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A Hiccup in Federal Common Law Jurisprudence: *Sosa, Bestfoods* and the Supreme Court's Restraints on Development of Federal Rules of Corporate Liability

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Abstract

Since *Clearfield Trust Co. v. United States*,[1] the Supreme Court has time and again limited the federal courts' use of federal common law. In a diversion from that effort, a divided Supreme Court held in *Sosa v. Alvarez-Machain*[2] that federal courts have limited authority to develop federal common law based upon the law of nations. Despite the *Sosa* decision, there are separation of power, federalism, and institutional concerns that lead the Supreme Court to limit use of federal common law. However, the Court's efforts have been contravened by the Courts of Appeals, which have embraced the notion of federal common law.

Under the Supreme Court's decisions, the presumption is that state law should be used to fill the interstices of the Bankruptcy Code, the federal Superfund Act (also known as CERCLA) Title VII of the Civil Rights Act, and other federal statutes. Thus, parties and courts err when they assume that distinct federal common law should be used to decide issues such as corporate liability under CERCLA and Title VII. Instead, state law should be used absent a statutory directive, clearly contrary legislative history, or conflict between a distinct statutory policy and state law. A perceived need for "uniformity" does not justify use of distinct federal common law such as the substantial continuity test of successor liability.

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1 318 U.S. 363 (1943).

2 124 S. Ct. 2739 (2004).

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I. INTRODUCTION

For more than fifty years, the Supreme Court has endeavored not only to limit development of federal common law but also lower federal courts' use of common law analysis.[3] In a diversion from those efforts, a divided Supreme Court held at the end of the 2003 Term in *Sosa v. Alvarez-Machain*[4] that the Alien Torts Statute ("ATS") gives federal courts jurisdiction over civil actions by aliens for violations of international law and, more significantly, that federal courts have a limited authority to develop federal common law based upon international law.[5]

The decision is especially significant because in a series of cases during the past twenty-five years, the Supreme Court has limited development of federal common law unanimously and actively, reviewing Courts of Appeals decisions when there was no intercircuit conflict over the use of federal common law. However, the decision in *Sosa* does not give federal courts free reign to develop federal common law and use common law analysis. To the contrary, the Court's decision admonishes federal courts to be very cautious about recognizing new federal common law causes of action based upon the law of nations.[6] That admonition is consistent with Supreme Court decisions in which the Court and Justice Scalia have been critical of the lower courts'[7] willingness to develop federal common law rules.[8]

Justice Scalia, who the late Chief Justice Rehnquist and Justice Thomas joined in a concurring opinion, clearly has no faith that lower federal courts

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[3] For the purposes of this article, "common law analysis" means (i) analogy (i.e., the borrowing of decisional rules from related areas of law to decide the same legal issue); (ii) adoption of decisional rules based upon a determination that they are consistent with federal or statutory policies; or (iii) the consideration or weighing of conflicting policies to determine the appropriate decisional rule to be applied.

[4] 124 S. Ct. 2739 (2004).

[5] *Id.* at 2754-55, 2757-66.

[6] *Id.* at 2765-69.

[7] For the purposes of this paper, the term "lower courts" refers to the District Courts and Courts of Appeals.

[8] *E.g.*, O'Melveny & Myers v. FDIC, 512 U.S. 79, 87-89 (1994).

will exercise such caution.[9] That distrust is understandable because in many instances the Courts of Appeals have not heeded the Supreme Court's efforts to limit the development of federal common law and use of common law analysis. In Justice Scalia's view, control of the lower courts and separation of power concerns justified a bar upon judicial law-making absent the approval of Congress.

Despite Justice Scalia's critical concurring opinion, the majority's opinion is consistent with Supreme Court precedent and congressional action. *Sosa* thus required a balance of separation of power and institutional concerns. A majority of the Court decided in *Sosa* that for the moment, the Court's interest in maintaining existing precedent outweighed other concerns. However, that view is not likely to prevail for long if the lower courts disregard the Supreme Court's admonition to exercise restraint when developing new federal common law causes of action based upon the law of nations.

Nothing in *Sosa* undermines the Supreme Court's efforts to limit development of federal common law in other decisions, including that of *United States v. Bestfoods*.[10] Therefore, parties and courts would make a mistake if they viewed *Sosa* as giving federal courts carte blanche to use federal common law to fill the interstices of federal statutes. To the contrary, the Supreme Court is more likely to limit the use of federal common law to fill the interstices of federal statutes in areas including bankruptcy, employment, environmental and immigration law.

II. THE SUPREME COURT DECISION IN *SOSA V. ALVAREZ-MACHAIN*

The case of *Sosa* involved a civil lawsuit by Mexican physician Humberto Alvarez-Machain against the United States, individual Drug Enforcement Administration agents, and Mexican citizens who at the behest of the DEA arranged the doctor's kidnapping and transportation to the United States.[11] The doctor was then tried and acquitted on federal criminal charges stemming from the torture and murder of a DEA agent in Mexico.[12]

The questions before the Court included whether the long-standing ATS[13] provided federal courts with subject-matter jurisdiction over the

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9 *Sosa*, 124 S. Ct. at 2774-76 (Scalia, J. concurring).

10 524 U.S. 66 (1998).

11 *Sosa*, 124 S. Ct. at 2746-47.

12 *Id.*

13 28 U.S.C. § 1350. The current ATS differs slightly from its original version, which was

action of Alvarez and whether his complaint, seeking damages for purported international law violations, should be dismissed for failure to state a cause of action.[14] The majority of the Court held that although international law did not provide the plaintiff-respondent with a cause of action over which a district court had jurisdiction under the ATS, there might be some federal common law actions arising from international law, for which the statute creates jurisdiction.[15]

At the outset, it is important to note that the Supreme Court clearly agreed on a number of issues concerning the development of federal common law. First, the Court agreed that the ATS gives federal courts jurisdiction over actions by aliens arising under international law.[16] Secondly, the Court summarily rejected the argument that the ATS granted federal courts jurisdiction and empowered them to create a body of federal common law based on international law.[17] The Supreme Court thus confirmed that in order to find this dual purpose there must be specific evidence of congressional intent as the Court identified in *Pilot Life Insurance Co. v. Dedeaux.*[18]

A. *The Majority Opinion of* Sosa

The disagreement in *Sosa* stems, in large part, from differing views concerning the extent to which separation of power concerns require the Supreme Court to bar the development of federal common law based upon the law of nations. According to the majority, when Congress enacted the ATS it "understood federal courts would recognize private causes of action for certain torts in violation of the law of nations," and since then nothing "has categorically precluded federal courts from recognizing a claim under the law of nations as an element of common law."[19] To the contrary, the majority finds that Congress "has not only expressed no disagreement with our [assumption], but has responded to its most notable instance by enacting legislation supplementing the judicial determination in some detail."[20]

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enacted as part of the Judiciary Act of 1789, Act of Sept. 24, 1789, ch. 20, § 9(b), 1 Stat. 79; *Sosa*, 124 S. Ct. at 2755 n.10.

14 *Sosa*, 124 S. Ct. at 2754-55.

15 *Id.* at 2765-69.

16 *Id.* at 2754-55, 2772 (Scalia, J., concurring in part).

17 *Id.* at 2761.

18 481 U.S. 41, 54-56 (1987).

19 *Sosa*, 124 S. Ct. at 2765.

20 *Id.* at 2755-59.

More simply, the Supreme Court's rationale is as follows:

1. At the time of enactment of the ATS, Congress understood that federal courts would develop common law, based upon the law of nations, on a limited basis.[21]
2. For more than 200 years since the jurisdictional statute's enactment the Supreme Court and other federal courts have assumed the authority to develop common law based upon the law of nations, but in most cases the courts have declined to develop such law.[22]
3. In response to that long-standing assumption, Congress has not enacted legislation that contradicts the assumption.[23]
4. Instead, with the enactment of the Torture Victim Protection Act and in statements in the Act's legislative history, Congress has acknowledged to a limited extent that the assumption is correct.[24]

In support of its view that Congress "understood" that federal courts would recognize a limited number of common law actions based on international law, the majority presents a lengthy discussion of early legislative concerns about the United States' compliance with the law of nations. These concerns led to the Constitutional grant of the Supreme Court's original jurisdiction over "all Cases affecting Ambassadors, other public ministers and Consuls"[25] and the First Congress's enactment of statutes including the ATS.[26]

The majority's conclusion is that there may exist a small number of federal common law actions, arising from international law, that courts recognized at the time of the Alien Tort Statute's enactment in 1789.[27] There also may be federal common law actions, arising from international law, if the "claim based on the present-day law of nations . . . rest[s] on a norm of international law accepted by the civilized world and defined with a specificity comparable to the features of the 18th century paradigms we have recognized."[28] The majority held that the physician's action was not within either category of claims.[29]

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21 *Id.* at 2762-65.

22 *Id.* at 2761.

23 *Id.* at 2763.

24 *Id.*

25 *Id.* at 2756-57 (quoting U.S. Const., Art. III, § 2).

26 *Id.* at 2757-58.

27 *Id.* at 2761-62.

28 *Id.* at 2762-69.

29 *Id.*

The rationale of *Sosa* is similar to the reasoning of the Supreme Court in the line of decisions culminating in *United States v. Bestfoods*.[30] The decisions, including *Edmonds v. Compagnie Generale Transatlantique*,[31] *Burks v. Lasker*,[32] and *United States v. Texas*[33] provide a rule of interpretation for new federal statutes: "'Statutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.' In such cases, Congress does not write upon a clean slate."[34] The presumption applies if the existing law is state common law, federal maritime law, or federal common law "[a]lthough a different standard applies when analyzing the effect of federal legislation on state law."[35] The presumption is overridden only if there is congressional intent to change the existing law or the existing law conflicts with a statutory policy.[36]

In the *Bestfoods* line of decisions and *Sosa*, the Supreme Court's purpose is the same. It seeks to establish a balance between legislative and judicial law-making where there are long-standing decisional rules of law. In both situations, the Court allows the long-standing decisional rules of law to stand absent contrary congressional intent or a conflict between judicially-made law and a statutory policy, where separation of power concerns require the elected branches of government to prevail.[37]

There is one important aspect in which the *Bestfoods* line of decisions and *Sosa* differ. The *Bestfoods* presumption limits the discretion of federal courts to make new law. In *Sosa*, the Supreme Court allows the federal judiciary continued discretion to make new law while admonishing the lower courts

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30 524 U.S. 60 (1998). Interestingly, Justice Souter is the author of the majority opinion in *Sosa* and the unanimous decision in *Bestfoods*.

31 443 U.S. 256 (1979).

32 441 U.S. 471 (1979).

33 507 U.S. 529 (1993).

34 *Id.* at 534 (citations omitted).

35 *Id.*

36 *E.g.*, *id.* at 533-37 (1993); Astoria Fed. Savings & Loan Ass'n v. Solimino, 501 U.S. 104, 108-113 (1991).

37 When federal decisional rules of law are at issue and Congress and the judiciary have concurrent constitutional authority to make law on a subject, the Supreme Court has deferred to Congress and viewed a statute on the subject as abrogating decisional rules. City of Milwaukee v. Illinois, 451 U.S. 304 (1981). When a long-standing federal decisional rule of law addresses an issue, on which Congress has been silent, those rules remain in place absent clear congressional intent to override the rule or a conflict between the rule and statutory policy. *United States v. Texas*, 507 U.S. at 533-37; *Solimino*, 501 U.S. at 108-12. When state rules of law are at issue, separation of power and federalism concerns lead the Supreme Court to require clear congressional intent to override the state law or a conflict with the federal statute or a statutory policy. Atherton v. FDIC, 519 U.S. 213, 218-27 (1997); O'Melveny & Myers v. FDIC, 512 U.S. 79, 85-89 (1994).

to use that discretion in a very limited fashion. This difference appears to be the cause of Justice Scalia's disagreement with the majority.

B. *Justice Scalia's Concurring Opinion in* Sosa

In Justice Scalia's view, *Erie R. Co. v. Tompkins*[38] and other Supreme Court decisions, including *Texas Industries, Inc. v. Radcliff Materials, Inc.*[39] and *Northwest Airlines, Inc. v. Transport Workers*,[40] preclude federal courts from determining, as a matter of discretion, if norms of international law give rise to federal common law actions.[41] According to Scalia, in order to determine the existence of federal common law there must be a source that authorizes a federal court to do so,[42] and the ATS does not supply that authorization. In light of *Erie*, he is unwilling to find that the federal judiciary's assumption of authority for more than 200 years, coupled with the lack of any congressional response to that assumption, justifies the federal courts' continued assumption of authority.[43] Finally, he agrees with the majority that there are prudential reasons why federal courts should hesitate to develop such federal common law.[44] Therefore, he concludes that federal courts should not develop federal common law in the area without explicit authorization from Congress.[45]

Justice Scalia's reliance upon *Erie* is questionable. As the majority points out in response to the concurring opinion: "*Erie* did not in terms bar any judicial recognition of new substantive rules, no matter what the circumstances, and post-*Erie* understanding has identified limited enclaves in which federal courts may derive some substantive law in a common law way."[46]

Instead, the Supreme Court's division appears to turn on a disagreement on one issue: Whether federal courts should exercise discretion to develop federal common law, based on international law, without explicit Congressional authorization? Justice Scalia's answer is a clear no. In part, his negative response arises from his concern that judicial law-making will lead inevitably to conflict with the elected branches of government

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38 304 U.S. 64 (1938).

39 451 U.S. 630 (1981).

40 451 U.S. 77 (1981).

41 Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2770-72 (2004) (Scalia, J. concurring).

42 *Id.* at 2772 (Scalia, J. concurring).

43 *Id.* at 2773-74 (Scalia, J. concurring).

44 *Id.* at 2774 (Scalia, J. concurring).

45 *Id.*

46 *Id.* at 2764.

responsible for the nation's foreign relations.[47] Furthermore, his negative response stems from his distrust of the federal courts to exercise discretion appropriately. In Justice Scalia's own words:

> We Americans have a method for making the laws that are over us. We elect representatives to two Houses of Congress, each of which must enact the new law and present it for the approval of a President, whom we also elect. For over two decades now, unelected federal judges have been usurping this lawmaking power by converting what they regard as norms of international law into American law. Today's opinion approves that process in principle, though urging the lower courts to be more restrained.
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> This Court seems incapable of admitting that some matters—any matters—are none of its business. In today's latest victory for its Never Say Never Jurisprudence, the Court ignores its own conclusion that the ATS provides only jurisdiction, wags a finger at the lower courts for going too far, and then—repeating the same formula the ambitious lower courts themselves have used—invites them to try again.
>
> It would be bad enough if there were some assurance that future conversions of perceived international norms into American law would be approved by this Court itself. (Though we know ourselves to be eminently reasonable, self-awareness of eminent reasonableness is not really a substitute for democratic election.) But in this illegitimate lawmaking endeavor, the lower federal courts will be the principal actors; we review but a tiny fraction of their decisions. And no one thinks that all of them are eminently reasonable.[48]

In arguing for denial of discretion to lower federal courts, Justice Scalia relies heavily upon the Supreme Court's decision in *Texas Industries, Inc. v. Radcliff Materials, Inc.*[49] and to a lesser extent upon *Northwest Airlines, Inc. v. Transport Workers*.[50] Those decisions, and other efforts by the Supreme Court

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[47] *Id.* at 2774-75 (Scalia, J. concurring).

[48] *Id.* at 2776 (Scalia, J. concurring) (citations omitted).

[49] *Id.* at 2771 (Scalia, J. concurring), *discussing* Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981).

[50] *Id.* (Scalia, J. concurring), *discussing* Northwest Airlines, Inc. v. Transport Workers, 451 U.S. 77 (1981).

to limit development of federal common law and use of common law analysis, explain Justice Scalia's unwillingness to allow lower federal courts discretion. Those efforts also show that the Supreme Court is likely (i) to eliminate the discretion given lower federal courts by *Sosa* if they do not apply *Sosa* narrowly and (ii) to continue limiting, in other areas of law, development of federal common law and use of common law analysis. Therefore, the Supreme Court is likely to visit these issues again when lower courts use common law analysis and establish rules of federal common law.

III. THE SUPREME COURT'S EFFORTS TO LIMIT FEDERAL COURTS' DEVELOPMENT OF FEDERAL COMMON LAW.

In *Clearfield Trust Co. v. United States*,[51] the Supreme Court recognized that federal courts have the authority to develop uniform federal common law in order to protect important federal interests.[52] The Supreme Court found that the need for uniformity required a federal common law rule, rather than Pennsylvania law, to determine if the United States gave untimely notice of forgery of endorsement on a government check, which would bar the bank's liability as a guarantor of the endorsement.[53] U.S. Treasury regulations required a bank to guarantee prior endorsements on a government check and governed its liability for a forged endorsement.[54] The Court, with little discussion, concluded that important federal interests had to be protected with uniform federal common law:

> The issuance of commercial paper by the United States is on a vast scale and transactions in that paper from issuance to payment will commonly occur in several states. The application of state law, even without the conflict of laws rules of the forum, would subject the rights and duties of the United States to exceptional uncertainty. It would lead to great diversity in results by making identical transactions subject to the vagaries of the laws of the several states. The desirability of a uniform rule is plain.[55]

Subsequently, the Supreme Court created the possibility of wide-ranging development of federal common law with *Textile Workers Union v. Lincoln*

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51 51 318 U.S. 363 (1943).

52 *Id.*

53 *Id.* at 366-69.

54 *Id.* at 365, 366, nn.1, 2.

55 *Id.* at 367.

Mills.[56] There the Court found that by adopting Section 301 of the Labor Management Relations Act ("LMRA"), Congress authorized federal courts to develop uniform federal common law for application in LMRA actions.[57] According to the Court, the "policies of our national labor laws" would guide the federal courts in developing that common law.[58]

A. *The Limits of* Lincoln Mills *as a Basis For Establishing Federal Common Law Beyond LMRA.*

In light of *Clearfield Trust*, the Supreme Court's decision in *Lincoln Mills* appears at first to be an anomaly. The Court in *Clearfield Trust* declared that federal courts may fashion federal common law to protect federal interests. Why did the Supreme Court have to find in Section 301 of the LMRA a grant of power to develop a federal common law for the interpretation of collective bargaining agreements?[59] Two intervening Supreme Court decisions indicate the answer. The first decision, *United States v. Standard Oil Co.*[60] came only four years after *Clearfield Trust* and ten years before *Lincoln Mills*. The Supreme Court decided the second case, *Bank of America v. Parnell*,[61] only one year before *Lincoln Mills*. Together, they raised serious doubts about the broad application of the *Clearfield Trust* Doctrine, particularly in cases such as *Lincoln Mills* in which the United States was not a party.[62]

Nonetheless, there was good reason to find that federal courts could develop federal common law in order to interpret collective bargaining agreements. Congress recognized in the LMRA's legislative history that state law rules could inhibit enforcement of the agreements against unions, which would not promote industrial peace.[63] Arguably, there was some evidence of congressional intent to override contrary state law in order to further federal labor law policy.[64] Furthermore, Congress, the Supreme Court, or both had

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[56] 353 U.S. 448 (1957).

[57] *Id.* at 450-56.

[58] *Id.* at 456.

[59] *Lincoln Mills*, 353 U.S. 448, 450-51, nn.1-2 (1957) (noting intercircuit conflict and listing cases).

[60] 332 U.S. 301 (1947).

[61] 352 U.S. 29 (1956).

[62] For a discussion of *Standard Oil* and *Parnell*, see text, *infra* at nn. 99-104. In this article, I count as "*Clearfield Trust* Doctrine" decisions only those Supreme Court decisions where the majority opinion considers, (i) whether to develop federal common law in reliance upon *Clearfield Trust*, without identifying any other basis for developing federal common law, and (ii) displaceing state law with federal common law because of the existence of "federal interests."

[63] Lincoln Mills, 353 U.S. at 452-54.

[64] *Id.* at 454-55.

reason to view state law interference as a very real threat because in a seminal federal labor law case the union invoked state law in an unsuccessful attempt to evade review by the Supreme Court.[65] The result was the Supreme Court's finding in Section 301 a grant of power to make federal common law based upon federal labor law policies.

The Supreme Court has not turned from the course taken in *Lincoln Mills*.[66] The Court even developed a body of law concerning the LMRA's preemption of state law,[67] and held that the LMRA preempted an injured union member's negligence action for personal injury against a union to the extent the claims required interpretation of a collective bargaining agreement.[68] If a state official enforces a state policy and denies a bargaining unit member a state benefit because of her right under a collective bargaining agreement to arbitrate grievances, the state action may be preempted by LMRA and the official's action may give rise to liability under 42 U.S.C. Section 1983.[69]

At the same time, the Supreme Court's finding that LMRA Section 301 provided federal courts with the power to create federal common law and decisions subsequent to *Lincoln Mills* make it difficult to find authority to create a body of federal common law in other federal statutes. As to the LMRA, the Supreme Court identified a specific Congressional policy that explained the need for federal courts to develop federal common law for the interpretation of collective bargaining agreements.[70] On the other hand, the

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[65] In *Steele v. Louisville & N. RR*, 323 U.S. 192 (1944), a seminal case in which a bargaining unit member brought action for breach of duty of fair representation involving racial discrimination pursuant to the Railway Labor Act. The union argued that state courts granted demurrer on state law grounds, including that an Alabama statute barred suit against a union, an unincorporated association, unless all members were liable individually. *Id.* at 197 n.1.

[66] John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964) (considering when acquisition of employer's assets results in the acquirer having obligations under a collective bargaining agreement of the employer); Howard Johnson Co. v. Detroit Local Joint Executive Board, 417 U.S. 249 (1974) (same); Vaca v. Sipes, 386 U.S. 171 (1967) (finding in LMRA duty of fair representation that gave union member private action against employer and union for mishandling grievance); DelCostello v. Teamsters, 462 U.S. 151 (1983) (finding that federal statute of limitations was consistent with the policies of federal labor law, rather than state limitations statutes and should be applied in private duty of fair representation actions).

[67] *E.g.*, Allis Chalmers v. Lueck, 471 U.S. 202 (1985); Lingle v. Norge Div. Of Magic Chef, Inc., 486 U.S. 399 (1988).

[68] Electrical Workers v. Hechler, 481 U.S. 851 (1987).

[69] Livadis v. Bradshaw, 512 U.S. 107 (1994).

[70] *Id.* at 122 (Section 301 "authorize[s] the development of federal common-law rules of decision in large part to assure that agreements to arbitrate grievances would be enforced, regardless of the vagaries of state law and lingering hostility toward extrajudicial dispute resolution.").

Court found that other federal statutes did not grant judicial authority to create federal common law.[71]

Since the *Lincoln Mills* decision, the Supreme Court has found a congressional grant of judicial power to develop a body of federal common law in only one federal statute, the Employment Retirement Income Security Act ("ERISA").[72] That finding is based upon statements in ERISA's legislative history that courts should develop federal rules to govern in suits by pension plan beneficiaries and participants and that specifically refer to federal courts' power under LMRA Section 301.[73]

B. *Supreme Court Limits on* Clearfield Trust*: The First 35 Years*

From the time of deciding *Clearfield Trust* through the 1977 Term, the Supreme Court labored to determine when it was appropriate to develop federal common law, rather than apply state law, in cases not involving the LMRA. During that time, in cases involving a War Department procurement contract,[74] libel actions against federal officials,[75] and in *United States v. Little Lake Misere Land Co.*,[76] the Supreme Court referred to *Clearfield Trust* and found that federal common law should be applied to protect federal interests not involving the LMRA. During the final 22 years of that 35-year period, the Supreme Court clearly invoked the *Clearfield Trust* Doctrine and developed federal common law on only one occasion after 1950.[77]

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[71] *See* Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63, 69 (1965) (no provision of Mineral Leasing Act of 1920 supported finding that Court should develop federal common law to decide dispute among private parties dealing in the leases.); Wheeldin v. Wheeler, 373 U.S. 647, 651-52 (1963) (statute governing issuance of congressional subpoenas, and violation of that statute, did not result in private action "arising" under 28 U.S.C. § 1331 and distinguishing *Lincoln Mills*.).

[72] Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 54-56 (1987).

[73] *Id.* at 55-56.

[74] United States v. Allegheny County, 322 U.S. 174 (1944). In *Nat'l Metro. Bank v. United States*, 323 U.S. 454, (1945), the Supreme Court followed, but did not extend, *Clearfield Trust* where the Court used federal common law to decide the liability of a bank which had accepted checks forged by a Government clerk. The late Hon. Henry Friendly considered two other Government contract cases decided by the Supreme Court after *Clearfield Trust* to be *Clearfield Trust* Doctrine cases. Henry Friendly, *In Praise of Erie – And of the New Federal Common Law*, *in* BENCHMARKS 155, 182 (1967). However, in the Supreme Court decisions, the majority opinions do not cite *Clearfield Trust* and rely respectively on pre-*Erie* federal general law decisions and federal regulations as the basis for their conclusions. Priebe & Sons, Inc. v. United States, 332 U.S. 407, 410-12 (1947); Fed. Crop Ins. Co. v. Merrill, 332 U.S. 380, 383-86 (1947). Therefore, it does not appear accurate to characterize the Supreme Court decisions as prodigy of *Clearfield Trust*.

[75] Barr v. Matteo, 360 U.S. 564 (1959); Howard v. Lyons, 360 U.S. 593 (1959).

[76] 412 U.S. 580 (1973).

[77] Barr v. Matteo, 360 U.S. 564 (1959); Howard v. Lyons, 360 U.S. 593 (1959). I count the decisions in *Barr* and *Howard* as one occasion because they involve the same issue and the Supreme Court

Although the Supreme Court cited *Clearfield Trust* in *Banco Nacional v. Sabbatino*,[78] it cannot be considered a *Clearfield Trust* Doctrine decision. In *Sabbatino* the Court held that despite *Erie* the Act of State doctrine was a federal and not a state law issue.[79] The Court applied the doctrine to find that federal courts, in a diversity matter, could not review the propriety of the Cuban government's expropriation of property within its territory and pursuant to Cuban law.[80] In finding that the Act of State doctrine was federal law, the Court relied in part upon constitutional and statutory provisions indicating an intent "to give matters of international significance to the jurisdiction of federal institutions."[81] In light of this reliance upon constitutional and statutory provisions and its declining to review a foreign government's expropriation of property within its own territory, the decision in *Sabbatino* may be characterized best as a case of federal preemption and of declining to address a "political question."[82]

In *Illinois v. City of Milwaukee*,[83] the Supreme Court recognized federal courts' authority to make "federal common law" in order "to appraise the equities of the suits alleging creation of a public nuisance by water pollution" in a suit by Illinois against a number of Wisconsin municipalities over their pollution of Lake Michigan.[84] The Court in *Illinois v. City of Milwaukee* relied upon Supreme Court decisions in lawsuits by States to halt water pollution by other States or municipalities in other States.[85] In actions by States, the Constitution's grant of judicial power to federal courts over such actions and the grant of original jurisdiction to the Supreme Court gave the federal

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called them "companion case[s]." *Lyons*, 360 U.S. at 594 (1959).

[78] 376 U.S. 398, 426 (1964).

[79] *Banco Nacional*, 376 U.S. at 424-27. The Act of State doctrine, a common law rule developed by English courts and adopted by U.S. jurisdictions, bars a court from reviewing the activities of a foreign government within its own territory. *Id.* at 416-20. In such instances, a party must obtain redress by seeking diplomatic action by the United States. *Id.*

[80] *Id.* at 401-08, 438-39.

[81] *Id.* at 427 n.25. In *Sabbatino*, the Court did not decide whether federal question jurisdiction existed. *Id.* at 398 n.20.

[82] *Id.* at 427-37. The historical context of *Sabbatino* supports the characterization of the decision as a case of preemption and deference to the legislature and executive on a "political question." The Supreme Court decided *Sabbatino* less than three years after the Bay of Pigs invasion, approximately two years after the Cuban trade embargo began, and seventeen months after the Cuban Missile Crisis. JANE FRANKLIN, CUBA AND THE UNITED STATES: A CHRONOLOGICAL HISTORY (1997).

[83] 406 U.S. 91 (1972).

[84] *Id.* at 93, 107.

[85] *Id.* at 94-96, 106-07, *citing* New Jersey v. New York, 283 U.S. 473 (1931); New York v. New Jersey, 256 U.S. 296 (1921); Missouri v. Illinois, 200 U.S. 496 (1906); Missouri v. Illinois, 180 U.S. 208 (1900). In several of those cases the Supreme Court declined to enjoin water pollution. *New York v. New Jersey*, 256 U.S. at 312-13; *Missouri v. Illinois*, 200 U.S. at 526.

judiciary authority to develop federal common law that governs the States' disputes.[86] However, the federal courts' authority to develop federal common law in such State actions ended upon Congress exercising its constitutional power and enacting statutory law to displace that common law.[87] Therefore, the Court's rationale for finding authority to create federal common law in *Illinois v. City of Milwaukee* is distinct from the bases in *Clearfield Trust* and *Lincoln Mills*.

In short, during the first thirty-five years after deciding *Clearfield Trust*, the Supreme Court recognized the need for federal common law in only three or four instances that did not involve a specific constitutional or congressional grant of judicial power to make common law. In the same period, the Supreme Court rejected at least eight pleas in which *Clearfield Trust* was invoked for the establishment of federal common law to protect purported federal interests. In those cases, the Supreme Court either deferred to Congress or held that state law should govern the dispute.

1. *LITTLE LAKE MISERE LAND* CO. AND THE USE OF THE *CLEARFIELD TRUST* DOCTRINE.

To appreciate the Supreme Court's use and limits upon the *Clearfield Trust* Doctrine, it is crucial to understand the facts of *United States v. Little Lake Misere Land Co.*[88] There, the Louisiana legislature enacted a statute that attempted to free from prescription the mineral rights of parties in property acquired by the United States pursuant to the Migratory Bird Conservation Act.[89] Under the terms of the United States' acquisition of the property, the parties' mineral rights expired upon failure to develop the rights during a ten-year period.[90] However, the state statute made mineral rights in property acquired by the United States not subject to prescription.[91]

In *Little Lake Misere Land Co.*, there was clear and egregious overreaching by the Louisiana legislature in conflict with federal interests. The legislature attempted to nullify the property rights of the United States. The decisions

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86 U.S. CONST. art III; *Illinois v. Milwaukee*, 406 U.S. at 105-07.

87 Milwaukee v. Illinois, 451 U.S. 304, 316-19 (1981) (holding that the Clean Water Act displaced federal courts' power to determine under federal common law whether Illinois should be granted injunction against Wisconsin municipalities for public nuisance because of pollution of Lake Michigan); Arizona v. California, 373 U.S. 546, 560-62, 564-66 (1963) (finding that the Project Act, not federal common law of equitable apportionment, governed parties' rights to Colorado River water).

88 412 U.S. 580 (1973).

89 *Id.* at 596-98.

90 *Id.* at 582-83.

91 *Id.* at 584.

in *Clearfield Trust, Barr v. Matteo,*[92] *Howard v. Lyons,*[93] *United States v. Allegheny County*[94] and *Little Lake Misere Land Co.* thus all have an important feature in common.

In *Little Lake Misere Land Co.*, state law threatened to interfere with the federal government's use of its property in that the state law attempted either: (i) to extend private parties' rights to mine or drill for oil or gas on a federal wildlife refuge, or (ii) to force the federal government to purchase those extended rights. In the companion cases of *Barr* and *Howard v. Lyons*, state law imposed liability for defamation upon a federal official performing his job duties.[95] In *Clearfield Trust* state law required the Government to make payment on fraudulent checks.[96] In *Allegheny County*, state law imposed liability for state taxes upon the Government for manufacture of war materials.[97] In each case, state law threatened to directly increase the Government's cost of performing basic activities including acquisition and management of real property, purchasing of materials, and disbursal of funds. The Supreme Court has always recognized that the federal judiciary has the authority to prevent such state interference with the federal government.[98] In other Supreme Court cases in which parties attempted unsuccessfully to invoke the *Clearfield Trust* Doctrine, state law posed no similar threat to basic Government activities.

2. SUPREME COURT CASES DECLINING TO EXTEND *CLEARFIELD TRUST.*

In *United States v. Standard Oil Co.*,[99] three years after *Clearfield Trust*, the Supreme Court rejected the Government's argument for a federal common law tort action that would allow it to recover reimbursement for medical expenses incurred to treat a soldier hit by a truck.[100] The Court recognized that a clear federal interest existed but left to Congress the decision of whether to create the cause of action.

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92 360 U.S. 564 (1959).

93 360 U.S. 593 (1959).

94 322 U.S. 174 (1944).

95 Barr v. Matteo, 360 U.S. 564, 566-68 (1959); Howard v. Lyons, 360 U.S. 593, 594-96 (1959).

96 Clearfield Trust Co. v. United States, 318 U.S. 363, 364-66 (1943).

97 322 U.S. 174. 178-81 (1944).

98 McCulloch v. Maryland, 17 U.S. 316 (1819). The federal judiciary's authority is based upon the Constitution's Supremacy clause. U.S. CONST. art. VI, cl. 2; Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 540-41 (2001). In one of the early *Clearfield Trust Doctrine* cases, the Supreme Court invoked *McCulloch v. Maryland* by name. United States v. Allegheny County, 322 U.S. 174, 176-77 (1944).

99 332 U.S. 301 (1947).

100 *Id.* at 301.

> [W]e have not here simply a question of creating a new liability in the nature of a tort. . . . [T]he issue comes down in final consequence to a question of federal fiscal policy, coupled with considerations concerning the need for and the appropriateness of means to be used in executing the policy . . . .
>
> Whatever the merits of the policy, its conversion into law is a proper subject for congressional action . . . . Congress, not this Court or the other federal courts, is the custodian of the national purse. By the same token it is the primary and most often the exclusive arbiter of federal fiscal affairs. And these comprehend . . . . securing . . . against financial losses however inflicted . . . .
>
> Moreover Congress without doubt has been conscious throughout most of its history that the Government constantly sustains losses through the tortious . . . conduct of persons interfering with federal funds, property and relationships. We cannot assume that it has been ignorant that losses long have arisen from injuries inflicted on soldiers . . . .
>
> When Congress has thought it necessary to . . . prevent interference with federal funds, property or relations, it has taken positive action to that end. We think it would have done so here, if that had been its desire.[101]

Nine years later the Supreme Court held that state law, not federal common law, should be applied to decide a bank's liability for negotiating federal bearer bonds stolen from the plaintiff.[102] The Court in *Bank of America v. Parnell* noted that the only possible reason for a uniform federal common law rule would be that "the floating of securities of the United States might somehow or other be adversely affected by the local rule of a particular state regarding the liability of a converter," but rejected that

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[101] *Id.* at 314-16. Congress eventually adopted a statute that allowed the United States to recover reimbursement for medical expense incurred to treat active military personnel injured in an accident. *E.g.* United States v. Trammel, 899 F.2d 1483, 1486-88 (6th Cir. 1990) (discussing the Federal Medical Care Recovery Act, 42 U.S.C. §§ 2651-2653, and its history). As originally drafted, the statute would have given the United States only a right of subrogation, but it was amended to give the United States an independent action. *Trammel*, 899 F.2d at 1487. State law, not federal common law, governs the Government's right to obtain reimbursement. *Trammel*, 899 F.2d at 1487-88.

[102] Bank of America v. Parnell, 352 U.S. 29 (1956), *rev'g*, 226 F.2d 297 (3d Cir. 1955).

concern as "far too speculative."[103] It thus found no reason to apply uniform federal common law "to transactions essentially of local concern."[104]

In *United States v. Brosnan*,[105] the Supreme Court held that state law should be adopted as federal common law in order to determine whether state proceedings by a mortgage-holder that foreclosed upon default should extinguish junior federal tax liens, even though the United States neither participated nor was required to participate.[106] The Court found that in that instance it was more appropriate for Congress to displace state law:

> [T]he need for uniformity in this instance is outweighed by the severe dislocation to local property relationships which would result from our disregarding state procedures. Long accepted nonjudicial means of enforcing private liens would be embarrassed, if not nullified where federal liens are involved, and many titles already secured by such means would be cast in doubt. We think it more harmonious with the tenets of our federal system and more consistent with what Congress has already done in this area, not to inject ourselves into the network of competing private property interests, by displacing well-established state procedures governing their enforcement, or superimposing on them a new federal rule.
>
> It must be recognized that the factors supporting a federal rule of uniformity in this field, and those militating against the dislocation of long-standing state procedures, are full of competing considerations. They involve many imponderables which this Court is ill-equipped to assess, on which Congress has not yet spoken, and which we think are best left to that body to deal with in light of their full illumination.[107]

Five years after *Lincoln Mills*, the Court decided the case of *Wheeldin v. Wheeler*.[108] There, the Court rejected the argument that a federal statute governing issuance of subpoenas empowered federal courts to create a cause of action for alleged wrongful issuance and service of a subpoena on behalf of the House Un-American Activities Committee.[109] The Court found that

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103 *Id.* at 32.

104 *Id.* at 33.

105 105 363 U.S. 237 (1960).

106 *Id.* at 237.

107 *Id.* at 251-52.

108 373 U.S. 647 (1963).

109 *Id.*

there was no important federal interest implicated such as was the case in *Clearfield Trust*.[110] It additionally failed to find any congressional grant of power to create a cause of action as existed in *Lincoln Mills*.[111] The Court stated, "[a]s respects the creation by the federal courts of common-law rights, it is perhaps needless to say that *we are not in the free-wheeling days before Erie R. Co. . . . . The instances where we have created federal common law are few and restricted.*"[112]

In *United States v. Yazell*,[113] the Supreme Court rejected the Small Business Administration's argument for a federal common law that would allow the government to enforce a judgment based upon a failure to repay a disaster loan against a married borrower's personal property, even though state covertures law prevented levying upon her property.[114] According to the Court,

> [T]his Court, in the absence of specific congressional action, should not decree in this situation that implementation of federal interests requires overriding the particular state rule involved here. Both theory and the precedents of this Court teach us solicitude for state interests, particularly in the field of family and family-property arrangements. They should be overridden by the federal courts only where clear and substantial interests of the National Government, which cannot be served consistently with respect for such state interests, will suffer major damage if the state law is applied.[115]

The same year that it decided *Yazell*, the Supreme Court held that no federal interest required development of federal common law to decide private parties' rights in a mineral lease issued by the United States pursuant to the Mineral Leasing Act.[116] According to the Court, state law should be applied to determine the rights of the private parties.[117] Furthermore, state law should decide the respective rights of the United States and other parties under a mineral lease unless an overriding federal interest existed.[118] The Court also stated that even if a compelling federal interest existed, additional

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110 *Id.* at 651

111 *Id.* at 651-52.

112 *Id.* at 651 (emphasis added).

113 382 U.S. 341 (1966).

114 *Id.*

115 *Id.* at 351-52.

116 Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63 (1966).

117 *Id.* at 67-71.

118 *Id.* at 71-72.

considerations were necessary to weigh both the impact of federal common law upon important state interests and the feasibility of developing a uniform federal rule.[119]

Eleven years later, the Supreme Court found in *Miree v. DeKalb County*[120] that state law should determine whether an agreement between the Federal Aviation Administration and a county would impose liability on the county to a deceased passenger, a burn victim, and the aircraft's owner.[121] The accident occurred when the aircraft struck birds attracted to the county's landfill adjacent to an airport.[122] Following *Parnell*, the Court found there was no federal interest sufficient to justify overriding state law.[123] The *Clearfield Trust* Doctrine did not apply because the Court found "no reason for concluding that [FAA] operations would be burdened or subjected to uncertainty by variant state-law interpretations regarding whether those with whom the United States contracts might be sued by third-party beneficiaries to the contracts."[124] The Court also stated that while federal interests concerning aviation regulation and safety were present, federal common law should not be developed when that law would only advance those federal interests. According to the Court, "[w]hether latent federal power should be exercised to displace state law is primarily a decision for Congress" and "the issue of whether to displace state law on an issue such as this is primarily a decision for Congress."[125]

In *Standard Oil Co.*, *Brosnan*, *Yazell*, *Pan American Petroleum,* and *DeKalb County* the liability of private parties, not the United States, was the issue. As such, there was no indication that federal common law was necessary to protect against state law burdening basic governmental activities. There was simply no federal interest at stake similar to the interests involved in *Clearfield Trust*, *Barr*, *Allegheny County,* and *Little Lake Misere Land Co.* In the absence of such federal interests, separation of power and federalism concerns drive the Supreme Court to limit the *Clearfield Trust* Doctrine. In *Standard Oil Co.*, *Brosnan*, *Yazell*, *Pan American Petroleum,* and *DeKalb County*, the Supreme Court recognizes that for various reasons the federal judiciary should defer to Congress to decide whether federal law should be developed in an area.

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119 *Id.* at 68-69 (citing United States v. Yazell, 382 U.S. 341 (1966) and United Auto Workers v. Hoosier Cardinal Corp., 383 U.S. 696 (1966)).

120 433 U.S. 25 (1977).

121 *Id.*

122 *Id.* at 27-32.

123 *Id.* at 31-33.

124 *Id.* at 30.

125 *Id.* at 32.

The Supreme Court's decisions in *Standard Oil Co.* and its aftermath illustrate how a more expansive use of the *Clearfield Trust* Doctrine could create separation of power problems. In *Standard Oil*, the Supreme Court declined to create a federal cause of action allowing the United States to recover in tort, medical expenses incurred because of the injury of military personnel.[126] Congress eventually recognized the importance of the federal interest and created a cause of action, but did not act until fourteen years after the *Standard Oil* decision.[127] However, lack of congressional action for fourteen years suggests that the federal interest was not important to Congress. Additionally, congressional action finally occurred only after Congress weighed whether subrogation to the injured soldier or a direct action was more appropriate.[128] More active use of the *Clearfield Trust* Doctrine thus could lead to the federal courts setting the congressional agenda and the scope of its debate, contrary to the Constitution's provisions that make the federal judiciary a governmental branch of limited power subject to regulation by Congress.[129]

In the *Clearfield Trust* Doctrine cases, separation of power issues arose in another sense. In *Standard Oil* and *Wheeldin* respectively, the United States and a private party invoked the power of the federal courts to create a federal cause of action.[130] In *Standard Oil*, the Supreme Court declined to act because the United States sought judicial use of federal power involving the Government's purse strings, an area where Congress has primary responsibility and presumably would have created a cause of action to protect those purse strings if it wished.[131] In *Wheeldin*, the Court declined to act because a private party invoked the Court's use of federal power in an area where the Court found that Congress had an opportunity to act but did not do so.[132] The Supreme Court thus declined to use its judicial power where

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126 *See* discussion of *Standard Oil*, *supra* at notes 99-101 and accompanying text.

127 76 Stat. 593 (1962).

128 United States v. Trammel, 899 F.2d 1483, 1486-88 (6th Cir. 1990) (discussing the Federal Medical Care Recovery Act, 42 U.S.C. §§ 2651-53, and its history). In the case of *Sabbatino*, Congress took less than seven months to abrogate the Supreme Court's decision. *See* Foreign Assistance Act § 301(d)(4), 22 U.S.C. § 2370 (e)(2) (codifying 78 Stat. 1013 (Oct. 7, 1964)); Banco Nacional v. Sabbatino, 376 U.S. 398 (March 23, 1964). There, the Supreme Court's hesitation to develop federal common law set the congressional agenda. However, deference to Congress gave it full control to decide when to create a federal cause of action and the scope of the action; that would not have occurred in *Standard Oil Co.* or *Sabbatino* if the Supreme Court recognized a cause of action, or if Congress disagreed with the Court and the legislative branch had to undo the Court's decision.

129 U.S. CONST. art. I, §§ 1, 8, art. III, §§ 1-2.

130 United States v. Standard Oil Co., 332 U.S. 301, 302 (1947); Wheeldin v. Wheeler, 373 U.S. 647, 648 (1963).

131 *Standard Oil Co.*, 332 U.S. at 311, 314-16.

132 *Wheeler*, 373 U.S. at 652.

Congress has primary responsibility, where it may have decided not to exercise its legislative power, or where conflicting policy considerations made Congress the appropriate decision maker.[133]

In *Brosnan* and *Yazell* respectively, the United States and a federal agency invoked the *Clearfield Trust* Doctrine in an attempt to override state law.[134] In *Parnell*, *Pan American Petroleum*, and *DeKalb County*, private parties did likewise.[135] In doing so, the parties sought to use the federal courts, not Congress, to protect or further purported federal interests. In each case, the Supreme Court recognized those responsibilities as being entrusted to Congress and not the federal judiciary.[136] In addition, there are federalism concerns that explain the Supreme Court's limiting the use of the *Clearfield Trust* Doctrine in *Parnell*, *Brosnan*, *Yazell*, *Pan American Petroleum*, and *DeKalb County*. In those cases, the United States or private parties sought to invoke the federal judiciary's power to develop a rule of federal common law contrary to a state common law rule.[137] Additionally, the United States or private parties sought to override state law in areas where the law impacted property ownership and business transactions.[138] The Supreme Court recognized that in the federal system, parties rely upon those state laws to determine their obligations and rights in property and business transactions, and the Court was loathe to disturb such state laws.[139]

A federalism concern does not appear to be present in *Clearfield Trust* because the matter involved a check issued by the Government and the Treasury Department had promulgated regulations governing negotiation of Government checks.[140] Banks thus had notice of the federal interest at stake and of the possibility of federal action to protect that interest. Furthermore, the Supreme Court in *Clearfield Trust* did not change the existing law and

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[133] *Standard Oil Co.*, 323 U.S. at 310-14. *See also* United States v. Gilman, 347 U.S. 507, 509-13 (1954) (conflicting policy considerations made it appropriate for Congress, not the federal courts, to decide whether the government may assert an indemnity claim against a federal employee whose action resulted in a Federal Torts Claim Act claim against United States); United States v. Brosnan, 363 U.S. 237, 238-39 (1960); United States v. Yazell, 382 U.S. 341, 342-43 (1966).

[134] *Brosnan*, 363 U.S. at 238-39; *Yazell*, 382 U.S. at 342-43.

[135] *Parnell*, 352 U.S. at 31-32; Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63, 65-66 (1965); Miree v. DeKalb County, 433 U.S. 25, 26-27 (1977).

[136] *Miree*, 433 U.S. at 31-33; *Pan Am. Petroleum Corp.*, 384 U.S. at 68-71; *Yazell*, 382 U.S. at 352; *Wheeler*, 373 U.S. at 650-52; *Brosnan*, 363 U.S. at 251-52; *Standard Oil Co.*, 332 U.S. at 315-16.

[137] *Miree*, 433 U.S. at 32-33; *Pan Am. Petroleum Corp.*, 384 U.S. at 65-68; *Yazell*, 382 U.S. at 342-43; *Brosnan*, 363 U.S. at 238-40.

[138] *Miree*, 433 U.S. at 32-33; *Pan Am. Petroleum Corp.*, 384 U.S. at 65-66; *Yazell*, 382 U.S. at 350-53; *Brosnan*, 363 U.S. at 341-42.

[139] *Miree*, 433 U.S. at 30-33; *Pan Am. Petroleum Corp.*, 384 U.S. at 68, 71-72; *Yazell*, 382 U.S. at 351-53; *Brosnan*, 363 U.S. at 342.

[140] Clearfield Trust Co. v. United States, 318 U.S. 363, 365 n.1, 366 n.2 (1943).

thus did not change bank expectations as to when they would be liable to the United States for negotiating a Government check with a forged endorsement.[141] Rather, the Supreme Court continued a line of pre-*Erie* cases in which it declined to allow various defenses to bar the United States from recovering a payment on a check with a forged endorsement.[142]

Similarly, the Court in *United States v. Allegheny County*[143] invoked *Clearfield Trust* to overcome a Pennsylvania law under which a World War II era defense contractor would have been liable for state taxes on machinery owned by the United States but in the possession of the contractor.[144] The United States intervened in *Allegheny County* because, under the terms of the contract, the United States would have had to reimburse the contractor for payment of the state taxes.[145] The Supreme Court used the *Clearfield Trust* Doctrine in *Allegheny County* only to extend *McCullough v. Maryland*, one of the Court's earliest precedent, holding that States may not tax the United States.[146] Given the fundamental and well-known precedent of *McCullough* and long-standing precedent that federal law governed the interpretation of a contract with the United States,[147] Allegheny County should not have been surprised at the result.

3. THE LIMITS ON *CLEARFIELD TRUST*: THE DECISIONS AFTER *MIREE V. DEKALB COUNTY.*

During the 1978 Term, the Supreme Court decided a set of cases concerning the use of the *Clearfield Trust* Doctrine. In each case the Court determined that state common law, rather than a judicially created federal common law, was more appropriately applied to the case at hand.

In the case of *United States v. Kimbell Foods, Inc.*,[148] the Supreme Court reviewed decisions in which the Farm Home Administration ("FHA") and Small Business Administration ("SBA") invoked *Clearfield Trust* and sought the creation of federal common law to override state law.[149] In the SBA case, the district court fashioned federal common law based on tax law and found

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141 *Id.* at 365-66.

142 United States v. Nat'l Exch. Bank, 214 U.S. 302 (1909); Nat'l Metro. Bank v. United States, 323 U.S. 454, 457-58 (1945) (discussing *Clearfield Trust* and *National Exchange Bank*).

143 322 U.S. 174 (1944).

144 *Id. at* 177-82.

145 *Id.* at 179-80.

146 *Id.* at 175-77, 182-89, *citing* McCullough v. Maryland, 17 U.S. 316 (1819).

147 United States v. Bethlehem Steel, 205 U.S. 105 (1905).

148 440 U.S. 715 (1979).

149 *Id.* at 718-24.

that the SBA had a superior lien on a borrower's personal property.[150] The Fifth Circuit Court of Appeals reversed and applied the Texas Uniform Commercial Code to find that another secured creditor had a superior lien to the SBA's lien on the borrower's property.[151] At trial in the FHA case, the district court found that under either state law or federal common law, the Administration did not have a perfected security interest in the tractor of a bankrupt borrower that was superior to a repairman's lien.[152] The Fifth Circuit Court of Appeals affirmed in part and reversed in part, finding that under federal common law developed from the Model UCC and Tax Lien Act, only one of several repair bills created a repairman's lien superior to the FHA's lien.[153] The Supreme Court held that under *Clearfield Trust*, federal rules of law should govern to decide the creditor rights of the FHA and SBA, which administered national programs pursuant to federal statute.[154] Nevertheless, the Court held in both cases that state law, not distinct federal common law, should be applied to decide the creditor rights of the U.S. agencies.[155]

The Supreme Court in *Kimbell Foods* set forth a multi-factor test to determine whether the federal judiciary should develop uniform federal common law or simply utilize existing state law. The factors that the Supreme Court identified as favoring creation of federal law rules distinct from state law were: (1) whether a federal program "by [its] nature [is] and must be uniform in character throughout the Nation,"[156] and (2) "[w]hether application of state law would frustrate specific objectives of the federal programs."[157] Additionally, the Court stated that federal courts had to "consider the extent to which application of a federal rule would disrupt commercial relationships predicated on state law."[158] The Court then concluded that state law should govern:

> We are unpersuaded that, in the circumstances presented here, nationwide standards favoring claims of the United States are necessary to ease program administration or to safeguard the Federal Treasury from defaulting debtors. Because the state commercial codes "furnish convenient solutions in no way inconsistent with

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150 *Id.* at 720-22.

151 *Id.* at 722-23.

152 *Id.* at 724.

153 *Id.* at 724-25.

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

155 *Id.* at 727-31.

156 *Id.* at 728 (quoting United States v. Yazell, 382 U.S. 341, 354 (1966)).

157 *Id.*

158 *Id.* at 729.

> adequate protection of the federal interest[s]," we decline to override intricate state laws of general applicability on which private creditors base their daily commercial transactions.[159]

In part, the Supreme Court found no need for uniformity because FHA and SBA regulations and manuals anticipated the use of state law in order to perfect liens on personal property.[160]

The *Kimbell Foods* decision, considered together with *Clearfield Trust* and *Allegheny County*, provide a hint as to what constituted "national programs" for which the federal judiciary would be willing to develop a uniform federal common law. In *Clearfield Trust*, the activity was the Government's issuance and payment of checks, which involved "transactions on a vast scale."[161] Similarly in *Allegheny County*, the activity was the Government's procurement contracts for war materials during World War II; another area involving a tremendous number of transactions which affected the Government's liability under an indemnity or reimbursement provision.[162] Furthermore, uniform federal common law was adopted concerning an activity where parties dealing with the Government had reason to expect federal law would control.[163]

Later in the 1978 Term, the Supreme Court decided *Wilson v. Omaha Indian Tribes*.[164] There, the Supreme Court considered in light of *Kimbell Foods* whether to apply uniform federal common law rules in a case which addressed the effect of changes in a stream's location, where it arguably moved the boundary between two States and involved a dispute over land that had been part of an Indian reservation.[165] After a lengthy discussion of the interpretation and scope of 25 U.S.C. Section 194, the Supreme Court addressed the issue of whether a uniform federal common law rule or state law should decide the ownership of the land.[166] The Supreme Court held that federal law should govern because it involved a dispute over property that the United States held in trust as a reservation for the Tribes.[167]

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159 *Id.* (citations omitted).

160 *Id.* at 729-31.

161 Clearfield Trust Co. v. United States, 318 U.S. 363, 367 (1943).

162 United States v. Allegheny County, 322 U.S. 174, 177-78, 179 (1944).

163 *See, e.g.*, United States v. Nat'l Exch. Bank, 214 U.S. 302, (1909); United States v. Bethlehem Steel, 205 U.S. 105 (1905). In these pre-*Erie* decisions the Supreme Court applied uniform federal law to determine the respective issues of a bank's liability for negotiating a Government check with a forged endorsement and parties' rights and obligations under a Government contract.

164 442 U.S. 653 (1979).

165 *Id.* at 658-63.

166 *Id.* at 669.

167 *Id.* at 669-71. The Court rejected the argument that uniform federal common law should be

Nevertheless, the Court held that in light of *Kimbell Foods* state law should be borrowed or adopted as federal law to decide who had the right to possess the property.

> . . . States may differ among themselves with respect to the rules that will identify and distinguish between avulsions and accretions, but as long as the applicable standard is applied, evenhandedly to particular disputes, we discern no imperative need to develop a general body of federal common law to decide cases such as this, where an interstate boundary is not in dispute. We should not accept "generalized pleas for uniformity as substitutes for concrete evidence that adopting state law would adversely affect [federal interests]."[168]

The Court also stated that the third prong of the *Kimbell Foods* test, disruption of state law, prompted it to select state law over federal common law:

> [T]he States have substantial interest in having their own law resolve controversies such as these. Private landowners rely on state real property law when purchasing real property, whether riparian land or not. There is considerable merit in not having the reasonable expectations of these private landowners upset by the vagaries of being located adjacent to or across from Indian reservations or other property in which the United States has a substantial interest. Borrowing state law will also avoid arriving at one answer . . . in disputes involving Indians on one side and possibly quite different answers with respect to neighboring land where non-Indians are the disputants.[169]

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applied because the case involved movement of the Missouri River that changed the boundary between Nebraska and Iowa. According to the Court, there was no boundary dispute between the States, which had settled the location of their boundary "on the ground" as the result of a Compact and previous litigation before the Supreme Court. *Id.* at 672-74, (citing Nebraska v. Iowa, 406 U.S. 117 (1972)). However, it held that federal law should govern because the case involved land to which the Omaha Tribes had "aboriginal title," it never was land of a State subject to its laws, and upon the creation of the reservation the United States received an interest in the property and held it in trust for the Tribes. *Id.* at 669-71.

168 *Id.* at 673 (quoting *Kimbell Foods*, 440 U.S. at 730).

169 *Id.* at 674.

The Supreme Court in *Kimbell Foods* and *Omaha Indian Tribes* made it clear that the federal judiciary should not adopt federal common law based on "generalized pleas for uniformity."[170]

In the 1980 Term, the Supreme Court in *Milwaukee v. Illinois* raised further doubts about wide-spread use of federal common law by the federal judiciary. Although the decision involved a federal common law issue other than the *Clearfield Trust* Doctrine, the Supreme Court quoted from a myriad of past decisions to emphasize that federal common law was not favored:

> Federal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision. The enactment of a federal rule in an area of national concern, and the decision whether to displace state law in doing so, is generally made not by the federal judiciary, purposefully insulated from democratic pressures, but by the people through their elected representatives in Congress. *Erie* recognized as much. . . . When Congress has not spoken to a particular issue, however, and when there exists a "significant conflict between some federal policy or interest and the use of state law," the Court has found it necessary, in a "few and restricted" instances, to develop federal common law. Nothing in this process suggests that courts are better suited to develop national policy in areas governed by federal common law than they are in other areas, or that the usual and important concerns of an appropriate division of functions between the Congress and the federal judiciary are inapplicable.[171]

Nonetheless, federal entities did not turn from their efforts to seek the development of federal common law that would override state law nor did federal appellate courts hesitate to appease them. In *O'Melveny & Myers v. FDIC*,[172] a case in which no intercircuit conflict was identified, the Supreme Court reversed a decision of the Ninth Circuit Court of Appeals in which that court accepted the FDIC's argument that uniform federal common law should decide whether knowledge should be imputed to a bank for which the FDIC was a receiver in a civil action on behalf of the bank.[173]

In this extraordinary case, the Supreme Court undertook to correct an appellate decision in favor of a federal entity and summarily rejected the

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[170] *Wilson*, 442 U.S. at 673 (quoting *Kimbell Foods*, 440 U.S. at 730).

[171] Milwaukee v. Illinois, 451 U.S. 304, 312-13 (1981) (citing *e.g.*, *Erie*, *Wallis* v. *Pan Am. Petroleum*, *Wheeldin*, and *Clearfield Trust*).

[172] 512 U.S. 79 (1994).

[173] *Id.* at 82-89 (1994).

FDIC's arguments for development of federal common law. As to the FDIC's evocation of *Kimbell Foods* and its plea for a uniform federal rule, the Supreme Court stated:

> [T]his is not [a] case[] in which judicial creation of a special federal rule would be justified. Such cases are, as we have said in the past, "few and restricted," limited to situations where there is a "significant conflict between some federal policy or interest and the use of state law." Our cases uniformly require the existence of such a conflict as a precondition for recognition of a federal rule of decision. Not only the permissibility but also the scope of judicial displacement of state rules turns upon such a conflict. What is fatal to respondent's position in the present case is that it has identified *no* significant conflict with an identifiable federal policy or interest. There is not even at stake that most generic (and lightly invoked) of alleged federal interests, the interest in uniformity. The rules of decision . . . here do not govern the primary conduct of the United States or any of its agents or contractors . . . .
>
> The closest respondent comes to identifying a specific, concrete federal policy or interest that is compromised by California law is its contention that state rules regarding the imputation of knowledge might "deplet[e] the deposit insurance fund." But neither FIRREA nor the prior law sets forth any anticipated level for the fund, so what respondent must mean by "depletion" is simply the forgoing of *any* money which, under any *conceivable* legal rules, might accrue to the fund. That is a broad principle indeed, which would support . . . judicial creation of new, "federal-common-law" causes of action to enrich the fund. . . . [W]e have no authority to do that, because there is no federal policy that the fund should always win. Our cases have previously rejected "more money" arguments remarkably similar to the one made here.
>
> Even less persuasive—indeed, positively probative of the dangers of respondent's facile approach to federal-common-law-making—is [the] contention that it would "disserve the federal program" to permit California to insulate "the attorney's or accountant's malpractice," imposing costs "on the nation's taxpayers . . . ." By presuming to judge what constitutes malpractice, this argument demonstrates the runaway tendencies of "federal common law" untethered to a genuinely identifiable (as opposed to judicially constructed) federal policy. What sort of tort liability to impose on

> lawyers and accountants in general, and on lawyers and accountants who provide services to federally insured financial institutions in particular,"involves a host of considerations that must be weighed and appraised'" . . . . Within the federal system, at least, we have decided that that function of weighing and appraising" 'is more appropriately for those who write the laws, rather than for those who interpret them.'"[174]

First, the Court in *O'Melveny & Myers* provides guidance as to what activities are "national programs" for which uniform federal common law should be developed. Such activities are the Government's payment of checks, interpretation of Government contracts, and other Government business transactions where "uniform rules of decision" are needed to "govern the primary conduct of the United States or . . . its agents or contractors."[175] In other words, federal courts have the authority to protect the Government by developing federal common law to displace state law if the law is likely to significantly increase the Government's cost of basic business activities, i.e. disbursing funds, acquiring and managing real property, and purchasing goods and services. Additionally, displacement of state law may be appropriate particularly when the law places burdens on activities within the exclusive responsibility of the Government, i.e. development and purchase of military equipment.

In *O'Melvney & Myers*, the Supreme Court also provided important instruction regarding the extent of conflict that must exist to authorize development of federal common law in areas other than those involving the Government's "primary conduct." [176] Before the federal judiciary may create federal common law, rather than use state law, there must be a "significant conflict" between a specific federal policy or interest and state law which suggests that the conflict must justify preemption of the state law.[177] Furthermore, state law may be displaced only to the extent that the policy or interest requires it. Arguments for uniformity, or "more money," are

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[174] *O'Melveny & Myers*, 512 U.S. at 87-89 (citations omitted).

[175] *Id.* at 88; Boyle v. United Tech. Corp., 487 U.S. 500, 506-09 (1988) (Federal common law rule of Government contractor defense displaced state law that would have imposed liability upon defense contractor for product liability because of manufacture of military helicopter as contract and specifications required); United States v. Allegheny County, 322 U.S. 174 (1947) (Government war materials procurement contract); Clearfield Trust Co. v. United States, 318 U.S. 363 (1943) (Bank's liability to United States for negotiating Government check with forged endorsement).

[176] *O'Melveny & Myers*, 512 U.S. at 87.

[177] *Id.* For a discussion of the Supreme Court's use of the words "significant conflict" in the context of preemption of state law, *see infra* notes 291-96 and accompanying text.

generally insufficient to justify the creation of federal common law that would displace state law.[178]

To understand the Supreme Court's criticism of the "*most generic (and lightly invoked) of alleged federal interests, the interest in uniformity*" and "*runaway tendencies of 'federal common law' untethered to a genuinely identifiable (as opposed to judicially constructed) federal policy*,"[179] it is necessary to examine the response of the United States Supreme Court, and the courts of appeals, to *Kimbell Foods*, *Omaha Indian Tribes*, and *Milwaukee v. Illinois*. After the decisions in those cases were handed down, the United States continued to assert the need for development of uniform common federal law and cited supporting language in *Kimbell Foods* concerning the need for uniformity by federal programs.[180] In response to that argument, the Sixth Circuit Court of Appeals read *Kimbell Foods*, *Omaha Indian Tribes*, and *Milwaukee v. Illinois* as limiting the displacement of state law to situations in which state decisional rules would "hinder the administration of" a federal program.[181] Given the Supreme Court's statements about the limitations upon the development of federal common law in such decisions,[182] as well as the federalism and separation of power concerns underlying those decisions,[183] the Sixth Circuit's approach was clearly warranted and arguably mandated.

In deciding whether an alter ego theory could be used to pierce the corporate veil in the absence of fraud, other federal courts have paid limited attention to *Omaha Indian Tribes, Milwaukee v. Illinois,* and the rule set forth in *Kimbell Foods*.[184] Instead, those courts focused on statements in *Kimbell Foods* regarding federal programs' need for uniformity, which justifies the creation of federal common law.[185] The Third Circuit Court of Appeals held that because the Medicare program and a variety of its objectives required

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[178] *Id.* at 87-88.

[179] *Id.* at 88, 89 (emphasis added).

[180] United States v. Certain Real Property at 2525 Leroy Lane, 910 F.2d 343, 347-49 (6th Cir. 1990); United States v. Jon-T Chemicals, Inc. 768 F.2d 686, 689, 690 n.6 (5th Cir. 1985); United States v. Pisani, 646 F.2d 83, 86-89 (3d Cir. 1981).

[181] *2525 Leroy Lane,* 910 F.2d at 347-49 (rejecting the Government's argument that uniform rules were needed to effectuate the goals of the federal forfeiture scheme and finding that state property law should be applied as decisional rules because they "will not hinder the administration of" the federal program).

[182] *See supra* notes 148-71 and accompanying text for a discussion of the Supreme Court decisions in *Kimbell Foods, Omaha Indian Tribes,* and *Milwaukee v. Illinois*.

[183] *See supra* notes 124-46 and accompanying text.

[184] *See generally, Jon-T Chemicals,* 768 F.2d 686; *Pisani*, 646 F.2d 83.

[185] United States v. Kimbell Foods, Inc., 440 U.S. 715, 728 (1979) ("Undoubtedly, federal programs that 'by their nature are and must be uniform in character throughout the Nation' necessitate formulation of controlling federal rules."); *Jon-T Chemicals, Inc.*, 768 F.2d at 690 n.6; *Pisani*, 646 F.2d at 86.

uniformity, federal common law should be developed to decide alter ego liability issues arising in an action to recover Medicare overpayments.[186] In doing so, the court simply stated that "a uniform rule is needed since state law *could frustrate specific objectives of the Medicare program*,"[187] and rather than determine the New Jersey law of alter ego liability, the court assumed that state law "*might be more restrictive*" than federal law.[188] Similarly, when the issue of piercing the corporate veil arose in a False Claims Act case, the Fifth Circuit Court of Appeals held that because the claims involved payments by a national cotton subsidy program, uniformity was necessary, and federal common law should govern.[189]

After *O'Melveny & Myers*, the Supreme Court decided *Atherton v. FDIC*,[190] another case involving an action by the FDIC as a bank's receiver.[191] The Supreme Court ultimately gave the FDIC a victory in *Atherton*, but once again rejected an argument for federal common law based upon the *Clearfield Trust* Doctrine.[192] In doing so, the Supreme Court found a number of reasons why the purported need for "uniformity" did not exist once federal laws and regulations concerning banks were examined.[193] Additionally, the Court found that there were no other conflicts between state law and federal policy or interests to justify federal common law.[194]

The decisions in *Kimbell Foods* and *Omaha Indian Tribes* confirm that federalism concerns, stemming from economic actors' reliance on state law to shape transactions, are one reason for the Supreme Court's limitations upon the *Clearfield Trust* Doctrine. In *Kimbell Foods*, the Court's decision explicitly found it to be inappropriate to adopt uniform federal common law that would disrupt state law governing creditors' rights because businesses rely on such laws when carrying out transactions.[195] Similarly, in *Omaha Indian Tribes* the Supreme Court declined to use federal common law because it would disrupt the state law on which real estate owners relied to determine their property rights.[196]

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186 *Pisani*, 646 F.2d at 86-89.

187 *Id.* at 86 (emphasis added).

188 *Id.* at 87 (emphasis added).

189 *Jon-T Chemicals, Inc.*, 768 F.2d at 690 n.6. In *Jon-T Chemicals*, the court did not decide that it needed to create a special rule of federal law regarding alter ego liability. *Id.* Instead, the court found that as to alter ego liability Texas and federal law were essentially the same. *Id.*

190 519 U.S. 213 (1997).

191 *Id.*

192 *Id* at 217-31.

193 *Id.* at 219-24.

194 *Id.* at 224-26.

195 United States v. Kimbell Foods, Inc., 440 U.S. 715, 739-40 (1979).

196 Wilson v. Omaha Indian Tribes, 442 U.S. 653, 674-76 (1979).

From *Kimbell Foods* through *Atherton*, the Supreme Court not only repeatedly stated that separation of power concerns require limits to be placed on the *Clearfield Trust* Doctrine, but also voiced concerns about the disruption of state law on which economic actors rely.[197] In particular, the Court in *O'Melveny & Myers* condemned, as contrary to the Constitution's separation of powers, the development of federal common law based upon "judicially constructed" and not "genuinely identifiable" federal policies or interests.[198] Additionally, the Court emphasized that in most cases the federal judiciary must leave to Congress decisions on the creation of law.[199]

C. Bestfoods *and the Use of Federal Common Law Doctrines To Determine Successor Liability Under Federal Statutes*

In *United States v. Bestfoods*, the Supreme Court decided the circumstances under which a parent corporation was liable under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), for the activities of a subsidiary in releasing hazardous substances into the environment.[200] At the outset of its analysis, the Supreme Court discussed the common law rule that shareholders are not liable for the activities of a corporation, that rule's application in the case of parent and subsidiary corporations, and "piercing the corporate veil," a traditional exception to that common law rule.[201] At one point, the Court describes the rule of a parent corporation's limited liability as "'ingrained in our economic and legal systems.'"[202]

Additionally, the Supreme Court points out that despite scholarly criticism of limited parent corporation liability where a subsidiary is a

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[197] *Atherton*, 519 U.S. at 218 ("Whether latent federal power should be exercised to displace state law is primarily a decision for Congress, not the federal courts.") (quoting Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63, 68 (1963); O'Melveny & Myers v. FDIC, 512 U.S. 79, 85-88 (1994); *Kimbell Foods*, 440 U.S. at 739-40. In *Kimbell Foods*, the court stated its federalism concern as follows:

> Because the ultimate consequences of altering settled commercial practices are so difficult to foresee, we hesitate to create new uncertainties in the absence of careful legislative deliberation...[unless] ... necessary to vindicate important national interests. ... [T]he prudent course is to adopt the ready made body of state law as the federal rule of decision until Congress decides to strike a different accommodation.

Kimbell Foods, 440 U.S. at 739-40.

[198] *O'Melveny & Myers*, 512 U.S. at 89.

[199] *Id.* (quoting Northwest Airlines v. Transport Workers Union, 451 U.S. 77, 98 n.41 (1981)). For a further discussion of *Northwest Airlines*, see, *infra*, notes 318-23, 343-51, 369-86 and accompanying text.

[200] United States v. Bestfoods, 524 U.S. 60 (1998).

[201] *Id.* at 61-63.

[202] *Id.* at 61 (citations omitted).

polluter, "nothing in CERCLA purports to reject this bedrock principle, and against this common-law backdrop the congressional silence is audible."[203] As to the principle of piercing the corporate veil to find a corporate parent liable under CERCLA, the Court adds:

> Nothing in CERCLA purports to rewrite this well-settled rule, either. CERCLA is thus like many another congressional enactment in giving no indication that 'the entire corpus of state corporation law is to be replaced simply because a plaintiff's cause of action is based upon a federal statute,' . . . and the failure of the statute to speak to a matter as fundamental as the liability implications of corporate ownership demands application of the rule that '[i]n order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law.'[204]

The Court in *Bestfoods* concluded its discussion of parent liability for a subsidiary's activities by agreeing with the Sixth Circuit Court of Appeals that a parent corporation is only liable derivatively under CERCLA if the corporate veil of its subsidiary may be pierced.[205] This decision refuted the positions of the First, Second, Third, Fourth, and Eighth Circuits which had all agreed that federal courts should fashion a uniform federal law of corporate liability under CERCLA. As the First Circuit stated subsequently in *United States v. Davis*,[206] the Supreme Court's decision in *Bestfoods* "left little room for the creation of a federal rule of [corporate] liability" under CERCLA.[207]

The Second Circuit agreed in *New York v. National Services Industries, Inc.*,[208] acknowledging the decision in *Bestfoods* required overruling of *B.F. Goodrich v. Betkoski*.[209] According to the Second Circuit,

> we take from *Bestfoods* the principle that when determining whether liability under CERCLA passes from one corporation to another, we must apply common law rules and not create CERCLA-specific rules. Because the substantial continuity test adopted in *Betkoski*

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203 *Id.* at 62.

204 *Id.* at 63 (quoting Burks v. Lasker, 441 U.S. 471, 478 (1979) and United States v. Texas, 507 U.S. 529, 534 (1993)) (citations omitted).

205 524 U.S. at 63-64.

206 261 F.3d 1 (1st Cir. 2001).

207 *Id.* at 54.

208 352 F.3d 682 (2d Cir. 2003).

209 99 F.3d 505 (2d Cir. 1996).

> departs from the common law rules of successor liability, *Betkoski* is no longer good law.[210]

The pre-*Bestfoods* position of the five Courts of Appeals is one example of the lower federal courts' willingness to develop federal common law rules and use common law analysis despite contrary Supreme Court precedent. Before 1996, only the Sixth Circuit Court of Appeals applied state law to decide "successor liability" under CERCLA.[211] Now, only the Third, Fourth, and Eighth Circuits recognize the need for a federal common law of "successor liability" for CERCLA matters.[212] While their decisions are not in total agreement, the First, Second and Ninth Circuits now agree that *Bestfoods* or other Supreme Court decisions support the conclusion that there is no justification for developing a federal common law of "successor liability" for CERCLA that differs from state law.[213]

The *Bestfoods* decision and the contrary court of appeals decisions highlight a conflict between Supreme Court and the courts of appeals on the development of federal common law. Before *Bestfoods*, Supreme Court decisions made it clear that development of federal common law should be the exception and not the rule. As a result, some federal courts and individual judges questioned the use of the substantial continuity test rather than state law to decide successor liability questions arising in actions under federal statutes.[214] However, many of the courts of appeals accepted the

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[210] *Nat'l Serv. Indus.*, 352 F.3d at 685.

[211] City Mgmt. Corp. v. U.S. Chem. Co., 43 F.3d 244, 250-51 (6th Cir. 1994) (determining that state law and not federal common law governed the issue of successor liability under CERCLA) (citing Anspec Co. v. Johnson Controls, Inc., 922 F.2d 1240, 1247 (6th Cir. 1991).

[212] United States v. General Battery Corp., 423 F.3d 294 (3d Cir. 2005), *petition for cert. filed sub nom.* Exide Technologies v. United States, 74 U.S.L.W. 3572 (U.S. March 31, 2006) (No. 05-1269); United States v. Carolina Transformer Co., 978 F.2d 832, 837-38 (4th Cir. 1992); United States v. Mexico Feed and Seed Co., 980 F.2d 478, 486-87 (8th Cir. 1992); Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86, 90-92 (3rd Cir. 1988).

[213] In *Nat'l Serv. Indus.*, at 685-87 (2d Cir. 2003) (Walker, C.J.), the court continued to insist that federal common law and not state law governs the scope of successor liability under CERCLA. Nonetheless, the court found that *Bestfoods* foreclosed the use of the substantial continuity doctrine. On the other hand, the First Circuit found in *Bestfoods* justification for its decision in John S. Boyd Co., Inc. v. Boston Gas Co., 992 F.2d 401, 406 (1st Cir.1993) that state law should determine successor liability in CERCLA cases. United States v. Davis, 261 F.3d 1, 54 (1st Cir. 2001). A year before *Bestfoods*, the Ninth Circuit held in light of *Atherton v. FDIC*, 519 U.S. 213 (1997), that state law and not distinct federal common law should decide successor liability under CERCLA and overruled *Louisiana-Pacific Corp. v. Asarco*, 909 F.2d 1260 (1990). Atchison, T. & Santa Fe Ry. v. Brown & Bryant, Inc., 132 F.3d 1295, 1298-1301 (9th Cir. 1997).

[214] *See infra* notes 251-55, 305-12 and accompanying text for a discussion of federal courts' use of the substantial continuity test in cases involving the National Labor Relations Act ("NLRA"), the Labor Management Relations Act ("LMRA") and Title VII of the Civil Rights Act, to determine whether a

development of federal common law and the substantial continuity test notwithstanding contrary Supreme Court precedent.

Bestfoods addresses a fundamental issue that most lower courts have ignored when adopting the substantial continuity test as federal common law to fill the "interstices" of federal statutes. The issue is whether common law analysis should be used to fill the gaps of federal statutes or whether another type of analysis should be used. In *Bestfoods*, the Supreme Court adopted a rule that avoids common law analysis as much as possible.

1. *THE SEVENTH CIRCUIT QUESTIONS THE USE OF THE SUBSTANTIAL CONTINUITY DOCTRINE AND REJECTS THE USE OF OTHER FEDERAL COMMON LAW.*

Ten years ago, the Seventh Circuit Court of Appeals questioned the blanket use of the substantial continuity doctrine to decide successor liability in Title VII cases.[215] At that time, the court commented on the doctrine, stating

> [t]he reason for this special federal common law doctrine of successor liability—this departure from the more limited approach of the common law generally—is a little elusive, especially in a case such as this in which the actual violator is fully answerable for the consequences of the violation.[216]

Ultimately, the court applied the doctrine because the "defendants d[id] not challenge [its] application."[217] This hint that parties should question the use of the substantial continuity test came five months after the Supreme Court's decision in *O'Melveny & Myers*.[218] There, the Supreme Court rejected the development of a uniform federal common law rule for imputing corporate officers' knowledge to a corporation.[219] The FDIC sought to have a uniform rule established for actions that it brought, as a receiver, to recover funds on behalf of failed savings and loans.[220]

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business, which purchased substantially all of another firm's assets and had common management and employees, was a successor of the seller. For a discussion of courts' lack of enthusiasm for the substantial continuity test as a state common law rule, *see infra* notes 241-47 and accompanying text.

215 EEOC v. G-K-G, Inc., 39 F.3d 740 (7th Cir. 1994).

216 *Id.* at 748.

217 *Id.*

218 512 U.S. 79 (1994).

219 *Id.* at 85-89.

220 *Id.* at 83, 85.

When the hint in *EEOC v. G-K-G, Inc.* is read in light of *O'Melveny & Myers*, the Seventh Circuit's decision suggests an early recognition of the significance of the Supreme Court ruling. On the one hand, the Supreme Court's decision in *O'Melveny & Myers* represented one of many instances where the Court narrowed the application of the *Clearfield Trust* Doctrine.[221] Perhaps more importantly, the Supreme Court indicated a two-pronged analysis is necessary to determine whether a federal statute requires development of federal law to displace state law.

In the first step of the analysis, the Court examined the statutory text and legislative history of the Financial Institutions Reform, Recovery, and Enforcement Act ("FIREEA") to determine if Congress intended federal common law to displace state law.[222] Second, the Court considered whether there was any conflict between an important federal interest and state law, which would justify displacement of that law.[223] This two-step analysis was an important foundation for the Supreme Court's decision in the subsequent decisions of *Atherton*[224] and *Bestfoods*.[225] In *Atherton*, the Supreme Court applied the two-step analysis by first noting the absence of any important federal interest that conflicted with applicable state laws.[226] The Court then examined the text, legislative history, and background of the relevant statute's enactment and determined that Congress had intended for state and not federal common law to fill the interstices of the statute.[227]

In *Bestfoods*, the Supreme Court refined the two-pronged analysis of *Atherton* and *O'Melveny & Myers* by holding that, as to long-standing rules of state law, there is a presumption that Congress intended the use of the state law to fill the interstices of a statute.[228] Because there was no dispute in *Bestfoods* as to the liability of the parent corporation under either state or federal rules for piercing the corporate veil, the Supreme Court did not reach the issue of whether there was any conflict between state law and federal interests that required the displacement of state law.[229]

In their pre-*Bestfoods* decisions, the Second, Fourth, and Ninth Circuit Courts of Appeals held, the Eighth Circuit Court of Appeals assumed, and the Third Circuit Court of Appeals suggested that federal courts should

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221 *Id.* at 87-89. *See* the discussion of *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943), and other *Clearfield* Trust Doctrine decisions by the Supreme Court, *supra* Part III, III.B.

222 *O'Melveny & Myers*, 512 U.S. at 85-87.

223 *Id.* at 87-89.

224 519 U.S. 213 (1997).

225 524 U.S. 60 (1998).

226 Atherton v. FDIC, 519 U.S. 213, 218-26 (1997).

227 *Id.* at 226-31.

228 *Bestfoods*, 524 U.S. at 61-64.

229 *Id.* at 63 n.9.

develop a uniform federal common law of successor liability for CERCLA.[230] The Second, Fourth, and Eighth Circuits accepted that the substantial continuity test should be borrowed from NLRB and LMRA cases because the test was consistent with the policies of CERCLA.[231]

In subsequent decisions of the Second and Ninth Circuits, which overruled *B.F. Goodrich v. Betkoski* and *Louisiana-Pacific Corp. v. Asarco* respectively, each of the two Courts of Appeals rejected the notion that CERCLA requires the development of a uniform federal law of successor liability that differs from state law.[232] The decisions of *New York v. National Services Industries, Inc.* and *Atchison, Topeka & Santa Fe Railway v. Brown & Bryant, Inc.* raise serious doubts about the validity of the decisions by the Fourth Circuit in *United States v. Carolina Transformer Co.* and by the Eight Circuit in *United States v. Mexico Feed and Seed Co.* Those decisions accepted that in CERCLA cases, the development of a federal common law of successor liability includes the substantial continuity test. Doubts regarding these cases are especially strong because the court of appeals in *National Services Industries* overruled *Betkoski* in light of the Supreme Court's decision in *Bestfoods*.[233]

The validity of *Carolina Transformer* and *Mexico Feed and Seed* are even more suspicious because each decision relies on the Third Circuit's decision in *Smith Land & Improvement* in which the court only had to decide whether caveat emptor could be raised as a defense in CERCLA actions.[234] These two

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[230] B.F. Goodrich v. Betkoski, 99 F.3d 505, 581-519 (2d Cir.1996), *overruled by* New York v. Nat'l Servs. Indus., Inc., 352 F.3d 682 (2d Cir. 2003); United States v. Carolina Transformer Co., 978 F.2d 832, 837-38 (4th Cir. 1992); United States v. Mexico Feed and Seed Co., 980 F.2d 478, 486-87 (8th Cir. 1992); Louisiana-Pacific Corp. v. Asarco, 909 F.2d 1260, 1262-64 (1990), *overruled by* Atchison, T. & Santa Fe Ry. v. Brown & Bryant, Inc., 132 F.3d 1295 (9th Cir. 1997); Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86, 90-92 (3rd Cir. 1988). The Court's discussion of federal common law in *Smith Land* is arguably nothing more than dicta because evidence existed to support a finding of successor liability based on a theory of statutory merger or consolidation. *Id.* However, the Third Circuit recently rejected that reading of *Smith Land*. United States v. General Battery Corp., 423 F.3d 294. 298 (3d Cir. 2005) (*Smith Land's* discussion of the use of federal common law was "unambiguous, essential to the *Smith Land* disposition, and controlling on the issue before us. *Smith Land* expressly rejected the position that a particular state's successor liability law applies under CERCLA.").

[231] *B.F. Goodrich*, 99 F.3d at 519; *Carolina Transformer Co.*, 978 F.2d at 837-38; *Mexico Feed and Seed Co.*, 980 F.2d at 487-90.

[232] *National Serv. Indus., Inc.*, 352 F.3d 682 (overruling *Betkoski*); *Atchison, T. & Santa Fe Ry.* 132 F.3d at 1298-1301 (overruling *Louisiana-Pacific Corp v. Asarco*).

[233] *Bestfoods*, 524 U.S. 60.

[234] *Smith Land & Improvement Corp.*, 851 F.2d at 88. To the extent there was evidence of record before the Court in *Smith Land & Improvement Corp.* concerning the potential liability of the defendants, it indicated that the corporate transactions at issue were statutory mergers or consolidations that may have resulted in successor liability without resort to the substantial continuity test. *Id.* at 91. Furthermore, the Court never stated that the use of the substantial continuity test was appropriate in CERCLA cases. It

decisions cannot be considered persuasive precedent when there is disagreement among numerous federal appellate courts, and the only appellate court opinion that supports the Fourth and Eighth Circuit decisions appears to be obiter dicta. Finally, the continued validity of the *Mexico Feed and Seed* is questionable because even though the court assumed that only federal law and not state law should be used to decide successor liability, the court ultimately found no liability.[235]

Even if the Courts in *Carolina Transformer* and *Mexico Feed and Seed* were correct that federal common law should be used to decide successor liability under CERCLA, their adoption of the substantial continuity test is questionable in light of *Bestfoods* and the Third Circuit's decision in *United States v. General Battery Corporation.*[236] The majority in *General Battery* maintains that *Smith Land & Development* remains good law in light of *Bestfoods*.[237] Nonetheless, the court held that under CERCLA, the federal common law of successor liability includes only "'the general doctrine of successor liability in operation in most states.'"[238] Ultimately, the *General Battery* court held that the substantial continuity test was not part of the doctrine of successor liability in most states.[239]

Although it is doubtful that the Third Circuit's decision in *Smith Land & Development* remains viable in light of *Bestfoods*, the Court of Appeals certainly was correct that the substantial continuity test is not accepted as part of the common law of successor liability in most states. Thirty years ago in *Turner v. Bituminous Casualty Co.*,[240] the Michigan Supreme Court followed the First Circuit's interpretation of New Hampshire law in *Cyr v. B. Offen*

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only acknowledged that the EPA had advocated the use of a "'continuity of business operation approach,'" *Id.* at 91, n.2, and stated that the district court should use "the general doctrine of successor liability in operation in most states." *Id.* at 92. The EPA has expressed the view that a "need for uniformity" justifies the use of federal common law, and the continuity of business operation test, to decide corporate liability issues that arise under CERCLA, EPA Memorandum, "Liability of Corporate Shareholders and Successor Corporations For Abandoned Sites Under CERCLA," Courtney M. Price, Assistant Administrator for Enforcement and Compliance Monitoring (June 13, 1984). However, that legal opinion deserves respect only if persuasive. *E.g.* Christensen v. Harris County, 529 U.S. 576, 586-87 (2000); Reno v. Koray, 515 U.S. 50, 61 (1995). The memorandum's persuasiveness is weak, and perhaps non-existent, given the wealth of subsequent Supreme Court and Court of Appeals decisions contrary to *Smith Land & Improvement Corp.*

235 *Mexico Feed and Seed Co.*, 980 F.2d at 488-90.

236 423 F.3d 294 (3d Cir. 2005), *petition for cert. filed sub nom.* Exide Technologies v. United States, 74 U.S.L.W. 3572 (U.S. March 31, 2006) (No. 05-1269)..

237 *Id.* at 298-301.

238 *Id.* at 298 (quoting *Smith Land & Improvement Corp.*, 851 F.2d at 91-92 (3d Cir. 1988)).

239 *Id.* at 309.

240 397 Mich. 406, 244 N.W.2d 873, 881-84 (1976).

& Co., Inc.[241] and adopted the continuity of enterprise test, another name for the substantial continuity test, to impose successor liability upon a purchasing corporation where it acquired the selling corporation's assets for cash, but the purchaser retained the seller's key personnel, assets, general business operations and name; the seller ceased operations and dissolved soon after receiving payments for its assets, the purchaser assumed the debts and liabilities of the seller to the extent necessary to continue the seller's normal business operations, and the purchaser held itself out as the continuation of the seller.[242] Subsequently, the New Hampshire Supreme Court repudiated the First Circuit's decision in *Cyr*[243] and courts have overwhelmingly rejected the test as a state common law rule of successor liability,[244] and the test has not been recognized as valid law by the Restatement of Law of Torts.[245]

For the Seventh Circuit Court of Appeals, the "hint" in *G-K-G* proved to be prophesy. As a result, the court of appeals subsequently applied the two-pronged analysis of *O'Melveny & Myers* and *Bestfoods* in *James Papa v. Katy Industries, Inc.*[246] The court held that the state law rule of piercing the corporate veil usually should be applied to determine affiliate liability in separate cases under Title VII and the Age Discrimination in Employment Act ("ADEA").[247] Applying *Bestfoods*, the court held not only that the corporate veil of affiliated corporations should not be pierced, but also the

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241 501 F.2d 1145 (1st Cir. 1974) In determining whether successor liability existed as a matter of New Hampshire law, the Court of Appeals in *Cyr* relied upon decisions in which the United States Supreme Court, as a matter of federal law, approved the National Labor Relations Board's use of the substantial continuity test in National Labor Relations Act cases and extended its use to cases involving the Labor Mangement Relations Act. *Id.* at 1152-53, *discussing,* Howard Johnson Co., Inc. v. Hotel & Restaurant Employees, 417 U.S. 249 (1974); N.L.R.B. v. Burns International Security Services, 406 U.S. 272 (1972); John Wiley & Sons v. Livingston, 376 U.S. 543, 548 (1964).

242 *Turner v. Bituminous Casualty Co.*, 244 N.W.2d at 881-84.

243 Bielagus v. EMRE of New Hampshire Corp., 826 A.2d 559, 568-69 (2003) (reiterating New Hampshire Surpreme Court's statement that *Cyr* does not accurately reflect New Hampshire common law), *citing* Simoneau v. South Bend Lathe, Inc., 543 A.2d 407, 409 (1988) (stating that *Cyr* does not reflect New Hampshire law of product liability and risk-spreading in tort matters).

244 Savage Arms, Inc. v. Western Auto Supply Co. 18 P.3d 49, 55-56 & nn. 32-35 (Alaska 2001) (adopting continuity of enterprise test, identifying Alabama and Michigan as other states that have adopted test, misidentifying New Hampshire as state that has adopted test and noting that from 18 to 22 state or federal courts have rejected it as state law); Restatement (Third) of Torts: Prod. Liab. § 12, Reporters' Note, cmt. c (1998).

245 Restatement (Third) of Torts: Prod. Liab. § 12, cmt. c & Reporters' Note, cmt. c (1998).

246 Papa v. Katy Indus., Inc., 166 F.3d 937, 939-42 (7th Cir. 1999).

247 *Id.*

corporations were not an employer with sufficient employees requiring application of Title VII and the ADEA.[248]

Despite the parties' acceptance of the "integrated enterprise" test in their arguments, the Seventh Circuit in *Papa* declined to adopt the test used by the NLRB to decide affiliate liability issues for Title VII cases.[249] The court could not "blame the lawyers for structuring their analysis this way, because we and other courts of appeals have often done likewise. . . ."[250]

The Third Circuit Court of Appeals and other federal courts have not been as quick to embrace *Bestfoods*. Despite the decision in *Bestfoods*, the majority in *General Battery* held that federal common law should be used to decide successor liability under CERCLA and declined to read *Atherton, O'Melveny & Myers* and *Bestfoods* as contrary to prior court of appeals' decisions.[251] The district court in *New York v. National Service Industries* also found reason to disregard *Bestfoods*.[252] In some cases, both the parties and the courts assumed the applicability of federal common law. In *Brzozowski v. Correctional Physician Services, Inc.*,[253] the Third Circuit Court of Appeals and

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248 *Id.*

249 *Id.* at 939-40.

250 *Id.* at 939.

251 US v. Gen. Battery Corp., 423 F.3d 294 (3d Cir. 2005). The court of appeals found that Exide Corporation, as successor to General Battery Corp., was also the successor of Price Battery, which General Battery acquired before merging with Exide. *Id.* at 296, 305-08. In a concurring and dissenting opinion, Judge Rendell agreed with the result reached by the majority. *Id.* at 309-18. She nevertheless maintained that, in light of decisions such as *United States v. Bestfoods*, 524 U.S. 51 (1998), the Third Circuit Court of Appeals should reconsider the decisions of *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 91-92 (3d Cir. 1988) and *Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209 (3d Cir. 1993). *Gen. Battery Corp.*, 423 F.3d at 298-304.

252 New York v. Nat'l Serv. Indus., Inc., 380 F. Supp. 2d 122 (E.D.N.Y. 2005). Even within the Seventh Circuit, courts have not been quick to embrace *Bestfoods*. In *N. Shore Gas Co. v. Salomon Inc.*, the Seventh Circuit declined to reach the issue of whether state law or federal common law should decide corporate successorship issues because the parties assumed that federal common law applied and did not brief the issue. 152 F.3d 642, 650-51 (7th Cir. 1998). Subsequently, a district court within the Seventh Circuit held that federal common law, and the substantial continuity test, should decide successor liability in CERCLA cases without discussing the state law versus uniform federal common law issue raised by *Bestfoods* and Atherton v. FDIC, 519 U.S. 213 (1997). Norfolk S. Ry. Co. v. Gee Co., No. 98 C 1619, 2001 WL 710116, at *22-24 (N.D. Ill. June 25, 2001). The district court assumed that CERCLA requires a uniform law of successor liability, which includes the substantial continuity test. *Norfolk S. Ry. Co.*, at *22-24. Although the court clearly was aware of *N. Shore Gas Co.* and *EEOC v. G-K-G, Inc.*, 39 F.3d 740 (7th Cir. 1994), it ignored the Seventh Circuit's hints in those cases to use state law, rather than federal common law, and the court of appeal's embrace of *Bestfoods* in *Papa*, 166 F.3d at 937. *Norfolk S. Ry. Co.*, 2001 WL 710116, at *23. However, there is no indication that the parties raised the *Bestfoods* issue, and by finding that the alleged successor could not be held liable under the mere continuation or substantial continuity test, the district court disposed of the successorship issue in a manner that made an appeal less likely.

253 360 F.3d 173 (3d Cir. 2004).

the plaintiff—and apparently the alleged successor as well—accepted without question that the substantial continuity doctrine should be applied to decide whether an asset purchaser is a corporate successor for the purposes of a Title VII gender discrimination action.[254]

Examination of the Supreme Court decision in *Bestfoods* and other precedent, including *O'Melveny & Myers*, demonstrates that those courts have ignored relevant Supreme Court precedent. Their disregard of the Supreme Court precedent may have occurred because the lower courts have overlooked, ignored, or denied the significance of *Bestfoods* as part of the Supreme Court's efforts to limit use of common law analysis when deciding how to fill the interstices of federal statutes.

2. *SUBSTANTIAL CONTINUITY TEST IN LMRA, TITLE VII AND CERCLA CASES*

Originally, the NLRB developed the substantial continuity test to determine a successor employer's liability under the National Labor Relations Act, and the Supreme Court approved the Board's use of the test in *Fall River Dyeing and Finishing Corp. v. NLRB*[255] and *Golden State Bottling Co. v. NLRB*.[256] Later, the Supreme Court referred to the test in two cases involving the LMRA.[257] Subsequently, in decisions questionable in light of the Supreme Court's decision in *NLRB v. Burns International Security Services, Inc.*, federal appellate courts read *Golden State Bottling* and other LMRA decisions as establishing the substantial continuity test as the means to

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[254] *Id.* at 177-79. In contrast, at least one court of appeals has held that the Federal Advisory Committee Act ("FACA") does not provide an implied private right of action despite a 16-year-old assumption by the Supreme Court and other federal courts that FACA did so. Manshardt v. Fed. Judicial Qualifications Comm., 408 F.3d 1154 (9th Cir. 2005).

[255] 482 U.S. 27, 42-43 (1987).

[256] 414 U.S. 168, 171-72 (1973).

[257] In *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 544 (1964), the Court referred to the substantial continuity test, but ultimately found successor liability under traditional state law because of a corporate merger. The Court in the second decision declined to find successor liability because the alleged successor never hired most of the asset seller's employees. Howard Johnson Co. v. Detroit Local Joint Executive Bd., 417 U.S. 249, 251-52 (1974). In *NLRB v. Burns Int'l Sec. Serv., Inc.*, 406 U.S. 272, 286 (1972), the Court explained the *Wiley* decision as a "holding [that] dealt with a merger occurring against a backdrop of state law that embodied the general rule that in merger situations the surviving corporation is liable for the obligations of the disappearing corporation." *See also* Holland v. Williams Mountain Coal Co., 256 F.3d 819, 826-30 (D.C. Cir. 2001) (Santelle, J., concurring).

determine successor liability in cases applying the LMRA.[258] Lower courts later adopted the doctrine for use in Title VII cases.[259]

The Supreme Court decision in *Bestfoods*, the decisions by courts of appeal in *National Services Industries, Inc.* and *Atchison, Topeka & Santa Fe Railway*, and the decisions of the Seventh Circuit also raise doubts about the Third Circuit's application of federal common law and the substantial continuity test in Title VII actions. Yet, parties and federal courts continue to assume that the test should be applied to decide successor liability in CERCLA and Title VII cases.

3. FOUNDATIONS OF *BESTFOODS*

In quick, shorthand fashion, the Supreme Court in *Bestfoods* dismissed the proposition that some law (other than state common law) may apply to decide whether, under CERCLA, a parent corporation is liable for a subsidiary's actions. As support, the Court cites three prior decisions: *Edmonds v. Compagnie Generale Transatlantique*,[260] *Burks v. Lasker*,[261] and *United States v. Texas*.[262] Those decisions are one starting point for understanding the significance of *Bestfoods*.

In *Edmonds*, the Supreme Court faced the issue of whether the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act had changed the traditional maritime law, which imposed upon multiple

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258 *See Brzozowski*, 360 F.3d at 177 (discussing *Golden State Bottling Co.*, 414 U.S. 168, and *John Wiley & Sons*, 376 U.S. 543); EEOC v. MacMillan Bloedel Containers, Inc., 503 F.2d 1086, 1089-91 (6th Cir. 1974) (discussing *Howard Johnson Co.*, 417 U.S. 249); *see also* Holland v. Williams Mountain Coal Co., 256 F.3d at 825 (discussing *John Wiley & Sons, Golden State Bottling and Howard Johnson Co.*). In *Burns Int'l Sec. Serv., Inc.*, 406 U.S. at 286, the Court explained that the *Wiley* decision as a "holding dealt with a merger occurring against a backdrop of state law that embodied the general rule that in merger situations the surviving corporation is liable for the obligations of the disappearing corporation." *See also Holland*, 256 F.3d at 826-30 (D.C. Cir. 2001) (Santelle, J., concurring). For the purposes of this article, it is not crucial whether the federal appellate courts are correct in stating that the substantial continuity test should be applied to determine successor liability in LMRA cases.

259 *E.g.*, *Brzozowski*, 360 F.3d at 177 (discussing EEOC v. MacMillan Bloedel Containers, Inc., 503 F.2d 1086, 1089-91 (6th Cir. 1974)); *G-K-G, Inc.*, 39 F.3d at 748 (accepting parties' assumption that the substantial continuity test should be used to decide successor liability under Title VII). Interestingly, the Third Circuit Court of Appeals in *Rego v. ARC Water Treatment Co. of Pa.*, 181 F.3d 396, 401-03 (3d Cir. 1999), did not invoke the substantial continuity test by name, but instead indicated it was deciding successor liability under the mere continuation test, a traditional rule developed by state courts. In *Rego*, the court affirmed the district court's decision that there was no basis for successor liability. *Rego*, 181 F.3d at 401-403.

260 443 U.S. 256 (1979), *cited in Bestfoods*, 524 U.S. at 62.

261 441 U.S. 471 (1979), *cited in Bestfoods*, 524 U.S. at 62.

262 507 U.S. 529 (1993), *cited in Bestfoods*, 524 U.S. at 63.

tortfeasors joint and several liability for an indivisible injury to a longshoreman.[263] The Court stated that "we are unpersuaded that Congress intended to upset a 'long-established and familiar principle' of maritime law by imposing a proportionate-fault rule" and found that joint and several liability remained the law.[264] According to the Court, the language of the 1972 amendment did not specifically change the traditional rule of law.[265] Instead, the amendment dealt with issues concerning the liability of a stevedoring company to a vessel when an injured longshoreman sued the vessel, and the liability of a vessel to a longshoreman hired by the vessel to provide stevedoring services.[266]

Furthermore, the Supreme Court found nothing in the legislative history to indicate that Congress intended to change the traditional maritime law concerning the joint and several liability of multiple tortfeasors.[267] According to the Court,

> [t]he legislative history strongly counsels against [an] interpretation of the statute, which modifies the longshoreman's pre-existing rights against the negligent vessel. The reports and debates leading up to the 1972 Amendment contain not a word of this concept. This silence is most eloquent, for such reticence while contemplating an important and controversial change in existing law is unlikely.[268]

That same year, the Supreme Court considered the case of *Burks v. Lasker*.[269] There the Court was faced with the issue of whether a state law, which allowed disinterested directors of a corporation to end a derivative suit, should apply to an implied right of action under the Investors Company Act and Investors Advisors Act.[270] The Court held that the state law rule should apply even though the plaintiffs had an implied cause of action under federal statutes.[271] The Court stated,

> [T]he first place one must look to determine the powers of corporate directors is the relevant State's corporation laws. Corporations are

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263 *Edmonds*, 443 U.S. at 258-60 (1979).

264 *Id.* at 263-73.

265 *Id.* at 262-65.

266 *Id.*

267 *Id.* at 266-68.

268 *Id.* at 266-67.

269 269441 U.S. 471 (1979).

270 *Id.* at 473.

271 *Id.* at 480-86.

> creatures of state law, and it is state law which is the font of corporate directors' powers. . . . In short, in this field congressional legislation is generally enacted against the background of existing state law; Congress has never indicated that the entire corpus of state corporation law is to be replaced simply because a plaintiff's cause of action is based upon a federal statute.[272]

In *United States v. Texas*,[273] the Supreme Court considered whether the Debt Collection Act had abolished the long-standing federal common law rule that the United States may recover pre-judgment interest when appearing as a plaintiff in a breach of contract claim.[274] In finding that the Act did not abolish that federal common law rule, the Court stated, "'[s]tatutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident.' In such cases, Congress does not write upon a clean slate."[275] The Court also stated that the presumption applies if the existing law is state common law, federal maritime law, or federal common law "[a]lthough a different standard applies when analyzing the effect of federal legislation on state law. . . ."[276]

In *United States v. Texas*, the Supreme Court relied in large apart upon *Astoria Federal Savings & Loan Ass'n v. Solimino*.[277] There, the Court considered whether, in an ADEA case, preclusive effect should be given to a state agency's determination, which had not been reviewed by any state court, that an employer had not discriminated against an employee because of his age.[278] As a first principle, the Supreme Court stated that in adopting the ADEA

> . . . Congress is understood to legislate against a background of common-law adjudicatory principles. Thus, where a common-law principle is well established, as are the rules of preclusion, the courts may take it as a given that Congress has legislated with an

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272 *Id.* at 478.

273 507 U.S. 529 (1993).

274 *Id.*

275 *Id.* at 534 (citations omitted).

276 *Id.* (citation omitted).

277 501 U.S. 104 (1991).

278 *U.S. v. Texas*, 507 U.S. at 534.

> expectation that the principle will apply except 'when a statutory purpose to the contrary is evident.'[279]

Ultimately, the Court held that a state administrative adjudication, unreviewed by a state court, should not be given preclusive effect. The rationale for this decision was that it would conflict with provisions of ADEA, which stated that an employee could bring an action despite an unsuccessful proceeding before a state agency and it would be contrary to policies of the ADEA and Title VII.[280]

The Supreme Court decisions on which *Astoria Federal Savings & Loan* relies for the most part involve questions of preclusion decided as a matter of federal law, but the Court does not indicate whether it is deciding the issues as a matter of state or federal law.[281] It also relies on an admiralty case.[282] In one of the decisions, *Briscoe v. LaHue*,[283] the Supreme Court considered two cases in which convicted criminals sought to bring 42 U.S.C. § 1983 actions against police officers based on allegations that the officers presented perjured testimony at the plaintiffs' criminal trials.[284] The Court held that Section 1983 did not provide a cause of action against the police officers.[285] In a lengthy discussion, the Court found that by the time of the enactment of Section 1983, common law immunity was well-established for all persons, including witnesses, who were integral parts of the judicial process.[286] Furthermore, it found nothing in the legislative history of Section 1983 to show that Congress intended to revoke immunity and allow suits against government officials who gave perjured testimony.[287]

Similarly, the Supreme Court in *Atherton v. FDIC* rejected the argument that in adopting 12 U.S.C. 1821(k), and thereby creating a gross negligence standard for bank officials' liability to the FDIC as a bank's receiver,

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279 *Astoria Fed. Sav. & Loan Ass'n*, 501 U.S. at 108 (citations omitted).

280 *Id.* at 110-14.

281 *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331 (1979) (preclusion issue decision based on federal law); Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found., 402 U.S. 313 (1971) (preclusion issue decision in patent litigation based on federal law); Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940) (defendant invokes *res judicata* based on prior bankruptcy case; decision does not indicate whether issue is one of state or federal law). The Court also cites *United States v. Turley*, 352 U.S. 407 (1957), which involves use of common law definition of terms to interpret a federal criminal statute. *See* Astoria Fed. Sav. & Loan Ass'n, 501 U.S. at 108.

282 Isbrandtsen Co. v. Johnson, 343 U.S. 779 (1952).

283 460 U.S. 325 (1983).

284 *Id.* at 326-27.

285 *Id.*

286 *Id.* at 335-36.

287 *Id.* at 336-41.

Congress intended to override state law under which a bank director or officer could be found liable under a standard of care less than gross negligence, such as negligence.[288] Rather, the Court held that the statute's language, the background of its adoption, and its legislative history showed a congressional intent to establish a minimum for statutory actions pursuant to Section 1821(k) while allowing actions under state law when a lesser standard existed.[289]

In its decisions before *Bestfoods*, including *Atherton*, *O'Melveny & Myers*, *Burks v. Lasker*, *Astoria Federal Savings & Loan*, and *Briscoe v. La Hue*, the Supreme Court recognized that when Congress enacts a statute it is presumed to leave undisturbed long-standing rules of law, including state law. To overcome that presumption, either the language of the federal statute or its legislative history must show a congressional intent to displace the long-standing law.[290] In addition, the long-standing law may be displaced if it conflicts with a specific purpose of a federal statute.[291]

The Supreme Court also indicated to what degree a conflict must exist between a federal statute's purpose and long-standing state law in order to displace the state law. In its discussion of the presumption of the continued existence of state law, the Supreme Court in *United States v. Texas* cited with approval the case of *City of Milwaukee v. Illinois*.[292] There, the Supreme Court indicated that absent explicit or implicit field preemption,

> Congressional enactments that do not exclude all state legislation in the same field nevertheless override state laws with which they conflict. The criterion for determining whether state and federal laws are so inconsistent that the state law must give way is firmly established in our decisions. Our task is "to determine whether, under the circumstances of this particular case, [the State's] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[293]

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288 Atherton v. FDIC, 519 U.S. 213, 226-31 (1997).

289 *Id.* *See also* O'Melveny & Myers v. FDIC, 512 U.S. 79, 85-87 (1994) (discussing how, in adopting FIRREA, Congress showed no intent to override presumption that state law should be used to fill interstices of statutes).

290 *Atherton*, 519 U.S. at 226-31; *O'Melveny & Myers*, 512 U.S. at 85-87.

291 *United States v. Texas*, 507 U.S. 529, 534 (1993); Papa v. Katy Indus., Inc., 166 F.3d 937, 940-42 (7th Cir. 1999).

292 United States v. Texas, 507 U.S. at 534 (citing City of Milwaukee v. Illinois, 451 U.S. 304 (1981)).

293 *City of Milwaukee*, 451 U.S. at 316-17.

Similarly, the Court in *United States v. Kimbell Foods, Inc.* stated that in order to justify the development of federal common law to displace state law, a court "must also determine whether application of state law would *frustrate specific objectives of . . . federal programs.* If so, we must fashion special rules solicitous of those federal interests."[294] Read together, the Supreme Court decisions suggest that for a federal statute's purpose to override long-standing state law, there must be a conflict between a statutory purpose and state law sufficient to justify pre-emption of the state law.

In CERCLA and Title VII cases adopting the substantial continuity test, federal appellate courts have not followed the *Bestfoods* line of Supreme Court decisions. In the CERCLA cases, the Third, Eighth, and Ninth Circuits favored a federal common law rule to determine successor liability because they found that CERCLA authorized the creation of federal common law to supplement the statute and there was a need for national uniformity.[295] In the Title VII cases, the federal appellate courts adopted the test in order to further the Congressional intent of ensuring relief for victims of employment discrimination.[296] The question is whether Supreme Court precedent, concerning federal common law, supports the use of that law in Title VII and CERCLA cases.

D. *Constitutional Concerns Behind* Bestfoods *and the Supreme Court's Limitations Upon Federal Common Law*

Separation of power concerns drive the Supreme Court's reluctance to find grants of judicial power to develop a body of federal common law in federal statutes. As the Court stated in *Wallis v. Pan American Petroleum Corp.*:

> It is by no means enough that . . . Congress could under the Constitution readily enact a complete code of law governing transactions in federal mineral leases among private parties. Whether

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[294] United States v. Kimbell Foods, Inc., 440 U.S. 715, 728 (1979) (emphasis added). *See also O'Melveny & Myers*, 512 U.S. at 87. (*Clearfield Trust* Doctrine justifies development of "a special federal rule" only in "'few and restricted' . . . situations where 'there is a *'significant conflict between some federal policy or interest and the use of state law.'*") (emphasis added) (citations omitted). For a discussion of the Supreme Court's decision in *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943), and the definition of the *Clearfield Trust* Doctrine, see *supra* notes 52-55 and accompanying text.

[295] *See* United States v. Gen. Battery Corp., 423 F.3d 294 (3d Cir. 2005); United States v. Carolina Transformer Co., 978 F.2d 832, 837-38 (4th Cir. 1992); United States v. Mex. Feed and Seed Co., 980 F.2d 478, 486-87 (8th Cir. 1992); Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86, 90-92 (3d Cir. 1988).

[296] EEOC v. MacMillan Bloedel Containers, Inc., 503 F.2d 1086, 1090-92, 1094-95 (6th Cir. 1974).

> latent federal power should be exercised to displace state law is primarily a decision for Congress. Even where there is related federal legislation . . . , "Congress acts against the background of the total *corpus juris* of the states."[297]

A similar separation of powers concern also supports the *Bestfoods* line of decisions. As the Supreme Court stated in *Astoria Federal Savings & Loan Ass'n v. Soliminio*, "[c]ourts do not, of course, have free rein to impose rules of preclusion . . . when the interpretation of a statute is at hand. In this context, the question is not whether [preclusion] is wise but whether it is intended by the legislature."[298] In short, the Supreme Court defers to Congress in both the *Bestfoods* line of decisions and the *Clearfield* Doctrine decisions after *Lincoln Mills*. Therefore, the Supreme Court is very unlikely to find that either the *Clearfield Trust* Doctrine decisions or *Lincoln Mills* and its progeny support a finding that CERCLA and the Civil Rights Act authorize federal courts to create a body of federal common law on issues such as successor liability.

An examination of the Supreme Court's decision in *Pilot Life Insurance Co. v. Dedeaux*,[299] along with the legislative history of ERISA, suggests an additional reason for the Supreme Court's finding that in enacting CERCLA, Congress did not authorize the federal courts to create a general body of federal common law, including successor liability rules. In *Pilot Life Insurance*, the Supreme Court's finding that Congress intended courts to create a body of federal common law is based upon language in ERISA's legislative history that refers specifically to Section 301 of the LMRA.[300] The legislative history of ERISA was published in 1974.[301]

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[297] Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63, 68 (1966) (citation omitted). *See also* Wheeldin v. Wheeler, 373 U.S. 647, 651-52 (1963) ("Congress has not done here what was done in [*Lincoln Mills*] and left to federal courts the creation of a federal common law for abuse of process."). According to the Court in *Wheeldin*, given the opportunities and failures of Congress to legislate, "it is not for us to fill any *hiatus* Congress has left in this area." *Wheeldin*, 373 U.S. at 652.

[298] 501 U.S. 104, 108 (1991). *See also City of Milwaukee*, 451 U.S. at 317 (When determining whether federal legislation overrides federal common law, "it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law.").

[299] 481 U.S. 41 (1987).

[300] The Conference Report on ERISA, H.R. Conf. Report No. 93-1280 327 (1974) states:

> Under the conference agreement, civil actions may be brought by a participant or beneficiary to recover benefits due under the plan, to clarify rights to receive future benefits under the plan, and for relief for breach of fiduciary responsibility. . . . *All such actions in Federal or State courts are to be regarded as arising under the laws of the United States in similar fashion to those brought under section 301 of the Labor-Management Relations Act of 1947.*

Pilot Life Ins., 481 U.S. at 55, *quoting* H.R. Conf. Report No. 93-1280.

[301] *See id.*

Six years later Congress enacted CERCLA.[302] In the legislative history of CERCLA, there is no specific language indicating Congress intended to empower federal courts to develop a body of federal common law for CERCLA. In the legislative history, the discussion of federal courts' development of federal common law indicates that references to "joint and several" liability were eliminated from CERCLA so that courts would not impose joint and several liability in every case.[303] Some courts read this legislative history as showing a Congressional intent to allow federal courts to develop federal common law regarding whether joint and several liability is appropriate.[304]

The general discussion provided in CERCLA's legislative history does not come close to the specific language in ERISA's legislative history. In ERISA's history (after the enactment of the LMRA but before CERCLA), Congress used direct and unambiguous language to state its intention to authorize the creation of a body of federal common law. The language in the CERCLA history cannot be read to do the same.

In the *Bestfoods* line of decisions, separation of power concerns also are present. By creating and applying a general presumption that Congress did not intend to override long-standing state law, federal common law, or court-developed maritime law, the Court defers to Congress and allows Congress to decide when to disturb long-standing law. By applying the presumption in a wide range of cases, the Supreme Court communicates that Congress is expected to consider long-standing existing law and indicate, in the statute or legislative history, an intent to modify that law. In other words, the Supreme Court sees the separation of powers in the Constitution as giving Congress complete law-making authority. Absent a clear sign from Congress, or a clear conflict between a statutory purpose and state law, the federal courts should not encroach by assuming that "overworked federal legislators" have transferred "a part of their historic lawmaking function to federal judges."[305]

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[302] Comprehensive Environmental Response, Compensation, and Liability Act, 100 Stat. 1617, (1980) (codified as amended at 42 U.S.C. § 9602 *et seq.* (2005)).

[303] *See, e.g.*, United States v. Monsanto Co., 858 F.2d 160, 171 & n.23 (4th Cir. 1988) (discussing CERCLA's legislative history concerning joint and several liability); United States v. Wade, 577 F. Supp. 1326, 1237-38 (E.D. Pa. 1983)(same); United States. v. Chem-Dyne Corp., 572 F. Supp. 802, 806-08 (W.D. Ohio 1983) (same).

[304] *See Monsanto*, 858 F.2d at 171; *Wade*, 577 F. Supp. at 1237-38; *Chem-Dyne Corp.*, 572 F. Supp. at 806-08. *But see* Anspec v. Johnson Controls, Inc., 922 F.2d 1240, 1250 n.7 (6th Cir. 1991) (reading legislative history as indicating that federal courts should use existing state law rules to decide whether joint and several liability is appropriate).

[305] Friendly, *supra* note 74, at 192.

Federalism concerns are likewise present in *Bestfoods*. The Supreme Court recognizes multiple aspects of corporate law, including limited parent responsibility for a subsidiary's activities and "piercing the corporate veil," as well-established state law.[306] Corporations and others make their decisions, as participants in a market economy, by relying on those state law rules. In *Bestfoods*, *Atherton*, *O'Melveny & Myers*, *Kimbell Foods*, and *Wilson v. Omaho Tribes*, the Supreme Court's view is that absent clear direction from Congress, a clear conflict between state law and a statutory purpose, or a clear conflict between state law and narrowly defined "important federal interests," the Constitution empowers only Congress and not the federal judiciary to override state laws and make new laws contrary to the expectations of those market participants.

In all of the cases, the Supreme Court's reticence to overrule state law is based upon common concerns regarding separation of powers and federalism. Those common concerns suggest that the Supreme Court will not apply the *Clearfield Trust* Doctrine to find that the federal judiciary should develop federal common law to decide successor liability issues under CERCLA. Similarly, those concerns make it doubtful that federal common law should be used to develop a federal common law of successor liability for Title VII without reference to state common law.

E. MacMillan Bloedel Containers, Carolina Transformer, Mexico Feed and Seed and Smith Land & Improvement: *Divergent Paths of the Supreme Court and the Lower Federal Courts in Using Federal Common Law*

The decision in *EEOC v. MacMillan Bloedel Containers, Inc.*[307] is the seminal court of appeals decision adopting the substantial continuity test to determine the liability of an asset purchaser under Title VII of the Civil Rights Act.[308] In accepting the substantial continuity test as appropriate to decide the successor liability of an asset purchaser, the Sixth Circuit Court of Appeals relied on the legislative history of the Title VII relief provisions to find that it granted the federal judiciary broad equitable powers to shape relief for discrimination victims.[309] The court of appeals also found that those broad powers included the authority to impose successor liability upon asset purchasers.[310] Finally, according to the court, similar policy considerations between the National Labor Relations Act and Title VII

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306 United States v. Bestfoods, 524 U.S. 60, 61-64 (1998).

307 503 F.2d 1086 (6th Cir. 1974).

308 *Id.*

309 *Id.* at 1090-92.

310 *Id.*

justified the use of the substantial continuity test in Title VII cases to determine the successor liability of an asset purchaser.[311] Subsequently, other courts of appeals accepted the Sixth Circuit's analytical approach without many doubts.[312]

The Sixth Circuit applied common law analysis, including the weighing of policy issues and analogy, to justify use of the substantial continuity test in a Title VII matter because it promoted federal policy against unlawful discrimination. The court's analysis is virtually identical to the Supreme Court's approach in *Clearfield Trust* and other early *Clearfield Trust* Doctrine cases. That analysis has been described as identifying a federal interest and determining as to that interest whether federal common law is "desirable," meaning the "degree of federal need for a federal rule."[313]

1. THE PROBLEM OF *MACMILLAN BLOEDEL CONTAINERS*

A potential problem with this approach is that it arguably results in unfettered discretion for the federal judiciary to develop federal common law. As one commentator has stated:

> [W]hether a federal or state rule will govern an issue is generally described as a two-stage query: one asks, first, whether the issue falls within federal common law power and second, whether state or federal law should be chosen. One consequence of finding that the power to create federal common law is so broad . . . is that the two-fold inquiry often merges into one. . . . The desirability or nondesirability of a federal rule surely influences one's judgment

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311 *Id.* at 1089-92, 1094.

312 *See, e.g.*, Brzozowski v. Correctional Physician Servs., 360 F.3d 173, 177-79 (3d Cir. 2004) (discussing successor liability issue presented by parties, finding successor liability may exist); *Id.* at 182-86 (Garth, J., dissenting) (contending no successor liability under substantial continuity doctrine); Rojas v. TK Communications, Inc., 87 F.3d 745, 750 (5th Cir. 1996) (following *MacMillan Bloedel Containers*); In re Nat'l Airlines, Inc. 700 F.2d 695, 698 (11th Cir. 1983) (same); Trujillo v. Longhorn Mfg. Co., 694 F.2d 221, 224-25 (10th Cir. 1982) (same); Slack v. Havens, 522 F.2d 1091, 1094-95 (9th Cir. 1975) (same); Brzozowski v. Correctional Physician Servs., Civil Action No. 00-2590, slip op. at 2-4 (E.D. Pa. May 10, 2001) (parties appear to have assumed continuity test should be used but disagreed whether asset purchaser was liable as successor under test). *But see* Papa v. Katy Industries, Inc., 166 F.3d 937, 939-42 (7th Cir. 1999) (applying *Bestfoods* analysis, rather than borrowing NLRB rule, to determine whether affiliated corporations should be treated as one employer under federal discrimination statutes); EEOC v. G-K-G, Inc., 39 F.3d 740, 748 (7th Cir. 1994) (questioning use of substantial continuity test to determine successor liability in Title VII matter but applying test because parties assumed it should be used).

313 Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 883, 887, 944 (1986).

> whether . . . federal enactments have 'directed' that there be one. A judge who thinks a federal rule is undesirable is not likely to believe Congress presupposed it; one who believes federal law absolutely necessary is much more likely to believe Congress had it in mind.[314]

The Supreme Court's analysis in *Clearfield Trust* thus may lead to federal courts impinging upon the constitutionally mandated role of Congress to decide *if and when* to make federal law.[315] The Court's reasoning may also allow federal courts to supplant state law that individuals expect to determine their rights and obligations in economic transactions.[316] These separation of power and federalism concerns are potentially aggravated where parties assume a federal common law rule should govern an issue and a federal court accepts that assumption.

2. SUPREME COURT'S RESPONSE TO THE *MACMILLAN BLOEDEL CONTAINERS* PROBLEM

For twenty-five years, the Supreme Court has shown concern about these separation of power and federalism concerns and endeavored to reshape the *Clearfield Trust* Doctrine.[317] However, that effort has been constrained by not only the Court's own use of the *Clearfield Trust* Doctrine, but also lower courts' use of common law analysis and the availability of cases allowing the Court to reshape the doctrine.

The Supreme Court's efforts to limit the use of the *Clearfield Trust* Doctrine and federal common law began more than thirty years ago.[318] However, during that time a divided Supreme Court used the doctrine to override state law when, in an area in which the Constitution gives the federal government exclusive power, it viewed the interests of a federal

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[314] *Id.* at 950-51.

[315] *See supra* notes 104-07, 126-29 and accompanying text.

[316] *See supra* notes 134-39, 158-59, 195-97 and accompanying text.

[317] *See* Atherton v. FDIC, 519 U.S. 217, 231-32 (1997) (In a one paragraph opinion, O'Connor, J., joined by Scalia and Thomas, JJ., concurred except to object to the majority's not relying solely on statutory language but instead citing statute's text and "notably unhelpful legislative history" as support.); O'Melveny & Myers v. FDIC, 512 U.S. 79, 90-91 (1994) (Stevens, J., joined by Blackmun, O'Connor and Souter, JJ., in concurring, added comments concerning the federal court's duty to ascertain applicable state law rather than develop federal common law rule.); Wilson v. Omaha Indian Tribes, 442 U.S. 653, 679-80 (1979) (Blackmun, J., with whom Burger, C.J. joined, concurred but made additional comments about the interpretation of 25 U.S.C. § 194.); United States v. Kimbell Foods, Inc., 440 U.S. 715 (1979) (unanimous).

[318] *See, e.g.*, Miree v. DeKalb County, 433 U.S. 25 (1977); Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63 (1966).

program to be at risk..[319] Additionally, the Court used the doctrine to override state law, which discriminated against a federal interest, when the Court apparently was hesitant to use other constitutional grounds to invalidate the discriminatory law.[320]

3. THE CONFLICT BETWEEN THE SUPREME COURT AND THE COURTS OF APPEALS IN FEDERAL COMMON LAW DECISIONS

During those thirty or more years, lower federal courts have shown a great willingness to use common law analysis. For example, the Seventh Circuit Court of Appeals in *Kohr v. Allegheny Airlines, Inc.*[321] held that federal common law and not state law should be used to determine contribution and indemnity claims among the United States, Allegheny Airlines, the corporate owner of a small airplane, and the estate of a student pilot.[322] The underlying lawsuits arose out of an aerial collision between the student pilot's aircraft and an Allegheny passenger aircraft, under the direction of an FAA controller, and included diversity actions and Federal Tort Claims Act actions by the estates of the aircrafts' occupants.[323] Furthermore, the actions were commenced in the district courts of various states and consolidated in Indiana by the Multidistrict Litigation Panel.[324]

The lower federal courts also resorted to common law analysis, rather than looking to congressional intent as shown by statutory text and legislative history, to determine whether a federal statute provided a private party with an implied right of action.[325] Similarly, lower federal courts resorted to

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319 *See* Boyle v. United Tech. Corp., 487 U.S. 500, 506-09 (1988).

320 *See* United States v. Little Lake Misere Land Co., 412 U.S. 580 (1973). In concurring in the judgment in *Little Lake Misere Land Co.*, 412 U.S. at 605-06, Justice Stewart objected to the use of "some brooding omnipresence labeled federal common law" and would have found the Louisiana statute unconstitutional under the Contract Clause. In his concurrence, then Justice Rehnquist agreed with Justice Stewart that federal common law should not have been used to displace the state law. *Id.* at 606-07. However, Justice Rehnquist believed that past precedent limited the Court's ability to find the statute unconstitutional under the Contract Clause and would have found the statute to be unconstitutional because it constituted discriminatory treatment by a State that interfered with the execution of federal laws. *Id.* at 607-08.

321 504 F.2d 400 (7th Cir. 1974).

322 *Id.* at 403.

323 *Id.* at 401.

324 *Id.*

325 *See* Ash v. Cort, 496 F.2d 416, 420-21 (3d Cir. 1974) (noting that absent clear legislative intent to grant or withhold statutory implied cause of action, federal courts should ascertain the policies underlying the law and determine whether implied action will further those policies.), *rev'd* 422 U.S. 66 (1975); Potomac Passengers Ass'n v. Chesapeake & O. Ry., 475 F.2d 325, 340 (D.C. Cir. 1973) (same), *rev'd sub nom.* Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers, 414 U.S. 453 (1974) [hereinafter *Amtrak*].

common law analysis to decide whether a federal statute provided a right to contribution.[326]

As the Supreme Court did in *Lincoln Mills*, the courts of appeals at times identified statutory text, legislative history, or a combination of text and history to justify development of federal common law.[327] At times, those courts also read Supreme Court precedent, including *Illinois v. City of Milwaukee*,[328] *Bivens v. Six Unknown Named Agents*,[329] and *Lincoln Mills*[330] as generally authorizing the use of common law analysis to fill the interstices of federal statues.[331] In doing so, the courts ignored the specific constitutional

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[326] The Fifth Circuit Court of Appeals "resolved by reference to federal common law" the issue of whether a defendant had a right to contribution in an anti-trust action and held that no right of contribution existed. Wilson P. Abraham Constr. Corp. v. Tex. Indus., Inc., 604 F.2d 897, 901-06 (5th Cir. 1979), *aff'd sub nom. on other grounds,* Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981). Conversely, at least one federal court resorted to a federal common law analysis and found that Title VII allowed a contribution action. Glus v. G.C. Murphy Co., 629 F.2d 248, 253, 256-57 (3d Cir. 1980), *vacated and remanded sub nom. for further consideration in light of* Northwest Airlines v. Transp. Workers, 451 U.S. 77 (1981), Retail, Wholesale & Dep't Store Union v. G.C. Murphy Co., 451 U.S. 935 (1981). In her dissent in *Glus*, Judge Sloviter argued that Congressional intent should govern whether or not a statute created an implied cause of action and viewed the majority's use of a common law analysis as "overstep[ping] into the legislature's domain." *Glus*, 629 F.2d at 262-68 (Sloviter, J., dissenting). Many other federal courts accepted, without lengthy discussion, that Title VII may provide a right to contribution. *See* cases cited in *Northwest Airlines, Inc. v. Transp. Workers Union*, 451 U.S. 77, 84 n.11 (1981).

[327] *See* Illinois v. Outboard Marine Corp., 619 F.2d 623, 626, 627 n.14, 629-32 (7th Cir. 1980) (contending that policy considerations expressed in *Illinois v. Milwaukee* regarding the legislative history and various provisions of the Clean Water Act supported a finding that federal common law provided State action for nuisance against defendant polluting Lake Michigan); Georgia Power Co. v. 54.20 Acres of Land, 563 F.2d 1178, 1189-91 (5th Cir. 1977) (finding provisions of Federal Power Act, legislative history, and background of its adoption justified use of federal common law rules to determine appropriate compensation in condemnation action by utility company.); EEOC v. MacMillan Bloedel Containers, Inc., 503 F.2d 1086, 1090-93 (6th Cir. 1974).

[328] 406 U.S. 91 (1972).

[329] 403 U.S. 388 (1971). In subsequent decisions, the Supreme Court made clear that *Bivens* could not be read so broadly. Rather, the Supreme Court read *Bivens* to mean that in cases of constitutional violations, the jurisdictional grant of 28 U.S.C. § 1331 gives federal courts "the authority to choose among available judicial remedies in order to vindicate constitutional rights." Bush v. Lucas, 462 U.S. 367, 374 (1983).

[330] 353 U.S. 448 (1957).

[331] *See Glus*, 629 F.2d at 248 (relying on *Illinois v. Milwaukee* and *Lincoln Mills*); *see also Ash*, 496 F.2d at 421 (relying on Supreme Court decisions including *Bivens* and J.I. Case Co. v. Borak, 377 U.S. 426 (1964)). In a dissent to *Ash*, Judge Aldisert criticized the majority for "defying the Supreme Court's recent pronouncement in" *Amtrak*, which he read as flashing "bright warning lights" that lower federal courts should not use excerpts from the *J.I. Case* decision to justify finding "implied civil remedies not expressly authorized by Congress." 496 F.2d at 426-27. Judge Aldisert clearly read *Amtrak* accurately. *See also* Miller v. Apartments and Homes of N.J., Inc., 646 F.2d 101, 107-110 (3d Cir. 1981) (weighing of various policy considerations to determine whether in 42 U.S.C. § 1988 action co-defendants have right to

or statutory bases that the Supreme Court identified to justify development of common law in those cases.[332] The court of appeals' decisions following *EEOC v. MacMillan Bloedel Containers, Inc.*,[333] as well as *United States v. Carolina Transformer Co.*,[334] *United States v. Mexico Seed and Feed Co.*[335] and *Smith Land & Improvement Corp. v. Celotex Corp.*[336] are the product of that milieu. In *MacMillan Bloedel Containers*, the court of appeals decided to develop federal common law identifying legislative history and text in Title VII to justify that action.[337]

Similarly, in *Carolina Transformer* the court of appeals concluded that federal common law should be developed to determine successor liability issues under CERCLA.[338] In doing so, it relied on the prior decision of *United States v. Monsanto*[339] where the court stated it "must consider traditional and evolving principles of federal common law, which Congress has left to the courts to supply interstitially."[340]

The court of appeals in *Mexico Seed and Feed Co.* did not even consider whether it should develop federal common law in order to determine successor liability under CERCLA. The court merely accepted the parties' assumptions that federal law should be applied, but ultimately held that there

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contribution and type of contribution claim available); United States v. Best, 573 F.2d 1095, 1101-03 (9th Cir. 1978) (weighing conflicting policy considerations and determining that under federal common law it was inappropriate to create remedy of federal court's suspension of license of driver convicted of drunken driving on federal facility).

332 In *Glus*, the majority read *Illinois v. Milwaukee* as standing for the general proposition that "there is a federal common law" and *Lincoln Mills* for the proposition that "in some circumstances federal common law causes of action arise from the interstices of congressional actions." *Glus*, 629 F.2d at 253. In her dissent, Judge Sloviter correctly explained how the majority applied the Supreme Court decisions too broadly. *Id.* at 260-65. In *Ash*, the majority never indicated that in *Bivens*, 403 U.S. at 389-92, the Supreme Court held that the Fourth Amendment gave the federal judiciary the power to create a cause of action against federal agents. *Ash*, 496 F.2d at 421.

333 *E.g.*, Brzozowski v. Correctional Physician Serv., 360 F.3d 173, 177 (3d Cir. 2004) (following *EEOC v. MacMillan Bloedel Containers, Inc.*); In re Nat'l Airlines, Inc. 700 F.2d 695, 698 (11th Cir. 1983) (same); Trujillo v. Longhorn Mfg. Co., 694 F.2d 221, 224-25 (10th Cir. 1982) (same); Slack v. Havens, 522 F.2d 1091, 1094-95 (9th Cir. 1975) (same).

334 978 F.2d 832 (4th Cir. 1992).

335 980 F.2d 478 (8th Cir. 1992).

336 851 F.2d 86 (3d Cir. 1988).

337 EEOC v. MacMillan Bloedel Containers, Inc., 503 F.2d 1086, 1089-93 (6th Cir. 1974).

338 United States v. Carolina Transformer Co., 978 F.2d 832, 837-38 (4th Cir. 1992). *See also* Lansford-Coaldale Joint Water Auth. v. Tonolli Corp., 4 F.3d 1209, 1225 (3d Cir. 1993) (concluding that need for uniformity requires use of federal common law to decide when corporate veil should be pierced).

339 858 F.2d 160 (4th Cir. 1988).

340 US v. Monsanto Corp., 858 F.2d 160, 171 n.23 (4th Cir. 1988).

was no basis for finding a defendant to be a successor under the substantial continuity test.[341]

In *Smith Land & Improvement Corp.*, the court of appeals did not have to decide whether state law or federal common law should determine successor liability issues.[342] In fact, the evidence available to the court indicated that the successor liability issues involved statutory consolidations or mergers and thus could be decided without use of the substantial continuity test, which is a creation of the federal courts.[343] Nevertheless, the court cited with approval various authorities that advocated the use of federal common law, and the substantial continuity test, to determine successor liability in CERCLA cases.[344] The court went on to state that in order to determine successor liability in CERCLA cases, a need for "national uniformity" might require the use of "[t]he general doctrine of successor liability in operation in most states . . . rather than the excessively narrow statutes which might apply in only a few states."[345]

F. *The Supreme Court Quashes the Expansive Use of Federal Common Law*

In response to the lower courts' expansive use of federal common law, the Supreme Court took steps in three types of cases to limit development of court-made rules based on policy analysis. First, the Court made legislative intent, as opposed to an analysis of statutory policies, the determinative factor in whether a federal statute creates an implied private cause of action.[346]

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341 *Mex. Seed and Feed Co.*, 980 F.2d at 487 n.9, 489-90.

342 *Smith Land & Improvement Corp*, 851 F.2d at 87-88. On appeal, the issue in *Smith Land & Improvement Corp.* was whether *caveat emptor* could be asserted as defense to CERCLA action. *Id.* However, the Third Circuit Court of Appeals recently treated *Smith Land & Improvement Corp.* as binding precedent and required it to apply federal common law when deciding successor liability under CERCLA. United States v. Gen. Battery Corp., 423 F.3d 294, 301 (3d Cir. 2005).

343 *Smith Land & Improvement Corp.*, 851 F.2d at 91.

344 *Id.* at 91, n.2.

345 *Id.* at 92.

346 *See, e.g.*, Universities Research Ass'n v. Coutu, 450 U.S. 754 (1981), *rev'g*, 595 F.2d 396 (7th Cir. 1979); Transamerica Mortgage Advisers, Inc. v. Lewis, 444 U.S. 11, 14-24 (1979), *rev'g sub nom.*, Lewis v. Transamerica Corp. 575 F.2d 237 (9th Cir. 1978). In *Coutu*, 595 F.2d at 396, the Seventh Circuit relied upon its decision in *McDaniel v. University of Chicago*, 512 F.2d 583, 586-87 (7th Cir. 1975), *reaff'd on remand*, 548 F.2d 689 (7th Cir. 1977), in which the court of appeals implied from the Davis-Bacon Act a cause of action on behalf of wage earners because other state remedies had not been effective to protect their interests. In *Lewis*, the Ninth Circuit relied on decisions of other Courts of Appeal to conclude that the Investment Advisors Act provided an implied private action for damages. *Lewis*, 575 F.2d at 238 (citing Wilson v. First Houston Inv. Corp., 566 F.2d 1235 (5th Cir. 1978) and Abrahamson v. Fleschner, 568 F.2d 862 (2d Cir. 1977)). Those decisions used a multi-factor analysis, including consideration of statutory policies, to find that the Investment Advisers Act provided an implied private action for damages.

Secondly, the Supreme Court decided that legislative intent and a presumption against congressional creation of a right to contribution, and not weighing of policies, should be used to determine whether a federal statute provides to a liable party a contribution action against other alleged violators of the statute.[347] Finally, the Supreme Court began to apply a presumption that Congress intended to use long-existing law, including state law, to fill the interstices of a federal statute where a conflicting congressional intent or specific statutory policy was lacking.[348] The *Bestfoods'* decision falls within the third category of the Supreme Court's efforts to curb the federal courts' development of federal common law.

With these decisions, the Supreme Court reduced the situations in which it was possible to use federal common law analysis. By doing so, the Court sought to reduce separation of powers and federalism concerns by restraining the lower federal courts' development of federal common law.

In *The Scope of Federal Common Law*, Professor Field criticized the Supreme Court's curtailment of federal common law analysis in the cases of *Northwest Airlines* and *Texas Industries*.[349] She suggested that judicial restraint in using common law analysis was enough to curb excesses.[350] However, in *Bestfoods* the Supreme Court continued to curtail the use of common law analysis. Only in *Sosa v. Alvarez-Machain*[351] does the Court plead for judicial restraint rather than adopt a legal rule that would preclude the use of common law analysis. Perhaps concerns other than separation of powers and federalism lead the Supreme Court to disfavor common law analysis.

See Wilson, 566 F.2d at 1238-43; *Abrahamson*,, 568 F.2d at 872-79. *See also* Touche & Ross Co. v. Redington, 442 U.S. 560 (1979), *rev'g*, 592 F.2d 617, 621-23 (2d Cir. 1978) (Second Circuit found that Section 17 of Securities Exchange Act of 1934 provided implied action for damages because Act imposed a duty upon accountants to brokers' customers, and that private action would further the legislative policy of protecting those customers.) *See also* Cort v. Ash, 422 U.S. 66 (1975) *rev'g* 496 F.2d 416, 418-19, 421, 423-24 (3d Cir. 1974) (Third Circuit used common law analysis to determine whether federal statute, prohibiting corporate campaign contributions, provided implied cause of action).

347 Tex. Indus., Inc. v. Radcliff Materials, Inc. 451 U.S. 630, 638-46 (1981). In *Tex. Indus., Inc.*, the Court proclaimed that the Anti-trust statutes' text and legislative history did not authorize courts to create a contribution action in anti-trust matters – that contribution in anti-trust actions is "a matter for Congress, not the courts, to resolve." *Id*. *See also* Northwest Airlines, Inc. v. Transp. Workers Union, 451 U.S. 77, 91-99 (1981) (noting that whether Title VII and Equal Pay Act allowed contribution actions was a question of congressional intent, and not an area where development of federal common law was justified).

348 *See* O'Melveny & Myers v. FDIC, 512 U.S. 79, 85-87 (1994); Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 108-14 (1991); Briscoe v. LaHue, 460 U.S. 325, 335-36 (1983).

349 Field, *supra* note 315, at 883.

350 *Id.* at 888-90 nn.24-29.

351 124 S. Ct. 2739 (2004).

In *Texas Industries*, the Court's discussion of the conflicting policy considerations for and against an implied right of contribution in anti-trust cases suggests institutional concerns that may have prompted the Supreme Court's efforts to curtail the use of common law analysis.[352] Scholars and parties took opposing sides on the issue, each offering reasons why an implied right of contribution would, or would not, further the policies underlying the anti-trust statutes.[353] Ultimately, even the courts of appeals found themselves in opposition on the issue.[354]

By its nature, common law analysis inevitably leads to such disagreements within a court system with twelve regional circuits and in which error by a lower court is not likely to result in the Supreme Court's exercising its discretionary authority to accept a case for review.[355] If common law analysis is used to fill the gaps of federal statutes, a party simply has to identify some policy and then persuade a judge, and on appeal, two or three more judges, that the policy justifies a decisional rule, which is presumably favorable to that party. For an intercircuit conflict to develop subsequently, another party simply has to identify other policy reasons that justify a different rule and convince the judges in one of the other eleven circuits to adopt the different rule or to modify the first court's rule. This is a serious problem in our federal court system where there are twelve intermediate appellate courts, each of whose decisions are the law of its respective circuits until reviewed by the Supreme Court. Depending on the creativity of attorneys and the

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352 *Tex. Indus*, 451 U.S. at 634-38.

353 *Id.* at 631, 635 n.6. At least nine parties filed amicus briefs urging affirmance or reversal. *Id.* at 631. There were four other amicus briefs. *Id.* The Supreme Court cited twelve law review articles discussing the issue of right of contribution in anti-trust actions. *Id.* at 635, n.6. In *Sosa*, 124 S. Ct. 2739 (2004), scholars and others filed nineteen amicus briefs on the merits. *See* Brief of Professors of Federal Jurisdiction and Legal History as Amici Curiae in Support of Respondents, Sosa v. Alvarez-Machain, 2004 Westlaw 419425 (Feb. 27, 2004) (Nos. 03-339, 03-485). *See also* Appellate Brief for Respondent, Sosa v. Alvarez-Machain, 124 S. Ct. 2739 (2004), 2004 Westlaw 419421-29; Brief of Amici Curiae International Jurist in Support of Affirmance, Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2004 Westlaw 398960-64; Brief for the National Association of Manufacturers as Amici Curiae in Support of Reversal, Sosa v. Alvarez-Machain 124 S. Ct. 2739, 2004 Westlaw 199236; Brief Amicus Curiae of Pacific Legal Foundation in Support of Petitioner, Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2004 Westlaw 177035-36; Brief of Washington Legal Foundation, National Fraternal Order of Police, and Allied Educational Foundation as Amici Curiae in Support of Petitioner, Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2004 Westlaw 162759-61.

354 *Tex. Indus*. 451 U.S. at 632, n.1.

355 *See* Sup. Ct. R. 10 & 10(a,c) (Supreme Court will grant a petition for a writ of certiorari "only for compelling reasons" including, *inter alia*, when a "United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter," but a petition "is rarely granted when the asserted error consists of... misapplication of a properly stated rule of law.")

predilections of judges, a party may be subject in the twelve circuits to two or more different decisional rules, each derived through common law analysis.

Unfortunately, this is more than a simple hypothetical concern to be discussed in a scholarly atmosphere. In the matters reviewed in *Kimbell Foods*, two U.S. District Courts, and different panels of the Fifth Circuit Court of Appeals, used at least three different federal common law rules to determine the priority of security interests of the FHA and SBA versus private parties' interests. In fact, the Fifth Circuit identified, but rejected, two other common law rules.[356]

There currently exists an intercircuit conflict involving Title VII claims. The courts of appeal have developed three different decisional rules using common law analysis, and the Seventh Circuit Court of Appeals has declined to use such an analysis in light of *Bestfoods*. As such, there is in fact a four-way intercircuit conflict.

The current intercircuit conflict involves the decisional rule to determine when related corporations should be treated as one employer for the purposes of Title VII and other federal anti-discrimination statutes. That issue is decisive in cases because if a corporation is an employer and has less than the prerequisite number of employees, then it is not subject to an enforcement proceeding or a private suit by an employee under the statutes.

The majority of circuit courts have applied or adopted the "four-factor integrated enterprise test" to determine when related corporations should be treated as one employer for the purposes of Title VII or other federal anti-discrimination statutes.[357] Many of those courts borrowed the integrated enterprise test, developed for use in NLRB proceedings, without considering how the test would further Title VII policies or accepted parties' assumption that the test applied.[358]

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[356] In the case involving the SBA's security interest, the Texas District Court applied the federal choate lien test and state law alternatively, and on appeal the Fifth Circuit selected a federal common law rule, based on the U.C.C. principle of first-in-time, first-in-right, after surveying three possible rules. United States v. Kimbell Foods, Inc., 440 U.S. 715, 721-23 (1979). In the case involving the FHA, the Georgia District Court identified various grounds under state and federal law for finding that the FHA's security interest was not superior, and the Fifth Circuit developed federal common law based on the Model U.C.C. and the Tax Lien Act of 1966. *Id.* at 724-25.

[357] *See e.g.*, Romano v. U-Haul Int'l, 233 F.3d 655, 664-66 (1st Cir. 2000) (supporting Title VII treatment); Cook v. Arrowsmith Shelburne, Inc. 69 F.3d 1235, 1240 (2d Cir. 1995) (same); Hukill v. Auto Care, Inc., 192 F.3d 437, 442 (4th Cir. 1999) (supporting treatment under Family and Medical Leave Act); Childs v. Local 18, IBEW, 719 F.2d 1379, 1382 (9th Cir. 1983) (supporting Title VII treatment); McKenzie v. Davenport-Harris Funeral Home, 834 F.2d 930, 933 n.3 (11th Cir. 1987) (same); Trevino v. Celanese Corp., 701 F.2d 397, 403-04 (1983) (same).

[358] *See, e.g.*, Knowlton v. Teltrust Phones, Inc., 189 F.3d 1177, 1184 (10th Cir. 1999) (accepting parties' argument that test applied); *Arrowsmith Shelburne*, 69 F.3d at 1241-42 (following other Circuit

The four prongs of the integrated enterprise test are: (1) interrelation of operations, (2) centralized control of labor relations, (3) common management, and (4) common ownership or financial control.[359] Among the courts of appeal that have used the test, there is a conflict over what constitutes sufficient control over labor operations to justify a finding that related corporations are one employer. The Fifth and Tenth Circuit Courts have held that "'a parent's broad general policy statements regarding employment matters are not enough'" and that "'to satisfy the control prong, a parent must control the day-to-day employment decisions of the subsidiary.'"[360] According to those circuit courts, this "stringent requirement of inter-relatedness is based on the corporate law principle of limited liability."[361]

Conversely, the First, Second, and Sixth Circuit Courts of Appeals have taken a more flexible approach that focuses on employment decisions. To each of those circuit courts, the ultimate question is whether a parent corporation "exerts [over those decisions] 'an amount of participation that is sufficient and necessary to the total employment process, even absent total control or ultimate authority over hiring decisions.'"[362] Under this approach, there is sufficient evidence to hold a parent corporation liable under Title VII if the parent corporation's management influenced a subsidiary's decisions to dismiss a new employee because of her sex and there was other evidence of inter-relatedness between the affiliates.[363]

Courts); *McKenzie*, 834 F.2d at 932-34 (following other courts); *Trevino*, 701 F.2d at 403-405 (finding it appropriate to adopt NLRB enterprise test because of courts' use of that rule and other NLRB rules in Title VII cases); Mas Marques v. Digital Equip. Corp., 637 F.2d 24, 26-27 (1st Cir. 1980) (acknowledging that the enterprise test is the rule that is most consistent with liberal treatment of the definition of employer under Title VII).

[359] *E.g.* Swallows v. Barnes & Noble Bookstores, Inc., 128 F.3d 990, 993-94 (6th Cir. 1997); *McKenzie*, 834 F.2d at 933; *Trevino*, 701 F.2d at 404.

[360] *Romano*, 233 F.3d at 666 (discussing different views of Courts of Appeal on breadth to give integrated enterprise test in Title VII case), *quoting* Lockard v. Pizza Hut, Inc., 162 F.3d 1062, 1070 (10th Cir. 1998); Lusk v. Foxmeyer Health Corp., 129 F.3d 773, 777 (5th Cir. 1997).

[361] *Romano*, 233 F.3d at 666 (citing *Lusk*, 129 F.3d at 777 n.3, 778). *See also* Frank v. U.S. West, Inc., 3 F.3d 1357, 1362 (10th Cir. 1993).

[362] *E.g. Romano*, 233 F.3d at 666 (following *Arrowsmith Shelburne*, 69 F.3d at 1240-41); Armbruster v. Quinn, 711 F.2d 1332, 1338 (6th Cir. 1983).

[363] *Romano*, 233 F.3d at 660-61, 667-68. In *Arrowsmith Shelburne.*, 69 F.3d at 1237-38, the court held that treatment of parent and subsidiary as one employer may be appropriate when there was evidence that parent's general manager made discriminatory statements about women employees and he targeted plaintiff, subsidiary's female employee, for dismissal. In *Arrowsmith Shelburne*, evidence of interrelatedness included that employment applications went through parent, parent approved personnel status reports of subsidiary, subsidiary cleared with parent major personnel decisions, plaintiff was hired at direction of parent's vice president for human resources and fired at direction of parent's general manager, and the affiliates had common management and common offices. *Arrowsmith Shelburne*, 69 F.3d at 1241.

In *Nesbit v. Gears Unlimited, Inc.*,[364] the Third Circuit declined to adopt either the integrated enterprise test or the *Bestfoods* analysis to decide whether affiliated corporations should be treated as a single employer under Title VII.[365] Instead, that court considered "Title VII's policy goals" and determined that affiliated corporations should be treated as one employer when: (i) the corporations were split into separate organizations to avoid Title VII coverage, (ii) the parent directed the subsidiary to perform alleged discriminatory action, or (iii) under the bankruptcy concept of substantive consolidation, the affiliates should be treated as one entity. [366] The court acknowledged that in adopting a modified substantive consolidation rule for Title VII cases, it was creating "an intentionally, open-ended, equitable inquiry . . . of federal common law." [367]

Similarly, federal courts have identified state law, the integrated enterprise test, and the federal Labor Department's "DOL factors test" as three possible sources for resolving issues relating to piercing the corporate veil under the Worker Adjustment Retraining Notification ("WARN") Act.[368] To pick the appropriate test, the Third Circuit Court of Appeals resorted to common law analysis, selecting the "DOL factors test" because it was "created with WARN Act policies in mind."[369]

Before *Northwest Airlines v. Transport Workers Union*, a different institutional issue appears to have occurred as a result of the federal courts' methods for addressing contribution and indemnity claims against unions in Title VII cases. Those claims were asserted in Title VII litigation as a result of collective bargaining agreement provisions, which allegedly discriminated against either men or women.[370] In all of those cases, individual employees

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364 347 F.3d 72 (3rd Cir. 2003).

365 *Nesbit*, 347 F. 3d at 84-86 (rejecting both the use of the integrated enterprise test and the utilization of *Bestfoods* analysis).

366 *Id.* at 85-87. *See also* cases cited *supra* note 314.

367 *Id.* at 87.

368 *See* Pearson v. Component Tech. Corp., 247 F.3d 471, 484-89 (3d Cir. 2001).

369 *Id.* at 490.

370 Stevenson v. Int'l Paper Co., 432 F. Supp. 390, 392-94 (W.D. La. 1977) (considering claims of gender discrimination with union co-defendant); Int'l Union of Elect., Radio and Mach. Workers v. Westinghouse Elect. Corp., 73 F.R.D. 57, 58-59 (W.D.N.Y. 1976) (considering gender discrimination claims by union plaintiff); Grogg v. Gen. Motors Corp., 72 F.R.D. 523, 526-28 (S.D.N.Y. 1976) (considering gender discrimination claims by union plaintiff); Lynch v. Sperry Rand Corp., 62 F.R.D. 78, 80-81 (S.D.N.Y. 1973) (considering gender discrimination claim by male employees and union plaintiff); Gilbert v. Gen. Elect. Co., 59 F.R.D. 267, 269-71 (E.D. Va. 1973) (considering gender discrimination claims by union plaintiff); Torockio v. Chamberlain Mfg. Co., 51 F.R.D. 517, 518-19 (W.D. Pa. 1970) (considering gender discrimination claim with union defendant); Blanton v. S. Bell Tel. & Tel. Co., 49 F.R.D. 162, 163-64 (N.D. Ga. 1970) (considering gender discrimination claims by union plaintiff); Bowe v. Colgate-Palmolive Co., 272 F. Supp. 332, 335-36 (S.D. Ind. 1967) (considering gender discrimination

and unions were co-plaintiffs against an employer, the union and employer were co-defendants, or the union was a third-party defendant.[371] Numerous U.S. District Courts dealt with the contribution claims by summarily accepting that they were allowed or by considering their resolution a question of fact.[372]

By not addressing at an early stage whether the claims were allowed under Title VII, those district courts made resolutions of the cases more complicated in two ways. In cases in which a union was only a plaintiff, the claims added an additional issue that potentially had to be resolved by a trial between the employer and union. In cases in which a union was a co-defendant, the claims potentially required the union's participation in litigation until the employer and union resolved all claims against them, rather than allowing the union's dismissal after it reached a settlement with members of a collective bargaining unit. In both situations, the lower courts' means of dealing with the claims had a potential for increasing workload.

In *Northwest Airlines*, the Supreme Court's rule addressed this institutional issue by putting on the party asserting a contribution or indemnity claim the burden of establishing, via statutory text and legislative history, congressional intent, a question of law. The rule made it more likely that federal courts may resolve the issue at an early stage as the result of a motion to dismiss or for summary judgment, and more likely that federal appellate courts will have an opportunity to review that resolution.

There may be societal and institutional concerns unrelated to the operation of the federal courts that lead the Supreme Court to focus upon congressional intent. By limiting judicial discretion to develop common law rules, the Supreme Court not only addresses separation of power and federalism concerns, but also articulates a decisional rule that promotes predictability of the use of federal common law. After *Clearfield Trust* and *Lincoln Mills*, Judge Friendly was enthusiastic about the potential of federal common law, but he nevertheless expressed concern that in *Clearfield Trust* the Supreme Court "jumped [over] rather quickly and not altogether convincingly, [the issue of] whether, having [an] opportunity, the federal courts should adopt a uniform nationwide rule."[373] Other enthusiastic

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claims with union defendant), *aff'd in part and rev'd in part*, 416 F.2d 711 (7th Cir. 1969). In *Northwest Airlines, Inc. v. Transp. Workers Union*, 451 U.S. 77, 84 n.11 (1981), the Supreme Court identified these and other lower federal court decisions as supporting the conclusion that as to an award of back pay Title VII provided an employer with a right of contribution against a union.

371 *See* cases cited *supra* note 328.

372 *See, e.g., Stevenson*, 432 F. Supp at 407-09; *Int'l Union*, 73 F.R.D. at 59, *Grogg*, 72 F.R.D. at 528; *Lynch*, 62 F.R.D. at 89-90; *Gilbert*, 59 F.R.D. at 270-71; *Torockio*, 51 F.R.D. at 519; *Blanton*, 49 F.R.D. at 164; *Bowe*, 272 F. Supp. at 357-58.

373 Friendly, *supra* note 74, at 183.

commentators recognized that the two-step decisional rule of *Clearfield Trust* potentially gave judges the ability to adopt a uniform federal rule whenever they believed it to be appropriate.[374] Other commentators have noted that it is generally difficult to predict when federal courts will decide to develop uniform rules of federal common law:

> There are no bright lines delineating the matter on which federal courts have the power to develop and apply federal common law, and distinguishing these subjects from those on which Erie requires that state law be applied. Whether state law or federal law controls on matters not covered by the Constitution or an Act of Congress is a very complicated question, one that does not yield to any simple answer in terms of the parties to the suit, the basis of subject-matter jurisdiction, or the source of the right that is to be enforced.
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> . . . To some extent, each exercise of federal common lawmaking is sui generis in that it is the product of the unique interplay of specific statutory or constitutional language, case-sensitive policy concerns, and other case-specific factors.[375]

Predictability is perhaps the most important societal aspect of our legal system because it allows for parties to accurately determine their rights in, and the legal consequences of, a myriad of circumstances.[376] Additionally, predictability may help to assure public confidence in the judiciary, which provides the federal courts with the persuasive authority on which they depend for enforcement of their decisions. Therefore, to the extent that the Supreme Court in *Bestfoods* and other cases articulates rules that promote predictability, the rules further this societal and institutional interest.

While institutional concerns may be at work in *Bestfoods*, *Texas Industries* and *Northwest Airlines*, nothing suggests that they were predominant in effecting the Supreme Court's decisions. By their nature, unstated institutional concerns must have limited effect because the Supreme Court,

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374 Field, *supra* note 315, at 887, 944.

375 19 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4514 (1996).

376 *See, e.g.*, United States v. Thornton, 541 U.S. 615, 622-24 (2004). In this 2003 Term decision, the Supreme Court held that a police officer may undertake the warrantless search of an automobile recently occupied by a criminal suspect who is arrested although first contact between the officer and suspect occurred after the suspect exited the vehicle. *Id.* at 622-24. The Court justified its decision in part because it sought to articulate "a bright-line rule" that police could apply easily in a situation where there safety is at risk. *Id.* In a dissent, Justice Stevens complained that the majority opinion did not articulate a "bright-line rule" that allowed police to determine the extent of their search authority in a recurring situation. *Id.* at 636 (Stevens, J., joined by Souter, J., dissenting).

lower federal courts, and parties cannot invoke them as justification for their respective decisions and arguments. Certainly, separation of power and federalism concerns are enough to support the *Bestfoods* presumption of the use of state law because it designates Congress as the primary decision-maker on whether federal statutes should override state law. Likewise, separation of power concerns are sufficient to justify the rule of *Northwest Airlines* and *Texas Industries*. By maintaining a long-standing presumption that federal statutes do not provide a right of contribution, the rule assigns to Congress, rather than to the federal courts, the decision of whether to create a statutory right to contribution.

At the time of the decisions in *Northwest Airlines* and *Texas Industries*, the states' legislatures had been working diligently to develop the law of contribution within their respective jurisdictions. In at least one instance Congress stepped in and explicitly provided specifically for a uniform right of contribution.[377] Therefore, creation of a right to contribution under individual statutes or via a general contribution statute, was arguably a question that should be left to Congress because it was aware of the issue and could act upon it.[378]

Similarly, in the Supreme Court decisions involving the issue of federal statutes providing implied private actions, lower courts were very willing to find the existence of a private right of action,[379] and as to federal securities

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[377] *See* Nw. Airlines, Inc. v. Transp. Workers, 451 U.S. 77, 87-88, n.17 (1981) (identifying 30 states that created right of contribution by statute and four states where legislatures adopted contribution statutes after judiciary recognized right of contribution). The National Conference of Commissioners on Uniform State Laws originally promulgated the Uniform Contribution Among Tortfeasors Act ("UCTFA") in 1939, and at least eight states subsequently adopted legislation conforming substantially to the 1939 version of the Uniform Act. 12 U.L.A. 187-88 (1996). At least eleven states adopted the revised UCTFA promulgated in 1955, and nine of those states did so by 1978. 12 U.L.A. at 185. *See also* Clean Water Act, Section 311(g-h), 33 U.S.C. § 1321 (g-h), *added by* Public Law 92-500, 86 Stat. 862 (Oct. 18, 1972) (providing right of contribution).

[378] Congress has not ignored the presumption, or the presumption is consistent with congressional practice before *Northwest Airlines* and *Texas Industries*. In legislation enacted subsequent to the decisions in *Northwest Airlines* and *Texas Industries*, Congress has provided for a right to contribution and clarified whether it intended to create a right to contribution as part of a statutory scheme. *See* Securities and Exchange Act, Section 4f, 15 U.S.C. 78u-4(f)(5-9), *added by* Public Law 105-353, 112 Stat. 3233 (Nov. 3, 1998) *and* Public Law 104-67, 109 Stat. 743 (Dec. 22, 1995); Oil Pollution Act of 1990, Section 1009, 33 U.S.C. § 2709; CERCLA Section 113(f), 42 U.S.C. § 9613(f), *added by* Superfund Amendments and Reauthorization Act of 1986, Public Law 99-499, 100 Stat. 1613 (Oct. 17, 1986). In at least one instance before the 1980 Term, Congress indicated an intent to create a right of contribution. *See* Clean Water Act, Section 311(g-h), 33 U.S.C. § 1321 (g-h), *added by* Public Law 92-500, 86 Stat. 862 (Oct. 18, 1972).

[379] *See, e.g.*, Illinois v. Outboard Marine Corp., 619 F.2d 623, 626, 627 n.14, 629-32 (7th Cir. 1980); Ash v. Cort, 496 F.2d 416, 420-21 (3d Cir. 1974), *rev'd* 422 U.S. 66 (1975); Potomac Passengers Ass'n v. Chesapeake & O. Ry., 475 F.2d 325, 340 (D.C. Cir. 1973), *rev'd sub nom.* Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers, 414 U.S. 453 (1974). *See also* Ash v. Cort, 496 F.2d at 426-27

statutes at least one court of appeals was willing to presume the existence of an implied action absent congressional intent to the contrary.[380] Such a willingness created separation of powers concerns because the lower courts, and not Congress, had made themselves the decision-makers concerning what federal statutes should provide private causes of action.

Only in *Sosa* are institutional concerns stated, at least by Justice Scalia, with whom the late Chief Justice Rehnquist and Justice Thomas join. Their concurrence makes it clear that they do not trust the lower courts to exercise judicial restraint in developing federal common law based upon the law of nations.[381] The interaction of the Supreme Court and courts of appeal, which culminated in decisions including *Universities Research Association v. Coutu*,[382] *Transamerica Mortgage Advisers, Inc. v. Lewis*,[383] *Touche Ross & Co. v. Redington*,[384] *Cannon v. University of Chicago*,[385] *Northwest Airlines*, and *Texas Industries* may explain why the minority explicitly raises institutional concerns. Before *Touche Ross & Co.* and *Cannon*, the Supreme Court used a multi-pronged test and common law weighing of policies to determine whether a federal statute provided an implied private cause of action, but the Court urged lower federal courts to exercise judicial restraint in finding implied actions.[386] The lower federal courts did not heed that admonition.[387] In response, the Court in *Touche Ross & Co.* and *Cannon* eliminated the lower federal courts' discretion by making congressional intent the key issue that determines whether a statute provides an implied private right of action.[388] In *Northwest Airlines* and *Texas Industries*, two cases on which Justice Scalia relied in *Sosa*, the Court extended *Touche Ross & Co.* and *Cannon* and held that congressional intent, and not a weighing of policies, should determine

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(Aldisert, J., dissenting) (criticizing court of appeals majority for not following Supreme Court's decision in *Amtrak*).

380 In connection with finding that the Investment Advisors Act provided an implied private action for damages, the Second Circuit Court of Appeals in *Abrahamson v. Fleschner* stated that it would find the Act provided an implied action "absent clear evidence . . . that private actions were not intended" by Congress. Abrahamson v. Fleschner, 568 F.2d 862, 874 (2d Cir. 1977). The Court found that the Act provided an implied private action even though from the legislative history it was "clear that Congress simply did not consider the matter." *Id.* at 875.

381 Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2774-76 (2004) (Scalia, J., concurring).

382 450 U.S. 754 (1981).

383 444 U.S. 11, 14-24 (1979).

384 442 U.S. 560 (1979).

385 441 U.S. 677 (1979).

386 *See e.g.*, Cort v. Ash, 422 U.S. 66 (1975); Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers, 414 U.S. 453 (1974).

387 *See supra* notes 323-334 and accompanying text.

388 *See supra* note 348 and accompanying text.

whether a federal statute provides an implied right to contribution.[389] In light of *Touche Ross & Co.*, *Cannon*, *Northwest Airlines* and *Texas Industries*, it is apparent that Justice Scalia, Chief Justice Rehnquist and Justice Thomas view the *Sosa* majority's invocation of judicial restraint as an effort that failed in the past and is not likely to succeed now.

By invoking institutional concerns, the minority also puts the lower courts on notice that the future of *Sosa* depends on their actions. Three justices do not trust the lower federal courts to exercise judicial restraint in developing federal common law pursuant to *Sosa*. If the federal courts do not restrain themselves, there is a serious threat that other justices will join the trio and abandon the *Sosa* experiment just as the Court discarded the multi-prong test of *Cort v. Ash*.[390]

1. THE FUTURE OF *CAROLINA TRANSFORMER, MEXICO FEED AND SEED, SMITH LAND* AND *GENERAL BATTERY*

The Supreme Court in *Bestfoods* established that when determining corporate liability under CERCLA, a presumption of congressional intent should be applied absent evidence to the contrary.[391] The presumption is that Congress intended reference to state law to decide issues such as piercing the corporate veil and successor liability.[392] It is generally accepted that Congress authorized federal courts to develop federal common law for determining joint and several liability under CERCLA.[393] However, it does not follow as a matter of logic, statutory interpretation, or legislative history that Congress gave the federal judiciary general authorization to develop federal common law that fills all of the interstices of CERCLA. The text of CERCLA supports a contrary conclusion because amendments to the Act specifically state when the federal judiciary was to develop federal law relating to

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389 *See* Nw. Airlines, Inc. v. Transp. Workers, 451 U.S. 77 (1981); Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981).

390 422 U.S. 66 (1975).

391 United States v. Bestfoods, 524 U.S. 51, 62-63 (1998).

392 *Id.*

393 United States v. Monsanto, 858 F.2d 160, 171 & n.23 (4th Cir. 1988). *But see* Anspec Co. v. Johnson Controls, Inc., 922 F.2d 1240, 1250 n.7 (6th Cir. 1991) (Kennedy, J., concurring) (noting that legislative history indicates congressional intent that federal courts should apply existing state law of joint and several liability).

CERCLA,[394] and in other instances, the Act provides that state law should govern issues.[395]

Additionally, the First Circuit in *United States v. Davis*, and the Ninth Circuit in *Atchison, Topeka & Santa Fe Railway v. Brown & Bryant, Inc.*, which respectively follow the Supreme Court's decisions in *Bestfoods* and *Atherton*, may foreclose the conclusion that statutory text, legislative history, or specific policies of CERCLA justify displacement of state law with federal law. To the contrary, the courts of appeal do not find in CERCLA any statutory text, legislative history, or specific policies that require such displacement.[396] Therefore, the presumptive use of state law should apply when deciding successor liability in CERCLA cases.

The *Bestfoods* decision requires the identification of statutory text, legislative history, or specific statutory policy to overcome the presumption that state law should be used to fill the interstices of federal statutes addressing issues such as corporate liability. To date, no court has identified any such text, history, or specific policy in CERCLA. Therefore, state law should be used to determine corporate liability issues, including successor liability, in CERCLA matters. Because *Carolina Transformer Co.*, *Mexico Feed and Seed Co.*, and *Smith Land & Improvement* did not use the *Bestfoods* approach and concluded summarily that federal common law should decide such issues, the decisions cannot remain good law. Their viability is especially questionable to the extent that they rely on a need for uniformity as a rationale for development of federal common law because the Supreme Court in *O'Melveny & Myers v. FDIC* unanimously warned lower federal courts against use of "uniformity" to justify use of federal common law.[397]

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[394] In CERCLA Section 113(f)(1), 42 U.S.C. § 9613(f)(1), Congress stated specifically, as to contribution actions brought during or after actions pursuant to Sections 106 or 107(a), 42 U.S.C. §§ 9606, 9607(a), that the "claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law." 42 U.S.C. § 9613(f)(1), *added by* Superfund Amendments and Reauthorization Act of 1986, Public Law 99-499, 100 Stat. 1613 (Oct. 17, 1986).

[395] CERCLA Section 107(e), 42 U.S.C. § 9607(e), provides that the statute does not displace conveyances or indemnification and hold harmless agreements that assign liability under CERCLA, or subrogation rights existing under state law, except that the agreements cannot extinguish a person's liability under CERCLA.

[396] *See* United States v. Davis, 261 F.3d 1, 54 (1st Cir. 2001) (claiming *Bestfoods* confirmed the court of appeals' view that state law should govern successor liability in CERCLA cases.); Atchison, Topeka & Santa Fe Ry. Co. v. Brown & Bryant, Inc., 132 F.3d 1295, 1298-1301 (9th Cir. 1997) (holding that in light of Atherton v. FDIC, 519 U.S. 213 (1997) state law, and not distinct federal common law, should decide successor liability under CERCLA (overruling La.-Pac. Corp. v. Asarco, 909 F.2d 1260 (1990)). *But see* New York v. Nat'l Serv. Indus., Inc., 352 F.3d 682, 685-87 (2d Cir. 2003) (Walker, C.J.) (In light of *Bestfoods*, *B.F. Goodrich v. Betkoski* is overruled, but federal common law, not state law, governs scope of successor liability under CERCLA).

[397] In *O'Melveny & Myers v. FDIC*, 512 U.S. 79 (1994), the Supreme Court described "uniformity"

Other federal court decisions, which decide summarily that uniformity requires use of federal common law in CERCLA matters, also cannot remain good law.[398]

The majority in *United States v. General Battery Corp.*[399] defends *Smith Land & Improvement* despite the decisions of *Bestfoods* and *O'Melveny & Myers*. According to the majority, the Supreme Court decisions are not contrary to the Third Circuit's statement in *Smith Land & Improvement* that a need for uniformity justifies the development of federal common law to decide successor liability under CERCLA.[400] In doing so, the majority maintained that the states' law of successor liability is "unsettled," and there are significant differences in the rules of successor liability from state to state.[401]

According to the Third Circuit majority, "[s]tate law does vary substantially on the issue of successor liability, and its unpredictability counsels in favor of CERCLA uniformity."[402] Additionally, in the *General Battery* majority's view, "[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."[403] At one point, the majority states that variable state successor liability standards would conflict with the CERCLA policies of encouraging early settlements and facilitating a liquid market in brownfields by "increas[ing] significantly CERCLA litigation and transaction costs."[404]

The *General Battery* majority did not consider whether there was a "conflict" between the Pennsylvania law of successor liability and specific policies of CERCLA.[405] Rather, it found a conflict "because CERCLA's goal

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as the "most generic (and lightly invoked) of alleged federal interests." *Id.* at 88. The Court went on to state that uniformity justifies development of federal common law only when the "rules of decision at issue . . . govern the primary conduct of the United States, or any of its agents or contractors." *Id.* Furthermore, the Court stated as to rules that affected FDIC's ability to recover in litigation because of private entities' past actions: "Uniformity of law might facilitate the FDIC's nationwide litigation . . . eliminating state-by-state research and reducing uncertainty – but if the avoidance of those ordinary consequences qualified as an identifiable federal interest, we would be awash in 'federal common-law' rules." *Id.*

398 *See, e.g.*, Lansford-Coaldale Joint Water Auth. v. Tonolli Corp., 4 F.3d 1209, 1225 (3d Cir. 1993).

399 423 F.3d 294, 299-301 (3d Cir. 2005) (discussing *Bestfoods* and *O'Melveny & Myers*).

400 *Id.*

401 *Id.* at 301-03.

402 *Id.* at 301-02.

403 *Id.* at 302-03 (emphasis added).

404 *Id.* at 303.

405 *Id.*

of minimizing litigation and transaction costs is ill-served by a case-by-case approach to the question of successor liability choice-of-law."[406]

The Supreme Court's decisions, including *O'Melveny & Meyers* and *Atherton,* cannot be disregarded so easily. As Judge Rendell puts it in her minority opinion,

> To say that the need for uniformity is the articulated federal policy supplying the rationale for creating federal common law is to put the analytic rabbit in the hat, so to speak. If uniform application is indeed the goal, resort would never be had to state law assuming some variation as among the different laws. Uniformity cannot be, and has never been said to be, the single animating principle. . . . [I]t is [not] a . . . goal . . . that has served as the basis on which the Supreme Court, or any other court of appeals to have addressed the issue, has rejected the application of state law. Rather, as discussed above and made clear in *O'Melveny* and *Atherton*, those courts that have considered rejecting the application of a particular state law in favor of a federal scheme have done so only when the state law in question clearly conflicted with an important federal policy to be advanced. . . .
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> The *Kimbell Foods* test details three considerations relevant to the determination of whether federal common law or state law should provide the rule of decision: 1) whether the nature of the federal program requires national uniformity; 2) whether the application of state law would frustrate specific objectives of the federal program; and 3) whether the application of federal law would disrupt commercial relationships predicated on state law.
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> . . . [I]t is the second factor of the *Kimbell Foods* test which should receive paramount consideration. The Supreme Court in *O'Melveny* and *Atherton* cite to the *Kimbell Foods* test in direct support of the precept that "when courts decide to fashion rules of federal common law, 'the guiding principle is that a significant conflict between some federal policy or interest and the use of state law . . . must first be specifically shown.' Indeed, such a 'conflict' is normally a 'precondition.'[407]

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[406] *Id.*

[407] *Id.* at 317 n.18 (citations omitted) (Rendell, J., concurring in result and dissenting in part) (citing Atherton v. FDIC, 519 U.S. 213, 218 (1997).

In *General Battery*, a majority of the Third Circuit panel states an alternative rationale for holding that uniform federal common law rules should decide successor liability under CERCLA. They suggest that the determination of a corporation's successors constitutes statutory interpretation, and under recent Supreme Court precedent, generally accepted common law rules should be applied to decide the scope of a statutory term.[408] This alternative rationale is based on the premise that by adopting 1 U.S.C. Section 5[409] in 1947, Congress intended the terms "corporation," "company," and "association," to include "successors" and that "successors" becomes an undefined term of statutes that use those three terms.

This rationale is problematic. First, successor liability is normally treated as an issue of common law, not as an issue of interpreting the term "corporation." Despite 1 U.S.C. § 5, federal courts have uniformly treated successor liability under federal statutes as an issue of common law.[410] Further, nothing in the language of 1 U.S.C. § 5 indicates a congressional intent to make "successor" an undefined term of other statutes with the terms "corporation," "company," or "association," and there is no reason to give a statute enacted as an interpretative rule such an effect. Third, the rationale involves a significant extension of the rule in *Clackamas Gastroenterology Associates v. Wells*,[411] and *Burlington Industries, Inc. v. Ellerth*,[412] without any argument or authority that the Supreme Court would approve the rule's application in the successor liability context. Finally, and perhaps most importantly, when the Third Circuit relied upon *Clackamas Gastroenterology* and *Burlington Industries* in *General Battery*, it ignored the fundamental distinction between *Bestfoods* and *Burlington Industries* and *Clackamas Gastroenterology*. In the cases of *Clackamas Gastroenterology* and *Burlington Industries*, there existed an explicit statutory term without a definition and an explicit term with a circular and meaningless definition,

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[408] *Id.* at 304-05 (citing Clackamas Gastroenterology Assocs. v. Wells, 538 U.S. 440, 448 (2003) and Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 754-55 (1998)).

[409] The provision states that "'company' or 'association', when used in reference to a corporation, shall be deemed to embrace the words 'successors and assigns of such company or association.'" 1 U.S.C. § 5 (2000).

[410] *See, e.g.*, Brzozowski v. Correctional Physician Serv., 360 F.3d 173, 177-79 (3d Cir. 2004) (discussing cases); United States v. Davis, 261 F.3d 1, 52-55 (1st Cir. 2001) (discussing successor liability under CERCLA); Atchison, T. & Santa Fe Ry. Co. v. Brown & Bryant, Inc., 132 F.3d 1295, 1298-99 (9th Cir. 1997) (successor liability under CERCLA); EEOC v. MacMillan Bloedel Containers, Inc. 503 F.2d 1086, 1089-92 (6th Cir. 1974) (discussing successor liability under Title VII). In her concurring opinion in *General Battery*, Judge Rendell criticized this alternative rationale, as well as the majority's adoption of the alternative rationale, which was not addressed by the parties. *Gen. Battery Corp.*, 423 F.3d at 311, n.14.

[411] 538 U.S. 440 (2003).

[412] 524 U.S. 742 (1998).

respectively.[413] By adopting the rule that such statutory terms should be interpreted using general common law principles, the Supreme Court provides a rule of interpretation that avoids separation of power issues because the judiciary is not performing the legislative role of defining a term in light of statutory policies or purposes.[414] Additionally, the rule puts Congress on notice that if it intends a statutory term with a generally accepted legal meaning to have a different meaning, the legislature must supply a definition.

The situation in *Bestfoods* is quite different. CERCLA does not attempt to define the term "successor," and the statute and legislative history provide no clear indication as to how Congress intended the judiciary to decide issues such as parent-subsidiary liability and successor liability.[415] That situation involves separation of powers issues because the judiciary must provide a rule of law to fill a statutory gap without additional guidance from Congress. It also involves federalism concerns because the federal judiciary must provide law in an area where the states have traditionally enjoyed sovereignty. The Supreme Court in *Bestfoods* decided that the federalism concerns require the federal judiciary to defer in most instances to a state's law. Additionally, the Supreme Court decided that the separation of powers concerns require the federal judiciary to defer in most cases to Congress by not making policy decisions best left to the representative branch of government.

In *General Battery*, the resolution of the corporate successor issue involved federalism concerns rather than simply presenting a separation of powers issue. Therefore, the Supreme Court's rationale in *Bestfoods*, not that of *Clackamas Gastroenterology* and *Burlington Industries*, is the most applicable in *General Battery*. The Third Circuit appears to recognize the problems with the application of the *Clackamas Gastroenterology* and *Burlington Industries* rationales, but the panel attempts to minimize the problems by reading *Bestfoods* as applying general rules of corporate law rather than using a specific state's law.[416] In her concurring opinion, Judge Rendell points out that this reading of *Bestfoods* clearly cannot be reconciled with the *Bestfoods* Court's

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[413] *See Clackamas Gastroenterology*, 538 U.S. at 444-46 (determining meaning of undefined term "agent", part of the statutory definition of "employer"); *Burlington Indus., Inc.*, 524 U.S. at 754-55 (determining meaning of term "employee", defined as "an individual employed by an employer").

[414] *See Clackamas Gastroenterology*, 538 U.S. at 446-47 (rejecting the Ninth Circuit Court of Appeals approach, which read the definition of "employee" broadly to fulfill Americans with Disabilities Act's purpose of "ridding the Nation of the evil of discrimination." *See also* discussion of *EEOC v. MacMillan Bloedel Containers, Inc.* and *Clackamas Gastroenterology*, *infra*, at notes 433-41 and accompanying text.

[415] Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 (2000) (definitions). *See also* discussion of CERCLA's provisions and legislative history *supra* notes 393-97 and accompanying text.

[416] United States v. General Battery Corp. Inc., 423 F.3d. 294, 305 (3d Cir. 2005).

affirming the court of appeals application of Michigan law and the Supreme Court's admonition that "CERCLA is thus like many another congressional enactment in giving no indication 'that the entire corpus of state corporation law is to be replaced simply because the plaintiff's cause of action is based upon our federal statute.'"[417]

In short, the Ninth Circuit Court of Appeals decision in *Atchison, T. & Santa Fe, Ry. v. Brown & Bryant, Inc.*,[418] and the First Circuit Court of Appeals in *United States v. Davis*[419] present a convincing analysis of Supreme Court precedent, which leads to the conclusion that state law should be used to decide successor liability issues under CERCLA. The majority in *General Battery* does not present any convincing argument that *Smith Land & Development* is viable law in the face of those Supreme Court decisions. Therefore, *General Battery* is not likely to survive any Supreme Court review to resolve this intercircuit conflict.

2. FUTURE OF *MACMILLAN BLOEDEL CONTAINERS* AND *BRZOZOWSKI*

In light of *Astoria Federal Savings & Loan Association v. Solimino* and *Bestfoods*,[420] the decision in *EEOC v. MacMillan Bloedel Containers, Inc.* appears to have been overruled. In *MacMillan Bloedel Containers*, the court examined the statutory text and legislative history of Title VII to find polices that would allow it to determine that the substantial continuity test should be used to fill the interstices of Title VII. This is the type of common law analysis that the courts of appeal used in cases including *Glus v. G.C. Murphy Co.*,[421] *Wilson P. Abraham Construction Corp. v. Texas Industries, Inc.*,[422] *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*,[423] and *Kohr v. Allegheny Airlines, Inc.*[424] The Supreme Court rejected the use of that same common law analysis in decisions including *Texas Industries, Inc. v. Radcliff Materials, Inc.*,[425] *Northwest Airlines, Inc. v. Transport Workers Union*,[426] and *Miree v. DeKalb County*.[427]

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417 *Id.* at 312.

418 132 F.3d 1295, 1299-1302 (9th Cir. 1997).

419 261 F.3d 1, 53-54 (1st Cir. 2001).

420 United States v. Bestfoods, 524 U.S. 51 (1998); Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104 (1991).

421 629 F.2d 248, 252-54 (3d Cir. 1980).

422 604 F.2d 897, 900-06 (5th Cir. 1979).

423 594 F.2d 1179, 1182-86 (8th Cir. 1979).

424 504 F.2d 400, 402-04 (7th Cir. 1974).

425 451 U.S. 630 (1981).

426 451 U.S. 77 (1981).

427 433 U.S. 25, 31-33 (1977).

The Supreme Court's decisions in *Lincoln Mills* and *Pilot Life Insurance* do not support the approach of the Sixth Circuit. The Court in *MacMillan Bloedel Containers*, and the courts of appeal that have followed it, have not suggested that a statutory provision of Title VII empowers the federal judiciary to develop a body of federal common law to be applied in employment discrimination cases.[428] Because Congress has shown that it will use specific language to give that power to the judiciary, it is anomalous to think that in the absence of such language, a federal court can interpret Title VII or other statutes to confer such authority.[429]

At least one Supreme Court decision concerning the Americans with Disabilities Act ("ADA"), shows that the Court disfavors the weighing of policies approach taken by the Sixth Circuit in *MacMillan Bloedel Containers.*[430] In *Clackamas Gastroenterology*, the Court considered how to determine whether a person is an "employee" under the ADA in the face of the statute's "'nominal definition' that is 'completely circular and explains nothing.'"[431] To give meaning to the term "employee," the Supreme Court looked to general principles of common law and particularly the common law definition of "servant" in the Restatement (Second) of Agency.[432] In selecting this approach, the Court rejected the analysis of the Second and Ninth Circuit Courts of Appeals, which took the view that, as a matter of law, shareholder-employees of professional corporations must be treated as employees for the purposes of the ADA, ADEA, and other federal anti-discrimination statutes.[433] The Second and Ninth Circuits adopted their interpretation of the term employee on the basis that the term should be defined broadly to further the purpose of ADA, ADEA, Title VII, and other similar federal statutes "to stamp-out discrimination in various forms."[434]

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[428] EEOC v. MacMillan Bloedel Containers, Inc. 503 F.2d 1086, 1090-92 (6th Cir. 1974) (discussing Title VII). *See also* Rojas v. TK Communications, Inc., 87 F.3d 745, 750 (5th Cir. 1996); In re Nat'l Airlines, Inc., 700 F.2d 695, 698 (11th Cir. 1983); Trujillo v. Longhorn Mfg. Co., 694 F.2d 221, 224-25 (10th Cir. 1982); Slack v. Havens, 522 F.2d 1091, 1094-95 (9th Cir. 1975).

[429] Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 55 (1987). *But see* Cannon v. University of Chicago, 441 U.S. 677, 695-98 (1997) (holding that Congress intended to provide a private action pursuant to Title IX of the Civil Rights Act for reasons including that Title IX was virtually identical to Title VI and at the time of Title IX's adoption federal courts had interpreted Title VI to provide an implied private action).

[430] It is important to note that the *Macmillan Bloedel Containers* decision did not involve the filling of a interstice in the statute.

[431] Clackamas Gastroenterology Assocs. v. Wells, 538 U.S. 440, 444 (2003) (quoting Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323 (1992)).

[432] *Clackamas Gastroenterology*, 538 U.S. at 448-49.

[433] *Id.* at 446-47, *rev'g* Wells v. Clackamas Gastroenterology Assocs., 271 F.3d 903 (9th Cir. 2001) *and abrogating* Hyland v. New Haven Radiology Assoc., 794 F.2d 793 (2d Cir. 1986).

[434] *Hyland*, 794 F.2d at 796, 797-98 (2d Cir. 1986), *followed by* Wells v. Clackamas Gastroenterology

It therefore stands to reason that *MacMillan Bloedel Containers* cannot be considered good law. Additionally, its conclusion cannot stand unless parties can identify within Title VII either (a) specific statutory text or legislative history that justifies the overriding of a presumption that state law should be used to fill the statute's interstices,[435] or (b) specific federal interests or policies that conflict with the state law of successor liability.[436] As to Title VII policies with which traditional rules of successor liability might conflict, the Ninth Circuit has stated:

> Title VII . . . depends almost entirely upon individual workers -- private attorneys general -- to achieve the deterrent purposes of the statute. . . . Congress has armed Title VII plaintiffs with remedies designed to punish employers who engage in unlawful discriminatory acts, and to deter future discrimination both by the defendant and by all other employers.[437]

A full discussion of Title VII policies, and their potential conflicts with state rules of successor liability is beyond the scope of this article. However, resolution of the second issue is likely to turn on whether federal courts find that the court of appeals in *MacMillan Bloedel Containers* identified policy concerns that conflicted with the state law of successor liability or merely adopted a rule of successor liability that promoted Title VII policies.[438]

In recent cases, the Supreme Court has declined to find a congressional policy that justified the development of uniform federal law to displace state corporation law.[439] Additionally, the Supreme Court has confirmed the validity of past decisions in which the Court selected state law to fill the

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Assocs., 271 F.3d 903, 905 (9th Cir. 2001), *rev'd*, 538 U.S. 440 (2003). This rejected approach is similar to the approach of the Courts of Appeals in United States v. Carolina Transformer Co., 978 F.2d 832 (4th Cir. 1992), United States v. Mex. Seed and Feed Co., 980 F.2d 478 (8th Cir. 1992) and Smith Land & Improvement Corp. v. Celotex Corp., 851 F.2d 86 (3d Cir. 1988).

[435] *See* United States v. Bestfoods, 524 U.S. 51, 60, 62-63 (1998); Atherton v. FDIC, 519 U.S. 213, 226-31 (1997).

[436] *See* Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 110-13 (1991); Papa v. Katy Indus., Inc., 166 F.3d 937, 940-41 (7th Cir. 1999).

[437] Rivera v. NIBCO, Inc., 364 F.3d 1057, 1067 (9th Cir. 2004) (citations omitted).

[438] *Compare, e.g.*, Romano v. U-Haul Int'l, 233 F.3d 655, 666 (1st Cir. 2000) (adopting broad version of continuity of enterprise test on basis that it is more consistent with purposes of Title VII) *with Papa*, 166 F.3d at 940-41 (7th Cir. 1999) (noting that in addition to situations where piercing the corporate veil is warranted, other instances may exist where conflict between a state rule and Title VII might require treatment of parent and subsidiary as one employer under Title VII).

[439] *See, e.g.*, *Atherton*, 519 U.S. at 226-31; Kamen v. Kemper Fin'l Servs. 500 U.S. 90, 107-08 (1991); Burks v. Lasker, 441 U.S. 471, 480-86 (1979).

interstices of a federal statute.[440] Those decisions create serious doubt about the Supreme Court's willingness to find in the federal anti-discrimination statutes a specific policy that justifies displacement of state corporate law concerning successor and affiliate liability.

Furthermore, if there is no text or legislative history that justifies the overriding of the presumptive use of state law to determine successor liability under Title VII, the federal courts cannot disregard, in total, the state law of successor liability as the Court in *MacMillan Bloedel Containers* did.[441] State law rules should apply in most cases.[442] At best, if it has not been adopted as state law, perhaps the substantial continuity test may be used to supplement state law when a victim of discrimination seeks a remedy, such as reinstatement, and that remedy is possible only by imposing successor liability upon an asset purchaser that knew of the Title VII claims and hired substantially all of the seller's employees.[443]

Resolution of these issues also may depend on whether Congress intended to place Title VII claimants in a position superior to other creditors of a bankrupt, insolvent, or financially troubled business. Certainly, the legislative history cited in *MacMillan Bloedel Containers* cannot be read as doing so. The history only states that the relief provision of Title VII "requires that persons aggrieved by [an] unlawful employment practice be, *so far as possible, restored to a position where they would have been were it not for the unlawful discrimination.*"[444] Absent evidence of congressional intent to give a

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[440] In *Kamen*, 500 U.S. at 98, the Supreme Court cited with approval De Sylva v. Ballantine, 351 U.S. 570 (1956) and Reconstruction Fin. Corp. v. Beaver County, 328 U.S. 204 (1946). In *Ballantine*, the Court held that state law should be applied to determine whether an illegitimate child was a child for the purposes of the Copyright Act. *Ballantine*, 351 U.S. at 580-81. In *Reconstruction Fin. Corp.*, the Court held that Pennsylvania property law should decide what state taxes must be paid on property of the Reconstruction Finance Corporation, a corporation created by Congress. *Reconstruction Fin. Corp.*, 328 U.S. at 208-10. *See also Lasker*, 441 U.S. at 477 (citing *De Sylva v. Ballantine* with approval).

[441] *See, e.g.*, Brzozowski v. Corr. Physician Servs., 360 F.3d 173, 177-79 (3d Cir. 2004) (discussing successor liability issue presented by parties, finding successor liability may exist); *Id.* at 182-86 (Garth, J., dissenting) (contending no successor liability under substantial continuity doctrine); *see also* Rojas v. TK Commc'ns, Inc., 87 F.3d 745, 750 (5th Cir. 1996) (following *MacMillan Bloedel Containers*); In re Nat'l Airlines, Inc. 700 F.2d 695, 698 (11th Cir. 1983); Trujillo v. Longhorn Mfg. Co., 694 F.2d 221, 224-25 (10th Cir. 1982) (same); Slack v. Havens, 522 F.2d 1091, 1094-95 (9th Cir. 1975) (same); Brzozowski v. Corr. Physician Servs., Civil Action No. 00-2590, slip op. at 2-4 (E.D. Pa. May 10, 2001) (noting that parties appear to have assumed continuity test should be used but disagreed whether asset purchaser was liable as successor under test.).

[442] *See* United States v. Bestfoods, 524 U.S. 60 (1998); Astoria Fed. Sav. & Loan v. Solimino, 501 U.S. 104 (1991); Papa v. Katy Indus., Inc., 166 F.3d 937, 939-42 (1999) (applying *Bestfoods* analysis, rather than borrowing NLRB rule, to determine whether affiliated corporations should be treated as one employer under federal discrimination statutes).

[443] *See* EEOC v. G-K-G, Inc., 39 F.3d 740, 748 (7th Cir. 1994).

[444] EEOC v. MacMillan Bloedel Containers, Inc., 503 F.2d 1086, 1091 (1974) (emphasis added)

Title VII claim priority over others, a Title VII claimant arguably should face the same risks as any other unsecured claimant or creditor.

In *MacMillan Bloedel Containers*, the court of appeals also finds in Title VII justification for the creation of special federal common law rules because under the statute federal courts act as courts of equity.[445] The Supreme Court has held to the contrary, ruling that although federal courts act as courts of equity in bankruptcy proceedings, the Bankruptcy Code does not allow the federal judiciary to create special rules of federal common law that determine creditors' rights.[446] In the absence of a specific Bankruptcy Code provision or conflict with a specific statutory policy, state law decides their rights.[447]

It logically follows that if the conclusion of *MacMillan Bloedel Containers* cannot survive, the Third Circuit's decision in *Brzozowski* must fall as well. That decision, and the decisions of other federal courts as well, rest upon the Sixth Circuit's conclusion in MacMillan Bloedel Containers.[448]

3. TREATMENT OF RELATED CORPORATIONS AS ONE EMPLOYER: *BESTFOODS* VERSUS COMMON LAW IN TITLE VII CASES

The analysis of *Astoria Federal Savings & Loan Ass'n* and *Bestfoods* should extend to other issues arising in Title VII matters. In *James Papa v. Katy Industries, Inc.*,[449] the Seventh Circuit Court of Appeals applied the *Bestfoods* analysis to determine whether affiliated corporations should be treated as one

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(citing H. REP. No. 92-899 (1972)). Absent an indication to the contrary, this language may acknowledge that there are instances, including the bankruptcy, insolvency, or business failure of an employer in which a victim of discrimination cannot obtain relief.

445 *MacMillan Bloedel Containers*, 503 F.2d at 1091 ("[T]he courts [, Under Title VII,] were given broad equitable powers to eliminate discrimination in employment to eradicate present and future effects of past discrimination.").

446 *See* Raleigh v. Ill. Dep't of Revenue, 530 U.S. 15, 20 (2000) (holding that absent contrary provision of Bankruptcy Code or some federal interest that requires a different result, state law determines substance of creditors' claims); Butner v. United States, 440 U.S. 48, 52-56 (1979) (holding that state law, and not federal equitable rule, should determine extent of secured creditor's right to rent and profits from property on which it holds mortgage).

447 *Raleigh*, 530 U.S. at 20, 24-26; *Butner*, 440 U.S. at 52-56.

448 *See* Brzozowski v. Correctional Physician Servs., 360 F.3d 173, 177-79 (3d Cir. 2004) (discussing successor liability issue presented by parties, finding successor liability may exist); *Id.* at 182-86 (Garth, J., dissenting) (contending no successor liability under substantial continuity doctrine); Rojas v. TK Communications, Inc., 87 F.3d 745, 750 (5th Cir. 1996) (following MacMillan Bloedel Containers); In re Nat'l Airlines, Inc. 700 F.2d 695, 698 (11th Cir. 1983) (same); Trujillo v. Longhorn Mfg. Co., 694 F.2d 221, 224-25 (10th Cir. 1982) (same); Slack v. Havens, 522 F.2d 1091, 1094-95 (9th Cir. 1975) (same).

449 449 166 F.3d 937 (1999).

employer for the purposes of Title VII.[450] The Supreme Court's decision in *Astoria Federal Savings & Loan*, an ADEA case that is in the *Bestfoods* line of decisions, appears to mandate the use of that analysis.[451] Notwithstanding, courts of appeals ignore *Astoria Federal Savings & Loan* and *Bestfoods* and use common law analysis to decide what rules should determine when to treat related companies as one employer.[452] As a result, the Seventh Circuit has adopted one rule, the Third Circuit a second rule, and other Circuit Courts of Appeals have adopted two versions of the continuity of enterprise rule for determining when related corporations should be treated as one employer under Title VII.[453] Such discrepancy creates a clear intercircuit conflict, which may give the Supreme Court an opportunity to provide further guidance on the reach of *Bestfoods*.

In light of the Supreme Court decisions in *Bestfoods* and *Clackamas Gastroenterology*, it may be appropriate to revisit federal courts' use of common law analysis, and the rule of substantive consolidation, to determine—without reference to well-established state law or common law rules—whether bankruptcy proceedings of affiliated corporations, and the assets and debts of the affiliates, should be consolidated.[454] In *Nesbit v. Gears Unlimited,*

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[450] *Id.* at 939-42.

[451] Astoria Federal Sav. & Loan Ass'n v. Solimino, 501 U.S. 104 (1991).

[452] *See, e.g.*, Nesbit v. Gears Unlimited, Inc., 347 F.3d 72, 84-89 (3d Cir. 2003); Romano v. U-Haul Int'l, 233 F.3d 655, 664-68 (1st Cir. 2000). In *Nesbit*, 347 F.3d at 84-89, the Third Circuit Court of Appeals identified and weighed various policies to determine that a test of substantive consolidation from bankruptcy law, not piercing the corporate veil, should be used to determine if two related corporations should be treated as one employer. In *Romano*, 233 F.3d at 664-66, the First Circuit Court of Appeals accepted that the integrated-enterprise test should be used in Title VII cases to decide when two related corporations should be considered a single employer. The court then weighed various policies to identify which of the test's factors is most important in determining whether related companies are a single employer. *Romano*, 233 F.3d at 665-68.

[453] *See Papa*, 166 F.3d at 939-42 (applying *Bestfoods* (Seventh Circuit)); *Nesbit*, 347 F.3d at 86-88 (adopting substantive consolidation test (Third Circuit)); *Romano*, 233 F.3d at 666-67 (applying broad continuity of enterprise test (First Circuit)); Lusk v. Foxmeyer Health Corp., 129 F.3d 773, 777 (5th Cir. 1997) (applying narrow continuity of enterprise test (Fifth Circuit)); Frank v. U.S. West, Inc., 3 F.3d 1357, 1362 (10th Cir. 1993) (applying narrow continuity of enterprise test (Tenth Circuit)).

[454] *See, e.g.*, In re Bonham, 229 F.3d 750, 763-66 (9th Cir. 2000) (adopting substantive consolidation test of Second Circuit); In re Giller, 962 F.2d 796, 799 (8th Cir. 1992) (using different three-factor form of test); Eastgroup Props. v. S. Motel Assoc., Ltd. 935 F.2d 245, 249-52 (11th Cir. 1991) (adopting different two-part test). *Compare* Raleigh v. Ill. Dep't of Revenue, 530 U.S. 15, 20 (2000) (stating a absent contrary provision of the Bankruptcy Code or some federal interest that requires a different result, state law determines substance of creditors' claims); Butner v. United States, 440 U.S. 48, 52-56 (1979) (contending state law, and not federal equitable rule, should determine extent of secured creditor's right to rent and profits from property on which it holds mortgage).

In *In re Bonham*, 229 F.3d at 764, the court of appeals stated that the Supreme Court in Sampsell v. Imperial Paper & Color Corp., 313 U.S. 215 (1941) "first tacitly approved" the "substantive

Inc., the Third Circuit Court of Appeals highlighted this instance of the federal courts' use of common law analysis, which has resulted in an intercircuit disagreement.[455]

It may also be appropriate to revisit the court of appeals decision in *Pension Benefit Guarantee Corp. v. Ouimet Corp.*,[456] in which the court of appeals held that federal law, without reference to state law, should determine whether legal separation of affiliated corporations should be discarded so that they may be found liable to the PBGC under Title IV of ERISA. Similarly, there are questions about the continued validity of courts of appeals decisions that did not use a *Bestfoods* analysis to select a special federal common law rule to determine alter ego liability in Government actions for recovery of Medicare overpayments or pursuant to the False Claims Act.[457]

Finally, in light of *Bestfoods* and *Papa v. Katy Industries, Inc.*, it is doubtful that "uniformity" or a promotion of statutory policies justifies the selection of federal law to decide corporate veil piercing issues that arise under the Worker Adjustment Retraining Notification ("WARN") Act as held in *Pearson v. Component Technology Corp.*[458] In *Pearson*, the court noted the existence of the *Bestfoods* and *Papa* decisions.[459] Nevertheless, the court invoked the need for uniformity as grounds for applying a Department of Labor test, rather than state law, to decide veil piercing issues under the

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consolidation of two estates." *In re Bonham*, 313 U.S. at 764 (emphasis added). However, the Supreme Court in *Sampsell* did not purport to establish any federal common law rule and did not use the term substantive consolidation. The issues in *Sampsell* were (a) whether an unsecured creditor of an individual debtor could reach the assets of the debtor's family corporation, which was found to have received the debtor's assets as result of a fraudulent transfer, and (b) whether under the law of fraudulent transfers, an unsecured creditor of the corporation received priority over the unsecured creditor of the individual debtor. *Sampsell*, 313 U.S. at 218-21. In deciding these issues, the Supreme Court looked to state court decisions concerning fraudulent transfers. *Sampsell*, 313 U.S. at 218-21. Additionally, in *Sampsell*, neither the Supreme Court nor Ninth Circuit Court of Appeals indicated that the corporation was a debtor in bankruptcy. *Sampsell*, 313 U.S. at 215-19; Imperial Paper & Color Corp. v. Sampsell, 114 F.2d 49, 50-52 (1940), *rev'd*, 313 U.S. 215 (1941). Interestingly, the Ninth Circuit described the issue on appeal as whether under California law the corporation was the debtor's alter ego, and there was justification to disregard the corporate entity. *Sampsell*, 114 F.2d at 52 (1941).

[455] *Nesbit*, 347 F.3d at 86 n.7 (3d Cir. 2003) (discussing four or five versions of substantive consolidation test developed respectively by various bankruptcy courts, First, Second, Eighth, Ninth, Eleventh, and District of Columbia Circuits).

[456] 711 F.2d 1085, 1089, 1091-93 (1st Cir. 1983).

[457] *See* United States v. Jon-T Chemicals, Inc. 768 F.2d 686, 690 n.6 (5th Cir. 1985) (failing to reach the issue because federal law and Texas law were essentially the same); United States v. Pisani, 646 F.2d 83, 86 (3d Cir. 1981) (Objectives of Medicare program required development of special federal rule of alter ego liability.).

[458] 247 F.3d 471, 488-89 (3d Cir. 2001).

[459] *Id.* at 489-90.

WARN Act.[460] The court also justified its selection of federal law on the grounds that the DOL factors "were created with WARN Act policies in mind and . . . focus particularly on circumstances relevant to labor relations."[461] While the court expressed concern that use of state law rules might "permit '[t]he policy underlying a federal statute' to be 'defeated by . . . an assertion of state power,'" it did not identify any potential conflicts between state rules of corporate liability and specific WARN Act policies.[462] In other words, the Court of Appeals selected a federal rule of law because it purportedly advanced statutory policies, not because state law conflicted with the federal statute.

V. CONCLUSION

The Supreme Court's decision in *Sosa* is significant for its approval of the federal judiciary's development of federal common law rules to govern private actions by aliens based upon the law of nations. However, beyond the realm of international law, its importance is doubtful. For sixty years, the Court's approval of the development of federal common law has been the exception, not the rule. Justice Scalia's concurring opinion in *Sosa*, and past

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460 *Id.* at 489.

461 *Id.* at 490.

462 *Id.* at 489. At first glance, the decision in *Pearson* seems to ignore the Supreme Court's admonition that when an administrative agency, pursuant to authority delegated by Congress, interprets a statute, a federal court must defer to the interpretation unless it "is arbitrary, capricious or manifestly contrary to the statute." Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984). *But see* Christensen v. Harris County, 529 U.S. 576, 586-87 (2000) (noting that agency statutory interpretations in opinion letters, policy statements, agency manuals, and enforcement guidelines, which are not the result of a formal adjudication or notice-and-comment, do not "warrant Chevron-style deference" because they "lack the force of law."). On further investigation, it is clear that the issue of deference does not occur in *Pearson* because, in the rule-making for 20 C.F.R. 693.3(a)(2), the Department of Labor does not express a view concerning the law that should be used to determine corporate liability issues under the WARN Act. According to the Department, the intent of the regulation, concerning whether to treat a subsidiary or independent contractor, and its parent or contracting company, as one employer, is not to create a special definition of these terms [independent contractors and subsidiaries] for WARN purposes; the definition is intended only to summarize existing law that has developed under State Corporations laws and such statutes as the NLRA, the Fair Labor Standards Act (FLSA) and the Employee Retirement Income Security Act (ERISA). The Department does not believe that there is any reason to attempt to create new law in this area especially for WARN purposes when relevant concepts of State and federal law adequately cover the issue. Thus, no change has been made in the definition. Similarly, the regulation is not intended to foreclose any application of existing law or to identify the source of legal authority for making determinations of whether related entities are separate. 54 Fed. Reg. 16042, 16045 (April 20, 1989). In the converse of *Chevron*, the executive defers to the judiciary and allows the courts to select the corporate liability law that should be applied in WARN Act cases.

Supreme Court decisions limiting the use of federal common law and common law analysis, show that separation of powers, federalism, and institutional concerns have led the Court to limit the use of federal common law and common law analysis. Therefore, it would be a mistake for parties and lower federal courts to view *Sosa* as a general endorsement of the use of federal common law. To the contrary, the *Sosa* majority's admonition that lower federal courts must exercise restraint in recognizing new causes of action, Justice Scalia's concurring opinion, and past Supreme Court decisions eliminating use of common law analysis, constitute a warning that *Sosa* may be a short-lived experiment if lower federal courts fail to exercise judicial restraint.

Despite the Supreme Court's limitations upon the use of federal common law, lower federal courts have accepted that federal common law, and not state law, should be used to decide corporate liability issues in Title VII actions, including successor liability and treatment of related corporations as a single employer. In Title VII actions, parties commonly assume that federal common law, and the substantial continuity test, should be used to decide successor liability issues. Similarly, the First, Second, Third, Fourth, and Eight Circuit Courts of Appeals accepted the view that federal common law, not state law, should be used to decide successor liability issues in CERCLA actions.

The Supreme Court's decision in *United States v. Bestfoods* raises serious doubts about the view that federal common law should be used to decide corporate liability issues in cases involving federal statutes, including the Bankruptcy Code, False Claims Act, CERCLA and Title VII. Therefore, the Supreme Court is very likely to favor use of state law to decide corporate liability issues. Nevertheless, some parties and federal courts continue to assume that federal law should determine the issues.

The Supreme Court's decision in *Bestfoods* and the post-*Bestfoods* decisions of the First Circuit in *Davis* and the Ninth Circuit in *Atchison, T. & Santa Fe Ry.*, make it clear that state law, not federal law, should determine successor liability issues in CERCLA cases. The Third, Fourth, and Eighth Circuit Courts of Appeals decisions, which favor use of federal common law in CERCLA actions, should be reevaluated to determine their validity. In *Bestfoods* and other decisions, the Supreme Court rejected their premise that common law analysis, and federal law, should be used to fill the interstices of federal statutes.

In *MacMillan Bloedel Containers*, *Brzozowski,* and other decisions, the courts of appeals also accepted the premise that common law analysis and federal law should be used to fill the interstices of Title VII. Those decisions cannot be considered good law in light of *Bestfoods*, and parties should not assume that federal law controls questions of successor liability in Title VII

cases. The continued validity of *MacMillan Bloedel Containers*, and other court of appeals decisions following it, depends on whether courts can identify a conflict between the policies of federal anti-discrimination statutes and state common law rules concerning successor liability.

Similarly, it is a questionable practice for the courts of appeals to decide Title VII parent-subsidiary liability issues by using common law analysis and borrowing the integrated enterprise test or substantive consolidation test. Nevertheless, courts of appeals other than the Seventh Circuit have disregarded that court's conclusion that a *Bestfoods* analysis should be used to decide whether affiliated corporations should be treated as one employer. It remains to be seen whether the courts of appeal in conflict with the Seventh Circuit can justify under *Bestfoods* their use of the substantial continuity test or other federal common law rules to determine corporate liability in Title VII cases. There are reasons to doubt that the courts will be successful.