 192. Citing CERCLA's sponsor's advocacy of adopting a uniform rule, the author contends that the personal conclusions of one member of Congress cannot outweigh the absence of support for a uniform rule in CERCLA's text or relevant committee reports. *Id.* 192–93.

[133] *Atchison*, 159 F.3d at 364. Applauding the Ninth Circuit's decision in *Atchison*, one author provided the following explanation:

> The application of existing state law is preferable to the creation of new federal common law. State law, which has evolved over many years is frequently codified in statutes, is well developed and can be easily discoverable and applicable. In contrast, "the creation of new federal common law is a difficult, open-ended, and long term task." If courts were to begin creating new federal common law, they would bear the burden of fashioning rules appropriate to the circumstances that each element of corporation law would bring with it.

Dopf, *supra* note 32, at 199 (footnotes omitted).

[134] *See* Clarke, *supra* note 32, at 1313. Clarke also noted:

> Even if a uniform federal rule of successor liability had a greater effect on the business community than expected, CERCLA's legislative history reveals that Congress was far more concerned with the substantial threats to human health and the environment posed by the national hazardous waste disposal problem than it was with disrupting commercial relationships based on state law.

Id.

[135] *See supra* notes 17–21 and accompanying text (discussing the reasons for, and consequences of, CERCLA's hasty enactment, the resultant statutory deficiencies, and the judicial system's efforts to resolve issues created by the Act's deficiencies).

[136] Aronovsky & Fuller, *supra* note 14, at 452 n.142. The authors quote Anderson v. Abbott, 321 U.S. 349, 365 (1944): "no State may endow its corporate creatures with the power to place themselves above the Congress of the United States and defeat the federal policy . . . which Congress has announced." *Id.*

propose that federal courts now have the responsibility to fashion uniform rules that pierce the corporate veil in order to identify liable parties and achieve the specific purposes of the federal statute.[137] To the contrary, some scholars maintain that CERCLA's silence on the matter supports the application of state law, and thereby respects the philosophy of federalism.[138] Indeed, many arguments have been raised to potentially resolve the issue, and some are more persuasive than others.[139] Unfortunately, however, neither Congress nor the Supreme Court has adopted an argument that might potentially quiet the twenty-eight-year-young controversy.[140]

In *Kimbell*, the Supreme Court noted that judicial policy, viewed in light of three different factors, would guide courts when deciding whether to fashion a nationwide federal law.[141] These factors include whether a need for uniformity exists, whether the application of state law would disrupt the specific purposes of the federal law or program, and whether the adoption of a federal rule would frustrate commercial relationships rooted in state law.[142] This test has been used in a vast number of cases, dealing with a variety of legal issues.[143] Consequently, Part III of this Note will analyze the successor liability problem under CERCLA using the framework and factors outlined by the Supreme Court in *Kimbell*.

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137 *Id. But see* Warren, *supra* note 3, at 326.

138 Warren, *supra* note 3, at 326. The author stated:

> State law could be fashioned to favor corporations by allowing them to escape liability as successors under CERCLA, or it could give preference to environmental concerns and promulgate successor liability standards that are tough on corporations. Regardless, many people argue that CERCLA's silence on the issue necessitates deference to state law.

Id. (footnote omitted).

139 *See supra* Parts II.D–E. (discussing the various arguments for the adoption of federal law and those for the application of state law to resolve the issue of successor liability).

140 *See infra* Parts IV.A–C (explaining ways in which Congress or the Supreme Court could resolve the issue of successor liability).

141 *See supra* notes 55–62 and accompanying text (discussing the *Kimbell* factors and their wide application to different areas of the law, and also explaining how the *Kimbell* factors are applied to facts to decide when federal common law should be created and when state law should govern an issue).

142 *See supra* notes 56–58 and accompanying text (elaborating on the application of these factors to legal issues, and explaining what consequences each factor is designed to measure).

143 *See supra* note 58 (noting the wide array of cases and legal issues to which the *Kimbell* test has been applied).

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A. Is There a Need for a Federal Uniform Definition of Successor Liability?

One of the difficulties that many courts face when confronted with issues of statutory construction is deciding what Congress would do, or, in the alternative, deciding that Congress left it solely to the courts to resolve the specific issue.[144] The Supreme Court, however, is reluctant to fashion federal rules to fill gaps in federal statutes.[145] In the context of successor liability, a judicial and scholarly debate has continued for more than twenty years on this very issue. In *Kimbell*, when discussing whether uniformity in the administration of a federal program is necessary, the Supreme Court suggested that for uniformity to be essential, the federal program or Act by its very nature must necessitate the creation of uniform rules.[146] An additional question to consider is whether state law inadequately resolves the question of successor liability, thereby necessitating the creation of federal law.[147]

Perhaps the strongest argument for creating a federal uniform law in this area is Congress's goal to expedite the litigation of successor liability issues.[148] In the absence of a uniform federal rule, litigants, attorneys, and judges might spend needless resources in resolving liability cases.[149] One goal of CERCLA is to minimize litigation and transaction costs, and some circuits have held that this goal is served marginally by a state-by-state, or case-by-case, approach to determine which law should apply.[150]

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144 United States v. Gen. Battery Corp., 423 F.3d 294, 298 (3d Cir. 2005). In this case, the Third Circuit took the latter approach in holding that Congress expected courts to resolve the issue by fashioning a federal common law that answered successor liability issues. *Id.* In *Smithland*, the Third Circuit Court of Appeals explained that a general common law doctrine of successor liability administered in most states should be adopted by courts rather than specific statutes that apply in a few states. Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86, 91–92 (3d Cir. 1988); *see also* Anspec Co., Inc. v. Johnson Controls, Inc., 922 F.2d 1240, 1245 (6th Cir. 1991) ("a federal court . . . must find . . . that Congress painted with a broad brush and left it to the courts to 'flesh out' the statute by fashioning a body of substantive federal law[] . . . .").

145 *See supra* text accompanying notes 77–78 (discussing the Supreme Court's caution that controversies involving federal programs do not always require the adoption of uniform federal rules).

146 United States v. Kimbell, 440 U.S. 715, 728 (1979).

147 *See supra* notes 118, 121 and accompanying text (quoting the analysis of the Sixth Circuit Court of Appeals of when it is appropriate to apply state law instead of fashioning federal common law).

148 *See supra* notes 21, 36–37, 89 and accompanying text (considering the amount of litigation spawned by CERCLA's absence of how to resolve successor liability issues, and also arguing that a case-by-case approach to resolve the issue in each state would only increase the amount of litigation and circumvent CERCLA's goals).

149 *See supra* notes 21, 36 and accompanying text (supporting the notion that CERCLA's silence on the issue of successor liability has led to incalculable amounts of litigation).

150 *See supra* note 89 and accompanying text (arguing that a case-by-case approach to resolving the issue in each state would only increase the amount of litigation and fail to

The creation of a uniform law would avoid this often lengthy process of parties arguing over which law governs and would allow parties to spend time litigating the more important issue: who is the appropriate successor in interest.[151] Because the Supreme Court is weary of fashioning new common law, an alternative approach might be for the Court to use its interpretive power under *Marbury v. Madison*, and to hold that Congress intended successor liability be enforced under state law.[152] Without considering possible consequences, this approach arguably would avoid the litigation costs and judicial resources currently used to decide whether state or federal law should apply.[153]

On the contrary, a federal common law rule may not be necessary because in most cases, state law adequately determines whom the EPA can pursue for compensation, and, as a result, state law achieves CERCLA's purpose of identifying liable parties.[154] Furthermore, state law does not vary widely on matters of corporate dissolution and successor liability; consequently, there is no real need to fashion a law that brings all the states into conformity with one another.[155] In

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satisfy CERCLA's goals); *see also* United States v. Gen. Battery Corp., Inc., 423 F.3d 294, 300 (3d Cir. 2005) ("Applying a particular state's law requires a state-by-state interpretation of the federal liability statute—a result, in the case of successor liability under CERCLA, that we believe conflicts with the statutory objectives.").

151 *See supra* notes 27–29 and accompanying text (explaining that CERCLA's primary goal is to remediate contaminated sites promptly).

152 *See supra* notes 116–18 and accompanying text (explaining that CERCLA's silence on the issue manifests an intent to have liable successors determined by the application of relevant state law). *But see supra* notes 53–54 and accompanying text (contending that the right to construe a statute is different than the authority to fashion new laws).

153 *But see* Smolen, *supra* note 83, at 148–49.

> [T]he Third Circuit held that applying state successor liability standards would lead to increases in both the amount of litigation brought under CERCLA and transaction costs. Moreover, applying state law conflicts with the dual policy reasons behind the passage [of] CERCLA [] encouraging both early settlement of lawsuits and redevelopment of previously contaminated land.

Id. (footnote omitted).

154 *See supra* note 132 and accompanying text (arguing that state law furnishes the necessary standards to determine who the EPA may consider for compensation of clean-up costs, thereby satisfying CERCLA's objectives). *But see supra* notes 88–89 and accompanying text (arguing that state law inadequately satisfies CERCLA's objectives of a liquid market in brownfield assets by creating an unpredictable case-by-case approach to successor liability. Instead, it is contended that a uniform and predictable federal standard comports with CERCLA's objective of creating a liquid market in brownfield assets).

155 *See supra* note 132 (suggesting that because state law does not vary widely on issues of successor liability, there is no need for national uniformity); *see also* Dennis, *supra* note 50, at 1451 (explaining that laws which govern the piercing of the corporate veil do vary among the states). *But see* United States v. Gen. Battery Corp., Inc., 423 F.3d 294, 301 (3d Cir. 2005) (arguing that although state law does not vary widely on the issue, and although

summation, the argument is that fashioning a federal law would not substantially affect the current process and laws that govern successor liability; and, therefore, no real need exists for a federal law in this instance.[156]

As is apparent, the first prong of the *Kimbell* test is a difficult hurdle over which to leap for those in favor of national uniformity in this area. The "need" articulated by the *Kimbell* court creates a high standard that must be met in order to persuade the court to fashion federal common law.[157] Therefore, the question may be limited to a consideration of whether minimizing litigation costs and judicial time meets the "necessary" standard articulated in *Kimbell*.[158] However, a further question to consider is whether, even if these considerations (minimizing litigation costs and judicial time) create a need for federal uniformity and the statute is nonetheless judicially construed to apply state law, would the need be an imagined phenomenon swallowed up by the interests of federalism?[159] In contrast, would a decision to adopt a federal standard merely be an exercise of filling definitional gaps ("successor corporation") in a hastily enacted statute, rather than the "free-wheeling creation of federal common law[?]"[160] Additionally, even if a need for

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successor liability involves aspects of tort and corporate law, both of which are generally matters of state law, the seeming state-by-state uniformity is less apparent when applied to specific cases). *Id.* The Third Circuit also cited several examples of how small and subtle legal nuances on successor liability issues create differences when applied in different states: New York and other states emphasize "continuity of ownership" as a factor of successor liability, while other states do not; some states, including Pennsylvania and New Jersey, apply unique successor liability doctrines in environmental cases, while other states do not; in some states, the rules governing liability are ambiguous and are not applied uniformly; and, finally, even states and jurisdictions that generally agree on which legal doctrines are appropriate to apply, administer them differently. *Id.* at 301–02 n.6.

156 *See supra* notes 118–21, 131 and accompanying text (contending that the instances are few and restricted in which federal law should be created and applied, and state law adequately resolves the issue of successor liability, thereby quashing the need for federal uniformity that some courts argue is mandated in the realm of successor liability under CERCLA). *But see* United States v. Bliss, 667 F. Supp. 1298, 1308 (E.D. Mo. 1987). Supporting the creation of federal law, the court held that federal law should be created in order for the issue of successor liability to be resolved meeting CERCLA's objectives. *Id.* The court reasoned that the application of the state standards might not preclude further litigation on the issue, and the possibility of different state standards might lead to inconsistent results. *Id*.

157 *See supra* notes 141–43 (reviewing some of the standards considered in determining whether the creation of a federal law is necessary).

158 *See supra* note 122 (explaining that CERCLA does not require application of federal law unless state law would be inconsistent with CERCLA's stated purposes).

159 *See* Warren, *supra* note 3, at 326 (supporting the idea that arguments in favor of the application of state law have their roots in federalism).

160 United States v. Gen. Battery Corp., 423 F.3d 294, 300 (3d Cir. 2005) (explaining that recent Supreme Court cases have not filled in gaps of federal liability statutes with the law

federal uniformity exists, a final inquiry becomes whether the application of state law sufficiently resolves the need.[161]

B. Would the Application of State Law Disrupt the Specific Purposes of CERCLA?

As discussed in Part II.A, Congress had the following two purposes in enacting CERCLA: 1) to allow the EPA to quickly pursue recovery costs from parties liable for clean-up activities at a hazardous site; and 2) to identify and actually remediate contaminated sites.[162] CERCLA's legislative history demonstrates that Congress intended for its purposes to be fulfilled promptly by cleaning up hazardous waste sites quickly.[163] One author argues that CERCLA is a remediation statute intended to impose liability on parties for past actions that have caused present consequences.[164] Therefore, the ultimate decision to apply state or federal law must consider these purposes and not prohibit them from prompt accomplishment.[165]

Proponents of state law argue that CERCLA's purposes are accomplished by the application of state law: a liable party can be identified through the application of state corporate liability laws.[166] However, the concern remains as to whether state law will continue to satisfy CERLCA's purposes.[167]

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of an individual state; rather, the Court has filled the statutory gaps with general common law principles); *supra* notes 77, 135 (emphasizing the statutory gaps present in CERCLA).

[161] *See supra* Part III.A (discussing whether the application of State Law to resolve the issue of successor liability satisfies CERCLA's specific objectives).

[162] *See supra* notes 17–21 and accompanying text (citing the purposes and Congressional intent for enacting CERCLA).

[163] *See supra* note 29 and accompanying text (emphasizing that CERCLA was enacted to combat the growing concerns over the environmental and health risks created by the disposal of hazardous waste and that Congress intended to have hazardous waste sites promptly remediated).

[164] *See supra* note 17 and accompanying text (citing one author who explained CERCLA, as a backward-looking Act, and seeking to remediate past events of contamination that have created present consequences).

[165] *See supra* notes 57–58 and accompanying text (discussing the *Kimbell* factors and their utility in deciding whether state or federal law would meet a federal policy's objectives); *see also* Clarke, *supra* note 32, at 1312 ("'One can hardly imagine a federal program more demanding of national uniformity than environmental protection.' . . . [U]niform enforcement of CERCLA is especially necessary because hazardous sites often present problems and dangers that cross state lines and demand remedial attention at the federal level.") (footnote omitted).

[166] *See supra* note 111 and accompanying text (citing an example of how state corporate liability laws can be used to find responsible parties in successor liability cases under CERCLA, and arguing that state liability laws are largely uniform among the fifty states).

[167] *See supra* note 59 and accompanying text (citing one instance where state law is inadequate to resolve issues of successor liability).

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The legislative history and the holdings of several circuits reflect that CERCLA's purposes would not be fulfilled in the absence of federal uniformity, reasoning that such silence in this area could lead to states creating more lenient laws to attract business, and consequently, could create a "race to the bottom" for states and a "safe haven" for polluters.[168] More specifically, the Third Circuit Court of Appeals reasoned that CERCLA's purposes and goals could be subverted by a liable party's decision to merge under the laws of states that restrict the possibility of successor liability.[169]

In contrast to this view, circuits opposed to a federal law in this area generally reason that a "race to the bottom" will not result and that different states will not create "safe havens."[170] This view is supported by the fact that presently no state law can genuinely be characterized as creating a safe haven.[171] Additionally, it is argued that all states have their own interest in being certain that successor corporations do not avoid successor liability.[172] Furthermore, many states have agencies

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[168] *See supra* notes 67, 76, 116, 120–21 and accompanying text (arguing that federal uniformity comports with Congress's desire to prohibit polluters from establishing their operations in states that have more lenient liability laws). *See also* Clarke, *supra* note 32, at 1312–13. Clarke stated:

> Several courts finding a need for uniform enforcement of CERCLA have noted that an important consideration leading to [CERCLA's] enactment was the failure of the states to respond adequately to hazardous waste problems[] . . . [and]
>
> . . . that district courts "must consider national uniformity" to prevent the unduly restrictive successor liability laws of particular states from frustrating CERCLA's goals.

Id. (footnote omitted).

[169] *See supra* note 80 and accompanying text (citing *Smithland*, where the Third Circuit Court of Appeals held that a federal uniform standard should be adopted to prevent CERCLA's objectives from being circumvented by a party choosing to merge or incorporate in a state with laws that unnecessarily restrict successor liability).

[170] *See supra* notes 120–21 and accompanying text (arguing that creation of a "race to the bottom" or "safe havens" is not a valid concern because states have an interest in protecting human health and the environment).

[171] *See* Atchison, Topeka & Santa Fe Ry. Co. v. Brown & Bryant, Inc., 159 F.3d 358, 364 (9th Cir. 1997); *see also* Redwing Carriers, Inc. v. Saraland Apartments, 94 F.3d 1489, 1502 (11th Cir. 1996).

[172] *See Atchison*, 159 F.3d at 364. See also *Redwing Carriers, Inc.*, 94 F.3d at 1502, stating:

> 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.

Id. (quoting Anspec Co. v. Johnson Controls, Inc., 922 F.2d 1240, 1250 (6th Cir. 1991)).

analogous to the EPA that are authorized to deal with hazardous waste sites, which further ensures that a race to the bottom is not as inevitable as some might suppose.[173] Therefore, the notion is that cleaning up hazardous waste sites is not a unique federal interest, and states have quieted any perceived need for federal uniformity by creating state agencies that promote remedial efforts to clean up hazardous waste sites.[174]

One additional objective of CERCLA, however, is to facilitate a more liquid market in "brownfield" assets.[175] Some proponents of a federal law have urged that this purpose is best served by uniform and predictable standards and that unpredictability as to which law to apply would only complicate and increase the costs of "brownfield" transactions.[176] In sum, a uniform law in this area could give to corporations and investors, purchasing a property that potentially contains hazardous waste, security as to which law will apply if waste is found and liability is investigated.[177]

Having considered the need for federal uniformity and whether state law can satisfy any need for uniformity, the final inquiry is whether a federal rule would frustrate corporate relationships.[178]

C. Would the Adoption of a Federal Rule Frustrate Commercial Relationships Established Under State Law?

This is a difficult inquiry because the "consequences of the rule and the degree of disruption, if any, would depend on the substantive content of the rule, not on its mere existence."[179] Although some courts

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173 *See id*.

174 *Id*.; *see also* Dennis, *supra* note 50, at 1501–02 ("Claims that adoption of state law would lead to the creation of "safe havens for polluters and would quickly exhaust the Superfund were shown to be too speculative to meet the evidentiary standards established in other cases.").

175 *See supra* note 88 and accompanying text (discussing that a uniform federal rule would help facilitate Congress's economic interest in creating a more liquid market in "brownfield" assets).

176 *See supra* note 88 (discussing that some of the statutory objectives of CERCLA are to encourage the clean-up, transfer, and redevelopment of contaminated sites); *see also* Polius v. Clark Equip. Co., 802 F.2d 75, 83 (3d Cir. 1986) ("Unforeseeable alterations in successor liability principles complicate transfers and necessarily increases [sic] transaction costs. Major economic decisions, critical to society, are best made in a climate of relative certainty and reasonable predictability.") (citation omitted).

177 *But see* Redwing Carriers, Inc. v. Saraland Apartments, 94 F.3d 1489, 1502 (11th Cir. 1996) (explaining that due to the popularity of limited partnerships, investors' expectations may be upset by the adoption of a federal rule).

178 *See infra* Part III.C.3 (discussing whether the adoption of a federal rule would frustrate commercial relationships created under state law).

179 *See* Clarke, *supra* note 32, at 1313. *But see id.*

have held that this factor supports the adoption of state law, many have failed to address extensively its implications when applied to the successor liability problem.[180] One author commented that the application of a state's law of incorporation to external issues could result in difficult problems, such as if a case involved several corporations incorporated in different states.[181] Under these circumstances, a corporation has no guarantee that the successor liability laws in its state of incorporation will govern successor liability issues—a guarantee and predictability that any corporation is entitled to and would receive with a federal standard.[182] In addition to concerns about lack of predictability, outside of the CERCLA issue, some courts have held that the frustration of commercial relationships based on state law may result in a variety of ways.[183]

This discussion will be considered in light of three factors considered by some courts.[184] First, Part III.C.1 discusses whether commercial relationships are disrupted when a corporation anticipated that an issue was to be governed by state law.[185] Second, Part III.C.2 analyzes whether disruption of commercial relationships will result once a federal standard has been widely applied.[186] Third, Part III.C.3 considers whether commercial relationships would be disrupted by the uncertainty that newly fashioned federal common law creates.[187]

> Even if a uniform federal rule of successor liability had a greater effect on the business community than expected, CERCLA's legislative history reveals that Congress was far more concerned with the substantial threats to human health and the environment posed by the national hazardous waste disposal problem than it was with disrupting commercial relationships based on state law.

Id.

180 *See generally Redwing Carriers, Inc.*, 94 F.3d at 1502 (arguing that creation of a federal law would frustrate "the expectations investors have under current state law rules . . . .").

181 Note, *Piercing the Corporate Law Veil: The Alter Ego Doctrine Under Federal Common Law*, 95 HARV. L. REV. 853, 863 (1982); *see also supra* note 136 (explaining why some problems exist when CERCLA issues cross state-lines).

182 Dennis, *supra* note 50, at 1502–03.

183 *See supra* note 58 (discussing three ways that courts have held that frustration of commercial relationships based on state law can result).

184 The questions and cases discussed in this Part were first considered in Dennis, *supra* note 50.

185 *See infra* notes 187–91 and accompanying text (discussing and applying a choice-of-law Supreme Court case that considered whether commercial relationships are disrupted when an entity anticipated that an issue was to be governed by state law).

186 *See infra* notes 192–97 and accompanying text (considering and applying a choice-of-law Ninth Circuit case to the question of whether disruption of commercial relationships will result when a federal law has been widely applied).

187 *See infra* notes 198–201 and accompanying text (discussing and applying a Ninth Circuit case to the present issue of successor liability in the context of whether commercial

1. Are Commercial Relationships Disrupted When a Corporation Anticipated That an Issue Was To Be Governed by State Law?

First, courts have considered the disruption of commercial relationships in actions taken before the adoption of a federal rule when a corporation has anticipated that the issue would be handled by state law.[188] For example, the Supreme Court in *United States v. Brosnan* refused to create a federal rule dealing with federal tax liens being nullified in the foreclosure proceedings of a particular state.[189] The Court reasoned that although uniformity could be beneficial to the federal government, allowing state law to govern foreclosure proceedings would be more consistent with Congress's previous actions.[190]

As applied to the issue at hand, if a federal law governing successor liability was created, an investor, stockholder, or corporation who invested in a corporate body or transaction before the federal law was created would not have had the opportunity to contemplate his potential liability under the federal law.[191] In short, an investor or parent corporation might be held liable unfairly if a federal standard is different than the standard contemplated when the investment was made.[192]

2. Will Disruption of Commercial Relationships Result Once a Federal Standard Has Been Widely Applied?

Second, courts have considered the disruption of commercial relationships that might result from the effects the rule will have after it becomes well-known and widely applied.[193] For example, in *United States v. Hadden Haciendas Co.*, the Ninth Circuit Court of Appeals created a federal rule that permitted post-foreclosure actions for damages.[194] The

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relationships would be disrupted by the resultant uncertainty that a new federal law would create).

188 Dennis, *supra* note 50, at 1503.

189 363 U.S. 237, 241–42 (1960). *See also* Dennis, *supra* note 50, at 1503. Dennis noted that the *Kimbell* Court cited *Brosnan* as just one authority for the third factor in the *Kimbell* test. *Id.*; *see* United States v. Kimbell Foods, Inc., 440 U.S. 715, 729 n.24 (1979).

190 *Brosnan*, 363 U.S. at 242. Additionally, the Court gave the following reasons for choosing to adopt state law: "Long accepted nonjudicial means of enforcing private liens would be embarrassed[] . . . and many titles already secured by such means would be cast in doubt." *Id.*; *see also* Dennis, *supra* note 50, at 1503.

191 Dennis, *supra* note 50, at 1506. The author also argues that "creditors who finance a parent corporation will now have to concern themselves with the parent's liability for damages incurred by the subsidiary." *Id.* at 1507.

192 *Id.* This represents an unforeseen risk that the creditor did not have to consider when she originally financed the parent corporation. *Id.* at 1507.

193 *Id.* at 1504.

194 541 F.2d 777, 785 (9th Cir. 1976); *see also* Dennis, *supra* note 50, at 1504 n.592.

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court reasoned that the federal law did not overly intrude on state laws protecting debtors because the necessary protection contemplated by state statutes would be achieved by application of a federal rule and the federal program.[195]

In the context of successor liability, a uniform rule would help serve CERCLA's remedial purposes of identifying potentially liable parties and increasing the liquid market in "brownfield" assets.[196] In the long run, this would benefit both states and individuals by allowing them to predict how liable parties will be identified, and it might also increase the rate at which hazardous property is cleaned up, redeveloped, or transferred.[197] However, although the creation of federal law might meet states' and CERCLA's expectations in cleaning up hazardous waste, no specific federal policy would be compromised by applying the laws of the individual states.[198]

3. Would Commercial Relationships Be Disrupted By the Uncertainty Newly Fashioned Federal Common Law Creates?

Third, courts have considered the uncertainty caused by the adoption and application of a new federal law.[199] For example, in 1986 the Ninth Circuit Court of Appeals articulated two concerns that a federal rule might present to litigants applying a newly fashioned federal law. The concern most relevant to the issue of successor liability is whether the application of a new federal rule—in place of applying a fully defined and established state law—could create uncertainty about how the rule is applied in a specific set of circumstances.[200]

In CERCLA's world of successor liability, the confusion will most likely be temporary while federal courts try to apply the new federal law.[201] Although some argue that creation of a federal law will bring

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195 *Hadden Haciendas*, 541 F.2d at 785.

196 *See supra* notes 88–89 and accompanying text (explaining how a federal rule would help facilitate a more liquid market in brownfield assets, and thereby satisfy CERCLA and its amendment's purposes).

197 *See supra* notes 88–89 and accompanying text (discussing the objectives of the 2001 Amendments to CERCLA and the relevance of "brownfield" assets, and explaining that one of CERCLA's goals is to reduce litigation and transaction costs).

198 *See supra* notes 122,153 and accompanying text (explaining that no federal policy would be compromised by the application of state law). *But see supra* note 89 (arguing that CERCLA's objectives of lowering litigation costs is poorly served by a case-by-case approach to the question of successor liability); note 67 (arguing that more lenient state laws would disrupt the federal policy behind enacting CERCLA).

199 Dennis, *supra* note 50, at 1505.

200 *See id.* at 1505–06 (citing Mardan Corp. v. C.G.C. Music, Ltd., 804 F.2d 1454, 1460 (9th Cir. 1986)).

201 *Id.* at 1510–11.

predictability to the realm of successor liability, others maintain that the confusion will only start anew and continue until a large enough body of case law exists such that litigants can predict confidently how a federal court will apply the law to a particular set of circumstances.[202] In addition to these concerns and approaches, other concerns and arguments remain as to which law should apply.

IV. A NEED FOR UNIFORMITY

The arguments both for application of state law and those for application of federal law are persuasive.[203] And yet, need for national uniformity is apparent from the declared purposes of CERCLA and in order to avoid the continued confusion and unpredictability that differences in state law create.[204] Therefore, this Note proposes that the confusion must be alleviated in one of three ways.[205] First, Congress could resolve the issue through a statutory amendment that clearly states how a successor corporation is to be determined for purposes of liability.[206] Second, if the Supreme Court determines that Congress will continue to remain silent, it could use its authority to construe the Act and clearly define what Congress intended a "corporation" to mean.[207] Finally, if it is apparent that mere statutory construction will inadequately resolve the issue, *uniform* federal common law should be created to clearly outline how a successor corporation is to be determined.[208]

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202 *See supra* notes 88 and 176 and accompanying text (explaining that predictability is a desirable trait of a federal law in this area). *But see* Dennis, *supra* note 50, at 1510–11 (discussing the temporary confusion that will continue to plague corporations and investors if a federal law is adopted).

203 *See supra* Parts II.D–III (discussing the histories and arguments for application of state law and application of federal law).

204 *See supra* Part III (analyzing the various arguments for application of state law and federal law, and considering the reasons why fashioning a federal rule in the realm of successor liability is superior to the case-by-case approach of applying state law).

205 *See infra* Part IV.B. Mere statutory construction can be difficult to separate fully from the fashioning of federal common law in the realm of successor liability due to the specific language that must be included to define how a successor corporation is to be determined under CERCLA. *See infra* Part IV.B.

206 *See infra* Part IV.A (proposing a statutory amendment to define how a successor corporation is to be determined under CERCLA, and considering how such an amendment would resolve the issue of successor liability).

207 *See infra* Part IV.B (proposing statutory construction as an option to resolving the issue of successor liability).

208 *See infra* Part IV.C (proposing that the Supreme Court resolve the issue by creating a uniform approach to determining who is a successor corporation under CERCLA).

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A. Proposed Amendment to 42 U.S.C. § 9607 of CERCLA

Congress could amend section 9607 of CERCLA to define "corporation" as follows:

> *(5) For purposes of liability, "any person" as used in this section includes successors to any corporate entity that is subject to liability. Where the facts are in dispute as to whether a corporation is truly a successor to a liable party, a "successor corporation" shall be determined by the following factors:* "(1) retention of the same employees [by the buyer]; (2) retention of the same supervisory personnel; (3) retention of the same production facilities in the same location; (4) production of the same product; (5) retention of the same name; (6) continuity of assets; (7) continuity of general business operations; and (8) whether the buyer holds itself out as a continuation of the" divesting corporation.[209]

Commentary

This problem that could easily be fixed if Congress decided to resolve the issue and amend CERCLA to state clearly which law should govern or, alternatively, to indicate clearly how "person" is to be defined under the courts' term "successor corporation."[210] Unfortunately, however, CERCLA was enacted in 1980, and its progeny—the 1986 and 2000 Amendments—were silent as to the issue of successor liability. Consequently, if the issue is to be resolved, the Court should assume the responsibility because Congress has had nearly twenty-eight years to amend CERCLA with a clear definition of "successor corporation," but has failed to do so. Obviously, this is the fastest and, arguably, the least controversial method of resolving the conflict. However, in summary, absent any indication that an amendment to CERCLA is forthcoming, the Court should assume the responsibility of resolving the issue.

B. Supreme Court Construction of "Successor Corporation"

The Supreme Court could construe CERCLA to define how a "successor corporation" is to be determined:

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[209] The text appearing in normal font represents language taken from the First Circuit's opinion in United States v. Davis, 261 F.3d 1, 53 (1st Cir. 2001). The text appearing in italics represents the proposed amendment of the author of this Note.

[210] *See supra* notes 33–34 and accompanying text (explaining that although Congress did not include "successor corporation" in the definition of "person," federal circuit courts have interpreted "corporation" to include "successor corporation").

> *Corporation[s]," included under 42 U.S.C. § 9601, which are liable for clean-up costs of contaminated sites, include the following:* the current owner of a site on which remedial action is necessary *when a responsible party cannot be found* and the owner of a site at the time the hazardous waste was disposed of. *Additionally, where the responsible party is a defunct corporation, the Act is interpreted to include any "corporation" that is a successor-in-interest, successor-in-business, or successor-in-assets to the defunct corporation*.[211]

Commentary

This proposed judicial construction might alleviate some of the confusion in determining who a successor corporation is. Unfortunately, this interpretation may be too ambiguous to give courts enough direction when determining successor corporations in every instance. Additionally, a larger difficulty remains with the premise that the Court's authority to construe a statute is very different than its authority to create a new federal rule.[212] Some commentators have argued that the Court could easily define "successor corporation" without creating federal common law.[213] However, if federal courts are to define "successor corporation" rather than apply state law or create common law, the holding must not be so broad that it abuses the courts power to construe statutes by creating definitions that are in themselves whole new laws.

Therefore, under the separation of powers doctrine, while statutory construction might be more acceptable than fashioning federal common law, any definition might be too narrow and leave continued ambiguity causing parties to litigate, thereby violating one of CERCLA's purposes that an amendment or interpretation is meant to correct—reducing litigation costs. In short, an acceptable interpretation to resolve the issue may be too broad to simply be characterized as construing CERCLA.

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[211] 42 U.S.C. § 9601 (2000). The text appearing in normal font represents language that was adapted from dicta in the Third Circuit's opinion Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86, 90 (3d Cir. 1988). The text appearing in italics represents the proposed interpretation of the author of this Note.

[212] *See supra* notes 52–53 and accompanying text (discussing the difference between statutory construction and the creation of federal rules).

[213] *See supra* text accompanying note 87 (citing the Third Circuit's holding that creation of a federal rule would constitute statutory interpretation and not the creation of federal common law).

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C. Judicially Created Common Law Defining "Sucessor Corporation"

The Supreme Court could create federal common law that clearly defines how a "successor corporation" is to be determined:

> *The circuit courts in favor of federal common law have adopted the "substantial continuation" test as the appropriate uniform federal standard. After concluding that adoption of a uniform federal standard is what Congress intended, we see no reason why the "substantial continuation" test should not be adopted as that standard. As such, when determining whether a corporation is liable as a successor in liability for clean-up costs on a contaminated waste site, courts should analyze the facts in light of the following eight factors:* "(1) retention of the same employees [by the buyer]; (2) retention of the same supervisory personnel; (3) retention of the same production facilities in the same location; (4) production of the same product; (5) retention of the same name; (6) continuity of assets; (7) continuity of general business operations; and (8) whether the buyer holds itself out as a continuation of the" divesting corporation.[214]

Commentary

Although this might be the least favorable alternative, it is probably the most likely and reasonable. The "substantial continuation" test has been applied in many cases already. Therefore, fears that a new common law would only create confusion of application until a large number of cases have been decided are somewhat unfounded. Furthermore, determining successor corporations can require an extremely fact-sensitive analysis. Therefore, the proposed test gives courts the ability to analyze cases consistently, based on a variety of factors, and in spite of varying facts.

Additionally, as previously discussed, the stated purposes of CERCLA are to promptly pursue recovery costs, to identify and remediate contaminated sites, and to minimize litigation and transaction costs in identifying potentially responsible parties.[215] Also, CERCLA's sponsor indicated that one of its *primary* purposes is to ensure the creation of a uniform rule of law to mitigate the possibility of businesses

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[214] The text appearing in normal font represents language taken from the First Circuit's opinion in United States v. Davis, 261 F.3d 1, 53 (1st Cir. 2001) (citation omitted). The text appearing in italics represents the proposed judicial holding of the author of this Note.

[215] *See generally supra* notes 88–89 and accompanying text (discussing the purposes for which CERCLA was enacted).

locating in states that are "safe havens" for pollution.[216] In consideration of these purposes, the benefits of the proposed uniform test become even more apparent.[217]

V. CONCLUSION

Although the application of State X's or State Y's law might be able to resolve the hypothetical presented in Part I of this Note, the adequacy of their ability to also meet CERCLA's specific objectives is questionable. Additionally, the difference in corporate liability laws between State X (more lenient laws) and State Y (more strict laws) creates an additional hurdle for the federal court to consider when deciding which law should govern the issue. Indeed, the creation of a federal rule as discussed in Part IV has a greater likelihood of satisfying CERCLA's various purposes while also giving the federal court in the hypothetical in Part I a *uniform*, widely applied, and predictable approach to determining whether E Corp. is a successor in interest. Furthermore, a *uniform* rule would allow E Corp. and the government to avoid the unnecessary cost of litigating to determine which law should apply in a specific scenario: federal law, State X's law, or State Y's law. The result of adopting a *uniform* standard is that the federal court would be emboldened to resolve hastily the greatest issue: who will pay for the clean-up costs of the contaminated facilities?

The different approaches to adopting a federal rule introduced in Part IV of this Note would each have a greater likelihood of resolving who is liable in a successor liability case. Specifically, the second approach in Part IV.B, which advocates statutory construction, is less likely to resolve the issue because further ambiguity would remain as to how a successor is to be determined. Alternatively, the first and third approaches in Parts IV.A and IV.C clearly define factors to consider when determining who is a liable successor to contaminated property. However, this being the case, any of the three approaches discussed in Part IV would resolve issues of never-ending litigation to determine which law is the applicable standard. Specifically, each approach as applied to the hypothetical would eliminate litigation to decide which law applies, and each party would arrive at the judge's bench ready to argue the facts as applied to a predictable standard, thereby expediting the process of determining who is liable for cleaning up a contaminated site—the ultimate purpose of CERCLA.

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[216] *See supra* note 116 and accompanying text (citing Representative Florio's discussion of CERCLA's primary objectives).

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In summary, the predictability of a federal common law and the ability of a *uniform* law to satisfy CERCLA's objectives make it a superior choice to the application of state law. Among the many stated reasons for a uniform rule, analysis of the issue using the *Kimbell* test further substantiates that uniform law is the appropriate choice.[218] First, the need for federal common law to resolve the issue is clear. The application of state law would not encourage early settlement of lawsuits, whereas uniformity would expedite the process because litigation time would not be wasted in determining who is a "successor corporation." Additionally, state law would not facilitate the prompt redevelopment of brownfield sites. Both of these reasons are purposes for which CERCLA was enacted.

Second, state law would disrupt the specific purposes of CERCLA. Application of state law could create a future "race to the bottom" among states that create lenient laws to attract business.[219] Additionally, state law is often inadequate to address problems of hazardous waste that cross state lines and require federal intervention for complete resolution. Finally, state law could inhibit the prompt redevelopment of brownfield sites, due to the unpredictability that corporations would face in determining which law would govern if they were involved in a lawsuit seeking to identify a potentially responsible party.

Third, a federal rule would not frustrate commercial relationships founded upon state law. Any challenge that might be created would only be temporary. Confusion would remain until a large enough body of law existed such that corporations could predict how the courts would apply the federal standard. Nevertheless, this temporary confusion is preferable to the restrictive state laws that would alternatively govern the issue and, consequently, frustrate CERCLA's main goals.

A consideration of the issue under the *Kimbell* factors ensures that creation of federal law to resolve the issue of successor liability has the highest potential for meeting CERCLA's objectives. Accordingly, federal

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[218] *See supra* Parts III.A–C (examining the *Kimbell* factors as applied to the issue of successor liability under CERCLA to decide whether federal law should be adopted rather applying state law).

[219] *See supra* note 168 and accompanying text (arguing that CERCLA's legislative history and several circuits' holdings reflect that the absence of federal uniformity would cause states to enact more lenient laws to stimulate their economies).

common law has the greatest possibility of remedying a deficiency in a statute that could be resolved by the creation of a rule that is uniform and predictable.

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